

IN THE HIGH COURT OF DELHI AT NEW DELHI

W.P.(C) 4719/2006

Reserved on : 15th January 2010
Decision on : 19th March 2010

M/S PHARMEX DRUG I P. LTD. Petitioner
Through Mr. Ajay Veer Singh, Advocate

versus

ADDL.DIRECTOR GENERAL OF FOREIGN
TRADE Respondent
Through Mr. Ravinder Aggarwal, Central Govt.
Standing Counsel.

CORAM: JUSTICE S. MURALIDHAR

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| 1. Whether reporters of the local papers be allowed to see the judgment? | No |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

JUDGMENT
19.03.2010

1. The Petitioner seeks to challenge an order dated 15th December 2005 passed by the Additional Director General of Foreign Trade (ADGFT), dismissing its appeal against the Adjudication Order No. 3/33/AM-02/ECA/CAL/132 dated 9th October 2002, passed by the Deputy DGFT whereby a fiscal penalty of Rs.2 crores was imposed on the Petitioner and its directors for under-invoicing the items imported against the Value Based Advance Licence (VBAL) dated 6th April 1984.

2. The Petitioner obtained the above VBAL for the CIF value of Rs.4 lakhs (US \$ 12,500) for import of 5.1 kg of *Riboflavine* with a condition to export 10 lakh 5mg *Riboflavine* Tablets for a FOB value of Rs. 8 lakhs (US \$ 25,000) within 12 months from the date of issue of licence.

3. The Customs Authorities reported that the Petitioner had imported 240 kg of raw material @ US \$ 52 per kg whereas in terms of the application, raw material, i.e., *Riboflavine* was to be imported @ US \$ 2450.98 per kg. The petitioner was shown to have imported the raw material by a Bill of Entry dated 9th December 1994 @ US \$ 52 per kg. On this basis, it was inferred that the Petitioner had under-invoiced imported item and thus imported excess raw material to the extent of 234.90 kg. Value wise it worked out to Rs.1.84 crores. On this basis, penal proceedings were initiated and a fiscal penalty of Rs.2 crores was imposed.

4. The case of the Petitioner is that on receipt of the VBAL on 6th April 1994 it noticed discrepancy in column 3 of the licence where the item of import had been mentioned as Riboflavine-5.1 kg. The Petitioner requested the Joint DGFT to delete the quantity since it was a VBAL, and *Riboflavine* was not a sensitive item. A letter dated 8th June 1994 was written to the Joint DGFT in the following terms:

“On perusal with col. 3 of licence, we have observed that description of item of import has been mentioned Riboflavin – 5.1 kg. As this is a value based licence & Riboflavin is not a sensitive item and as such the quantity restriction mentioned therein does not appear to be correct. We therefore request you to delete the quantity shown in col. 3 of the aforesaid licence.”

5. This request was reiterated by further letter dated 12th August 1994. It is stated that thereafter the Additional DGFT deleted the quantity and after deletion in column 3 the order reads as “description of goods Riboflavine 5.1 KG.....Quantity restriction is deleted”. The Petitioners

have enclosed with this petition a copy of the licence with the deletion. It is stated that pursuant to the VBAL, a Lease Agreement Undertaking (LUT) under the Duty Exemption Scheme was drawn up between ADGFT and the Petitioner on 7th June 1994. By a letter dated 5th August 1994, the ADGFT accepted the LUT for a value of Rs. 3,90,000/-. A bill of entry was filed thereafter on 9th December 2004 for a total invoice value of US\$ 12,480/-. A copy of the said bill of entry has been enclosed. An invoice dated 20th March 1994 for the finished goods exported from Bombay to Dubai for a total FOB of US \$ 25,000 have also been enclosed. The Bank of Madura Ltd., New Delhi gave a certificate of export realization dated 21st April 1994 and that was furnished to the DGFT as proof of fulfilment of the export obligation.

