IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: July 20, 2010
Decision on: August 5, 2010

W.P.(C) No. 2497 of 2008

INDIAN EXPORTERS GRIEVANCE FORUM & ANR. ..... Petitioners

Through: Mr. Vikram Nankani with Mr. Tarun Gulati, Mr. Rony John, Kishore Kunal, Mr. Neil Hilderth, Mr. Shashi Mathews and Mr. Sparsh Bhargava, Advocates.

versus

UNION OF INDIA & ORS. .....Respondents

Through: Mr. A.S. Chandhiok, Additional Solicitor General with Mr. Satish Agarwala with Mr. Shirish Aggarwal, Advocates.

CORAM: JUSTICE S. MURALIDHAR

1. Whether Reporters of local papers may be allowed to see the judgment? No
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in Digest? Yes

J U D G M E N T

W.P.(C) No. 2497 of 2008 & CM No. 4677 of 2008 (for stay)

1. Petitioner No.1 is the Indian Exporters Grievance Forum, which is a society registered under the Societies Registration Act, 1860 and having as its members professional exporting firms and Government recognised Export Houses, Trading Houses, Star Trading Houses and Super Star Trading Houses. It has, along with its authorised signatory Mr.Harish Kumar, Petitioner No.2, filed this petition seeking a declaration that para

('DGFT'), Department of Commerce, Ministry of Commerce & Industry, Government of India are ultra vires Articles 14, 19(1)(g) and 300A of the Constitution of India and/or Section 5 of the Foreign Trade (Development & Regulation) Act, 1992 ('FTDR Act'), the provisions of para 3.7.6 of the Foreign Trade Policy ('FTP') and Section 25 of the Customs Act, 1962.

2. The Petitioners also pray for the quashing of the Circular dated 8th May 2007 issued by the Department of Revenue, Ministry of Finance, Government of India in terms of which for the purposes of availing of duty credit, the exporter would have to demonstrate that the items sought to be imported should be an "input" in the manufacture of the exported items.

Background

3. The brief facts leading to the filing of the present petition are that the FTP was announced on 31st August 2004. It contained an export incentive scheme called the Target Plus Scheme ('TPS'), which was effective from 1st April 2004 to 31st March 2005. The TPS was continued for one more year from 1st April 2005 to 31st March 2006. It was thereafter discontinued. The relevant provision of the TPS dealing with the eligibility, entitlement and items permissible for import of the TPS during the above period reads as under:

> "3.7.1 Objective
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> The objective of the scheme is to accelerate growth in exports by rewarding Star Export Houses who have achieved a quantum growth in exports. High

higher than the general annual export target fixed (since the target fixed for 2005-06 is 17%, the lower limit of performance for qualifying for rewards is pegged at 20% for the current year).

3.7.3 Entitlement

The entitlement under this scheme would be contingent on the percentage incremental growth in FOB value of exports in the current licensing year over the previous licensing year, as under:

Percentage incremental growth	Duty Credit Entitlement (as a % of the incremental growth)
20% and above but below 25%	5%
25% or above but below 100%	10%
100% and above	15% (of 100%)

Note: (1) Incremental growth beyond 100% will not qualify for computation of duty credit entitlement.

(2) For the purpose of this scheme, the export performance shall not be transferred to or transferred from any other exporter. In the case of third party exports, the name of the supporting manufacturer/ manufacturer exporter shall be declared.

(3) Exporters shall have the option to apply for benefit either under the Target Plus Scheme or under the *Vishesh Krishi Upaj Yojana*, but not both in respect of the same exported product/s. provided that in calculating the entitlement under Para 3.7.3 the total eligible exports shall be taken into account for computing the percentage incremental growth but the

benefit is claimed under para 3.8.2.

(4) All exports including exports under free shipping bill verified and authenticated by Customs and Gems & Jewellery Shipping bills but excluding exports specified under para 3.7.5, shall be eligible for benefits under the Target Plus Scheme.

(5) In respect of export of Cut & Polished diamonds only those shipments would be taken into account for computation of eligible exports under the scheme where a minimum of 10% value addition has been achieved.

