

(2018) 04 DEL CK 0104

In the Delhi High Court

Case No : WRIT PETITION(CIVIL) No. 5082 of 2017

M/S GOODONE TRADERS PVT. LTD. (FORMERLY KNOWN AS M/S YOGMAYA TRADERS PVT. LTD.)Vs . DIRECTORATE GENERAL OF FOREIGN TRADE & ANR.

Date of Decision : 12-04-2018

Acts Referred:

Constitution Of India, 1950 — Article 14

Citation : (2018) 04 DEL CK 0104

Hon'ble Judges : SANJIV KHANNA, CHANDER SHEKHAR

Bench : Division Bench

Advocate : G.K. Sarkar, Malabika Sarkar, Prashant Srivastava, Deepak Mahajan, Amit Mahajan, Sanjeev Narula,

Final Decision : Allowed

Judgement

SANJIV KHANNA, J. (ORAL):

This common order and judgment would dispose of the aforesaid writ petitions, which primarily relate to interpretation of Notification No. 43(RE-

2013)/2009-2014 dated 25th September, 2013, by which the following additions were made to paragraph 3.14.5.(c) of Chapter 3 to the Foreign Trade

Policy 2009-2014:-

â??i) Benefit of Incremental Export Incentivisation Scheme for the year 2013-14 will be limited to a scrip of a value not exceeding Rs. 1 Crore per

IEC.

(ii) Claims in excess of this value will be subjected to greater scrutiny by Regional Authority.

2.As a result of the aforesaid amendment, paragraph 3.14.5.(c) relating to Incremental Export Incentivisation Scheme (IEIS) on annual basis would

read as under:-

3.14.5 Incremental Exports Incentivisation Scheme (IEIS) on annual basis

Entitlement

(a)Objective of the Scheme is to incentivize incremental exports.

(b)An IEC holder would be entitled for a duty credit scrip @ 2% on the incremental growth (achieved by the IEC holder) during the current year (for example, say for the period 01.04.2013 to 31.3.2014) compared to the previous year (for example, say for the period from 01.04.2012 to 31.3.2013) on

the FOB value of exports. Incremental growth shall be in respect of each exporter (IEC holder) without any scope for combining the exports for

Group Company.

(c)Incentive will be admissible only if the IEC holder has achieved growth in the financial year 2013-2014 vis a vis financial year 2012-2013. Quantum

of benefit will be calculated on the incremental growth achieved subject to eligibility criteria given in para 3.14.4(d) of FTP 2009-14.

i)Benefit of Incremental Export Incentivisation Scheme for the year 2013-14 will be limited to a scrip of a value not exceeding Rs. 1 Crore per IEC.

(ii)Claims in excess of this value will be subjected to greater scrutiny by Regional Authority.

Eligibility Criteria (d) For the purpose of the scheme, export performance shall not be allowed to be transferred from any other IEC holder. Benefit

under the scheme will not be allowed to an exporter who had made no export during fiscal year 2011-12 and fiscal year 2012-13. The following

exports shall not be taken into account for calculation of export performance or for computation of entitlement under the Scheme:

(i)Export of imported goods or exports made through trans-shipment.

(ii)Export from SEZ/ EOU /EHTP /STPI/BTP/FIWZ

(iii)Deemed Exports

(iv)Service Exports

(v)Third Party exports

(vi)Diamond, Gold, Silver, Platinum, other precious metal in any form including plain and studded jewellery and other precious and semiprecious stones.

(vii)Ores and concentrates of all types and in all formations.

- (viii) Cereals of all types.
- (ix) Sugar of all types and all forms.
- (x) Crude petroleum oil and crude primary and base products of all types and all formulations.
- (xi) Export of milk and milk products.
- (xii) Export performance made by one exporter on behalf of other exporter.
- (xiii) Supplies made to SEZ units.
- (xiv) Items, export of which requires an export authorisation (except SCOMET), will not be considered.
- (xv) Export of Meat and Meat Products.
- (xvi) Exports to Singapore, UAE and Hong Kong.

Special Provision (e) The scheme is region specific and will cover exports to USA, Europe and Asian countries only. In addition export to 53 countries

in Latin America and Africa (as mentioned in Public Notice 3 dated 18th April 2013) will be entitled to this benefit. Disclaimer provisions of para 3.17

10 (b) of FTP shall not be admissible. This benefit will be over and above any benefit being claimed by the exporter under any of the Chapter 3

Schemes.

