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

Reserved on: 10.11.2023
Pronounced on:13.12.2023

\+ **W.P.(C) 8048/2014 & CM APPLs. 9426/2015, 9534/2015, 10662/2015 & 8512/2018**

M/S MARBLE ART & ANR. ..... Petitioners
Through: Mr.Manoj, Ms.Aparna Sinha & Mr.M.T. Reddy, Advs.

versus

UNION OF INDIA & ORS. ..... Respondents
Through: Mr.Anil Soni, CGSC for UOI.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

JUDGMENT

1. This petition has been filed by the petitioner praying for the following reliefs:-

> *"(a) Issue a Writ, Order or direction in the nature of mandamus or any other appropriate Writ, order or direction, upon the Respondent No. 2 to fix the wastage norms for the downstream products of the Petitioners;*
> *(b) Issue a Writ, Order or direction for waiving the requirement of data "certified by Excise" as demanded by the Respondents, or, in the alternative; direct the Ministry of Commerce to collect data afresh after affording reasonable time to the Petitioners to restart the process of production of downstream products and upon inspecting the relevant process at the unit of the Petitioners and;*
> *(c) Issue a Writ, Order or direction in the nature of mandamus to the Excise department*

> *not to interfere or influence the process of fixation of wastage norms;*
> *(d) Issue a Writ, Order or direction in the nature of mandamus to the Ld. Settlement Commission to keep the Petitioners' Settlement Application in abeyance till the fixation of wastage norms by the Respondent No. 2;"*

<u>CASE OF THE PETITIONER:</u>

2. It is the case of the petitioner that petitioner no.1 is a Partnership Firm with the petitioner no.2 being one of the partners. It is claimed that the petitioner no.1 was a 100% Export Oriented Unit (hereinafter referred to as 'EOU') and was granted a Letter of Permission (in short, 'LOP') on 16.06.1999 by the Development Commissioner, Noida, Special Economic Zone, Noida, Uttar Pradesh. The said EOU was approved for the manufacture of marble and the downstream products of Marble, being - (a) Marble Slabs and Tiles, (b) Mosaics, (c) Borders, (d) Profiles, (e) Gauged Slate, and (f) other articles made of natural stone. It is claimed that the raw material utilized by petitioner no.1 is either imported or procured from the domestic market. The said raw material is rough and irregular large sized blocks of marble. The rough marble blocks are sawn into rough marble slabs of the standard thickness of 20mm as per ISI Specification No. IS:1130-1969. The downstream products mentioned above are manufactured from the rough marble slabs of 20mm thickness. The petitioner claims that for putting the marble blocks into the shape and converting them into marble slabs, the marble blocks are sent by the petitioners to some other units on-job work basis after taking proper permission from the concerned authority, that is, the

Deputy Commissioner of Central Excise and Customs. After the conversion of the marble blocks into the marble slabs, the petitioner no.1 further processes the same by either exporting the marble slabs or making Domestic Tariff Area (in short, 'DTA') sale of the same or manufacturing downstream products from such slabs.

3. The petitioner states that under the EXIM Policy 1997-2002, EOUs were permitted to sell rejects as well as goods up-to 50% of the FOB value of exports in the domestic market, subject to the payment of duty and fulfilment of minimum Net Foreign Exchange Earnings (in short, 'NFE'). Over and above this limit, EOU could sell finished products, which were freely importable against payment of full duty.

4. It is stated that the fixation of the Wastage Norms is of great relevance to the industry, particularly for the EOU units. In terms of Para 9.30(b) of the Handbook of Procedures, wastage norms in respect of items not covered by Appendix 41 are to be fixed by the Board of Approvals (in short, 'BOA'). However, the Development Commissioner may fix *ad hoc* norms for a period of six months and within that stipulated period, the norms shall be fixed by the BOA, which shall prevail. The above provision was reiterated in Para 6.8(e) of Chapter 6 of the Foreign Trade Policy 2004-2009, as under:-

> *"(e) Scrap/ waste/ remnants arising out of production process or in connection therewith may be sold in the DTA as per the Standard Input-Output norms notified under the Duty Exemption Scheme on payment of concessional duties as applicable within the overall ceiling of 50% of FOB value of exports. Such sales shall, however, be subject to achievement of positive NFE. In respect of items not covered by the norms, the*

