(2011) 07 BOM CK 0045

In the Bombay High Court

Case No : Writ Petition No. 8412 of 2010

Jindal Drugs Ltd. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 13-07-2011

Acts Referred:

Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 25
Foreign Trade (Development and Regulation) Act, 1992 — Section 15, 16, 19, 3, 5

Citation : (2011) 273 ELT 27

Hon'ble Judges : D.Y. Chandrachud, J;Anoop V. Mohta, J

Bench : Division Bench

Advocate : V. Shreedharan with Prakash Shah instructed by M/s. PDS Legal, for the Appellant; A.S. Rao with S.D. Bhosale and Ms. Naveena Kumari, Counsel, for the Respondent

Judgement

D.Y. Chandrachud, J.—The Petitioner engages in the export of menthol based products and is a status holder within the meaning of the Foreign Trade Policy. The Petitioner exports Aromatic Chemicals. On the basis of the export of Aromatic Chemicals, the Petitioner was granted a Duty Free Credit Entitlement (DFCE) Certificate by the Zonal Joint Director General of Foreign Trade, Mumbai. The Certificate entailed that the Petitioner could avail of a duty free credit entitlement and that the imports would be subject to an actual user condition. The Certificate was issued subject to the provisions of paragraph 3.2.5 of the Handbook of Procedures for 2002-2007. Among the conditions imposed on the Petitioner in the condition-sheet was that the import should have nexus with the product goods exported in the proportion indicated therein. The Petitioner is entitled under the DFCE Certificate to import chemical and allied products to the extent of 57.68 per cent of eligible exports and 42.32 per cent consisting of fish and fish products.

2. The Petitioner imported chemicals on the payment of duty by utilizing the credit available under the DFCE Certificate. The validity of the Certificate was

extended until 25 May 2011. On 5 October 2010, the Petitioner imported a consignment of Anethole (Benzene Methoxy-4-1-Propeny) falling under Chapter Sub-heading 2909 30 19 of the First Schedule to the Customs Tariff from a consignor in the US and filed a Bill of Entry for home consumption. While filing the Bill of Entry, the Petitioner sought to effect payment of duty by making a debit in respect of the credit available under the DFCE Certificate.

3. On 8 October 2010 and 10 October 2010, the Deputy Commissioner of Customs (Imports), who is impleaded as the Fourth Respondent, raised several queries inter alia stating that it was mandatory to establish a nexus between the goods imported with the export product group in terms of para 3.7.6 of the Foreign Trade Policy for 2004-2005. The Petitioner was accordingly called upon to submit documents for establishing the nexus of the goods imported with respect to the export product against which the licence had been obtained. The Petitioner was also called upon to disclose the standard input output norms under which the imported items were covered.

4. The Petitioner has moved this Court in order to challenge the validity of paragraph 3.2.6A of the Handbook of Procedures of the Foreign Trade Policy for 2002-2007, (January, 2004 - Revised Edition) in so far as it provides that the goods which are allowed to be imported under the Duty Free Credit Entitlement Scheme (DFCE Scheme) shall have a nexus to the product exported and that a declaration in this regard must be made by the Appellant in Appendix-17D. The Petitioner contends that Paragraph 3.2.6A of the Handbook of Procedures is ultra vires, para 3.7.2.1 (vi) of the Foreign Trade Policy and an Exemption Notification (53/03) issued u/s 25 of the Customs Act, 1962. The Petitioner also challenges the legality of a restriction imposed in the DFCE Certificate dated 26 July 2006, which imposes a similar requirement of a nexus with the product group of the export product.

5. In order to appreciate the basis of the challenge in these proceedings, a reference would have to be made to the relevant part of the Foreign Trade Policy for 2002-2007 to which the dispute relates. Para 3.7.2.1 of the Foreign Trade Policy brought into force with effect from April 2003, a special strategic package for status holders. Clause (vi) of the aforesaid Scheme entails a Duty Free Import Entitlement for status holders with an incremental growth of more than 25% in the FOB value of exports subject to a minimum export turnover as stipulated therein in Free Foreign Exchange. Clause (vi) made the following provision :-

(vi) Duty free import entitlement for status holders having incremental growth of more than 25% in FOB value of exports (in free foreign exchange) subject to a minimum export turnover of Rs. 25 crore (in free foreign exchange). The duty free entitlement shall be 10% of the incremental growth in exports. Such entitlement can be used for import of capital goods, office equipment and inputs for their own factory or the factory of the associate/supporting manufacturer/]ob worker The entitlement/goods shall not be transferable.