Utilisation of Scrip (f) The duty credit scrip will be freely transferable. Such scrips shall also be eligible for domestic sourcing and for payment of

Service Tax as per para 3.17.5 of FTP 2009-14.

(for the sake of convenience, the amendments made by Notification No. 43(RE-2013)/2009-2014 dated 25th September, 2013 have been quoted in

italics and underlined).

3. The issue, which arises for consideration, is whether clause (i) incorporated in paragraph 3.14.5.(c) poses an upper limit of benefit under the

Incremental Export Incentivisation Scheme for the year 2013-14 or in view of clause (ii), and on interpretation of paragraph 3.14.5.(c) claims in

excess to this value would be subjected to greater scrutiny by the Regional Authority.

4. Stand of the petitioners herein is that amount of Rs.1 crore specified in clause (i) was not the upper limit but the amount was specified for

greater scrutiny by the Regional Authority. Respondents submit to the contrary.

5. By public Notice No.28/2009-2014(RE-2013) dated 25th September, 2013, amendments were made to the "Handbook of Procedure, Volume I for Incremental Exports Incentivisation Scheme" by inserting clause (e) and (f) to paragraph 3.8.3 which are reproduced as under:-

(e) Claims with growth in excess of the value and percentage specified under paragraph 3.14.4 (c)(i) and (ii) and paragraph 3.14.5 (c) (i) and (ii) of FTP, will be subjected to greater scrutiny by Regional Authority.

Such scrutiny of the claim will require the following documents:-

(i) Calling for evidence of manufacture/purchase of export goods i.e. excise return/sales tax returns or any other evidence.

(ii) Checking exports of company from whom goods have been purchased i.e. whether such company had done export in previous 2 years and

quantum of exports in previous 2 years and quantum of exports in current year.

(iii) Calling for any other evidence to justify export growth and consequent entitlement of Incremental Exports Incentivisation Scheme.

(f) The provisions mentioned in paragraph 3.8.3 of HBP v1 relating to procedure of Incremental Exports Incentivisation Scheme, will also be applicable to

claims filed under paragraph 3.14.5 of FTP i.e. for the year 2013-14. The applications in this case can be filed after 1st April, 2014. The last date

for filing of application will be as per para 3.11.9 of HBP v1 and late cut provisions of para 9.3 of HBP v1 2009-14 will be applicable.

6. The aforesaid public notice in our opinion settles the position beyond any doubt and debate. This public notice clarifies that amendment in form of

clauses (i) and (ii) to paragraph 3.14.5.(c) of the Foreign Trade Policy were to ensure that annual claims in excess of Rs.1 crore should be subjected

to greater scrutiny by the Regional Authority. In other words, the two newly inserted clauses had to be read harmoniously. Clauses (i) and (ii) were

not introduced and inserted as clauses, but as a part of sub-paragraph (c) to paragraph 3.14.5. Clause (i), did not put or prescribe an upper limit.

To interpret it differently would make clause (ii) otiose and redundant. The public notice No.28/2009-14(RE-2013) dated 25th September, 2013 had set

out the procedure for scrutiny of claims in excess of Rs.1 crore, by giving details of the documents and particulars to be submitted by the exporter.

Clearly, this was not required and necessary, if Rs. 1 crore was the upper limit, and therefore claims over this amount were not required to be

scrutinised and examined.

7. Similar controversy had arisen before the Bombay High Court, when insertions made in the form of clauses (i) and (ii) to paragraph 13.4.4.(c) of the

Incremental Exports Incentivisation Scheme, vide Notification No.44(RE-2013)/2009-2014 dated 25th September, 2013, which was applicable for the

period beginning from 1st January, 2012 to 31st March, 2013. After amendment paragraph 3.14.4.(c) was as under:-

3.14.4 Incremental Exports Incentivisation Scheme

Scheme

Objective (a) The objective of the Scheme is to incentivize incremental exports.

Entitlement (b) An IEC holder would be entitled for a duty credit scrip@ 2% on the incremental growth (achieved by the IEC holder) during the

period

01.01.2013 to 31.3.2013 compared to the period from 01.01.2012 to 31.3.2012 on the FOB value of exports. Incremental growth shall be in respect of

each exporter (IEC holder) without any scope for combining the exports for Group Company.

(c) Incentive will be admissible only if the IEC holder has achieved growth in the financial year 2012-2013 vis a vis financial year 2011-2012.

Quantum of benefit will be calculated on the incremental growth achieved subject to eligibility criteria given in para 3.14.4(d) of FTP 2009-14 .

