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W.P.No.9616 of 2015

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Delivered on
14~10~2022	27~10~2022

CORAM

THE HON'BLE MR.JUSTICE N.SATHISH KUMAR

W.P.No.9616 of 2015

M/s. Polyhose India Private Limited,
Represented by its Director
Mr.Ali Asgar,
186/187, Also Towers, PH Road
Kilpauk, Chennai 600010.

.. Petitioner

vs.

The Additional Director General of Foreign Trade,
Ministry of Commerce and Industry
No.26, Shastri Bhawan, Annexe Building,
Haddows Road,4th & 5th Floor,
Chennai 600006.

.. Respondent

Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus to call for records of the Respondent in F.No.04/21/088/00175/AM15/272 and quash the order dated 17.02.2015 and to direct the Respondent to issue the SHIS(Status Holder Incentive Scrip) in accordance with the FTP (Foreign Trade Policy).



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For Petitioner : Mr.N.V. Balaji

For Respondent : Mr. Dr.D. Simon,
Central Government Standing Counsel.

ORDER

The writ petition is filed to quash the order of Respondent in F.No.04/21/088/00175/AMIS/272 dated 17.02.2015 and to direct the Respondent to issue the SHIS (Status Holder Incentive Scrip) in accordance with the FTP (Foreign Trade Policy).

2.a. It is the case of the Writ Petitioner that in order to encourage the exports the Government of India gives various incentives and it issues the Foreign Trade Policy (FTP) from time to time, pursuant to Section 5 of the Foreign Trade (Development and Regulation) Act, 1992, giving the details of such incentives. The detailed terms of the said incentive is provided in para 3.16 of the FTP. The benefit under the scheme is available to a status holder depends on the export performance of the past. Pursuant to the FTP 2009-2014 status holder is entitled to a Duty Credit Scrip @ 1% of FOB



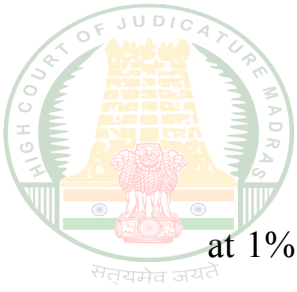
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value of exports made during 2009-10, 2010-11, 2011-12 and 2012-13.

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This shall be over and above any Duty Credit Scrip claimed/availed under this chapter. The scrip could be used for import of capital goods in the specified sector for which the scheme is applicable. The petitioner operates as a 100% Export Oriented Unit (EOU) licenced and approved by the Government of India vide letter of approval in LOP No.A/2003/022/EOU-TN dated 02.05.2003. The Petitioner are manufacturers and exporters of Thermoplastic High Pressure Hoses and have been conferred with a “Stat Export House” status by the appropriate authority vide certificate bearing No.A/2003/22/EOU-TN dated 10.06.2010 as recognition of export performance.

2.b. The Petitioner is an exporter of Thermoplastic High Pressure Hoses to various countries and the same is a sector which is eligible for the benefits of availing SHIS. The Petitioner have not availed the benefit of any Export Promotion Capital Goods Scheme ('EPCG')) under the FTP during the year 2011-12 and the same is not under dispute. Being eligible for the incentive in the form of SHIS, the petitioner had applied for a SHIS



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at 1% of the FOB value of exports for the year 2011-12 vide its application

No.04/21/88/00175/AM14 dated 18.12.2013 under Chapter 3.16 of the FTP.

The application was submitted before the office of the respondent who is the designated authority to grant the said licence.

