

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 01.09.2014

+ **W.P.(C) 5090/2013 & CM No.11457/2013**

BRG IRON & STEEL CO. PVT. LTD

..... Petitioner

versus

UNION OF INDIA & OTHERS

..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr C. Hari Shankar with Mr S. Sunil.

For the Respondents : Mr Sanjeev Narula, CGSC with Mr Ajay
Kalra for R-1.

Dr Ashwani Bhardwaj for R-5.

CORAM:-

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner is a two star export house status holder and has filed the present petition impugning the communication dated 31.05.2013 issued by the office of Additional Director General of Foreign Trade (hereinafter referred to as "Additional DGFT"). By the said communication, hereinafter referred to as the 'impugned communication', the Additional DGFT had informed the petitioner that it's entitlement under the Advance Authorization No. 0510324315 dated 09.05.2012, was limited to a sum of ₹38,83,52,050/- instead of ₹77,03,73,810/- (USD 1,54,07,476.20). The petitioner was further advised to submit the said Advanced Authorization for endorsement of Bank Guarantee condition for the differential amount.

2. It is the petitioner's case that it was exempt from the condition of furnishing bank guarantees in respect of any scheme framed under the Foreign Trade Policy. Further, according to the petitioner, it was entitled to Advance Authorization of a higher value and, therefore, the reduction in the value of Advance Authorization as indicated in the impugned communication was not justified.

3. The learned counsel for the petitioner submitted that under the Foreign Trade Policy, the petitioner, holding there status of a two star export house, was exempt from furnishing Bank Guarantees in respect of any scheme under the Foreign Trade Policy. It was further submitted that the petitioner was entitled to an Advance Authorization equivalent to 500% of the FOB and/or FOR value of the preceding year's export. It was contended that the Advance Authorization in question was issued to the petitioner on 09.05.2012 and, therefore, the exports during the year 2011-12 were to be considered for calculating the value of the Advance Authorization. It was pointed out that the Advance Authorization was computed on the basis of goods exported by the petitioner in the year 2010-11, which could not be considered as "*preceding year's export*". It was next contended by the learned counsel for the petitioner that Bank Guarantees, if any, would be furnished only to the Customs Authorities and the Additional DGFT could not demand the same.

4. The learned counsel for the petitioner referred to the counter affidavit filed on behalf of the respondents and submitted that the petitioner's claim for Advance Authorization based on the exports made in the year 2011-12 was not disputed as the stand of the respondents was that in the event the

petitioner required an amendment in the Advance Authorization, the same could be amended under the Foreign Trade policy.

5. The learned counsel appearing for the respondents referred to paragraph 4.7.1 of the Handbook of Procedures, which specified the manner of computing the entitlement of an exporter for Advance Authorization. The learned counsel further drew the attention of this Court to paragraph 4.7.3 of Handbook of Procedures, which specifically provided that an applicant would be entitled to authorization in excess of the entitlement subject to furnishing of 100% bank guarantee to the Customs Authority to cover the exemption from Customs Duty. It was submitted that the impugned communication was in conformity with the said clause and the petitioner had been advised to submit the Advance Authorization for endorsement of the Bank Guarantee condition for the amount in excess of its entitlement.

6. The learned counsel further referred to the petitioner's application for the Advance Authorization, filed electronically on 14.03.2012, and pointed out that the FOB value of exports (i.e. ₹7,76,70,410/-) mentioned in the application pertained to the licensing year 2010-11. He submitted that on the basis of the figure submitted by the petitioner, its entitlement to Advance Authorization would be ₹38,83,52,050/- and the Advance Authorization obtained by the petitioner for a higher value was clearly erroneous. Consequently, the Additional DGFT had called upon the petitioner to endorse the Advance Authorization with the bank guarantee condition for the value of the Authorization, which was in excess of the petitioner's entitlement of ₹38,83,52,050/-. He further submitted that since

Advance Authorization was applied on 14.03.2012, the expression 'preceding year' ought to be construed as 2010-11. The learned counsel further clarified that the impugned communication only required that the petitioner submit the Advance Authorization for endorsement of the Bank Guarantee condition and the petitioner would be required to submit a bank guarantee directly to the Customs Authorities in the event the imports exceeded the amount of Advance Authorization.

