

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION NO. 776 OF 2001

1. M/s. BMS CHEMIE, a registered partnership firm having their registered office at 105-A, Mittal Tower, 210, Nariman Point, Mumbai 400 021.

2. Mr. Jayanti S. Shah, partner of Petitioner no.1 firm, having his office at 105-A, Mittal Tower, 210, Nariman Point, Mumbai 400 021.

.. Petitioners

v/s.

1. Union of India, by and through the Joint Secretary, Ministry of Law, Justice and Company Affairs, Aayakar Bhavan, New Marine Lines, Bombay – 400 020

2. Directorate General of Foreign Trade, DES-II, Udyog Bhavan, New Delhi – 110 011.

3. Joint Director General of Foreign Trade, New Marine Lines
Mumbai – 400 020

.. Respondents

Mr. K.R. Bulchandani a/w Ms. Loshika K. Bulchandani, Mr. Avik Sarkar I/b M/s. Kamal & Co. for the petitioners
Mr. Pradeep Jetly and Mr. Rui Rodrigues for the respondents

**CORAM : A.S. OKA &
M.S. SANKLECHA, J.J.**

**RESERVED ON : - 28th MARCH, 2019
PRONOUNCED ON : - 4th APRIL, 2019**

JUDGMENT : (Per. M.S. Sanklecha, J.)

1. This petition under Article 226 of the Constitution of India challenges the order dated 27th February, 2001 passed by the Deputy Director General of Foreign Trade for respondent no.2 – Director General of Foreign Trade. The impugned order dated 27th February, 2001 was passed while implementing the Export Import Policy - 1997 to 2002 (Exim Policy 1997-2002) issued under Section 5 of the Foreign Trade (Development, Regulation) Act, 1992 (Act). By the impugned order dated 27th February, 2001 the petitioners' application dated 13th December, 2000 seeking retrospective effect from 1st April, 1997 to the credit rate at 15% fixed w.e.f. 1st April, 2000 under the Duty Exemption Pass Book ("DEPB" for short).

2. This petition was admitted on 11th June, 2001. The question which arises in this petition is :-

“Whether the petitioners are entitled to credit of duty on its exported product under the DEPB scheme at 15% with retrospective effect from 1st April, 1997, though the same was issued only on 1st April, 2000 ?”

3. Briefly, the facts leading to this petition are that the petitioner is

engaged in manufacture of drugs, pharmaceutical and fine chemicals. It *inter alia* manufactures and exports Oxyclozanide B.P. (Vet) (“final product” for short) using Trichloro Salicylic Acid (TCSA). On 1st April, 1997, the Exim Policy - 1997 to 2002 was notified under Section 5 the Act. In terms of Chapter 7 of the said Policy, the provisions relating to duty exemption / remission scheme including the DEPB Scheme was set out. At that time, the handbook of procedures was also issued by public Notice under paragraph 4.11 of the Exim Policy 1997-2002. It set out standard Input-Output norms which are used for issuing of Quality Based Advance License. The petitioner's final product finds mention at Sr. No.302, 303 and 304 of the Input-Output norms providing for different norms dependent upon the nature of goods used as raw-material / inputs to manufacture final products. Moreover, the products listed in the Input-Output norms will also form the basis for granting benefit under the DEPB scheme.

4. The objective of the DEPB Scheme is to neutralize the incidence of custom duty payable on the import content of the exported product so as to make the exported goods more competitive. This is provided by grant of duty credit against the product exported under the DEPB Scheme at such rates as are specified by the Director General of Foreign

Trade by issuing public notice. The credit so available under the DEPB scheme is utilized to discharge the custom duty on import of goods to be used in final products to be exported.

5. At the time of issuing the Exim Policy 1997-2002 and the handbook with effect from 1st April, 1997, no rate of credit to be available under the DEPB in case of export of final products was provided. However, on 21st May, 1997, the Director General of Foreign Trade in exercise of his power under paragraph 4.11 of the Export Import Policy, 1997, prescribed the rate of credit under the DEPB Scheme relating to various items listed in the handbook of Input Output norms. However, no rate of credit in respect of the petitioners' final product was provided for. Therefore, Basic Chemicals, Pharmaceuticals and Cosmetics Export Promotion Council ("Council" for short) of which the petitioner a member, addressed communications to the Director General of Foreign Trade seeking fixation of DEPB rate of credit in respect of final products exported by the petitioner as they are listed in the Input-Output norms.

