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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: July 06, 2017

Date of decision: July 17, 2017

+ **W.P. (C) 8324/2016 & CM No. 34511/2016**

NOCIL LTD.

..... Petitioner

Through: Mr. P. Chidambaram, Senior Advocate with Mr. Sandeep Sethi, Senior Advocate with Ms. Reena Khair, Ms. Praveena Gautam, Mr. Jitesh P. Gupta, Mr. Ashutosh Mishra, Advocates.

versus

**THE POLICY RELAXATION COMMITTEE
& ORS.**

..... Respondents

Through: Mr. Abhishek Ghai Advocates for R1 & R2.
Mr. Piyush Gaur, Govt. Pleader for Union of India.

**CORAM: JUSTICE S.MURALIDHAR
JUSTICE PRATHIBA M. SINGH**

JUDGMENT

Prathiba M. Singh, J.:

1. The challenge in the present petition is to the orders/minutes dated 24th April, 2015 of the Policy Relaxation Committee (hereinafter referred to as 'PRC'), a body constituted under the Foreign Trade Policy of 2009-2014.

2. The PRC vide the impugned order dated 24th April, 2015 permitted the clubbing of three Advanced Authorizations (hereinafter referred to as 'AAs') issued to the Petitioner. However, while permitting the clubbing of

the said AAs, the PRC added the following conditions:-

“I. Clubbing of the 3 Advance Authorizations as referred above be allowed. On clubbing, all Authorisations shall for all purposes, be deemed to be one Authorisation.

II. Export obligation period for the clubbed Advance Authorisations would be 48 months from the date of issuance of the first Authorisation.

III. This is only for regularization of exports already effected and closure purpose and not for any further exports/imports.

IV. Accounting of exports made against the Authorisations so clubbed, beyond 36 months but upto 48 months, from issue of the earliest Authorisation would be as under:

(a) For exports made after 36 months but upto 42 months subject to payment of composition fee @ 0.5% of FOB value of exports.

(b) For exports made after 42 months but upto 48 months on payment of composition fee @ 0.5% per month of FOB value of exports.

V. RA shall examine the case in terms of Para 4.09 of FTP (2015-2020) and ensure value addition of minimum 15%. The 15% value addition for evaluating entitlement is to be applied on the entire FOB and CIF of the Authorizations to be clubbed.

VI. RA should ensure proper accounting of the duty free inputs with reference to the export product while clubbing the Authorizations.

VII. Even after clubbing, shortfall, if any, shall be regularized on payment of Customs Duty + Interest in terms of Para 4.49 of H.B.P.”
(emphasis supplied)

The Petitioner is primarily aggrieved by condition (II) and (IV) (a) and (b)

above.

3. The Petitioner further challenges the impugned Public Notice No. 02 (RE-2013)/ 2009-2014 dated 18th April, 2013 which permitted clubbing of applications filed till 4th June, 2012 to be considered under Public Notice No. 79 (RE-2010)/2009-14. As a consequence of the Petitioner's non-compliance of the conditions imposed by the PRC, the Petitioner was placed in a DEL list on the websites of the authorities. The Petitioner prays for its name to be deleted in the list of defaulter from the respective websites.

Brief Background

4. Three AAs were issued to the Petitioner during the period 2007-10. Two AAs bearing numbers 0310450977 and 0310450982 were dated 21st November, 2007 and under these licences, the Petitioner was permitted to import goods without payment of duty and was obliged to fulfil all the export obligations attached thereto. The Petitioner was unable to fulfil its export obligations and had sought revalidation of the said licenses which was initially granted for a period of 30 months, meaning thereby that the export obligations had to be fulfilled by the end of 36 months i.e., by 20th November, 2010. Since the Petitioner was unable to fulfil its export obligations, it sought an extension for a further period of six months in December, 2010. Its request came to be rejected by the competent authority vide its letter dated 8th December, 2010 as only one revalidation was permissible under para 4.20.3 of Handbook of Procedures ('HBP'). Upon this rejection, the Petitioner had approached the Policy Relaxation Committee ('PRC') which rejected the Petitioner's request vide letter dated

3rd March, 2011 and a request for reconsideration of the same was also rejected by the PRC vide letter dated 22nd November, 2011.

5. On 10th June, 2010, the Petitioner had also obtained its 3rd AA licence no. 0310578263 which was valid for a period of 36 months i.e., up to 10th June, 2013.

