(2011) 02 DEL CK 0403

In the Delhi High Court

Case No : Writ Petition (C) No. 14367 of 2005 and C.M.A. No. 13447 of 2010

Estocorp India P. Ltd. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 03-02-2011

Acts Referred:
Foreign Trade (Development and Regulation) Act, 1992 — Section 15

Citation : (2012) 275 ELT 313

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : Abhinav Vasisht with Sumit Singh Beripal, for the Appellant; S.K. Dubey with Tungesh, for the Respondent

Final Decision : Allowed

Judgement

S. Muralidhar, J.

CM APPL. No. 13447/2010 (for restoration)

For the reasons stated therein/this application is allowed. The petition is restored to its file.

The application is disposed of.

WP (Civil) No. 14367/2005

1. With the consent of learned counsel for the parties, this petition has heard finally.

2. The Petitioner is aggrieved by rejection of its claim in respect of free shipping bills converted into bills under the Duty Entitlement Pass Book (''DEPB'') scheme by the Respondent Director General of Foreign Trade (''DEPB''). The conversion of free shipping bills into DEPB shipping bills was permitted first by a Circular dated 28th January 2003 issued by the Department of Revenue (''DOR''), Ministry of Finance. It was acknowledged that the DOR had come across cases where

exporters were not allowed to file free shipping bills under a particular export promotion scheme including DEPB scheme. As a result, the exporters exported goods against free shipping bills. Later, the exporters had approached the authorities for conversion of such free shipping bills into one under the export promotion schemes including DEPB scheme. Consequently, it was decided to allow such request as per certain conditions. Para 4 of the said Circular read as under :

4. It is, therefore, clarified that in the following types of cases conversion of shipping bill may be allowed :

(i) Where the exporter wanted to avail benefit of an export promotion scheme (including Drawback) but he was forced to file free shipping bill.

(ii) Where the exporter had filed shipping bill under a particular export promotion scheme but benefit of that scheme was denied to him by DGFT or Customs,

3. The conversion was to be allowed on the case-to-case basis subject to availability of export documents and the fact of use of inputs is satisfactorily proved in the resultant export products.

4. There was further amendment to the said circular on 12th May 2003 It was clarified in para 3 of the said circular which read as under :

3. The issue has been re-examined in consultation with DGFT/MOC and it is clarified that conversion of free shipping bills into Advance License/DEPB/DFRC/ Drawback shipping bills and conversion of shipping bills from one export promotion scheme to another (where the benefit of that Scheme has been refused by Customs/DGFT vide para 4 (i) of DOR Circular No. 6/2003-Cus.) may be permitted on merits by the Commissioner on case to case basis subject to conditions specified in Para 4 (a), (b) and (c) of DOR Circular No. 6/2003-Cus., dated 28th January 2003 and also subject to the following condition :

"the export has not availed benefit of any export promotion scheme and no fraud/ or suspected manipulation and no investigations have been initiated against the party in respect of such exports under these shipping bills.

5. The present petition concerns the claim made by the Petitioner in separate applications in respect of the following free shipping bills which were converted into DEPB shipping bills :

S. No.

Date of Application

Total Invoices

DEPB Claim

1.

9th January 2004

15

966994.00

2.

27th February 2004

15

1968032.00

3.

31st March 2004

11

1163366.00

4.

31st March 2004

20

2404600.00

5.

31st March 2004

23

2386216.00

Total

84

8889208.00

6. However, by separate letters dated 22nd February 2003 (No. 05/21/051/6614/ AM04), 27th February 2004 (No. 05/21/051/8433/AM04), 31st March 2004 (No. 04/21/051/9404), 31st March 2004 (No. 05/21/051/ 9405/AM04) and 31st March 2004 (No. 05/21/051/9406/AM04) of the DGFT, the Petitioners'' claims were rejected.

