IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.02.2023

CORAM :

The HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

W.P. No.1800 of 2020

M/s.Kawarlal & Co.,
No.27, Raghunayakulu Street,
Park Town, Chennai – 600 003,
by its Proprietor K.Ramlal Jain ... Petitioner

vs

1.The Director General of Foreign Trade,
Government of India,
Ministry of Commerce and Industry,
Udyog Bhawan,
New Delhi – 110 011.

2.The Deputy Director General of Foreign Trade,
Government of India,
Ministry of Commerce and Industry,
Policy 4 Branch,
Udyog Bhawan,
New Delhi – 110 011.

3.The Commissioner of Customs (DFIA),
Custom House,
Rajaji Salai,
Chennai – 600 001. ... Respondents

<u>Prayer</u>: Petition filed under Article 226 of the Constitution of India praying to issue a writ of Certiorarified Mandamus calling for the records

pertaining to order dated 08.11.2019 in File No.01/94/180/103/ AM19/PC-4/416 passed by the second respondent and to quash the same and consequently to direct the 1st and 2nd respondents to revalidate the unused 3 DFIA licences viz. (1)DFIA Licence No.0710070530 dated 12.03.2010 (2)DFIA Licence No.0710070929 dated 15.04.2010 and (3)DFIA Licence No.0710070930 dated 15.04.2010 issued under SION E1 and E5 by the first respondent, the same acquired and standing in the name of the petitioner, by virtue of the judgment of this Court in the case of Hoewitzer Organic Chemical Co. -vs- DGFT dated 12.04.2013 as also the judgment of the Division Bench of the Punjab and Haryana High Court in the case of Pushpanjali Floriculture Pvt. Ltd. -vs- UOI dated 01.07.2016.

For Petitioner : Mr.S.Baskaran

For Respondents : Mr.N.Ramesh,
Senior Panel Standing Counsel
for R1 and R2

Mr.Indrajit representing counsel for
Mr.A.P.Srinivas,
Senior Standing Counsel for R3

ORDER

The only issue that arises for consideration in this writ petition is whether the Public Notice No.84/2009-14, dated 23.07.2010 and the Policy Circular No.13, dated 31.01.2011, issued by the first respondent are prospective or retrospective in operation. The petitioner has purchased DFIA (Duty Free Import Authorisation) licences referred to supra in the prayer column on 15.04.2010. As per the above mentioned Public Notice dated 23.07.2010 as well as the Policy Circular dated 31.01.2011, a condition has been imposed by the first respondent that only the actual user of the licence can use the licence for import of goods mentioned in the licence. However, as per the DFIA licence issued on 15.04.2010, the said licence is transferable and the petitioner, who is the purchaser of the licences, claims that they are entitled to the usage and benefit of those licences. The petitioner has also been allowed to import based on the DFIA licences dated 15.04.2010 as seen from the communication sent by the Deputy Director General of Foreign Trade to the Commissioner of Customs (Exports) on 31.07.2008. The Joint Director General of Foreign Trade has also issued Policy Circular No.72 (RE-08)/2004-2009 dated 24.03.2009 to all the Regional Authorities and All Commissioners of Customs, Trade and Industry clarifying that alternative inputs are allowed for import as per SION (Standard Input Output Norms) under the DFIA Scheme. The petitioner has relied upon the following authorities in support of his contention that the import policy prevalent at the time of issuance of the licence would apply to goods covered by imports made under that licence and the subsequent change in policy will be of no consequence:

a)An order of the learned Single Judge of this Court in the case of **Hoewitzer Organic Chemical Co. vs. D.G.F.T., New Delhi, reported in 2013 (294) E.L.T. 7 (Mad.)**;

b)A judgment of the Division Bench of the Punjab and Haryana High Court in the case of **Pushpanjali Floriculture Pvt. Ltd. vs. Union of India, reported in 2016 (340) E.L.T. 32 (P&H)**;

