
(2002) 11 MAD CK 0146

In the Madras High Court

Case No : Writ Petition No. 37545 of 2002 with WPMP No. 56354 of 2002

Global Polybag Indus. (P) Ltd.

APPELLANT

Vs

Jt. D.C., Madras Export Processing Zone

RESPONDENT

Date of Decision : 14-11-2002

Acts Referred:

Foreign Trade (Development and Regulation) Act, 1992 — Section 9(4)

Citation : (2003) 151 ELT 512

Hon'ble Judges : E. Padmanabhan, J

Bench : Single Bench

Advocate : C. Natarajan, S.C., instructed by N. Inbarajan and N. Sriprakash, for the Appellant; V.T. Gopalan, Addl. Solicitor General and S. Gajendran, ACGSC, for the Respondent

Final Decision : Allowed

Judgement

E. Padmanabhan, J.—The writ petitioner herein prays for the issue of a writ of certiorari to call for the records relating to the proceedings of the first respondent in No. 19/30/95-EOU-TN-Vol. II, dated 16-8-2002 and quash the same.

2. Heard Mr. C. Natarajan, learned Counsel appearing for M/s. Inbarajan and Mr. N. Sri Prakash for the petitioner, Mr. V.T. Gopalan, learned Additional Solicitor General, appearing for Mr. S. Gajendran, Additional Central Government Standing Counsel for the respondents. With the consent of counsel on either side the writ petition was taken up for final disposal.

3. The petitioner a private limited company claims that it is a 100 % Export Oriented Unit governed by the Export-Import Policy (EXIM Policy) having secured the status in the year 1995. According to the policy, the manufacturing unit should be 100% Export Oriented, the Unit should export goods and services etc. The export oriented unit may import without payment of duty all types of goods including capital goods as defined in the EXIM policy required for its activity. The export oriented unit may procure goods required by it or in connection with its

activity without payment of duty from bonded warehouses in the domestic tariff area set up under the policy and the Unit is permitted to effect Domestic Tariff Area sale of its products up to a percentage of the FOB value of the export. The petitioners have set up the EOU (Export Oriented Unit) for the manufacture of HDPE plastic bags, sheets, tapes and rolls for which the duty free import of raw material is virgin plastic granule. The petitioners have established export performance earning foreign exchange to a considerable extent. The petitioners have earned a total Domestic Tariff Area sales permission to the extent of Rs. 30.87 crores under several orders on the export of the manufactured goods.

4. It is claimed that the petitioners have established the foreign exchange realisation by the production of the Export Invoices, Bank Statement etc. The bank has also certified the earnings of foreign exchange by exports. The export performance is also supported by movement records from the factory of the petitioners to the customs, including Excise Gate Passes and Excise AR-4 Forms. While so, there was an inspection on 12-1-2001 by a group of Enforcement Officers of the Central Excise Department who purported to investigate the matters pertaining to the petitioner EOU.

5. After the inspection a show cause notice was issued by the third respondent on 26-3-2002 running to 130 pages. The petitioners have also collected materials and submitted their explanation or objection, denying the allegations, besides pointing out that there is no violation at all. The allegations being the secured raw materials have been sold and not used in manufacturing thereby questioning the very fact of the export performance and resulting in the total rejection and the condemnation in all official and commercial documents of the Excise Department, Customs as well as the bank documents.

6. The petitioners were granted time to submit their objection till 30-9-2002. It is represented that objections have been filed pending the writ petition. The petitioners are awaiting a hearing and orders of adjudication are likely to be passed at any time.

7. The first respondent served the impugned proceedings dated 16-8-2002 suspending the DTA sales of the petitioners and the permissions granted therefore. Such suspension is stated being issued with the approval of the Development Commissioner. The petitioners moved the respondent. But there has been no response for revoking the order of suspension. All efforts to convince the first respondent to withdraw the suspension failed and hence the petitioners have come before this court.

8. According to the petitioners the order suspending the DTA approved orders of the Development Commissioner issued from time to time is per se arbitrary and illegal and violative of Articles 14 and 19(1)(g) of the Constitution of India, that the first respondent has no jurisdiction or authority to suspend or cancel the approval given based on the export performance of the petitioners by the Development Commissioner by several orders, passed between 11-6-1997 and

26-2-2002. Merely because a show cause notice has been issued it cannot be taken that the petitioners are guilty of violations of the omissions or commissions.

