

(2006) 09 DEL CK 0113

In the Delhi High Court

Case No : Writ Petition (C) 3300 of 1992 and C Ms 542-543 of 2006

Internsil P. Ltd.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 27-09-2006

Acts Referred:

Constitution of India, 1950 — Article 226

Foreign Trade (Development and Regulation) Act, 1992 — Section 15

Citation : (2007) 98 DRJ 541 : (2007) 207 ELT 500

Hon'ble Judges : Mukul Mudgal, J;Dr. S. Muralidhar, J

Bench : Division Bench

Advocate : V.P. Singh, D.S. Narula and Vandana Miglani, for the Appellant;
Amita Bansal and Manisha Singh, for the Respondent

Final Decision : Dismissed

Judgement

S. Muralidhar, J.—The petitioner is a 100% Export Oriented Unit (EOU), engaged in the manufacture of integrated circuits. The petitioner has its manufacturing unit located in Santa Cruz Electronics Export Processing Zone (SEEPZ), Mumbai and has been operational since 1979.

2. With a view to encouraging exports in foreign earnings, the Government of India, in April 1988, announced a scheme for grant of Cash Compensatory Support (CCS) to 100% Export Oriented Unit (EOU) situated in Export Processing Zones (EPZ). The scheme was initially valid for the year 1988-89 and was extended from time to time till 2.7.1991, when the cash assistance on the exports made from the country was abolished.

3. The petitioner claimed the CCS benefits based on the notional FOB value of exports which was arrived at by adding, inter alia, even the cost of raw materials which were, in fact, not paid for by the petitioner.

4. Vide letter dated 19.12.1991 the Office of the Development Commissioner, SEEPZ, Mumbai informed the petitioner that the petitioner had received ?an

excess amount of Rs.39,64,044/- against CCS claims for the export period of 1.4.1988 to 3.7.1991.? The petitioner was asked to refund the said excess amount paid to him.

5. The petitioner had been making representations to the Government of India, Ministry of Commerce contending that the CSS should be based on the notional FOB value, and not just on the net foreign earnings realized against the job work done by the unit. Vide a circular dated 31.3.1992, the Ministry of Commerce extended the practice of taking notional FOB value of exports which was available to the export made from the Domestic Tariff Area (DTA) also to the exports made from the EPZ. However, this benefit was made available only with effect from 3.12.1990, since even the DTA units were eligible for benefits from this date. Upon this, the petitioner made another representation on 25.2.1992 but the Ministry of Commerce vide letter dated 7.7.1992 negated the petitioner's request on the ground that the CCS scheme does not provide for payment with retrospective effect.

6. The petitioner thereafter filed the present writ petition on 15.9.1992 seeking a direction to the respondents to pay the petitioner cash incentives under the CSS scheme with retrospective effect from 14.4.1988 and also to pay the petitioner a sum of Rs.67,52,824/-. The petitioner also sought quashing of the demand notice dated 19.12.1991.

7. When this writ petition was listed on 22.2.1992, this Court directed issuance of notice to the respondents. On 28.7.1993, while issuing Rule DB, this Court stayed the demand made by letter dated 19.12.1991 till further orders.

8. On 3.8.2005, this Court made a detailed order and the relevant portion of the said order reads as under:

Petitioner has filed this petition way back in 1992 seeking quashing of the demand raised by respondents vide their letter dated 19.12.1991 and for asking them to make the due payment for the period 1.4.1989 to 2.12.1990. The company has also obtained a stay order from this Court against the recovery which is in force. When the matter was taken up for consideration, it was noticed that petitioner company had made a representation to respondents against the recovery sought to be made in terms of letter dated 19.12.1991 and for payment for the period 1.4.1989 to 2.12.1990. This representation has been rejected by order dated 7.7.1992. Petitioner's main grievance is that respondents have not furnished any basis for their action. Their first communication dated 19.12.1991 seeking recovery of Rs.39 lakhs and odd also did not indicate any ground or reason on which this recovery was sought to be made. Nor did their subsequent communication dated 7.7.1992 indicate any ground. It is also noticed that the scheme under which petitioner was claiming benefit was also providing for mechanism for redressal which has not been availed of by the petitioner.

Be that as it may, it all comes to whether the communication/ orders issued by respondents dated 19.12.1991 and 7.7.1992 would be done away with for being

non-speaking order and whether respondents could be asked to reconsider the matter and pass appropriate speaking orders on the pleas raised by petitioner. Learned Counsel for petitioner prays for an adjournment to seek some instructions in the matter.

9. Thereafter, on 22.8.2005, the following order was passed:

The order dated 3.8.2005 indicates reconsideration of matter and to pass appropriate speaking order by the respondent on the pleas raised by the petitioner. Accordingly, counsel for the petitioner is directed to make a representation to respondent No.1/Secretary, Ministry of Commerce within four weeks, who within six weeks on receipt of the said representation shall either dispose of the representation himself or through appropriate designated authority. Speaking reasoned order shall be communicated to the petitioner.

10. In accordance with the aforementioned order dated 22.8.2005 a detailed order dated 28.10.2005 came to be passed by the Development Commissioner, SEEPZ Special Economic Zone, Ministry of Commerce & Industry, Government of India, Andheri (East), Mumbai. After considering the pleas of the petitioner herein, the Development Commissioner directed recovery of Rs.23,65,251/- towards excess payments made to the petitioner during the period 1.4.1988 to 3.7.1991. With this, the earlier demand dated 19.12.1991, which was initially challenged in this writ petition, stands replaced by the later order dated 28.10.2005.

11. Consequent upon the above order dated 28.10.2005, the petitioner on 9.1.2006 filed an application CM No 543/2006 seeking amend the writ petition to challenge the said order as well. On 23.1.2006, this Court directed notice to be issued on the amendment application and stayed the recovery of the amount as directed in the order dated 28.10.2005.

