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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2333 OF 2007

M/s.Century Textiles &)
 Industries Ltd., a Company)
 incorporated under the Companies)
 Act, 1956 through its Division)
 Century Rayon having its)
 Registered Office at Century)
 Bhavan, Dr. A.B. Road,)
 Mumbai-400 030 and head office)
 at Industry House, 159,)
 Churchgate Reclamation,)
 Mumbai-400 020 and factory at)
 Shahad, Dist. Thane.)..PETITIONERS

Vs.

1.Union of India through)
 Joint Secretary, Ministry of)
 Law and Justice, having its)
 office at Aayakar Bhavan,)
 M.K. Road, Churchgate,)
 Mumbai-400 020.)
 2.The Joint Director General)
 of Foreign Trade, New CGO)
 Building, New Marine Lines,)

Mumbai-400 020.)
3.The Deputy Director General)
of Foreign Trade, New CGO)
Building, New Marine Lines,)
Mumbai-400 020.)
4.The Commissioner of Customs)
(Exports), having his office)
at New Customs House, Ballard)
Estate, Mumbai-400 038)
5.The Deputy Commissioner of)
Customs, Group VII, DEEC)
Section, having his office at)
New Customs House, Ballard)
Estate, Mumbai-400 038.)..RESPONDENTS

Mr. Vikram Nankani with Mr. Ms. Aarti Sathe and Mr.
Madhur R. Baya, for the petitioners.

Mr. A.J. Rane, Senior Counsel with Mr. P.S. Jetly,
Mr. D.A. Dubey and Mr. H.P. Chaturvedi, for the
Respondents.

CORAM: F.I. REBELLO &

R.S.MOHITE, JJ.

DATED: 17TH JANUARY, 2008

ORAL JUDGMENT (PER F.I. REBELLO, J.):

. Rule. Heard forthwith.

2. The petitioner company is in the business of manufacture and export of Rayon Viscose Filament Yarn, hereinafter referred to as the Yarn having its factory at Shahad, District Thane. Chapter 4 of the Export-Import Policy for the period April 1992 to March, 1997, hereinafter referred to as the said Policy, contained the Duty Exemption and Remission inter alia provided for issue of advance licenses for duty free import of the raw materials/inputs against export obligation. The petitioners were issued several advance licences. Against the advance licences granted to the petitioners exports were effected from time to time and export obligations were duly discharged by the petitioners.

3. The present petition relates to two advance licences bearing No.03020800 dated 12th December, 1995 and 03201698 dated 28th March, 1996 which hereinafter shall be referred to as the licences. According to the petitioners at the time of exports the petitioners correctly declared the goods in each shipping bill and wherever the said yarn was sub-standard, the same was so declared by the petitioners. The petitioners yarn was examined by the Customs Officer and after completion of the assessment under Section 17 of the Customs Act the yarn was allowed to be exported by the proper officer under Section 51 of the Customs Act. After

completion of the exports as is required in law, the petitioners submitted all the export documents for audit and/or logging of the DEEC Books Part-I and II by the Respondent No.5. As there was a delay in audit/logging of the licenses on 4th June, 2002 the petitioners filed Writ Petition No.1156 of 2002 in this Court which came to be disposed of by an order directing the respondents to complete the auditing and logging of DEECs and until then directed the Respondents not to invoke the bank guarantees which were furnished by the petitioners before the import of goods under one of the said licenses. Pursuant to the order of this Court the auditing and logging of the said license were completed by the Customs Authorities. In the course of auditing/logging the Customs Authorities accepted all the exports made by the petitioners, but demanded duty on the alleged excess quantity imported by the petitioners. This demand of customs duty along with the interest in respect of the said license was also paid by the petitioners.

4. It is the case of the petitioners that the yarn undergoes various processes in the course of manufacture thereof and there are different specifications for the said yarn. These specifications are known, accepted and well recognised in the international market. There are

different grades of quality, and each quality has a different price. These different grades in turn are based on different specifications and each such specification has different end-uses. Nonetheless all the varieties of the said yarn are commercially known, sold and marketed as Rayon Viscose Filament Yarn. In order to distinguish one quality from the other, different nomenclatures are used. At times some of the qualities are referred to as sub-standard, which is only to distinguish the quality of one type of yarn from the other. The sub-standard yarn is also Rayon Viscose Filament Yarn and technically the parameters/cerfifications thereof are the same as that of any other yarn except that end uses differ.

