

(2018) 01 DEL CK 0076

In the Delhi High Court

Case No : Civil Writ Petition No. 5935 Of 2017, Civil Miscellaneous No. 42082 Of 2017

M/S DEEPAK ENTERPRISES

APPELLANT

Vs

UNION OF INDIA & ORS

RESPONDENT

Date of Decision : 19-01-2018

Acts Referred:

Cenvat Credit Rules, 2004 — Rule 5

Foreign Trade (Development & Regulation) Act, 1992 — Section 5, 6

Citation : (2018) 360 ELT 905 (Del.)

Hon'ble Judges : Vibhu Bakhru

Bench : Single Bench

Advocate : Monish Panda, Mrinal Bharat Ram, Sanjiv Narula, Abhishek Ghai.

Final Decision : Allowed

Judgement

1. The petitioner has filed the present petition, inter alia, impugning orders dated 05.06.2013, 23.01.2014 and 28.08.2014 (hereafter collectively referred to as "the impugned orders") rejecting the petitioner's claim for refund of Terminal Excise Duty (TED) for supplies made by the petitioner to 100% Export Oriented Units (100% EOUs) during the period January, 2012 to April, 2013.

2. The petitioner has also impugned the minutes of the meeting of the Policy Interpretation Committee held on 04.12.2012, inter alia, seeking to clarify that "refund of CENVAT credit provisions are available under Excise Rule and CENVAT Rules hence refund of such credit by DGFT does not arise".

3. According to the petitioner, it is entitled to refund of TED on the supplies made to 100% EoUs as in terms of paragraph 8.2 (b) of the Foreign Trade Policy 2009-14 (hereafter "the FTP"), the supply of goods to EOUs would qualify as "deemed exports" and thus in terms of paragraph 8.3(c) read with paragraph 8.5 of the FTP, the same were eligible for refund of TED.

4. The respondents dispute the same as according to the respondents, the

supplies made by the petitioner were exempt from payment of excise duty and refund of TED under the FTP is available only in respect of those supplies that are otherwise exigible to excise duty. Respondents further claim that the petitioner had paid the excise duty by utilising Cenvat Credit and the procedure adopted by the petitioner to first utilize Cenvat Credit for payment of excise duty and then seeking a refund of the same amounts to circumventing the Cenvat Credit Rules and the FTP.

5. Briefly stated, the relevant facts necessary to address the controversy involved in the present petition are as under:- 5.1 The petitioner is a manufacturer of Motor Vehicle Parts (Back Plates) and its unit is located in a Domestic Tariff Area (DTA). The petitioner claims that during the period January, 2012 to April, 2013, it supplied Back Plates to two 100% EOU's, namely, M/s Danblock Brakes India Pvt. Ltd and M/s Roulands Braking (India) Pvt. Ltd. The petitioner claims that the said goods were excisable goods and were cleared on payment of excise duty. The above named EOUs did not provide CT-3 certificates to the petitioner.

5.2 According to the petitioner, it was permissible to supply the goods on payment of TED and subsequently claim refund. Accordingly, the petitioner applied for refund of TED aggregating Rs.67,18,748/- in respect of goods supplied during the period January, 2012 to 17.04.2013. The said claim was rejected by the Joint Director General of Foreign Trade (respondent no.3) on 05.06.2013 with the endorsement - "as supply is made to 100% EOU, TED is not admissible in terms of policy circular dated 15.03.2013".

5.3 In the meanwhile, on 18.04.2013, the Central Government (respondent no.1) published Notification No. 4 (RE-2013)/2009-2014 in exercise of powers conferred by Section 5 of the Foreign Trade (Development & Regulation) Act, 1992 (hereafter "the Act") amending the FTP by substituting paragraphs 8.3(c) and 8.4 of the FTP.

5.4 Thereafter, the petitioner resubmitted its claim for refund of TED relying on the judgment in Kandoi Metal Powders Mfg. Co. Pvt. Ltd. v. Union of India & Ors: 2014 (302) E.L.T. 209 (Del.), which was delivered by the Division Bench of this Court on 11.02.2014. The petitioner claimed that the said decision was binding on the respondents and the petitioner's claim be considered on the said basis. The said application of the petitioner was also rejected by a communication dated 28.08.2014 clarifying that the Policy Relaxation Committee (PRC) had allowed the refund of TED only to Kandoi Metal Powers Manufacturing Pvt. Ltd.

5.5 The petitioner challenged the aforesaid decision before respondent no.4; however, the same has not been disposed of as yet. The petitioner also made an application to the Policy Relaxation Committee of the DGFT; however, the same has also not been considered as yet.