6. Around the time of rejection for revalidation of the first two licences by the PRC, the DGFT issued Public Notice No. 79 (RE-2010)/2009-14 dated 13th October, 2011 by which the HBP was amended. The amended paras 4.20.3 and 4.20.4 are set out below:

“4.20.3 Only such Advance Authorisations shall be clubbed which have been issued within 36 months from the date of issue of the earliest Authorisation that is sought to be clubbed, whether such Authorisations are valid or not.

4.20.4 Upon clubbing wherever exports are accounted beyond the EO period of the earlier Authorisation, a composition fee of 0.5% of the shortfall in EO shall be levied.”

The amendments, thus, permitted clubbing of AAs which were dated within a time span of 36 months and if exports were not completed within the prescribed period, then a composition fee of 0.5% of the shortfall in Export Obligation ("EO") was leviable. This notification gave a second breath of life to the Petitioner's AAs, which, of course, turned out to be short lived as will be evidenced from the facts below.

7. On 5th June, 2012, para 4.20.3 of the Handbook of Procedures (Vol-1) was again amended vide to the following effect:

"4.20.3 Only such Advance Authorisations shall be clubbed which have been issued within 18 months from the date of issue of the earliest authorisation that is sought to be clubbed, whether such authorisations are valid or not. "

Thus the clubbing of AAs was now permissible for only those which were issued within 18 months from the date of issue of the earliest Authorisation and no clubbing of AAs with less than 18 months EOP was permissible.

8. The Petitioner made an application on 29th August, 2012 seeking clubbing of the aforementioned three Advanced Authorizations which were issued within 36 months of the earliest AA, after completing the exports and collecting all the documents. Vide letter dated 30th August, 2012, the application for clubbing was rejected, as the extant policy, by then, only permitted clubbing of licences which were issued within the 18 months' limit. The three AAs of the Petitioner were falling outside the 18 months' limit and were not entitled to clubbing.

9. The Petitioner, thereafter, sought to clarify vide letter dated 26th September, 2012 that it had sought clubbing of the three AAs as per Public Notice No. 79 dated 13th October, 2011. However, the ADGFT communicated to the Petitioner that the clubbing request is not maintainable in terms of para 4.20.3 of the HBP, as it stood on the date of application.

10. The DGFT, on 18th April, 2013 issued Public Notice No. 02, as a clarification in the HBP. The relevant portion of this clarification reads as under:-

“(1) In order to facilitate disposing of pending requests of the exporters by RAs, it has been decided to amend Para 4.20.5 of HBP v1 which reads as under:-

No clubbing of authorisations issued on or before 31st March, 2004 shall be allowed. Further, no clubbing of authorisations covered under Appendix 30A of the HBPv1 or authorisations with less than 18 months EOP shall be allowed. The amended Sub-para shall read as under [new portion in bold letters]:-

*"No clubbing of authorisations issued on or before 31st March, 2004 shall be allowed. Further, no clubbing of authorisations covered under Appendix 30A of the HBPv1 or authorisations with less than 18 months EOP shall be allowed. **However, requests for clubbing of Advance Licences/Authorisations, issued between 1.4.2002 and 31.5.2012, and received by RAs on or before 4.6.2012 may be disposed of as per the provisions of HBP-v1 prior to issue of Revised Edition/Annual Supplement dated 5.6.2012, provided conditions stipulated in Public Notice No. 79 dated 13.10.2011 are adhered".***

11. As per this Public Notice No. 02, all such requests for clubbing filed

prior to the coming into force of the amendment i.e., on or before 4th June, 2012 were to be considered and disposed of as per the provisions prevalent i.e., as per Public Notice No. 79. It is this clarification that the Petitioner is aggrieved by. The Petitioner states that the fixing of this date of 4th June, 2012 is completely perverse and arbitrary as it was done on 18th April, 2013 in a retrospective manner.

12. The Petitioner approached the PRC, for the second time, on 25th November, 2013 seeking clubbing of the three AAs for the purpose of redemption. The said request of the Petitioner was duly considered and clubbing was permitted subject to the conditions as extracted in para no.2 above. The Petitioner sought re-consideration of the said conditions but the PRC reiterated its earlier order, in its meeting dated 26th April, 2016. The said two orders dated 24th April, 2015 and 26th April, 2016 so passed form the genesis of the present petition.

