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

Date of decision: 22nd February, 2023

+ **W.P.(C) 2575/2022 and CM APPL. 7354/2022**

HORIZON AEROSPACE (INDIA) PVT LTD Petitioner

Through: Mr. Aditya Chatterjee; Mr. Nirvikar Singh; Mr. Aditya Rajagopal; Ms. Nitya Kaligotla & Ms. Pracheta Kar, Advocates. (M: 733784442)

versus

UNION OF INDIA & ORS.

..... Respondents

Through: Mr. Ravi Prakash, CGSC.

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. This hearing has been done through hybrid mode.
2. The present petition has been filed by the Petitioner - Horizon Aerospace (India) Pvt Ltd seeking quashing of the impugned order dated 31st January, 2022 passed by the Respondent No. 3 – Additional Director General of Foreign Trade (CLA) (Appellate Authority), impugned order dated 17th September, 2021 and impugned show cause notice dated 14th July, 2021 passed by the Respondent No. 2 – Assistant Director General of Foreign Trade (CLA).
3. The Petitioner is a company engaged in providing maintenance, repair, and overhaul of assemblies of aircrafts. It supplies its products to customers globally. On 7th June, 2017 it received a purchase order from a foreign entity namely M/s. Dedienne Aerospace, France for supply of certain goods. The total consideration in terms of the purchase order was EUR 2,655,372.20. The goods which were to be supplied to Dedienne

Aerospace were transferred by the Petitioner to M/s Siddhartha Logistics Co. Pvt. Ltd., a logistics company located in Satyavedu Mandal, Chittoor Distt., Andhra Pradesh for exporting the same Dedienne Aerospace. On 19th July, 2018 a shipping bill was raised, reflecting the Petitioner as the “Exporter” and the Dedienne Aerospace as the “Client”. The said bill also reflected that M/s. Siddhartha Logistics was accepting the consignment on behalf the Dedienne Aerospace. All the relevant documents including the purchase order, shipping bill cargo receipt and the invoices have been placed on record.

4. The total amount, which was to be received by the Petitioner, has been received by way of foreign remittance. The total realization of the consideration amount in foreign exchange has also been confirmed by the certificates of foreign inward remittance issued by HDFC Bank on 12th December, 2017, 19th April, 2018, 14th September, 2018, 10th December, 2018 and 8th July, 2019.

5. The case of the Petitioner is that in view of the said documents and the export having been carried out in terms of the Foreign Trade Policy (2015-2020) (*hereinafter*, “FTP”), the Petitioner is entitled for Duty Credit Scrips (*hereinafter*, “MEIS Scrip”) under the Merchandise Exports from India Scheme. It is submitted that the said scrip was in fact granted to the Petitioner by the Respondent No. 2, on 11th June, 2021. However, the same was cancelled by the Respondent No.2 vide show cause notice dated 14th July, 2021

6. Ld. Counsel for the Petitioner relies upon the FTP to argue that the said policy clearly contemplates issuance of MEIS scrips in recognition of exports of this nature. Specific reliance is placed upon clause 3.02, 3.03 &

3.06 of the FTP. He submits that the Respondent No. 2 seeks to contend that the Petitioner is ineligible for the said scrips in terms of clause 3.06 (i) and (vii) of the FTP, however, the said two clauses do not apply to the Petitioner as M/s Siddhartha Logistics was merely a logistics company, which provided support to the Petitioner for effecting the export to the Dedienne Aerospace and nothing more. Ld. Counsel for the Petitioner submits that the transaction in the present case was a case of pure export and not a case of export within India from Domestic Traffic Area (DTA) unit to Special Economic Zone (SEZ)/ Free Trade Warehouse Zone (FTWZ) unit located in India. It would also not qualify as an export made by unit in FTWZ.

7. Ld. counsel for the Petitioner also places reliance upon the judgement of the Hon'ble Madras High Court in **WP(C) No. 28777/2019** titled **Jindal Drugs Pvt. Ltd. v. Union of India & Ors.** and the judgement of the Hon'ble Bombay High Court in **WP(C) 5907/2020** titled **M/s Ashwini Ashish Dighe v. Union of India & Ors.**

8. On behalf of the Respondent, Mr. Ravi Prakash, Id. CGSC submits that since the export seems to be between two entities in India, thus the Petitioner is not entitled to issuance of MEIS scrips.

