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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 11th February, 2020

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W.P.(C) 12197/2019 & C.M.No.49871/2019 (stay).

M. D. OVERSEAS LIMITED

..... Petitioner

Through: Mr.Tarun Gulati, Sr.Adv. with
Mr.Kishore Kuna, Mr.Pratush Chaudhary,
Mr.Vikrant A.Maheshwari, Advs.

Versus

UNION OF INDIA AND ORS.

..... Respondents

Through: Mr.Anurag Ahluwalia, CGSC
with Mr.Abhigyan Siddhant, Mr.Shaurya
Jain, Advs. along with Mr.Rakesh Sharma,
FDTO, DGFT.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGMENT (ORAL)

1. This Writ Petition has been preferred by the Petitioner- M. D. Overseas Limited, through its General Manager-Trade & Finance, Mr. Amit Mittal for the following prayers:-

“(a) that this Hon’ble Court be pleased to issue a writ, order or directions in the nature of certiorari or any other writ, order or direction of like nature quashing the Impugned Public Notice dated 26.09.2019 issued by the Respondent No. 1 and the Impugned Deficiency Letter dated 01.11.2019 with respect to Application No. 05/27/040/00082/AM20 dated 24.06.2019 and dated

01.11.2011 with respect to Application No.05/27/040/00172/AM20 dated 18.09.2019;

(b) that this Hon'ble Court be pleased to issue a Writ of mandamus, or a Writ in the nature of mandamus, or any other appropriate Writ, Order or directions directing the Respondents to consider and process the Advance Authorisation Application No.05/27/040/00082/AM20 dated 24.06.2019 and dated 01.11.2011 with respect to Application No.05/27/040/00172/AM20 dated 18.09.2019;

(c) For such further and other reliefs, including costs of this Petition, as this Hon'ble Court may deem fit and proper in the nature and circumstances of the case.”

2. The Petitioner is an incorporated Company engaged in diverse businesses including the manufacture and export of Gold Jewellery and Gold Medallions, for which, the Petitioner regularly imports Gold bars.

3. The Petitioner *vide* its application dated 24th June, 2019 had sought for Advance Authorization under Para 4.37 of the Foreign Trade Policy (2015-2020) (hereinafter referred to as, “FTP”) seeking for import of Gold Bars worth over Rs. 944 crores and export of Gold Medallions & Coins worth over Rs. 958 crores.

4. The Directorate General of Foreign Trade (hereinafter the “DGFT”) issued a deficiency letter pertaining to the aforesaid application on 25th June, 2019, which the Petitioner replied to, *vide* letter dated 25th June, 2019.

5. Another deficiency letter was issued by DGFT on 15th July, 2019 directing the Petitioner to clarify if the Petitioner had achieved the prescribed value addition, in response to which the Petitioner sent a clarificatory letter dated 18th July, 2019.

6. On 18th September, 2019, the Petitioner preferred another application for Advance Authorization for the import of Gold Bars to the value of over Rs. 2663 crores and export of Jewellery /Articles manufactured by fully mechanized process worth over Rs. 2716 crores.

7. Thereafter, DGFT, *vide* the impugned Public Notice dated 26th September 2019, disallowed the issue of Advance Authorization for two export items namely "Gold Medallions and Coins" or "Any Jewellery manufactured by fully mechanized process".

8. In light of the impugned Public Notice, the Petitioner addressed a letter dated 30th September, 2019, to DGFT requesting a refund of the Application money. *Vide* a letter dated 1st October 2019, DGFT issued a deficiency letter in regard to the aforesaid application dated 18th September, 2019, which stated the Petitioner's application could not be considered in light of the impugned Public Notice.

9. The Petitioner, in its reply dated 10th October 2019 to the aforesaid deficiency letter, disputed the application of the Impugned Public Notice to the Petitioner's Application referring to Para 1.05 of the FTP, wherein it has been so provided that the application would be processed in light of the prevalent rules and procedures. Moreover, it was pointed out that the Application should have been processed

within the time limits as provided for in the FTP. Furthermore, in another letter issued on the same date, the Petitioner requested for issuance of Advance Authorization on its earlier application dated 24th June, 2019, as well.

10. Yet another request was, thereafter, made by the Petitioner on 1st November, 2019, for issuance of the Advance Authorization for its Application dated 24th June, 2019 as well as Application dated 18th September, 2019 wherein the Petitioner stated that it does not seek to press its application for refund of application money.