6. The Scheme was announced as part of a series of initiatives in the EXIM Policy notified on 31 March 2003 with the object of accelerating the incremental growth of exports and to facilitate the country emerging as a major base for sourcing products and services for the rest of the world. It was recognized that status holders would continue to play a significant role in boosting exports particularly from the small scale sector. In view of this, a duty free import entitlement of 10% of the incremental growth in the value of exports was allowed subject to the condition of eligibility based on actual user. The benefits of the Scheme were available with effect from 1 April 2004. Since the Scheme was a new initiative, a large number of representations were received from Trade Associations, Export Promotion Councils and from individual exporters seeking clarifications on the implementation of the Scheme. Government had also received reports that certain status holders were attempting to increase their export turnover by taking credit for the export of others without putting in any significant efforts for increasing exports. Government was of the view that the diversion/enhancement of exports merely to increase benefits under the Scheme would not lead to the intended objective being fulfilled and such transactions would amount to a misuse of the Scheme.

7. In view of this, on both counts it became essential to lay down specific norms for the implementation of the Scheme. Consequently, by a Notification issued u/s 5 of the Foreign Trade (Development and Regulation) Act, 1992 (Notification 28-RE-2003), the provisions of clause 3.7.2.1. were amended inter alia by the introduction of several notes.

8. The Handbook of Procedures was notified by the Director General of Foreign Trade under paragraph 2.4 of the EXIM Policy for 2002-2007 on 31 March 2003. Paragraph 3.2.5 of the Handbook stipulated that the duty free credit entitlement can be used for import of capital goods, office equipment and inputs provided they are freely importable. Moreover, the goods imported would be non-transferable and would have to be used by the status holder or by his supporting manufacturer/job worker. Upon the amendment of Clause 3.7.2.1 of the Foreign Trade Policy, on 28 January 2004, an amendment was brought about to provide for guidelines in para 3.2.6A of the Handbook of Procedures for duty free import entitlement for status-holders. Para 3.2.6A inter alia contains the following requirements :

3.2.6A "The scheme will be applicable to status holders who were also status holders as on 31-3-2003 and who had achieved minimum export turnover of 25 crores in the year 2003-04.

I......

II. Goods allowed to be imported under this scheme shall have a nexus with the products exported and a declaration in this regard shall be made by the applicant in Appendix 17D.

III........

IV.......

V......

VI......

(emphasis supplied)

9. On 4 June 2005, a further amendment was made to the Handbook of Procedures as a result of which the words "nexus with the product exported" were replaced by the words "nexus with the product group exported". Consequently, as a result of the modification, the goods which are imported are required to have a nexus with the product group in which the exported goods fall. For instance, in the case of the Petitioner, the export product groups are (i) chemical and allied products; and (ii) fish and fish products. The entitlement of the Petitioner is with reference to the aforesaid product groups.

10. The Petitioner is before this Court in proceedings under Article 226 of the Constitution in order to challenge the validity of the condition imposed by the Handbook of Procedures requiring a nexus between the goods imported under the Scheme with a product group of the exported products. The submission which has been urged on behalf of the Petitioner is that: (i) Whereas, the Foreign Trade Policy is issued in exercise of powers conferred upon the Central Government by Section 5 of the Foreign Trade (Development and Regulation) Act, 1992, the Handbook of Procedures is issued by the Director General of Foreign Trade in pursuance of the powers conferred in para 2.4 of the Policy; (ii) The DGFT while issuing the Handbook of Procedures is entitled to make procedural provisions for the implementation of the policy and cannot modify the policy; (iii) By and as a result of the introduction of the requirement of a nexus between the goods imported and the product group of the goods exported, the DGFT has by the Handbook of Procedures imposed a condition which does not form part of the Foreign Trade Policy; (iv) Under the Foreign Trade Policy, the Petitioner is entitled to import any goods subject to the condition of actual user. A restriction on the nature of the input which requires the existence of a nexus with the goods exported has the effect of curtailing the goods which can be imported under the policy. The requirement imposed by the Handbook of Procedures is therefore, ultra vires the Foreign Trade Policy and; (v) Under the relevant Customs Notification (53 of 2003) dated 1 April 2003 issued u/s 25 of the Customs Act, 1962, the goods which can be imported against a DFCE Certificate have been defined. The condition which is imposed by the Handbook of Procedures, is ultra vires the exemption Notification.

