

(2016) 10 GUJ CK 0009

In the Gujarat High Court

Case No : Special Civil Application No. 11262 of 2016 with S.C.A. Nos. 11263-11264 and 14808 of 2016

Intolcast Pvt. Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 13-10-2016

Acts Referred:

Citation : (2017) 345 ELT 217

Hon'ble Judges : Akil Kureshi and A.J. Shastri, JJ.

Bench : Division Bench

Advocate : Shri Paresh M Dave with Aditya S Tripathi, Advocates, for the Petitioner; Shri Devang Vyas, Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

Akil Kureshi, J. (Oral)—All these petitions arise in common background. For convenience, we may notice facts from Special Civil Application No. 11262 of 2016.

2. Petitioners have challenged a Trade Notice No. 11 of 2015, dated 14-12-2015 issued by the Director General of Foreign Trade, Government of India ["DGFT" for short]. The petitioners are engaged in manufacturing and exporting engineering goods like casting, valves, parts of valves, etc. In exercise of powers under Section 5 of the Foreign Trade Development Regulation Act ["the Act" for short], the Government of India had framed Foreign Trade Policy 2009-14. Under such policy, the Government of India framed a Focus Product Scheme ["FPS" for short] which envisaged granting of duty credit scrip equivalent to 2% of the FOB value of exports of notified products mentioned in Appendix-37-D which were made from 27-8-2009 onwards. Relevant portion of this scheme reads as under :

"3.15 Focus Product Scheme (FPS)

3.15.1 Objective

Objective is to incentivise export of such products which have high export intensity/employment potential, so as to offset infrastructure inefficiencies and other associated costs involved in marketing of these products.

3.15.2 Entitlement

Exports of notified products (as in Appendix 37D of HBPv1) to all countries (including SEZ units) shall be entitled for Duty Credit scrip equivalent to 2% of FOB value of exports (in free foreign exchange) for exports made from 27-8-2009 onwards, unless a specific date of export/period is specified by public notice/notification."

3. Appendix 37-D contained a list of notified products for the purpose of FPS. Entry 242 thereof reads as under :

Sr. No.

FPS Product Code

ITC (HS) Code

Description

Rate Percentage

Bonus Benefit

242

242

8481

Items of a kind used on bicycles : Taps, Cocks, Valves and Similar Appliances for pipes, boiler shells, tanks, vats or the like including pressure-reducing valves and thermostatically controlled valves

2%

2%

4. Taking benefit of the said scheme, the petitioners would apply for the duty credit scrip on its exports of valves for industrial uses. A copy of one of such application is produced by the petitioners at Page 50 along with the petition. Counsel for the petitioners would point out that in such application, it was clearly mentioned that what was exported was parts of valves made of stainless steel and manufactured through ferrous investment and precision casting process. Thus, clearly the fact that these valves were not bicycle tube valves was disclosed by the petitioners at the outset. It is undisputed that the authorities granted the benefit of the said scheme on all exports made by the petitioners of such valves and parts of the valves. At Page 84, the petitioners have produced a list of, in all, 28 such applications made by the petitioners and granted by the

respondents.

5. The FPS ended on 31-3-2015. It was replaced by a new Merchandise Exports from India Scheme ["MEIS" for short] w.e.f. 1-4-2015. This new scheme also recognised export incentive in similar fashion as was done under the predecessor scheme of FPS. Relevant portion of MEIS reads as under :

Merchandise Exports from India Scheme (MEIS)

"3.03 Objective

Objective of Merchandise Exports from India Scheme (MEIS) is to offset infrastructural inefficiencies and associated costs involved in export of goods/products, which are produced/manufactured in India, especially those having high export intensity, employment potential and thereby enhancing India's export competitiveness.

3.04 Entitlement under MEIS

Exports of notified goods/products with ITC(HS) code, to notified markets as listed in Appendix 3B, shall be rewarded under MEIS, Appendix 3B also lists the rate(s) of rewards on various notified products [ITC (HS) code-wise]. The basis of calculation of reward would be on realised FOB value of exports in free foreign exchange, or on FOB value of exports as given in the Shipping Bills in free foreign exchange, whichever is less, unless otherwise specified."

6. Corresponding Appendix 3B contains various entries. Relevant for our purpose is Entry No. 4097 and reads as under :

Sr. No.

