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

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Reserved on: February 07, 2017

Decided on: April 03, 2017

+ **WP (C) 11198/2015**

IFB INDUSTRIES LTD.

..... Petitioner

Through: Mr. S. Ganesh Sr. Advocate with
Ms. Maneesha Dhir with Ms. Jayashree
Shukla Dasgupta and Mr. Aseem
Swaroop, Advocates.

versus

UNION OF INDIA & ANR.

..... Respondents

Through: Mr. Akshay Makhija, CGSC with
Mr. Sumant Bhushan, Adv. for UOI.
Mr. Manish Mohan, CGSC with Mr.
Shivam Chanana and Ms. Manisha
Saroja, Advs. for R2/BIFR.

CORAM:

HON'BLE MS. JUSTICE INDIRA BANERJEE

HON'BLE MR. JUSTICE ANIL KUMAR CHAWLA

JUDGMENT

INDIRA BANERJEE, J

1. In this writ petition the petitioner has challenged an order dated 13.10.2015 passed by the Policy Relaxation Committee, hereinafter referred to as 'PRC', constituted under the Foreign Trade Policy, rejecting the petitioner's

application for procedural relaxation and concessions to enable the petitioner to get credit for exports already made by the petitioner against export obligations incurred by the petitioner on certain Advance Licenses issued to the petitioner.

2. The petitioner is engaged in the manufacture of home appliances and automotive parts and components for which raw material and inputs are required to be imported.
3. The petitioner was accordingly issued 40 Advance Licenses to which exports obligations were attached. In terms of the Advance Licenses, the export obligations attached thereto had to be fulfilled in value as well as quantity.
4. In respect of 29 of the 40 Advance Licenses, the petitioner had discharged export obligations both in terms of value and quantity. However, in respect of balance 11 licenses, the petitioner had discharged its export obligations more than 5 times in value but there was deficiency in quantity.
5. The petitioner contends that:
 - (i) as the market for petitioner's products had collapsed by reason of worldwide recession and the petitioner had become sick, its case was referred to the BIFR. Paragraph 4.1.9 (A) of the Foreign Trade Policy 2004-2009 would thus be attracted.
6. The said paragraph provided that a sick industrial company registered with the BIFR would have the right to a five year

extension of the period allowed for discharge of export obligations. In fact, by an order dated 14.01.2009, BIFR had sanctioned a revival scheme, which envisaged five year extension of the period for discharge of export obligations. However, the extended period could only be availed subject to issuance of extension orders in respect of each of the Advance Licenses in question by the Director General, Foreign Trade, Kolkata (DGPT)

7. There are two broad grounds of challenge to the impugned order. Firstly it is contended that the petitioner has a legal right to the relaxation and concessions which have wrongfully being denied to the petitioner. The petitioner is entitled to enforce the rights in proceeding under Article 226 of the Constitution of India. The second ground of challenge to the impugned order is on the ground of discrimination against the petitioner and violation of Article 14 of the Constitution of India. According to the petitioner, similar relaxations and concessions as sought by the petitioner have been granted by the PRC to a large number of similarly circumstanced exporters.
8. It appears that the petitioner's application for concessions and / or relaxations had been rejected by the PRC by the order dated 09.06.2015, which was challenged by the petitioner by filing a writ petition being WP(C) No.8031/2015 in this Court.

9. By an order dated 10.09.2015, this Court set aside the order of the PRC dated 09.06.2015 with liberty to the petitioner to file a representation before the PRC. The respondents were directed to pass a reasoned order after giving the petitioner an opportunity of hearing.
10. Mr. Ganesh, learned Senior Advocate appearing on behalf of the petitioner submitted that extension orders were issued by the Joint DGFT, Kolkata in July 2010, after a delay of 1 ½ years. The extension was with retrospective effect from January, 2009. The petitioner, therefore, in effect, got an extension of 3 ½ years instead of full period of five years to which the petitioner was entitled under Clause 4.1.9 (A) of the FTP 2004-2009 as a matter of legal right.
11. The petitioner, therefore, applied to the PRC for an appropriate extension of export obligation period to make up for the lost extension period of 1 ½ years. Mr. Ganesh argued that the petitioner should be granted period of five years with effect from July 2010 till July 2015 and all exports made by the petitioner upto July 2015 should be taken into account towards discharge of the petitioner's export obligations. To this, the petitioner was entitled as a matter of legal right irrespective of exercise of discretionary indulgence by the PRC in favour of the petitioner.
12. Mr. Ganesh argued that with effect from 2009, the Import Controlling Authority changed the alphanumeric numbering of import licenses and also changed the software used by them

