THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 07.01.2015

+ W.P.(C) 1365/2014 & CM No. 2834/2014

M/S D.G. EXPORTS ..... Petitioner

versus

UNION OF INDIA & ORS. ..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Vikas Singh, Sr. Advocate with Mr S. Venkatesh, Ms Deepika Kalia, Mr Anuj P. Agarwala and Mr Kapis Seth.

For the Respondents : Mr Akshay Makhija, CGSC with Ms Mahima Bahl. Mr Kamal Nijhawan, Sr. Standing Counsel with Mr Sumit Gaur for R-3 & 4.

CORAM:-
HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner impugns a circular dated 04.12.2008 being circular No. 45 (RE-08)/2004-2009 (hereafter 'impugned circular') issued by the Director General of Foreign Trade (hereafter the 'DGFT') whereby the DGFT has proscribed export of goods, which are apparently in the nature of military stores, without a No Objection Certificate (NOC) from Department of Defence Production and Supplies, Ministry of Defence (hereafter 'DoDP').

2. According to the petitioner, the impugned circular is *ultra vires* the

Foreign Trade (Development and Regulation) Act, 1992 (hereafter the 'FTDR Act') and the Foreign Trade Policy (hereafter 'FTP') notified thereunder.

3. The petitioner is a proprietorship concern of one Dinesh Kumar and is stated to be engaged in exporting products required for personal protection. These products include products like bullet proof jackets and other items for personal safety of the security personnel. The imports of such goods are not restricted under the FTP and such goods are freely importable. The petitioner asserts that it received a purchase order for supply of bullet proof vests of the required specification from the Ministry of Interior, Tunisia. It is contended that although such bullet proof vests are freely exportable under the FTP, the petitioner has been unable to export the goods on account of the insistence of the respondent to obtain a NOC from the DoDP.

4. In the aforesaid backdrop, the controversy to be addressed is whether the condition requiring the exporters to obtain permission of DoDP for exports of products such as bullet proof vests is contrary to the FTP and/or the FTDR Act.

5. Prior to the enactment of the FTDR Act, the import and export of goods was regulated under the Import and Exports (Control) Act, 1947. The Preamble of the said Act indicated that the said Act was enacted *'to prohibit or control imports and exports. Whereas it is expedient to prohibit, restrict or otherwise control imports and exports.'*

6. The Import and Export (Control) Act, 1947 was repealed and

replaced by the FTDR Act and its Preamble reads as under:-

> "An Act to provide for the development and regulation of foreign trade by facilitating imports into, and augmenting exports from, India and for matters connected therewith or incidental thereto."

7. The Preamble of the two Acts is indicative of a paradigm shift in the focus of the legislative intent towards development of foreign trade by augmenting exports from India. The Central Government is empowered to frame a Foreign Trade Policy under Section 5 of the FTDR Act which reads as under:-

> "**5. Foreign Trade Policy.**-The Central Government may, from time to time, formulate and announce, by notification in the Official Gazette, the foreign trade policy and may also, in the like manner, amend that policy.
>
> Provided that the Central Government may direct that, in respect of the Special Economic Zones, the foreign trade policy shall apply to the goods, services and technology with such exceptions, modifications and adaptations, as may be specified by it by notification in the Official Gazette."

8. In exercise of powers under Section 5 of the FTDR Act, the Central Government has notified the FTP. Paragraph 2.1 of the FTP, clearly, indicates that the exports shall be free except where regulated by the FTP or by any other law in force. It is also provided that the item wise policy for export shall be as specified under the Indian Trade Classification (Harmonised System) Classification for Export & Import Terms (hereafter referred to as 'ITC (HS)'). The relevant extract of paragraph 2.1 of the FTP is quoted below:-

"Exports and Imports shall be free, except where regulated by FTP or any other law in force. The item wise export and import policy shall be, as specified in ITC (HS) notified by DGFT, as amended from time to time."

9. A plain reading of paragraph 2.1 of the FTP indicates that there is no restriction as to export of any item unless it is expressly provided under the FTP or any law in force. In the present case, there is, admittedly, no law that expressly prohibits or restricts the exports of bullet proof vests. Thus, the only question that needs to be addressed is whether any such restriction can be read in the FTP. ITC (HS) indicates the policy in respect of separate items and it is necessary to refer to entry 4 & 5 of Table-A of Schedule 2 of ITC (HS), 2012 which reads as under:-

"

S. No.	Chapter	Item Description	Policy	Nature of Restriction
4	Any Chapter	Military stores as specified by Director General of Foreign Trade	Free	No Objection Certificate from Department of Defence Production and Supplies, Ministry of Defence, New Delhi, except the goods as specified at Export Licensing Note 1 below which are freely exportable without the No Objection Certificate.
5	28, 29, 30, 35, 36, 37, 38, 39, 40, 48, 49, 59, 69, 70, 71, 72 to 91, 93	Special Chemicals, Organisms, Materials, Equipments & Technologies (SCOMET) goods as specified in Appendix 3 of this schedule of this book.	Prohibited/ Restricted/ Free	Exports governed as per the conditions indicated in Appendix-III of this schedule. Further where no specific conditions as at category 2 to 7 are enumerated, licence shall be required.