Reasons and Conclusions

6. At the outset, it will be relevant to refer to paragraphs 8.2 (b), 8.3 and 8.5 of the FTP as applicable prior to 18.04.2013, which are relied upon by the petitioner. The same are set out below:- "8.2 Categories of Supply

Following categories of supply of goods by main/sub-contractors shall be regarded as "Deemed Exports" under the FTP, provided goods are manufactured in India:

(a) Supply of goods against Advance Authorisation/Advance Authorisation for annual requirement/DFIA;

(b) Supply of goods to EOU/STP/EHTP/BTP;

(c) Supply of capital goods to EPCG Authorisation holders;

xxxx xxxxx xxxx

8.3 Benefits for Deemed Exports

Deemed exports shall be eligible for any/all of following benefits in respect of manufacture and supply of goods qualifying as deemed exports subject to terms and conditions as in HBP v1:-

(a) Advance Authorisation/Advance Authorisation for annual requirement/DFIA.

(b) Deemed Export Drawback.

(c) Exemption from terminal excise duty where supplies are made against ICB. In other cases, refund of terminal excise duty will be given. Exemption from TED shall also be available for supplies made by an Advance Authorization holder to a manufacturer holding another Advance Authorization if such manufacturer, in turn, supplies the product(s) to an ultimate exporter.

8.5 Eligibility for refund of terminal excise duty/drawback

"Supply of goods will be eligible for refund of Terminal Excise Duty in terms of para 8.3(c) FTP provided recipient of goods does not avail CENVAT credit/rebate on such goods."

7. By the notification dated 18.04.2013, the Central Government amended paragraphs 8.3(c) and 8.4 of the FTP. The relevant extract of the said notification is set out below:- "2. The existing paragraphs 8.3 (c) and 8.4 in the FTP are substituted by amended paragraphs 8.3(c) and 8.4 as given below:

(i) Existing Paragraph 8.3 (c)

"Exemption from terminal excise duty where supplies are made against ICB. In other cases, refund of terminal excise duty will be given. Exemption from TED shall also be available for supplies made by an Advance Authorisation holder to a manufacturer holding another Advance Authorisation if such manufacturer, in turn, supplies the product(s) to an ultimate exporter."

Amended Paragraph 8.3 (c)

"Refund of terminal excise duty will be given if exemption is not available. Exemption from TED is available to the following categories of supplies:

- (i) Supplies against ICB;
- (ii) Supplies of intermediate goods, against invalidation letter, made by an Advance Authorisation holder to another Advance Authorisation holder; and
- (iii) Supplies of goods by DTA unit to EOU/EHTP/STP/BTP unit.

Thus such categories of supply which are exempt ab initio will not be eligible to receive refund of TED."

(ii) Existing Paragraph 8.4

"Following table shows the benefits available to different categories of supplies as mentioned in Para 8.2 above. In respect of such supplies supplier shall be entitled to the benefits listed in paragraphs 8.3 (a), (b) & (c) of the Policy, whichever is applicable."

Relevant sub-para of 8.2

Benefit available as given in Para 8.3, whichever is applicable

(a)

(b)

(c)

(a)

Yes (for intermediate supplies)

Yes (against ARO or Back to Back letter of credit)

Yes (Against ARO or Back to Back letter of Credit)

(b)

Yes

Yes

Yes

(c)

Yes

Yes

Yes

(d)

Yes

Yes

Yes

(f)

Yes

Yes

Yes

(h)

No

Yes

Yes

(i)

Yes

Yes

No

(j)

Yes

Yes

Yes

Amended Paragraph 8.4

"Following table shows the benefits available to different categories of supplies as mentioned in Para 8.2 above. In respect of such supplies supplier shall be entitled to the benefits listed in paragraphs 8.3 (a), (b) & (c) of the Policy, whichever is applicable."

Relevant sub-para of 8.2

Benefit available as given in Para 8.3, whichever is applicable

(a)

(b)

(c)

(a)

Yes (for intermediate supplies against an invalidation letter)

Yes (against ARO or Back to Back letter of credit)

(i) Exemption in case of invalidation

(ii) Refund in case of ARO or back to back letter of credit

(b)

Yes

Yes

Exemption

(c)

Yes

Yes

Refund

(d)

Yes

Yes

Exemption

(f)

Yes

Yes

(i) Exemption

(ii) Exemption, if ICB. Refund, if without ICB.