2.According to the learned counsel for the petitioner, erroneously and by total non application of mind to the settled position of law, the respondents have rejected the petitioner's representation seeking for re-validation of the DFIA licence on the ground that only an actual user can seek for re-validation and also on the ground that the petitioner has failed to establish the reasons for delay in approaching the appropriate authorities for consideration of such a request in time. Insofar as the delay is concerned, the learned counsel appearing for the petitioner would submit that the delay is not on the part of the petitioner. Since the Circular and the Public Notice referred to supra were in vogue and were being challenged before the Constitutional Courts, the petitioner cannot be faulted with for the delay. He also drew the attention of this Court to an order dated 27.04.2012 passed in a Writ Petition, filed by the very same petitioner in M.P. No.1 of 2012 in W.P. No.24333 of 2010 and particularly referred to paragraph 10 of the above order in support of his contention.

3.Learned counsel for the petitioner would also submit that since the DFIA licences, purchased by the petitioner, came into effect on 15.04.2010, the aforesaid clarification given by this Court in its order dated 27.04.2012 applies to the case of the petitioner. The learned counsel for the petitioner also drew the attention of this Court to an order dated 01.11.2018 passed in W.P. No.11046 of 2018, filed by the very same petitioner seeking for a Mandamus to direct the first respondent to revalidate the unused three DFIA licences, which are the subject matter of the writ petition. This Court by its order dated 01.11.2018, in the aforesaid Writ Petition, directed the first respondent to consider the representation of the petitioner dated 21.11.2017 and pass orders on the same, on merits and in accordance with law within a period of four weeks from the date of receipt of a copy of the said order. Only pursuant to the said order passed by this Court, the impugned order has been passed rejecting the petitioner's request for revalidation of DFIA licences.

4.A counter affidavit has been filed by the respondents stating that the judgment of the Division Bench of Punjab and Haryana High Court in the matter of Pushpanjali Floriculture Pvt. Ltd. vs. Union of India, which is relied upon by the petitioner, is the subject matter of challenge by the respondents before the Hon'ble Supreme Court in S.L.P. No.960 of 2017. They have stated that since the matter is sub judice before the Hon'ble Supreme Court, the petitioner does not have any legal right to revalidate the DFIA licences and therefore, the request of the petitioner has been rightly rejected under the impugned order in accordance with the provisions of FTDR Act, 1992 and FTP (Foreign Trade Policy).

5.With regard to the contention raised by the petitioner that the Public Notice dated 23.07.2010 and the Policy Circular dated 31.01.2011 are only prospective in nature is concerned, the respondents have not rebutted the same in the counter affidavit.

6.Admittedly, no stay of the judgment, passed by the Division Bench of the Punjab and Haryana High Court in the matter of Pushpanjali Floriculture Pvt. Ltd. vs. Union of India, referred to supra, has been granted by the Hon'ble Supreme Court. It is also not in dispute that the decision rendered by a learned Single Judge of this Court in the case of Hoewitzer Organic Chemical Co. vs. D.G.F.T., New Delhi reported in 2013 (294) E.L.T. 7 (Mad.), which is relied upon by the learned counsel for the petitioner, has attained finality as the department has not filed any Appeal as against the said order. In the said decision, the learned Single Judge, after following the judgments of the Hon'ble Supreme Court in the case of S.B.International Ltd. vs. Assistant Director General of F.T. Reported in 1996 (82) E.L.T. 164 (S.C.) as well as the Jain Exports (P) Ltd. vs. Union of India reported in 1992 (61) E.L.T. 173 (S.C.), has held that the import policy prevalent at the time of issuance of the licence would apply to goods covered by imports made under that licence and the subsequent change in policy will be of no consequence. In the said case also, since the DFIA licence came into effect on 15.04.2010 as in the present case and the clarification order dated 31.07.2008 and DGFT Policy Circular dated 24.03.2009 were in force, the licensee would get the benefit of the said clarification and the DGFT Policy Circular. It was also held that the Public Notice No.84/2009-14 dated 23.07.2010, Clarification dated 23.09.2010 and the Policy Circular No.13, dated 31.01.2011 will have no consequence in respect of the licences already issued and the issue was decided in favour of the petitioner therein.

