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

+ **W.P.(C) 1816/2019 & CM Nos.8499/2019 &8500/2019**

HOLOFLEX LIMITED AND ANR. Petitioners

Through: Mr Abhijeet Sinha, MrKumarjit
Banerjee, Mr Gaurav Gupta and
MsSanchari Chakraborty,
Advocates.

Versus

UNION OF INDIA AND ORS. Respondents

Through: MrRipu Daman Bhardwaj,
CGSC for R-1 to R-6/UOI.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER
22.02.2019

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VIBHU BAKHRU, J

1. The petitioners have filed the present petition impugning an order dated 13.12.2018 (hereafter 'the impugned order') passed by the Director General of Foreign Trade (DGFT), wherein the review petition preferred by the petitioner under Section 16 of the Foreign Trade Development and Regulation Act, 1992 (hereafter 'FTDR Act'), against an order dated 05.03.2018, was rejected. By the said order, the Additional DGFT had rejected petitioner no.1's appeal preferred under Section 15 of the FTDR Act, against an order dated 21.11.2014 passed by the Joint DGFT, Kolkata.

2. The principal controversy involved in the present petition relates to the discharge of the export obligations by petitioner No.1 (hereafter 'Holoflex'). Whereas, Holoflex claims that it has discharged its export obligations by making supplies to a Special Economic Zone (SEZ) unit, the respondents have rejected the same on the ground that it has failed to file the necessary documents to evidence fulfillment of its export obligations.

3. Holoflex had obtained an authorisation under the Export Promotion Capital Goods Scheme (EPCG Authorisation No. 0230000858 dated 27.01.2005) for import of capital goods for manufacturing its products. In terms of the said authorisation, Holoflex had saved import duty, amounting to a sum of ₹2,17,317,25/- and had undertaken an export obligation of an aggregate value (FOB) of ₹17,38,538/- (US\$37508.91), over and above its average exports. The said exports were to be completed within a period of eight years from the date of issue of the EPCG Authorisation.

4. The said period expired on 27.01.2013. Admittedly, prior to the expiry of the said period, Holoflex did not submit any documents to substantiate that it had exported goods of the stipulated FOB value over and above the average export turnover prior to import of the capital goods in question. Since Holoflex did not obtain the necessary Export Obligation Discharge Certificate (EODC) and also failed to submit the necessary documents for establishing discharge of its obligation, the respondent authorities issued several show cause notices.

5. The first show cause notice, under Rule 7 of the Foreign Trade (Regulation) Rules, 1993, was issued on 26.04.2013 whereby Holoflex was called upon to show cause why action should not be taken against it and its directors under the FTDR Act. This was followed by another notice dated 22.01.2014 calling upon the petitioner to show cause why a fiscal penalty should not be imposed under Section 11(2) of the FTDR Act.

6. Holoflex responded to the said show cause notice by a letter dated 29.01.2014 claiming that it had fulfilled its export obligations. It also sent several documents in support of its contention. It is averred in the petition that Holoflex had supplied goods to a unit of Nokia India Pvt. Ltd. (hereafter 'Nokia'), which was an Indian subsidiary of a Finnish Telecom Company and had established a unit in Special Economic Zone, Sriperumbudur, near Chennai. The additional DGFT responded to the aforesaid communication by a letter dated 26.02.2014 by observing that the supplies referred to, in two of the bills, appeared to be to an SEZ Unit and the same required submission of Bill of Exports and realisation from SEZ accounts of the unit. He sought clarification in this regard.

7. It does not appear from the record that Holoflex issued any such clarification as sought. However, the petitioners assert that petitioner no.2 had apprised the respondent authorities that no Bill of Exports had been issued in respect of the goods supplied to Nokia.

8. Thereafter, on 26.06.2014, the Joint DGFT issued a Circular

directing further license and renewal of expired license to be refused in terms of Section 9(2) of the FTDR Act. The petitioner sent a letter dated 16.09.2014 representing against the said Circular.

9. Thereafter, on 04.09.2014, the Joint DGFT issued another show cause notice calling upon Holoflex and its directors to show cause why fiscal penalty should not be imposed under Section 11(2) of the FTDR Act.

10. In response to the aforesaid show cause notice, Holoflex submitted a letter dated 30.10.2014, enclosing therewith a certificate dated 25.09.2014 issued by a courier agency (M/s Blue Dart Express Ltd.) certifying the supply of goods to Nokia in the SEZ against the relevant AWB. The petitioner also enclosed therewith a letter dated 15.09.2014 addressed to the Development Commissioner, SIPCOT High-Tech SEZ regarding authentication and confirmation of the supplies made to Nokia.

11. The Joint DGFT did not accept the documents submitted as sufficient to establish the fulfillment of export obligations and, therefore, passed an order dated 21.11.2014 imposing a fiscal penalty of a sum of ₹2,00,000/-.

12. Aggrieved by the same, the petitioner preferred an appeal before the Additional DGFT under Section 15(1) of the FTDR Act, *inter alia*, submitting that supply of goods to a recognized courier agency ought to be treated as transshipment of goods and, therefore, no further Bill of Export was required. It also submitted that Nokia had issued 'I' Form

covering the invoices raised by it and the same ought to be accepted as the requisite documents to substantiate performance of export obligation.

13. The appeal preferred by Holoflex was rejected by an order dated 05.03.2018 passed by the Addl. DGFT. Holoflex preferred a review petition, which was rejected by an order dated 13.12.2018, passed by the DGFT, the said order impugned herein.