6. In response to the above, the Director General of Foreign Trade on 5th July, 1997 issued a Public Notice No.22/97 *inter alia* providing

for the credit of the rate at 7% on the FOB value of final product exported under the DEPB scheme. Thereafter, the Council made representation claiming a higher rate of credit for the export of its final products under the DEPB Scheme. The Director General of Foreign Trade on 31st March, 1999 issued a Public Notice revising the rate of credit to 8% on the FOB value of exported final product. Thereafter, on 11th August, 1999 a further application was made by the petitioners for higher rate of credit. Consequent to the above representation dated 11th August, 1999, the Director General of Foreign Trade by Public Notice dated 31st March, 2000, enhanced the rate of credit under the DEPB scheme in respect of the petitioners' final product to 15% of the FOB value of exported final products.

7. On issue of the above Public Notice dated 31st March, 2000, the petitioners by representation dated 13th December, 2000 to the Additional Director General of Foreign Trade sought fixation of credit at the rate of 15% of the FOB value of exported goods under the DEPB scheme effective from 31st March, 2000 be given with retrospective effect from 1st April, 1997. In support instances of Public Notices being issued with retrospective effect in case of some marine products were cited. However, the above representation was rejected by the

impugned order dated 27th February, 2001.

8. Thus, leading to the filing of this petition. It seeks to set aside the order dated 27th February, 2001 and prays for a direction to the respondents that the public notice, bearing No.1(Re-2000) dated 31st March, 2000 providing for credit at 15% of the FOB value of final product exported be applied retrospectively w.e.f. 1st April, 1997.

9. Mr. Bulchandani, the learned Counsel appearing in support of the petition submits as follows :-

(a) that the impugned order dated 27th February, 2001 passed by the Deputy Director General of Foreign Trade be set aside and the public notice No.1(Re-2000) dated 31st March, 2000 fixing credit at 15% on the FOB value of final product w.e.f. 1st April, 2000 be given retrospective effect w.e.f. 1st April, 1997 when the Exim Policy 1997-2002 and the handbook became effective;

(b) Attention was invited to paragraph 7.50 of the Handbook of Procedures, which provides for benefit of DBPB rate of credit being made available on export made, provided an application of grant of DEPB is made within a period of 90 days from the date of exports or 60 days of notification, whichever is later. Thus, it is submitted that the

respondent was bound to grant retrospective benefit to the petitioner of the higher rate of credit notified w.e.f. 1st April, 2000; and

(c) The respondent in case of other products which are notified in the Input-Output norms have issued a public notice separately with retrospective effect as is evident from the clarification issued by the Marine Product Import Development Authority. Thus, it is submitted there is a power to issue credit rate for application with retrospective effect.

In the above facts, it is submitted that the impugned order dated 27th February, 2001 issued by the Deputy Director General of Foreign Trade as per the directions of the Director General of Foreign Trade be set aside. Further, the respondent be directed to issue a public notice applying the credit rate at 15% of the FOB value of exports with retrospective effect from 1st April, 1997 in respect of the notified final products admittedly exported by the petitioners.

10. On the other hand, Mr. Jetly, the learned Counsel for the respondent states that no retrospective effect can be given to the public notice dated 31st March, 2000 fixing the rate of credit for DEPB scheme in respect of FOB value of the final product at 15%. This as the rate of credit at 15% has been fixed w.e.f. 1st April, 2000. Thus, no reason to

interfere with the impugned order dated 27th April, 2000.

11. Before we consider the rival submissions, it would be necessary to refer to paragraph 7.50 of the Handbook being relied upon by the petitioner, which is as under :-

“Export in anticipation of credit rate.

Exporter may export product for which credit rate is not notified provided that such export products are covered under Standard Input Output Norms which are listed in the Handbook of Procedures (Vol.2), 1997-2002. In case the credit for such products are notified, the exporter shall be entitled for DEPB provided an application for issuance of DEPB is made within a period of 90 days from the date of exports or 60 days from the date of notification of credit rate, whichever is later. However, in such cases exports made, shall be entirely on the risk and responsibility of the exporter.”

12. We have considered the rival submissions. The undisputed facts in the present case is that the petitioners' final product was mentioned in the standard Input-Output norms. However, on introduction of the Exim Policy 1997 to 2002, no public notice was issued prescribing the rate of credit available under the DEPB scheme in respect of the final products exported by the petitioners. In terms of the Exim Policy as

provided in paragraph 7.14 thereof, under the DEPB scheme an exporter may apply for credit as a specified percentage of FOB value of exports. The rates at which the credit may be available would be notified by the Director General of Foreign Trade by way of Public Notice. The credit is available only in case the same has been notified. It was only w.e.f. 5th July, 1997 that a Public No. 22/97 was issued in exercise of powers under paragraph 4.11 of the Exim Policy *inter alia* providing the rate of credit at 7% of the FOB value of export under the DEPB scheme to be utilized in discharge of duty on imports. Thereafter, on the representation made by the Council to which petitioners belong the credit rate of 7% under the DEPB scheme for petitioners' final product were enhanced to 8% w.e.f. 31st March, 1999 for finally to 15% w.e.f. 31st March, 2000 on the FOB value of exported final product.