2.c. The Respondent had issued two deficiency letters seeking clarification and additional information and in none of the letters the Respondent indicated about the rejection of application being a 100% EOU. The Petitioner replied the deficiency letters and supported the application for grant of SHIS. The Respondent vide the impugned proceedings in F.No.04/21/088/00175/AM15/272 dated 17.2.2015 has rejected the SHIS application citing the reason that the Petitioner is operating as a 100% EOU. As per Para 3.16.4(v) of FTP i.e., Plastic Sector and being a status holder, the Petitioner is eligible for the benefit of SHIS. There is nothing in the FTP to reject the application for issuance of SHIS to a 100% EOU. The rejection has been made without reference to any provision in the law on FTP, though the Petitioner is eligible for SHIS under the FTP. Hence the Petitioner submitted that the impugned order passed by the Respondent



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without application of mind and totally in contravention of the law particularly the FTP and has been passed without giving any opportunity to the Petitioner and is violative of principles of natural justice. It is also stated that the rejection is made without considering the provisions under FTP. The FTP expressly permits 100% EOU to avails the SHIS licence and restriction is placed on the availment of such benefit by 100% EOU. Hence, the Writ Petition.

3.a. In the Counter it is stated by the Respondent that the petitioner had exported Thermoplastice Yarn Praided Hose Pipe, Thermoplastic aramid & Brainded Hose Pipe under the ITC HS Code 39173100 which is not eligible under SHIS under Plastic category. This was clarified by DGFT, H.Qrs. Vide clarification letter dated 28.03.2012 under Ref. No. 01/91/180/738/AM12/PC3/418 on eligibility for SHIS as per S.No.5-Plastics under Para 3.16.4 of FTP, 2009-14.

3.b. According to the Respondent Plastic means those materials of Headings 3901 to 3914 which are or have been capable, either at the



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moment of polymerization or at some subsequent stage, of being formed under external influence (usually head and pressure, if necessary with a solvent or plasticiser) by mounding, casting, extruding, rolling or other process into shapes which are retained on the removal of the external influence. In the light of the above, this case has got no merit for consideration as they have exported the product falling under ITC HS Code 39173100.

3.c. The Petitioner has challenged vide their letter dated 14.01.2015 to the Respondent office that there exist no such provision in FTP restricting the benefits to plastic products classifiable under 3901 to 3914 and the relevant provision only prescribes that products classifiable under plastic sector are eligible for the status holder benefit. According to the Respondent, the expression “Plastic” means those materials of headings 3901 to 3914 under Sl.No.1 under Notes in Chapter 39 of ITC HS Classification. Therefore, prayed for dismissal of the petition.

4.a. In the rejoinder the Petitioner denying the entire counter



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affidavit. It is stated in the rejoinder that the Petitioner vide letter dated

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14.01.2015 submitted that there is no provision under FTP restricting the benefit of SHIS to plastic products falling in S.Nos.3901-3914. According to the Petitioner the FTP provides that the plastic sector is an eligible section SHIS and the restriction by the Respondent is beyond the provisions of FTP. Respondent having accepted the reply of the Petitioner in respect of eligibility of the plastic sector for SHIS benefit given way back in January 2014, cannot change his stand, that too by way of a counter affidavit before this Court. The issue of eligibility for SHIS for plastic sector, being an issue considered and accepted by the Respondent, the opposite stand taken by the Respondent is noting but improving the reasons in the impugned order.

4.b. According to the petitioner Para 2.3 of the Foreign Trade Policy 2009-14 empowers the DGFT to do the following:

“If any question or doubt arises in respect of interpretation of any provision contained in FTP, or classification of any item in ITC (HS) or HBP-v1 or HBP-v2,



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or Schedule of DEPB Rates (including content, scope or issue of an authorization there under) said question or doubt shall be referred to DGFT whose decision thereon shall be final and binding.”

4.c. Therefore, it is the contention of the Petitioner that the products manufactured by them are clearly covered under the Chapter Plastic in the Customs Tariff Schedule and also as per the Standard Input Output Norms notified for plastic sector by the DGFT (SI No H 429 and H 430) The Petitioner are the Status Holder manufacturing products in plastic sector and hence squarely covered under Para 3.16.4. It is therefore the contention of the Petitioner that when the FTP is clear that the clarification given by the DGFT is beyond its power and the Respondent's reliance on the clarification letter dated 28.03.2012 is required to be rejected. It is also stated that the said clarification letter was not served on the Petitioner. In the impugned order the Respondent rejected the letter of the Petitioner dated 14.01.2015 only on the ground that the petitioner is a 100% EOU unit. Hence, the Writ Petition may be allowed.