> *Development Commissioner may fix ad-hoc norms on the basis of data for a period of six months and within this period, he shall get the norms fixed by the BOA. Sale of waste/scrap/remnants by units not entitled to DTA sale or sales beyond the DTA sale entitlement, shall be on payment of full duties. The scrap/waste/remnants may also be exported."*

5. The petitioner states that as the Wastage Norms against the products of the petitioner had not been mentioned in Appendix 41 of the Handbook, therefore, the petitioner no.1 made an application to the Development Commissioner, Noida Special Economic Zone, that is the respondent no.3 herein, in March 2004 requesting for fixation of *ad hoc* Wastage Norms for 'sawing of marble blocks into marble slabs'. Respondent no.3 vide letter dated 30.08.2004 fixed the *ad hoc* Wastage Norms for 'sawing of marble blocks into marble slabs' and as per Chapter Note 4 of Chapter 25 of Central Excise Tariff Act, 1985, allowing wastage over and above 30 sq.mtr of marble slab received out of 1 cubic mtr. of marble block of an irregular shape. In terms of the FTP, these are only *ad hoc* norms and the final Wastage Norms are required to be fixed by the BOA. The Ministry of Commerce referred the matter to the Ministry of Mines, requesting it to fix the percentage of the Wastage Norms for conversion of irregular shaped marble blocks into marble slabs. The Ministry of Mines, in turn, referred the issue to the Indian Bureau of Mines, Nagpur, as it was presumed to have more specialized information on the concerned issue. It is claimed that the Indian Bureau of Mines conducted an extensive study and suggested the Wastage Norms vide its letter dated

16.02.2005, and on the basis of such recommendations, the BOA fixed the Wastage Norms and allowed 31% wastage in terms of irregular/uneven blocks and 26% in terms of regular/even blocks, and additional 3.5% percentage in case of rough marble slab to polished slab. The same was communicated to the petitioner vide letter dated 05.04.2005 of the respondent no.3 herein.

6. The petitioner then filed an application dated 22.08.2005 before the respondent no.3 for fixing *ad hoc* norms for its downstream products, that is, marble mosaic, profiles, decorative borders, marble tiles, etc. The petitioner claims that these downstream products manufactured by the petitioner are rather unique in the sense that there is no other EOU in India that manufactures these products. The petitioner claims that the issue was again referred to the Indian Bureau of Mines, which collected the relevant data. The petitioner further claims that without any authority, however, the Custom and Central Excise Department (hereinafter referred to as 'Excise Department') interfered with the fixation of the Wastage Norms, and vide letter dated 15.10.2007 by the Commissioner of Custom and Central Excise, Noida, intimated the Ministry of Commerce that if the latter was desirous of fixing Wastage Norms, then the Excise Department must be made a party to the process as it was in possession of the actual data. It was stated that if the norms are fixed without the involvement of the Excise Department, they would not be acceptable to the Excise Department. The petitioner claims that in fact the Excise Department has no role in the fixation of the wastage norms and, therefore, the above threat was completely unjustified.

7. The petitioner claims that vide letter dated 22.04.2008, the Indian Bureau of Mines submitted a report wherein it was suggested that the wastage for mosaic tiles was 37%, for borders it was 43%, for profiles it was 28%, for marble tile (tumbled and antique) it was 28%, and for marble tile (specification 305 x 305 x 17 mm) it was 18%, after considering tiles of the specification of 310 x 310 x 10 mm as input materials. The petitioner claims that the above report was erroneous inasmuch as it presumed the thickness of input material to be 10mm. The petitioner states that, in spite of the above report, the Wastage Norms were not fixed by the BOA.

8. The petitioner, therefore, filed a Writ Petition before this Court, being W.P (C) 464/2011. This Court vide its order dated 30.07.2012 was pleased to dispose of the said Writ Petition by directing as under:-

> *"Accordingly, it is directed that the Committee shall deliberate upon the matter and conclude its proceedings on or before 1.10.2012. On conclusion of the proceedings and on coming to a definitive finding as to what should be the wastage norms for downstream products, the said order should be communicated to the Petitioner as well as the Settlement Commission and all other concerned parties. In the interregnum, in order to protect the interest of the Petitioners, the proceedings before the Settlement Commissioner shall remain stayed.*
> *With these observations, learned counsel for the Petitioner does not wish to press the writ petition further.*
> *The writ petition is disposed of accordingly.*
> *List for compliance on 31st October, 2012.*
> *Needless to say, the Petitioner shall supply all relevant documents in respect of which notice will be issued to them, by the Respondents.*

I make it clear that the Committee constituted for fixation of wastage norms of downstream products shall not be impeded by the assertion of the Central Excise that the norms may not be fixed for wastage, as their investigation is at critical juncture. In my view, investigation and fixation of norms are two different aspects. Therefore, the Committee should continue its process of fixation of norms, as directed, unhindered by the said submission.
Dasti."