for recording the fulfilment of export obligations, as a result of which, the system and software of the respondent did not accept and record the earlier license numbers given to licenses issued prior to 2009 in connection with the shipping bills covering export made in relation to the licenses. These exports could not be considered for no fault of the petitioner, but only because of the software. Mr. Ganesh strenuously argued that the petitioner is entitled to have these exports taken into consideration, as a matter of legal right even without exercise of discretionary indulgence by PRC in favour of the petitioner.

13. Mr. Ganesh argued that a large number of other exporters, including in particular, those who have made their exports on free shipping bills had applied to PRC for relaxation in the form of directions that the export made on such shipping bills should be considered towards discharge of the export obligations even though the shipping bills were free shipping bills and though the Advance License numbers could not be uploaded because of defect in the software. This specific prayer has been granted by the PRC in a large number of cases particulars whereof have been given in the writ petition.
14. Mr. Ganesh next argued that paragraph 4.20 of the Handbook of the Procedures provides for the facility of clubbing of licenses for the redemption / regularization of licenses even if the licenses pertain to the different financial years in the period from 1992 to 2002, and even if the licenses have been

issued under different Customs Notifications. Mr. Ganesh argued that this facility is also granted as a matter of right under the Handbook, irrespective of exercise of discretion in favour of the exporter by PRC. Mr. Ganesh finally argued that PRC had granted the facility of clubbing of licenses in a large number of cases, for example, in the cases of M/s Zenith Birla (India) P. Ltd. Thane; M/s Titan Laboratories Pvt. Ltd. Mumbai; and M/s Shilpa Medicare Ltd., Raichur.

15. It appears that subsequently certain restrictions were introduced in paragraph 4.20.3 of the Handbook (2009-2014) by amendments on 13.10.2011. Mr. Ganesh argued that these restrictions had to be prospective and could apply only to licenses issued after 13.10.2011. The licenses in respect of which the petitioner has sought facility of clubbing relate to the period 1992-2002 and are therefore squarely covered by paragraph 4.20 of the Handbook of 2004-2009. The later amendments of 13.10.2011 do not apply to the petitioner at all.
16. By the impugned order dated 13.10.2015, PRC rejected the prayer of the petitioner on the ground that the petitioner had already been granted a five year extension of export obligation period as per the order of the BIFR. Mr. Ganesh argued that the PRC did not consider the contention of the petitioner that the extension orders had come after 1 ½ years, the extension was therefore only of 3 ½ years with effect from July 2010 and not full extension of five years.

17. The PRC granted waiver of the requirement of mentioning license details only in respect of deemed exports made to special economic zones and not in respect of actual exports made to foreign countries. Mr. Ganesh argued that this ground taken by the PRC was not correct as waiver had been granted in respect of actual exports in a large number of cases. In any case, relaxation in case of a deemed exports and denial thereof in case of actual exports was arbitrary, discriminatory and unreasonable.
18. Mr. Ganesh argued that the request for clubbing of licenses was rejected by relying on time limits which were introduced for the first time by amendments made on 13.10.2011 to the Handbook of 2009-2014. This amendment had no application on the present case.
19. Mr. Ganesh argued that the legality and the validity of the impugned order of PRC dated 13.10.2015 had to be judged on the basis of reasons contained therein. The grounds or reasons stated in the impugned order are manifest, patent and self-evident. They are grossly erroneous. The order is therefore required to be set aside by this Court. The grounds cannot be improved by affidavit in this context.
20. The learned Central Government Standing Counsel appearing on behalf of the respondents, Mr. Akshay Makhija submitted that the petitioner had prayed for clubbing of 11 Advance Authorizations issued between the period 1989 to 1993, condonation of procedural lapses of not mentioning details of

the Advance License number in shipping bills for shipments made during the period 2006-2007 to 2014-2015 on account of difficulties made for implementation of new new EDI system; counting of shipments during the original validity period and extended period considering all exports and deemed exports made by the petitioner for the purpose of regularization and closure as per paragraph 4.1.9(A) of FTP.

