(2004) 11 GUJ CK 0013

In the Gujarat High Court

Case No : Special Civil Application No. 11755 of 2003

Shell Exports (Kandla) APPELLANT

Vs

Union of India (UOI) RESPONDENT

Date of Decision : 03-11-2004

Acts Referred:

Constitution of India, 1950 — Article 226
Foreign Trade (Development and Regulation) Act, 1992 — Section 5

Citation : (2004) 11 GUJ CK 0013

Hon'ble Judges : Sharad D. Dave, J;B.J. Shethna, J

Bench : Division Bench

Advocate : Mihir Thakore, for Ketan D. Shah, for the Appellant; Dharmishta Raval and Jitendra Malkan, for the Respondent

Final Decision : Dismissed

Judgement

B.J. Shethna, J.—Rule, Learned Standing Counsel Shri Jitendra Malkan waives service of Rule for the respondents. Heard learned Counsel for the parties.

2. The petitioner - M/s. Shell Exports (Kandla) is a Partnership firm engaged in the business of manufacture and Export of Made-ups and ready-made Garments, having its unit at Kandla Special Economic Zone (for short "SEZ"), has filed this petition under Article 226 of the Constitution and prayed that the impugned orders dated 1.7.2003 (Annexure : A) and 9/10.6.2003 (Annexure : B) passed by the respondent No. 2 be quashed and set aside. The petitioner has also prayed for issuance of writ of mandamus or direction, issuing direction to the respondent to grant Duty Entitlement Pass-Book (for short "DEPB Entitlement") as per its Application for the period from 5.6.2002 to 31.3.2002 as per Export and Import Policy 2002-2007, vide Notification dated 5.6.2002.

3. The Government of India, Ministry of Commerce & Industries, issued Notification No. 1/2002-07 dated 31.3.2002 in exercise of powers conferred u/s. 5 of the Foreign Trade (Development and Regulation Act, 1992 (No. 22 of 1992) read with Paragraph 1.1 of the Export and Import Policy, 2002-07, notifying the

Export & Import Policy 2002-07 as contained in Annexure to it. The said policy was to come into force with effect from 1.4.2002. The duration period of the said policy is 5 years commencing from 1.4.2002 to 31.3.2007 as provided in clause :1.1 of Chapter : I of the said policy. There are 4 objectives in clause : 1.4 of the Policy which are as under : 1.4 The Principal objectives of this policy are :

(i) To facilitate sustained growth in exports to attain a share of at least 1% of global merchandise trade;

(ii) To stimulate sustained economic growth by providing access to essential raw materials, intermediates, components, consumables and capitable goods required for augmenting production and providing services.

(iii) To enhance the technological strength and efficiency of India agriculture, industry and services, thereby improving their competitive strength while generating new employment opportunities, and to encourage the attainment of internationally accepted standards of quality.

(iv) to provide consumers with good quality goods and services at internationally competitive prices while at the same time creating a level playing field for the domestic producers.

Chapter : 7 of the said policy is for Special Economic Zones (SEZ). Clause : 7.9 of Chapter : 7 of the Policy refers to entitlement for supplies from the DTA.

We are concerned with Clause : 7.9 (a) in this petition. Therefore, the same is reproduced hereunder :

(a) Supplies from the DTA to SEZ units shall be eligible for the following :

(I) DTA supplier shall be entitled from :-

(i) Relevant entitlements under Paragraph 8.3 of the Policy

(ii) Discharge of Export performance, if any, on the supplier.

Government of India, Ministry of Commerce and Industry, issued notification No. 7/2002-07 dated 5.6.2002 in exercise of powers conferred u/s. 5 of the Foreign Trade (Development and Regulation) Act, 1992 (No. 22 of 1992) read with Paragraph : 1.1 of the Export and Import Policy, 2002-07, adding sub-clause (iii) to Paragraph 7.9 (I) of Chapter VII of the Policy, which reads as under :

(iii) Benefit of DEPB in lieu of Drawback for supplies made to SEZ or unit in SEZ (Annexure : C).

4. In view of the notification No. 7/2002-07 dated 5.6.2002 (Annexure ; C) issued by the Central Government the petitioner submitted an Application dated 26.5.2003 to the Development Commissioner, Kandla Special Economic Zone, Gandhidham (Annexure : D) for DEPB Entitlement as per Export & Import policy 2002-2007, vide Notification No. 07/2002-07 dated 5.6.2002 (Annexure : D). The same was rejected by the Joint Development Commissioner, on 9.6.2003

