(2008) 02 DEL CK 0065

In the Delhi High Court

Case No : Writ Petition (Civil) No. 14980 of 2006

Dewas Soya Limited APPELLANT

Vs

Union of India (UOI) and Others RESPONDENT

Date of Decision : 04-02-2008

Acts Referred:

Citation : (2009) 235 ELT 821

Hon'ble Judges : Gita Mittal, J

Bench : Single Bench

Advocate : M.P. Devnath, for the Appellant; Rajeev Saxena, for the Respondent

Final Decision : Allowed

Judgement

Gita Mittal, J.—This writ petition has been filed by M/s Dewas Soya Limited petitioner herein seeking a mandamus to the respondents to implement the decision dated 14th February, 2006 followed by an office memorandum dated 27th February, 2006 issued by the Grievance Redressal Committee of the Ministry of Commerce and for consequential benefits. The petitioner has stated that it is a manufacturer- exporter of Soya Bean Extraction Meal and has been recognised as a status holder by the office of the Director General of Foreign Trade ? respondent No. 2 herein. During the financial year 2003-2004 the petitioner had exported soya bean extraction meal valued at Rs. 48,91,58,475/-. In the preceding financial year 2002-2003 the petitioner had exported the said item for a value of Rs. 8,86,17,620/- thus, it is claimed the petitioner has effected an incremental export growth of 486.45% in 2003-2004 over 2002-2003.

2. The petitioner places reliance on the Export and Import Policy (2002- 2007) as on 1st April, 2003 notified by the Ministry of Commerce and Industry in exercise of powers conferred by Section 5 of the Foreign Trade (Development and Regulation) Act, 1992 whereby the foreign trade policy has been spelt out. This policy is notified by the Government in recognition of the fact that foreign trade

is not a thing in itself but a means to economic growth and national development. The primary purpose is not merely earning of foreign exchange but also the stimulation of greater economic activity.

3. In terms of para 3.7.2.1 (f) of the Export and Import Policy 2002-2007, a status holder was eligible for a Duty Free Credit Entitlement (''DFCE'', for short) benefit if the status holder had an incremental growth of more than 25% in the FOB value of exports, subject to a minimum export turnover of Rs. 25 crores.

The DFCE was prescribed to be equivalent to 10% of the incremental growth in exports. It was also prescribed that the DFCE entitlement can be used for duty free import of capital goods, the office equipments and inputs for the petitioner''s own factory or the factory of the associate/supporting manufacturer/job of worker. As per the policy, such DFCE certificate and/or the goods imported therein shall not be transferrable.

4. On a claim that the petitioner satisfied all the requirements of para 3.7.2.1 (f), the petitioner made an application on the 22nd July, 2005 to the Joint Director General of Foreign Trade, Mumbai as prescribed under appendix 17D and submitted all documents required in the check list. The petitioner claimed a DFCE entitlement of Rs. 3,92,02,950/-. All additional documents and clarifications as sought by the respondent by the letters dated 11th August and 30th September, 2005 are stated to have been furnished.

5. By an order passed on 2nd No. vember, 2005, the Joint Director of Foreign Trade, Mumbai rejected the application of the petitioner.

6. It is pointed out by the petitioner that for the purposes of redressal of grievances of exporters, the respondent No. 1 has provided a Grievance Redressal Mechanism in the statutory policy. The same has been put in place by government resolution and is contained in clause 2.4.9.2 of the notified policy. As per the Foreign Trade Policy and Handbook of Procedures, clause 2.49.2 thereof prescribed thus:

2.49.2 Grievance Redressal Mechanism In order to facilitate speedy redressal of grievances of trade and industry, a new grievance redressal mechanism has been put in place by a Government Resolution.

The government is committed to resolving all outstanding problems and disputes pertaining to the past policy periods through the Grievance Redressal Committee set up on 27.10.2004, for condoning delays, regularising breaches by exporters in bona fide cases, resolving disputes over entitlements, granting extensions for utilisation of licenses etc.