3.7.6 Imports allowed

The Duty Credit may be used for import of any inputs, capital goods including spares, office equipment, professional equipment and office furniture provided the same is freely importable under ITC (HS) Classification of Export and Import items, for their own use and that of supporting manufacturers as declared in `*Aayat Niryaat* Form'.

Import of agricultural Products listed in Chapter 1 to 24 of ITC (HS) Classification of Export and Import items expect the following shall be allowed:

(i) Garlic, Peas and all other Vegetables with a Duty of more than 30% under Chapter 7 of ITC (HS) Classification of Export and Import items.

(ii) Coconut, Areca Nut, Oranges, Lemon, Fresh Grapes, Apple and Pears and all other fruits with a Duty of more than 30% under Chapter 8 of ITC (HS) Classification of Export and Import items.

(iii) All spices with a Duty of more than 30% under

(iv) Tea, Coffee and Pepper as per Chapter 9 of ITC (HS) Classification of Export and Import items.

(v) All Oil Seeds under Chapter 12 of ITC (HS) Classification of Export and Import items.

Further, Natural Rubber as per Chapter 40 of ITC (HS) Classification of Export and Import items shall also not be allowed for import under the Scheme.

Import of all edible oils classified under Chapter 13, shall be allowed under the scheme only through STC and MMTC."

4. The above provisions were valid from 1st April 2004 to 31st March 2005. For the next licence year from 1st April 2005 to 31st March 2006, they were continued with certain minimal changes.

5. It is stated that the HBP is issued by the DGFT in terms of para 2.4 of the FTP. The said paragraph clarifies that the HBP "is a supplement to the Foreign Trade Policy and contains relevant procedures and other details". In the TPS, at the time of announcement of the FTP, para 3.2.5 read as under:

"3.2.5 The status holders having an annual incremental growth of more than 25% in the FOB value of exports (in free foreign exchange) shall be entitled to the facility of duty free credit entitlement subject to achieving a minimum annual export turnover of Rs. 25 crore (in free foreign exchange). Such status holders shall be entitled to duty free credit entitlement certificate to the extent of 10% of the incremental growth in exports.

Accordingly, status holders who will achieve more than 25% growth in exports in the year 2003-04 (in free

export of Rs. 25 crore (in free foreign exchange) shall be entitled for duty free credit entitlement certificate @ 10% of the incremental growth in exports.

The duty free credit entitlement can be used for import of capital goods, office equipments and inputs provided the same is freely importable under ITC (HS). Such goods shall be non transferable. Goods imported against such entitlement certificate shall be used by status holder or his supporting manufacturer/jobworker provided the name and address of the supporting manufacturer/ jobworker is endorsed on the certificate issued by RLA.

Application shall be filed with the jurisdictional regional licensing authority as per the address given in status certificate. The application for the duty free credit entitlement certificate would be made in Appendix-17D.

The duty free entitlement certificate shall be valid for a period of 12 months. The status holder shall within one month of the expiry of the validity of the duty free entitlement certificate, submit a statement of imports made under the certificate as per Appendix-17E to the jurisdictional Regional Licensing Authority."

6. By a public notice dated 7th April 2005, the DGFT prescribed a form in Appendix 17D in which an application would have to be made for availing of Duty Free Export Credit ('DFEC') under the TPS for the two licencing years 2004 to 2006. At Serial No. 10 of Appendix 17D, it was clearly stated that goods i.e. inputs and capital goods should have a 'broad nexus' with the

Appendix 17D as amended contained a provision in relation to the "broa nexus" and read as under:

> "Goods allowed to be imported under this scheme shall have a broad nexus with the products exported. For the purpose of import entitlements under this scheme, 'broad nexus' would mean goods imported with reference to any product groups of the exported goods within the overall value of the entitlement certificate."

7. Consequently, notifications were issued on 8th April 2005 and 10th July 2006. The contention of the Petitioners is that the Respondents had no power or jurisdiction to impose a condition of "broad nexus" or to define the term "broad nexus" when there was no such condition in para 3.7.6 of the FTP. In other words, it is submitted that any change to the conditions in the FTP could be brought about by the Government of India only by a notification under Section 5 of the FTDR Act.