HS Code

ITC (HS) Code

Description of goods

MEIS-Reward Rate

(in %)

Country Group Code A

Country Group Code B

Country Group Code 2

4097

84807900

Other Moulds For Rubber/Plastics

3

3

0

8481

Taps, Cocks, Valves and Similar Appliances for pipes, boiler shells, tanks, vats or the like including pressure-reducing valves and thermostatically controlled valves

7. On 14-12-2015, the DGFT issued the impugned trade notice which reads as under :

"The product description appearing under ITCHS 8481 mentioned at Sr. No. 269 of Appendix 37-D, Table-1, of Foreign Trade Policy 2009-14 notified vide public notice No. 52 dated 25-2-2014 is as under :

"Items of a kind used on bicycles : Taps, Cocks, Valves and similar Appliance for pipes, boiler shells, tanks, vats or the like including pressure-reducing valves and thermostatically controlled valves"

2. DGFT has received representations from exporters requesting for providing benefits under focus Produce Scheme of Foreign Trade Policy 2009-14 on the export of industrial valves under item at Sl. No. 269 of Appendix 37-D, Table-1 of Foreign Trade Policy 2009-14 notified vide public notice no. 52 dated 25-2-2014 or under any other Sl. No. in the earlier public notices having same description and even to those items which are not used in bicycles.

3. It is hereby clarified that intention from the beginning had been to grant incentive to bicycle parts only under this serial No. 269 under FPS and this intention has been clearly indicated. Other items, which are not parts of bicycle, appearing in the above mentioned description are not eligible for FPS benefit under FTP 2009-14. The Focus Product Scheme has sunset on 31-3-2015, therefore, there is no merit in requests for providing benefit to other products.

4. Cases where RA has issued any scrips against the export of parts other than those uses in bicycle under ITCHS 8481 mentioned at Sl. No. 269 of Appendix 37-D, Table-1 of Foreign Trade Policy 2009-14 notified vide public notice No. 52, dated 25-2-2014 or under any other Sl. No. in the earlier public notices having same description are liable to be reviewed and corrective measures be taken to recover such claims granted by oversight."

8. Pursuant to such trade notice, the respondents initiated two actions against the petitioners. First was to seek recovery of the benefits already released. One such recovery notice dated 30-5-2016 is produced at Page 117 of the petition. Under such notice, the respondents, referring to the said trade notice dated 14-12-2015, asked the petitioners to repay within 15 days the duty credit along with interest which was granted under the said heading, failing which, the authorities would initiate appropriate action against the petitioners. The petitioners were also adviced not to make fresh application under the same heading. The second action taken against the petitioners was to withhold the

benefits under the MEIS scheme even though the same may be otherwise grantable. The grievance of the petitioners is that for not refunding the benefits under the FPS, the respondents would refuse to even process the petitioners' application for the export incentives under the MEIS.

9. In such background, the petitioners have challenged the said trade notice as well as the action of the respondents in blocking the petitioners' applications for export incentives under the MEIS scheme.

10. Appearing for the petitioners, learned counsel Mr. Dave raised following contentions :

(i) The clarification made in the impugned trade notice cannot apply with retrospective effect and to cases which were closed long back;

(ii) Through the trade notice, in the guise of clarification, the authorities cannot change the very essence of the entry in question. It was contended that in taxing matters, the purpose or intention behind a certain provision is wholly irrelevant. What is to be seen is the true interpretation flowing from the plain language of the provision;

(iii) Counsel further submitted that the heading of the Entry 242, which was later on renumbered as 269, created a confusion. Such heading was "Items of a kind used on bicycles". The language used in the entry did not fit this description and this mismatch was, later on, corrected in the MEIS where the entry was retained as it is, but the title "Items of a kind used on bicycles" was deleted.

(iv) Counsel submitted that the true intention can be gathered from the reference to the Customs Tariff Entry 8481 which referred to taps, cocks, valves, etc. and had no connection with the items used in bicycles;

(v) Counsel lastly contended that even otherwise, it would be wholly impermissible to allow the respondents to withdraw the benefits already granted. Firstly, the petitioners and similarly situated exporters would arrange their affairs on the premise that on the specified exports, the exporter would get incentives in the form of 2% duty credit scrip on the FOB value of the exports. Such scrips were also freely transferable. The petitioners had transferred such scrips. Any action on part of the respondents to recover the amounts involved would lead to great prejudice to the petitioners.