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5.a. Learned counsel for the Petitioner would submit that in the impugned order the petitioner's claim has been rejected only on the ground that the petitioner is 100% EOU unit. Whereas now a different stand has taken in the counter that as if as per the letter dated 28.03.2012 under reference No.01/91/180/738/AM12/PC3/418 the petitioner is not eligible for SHIS since the petitioner had exported Thermoplastic Yarn Praided Hose Pipe, Thermoplastic aramid & Braided Hose Pipe under the ITC HS Code 39173100. Hence, it is the contention of the learned counsel for the Petitioner that such a contrary stand has been taken in the counter for the first time. It is his further contention that the letter dated 19.9.2014 itself the Respondent admitted that the Petitioner's product comes under "Plastics Sector" and not under the "Engineering Sector" and in the letter dated 30.12.2014 also they have admitted that though Plastics is also included at Para 3.16.4(v) of FTP, the Plastics from S.Nos.3901 to 3914 only will be allowed. According to the learned counsel that the clarification issued by the DGFT is contrary to the Foreign Trade Policy. It is his contention that as per para 2.3 of the Foreign Trade Policy 2019-14 DGFT can pass any clarification when any question or doubt arises in respect of interpretation



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of any provisions contained in FTP, or classification of any item in ITC

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(HS) or HBP-v1 or HBP-v2. Such being the position when there is no ambiguity in the policy DGFT cannot rewrite the policy by clarification when admittedly the Foreign Trade Policy provides incentives for Plastics. Therefore, making clarification without any doubt or ambiguity the DGFT's letter is no force in the eye of law.

5.b Having rejected the claim of the petitioner under different ground that the Petitioner is 100% EOU, now in the counter different stand has been taken based on the letter, according to the learned counsel for the Petitioner, the letter is also not valid in the eye of law, as the DGFT has no power to rewrite the Foreign Trade Policy. Therefore, submitted that the impugned order has to be set aside and the petitioner is entitled to the incentive as per the Foreign Trade Policy.

5.c. In support of his contention the learned counsel for the petitioner placed reliance on the following judgments:

1. M/s.Yum restaurants (I) Pvt.Ltd.,and others vs.

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*Union of India and others [2015(1) TMI 1127-
Delhi High Court]*

*2. Union of India vs. E.I.Dupoint India Pvt.Ltd.,and
another [2020(1) TMI 598-Delhi High Court]*

6.a. Whereas it is the contention of the learned counsel for the Respondent that that DGFT has clearly clarified by its letter dated 28.03.2012 that the Plastics in Sl.No.3901 to 3914 alone eligible for incentives and the others are not eligible for any incentives. According to the learned counsel for the Respondent, Section 3(2) of the Foreign Trade (Development and Regulation) Act, 1992 clearly provides that the Central Government may also, by Order published in the official gazette, make provision for prohibiting, restricting or otherwise regulating import or export of goods or services or technology. According to him DGFT has a power to issue notification and any orders and other instruments relating to the Directorate General of Foreign Trade, by the DGFT or the Additional General of Foreign Trade are ratified by the notification issued by the Central Government published on 16.02.2002. Hence it is his contention that when the letter clearly states that only certain items under the plastics

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alone eligible for incentives, the Petitioner is not entitled to any such incentives.

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6.b. The Learned counsel for the Respondent also relied upon the following judgments in support of his contention:-

1. *Union of India vs. Navin Kr. Jhs [2016 341 E.L.T. 561 Calcutta]* held that the notification issued by the DGFT is valid.
2. *DGFT and Another vs. Mustafa Traders and Another [W.A.No.480 of 2011-Keral High Court) High Court of Kerala]* has held that the notification issued by the DGFT is valid in law.

