IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.04.2024

CORAM

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

W.P.No.9575 of 2021

M/s. MAK Controls and Systems (P) Ltd.,
Represented by its Managing Director,
Saravanan Manickam,
7/41-B, Avinasi Road, Civil Aerodrome Post,
Coimbatore – 641014. ... Petitioner

Vs

1. Union of India,
Ministry of commerce and Industry,
Department of Commerce,
Udyog Bhavan,
New Delhi – 110 001.

2. Policy Relaxation Committee,
O/o Director General of Foreign Trade,
Department of Commerce,
Udyog Bhavan, New Delhi – 110 001.

3. The Joint Director General of Foreign Trade,
Trichy Road,
Coimbatore,
Tamil Nadu – 641 018. ... Respondents

Writ Petition is filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, to call for the records pertaining to the impugned decision of the second respondent in Case No.03 of the minutes of the PRC Meeting No.23/AM21 dated 18.02.2021 and quash the same and further direct the third respondent to consider the claims of the petitioner made under Focus Product Scheme and Merchandise Export from India Scheme afresh.

For Petitioner	:	Dr. M.R.Venkatesh for Mr. Hari Radhakrishnan
For Respondents	:	Mr. T.V.Krishnamachari, Senior Panel Counsel

O R D E R

The Writ Petition has been filed challenging the order passed by the second respondent in Case No.03 of the Minutes of the PRC Meeting No.23/AM21 dated 18.02.2021, thereby, the request made by the petitioner was rejected.

2. The Petitioner/Company was engaged in the manufacture and sale of power supply systems of Ground Radar and Digital Ground Support

Equipment. The petitioner is also offering its products and services to various Civil, Military and Aviation Industries. The petitioner has indigenized most of the systems previously being imported by the agencies, such as Defence Research and Development Organization (DRDO) and various defence Navartana Public Sector Enterprises. Till 31.03.2015, the Government of India, Ministry of Commerce, was operating inter-alia an Export Incentive Scheme, called as Focus Product Scheme (hereinafter referred to as 'the FPS Scheme' for short). The objective of the said scheme is laid down in Para 3.15.1 of the Foreign Trade Police 2009-14. As the objective of the FPS is to promote export of products having high export intensity/employment potential, so as to offset infrastructural inefficiencies and other associated costs are involved in marketing of these products. From 01.04.2015, the Government of India introduced a new export incentive scheme called Merchandise Export from India Scheme (hereinafter referred to as 'the MEIS Scheme' for short) replacing all other Export incentive schemes including the FPS Scheme and its objective mentioned in Para 3.00 under the chapter is to provide rewards to exporters to offset infrastructural insufficiencies and associated costs. Para 3.03 of the

Foreign Trade Policy 2015-2020 (Vol-I) describes the objective of the MEIS Scheme which is to promote the manufacture and export of notified goods/products.

3. While that being so, the petitioner received a contract from M/s.ELTA Systems Limited (IAI) Israel (hereinafter referred to as 'the buyer' for short) under the Indian Offset Partner arrangement for supply of few components, which would be incorporated in the defence equipments supplied by the said buyer to the defence establishments in India. The agreement with the said buyer, has 5 batches of deliverables and out of 5 batches, the petitioner has already shipped 2 batches to Israel directly and availed the erstwhile the FPS Scheme incentive. In the month of March 2015, the buyer indicated their preference to have the delivery of the supplies from the petitioner/Company at a Free Trade Warehousing Unit located at Sri City, Andhra Pradesh. In terms of Rule 18(5) of the Special Economic Zone Rules, 2006, the said unites are permitted to hold goods on account of foreign suppliers. The petitioner consigned the remaining three batches of shipment and completed the supplies. The said supplies were

made as usual against export document, such as Bills of Export, Export Invoices and also made the payment in freely convertible foreign currency, which were also duly received by the petitioner. The product supplies were also notified products and eligible for the FPS and MEIS Scheme incentives. Therefore, the petitioner applied for the same by six applications claiming the FPS and MEIS Scheme incentives.

