

(2014) 12 DEL CK 0303

In the Delhi High Court

Case No : Writ Petition (Civil) 6387/2012, CM No. 17030/2012, W.P.(C) 4754/2014 and CM 9467/2014

Malik Tanning Industries

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 08-12-2014

Acts Referred:

Constitution of India, 1950 — Article 300A

Foreign Trade (Development and Regulation) Act, 1992 — Section 15, 16, 19, 3, 5

Citation : (2015) 320 ELT 508 : (2015) 129 SCL 507

Hon'ble Judges : Vibhu Bakhru, J

Bench : Single Bench

Advocate : Shikha Sapra and Naveen Malhotra, Advocate for the Appellant; Amit Mahajan, Anurag Ahluwalia, CGSCs and Amrit Singh, Advocate for the Respondent

Judgement

Vibhu Bakhru, J.—The petitioners impugn policy circular No.42 (RE-2010) /2009-14 dated 21.10.2011 issued by the Directorate General of Foreign Trade (hereafter referred to as "impugned circular") inasmuch as it curtails the benefit available under Focus Product Scheme in respect of "Technical Textiles" to only 33 items with retrospective effect from 01.04.2011.

2. The petitioners are in the business of exporting products and in the ordinary course of business had exported polyester printed and dyed fabrics. In terms of paragraph 3.15 of the Foreign Trade Policy 2009-2014, the petitioners were granted Duty Credit Scrips equivalent to 2% of the FOB value of the said products exported by them. Apparently, the said scrips have been utilized/sold by the petitioners. And, as such, the petitioners have already received the benefit available, with respect to the products exported by them, in terms of the Focus Product Scheme (hereafter "FPS") under the Foreign Trade Policy. The benefit under the FPS was granted to the petitioners as the products exported were considered to be "Technical Textiles" as notified under Appendix 37D of the Handbook of Procedures published by the Government of India.

3. The impugned circular has the effect of excluding the products exported by the petitioners from the definition of technical textiles and thus, has rendered the petitioners ineligible for claiming the incentive under the FPS. The grievance of the petitioners is compounded as the impugned circular excludes the products exported by them from the definition of technical textiles with retrospective effect. Thus, the benefits that have already been availed and utilized by the petitioners, are now sought to be recovered.

4. Malik Tanning Industries (petitioner in W.P.(C) 6387/2012) has been called upon, by a letter dated 16.07.2012, to return the Duty Credit Scrips or refund the amount of duty along with 15% interest in respect of following scrips that were issued to the said petitioner in June/July 2011:-

"1. File No.05/50/87/01135/AM.12 : Rs.2,74,814/-

(Licence No.0510292953 / 10.06.2011)

2. File No.05/50/87/01609/AM.12 : Rs.3,38,830/-

(Licence No.0510295324 / 01.07.2011)

3. File No.05/50/87/01608/AM.12 : Rs.8,20,959/-

(Licence No.0510295322 / 01.07.2011)"

5. A similar letter dated 16.07.2012 was also issued to M/s. Kavish Impex Pvt. Ltd. (petitioner in W.P.(C) 4754/2014) calling upon the said petitioner to refund the amount of duty in respect of said scrips along with interest. The details of the scrips and the amount of refund sought is as under:-

"1. File No.05/50/87/02710/AM.12 Recovery Amount : Rs.22,08,781/-

(Licence No.0510299562 / 12.08.2011)

2. File no.05/50/87/02711/AM.12 Recovery Amount : Rs.29,18,898/-

(Licence No.0510299561 / 12.08.2011) "

6. Both the petitioners have, accordingly, prayed that the said letters of demand dated 16.07.2012 (hereafter the "impugned letters of demand") be set aside.

7. The principal question to be addressed is whether the Director General of Foreign Trade (hereafter "DGFT") could issue the impugned circular to recall a benefit provided to the petitioners under the Foreign Trade Policy, with retrospective effect.

