
(2001) 10 BOM CK 0010

In the Bombay High Court

Case No : Writ Petition No. 1669 of 1995

Hanil Era Textiles Ltd. and Another

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 31-10-2001

Acts Referred:

Citation : (2002) 103 ECR 523

Hon'ble Judges : R.M. Lodha, J;Nishita Mhatre, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

R.M. Lodha, J.—The Petitioners though in the Writ Petition have prayed for various reliefs, during course of arguments, Mr. N.G. Thakkar, learned Senior Counsel for the Petitioners, said that Petitioners are only aggrieved by the order dated 24th November 1995 passed by Development Commissioner to the extent while considering the matter of Domestic Tariff Area sale (for short "DTA sale") entitlement for the period from 6th January 1994 to 30th June 1995 the formula provided under Clause 119 of the Export and Import Policy (for short "Exim Policy") providing for value addition which was effective from 1st April 1993 has not been made applicable to the Petitioners.

2. The aforesaid submission arises from the following facts and circumstances:

The Petitioners made an application dated 7th June 1991 to the Department of Development Secretariat for Industrial Approval of Government of India seeking permission under the 100% export oriented scheme for manufacture of Acrylic Yarn and Cotton Acrylic Yarn. The Secretariat for Industrial Approval by letter dated 17th December 1991 granted permission to the first Petitioner under the 100% export oriented scheme thereby extending all the facilities and privileges available under the scheme for the manufacture of Acrylic Yarn and Cotton Acrylic Yarn of annual capacity of 85000 spindles on the terms and conditions mentioned therein, inter alia, (a) that entire 100% production shall be exported

to General Currency Area Countries/Hard Currency Area countries, and (b) a minimum value addition of 37.72% shall be maintained. By letter dated 25th January 1993, the Secretariat for Industrial Approval on the request made by the Petitioners for increase in capacity modified the condition of maintaining minimum value addition by modifying it to 38.22% from 37.72% as was stipulated in the permission granted on 17th December 1991. It appears that the first Respondent by Notifications dated 16th August 1993 modified Exim Policy including modification in the procedure for the revised value addition criteria applicable to that export oriented units at the export process zones. The said modifications were to be effective from 1st April 1993. By modification in paragraph 119, while calculating value component of B, the value of fall indigenous inputs purchased by the export oriented unit was deleted. In other words, under paragraph 119, for arriving at value addition as a percentage, though the formula continued to be $VA = A - B/A \times 100$, where VA is value addition, A is FOB value of exports realised by EOU unit and B is a sum total of CIF value of all imported inputs, the CIF value of all imported capital goods and the value of all payments made in foreign exchange by way of commission, royalty, fees, dividends interest on external borrowings during the first five years period or any other charges. "Inputs" mean raw materials, intermediates, components, consumables, parts and packing materials. It further appears that as per the amended Exim Policy, the Director General of Foreign Trade prescribed the procedure in respect of the operation of revised value addition criteria applicable to export oriented units. In terms thereof, the existing/approved units were required to exercise an option within three months from the date of public notice which was also published on 16th August 1993 either to continue under the old formula or change over with effect from 1993-94 to the revised value addition formula. The export oriented units opting for new value addition formula were required to submit to the Development Commissioner of the concerned Zones their past performance, fresh projections of exports, imports, other foreign exchange outgo and net foreign exchange earnings for the next five years. It was also required of the units opting for computation of value addition in accordance with new formula to execute a new Legal Agreement in the prescribed format after approval to the concerned units to change from old formula to the new formula in respect of value addition. The Petitioners by their letter dated 29th December 1993 addressed to the Deputy Development Commissioner opted for change over to new value addition formula and along with application seeking option for change over, requisite information was provided but the said application seeking option for change over was later on withdrawn by Petitioners. It may be noted here that the Petitioners by their letter dated 20th April 1995 addressed to the Development Commissioner applied for permission to sell 25% of their production in DTA. The said application was in pursuance to the stipulation in paragraph 102 of Chapter IX of Exim Policy. The Development Commissioner by his letter dated 12th May 1995 informed the Petitioners that during the period 1st January 1994 to 31st March 1995 the first Petitioner has achieved the value addition of 28.88% as against the value addition of 54.45%

