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

\+ W.P.(C) 3198/2018

LOK-BETA PHARMACEUTICAL INDIA PVT. LTD. ..... Petitioner

Through: Ms Anjali J. Manish and Ms Nidhi Saini, Advocates.

versus

UNION OF INDIA AND ORS. ..... Respondents

Through: Mr Kirtiman Singh, CGSC with Mr Prateek Dhanda, Mr Waize Ali Noor and Ms Shruti Dutt, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

O R D E R

% 23.05.2019

VIBHU BAKHRU, J

1. The petitioner has filed the present petition, *inter alia,* impugning the decision of respondent no.3 (Policy Relaxation Committee – hereafter 'PRC') taken in its meeting held on 08.08.2017 in Case No.4. By the said decision, the PRC has rejected the petitioner's request for reconsidering its earlier decision rendered on 19.07.2016. The petitioner is, essentially, aggrieved by the decision of the PRC to not extend the export obligation period in respect of Advance Authorization bearing no. 0310696315 dated 28.05.2012.

2. The petitioner is a merchant exporter, *inter alia*, engaged in purchase and sale of pharmaceutical products. The petitioner states that it had entered into an agreement with a Russian Company for supply of a drug named Cycloserine USP, which is used to prevent/treat drug resistant Tuberculosis. It is stated that the said Russian Company intended to supply the said drugs to the Russian Government pursuant to a tender invited by the Russian Government.

3. The petitioner applied for an Advance Authorization for importing the bulk drugs for the purposes of supplying the same to the Russian Company after repackaging the drug in question for retail trade and exporting the same to the Russian Company. Pursuant to the petitioner's application, it was issued an Advance Authorisation No.0310696315 dated 28.05.2012. In terms of the Advance Authorization, the petitioner was entitled to import the specified inputs for exporting the drug, "Cycloserine Capsule USP 250 Mg". The petitioner claims that it utilised the said Advance Authorization for importing 694.79 Kgs of Cycloserine USP against two Bills of Entry bearing No. 7099833 dated 13.06.2012 and 7165657 dated 20.06.2012

4. According to the petitioner, it exported 681.173 kgs (2724690 Nos.) of Cycloserine Capsule USP 250 Mg of FOB value of ₹9,56,80,677/- against the Advance Authorization in question. The said exports were made in nine tranches. A tabular statement indicating the details of the exports against the Advance Authorization in question is set out below:-

"**Export Details**

Sr.No.	S.B.No.	Date	Export Qty. Gr. Wt. in kg.	Descriptions of export item	FOB value As pre S/B in Rs.
1	1424997	23.08.12	191.250	Cycloserine Caps. US 250 mg.	26491689.78
2	1420538	23.08.12	61.20	Cycloserine Caps. US 250 mg.	8668733.43
3	1450760	24.08.12	191.270	Cycloserine Caps. US 250 mg.	26494051.89
4	2603598	15.11.12	99.450	Cycloserine Caps. US 250 mg.	12490003.50
5	4001533	15.02.13	24.255	Cycloserine Caps. US 250 mg.	2980297.33
6	7194918	29.08.13	25.500	Cycloserine Caps. US 250 mg.	3049086.75
7	5571138	17.10.14	85.680	Cycloserine Caps. US 250 mg.	12979443.49
8	5571144	17.10.14	1.275	Cycloserine Caps. US 250 mg.	191005.23
9	9943834	02.06.15	14.94	Cycloserine Caps. US 250 mg.	2336365.60
			694.79		95680677.00

5. The petitioner claims that payments against all the aforesaid consignments have been realised.

6. On 02.09.2015, the petitioner sent a letter to the Licensing Authority requesting for issuance of the Export Obligation/Discharge Certificate (EODC) as, according to the petitioner, it had fulfilled its export obligation both in respect of quantity as well as value. In

response to the aforesaid request, the Licensing Authority issued deficiency letter dated 08.09.2015 informing the petitioner that the shipping bill no.7194918 dated 29.08.2013; shipping bill no.5571138 dated 17.10.2014; shipping bill no.5571144 dated 17.10.2014; and shipping bill no.9943834 dated 02.06.2015 were beyond the export obligation period of twelve months, which expired on 12.06.2013.