8. The Foreign Trade Policy is framed under the provisions of Section 5 of the Foreign Trade (Development and Regulation) Act, 1992 (hereafter the "Act") . Section 5 of the Act provides that "the Central Government may, from time to time formulate and announce, by notification in the Official Gazette, the export and import policy and may also, in the like manner, amend that policy."

9. Section 6 of the Act provides for the appointment of DGFT and also indicates functions to be performed by the DGFT. The said Section is quoted below:-

"6. Appointment of Director General and his functions.

(1) The Central Government may appoint any person to be the Director General of Foreign Trade for the purposes of this Act.

(2) The Director General shall advise the Central Government in the formulation of the export and import policy and shall be responsible for carrying out that policy.

(3) The Central Government may, by Order published in the Official Gazette, direct that any power exercisable by it under this Act (other than the powers under sections 3, 5, 15, 16 and 19) may also be exercised, in such cases and subject to such conditions, by the Director General or such other officer subordinate to the Director General, as may be specified in the Order."

10. In exercise of the powers conferred under Section 5 of the Act, the Central Government has notified the Foreign Trade Policy. Paragraph 2.3 of the Foreign Trade Policy, inter alia, provides that any question or doubt relating to interpretation of any provisions contained in Foreign Trade Policy or classification of items shall be referred to DGFT. Paragraph 2.4 of the Foreign Trade Policy further empowers DGFT to specify the procedure to be followed by an importer or exporter for implementation of the Act, the Rules and Orders made thereunder and the Foreign Trade Policy. Paragraph 2.3 and 2.4 of the Foreign Trade Policy are relevant and are quoted below:-

"Interpretation of Policy 2.3: If any question or doubt arises in respect of the interpretation of any provision contained in FTP, or classification of any item in the ITC(HS) or HBP-v1 or HBP-v2, or Schedule of DEPB Rates (including content, scope or issue of an authorization there under) said question or doubt shall be referred to the DGFT whose decision thereon shall be final and binding.

Procedure 2.4: DGFT may, specify procedure to be followed for an exporter or importer or by any licensing or any other competent authority for purpose of implementing provisions of FT (D&R) Act, the Rules and the Orders made thereunder and FTP. Such procedures shall be published by means of a Public Notice, and may, in like manner, be amended from time to time."

11. Chapter 3 of the Foreign Trade Policy contains promotional measures with respect to foreign trade, initiated by the Government of India. Paragraph 3.15 of the Foreign Trade Policy contains provisions for the FPS and is quoted below for ready reference:-

"3.15 FOCUS PRODUCT SCHEME (FPS)

Objective 3.15.1: 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.

Entitlement 3.15.2: 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 27.08.2009 onwards.

However, Special Focus Product(s) /sector(s) , covered under Table 2 and Table 5 of Appendix 37D, shall be granted Duty Credit Scrip equivalent to 5% of FOB value of exports (in free foreign exchange) for exports made from 27.8.2009 onwards."

12. A plain reading of paragraph 3.15.2 of the Foreign Trade Policy indicates that export of products which are eligible for being considered under the FPS are notified in Appendix 37D of Handbook of Procedures Vol. I (hereafter "Handbook-I") . The Handbook-I also contain provisions with respect to FPS, which are quoted below:-

"FOCUS PRODUCT SCHEME (FPS) "

3.9 Policy pertaining to FPS is given in Chapter 3 of FTP. Notified Products are listed in Appendix 37D.

3.9.1 An application for exports made from 27.8.2009 onwards shall be filed, with RA concerned in ANF3C along with documents prescribed therein. Eligibility of Focus Product (as in Appendix 37D) shall be determined from date of export as per Para 9.12 of HBP v1.

3.9.2 The procedure for filing applications against export of Market Linked Focus Products under FPS (Para 3.15.3 of FTP) will be the same as laid down for Focus Product Scheme in Para 3.9.1 above. In case of applications for grant of benefit under Market Linked Focus Product scheme, for proof of landing of export consignment in specified market, Para 3.8.2 of HBP Vol.1 shall apply."