12. In reply to the amendment application, the respondent has pointed out that the order dated 28.10.2005 was made under the provisions of the Foreign Trade (Development & Regulation) Act, 1992 (Act) and that u/s 15 of the said Act, any person aggrieved by an decision or order made under the said Act may prefer an appeal to the competent authority. It was specifically averred that this petition is not maintainable as this Court does not have territorial jurisdiction to hear the matter.

13. Mr. V.P. Singh, the learned senior counsel appearing for the petitioner, submits that the preliminary objection raised by the respondent to the maintainability of the present petition ought not to be entertained particularly because the remedy under the Act was not efficacious. It was submitted that the counter affidavit to the writ petition filed in March, 1993 by the Under Secretary, Ministry of Commerce and that an officer of the same designation has passed the impugned order dated 28.10.2005, whereas this Court had directed the Secretary, either by himself or through the appropriate designated authority to dispose of the petitioner's representation. It was submitted that in the

circumstances, the filing of a departmental appeal would be an exercise in futility. On the question of territorial jurisdiction, the submission is that the writ petition has been pending here for several years and on that short ground, this Court ought to decide the writ petition on merits by overruling any preliminary objection as to maintainability. It was further contended that the seat of the Union Government is in New Delhi and that even though the impugned order passed in Mumbai, the representation made by the petitioner was to the concerned authority at New Delhi.

14. We are unable to agree with the submission of the learned Counsel for the petitioner. The mere fact that the present petition has been pending in this Court for many years will not be a ground for entertaining the writ petition on merits regardless of the fact that an effective alternate efficacious statutory remedy is available to the petitioner. We have, recently in *Hindustan National Glass & Industries v. UOI* [W.P.(C) 2209/1996] decided on 23.8.2006] held, in the context of the Central Excise & Salt Act, 1944 that merely because a writ petition challenging a show cause notice issued under that Act has been pending in this Court for over ten years, cannot compel the Court to decide the writ petition on merits. As far as the present case is concerned, we find that the impugned order passed by the Development Commissioner is under the Foreign Trade (Development & Regulation) Act, 1992 and there is effective remedy by way of an appeal u/s 15 of the Act, which reads as under:

15 Appeal ? (i) Any person aggrieved by any decision or order made by the Adjudicating Authority under this Act may prefer an appeal:

(a) where the decision or order has been made by the Director General, to the Central Government;

(b) where the decision or order has been made by an officer subordinate to the Director General, to the Director General or to any officer superior to the Adjudicating Authority authorized by the Director General to hear the appeal,

within a period of forty-five days from the date on which the decision or order is served on such person:

Provided that the Appellate Authority may, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the aforesaid period, allow such appeal to be preferred within a further period of thirty days:

Provided further that in the case of an appeal against a decision or order imposing a penalty or redemption charges, no such appeal shall be entertained unless the amount of the penalty or redemption charges has been deposited by the appellant.

Provided also that, where the Appellate Authority is of opinion that the deposit to be made will cause undue hardship to the appellant, it may, at its discretion, dispense with such deposit either unconditionally or subject to such conditions as it may impose.

(2) The Appellate Authority may, after giving to the appellant a reasonable opportunity of being heard, if he so desires, and after making such further inquiries, if any, as it may consider necessary, make such orders as it thinks fit, confirming, modifying or reversing the decision or order appealed against, or may send back the case with such directions, as it may think fit, for a fresh adjudication or decision, as the case may be, after taking additional evidence, if necessary:

Provided that an order enhancing or imposing a penalty or redemption charges or confiscating goods of a greater value shall not be made under this Section unless the appellant has been given an opportunity of making a representation, and, if he so desires, of being heard in his defense.

(3) The order made in appeal by the Appellate Authority shall be final.

15. We are of the view that the petitioner does have an effective statutory remedy available to it against the impugned order dated 28.10.2005 and that the present writ petition under Article 226 challenging the said order is not maintainable. Mr. V.P. Singh, learned senior counsel for the petitioner sought to contend that the petitioner may be willing to give up a right to avail such alternate remedy, although he did not have instructions to say so. Be that as it may, we are not inclined to permit the petitioner to waive its statutory right to an appeal on the basis of certain submissions made across the Bar. When this Court made an order on 22.8.2005 directing the Secretary, Ministry of Commerce to either himself or through appropriate designated authority dispose of the petitioner's representation, it did not intend to substitute any existing statutory procedure for disposal of the representation. Merely because the order dated 28.10.2005 has been passed by the Development Commissioner, there is no ground for apprehending that the appeal against the said decision u/s 15 of the Act will not receive due consideration by the appellate authority. In any event, the decision by the appellate authority would also be subject to judicial review. However, we clarify that if the petitioner files an appeal u/s 15 of the Act against the order dated 28.10.2005 passed by the Development Commissioner within three weeks from today and in any event not later than 20.10.2006, the same shall be entertained by the respondents and disposed of on merits without raising the bar of limitation.

16. As regards the objection on the basis of lack of territorial jurisdiction, we are of the view that the cause of action in the present writ petition has arisen in Mumbai, the petitioner company has its registered office in Mumbai and the authorities which have made the impugned order are also located in Mumbai. Therefore, after exhausting the statutory remedy u/s 15 of the Act, the petitioner should, if still aggrieved, approach the High Court of Judicature at Mumbai for further relief.

17. For the above reasons, we decline to entertain this writ petition on the ground of the maintainability. In that view of the matter, we do not wish to

express any opinion on the merits of the case. Subject to the clarification in para 15 above, the writ petition is dismissed and the interim orders stand vacated. The application for amendment stands disposed of accordingly.