

(2011) 06 BOM CK 0051

Bombay High Court

Case No: Writ Petition No. 4499 of 2007

Essel Mining and
Industries Ltd.

APPELLANT

Vs

Union of India (UOI)
and Others

RESPONDENT

Date of Decision: June 14, 2011

Acts Referred:

- Constitution of India, 1950 - Article 226
- Customs Act, 1962 - Section 25
- Foreign Trade (Development and Regulation) Act, 1992 - Section 4, 5

Citation: (2011) 270 ELT 308

Hon'ble Judges: D.Y. Chandrachud, J; Anoop V. Mohta, J

Bench: Division Bench

Advocate: V. Sreedharan and Prakash Shah, instructed by PDS Legal, for the Appellant;
Pradeep S. Jetly and Rajinder Kumar, for the Respondent

Judgement

D.Y. Chandrachud, J.

The Petitioner has been recognized as an Export House by the Director General of Foreign Trade in the Union Ministry of Commerce. The Petitioner engages in the manufacture of Ferro molybdenum, which falls under Heading 72.02 of the Central Excise Tariff, at its factory at Vapi. Roasted molybdenum concentrate is the principal raw material and input in the manufacture of Ferro molybdenum and is imported by the Petitioner. The Petitioner is also engaged in the mining of iron ore. Iron ore is sold within India and is exported by the Petitioner.

The Target Plus Scheme:

2. The Target Plus Scheme was formulated in Chapter 3 of the Foreign Trade Policy for 2004-09 ("the FTP"). The scheme came to be discontinued in 2006. Paragraph 3.7.1 provides that the object of the scheme is to accelerate growth in exports by

rewarding Star Export Houses who have achieved a quantum growth in exports. High performing Star Export Houses became entitled to a duty credit based on incremental exports substantially higher than the general annual export target fixed. For instance, since the target fixed for 2005-06 was 17%, the lower limit of performance for qualifying for rewards was pegged at 20% for the then current year. All Star Export Houses which had achieved a minimum export turnover in free foreign exchange of Rs. 10 crores in the previous licensing year were eligible for consideration under the Scheme. Under Para 3.7.3, the entitlement under the scheme was contingent on the percentage incremental growth in the FOB value of exports in the current licensing year over the previous licensing year. The duty credit entitlement was prescribed in a table as a percentage of the incremental growth recorded in the FOB value of exports. Hence, (i) where the percentage incremental growth was above 20% but below 25%, the duty credit entitlement was 5% of the incremental growth; (ii) where the percentage incremental growth was above 25% but below 100%, the duty credit entitlement was 10% of the incremental growth; and (iii) where the percentage incremental growth was in excess of 100%, the duty credit entitlement was 15% thereof.

3. Clause 3.7.6 of the Foreign Trade Policy, permitted the utilization of the duty credit for effecting imports. Clause 3.7.6, in so far as it is material, was to the following effect:

3.7.6 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 or that of supporting manufacturers as declared in "Aayaat Niryaat Form.

(emphasis supplied).

Under paragraph 3.7.6, the duty credit could be utilized for the "import of any inputs" and for capital goods including spares, office equipment, professional equipment and office furniture. Only those inputs which were freely importable could be imported. Moreover, importers could import inputs only "for their own use or that of supporting manufacturers". The Handbook of Procedures listed out in paragraph 3.2.5 the nature of goods which were allowed to be imported under the Scheme. Paragraph 3.2.5 requires a "broad nexus" with the products exported. The relevant provision in the Handbook of Procedures was to the following effect:

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.

(emphasis supplied).

The Standard Input-Output Norms for Engineering products in the Handbook of Procedures contain Entry C-478 which relates to ferro molybdenum and Entry C-1932 which relates to iron ore including processed iron ore.

4. In exercise of the powers conferred by Section 25 of the Customs Act, 1962 the Union Government issued an exemption notification (32 of 2005) on 8 April 2005 to provide for an exemption from the payment of customs duty on goods imported into India against a duty credit certificate issued under the Target Plus Scheme in accordance with paragraph 3.7 of the Foreign Trade Policy. The explanation to the notification stipulates in Clause (1) that goods for the purpose of the notification would mean "any inputs, capital goods including spares, office equipment, professional equipment, office furniture and agricultural products listed in Chapters 1 to 24 of the First Schedule to the Customs Tariff Act as may be notified by DGFT from time to time which are freely importable under the Foreign Trade Policy. The definition of the expression "goods" in the Customs notification is thus parimateria with Clause 3.7.6 of the Foreign Trade Policy.