(purported to be opted by Petitioners) and accordingly the Petitioners were ineligible for DTA sale. Thereafter the Petitioners by their letter dated 9th June 1995 applied to the Development Commissioner for revision in the value addition percentage of the first Petitioner's unit and for fixing it at 30.03% in view of the revised projections and the changed conditions stated in the said letter. The Development Commissioner by letter dated 22nd June 1995 approved the revised proposal of the Petitioners for period from 1995-96 to 1999-2000 whereby value addition was approved at 30.03% and it was mentioned that the letter of permission dated 17th December 1991 may be deemed to have been amended to that extent. It may be noted here that thereafter the Petitioners withdrew their option letter dated 29th December 1993. The Petitioners then by their letter dated 8th July 1995 sought permission from second Respondent for DTA sale entitlement as on 31st March 1995. The Development Commissioner was informed by the Petitioners that during 1st January 1994 to 31st March 1995 the Petitioners' unit had achieved value addition at 28.88% which was more than 90% of the revised value addition approved by the Development Commissioner. However, the Development Commissioner by letter dated 17th July 1995 informed the Petitioners that as the value addition achieved by the Petitioners' unit was below the industrial norms of 30%, it was not possible to agree to the Petitioners' proposal, and Petitioners cannot be permitted for DTA sale from 1st January 1994 to 31st March 1995. It appears that the Petitioners thereafter by their letter dated 27th July 1995 applied to the Development Commissioner for permission to sell 25% of production in DTA. Along with application the Petitioners submitted various documents including statement of exports from 1st January 1994 to 30th June 1995. The Development Commissioner by letter dated 1st August 1995 asked the Petitioners to complete various formalities as stated in their letter and also to exercise their option for submitting DTA claim on quarterly, half-yearly or yearly basis as per the guidelines given in the Handbook of Procedures. The Petitioners in response thereto submitted the requisite information to the Development Commissioner and also exercised their option for submitting DTA claim on quarterly basis in future. The Development Commissioner by letter dated 11th August 1995 asked the Petitioners to adjust the balance quantity of advance DTA sale at an early date. Second Respondent in the communication dated 11th August 1995 brought to the notice of the Petitioners that value addition for the period 1st January 1994 to 31st March 1995 was only 10.88% against 54.45% and, therefore, the Petitioners were not entitled for DTA sale against their export for the period 1st January 1994 to 31st March 1995 but for the period from 1st April 1995 to 30th June 1995 the value addition was 81.40% against 30.03% and, therefore, Petitioners were informed that they were entitled for DTA sale only for the period 1st April 1995 to 30th June 1995. By the letter dated 14th August 1995, the Petitioners, inter alia, contested the second Respondent's determination of value addition up to March 1995 and then upto June 1995 as according to the Petitioners the same was not in conformity with the Exim Policy. The second Respondent by its order dated 18th August 1995 rejected the Petitioners'

application. The second Respondent amongst others held that the first Petitioner was governed by value addition at 54.45% {under new formula from the date of commencement of production i.e. 6th January 1994 to 31st March 1995) and that it would be governed by value addition at 30.03% from 1st April 1995 to 31st March 2000. The Petitioners thereafter addressed a letter dated 21st August 1995 to the Joint Secretary of the first Respondent against the order of second Respondent and then the present Writ Petition was filed challenging the order dated 18th August 1995 passed by the Development Commissioner. By interim order dated 13th October 1995, this Court directed Development Commissioner to re-scrutinize the facts and figures and pass a fresh order on application of the Petitioners for permission for DTA sale for the period from 1st January 1994 to 31st March 1995 within time granted by this Court. Pursuant thereto, the Development Commissioner passed the order on 24th November 1995 which has been challenged by Petitioners by seeking amendment in the Writ Petition, but as already noted above, the learned Senior Counsel appearing for Petitioners has challenged the said order dated 24th November 1995 only to the extent the new formula of value addition provided in paragraph 119 effective from 1st April 1993 has not been applied to the Petitioners.