11. DGFT issued the impugned Deficiency Letters both dated 1st November, 2019, which stated that the Advance Authorization as sought for by the Petitioner, could not be granted in light of the Impugned Public Notice dated 26th September, 201

12. It has been contended by the Ld. Counsel for the Petitioner that the DGFT *vide* its circular dated 26th September, 2019 by having excluded items of "Gold Medallions and Coins" or "Any Jewellery manufactured by fully mechanized process" has amended the provisions of the FTP which expressly provides for the Advance Authorization incases of these export items as per Para 4.32 of the FTP.

13. It has been averred that, since, DGFT has no powers to amend the FTP, in view of the specific exclusion of delegation of powers under Section 5 by the Central Government to DGFT, in Section 6 of the The Foreign Trade (Development & Regulation) Act, 1992, (hereinafter the "FTDR Act"), the circular is ultra vires and is liable to

be quashed accordingly.

14. The Petitioner has placed reliance on, ***Deepak Enterprises vs. UOI***¹ & ***DGFT vs. Kanak Exports***², to argue that the exclusion of the items from the benefit of Advance Authorization amounts to amendment of the FTP and thus, DGFT had no jurisdiction to exclude the same behest a Public Notice.

15. The said exclusion, as per the Counsel of the Petitioner, could only have been made through a Notification made by the Central Government in exercise of its powers under Section 5 of the FTDR Act. Furthermore, it has been contended by relying on judgment in ***K.G. Denim Ltd. vs. CBEC***³ that a benefit which has been extended *vide* a Statutory policy cannot be taken away by a Policy Circular.

16. Without prejudice, the Ld. Counsel of the Petitioner has contended that the Circular could not have been applied retrospectively. The Counsel relies on the judgement of ***Malik Training Industries v Union of India***⁴ for the same. It is submitted that the according to the Para 9.10 of the Handbook of Procedures (HBP) read with the Public Notice dated 8th June 2015 which provides for preferential treatment for Status Holders, the application of the Petitioner should have been processed within one day. However, as per the Counsel for the Petitioner, there was an unjustified unreasonable delay in processing of the Petitioner's Application.

¹ 2018 (360) ELT 905 (Del.)

² 2015 (326) ELT 26 (SC)

³ 2018 (361) ELT 521(Mad.)

⁴ 2015 (32) ELT 508 (Del.)

17. It has further, been so contended that by the Petitioner that, since the delay was not attributable to the Petitioner, placing reliance on the case ***Commissioner vs. M.P.V. and Engg. Industries***⁵, the grant of the exemption should relate back to the date when the application was made. Since the Petitioners application were filed before the Impugned Public Notice dated 26th September, 2019, it has been contended that Petitioner's application would not be subject to the impugned Public Notice.

18. *Per Contra*, it is the contention of the Ld. Counsel for the Respondent that *vide* the Public Notice, DGFT has only amended the procedure followed under the FTP for grant of Advance Authorization using its powers under Para 1.03 of the FTP and export, in general, of Gold Medallions has not been disallowed. Moreover, it has been contended that the time limit as provided for, in the FTP is only indicative in nature. It has been averred that the Petitioner's Application for Advance Authorization was transferred by the Field office of DGFT to its Headquarters since it was known that some deliberations regarding the export of Gold Medallions were ongoing. It has been argued by the Ld. Counsel for the Respondent that merely making the Application for the Advance Authorization does not entitle the Petitioner to claim Advance Authorization.

19. The Foreign Trade (Development & Regulation) Act, 1992, under Section 5 empowers the Central Government to formulate, announce and amend the Foreign Trade Policy by way of notification

⁵ 2003 (153) E.L.T. 485 (S.C.)

in the Official Gazette. Moreover, Section 6 of the Act provides for the appointment of the Director General & his functions and it reads as under:-

“6. Appointment of Director General and his functions.—

- (1) The Central Government may appoint any person to be the Director General of Foreign Trade for the purposes of this Act.
- (2) The Director General shall advise the Central Government in the formulation of the foreign trade policy and shall be responsible for carrying out that policy.
- (3) The Central Government may, by Order published in the Official Gazette, direct that any power exercisable by it under this Act (other than the powers under sections 3,5,15,16 and 19) may also be exercised, in such cases and subject to such conditions, by the Director General or such other officer subordinate to the Director General, as may be specified in the Order.”