"

10. It is not disputed that the aforesaid entries have to be read as a part of the FTP. Entry no. 4, which relates to military stores indicates that military stores are freely exportable; the same is indicated by the word 'Free' under the column under the heading "Policy". However, it is also provided that a No Objection Certificate from DoDP would be required for export of items other than those listed under Note 1 to Table-A. It is relevant to note that entry no. 4 only applies to military stores as specified by the DGFT. Admittedly, the DGFT has not specified any item of military stores as yet and thus, the present entry has been rendered ineffective. The expression 'military stores' only specifies the nature of items that may be specified by the DGFT. This entry cannot be read as restricting all items in the nature of 'military stores' unless made freely exportable by the DGFT. Given the underlying intent of FTP - items are freely exportable unless restricted - it is not possible to read any restriction under entry no. 4 unless the DGFT specifies those items.

11. The Central Government in exercise of powers under Section 5 of FTDR Act has issued a notification dated 18.04.2012, *inter alia,* notifying Schedule 2 of ITC (HS), 2012 to contain the Export Policy. Paragraph 1 of Schedule 2 of ITC (HS), 2012 reads as under:-

> **"1. Free Exportability**
>
> All goods other than the entries in the export licensing schedule along with its appendices are freely exportable. The free exportability is however subject to any other law for the time being in force. Goods not listed in the Schedule are deemed to be freely exportable without conditions under the Foreign Trade (Development and Regulations) Act, 1992 and the rules, notifications and

> other public notices and circulars issued there under from time to time. The export licensing policy in the schedule and its appendices does not preclude control by way of a Public Notice Notification under the Foreign Trade (Development and Regulations) Act, 1992.
>
> Goods listed as "Free" in the Export Licensing Schedule may also be exported without an export licence as such but they are subject to conditions laid out against the respective entry. The fulfillment of these conditions can be checked by authorized officers in the course of export."

12. At this stage, it is also necessary to consider the relevant contents of the impugned circular which are quoted below:-

> "2. Table A (S. No. 4) of Schedule II of ITC(HS) Classification of Export & Import items, 2004-09 lays down the policy for export of 'military stores' i.e. a No Objection Certificate from Department of Defence Production (MoD) is required except in respect of goods as specified at Export Licensing Note 1 which are freely exportable without No Objection Certificate.
>
> 3. Keeping in view the above, it is reiterated that no export of goods, which are apparently in the nature of 'Military Stores' may be allowed without No Objection Certificate from Department of Defence Production, by all units including EOU/EHTP/STP/BTP units."

13. The challenge to the validity of the impugned circular must be considered in the context of Schedule 2 of ITC (HS), 2012.

14. Plainly, the FTP empowered the DGFT to specify items of military stores that would be freely exportable subject to obtaining a NOC from DoDP. Admittedly, the DGFT has not specified any such list but, by the impugned circular, has sought to pass an omnibus order disallowing export

of all goods which are '*apparently in the nature of 'Military Stores''*. Clearly, the same is not in conformity with the FTP read with Schedule 2 of ITC (HS), 2012 as notified by the Central Government.

15. The next question that needs to be addressed is whether the DGFT is empowered under the legal framework to issue such omnibus directions which are, apparently, not in conformity with the notified FTP.

16. Section 6 of the FTDR Act provides for the appointment of the DGFT and also indicates functions to be performed by the DGFT. The said Section is quoted below:-

> **"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 foreign trade 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."

17. Paragraph 2.3 of the FTP, *inter alia,* provides that any question or doubt relating to interpretation of any provisions contained in FTP or classification of items shall be referred to the DGFT. Paragraph 2.4 of the FTP further empowers the DGFT to specify the procedure to be followed

by an importer or exporter for implementation of the FTDR Act, the Rules and the Orders made thereunder and the FTP. Paragraph 2.3 and 2.4 of the FTP are relevant and are quoted below:-

> "**Interpretation of Policy** **2.3** If any question or doubt arises in respect of the interpretation of any provision contained in FTP, or classification of any item in the ITC(HS) or HBP-v1 or HBP-v2, or Schedule of DEPB Rates (including content, scope or issue of an authorization there under) said question or doubt shall be referred to DGFT whose decision thereon shall be final and binding.
>
> **Procedure** **2.4** DGFT may, specify procedure to be followed for an exporter or importer or by any licensing or any other competent authority for purpose of implementing provisions of FT (D&R) Act, the Rules and the Orders made there under and FTP. Such procedures shall be published by means of a Public Notice, and may, in like manner, be amended from time to time."