6. Nearly two years thereafter on 2nd February 1996 a show cause notice was issued alleging non-fulfilment of the export obligation. Along with its reply dated 19th March 1996 the Petitioner set out the above facts enclosing a copy of the export realization certificate dated 7th April 1994. It informed the Respondents that the DEEC Book was awaited from the Customs Authorities. A further letter dated 22nd October 1996 written by the Petitioner to the Joint DGFT (CLA) stated that the Assistant Chemical Examiner, Bombay had informed them that the DEEC book had not been released to the several exporters including the Petitioner and that it would be released only after completing certain formalities.

7. By an order dated 18th June 1997 the Deputy DGFT passed an order for

forfeiture of the LUT holding that the Petitioner violated the conditions of the licence. The Petitioner was asked to pay duty to the customs authority for the material that had been exported together with the interest at 24% per annum and also surrender the REP Licence/Exim scrips.

8. Aggrieved by the above order, an appeal was filed before the ADGFT. Meanwhile another show cause notice was issued on 18th May 2001 by the DGFT requiring the Petitioner to appear before him on 4th June 2001. By a letter dated 4th June 2001, the Petitioner requested for an adjournment stating that its Managing Director was not present in the city. A further notice dated 26th June 2001 was issued from the office of the Joint DGFT asking the Petitioners to show cause why action should not be taken for imposition of penalty under Section 11 (2) of the Foreign Trade (Development & Regulation) Act, 1992 [hereinafter “FT (D&R) Act”]. Thereafter the Petitioner received an ex parte order dated 9th October 2002 passed by the Joint DGFT imposing a penalty of Rs. 2 crores. Aggrieved by the said order, an appeal was filed before the ADGFT which was dismissed by the impugned order dated 15th December 2005.

9. First, it is submitted that the impugned order dated 9th October 2002 was violative of the principles of natural justice. Despite the Petitioner requesting for adjournment of the hearing, the Respondents had proceeded to pass an ex parte order. Further the show cause notice asking the Petitioner to appear before him, had been issued by the Joint DGFT.

However, the Order dated 9th October 2002 had been passed by the

Deputy DGFT. The case could not have been transferred from Joint DGFT to Deputy DGFT except by an order in terms of Section 13 FT (D&R) Act. Reliance is placed on the judgment in ***Consolidated Enterprises v. CC, Mumbai 2001 (137) ELT 1223***. The Deputy DGFT had been authorized to deal with cases up to value of Rs.1 crore in terms of notification dated 20th January 1999 issued by the Central Government under Section 13 of the FT (D&R) Act whereas in the instant case, the Deputy DGFT imposed a penalty of Rs.2 crores on the Petitioner. In any event, it is submitted that the Petitioner had only by mistake mentioned the rate of import of *Riboflavine* at US \$ 2450.98 per kg whereas it was a universal fact that the import rate was US \$ 52 per kg. It is pointed out that if the rate is taken at US \$ 52 per kg, then the export proceeds stood fully realized and consequently there was no violation.

10. In the impugned order of the Addl. DGFT, the only ground for rejecting the Petitioner's appeal is that despite opportunities, the Petitioner had failed to produce the copy of the DEEC book. By an order dated 27th April 2009, this Court had directed the Petitioner to produce a copy of the letter/application seeking permission to import *Riboflavine* in which the price of the raw material was mentioned at US \$ 2450.5 per kg. The Petitioner was not able to produce the said document.

11. In the instant case, the Petitioner was issued a VBAL on 6th April 1994 with the condition that it could import 5.1 kg *Riboflavine*. The further condition was that it would export 10 lakh 5mg *Riboflavine* Tablets for a

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FOB value of Rs. 8 lakhs (US \$ 25,000) within 12 months from the date of the issuance of licence. After the Petitioner pointed out by its letter dated 8th June 1994 that the quantity mentioned of the item of import did not appear to be correct, since *Riboflavine* was not a sensitive item, the office of the DGFT corrected the VBAL. Enclosed with the writ petition is the copy of VBAL which has been issued where column 3 reads “Description of goods Riboflavin 5.1 kgs quantity restriction is deleted”. There is a rubber stamp on the said entry with the date of “8/94”. The above endorsement implies that there was no restriction on the Petitioner importing only 5.1 kg *Riboflavine*. It must be mentioned here that LUT was also executed thereafter on 5th August 1994. The above facts as averred in the petition are not denied in the counter affidavit of the Respondent. In fact, all these paragraphs are said to be matter of record and therefore not needing any reply. There was thus no restriction on the quantity of *Riboflavine* that could be imported. The only condition was that the Petitioner should within six months thereafter export *Riboflavine* tablets of a FOB value of US \$ 25,000. Clearly, that condition has been satisfied by the Petitioner. The Respondents are not denying that the Petitioner furnished a certificate of export dated 21st April 1994 issued by the Bank of Madura Ltd. In fact, in para 12 of the counter affidavit it is stated as under:

“12. That the contents of the para 12 of the writ petition are admitted to the extent that the party had submitted Bank Realization Certificate and did not submit other related documents i.e. Export DEEC Book (in original) duly logged by Customs and Shipping Bill in original, Bill of lading and invoice showing fulfillment of export obligation.”

12. Therefore, what is held against the Petitioner is the non-submission of the export DEEC book in original duly logged by the customs, the shipping bill in original, the bill of lading and the invoice showing fulfillment of export obligation. As regards the latter it appears that only the DEEC book was awaited from the Customs Authorities as it was not available with the Petitioner. It is pointed out by the Petitioner in para 10 of the writ petition:

“That vide invoice No. EX/3/93-94 dated 20.03.1994 and vide Shipping Bill No. 423488 dated 28.03.1994 the finished goods manufactured from the material imported i.e. Riboflavin tablets were exported from Bombay to M/s Servotech International, Dubai for a total FOB of US\$ 25,000/- (Rs. 7,81,750/-).”

13. Consequently, this Court accepts the contention of the Petitioner that it complied with the precise condition of the VBAL, viz., it had to export riboflavin tablets worth US\$ 25000 within six months.

14. The only contention that remains is the alleged under-invoicing by the Petitioner of the import. The show cause notice dated 26th June 2001 alleges that “the noticee firm has failed to furnish evidence in token of having realised the said export proceeds within stipulated period.” It further refers to letter dated 5th January 1998 from the Addl. Commissioner of Customs, Bombay that at the time of application for VBAL, the applicant declared the value of input material as US \$2450.98 per kg whereas in the bill of entry No.4157 dated 9th December 1994, it indicated the rate @ US \$ 52 per kg. Both these documents were obviously sent to the Joint DGFT by the Customs authorities. However,

the Joint DGFT has not enclosed the copies of the said communication received by it from the customs authorities with the show cause notice sent to the Petitioner. There is no explanation why documents sought to be relied upon by the Respondents were not enclosed in the show cause notice. It has also not been enclosed with the counter affidavit in response to this writ petition. On the other hand, the Petitioner has repeatedly stated that the said documents are not available with it but are available with the customs authorities. Merely granting more time to the Petitioner to produce documents that it did not have, was not going to solve the problem. Either the Joint DGFT could have furnished the documents received by it from the customs authorities or it could have summoned the documents straightway from the customs authorities. It did not choose to do either.

15. In the circumstances, the procedure adopted by the ADGFT does not appear to be reasonable.

16. It is stated in Ground (V) of the writ petition that its financial condition was not good; its factories have been attached by the Uttar Pradesh Financial Corporation; the Central Bank of India filed a case against it in the Debts Recovery Tribunal; it incurred a loss of Rs. 75 lakhs as per the balance sheet for the year 2001-02. In the above circumstances, understandably the Petitioner could not produce any of the documents.

17. The Respondents have also not furnished a satisfactory explanation why the Petitioner was not granted an adjournment of the hearing. The impugned order dated 9th October 2002 passed by the ADGFT merely states that a show cause notice dated 26th June 2001 was issued. It has also not explained how when the jurisdiction of the Deputy DGFT was limited to Rs. one crore, an order of imposing penalty of Rs. 2 crores can be passed.

18. For all of the aforementioned reasons, the impugned order dated 9th October 2002 and the order in appeal dated 15th December 2005 of the ADGFT are hereby set aside.

19. The writ petition is allowed with costs of Rs. 5,000/- which will be paid by the Respondents to the Petitioner within a period of four weeks from today.

S. MURALIDHAR, J.

MARCH 19, 2010
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