

**(2012) 09 GUJ CK 0104**

**In the Gujarat High Court**

**Case No :** Special Civil Application No. 9039 of 2011 with SCA No's. 9040-9046 of 2011

Refnol Resins and Chemicals Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

---

**Date of Decision :** 12-09-2012

**Acts Referred:**

Foreign Trade (Development and Regulation) Act, 1992 — Section 11, 11(2), 13, 14, 20

**Citation :** (2013) 287 ELT 61

**Hon'ble Judges :** Harsha Devani, J; Akil Abdul Hamid Kureshi, J

**Bench :** Division Bench

**Advocate :** Paresh M. Dave, for the Appellant; P.S. Champaneri, for the Respondent

---

## **Judgement**

Akil Kureshi, J.—Rule. Learned counsel Shri F.S. Champaneri waived rule for the respondents. Considering the nature of disputes involved, the petitions are taken up for final disposal straightaway. These petitions are directed against separate orders passed in the month of July, 2010 by the Joint Director General of Foreign Trade. We may record facts in brief.

2. The petitioner No. 1 is a company registered under the Companies Act. The petitioner No. 2 is an office bearer. The petitioners are engaged in the business of manufacture of various chemicals. The petitioners had made certain imports in terms of nine advanced licenses issued by the Joint DGFT, Ahmedabad. Such imports were made for manufacture of chemicals for export. Joint DGFT, however, noticed that such export obligations were not fulfilled by the petitioners. On such basis, individual show-cause notices came to be issued against the petitioners for breach of the conditions of licence and other terms of the policy of the Government of India under which such imports were permitted. Since the scope of the show-cause notice is at the centre of the controversy, we may record the relevant portion of one such show-cause notice. In a show-cause notice dated 6-9-2006, the Joint DGFT conveyed to the petitioners that.

M/s. Refnol Resins & Chemicals Ltd., Plot No. 23, Phase-III, GIDC, Naroda, Ahmedabad 282 0476 has obtained Qty. Based Advance License No. 0003391, dated 9-8-1996 for C.I.F. value of Rs. 844400/- equivalent to US 24057/- which issued from file No. 08/81/040/1168/AM96 of this office.

2. AND Whereas one of the condition as per condition sheet attached to the licence was that the Notice firm would export the item mentioned in condition sheet for F.O.B. value for Rs. 1137240/- equivalent to US \$ 32400/- within a period of 18 months from the date of clearance of first consignment.

3. AND FURTHER Whereas on their failure to produce the required documents as per para 126 of Hand Book of Procedure 1992-97 showing fulfillment of Export Obligation against above mentioned license the notice firm declared as defaulter by this office vide defaulter circular/demand notice No. 65/am07, dated 7-4-2006.

4. AND WHEREAS the above action of the Noticee firm contravenes the provision of Paragraph 49 of Import & Export Policy Book 1992-97 read with para 109D of Hand Book of Procedure 1992-97 & Section 11 of the Foreign Trade (Development & Regulation) Act, 1992 read with section 20 of the Foreign Trade (Development and Regulation) Act, 1992.

3. On the basis of the above allegations, the show-cause notice proposed following action against the petitioners:-

5. Now, therefore in exercise of the powers vested in me u/s 13 of the Foreign Trade (Development & Regulation) Act, 1992, I call upon the Noticee firm to show cause within period of 30 days from receipt of this notice as to why action should not be taken u/s 11(2) of the Foreign Trade (Development & Regulation) Act, 1992 to imposition of fiscal penalty on the Noticee firm and its directors. If they want to have personal hearing to explain their case they may appear before the Jt. Director General of Foreign Trade of this office on 5-10-2006 at 3.00 p.m.

4. In para 6 of the show-cause notice, it was stated that the notice was issued without prejudice to any other action that may be taken against the noticee under any law, rules or regulations in force. In paragraph 7, the noticees were called upon to furnish certain documents and informations.

5. All other show-cause notices are commonly worded without any changes in material aspects.

6. It appears that the petitioners did not respond to such show-cause notices nor did they appear before the authority. The Joint DGFT thereupon passed nine individual orders, as noted, sometime in July, 2010. In one such order, he only imposed a penalty of Rs. 10,000/- u/s 11(2) of the Foreign Trade (Development and Regulation) Act, 1992 (hereinafter referred to as "the Act of 1992"). In rest of the orders, in addition to imposing such penalty u/s 11(2) of the Act of 1992, he also directed recovery of seizable amount of customs duty with 15% interest. We may notice one such order dated 21-7-2010 which reads as under:-

I, therefore, in exercise of powers as conferred in me u/s 13 of Foreign Trade (Development & Regulation) Act, 1992, Order as under:-

9.1 The Recovery/payment of customs duty of Rs. 1148616/- (Rupees eleven lakh forty eight thousand six hundred sixteen only) from/by the noticee Company/Directors jointly and severally.