8. A further circular dated 8th May 2007 was issued by the Department of Revenue, Government of India. Paras 3,4 and 5 of the said circular state as under:

> "3. The matter has been examined in consultation with the Ministry of Law (MOL). After examination of the provisions of Para 3.7.6 of the FTP and Para 3.2.5 (II) of the HBP, the MOL has opined that the FTP does not use the expression "broad nexus" and, therefore, the same cannot be dissociated from the words "input" and "use" mentioned in the Policy. The MOL has categorically stated that the addition in Para 3.2.5 (II) of the HBP is to facilitate the search for "inputs" and "use" and any interpretation so as to dissociate the import from the "inputs" and "use" in the export goods would make it ultra vires the FTP. The MOL has further stated that the words "inputs" and "use" cannot be brushed aside and have to be in focus for the intended import.

as the case may be. For this purpose, the intended input must have relationship with the export product. Whereas SION will act as a prima facie evidence of the inputs, the exporter is not debarred from satisfying the authorities that there is a broad nexus between the intended import item as an input with the export product, both falling within the same product group. Ignoring to give effect to the words "inputs" in the beginning and "own use" towards the end in Para 3.7.6 of the FTP would mean to render a part of it redundant and would not be in keeping with the objective and framework of the scheme.

4. In the light of this, the Ministry of Law clarified that the holder of TPS certificate is permitted to import an item under the TPS and get the same processed into possible resultant products only if the same has a 'broad nexus' with the product group as an input in the export product and is required to be used as an input in the product exported for which TPS benefit is sought. The Ministry of Law has also clarified that the term 'broad nexus' with the product group is in addition to and not in substitution of the words "inputs" and "own use" in Para 3.7.6 of the Scheme.

5. The Ministry has accepted the aforesaid opinion of the Ministry of Law. Accordingly, import of goods against TPS certificates may be allowed keeping in view the said opinion discussed in paragraphs 3 and 4 above."

The above circular dated 8th May 2007 has been challenged in this petition.

9. Subsequently by a Public Notice dated 21st June 2007, the DGFT further made the following changes:

> "In para 3.2.5 (II) second sentence, viz. 'For the purpose of import entitlements under this scheme, 'broad nexus' would mean goods imported with reference to any of the product groups of the exported goods within the overall value of the entitlement certificate' inserted in Handbook of Procedures (Vol.1) RE 2005 {HBP v1 (RE2005)} is hereby deleted."

By the said Public Notice, the following notes were also added in para 3.2.5

> "Note 1. The words 'Goods' in first sentence shall mean inputs and capital goods as permitted under Para 3.7.6 of FTP (RE2004 & RE2005).
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> Note 2. In para 3.7.6 of FTP (RE2004 & RE 2005), there is no quantitative/duty quantum restriction on import of inputs related to export products, which may otherwise be stipulated as a norm for export product."

10. The effect of the above Public Notice dated 21st June 2007, which has also been challenged in this petition, is that it seeks to further narrow down the right to import only such inputs under TPS as those which have nexus with the export product, and not the export product group. After the amendment, para 3.2.5 (II) of HBP reads as under:

> "II. Goods allowed to be imported under this scheme shall have a broad nexus with the products exported. For the purpose of import entitlements under this scheme, 'broad nexus' would mean goods imported with reference to any of the product groups of the exported goods within the overall value of the entitlement certificate."

11. Thereafter a further circular No. 45/2007-Customs dated 19th December 2007 was issued whereby the Respondents further clarified that the term 'broad nexus' has to be construed with reference to the words "use" and "inputs" in the FTP. Thus Respondent No.3 restricted the benefit under the TPS by clarifying that only 'inputs' used in the manufacture/production of goods exported will be allowed to be imported.

Petitioners' Submissions

12. It is contended by Mr. Vikram Nankani, learned counsel for the Petitioners, that members of Petitioner No.1 Society had made incremental exports and had become entitled to duty-free credit. By unduly seeking to restrict the items that could be imported, an accrued benefit had been taken away. It is submitted that the schedule of making imports was planned well in advance and in the present case the exports had already taken place between 1st April 2004 and 31st March 2006. Any change in the HBP made long after the completion of those exports should not be permitted even on the ground of legitimate expectation. Importantly, it is contended that such change cannot be brought about through circulars and Forms but only by means of an amendment through the notification under Section 5 of the FTDR Act. The power to make such changes obviously could not have been delegated by the Central Government to the DGFT. It is for these reasons that the amended para 3.2.5 (II) of the HBP is assailed being beyond the competence of the DGFT and, therefore, liable to be quashed.

