
(2001) 04 CAL CK 0039
In the Calcutta High Court
Case No : Writ Petition No. 752 of 1999

Izharul Haque

APPELLANT

Vs

Joint Director General of Foreign Trade

RESPONDENT

Date of Decision : 16-04-2001

Acts Referred:

Foreign Trade (Development and Regulation) Act, 1992 — Section 3, 5, 5(3)

Citation : (2001) 132 ELT 539

Hon'ble Judges : Kalyan Jyoti Sengupta, J

Bench : Single Bench

Advocate : Mehta, for the Appellant; Basu, for the Respondent

Judgement

Kalyan Jyoti Sengupta, J.—By this writ petition the petitioner has challenged the impugned circular being No. 28 (RE): 98 dated 28th July, 1998 being Annexure-GG to the petition. Admittedly, the writ petitioners are the exporters of the textile goods namely Gents jackets with or without lining both knitted and woven. In this case the petitioner's grievance is that in terms of the export policy the petitioner exported 8 consignments of textile goods abroad and those goods are concerning woven materials. According to the petitioner they are entitled to get duty exemption (DEPB) credit as per notified rate as in Annexure-F to the writ petition. The applications were made for the exports which had taken place immediately after the aforesaid impugned circular being issued. Those applications were not processed in accordance with the previous notification wherein there is no mention of charging value cap for DEPB entitlement so far as woven materials are concerned. The department concerned, however, insisted on complying with the aforesaid clarificatory circular which is under challenge and sought to impose value cap of Rs. 200/- in case of woven materials also. Mr. Mehta, learned Counsel appearing in support of the application contends that the aforesaid clarificatory circular issued by the Deputy Director is wholly illegal and ultra vires the provision of Sections 3 and 5 of the Foreign Trade (Development and Regulation) Act, 1992. According to him the aforesaid impugned circular was

not notified in the official gazette and the same cannot be treated as an amendment of the previous notification. This amendment can only be done under the provisions of Section 5 read with Section 3 of the aforesaid Foreign Trade (Development and Regulation) Act, 1992. He also contends that this clarificatory power is not extended to make amendment either. In support of his submission he has relied on a Division Bench judgment of this court reported in Enterprise International Ltd. Vs. Collector of Customs, . He contends that by the previous notification certain benefit was given to the exporters so far as the aforesaid materials are concerned and such benefit cannot be taken away by the Deputy Director of Foreign Trade in terms of the aforesaid impugned clarificatory circular. Further he contends that the clarificatory circular cannot take place by way of amendment. In support of his submission he has relied on the decision of the Supreme Court reported in Bengal Iron Corporation and another Vs. Commercial Tax Officer and others, . Therefore, he contends that the applications which have been made by his client should be directed to be considered ignoring the impugned aforesaid circular. He has shown me an interim order passed by this Court in this matter on 6th April, 1999 whereby the petitioners were allowed to make the applications for taking duty exemption entitlement with a value cap of Rs. 200/- per piece even for woven gents jacket with or without lining without prejudice. According to Mr. Mehta in terms of the aforesaid interim order his client has already made this application and the same has been processed. He contends that if the writ petition succeeds then the aforesaid interim order will not have any binding effects and his application for the duty exemption entitlement should be granted without value cap of Rs. 200/- per piece in case of woven materials also.

2. Mr. Basu, learned Senior Advocate contends, first of all, that the petitioner has alternative remedy. The petitioners should have referred this dispute under Clause 4.13 of Export and Import Policy which was then applicable and secondly, the Director could have taken decision in this regard. Since there is dispute and doubt as to whether value cap is imposable in case of woven materials or not this could have been finally decided by the Director himself. Therefore, the writ petition should not be allowed.

3. On merit Mr. Basu contends that clarification has been given by the Director as there were various problems and some disputes and doubts arose at one point of time, the Deputy Director is quite competent to issue such clarification by the aforesaid impugned notice to obviate this problem. He contends that the effect of the circular is not really an amendment of any provision of law. By this notice only the doubt has been removed and so value cap has been imposed in case of woven gents jackets with or without lining. Mr. Basu, however, in his usual fairness submits that if I hold that this circular has got effect of amendment of the previous circular issued under the aforesaid Act for Duty Entitlement Pass Book Scheme then possibly there is some merit in the contention of the writ petition.