7. I have perused all the materials.

8. The Petitioner challenged the impugned order rejecting the incentives claimed as per the Foreign Trade Policy. The impugned order passed by the Respondent on the ground, since the Petitioner is 100% EOU, is not entitled for incentives. Whereas for the first time in the counter new



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ground has been canvassed that though the Plastics have been included in the Foreign Trade Policy only certain category of the plastics i.e.,7 serial number alone are eligible for the incentives. It is relevant to note that it is not disputed that the Petitioner exporting the plastics. In this regard it is relevant to extract the Foreign Trade Policy 2009-14 came into effect on 05.06.2012. In Para 3.16.4 of the Foreign Trade Policy it is stated as follows:

3.16.4 Status Holders of the following Sectors shall be eligible for the Status Holders Incentive Scrip (SHIS):

(i) Leather Sector (excluding finished leather

(ii) Textiles and Jute Sector.

(iii) Handicrafts:

(iv) Engineering Sector (excluding Iron & Steel, Nonferrous Metals in primary or intermediate forms, Automobiles & two wheelers, and nuclear reactors & parts and Ships, Boats and Floating Structures,

(v) Plastics; and



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(vi) Basic Chemicals (excluding Pharma Products).

9. In (v) the Plastics also included. These facts are not disputed. In the latter dated 30.12.2014 addressed by the Office of the Additional Director General of Foreign Trade it is stated though plastics is also included at Para 3.16.4(v) of FTP, the Plastics from S.Nos.3901 to 3914 only will be allowed. For which the Petitioner has sent a reply on 14.01.2015 indicating that as per the Foreign Trade Policy (FTP) 2009-14, the Plastic Sector is also eligible for SHIS benefit. Thereafter, there is no clarification issued by the Respondent. However, final order has been passed on 17.12.2015 which is the impugned order. The application for SHIS has been rejected since the Petitioner firm being an 100% EOU unit.

10. It is relevant to note that Section 3 of the Foreign Trade (Development and Regulation) Act, 1992, the Central Government may, by Order published in the Official Gazette, make provision for the development and regulation of foreign trade by facilitating imports and increasing

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exports. Section 5 of the Act makes it clear that the Central Government may, from time to time formulate and announce, by notification in the Official Gazette, the foreign trade policy and may also, in like manner, amend that policy.

11. Section 6 of the Act deals with the Appointment of Director-General and his functions. The Director General appointed by the Central Government shall advise the Central Government in the formulation of the Foreign Trade Policy and shall be responsible for carrying out that policy. The Central Government may also, by Order published in the Official Gazette, direct that any power exercisable by it under this Act (other than the powers under sections 3,5,15,16 and 19) may also be exercised, in such cases and subject to such conditions, by the Director General or such other officer subordinate to the Director General, as may be specified in the Order.

12. Section 5 of the Act makes it clear that the power to amend the policy is always vested with the Central Government. Under Section 6 of the



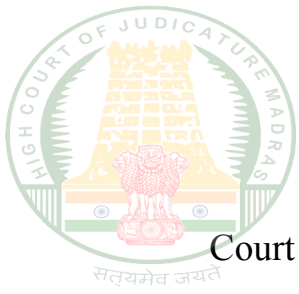
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Act, the Central Government may by order published in the Official Gazette,

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direct that any power exercisable by it under this Act other than the power under Section 3,5,15,16 and 19 of the Act. Therefore Section 6 makes it clear that power to amend the policy is with Government as per Section 5 of the Act. The policy referred above is formulated by the Central Government wherein Plastics sector also included to claim certain benefits. Paragraph 2.3 of the FTP 2004-09 as well as the paragraph 2.3 of the FTP 2009-14 contemplate that questions and/or doubts in respect of the interpretation of any provision of the Foreign Trade Policy would be referred to DGFT whose decision would be final and binding, in respect of such questions. Therefore, in the absence of any amendment in the Foreign Trade Policy the main point will arise whether the DGFT by Circular can rewrite the policy or amend the policy. When the policy provides for incentive for entire Plastics sector whether that can be restricted to the particular Serial Number. As per Section 5 of the FTDR Act, 1992, which makes very clear that to amend the policy is always with the Central Government. Such a power has not been granted to the DGFT as per Section 6 of the Act.

