

(2005) 03 AHC CK 0146

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 34 of 2005

J.S. Gupta and Sons

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 01-03-2005

Acts Referred:

Central Excises and Salt Act, 1944 — Section 37B, 5A

Constitution of India, 1950 — Article 226

Customs Act, 1962 — Section 151A, 5

Foreign Trade (Development and Regulation) Act, 1992 — Section 10, 3, 5, 7, 8

Citation : (2005) 100 ECC 121 : (2007) 212 ELT 22

Hon'ble Judges : R.K. Agrawal, J;Prakash Krishna, J

Bench : Division Bench

Advocate : Navin Sinha and Pankaj Bhatia, for the Appellant; K.C. Sinha and D.K. Soni, S.C., for the Respondent

Final Decision : Allowed

Judgement

R.K. Agrawal, J.—By means of the present writ petition filed under Article 226 of the Constitution of India, the petitioner, M/s J. S. Gupta and Sons, seek the following reliefs:

"(i) issue suitable writ, Order or direction quashing the Order dated 5th January 2005 (Annexure -- XVIII to this writ petition) passed by the respondent No. 2;

(ii) suitable writ, Order or direction quashing the Order dated 19th/20th April 2004 whereby the permission granted to sub-contract production to job work was cancelled;

(iii) Suitable writ, Order or direction commanding the respondents to restore the facility of procuring goods without payment of duty forthwith;

(iv) Suitable writ, Order or direction commanding the respondents to permit the petitioner to sub-contract the production on job work basis as was being permitted prior to the Order dated 19th/20th April 2004;

- (v) suitable writ, Order or direction restraining the respondent Nos. 2 and 3 from harassing the petitioner and prohibiting investigation against the petitioner;
- (vi) issue any other appropriate writ, Order or direction which this Hon"ble Court may deem fit and proper in the circumstances of the case; and
- (vii) award cost of this writ petition to the petitioner."

2. Briefly stated, the facts giving rise to the present petition are as follows:

The petitioner is a registered firm. It is a 100% Export Oriented Unit. According to the petitioner, it has been awarded for excellent performance for export by the Ministry of Commerce, Government of India. It had been granted letter of permission dated 15.12.2000 to set up a 100% Export Oriented Unit in terms of the EXIM Policy 1997-2002 framed by the Ministry of Commerce under the Foreign Trade (Development and Regulation) Act, 1992 (hereinafter referred to as "the Foreign Trade Act"). According to the petitioner, u/s 5 of the Foreign Trade Act, the Central Government has framed EXIM Policy from time to time. Under the said policy, the Central Government provides various facilities to the exporters subject to certain conditions. Para 9.5 of Chapter XI of the EXIM policy 1997-2002 provided that the letter of permission issued to an Export Oriented Unit by the concerned authority would be considered as a licence for all purposes including procurement of raw materials and consumables either directly or through canalizing agency. Para 9.20 of the said Scheme provides for the facility of procurement of raw materials and export of finished goods to be exempt from the Central levies. The Central Government has issued a notification u/s 5A of the Central Excise Act on 4.1.1995 exempting all the goods specified from payment of duty to the Units registered as Export Oriented Unit. Similar notification has been issued by the Central Government u/s 5 of the Customs Act. It is entitled as an Export Oriented Unit to obtain raw material/input free of customs and excise duties for the manufacture of the goods which are meant for export. As the petitioner has been granted letter of permission in terms of the EXIM policy 1997-2002, the petitioner had imported raw material and other items for being used in the manufacture of finished goods meant for export without payment of any duty, The said import has been made on furnishing a bond in the prescribed form.

3. According to the petitioner, on 2.1.2004 and 3.1.2004 the officers of the Central Excise Department, Meerut, inspected the premises on the presumption that it has been diverting the duty free material to other persons and pending investigation it was directed to pay an amount of Rs. 26,99,871.00 as revenue deposit which it had deposited under protest. Further, on 8.1.2004 a search was conducted in the premises of M/s Swati Non-Ferrous Pvt. Ltd., Thane (Maharashtra) and certain goods which were sent by the petitioner for job work, which the petitioner claimed to have sent under the permission granted by the Departmental Officers, were seized. The Commissioner, Customs and Central Excise, Meerut-II wrote a letter on 10.2.2004 to the Development Commissioner,