(h)

No

Yes

Refund

(i)

Yes

Yes

No

(j)

Yes

Yes

Refund

8. The respondents contend that the aforementioned notification was only clarificatory and it was never the intention of the Central Government to allow refund of TED on goods supplied to EOUs that was exempt from charge of excise duty. The said contention is unpersuasive. First of all, the tenor of the notification dated 18.04.2013 does not indicate that it is clarificatory; on the contrary, it expressly provides that the notification is being issued in exercise of powers conferred under Section 5 of the Act to make the amendments in the FTP. Secondly, there was no ambiguity in Paragraph 8.3(c) of the FTP (prior to the amendment). It expressly provided that exemption of TED would be available for supplies made against ICD (International Competitive Bidding) and "in other cases refund of terminal excise duty will be given". Thus, the Central Government had clearly indicated cases where refund of TED will be given. Further, Paragraph 8.5 of the FTP also clarified that refund of TED would be available to the supplier provided the recipient of the goods does not avail Cenvat credit/rebate on such goods. The added condition that "refund of terminal excise duty will be given if exemption is not available" was subsequently introduced by the Central Government by substituting paragraph 8.3(c) of the FTP with the amended Paragraph 8.3(c), which also specifies the categories of supplies where exemption of TED was available. Plainly, the amendment is substantive and cannot be termed as clarificatory. Paragraph 8.4 of the FTP as amended also reflects the change in the FTP.

9. Section 5 of the Act provides that "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 well settled that unless the statute conferring the power to make delegated or subordinate legislatures expressly provide that the same can be made with retrospective operation, no such power would be inferred. Thus, it is apparent from the above that the Central Government is not empowered to make any retrospective changes in the policy.

10. In *DGFT v. Kanak Exports*: (2016) 2 SCC 226, the Supreme Court had explained as under:- "113. We may, in the first instance, make this legal position clear that a delegated or subordinate legislation can only be prospective and not retrospective, unless the rule-making authority has been vested with power under a statute to make rules with retrospective effect. In the present case, Section 5 of the Act does not give any such power specifically to the Central Government to make rules retrospective."

11. In view of the settled position of law, the Central Government could also not make any substantive changes in the FTP, which had the effect of taking away any vested right. In the present case, the FTP expressly provided for the refund of TED in certain cases. It is not disputed that the goods supplied by the

petitioner to the EOUs constituted "deemed exports" and thus, the petitioner had a vested right to claim refund of excise duty in respect of goods supplied during the period prior to 18.04.2013 in terms of the then applicable FTP.

12. This Court is also not persuaded to accept the policy circular issued by the DGFT (Policy Circular No. 16 (RE-2012/2009-14) dated 15.03.2013) seeking to clarify that no refund of TED should be provided in cases where the supplies of goods are ab initio exempted from payment of excise duty, is binding. The same is clearly beyond the powers of the DGFT.

13. Section 6 of the Act provides for appointment and functions of the DGFT and is set out below:- "6. Appointment of Director General and his functions.

(1) The Central Government may appoint any person to be the Director-General of Foreign Trade for the purposes of this Act.

(2) The Director-General shall advise the Central Government in the formulation of the export and import policy and shall be responsible for carrying out that policy.

(3) The Central Government may, by Order published in the Official Gazette direct that any power exercisable by it under this Act (other than the powers under sections 3, 5, 15, 16 and 19) may also be exercised, in such cases and subject to such conditions, by the Director-General or such other officer subordinate to the Director General, as may be specified in the Order."

14. It is thus seen that the DGFT is appointed for the purposes of the Act and is responsible for carrying out the export-import policy that may be formulated by the Central Government. The role of the DGFT is limited to advising the Central Government in formulation of the export import policy and to exercise certain other powers of the Central Government, which are exercisable under the Act. However, that does not include the power to either frame or amend the FTP.

15. In terms of paragraph 2.3 of the FTP, any doubt in respect of interpretation of any provisions contained in FTP is to be referred to the DGFT whose decision shall be final and binding. However, in the present case, the plain language of paragraphs 8.2, 8.3(c) and 8.5 of the FTP as applicable prior to 18.04.2013 was unambiguous and thus, the question of the DGFT issuing any clarification in that regard did not arise. It is perhaps for this reason that the Central Government has subsequently amended the FTP.

16. As observed above, the DGFT is responsible for carrying out the FTP as framed by the Central Government. Thus, any circular or notice issued by the DGFT that is inconsistent with the FTP would be clearly beyond the powers of the DGFT. In *M/s Atul Commodities Pvt. Ltd. and Ors. v. Commissioner of Customs, Cochin-9*: (2009) 5 SCC 46, the Supreme Court had explained that the DGFT would have no power to amend the FTP. In *Narendra Udeshi v. Union of India Ors*: 2003 (1) BomCR 500, the Division Bench of the Bombay High Court had held that the circulars and public notices issued by the DGFT, which are

inconsistent with the FTP would be liable to be set aside.