18. The role of the DGFT – although important and significant – does not extend to modifying the FTP in any manner. Section 6(3) of the FTDR Act, clearly, indicates that the Central Government may direct certain powers exercisable by it may be exercised by the DGFT. However, the

same would not extend to powers exercised by the Central Government, *inter alia,* under Section 5 of the FTDR Act. Thus, notifying the FTP or any amendment thereto can be done only by the Central Government and not by the DGFT. Whilst the DGFT has the power to issue any clarification in respect of any doubts that may arise in respect of interpretation of the FTP and also specify the procedures to be followed for export or import of goods, the DGFT cannot step outside the framework of the FTP.

19. In the present case, entry no. 4 of Table A of Schedule 2 of ITC (HS), 2012 requires that a NOC be obtained from DoDP in respect of items specified by the DGFT. In the circumstances, the only role that the DGFT could play in respect of the said entry was to specify a list of items covered under the said entry. Clearly, the impugned circular is not in conformity with this entrusted function.

20. The counter affidavit filed on behalf of the DGFT indicates that the DGFT has sought to justify the impugned circular by stating that although "*DGFT is a facilitator of exports, yet at the same time DGFT has to abide by Government of India's commitment to the world community regarding Non-Proliferation of Weapons of Mass Destruction and other national/international commitments.*"

21. I am unable to appreciate this contention, first of all, for the reason that the appointment and the functions of the DGFT are as indicated in Section 6 of the FTDR Act and the DGFT is not authorized to interpret other commitments of the Central Government and issue circulars with respect thereto. Paragraph 2.1 of the FTP notes that restrictions in exports

may be imposed by any other law. However, such restrictions would have to be specified in the text of that law and not by circulars issued by the DGFT. And, it is not the respondent's case that exports of military stores are restricted under any other law.

22. Secondly, implying that the impugned circular has been issued considering India's commitment regarding non-proliferation of weapons of mass destruction is, plainly, without application of mind. Bullet proof vests and military stores cannot be read as including weapons of mass destruction. Further, the respondent has failed to point out any commitment made by India for restricting export of bullet proof vests, which is the product in question.

23. The respondent has further sought to justify the impugned circular and the requirement of the obtaining NOC from DoDP on the basis of entry no.5 of Table-A of Schedule 2 of ITC (HS), 2012 - Export Policy.

24. In my view, this contention is unmeritted. Entry no. 5 provides that Special Chemicals, Organisms, Materials, Equipments & Technologies (referred to as 'SCOMET goods') as specified in Appendix 3 would be either prohibited, restricted or free.

25. Concededly, Appendix 3 does not contain the item of bullet proof vests. It is contended that Appendix 3 includes category 6, which is reserved for munitions list and the same is yet to be finalized. The respondent contends that munitions list would be notified by the DGFT following the decision taken by the Government at an appropriate time.

26. Thus, admittedly, bullet proof vests are not included in the SCOMET list as yet. In the circumstances, I am unable to accept that the FTP, in any manner, restricts export of bullet proof vests. In any event the impugned circular does not purport to notify any item of SCOMET list but seeks to restrict items, which are apparently considered as 'military stores'.

27. Before concluding, it would also be necessary to observe that it is not disputed that bullet proof vests are freely importable in the country. In the circumstances, it does not stand to reason to read in any restriction for export of such items in the FTP.

28. It is also relevant to note that on 28.02.2014, the learned counsel appearing for respondent no.1 had stated that the expression 'military stores' is expected to be clarified by the DGFT within a period of three weeks from that date. It is also clear from the FTP that the DGFT has to specify these items. However, the DGFT has failed and neglected to specify items falling within the expression 'military stores', as yet.

29. In the circumstances, the writ petition is allowed and the impugned circular is set aside. The pending application stands disposed of.

30. Further, the DGFT is directed to specify the list of items of military stores that require a NOC from DoDP within eight weeks from date. Respondent no.1 shall also ensure that an appropriate time frame is specified within which the request for a NOC has to be considered by the DoDP. In the meantime, the petitioner would be permitted to export non lethal items, which are not expressly specified under entry 4 and 5 of Table-A of Schedule 2 of ITC (HS), 2012 - Export Policy and the export of

which, are otherwise not prohibited and restricted under the FTP or any other law.

VIBHU BAKHRU, J

JANUARY 07, 2015
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