Respondents' submissions

13. In reply, it is submitted by Mr.A.S.Chandhiok, learned Additional Solicitor General (ASG) appearing for the Respondents, that the term 'broad nexus' became necessary to be defined since otherwise a person exporting garments might end up importing automobile parts which could not have been used by such importer as either an input in manufacture by him or by an associate manufacturer. It is pointed out that the FTP does not use the

The intended input must have a relationship with the export product. It submitted that the condition of the broad nexus in para 3.2.5 (II) of the HBP was clarificatory of the terms 'inputs' and 'use' in the FTP and any interpretation so as to dissociate 'inputs' from 'use' in the exported goods would be contrary to the provisions of the FTP. The Law Ministry had therefore clarified that "the holder of Target Plus Scheme certificate is permitted to import an item under the Target Plus Scheme and get the same processed into possible resultant products only if the same has a 'broad nexus' with the product group as input in the export product and is required to be used as an input in the product exported for which Target Plus Scheme benefit is sought. It also clarified that "the term 'broad nexus' with the product group is in addition to and not in substitution of the words 'inputs' and 'own use' in para 3.7.6 of the Scheme". It is submitted that the subsequent circulars are all consistent with the above opinion of the Law Ministry.

Challenge to maintainability of the petition not sustainable

14. A preliminary objection has been raised by the learned ASG to the maintainability of this writ petition on the ground that the Petitioners do not have a *locus standi* to challenge the impugned Circulars and the Notifications. He places reliance on the decision of this Court in ***Vaas Exports v. Union of India 143 (2007) DLT 525***.

15. This Court does not find the above preliminary objection to be tenable in

Notification. Petitioner No.1 is entitled to represent the collective interest its members. Recognizing the locus standi of Petitioner No.1 will avoid multifarious litigation by each of the members of the Petitioner No.1 seeking identical relief. The facts in ***Vaas Exports*** were different and, therefore that decision does not help the Respondents in the present case.

Scope of petition restricted to challenging the procedure adopted for change in the policy

16. It is next submitted by the learned ASG that the impugned Circular and Notification are an expression of the policy decision taken by the Government of India and, therefore, in effect the Petitioners are challenging the policy decision of the Government of India. It is submitted that in exercise of its powers under Article 226 of the Constitution, this Court cannot judicially review the executive policy of the Government of India.

17. In the considered view of this Court, there is no merit in the above objection either. The precise legal issue raised by the Petitioners is whether a change to the duty credit entitlements announced by the FTP can be brought about without amending such policy and by issuing Circulars and Notifications or Forms. This can be examined by this Court in exercise of its powers under Article 226 of the Constitution. By doing so, this Court is not judicially reviewing the policy of the Government of India but only the procedure adopted by it to change the policy which might incidentally prejudice an exporter.

Is the procedure adopted for change in the FTP lawful?

18. Mr. Nankani submitted that there was nothing in para 3.7.6 of the FTP to indicate that the goods imported would necessarily have to be used as inputs in the goods exported. He submitted that the scheme was in fact one of a cash incentive as explained by the Jt. DGFT itself in its counter affidavit filed in W.P. (C) No. 12603 of 2006 in this Court (titled ***Indo Afghan Chamber of Commerce v. Union of India***). A change in the policy to the detriment of the Petitioners could not be brought about through Circulars and Forms but had to be only by way of a Notification under Section 5 of the FTDR Act. He submitted that without prejudice to the submissions of the Petitioners regarding the validity of the Circular dated 8th May 2007, as long as the Petitioners were able to show that the goods imported constituted an input and had a broad nexus to any product group of exported goods, the Petitioners would be willing to abide by that condition. However, the change, in any event, cannot be made long after the exports had taken place. The exports and imports had been planned keeping in view the FTP already announced. Mr. Nankani relied on the decisions in ***Atul Commodities Pvt. Ltd. v. Commissioner of Customs (2009) 235 ELT 385 (SC)*** and ***Union of India v. Asian Food Industries (2006) 13 SCC 542***.