(emphasis supplied)

20. *Vide* its powers under Section 5 of the FTDR Act, 1992, the Central Government notified the Foreign Trade Policy 2015-2020 which came into effect on 5th December 2017.

21. In the “Scheme for Exports and Imports for Gems & Jewellery” under Chapter-4 of the Foreign Trade Policy 2015-2020, the Central Government, *vide* Para 4.31, has provided for duty free import (excluding Integrated Tax and Compensation Cess leviable under Section 3(7) and 3(9) of customs Tariff Act) of input for manufacturing export product.

22. Furthermore, *vide* Para 4.32 of the Policy, the Items of Export for which the duty free import of input would be available is provided and the relevant portion reads as under:-

“4.32 Items of Export –

Following items, if exported, would be eligible:

- (i) Gold jewellery, including partly processed jewellery and articles including medallions and coins (excluding legal tender coins), whether plain or studded, containing gold of 8 carats and above up to a maximum limit of 22 carats;...”

23. The Schemes, so provided by the Central Government are listed in Para 4.33 wherein under sub para (iv), the Central Government has provided for Advance Authorization for Precious Metals, for which the detailed scheme is provided under Para 4.37 which reads as under:-

“4.37 Advance Authorisation for Precious Metals:

- (a) Advance Authorisation shall be granted on pre-import basis with ‘Actual User’ condition for duty free (excluding Integrated Tax and Compensation cess leviable under Section 3(7) and 3(9) of Customs Tariff Act)import of:
 - (i) Gold of fineness not less than 0.995 and mountings, sockets, frames and findings of 8 carats and above;
 - (ii) Silver of fineness not less than 0.995 and mountings, sockets, frames and findings containing more than 50% silver by weight;
 - (iii) Platinum of fineness not less than 0.900 and mountings, sockets, frames and findings containing more than 50% platinum by weight.
- (b) Advance Authorisation shall carry an export obligation which shall be fulfilled as per procedure indicated in Chapter 4 of Handbook of Procedures.

(c) Value Addition shall be as per paragraph 4.38 of FTP and 4.61 of Handbook of Procedures.”

24. Moreover, the Foreign Trade Policy (2015-2020), under Para 1.03 empowers the DGFT to notify Handbook of Procedures for the purposes of laying down the procedures to be followed by exporter or the importer and the same reads as under :-

“1.03 Hand Book of Procedures (HBP) and Appendices & Aayat Niryat Forms (AANF)

Director General of Foreign Trade (DGFT) may, by means of a Public Notice, notify Hand Book of Procedures, including Appendices and Aayat Niryat Forms or amendment thereto, if any, laying down the procedure to be followed by an exporter or importer or by any Licensing/Regional Authority or by any other authority for purposes of implementing provisions of FT (D&R) Act, the Rules and the Orders made there under and provisions of FTP.”

25. Having heard the learned counsel for the parties and looking to the facts and circumstances of the case, it appears that by impugned public notice No.35/2015-2020 dated 26th September, 2019 (Annexure P-1 to the memo of writ petition) issued by respondent No.1 whereby the Director General of Foreign Trade (‘DGFT’), in exercise of the powers under paragraph 1.03 of the Foreign Trade Policy 2015-2020, disallowed issuance of Advance Authorisations where item of export is “Gold Medallions and Coins” or any jewellery/articles manufactured by fully mechanized process, has in effect amended the Foreign Trade Policy, in excess of power and jurisdiction of the DGFT.

26. In *Director General of Foreign Trade vs. Kanak Exports*⁶, the Supreme Court in paragraph 97, 98 and 100 held as under:-

“97. It is explained by the learned counsel for the Union of India that a notification issued under Section 5 of the Act or any change brought about by DGFT in exercise of the powers under Para 2.4 of the Import and Export Policy in the Handbook Procedure, by way of a public notice the same are gazetted and notified in the Gazette of India. It is also pointed out that the notification/public notices issued relating to non-statutory rules, regulations, order and resolutions issued by the Ministries of Government of India (other than the Defence Ministry), and by the Supreme Court of India are published under Part 1 Section 1 of the Gazette of India. On the other hand, notifications issued by the Ministries of Government of India (other than the Defence Ministry) are published under Part II Section 3(ii) of the Gazette of India. On that basis, justification is sought to be given that Notification No. 28/(RE-2003)/2002-2007 dated 28-1-2004, Notification No. 38/(RE-2003)/2002-2007 dated 21-4-2004 were published in the Gazette of India under Part II, Section 3 sub-section (ii), while Public Notice No. 40 dated 28-1-2004 was published in the Gazette of India under Part I Section 1 of the Gazette of India and as such, as both the notifications as well as the public notices are officially gazetted in the Gazette of India. Thus, there is no distinction between the two as the same carry the same impact and effect.