7. So far as the constitution of the Standing Grievance Committee was concerned the same is prescribed under clause 9.9 of the policy which reads thus s:

9.9 Standing Grievance Committee

The detail of the Grievance Redressal Mechanism is given in para 2.49 of the policy.

In order to facilitate speedy redressal of genuine grievances of trade and industry pertaining to the Policy and Procedure, Grievance Committees have been constituted.

These Grievance Committees are chaired by (i) the Director General of Foreign Trade at the Headquarters and (ii) head(s) of the concerned Regional Licensing Authority (s) in the respective licensing offices. Grievance Committee will include representatives of the Federation of Indian Export Organisations (FIEO), Export Promotion Councils/Commodity Boards, Development Authorities, and Government Departments/technical authorities as their members.

8. Aggrieved by the decision dated 2nd No. vember, 2005 of the Joint Director General Foreign Trade, the petitioner made an application dated 30th No. vember, 2005 before the Grievance Redressal Committee which granted a personal hearing to the petitioner on the 26th December, 2005.

9. On a consideration of the matter, the Grievance Redressal Committee accepted the contentions of the petitioner and held the petitioner entitled to the DFCE benefit. The decision of the Grievance Redressal committee was communicated to the petitioner by an office memorandum dated 14th February, 2006 of the Ministry of Commerce and Industry. This communication records that the decision of the Grievance Redressal Committee was duly approved as per instructions contained in the DGFT OM No. 01/60/162/44/AM05/EFGC(Gr.Cell) dated 6th October, 2005 and reads as under:

The Committee gave patient hearing to the petitioner and noted that the claim of the petitioner for Duty Free Credit Entitlement (DFCE) was rejected on the ground that all shipments except two of export of soya been extraction meals against advance licenses were against free shipping bills. The Committee further noted the contention of the petitioner that the requirement of the law would be met as in 13 shipping bills which pertain to advance license. It was clearly mentioned that goods were being exported against advance license and in the remaining 24 shipping bills no export incentive under custom laws was claimed but all the shipping bills were assessed by the officer of the custom as the export product namely soya been extraction meals attracted cess under the Agriculture and Processed Food Products Export Cess Act 1985 and hence DFCE was admissible even against the exports against which no export incentive was claimed by the exporter in the shipping bills. The petitioner also stated that he was a manufacturer exporter and the entire exports were manufactured at his factory. The committee appreciated these contentions and was of the view that DFCE claim of the petitioner may be admitted. However as it involved a relaxation of policy, approval of competent authority would be taken before orders are issued.

2. Accordingly it is requested that the decision of the Committee may kindly be implemented immediately and compliance report furnished to this Cell.

The respondent No. 1 had thus required that the decision of the Committee be implemented and compliance report be furnished to the Grievance Redressal Cell.

10. This communication was followed by another communication dated 27th February, 2006 issued again on behalf of the Ministry of Commerce and Industry by its Deputy Secretary and was to the following effect:

The undersigned is directed to refer to the OM of even No. , dated 14.02.2006 on the above mentioned subject and to say that the last sentence of the decision. However as it involved a relaxation of policy, approval of Competent Authority would be taken before orders are issued, stands deleted as approval of the Hon''ble Commerce and Industry Minister has already been obtained before issuing orders.

Accordingly, it is requested that the decision of the Committee may kindly be implemented immediately and compliance report furnished to this Cell.

Copies of these decisions were endorsed to the respondent nos. 2 and 3 as well.

11. Inasmuch as the respondent failed to implement the decisions taken informed to the petitioner by the communication dated 14th February, 2006 and 27th February, 2006 and the failure to issue the DFCE certification, the petitioner has filed the present writ petition assailing the non-action of the respondents on grounds of arbitrariness and illegality.