13. In terms of paragraph 3.9.1 of the Handbook-I, the incentive under the FPS would be determined from the date of export. And, as per the Foreign Trade Policy, the export of products as listed in Appendix 37D of the Handbook-I are eligible for the incentives under the FPS. Entry 33 of Table 4 of Appendix 37D of Handbook-I is relevant for the purpose of these petitions and is extracted below:-

14. If one examines the scheme of the Act, the Foreign Trade Policy as well as the role of DGFT, it is clear that whilst Central Government is empowered to frame the Foreign Trade Policy, the role of DGFT is essentially to specify the procedure to be followed by an importer and exporter for implementing the Foreign Trade Policy and to clarify any question or doubt in respect of interpretation of any provisions contained in Foreign Trade Policy or classification of any item in the ITC (HS) Code or the Handbook of the Procedures. The policy to grant export incentives by way of the FPS is an integral part of the Foreign Trade Policy; the role of DGFT with regard to the same is limited to specifying the procedures to be followed by an importer and exporter for implementing the said scheme and providing any clarification in that regard, where necessary. The Hand

Book of Procedures has been framed by the DGFT in exercise of functions entrusted under paragraph 2.4 of the Foreign Trade Policy and as paragraph 3.15.2 of the Foreign Trade Policy refers to export of products notified in Appendix 37D of Handbook-I, DGFT is entrusted with the function of specifying and updating the eligible products in the said Appendix.

15. The DGFT has adopted the Indian Trade Classification based on harmonized system of coding for import-export operations.

16. Appendix 37D of the Handbook-I, has to be viewed in the backdrop of the aforesaid legal framework. Entry 33 of Table 4 of Appendix 37D of Handbook-I contains the entry "Technical Textiles " Woven Fabrics of Synthetic Filament Yarn" under the heading "Technical Textiles Products". The ITC (HS) code specified for the said entry is 5407. A reference to the published ITC (HS) Code 5407 indicates that it includes several items, which are specifically listed. Concededly, ITC (HS) Codes have been adopted by DGFT for export-import operations. In my view, plainly, the product exported by the petitioners " polyester printed and dyed fabrics, would fall within the said entry, first and foremost, for the reason that the language of the entry "woven fabrics of synthetic filament yarn" is unambiguous. Secondly, it is not disputed that the products fall within the entry of ITC (HS) Code 5407, which has been adopted by DGFT for the purposes of import-export operations. Thirdly, it is admitted that export of polyester printed and dyed fabrics were considered eligible for FPS prior to 01.04.2011.

17. The learned counsel for the respondent urged that the words "technical textiles" must not be read as synonymous to the words "woven fabrics of synthetic filament yarn". According to him "woven fabrics of synthetic yarn" is only one of the attributes of technical textiles and does not define that expression. I am unable to accept this contention as the use of "Em dash" between expressions "technical textiles" and "woven fabrics of synthetic filament yarn" cannot be read in the manner as suggested by the respondent. "Em dash" is a punctuation mark that depending on the text, is used to insert parentheses. Thus, the expression "woven fabrics of synthetic filament yarn" has to be read as explaining or defining the expression "Technical textiles". Further any doubt regarding the meaning of the said entry, although not warranted, is resolved by referring to the ITC (HS) Code 5407, which undisputedly includes polyester dyed fabrics.

18. In view of the aforesaid, the interpretation of the words "Technical Textiles" has never been in any doubt and its interpretation cannot be called in question. However, it has been contended on behalf of the respondent that it was not the legislative intent to include "polyester printed fabrics" as "technical textiles" and it was never intended to include all items as specified under the ITC (HS) Code 5407 but only a few limited items. It was submitted that as it was found that exporters were availing of the FPS benefits for various products, the DGFT proceeded to issue the impugned circular, which must be read as clarificatory.

