IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.15057 OF 2023

Phoenix Industries Limited
a company incorporated under
the Companies Act, 1956 and
having its office at 243, Udyog Bhavan,
Sonawala Road, Goregaon (East)
Mumbai, Maharashtra – 400 063 ...**Petitioner**

Versus

1. **The Union of India**
Through the Secretary,
Ministry of Commerce
having its office at Udyog Bhavan,
New Delhi – 110 001

2. **The Director General of Foreign Trade**, having its office at Directorate
General of Foreign Trade,
Udyog Bhavan, New Delhi

3. **The Additional Director General of Foreign Trade**, 2nd Floor
Nishta Bhavan, New Marine Lines,
Churchgate, Mumbai – 400 020

4. **The Commissioner of Customs**,
having its office at Nhava Sheva-II
Jawaharlal Nehru Customs Nhava
Sheva, Tal-Uran, District – Raigad
Maharashtra – 400 701 ...**Respondents**

Mr. Prakash Shah a/w Mr. Jas Sanghavi i/b. PDS Legal for Petitioner.

Mr. D. P. Singh a/w Mr. Advait Sethna and Mr. Vikas Salgia for Respondent Nos.1 to 3.

Mr. Saket R. Ketkar for Respondent No.4.

CORAM : K. R. SHRIRAM &
JITENDRA JAIN, JJ.

DATED : 16th AUGUST 2024

ORAL JUDGMENT : (Per K. R. Shriram, J.)

1. Rule. Rule made returnable forthwith. By consent of the parties, heard finally.

2. Petitioner has approached this Court challenging the legality and validity of decisions taken by the Policy Relaxation Committee ("**PRC**") in meeting No.07/AM23 held on 21st June 2022 and meeting No.08/AM24 held on 26th June 2023, *interalia,* rejecting request of Petitioner by holding that "Bill of Export" is a mandatory document in terms of Foreign Trade Policy ("**FTP**") for discharge of Export Obligation ("**EO**") of Advance Authorisation ("**AA**") even in case of supplies to Special Economic Zone Unit ("**SEZ**"). According to Petitioner the action on part of Respondents in not accepting the supplies made by Petitioner to units located in the SEZ in discharge of EO against AA issued to Petitioner solely on the ground of non-submission of "Bills of Export", notwithstanding other evidence on record substantiating Petitioner's claim of export, is bad in law.

3. Petitioner is engaged in the business of manufacturing, refining and export of Non-Ferrous Metal Alloys from its units situated in Dadra-Nagar Haveli, Silvassa. Petitioner had received purchase orders from one Ideal Fasteners (India) Pvt. Ltd. located in SEZ for

manufacture and supply of Zinc Alloy Ingots Zamak-5. Accordingly, Petitioner obtained an AA for the purpose of duty-free import of goods stated therein to be used in export of final products Zinc Alloy Ingots Zamak-5 to its customers located in the SEZ. Petitioner was permitted to import goods of CIF value of Rs.3,73,79,160/- against which export obligation of FOB value of Rs.4,36,25,000/- was under the AA. According to Petitioner, and admittedly so, supply of goods to units located in SEZ is deemed export and treated to be valid discharge of export obligation for the purpose of the aforesaid AA in terms of FTP. Undisputedly, the final products of Petitioner were exported / supplied to its customer within the SEZ, but due to an inadvertent error while supplying the goods neither Petitioner nor the buyers on behalf of Petitioner prepared and filed the "Bills of Export" corresponding to the said supplies made by Petitioner under the said licenses. It is not disputed that other than the Bill of Export, Petitioner had supplied all other documents including the application in ARE-1 duly assessed by proper officer having jurisdiction over the factory of Petitioner and authorised officer having jurisdiction over the units located in SEZ have been submitted. As the export obligation period expired, Petitioner sought an extension to Respondent No.3 which was granted and the license validity date was amended from 24th June 2017 to 23rd December 2017.