9. The petitioner complaining that the norms were still not fixed, first filed an application in the abovementioned Writ Petition, being IA No. 19570/2012, detailing the subsequent developments. However, the said application was disposed of vide Order dated 21.10.2013, holding that the petitioner must avail of other remedies. A review petition filed by the petitioner against the said Order was withdrawn by the petitioner on 26.09.2014, reserving leave to file a fresh Writ Petition. The petitioner has thereafter filed the present petition claiming the above-mentioned relief.

10. During the pendency of the present petition the 'Norms Committee-IV (Chemical and Allied Products)' (hereinafter referred to as 'Norms Committee') submitted its report under cover of a letter dated 08.05.2015, recommending as under:-

4-Decision of the Norms Committee

1-Norms committee carefully considered the case, studied report of IBM, Central Excise and documents provided by M/s Marble Arts. Committee discussed the firm's claim that rough slabs or tiles of 20 mm thickness have been used as the raw material for making finished products with the following thicknesses:

i) 17mm thickness for item no. 7&8
ii) 10mm thickness for item no. 1,2,3,5 & 6

iii) 12mm thickness for item no.4 and
II-Committee took the following decisions:

- *For item no. 7 &8, Norms committee fixed the wastage @ 17%.*
- *For item no. 1-6, Norms committee decided not to fix any wastage as it would amount to Wasting national resources. The decision was taken on account of the following reasons*

III- The production process that M/s Marble Arts claimed to use is not a standard practice of the Marble industry as it is not economically viable. Converting a 20 mm thickness slabs into a product with 10/12 mm thickness product wastes almost half of the raw material and consumes large, amount of energy. On account of this, the process is not a standard industry practice and if the production is undertaken, it will not be commercially/economically viable. Experts from Indian Bureau of Mines, Department of Industrial Policy and Promotion and Industry body All India Granite and stone Association confirmed this.
IV-While M/s Marble Art has the freedom to carry out production activities for items of their choice, Norms Committee does not want to support activities which are not commercially viable or where large amount of wastage is generated. Extending duty free import benefits to such cases would be wasting national resources.
V. While the Norms Committee took note of the investigation details provided by the Central Excise (Para 3C above), it has not based its decision on the observations of the Central Excise."

Petitioner's submissions

11. The learned counsel for the petitioner submits that the above decision of the Norms Committee is totally flawed inasmuch as it has wrongly presumed that the petitioner would first convert a 20mm

thickness slab into a product of 10/12mm thickness and thereafter into the downstream products. He submits that, without prejudice to the above, the Norms Committee cannot refuse to fix the Wastage Norms only on the grounds that the products intended to be manufactured may not be commercially viable.

Respondent's submissions

12. On the other hand, the learned counsel for the respondents submits that the EOU Scheme was introduced in the year 1980. Under the said Scheme, inputs are allowed to be procured or imported without payment of duty, subject to the condition that such inputs are used predominantly for the production of goods to be exported without payment of duty, with allowed clearance in the DTA by payment of the applicable duties. This has necessitated the Government to closely monitor the consumption of inputs in the production process of the EOU units. With this intention, the Government, through the Ministry of Commerce, has prescribed a detailed guideline for determining the ratio of inputs to its outputs and also on the other side, the Ministry of Finance takes care of the revenue aspect of the Government and also insists on the compliance of the said input and output norms.

13. He submits that the Norms Committee consisting of members from various departments, considered the application of the petitioner for fixation of the wastage norms for the following eight items:-

S.NO.	PRODUCT
1.	Mosaic
2.	Borders
3.	Profile

4.	Tiles
5.	Tumbled/Antique Marble Tiles
6.	Polished/Honed Marble Tiles
7.	Polished/Honed Marble Tiles
8.	Polished/Honed Marble Tiles

14. Based on the investigation conducted by the Excise Department, and considering the case of the petitioner, the Norms Committee issued the above mentioned recommendations.

