

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

Reserved on: 13.02.2020

Date of decision: 05.03.2020

+ **W.P.(C) 6045/2016**

M/S WADPACK PRIVATE LIMITED

..... Petitioner

Through: Mr.Karan Sachdev & Mr.Kunal
Kapoor, Advs.

versus

THE DIRECTOR GENERAL OF FOREIGN TRADE & ANR

..... Respondents

Through: Mr.Akshay Makhija, CGSC with
Ms.Kriti Awasthi, Adv.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

1. This petition has been filed by the petitioner praying for a Writ of Mandamus directing the respondent no. 1 to condone the procedural lapse of supplying the goods to the SEZ units only under ARE-1 without Bills of Exports with respect to its Advance Authorization No. 0710063364 dated 02.03.2009 as also for issuance of Redemption Certificate to the petitioner with respect to the said Advance Authorization.

2. The facts in brief are that the petitioner was issued the Advance Authorization by the respondent no. 2 on 02.03.2009. The petitioner claims to have supplied the finished goods, that is corrugated boxes, to Nokia Semens and its units in SEZ units between 2009 to 2011. On 22.05.2012, the petitioner submitted the documents to respondent no. 2

for issue of Export Obligation Discharge Certificate (EODC). The respondent no. 2 in turn called upon the petitioner to furnish the Bills of Exports towards goods supplied to the SEZ units as also the Bank Realization Certificate in Appendix-22A of the Hand Book of Procedure. The petitioner, while submitting The Bank Realization Certificate, instead of Bills of Exports, submitted the ARE-1 as proof of making exports against Advance Authorization. The petitioner claims that due to an inadvertent error, the Bills of Exports were not filed.

3. Pursuant to an order for personal hearing being granted to the petitioner, passed by this Court, the petitioner approached the Policy Relaxation Committee (PRC) seeking condonation of this lapse. The PRC in its meeting dated 02.02.2016 observed as under:-

“The case was discussed again at length. The committee was of the view that in terms of Para 4.12 of FTP, 2009-14, the applicant was require to mention consumption of exempted materials on export documents along with file No/Licence No against that exports are being made towards discharge of export obligation. In terms of Para 4.25 of HBP, 2009-14 read with ANF-4F for discharge of export obligation, the applicant should submit original copy of Shipping Bill/Bill of Export, Excise Invoice and Bank Realisation Certificate. However, the applicant has failed to submit these documents except BRC Certificate issued by Superintendent Central Excise cannot substitute the documents prescribed in ANF-4F because it does not prove that duty free imported goods were consumed in the resultant products have been supplied to SEZ unit towards discharge of export obligation against Advance authorization in question. The Committee, therefore, did not accede to the request. The applicant is hereby

directed to get the case regularized in terms of Para 4.49 of Hand Book of Procedures, 2015-20.”

4. The learned counsel for the petitioner submits that though the petitioner admits its mistake of not submitting the Bills of Exports as they were not generated/filed, the petitioner, in form of ARE-1; its own affidavit alongwith statement showing use of imports for finished goods duly certified from the Chartered Accountant; and a certificate confirming the receipt of goods in the SEZ as also the Bank Realization Certificate, has produced sufficient proof to show its entitlement to the fulfillment of exports obligation under the Advance Authorization and therefore, was entitled to the issuance of the EODC. He places reliance on the judgment of the Bombay High Court in **Larsen & Toubro Limited vs. Union of India**, 2018 (360) ELT 289 (Bom.), to submit that in a similar circumstance, the High Court had held that where the ARE-1 form had been supplied, it was only a technical obligation of the said form not mentioning the Advance Authorization Number in the initial copies on which the claim of the petitioner herein had been rejected, and that the PRC should have accepted the explanation given by the petitioner therein instead of penalizing the petitioner therein for such procedural lapse.

5. The learned counsel for the petitioner further places reliance on the Circular dated 11.07.2012 issued by the DGFT, granting relaxation under Para 2.5 of the Foreign Trade Policy condoning procedural lapse of non-mention of EPCG licence number and date on the shipping bills. He submits that similar lapse of the petitioner of mentioning the Advance

Authorization number and date on the ARE-1 should have been condoned by the PRC.

6. The learned counsel for the petitioner further submits that even in ARE-1, it is only the self-declaration of the petitioner that is material. It is made only for the purpose of ensuring that the party does not obtain the benefit twice over for the same export. In the present case, apart from the certificate from the Chartered Accountant, the PRC itself has verified from the concerned Excise Department that the petitioner has not availed such benefits twice over. The learned counsel for the petitioner further submits that the ARE-1 has also been certified by the Customs Authority of the SEZ.

