

W.P. No.27387 of 2011

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 14.07.2021

CORAM

**THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM**

W.P.No.27387 of 2011  
and M.P.Nos.1 of 2011 & 1 of 2013

M/s.BAPL Industries Limited,  
S.F.No.80/2,  
Nallatipalayam Village,  
Coimbatore.

..Petitioner

Vs.

1.Union of India,  
Rep. By its Secretary,  
Department of Commerce,  
Ministry of Commerce & Industry,  
Udyog Bhawan,  
New Delhi – 110 107.

2.The Director General of Foreign Trade,  
H Wing, Gate No.2,  
Udyog Bhavan,  
New Delhi 110 011.

3.Development Commissioner,  
MEPZ Special Economic Zone,  
NH 45, Tambaram,  
Chennai 600 045.

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4.Customs, Excise & Service Tax,  
Appellate Tribunal, First Floor,  
Shastri Bhavan Annexure,  
Haddows Road,  
Chennai.

5.Commissioner of Central Excise,  
6/7 A.T.D. Street,  
Race Course,  
Coimbatore 641 018.

..Respondents

**Prayer:** Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorarified Mandamus, calling for the records and to quash the impugned appellate order dated 21.09.2011 in F.No.12013/11/2011-ADJ/AC on the file of the 1<sup>st</sup> respondent and directing the first respondent to issue proper directions to consider the deemed exports made by the petitioner under para 9.10 of the policy also for the purpose of determining the petitioner's DTA entitlement.

For Petitioner : Mr.M.Karthikeyan

For Respondents : Mr.R.M.Santhanaraman  
(Senior Standing Counsel)

**ORDER**

The lis on hand is filed to call for the records and quash the impugned appellate order dated 21.09.2011 passed in F.No.12013/11/2011-

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ADJ/AC on the file of the 1<sup>st</sup> respondent and to issue proper directions to 1<sup>st</sup> respondent to consider the deemed exports made by the petitioner under para 9.10 of the policy, also for the purpose of determining the petitioner's DTA entitlement. The petitioner is a manufacturer and exporter of cotton yarn and during the relevant period, the petitioner was a 100% Export Oriented Unit set up under the provisions of the Export Import policies, which were in force during the relevant point of time. As per para 9.9 of the Exim Policy 1997-2002, 100% Export Oriented Undertakings (for short, EOUs) are permitted to clear the manufactured goods in Domestic Tariff Area (DTA-within the country), to an extent of 50% of the FOB value of exports made by them, subject to fulfillment of minimum Net Foreign Exchange Percentage (for short, NFEP) on payment of applicable duties. As per the Notification No.2/95, the goods manufactured by 100% EOUs wholly out of indigenous raw materials are allowed to be sold in DTA at concessional rate of duty, which would be equal to duty of excise payable on like goods, manufactured in India, as against the normal duty of "aggregate of the customs duty payable on like goods imported in India". Wherever the petitioner also uses imported raw materials, they have paid

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concessional rate of duty under Notification No.2/95 CE, according to which the duty payable would be 50% of the aggregate of the customs duty payable on the like imports.

2. When the facts stand as it is, the learned counsel for the petitioner solicited the attention of this Court with reference to the notification as well as para 9.9 of the Exim Policy 1997-2002, wherein sub-clause-b contemplates DTA sale up to 50% of FOB value of exports may be made subject to payment of applicable duties and fulfillment of minimum NFEP prescribed in Appendix 1 of the Policy. No DTA sale shall be permissible in respect of motor cars, alcoholic liquors and such other items as may be stipulated by Director General of Foreign Trade by a Public Notice issued in this regard. The learned counsel referred the circular dated 07.04.2000. In the said circular also, in Para No.3 it is enumerated "Though it is very clear that DTA sale entitlement of EOU/EPZ unit under paragraph 9.9 (b) would be up to 50% FOB value of exports (i.e., physical export only) it appears that in some cases EOU/EPZ units have been allowed DTA sale entitlement against deemed export effected under the provision of para 9.10

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of the policy. As the clearances under Para 9.9(b) are on payment of concessional duties, it is possible that this DTA entitlement might have been availed of by EOU/EPZ unit, resulting in loss of revenue". Pursuant to the Notification, show cause notices were also issued.