7. The impugned communication does not demand that the Bank Guarantee(s) be submitted to the Office of the Director General of Foreign Trade (hereinafter referred to as 'DGFT') and it has been clarified that the Bank Guarantee(s) would be required to be furnished directly in favour of the customs authorities. Thus, the petitioner's grievance in that regard is illusory. The essential controversies that need to be addressed are, whether the petitioner was entitled to an Advance Authorization for a value exceeding ₹38,83,52,050/-, and whether an exporter holding the status of a Two Star Export House is required to submit Bank Guarantees while claiming Advance Authorization in excess of its entitlement.

8. Before proceeding further, it is necessary to examine the relevant provisions of the Foreign Trade Policy, the Handbook of Procedures and the legal framework under which the Foreign Trade Policy and the Handbook of Procedure are notified.

9. Section 5 of the Foreign Trade (Development and Regulation) Act, 1992 (hereinafter referred to as 'FT(D&R) Act') provides that "*the Central Government may, from time to time formulate and announce, by*

notification in the Official Gazette, the export and import policy and may also, in the like manner, amend that policy.” Section 6 of the FT(D&R) Act contains provisions for appointment and functions of DGFT. The said Section is quoted below for ready reference:

“6. Appointment of Director General and his functions.

(1) The Central Government may appoint any person to be the Director General of Foreign Trade for the purposes of this Act.

(2) The Director General shall advise the Central Government in the formulation of the export and import policy and shall be responsible for carrying out that policy.

(3) The Central Government may, by Order published in the Official Gazette, direct that any power exercisable by it under this Act (other than the powers under sections 3, 5, 15, 16 and 19) may also be exercised, in such cases and subject to such conditions, by the Director General or such other officer subordinate to the Director General, as may be specified in the Order.”

10. It is thus seen that the DGFT is appointed for the purposes of the FT(D&R) Act and is responsible for carrying out the export-import policy that may be formulated by the Central Government.

11. In exercise of powers under Section 5 of the said FT(D&R) Act, the Central Government has notified the Foreign Trade Policy, 2009-2014. Paragraph 2.4 of the said policy expressly empowers DGFT to specify the procedure to be followed by an exporter/importer/licensing authority/competent authority *for the purposes of implementing the FT(D&R) Act, the Rules and Orders made there under and the Foreign Trade Policy*. Admittedly, the Handbook of Procedures has been notified by the DGFT in terms of the Foreign Trade Policy.

12. The Foreign Trade Policy contains an Advance Authorization scheme. In terms of the said scheme Advance Authorization for imports is available for duty free import of inputs which are physically incorporated or consumed in manufacture of export product. The entitlement of the value of Advance Authorization is specified in paragraph 4.7.1 of the Handbook of Procedures. The relevant extract of which reads as under:-

“4.7.1 Entitlement

CIF value of one or more such authorisations shall be maximum 500% of FOB and/or FOR value of preceding year's exports and/or supplies in case of status holders and Rs. 5 crore or 500% of the FOB and/or FOR value of preceding year exports and/or supply, whichever is more, for others.”

13. It is seen from paragraph 4.7.1 of the Handbook of Procedures that a status holder – which the petitioner, concededly, is - is entitled to an Advance Authorization of 500% of the value of exports in the preceding year. Thus, the petitioner was entitled to Advance Authorization for a value equivalent to five times its export in the preceding year. However, since the petitioner had applied for the Advance Authorization on 14.03.2012, the relevant preceding year would, obviously, be 2010-11. The fact that the Advance Authorization in question was issued on 09.05.2012 is not germane since the same only communicated the acceptance of the application made by the petitioner. It is also relevant to note that the petitioner's application was also made on the basis of the FOB value of its exports during the year 2010-11, which were declared to be ₹7,76,70,410/-. Thus, in terms of paragraph 4.7.1 of the Handbook of Procedures the correct value of Advance Authorization would be five times the export

declared by the petitioner i.e. ₹38,83,52,050. Therefore, in so far as the impugned communication reflects the petitioner's entitlement to be ₹38,83,52,050/-, the same cannot be faulted. The reference made by the learned counsel for the petitioner to Rule 8 of the Foreign Trade (Regulation) Rules, 1993 which provides for amendment of any licence to rectify any error or omission therein is misplaced. Admittedly, no such application for amendment of the Advance Authorization was made by the petitioner. The DGFT could also not be expected to *sou moto* make any amendment in the Advance Authorization which had been issued to the petitioner; the necessary figures of exports for making such amendment had also not been furnished by the petitioner along with its application.