13. In this regard it is useful to refer the judgment of the Delhi High



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Court in *M/s. Yum Restaurants (I) Pvt. Ltd case (supra)* wherein in para 19

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“19. I find it difficult to accept this contention as the meaning sought to be attributed to paragraph 3.12.2 of the FTP 2009-14 is not sustainable by the plain language of that provision. Whilst, it cannot be disputed that DGFT is empowered to interpret the foreign trade policy, such powers can be exercised only when the plain language of the policy presents an ambiguity. It would not be open for DGFT to introduce new conditions and criteria under the guise of interpreting the policy as that would, clearly, amount to amending the provision of the foreign trade policy. The words used in paragraph 3.12.2 of FTP 2009-14 are "Indian Service Providers". There is no scope to read into these words the condition that for service providers to be Indian, its shareholders must also be Indian. This, clearly, would amount to introducing an additional eligibility condition which is extraneous to the eligibility criteria as spelt out in paragraph 3.12.2 of the FTP 2009-



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14. Introduction of such condition would, in effect, amount to amending the FTP 2009-14. The conclusion of DGFT that Indian companies having foreign equity cannot be considered as Indian, militates against well established canons of company law.”

14. In *E.I.Dupoint India Pvt.Ltd., case (supra)* in paragraphs 28, 29 and 30 the Delhi High Court has held as follows:

“28. It cannot be forgotten that export promotions schemes are intended to benefit exporters, who, through the export, earn valuable foreign exchange. It is precisely for this reason that, minimum free foreign exchange has been stipulated as one of the pre-conditions for being entitled to the benefits of SFIS. It would do complete disservice to the intent to clause 3.6.4.2 of the SFIS, therefore, to restrict the benefit thereof, to entities which fulfill the two conditions stipulated therein, viz. of providing of a service/services listed in Appendix-10 of the



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FTP and of earning free foreign exchange of at least Rs.10 lakhs in the preceding financial year, to the benefits of the said Scheme.

29. The decision of the said Policy Interpretation Committee (PIC) is, therefore, on the fact of it, unsustainable in law.

30. The PIC, no doubt, was entitled to interpret the policy. Under the guise of such interpretation, however, the PIC had no authority, however, to reword the policy, or import, into the policy, conditions and restrictions which were not to be found therein. What the PIC has effectively done is to dovetail para 3.6.4.1 of the FTP 2004-2009 into para 3.6.4.2 thereof. Such an exercise is totally untenable in law. If the framers of the FTP intended to subject the entitlement, or the eligibility, to benefits under the SFIS, by the objective thereof, the framers ought to have expressly done so. This, having not been done by the framers of the policy, cannot be done by its



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interpreter. The interpreter of the law cannot be wiser than the framer thereof.”

15. Considering the powers of DGFP, it is only given power to clarify the doubts raised as to the interpretation of Policy, taking such powers he cannot amend the very Policy itself. Though much reliance has been placed to the notification issued by the DGFP was upheld by the Calcutta High Court and Kerala High Court, the above case is not applicable to the facts of the present case. The Notification in the above cases are in different context not in respect of amending the very policy conditions itself.

16. Similarly, it is also submitted that the Central Government has notified Authentication (Orders and other Instruments) Rules, 2002 wherein the rule, only with regard to the authentication of orders and all other instruments made in the name of the President. Therefore, the Respondent cannot take advantage of the Authentication Rules to contend that amending the very policy itself is authenticated by the Central Government. As the product is not disputed and export is also not disputed, when the foreign policy clearly covers the Plastics, the Petitioner is certainly entitled to incentives as per policy. In such a view of the matter the impugned order is

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set aside.

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17. Accordingly, the Writ Petition is allowed. Impugned Order is set aside and the Respondent is directed pay incentives to the Petitioner.

27.10.2022

Speaking/Non speaking order

Index : Yes/No

Internet : Yes/No

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To

The Additional Director General of Foreign Trade,
Ministry of Commerce and Industry
No.26, Shastri Bhawan, Annexe Building,
Haddows Road, 4th & 5th Floor, Chennai 600006.



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N.SATHISH KUMAR, J.

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Order in
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