(2014) 04 CAL CK 0025

In the Calcutta High Court

Case No : W.P. No. 18151 (W) of 2012

Bharat Heavy Electricals Ltd. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 30-04-2014

Acts Referred:

Citation : (2015) 316 ELT 466

Hon'ble Judges : Indira Banerjee, J

Bench : Single Bench

Advocate : Samir Chakraborty and Abhijit Biswas, Advocates for the Appellant; Pradip Tarafdar and Utpal Maitra, Advocates for the Respondent

Judgement

Indira Banerjee, J.—In this writ application, the petitioner, a public sector undertaking of the Government of India, has challenged the validity and legality of the decisions dated 15 March, 2011 and 9 September, 2011 of the respondent No. 5, to the extent that the respondent No. 5 has held that cement and steel are not eligible for deemed export benefits, except in respect of supplies provided under Paragraph 8.2(d) of the Foreign Trade Policy 2009-14. The petitioner has also challenged notices dated 20 July, 2012/14 July, 2012 issued on behalf of the respondent No. 3 by the respondent No. 4, whereby the petitioner has been informed that no deemed export benefit was available for supply of cement and steel as inputs in mega power projects, in which the petitioner effected supplies, and called upon to pay back the deemed export benefit received in the form of refund of Terminal Excise Duty paid by the petitioner on steel and cement supplied, along with 15% interest, in default whereof, the petitioner has been threatened with action under the Foreign Trade (Development and Regulation) Act, 1992.

2. On 13th of July 2007, Damodar Valley Corporation issued a letter of intent to the petitioner for supply of plant and equipment including mandatory spares for the Thermal Power Project at Koderma. Similar letter of intent was issued to the petitioner on 14th of August, 2007 for supply of plant and equipment, including

mandatory spares, for setting up Durgapur Thermal Power Station.

3. On 11 August, 2001, agreements were entered into by and between ONGC Tripura Company Limited and the petitioner for supply of plant and equipment, civil construction materials, maintenance tools, tackles and commissioning spares for design and engineering, manufacturing, fabrication and assembly of a gas based combined cycle power plant at Udaipur in Tripura.

4. The petitioners supplied the items mentioned above to the respective power projects, including cement and steel. The petitioner filed claim applications before the Joint Director General of Foreign Trade, for refund of Terminal Excise Duty in respect of supplies made under the category of deemed exports.

5. According to the respondents, the petitioner while filing its refund application gave an undertaking to the effect that the petitioner would refund the amount of drawback claimed by it, in excess of any amount which might be re-determined by the Government, as a result of post-verification. However, the giving of such undertaking does not prevent the petitioner from challenging the determination if the same is illegal.

6. The Terminal Excise Duty, paid in respect of cement and steel supplied to the said 3 projects by the petitioner was refunded by the Directorate General of Foreign Trade and was received by the petitioner. Thereafter, the issue regarding the entitlement of deemed export benefit was referred to the Directorate General of Foreign Trade and the same was placed before the Policy Interpretation Committee headed by the Director General of Foreign Trade, wherein representatives of the Ministry of Power were present and consulted. According to the respondents, the cases related to deemed export benefits for supply of fuel, cement, steel, etc., was discussed.

7. According to the respondents, the policy permits free fuel only under EOU/SEZ/ Advance Authorisation Scheme. In no other case, supply of fuel is eligible for deemed export benefit. Similarly, except as provided under Paragraph 8.2(d) of the Foreign Trade Policy, the supply of cement and steel would not be eligible for Deemed Export Benefit.

8. Chapter 8 of the Foreign Trade Policy provides for Deemed Export Benefits. What is meant by deemed export is defined in Paragraph 8.1 whereas Paragraph 8.2 specifies the categories of supply of goods, which are to be regarded as deemed exports under the Foreign Trade Policy if they are manufactured in India. In terms of Paragraph 8.2(g) supply of goods to power projects and refineries are to be regarded as deemed exports.

9. Paragraph 8.3 provides for benefits available in case of deemed exports. In terms of clause (c) thereof, Terminal Excise Duty is refundable in all cases of ''deemed exports'' except for supplies made against ''International Competitive Bidding'', in which case there is complete exemption from payment of Terminal Excise Duty. In this context, reference may be made to Paragraphs 8.4.4(i) and

(iv) of the Foreign Trade Policy set out hereinbelow.

"8.4.4(i): In respect of supplies made under paragraphs 8.2(d), (f) and (g) of FTP, supplier shall be entitled to benefits listed in Paragraphs 8.3(a), (b) and (c), whichever is applicable.......

7.4.4(iv): Supply of capital goods and spares upto 10% of FOR value of capital goods to power projects in terms of paragraph 8.2(g), shall be entitled for deemed export benefits provided the ICB procedures have been followed at Independent Power Producer (IPP)/Engineering and Procurement Contract (EPC) stage. Benefit of deemed exports shall also be available for renovation/ modernization of power plants. Supplier shall be eligible for benefits listed in paragraph 8.3(a) and (b) of FTP, whichever is applicable. However, supply of goods required for setting up of any mega power project as specified in S. No. 400 of DoR Notification No. 21/2002-Customs, dated 1-3-2002, as amended, shall be eligible for deemed export benefits as mentioned in Paragraph 8.3(a), (b) and (c) of FTP, whichever is applicable, if such mega power project complies with the threshold generation capacity specified therein, in Customs Notification."