9.2 The Recovery/payment of interest with effect from 20-9-2000 till the date of payment at the rate of 15% (Interest as on date comes to amount of Rs. 1686577/- (Rupees sixteen lakh eighty six thousand five hundred seventy seven only) from/by the noticee Company/Directors jointly and severally.

9.3 The Recovery/payment of Penalty amount of Rs. 10000/- (Rupees ten thousand only) from/by the noticee Company/Directors jointly and severally.

9.4 The recovery/payment in respect of 9.1 and 9.2 above may be made to the customs authority concerned.

9.5 The recovery/payment in respect of 9.3 above may be made to the Regional Authority.

9.6 Immediately after recovery/payment of the amount as indicated in paras 9.1 to 9.3 above, the Show Cause Notice will be treated as withdrawn and case will stand as closed/discharged/regularised.

7. Thereupon, the petitioners have approached this court in the present petitions calling in question the legality of such orders passed by the Joint Director General of Foreign Trade.

8. Counsel for the petitioners clarified at the outset that the petitioners do not question that portion of the orders under which the Joint DGFT imposed penalty u/s 11(2) of the Act of 1992. He, however, strongly opposed the recovery of customs duty with interest as provided by the authority in the impugned orders.

9. The challenge to such orders is sought to be sustained on two grounds. Firstly, that the show-cause notice did not anywhere suggest that for the alleged breaches, the Joint DGFT proposed to recover customs duty with or without interest. The second contention of the petitioners is that in any case, the Joint DGFT has no power under the Act of 1992 to recover customs duty which can be done only by the customs authorities exercising statutory powers under the Customs Act, 1962.

10. Learned counsel Shri Champaneri, on the other hand, opposed the petitions contending that the show-cause notices were sufficiently clear. In such notices, the authorities had specified that the petitioners had not fulfilled the export obligations and had thereupon breached the conditions of the import licenses as also the rules and regulations under which permission to import raw materials was granted. He further relied on the affidavit-in-reply filed by the respondents to contend that in terms of the import license and the regulations framed by the Government of India, Joint DGFT was also empowered to recover customs duty

on the premise that the export obligations specified in the import licence were not fulfilled.

11. In the present group of petitions, we confine ourselves only to the question of recovery of customs duty with interest. Here also, we propose to take up only the first contention of the petitioners for consideration. We have recorded the relevant portion of the show-cause notices. From bare perusal of such notices, it becomes clear that there was no proposal for recovery of the customs duty. All that the notice indicated was that for alleged breaches of failure to fulfill the export obligations, the Joint DGFT proposed to impose penalties in terms of Section 11(2) of the Act of 1992. Section 11 pertains to contravention of the provisions of the Act, rules, orders and export and import policy. Sub-section (1) thereof provides that no export or import shall be made by any person except in accordance with the provisions of the Act and the rules and orders made thereunder and the export and the import policy for the time being in force. Subsection (2) of Section 11 provides for penalty in case where a person makes or abets or attempts to make any export or import in contravention of the provisions of the Act of 1992 or any rules or orders made thereunder or the export and the import policy. Such penalty would be not exceeding one thousand rupees or five times the value of goods in respect of which the contravention was made or attempted, whichever is higher. Section 11(2) of the Act of 1992 reads as under:-

11. Contravention of provisions of this Act, rules, orders and export and import policy.

(2) Where any person makes or abets or attempts to make any export or import in contravention of any provision of this Act or any rules or orders made thereunder or the export and import policy, he shall be liable to a penalty not exceeding one thousand rupees or five times the value of the goods in respect of which any contravention is made or attempted to be made, whichever is more.

Section 14 of the Act of 1992 pertains to giving of opportunity to the owner of the goods and provides that no order imposing a penalty or of adjudication of confiscation shall be made unless the owner of the goods or conveyance, or other person concerned, has been given a notice in writing informing him of the grounds on which it is proposed to impose a penalty or to confiscate such goods or conveyance and to make a representation against the imposition of penalty or confiscation.

12. From the above, it can be seen that the competent authority u/s 11(2) of the Act of 1992 had power to impose penalty up to a maximum of Rupees one thousand or five times the value of goods in respect of which any contravention is made or attempted to be made, whichever is higher. Such provision nowhere pertains to recovery of the customs duty with or without interest. In the show-cause notice, all that the petitioners were conveyed was that on failure to dislodge the allegations made in the notice, the authority would proceed to pass

penalty order u/s 11(2) of the Act of 1992. Thus, in the show-cause notice, there was no proposal that the authority would also proceed to pass an order for recovery of customs duty with interest. Under the circumstances, we are of the opinion that the final orders that the Joint DGFT passed, traveled beyond the proposals of the show-cause notice insofar as the orders pertain to recovery of customs duty and interest. To such extent, the orders are vulnerable and are, therefore, hereby quashed.

13. We, however, clarify that we have not examined the contention of the petitioners that in any case. Joint DGFT had no power to provide for recovery of customs duty. We further clarify that if otherwise open in law for the authorities to Seek recovery of the duties, this order shall not come in way of the respondents in doing so in accordance with law. Rule made absolute in all matters to the above extent. No costs.