7.In the instant case also, only based on the Public Notice No.84/2009-14 dated 23.07.2010, the clarification dated 23.09.2010 and the Policy Circular No.13 dated 31.01.2011, the petitioner's request for revalidation of the DFIA licences, which are the subject matter of the writ petition, have been rejected under the impugned order. Though the petitioner's DFIA licence came into effect on 15.04.2010 itself, the petitioner has been able to utilise the DFIA licence only for few months and thereafter, due to the aforementioned Public Notice dated 23.07.2010, Clarification dated 23.09.2010 and Policy Circular No.13 dated 31.01.2011, they have been unable to get the benefit of DFIA licences. The relevant paragraphs in the judgment rendered by the learned Single Judge of this Court in the Howitzer case, referred to supra, are reproduced hereunder:

> *"7. The learned Senior Counsel appearing for the petitioner relied upon a decision of the Supreme Court in Jain Exports (P) Ltd. v. Union of India - 1992 (61) E.L.T. 173 (S.C.) to canvas the plea that the* ***import policy prevalent at the time of issuance of the license would apply to goods covered by imports made under that license and the subsequent change in policy will be of no consequence.*** *A similar view was taken by a Division Bench of the Bombay High Court in Ashok Kumar Jain v. Union of*

India - 2010 (253) E.L.T. 767 (Bom.). In paragraph (4) of the said decision, the Division Bench, after referring to the decision of the Supreme Court in Jain Exports (P) Ltd. case, supra, observed as follows:

> *"4.Mr.Jetly learned counsel appearing for the Revenue submitted that the importing question would be governed by the import and export policy applicable for the year AM 91-94 as the import had taken place in June, 1992 i.e. after expiry of AM 1988-91. He submitted that though REP licence was issued when AM 1988-91 was in force, since the import had taken place in June, 1992 the REP licence as well as import made under the REP licence would be governed by the import and export policy in force on the actual date of import and not on the date when the REP licence was issued. Per Contra, Mr.Rana submitted that import would be governed by import export policy AM 1988-91. In support of his submission he referred to and relied upon by a decision of the Supreme Court in Jain Exports (P) Ltd. Vs. Union of India - 1992 (61) E.L.T. 173 (S.C.) = 1988 3 SCC 579. In that case, two consignments of natural coconut oil were imported from Srilanka and arrived at port of*

destination on 22nd September, 1981 and 10th September, 1982 respectively. The import was effected in pursuance of a licence which was issued in the year 1980-81 but the goods were actually imported after the policy had expired and new policy had come into force. In paragraph No.2 of the decision, Supreme Court posed the questions which had arisen for its consideration. The question No.1 was

'(1) The import policy of which year would be applicable to the present case - the period during which the licences were issued or the time when the import actually took place'

In paragraph No.3 of the decision, the Supreme Court held that the High Court had come to the correct conclusion to the terms of import policy of 1980-81 (i.e. period during which the licence was issued) would apply. In view of the decision of the Supreme Court, we have no doubt that the import in question which was effected in pursuance of a REP Licence dated 13th December, 1990, would be governed by the import export policy of AM 1988-91.' "

....

9.Another point canvassed by the learned Senior Counsel appearing for the petitioner is the endorsement in the license, which reads as follows:

> *'The licence shall be subject to the conditions in force relating to the goods covered by the licence and the class of importers as described in the relevant Export-Import Policy and Handbook of procedures, or any amendment thereof made upto and including the date of issue of the licence, unless otherwise specified."*

It is pointed out that the Import-Export Policy and Handbook of Procedures that covers the license is of the year 2009-2014 and the clarification issued by the DGFT dated 31.7.2008.