15. He further reiterates that the production process claimed by the petitioner is not a standard practice of the marble industry as it is not economically viable. Converting 20mm thickness slabs into a product with 10/12mm thickness product wastes almost half of the raw material and consumes a large amount of energy. The process is not a standard industry practice and if the production is undertaken, it will not be commercially/economically viable. He submits that this was confirmed by the Indian Bureau of Mines, Department of Industrial Policy and Promotion, as also by the Industry Body, that is, the All India Granite and Stone Association. He submits that, therefore, it was decided that while the petitioner has the freedom to carry out production activities for items of their choice, the Norms Committee does not want to support activities which are not commercially viable or where a large amount of wastage is generated. He submits that extending duty free import benefits to such cases would be wasting national resources. He submits that, therefore, the present petition is liable to be dismissed.

Analysis and Findings

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

17. The importance of fixation of the Wastage Norms has been highlighted by the respondents themselves when they state that the nature of the EOU Scheme necessitates the Government to closely monitor the consumption of input and the production process in the EOU Unit, and with this intent, the detailed guideline for determining the ratio of input to its output has been provided.

18. Para 9.30(b) of the Handbook of Procedure also mandates that the Wastage Norms in respect of the items not covered by the Appendix 41 are to be fixed by the BOA. Para 6.8(e) of the Chapter 6 of the FTP 2004-2009 also states that with respect to the items not covered by the norms notified by the Duty Exemption Scheme, Development Commissioner may fix *ad-hoc* norms, which would be valid for a period of six months, and within this period, final norms shall be fixed by the BOA.

19. From the above, it is apparent that the function and the duty of the BOA is to fix the Wastage Norms. The BOA cannot refuse to exercise this jurisdiction and this power merely because it is of the opinion that the product for which such norms are requested to be determined, would not be commercially viable, or due to the high quantity of wastage, such products should not be allowed in the EOU. The power vested in the BOA is coupled with a duty inasmuch as it is required for giving full effect of EOU Scheme, and without such norms, the Scheme itself would be difficult to implement. It is,

therefore, mandatory for the BOA to fix the Wastage Norms, when requested or applied for.

20. In the present case, the Norms Committee refused to determine the Wastage Norms on the ground that the products sought to be manufactured by the petitioner would result in high quantity of wastage of raw materials. The Norms Committee further opined that such activities would not be commercially viable and, in any case, should not be allowed in the EOU.

21. As far as the commercial viability is concerned, it is for the petitioner to decide whether the production of the products in question is commercially viable to it or not. The commercial viability of the products cannot be a ground for the BOA to refuse to exercise the jurisdiction and duty vested in it.

22. Similarly, whether such products can be and should be allowed under EOU Scheme, is a matter of policy, which is to be determined by the concerned Ministry. The learned counsel for the respondents has not been able to show any power vested with the Norms Committee to prohibit the production of the any particular product by an EOU under the EOU Scheme. In absence of any such power, the reason given by the Norms Committee would be *ultra-vires* the Scheme and cannot be sustained.

23. In addition to the above, this Court, by its order dated 30.07.2012, passed in WP(C) 464/2011, had directed the Norms Committee to fix the norms without being impeded with the assertion of the Excise Department. A reading of the Impugned Report of the Norms Committee, however, indicates that even this direction has

been flouted, and the Norms Committee has passed its decision based on the input received from the Excise Department. For the said infractions as well, the Impugned Report of the Norms Committee is liable to be set aside.

Conclusion and Directions:

24. In view of the above, the Impugned Report of the Norms Committee dated 08.05.2015 is set aside.

25. The Committee shall re-consider and fix the Wastage Norms for the products applied for by the petitioner, in accordance with the law and in accordance with the direction issued by this Court vide its order dated 30.07.2012 passed in WP(C) 464/2011. Such exercise to be completed within a period of eight weeks from the receipt of the copy of this judgment.

26. This judgment shall not, however, in any manner impinge upon the power of the Government of India to, in accordance with law, prohibit the manufacture of any of the items for which the petitioner has applied for fixation of the Wastage Norms. In case any such decision is taken by the Government of India, the petitioner shall have a right to challenge the same in accordance with law.

27. This petition and all the pending applications are disposed of.

28. There shall be no order as to costs.

NAVIN CHAWLA, J

DECEMBER 13, 2023/*rv*/*RP/am*

Click here to check corrigendum, if any