(vi) In support of his contentions, counsel relied on following decisions :

? In case of *Malik Tanning Industries v. Union of India* reported in 2015 (320) E.L.T. 508 (Del.)

? In case of *Suchitra Components Ltd. v. Commissioner of Central Excise, Guntur* reported in 2007 (208) E.L.T. 321 (S.C.) : 2008 (11) S.T.R. 430 (S.C.)

11. On the other hand, Shri Raval for the department opposed the petition contending that in terms of the foreign trade policy itself the DGFT has the power

to issue clarificatory circulars. The circular merely clarifies what is even otherwise the correct position. Such clarification would always apply from the inception. This should not be confused with retrospective operation of a circular. The clarification was issued for bringing greater uniformity in implementation of the policy.

12. We may briefly recount the facts. In the FPS, export incentives were recognised under Entry 242 (renumbered as 269) on exports of taps, cocks, valves and similar appliances for pipes, boiler shells, tanks, vats or the like including pressure reducing valves and thermostatically controlled valves. The petitioners and other similarly situated exporters had exported valves and parts not used for bicycles but for other industrial uses by making correct declaration. They had applied for the benefit under the scheme. Such applications were processed and benefits were granted. The scheme came to an end on 31-3-2015. Long after that, DGFT issued the impugned clarificatory circular, in which, it is provided that the intention all along had been to grant the incentives to bicycle parts only. The other items, which are not parts of bicycle appearing in the said description, are not eligible for the benefit.

13. In our opinion, the circular does not simply provide for a clarification. It goes much further and essentially seeks to amend the entry itself. In the impugned trade notice itself it was recognised that the entry contained several parts which were not bicycle parts. If that be so, a question would immediately arise, what would be utility of mentioning several other parts in the said entry. In other words, if the impugned circular is seen as merely a clarificatory circular, several parts mentioned in the entry would be rendered otiose. In fact, virtually, the entire entry would be rendered meaningless.

14. We are conscious that this entry contained a heading "Items of a kind used on bicycles". However, the main body of the entry contained predominantly parts which were not possible of being used on bicycles. These are taps, cocks, valves and other appliances for pipes, boiler shells, tanks, vats or the like. As per the entry, this would include pressure reducing valves and thermostatically controlled valves. Various parts mentioned in the first part of the entry ex facie are not useful on bicycles. The later part, the inclusive portion of the entry when it refers to pressure reducing valves and thermostatically controlled valves also are not used on bicycles. If we therefore, put unnecessary stress on the heading of the entry itself, we would destroy the very essence of the entry and render the entire incentive nugatory. If the intention of the policy makers was to confine the benefits of the export incentives to parts that can be used in bicycles, the description of various items in the said entry which can never be used on bicycles ought not to find place there. There was thus a clear mismatch between the heading and the main entry itself.

15. Strictly speaking, though the new policy may not provide a safe guide to interpret the old policy, we may take note of the contents of the new policy also. This is for the reason that if the Government of India noted a mismatch between

the heading and the contents of an entry, the reasonable way to resolve the discrepancy would be to delete that portion which was unintentional. In other words, if the intention behind framing Entry No. 242 was to confine the export benefits to items used on bicycles and the description of the entry was an error, at least, in the new export policy, this mismatch would be corrected by deleting or suitably amending entry and retaining the title. What in actual terms has been done in the new MEIS is to delete the title and retain verbatim the entry itself. This is an additional indication to refute the assertion of the DGFT in the impugned trade notice that the intention behind framing of the said Entry 242 was to confine the export benefits only on the items used on bicycles.

16. One more ground to take such a view is the description of Customs Tariff No. 8481 which is mentioned in Entry 242 and which reads as under :

8481

Taps, cocks, valves and similar appliances for pipes, boiler shells, tanks, vats or the like, including pressure reducing valves and thermostatically controlled valves.

Thus, the Entry 242 was bodily lifted from Customs Tariff No. 8481.