14. The only question that remains to be answered is whether the petitioner being a status holder under the Foreign Trade Policy is exempt from furnishing bank guarantees. The learned counsel for the petitioner had submitted that since Foreign Trade policy is framed under the FT(D&R) Act which exempts the "*status holders*" from furnishing Bank guarantees under "*any scheme in the FTP*" the same would also include exemption from furnishing bank guarantees under the Advance Authorization Scheme.

15. The duty exemption and remission schemes are provided under Chapter IV of Foreign Trade Policy. The Advance Authorization scheme is one of the two duty exemption schemes as contained in the said policy. Essentially, the Advance Authorization scheme permits an exporter, an advance authorization for importing inputs which are physically incorporated in the export product or are consumed in the manufacture of the export product without payment of duty. The relevant paragraphs of the

Foreign Trade Policy relating to Advance Authorization Scheme are quoted below:-

“ADVANCE AUTHORISATION SCHEME

4.1.3 Advance Authorisation

An Advance Authorisation is issued to allow duty free import of inputs, which are physically incorporated in export product (making normal allowance for wastage). In addition, fuel, oil, energy, catalysts which are consumed/utilised to obtain export product, may also be allowed. DGFT, by means of Public Notice, may exclude any product(s) from purview of Advance Authorisation.

Duty free import of mandatory spares upto 10% of CIF value of Authorisation which are required to be exported/supplied with resultant product are allowed under Advance Authorisation. Advance Authorisations are issued for inputs and export items given under SION. These can also be issued on the basis of *Ad hoc* norms or self declared norms as per para 4.7 of HBP v1.

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- 4.1.4** Advance Authorisations are exempted from payment of basic customs duty, additional customs duty, education cess, anti-dumping duty and safeguard duty, if any. However, imports for supplies covered under paragraph 8.2 (h) & (i) will not be exempted from payment of applicable anti-dumping and safeguard duty, if any.

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- 4.1.6** Advance Authorisation necessitates exports with a minimum value addition of 15%, except for items specified in Appendix 11B of HBP v1 and for items in Gems & Jewellery sector, for which value addition would be as per paragraph 4A.2.1 of HBP v.1. Exports to SEZ

Units/supplies to Developers/Co-developers, irrespective of currency of realization, would also be covered.

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4.1.7 Advance Authorisation shall be issued in accordance with Policy and procedure in force on Authorisation issue date.

Validity period of Advance Authorisation for import shall be as prescribed in HBP v1.

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4.1.9 Export Obligation

Period of fulfilment of export obligation under Advance Authorisation shall be as prescribed in HBP v1.

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4.1.14 Admissibility of Drawback

In case of an Advance Authorisation, drawback shall be available for any duty paid material, whether imported or indigenous, used in goods exported, as per drawback rate fixed by DoR, Ministry of Finance (Directorate of Drawback). Drawback allowed shall be mentioned in Authorisation. ”

16. The Foreign Trade Policy specifically provides for certain promotional measures under the Chapter titled “Promotional measures in DGFT”. The recognition of export and trading houses is a measure which falls within the said Chapter. Paragraph 3.10 of Chapter 3 of the Foreign Trade Policy contains provisions for export and trading houses. Paragraph 3.10.2 of the Foreign Trade Policy provides for Export and Trading Houses to be categorized on the basis of their export performance. Paragraph 3.10.4

provides for the privileges available to an export and trading house status holder and is quoted below for ready reference:-

“3.10.4. Privileges of Export and Trading House Status Holders

A Status Holder shall be eligible for privileges as under:

- (i) Authorization and Customs Clearances for both imports and exports on self-declaration basis;
- (ii) Fixation of Input-Output norms on priority within 60 days;
- (iii) Exemption from compulsory negotiation of documents through banks. Remittance/Receipts, however, would be received through banking channels;
- (iv) 100% retention of foreign exchange in EEFC account;
- (v) Exemption from furnishing of BG in Schemes under FTP;
- (vi) SEHs and above shall be permitted to establish Export Warehouses, as per DoR guidelines.
- (vii) For status holders, a decision on conferring of ACP Status shall be communicated by Customs within 30 days from receipt of application with Customs.
- (viii) As an option, for Premier Trading House (PTH), the average level of exports under EPCG Scheme shall be the arithmetic mean of export performance in last 5 years, instead of 3 years.

- (ix) Status Holders of specified sectors shall be eligible for Status Holder Incentive Scrip under Para 3.16 of FTP.
- (x) Status Holders of Agri. Sector (Chapters 1 to 24) shall be eligible for Agri. Infrastructure Incentive Scrip under VKGUY — Para 3.13.4 of FTP.”