7. In view of the above, by a letter dated 03.06.2016, the petitioner approached the PRC for extension of the export obligation period. Thereafter, on 20.01.2017, the petitioner received a letter from the Licensing Authority, *inter alia,* stating that its application was deficient for various reasons including that three export shipments were made beyond the period of eighteen months and, therefore, the petitioner was required to pay duty and interest for excess import of 271.230 kgs of Cycloserine. It was further stated therein that a total of 172.330 kgs of Cycloserine USP drug were lying unutilised with the petitioner and, therefore, in terms of the Policy Circular no.18 dated 30.10.2007, the same were required to be destroyed and the petitioner was required to furnish the Destruction Certificate.

8. The petitioner responded to the said letter on 24.03.2017. Whilst, the petitioner paid the compensation fee as demanded, it submitted that the calculation of the unutilised product was erroneous as the entire quantity imported had been utilised for performing the export obligations and, in the circumstances, the said products could no longer be destroyed.

9. In the meantime, the PRC in its meeting held on 19.07.2016, considered the petitioner's request and extended the export obligation period for a period from twelve months to eighteen months against the import of each consignment. Accordingly, the export obligation period was extended upto 30.06.2014 in respect of the first consignment imported on 13.06.2012 and upto 31.06.2014 for second consignment imported on 20.06.2012. The said extension was subject to a payment of composition fee at the rate of 0.5% of the FOB value. The relevant extract of the minutes of the meeting of the PRC, held on 19.07.2016, is set out below:-

> "The Committee noted that the Authorization No. 0310696315 dt. 28.05.2012 was issued with conditions stipulated under PC-9 dated 30.06.2003, which allows 12 months period for EG fulfillment from import of each consignment. The imports were made on 13.06.2012 & 20.06.2012. Accordingly, initial obligation period was upto 31.12.2013 & 31.12.2013, respectively. The applicant has fulfilled 81.66% export obligation during the initial obligation period and remaining 17.60% thereafter. Taking all these facts into account, the Committee decided the following:
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> > I. Export obligation period be extended from 12 months to 18 months against import of each consignments i.e. upto 30.06.2014 & 31.06.2014 respectively.
> >
> > II. This is only for accounting and regularization of exports already effected.

> III. This is subject to a payment of composition fee @ 0.5% on FOB value of export made after initial obligation period.
>
> IV. RA shall check that 50% exports against each consignment were made within initial export obligation period. If not, composition fee will be charged @ 0.5% per month on unfulfilled FOB.
>
> V. The minimum value addition of 15% as prescribed under Para 4.09 of FTP (2015-2020) shall be maintained.
>
> VI. Shortfall, if any, shall be regularised in terms of Para 4.49 of HBP read with PC-18 dated 30.10.2007."

10. Thereafter, on 27.03.2017, the petitioner filed another application before the PRC seeking review of the decision dated 19.07.2016 and further, seeking extension of the export obligation period in respect of the three export shipments that were made beyond the export obligation period as extended by PRC (that is beyond the period of 18 months from the first import).

11. The petitioner's application was considered by the PRC at a meeting held on 08.08.2017 and the same was rejected. The said decision is impugned by the petitioner in the present petition.

12. Ms Anjali, learned counsel appearing for the petitioner submitted that the petitioner had performed its obligation and, therefore, denial of the petitioner's request to extend the export obligation period was erroneous. She earnestly contended that the petitioner had faced

genuine hardships on account of the policy change by the Russian Government and the same ought to have been considered by the PRC. She referred to paragraph 2.5 of the Foreign Trade Policy (FTP) and submitted that the DGFT was empowered to grant relaxation in cases of genuine hardships and, therefore, the petitioner's case ought to have been considered favourably.