....

19. Since the license in this case was issued on 15.4.2010 and on the date on which the license was issued the clarification dated 31.7.2008 and the DGFT Policy Circular dated 24.3.2009 were in force, the license would get the benefit of the said clarification and the DGFT Policy Circular. ***Subsequent change in policy by way of Public Notice No.84/2009-14, dated 23.7.2010, clarification dated 23.9.2010 and the Policy Circular No.13, dated 31.1.2011 will have no consequence in***

respect of the license that has_already been issued. *Accordingly, the said issue is decided in favour of the petitioner.”*

8.In the Division Bench of Punjab and Haryana High Court in the case of Pushpanjali Floriculture Pvt. Ltd. vs. Union of India reported in 2016 (340) E.L.T. 32 (P&H), which is relied upon by the learned counsel for the petitioner, the following observations have been made:

'44.It is seen that the DFIA is issued with a limited validity of 24 months. ***Due to the actions of the respondents the DFIAs could not be utilised by the petitioner.*** *The Hon'ble Supreme Court in the matter of Sandeep Exports Ltd., 2004 (9) SCC 128 = 2004 (164) E.L.T. 133 (S.C.),* ***had directed the respondents to issue certificate for the purpose of revalidation of expired licenses due to disputes raised by the department. We are satisfied that due to the impugned invalid notifications, Public Notice/Circulal, licenses could not be utilised by the petitioner. The petitioner cannot be expected to present licenses for debit in such circumstances. Therefore, a case for directing revalidation of the licence is also made out.***

45.In view of the above discussion, the writ petition of the petitioner is partially allowed in the following *terms:*

(i)Clause 4 of Notification No.31 (RE-2013)/2009-2014, dated 01.08.2013, Clause 2 of Public Notice No.35 (RE-2013)/2009-2014, dated 30.10.2013 and Clause 3 of Notification No.90 (RE-2013)/2009-2014, dated 21.08.2014 are struck down.

(ii)It is declared that the rest of the said impugned Notification No.31 (RE-2013)/2009-2014, dated 01.08.2013, Public Notice No.35 (RE-2013)/2009-2014, dated 30.10.2013 and Notification No.90 (RE-2013)/2009-2014, dated 21.08.2014, would not apply to DFIAs issued prior to 01.08.2013, whether they be in the hands of the holders or of transferees thereof, provided, of course, that the transfer of the DFIAs has been effected after securing necessary permission of the DGFT therefor. ***The entitlement under the DFIA shall be as per the SION as it existed on the date of issuance of the DFIAs.***

(iii)Respondents 1 to 3 are directed to revalidate the DFIAs dated 28.03.2012 and 13.04.2012 which are the subject matter of the present proceedings.

(iv)The Commissioner of Customs, ICD Ludhiana,

is directed to allow exemption of basic customs duty in respect of the import of Soda Ash by the petitioner by debiting the DFIA licence under Bill of Entry No.7080616, dated 16.10.2014.

(v)The prayer for granting exemption, so far as anti-dumping duty is concerned, is rejected for the reasons recorded above.'

9.As seen from the aforesaid decision of the Punjab and Haryana High Court, it is clear that in the absence of any power of amendment with retrospective operation, any subsequent issuance of any notification or instructions by Central Government or any other authority would not divest, the licence holder or the transferee, of the benefits promised on the date of issuance of DFIA licence.

10.In the case on hand also, under the DFIA licences purchased by the petitioner, which came into effect on 15.04.2010, certain benefits were given to the user or the transferee of the said licences. But the said benefit has been withdrawn to the petitioner by the respondents pursuant to the subsequent Circulars amending the terms and conditions of the licence, which in the considered view of this Court is arbitrary and illegal and therefore, this Court is in agreement with the view taken by the

Division Bench of the Punjab and Haryana High Court in the above referred decision.