5. It is the case of the petitioners that between 9th November, 2001 and 7th August, 2002 in respect of the aforesaid two advance licenses, the Respondent No.2 alleged non-ccompletion of export obligation and asked the petitioners to show cause as to why the LUT/Bank Guarantee given by them should not be enforced/forfeited. By a defaulter memo dated 8th August, 2002 in respect of the advance licence No.03201698 the petitioners were declared as defaulters for having not completed the export obligation cast upon them under the said license. The petitioners were served with demand

notice to which they replied as also to the defaulter notice and explained that in respect of each of the licences they had completed export obligation cast upon them. However, in view of the pending audit/logging of the respective DEEC Books connected with the aforesaid two advance licences by Respondent No.5 they were not in a position to submit the required documents to substantiate their claim. In spite of the explanation by show cause notice dated 18th June, 2003 in respect of advance license No.03201698 and notice dated 31st May, 2004 in respect of advance license No.03200800 the respondent No.2 alleged non-completion of export obligation and accordingly called on the petitioners to show cause as to why the fiscal penalty should not be imposed upon them along with their Directors in terms of Section 11 of the said Act.

6. Between 7th March, 2005 and 26th April, 2005 in view of the completion of audit and/or logging by the Customs Authorities the petitioners submitted all the relevant documents to the Licensing Authority for issuance of Redemption Certificate. Certain discrepancies were pointed out and the same documents were returned to the petitioners. On 30th June, 2005 after receiving the documents duly completed by the Customs Authorities and after complying with the other deficiencies pointed out by

the Licensing Authority the Petitioners once again submitted the relevant export documents to the Licensing Authority. When the matter was pending with the Licensing Authority on 20th June, 2005, the 5th Respondent sought to invoke the bank guarantee notwithstanding the order dated 4th June, 2002 of this Court. The petitioners, therefore, took out Notice of Motion No.316 of 2005 in Writ Petition No.1156 of 2002, wherein by an order of this Court this Court was pleased to restrain the Customs Authorities from invoking and/or encashing the bank guarantees. By communication dated 25th July, 2005 and 3rd August, 2005 the petitioners were informed by the Licensing Authority for the first time that as the petitioners had exported sub-standard quality of goods, therefore, the customs duty was required to be paid on proportionate imported raw materials. The Licensing Authority, however, issued the closure letters in respect of the said license. The petitioners made detailed representation explaining that the word "sub-standard" merely represents the different uses to which the said yard of different specifications is put to and that it is only a commercial nomenclature given to the said yarn, but the fact of the matter remains that the said yarn exported by the petitioners is the same as required under the said licenses read with the DEEC Books whereby the said yarn exported answers the

description and is the same as Rayon Viscose Filament Yarn. After hearing the Foreign Trade Development Officer by two separate letters informed the petitioners to deduct the shipping bills for sub-standard goods and requested the petitioners to pay duty on the quantity of 196.04 metric tonnes in case of the said license dated 12th December, 1995 and on 163.90 metric tonnes in case of the said license dated 28th March, 1996 and returned all original documents to the petitioners. The petitioners requested for considering the representation made by letter of 2nd December, 2005. In spite of that on 10th April, 2006 by two identical letters the petitioners were called upon to pay duty as earlier demanded. In spite of further correspondence and as no relief was granted the present petition.