13. The learned counsel further submitted that the PRC failed to appreciate that the drugs in question were imported from a registered source and, therefore, in terms of the Policy Circular no. 12 dated 27.06.2005, the normal conditions for export were applicable. She submitted that in terms of the licence and the FTP, the export obligation period was not twelve months as assumed by the respondents but thirty six months. Lastly, she submitted that the PRC, in the case of ***Mylan Laboratories Ltd., Hyderabad: Case No.41, decided on 04.05.2016,*** had extended the export obligation period from eighteen months to thirty six months and therefore, the petitioner's case should also have been considered favourably.

14. She also referred to the decision of the Supreme Court in ***Macquarie Bank Limited v. Shilpi Cable Technologies Ltd.: 2018 (2) SCC 674*** and, on the strength of the said decision, contended that the export obligation period was merely a procedural matter and such matters were required to be considered to meet the ends of justice. She submitted that that since the petitioner had discharged its export obligation, the PRC's decision to ignore the exports made beyond the export obligation period was arbitrary and unreasonable.

15. I have heard the learned counsel for the parties.

16. The contention that the petitioner had imported the drug in question from a registered source and, therefore, the export obligation period was thirty six months and not twelve months, cannot be accepted. First of all, no such contention has been canvassed before the Licensing Authority or before the PRC and no such contention has been raised by the petitioner in the writ petition as well. This Court is, thus, of the view that this contention is an afterthought and must be rejected outrightly. The petitioner has all along proceeded on the basis that the export obligation was twelve months from the date of import and had approached the PRC for extension of the said period. Thus, it would not be open for the petitioner to now contend that the export obligation period was thirty six months.

17. Secondly, even if it is accepted that the petitioner had imported the products from a registered source (which, in this case, it had not), it cannot be accepted that the export obligation period was 36 months and not twelve months. In terms of policy circular no.12 dated 27.06.2005, it was clarified that if the imports are from registered sources, conditions governing normal advance licences are applicable. In these cases, it included validity period and normal export obligation period. Paragraph 2 of the said circular is relevant and is set out below:-

> "2) In case where Advance Licence holders are exporting the goods which are manufactured from the raw materials procured from local sources, then they are not allowed to import from unregistered sources. In case

exporters intend to procure the material either from registered sources or from local sources through ARC and Invalidation then the exemption facility given on the Advance Licences for importing from unregistered sources may be withdrawn and shall be modified to import from registered sources only. Once the imports are from registered sources, conditions governing normal Advance Licences are applicable in these cases which include normal validity period and normal EG period.

18. In view of the above, the petitioner is correct that in the event, it is accepted that if the products are exported from a registered source, normal provisions with regard to the export obligation period would apply. However, the contention that the said period is thirty six months is incorrect. In terms of paragraph 4.22 of the Handbook of Procedures for the year 2009-2010 (Volume-I), the export obligation period for advance authorization issued with inputs as mentioned in Appendix – 30A would be for the period as stipulated against each entry, therein. Paragraph 4.22 of the Handbook of Procedures is set out below:-

"**Export Obligation (EO) Period and its extension**	4.22	Fulfilment Period of EO under an Advance Authorisation shall commence from Authorisation issue date, unless otherwise specified. EO shall be fulfilled within 36 months except in case of supplies to projects / turnkey projects in India / abroad

under deemed exports category, where EO must be fulfilled during contracted duration.

EO period for Advance Authorizations issued with input (s) as mentioned in Appendix 30A shall be as per the period stipulated against each entry therein. Facility of extension of EOP shall not be allowed in case of Advance Authorisation issued for these inputs. RA shall make an endorsement in Advance Authorisation to this effect."

19. Appendix-30A of the said Handbook clearly specifies that the export obligation period for drugs (with specific export order and pre import condition) would be twelve months from the date of clearance of each import consignment by the Customs Authorities. In view of the above, even if it is accepted the petitioner had imported the drug in question from a registered source, the export obligation period applicable would be twelve months from the date of the consignments imported by the petitioner.