informing the petitioner that DEPB would be available for supplies made from DTA to SEZ unit with effect from 1.4.2003 only (Annexure : B). Thereupon, the petitioner once again, submitted an Application dated 13.6.2003 (Annexure : E) as no reason was assigned for rejecting their earlier Application (Annexure : B) dated 9.6.2003. Thereafter the petitioner submitted an Application dated 13.6.2003 (Annexure : F) to the Hon''ble Minister of Commerce MR, Ministry of Commerce, Udyog Bhavan, New Delhi for DEPB Entitlement for supplies from DTA Units at Kandla SEZ for the financial year 2002-03 (5.6.2002 to 31.3.2003), the copy of the same was sent to Joint D.C. Kandla SEZ, and others. It is stated in the said Application that in view of the notification dated 5.6.2002 all their supplies/exports were effected for the year 2002-03 on the basis of the same notification and later on they had applied for DEPB entitlement to the Office of the Development Commissioner, Kandla Special Economic Zone vide their Application dated 26.5.2003. Non-granting of DEPB resulted in very high procurement cost for basis raw material and as a consequence thereof their export competitiveness was affected. It was also stated in it that despite clear provisions of the EXIM policy the said benefit is not provided to them, therefore, necessary instruction be issued to the competent Authority to consider their case sympathetically and extend the benefit of DEPB to the supplies from DTA which was procured by them during financial year.

5. The Development Commissioner, Kandla, SEZ, by its letter dated 1.7.2003 informed the petitioner that though the provisions in the Exim Policy were made on 5.6.2002, the corresponding notifications by the Department of Revenue regarding procedure for receipt of all such material under claim of DEPB and the notifications enabling the acceptance of DEPB issued against such supplies have been issued only with effect from 1.4.2003. Therefore, DEPB benefit can be availed only for the supplies made from DTA to SEZ units with effect from 1.4.2003 and the supplies made prior to 1.4.2003 would not be entitled for the said benefit. Accordingly, the Application dated 26.5.2003 of the petitioner (Annexure : D) was rejected by the Development Commissioner by a reasoned order (Annexure : A). Hence, this petition.

6. Learned Senior Advocate Shri Mihir Thakore, appearing for the petitioner submitted that once the Government issued Notification dated 5.6.2002 the petitioner would be entitled for all the benefits under the said notification with effect from 5.6.2002 itself. In absence of any clarification made in it by the Government that the said notification shall come into effect from any particular day. He submitted that issuance of corresponding notification by the Government regarding procedure for receipt and acceptance of DEPB with effect from 1.4.2003 would not take away the right of the petitioner which has accrued to it under Notification dated 5.6.2002. He submitted that principle of issue estoppel certainly applies in this case as the petitioner has entered into transaction in view of the Government Notification dated 5.6.2002 and by not denying the benefit under it the petitioner has made to suffer tremendous loss. He, therefore, submitted that the impugned orders/letters dated 1.7.2003 and 9/10.6.2003

(Annexure : A & B respectively) passed by the Development Commissioner and Joint Development Commissioner respectively be quashed and set aside. In support of his submission Shri Thakore has placed reliance on the Judgment of the Hon''ble Supreme Court in the case of Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others, and the Judgment of the Karnataka High Court in the case of Union of India (UOI) Vs. Yokogawa Bluestar Ltd.,

7. We have already narrated the facts of this case hereinabove and having carefully gone through both the Judgments of the Hon''ble Apex Court as well as Karnataka High Court, we failed to appreciate that how those Judgments are applicable on facts of this case. The facts of M/s. Motilal Padampat Sugar Mills Co. Ltd. (Supra) have been reproduced by the Apex Court in Para : 2 of its Judgment. Therefore, we have not thought it fit to reproduce the same herein in detail. Suffice it to say that in M/s. Motilal Padampat Sugar Mills case a statement was made by the Secretary of the Industries Department of the Government and on the basis of it news item was published in the news paper "National Herald". Acting on it, the petitioner of that case sought benefit of the same and on facts of that case the Hon''ble Supreme Court found that principle of issue estoppel would apply and the petition was allowed. That is not the case here.

8. In the case of YOKOGAWA BLUESTAR (supra) the facts have been reproduced in Para ; 2 of the Judgment of the Karnataka High Court. In that case admittedly the Government had permitted the petitioner to import goods and notification was already issued in the matter for a period of 5 years. Thus, on facts of that case the Karnataka High Court held that it was a case of issue estoppel.

9. Coming to the facts of the present case it is clear that export and import policy, 2002-07, for 5 years came into force with effect from 1.4.2002 and its duration period was with effect from 1.4.2002 to 31.3.2007. We have already reproduced earlier in part of this Judgment the four objectives for issuing this export and import policy. After issuing the said policy under Notification dated 31.3.2002 coming into force with effect from 1.4.2002 considering the interest of business community the Government thought it fit to extend the benefit of DEPB in lieu of draw back for supply made to SEZ or unit in SEZ, therefore, the notification dated 5.6.2002 (Annexure : C) was issued. But, it is pertinent to note that it is not stated in the said notification that the same will come into force with effect from any particular day. It was obviously for new financial year starting from 1.4.2003 and, therefore, the corresponding notifications were issued for receipt and acceptance of DEPB with effect from 1.4.2003. In that view of the matter by no stretch of imagination it can be said that the principle of issue estoppel would apply in this case in favour of the present petitioner.

10. In view of the above discussion, this petition fails and is hereby dismissed. Rule discharged. However, there shall be no order as to costs.