17. Undeniably, one of the privileges extended to Export and Trading House status holder is that they are exempt from furnishing bank guarantee in schemes by virtue of clause (v) of paragraph 3.10.4 of the Foreign Trade Policy. A bank guarantee is an instrument to provide security in respect of the amount covered. It is, thus, not far to see why status holders have been granted the privilege in respect of exemption from furnishing bank guarantees. It is apparent that the Central Government in its wisdom thought it fit that exporters who had been recognised on account of their established track record should be considered creditworthy enough to be allowed the benefit of schemes under their policy without providing any security in the form of a bank guarantee. The requirement for furnishing bank guarantee in respect of Advance Authorization scheme as contained in the Handbook of Procedures must be viewed in this perspective.

18. The procedure and mechanism for availing of the benefit of the Advance Authorisation scheme as contemplated under the Foreign Trade Policy is provided in Chapter 4 of the Handbook of Procedures. Paragraph 4.7.1 of the Handbook of Procedures provides for the quantum of entitlement of Advance Authorisation and paragraph 4.7.3 of the Handbook of Procedures expressly provides that an authorization in excess of the entitlement would be permitted on furnishing of a bank guarantee.

Paragraph 4.7.3 of the Handbook of Procedure provides for furnishing of bank guarantee to the Customs Authorities to cover exemption from custom duties. The relevant paragraph reads as under:-

“4.7.3 Authorisation in Excess of Entitlement

An applicant shall be entitled for authorisation in excess of entitlement mentioned in paragraph 4.7.1 subject to furnishing of 100% Bank Guarantee to Customs authority to cover exemption from customs duties. A specific endorsement to this effect shall be made on authorization.”

19. The purpose of providing for a bank guarantee to Custom Authorities is to mitigate the risks against a default by the exporter and to ensure that in the event the exporter fails to perform its obligations i.e. unable to export goods of a value higher than the imports plus the minimum value addition required, the Custom Authorities can recover the duty in respect of the imports which were cleared without payment of duty. It is, thus, clear from the context that the condition of providing bank guarantee by a status holder in the given facts is repugnant to the privilege granted under the Foreign Trade Policy.

20. Given the scheme of the FT(D&R) Act, the Foreign Trade Policy and the role of DGFT, the Handbook of Procedures as notified by the DGFT is to specify the procedure for the purpose of carrying out the policy as formulated by the Central Government. Since the Foreign Trade Policy expressly provides that a status holder will have the privilege of exemption from providing a Bank Guarantee in respect of any scheme, the Handbook of Procedures - which is for providing the procedure in aid of the Foreign

Trade Policy - cannot impose a condition which militates against the said Policy. Thus, in this view, the repugnancy between clause 4.7.3 of the Handbook of Procedures and paragraph 3.10.4(v) of the Foreign Trade Policy must be resolved in favour of the Foreign Trade Policy. The condition imposed under clause 4.7.3 of the Handbook of Procedures to the extent that it requires a “*status holder*” to provide a bank guarantee to the Custom Authorities for the duty free inputs is contrary to policy and is, thus, liable to be disregarded.

21. A Division Bench of the Bombay High Court in the case of **Narendra Udeshi v. Union of India: 2003 (1) BomCR 500** has also expressly held that the circular in public notices issued by DGFT which are inconsistent with the Foreign Trade Policy framed by the Central Government would be liable to be set aside. The court further held that:

“The Hand Book of procedures prescribed by the DGFT must be in consonance with the policy and must aid and advance the policy of the Central Government and not scuttle or defeat the policy. In the instant case, the Hand Book of procedure has been amended by the DGFT to prohibit duty free import of natural rubber under the advance licence when the EXIM Policy expressly permits duty free import of natural rubber under an advance licence. Therefore, the impugned circulars and the public notice are beyond the scope and ambit of the powers vested in DGFT and, therefore, liable to be quashed and set aside.”

22. I concur with the aforesaid view expressed by the Bombay High Court that the Handbook of Procedures must be in consonance with the Foreign Trade Policy.

23. The impugned communication, to the extent that it calls upon the petitioner to submit the Advance Authorization No. 0510324315 dated 09.05.2012 for endorsement of the Bank Guarantee condition, is set aside. The petition is allowed to the aforesaid extent.

24. Accordingly, the petition and the application are disposed of without any order as to costs.

SEPTEMBER 01, 2014
pkv/RK

VIBHU BAKHRU, J