9. A perusal of the present petition would show that MEIS scrips were issued to the Petitioner for a duty credit amount of Rs.42,18,906/- on 11th June, 2021. However, on 14th July, 2021 the impugned show cause notice was issued for cancellation of MEIS scrips on the suspicion that the transaction/ supply is DTA to a SEZ/FTWZ.

10. On 20th July, 2021 the Petitioner filed a reply to the impugned show cause notice. Thereafter, a communication dated 11th August, 2021 was sent

to the Respondent No.4 - Director General of Foreign Trade, wherein the Petitioner cited the judgment of *Jindal Drugs (supra)* and sought a policy clarification. The Respondent No. 4 asked the Petitioner to approach the Respondent No. 2. Accordingly, the Petitioner sent communication dated 10th September 2021 to the Respondent No. 2 reiterating that there had been no misrepresentation or mis-direction by the Petitioner. The Petitioner also brought to the notice of the Respondent No 2 the judgment of *Jindal Drugs (supra)*. Thereafter the Petitioner was, afforded a personal hearing on 17th September, 2021. The Petitioner also filed *W.P.(C) 10603/2021* challenging the impugned show cause notice.

11. The Respondent No. 2 passed the impugned order dated 17th September, 2021 cancelling the MEIS scrip previously issued to the Petitioner, imposing a penalty of INR 1,00,000/-, directing the Petitioner to pay the duty credit amount, and placing the name of the Petitioner and its directors on the Denied Entity List (DEL), depriving them of all fiscal benefits and export privileges.

12. Aggrieved by impugned order dated 17th September, 2021, the Petitioner had filed a writ petition before this Court being *W.P. (C) No. 10709/ 2021*, challenging the impugned order and the show cause notice. In the said writ petition, vide order dated 28th September, 2021, this Court permitted the Petitioner to file a statutory appeal. The operative portion of the order dated 28th September, 2021 passed by this Court reads as under:

“CM APPL. 33064/2021

1. Exemptions allowed, subject to all just exceptions.

2. The application stands disposed of.

W.P.(C) 10709/2021 & CM APPL. 33061/2021(stay)

3. The present writ petition has been preferred assailing

the order dated 17.09.2021 passed by the Office of the Additional Director General of Foreign Trade/respondent no.2 pursuant to the Show Cause Notice dated 14.07.2021, whereby the petitioner has been held to be ineligible to avail the benefits under the MEI Scheme and has been directed to refund the amount received by it by way of MEI scrip.

4. On the last date, in the light of the petitioner's stand that the decision of the respondent no.2 holding the petitioner to be ineligible to receive benefits under the MEI Scheme on the ground that the exports made to one Didienne Aerospace in Toulouse, France were, in fact supplies made to an entity in the Free Trade Warehousing Zone (FTWZ), was erroneous, learned counsel for the respondents were granted time to obtain instructions.

5. Today, Mr.Malhotra, learned counsel for the respondent nos.2 & 3 submits that the impugned order holding the petitioner to be ineligible for receipt of benefits under the MEI scheme was correctly passed as the documents filed by the petitioner in support of its claim, made it clear that the goods were indeed exported to an entity based in France and not to a FTWZ in India, and therefore, there is no infirmity with the impugned order. He, however, concedes that the said position is not clearly reflected in the impugned order, which merely records that the petitioner had received MEIS benefits by mis-declaration of the destination of exports to be Toulouse, France, whereas the documents show that the supplies were instead made to one Siddhartha Logistics FTWZ Pvt. Ltd., and the place of delivery was Sri City Multi Product FTWZ, Andhra Pradesh, India. He, however, contends that these factual aspects cannot be considered in the writ proceedings and therefore, prays that the petitioner, if aggrieved, be directed to prefer a statutory appeal under Section 15 of the Foreign Trade (Development and Regulation) Act, 1992.

