
(2010) 12 DEL CK 0319

In the Delhi High Court

Case No : Writ Petition (C) 9376 of 2009

Vacmet Packagings (India) Pvt Ltd.

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 15-12-2010

Acts Referred:

Citation : (2011) 1 AD 291 : (2011) 176 DLT 57 : (2011) 264 ELT 50

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : Madan Gera, for the Appellant; S.K. Dubey and D. Abhinav Rao, for the Respondent

Final Decision : Dismissed

Judgement

S. Muralidhar, J.—The short question in this petition is whether the Petitioner company Vacmet Packagings (India) Pvt. Ltd. ("VPIPL") is entitled to avail of the "Target Plus Scheme" announced as part of the Foreign Trade Policy 2004-09 ("FTP 2004-09") announced by the Ministry of Commerce and Industry, Government of India. Para 3.7.2 of the FTP 2004-09 spells out the eligibility criteria as under:

3.7.2 All Star Export Houses (including Status Holders as defined in para 3.7.1 of Exim Policy 2002-07) which have achieved a minimum export turnover in free foreign exchange of Rs. 10 crores in the previous licencing year are eligible for consideration under the Target Plus Scheme.

2. It is not in dispute that VPIPL is a Star Export House. Para 3.7.4 indicates who can apply under the Target Plus Scheme. It reads as under:

3.7.4 Companies which are Star Export Houses as well as part of a Group company shall have an option to either apply as an individual company or as a Group based on the growth in the Group's turnover as a whole. (For the purpose of this scheme the definition of Group Company? as given in Chapter 9 will be applicable. Furthermore only such companies of the Group as are Star Export

Houses will be considered).

If a Group company chooses to apply based on the export of one or more of its individual Star Export House companies, the entitlement would be calculated considering the export performance of the applicant company during the previous licencing year and current licencing year. It shall be necessary that the adjusted export performance of all the Star Export House companies of the Group during the current licencing year does not fall below the combined performance of all Star Export House companies of the Group in the previous licencing year.

In case the Group chooses to apply based on the overall growth in Group's turnover (i.e. the turnover of all the Star Export House companies), any one of the Star Export House companies of the Group may file an application on behalf of all the Star Export House companies of the Group.

3. The case of the Petitioner is that it has another "enterprise" which is in fact a partnership firm in the name of M/s Polypacks Industries having three partners Mr. Dinesh Chand Aggarwal, Mr. Suresh Chand Aggarwal and Mr. Raj Narain Aggarwal. It is stated that the said firm is also a recognised Star Export House. The contention of the Petitioner is that M/s Polypacks Industries is a "group company" of VPIPL for the purposes of Clause 3.7.4 of the FTP 2004-09 .

4. The above clause incorporates by reference the definition of a "group company" as contained in Clause 9.28 of the FTP 2004-09 which reads as under:

9.28 "Group Company" means two or more enterprises which directly or indirectly, are in a position to-

(i) exercise twenty-six per cent or more of the voting rights in the other enterprise; or

(ii) appoint more than fifty percent, of the members of the board of directors in the other enterprise; or

For the group companies to claim benefits or have their exports counted for benefits to be claimed by another member of the group, the group company should have been in existence at least 2 years prior to the date of application under any of the export promotion schemes notified in the Policy.

5. The Petitioner is aggrieved by the rejection on 23rd June 2008 of Ministry of Law and Justice to the Petitioner's contention that firm M/s. Polypacks Industries is a group company of VPIPL. Resultantly the Petitioner's claim under the Target Plus Scheme was rejected by an order dated 4th May 2008 which was communicated to the Petitioner on 3rd December 2008. These orders have been challenged in the present petition.

6. Mr. Gera, learned Counsel appearing for the Petitioner submits that the definition of "group company" in para 9.28 of FTP 2004-09 only refers to "two or more enterprises" and does not require both those enterprises to be the

companies. According to him one of the enterprises could be a company and the other a firm. Further elaborating on this point, Mr. Gera submits that the word "enterprises" does not necessarily have to mean a firm. It could be the individual partners of a firm. Accordingly, it is submitted that as long as the individual partners of M/s Polypacks Industries hold shares carrying 26% voting rights in VPIPL or such individual partners are in a position to appoint more than 50% of the members of the board of directors of VPIPL, the firm M/s Polypacks Industries would be a "group company" of VPIPL. It is consequently submitted that VPIPL ought to be permitted to avail of the benefits under the Target Plus Scheme.

7. This Court is unable to accept the above submissions.

8. It is plain that the definition of "group company" under para 9.28 of the FTP 2004-2009 envisages two "enterprises" one of which is in a position to exercise 26% voting rights in the other. While it is correct that the word used is "enterprise", certainly that word cannot mean an individual. Even if one were to accept the argument that of the two or more "enterprises", one could be a company and the other a firm, it must be shown that such firm holds shares in the company and is in a position to exercise 26% or more voting rights in the company. Factually in the present case there is no shareholding by the firm M/s Polypacks Industries in VPIPL. It is only the individual partners of M/s Polypacks Industries who hold shares in VPIPL. 9. This is plain from the Petitioner's averment in para 3 of the writ petition which reads as under:

3. That the Petitioner Company has another Enterprise known by the name of M/s Polypacks Industries which is a Partnership Firm having three partners i.e. Mr Suresh Chand Aggarwal, Mr. Raj Narain Aggarwal and Sh. Dinesh Chand Aggarwal. The said firm is also recognized as one Star Export House, copy of which is ANNEXURE "P-3". The said Partners of M/S Polypacks Industries are also Directors of the Petitioner Company. The aforesaid three partners of M/S Polypacks Industries are share holders of the Petitioner Company holding 37,16,000 equity shares out of total 62,70,000 equity shares to the extent of 59.26% of the total paid up equity capital of the Petitioner Company as on 31st March, 2005. The Certificates given by the Company Secretary certifying the number of shares and the percentage of the Partners of M/S Polypacks Industries in the Petitioner Company are also placed on record.

10. The argument that as long as the individual partners hold share in the company, they would satisfy the requirement of Clause 9.28 is one of desperation. Clearly such individual partners will not answer the description of "enterprise" in Clause 9.28. To accept such contention is to negate the very purpose of treating the other enterprise as "group company" for the purpose of Clause 3.7.4 of the FTP 2004-09. The word "group company", on a plain reading, should ordinarily mean another "company". Even if the meaning of "enterprise" in Clause 9.28 were stretched to include a firm, it must be shown that the firm as such, and not its individual partners, holds 26% voting rights in the company.

Clearly this is not a position in the present case. No fault can be found with the decision of the Respondents in declining to extend the benefits of Target Plus Scheme to VPIPL and in refusing to treat the firm M/s Polypacks Industries as a "group company" of the VPIPL.

11. There is no merit in the writ petition and it is dismissed as such.