“(i) Benefit of Incremental Export Incentivisation Scheme for the last quarter of 2012-13 will be limited to 25% growth or Incremental growth of

Rs. 10 crores in value, whichever is less.

(ii) Claims in excess of this value will be subjected to greater scrutiny by Regional Authority.

Eligibility Criteria (d) For the purpose of the scheme, export performance shall not be allowed to be transferred from any other IEC holder.

Benefit under this scheme will not be allowed to an exporter who had made no export between 01/01/12 to 31/03/12 .The following exports shall not

be taken into account for calculation of export performance or for computation of entitlement under the Scheme:

- (i) Export of imported goods or exports made through trans-shipment.
- (ii) Export from SEZ/ EOU IEHTP ISTPIIBTPIFTWZ
- (iii) Deemed Exports
- (iv) Service Exports
- (v) Third Party exports
- (vi) Diamond, Gold, Silver, Platinum, other precious metal in any form including plain and studded jewellery and other precious and semiprecious stones.
- (vii) Ores and concentrates of all types and in all formations.
- (viii) Cereals of all types.
- (ix) Sugar of all types and all forms.
- (x) Crude I petroleum oil and crude I primary and base products of all types and all formulations.
- (xi) Export of milk and milk products.
- (xii) Export performance made by one exporter on behalf of other exporter.
- (xiii) Supplies made to SEZ units.
- (xiv) Items, export of which requires an export authorisation (except SCOMET), will not be considered.
- (xv) Export of Meat and Meat Products.
- (xvi) Exports to Singapore, UAE and Hong Kong.

Special ProvisionÂ (e) The scheme is region specific and will cover exports to USA, EuropeÂ and Asian countries only. Disclaimer provisions of

para 3.17 .1 0 (b) of FTP shall not be admissible. This benefit will be over and above any benefit being claimed by the exporter under any of the

Chapter 3 Schemes, therefore, provisions of para 3.17.8 of FTP 2009-14 will not be invoked for such benefit.

Utilisation of Scrip (f) The duty credit scrip will be freely transferable. Such scrips shall also be eligible for domestic sourcing as per para 3.17.5 of

FTP 2009-14.

(for the sake of convenience, amendments/modifications made by Notification No.44(RE-2013)/2009-2014 dated 25th September, 2013 have been

typed in italics and underlined).

8. Bombay High Court in J.S.W. Steel Ltd. And Another. Vs. Union of India And Others, (2016) 334 ELT 222 (Bom) had held:-

28. We have considered the rival submissions with great care. It seems to us that Mr. Nankani's submissions deserve to be accepted. We find it

difficult to accept the proposition that where there was no cap or limit in the 2012 Notification or in any of its surrounding or contemporaneous

documents such as public speeches, policy documents, changes in the Handbook of Procedures and so on, such a restriction could be said to have

been brought in by the 2013 Notification. We are mindful of the purpose and intent of the 2013 Notification. It is entirely salutary. None should receive

unintended benefit from the 2012 Notification. Certain checks and measures are undoubtedly essential and the Department quite wisely has chosen

the course of specifying a greater scrutiny for high value claims. There is nothing objectionable about any of this. Indeed, the Petitioners do not object

to this. But this is a far cry from an insistence that irrespective of the value of the incremental exports, those incentives must be restricted to a paltry

Rs. 20 lakhs. There is no such restriction to be found in the 2012 Notification or in the 2013 Notification. We certainly cannot read it into 2013

Notification. To do so would be to render, as Mr. Nankani says, clause (II) entirely redundant. If the cap was Rs. 20 lakhs, no exporter, no matter what is his

incremental exports for the period in question, would ever submit an

application or make a claim in excess of Rs. 20 lakhs. There would then be no question of "greater scrutiny" by the Regional Authority. That clause

would be entirely meaningless. Evidently, therefore, what clause (ii) says is that while claims up to the value of Rs. 20 lakhs will require one degree of

scrutiny, those in cases of more than that amount will require much greater study, examination and scrutiny.

29. We are mindful of the principles of interpretation that Mr. Rana presses into service. None can claim any benefit or incentive as an absolute right.

However, a definite policy is enunciated in the present case. That policy extends an incentive for a demonstrated increase in exports. Its purpose is

also clear, viz., to encourage more exports. The policy's terms must, therefore, receive an interpretation as would advance its stated purpose, viz., to

promote and encourage exports. That this is also one of the avowed objects of the Foreign Trade (Development and Regulation) Act, 1992 is also not

doubted. Where the policy did not itself place any such cap - and plainly it did not, for we find no words of limitation in it, other than those in the

eligibility criteria, and these are accepted - any interpretation of the 2013 Notification, therefore, that restricts the incentives in their entirety would

therefore be arbitrary, violating the policy's objective and the mandate of Article 14 of the

Constitution of India.