4. However, the claim under the FPS Scheme were returned by letters dated 03.11.2015 and 04.11.2015. Insofar as the claims for MEIS Schemes incentive is concerned, the third respondent rejected the same on the ground that as per PN No.30, by communication dated 12.04.2016. Aggrieved by the same, the petitioner filed a Review before the Policy Relaxation Committee, viz., the second respondent. The second respondent conducted meeting and by communication dated 18.02.2021, claim made by the petitioner was rejected.

5. The respondents have filed counter-affidavit and specifically contended that the petitioner, without exhausting the Review before the

Policy Relaxation Committee, directly approached this Court under Article 226 of the Constitution of India and as the Writ Petition is not maintainable and after rejection of the incentive claims under the FPS and MEIS by the second respondent, the petitioner approached by way of Review as contemplated under Section 16 of the Foreign Trade (Development and Regulation) Act, 1992 before the second respondent. The same was rejected by the order impugned in this Writ Petition dated 18.02.2021.

6. Heard the learned counsel for the petitioner and the learned Senior Panel Counsel appearing for the respondents and perused the materials available on record.

7. The very same issue has already been dealt with by this Court in the case of ***Jindal Drugs Pvt. Ltd., -vs- Union of India*** reported in 2022 (379) E.L.T.59 (Mad) and the relevant portion is extracted hereunder:-

> *"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 pargraph 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."

8. Further, a Division Bench of the High Court of Bombay in the case of ***Ashwini Ashish Dighe -vs- Union of India*** reported in (2019 (368) E.L.T.610 (Bom.)] and the relevant portion is extracted hereunder:-

"10. It is in the above circumstances, that we set aside the communication dated 18 July, 2019 and direct the respondent no. 3 - Director General of Foreign Trade to examine this issue in the context of the petitioner's claim. This clarification with regard to paragraph 3.06 of the FTP 2015-20 would bind all Authorities under the Foreign Trade Development and Regulation Act so far as the interpretation put on paragraph 3.06 of the FTP by the Director General of Foreign Trade - respondent no. 3 is concerned. In the above circumstances, the impugned communication dated 18 July, 2019 is set aside. The petitioner to make a fresh representation about its claim for the benefit of paragraph 3.06 of the FTP to the respondent no. 3 - the Director General of Foreign Trade

who would consider the same and pass appropriate order thereon. This it would do as expeditiously as possible and preferably within 12 weeks from the date this order is uploaded on the High Court website.

11. The four impugned orders dated 25 October, 2017 are also set aside. It is only after the Director General of Foreign Trade rules on the appropriate interpretation of paragraph 3.06 of the FPT, the Joint Director General of Foreign Trade would take up the petitioner's application and dispose it of in accordance with law as expeditiously as possible and preferably with in a period of six weeks from the communication of the Director General of Foreign Trade on the above application.

12. Needless to state that the respondent no. 4 - the Joint Director General of Foreign Trade, before he passes any order adverse to the petitioner's claim for MEIS scheme *consequent to the interpretation of paragraph 3.06 of the FTP, would give a personal hearing to the petitioner before deciding the issue."*

9. The above decisions were also followed by the High Court of Delhi in the case of ***Horizon Aerospace (India) Pvt Ltd. -vs- Union of India*** (Order dated 22.02.2023 in W.P.(C).No.2575 of 2022 and the relevant portion is extracted hereunder:-

> *"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 31 st 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."

10. In view of the above decisions, the impugned order dated 18.02.2021 passed by the second respondent is hereby quashed. The third respondent is directed to allow the claim made by the petitioner under the FPS and MEIS Scheme and pass appropriate orders within a period of four weeks from the date of receipt of a copy of this order.

11. In the result, this Writ Petition is allowed. No costs.

04.04.2024

Index:Yes/No
Neutral Citation/Yes/No
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To

1. The Union of India,
   Ministry of commerce and Industry,
   Department of Commerce,
   Udyog Bhavan,
   New Delhi – 110 001.

2. The Policy Relaxation Committee,
   O/o Director General of Foreign Trade,
   Department of Commerce,
   Udyog Bhavan, New Delhi – 110 001.

3. The Joint Director General of Foreign Trade,
   Trichy Road,
   Coimbatore,
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G.K.ILANTHIRAIYAN, J.

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