3. The Import-Export Policy for the period from 1990-1993 was substituted by Export and Import Policy effective from 1st April 1992 to 31st March 1997. As the contention raised before us is only with reference to paragraph 119 of the said Policy, we do not deem it fit to refer to various other paragraphs of the said Policy. Paragraph 119 with regard to value addition of the said Policy reads thus:

Value addition

119. "Value Addition" for the purpose of this chapter shall be expressed as a percentage and shall be calculated according to the following formula:

$VA = A-B/A \times 100$, where

VA is value addition,

A is the FOB value realised by the EOU/EPZ unit; and

B is the sum total of the CIF value of all imported inputs, the value of all payments made in foreign exchange by way of commission, royalty, fees or any other charges, and the value of all indigenous inputs purchased by the EOU/EPZ unit. Inputs mean raw materials, intermediates, components, consumables, parts and packing materials.

4. The aforesaid paragraph 119 of the Exim Policy 1992-97 was revised by Notification dated 16th August 1993 with effect from 1st April 1993. The amended paragraph of value addition effective from 1st April 1993 reads thus:

Value addition

119. Value Addition for the purposes of this chapter shall be expressed as a percentage and shall be calculated for a period of five years from the

commencement of commercial production according to the following formula:

$VA = A - B/A \times 100$, where

VA is value addition,

A is the FOB value of exports realised by the EOU/EPZ unit; and

B is the sum total of the CIF value of all imported inputs, the CIF value of all imported capital goods, and the value of all payments made in foreign exchange by way of commission, royalty, fees, dividends interest on external borrowings during the first five years period or any other charges. "Inputs" mean raw materials, intermediates, components, consumables, parts and packing materials.

Note: 1. If any input is obtained from another EOU/EPZ unit, the value of such input shall be included under B.

2. If any capital goods imported duty free is leased from a domestic leasing company, the CIF value of the capital goods shall be included under B.

3. In the case of projects where the investment in land, building, plant and machinery exceeds Rs. 200 crores, the value of the capital goods shall be amortised over a period of seven years: i.e. in such cases, only 5/7th of the CIF value of the imported capital goods shall be included under B.

5. Though there was no change in so far as it was provided that value addition shall be expressed as a percentage and shall be calculated for a period of five years from the commencement of commercial production according to the formula $VA = A - B/A \times 100$, but in so far as component B is concerned, by the amended provision the value of all indigenous inputs purchased by export oriented unit was deleted. However, in respect of existing/approved units, option was given to such units to exercise their option within three months from the date of public notice as to whether they intend to continue either under the old formula or change over with effect from 1993-94 to the revised value addition formula. Public notice was published on 16th August 1993 itself which reads thus:

COPY OF PUBLIC NOTICE No. 150/(PN)/92-97

Dated 16th August, 1993.

Value additional for the purpose of Chapter-IX of Export & Import Policy, 1992-97.

Attention is invited to paragraph 119 of Chapter IX of the Export & Import Policy, 1992-97 (Revised Edition, March, 1993) in which the revised value additional criteria applicable to EOUs/EPZ units has been laid down. In exercise of the powers conferred under Paragraph 16 of the Export & Import Policy, 1992-97 (Revised Edition, March, 1993), the Director General of Foreign Trade hereby prescribes the following procedures in respect of the operation of the revised value addition criteria applicable to EOU/EPZ units:

(i) the existing/approved units may exercise an option within three months from

the date of this public notice either to continue under the old formula or change over with effect from 1993-94 to the revised value addition formula;

(ii) the EOUs/EPZ units opting for the new value addition formula shall submit to the Development Commissioners of the EPZ concerned, their past performance, fresh projections of exports, imports, other foreign exchange outgo and net foreign exchange earning for the next five years. In case of EOUs, where remaining bonding period is less than 5 years, the projections may be for this duration only.