6. He, however, assures the Court that in case the

petitioner were to file an appeal assailing the impugned order, the respondents will neither take any coercive action in furtherance of the impugned order dated 17.09.2021, nor place the petitioner in the 'Denied Entity List' till the appeal is disposed of on merits.

7. In the light of the aforesaid stand taken by the respondent by which they will remain bound, the writ petition is disposed of by granting two weeks' time to the petitioner to file a statutory appeal assailing the impugned order dated 17.09.2021. In case such an appeal is filed within the time so granted, the respondents will deal with the same expeditiously by passing a reasoned and speaking order after granting due opportunity of hearing to the petitioner as per the prescribed procedure.

8. It is further directed that, in case, an adverse order is passed against the petitioner, the same will not be implemented for a period of one week from the date of passing of the said order.

9. Needless to state, it will be open for the petitioner to assail the said order, as permissible in law."

13. Thereafter, the Petitioner filed a statutory appeal against the order dated 17th September 2021, before the Respondent No. 3. The appeal Petitioner came to be heard and decided by the impugned order dated 31st January, 2022 passed by the Respondent No. 3.

14. A perusal of the impugned order dated 31st January, 2022 shows that apart from clause 3.06(i) and (vii), the Respondent No. 3 has not taken into consideration the decision in ***Jindal Drugs (supra)***. The same has now been followed in ***M/s Ashwini Ashish Dighe (supra)***. A perusal of the statutory appeal, which was filed as also the earlier representations given by the Petitioner, clearly show that ***Jindal Drugs (supra)*** was relied upon by the Petitioner.

15. A perusal of the FTP would show that the same is meant for providing incentives for manufacture and export of goods from India. The exports made under this policy are to be rewarded, by issuance of MEIS scrips which can be encashed for exports, against custom duty which would be payable for future imports.

16. The objective and purpose of the FTP and the MEIS has been set out in the following clauses:

“Merchandise Exports from India Scheme (MEIS)

3.03 Objective

Objective of the Merchandise Exports from India Scheme (MEIS) is to promote the manufacture and export of notified goods/ products.

3.04 Entitlement under MEIS

Exports of notified goods/products with ITC[HS] code, to notified markets as listed in Appendix 3B, shall be rewarded under MEIS. Appendix 3B also lists the rate(s) of rewards on various notified products [ITC (HS) code wise]. The basis of calculation of reward would be on realised FOB value of exports in free foreign exchange, or on FOB value of exports as given in the Shipping Bills in freely convertible foreign currencies, whichever is less, unless otherwise specified.

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3.06 Ineligible categories under MEIS

The following exports categories /sectors shall be ineligible for Duty Credit Scrip entitlement under MEIS

- (i) Supplies made from DTA units to SEZ units*
- (ii) Export of imported goods covered under paragraph 2.46 of FTP;*
- (iii) Exports through trans-shipment, meaning thereby exports that are originating in third country but trans-shipped through India;*
- (iv) Deemed Exports;*

- (v) *SEZ/ EOU /EHTP/ BTP /FTWZ products exported through DTA units;*
- (vi) *Export products which are subject to Minimum export price or export duty.*
- (vii) *Exports made by units in FTWZ.*

17. The above clauses of the MEIS came upon consideration before the Hon'ble Madras High Court, in ***Jindal Drugs (supra)*** wherein the Petitioner - Jindal Drugs Pvt. Ltd. was involved in export to Ireland. In the said transaction, DHL logistics in Chennai was used as logistics support. In the context of the said facts, the Id. Single Judge of the Hon'ble Madras High Court vide judgement dated 30th July, 2021 observed as under:

"17. The question of eligibility to the Scheme is fundamental to the prayer sought by the petitioner. Para 3.06 of the Scheme sets out seven categories of transactions/entities that would be ineligible for the benefits of MEIS. I have extracted the same at paragraph 5 of this order and do not repeat it again for the sake of brevity.