9. It is contended further that the show cause notice itself is for the period commencing from 1-9-1998 to 12-1-2001 while the DTA sales have been authorised for the prior period from 1996-97 to 1997-1998 and therefore it cannot be proceeded against or suspended. The suspension is per se illegal and violative of the policy and liable to be quashed. It is further contended that if the suspension is not quashed the petitioner will be put to serious hardship and loss. The petitioners are effecting DTA sales as per the existing policy and the privilege had been earned and by sale of rejects or waste, no prejudice will be caused to the respondents. There is no provision in the EXIM policy or Handbook by which the impugned order can be passed. Hence the present writ petition.

10. The first respondent filed a counter affidavit. According to the respondent 100% EOU scheme provides for grant of permission for setting up a new undertaking/unit which is valid for three years and the undertaking not being established within three years, a further extension of time for another three years is permissible. The permission would be granted subject to certain conditions stipulated in the Annexures to the permission. In the case of the petitioners such permission for manufacture and Export of HM/ HDPE/LDPE/PP sheets, Tubes and Bags was granted on 8-6-1995 for three years. The petitioners commenced manufacture with effect from 1996. Once the new unit is established, it is governed by the legal undertaking, which letter of undertaking specifically provides that the unit/undertaking would be bound to abide by the policy as well as any direction issued by the Government from time to time. DTA sales under the EXIM policy provides that permission for DTA sale shall be granted only if an EOU achieves the prescribed minimum value Addition/NFEP (Net Foreign Exchange Earning as a percentage of exports) during the relevant period. As per the guidelines an EOU duly certified by Chartered Accountant and Central Excise Authorities, the Development Commissioner will determine the extent of DTA sale admissible and issue authorisation in terms of value. The DTA sale shall be at the rate of 50% of FOB value of exports. The word "exports" has been defined in FTDR Act as goods taken out of India. Therefore, though DTA sales in foreign currency are counted from calculating fulfilment of export obligation the same is not taken account of for fixing the entitlement of DTA sale.

11. The Commissioner of Central Excise by its letter dated 23-7-2002 reported that the plastic granules imported by the company as raw material without payment of customs duty were being removed/diverted unauthorizedly from their private bonded warehouse and sold locally and in order to cover up the diversion, the company inflated the weight and value of the export consignments. It is also reported that the company has shown inflated weight and value in the export documents not only to cover up the diversion but also to show that it has achieved the required export obligation. Since the contents of the letter of the Department of Central Excise was of a serious nature, the office of the

Development Commissioner took the action of suspending DTA sale permission that had already been granted. The DTA sale permission as such had not been cancelled. The petitioners sought for clarification and it was clarified on 25-9-2002 indicating that they can continue to clear waste and rejects.

12. The contention that suspending the DTA approval is arbitrary and illegal is devoid of merits. DTA permission is a facility given to EOUs based on the FOB value of exports and if the FOB value of exports itself is in doubt the question of permitting DTA sale does not arise. The DTA sale permission under Para 9.9(b) of the EXIM policy 1997-2002 entailed only concessional duty, this would have resulted in heavy loss of revenue to Government.

13. According to the second respondent the total customs duty thus evaded by the assessee is Rs. 16,13,10,303 and the Central Excise duty is Rs. 4,65,456/-. In view of the serious nature of allegations the first respondent initiated action suspending the DTA sale permission. But the first respondent has not stopped the imports and exports and normal function of the company, but has only passed order suspending the DTA sale on concessional duty, which is supported by Para 6 of the Legal Undertaking given by the petitioner. DTA sales have been granted only for a periods 1996-97 and 1997-98, the validity of the DTA sale permission would have expired on 31-3-2002 and 31-3-2001 respectively and the same is no longer available. The petitioners are not restrained from doing its normal activities of import and export which is the object of the licence granted as a 100% EOU. Only DTA sales have been suspended and not cancelled. There are absolutely no merits. The writ petition deserves to be dismissed.

14. The points that arise for consideration are :-

(a) Whether DTA sale is part of the licence and before suspending the licence, the procedure prescribed has to be followed?

(b) Whether there could be a suspension of DTA Sales on the facts of the case?

(c) Whether the order of suspension of DTA sales is liable to be quashed as arbitrary and violative of the rules or regulations contained in the EXIM policy?

(d) To what relief, if any?