4. By a letter dated 26th November 2018, Petitioner submitted an application for redemption of the AA in Form ANF-4f alongwith all documents mentioned therein. Petitioner was issued a deficiency letter by Respondents which was cured by Petitioner vide its letter dated 21st February 2019. Petitioner states that it informed Respondent that the "Bill of Export" was already submitted as invoice which contained all the relevant details and the same was endorsed by the Excise / Customs Department. Petitioner received another deficiency letter dated 13th May 2019 and was also called upon to attend a personal hearing, if deficiency was not cured. Petitioner attended the personal hearing given by Respondent No.3 on 12th June 2019 and submitted that the supply to the SEZ unit was under the invoices and the said invoices alongwith ARE-1 be considered as evidence of export in lieu of "Bills of Export" and Export Obligation Discharge Certificate ("**EODC**") be issued.

5. This request of Petitioner was not accepted and after few personal hearings and few deficiency letters, Petitioner received the impugned order by way of minutes of the meetings dated 21st June 2022 and 26th June 2023 issued by Respondent No.2. By the said minutes, the Committee decided to reject Petitioner's request to condone the procedural lapse in not preparing "Bill of Exports" and to consider AA in lieu of "Bill of Exports" towards fulfillment of EO against AA.

6. An affidavit-in-reply has been filed on behalf of Respondent Nos.1 to 3 by one Haroon Bilal affirmed on 26th February 2024 and one Umesh Shripal Chougule affirmed on 2nd January 2024 on behalf of Respondent No.4. The stand taken by Respondent Nos.1 to 3, which is also adopted by Respondent No.4, is that submission of "Bill of Export" in case of export to SEZ is mandatory. This was the stand taken by Mr. Singh and same was adopted by Mr. Ketkar.

7. Mr. Shah placed on record a Policy Circular No.4 of 2024 dated 3rd June 2024, by which the Directorate General of Foreign Trade ("**DGFT**") has relaxed the provisions of submission of "Bill of Export" as evidence of export obligation discharge for supplies made to SEZ Unit in case of AA. A copy of the same, for ease of reference, is scanned and re-produced below:-

Government of India
Ministry of Commerce and Industry
Department of Commerce
Directorate General of Foreign Trade
Vanijya Bhawan, Akbar Road, New Delhi
Policy - 4 Division
*****
Policy Circular No. 04 /2024

Dated: 3rd June 2024

To

All Regional Authorities of DGFT
All Exporters/Members of Trade
All Custom Authorities

Subject: Relaxation in the provision of submission of 'Bill of Export' as evidence of export obligation discharge for supplies made to SEZ units in case of Advance Authorisation.

Para 4.21 (iv) of FTP specifies that the authorisation holder needs to file Bill of Export for export to SEZ unit/developer/co-developer in accordance with the procedures given in SEZ Rules. As per Para 4.24 (b) of FTP the above Para 4.21 shall apply to DFIA also.

2. In line with above FTP provision, in case of supplies made to SEZ units under Advance Authorisation/DFIA, Sl. No.2(a)(ii) of 'Guidelines for Applicants' in ANF-4F (Application for Redemption) and Sl. No.5(b) of 'Guidelines for Applicants' in ANF-4G (Application for Transferable DFIA) prescribe the following documents:

"...EP copy of the shipping bill(s) containing details of shipment effected or bill of export in case of export to SEZ..."

3. This Directorate is in receipt of representations from Industry highlighting hardships to Exporters in complying with this requirement. This issue has been examined. In exercise of powers vested with the Competent Authority in terms of Para 2.59 of the FTP, it has been decided to relax this requirement of submission of 'Bill of Export' in case of exports made to SEZ unit/developer /co-developer under Advance Authorisation/DFIA, for all such supplies made prior to 01.07.2017.