19. Undoubtedly, any question or doubt, which arises in respect of interpretation of any provision contained in the Foreign Trade Policy or classification of any item in the ITC (HS) or Handbook-I, is to be referred to DGFT. However, this is not a case where any doubt as to classification could be entertained. The entry in question is unambiguous and leaves no scope for any doubt. Although, the impugned circular mentions that clarifications have been sought by regional authorities with regard to the products classified under ITC (HS) Code 5407, the effect of the impugned circular is not to clarify any doubt as to the interpretation of the expression "technical textiles - woven fabrics of synthetic filament yarn" but to curtail the number of products which would be eligible for availing the export incentive. The impugned circular has specified 33 items listed in the annexure thereto as opposed to 124 items as listed under ITC (HS) Code 5407. The object of the impugned circular is, undeniably, to curtail the number of products, which would be eligible for export incentives. The power granted to DGFT for clarifying any question and doubts with regard to entries in the ITC (HS) Code cannot be used to provide a definition where the entry itself is not ambiguous. In my view, there can be no doubt that the impugned circular brought about a substantive change as it restricted the scope of FPS as envisioned under paragraph 3.15.2 of the Foreign Trade Policy.

20. Although the impugned circular is stated to have been issued pursuant to clarification sought by regional authorities, the import of the circular is clearly in the nature of a substantive amendment. The DGFT decided that textile products covered under the relevant entry must be restricted to products manufactured for non aesthetic purposes that would include textiles for a automotive application, medical textiles, geo textiles, agro textiles etc. Indisputably, this decision does not stem from any ambiguity in the expression "technical textiles " woven fabrics of synthetic filament yarn", but represents a substantive change in policy, i.e. to restrict FPS benefits to textile products for non-aesthetic purposes " 33 specific items as listed in annexure to the impugned circular. Notably, the "new focus products" contained in table 4 were admissible for claiming FPS benefits w.e.f. 27.08.2009; woven fabrics of synthetic filament yarn were granted the benefit of the FPS scheme with effect from the said date. This benefit is sought to be withdrawn w.e.f. 01.04.2011. In other words, there is no dispute that woven fabrics of synthetic filament yarn exported prior to 01.04.2011 would continue to be eligible for export incentive under FPS. In my view, this also indicates that the impugned circular seeks to bring about a substantive change in policy.

21. The quintessential question that needs to be addressed is whether DGFT would have the power to amend the list of products, export of which are eligible for incentive under the FPS with retrospective effect.

22. The above question needs to be answered in light of the provisions of Section 5 and Section 6 of the Act. In terms of Section 5, the Central Government is empowered to formulate and announce the Foreign Trade Policy and/or also in

the like manner amend that policy.

23. A bare reading of the provisions of Section 5 of the Act indicates that a policy cannot be made with retrospective effect. The expression "formulate and announce" used in Section 5 clearly means that the power is to be exercised prospectively. The Supreme Court in *Union of India (UOI) and Others Vs. Asian Food Industries*, held as under:-

"48. The Delhi High Court, however, in our view correctly opined that the Notification dated 4-7-2006 could not have been taken into consideration on the basis of the purported publicity made in the proposed change in the export policy in electronic or print media. Prohibition promulgated by a statutory order in terms of Section 5 read with the relevant provisions of the policy decision in the light of sub-section (2) of Section 3 of the 1992 Act can only have a prospective effect. By reason of a policy, a vested or accrued right cannot be taken away. Such a right, therefore, cannot a fortiori be taken away by an amendment thereof."

24. The power exercised by the Central Government is a power delegated by the Legislation. It is well settled that in absence of an express provision enabling a delegate to make delegated Legislation with retrospective effect, no such power can be inferred. Section 5 of the Act does not empower the Central Government to frame policy with retrospective effect. Thus, the schemes framed under the Foreign Trade Policy cannot be altered or amended with retrospective effect.