5. The Petitioner applied for and obtained a credit entitlement certificate under the Target Plus Scheme of the Foreign Trade Policy for 2004-09. This benefit was claimed in respect of the incremental growth of export of iron ore during the year 2004-05, as compared to exports for 2003-04. In the present case, the base year was 2003-04. The credit entitlement sought by the Petitioner was in respect of exports made during the year 2004-05. The Petitioner claimed to have achieved a 115% incremental growth over exports made during the year 2003-04. On this basis, the Petitioner claimed an entitlement to credit at the rate of 15% of the incremental growth. On 5 January 2007, the Director General of Foreign Trade (DGFT) issued a credit entitlement certificate of Rs. 20.35 crores to the Petitioner. The Petitioner imported Molybdenum concentrates, being an input required for the manufacture of Ferro molybdenum. The Petitioner claimed the benefit of the Target Plus Scheme and an exemption under Notification 32 of 2005 dated 8 April 2005 u/s 25 of the Customs Act, 1962. The Petitioner filed a Bill of Entry for clearance, claiming the benefit of the notification. A query was raised by the Appraising Officer requiring the Petitioner to indicate the name of the export product against which the "Target Plus Licence to claim exemption" had been obtained. According to the Petitioner, since the export product and imported item fall within the same product group in the Standard Input Output Norms (SION), it was entitled to the benefit of the exemption notification.

6. A circular was issued by the Central Board of Excise and Customs on 8 May 2007. The circular records that it had been brought to the notice of the Ministry by the trade that some exporters had obtained duty credit certificates against exports of rice and using these certificates, they had imported almonds which, after removal of shells, had been sold in the market without payment of duty. As dry fruit/almonds cannot be used in the processing or manufacture of rice, it was alleged that the

condition of broad nexus stipulated in the Handbook was not fulfilled. Moreover, it was alleged that the actual user condition specified in the policy and in the Customs notification was also violated because almonds, after removal of shells were being sold in the open market. It is alleged that the act of importation of almonds which were neither inputs nor capital goods in relation to rice would be a misuse of the Target Plus Scheme. The circular states that the opinion of the Union Ministry of Law was sought on the interpretation of the terms contained in paragraph 3.7.6 of the Foreign Trade Policy. The circular elaborates that while interpreting the expression "inputs" and "use" in paragraph 3.7.6 of the Policy, the Ministry was of the following opinion:

Together these words indicate that the item sought to be imported should be an "input" in the manufacture of the exported items which is required for "use" by the exporter or the supporting manufacturer, as the case may be. For this purpose, the intended input must have a relationship with the export product.

The conclusion which was drawn by the Union Ministry of Law has then been set out in the circular in the following terms:

In the light of this, the Ministry of Law has 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.

7. The Petitioner has, in these proceedings under Article 226 of the Constitution, sought to impugn the validity of the circular issued by the Central Board of Excise and Customs on 8 May 2007. The ground of challenge is to the condition which the circular imposes that the input which is imported by an eligible exporter must be an input which is required to be used in the product exported for which TPS benefit is sought. The contention of the Petitioner before the Court is that by introducing that condition, the circular, in fact, amends the Foreign Trade Policy which is impermissible in law.

8. The submission of the Petitioner is that the restriction which was imposed by the circular dated 8 May 2007 is ultra vires the Foreign Trade Policy and is unlawful. According to the Petitioner, the requirement that inputs imported must be inputs used in the products exported, for which TPS benefit has been sought is not a condition which is required under the Foreign Trade Policy. According to the Petitioner, molybdenum concentrates fall in the same product group as Iron ore in the Standard Input Output Norms. The broad nexus requirement of the Paragraph 3.2.5 of the Handbook of Procedures has been fulfilled. The circular is invalid because it modifies the policy. On the other hand, it has been urged on behalf of the

Respondent by Counsel that the Target Plus Scheme was an additional incentive which was given to accelerate the growth of exports. The submission of the Respondent is that the expression "inputs" in paragraph 3.7.6 implies that the products which are imported must be inputs in the manufacture of those goods which are exported and in respect of which benefit is claimed under the Target Plus Scheme. In the affidavit in reply, this submission has been reiterated. The contention of the Respondent in the reply is that "there should be one to one nexus between the export product and the imported inputs". Paragraph 3.2.5 of the Handbook of Procedures made, according to Counsel for the Respondent, a relaxation in the Foreign Trade Policy. The circular restores the intendment of the policy. According to the Respondent, the Petitioner obtained a Target Plus Licence against the export of iron ore and would not be entitled to utilise the duty credit against the import of molybdenum concentrates which is not an input in the manufacture of iron ore.