4. Accordingly, for the purpose of fulfillment of export obligation, under Advance Authorizations/DFIA Schemes, in case of supplies made to SEZ unit/developer/co-developer prior to 01.07.2017, the exporter may submit the following corroborative evidence in lieu of 'Bill of Exports':

a. ARE-1 (showing the Advance Authorisation No./DFIA file No. and) duly attested by jurisdictional Central Excise/GST Authorities of AA holder/DFIA Exporter
b. Evidence of receipt of supplies by the recipient in SEZ
c. Evidence of payment made by the SEZ unit to the AA/DFIA exporter as per Para 4.21 of FTP.

5. This Policy Circular is issued with the approval of DGFT.

(K M Harilal)
Joint. Director General of Foreign Trade

(Issued from file no. 1/94/180/025/AM20/PC-4)

8. The DGFT has decided to, in exercise of powers vested with the Competent Authority in terms of paragraph 2.59 of the FTP, relax the requirement of submission of "Bill of Export" in case of exports made to SEZ Unit / Developer / Co-Developer under AA for all such supplies made prior to 1st July 2017. Mr. Singh was unable to explain why the cut-off date is given as 1st July 2017 and infact was candid to say he had raised the same query with DGFT to which he has not received any response .

9. In view of the cut-off date of 1st July 2017 as per the Circular, out of the 37 supplies mentioned in the application dated 26th November 2018 for redemption / no bond certificate against AA filed by

Petitioner, 29 supplies would get covered. Therefore, for these 29 supplies Respondent Nos.1 to 3 will have to issue EODC. That would leave the balance 8 supplies to be considered.

10. Mr. Shah relied upon a judgment of the Co-ordinate Bench of this Court in ***Larsen & Toubro Limited vs. Union of India***[1] to submit that the issue has been concluded against Respondents. Mr. Shah submitted that the refusal to relax export obligations in respect of supplies made to SEZ in the absence of assessed copy of "Bill of Export" has been held to be unjustified. Paragraphs 63 to 71 of *Larsen & Toubro Limited (supra)* read as under:-

> *"63. The petitioner accordingly approached the Policy Relaxation Committee on 29-8-2013. The petitioner gave all the details of the purchase order, the goods which were to be supplied against the purchase order, the advance authorisation number and they gave the file number as well from the office of the Joint Director General of Foreign Trade. The Annexure-A of this communication refers to all these details. They claim that the advance authorisation and imported inputs on duty free basis were utilised in the manufacture of the resultant export product. They, therefore, claim that the supplies have been made to the named entity and at SEZ, Jamnagar. That was under the bona fide belief that filing of Bill of Export for the supply of SEZ units is mandatory only in cases of claiming of benefit under the duty drawback scheme. Hence, this procedural lapse of not filing the Bill of Export occurred. That is how they reiterated that the said supplies were effected with valid ARE1 forms, which were subsequently duly certified by SEZ Customs Authorities as proof of evidence for the goods having been supplied. All these documents have been duly endorsed and stamped. What we find is that the Policy Relaxation Committee still maintains that there is no mention of advance authorisation number on the copy of the ARE1, submitted vide letter dated 29-8-2013. The same copies of AREs, submitted on 28-11-2013, however bears the details of the advance authorisation number. Thus, it is evident that the endorsement regarding authorisation details were made subsequently.*

1 2018 (360) E.L.T. 289 (Bom.)

64. The petitioner has not disputed this position. They have clearly stated in their letter dated 29-8-2013 that the advance authorisation number or whatever certificates obtained by SEZ Customs Authorities as proof of the export obligation being fulfilled were obtained subsequently. In that regard, what we find is that there is a signature appearing at page 102 of the paper-book on Form ARE-1. certified copy of 28-10-2013, therefore the Policy Relaxation Committee was of the view that on 29-8- 2013, when the copy of the document was forwarded, it did not contain the advance authorisation number but it was subsequently put and therefore in November, 2013, the copies were forwarded bearing such numbers.

65. The petitioner had clarified that they were in touch with the Central Excise Authorities and they subsequently certified this form with the advance authorisation number. They requested for intervention by the Committee, as a special case.