7. A reply has been filed by Vijay N. Shewale, Joint Director General of Foreign Trade. It is their contention that the petitioners had exported sub-standard goods and as such they were liable to pay customs duty on proportionate import of raw materials. It is pointed out that the petitioners claim for grant of DEPB norms are understood to be applicable only for prime/fresh/superior quality goods. The petitioner submitted their explanation dated 9th November, 2004 to the Joint Director

General of Foreign Trade, Mumbai. The case was considered in Advance Licensing Committee meeting dated 24th February, 2005 and the Advance Licensing Committee decided to recommend the case to Policy Interpretation/Relaxation Committee for providing suitable interpretation. The Policy Relaxation Committee (PRC) comprised of Technical Authorities of different Departments and experts in Policy matters. The PRC in its meeting dated 22nd March, 2005 considered the case and rejected the petitioners request stating that the item in question did not quality for DEPB Credit as standard input output norms applied to quality products and the DEPB rates are arrived at on the basis of the standard input output norms for good quality. It is not necessary to refer to the other averments as the petitioners claim has been rejected in view of the decision taken by PRC.

8. At the hearing of this petition the submission of the petitioners is that once there is an export policy which is notified, it is not open to any person including P RC to issue and/or take any decision contrary to the said policy. The said policy can only be amended by the Government. In the instant case the Policy which is statutory in character was binding on the respondents and they could not have taken the decision contrary to the

said policy. On that count alone the decision communicated is liable to be quashed and set aside.

. In the alternative it is submitted that even assuming without admitting that it was open to PRC to take a decision that decision could not be retrospective and at the highest it could be prospective considering that the petitioners have already completed their export obligation under the policy then in force.

9. Section 5 of the Foreign Trade (Development and Regulation) Act, 1992 reads as under:-

"5. **Export and import policy.**-- The Central Government may, from time to time formulate and announce, by notification in the Official Gazette, the export and import policy and may also, in the like manner, amend that policy."

. It is, therefore, clear that the power to formulate and announce export import policy is conferred on the Central Government and that power can be exercised by issuance of a Notification in the Official Gazette. This power was exercised in respect of the product Rayon Viscose Filament Yarn. The Notification does not specify any specification

of the filament yarn whether it be standard or sub-standard. The petitioners further have explained that the expression sub-standard used by them is in a commercial sense, and it is not that the goods are sub-standard, but these are of different grades of quality and each quality has a different price and it has different end-uses. It does not cease to lose its character as Rayon Viscose Filament Yarn. It was open to the Central Government considering the power conferred on it under Section 5 if it choose to amend that policy. That was not done. The petitioner was sought to be denied the benefit based on the recommendations of what is described as PRC. Under Section 5 of the Foreign Trade Act no power has been conferred on the said committee to amend the export and import policy as notified by the Central Government. Once that be the position and the petitioners had already completed their export obligations the decision of the PRC to reject the explanation and make a demand for the purported unfulfilled export obligation is totally without jurisdiction and consequently the order on this count is liable to be set aside.

. On behalf of the Respondents Shri A.J. Rana, Senior Counsel with his usual fairness has placed before us a judgment of a co-ordinate Bench of this Court in the case of Narendra Udeshi vs.

Union of India in Writ Petition No.808 of 2002 decided on 1st October, 2002 wherein in respect of a similar issue the learned Bench held that the power to amend the policy being within the exclusive domain of the Central Government the said powers in that case could not have been usurped by D.G.F.T. in the guise of laying down regulatory measures. The judgment of this Court was taken in applied to the Supreme Court which dismissed the Special Leave Petition by its order dated 7th May, 2003.

. The Petition, therefore, is liable to be allowed on this point alone.

10. Even otherwise the decision of PRC is not an exercise in subordinate legislation or for that matter a decision of a quasi judicial authority. The decision taken is purely administrative in character. Once there be a policy in force and even if there had been power in the PRC to take a decision that decision at the highest being administrative could not have related back for the period when the export import policy was in force and parties had acted on the same. We are, therefore, clearly of the opinion that even if there was power in the PRC, which in the earlier part of this order we have held that it did not possess, the decision at the highest if it could have been made,

could only operate from the date of the decision and not an earlier period. On this count also the petition is liable to be allowed.

11. For all the aforesaid reasons the petition is made absolute in terms of prayer (a), (b) (i) and consequently prayer (b)(iv). In the circumstances of the case there shall be no order as to costs.

(R.S.MOHITE, J.)

(F.I.REBELLO, J.)