12. The writ petition has been opposed by Mr. Rajeev Saxena, learned Counsel appearing for the respondent on the ground that only the Director General Foreign Trade was the competent authority to take a decision in the matter and not the Grievance Redressal Committee. It has further been urged that the subject matter of the present writ petition is pending consideration before the Supreme Court in Civil Appeal No. 1589/2006 in the case entitled Union of India v. Adani Exports Limited wherein the court has stayed the orders of the High Court of Gujarat which are dated 6th March, 2006. It has further been urged that the Grievance Redressal Committee had power only to consider claims which had been rejected on procedural grounds as limitation etc and not the issues which had been raised by the petitioner.

13. I have heard learned Counsel for the parties. The Foreign Trade Policy which was notified by the respondent No. 1, was in exercise of statutory power and intended in the larger interest of the nation as well. In order to adjudicate upon the objections raised by the respondents it becomes necessary to consider the relevant provisions of the policy so far as the creation and constitution of the Grievance Redressal Committee is concerned. The same are prescribed under clause 2.4.9.2 and 9.9.

14. As per the scheme of the notified policy, the Director General of Foreign Trade has a commitment to function as a facilitator of exports and imports. Clause 2.4.9.2 wherein the Grievance Redressal Mechanism has been provided and clause 9.9 wherein the constitution of the standing grievance committee is

provided reads thus:

9.9 Standing Grievance Committee The detail of the Grievance Redressal Mechanism is given in para 2.49 of the policy.

In order to facilitate speedy redressal of genuine grievances of trade and industry pertaining to the Policy and Procedure, Grievance Committees have been constituted.

These Grievance Committees are chaired by (i) the Director General of Foreign Trade at the Headquarters and (ii) head(s) of the concerned Regional Licensing Authority (s) in the respective licensing offices. Grievance Committee will include representatives of the Federation of Indian Export Organisations (FIEO), Export Promotion Councils/Commodity Boards, Development Authorities, and Government Departments/technical authorities as their members.

15. Even as per the foreign trade policy relied upon by the respondents, ''the competent authority'' prescribed under clause 9.13 means an authority competent to exercise in power or to discharge any duty or function under the foreign trade policy and handbook of procedures or the rules and orders made therein or under this policy.

16. The export import policy is in national interest. Section 5 of the Foreign Trade Development and Regulation Act, 1992 reads thus:

5. Export and import policy ? The Central Government may, from time to time formulate and announce, by notification in the Official Gazette, the export and import policy and may also, in the like manner, amend that policy.

As per the counter affidavit in exercise of such statutory power, the Central Government frames the Export Import Policy and has notified the same for the period 2002-2007 which came into force with effect from 1st April, 2002 and is to remain in force up to 31st March, 2007 and would be co-terminus with the Tenth Five Year Plan (2002-2007). Thus, so far as the instant case is concerned, the policy as amended up to 31st March, 2003 was in operation.

17. The respondents have placed reliance on regulation 2.3 under chapter II of the General Provisions regarding imports and exports as contained in the Exim Policy, 2002-2007 to urge that any question or doubt arising with regard to a license/certificate/permission issued in accordance with the policy or touching upon the scope and content of such documents was required to be referred to the Director General of Foreign Trade whose decision thereon shall be final and binding.

18. It is noteworthy that the petitioner has not raised any question with regard to the license or certificate or permission issued to it but its claim and grievance relates to its claim to entitlement to the duty free credit entitlement based on exports effected in terms of a license issued to it. The petitioner has claimed the benefit which has accrued pursuant to acts done by it based on the license

without raising any question relating to the license issued to it.

19. Furthermore, I find that the office of the Director General Foreign Trade had finally passed an order dated 2nd No. vember, 2005 rejecting the claim of the petitioner. Such order was passed by the Joint Director General, Foreign Trade at Mumbai.

20. The Grievance Redressal Committee has been appointed by the respondent No. 1 to resolve all outstanding problems and disputes inter alias disputes over entitlements. The dispute relating to the duty free entitlement of the petitioner would thus be covered within the scope of the reference and the jurisdiction which was to be exercised by the Grievance Redressal Committee.