66. We are of the view that in the facts and circumstances of this case, the petitioner having duly supplied the copies of the ARE1 forms, it is only a further technical objection, of the said form not mentioning the advance authorisation number in the initial copies of the same but supplied later on, could have been condoned. It is not as if ARE1s have not been filed. It is not as if there is a doubt about the copy of ARE1s or the authenticity or genuineness thereof. It is not anybody's case that there are no ARE1 forms on record. Therefore, these forms were available. Therefore, the stand that there is no proof of export obligation being discharged, could not have been maintained once the petitioner was told to approach the Policy Relaxation Committee and it was empowered to relax any of the technical requirements or procedural matters. Equally, it was empowered to clarify in the facts of this case at least that the documents forwarded by the petitioner can be accepted as proof of export.

67. We do not see how the authorities then maintained that the petitioner's request for condonation of procedural lapse by not generating the Bill of Export cannot be accepted. What the Policy Relaxation Committee has done in its subsequent meeting, and which at page 153 purports to indicate its decision, is that guidelines insisting on Bill of Export being known, that Bill of Export not having been forwarded, the requirement in that behalf cannot be dispensed with.

68. We do not see how this subsequent decision can be reconciled with the earlier stand where the Policy Relaxation Committee was ready and willing to consider the dispensation provided there is proof of fulfilment of export obligation.

69. We were required to give this detailed reasoning only because somewhere down the line the authorities forgot that they were throughout insisting on proof of discharge of the export obligation and the petitioner was continuously maintaining that it had such proof in the form of documents in its possession and which has been duly forwarded. Once this was the issue and there was a

doubt as to how the ARE 1s, copies of which were earlier supplied, did not contain the advance authorisation number and its date, that subsequently even that aspect was clarified by the petitioner The petitioner clarified that it took the very same copies to the authorities and obtained their endorsement. It is not just a self-generated version or a self-certification but that there was an endorsement by the statutory authorities. The statutory authorities, namely, the Range Superintendent of Central Excise and the Development Commissioner, SEZ would not have appended their signatures on these copies and allowed the endorsement or the affixation of a stamp bearing the date of the advance authorisation and its number, unless they were satisfied that these are the very ARE1 forms and issued at the relevant time, of which the petitioner has brought the copies. That is how the copies have been certified by them. Even if one were to be hyper-technical and insist on absolute fulfilment of the procedural requirement, to our mind, in the facts and circumstances of this case, the authorities Could have concluded that this requirement is duly fulfilled.

70. Once we have held on facts that the requirement is duly fulfilled, then, we do not think that it is necessary to advert to the provisions of the SEZ Rules and particularly Rule 30 thereof. All the more when supplying goods from the domestic tariff area to SEZ is taken as equivalent to an export of goods physically from this country to abroad. Once such an act of the petitioner is taken to be an export, entitling them to the benefits of the advance authorisation and the scheme in respect thereof, then, all the conditions stipulated in that authorisation ought to be taken as fulfilled. Therefore, the Policy Relaxation Committee, as an after-thought, could not have directed the petitioner to get the case regularised as per provisions of the Handbook of Procedures 2009-2014, Vol-l or the SEZ Rules. We are considering the FTP of 2004-09 and the Handbook of Procedures in relation to this Policy Unmindful of the same, in its subsequent decision, the Committee refers to FTP of 2009-14.

71. As a result of the above discussion, we do not think that the petitioner was required to be visited with any adverse consequences, including issuance of Show Cause Notice. We are not in agreement with Mr. Desai that the Policy Relaxation Committee empowered by the Policy itself, namely, the FTP to relax the policy condition has acted within the four corners thereof. We have pointed out its flip-flop and twists elaborately. We find that it has acted not in accordance with the Policy and the FTDR to insist on absolute satisfaction of the procedural requirement. Though it was agreeable to accept any proof of fulfilment of export obligation, by relaxing the requirement of Bill of Export, it then picked the alleged inadequacies in the documents evidencing fulfilment of export obligation forwarded by the petitioner. These documents were duly certified and stamped/endorsed by the statutory authorities and still the Policy Relaxation Committee failed to grant the necessary relaxation. This decision, therefore, can be termed as wholly arbitrary, unfair, unreasonable and violative of the Mandate of

Article 14 of the Constitution of India. It is this conclusion which enables us to interfere in writ jurisdiction with the impugned decision and equally the Show Cause Notice."