25. The DGFT is one step further removed and essentially the functions of DGFT are in the nature of implementing the Foreign Trade Policy. By virtue of Section 6(3) of the Act, DGFT may also exercise such powers as may be specified by an order made by the Central Government. However the powers, which are to be exercised by the Central Government under Section 5 of the Act, cannot be delegated to DGFT as the same are expressly excluded under Section 6(3) of the Act.

26. A Division Bench of the Bombay High Court in *M/s. Noble Resources and Trading India Pvt. Ltd. Vs. Union of India and others*, examined the challenge to a notification dated 31.03.2011 issued by DGFT whereby schedule of rates under the Duty Entitlement Pass Book (DEPB) Scheme was amended to disentitle export of cotton with respect to shipments made on or after 21.04.2010. The circular explained the amendment as under:-

"Benefit under DEPB scheme encourages export of concerned commodity. Hence when the intention of the Government is not to encourage exports of specific commodity, DEPB benefit on such a commodity would be contradictory to its intention. Accordingly, this Public Notice clarifies that DEPB benefit on export of cotton shall not be available. DEPB benefit on export of cotton yarn was withdrawn with effect from 21-4-2010, therefore, DEPB benefit on cotton (the basic raw material for cotton yarn) has been disallowed for exports made from 21-4-2010 onwards."

The Bombay High Court held that the DEPB benefits could not be withdrawn with retrospective effect and held as under:-

"The issue in the present case is really an issue of the existence of authority or power. The Director General of Foreign Trade had no power or jurisdiction as an authority vested with the power of implementing the Foreign Trade Policy to withdraw the DEPB benefits on the export of cotton with retrospective effect from 21 April 2010. The rationale for the withdrawal was that with effect from 21 April 2010 the policy of the Union Government was not to grant incentives on the export of cotton or cotton yarn as was reflected in the notice dated 21 April 2010 withdrawing DEPB benefits on cotton yarn. Moreover, it was urged that there was an export tax which was withdrawn only on 1 April 2010. Whatever be the motive, the exercise of powers has to be in a manner which is consistent with the statute."

A Special Leave Petition (SLP No.12266/2012) filed against the decision of the Division Bench of the Bombay High Court is pending before the Supreme Court.

27. In the case of Mahabir Vegetable Oils Pvt. Ltd. and Another Vs. State of Haryana and Others, , the Supreme Court had held as under:-

"41. We may at this stage consider the effect of omission of the said note. It is beyond any cavil that a subordinate legislation can be given a retrospective effect and retroactive operation, if any power in this behalf is contained in the main Act. The rule-making power is a species of delegated legislation. A delegate therefore can make rules only within the four corners thereof.

42. It is a fundamental rule of law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication."

28. A similar view was expressed by the Supreme Court in the case of Vice Chancellor, M.D. University, Rohtak Vs. Jahan Singh, . In that case, the Supreme Court considered the resolution of the Executive Council of M.D. University, Rohtak purporting to amend the Regulations with retrospective effect. The Supreme Court held as under:-

"19. The Act does not confer any power on the Executive Council to make a regulation with retrospective effect. The purported regulations, thus, could not have been given retrospective effect or retroactive operation as it is now well settled that in absence of any provision contained in the legislative Act, a delegatee cannot make a delegated legislation with retrospective effect."

29. It is also necessary to bear in mind that the benefit granted to the petitioners under the FPS has already been availed by them in terms of the Foreign Trade Policy as in vogue at the material time. Thus, the effect of the impugned circular is to recall a vested right; this, in my view, would also violate Article 300A of the Constitution of India.

30. In view of the aforesaid, neither the central government, nor DGFT would have the power to amend the Foreign Trade Policy or withdraw any export benefit with retrospective effect. The impugned circular inasmuch as it seeks to restrict the list of eligible items under entry 33 of Table 4 of Appendix 37D of the Handbook-I with retrospective effect is set aside. Accordingly, the impugned letters of demand are also set aside.

31. The writ petitions are, accordingly, allowed as aforesaid. The pending applications stand disposed of. No order as to costs.