9. Now, it is not disputed before the Court that the goods which have been imported by the Petitioner satisfy the requirement that there should exist a "broad nexus" between the goods which are imported and the goods which are exported as stipulated in Paragraph 3.2.5 of the Handbook of Procedures. The requirement under the Handbook of Procedures is that for the purposes of import entitlements under the scheme, "broad nexus" would mean goods imported with reference to any of the product groups of the imported goods within the overall value of the entitlement certificate. There is no dispute before the Court that this requirement under the Handbook of Procedures has been duly fulfilled. No submission to the contrary has been urged by Counsel for the Respondents. The fact that the goods imported were required by the Petitioner for its own use has not been disputed before the Court by Counsel for the Respondents. But the case of the Respondents is that the requirement which is stipulated in the circular dated 8 May 2007 is that there should not only be a broad nexus of the goods imported with reference to the product group of the exported goods but that the goods imported must constitute an input in relation to the very products which have been exported. Now, reading paragraph 3.7.6 of the Foreign Trade Policy, it is evident that an eligible exporter is entitled to utilize duty credit in the import of any inputs, provided (i) they are freely importable; and (ii) the inputs are imported by importers for their own use. Paragraph 3.7.6 does not stipulate that the goods which are imported must be inputs for the manufacture of the export product in relation to which the benefit of the Target Plus Scheme is claimed. What paragraph 3.7.6 requires is that the goods which are imported by the eligible exporter must be inputs and the inputs must be imported "for their own use", meaning thereby the use of the importer himself. This is also amplified by the requirement of the exemption notification dated 8 April 2005 which stipulates that the goods imported against the certificate shall not be transferred or sold. Paragraph 3.7.6 on its plain construction, does not incorporate a requirement that the goods which are imported as inputs must find physical

incorporation in the export products in relation to which the benefit of the Target Plus Scheme is claimed. In fact, even Paragraph 3.2.5 of the Handbook of Procedures which spells out the meaning of the "broad nexus" requirement does not impose such a condition. Such a requirement is sought to be introduced for the first time by the circular dated 8 May 2007.

10. The Foreign Trade Policy, it is well settled, is referable to the provisions of Sections 4 and 5 of the Foreign Trade Development and Regulation Act, 1992. The policy cannot be amended by an administrative circular. The circular does not in this case supplement the policy or fill up an interstitial space. The circular imposes a substantive condition at variance with the policy. Where the Central Government has considered it necessary to impose a requirement of physical incorporation, such a condition has been made expressly in other provisions of the Foreign Trade Policy. For instance, in relation to advance plus licences governed by the duty exemption scheme, it has been stipulated that an advance licence is issued to allow duty free importable inputs which are physically incorporated in the export products (paragraph 4.1.3 of the Foreign Trade Policy for April 2005). Similarly, while issuing an exemption notification in relation to imports covered by advance licences, the Union Government in its notification dated 10 September 2004 (Notification 93/04) has specifically defined materials to mean raw materials, components intermediates, consumables, catalysts and parts which are required for manufacture of resultant products. No such requirement was incorporated in paragraph 3.7.6 of the Foreign Trade Policy. In other words, the condition that the inputs which are imported must be used in the export of the resultant product was not incorporated as part of paragraph 3.7.6 of the Foreign Trade Policy. In that view of the matter, it is not possible to accept the contention of the Respondent that the conditions which were imposed by the circular dated 8 May 2007 were implicit in paragraph 3.7.6 of the Foreign Trade Policy. We, therefore, come to the conclusion that the conditions which were stipulated by the circular dated 8 May 2007 were ultra vires paragraph 3.7.6 of the Foreign Trade Policy and Customs notification dated 8 April 2005 (Customs Notification 32/05).

11. Before concluding, it would be necessary to note that during the course of the hearing of the Petition, Counsel appearing on behalf of the Petitioner and the Respondent had placed before this Court, a judgment of a Learned Single Judge of the Delhi High Court in Indian Exporters Grievance Forum v. Union of India (Writ Petition (Civil) 2497 of 2008 decided on 5 August 2010). An appeal against the judgment of the Learned Single Judge is pending before the Division Bench and the judgment of the Learned Single Judge has been stayed. In deciding this matter, we have independently interpreted the terms of the Foreign Trade Policy and the relevant notifications and circulars that hold the field. It is, therefore, not necessary for this Court to make any observation in relation to the view which has been expressed by the Learned Single Judge of the Delhi High Court.

12. For the reasons aforesaid, we make rule absolute in terms of prayer Clause (a) by quashing and setting aside the impugned circular dated 8 May 2007 issued by the Ministry of Finance in the Department of Revenue and the consequential assessment. During the pendency of the Petition, the Petitioner was permitted by an interim order to import goods by availing of the benefit of the notification dated 3 March 2005 to the extent of the entitlement certificate dated 5 January 2007 by furnishing an undertaking in favour of the Commissioner of Customs in respect of the differential duty as demanded by the Authority. In view of the fact that the circular dated 8 May 2007 has now been quashed and set aside, the assessment shall be carried out afresh in accordance with law. There shall be no order as to costs.