11. This was followed by another Bench of this Court in ***Electromech Material Handling System (India) Pvt. Ltd. vs. The Union of India & Ors.***[2], where paragraphs 3, 4 and 5 read as under:-

> *"3. The impugned minutes of meeting / orders dated 29th August, 2016 and 6th July, 2017 passed under paragraph 2.5 of the Foreign Trade Policy 2009-14 refusing to relax export obligations in respect of the supplies made to SEZ in the absence of the assessed copy of bill of export. Consequently, the Export Obligations Discharge Certificates have not been issued to enable the petitioner to redeem the Advance Authorizations dated 21.01.2008, 09.04.2008, 09.05.2008 and 03.02.2009.*
>
> *4. It is an undisputed position before us that the issue arising herein stands concluded against the respondents and in favour of the petitioner by the decisions of this Court in Larsen and Tubro Ltd. (2018) 360 E.L.T. 289 and Rochem Separation Systems India Pvt. Ltd. Vs. Union of India & Ors. (Writ Petition No. 10999 of 2018, dated 27th September, 2018). In both the aforesaid decisions, this Court has taken a view that failure to produce a copy of the assessed bill of export in respect of the supplies made to SEZ, would not necessarily result in holding that there was a failure to discharge export obligation where one is able to establish supplies made to SEZ by production of copies of ARE-1.*
>
> *5. In the facts of this case, both the minutes of the meeting / orders dated 29th August, 2016 and the review order thereon dated 6th July, 2017 rejected the petitioner's application for relaxation only on account of failure to produce copy of bill of export of their supplies to SEZ. However, in the present facts, as in the earlier two cases party has been able to establish that supplies have been made to SEZ units i.e. M/s. Pipavav Shipyard Ltd. Ramapura, Gujarat and M/s. Hansen Drives Ltd. Coimbatore, Tamil Nadu."*
>
> *[emphasis supplied]*

12. We also note that the Special Leave Petition that was preferred by Union of India against the order and judgment of this Court was dismissed pursuant to ***Union of India vs. Larsen & Toubro Limited*** [3].

2 2018 (10) TMI 336 (Bom.)
3 2019 (367) E.L.T. A323 (SC)

13. Therefore, the law as its stands today is that if the party is able to show the proof of supply to SEZ Unit, then non-submission of "Bill of Export" cannot be treated as non-discharge of proof of EO.

14. Therefore, even as regards these 8 supplies are concerned, Respondent Nos.1 to 3 have to issue EODC subject to Petitioner once again submitting the following documents, as per paragraphs 4a to 4c of the aforesaid Policy Circular dated 3rd June 2024, which reads as under:-

> *"4......*
> *a. ARE-1 (showing the Advance Authorisation No./DFIA file No. and) duly attested by jurisdictional Central Excise/GST Authorities of AA holder/DFIA Exporter*
>
> *b. Evidence of receipt of supplies by the recipient in SEZ*
>
> *c. Evidence of payment made by the SEZ unit to the AA/DFIA exporter as per Para 4.21 of FTP."*

15. Mr. Shah states that aforesaid documents will be submitted within two weeks from today. The same will be examined by Respondents and if the documents are in order, the EODC shall be issued within four weeks of the submissions of the documents. If Respondents have any query they shall give a personal hearing, notice whereof shall be communicated atleast 3 working days in advance.

16. Consequently, rule is made absolute in terms of prayer clause (a). Both the impugned minutes of meetings are quashed and set aside.

17. Petition disposed.

[JITENDRA JAIN, J.] **[K. R. SHRIRAM, J.]**