Export Processing Zone, NOIDA, stating therein that on the basis of the intelligence information received to the effect that the petitioner was engaged in diverting the imported raw materials through its related firm M/s C. L. Gupta and Sons and also on the basis of the search conducted on 2.1.2004, necessary action be taken under the Foreign Trade Act for revocation/cancellation of the letter of permission issued to the petitioner. As a follow up measure, the Superintendent (Preventive), Central Excise, Meerut-II wrote a letter on 6.4.2004 informing the Assistant Commissioner that the Commissioner, Customs and Central Excise, Meerut-II had granted approval for immediate suspension of issuance of facility of C.T. - III/Procurement Certificate to the petitioner in terms of CVC guidelines in Paragraph No. 3 of letter dated 17.10.2002 and accordingly to ensure that the facility of C.T.-III/Procurement Certificate be suspended. The petitioner on coming to know about the move to suspend C.T.-III facility, moved a representation on 8.4.2004 for continuance of the facility. A show cause notice was issued by the Development Commissioner, NOIDA Export Processing Zone, on 19.3.2004 calling upon the petitioner to show cause as to why the letter of permission granted to the petitioner be not cancelled to which the petitioner submitted a detailed reply. While the matter was pending before the Development Commissioner, the Assistant Commissioner, Central Excise Division, Hapur, passed an Order on 19/20.4.2004 cancelling the permission to the petitioner to sub-contract the production in job work basis. Another show cause notice was issued on 20.4.2004 by the Development Commissioner, NOIDA Special Economic Zone, proposing to suspend the I.E. Code No. 4100000511 dated 19.2.2001 issued to the petitioner to which it submitted its reply on 9.6.2004. The matter is pending. The petitioner once again approached the Commissioner, Customs and Central Excise, Meerut, vide representation dated 29.4,2004, for restoration of C.T. - III facility which was rejected by Commissioner vide Order dated 14.5.2004. As the facility of C.T. - III was not being restored, the petitioner approached this Court by means of Civil Misc. Writ Petition No. 649(T) of 2004 which was disposed of vide judgment and Order dated 21.5.2004 with a direction to the petitioner to appear before the Assistant Commissioner for hearing and for passing appropriate orders on restoration of C.T.-III facility. The Commissioner, Customs and Central Excise, Meerut - II, vide Order dated 27.7.2004, directed that the facility of duty free procurement of raw materials shall remain stayed and shall be reviewed only on the completion of investigation in this case. The petitioner thereafter moved a representation on 20.7.2004 before the Chairman, Central Board of Excise and Customs, highlighting its difficulties. It once again made a representation to the Development Commissioner, NOIDA Special Economic Zone, NOIDA on 20.9.2004 for restoration of facility of duty free raw materials. According to the petitioner, the Assistant Development Commissioner wrote a letter on 22.9.2004 of the Commissioner, Customs and Central Excise, Meerut requesting him to restore the facility of duty free raw materials. Another representation was made to the Development Commissioner, NOIDA Special Economic Zone, NOIDA on 18.10.2004 upon which the Development Commissioner, vide letter dated

25.10.2004, had written to the Commissioner, Customs and Central Excise, Meerut - II for taking steps for restoration of the facility and once the investigations are completed, the action shall be taken against the petitioner under the Foreign Trade Act.

Against the Order dated 27.7.2004 passed by the Commissioner, Customs and Central Excise, Meerut - II, the petitioner preferred an appeal before the Customs, Excise and Service Tax Appellate Tribunal, which was decided by the Tribunal on 16.12.2004. The appeal had been allowed and the Tribunal has held that the Commissioner had no authority under the law to suspend the C.T. - III facility granted to the petitioner. It appears that in the meanwhile the petitioner had filed another writ petition before this Court being Civil Misc. Writ Petition No. 1759(T) of 2004, which was, however, withdrawn on 17.12.2004 in view of the Order passed by the Tribunal on 16.12.2004. In spite of the Order of the Tribunal dated 16.12.2004 as the facility had not been restored, the petitioner made a request on 29.12.2004 to the Superintendent, Central Excise and Customs, Amroha for issuance of pre-authenticated book of C.T. - III, which the Superintendent declined. Similar request was made on the Assistant Commissioner, Central Excise and Customs, Hapur. However, the Additional Commissioner (Preventive), vide letter dated 5.1.2005 informed the petitioner that the Central Board of Excise and Customs has decided that the C.T.-III/ Procurement facility can be permitted subject to the execution of bond for the value of the goods and 100% bank guarantee for the duty involved for the goods and similar such security for future procurement. A bank guarantee of Rs. 3.10 crores plus security for future procurement for restoration of C.T.-III facility was also demanded.

4. The petitioner represented to the Additional Commissioner (Preventive), Meerut that in view of the Order passed by the Tribunal on 16.12.2004, the Order dated 5.1.2005 demanding bank guarantee and security is unwarranted. Simultaneously a representation was also moved before the Chairman, Central Board of Excise and Customs, New Delhi. According to the petitioner, till date the facility of C.T. - III/Procurement has not been restored. The inaction as also the letter dated 5.1.2005 are under challenge in the present writ petition.