15. In exercise of powers conferred u/s 5 of the Foreign Trade (Development and Regulation) Act, 1992, the Central Government notified the Export and Import Policy for the period 1997-2002, which came into force with effect from 1st April, 1997 and to remain in force for a period of five years. The Central Government has also reserved its right to amend the policy in exercise of its powers conferred by Section 5 of the Act. Chapter III of the Policy defines various expressions, such as Capital Goods, Consumables, Draw Back, Export obligation, licensing year, manufacture, rules etc., Chapter IV prescribes the general provision regarding exports and imports. Clause 4.6 prescribes the terms and conditions of licence. Clause 4.6 reads thus :-

"4.6 Every licence shall be valid for the period of validity specified in the licence and shall contain such terms and conditions as may be specified by the licensing authority which may include :

- (a) The quantity, description and value of the goods;
- (b) Actual user condition
- (c) Export obligations
- (d) The value addition to be achieved, and
- (e) The minimum export price."

16. Clause 4.12 mandates that every exporter or importer shall comply with the provisions of the Foreign Trade (Development and Regulation) Act, 1992 and the Rules and Orders made thereunder. Chapter V provides for imports on export basis. Chapter VI relates to Export Promotion capital goods scheme. Chapter VII provides the duty exemption scheme. Clause 7.4 of this Chapter prescribes the export obligation. Clause 7.25 provides for duty entitlement pass book. Chapter IX provides for Export Oriented Units, Units in Export Processing Zones, etc., Clause 9.1 prescribes the eligibility. Clause 9.9 provides for DTA sales subject to certain restrictions towards rejects. Clause 9.9(e) enables an Export Oriented Unit to sell finished products which are freely importable under the Policy in the DTA over and above the levels permissible under sub-paragraphs (b) and (c) of this Chapter against payment of full duties, provided they have achieved on an annual basis, the stipulated NFEP and export obligation. Clause 9.15 enumerates the various benefits for EOU/EPZ Units. The same Chapter provides for bonding and debonding in respect of bonded warehouse. Chapter X provides for deemed exports. Chapter XI provides for exports.

17. There is no doubt that in terms of the EXIM policy the petitioners have established a EOU Unit. The Foreign Trade (Development and Regulation) Act, 1992 provides for development and regulation of foreign trade by facilitating imports into, and augmenting the exports from, India and for matters connected therewith or incidental thereto. Section 2(g) defines the expression "licence". Section 2(h) defines the expression "order" and Section 2(i) defines the expression "prescribed" as prescribed by rules made in the Act. u/s 3, the Central Government may make provision for development and regulation of foreign trade. Section 5 enables the Central Government from time to time to formulate and announce Export and Import policy. Section 9 provides for issue, suspension and cancellation of licence which would include licence granted as may be prescribed under the Act. Section 11 deals with contravention of provisions of the Act, Rules, orders and EXIM policy. Section 11(5) provides for confiscation. Section 12 provides for penalty. Thus, it is clear that for violation of the policy there could be an action u/s 11 as well as Section 12 of the Act. For violation of EXIM policy or the licence granted thereunder in favour of a EOU or DTA sales, which is part of the licence conditions, there could be an action u/s 11

or 12. Such a licence also can be suspended or cancelled u/s 9.

18. Section 19 provides for framing of Rules. In exercise of powers conferred by Section 19 of the Foreign Trade (Development and Regulation) Act, 1992, the Central Government has framed the Rules. Rule 2(e) defines the "policy" meaning the export and meaning policy formulated and announced by the Central Government. Rule 4 prescribes the application for grant of licence. Rule 6(2) prescribes that the goods covered by the licence shall not be disposed except in accordance with the provisions of the policy or in the manner specified by the licensing authority in the licence- Rule 9 provides for suspension of licence granted. Rule 10 provides for cancellation of licence. Rule 11 and 12 provides for declaration as to value and quality of the imported goods.

19. According to Mr. C. Natarajan, learned Senior Counsel, the suspension of DTA sale, a privilege conferred on the petitioner, being part of the licence granted under the EXIM Policy read with the Foreign Trade (Development and Regulation) Act, and the Rules framed thereunder, without following the procedure prescribed, there could be no suspension of the licence and without the precondition stipulated by the Rules and compliance thereof, there could be no suspension.

20. Per contra, Mr. V.T. Gopalan, learned Additional Solicitor General contends that what has been suspended is not a licence but the right in respect of DTA sales and it is in terms of the undertaking. The learned Solicitor General contended that it is not a licence, nor it is a part of the licence and therefore the rules do not apply and the communication of suspension which is only an interim suspension is valid and it is not liable to be interfered by this Court under Article 26 of the Constitution.