3.The learned counsel for the writ petitioner made a submission that the writ petitioner earlier approached this Court and this Court finally permitted the petitioner to prefer an appeal and the appellate authority also has not considered these aspects. It is contended that the entire issue raised in the present Writ Petition is no more *res-integra* and already decided by the Customs Excise and Service Tax Appellate Tribunal (for short, CESTAT) in more than one occasion. In order to substantiate the said contention, the learned counsel for the petitioner relied on the judgment of the Hon'ble Supreme Court of India in the case of ***Virlon Textile Mills Limited Vs. Commissioner of Central Excise, Mumbai***, reported in 2007 (211) E.L.T. 353 (S.C.). The Hon'ble Apex Court held as follows in para 7:

*“7.For the following reasons, we find merit in this civil appeal. Firstly, on examination of the Exim Policy we find that the said Policy as a rule stated that every 100% EOU was obliged to manufacture or produce*

from duty free imported raw materials capital goods etc., finished products/ articles and as a rule every 100% EOU was obliged to export its entire production and earn foreign exchange. This was what was called as Physical Exports. However, this rule had certain exceptions. In this civil appeal, we are concerned with DTA sales. As an exception, there existed two types of DTA sales under the said Policy, namely, DTA sales against rupee and DTA sales against foreign exchange which was similar to physical exports. This latter category was known as "Other Supplies in DTA". Therefore, to put it in brief, "Other Supplies in DTA" was equated with physical exports which, as stated above, was the general rule for 100% EOU. In other words, the general rule was physical exports and other supplies in DTA was equated to physical exports. This equation was necessary because other supplies in DTA gave certain benefits to the economy like preservation of foreign exchange, import substitution, savings of transportation costs and to provide competitiveness and level-playing field for Indian exporters. According to the Revenue, the expression occurring in the second proviso to [Section 3\(1\)](#), namely, "allowed to be sold in India" was applicable only to DTA sales against rupee and not DTA sale against foreign exchange. In this civil appeal, we are concerned with the law as it stood prior to 11.5.2001. In our view, DTA sale against foreign exchange was covered by the expression "allowed to be sold in India" and, therefore, such sale fell under the proviso to [Section 3\(1\)](#) of the 1944 Act. In the circumstances, the duty liability of the assessee (appellant herein) was required to be determined after allowing to it the benefit of notification No. 2/95-CE. That notification granted partial exemption to the assessee from duties in respect of goods manufactured in 100% EOU and allowed to be sold in India under para 9.9 (a), (b), (c) and (d). Once DTA sales against foreign exchange are held to be

covered by the proviso to [Section 3\(1\)](#) of the 1944 Act then the whole difference between DTA sales against rupee and DTA sales against foreign exchange, for the purposes of notification No. 2/95-CE would stand eliminated. This would be, however, subject to the compliance of other conditions of notification No. 2/95-CE. Therefore, in our view, the Tribunal had erred in relying on para 9.9(b) for limiting the benefits of exemption under notification No. 2/95-CE by imposing a new condition to the effect that the benefits would be admissible only in respect of 50% of such DTA sales against foreign exchange. Secondly, once the permission was granted by the competent authority under the Exim Policy to make DTA sales against foreign exchange, the assessee (appellant herein) was entitled to the benefit of concessional rate of duty under notification no. 2/95-CE. If DTA sales against rupee were allowed the benefit of notification No. 2/95-CE, then DTA supplies against foreign exchange, which were at par with physical exports, cannot be denied the same benefits and they cannot be subjected to a higher duty. Thirdly, once DTA sales against foreign exchange are covered by the above expression "allowed to be sold in India", all issues relating to calculation of the duty payable in terms of notification No. 2/95-CE will have to be decided afresh by the adjudicating authority and accordingly, we hereby remand the matter back to the Commissioner for calculating the duties payable by the assessee in terms of notification No. 2/95. The Commissioner will calculate the duties accordingly as hereinabove mentioned. Lastly, we are of the view that there is no fundamental difference, as far as the exemption notification No. 2/95-CE is concerned, between DTA sales against foreign exchange and DTA sales against rupee. Once DTA sales against foreign exchange fall within the expression "allowed to be sold in India", the Department cannot deny to such sales