(iii) The Development Commissioner shall, keeping in mind such projections, recommend revised VA to the concerned Board of Approvals (BOA). After approval by the BOA, amended Letter of Permission/Letter of Intent/Industrial licence, shall be issued by the concerned Development Commissioner in the case of EPZ units and by STA in respect of EOUs; and

(iv) units opting for computation of value addition in accordance with the new formula shall execute a new legal Agreement in the prescribed format.

2. This issues in public interest.

Sd/- (Ajit Kumar) Director General of Foreign Trade

6. It would be, thus, seen that upon revision of value addition criteria by Notification dated 16th August 1993 with effect from 1st April 1993, the existing/ approved units were given right of option as to whether they wanted to continue under the old formula or change over to the revised value addition formula with effect from the year 1993-94. It is not disputed that pursuant thereto the Petitioners by their letter dated 29th December 1993 made an application opting for change over to new value addition formula and along with application also provided certain information as was required. However, subsequently, the Petitioners admittedly withdrew the said application seeking option. Having withdrawn the application of option, obviously the first Petitioner continued to be governed under the old formula prescribed in paragraph 119 from 6th" January 1994 when the commercial production began till 31st March 1995 as with effect from 31st March 1995 by permission granted by letter dated 22nd June 1995 value addition was approved at 30.03%.

7. Facts which have been narrated above would clearly indicate that the Petitioners have been blowing hot and cold in so far as approval of value addition is concerned. It would be seen that initially by the permission dated 17th December 1991 the minimum value addition by the Petitioners was required to be maintained at 37.72%. Thereafter the Petitioners made an application for enhancement of their annual capacity and accordingly approval was granted but subject to the condition that the first Petitioner maintained minimum value addition of 38.22% as against 37.72% as was stipulated in the original letter of permission dated 17th December 1991. After the Notification dated 16th August 1993 came to be issued whereby value addition criteria was modified with effect

from 1st April 1993, the Petitioners by their application dated 29th December 1993 opted for new criteria of value addition. From the information supplied by the Petitioners along with application dated 29th December 1993, it was clearly stated that gross value addition shall be 54.45% and after deducting 25% of DTA sale it would come to 39.36%. However, later on when the revised proposal of the Petitioners in value addition was granted by order dated 26th February 1995 for the period from 1995-1996 to 1999-2000, value addition was approved to 30.03%. Obviously, for the period from 6th January 1994 when commercial production commenced till the revised value addition was approved by the second Respondent with effect from 1st April 1995, the Petitioners would be governed by old value addition formula as the Petitioners had already withdrawn their option for change over to new formula. In this backdrop of facts, second Respondent cannot be said to have erred in taking into consideration consumption of indigenous raw material for the period from 1st January 1994 to 31st March 1994, 1st April 1994 to 30th June 1994, 1st July 1994 to 30th September 1994, 1st October 1994 to 30th December 1994 and 1st January 1995 to 31st March 1995. The Development Commissioner (second Respondent) has calculated value addition in right perspective warranting no interference by this Court in extra-ordinary jurisdiction.

8. No other argument was pressed.

Dated: 31st October 2001

9. In view of what we have held above, the Writ Petition is liable to be dismissed. However, we may observe that during pendency of Writ Petition, certain interim orders came to be passed from time to time. Against the interim order passed by this Court on 30th July 1997, the Respondents preferred SLP before the Apex Court. Before the Apex Court, submission was made on behalf of the Petitioners herein that pursuant to the interim order dated 30th July 1997 appropriate effect has already been given by the Department and the order has been implemented. While considering the said submission on behalf of the present Petitioners, the Apex Court observed that interim orders must be treated to be purely ad hoc and will have to abide by the final order that may be passed in pending Writ Petition and equities will have to be adjusted between the parties in the light of the final decision and the working out of such interim order shall not come in the way of the either parties in getting appropriate reliefs in the light of the final decision. Be it noted that the learned Single Judge before whom the Writ Petition was posted for Motion hearing on 19th September 1995, Rule was issued and notice for interim reliefs was made returnable on 6th October 1995. The learned Judge refused to grant an ad-interim relief. The matter appeared before the learned Single Judge for interim reliefs on 7th October 1995 and on that date matter was adjourned to 12th October 1995. It appears that the learned Single Judge took up the matter for interim relief on 13th October 1995 and by a detailed speaking order found that prima facie there were errors in the order dated 18th August 1995 impugned in the Writ Petition and accordingly was of the view that the