21. The EXIM policy lays down establishment of EOU Units, import of goods without levy of duty, export of goods and after achieving the export obligation it also enables the EOU to dispose off part of its products in the local market. The said three limbs of the policy or licence form part of the licence. A licence cannot be divided into compartments as it is a bundle of rights which confers the privilege or obligation in respect of EOU under the Export and Import Policy. The policy has been framed by virtue of the statutory powers conferred u/s 5 of the Foreign Trade (Development and Regulation) Act. Therefore, the policy as notified is also impressed with the character of a statutory notification and hence there cannot be any controversy in this respect.

22. As seen from the policy, the EOU is established in terms of the EXIM policy. Under the policy EOU is permitted to import goods free of duty. The EOU has to export, which export is free of various levies or duties or taxes and the EOU is also conferred with the privilege of DTA sales. The licence consists of all the three privileges or obligation and it is a comprehensive one, besides form part of the licence granted to the petitioner. The said licence consists of three facets and it being a comprehensive cannot be compartmentalized for any purpose.

23. A perusal of the licence, the permission granted in favour of the petitioner, which is a 100% EOU, the unit is enabled to effect sale of goods manufactured in DTA Sales as prescribed by the policy and those sales are subject to levy of excise duty. Condition 3 of the licence reads thus :-

"3. The finished products authorised for manufacture under the scheme shall be exempted from payment of excise duties on their export from India subject to the observance of the prescribed procedures. Export duties shall be leviable unless specifically exempted. The sale of goods manufactured in DTA would be permitted as per prescribed policy and excise duties shall be levied as per prescribed rates. The clearance of rejects, waste or scrap material rags, trimmings, etc., shall be governed by the provisions of policy as notified from time to time and clearance by customs authorities in accordance with their notifications."

24. A perusal of the licence would show that all the three facets, viz., Export, Import and DTA sale form the licence. It may be that the EOU may not effect DTA sales, but depending upon the market condition it is open to the EOU to effect DTA Sales or export the entire product manufactured by it. The DTA sale is part of the licence which the EOU earns depending upon its performance in the export obligation and on being satisfied the EOU is granted permission to effect DTA sale as part of licence. Therefore, on a reading of the Act, the Rules and the policy and the licence conditions, this court sustains the contention of Mr. C. Natarajan, learned Senior Counsel that DTA sale is part of the licence and it is a licence by itself and the contention to the contra advanced by the learned Additional Solicitor General cannot be countenanced.

25. The learned Senior Counsel appearing for the petitioner rightly referred to a notification namely the General Exemption Notification No. 55 in support of his interpretation that the DTA sale is a licence in accordance with the provisions as found in sub-paragraphs (a), (b), (c) and (d) of Paragraph 9.9 or of Paragraph 9.20 of the EXIM policy, dated 1st April, 1997. The material portion of the notification reads thus :-

"Exemption to all excisable goods produced in 100% EOU, FTZ, EHTP or STP Units when sold in India. - In exercise of the powers conferred by Sub-section (1) of Section 5A of the Central Excises and Salt Act, 1944 (1 of 1944), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts all excisable goods (hereinafter referred to as the said goods) specified in the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) and produced or manufactured in a hundred per cent export oriented undertaking or a free trade zone or an Electronic Hardware Technology Park (EHTP) unit or a Software Technology Parks (STP) Unit and allowed to be sold in India under and in accordance with the provisions of sub-paragraphs (a), (b), (c) and (d) of paragraph 9.9 or of Paragraph 9.20 of the Export and Import Policy, 1st April, 1997 till 31 March, 2002, from so much of the duty of excise leviable thereon u/s 3 of the said (Central Excise Act) as is in excess of the amount

calculated at the rate of fifty per cent of each of the duties of customs, which would be leviable under the Customs Act, 1962 (52 of 1962) or under any other law for the time being in force, read with any notification for the time being in force in respect of the duty so chargeable on the like goods produced or manufactured outside India if imported into India."

26. Further attention of the court was drawn to the definition of licence as defined in Section 2(g) of the Foreign Trade (Development and Regulation) Act, 1992. The very nature of licence under the Scheme definitely means not only a licence to import or export, but includes a customs clearance permit and any other permission issued like DTA sales or grant under the Act.