11. On the other hand, it has been urged on behalf of the Respondents that: (i) Clause 3.7.2.1 (vi) of the Foreign Trade Policy specifically introduced an actual user condition by which the import of inputs was permitted for use in the importer''s own factory or the factory of an associate/supporting manufacturer/ job worker; (ii) The Act, the policy and the procedure provide a composite Scheme and it is a well settled principle of law, that the intention as laid down in

the policy and the procedure must be given effect to; and (iii) The incentive which was granted in Clause 3.7.2.1 was a new initiative which was introduced with effect from 1 April 2004. After the introduction of the incentive, representations were received by Government seeking clarification on various issues relating to the implementation of the Scheme and Government was seized of the problem relating to the misuse of the Scheme. Consequently, the Handbook of Procedures was amended by a Notification dated 28 January 2004, simultaneously with the amendment of the policy so as to clarify that the goods which are allowed to be imported under the Scheme should have a nexus with the product exported. This was made in implementing the basic object underlying the grant of an export incentive and in furtherance of the actual user condition. Hence, the clarification falls within the purview of para 2.4 of the Foreign Trade Policy.

12. Section 5 of the Foreign Trade (Development and Regulation) Act, 1992, empowers the Central Government to formulate from time to time and announce by a notification in the Official Gazette the export and import policy. The Central Government is empowered to amend the policy that is notified. Section 6(1) empowers the Central Government to appoint the Director General of Foreign Trade. The function of the Director General under sub-section (2) of Section 6, is to advise the Central Government in the formulation of the export and import policy and to be responsible for carrying out the policy. Under sub-section (3) of Section 6 powers exercisable by the Central Government may be delegated to the Director General upon a direction of the Central Government, but the powers u/s 3, 5, 15, 16 and 19 cannot be delegated. Consequently, the power to notify a scheme and to amend the scheme is a power which the Central Government alone can exercise and cannot be delegated to the Director General. Paragraph 2.4 of the EXIM Policy sets out the ambit of the functions of the Director General in the following terms :-

2.4 The Director General of Foreign Trade may, in any case or class of cases, specify the procedure to be followed by an exporter or importer or by any licensing or any other competent authority for the purpose of implementing the provisions of the Act, the Rules and the Orders made there under and this Policy. Such procedures shall be included in the Handbook (Vol. I), Handbook (Vol. 2), Schedule of DEPB Rate and in ITC (HS) and published by means of a Public Notice. Such procedures may, in like manner, be amended from time to time.

The Handbook (Vol. I) is a supplement to the EXIM Policy and contains relevant procedures and other details. The procedure of availing benefits under various schemes of the Policy are given in the Handbook (Vol. I).

[emphasis supplied]

13. Consequently, the Director General is empowered to "specify the procedure" to be followed by an exporter, importer or by any licensee or other authority "for the purpose of implementing the provisions of the Act, the Rules and orders

made there under". The Handbook of Procedure is a "supplement to the EXIM Policy and contains relevant procedure and other details". The Handbook is a mechanism for implementing the Foreign Trade Policy. The Handbook is supplementary to the policy and lays down procedural and other details. The Central Government as the delegate of Parliament is empowered by Section 5 to formulate the EXIM policy and set down its essential conditions. Every issue which may arise in the implementation of the policy in future may not be present to the mind of the framers when the policy is notified. The Director General as the implementing authority u/s 6(2) is entitled both statutorily and by the terms of Para 2.4 of the policy to take suitable steps for ironing out the creases and for issuing implementational directions. Statutorily such a role for the Director General is recognized by Section 6(2) which makes him responsible for carrying out that policy. The policy, in accordance with the provisions of Section 6(2), confers that power on the Director General in paragraph 2.4. While the Director General may issue directions in matters of procedure or for the proper implementation of the policy and other details incidental to the proper functioning of the policy, he cannot amend the policy This is because the power to amend is expressly conferred upon the Central Government alone. But that is not to say that whatever is not to be found in the policy cannot be provided for by the Director General in the Handbook of Procedures. So long as the provision which is made in the Handbook fulfills the essential nature and character of being a provision to implement the policy, or to lay down procedural requirements or other details necessary to flesh out the policy or ensure the proper functioning of the policy, the Director General must be held to have acted within jurisdiction. In each case, therefore, when there is a challenge to the validity of an action taken by the Director General, it is for the Court to determine as to whether the Director General has acted within the contours of the jurisdiction conferred upon him by Section 6(2) read with para 2.4 of the policy or whether he has transgressed the limitations on his jurisdiction by amending the policy. An amendment of the policy is something that lies beyond the powers of the Director General.

