

(2001) 10 CAL CK 0029

In the Calcutta High Court

Case No : APOT No. 620 of 2001 and Writ Petition No. 410 of 2000

Joint Director General of Foreign Trade

APPELLANT

Vs

IFGL Refractories Ltd.

RESPONDENT

Date of Decision : 18-10-2001

Acts Referred:

Central Excise Rules, 1994 — Rule 13, 13.1, 191BB

Citation : (2002) 143 ELT 294

Hon'ble Judges : Y.R. Meena, J;Arun Kumar Mitra, J

Bench : Division Bench

Advocate : N.C. Roychowdhury and Jayanta Banerjee, for the Appellant;Dulal Banerjee, J.P. Khaitan and Indira Banerjee, for the Respondent

Final Decision : Dismissed

Judgement

Y.R. Meena, J.—This appeal is directed against the judgment of learned Single Judge dated 16th May 2001 IFGL Refractories Ltd. Vs. Joint Director General of Foreign Trade, J. The limited controversy for our consideration in this appeal is whether the respondent is entitled for refund of terminal Excise Duty in accordance with the provisions of the import policy.

2. Learned Single Judge has considered the facts that the petitioner is a manufacturer of various items such as Tundish Nozzler, Tundish Shroud etc., which are refractory items used by the Visakhapatnam Steel Plant (in short VSP) in the manufacture of steel products, which thereafter are exported abroad. VSP being an exporter is the holder of Advance Licence issued by the Director General of Foreign Trade (hereinafter referred to as DGFT) on the strength of which it can import various specified items including refractory items from abroad free of Customs Duty.

3. Instead of importing such items from abroad it has chosen to procure such items from the petitioner who is the holder of an Advance Intermediate Licence under the import policy. The items manufactured by the petitioners are in the

normal course subject to Central Excise Duty under the Excise Law. However, since the supply of the said items by the petitioner to VSP constitute "Deemed Report" within the meaning of the import policy the petitioner is entitled to certain benefits under the policy. One of such benefits is refund of terminal excise duty under the policy. So the petitioner duly applied for such refund of terminal excise duty from the DGFT being the respondent No. 2. The petitioner previously got refund for the quarters ending March, 1994, June, 1994 and September, 1994. However, this time the DGFT refused to entertain demand of refund for the succeeding quarters. The DGFT is of the view that the petitioner was entitled to ab initio exemption of excise duty under Rule 13 of the Central Excise Rules, 1994 read with Notification No. 49/94, dated 22nd September, 1994.

4. The supplies by the petitioner to VSP had commenced prior to the issue of the said Notification No. 49/94. At that point of time Rule 191BB and Notification No. 33/90, dated April 1990, the provisions of which were substantially same as Rule 13 and Notification No. 49/94 were in force. In fact that petitioner had initially applied for exemption of excise duty under the earlier Rule and notification but the Central Excise Authorities rejected the same on the ground that the goods in question were not intermediate products nor raw materials for export and thereafter the excise authorities directed the petitioner to effect clearance to VSP on payment of Central Excise Duty.

5. The petitioner though preferred an appeal against the order of the excise authorities but withdraw the same as the same became infructuous because of payment of excise duty by the petitioner. The petitioner made repeated demands and request for refund from the excise authorities; however the aforesaid authorities have declined to entertain such demand contending that such claim lay with the DGFT. The petitioner then submitted the petition for refund of duty to DGFT. The DGFT has also rejected the request for refund of duty.

6. Petitioners thereafter file the petition before this Court. Learned Single Judge thereafter considered the various provisions of the import policy and the paras of the Handbook. Learned Single Judge held that the respondent is entitled for refund of excise duty paid by it under Para 122 of the import policy and he directed the authorities to refund the amount of excise duty paid by the respondent along with the interest @ 12% per annum and the interest will be computed from the date of passing of an impugned order.

7. Learned Counsel for the appellant Mr. Roy submits that though the petitioner was entitled for exemption from the payment of excise duty, in respect of Monoblock supplied to VSP under Notification No. 49/94, dated 2nd September, 1994 made under Rule 13.1(b) of the Central Excise Rules, but he submits that when respondent has paid the excise duty to the Excise Department it can ask for refund from the Excise Department.

8. Learned Counsel for the Respondent Mr. Banerjee submits that the petitioner/

respondent is the holder of advance intermediate licence within the meaning of paragraph 55 of the Export and Import Policy. The petitioner has supplied the refractory material to VSP under the duty exemption scheme as provided in paragraph 47 of the aforesaid policy.

9. The items supplied by the petitioner to VSP being the ultimate exporter fall in the category of consumables and consequently are "Inputs" in terms of paragraphs 47 and 55 and both of which fall within Chapter VII under the Heading "Duty Exemption Scheme". He further submits that under Duty Exemption Scheme in Chapter VII supply of goods to VSP would be regarded as "Deemed Exports" under Advance licence held by VSP. Therefore, the petitioner is entitled to get benefit of duty exemption, but it has not fulfilled certain requirements for exemption therefore the benefit of duty exemption has not been allowed to petitioner.

10. Mr. Banerjee further submits that the petitioner is also entitled for refund of terminal excise duty as its goods supplied to VSP comes in the definition of "Deemed Export" under Para 120 of the Scheme.

11. Mr. Banerjee, learned Counsel for the appellant further submits that it is true that in the Handbook there is no provision for refund of terminal Excise duty but when the petitioner/ respondent is entitled under the Export and Import Policy 1992-97, and Handbook which prescribed the procedure does not take away the right of the petitioner for which petitioner is entitled under the policy. He has supported the decision of learned Single Judge.