Petitioner's submissions

13. Mr. P. Chidambaram, learned Senior Advocate appearing for the Petitioner, submits as under:-

- (i) the PRC had no jurisdiction or power to impose the composition fee, and having allowed the clubbing of the three AAs, the imposition of conditions in effect constituted an amendment of the Policy as envisaged in Public Notice No. 79 which was outside the powers of the PRC;
- (ii) the PRC had no jurisdiction to fix a period of 48 months for fulfillment of its export obligations, as, under Public Notice No. 79

there was no outer limit so long as the flat rate of 0.5% composition fee was paid on the exports made after 36 months;

(iii) the Notification dated 18th April, 2013 while fixing a deadline of 4th June, 2012 as the date by which all applications filed for clubbing would be considered was arbitrary, discriminatory and illegal inasmuch as there is no basis for the fixation of 4th June, 2012, that too for filing of an application – what, according to Mr. Chidambaram, is relevant is the date of completion of exports and that if the export obligations have been undertaken by 5th June, 2012, the request ought to be considered under Public Notice No. 79, even though the request may be filed later;

(iv) the Petitioner had a 'legitimate expectation' for being considered as per Public Notice No. 79 as its AAs were within the 36 months' period;

(v) the non-compliance of the conditions of the payments as directed by the PRC in the impugned order, has resulted in the Petitioner being reflected in a list of defaulters and thus, enormous hardship has been caused to the Petitioner in view of the same.

14. Mr. Chidambaram further submits that the conditions imposed by the PRC also lack any basis in the policy inasmuch as while the Petitioner is willing to fully adhere to the Public Notice No. 79, any conditions extraneous to the said notification could not have been imposed as the same are in the realm of policy.

Respondent's submissions

15. Mr. Abhishek Ghai, the learned counsel for Respondent Nos. 1 and 2 submits that this is not the first occasion when the Petitioner has failed in its obligations. The Petitioner was repeatedly given relaxation for compliance with its export obligations and having failed to do so, the Respondents invoked Public Notice No. 79. However, on the date of the filing of the application by the Petitioner for clubbing i.e., on 29th August, 2012, the Petitioner's application was not liable to be entertained as the Public Notice No. 79 had already been superseded and the policy stood amended by the Notification dated 5th June, 2012. The relevant paragraph of the HBP having stood amended on 29th August, 2012 – the date of the Petitioner's request, the Petitioner could not have invoked the policy as it stood prior to 5th June, 2012.

16. It is further the submission of Mr. Abhishek Ghai, that the PRC has the power to grant relaxation and within the power of relaxation includes the power to impose conditions. The PRC having allowed the request of the Petitioner for clubbing of the three AAs, the conditions imposed by the PRC are not arbitrary or illegal. Mr. Ghai refers to and relies upon the judgment of Bombay High Court in *Kim Chemicals Limited v. Union of India* [decision dated 6th September 2016 in W.P.(C) No. 2325/2015] in support of his submissions.

Analysis and findings:

17. We have heard the submissions made by the learned counsels for the parties. From the facts and submissions, the following issues arise for our consideration:-

Issue No. 1

Whether the Petitioner is entitled to invoke Public Notice No. 79 dated 13th October, 2011 on 29th August, 2012 and seek clubbing of the three AAs?

Issue No. 2

Whether the PRC has the power to impose conditions, while allowing clubbing of the said three AAs?

Issue No. 1

Whether the Petitioner is entitled to invoke Public Notice No. 79 dated 13th October, 2011 on 29th August, 2012 and seek clubbing of the three AAs?

18. The Petitioner, admittedly, filed the application for clubbing of the three AAs on 29th August, 2012. On this date, the Policy that was prevalent was the policy dated 5th June, 2012 and not the Policy as envisaged under the Public Notice No. 79. Thus, the Petitioner could only seek clubbing as per the policy prevalent on the date of filing of the application. The subsequent Notification dated 18th April, 2013 merely clarified that all applications filed till 4th June, 2012 would be considered under the Public Notice No. 79. This was a logical step inasmuch as the cut-off date of 4th June, 2012 for filing of the applications and consideration of the same was fixed keeping in mind the fact that the subsequent policy came into effect from 5th June, 2012. Thus, the fixation of 4th June, 2012 is not arbitrary or perverse but in fact stands to logic.

19. Policies of this nature which allow exemptions and benefits are by

themselves dynamic and not static. Just as the Petitioner got a chance to avail of Public Notice No. 79 after the expiry of the validity of all the three AAs – which it did not avail during its prevalence, in the same way the amendment which came into effect on 5th June, 2012 reduced the period of the AAs which could be clubbed. There cannot be any vested right for a Petitioner to contend that a particular notification, in this case Public Notice No. 79 should be continued to be applicable indefinitely, until the Petitioner has had the opportunity of availing the same.