14. This principle has been adverted to in judgments of the Supreme Court. In the Union of India (UOI) and Others Vs. Asian Food Industries, , the Supreme Court observed that - "The provisions of 1992 Act, the Foreign Trade Policy and the procedures laid down there under, thus, provide for a composite scheme". The Supreme Court emphasised there that "a statute as is well known may have to be construed in the light of the subordinate legislation framed there under." In Hindustan Granites v. Union of India, 2007 (211) E.L.T. 3 (S.C.), the Supreme Court observed that "The Hand Book of Procedure merely implements the policy", but that does not prevent the Central Government from changing the policy. In Atul Commodities Pvt. Ltd. v. Commissioner of Customs, Cochin, 2009 (235) E.L.T. 385 (S.C.), the Supreme Court made a distinction between an amendatory and a clarificatory provision. The Supreme Court held that Section 5 of the Act of 1992 contemplates an amendment to the policy only at the behest

of the Central Government (and not by the DGFT) and hence, a change in the categorization of an item from a free category to the category of a restricted import could not be brought about merely by a circular. The same view has been recognized in a judgment of a Division Bench of this Court in Narendra Udeshi Vs. Union of India (UOI) and Others, .

15. Now, it is in this background, and considering the tests which have been enunciated by the Supreme Court that the challenge to the Handbook of Procedures must be considered. The Foreign Trade Policy notified a Strategic package for status holders in para 3.7.2.1 of the Revised Edition of April 2003. The object of the policy was to facilitate the acceleration of the incremental growth in exports. Clause (vi) of para 3.7.2.1, as it was notified, prescribed a duty free entitlement of 10% of the incremental growth in exports. Clause (vi) contemplated that the entitlement could be used for the import of capital goods, office equipment and inputs, "for their own factory or the factory of the associate/ supporting manufacturer/job worker". The entitlement and goods imported were not transferable. An actual user condition was imposed in Clause (vi) of para 3.7.2.1. On 28 January 2004, para 3.7.2.1 came to be amended by a notification u/s 5 of the Act. The reason for the amendment was that a large number of representations were received by the authorities from Trade Associations as well as individual exporters seeking clarification in regard to the implementation of the Scheme. At the same time Government was concerned with the need to make the policy truly adaptive to the object of facilitating an acceleration of exports. Government was seized with the issue of the diversion of benefits and of attempts to enhance exports merely to increase benefits under the Scheme in a manner which would not lead to achieving the object of an incremental growth in export. Simultaneously with the amendment of Paragraph 3.7.2.1 of the policy on 28 January 2004 the Handbook of Procedures was amended. As a result of the amendment para 3.2.6A was inserted in order to stipulate inter alia that the goods allowed to be imported under the scheme shall have a nexus with the product exported and that a declaration in this regard shall be made in Appendix 17D. The requirement that there should be a nexus between the goods imported and the product exported has been further relaxed as a consequence of an amendment brought into force with effect from 4 June 2005. As a result thereof, the nexus that is required is between the goods imported and the product group of the goods exported.

16. The Handbook of Procedures and the policy constitute a composite scheme. The Handbook of Procedures in the present case, has not transgressed the limitations which have been imposed in paragraph 2.4 of the policy. The requirement that there should exist a broad nexus of the nature that is spelt out in the Handbook of the Procedures fulfills the purpose of implementing the provision of the Foreign Trade Policy. The condition is a supplement to the EXIM policy and is intended to render the policy effective so as to achieve the essential object underlying the imposition of an actual user condition. So construed, it would not be possible to accept the contention that the condition imposed by the

Handbook of Procedures is ultra vires the Foreign Trade Policy. Similarly, it is not possible to accept the submission which has been urged that the condition imposed by the Handbook of Procedures is ultra vires the exemption notification issued on 1 April 2003 u/s 25 of the Customs Act, 1962. The exemption notification in fact stipulates that the Central Government was exempting goods when imported into India against the DFCE Certificate issued under para 3.7.2.1 (vi) of the EXIM policy. The exemption that is granted by Customs Notification 53 of 2003 is, therefore not de hors the Foreign Trade Policy but a measure which is in furtherance of the DFCE Certificate issued under paragraph 3.7.2.1 (vi). Once the Court has come to the conclusion that the condition in the Handbook of the Procedures was not ultra vires the policy, the challenge must fail for the same reason.

17. Counsel appearing on behalf of the Petitioner submitted that the Deputy Commissioner of Customs, while raising his queries upon the filing of a Bill of Entry for home consumption, must restrict himself to the observance of the conditions which are stipulated in the policy read with the Handbook of Procedures. In this regard, we are of the view that the Deputy Commissioner of Customs would be justified in ascertaining whether the condition of nexus as stipulated in the DFCE Certificate and in paragraph 3.2.6A of the Handbook of Procedures has been fulfilled. For the aforesaid reasons, we have declined to accede to the challenge to the validity of paragraph 3.2.6 A of the Handbook of Procedure and to the legality of the restriction imposed in the DFCE Certificate that the goods imported must have a nexus with the product group of the exported product. The Fourth Respondent shall now take necessary steps in accordance with law, in pursuance of the observations contained in the judgment.

18. The Petition is accordingly disposed of in the aforesaid terms. There shall be no order as to costs.