12. He further submits that when there are four benefits available under paragraph 122 of the policy, it is the option of petitioner to take whichever to petitioner.

13. Learned Counsel for the Department Mr. Roy Chowdhury submits that there is no question of option. The benefit given under paragraph 122 depends upon the facts and conditions fulfilled by the petitioner.

14. Heard learned Counsel for the parties. There is no dispute on the facts and facts are also found by the learned Single Judge that the petitioner is holder of advance intermediate licence which was issued for supply of various refractories items to the advance licence holder that is VSP Steel Plant for manufacture of inputs for making report (sic) products.

15. The refractories items were required for producing non-all steel bar export. The petitioner supplied the aforesaid goods issued under the duty exemption scheme. So the aforesaid supply is regarded as "Deemed Exports" under this policy. The petitioner has paid necessary Central Excise Duty for removal of goods from its factory to supply to the aforesaid exporter.

16. Under Chapter X of EXIM policy covering from 1st April, 1992 to 31st March, 1997, para 122 provides for benefits in case of "Deemed Exports" which reads as under :-

"(a) Duty exemption scheme only in respect of the deemed export categories as covered under paragraph 56(ii), (iii), (v) & (viii) of the policy; or

(b) Duty Drawback Scheme;

(c) Refund of terminal Excise duty;

(d) Special Import licence at the rate of 5% of the FOR value (excluding all taxes and levies) of supplies made with effect from 1st April, 1994".

17. The admitted facts are that the goods supplied by the petitioner to VSP comes under the category of "Deemed Export" in Chapter X of the policy and he has supplied the goods to VSP, for the purpose of manufacturing of goods, meant for export under the Import and Export Policy. In such case, the exporter gets four types of benefits, which are given in paragraph 122 of the policy. The petitioner has applied for exemption of Excise Duty that was rejected and thereafter the appeal was filed and that has been withdrawn. Then the petitioner applied to D.G.F.T., for refund of terminal Excise duty, which has been paid on the goods, which comes under the definition of "Deemed Exports". That was also rejected by the DGFT that the petitioner is holder of advance intermediate licence under the import policy, when he has paid the excise duty and if the goods of petitioner are exempted from excise duty and the excise duty wrongly paid, the petitioner can ask for refund of the excise duty from Excise Department.

18. It is true that four types of benefits are given in Chapter X of the policy but there is no question of option of the petitioner or any party who comes under the definition of "Deemed Exporters". We do not agree with Mr. Banerjee that under the policy from the four types of benefits under paragraph 122 of the policy, the petitioner has option to avail either of the benefits in like. All the four benefits that is (a) to (d) are only on fulfilling the different requirements under different facts and circumstances for different benefits. If by mistakes the petitioner has applied for exemption of excise duty and if it is not entitled for that benefit of exemption of excise duty under the scheme on the account of "Deemed Exports", that does not mean that if he fulfils the requirement for "refund of terminal excise duty" that benefit should be denied to it.

19. In the case in hand the admitted facts are that on supply of goods to VSP petitioner comes under the category of "Deemed Exports" defined in para 120 under Chapter X and once his goods comes under the category of "Deemed Export" under Chapter X it is entitled inter alia for "refund of terminal excise duty". The authorities in the department rejected his claim mainly on the ground that the petitioner/respondent has claimed exemption of duty under the scheme and that has been rejected and once he has paid the excise duty and entitled for refund of the excise duty, the petitioner/respondent should approach to the concerned authority in department for refund.

20. As stated above all the four benefits are given in para 122 of Chapter X in a case of "Deemed Exports" but if the assessee has wrongly claimed the

exemption of excise duty as given in Clause (a) of paragraph 122 of Chapter X that does not bar to claim the appropriate relief, under same para, on account of "Deemed Exports".

21. When the petitioner has supplied the goods to the VSP for manufacture of final products meant for export, the petitioner/respondent is entitled for the benefit of refund of terminal excise duty. That stage comes only after payment of excise duty.

22. Therefore, merely the assessee's claim for exemption of duty and if that claim is rejected, does not deprive him from claiming the benefit given in Clause (c) in paragraph 122 i.e. refund of terminal excise duty. Both reliefs are given in different facts and circumstances and conditions to fulfil.

23. The departmental authorities have not shown that the petitioner/respondent has not fulfilled the requirement for "refund of terminal excise duty" except that the claim of exemption duty has been rejected and relevant clause of the Handbook does not provide for refund of terminal excise duty.

24. As discussed above if assessee's claim does not fall under clause (a) of paragraph 122 of Chapter X of the Scheme, that does not bar in case assessee claims the other relief under that paragraph that is "refund of terminal excise duty". We also agree with Mr. Banerjee that once the scheme provides for benefits of refund of terminal excise duty, that cannot be taken away, if the procedure has not been provided in the Handbook for refund. Handbook is a procedure to give effect to the provisions of the Scheme. If the provisions of Handbook does not provide to refund the terminal excise duty on the "Deemed Exports" that does not mean that petitioner/respondent is not entitled for the "refund of terminal excise duty".

25. In case of refund of terminal excise duty, the concerned authority is DGFT to whom the petition has been moved for refund of terminal excise duty. Therefore, there is no question to approach the excise department for refund of any excise duty.

26. Considering the aforesaid facts and provisions of law, we found no infirmity in the order of learned single judge.

In the result the appeal stands dismissed as no order as to costs.

27. The learned Counsel for the appellant prays for stay of the operation of this order. Such prayer is rejected.