27. Section 9 of the Foreign Trade (Development and Regulation) Act, 1992, provides for suspension and cancellation of licence. Sub-section (4) of Section 9 reads thus :-

"(4) The Director General or the officer authorised under Sub-section (2) may, subject to such conditions as may be prescribed, for good and sufficient reasons, to be recorded in writing, suspend or cancel any licence granted under this Act. Provided that no such suspension or cancellation shall be made except after giving the holder of the licence a reasonable opportunity of being heard."

28. When once the court comes to the conclusion that DTA sale is a part of the licence, which privilege the EOU earns by its exports, then it follows that it is part of licence which enables the EOU to effect DTA sales. Being a licence or part of licence or one facet of licence granted under the EXIM policy, which was notified in exercise of powers conferred u/s 5 of the Foreign Trade (Development and Regulation) Act, 1992, the suspension of the licence shall be effected, if at all only in terms of the provisions of the Act and the Rules framed thereunder and not otherwise.

29. Before suspending the licence in terms of proviso to Sub-section (4) of Section 9 it is mandate to give a notice to the holder of the licence, a reasonable opportunity of being heard. Proviso to Sub-section (4) mandatory and it obligates the Director General or Officer authorised to grant a reasonable opportunity of being heard before suspending the licence which licence also takes in or include the DTA sales. That apart, the Director General has to record reasons in writing before suspending the licence. Such suspension could be imposed for good and sufficient reasons as it is a restriction on the licence and that part of DTA sales already earned.

30. In the present case, admittedly, the petitioner has not been given a reasonable opportunity of being heard. Section 9(4) makes no difference between a suspension of a licence as a substantial order of penalty or an interim suspension. u/s 19 of the Foreign Trade (Development and Regulation) Act, 1992, Rules have been framed. Rule 9 provides for suspension of a licence. The licence could be suspended under Sub-rule (1) of Rule 9, if an order of detention has been made under the Conservation of Foreign Exchange and Prevention of

Smuggling Activities Act, 1974, or if such an order of detention has been passed against a partner or a Managing Director of Partnership firm or a Private Limited Company being grantee of a licence, Sub-rule (2) of Rule 9 provides that the Director General or an Authorised Officer may suspend the operation of any licence under the Rules when proceeding for cancellation of such licence has been initiated under Rule 10.

31. In the present case Sub-rule (1) has no application. Sub-rule (2) of Section 9 if at all could be a source of power to suspend. But, Sub-rule (2) of Rule 9 could be invoked provided proceedings for cancellation of such a licence is initiated or being initiated under Rule 10. Rule 10 contemplates cancellation if the licence is obtained by fraud, suppression of facts or misrepresentation or the licensee has committed a breach of any of the conditions of the licence or the licensee has tampered with the licence in any manner or the licensee has contravened any law relating to customs or foreign exchange or the rules and regulations relating thereto.

32. In the present case, assuming for the purpose of arguments that an order of cancellation could be passed for the alleged violation which was detected by the Central Excise Authority, but, till date no proceeding has been initiated to cancel the licence granted under the Rules. Therefore Rule 10 cannot be relied upon.

33. DTA Sales, though it comes under the third facet of the licence, suspension of DTA sales which is nothing but suspension of a privilege conferred under the licence, such suspension should be in conformity with the statutory provision and DTA sales cannot be suspended as a matter of course since it is a privilege which the EOU has earned by its earlier exports. In other words, even suspension of one facet of the licence also attract the same rule and such suspension shall also be only in terms of the said Rules.

34. On a conspectus reading and consideration of the statutory provision, the rules and licence conditions, the order of suspension of the third facet of the licence, namely DTA sales, if at all could have been made under Sub-section (4) of Section 9 and such suspension shall be made after giving a reasonable opportunity. Concedingly, no such reasonable opportunity has been afforded to the petitioner as seen from the very impugned proceedings. Though it is pointed out that the import by the petitioner is not interfered, so also the export, but DTA sales alone has been interfered, this would mean the third facet of licence or privilege conferred under the licence granted to the petitioner, a valuable right accrued in favour of the petitioner, a 100% Export Oriented Unit, is suspended and such suspension not being in conformity with the statutory provisions, is liable to be quashed.

35. In the result, the writ petition is allowed. The impugned proceedings is quashed. However, liberty is given to the respondents to pass fresh orders according to the provisions of the Act and the Rules framed thereunder.

Consequently, connected WPMP is closed. The parties shall bear their respective

costs.