impugned order dated 18th August 1995 deserved to be stayed. The learned Single Judge accordingly granted stay of the operation of the impugned order dated 18th August 1995 and at the same time directed the Development Commissioner to re-scrutinise the figures and for passing a fresh order within six weeks therefrom. The learned Single Judge by interim order permitted DTA sale to the first Petitioner for the period 1st January 1994 to 30th June 1995 to the extent of Rs. 700 lakhs on payment of usual duties and other usual terms without prejudice to the rights and contentions of the parties on the conditions mentioned in the said order. Pursuant to the interim order passed by the learned Single Judge on 13th October 1995, the Development Commissioner re-scrutinise the matter and by order dated 24th November 1995 held thus:

(a) the first Petitioner continues to have installation of 85000 spindles and as such the STA letter dated 25th January 1993 did not become operative;

(b) As per paragraph 97 of Exim Policy, Acrylic Yarn shall have minimum value addition requirement at 20%;

(c) The revised value addition of 30.03% under new formula be applied prospectively i.e. with effect from 6th January 1994 (date of which commercial production began) and that first Petitioner is governed by the stipulated value addition at 37.72% under old formula with effect from 6th January 1994 to 31st March 1995 and is governed by stipulated value addition of 30.03% under new formula from 1st April 1995;

(d) The approval granted to revised projections and the revised value addition at 33.03% for the period 1st April 1995 to 31st March 2000 will be operative under new formula only upon execution of the legal undertaking by first Petitioner as required by paragraph 98 of the Exim Policy;

(e) The option exercised for period of eighteen months by the first Petitioner for the purpose of calculation of value addition and DTA sale is not as per the provisions of Exim Policy and guidelines thereunder;

(f) As the first Petitioner failed to exercise their option as provided under the guidelines for DTA sale for the period 1st January 1994 to 30th June 1995. their claim for this period will be pressed (sic) on quarterly basis;

(g) The delay in respect of DTA sale entitlement for the quarter 1st January 1994 to 31st March 1995 is condoned;

(h) The first Petitioner is entitled for DTA sale of Acrylic Yarn to the extent of 2,24,699 kgs. valued at Rs. 164.14 lakhs for the quarter ending 30th March 1994;

(i) During the quarter 1st April 1994 to 30th June 1994, the first Petitioner achieved negative value addition and as such they are not entitled for any DTA sale for this quarter;

(j) During the quarter 1st July 1994 to 30th September 1994, the first Petitioner

has achieved negative value addition and as such for this quarter as well the first Petitioner is not entitled for any DTA sale;

(k) For the quarter 1st October 1994 to 31st December 1994, the first Petitioner achieved value addition at 33.75% under old formula as against stipulated value addition of 33.73% and as the value addition achieved is more than minimum value addition required for Acrylic Yarn (i.e. 20%) as well as Cotton Yarn (i.e. 30%) but less than the stipulated, the first Petitioner would be entitled for sale of Acrylic Yarn as well as Cotton Yarn on pro-rata basis as provided in paragraph 1(j) of the guidelines for sale of goods in DTA;

(l) The first Petitioner was entitled for DTA sale of Acrylic Yarn to the extent of 4,63,452 kgs. valued at Rs. 386.33 lakhs and Cotton Yarn to the extent of 25,012 kgs. valued at Rs. 20.85 lakhs for the quarter ending 31st December 1994;