*the exemption under notification no. 2/95-CE, since DTA sales against foreign exchange will come under para 9.9. According to the Tribunal, the entire supply to DTA against foreign exchange was not entitled to the benefit of notification No. 2/95-CE but only 50% of the supply was eligible for the said relief. We do not see any basis for introduction of this condition in notification No. 2/95-CE. It appears that this condition is brought in on the ground that para 9.9 (b) refers to DTA sales up to 50% of the FOB value of exports. In our view, the Tribunal had erred in relying on the said para 9.9 (b) for limiting the benefits of exemption under notification No. 2/95-CE in respect of 50% of DTA sales (supplies) against foreign exchange. One cannot ignore the fact that DTA sales in foreign exchange provides for better money value as compared to DTA sales in rupee. Therefore, if DTA sales against rupee are allowed the benefits of notification No. 2/95-CE, DTA supplies, which are at par with physical exports, cannot be denied the same benefits. ”*

4. In the case of **Ginni International Limited Vs. Commissioner of Central Excise, Jaipur**, reported in **2002 (139) E.L.T. 172 (Tri.- Delhi)**, the Tribunal also took a view by following the ratio laid down by the Apex Court in **Virlon's** case. The order of CESTAT was confirmed by the Hon'ble Supreme Court and thus, the precedent laid down in **Virlon's** case became final. The learned counsel drawn the attention of this Court with reference to many other subsequent judgments, on the same line, and contended that the principle laid down by the Hon'ble Apex Court in **Virlon's** Case is still

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being followed by CESTAT and other Courts across the Country and therefore, there is no reason for the respondents to take a different stand and pass an impugned order and on that ground, the order impugned is liable to be set aside.

5. The learned Senior Standing Counsel appearing on behalf of the 5<sup>th</sup> respondent objected the said contention by stating that the point raised is relatable to technical issue and an adjudication of facts are necessary for applying the principles laid down by the Hon'ble Apex Court in **Virlon's** case. Therefore, the matter is to be decided by the 5<sup>th</sup> respondent, Commissioner of Central Excise and by the 4<sup>th</sup> respondent, CESTAT. The learned Senior Standing Counsel made a submission that the proceedings pending before the 4<sup>th</sup> respondent CESTAT in File No.E284/11 is pending due to the interim stay granted by this Court. Similarly, the appeal filed against the show cause notice before the 5<sup>th</sup> respondent is also pending. In view of the fact that both the proceedings are stayed in the present Writ Petition, the appeals have not reached finality. Thus, the respondents 4 and 5 may be allowed to continue the proceedings and take a decision and pass

orders.

6.This Court is of the considered opinion that the learned counsel for the petitioner articulated by stating that the issues are no more *res-integra* and decided by the CESTAT, which was confirmed by the Hon'ble Supreme Court. The principles enumerated by the Hon'ble Apex Court in **Virlon's** case are consistently followed by the CESTAT and therefore, the present Writ Petition is to be allowed.

7.This Court is of the considered opinion that the learned counsel for the petitioner relied on Para 9.9 of the Exim Policy, 1997-2002. The learned counsel for the petitioner further contended that the benefit granted to the physical export is to be extended to the deemed export also as per the policy and thus, the claim of the petitioner is to be allowed. With reference to the Exim Policy, as well as circulars issued by the Ministry of Commerce and Ministry of Finance and the business transactions, as well as the nature of benefits claimed, involves an adjudication of technical points. Such technical points with reference to the business transactions cannot be

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adjudicated in a writ proceedings under Article 226 of the Constitution of India. It requires examination of certain records as well as the policy decisions, which all are prevailing during the relevant point of time, more specifically, for the purpose of extending the benefits. Thus, it would be preferable, such issues are decided by the 5<sup>th</sup> respondent, Commissioner of Central Excise and the 4<sup>th</sup> respondent, Tribunal, which all are the expert bodies in the field. The power of judicial review under Article 226 of the Constitution of India, need not be extended for the purpose of adjudication of such technical issues, more specifically, when the appeal is pending before the CESTAT and the appeal against the show cause notice is also pending before the 5<sup>th</sup> respondent, Commissioner of Central Excise. However, it is made clear that the respondents 4 and 5 are bound to look into the principles laid down by the Hon'ble Supreme Court of India in **Virlon's** case and its applicability with reference to the facts and circumstances placed by the petitioner regarding their business transactions. All these facts and circumstances with reference to the records are to be adjudicated and the application of the principles also must be decided by affording opportunity to the parties. This being the factum established, the