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98. From the aforesaid explanation, we take it that the Public Notice dated 28-1-2004 was published in the Gazette of India in accordance with the requirement of law. The question, however, is as to whether by this public notice, DGFT was only carrying out the EXIM Policy or this public notice amounted to change in the said EXIM Policy. It is crystal clear that the public notice alters the provisions of the EXIM Policy. It would, therefore, amount to amending the EXIM Policy, whether clarificatory or otherwise. There may be a valid justification and rational for exclusion of four items contained therein, as pleaded by the Union. However, it had to be done in accordance with law. When DGFT had no power in this behalf, he could not have excluded such items from the purview of the EXIM Policy by means of public notice. The power of DGFT is only to be exercised for procedural purposes and both

⁶ 2015 (326) ELT 26 (SC)

the High Courts have rightly remarked that Para 3.2.6 inserted by the public notice goes beyond the procedural conditions.

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100. Therefore, we hold that the Public Notice dated 28-1-2004 issued by DGFT, so far as it excludes the aforesaid four items, is ultra vires.”

27. In view of the aforesaid decision, the powers exercised by DGFT while issuing the aforesaid public notice dated 26th September, 2019 which puts restrictions upon issuance of the advance authorisation for the Gold Medallions and Coins is beyond the power, jurisdiction and authority of DGFT.

28. It has been held by the Supreme Court in *Atul Commodities Pvt. Ltd. vs. Commissioner of Customs, Cochin*⁷, in paragraphs 49 and 50 as under:-

“49. One more aspect needs to be mentioned. Para 2.33 expressly states that import of old and used computers/second-hand computers are restricted. Para 2.33 of the Handbook does not restrict photocopying machines. Import of photocopying machines is expressly restricted only by Notification No. 31 dated 19-10-2005. This itself indicates that categorisation/recategorisation cannot be done by policy circulars. Such an exercise has to be undertaken by a specific amendment to the Policy vide Section 5 of the 1992 Act.

50. In this case, Notification No. 31 dated 19-10-2005 indicates that the Central Government has brought in photocopying machines into the category of second-hand goods vide an amendatory notification, therefore, import of photocopying machines stands restricted only on and after 19-10-2005. In fact, if the argument of the Department is to be accepted, then there was no need to issue Notification No. 31 dated 19-10-2005.”

⁷ 2009 (235) ELT 385 (SC)

29. It has been held by a Division Bench of this Court in ***Union of India vs. Indian Exporters Grievance Forum***⁸, in paragraph 35 and 36 as under:-

“35. It was thus understood that the nexus has to be maintained that ‘product group’, viz., the category of the products which is exported. If the import also falls in the same category/group, it would be allowable. In the aforesaid letter, in relation to the export in food, it was clarified that it would be ‘food category’ with respect to which the exporter was required to maintain nexus. In that particular case, the exporter was exporting dry fruits, he was permitted to import almond which falls in the category of ‘dry fruits’. Initially, when Public Notice NO. 16 dated 04.6.2005 was issued replacing earlier Appendix 17D with new one in Para 10 thereof, “broad nexus” was explained to mean goods imported with respect to any product group of the exported goods within the overall value of entitlement certificate. Same meaning was assigned in Para 3.2.5 of the HBP amended on 08.4.2005. Thus, Circular dated 01.8.2006 of the DGFT was in tune with the aforesaid. It is only thereafter that another Circular dated 08.5.2007 was issued bringing the concept of ‘use’ and ‘own used’ contained in the Policy to associate the same with ‘input’ and stating that the import was possible of those products only if the same had a ‘broad nexus’ with the product group as an input with the export group and **is required to be used as an input** in the product exported by which TPS benefit is sought. On this basis, Public Notice No. 21.6.2007 was issued and this was departure of earlier understating, the respondents naturally felt aggrieved against the same.