(m) For the quarter 1st January 1995 to 31st March 1995, the first Petitioner is entitled for DTA sale of Acrylic Yarn to the extent of 6,06,786 kgs. valued at Rs. 522.69 lakhs and Cotton Yarn to the extent of 40,477 kgs. valued at Rs. 34.87 lakhs;

(n) As regards the quarter 1st April 1995 to 30th June 1995, the first Petitioner has achieved valued addition of 61.93% under new formula which is more than the stipulated i.e. 30.03% (new formula) and they are entitled to 25% DTA sale on the basis of production and in value terms. The DTA sale entitlement in value terms for Acrylic Yarn worked out to Rs. 676.14 lakhs and for Cotton Yarn it was worked out to Rs. 45.47 lakhs. Thus, the first Petitioner was entitled for DTA sale on Acrylic Yarn to the extent of 6,02,404 kgs. valued at Rs. 676.14 lakhs and Cotton Yarn to the extent of 40,515 kgs. valued at Rs. 45.47 lakhs but subject to the legal agreement to be executed by the first Petitioner in respect of export obligation and net foreign exchange earnings for the period 1st April 1995 to 31st March 2000 as provided in paragraph 98 of the Exim Policy.

(o) The total DTA sale entitlement in respect of Acrylic Yarn comes to Rs. 1749.30 lakhs for the period 1st January 1994 to 30th June 1995. The first Petitioner so far availed the benefit of Rs. 2156.40 lakhs (Rs. 1456.40 lakhs by way of advance DTA sale of trial production and Rs. 700 lakhs by way of interim order of this Court dated 13th October 1995). Thus, the balance of Rs. 407.10 lakhs be adjusted against first Petitioner's future entitlement.

10. As we have already noted above, the said order passed by the Development Commissioner dated 24th November 1995 came to be challenged by Petitioners by seeking amendment in the Writ Petition and the learned Senior Counsel appearing for Petitioners only raised one ground in challenging the said order. Upon passing of the order dated 24th November 1995 on recruits the earlier order dated 128th August 1995 merged therein. The contention of the learned Senior Counsel appearing for Respondents that the said order dated 24th November 1995 does not reflect the correct figure of entitlement of the first

Petitioner in respect of DTA sale as the said order is based on the interim order passed by the learned Single Judge on 13th October 1995 and upon dismissal of the Writ Petition the figures given in the said order dated 24th November 1995 cannot stand has no merit. The order dated 24th November 1995 was passed by Development Commissioner on rescrutiny of the entire matter after hearing the parties and in view thereof the balance of Rs. 407.10 lakhs is required to be adjusted against first Petitioner's future entitlements. The Respondents shall accordingly be free to take appropriate steps in adjusting the balance of Rs. 407.10 lakhs against first Petitioner's future entitlements.

11. In so far as the interim orders dated 30th July 1997 and 24th December 1997 are concerned, we find that Respondents never disputed before this Court about the first Petitioner's entitlement of DTA sale for Rs. 12.97 crores for the period 1st July 1995 to 30th June 1996. Rather it was admitted before this Court by the learned Counsel for the Respondents that the Petitioners were entitled to the benefit of Rs. 12.97 crores DTA sale. It cannot be accepted that the said DTA sale entitlement for the period from 1st July 1995 to 30th June 1996 to the extent of Rs. 12.97 crores was admitted by Respondents on the basis of the order dated 13th October 1995 passed by the learned Single Judge. Accordingly no further order needs to be passed in respect of entitlement of DTA sale for Rs. 12.97 crores for the period from 1st July 1995 to 30th June 1996.

12. In the result, Writ Petition is dismissed with no order as to costs. The Respondents shall be free to take appropriate steps in adjusting the excess DTA sale o/Rs. 407.10 lakhs for future period as the Petitioners were not entitled to that extent for the relevant period.

13. Rule is disposed of in the aforesaid terms.

14. Certified copy expedited.