10. As argued by Dr. Chakraborty, Para 8.4.4(iv) refers to mega power project "as specified" in SI. No. 400 of Notification No. 21/2002 of the said Notification, inter alia, refers to mega power project which:

"(a) is certified by an officer not below the rank of the Joint Secretary to the Government of India in the Ministry of Power;

(b) is an inter-State thermal power plant of a capacity of 700 MW or more, if located in the States of Jammu and Kashmir, Sikkim, Arunachal Pradesh, Assam, Meghalaya, Manipur, Mizoram, Nagaland and Tripura;

(c) is an inter-State thermal power plant of a capacity of 1000 MW or more, if located in other States."

11. There is no dispute that all these three requirements are satisfied in the instant case. There is or can also be no dispute that power projects are covered by Chapter sub-heading 9801 of the Customs Tariff.

12. Benefit of deemed export is also available for renovation and complete modernisation of power plants. The supplier is eligible for benefits listed in Paragraph 8.3(a) and (b) of the Foreign Trade Policy, whichever is applicable. However, supply of goods for setting up any mega power project, as specified in Serial No. 400 of DoR Notification No. 21/2002-Customs, dated 1-3-2002 , as amended, are eligible for deemed export benefits as mentioned in Paragraph 8.3(a), (b) or (c) of the Foreign Trade Policy, whichever is applicable, if such mega power project complies with the threshold generation capacity specified in the said Customs notification.

13. SI. No. 400 of Notification No. 21/2002-Cus., dated 1-3-2002, as amended, reads as under:

Heading No. 9801 of the Customs Tariff is as under:

14. There can be no dispute that the entire scheme of the Foreign Trade (Development and Regulation) Act, 1992 (hereinafter referred to as the Foreign Trade Act) as also Foreign Trade Policy and Handbook of Procedures, Vols. 1 and 2 should be taken into account as argued by Mr. Tarafdar.

15. Mr. Tarafdar rightly argued that Section 3 of the Foreign Trade Act enables the Central Government to make provisions for the development and regulation of Foreign Trade by facilitating imports and increasing exports. There can also be no dispute that any policy framed in exercise of power under Section 3(1) must be so interpreted as to further the intention of the Legislature.

16. Under Section 3(2) the Central Government is empowered to issue orders prohibiting, restricting or otherwise regulating in all cases, or in specified classes of cases, and subject to such exceptions, if any, as may be made by or under the order, the import or export of goods, service, technology, as argued by Mr. Tarafdar.

17. Mr. Tarafdar argued that Section 5 of the Foreign Trade Act provides 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 the Foreign Trade Policy. This provision makes it clear that power to frame, announce and amend the Foreign Trade Policy vests only in the Central Government and not in any other authority. This is precisely what has been argued on behalf of the petitioners, by Dr. Chakraborty.

18. Mr. Tarafdar took this Court through the various provisions of the Foreign Trade Act and in particular Section 6 thereof. Section 6 of the Foreign Trade Act provides for appointment of the Director General of Foreign Trade (DGFT). Under Section 6(2) DGFT is responsible for carrying out the Policy. Section 6(3) empowers the Central Government to direct, by order, that all powers exercisable by it under the Act, except powers under Sections 3, 5, 15, 16 and 19, may also be exercised, in specified cases and subject to specified conditions, by DGFT or officers subordinate to him as may be specified in the Order. Therefore, the power to amend Foreign Trade Policy cannot be delegated and has to be exercised by the Central Government in the manner specified in Section 5 of the Foreign Trade Act.

19. In exercise of powers under Section 5, the Central Government notified the Foreign Trade Policy 2004-09 which was in force till March 31, 2009 and was replaced thereafter, in a similar manner, by the Foreign Trade Policy 2009-14, on and from April 1, 2009. Foreign Trade Policy 2009-14 has been amended in like manner from time to time, the last of such amendment being effected on June 5, 2012.

20. Paragraph 2.3 of the Foreign Trade Policy provides that if any question or doubt arises in respect of the interpretation of any provision contained in the

Foreign Trade Policy the same shall be referred to DGFT, whose decision thereon shall be final and binding. It was, therefore, within the jurisdiction of DGFT to interpret the relevant paragraphs of the Foreign Trade Policy. This Court is unable to accept Dr. Chakraborty''s submission that the respondent No. 5 had no jurisdiction to assume jurisdiction.

21. However, power to interpret does not confer on the DGFT, the power to amend, as argued by Dr. Chakraborty. This is made clear not only by Section 6(3) read with Section 5 of the Foreign Trade Act but also Paragraph 1.3 of the Foreign Trade Policy, which makes it clear that only the Central Government reserves right in public interest to make any amendments, by notification, to the Foreign Trade Policy, in exercise of powers conferred by Section 5 of the Act. The Central Government, while amending Para 8.4.4(iv) of FTP of 2009-14 by Notification No. 92 (RE-2010)/2009-14, dated December 28, 2011, retained the part of the said clause (iv) relating to supply of goods required for setting up of a mega power project exactly in the same way as it stood before the amendment. Dr. Chakravarty rightly argued that this clearly negates the interpretation of respondent No. 5 as contained in the said purported decisions as regards deemed export benefit availability in respect of cement and steel supplied to mega power projects.