7. In the counter affidavit, the Respondents first raised a preliminary objection that the impugned letters rejecting the claim of the Petitioners are appealable orders in terms of Section 15 of the Foreign Trade (Development Regulation) Act, 1992 (''FTDR Act'') and therefore, the present writ petition ought not to be entertained. On merits, it is submitted that by a subsequent circular dated 16th January 2004, the earlier circulars dated 28th January 2003 and 12th May 2003

were further amended. Para 3.2 of the said Circular reads as under :

3.2 As regards permitting conversion of free shipping bills into Advance Licence/ DEPB/DFRC shipping bills is concerned, it is true over a period of time, with liberalization having been ushered in the Customs administration, clearance of goods is being permitted mostly on the basis of self-declaration made by the exporters on the shipping bills. Such self-assessment scheme necessarily casts the responsibility on the exporter to make up his mind at the time of filing shipping bills as to which export promotion incentive he likes to avail the introduction of the system of online assessment, such request for conversion at a later date creates difficulties and it is not advisable to encourage such conversion.

It is therefore, clarified that conversion of free shipping bills into Advance Licence/ DEPB/DRFC shipping bills should not be allowed. As regards permitting conversion of shipping bills from one export conversion of free shipping bills into Advance Licence/DEPB/DFRC/Drawback shipping" Promotions scheme to another is concerned, it is clarified that such conversion should only be allowed where the benefit of an export promotion scheme claimed by the exporter has been denied by DGFT/MOC or customs due to any dispute. Such conversion may be permitted on merits by the Commissioner on case to case basis subject to the following conditions :

(a) The request for conversion is made by the exporter within one month of the denial/rejection of the benefit claimed.

(b) On the basis of available export documents etc., the fact of use of inputs is satisfactorily proved in the resultant export product.

(c) The examination report and other endorsement made on the shipping bill/ export documents prove the fact of export and the export product is clearly covered under relevant SION and DEPB Schedule as the case may be.

(d) On the basis of S/Bill/export documents the exporter is fulfilling all conditions of the Export Promotion Scheme into which he is seeking conversion.

(e) The exporter has not availed benefit of the export promotion Scheme under which the goods were exported and no fraud/misdeclaration/manipulation/ investigation is initiated against him in respect of such exports.

8. It is accordingly submitted by the Respondents that since on the date of taking up the applications of the Petitioner for consideration the aforementioned Circular dated 16th January 2004 had already been issued, it was decided to reject the Petitioner''s claims.

9. Mr. Abhinav Vasisht, learned counsel for the Petitioner pointed out that each of the free shipping bills in question in respect of which the Petitioner has made claims under the DEPB Scheme, were converted on 8th December 2003 i.e. even prior to the Circular dated 16th January 2004 copies of the free shipping bills bearing endorsement of conversion as on 8th December 2003 have been

enclosed as Annexure P-3 collectively. It is submitted that inasmuch as the conversion has already been granted, the claims cannot be rejected. Mr. S.K. Dubey, learned counsel for the Respondents reiterated the stand taken in the counter affidavit.

10. The above submissions have been considered. It appears to this Court that the claims of the Petitioner ought to have been accepted by the Respondents. It is not denied that the conversion of free shipping bills in question into DEPB bills was granted on 8th December 2003 itself. Therefore, even prior to the Circular dated 16th January 2004 conversion of the free shipping had already been granted. The claims of the Petitioner were only consequent upon such conversion. In any event the Circular dated 16th January 2004 was only prospective. The wording of para 3.2 of the said Circular makes it clear that conversion of free shipping bills would not be allowed after the date of said Circular.

11. Consequently, the impugned letters of the Respondents rejecting, the Petitioners claims are hereby set aside.

12. As regards the objection as to the availability of an alternative remedy by way of appeal under the FTDR Act, this Court is of the view that relegating the Petitioner at this stage to the alternative remedy would only delay the matter. The present writ petition has been pending in this Court for more than five years. Moreover, on merits, there are no complicated questions of fact. It has been found that the Petitioner is entitled to succeed.

13. For all the aforementioned reasons, the writ petition is allowed as prayed for. Consequential orders in favour of the Petitioner will now been issued by the Respondents within four weeks.