19. Mr. Chandhiok also relied on the decision in ***Atul Commodities Pvt. Ltd.*** to submit that the separate policy decision of the Government of India and the changes to such policy decision were not amenable to judicial review. The overall objective had to be kept in mind. Subsequent Circulars and

Ltd. v. Commissioner of Customs 2006 (194) ELT 11 (SC) and ***UCO Ban*** ***Calcutta v. Commissioner of Income Tax, W.B. (1999) 4 SCC 599***.

20. This Court finds that a similar attempt made by the DGFT which issued Circulars and Public Notices to amend the EXIM Policy of 2002-07 was invalidated by a Division Bench of the Bombay High Court in ***Narendra Udeshi v. Union of India 2003 (156) ELT 819***. The Bombay High Court observed that it was beyond the scope of the powers of the DGFT to bring out a change to the EXIM Policy. It was held that in the absence of any power under the FTDR Act, the Circulars and Public Notices to prohibit duty-free import of natural rubber under advance licence could not be issued by the DGFT.

21. This Court finds that para 3.7.6 of the FTP, by itself, does not indicate that the imported goods should constitute 'inputs' in the goods exported. In fact the language of para 3.7.6 is wide enough to include any kind of inputs: capital goods including spares, office equipment, professional equipment and office furniture etc. It is not possible to read para 3.7.6 restrictively. In ***Atul Commodities Pvt. Ltd.***, the Supreme Court explained that it was not open to the DGFT to change the nature of the imported items as specified in the FTP from the category 'free' to the category 'restricted' by issuance of Circulars. It was explained by the Supreme Court with reference to the facts of that case that the circulars and notifications issued by the DGFT were clarificatory and not amendatory in nature. It was explained that under the

FTDR Act contemplates amendment to the export and import policy und the FTDR Act. It empowers only the Central Government to make such amendment. This power is not given to the DGFT."

22. Turning to the facts of the present case, this Court finds that even if one were to accept the argument of the learned ASG that the 'broad nexus' requirement was justified keeping in view the overall objective of the FTP, the further change by way of the Circular dated 21st June 2007 to restrict the import to only that goods that constituted an `input' in the exported product is indeed impermissible. The condition is unduly restrictive and has the effect of negating the accrued benefit retrospectively. If one went by the Public Notice dated 4th June 2005, then it was clear that "for the purpose of import entitlements under the Scheme, 'broad nexus' would mean goods imported with reference to **any of the product groups of the exported goods** within the overall value of the entitlement certificate". It appears to this Court that while the above Public Notice dated 4th June 2005 was perhaps justified since it was issued during the time when the TPS was still continuing and it was, therefore, possible for the exporters to plan their exports and imports, the subsequent circular dated 8th May 2007 and Public Notice dated 21st June 2007 issued by the Respondents have, in the garb of clarifying the term 'broad nexus', unduly restricted the meaning of the word 'inputs' to mean only those inputs used in the manufacture of the goods exported. There is merit in the contention of the Petitioners that this was travelling far beyond what was provided in para 3.7.6 of the FTP and *ultra*

Act.

23. The stand of the Government of India in ***Indo Afghan Chamber of Commerce v. Union of India*** in its counter affidavit dated 12th September 2006 in Writ Petition (C) No. 12603 of 2006 as regards the incentive provided by the TPS and para 3.7.6 of the FTP is instructive. Paras 4, 5 and 6 of the said counter affidavit read as under:

> "4. That for the purposes of promotions of trade and export, Government of India promulgates Reward Schemes i.e. Target Plus Scheme (Erstwhile Duty Free Credit Entitlement for status holders under the then EXIM Policy), Vishesh Krishi Upaj Yojna, Served from India Scheme, Focus Market Scheme, and Others. It is submitted that the scheme in question i.e. Target Plus Scheme was continued with the objective of accelerating growth in exports by giving duty credit based on incremental exports, with such changes as were needed to curb malpractices noticed in erstwhile Duty Free Credit Entitlement for status holders (exports during 2003-04 period) under the then EXIM Policy.
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> 5. That it is humbly submitted that as per Target Plus Scheme exporter can utilize duty credit to import any freely importable goods except those mentioned in Para 3.7.6 of the Foreign Trade Policy. There is no export obligation attached on the imported goods, as this is a post-export award.
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> 6. That it is submitted that as per para 3.2.5 II of Handbook of Procedures Volume I goods allowed to

products exported. Erstwhile Duty Free Credit Entitlement for status holders under the then EXIM Policy allowed the utilization of the reward on imports that had nexus with product group. This has been elaborated in Policy Circular 27(RE-2005)/2004-2009 Dated: 05-10-2005. A copy of the Policy Circular 27(RE-2005)/2004-2009 Dated: 05-10-2005 is annexed hereto and marked as Annexure R-1. **However, it is clarified that 'Broad Nexus' means goods imported with reference to any of the product groups of the exported goods within the overall value of the entitlement certificate**." (emphasis supplied)

24. Thereafter in para 8 it was stated:

"It is submitted that the actual user is defined under Para 9.4 as "Actual User" means an actual user who may be either industrial or non-industrial. Para 9.5 *inter alia* reads as "Actual User (Industrial)' means a person who utilizes the imported goods for manufacturing in his own industrial unit or manufacturing for his own use in another unit including a jobbing unit" and Para reads as "9.6 'Actual User (Non-Industrial)' means a person who utilizes the imported goods for his own use in-

(i) any commercial establishment carrying on any business, trade or profession; or

(ii) any laboratory, Scientific or Research and Development (R&D) institution, university or other educational institution or hospital; or

(iii) any service industry."

It is submitted that the Policy defines manufacturing

> existence, by hand or by machine, a new product having a distinctive name, character or use and shall include processes such as refrigeration, re-packing, polishing, labeling, Re-conditioning repair, remaking, refurbishing, testing, calibration, re-engineering, Manufacture, for the purpose of this Policy, shall also include agriculture, aquaculture, animal husbandry, floriculture, horticulture, pisciculture, poultry, sericulture, viticulture and mining."
> Therefore, in view of the above it is submitted that in the instant case since the exporter will be processing the almond-in-shell to produce the final product i.e. either almond or roasted almond or salted almond, it will be taken to be in furtherance of the actual user condition."

25. Having taken the above stand in its affidavit dated 12th September 2006 in W.P. (C) No.12603 of 2006, it was not open to the Respondents to again introduce a change in the TPS with reference to the exports that had already been completed as on 31st March 2006.

26. It was sought to be argued by the learned ASG that the above affidavit was filed at a time when neither the circular dated 8th May 2007 nor the subsequent Public Notice dated 21st June 2007 were issued. This Court has referred to the affidavit dated 12th September 2006 only to understand what the Government of India itself meant by 'broad nexus' and 'actual user'. That understanding cannot keep shifting from time to time.

27. Given the objective of providing an incentive to exporters, para 3.7.6 of

group of the exported goods within the overall value of the entitleme certificate. The word 'nexus' obviously refers to a larger group of similar goods and not the very exported goods itself. Consequently the impugned circulars and notice that purported to 'clarify' the term 'broad nexus, i.e. the impugned circular dated 8th May 2007, the Public Notice dated 21st June 2007 and the further circular dated 19th December 2007, travelled beyond what was envisaged by para 3.7.6 of the FTP and severely restricted the benefit thereunder. It was a significant change that could be brought about only through a notification under Section 5 FTDR Act. The said circulars and public notice were, therefore, *ultra vires* para 3.7.6 of the FTP. Further they sought to retrospectively take away a benefit that had accrued to the exporters which cannot but be viewed as unreasonable in the context. The impugned circular dated 8th May 2007, the Public Notice dated 21st June 2007, the further circular dated 19th December 2007 and the amended para 3.2.5 of the HBP are accordingly quashed.

28. The writ petition is allowed to the above limited extent. The duty entitlement of the members of the Petitioner Society will be computed on the above basis and the corresponding duty credit will be given to them by the Respondents within a period of twelve weeks from today. The writ petition and the application are disposed of in the above terms.

S. MURALIDHAR, J

AUGUST 5, 2010