7. On the other hand, the learned counsel for the respondents submits that the power of this Court while exercising jurisdiction under Article 226 of the Constitution of India is highly limited and does not extend to relaxation of the conditions contained in the Hand Book of Procedure, which rests exclusively with the PRC. Unless the decision of the PRC is found to be perverse, arbitrary and unreasonable, this Court cannot interfere with the same. He places reliance on the Judgment dated 26.09.2018 of this Court in W.P. (C) 10193/2018 titled ***Shashi Cables Ltd. vs. Directorate General of Foreign Trade (DGFT) and Anr.***

8. He further submits that the petitioner was well aware of the requirement of submission of documents as prescribed in Paragraph 4.25 of the Hand Book of Procedure (Volume-1), 2004-09 as evidence of fulfillment of export obligations imposed under the Advance Authorization. He refers to the “Guidelines For Applicants”, which

require copies of the shipping bills containing details of shipment effected or Bill of Export incase of export to SEZ unit, to be submitted for claiming such benefits. He further refers to the SEZ Rules, 2006 and specifically Rule 30(3) thereof, which requires the Bill of Exports to be filed by the supplier. He submits that the PRC exercises its powers only where it finds a case of genuine hardship or public interest involved. Merely because a party has not been vigilant, would not require PRC's interference.

9. The learned counsel for the respondent further submits that the reliance of the petitioner on the verification submitted by the Excise Department would be of no relevance inasmuch as it is the Customs Authority which has to verify the factum of export against the Advance Authorization. He further relies upon the judgment of this Court in ***Holoflex Limited and Anr. vs. Union of India and Ors***, 2019 (2) TMI 1576, which distinguished the judgment of the Bombay High Court in ***Larsen & Toubro Limited vs. Union of India***, 2018 (360) ELT 289 (Bom.), and observed that filing of Bills 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.

10. I have considered the submissions made by the learned counsels for the parties.

11. To answer the submissions made by the respective counsels for the parties, certain provisions of Foreign Trade Policy, Handbook of Procedure and the SEZ Rules, 2006 need to be considered.

12. Paragraph 4.13 of the Foreign Trade Policy, 2004-2009, deals with “Advance Authorization Scheme” and provides that an Advance Authorization is issued to allow Duty Free Import of input duly and physically incorporated in export directed (making normal allowance for wastage). Such Advance Authorization can be issued either to manufacturer exporters or merchant exporters tied to support manufacturer(s) for *inter-alia* physical exports (including exports to SEZ). Paragraph 4.1.6 further states that exports to SEZ units, irrespective of currency of realization, would be covered.

13. The Handbook of Procedure, 2009-2014 as also 2015-2020, in Paragraph 4.12 and Paragraph 4.27 respectively, requires the shipping/supply document(s) to be endorsed with File Number or Authorisation Number to establish co-relation of export/supplies with the Authorization issued. Paragraph 4.25 further provides that the Authorization Holder shall furnish prescribed document in ANF-4F in support of fulfilment of export obligation.

14. Paragraph 5 of the condition attached to the Advance Authorization specifically draws the attention of the petitioner to paragraph 4.25 and states that the documents prescribed therein must be delivered for claiming discharge of export obligation.

15. Form ANF-4F, which is the Application form for ‘Redemption/No Bond Certificate against Advance Authorization’ further requires submission of shipping bill against the details of physical exports/deemed exports made.

16. Paragraph 2.5 of the Foreign Trade Policy empowers the DGFT to pass orders granting relaxation or relief from policy/procedure. It reads as under:

“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 hardship and averse 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:

<i>SL. No.</i>	<i>Description</i>	<i>Committee</i>
<i>(i)</i>	<i>Fixation/modification of product norms under all Schemes</i>	<i>Norms Committee</i>
<i>(ii)</i>	<i>Nexus with capital goods (CG) and benefits under EPCG Schemes</i>	<i>EPCG Committee</i>
<i>(iii)</i>	<i>All other issues</i>	<i>Policy Relaxation Committee (PRC)</i>

17. A reading of the above provisions would clearly show that the exemption from Policies/Procedure can be granted only in cases of genuine hardship and adverse impact on trade or in public interest, in consultation with *inter-alia* the PRC.

18. Rule 30 of the SEZ Rules further prescribes the procedure for procurement from the Domestic Tariff Area by SEZ units. Rule 30(3) specifically provides that where the goods are procured by the Unit in the SEZ under the claim of export entitlement, the same shall be allowed admission into the SEZ on basis of ARE-1 and a Bill of Export filed by the supplier. In fact, the Proviso to Rule 30 (3) of the Rules further prescribes 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 same purpose by the Specified Officer and shall be released to the Unit only after completion of the assessment of Bill of Export. Rule 30(7) provides for examination of the goods alongwith documents, that *inter-alia* include ARE-1 and Bill of Export, where goods are being procured under claim of an export entitlement. Rule 30(9) further provides that a copy of Bill of Export and ARE-1 with an endorsement of the Authorized Officer shall be treated as proof of export.