13. It is not disputed before us that the Public Notice dated 31st March, 2000 fixing the rate of credit at 15% under the DEPB scheme is not made specifically retrospective. It is also not the petitioner's case before us that the enhancement of the credit rate under the DEPB scheme with effect from 1st April, 2000 was in view of a clarification with regard to the correct interpretation of the Exim Policy or the Handbook of the Director General of Foreign Trade. In fact, the terms

of paragraph 4.3 of the Exim Policy 1997-2002, if any doubt arises in respect of the interpretation of the Policy or of the Handbook, the Director General of Foreign Trade will rule upon it and such a decision would be final. In the facts of this case, the Public Notice dated 31st March, 2000 fixing the rate of credit at 15% was not based on any clarification by the Director General of Foreign Trade. The reliance by the petitioner for retrospective operation of the above Public Notice dated 31st March, 2000 is only para 7.50 of the Handbook as reproduced hereinabove. A plain reading of the above provision in para 7.50 of the Handbook being relied upon by the petitioners would reveal that it applies only where the credit rate is not notified. In this case, the credit rate under the DEPB scheme was first notified on 5th July, 1997 and thereafter enhanced on 31st March, 1999, and later on 31st March, 2000. Thus, it would have no application to the present facts.

14. Further, as the impugned order dated 27th February, 2001 records that in view of the present policy, no retrospective effect can be given to the DEPB rates notified w.e.f. 1st April, 2000. This Policy is found in para 7.50 (as substituted) of the Handbook for the period commencing from 1st April, 2000 reads as under :-

*“7.50 Exports in Anticipation of credit rate.
No exports shall be allowed under the DEBP scheme unless the
DEPB rate of the concerned export product is notified.”*

Thus, no fault can be found with the view taken by the impugned order dated 27th February, 2001.

15. The reliance upon the retrospective benefit of credit rate under the DEPB scheme in case of Marine Products is without placing on record the Public Notice by which the same was given. In any case, from the Trade Notice dated 26th February, 1999 annexed at Exhibit-'P' to the petition, it appears to be a case where the description of the product in the Input-Output norms was itself changed / amended. This would lead to a change in the rate of credit of duty and the erstwhile para 7.50 of the Policy introduced w.e.f. 21st May, 1997 was in the Handbook at that time. However, the same does not find a place at the time when the Public Notice was issued on 31st March, 2000 (commencing from 1st April, 2000) as it stood substituted by the new provision.

16. In the above view, we see no reason to interfere with the impugned order dated 27th February, 2001.

17. It may be pointed out that the issue of credit rate for DEBP scheme would fall within the realm of delegated legislation. Thus, in the absence of express provision enabling a delegate to make legislation with retrospective effect, the same is beyond the competence of the delegate. In fact as the Delhi High Court in **Malik Tanning Industries Vs. Union of India, 320 ELT 508** has very succinctly stated the above position in law as under :-

“24. The power exercised by the Central Government is a power delegated by the Legislation. It is well-settled that in absence of an express provision enabling a delegate to make delegated Legislation with retrospective effect, no such power can be inferred. Section 5 of the Act does not empower the Central Government to frame policy with retrospective effect. Thus, the schemes framed under the foreign Trade Policy cannot be altered or amended with retrospective effect.

25. The DGFT is one step further removed and essentially the functions of DGFT are in the nature of implementing the Foreign Trade Policy. By virtue of Section 6(3) of the Act, DGFT may also exercise such powers as may be specified by an order made by the Central Government. However, the powers, which are to be exercised by the Central Government under Section 5 of the Act, cannot be delegated to DGFT as the same are expressly excluded under Section 6(3) of the Act.”

18. Moreover, this fixation of these rates and the date from which such fixed rates for which DEPB scheme are to be applied, would be dependent upon numerous factors involving expertise. Moreover, this decision is in the nature of a policy decision. Therefore, as held by the the Supreme Court in *Balco Employees Union Vs. Union of India, 2002(2) SCC 333* it is not for the Courts to interfere in matters of policy. Thus, in these facts, the impugned order dated 27th February, 2001 cannot be found fault with.

19. Accordingly, the petition is dismissed.

(M.S. SANKLECHA, J.)

(A. S. OKA, J.)