21. So far as the jurisdiction of this Committee was concerned, I find that the Grievance Redressal Committee is chaired by the Director General of Foreign Trade and includes heads of all concerned regional licensing authorities. It also includes representatives from all official and technical authorities. The Director General of Foreign Trade who is admittedly empowered to take a decision in this matter, chairs such committee. Therefore the decision taken on 14th February, 2006 by the Grievance Redressal Committee was chaired by the Director General of Foreign Trade and certainly addresses even the objections raised by the respondents to the effect that only the Director General, Foreign Trade was authorised and competent to take a decision in the matter. In this view of the matter, the objections taken by the respondent lose all force.

22. So far as the proceedings pending before the Apex Court are concerned, the petitioner has explained that the challenge before the High Court of Gujarat was to the validity of the retrospective effect of an amendment to the policy effected by a notification dated 28th January, 2004 It is urged that no such issue has been raised before this Court. The petitioner has dealt at length at the proceedings which were pending before the Gujarat High Court and the decision rendered therein which, according to the petitioner, has been assailed before the Apex Court to point out that none of the issues which have been raised before the Apex Court arise in the instant case. No. thing to the contrary has been placed or urged before this Court.

23. In any case it is an admitted position that so far as the petitioner is concerned, there is no dispute pending before the Apex Court and there is no stay of the present proceedings.

24. It now becomes necessary to examine the only ground which has been given by the respondent for non-implementation of the decision taken on 14th February, 2006 and the further order passed on 27th February, 2006. The respondents have stated that despite the approval of the highest authority which would be the concerned minister in the Ministry of Commerce and Industry, an office memorandum dated 20th March, 2006 was issued by the Director General of Foreign Trade that all decisions of the Grievance Redressal Committee which effected adversely the government stand in the court of law are to be kept in

abeyance.

25. It is an admitted position that the decision of the Grievance Redressal Committee or that of the Government on 27th February, 2006 has not been varied, modified or reviewed in any manner. The same has also not been assailed or challenged by the respondents by any proceedings before any court. The respondents have not given any details or particulars of either the proceedings in the court of law or the government stand in respect thereof. There is nothing to indicate as to how the decision of the Grievance Redressal Committee effects any government stand.

26. Furthermore it certainly cannot stand any test of law, reason or fairness that a valid and binding decision taken by a duty authorised and competent authority created by the respondents, which also stands approved at the highest level, can be kept in abeyance merely because the same affects adversely a government stand in any proceeding. The petitioner has claimed rights and benefit under a policy and a considered decision has been taken not by any individual, but by a Committee consisting of the highest authorities. The Director General of Foreign Trade was chairing the very committee which has taken the decision.

27. So far as the issuance of the DFCE certification in the policy is concerned, the same is a result of careful consideration of the matter and to achieve the multifold objects of economic policy. A decision to issue such certification to the petitioner cannot be denied so long as the policy subsists and the petitioner remains eligible and entitled to the same there under. There is no submission to this effect.

Consequently the action of the respondents to keep such decision in abeyance has to be held to be unjustified, unreasonable and unfair. The respondents have to exercise powers conferred upon them in terms of a policy notified in exercise of statutory power.

28. Learned Counsel for the petitioner has placed reliance on a pronouncement of the Apex court reported at Santoshi Tel Utpadak Kendra Vs. Deputy Commissioner of Sales Tax and another, to urge that where an authority has been created by exercise of statutory power, the same cannot be divested of its jurisdiction, unless the statute has plainly provided so. It has further been urged that the Joint Director General, Foreign Trade would be subordinate to the authority of Grievance Redressal Committee which has been appointed in exercise of statutory power in the policy.

For all these reasons, this writ petition is allowed. The respondents are consequently directed to implement the decision of the Grievance Redressal Committee dated 14th February, 2006 within a period of eight weeks from today.