17. Mr Narula, the learned counsel appearing for the respondents had contended that the petitioner was seeking to circumvent the provisions of Cenvat Credit Rules, 2004 (hereafter "the Cenvat Rules"). Rule 5 of the Cenvat Rules provides that credit in respect of input or input service used in the manufacture of final product, which is cleared for export or used in an intermediate product cleared for export or used in providing output service, which is exported, can be utilised by the manufacturer or provider of the output service in a specified manner. Rule 5 of the Cenvat Rules is set out below:- "Rule 5 Where any input or input service is used in the manufacture of final product which is cleared for export under bond or letter of undertaking, as the case may be, or used in the intermediate product cleared for export, or used in providing output service which is exported, the CENVAT credit in respect of the input or input service so used shall be allowed to be utilized by the manufacturer or provider of output service towards payment of,

(i) duty of excise on any final product cleared for home consumption or for export on payment of duty; or

(ii) service tax on output service, and where for any reason such adjustment is not possible, the manufacturer or the provider of output service shall be allowed refund of such amount subject to such safeguards, conditions and limitations, as may be specified, by the Central Government, by notification:

Provided that no refund of credit shall be allowed if the manufacturer or provider of output service avails of drawback allowed under the Customs and Central Excise Duties Drawback Rules, 1995, or claims rebate of duty under the Central Excise Rules, 2002, in respect of such duty; or claims rebate of service tax under the Export of Service Rules, 2005 in respect of such tax.

Provided further that no credit of the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act shall be utilized for payment of service tax on any output service.

Explanation: For the purposes of this rule, the words "output service which is exported" means the output service exported in accordance with the Export of Services Rules, 2005."

18. Mr Narula contended that since Rule 5 of the Cenvat Rules does not refer to deemed exports and therefore, refund of Cenvat was not available on such exports. He contended that in the circumstances, claiming refund of TED under the FTP amounted to circumvent the Cenvat Rules, and therefore, the petitioner is not entitled to refund of TED. The said contention is unmerited. There is no dispute that the petitioner had discharged the excise liability on the goods supplied to the EOUs. Thus, in terms of plain language of paragraph 8.3(c), as applicable prior to 18.04.2013, the petitioner would be entitled to refund of TED. The fact that the Cenvat Rules do not mention "deemed exports" would be of

little relevance considering that paragraph 8.3(c) of the FTP expressly provided for refund of TED in cases of deemed exports.

19. The learned counsel for the petitioner had also pointed out that although, after the notification dated 18.04.2013, refund of TED was not available in respect of goods which were exempt ab initio, a supplier to an EOU could still claim "deemed export drawback" under paragraph 8.3(b) of the FTP in respect of duty paid on inputs provided that such supplier did not avail any Cenvat Credit. He stated that in terms of paragraph 8.5 of the FTP as amended, the exporter was entitled to avail a deemed export drawback as provided in paragraph 8.3(b) of the FTP.

20. In Kandoi Metal Powders MFG. Co. Pvt. Ltd. (supra), the Division Bench of this Court had held that the Cenvat regime under the Central Excise Act, 1944 operate on its own terms and is independent on the rights and liabilities of the parties under the import export policies framed under the Act. The said decision squarely covers the controversy in the present case.

21. In Joint Director general of Foreign Trade v. IFGL Refractories Ltd.: 2002 (143) ELT 294 (Cal) - which was also referred to by this Court in Kandoi Metal Powders Mfg Co. Pvt. Ltd's case - the Calcutta High Court had held once the policy provides for refund of TED, the said right could not be taken away for want of a procedure under the Hand Book of Procedures. The court further held that "In case of refund of terminal excise duty, the concerned authority is DGFT to whom 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".

22. Mr Narula's contention that the said decision did not refer to the policy circular dated 15.03.2013 and, therefore, ought to be distinguished cannot be accepted. A plain reading of the said decision indicates that the Division Bench had taken note of the policy circular dated 15.03.2013. More importantly, the reasons as indicated in the said circular were rejected. The relevant extract of the said decision is as under:- "9. The authorities in this case appear to have proceeded to make an order adverse to the petitioner and proceeded to hold that the petitioner was disentitled to the benefit of refund in view of some clarification given by the Policy Interpretation Committee, in its meeting of 04.12.2012 to the effect that "refund of CENVAT credit provisions are available under Excise rules and CENVAT rules which should be availed of rather than claiming refund". This reasoning appears to have prevailed with the Policy Relaxation Committee as well in this case. This Court is unable to comprehend the rationale of the decision of the second and third respondents who also seem to have suggested that the petitioner should approach the DGFT for appropriate relief or clarification. Neither of the authorities dispute that the petitioner supplied goods to the EOU at the relevant time. Its entitlement, therefore, was defined in terms of the existing policy, i.e. refund in terms of paras 8.2, 8.3, 8.4 and 8.5 of the 2009 policy as discussed above. That a subsequent amendment was made to the existing