20. The Petitioner's contention that it has a legitimate expectation for its request to be considered under Public Notice No. 79 is belied by the fact that its request for clubbing itself was after the supersession of the said Public Notice. The HBP had stood amended and hence, there cannot be a legitimate expectation for continuation of a relaxation policy, which is non-existent on the date it is invoked.

21. The Petitioner having filed its application for clubbing on 29th August, 2012 cannot, therefore, legitimately expect that its application would be considered under Public Notice No. 79 which already stood amended and superseded. The authorities, therefore, rightly rejected the application for clubbing of the three AAs which were not as per the Notification dated 5th June, 2012.

Issue No. 2:

Whether the PRC has the power to impose conditions, while allowing clubbing of the 3 AAs.

22. The Petitioner, under these circumstances, approached the PRC for seeking an exemption and exercise of discretion in its favour. The powers of the PRC are contained in Para 2.5 of the Foreign Trade Policy 2009-14. The said paragraph is reproduced herein below:-

‘2.5 Exemption from Policy / Procedure

DGFT may pass such orders or grant such relaxation or / Procedure relief, as he may deem fit and proper, on grounds of genuine hardship and adverse impact on trade. DGFT may, in public interest, exempt any person or class or category of persons from any provision of FTP or any procedure and may, while granting such exemption, impose such conditions as he may deem fit. Such request may be considered only after consulting committees as under:

<i>Sl. No</i>	<i>Description</i>	<i>Committee</i>
<i>(i)</i>	<i>Fixation / modification of product norms under all schemes</i>	<i>Norms Committee</i>
<i>(ii)</i>	<i>Nexus with Capital Goods (CG) and benefits under EPCG Schemes</i>	<i>EPCG Committee</i>
<i>(iii)</i>	<i>All other issues</i>	<i>Policy Relaxation Committee (PRC)</i>

A mere perusal of the above reveals that the DGFT/PRC may grant an exemption in case of genuine hardship and adverse impact on trade or in public interest, and, while doing so, impose such conditions as it deems fit.

23. Thus, the powers of the PRC, while making its recommendations are wide and are purely discretionary. The PRC, in its order dated 24th April,

2015 has considered the relevant facts and permitted the clubbing of the three Advanced Authorizations and while permitting the said clubbing, conditions 'as it deemed fit' have been imposed by it which cannot be said to be perverse or arbitrary. The review order of the PRC dated 26th April, 2016 also clearly shows that the case of the Petitioner was discussed at length and it is only thereafter, that the decision dated 24th April, 2015 was reiterated. The submission of the Petitioner that the PRC does not have the power to impose such conditions does not appear to be correct inasmuch as the order of clubbing is by itself an exercise of power for granting an exemption.

24. No person is entitled to an exemption as a matter of right. Exemptions are granted by Authorities, which are purely discretionary orders. While exercising discretion, as per Para 2.5 of the Foreign Trade Policy 2009-14, if the PRC has imposed the conditions which it deemed fit, in public interest, unless it can be shown that the said conditions were completely perverse, arbitrary or illegal, the same cannot be interfered with. There is nothing that is being pointed out to show that the conditions imposed by the PRC are in any manner grossly unreasonable in order to call for any interference by us. The exercise of discretion to grant exemption is a delicate balance between balancing the hardship of the Petitioner and the adverse impact on trade. The PRC, in the background of the Petitioner's case, has imposed conditions which are neither illegal nor arbitrary. Similar conditions have also been imposed by the PRC in the case which came up for consideration before the Bombay High Court in *Kim Chemicals (supra)*. The said power, being exercised by the PRC in public interest, the conditions imposed therein

cannot be challenged on the ground of legitimate expectation, inasmuch as, the principle of legitimate expectation does not come into play where there is exercise of power in public interest. Recently, the Supreme Court in ***Reliance Telecom Ltd. v. Union of India (2017) 4 SCC 269*** has held as under:-

“The principle of “legitimate expectation” can never override public interest and when there is larger public interest, the question of legitimate expectation does not arise; and in any case, in the present case, if we allow ourselves to say so, this contention is absolutely sans merit.”