17. We are conscious that Entry 242 was flanked by several entries which referred to bicycles and parts of bicycles. Nevertheless, when the contents of the entry itself are sufficiently clear, have a wide import and apply to range of products and parts which have no relation to bicycles or its part, the interpretation sought to be given by DGFT in the clarificatory circular cannot be accepted.

18. We are not doubting the power of the DGFT to issue such a circular. The Foreign Trade Policy 2009-14 itself contained an interpretation Clause 2.3 which recognised that if any question or doubt in respect of interpretation of any provision contained in the policy arises, the DGFT would be an appropriate authority to make necessary clarification whose decision shall be final. To ensure uniformity and to avoid divergence of opinions, DGFT could as well exercise such powers and clarify the stand of the Government when a particular entry or provision of the scheme is capable of two interpretations. This would only ensure that all authorities under the DGFT would implement the scheme uniformly. This in turn will bring about greater consistency and predictability. However, a clarification cannot run counter to the plain interpretation of the provision and in guise of clarification, an entry cannot be amended. The power to amend an entry would be with the Government of India.

19. In case of Malik Tanning Industries (supra) the High Court held that the DGFT would not have power to issue circulars with retrospective effect. In the said judgment also, the distinction between a clarificatory circular and one which tampers with the entry itself was recognised.

20. In case of Pushpanjali Floriculture Pvt. Ltd. v. Union of India reported in 2016

(340) E.L.T. 32, Punjab and Haryana High Court held and observed as under :

"30. Even on first principles, we find that neither Section 5 of the Foreign Trade (Development and Regulation) Act, 1992, nor Para 1.2 of the FTP, where under the impugned Notifications dated 1-8-2013 and 21-8-2014 purport to have been issued, allow retrospective divesting, by any newly added provision, of the rights already available to the License holder/subsequent transferee, of the DFIA. It is well settled that the power to legislate retrospectively is not inherent, and has to be specifically conferred by statute no such power seems to emanate, either from Section 5 of the Foreign Trade (Development and Regulation) Act, 1992 or from Para 1.2 of the FTP. The following decisions, on which reliance has been placed in the writ petition, also underscored this settled legal position :

(a) Shri Hari Exports v. DGFT, 1994 (73) E.L.T. 794 (Del.)

(b) Hoewitzer Organic Chemicals Co. v. DGFT, 2013 (294) E.L.T. 7 (Mad.) and

(c) DGFT v. Kanak Exports, 2015 (326) E.L.T. 26 (S.C.)

43. It is pointed out in the petition that despite absence of any power under Section 5 of the FTDR Act, 1992 for any retrospective amendment, several such amendments/instructions are being issued and are being arbitrary applied in a retrospective manner. Some notifications of such nature are already struck down such as DGFT Notification No. 4 (RE.2013)/2009-14, dated 18-4-2013 withdrawing deemed benefits for supplies to Non Mega Power Projects Hon"ble High Court of Gujarat Struck down the Notification in the case of Astom (India) Ltd. v. Union of India - 2014 (301) E.L.T. 446 (Guj.) Regarding DGFT Notification No. 48 (RE:2005)/2004-2009, dated 20-2-2016 adding new products ineligible for duty free benefits under Target Plus Scheme, the Hon"ble Supreme Court in DGFT v. Kanak Exports reported in 2015 (326) E.L.T. 26 (S.C.) held that the said notification cannot be applied retrospectively."

21. In case of M/s. Baidyanath Ayurved Bhawan (Pvt.) Ltd., Jhansi v. The Excise Commissioner, U.P and Ors. reported in AIR 1971 SC 378, the Supreme Court reiterated that in interpreting taxing provision, the Court would not be concerned with intentment thereof.

22. Quite apart from the nature of the impugned trade notice, in any case, the respondents could not have stalled processing of the petitioners" applications for export benefits flowing from the MEIS which would stand on entirely different footing. Even if the petitioners were to refund the benefits already received under FPS, the respondents would have to follow the procedure for ensuring recoveries. Merely stalling the petitioners" applications for grant of export benefits flowing under a fresh scheme would simply not be permissible.

23. For such reasons, the impugned trade notice dated 14-12-2015 is quashed. The respondents shall not seek any recoveries of the export incentives granted to the petitioners under FPS and shall process further their applications for export benefits under MEIS in accordance with the provisions made therein.

24. All petitions are allowed and disposed of accordingly.