11.Admittedly, no stay has been obtained from the Hon'ble Supreme Court and only a S.L.P. is pending as against the Division Bench judgment of the Punjab and Haryana High Court in Pushpanjali Floriculture Pvt. Ltd. case. Further the order of the learned Single Judge of this Court in Hoewitzer case, referred to supra, has also attained finality and therefore, the petitioner must be given the benefit in accordance with the said decision.

12.This Court has perused and examined the impugned order dated 08.11.2019. As seen from the impugned order, it has been erroneously held that the petitioner has failed to establish the claim for revalidation of the DFIA licences as the petitioner is the holder of freely transferable DFIA licences and the transfer was permissible when the licence was originally issued in the year 2010, which came into effect on 15.04.2010. The reasons given by the respondents for rejecting the petitioner's applications seeking for revalidation are that the petitioner had failed to establish the reasons for delay in approaching the appropriate authorities for consideration of such a request on time. The delay has been properly explained by the petitioner before this Court. The subject Circulars, which were issued subsequent to the transfer of the DFIA licences in favour of the petitioner, were subject matter of challenge before this Court and this Court by its order dated 27.04.2012

in M.P. No.1 of 2012 in W.P. No.24333 of 2012, which was filed by the very same petitioner, has clarified as follows:

> *'10.In paragraphs 32 and 33 of the order dated 28.02.2012, I have specifically referred to the issue on the DGFT permitting import of Lactose (Pharma Grade) as an alternative to sugar, under the license granted. In the face of this fact, I do not find any justifiable ground to accept the objection of the Revenue to this clarification petition that the circular made on 23.09.2010 and 31.01.2011 would have an adverse effect on whatever was imported on the admitted fact position. In fact, it was not the case of Revenue that the Circular made on 23.09.2010 as well as on 31.01.2011 had, in any manner, dealt with the imports made prior to those dates. In clarifying this position, in this order, I do not find that the order passed by me would, in any manner undergo a change. Hence, to this limited extent of clarifying that the licenses transferred pursuant to*

Circular No.72 of 2008 dated 24.03.2009 till the time the subsequent clarification was issued on 17.06.2010 shall not be adversely dealt with by the respondents, the petition stands ordered.'

13.Only due to the aforesaid reasons, there was an unavoidable delay on the part of the petitioner to approach the authorities. Thereafter, the petitioner has also sent several representations dated 09.09.2013, 28.12.2013, 18.10.2015, 04.03.2016, 14.10.2016, 02.03.2017, 05.06.2017 and 21.11.2017 to the authorities requesting them to revalidate the DFIA licences. The delay has been properly explained by the petitioner. But arbitrarily and by total non application of mind to the same, an erroneous finding has been given by the respondents in the impugned order that the petitioner has failed to establish the reasons for delay in approaching the appropriate authorities.

14.For the foregoing reasons, in view of the fact that the respondents have arbitrarily and by total non application of mind has rejected the petitioner's request for revalidation of the subject DFIA licences, the impugned order has to be quashed and the writ petition has to be allowed. Accordingly, the impugned order dated 08.11.2019 passed by the second respondent is hereby quashed and the writ petition is allowed by directing the respondents to revalidate the three DFIA licences viz., (1)DFIA Licence No.0710070530 dated 12.03.2010 (2)DFIA Licence No.0710070929 dated 15.04.2010 and (3)DFIA Licence No.0710070930 dated 15.04.2010 for the unused period, within a period of four weeks from the date of receipt of a copy of this order. No costs.

14.02.2023

Neutral Citation:Yes/No
Speaking/Non Speaking order
Index:Yes/No
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To

1.The Director General of Foreign Trade,
Government of India,
Ministry of Commerce and Industry,
Udyog Bhawan,
New Delhi – 110 011.

2.The Deputy Director General of Foreign Trade,
Government of India,
Ministry of Commerce and Industry,
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3.The Commissioner of Customs (DFIA),
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ABDUL QUDDHOSE, J.

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