21. Mr. Makhija submitted that PRC had rightly declined clubbing of the Advance Authorizations since the Advance Authorizations had been obtained during the period 1989 to 1993 under the Duty Exemption Scheme which allows import of goods without payment of applicable duties.
22. Mr. Makhija submitted that request had to be considered in accordance with paragraph 4.20 of the Handbook of Procedures 2009 to 2014 which provided:

“4.20.4 Wherever exports are effected beyond EO extension period (allowed vide paragraph 4.22 below) of earlier authorisation, no clubbing shall be permitted.

4.20.5 Notwithstanding provisions of para 4.20.3 and 4.20.4 above, Clubbing of all expired Authorisations may also be permitted provided all expired Authorisations have been issued during Exim Policy period 1992-1997 & 1997-2002 i.e., 1st April 1992 to 31st March, 2002. However, clubbing of erstwhile Value Based Advance licneses shall not be allowed.”

23. Mr. Makhija submitted that since the request of the petitioner was for clubbing of expired Advance Authorizations issued between 1989 and 1993, which was not permissible according to the applicable provisions of the Handbook of Procedures, the request was turned down.
24. Mr. Makhija submitted that during the course of arguments, the petitioner had admitted that pre 1992 licenses could not be clubbed with the post 1992 licenses. It was submitted that before the PRC there was no request to ignore the pre 1992 licenses and grant clubbing only for the post 1992 licenses.
25. Mr. Makhija argued that even if it is assumed that clubbing may have been permitted for Advance Authorizations between 01.04.1992 to 31.03.2002, the last date to avail this facility was till 31.03.2012 as per the Public Notice No.79 (RE1010)/2000-14, dated 13.10.2011. The petitioner did not avail of this facility and therefore clubbing could not be permitted.
26. Mr. Makhija submitted that PRC rightly rejected the prayer for condonation of procedural lapses of non-mentioning details of Advance License numbers in the shipping bills for shipments made on the basis of BIFR package during the period 2006-2007 to 2014-2015 as shipping bills without details of authorization mentioned on it are treated as 'free shipping bills' and are not assessed by the Customs authority and consumption of exempted materials is not examined.

27. Mr. Makhija argued that under the Advance Authorization Scheme the petitioner had availed of duty free imports and thus it was under an obligation to utilize the said imports within a specified period. Even if the period is condoned, the petitioner needs to be able to demonstrate that it did, in fact, use the goods so imported and after adding value to the same exported the resultant products. It is not possible to ascertain at this juncture if the same had in fact been done merely on the basis of value of the goods exported without any proof of the exempted materials consumed in the resultant products. Even after shipment within the specified period, the applicant had the option to approach the Customs authority for getting extension of shipping bills under the provisions of the Customs Act, they did not, however, opt for the same either.
28. Mr. Makhija further submitted that the reasons given by the petitioner of difficulties in the computer system is incorrect as the procedure of registration of license started from 01.04.2009 onwards and was applicable only for Authorizations issued online after 01.04.2009 and not for the Authorizations issued prior to that date. In the case of the petitioner, all the Authorizations were issued prior to 01.04.2009.
29. Mr. Makhija argued that the petitioner is, in effect, is asking for amendment of free shipping bills which is not

permissible in law. The plea of software problem is an excuse to cover up the petitioner's own default.

30. Refuting the arguments of Mr. Ganesh that PRC had not rejected the request of the petitioner on the ground of non relatability of the free shipping bills, Mr. Makhija argued that this aspect has clearly been dealt with by the PRC.
31. Mr. Makhija argued that the petitioner was under obligation to export finished products manufactured by utilization of imported goods with value added within a period of 18 months from the date of issue of license. As per the prevalent procedure they were eligible for two extensions of six months for fulfilment of export obligations. Both these extensions were granted to the petitioner.
32. Mr. Makhija argued that as per the conditions attached to the license and provisions in the prevalent Handbook of Procedure 1992 to 1997, the petitioner was under obligation to submit documents evidencing fulfilment of export obligation and realization of remittances within two months from the date of expiry of export obligation. So effectively, the petitioner should have completed their export obligations within 30 months from the date of issue of each Authorization and submitted documents within two months thereafter, towards redemption of the cases, but they did not do so. Therefore, the petitioner was liable for penal action of violating the provisions of EXIM Policy under the Foreign Trade (Development and Regulation) Act, 1992.