regime which in effect liberalized the position further and exempted payment of TED altogether cannot surely be a reason for denying the scheme for refund of payment already made. The Court also is unable to see the reason why the respondents were of the view that refund claim or benefit under the CENVAT regime under the Central Excise Act or the other statutory schemes framed under it is available. In this Court's opinion, that regime operates in its own terms and is independent of the rights and liabilities of the petitioner and the respondents under the import-export policies framed under the 1992 Act. This Court notices that its reasoning is fortified by the decision of the Division Bench of the Calcutta High Court in *JDGFT v. IFGL Refractories Limited*, 2002 (143) ELT 294 (Cal). There, the Court ruled that once the supply of goods falls within the category of deemed export, the unit would be entitled to refund of TED."

23. Mr Narula also referred to the decision of the Bombay High Court in *Sandoz Private Limited and Lupin Limited v. Union of India*: 2016 (341) E.L.T. 22 (Bom.) and contended that the Court had distinguished the decision of the Division Bench of this Court in *Kandoi Metal Powders Mfg. Co. Pvt. Ltd.* (supra) and the same was not applicable in the facts of this case. However, a closer examination of the decision of the Bombay High Court indicates that the Court has in fact differed from the view expressed by this Court in *Kandoi Metal Powders Mfg. Co. Pvt. Ltd.* (supra). The Bombay High Court was of the view that the Court was unable to comprehend "the rationale of the decision of the second and third respondents". The Court was also of the view that the policy circular dated 15.03.2013 was merely clarificatory and the DGFT had the power to interpret and implement the policy. This is different from the view of this Court in *Kandoi Metal Powders Mfg. Co. Pvt. Ltd.* (supra), wherein the Court had opined that Cenvat regime under Central Excise operates in its own terms and is independent of the rights and liabilities of the parties under the FTP. This Court is also unable to concur with the view of the Bombay High Court that the Policy Circular dated 15.03.2013 clarifies an obvious position. Plainly, in such case, there was no requirement to amend the FTP.

24. Mr Narula had also referred to the decision of the Division Bench of this Court in *Union of India and Ors. v. Alstom India Limited*: 2015 (325) ELT 72 (Del) and on the strength of the said decision contended that the Division Bench had not accepted the earlier decision in *Kandoi Metal Powders Mfg. Co. Pvt. Ltd.* (supra). He further stated that the Court had set aside the observations of the learned Single Judge directing the authorities to examine the case of the Alstom India Ltd. keeping in mind certain observations and the judgment of this Court in *Kandoi Metal Powders MFG. Co. Pvt. Ltd.* (supra), and therefore, the said decision could be distinguished. The said contention is plainly without any merit. A plain reading of the decision of the Division Bench in *Union of India and Ors. v. Alstom India Ltd.* (supra) indicates that the Court had not expressed any opinion on any of the issues involved in the present petition. The observations made by the learned Single Judge in that case had been set aside only on the principle that a Court cannot direct a statutory authority to exercise discretion in a particular

matter. The Division Bench held that since the learned Single Judge had held that no interference of the Court is warranted at that stage, the learned Single Judge ought not to have directed the DGFT to pass an order keeping in mind the observations made by the learned Single Judge. Although, this Court has certain reservations as to the said decision, the same are not relevant for the purpose of the present case. However, it is clear that the Court had not expressed any final opinion on the issue at hand.

25. It is also relevant to note that in that case Alstom India Ltd. had supplied goods against the International Competitive Bidding (ICD). Paragraph 8.3(c) of the FTP, expressly provided that such supplies would be exempted from TED and in other cases refund of TED would be given. Thus, Union of India and Ors. v. Alstom India Ltd. (supra) would have little application in the facts of the present case.

26. In view of the above, the petition is allowed. The impugned orders/communications - orders dated 05.06.2013, 23.01.2014 and 28.08.2014 - rejecting the petitioner's claim for refund of TED in respect of the goods supplied between January, 2012 and 17.04.2013 on the ground that the said goods were exempted from excise duty, are set aside. The minutes of Policy Interpretation Committee dated 04.12.2012 and the Policy Circular dated 15.03.2013 insofar as the same are relied upon to reject the claim of the petitioner for refund of TED are set aside. The respondents are directed to process the petitioner's claim for refund of TED.

27. The pending application is also disposed of.