30. It is well-settled that even in matters of policy, this Constitutional mandate of fairness, reasonableness, non-arbitrariness and nondiscrimination

binds the Respondents. Once we approach these matters in this manner, then none of the judgments relied upon by Mr. Rana are applicable. This is a

case of a policy interpretation by those in charge of its implementation by which, ostensibly to prevent undue benefit to some, undue and unjustified

hurdles and obstacles are created disabling bona fide beneficiaries from availing of the policy's incentives and benefits. It is this aspect, highlighted

throughout, that persuades us to agree with the Petitioners/Exporters.

31. The other important and equally salutary principle of interpretation is that in a beneficial piece of legislation or a policy such as the one involved in

the present case, the Court will not or cannot read into that policy or legislation anything not already there, the introduction of which would result in the

imposition of an unwarranted restriction upon the rights of the beneficiaries or a class of beneficiaries. *Jnan Ranjan Sen Gupta v Arun Kumar Bose*,

(1975) 2 SCC 526, paragraph 9, at p. 530.

32. This in turn means that apart from adopting a plain meaning approach to the interpretation of the 2013 Notification, we must also adopt a purposive

approach to its interpretation and construction. Mr. Rana's submissions do not tell us how a cap or limit or specifying the maximum benefit would

advance the purpose of the incentive scheme. All that these submissions tell us is that there was a concern that none should receive undue or

unintended benefit. There can be no cavilling with that. But it surely cannot be suggested that any incentive above Rs.20 lakhs is axiomatically and

ipso facto an "unintended benefit". This is where an acceptance of Mr. Rana's submission takes us. But this was never the purpose nor the object of

the 2012 Notification. The 2013 Notification did not (and could not) suggest it.â??

9. Similar view has been taken by the Calcutta High Court in W.P. No. 1355/2015, *LGW Industries Limited Vs. Union of India And Others* decided on

28th January, 2016.â?â

10.A Division Bench of this Court in W.P. (C) No. 6732/2015, T.T. Ltd. Vs. Union of India & Anr. decided on 7th January, 2016 had upheld

constitutional validity of the Notification Nos.43(RE-2013)/2009-2014 and 44(RE2013)/2009-2014 both dated 25th September, 2013 adding sub-para to

paragraphs 3.14.5 (c) and 3.14.4 (c) to the Foreign Trade Policy 2009-14, albeit had stated that in view of sub-paras (ii), added to paragraph 3.14.4 (c)

and 3.14.5 (c) vide Notification Nos. 43(RE-2013)/2009-2014 and 44(RE2013)/2009-2014 the claims could not have been rejected without assigning

any reason.Â In terms of clause (ii), the Regional Authority was required to pass a reasoned order after application of mind on the contents of the

applications.Â Direction was accordingly given to the Regional Authority to pass a speaking order within 8 weeks.Â

11.We may note that the Bombay High Court in the case of J.S.W. Steel Ltd. (supra) had quashed the so-called clarification dated 23rd September,

2014 stating that the limit prescribed in clause (i) of paragraph 3.14.4.(c) in the Foreign Trade Policy place an upper limit for grant of import incentive

for the fourth quarter for the financial year 2012-2013. Following this decision in J.S.W. Steel Ltd. (supra) in Writ Petition No. 2157/2016, Welspun

Global Brand Limited and others versus Union of India and Others, decided on 12th June, 2017, Bombay High Court had held that the amount of Rs.1

crore mentioned in clause (i) to paragraph 3.14.5.(c) of the Foreign Trade Policy did not prescribe or fix an upper limit of Rs. 1 crore for grant of

export incentive payable on annual basis for financial year 20132014.

12.In view of the aforesaid discussion, the present writ petitions are allowed with a direction to the Regional Authority to examine the case of the

petitioner for grant of export incentive and pass a reasoned and speaking order.Â The application would not be rejected on the ground that total

amount being claimed exceeded Rs.1 crore during the financial year 201314.Â However, the greater scrutiny in terms of clause (ii) of paragraph

3.15.5

(c) read with paragraph 3.8.3 (e) (ii) would be undertaken.Â The aforesaid exercise would be completed within 10 weeks from the date copy of this

order is served on the respondent. There would be no order as to costs.Â Â Â Â Â Â Â Â Â Â