18. The first is, supplies effected by a Domestic Tariff Area (DTA) to a unit situated in a Special Economic Zone (SEZ), the second, export of imported goods covered under paragraph 2.46 of the Free Trade Policy, third, exports through trans-shipment, i.e., exports originating from elsewhere and routed to another destination through India, fourth, deemed exports, fifth, products of SEZ/EOU/EHTP/BTP/FTWZ exported through the DTA, sixth, exports which are subject to Minimum Export price or export duty and lastly, the seventh, exports made by units in SEZ. The first and last prohibitions are held against the petitioner.

19. Supplies made by a DTA unit to a SEZ unit would be paid for by the SEZ unit. In this case, admittedly, the consideration received is from Ireland, in US dollars.

The BRC dated 29.06.2018 evidences this position.

20. Moreover, in this case, supply has been made by the petitioner to FTWZ for onward shipment at the behest of the purchaser, UTEXAM, to a location of its choice. This modus operandi is supported by the documentation placed on record by the petitioner.

21. Thus, DHL logistics, the FTWZ, merely offers a facility to the petitioner to warehouse its consignments that are to be exported. The destination is decided by UTEXAM, which is the ultimate purchaser, which has paid the petitioner in USD for the consignment. The stipulation in Clause (vii) deals with exports made by a unit in the FTWZ. DHL, the FTWZ does not export the consignments but only facilitates such exports. The exports are thus, by the petitioner through DHL to a destination abroad.

22. To a query as to why the transaction was so structured, the petitioner explains stating that the consignments in question were, purchases by UTEXAM on behalf of Colgate Palmolive for supply at any number of the units of the latter. As and when the destination is decided, DHL is intimated of the same and the consignments shipped to that destination.

23. The exports in this case have already taken place at the point when the petitioner executes the relevant documents and the consignments are stored in the FTWZ, awaiting confirmation of the destination. This would avoid the circuitous route of shipment to UTEXAM at Ireland, and then onward to a final destination accompanied by multiple transportation costs and logistical complications. The role of DHL in this transaction is that of a warehouse and nothing more. The concept of 'ship to' and 'bill to', as used in this case, has been recognised under the GST regime, as commercial compulsions dictate, that transactions are to be structured in the most economical and least cumbersome manner in terms of time, procedure and expense involved.

24. Dr.Babu, raises an objection to the maintainability of the Writ Petition stating that the impugned order is appealable. I, however, find no statutory redress provided as against the impugned order though there is one provided as against an order cancelling the scrips under the FTDR Act had such order been passed. This submission is thus rejected.

25. The interpretation put forth by the petitioner is accepted, the impugned order is set aside and this Writ Petition allowed. No costs. Connected Miscellaneous Petitions are closed.

26. The scrips are for the months of May, October and June, 2018 with a validity of two years expiring on 27.05.2020, 09.10.2020 and 12.06.2020. These Writ Petitions have been filed on 19.06.2019 when the scrips were alive and current. Thus, in order to effectuate the relief granted now, there is a consequential direction to R3 to re-validate scrips bearing No.0319167227 dated 28/05/2018 for Rs.45,03,800.00 (scrip No.1), No.0319191300 dated 10/10/2018 for Rs.4,41,870/- (scrip No.2) and No.0319170001 dated 13/06/2018 for Rs.16,31,840/- (scrip No.3) and extend the same for the duration of the pendency of these Writ Petitions. The TRAs will be issued immediately thereafter and the aforesaid exercise will be carried out within a period of four (4) weeks from today. ”

18. This decision of the Hon’ble Madras High Court has also been considered by the Id. Division Bench of Bombay High Court in *M/s Ashwini Ashish Dighe (supra)*. Relevant part of the judgment dated 20th January, 2022 passed in *M/s Ashwini Ashish Dighe (supra)* are extracted below:

“48. We have carefully perused the decision in the case of *Jindal Drugs Private Limited (supra)* relied upon by the Petitioner. Paragraph 11 of the said decision is

relevant and is reproduced below:

“11. Upon a comparison of the above details contained in the bills of export of goods under which the petitioner has claimed duty drawback, with the bills of the parties to the transaction, I find that the numbers and date tally. It is thus clear that the export documents have been executed by the petitioner. The petitioner also confirms that the FTWZ has neither claimed not been granted any benefit under MEIS Scheme in regard to the instant transactions. If at all such claims had been advanced, they would have been barred under the provisions of 3.06(vii) of the policy note.”