4. Having heard the respective submissions of the learned Counsels I am to examine as to whether the existence of alternative remedy is a bar in entertaining the writ petition. While doing so, I am to examine whether Clause 4.13 as mentioned in Export and Import Policy is really an alternative remedy or not. So I appropriately reproduce the aforesaid clause :

"If any question or doubt arises in respect of the interpretation of any provision contained in this Policy, or regarding the classification of any item in the book titled "ITC (HS) Classifications of Export and Imports items", the said question or doubt shall be referred to the Director General of Foreign Trade whose decision thereon shall be final and binding.

If any question or doubt arises whether a licence has been issued in accordance with this Policy or if any question or doubt arises touching upon the scope and content of a licence, the same shall be referred to the Director General of Foreign Trade whose decision thereon shall be final and binding."

5. In my careful examination of the aforesaid clause it appears that the aforesaid clause will be applicable only in case where there is any question "or doubt in respect of interpretation of any provision contained in the Policy or regarding the classification of any item in the book titled ITC(HS) Classification of Export and Import items. Having regard to the subject matter of the writ petition and having noted the title of DEPB rates I am of the view that there is no room or scope for any doubt or dispute where any interpretation is required. Therefore, I hold that the aforesaid clause is not an alternative remedy atleast in this case. Even assuming that the aforesaid clause comes to be an alternative remedy then in this case theory of alternative remedy will not be applicable in view of the fact that the writ petition was admitted by this court without any reservation. Therefore, alternative remedy would not be applicable in this case. Moreover, by this writ petition the legality and validity as well as the authority of the Deputy Director has been challenged in issuance of the aforesaid impugned clarificatory circular. Therefore, I am unable to persuade myself to accept the argument of Mr. Basu that the writ petition should not be entertained.

6. Now coming to the question on merit no law has been shown to me that the Deputy Director can issue any clarification on his own motion or without any application being made in general. By the EXIM Policy of the relevant years it has been declared in no uncertain terms that in order to get Duty Entitlement credit in DEPB scheme the exporter need not have to pay value cap in case of woven gents jackets with or without lining and this notification was issued in terms of the aforesaid Act by the appropriate authority. I do not find that the impugned circular has been notified in accordance with the provisions of Section 3 of the aforesaid Act also.

7. I am of the view that the effect of this impugned clarificatory circular is nothing short of amendment of the previous circular and such amendment can only be done in accordance with the provision of Section 5(3) of the aforesaid Act

and read with Section 3 thereof. Therefore, the impugned circular is wholly ultra vires of the provision of the said Act and this view of mine is supported by decision of this Court reported in Enterprise International Ltd. Vs. Collector of Customs, as cited by Mr. Mehta. The Division Bench of this Court has held amongst others that the impugned clarification resulted in rendering the petitioners' Exim Scrips/REP Licences ineffective. Licences could only be cancelled or rendered ineffective in terms of Paragraphs 9 and 10 of the Import Control Order. The impugned circular did not come within any of those grounds. It has also been held further that the impugned clarification and/or notice has no statutory force and by the impugned circular right under the licences cannot be taken away. In the Supreme Court's decision Bengal Iron Corporation and another Vs. Commercial Tax Officer and others, cited by Mr. Mehta it has been held amongst others that the departmental clarifications and circulars cannot be given effect to in derogation of the provisions of the Act and also the previous notification. Therefore, I set aside the impugned circular and I direct the respondents to process the petitioner's application ignoring the aforesaid impugned circular and in accordance with the rules then prevailing. Therefore, the application which has also been processed in terms of the interim order should be given effect without imposing the value cap of Rs. 200/- so far as the woven jackets with or without lining are concerned. This application shall be processed and disposed of within a period of 8 weeks from the date of communication of this order.

8. However, this order will be restricted to these petitioners only.

9. Therefore, the writ petition succeeds. There will be no order as to costs.

10. All parties concerned are to act on a xerox signed copy of this Dictated Order on the usual undertakings.