25. The Bombay High Court in ***Kim Chemicals (supra)***, has rightly observed as under:-

“18. We are in agreement with the Respondents that the Petitioners case as set out in the petition cannot be accepted. It is evident from the petition itself that they aware of the defaults and which had occurred. They firstly sought a relaxation from the condition and then made an application for clubbing. The Petitioners have gone as far as insisting that their case is similar to other two companies one of which is M/s. Prachi Pharmaceuticals Pvt. Ltd. They had also, in similar circumstances, sought identical relief of clubbing according to the Petitioners. However, on the facts and circumstances and which are peculiar to the Petitioners case, the Respondents have, in the impugned orders, copies of which are from pages 43 to 48 of the paper-book, duly informed the Petitioners that the clubbing of the two advance authorisations as referred

particularly by us in the foregoing paragraphs is allowed. This is only for recognition of exports already effected and closure purpose and not for any further exports/imports. Pertinently, such a condition is not challenged. Then condition No. III appearing at page 43 in the order dated 11th February, 2014, reads as under:

"III. Exports made within 48 months from the date of earliest Authorisation i.e. upto 31.07.2012 shall only be taken in to consideration for EO fulfilment and clubbing subject to payment of composition fee @ 0.5% on FOB value of export made beyond the stipulated EOP in the earliest Authorisation. RA is directed to examine the case in terms of Para 4.1.6 of FTP and ensure value addition of minimum 15%. The 15% value addition for evaluating entitlement is to be applied on the entire FOB and CIF of the authorisations to be clubbed. RA should ensure proper accounting of the duty free inputs with reference to the export product while clubbing the Authorisations."

19. On a perusal of this condition, we do not find that the Petitioners have been treated unfairly and inequitably. A person who has not been able to fulfill the obligations cannot insist on an unconditional relaxation or exemption. The Committee in the elaborate exercise conducted by it and which resulted in passing of the order dated 3rd September, 2014, by the second Respondent, found that the relaxation has to be granted on case to case basis taking into consideration genuine hardship and the likely adverse impact on trade. It

is empowered to grant an exemption/relaxation of the conditions. One decision of the Policy Relaxation Committee cannot be quoted as a precedent in another case as the extent and genuineness of hardship may vary from case to case. Policy relaxation by its very nature is for relaxing normal policy/procedural provisions and cannot be claimed as of right. The Policy Relaxation Committee has extensively considered the case of the Petitioner. It found that it got 51 months effectively for completing the export obligations, but the commitment made was not honoured. It is in these circumstances that the clubbing applications were considered and the condition was imposed restricting the compliance to 48 months. Thus, exports effected upto 48 months from the date of issuance of the earliest authorisation for clubbing the authorisations came to be imposed. We do not think that such an exercise which by its very nature is a matter of discretion so as to enable the defaulters like the Petitioners to fulfill their obligations belatedly, can be challenged on the ground that there is a condition imposed in the relaxation or exemption. The above conclusion of the Committee cannot be said to be perverse or based on no material. We do not think that the Committee has failed to apply its mind to the relevant facts and circumstances of the Petitioner's case. The Petitioners cannot go on improving their version as originally projected by relying on some information available to them after an application made under the Right to Information Act, 2005, was invoked by them. By its very nature, the power to relax is exercised on case to case basis. Once relaxation is not a right and nothing accrues in the Petitioners' favour to apply and seek unconditional relaxation, then, all the more we do not think that the exercise

undertaken by the experts in the field and in charge of interpretation and implementation of the foreign trade policy should be interfered by us in our equitable and discretionary jurisdiction under Article 226 of the Constitution of India.”

26. Moreover, in the present case, the earliest AAs which were issued, dated back to 21st November, 2007 with an export obligation period of 24 months. The Petitioner has had sufficient time to discharge the said obligations. In fact, even the Public Notice No. 79 which permitted clubbing of the three AAs with a time span of 36 months was a relaxation. The invocation of the said relaxation after the same was superseded and amended cannot be claimed as a matter of right. On the date when the application was filed by the Petitioner, the said Public Notice No. 79 had already lapsed. The relaxation by the PRC allowing clubbing of the three AAs being an exercise of discretionary power and the conditions imposed thereon, being in furtherance of the exercise of that discretion for granting exemption from applicable policy and procedure, this Court does not deem it a fit case for interference under Articles 226/227 of the Constitution of India.

27. The writ petition and the pending application are, accordingly, dismissed with no orders as to costs.

PRATHIBA M. SINGH, J

S.MURALIDHAR, J

JULY 17, 2017

j

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