49. Applying the ratio of the above decision, in the absence of necessary documentary evidence as alluded to hereinabove, the Petitioner cannot claim MEIS benefit merely on the basis of pleadings. If the Petitioner claims that the export goods are delivered to the FTWZ unit and thereafter exported to Taiwan on the instructions of its Overseas Buyer, the burden of proof is on the Petitioner to produce the contractual agreement/authorization/transaction details with the Overseas Buyer to substantiate the same. It is the Petitioner's case that the FTWZ unit has merely held the goods in trust on the instructions of the Overseas Buyer as a warehousing unit and hence the Petitioner cannot be deemed ineligible for benefit under Paragraph 3.06 (vi) and 3.06(xix) of the FTP 2015-20. This fact is not substantiated with any confirmation from the FTWZ unit (Siddhartha Logistics Co. Pvt. Ltd.) that it held the goods merely in trust for the Overseas Buyer and that it has neither claimed nor been granted benefit in regard to the export goods which were subsequently shipped to Taiwan. In the Jindal Drugs case, though the facts are similar to the case in hand, the Madras High Court therein looked into the principal transaction between the parties to

ascertain the role of the parties, it confirmed receipt of foreign exchange from Ireland and the BRC evidencing this position, it referred to the supporting documentation pertaining to onward shipment by the FTWZ unit therein to the location of choice of the overseas buyer and then concluded that the FTWZ unit therein merely offered a facility of warehousing to the Petitioner therein to facilitate the export. None of the above issues have been pleaded, and effectively proved by the Petitioner, save and except one shipping bill which does not evidence the aforesaid position in the case of the Petitioner.”

19. In the present case, the decisions of ***Jindal Drugs (supra)*** and ***M/s Ashwini Ashish Dighe (supra)*** would be clearly applicable. The company i.e. M/s Siddhartha Logistics is merely a FTWZ logistics company located in Andhra Pradesh. The said company was involved neither in the manufacture of the products nor the entire sale transaction. It was merely providing logistical support to enable the shipment move within India and ultimately to the French customer i.e. Dedienne Aerospace. Further, it is also noticed that M/s Siddhartha Logistics has already issued its no objection giving consent to the Petitioner to claim the drawback benefits.

20. Under such circumstances, though the shipping bills dated 30th July, 2018 and 19th July 2018 describe M/s Siddhartha Logistics as an exporter or as the client, the actual exporter is Horizon Aerospace (India) Pvt. Ltd., The mere description or misdescription in the shipping bill for whatever compelling reasons, does not change the actual factum as to who actually exported the goods and received consideration for the same.

21. The documents, which have been placed on record, leave no manner of doubt that the case of the Petitioner is clearly covered by the FTP, which

has been extracted above. None of the exclusionary clauses would be applicable. The Petitioner was rightly issued the MEIS scrips. However, due to inexplicable reasons, the same was sought to be cancelled leading this long protracted litigation between the parties. The cancellation of MEIS scrips was done on 14th July, 2021 leading to the show cause notice proceedings, thereafter proceedings before the Appellate Authority of DGFT and also two writ petitions before this Court.

22. In this entire process, the Respondents failed to take into consideration the decision in *Jindal Drugs (supra)*. All these proceedings could have been easily avoided if the Respondents had taken into consideration the said judgment, which was binding upon it.

23. Under these circumstances, the petition is liable to be allowed. The impugned order dated 17th September, 2021 and the order in appeal dated 31st January, 2022 are set aside.

24. The action of the Respondent cancelling the MEIS scrips is also set aside. In view of the above, the Respondent is directed to revalidate the MEIS scrips which were granted to the Petitioner so as to enable the Petitioner to encash the same in its usual course of business.

25. The petition is allowed in the above terms.

26. The Petition along with all pending applications is disposed of

PRATHIBA M. SINGH
JUDGE

FEBRUARY 22, 2023

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