36. We are, thus, in agreement with the view taken by the learned Single Judge that Para 3.7.6 of the FTP by itself does not indicate that the imported goods should constitute ‘inputs’ in the goods exported relying upon *Atul Commodities* (supra). We also agree with the interpretation of the expression ‘broad nexus’ undertaken by the learned Single Judge. In fact, Bombay High Court in the case of *Narendra Udeshi* (supra) and *Essel Mining & Industries Ltd. v. Union of India* [2011 (270) E.L.T. 308 (Bom.)] has taken identical view dealing with the identical issue. For our benefit, we may reproduce the following para from the said judgment:

“10. The Foreign Trade Policy, it is well settled, is referable to the provisions of Sections 4 and 5 of the Foreign Trade Development and Regulation Act, 1992. The policy cannot be

⁸ 2013 (290) ELT 481 (Del.)

amended by an administrative circular. The circular does not in this case supplement the policy or fill up an interstitial space. The circular imposes a substantive condition at variance with the policy. VBC 13 wp4499.07-14.6 Where the Central Government has considered it necessary to impose a requirement of physical incorporation, such a condition has been made expressly in other provisions of the Foreign Trade Policy. For instance, in relation to advance plus licences governed by the duty exemption scheme, it has been stipulated that an advance licence is issued to allow duty free importable inputs which are physically incorporated in the export products (paragraph 4.1.3 of the Foreign Trade Policy for April 2005). Similarly, while issuing an exemption notification in relation to imports covered by advance licences, the Union Government in its notification dated 10 September 2004 (Notification 93/04) has specifically defined materials to mean raw materials, components intermediates, consumables, catalysts and parts which are required for manufacture of resultant products. No such requirement was incorporated in paragraph 3.7.6 of the Foreign Trade Policy. In other words, the condition that the inputs which are imported must be used in the export of the resultant product was not incorporated as part of paragraph 3.7.6 of the Foreign Trade Policy. In that view of the matter, it is not possible to accept the contention of the Respondent that the conditions which were imposed by the circular VBC 14 wp4499.07-14.6 date 8 May 2007 were implicit in paragraph 3.7.6 of the Foreign Trade Policy. We, therefore, come to the conclusion that the conditions which were stipulated by the circular dated 8 May 2007 were ultra vires paragraph 3.7.6 of the Foreign Trade Policy and Customs notification dated 8 April 2005 (Customs Notification 32/05).

11. Before concluding, it would be necessary to note that during the course of the hearing of the Petition, Counsel appearing on behalf of the Petitioner and the Respondent had placed before this Court, a judgment of a Learned Single Judge of the Delhi High Court in *Indian Exporters Grievance Forum v. Union of India* (Writ Petition (Civil) 2497 of 2008 decided on 5 August 2010). An appeal against the judgment of the Learned Single Judge is pending before the Division Bench and the judgment of the Learned Single Judge has been stayed. In deciding this matter, we have independently interpreted the terms of the Foreign Trade Policy and the relevant notifications and circulars that hold the field. It is, therefore, not necessary for this Court to make any observation in relation to the view which has been expressed by the VBC 15 wp4499.07-14.6 Learned Single Judge of the Delhi High Court.”

37. The upshot of the aforesaid discussion would be that the appeal is devoid of any merit. This appeal is dismissed with costs.”

(Emphasis supplied)

30. In view of the aforesaid decision, categorisation or re-categorization cannot be done by the policy circulars, such exercise has to be undertaken by specific amendment to the Foreign Trade Policy under Section 5 of the Act. Hence also, the public notice No.35/2015-2020 dated 26th September, 2019 (Annexure P-1) is beyond the power, jurisdiction and authority of DGFT.

31. In view of the aforesaid decision also, the power exercised by DGFT under paragraph 1.03 of the Foreign Trade Policy 2015-2020 is illegal and the same deserves to be quashed and set aside.

32. In view of the aforesaid facts, reasons and judicial pronouncements, we hereby quash and set aside the public notice dated 26th September, 2019 issued by respondent No.1 and consequential letters dated 1st November, 2019 which are Annexure P-2 and Annexure P-3 respectively to the memo of writ petition are directed to be decided by respondent No.1 as early as possible and practicable.

33. In view of the aforesaid, the writ petition stands allowed and disposed of.

CHIEF JUSTICE

C.HARI SHANKAR, J

FEBRUARY 11, 2020