19. Rule 30 of the Rules, so far as is relevant to the controversy in question, is reproduced herein below:

“30 Procedure for procurements from the Domestic Tariff Area

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(2) Goods procured by a Unit or Developer, on which Central Excise Duty exemption has been availed but without any availed of export entitlements, shall be allowed admission into the Special Economic Zone on the basis of ARE-1.

(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 Authorized 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.

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(7) On arrival of the goods procured from the Domestic Tariff Area at the Special Economic Zone gate, the Authorized Officer shall examine the goods in respect of description, quantity, marks and other relevant particulars given in the ARE-1, invoice, Bill of Export of packing list and also as per the examination norms laid down in respect of export goods in cases where the goods are being procured under claim of an export entitlement.

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

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(11) The Unit or Developer may also procure goods from Domestic Tariff Area without availing exemptions, drawbacks and concessions on the basis of invoice or transport documents, issued by the supplier:

Provided that such invoices or transport documents shall be endorsed to the effect that no exemptions, drawbacks and concessions have been availed on the said supplies."

20. A reading of the above provisions would clearly show that the Bill of Export is an essential document to be submitted for claiming discharge of export obligation under the Advance Authorization. The petitioner admits that in the present case it did not submit the Bill of Export and therefore, claims exemption under Paragraph 2.5 of the FTP. It is further admitted that the ARE-1 Forms that were submitted with the Excise Department at the time of supplies to the SEZ Unit did not bear the endorsement of the Advance Authorization Number or its date. It also did not specify the quantity of input used by the petitioner in the goods that was so supplied. It is only when the PRC demanded submission of original ARE-1, that the petitioner submitted copies of the ARE-1 with the Advance Authorization Number and its date stamped by itself on such ARE-1.

21. Besides, petitioner's statement of having worked and manufactured boxes for the past 39 years further weakens his claim in the petition. There is no explanation as to why the petitioner supplied goods only under cover of ARE-1 and not with Bill of Export except for it being an inadvertent mistake. A market player in business for this long would be expected to comply with formalities and file all relevant documents timely.

22. As is evident from the reading of the Paragraph 2.5 of the FTP, exemption from following policy/procedure can be granted only in cases of genuine hardship or adverse impact on trade or in public interest. In my opinion, it is not applicable for cases where the exporters, even *bonafide*, are not vigilant or are lax in compliance with the mandatory

conditions. The onus cannot be shifted to the Authorities in such cases to retrospectively determine if the petitioner had otherwise complied with all conditions of Advance Authorization.

23. As held by this Court in *Holoflex Limited* (supra), filing of Bill of Export 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. These goods, if they are to be claimed for export entitlement, are put to scrutiny by the Authorized Officer before they are allowed entry into the SEZ.

24. The judgment of the Bombay High Court in *Larsen & Toubro Limited* (supra), can also be of no avail to the petitioner. In the said case, the Court was persuaded in favour of the petitioner therein as the claim of the petitioner had been verified and endorsed by the Range Superintendent, Central Excise and the Development Commissioner of the SEZ. It was found not to be just a self generated version or a self certification. In the present case, however, the petitioner has merely put a rubber stamp on the copy of ARE-1(s) subsequently without such claim having been endorsed from the concerned Authority. The affidavit and the certificate from the Chartered Accountant are also self serving documents. In fact, in the representation submitted to the PRC, the petitioner revised its claim from 409.571 MTs of corrugated boxes having a value of Rs.1,79,82,784/- having been supplied, to 414.657 MTs of a value of Rs.3,25,36,085.70. This itself shows that the claim of the petitioner could not have been taken on its face value.

25. The PRC had earlier rejected the claim of the petitioner vide its communication dated 17.12.2013 stating that the Committee was not satisfied about the corroborating evidence produced by the petitioner. On challenge made by the petitioner, this Court by an order dated 16.12.2014, passed in WP(C) 8924/2014, titled *M/s Wadpack Private Limited v. The Director General of Foreign Trade & Anr*, granted opportunity to the petitioner to make a fresh representation alongwith all documents and further directed the DGFT to consider the same after affording an opportunity of hearing to the petitioner. The PRC has again rejected the claim of the petitioner by the Impugned Decision taken in the meeting held on 02.02.2016, observing that the certificate issued by the Superintendent, Central Excise cannot substitute documents prescribed in ANF-4F as it does not prove that duty free imported goods were consumed in the resultant products supplied to the SEZ Unit. As held by this Court in *Shashi Cables Ltd.* (supra), unless such decision of the PRC is found to be perverse, arbitrary, capricious or unreasonable or otherwise contrary to the statutory framework, no interference with the such decision is permissible in exercise of power of judicial review. In the present case, no such infirmity is found with the decision of the PRC.

26. In view of the above, I find no merit in the present petition and same is dismissed. There shall be no order as to cost.

NAVIN CHAWLA, J

MARCH 05, 2020/rv/Arya