5. We have heard Shri Navin Sinha, learned Senior Counsel, assisted by Shri Pankaj Bhatia, on behalf of the petitioner, and Shri D. K. Soni, learned Standing Counsel appearing for the respondents.

6. The learned counsel for the petitioner submitted that the letter of permission has been granted by the Development Commissioner, NOIDA Special Economic Zone, NOIDA which entitles the petitioner to procure raw materials and other items without payment of duty upon furnishing of a bond and till such time the letter of permission has not been withdrawn or cancelled, the facility for importing/procuring raw materials and other inputs without payment of duty cannot be suspended. He further submitted that the Central Board of Excise and Customs has no authority under law either u/s 37B of the Central Excise Act or

Section 151A of the Customs Act, to direct the petitioner to furnish bank guarantee and security for the amount of duty which may be applicable for import/procurement of raw materials/inputs. According to him, The Customs, Excise and Service Tax Appellate Tribunal has already held, vide Order dated 16.12.2004, that the Board has no power to issue any such direction and, therefore, the authorities are bound by the said Order and to restore the facilities. He further submitted that the petitioner had already deposited a sum of Rs. 26,99,871.00 under protest towards the duty demanded by the Central Excise Authorities and till such time the investigations are not finalised the petitioner cannot be directed to furnish the bank guarantee or security for the amount of duty. In any event, he submitted that because of the arbitrary and illegal action of the respondents, the petitioner is being prevented from carrying out and fulfilling its export obligation which is not only bringing a bad name to the petitioner but the nation is being deprived of precious foreign exchange. He, thus, submitted that the respondents be directed to restore the facility of C.T. - III as was being enjoyed by the petitioner earlier.

7. Shri D. K. Soni, learned Standing Counsel, however, submitted that there is definite information with the Department that the petitioner has been diverting the raw materials which it had imported without payment of duty to its sister concern for oblique purpose and, therefore, it is not entitled for the continuance of C.T. - III facility without safeguarding the interest of the Revenue which can amply be safeguarded if the petitioner furnishes the requisite bank guarantee and other security for the amount of duty and future imports. He further submitted that u/s 37B of the Central Excise Act and Section 151A of the Customs Act, the Central Board of Excise and Custom is empowered to issue directions and, therefore, the Order dated 5.1.2005 cannot be said to suffer from any legal infirmity and is valid within jurisdiction.

8. Having heard the learned counsel for the parties, we find that u/s 3 of the Foreign Trade Act the Central Government has been empowered to make provision for the development and regulation of foreign trade by facilitating import and increasing export. u/s 5 of the Foreign Trade Act the Central Government has been empowered to formulate and announce by notification in the Official Gazette the EXIM policy. u/s 7 of the Foreign Trade Act every exporter or importer is to be allotted an Import Exporter Code Number. Section 8 of the Foreign Trade Act provides for suspension and cancellation of Importer Exporter Code Number where any person has contravened any law relating to the Central Excise, Customs, Foreign Exchange or has committed any other economic offences. Section 9 of the Foreign Trade Act empowers the Director General to grant, renew, refuse to grant or renew a licence to export or import. He has also been empowered to suspend and cancel any licence of good and sufficient reason to be recorded in writing. The power relating to search and seizure has also been provided that Section 10 of the Foreign Trade Act. Penalty and confiscation has also been taken care of in the Foreign Trade Act.

9. The Central Government has announced the EXIM Policy 1997-2002 in exercise of powers u/s 5 of the Foreign Trade Act under the EXIM Policy, the Central Government had issued a notification dated 4.1.1995 u/s 5A of the Central Excise Act exempting all the goods specified from payment of duty to the Units registered as Export Oriented Unit.

10. We further find that the petitioner had been availing the benefit /facility of duty free imports and procuring raw materials and other inputs without payment of duty on furnishing of the prescribed bond in term of C.T. - III facility. The investigation for the alleged diversion of the raw material/inputs is still going on. It has not been finalised so far. The facility under the Central Excise Act is available to an Export Oriented Unit till such time the letter of permission granted by the Development Commissioner continues to remain in operation. It may be mentioned here the Tribunal in the appeal preferred by the petitioner had specifically held that there is no provision of law which empowers the Commissioner of Central Excise to suspend the facility of procuring raw material duty free by 100% Export Oriented Unit. There are provisions both under the Customs Act and the Central Excise Act for penalizing the 100% Export Oriented Unit which misuses the concession or facility provided to them. Various instructions and the circulars issued by the Central Board of Excise and Customs cannot take place of law. The Order of the Tribunal setting aside the Order passed by the Commissioner of Central Excise, dated 27.7.2004, is produced below:

"We have considered the submissions of both the sides. In the impugned Order as well in the submissions before us by the learned S.D.R., no provision of law has been cited which empowers the Commissioner of Central Excise to suspend the facility of procuring material duty free by a 100% EOU. Both the Customs Act and the Central Excise Act contain the provisions for penalising the 100% EOU which misuses the concession or facility provided to them under various investigations. The circular issued by the CBEC cannot take place of the law. The power to suspend the facility to obtain raw material free of duty is a penal action which can be initiated only under the authority of law. In absence of such authority of law being cited before us, we are of the view that the facility of procuring the raw material duty free cannot be suspended particularly when the status of the appellants as 100% unit has not been cancelled. If the 100% EOU is not allowed to procure the raw material without payment of duty, the very purpose of establishing the 100% EOU is lost and they have to fulfil the export obligations by procuring the raw material on payment of duty which will put them in awkward position. He, therefore, set aside the impugned Order passed by the Commissioner and allow the appeal."

We have been informed by Shri Sinha that till date the Central Excise Department has not challenged the aforesaid Order of the Tribunal and the said Order is still in operation.

11. In the case of Union of India and others Vs. Kamlakshi Finance Corporation

Ltd., , the Apex Court has held that it is of utmost importance that in disposing of quasi-judicial issues before them, Revenue officers are bound by the decisions of the appellate authorities. The Order of the Appellate Collector is binding on the Assistant Collector working within his jurisdiction and the Order of the Tribunal is binding upon the Assistant Collector and the Appellate Collectors who function under the jurisdiction of the Tribunal. The Apex Court has further held that the principle of judicial discipline requires that the Order of the higher appellate authority should be followed unreservedly by the subordinate authorities and the mere fact that the Order of the appellate authority is not acceptable to the Department, in itself in objectionable phrase, and is a subject matter of appeal, can furnish no ground for not following it unless its operation has been suspended by a competent court. If this healthy Rule is not followed, the result will only be undue harassment to the assessee and chaos in the administration of tax laws.

12. In the case of Authorised Officer (Land Reforms) Vs. M.M. Krishnamurthy Chetty[OVERRULED], , the Apex Court has held that it is well settled that even Order which may not be strictly legal, become final and are binding between the parties if they are not challenged before the superior Court.

13. In the case of V.S. Charati Vs. Hussein Nhanu Jamadar (Dead) by Lrs, the Apex Court has held that the Order of the Tribunal having not been challenged by the respondent become final and binding on both the parties. A decision simply because it may be wrong, would not thereupon become a nullity. It would continue to bind the parties unless set aside. All the effect of the decision on the parties, therefore, cannot be ignored.

14. A Division Bench of this Court in the case of P.N.C. Construction Company Ltd. v. State of U.P. and Ors. 2002 UPTC 262, has held that it is a well settled legal position that the Revenue officers are bound by the decision of the Appellate Authority. The Trade Tax Tribunal being the Appellate Authority, its Order is binding upon the Assessing Authority and the Revenue who function under the jurisdiction of the Tribunal.

15. As already mentioned hereinbefore, we find that the Tribunal by its Order dated 16.12.2004 had set aside the Order passed by the Commissioner, Customs and Central Excise, Meerut-II, dated 27.7.2004 wherein the Commissioner has suspended the facility of the duty free procurement of raw materials. The Tribunal has further held that the Board has no jurisdiction to suspend the facility to obtain raw material free of duty. It has further held that the facility of procuring the raw material duty free cannot be suspended till such time the status of the petitioner as 100% Export Oriented Unit has not been cancelled. The said Order is still operating and is binding upon the Commissioner, Central Excise, Meerut as also on other authorities subordinate to it. The letter/order dated 5.1.2005 is in the teeth of the decision given by the Tribunal, referred to above.

16. As laid down by the Apex Court in the decisions referred to above and this Court in the case of M/s P.N.C. Constructions Company Ltd. (supra), the respondents are bound by the decision of the Tribunal and cannot ignore the same. Any Order issued contrary to the decision of the Tribunal, therefore, cannot be sustained.

17. In view of the foregoing discussions, we are of the considered opinion that the Order dated 5.1.2005 is wholly illegal, contrary to law and without jurisdiction. It is hereby set aside.

18. In the result, the writ petition succeeds and is allowed. The respondents are directed to restore the facility of C.T. - III for procuring goods without payment of duty, forthwith However, the parties are left to bear their own costs.