20. In the present case, the import against the advance authorization was made against two Bills of Entry dated 13.06.2012 and 20.06.2012. Thus, the export obligation period expired on 12.06.2013 and

19.06.2013 respectively. During this period, the petitioner had exported five consignments, last of which was exported on 15.02.2013. The PRC had acceded to the petitioner's request and had extended the export obligation period by further six months, which expired on 12.12.2013/19.12.2013. During the said extended period, the petitioner had exported another consignment which was done on 29.08.2013. However, the remaining three consignments were exported after a significant delay; first two consignments were exported on 17.10.2014 and the last consignment was exported on 02.06.2015.

21. In terms of paragraph 2.5 of the FTP, DGFT is empowered to grant relaxation as he deems fit and proper on the ground of genuine hardship and adverse impact on trade in genuine if the extension, as sought for by the petitioner, is not granted.

22. Although, the petitioner contends that its case is one of the genuine hardships, there is no material on record which could persuade the PRC to consider that the extension of export obligation period to such an extent is warranted. The petitioner was fully aware while accepting the advance authorization and importing the products that it would require to perform the export obligation within a period of twelve months. It is possible that the petitioner has faced commercial difficulties, however, that would not be a ground to extend the export obligation period from twelve months to three years (thirty six months).

23. It is also well settled that the relaxation of the policy is not a matter of right. Sufficient discretion is granted to the DGFT to relax

any provision of the policy or procedure as it deems fit.

24. At this stage, it is relevant to refer to paragraph 2.5 of the Foreign Trade Policy 2009-2014 (FTP). Clearly, the DGFT is required to exercise its discretion keeping in view the guidelines which are implicit in the paragraph 2.5 of the FTP and the same is set out below:

> "**2.5 Exemption from Policy/Procedure**
>
> DGFT may pass such orders or grant such relaxation or relief, as he may deem fit and proper, on grounds of genuine hardships 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:

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

25. It is apparent from the above, that the DGFT has a wide discretion to grant any relief or relaxation as is clear from the use of the word "as he may deem fit". However, such relief/relaxation can be granted in cases of "genuine hardships" and "adverse impact on trade". Clearly, normal risks and vagaries of commerce would not qualify as genuine hardship. The applicant must establish a compelling case for such a relaxation. An applicant taking an extended risk of importing against Advance Authorization without a confirmed export order or an assured export market, would find it difficult to justify his request for relaxation of policy under paragraph 2.5 of the FTP. In order to invoke the powers of relaxation, the applicant must establish that his cause of hardship is on account of circumstances, which could not be reasonably anticipated by a person engaged in the trade.

26. In the present case, this Court is unable to accept that the decision of the PRC to deny extension of export obligation period is perverse, arbitrary or falls foul of the guidelines as indicated in paragraph 2.5 of the FTP.

27. The reliance placed by the petitioner in the case of ***Macquarie Bank Limited*** (*supra*) is wholly misplaced. Fixing an export obligation is not a matter of procedure but is a substantive condition for availing duty-free imports against advance authorization. The stipulation to the export obligation period cannot be considered as directory. It is a condition stipulated for availing of the facility of advance authorization, and such stipulation cannot be ignored merely because the petitioner has exported the stipulated quantity of goods beyond the period as

specified.

28. The learned counsel appearing for the petitioner has referred to the decision of the PRC in ***Mylan Laboratories Ltd., Hyderabad,*** however, there is no indication that the said decision was rendered in the context of export obligation relating to import of drugs from unregistered sources. The minutes of the PRC meeting do not indicate the factual matrix of that case. Further, there is also no averment to the said effect in the writ petition.

29. In view of above, the petition is unmerited and is, accordingly, dismissed.

VIBHU BAKHRU, J

MAY 23, 2019
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