33. Mr. Makhija submitted that the petitioner became sick in 2001 which was five years after the obligation period. Hence the plea of genuine sickness of the company could not be taken as a genuine reason for non-fulfilment of export obligations.
34. Mr. Makhija argued that under Section 19 (2) of the Sick Industrial Company (Special Provisions) Act, 1986, there was a deemed sanction of the provisions of the Scheme within six months even if no extra sanction was granted by the concerned authority. Therefore, the argument that the concerned authority did not pass orders in compliance with the Scheme till 2010 are nothing but an excuse to cover up the petitioner's own lapses and failure of the petitioner to act with duly diligence.
35. Mr. Makhija submitted that failure on the part of the petitioner to utilize the inputs imported without paying the duty for manufacture of resultant product and fulfilling the stipulated export obligation even after grant of extension up to 31.01.2014 has resulted in huge loss of revenue to the government exchequer. Mr. Makhija finally argued that the Director General, Foreign Trade might, in public interest pass such orders or grant such exemption, relaxation or relief as he may deem fit and appropriate, on grounds of genuine hardship and adverse impact on trade, to any person or class or category of persons from any provisions of Foreign Trade Policy or any procedure. While granting such exemption,

the Director General may impose such conditions that he may deem fit after consulting the Norms Committees for Fixation / Modification of the Products' Norms, EPCG Committee for Capital Goods and Benefits under EPCG Scheme, and the Policy Relaxation Committee for all other issues.

36. Mr. Makhija submitted that Policy relaxation is not a matter of right. The Committee considers the request on merits taking into consideration the genuine hardship and adverse impact on trade. It is submitted that this was not a case for further relaxation of policy since extraordinary relaxation had already been availed by the petitioner and the petitioner had itself been negligent. The PRC rightly rejected the prayers of the petitioner. However the petitioner has the option to get individual cases regularized in terms of paragraph 4.49 of the Handbook of Procedures 2015-2020.
37. The revival scheme sanctioned by BIFR envisaged a five year extension period for discharge of export obligations subject to issuance of extension orders in respect of each of the licenses in question.
38. The extension orders were, however, issued in July 2010, but with retrospective effect from January 2009. The petitioner thus, in effect got extension of 3 ½ years only. Appropriate extension of export obligation period was sought to make up for the lost 1 ½ years, which PRC apparently did not appreciate.

39. There is also no specific denial of the change in alphanumeric numbering of import Licences and change of software as a result of which the software did not accept the earlier licence numbers given to licences issued before 2009 in connection with shipping bills covering exports in relation to the licences. These exports were not taken into consideration for no fault of the petitioner. This is not in dispute.
40. It is also not in dispute that exports on free shipping bills have been considered towards exports against obligations under Advance Licences in case of other exporters though Advance Licence Numbers could not be uploaded.
41. In any case, paragraph 4.20 of the Handbook of Procedures provides for the clubbing of Licences, and this has been allowed in respect of M/s Titan Laboratories, M/s Zenith Birla India Ltd. and others. As rightly argued by Mr. Ganesh, subsequent restrictions in paragraph 4.20.3 introduced by amendment on 13.10.2011 have to be prospective and apply to Licences issued after 13.10.2011. The petitioner sought facility of clubbing in respect of Licences issued before 2002.
42. It is difficult to appreciate the logic as to why the requirement of mentioning of Licence details should be waived only in case of deemed exports to Special Economic Zones, but not in case of actual exports to foreign countries. Moreover, the contention of the petitioner that the waiver

had in some other cases been allowed even in case of actual exports out of India, has not seriously been refuted.

43. Mr. Ganesh has rightly argued that the validity of the impugned order of the PRC has to be adjudged on the basis of reasons contained therein and not the pleadings in the Counter Affidavit or the submissions made in Court. Thus, Court need not deal with the submissions of Mr. Makhija which are not borne out by the reasons in the impugned order.
44. Even assuming that the petitioner had sought clubbing of Licences issued from 1989 to 2002, the PRC could have moulded the relief by excluding the pre 1992 Licences, even though there may not have been any request for segregating the pre 1992 Licences.
45. Mr. Ganesh rightly pointed out that the PRC did not reject the application for procedural relaxations and concessions on the ground of non-utilization of imported inputs and raw materials for manufacture of the goods exported against shipping bills. Moreover, it is not denied that there were software problems.
46. The arguments relating to loss of revenue, advanced by Mr. Makhija are not supported by the impugned order of PRC or by any other materials on record.
47. The specific averments in the writ petition that in large number of cases, PRC has considered exports made under