22. As a matter of fact, it was only on June 5, 2012, that the Central Government amended the Foreign Trade Policy of 2009-14, by introducing Paragraphs 8.8.1 and 8.8.2, excluding cement and steel from deemed export benefits, inter alia, covered by Para 8.4.4(iv) of the Foreign Trade Policy, such exclusion is prospective. This is clear from Notification No. 1 (RE-2012)/2009-14, dated June 9, 2012, issued by the Central Government, that the amended provision came into force with effect from June 5, 2012, from which date the revised edition of Foreign Trade Policy became operational.

23. Moreover, as argued by Dr. Chakraborty, the decisions of the respondent No. 5 do not disclose any reason or basis in support thereof. As observed by the Supreme Court, inter alia, in the case of Hindustan Petroleum Corporation Ltd. Vs. Darius Shapur Chenai and Others, , relying upon its earlier decisions in Mahinder Singh Gill''s case and Gordhandas Bhanji''s case, orders passed by a statutory authority have to be supported either on the reasons stated therein or on the grounds available on record and cannot be supplemented by affidavits or submissions made subsequently. In the premises the petitioner is entitled to the reliefs sought for in the writ petition.

24. The power projects are of the nature specified in Notification No. 21/2002 (Serial No. 400). The respondents have not been able to specifically deny that the conditions laid down in Paragraph 8.4.4(iv) are duly satisfied. Benefit under Paragraph 8.3(c) cannot, therefore, be denied. The requisite project authority certificates and mega power project certificates, as required under SI. No. 400 of Notification No. 21/2002 , were duly provided by the respective project authorities.

25. In respect of steel and cement supplied as deemed exports, as per Para 8.3(c), between June, 2008 and September, 2010, the petitioner filed applications before the respondent authorities for refund of Terminal Excise Duty. Refunds were granted upon due approval by the DGFT between August, 2008 and March, 2011.

26. As argued by Dr. Chakraborty, the certificates issued by the project authorities duly certified that steel and cement were required for setting up the power projects. The respondents cannot go beyond such certificates. In support of his submission Dr. Chakraborty cited Zuari Industries Ltd. Vs. Commissioner of Central Excise and Customs,

27. Para 8.4.4(iv) refers to mega power project "as specified" in SI. No. 400 of Notification No. 21/2002 SI. No. 400 of the said Notification, inter alia, refers to mega power project which:

"(a) is certified by an officer not below the rank of the Joint Secretary to the Government of India in the Ministry of Power;

(b) is an inter-State thermal power plant of a capacity of 700 MW or more, if located in the States of Jammu and Kashmir, Sikkim, Arunachal Pradesh, Assam, Meghalaya, Manipur, Mizoram, Nagaland and Tripura;

(c) is an inter-State thermal power plant of a capacity of 1000 MW or more, if located in other States."

28. There is no dispute that all these three requirements are satisfied in the instant case. There is also no dispute that the power projects are covered by Chapter sub-heading 9801 of the Customs Tariff.

29. As argued by Dr. Chakraborty, there is no requirement in Paragraph 8.4.4(iv) that the goods to be supplied have to be those specified under Chapter sub-heading 9801 of the Customs Tariff. In the absence of such requirement, no such condition can be imported in clause (iv) of Paragraph 8.4.4.

30. Chapter Heading 9801 makes it apparent that goods covered thereunder include, disjunctively, "raw materials" for manufacture of all items of machinery, etc., specified therein which are required for the initial setting up of inter alia a power project. There can be no dispute that steel and cement are required for setting up of a specified power project. Even the machinery, equipment specified in the said Chapter Heading would require steel for manufacture thereof and cement for inter alia installation thereof, as foundation. Cement and steel cannot therefore, be excluded from deemed export benefits as per Paragraph 8.3(c) of the Foreign Trade Policy.

31. Cement and steel have been excluded from deemed export by amendment of the Foreign Trade Policy in June, 2012 by insertion of Paragraphs 8.8.1 and 8.8.2 as observed above. Prior to the amendment these items were not excluded. No reasons have been disclosed for the finding of the DGFT that deemed export

benefits would not be available in respect of steel and cement. On the other hand, the very fact that the Foreign Trade Policy had to be amended in June, 2012 to introduce specific provisions for exclusion of cement and steel makes it clear that cement and steel were included prior to the amendment in June, 2012. For the reasons discussed above, the writ application is allowed and the decision dated 15th March, 2011 and 9th September, 2011 and also the notices dated 20th of July, 2012/24th of July, 2012 are set aside and quashed. The petitioner shall not be required to pay back the deemed export benefit received in the form of refund of Terminal Excise Duty paid by the petitioner on steel and cement supplied to the concerned projects.