14. Mr Abhijeet Sinha, learned counsel appearing for the petitioners, advanced contentions on two fronts. First, he submitted that non-submission of the Bill of Exports was only a procedural matter and the same could not be considered as mandatory. Second, he submitted that Holoflex had submitted copies of five invoices out of which only two pertained to supplies made to Nokia in the SEZ unit and the remaining were physical exports but the same had been ignored.

15. Mr Sinha also relied upon the decision of the Bombay High Court in ***Larsen and Toubro Ltd. v. Union of India: (2018) 360 ELT 289*** in support of its contention that Bill of Exports was only a procedural matter and non-submission of the same could be excused.

16. At the outset, it would be relevant to refer to the conditions on which EPCG authorisation was issued to Holoflex. The capital goods imported by the petitioner were to be installed at the specified address. Some of the relevant conditions as set out in the condition sheet annexed to the EPCG license are set out below:-

“2. The firm is under obligation to Export Item Holograms & Other Allied Holographic Products worth US\$ 37,508.91 i.e. 8 times the duty saved of Capital Goods on FOB basis within a period of 8 years (12 years in case duty saved is Rs.100 Crore or more) from the date of issue of Licence. The Export Obligation shall be fulfilled by the use of the Imported Capital Goods.

3. The firm is also required to maintain its average of the past three years export performance of the same and similar products mentioned in Para 2. The annual average of the past export performance is Rs.4,351,169.33.

4. The firm may also discharge export obligation indicated in Para 2 above by way of direct export/through third party export. In all such cases name of the Exporter, name of EPCG licence holder, date and number of EPCG licence should also be indicated in Shipping Bills.

5. If EPCG Licence Holder is Merchant Exporter, the name of the Supporting Manufacturer shall also be indicated in the Shipping Bills. The Licensee shall fulfil the obligation imposed on the licence and discharge the stipulated Export Obligation through the Capital Goods installed in supporting manufacturers factory.

6. Import of Capital Goods under the licence shall be subject to actual user condition.

7. Licence holder shall submit statement of export within three months from the expiry of block year duly certified by a Chartered Accountant and concerned Bank

to the Licensing Authority. He shall also submit yearly performance of exports in electronics format.

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10. This licence will be operative as per provisions of the exim policy and Hand Book of Procedures 2004-2009 or any other law /provision time being in force

11. The licensee shall have to fulfill export obligation as per Para 5.8 of H.B. 2004-2009.”

17. It is apparent from the above that Holoflex was required to submit the statement of export within three months of the expiry of the block year duly certified by a Chartered Accountant and concerned Bank. Holoflex was also required to submit yearly performance of export in electronics format. Admittedly, Holoflex had failed to do so.

18. Further, it was also necessary that Holoflex's name and the EPCG license be indicated on the shipping bills/Bills of Export.

19. The petitioner was also required to follow the Handbook of Procedures which expressly required the petitioner to submit Bill of Exports as issued under Rule 30 of the Special Economic Zone Rules, 2006. Sub Clauses (3), (6) and (9) of Rule 30 of the said Rules are set out below:

“ (3) The goods procured by a Unit or Developer under claim of export entitlements shall be allowed admission into the Special Economic Zone on the basis of ARE-1

and a Bill of Export filed by the supplier or on his behalf by the Unit or Developer and which is assessed by the Authorised Officer before arrival of the goods:

Provided that if the goods arrive before a Bill of Export has been filed and assessed, the same shall be kept in an area designated for this purpose by the Specified Officer and shall be released to the Unit or Developer only after completion of the assessment of the Bill of Export.

- (6) The Bill of Export shall be assessed in accordance with the instructions and procedures, including examination norms, laid down by the Department of Revenue as applicable to export goods:

Provided that at the time of assessment, it shall be specifically examined whether the goods are required for the authorized operations by the Unit or Developer, with reference to the Letter of Approval or the list of goods approved by the Approval Committee for the Developer.

- (9) A copy of the Bill of Export and ARE-1 with an endorsement of the Authorised Officer that the goods have been admitted in full in the Special Economic Zone, shall be treated as proof of export.

20. It is seen in the present case that the petitioner had not provided the documents as required.

21. It is also relevant to note that in terms of Rule 30 of the Special Economic Zone Rules, 2006, the goods supplied to an SEZ Unit are required to be inspected prior to the issue of Bill of Exports. Filing of Bill of Exports is not a mere formality but serves as a valuable check for ensuring that the goods deemed to have been exported are in fact received by the SEZ Unit and are accounted as Deemed Exports. In the present case, the petitioner had merely filed only Form I which was issued for the purposes of Central Sales Tax Act.

22. In view of the above, the impugned decision cannot be faulted.

23. The decision in the case of *Larsen and Toubro* (*supra*) was rendered in a completely different factual matrix. In that case, the necessary documents duly certified by the authorities under the SEZ had been furnished. The Central Excise Authorities had also certified the supply of goods. ARE-1 forms, which were duly certified by the concerned authorities, had also been furnished. The application for EODC was also filed within time.

24. The contention that the respondents have ignored the shipping bills for physical exports was not one of the grounds urged by the petitioner in the appeal or the review filed by Holoflex. There is also little material on record to show that shipping bills conforming to the requirements, that is, stating the name of petitioner no.1 as well as EPCG license, were submitted. The present petition also lacks the

necessary pleadings in this regard. In the circumstances, this Court does not consider it apposite to entertain this controversy.

25. In view of the above, no relief can be granted to the petitioner.

26. The petition is, accordingly, dismissed.

FEBRUARY 22, 2019
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VIBHU BAKHRU, J