free shipping bills, have not specifically been denied by the respondents. In any case, the submission of Mr. Ganesh that exports were made under free shipping bills only because of computer problems as Advance License numbers were not being accepted, has not specifically been denied. The dates of the exports are matters of record. The dates are verifiable. There are specific averments that the export related to the period 2009 to 2015. The petitioner has only prayed that actual exports of the petitioner during this period should be taken into consideration for determining the discharge of the petitioners export obligations under the Advance Licenses. The prayer is not unreasonable.

48. May be, policy relaxation is not a matter of right, as argued by Mr. Makhija. At the same time relaxation cannot whimsically be denied if facts and circumstances warrant relaxation.
49. It is well settled that discretionary power cannot be exercised arbitrarily. If facts and circumstances exist which require exercise of discretion in a particular way, there is an obligation and / or duty to exercise discretion in that way. The proposition finds support from the judgment of the Supreme Court in Ex. Capt. Harish Uppal v. UOI & Ors. reported in 2003 (2) SCC 45.
50. As observed above, there is no specific denial that in large number of other cases, discretion has been exercised. The instances have been given. Refusal to exercise the power in

the case of the petitioner would be totally arbitrary, discriminatory and bad in law.

51. Mr. Ganesh submitted that there is no need or warrant for a remand because the petitioner had already submitted to the respondent the central excise ARI-I documents (duly endorsed by the Central Excise Authorities) and the export invoice (also endorsed by the Customs Authorities). Mr. Ganesh submitted that these documents fully establish the exports. The documents have never been doubted or questioned by the respondents. The exports have been certified by the Customs and the Excise Departments which are a limb or wing of the Central Government of which the respondents are a part.
52. Mr. Ganesh referred to the pleadings in the writ petition and submitted that paragraph 4.20 of the Handbook of Procedure 2004-2009 gives the facility of clubbing of licenses only for the purpose of redemption / regularization without imposing any restriction based on the period to which the licenses relate. Paragraph 4.20 expressly provides that the licenses may relate to different periods but the only requirement is that the Customs Exemption Notification in question must be similar. That requirement was fulfilled in the present case. PRC had not suggested that the requirement had not been fulfilled. The petitioner is thus entitled to clubbing of licenses for the purpose of redemption and / or regularization, as argued by Mr. Ganesh. The finding of the

PRC that clubbing of licenses would be allowed only if the licenses or Authorizations had been issued within a span of 36 months and the last shipment was within 48 months of the date of the first Licenses / Authorization is neither to be found in paragraph 4.20 of the Handbook. Rather paragraph 4.20 .5 of the Handbook provides:

“4.20.5. Notwithstanding the provisions of para 4.20.3 and 4.20.4 above, Clubbing of all expired licences may also be permitted provided all the expired licenses have been issued during the Exim Policy period of 1992-1997 & 1997-2002 i.e, 1st April, 1992 to 31st March, 2002.”

53. As argued by Mr. Ganesh, even though the respondent had filed lengthy and prolix affidavit, they had not attempted to counter the correctness of the specific pleadings in paragraph 13 of the writ petition.
54. From the impugned order of the PRC, it appears that the PRC has rejected the prayer of the petitioner for procedural relaxation and concession without proper application of mind to the contentions of the petitioner.
55. In a large number of cases, specific examples of which have been given in the writ petition and / or annexures thereto, PRC has considered exports under free shipping bills. Further the contention of the petitioner that exports were made under free shipping bills, only because the Advance License numbers were not accepted by reason of defects in the software, has been ignored. The PRC has not recorded

any definite finding that the Advance License numbers could be accepted in the software.

56. The writ petition is allowed. The impugned decision is set aside. The PRC is directed to reconsider its order dated 13.10.2015 in the light of the observations made above. The PRC may call for documents to satisfy itself that the export relate to finished goods manufactured by incorporation of raw materials and inputs imported against Advance Licences. If it is found that the exports during five year period are relatable to the import licenses, clubbing of license for the purpose of redemption and / or relaxation shall be allowed.

INDIRA BANERJEE, J

ANIL KUMAR CHAWLA, J

April 03, 2017
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