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respondents 4 and 5 are directed to proceed with the proceedings which all are pending before them, after hearing parties and by affording opportunity to the petitioner and take a decision and pass orders, as expeditiously as possible. The petitioner is at liberty to submit all the judgments and the grounds stated in the Writ Petition, before the respondents 4 and 5, by availing the opportunities to be provided.

With these directions, the Writ Petition stands disposed of. No costs. Consequently, connected Miscellaneous Petitions are closed.

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Index : Yes

Speaking Order : Yes

To

1. The Secretary,  
Union of India,  
Department of Commerce,  
Ministry of Commerce & Industry,  
Udyog Bhawan, New Delhi – 110 107.

2. The Director General of Foreign Trade,  
H Wing, Gate No.2,

12/14

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New Delhi 110 011.

3. Development Commissioner,  
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4. Customs, Excise & Service Tax,  
Appellate Tribunal, First Floor,  
Shastri Bhavan Annexure,  
Haddows Road,  
Chennai.

5. Commissioner of Central Excise,  
6/7 A.T.D. Street,  
Race Course,  
Coimbatore 641 018.

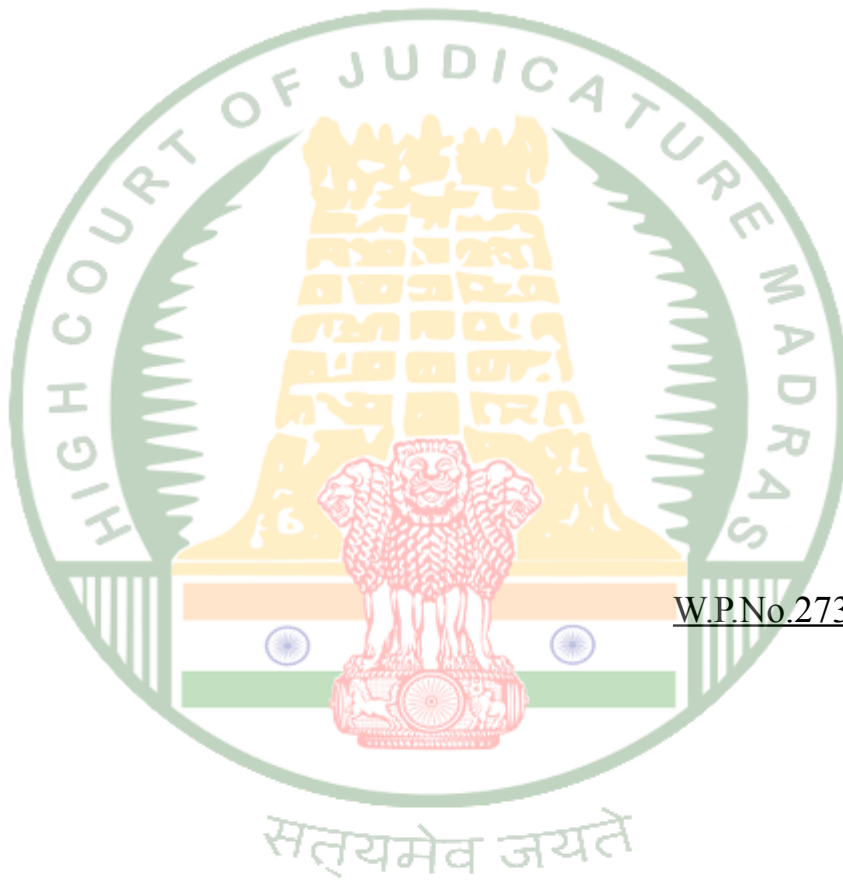


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**S.M.SUBRAMANIAM, J.**

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