
(2020) 03 DEL CK 0260

In the Delhi High Court

Case No : Civil Writ Petition No. 10512 Of 2019, Civil Miscellaneous Application No. 43487 Of 2019

M/S Multitex Filtration Engineers Limited

APPELLANT

Vs

Union Of India & Ors

RESPONDENT

Date of Decision : 12-03-2020

Acts Referred:

Constitution Of India, 1950 — Article 226
Customs Tariff Act, 1975 — Section 3

Citation : (2020) 03 DEL CK 0260

Hon'ble Judges : Manmohan, J;Sanjeev Narula, J

Bench : Division Bench

Advocate : Sujit Ghosh, Mannat Waraich, Toshin Bishnoi, Shiva Lakshmi, Amit Dogra, Siddharth Singh, Sonu Bhatnagar, Vaibhav Joshi, Anushree Narain, Venus Mehrotra

Final Decision : Allowed

Judgement

,,,,

Sanjeev Narula, J",,,,,

1. The petitioner aggrieved by the rejection of its claim of refund of Terminal Excise Duty (â??TEDâ?), has filed the present petition under Article",,,,,

226 of the Constitution of India, inter alia impugning the said decision, primarily relying upon the decision of this Court in M/s Alstom Transport India",,,,,

Limited v. Union of India and Ors. (2018) 363 ELT 69.,,,,,

2. At the admission stage, prima facie, it appeared to us that the Petitionerâ?s case is squarely covered by the aforementioned decision and also the policy",,,,,

circular No. 11/2015-20 dated 23th July, 2018 issued by Director General of Foreign Trade. We, accordingly permitted the Respondentsâ? counsel to",,,,,

take instruction on this aspect. Today, Ms. Shiva Lakshmi, CGSC on instructions states that petitioner's claim is distinguishable from the case of M/s",,,,,

Alstom Transport India Limited (supra) and opposes the petition. She also states that the respondents have waived their right to file a counter,,,,,

affidavit. In these circumstances, we have proceeded to hear the matter on merits. The subject matter of the present petition is indeed covered by the",,,,,

decision rendered by this Court in M/s Alstom Transport India Limited (supra) for the reasons discussed and deliberated hereinafter. Nevertheless, we",,,,,

have independently examined the facts of the case.,,,,,

3. Briefly stated, the petitioner - M/s Multitex Filtration Engineers Limited, holding excise registration, is a company inter alia engaged in the business",,,,,

of manufacturing industrial filtration equipment for oil, gas, etc. It was appointed as sub-contractor to supply equipment to power generating companies",,,,,

for the setting up of various power projects. In relation to the purchase orders placed by EPC Contractors -BHEL Noida, Lanco Infratech Gurgaon,",,,,

Oil India Limited and BHEL Hyderabad, the Petitioner supplied equipment in the nature of capital goods and spares, during the period of 15h",,,,,

December, 2009 to 10th February, 2011, in the capacity of a sub-contractor inter alia for setting up of Power Projects. It duly discharged excise duty",,,,,

upon clearance of the said goods. Thereafter, as an eligible claimant, petitioner sought to take benefit in terms of para 8.3 (c) read with 8.4.4 (iv)",,,,,

under chapter 8 of the Foreign Trade Policy (hereinafter "FTP") and submitted five applications for refund of TED, all dated 28th February, 2014",,,,,

before Additional Director General of Foreign Trade, IP Estate, New Delhi.",,,,

The details of such applications are as follows:,,,,,

(i) Application no. MFE/CTC-168VIJ, dated 28.02.2014 for supplies made to BHEL Noida for setting up of Thermal Power Project (3x250 MW)",,,,,

(ii) Application no. MFE/CTC-160/NIJ-132 dated 28.02.2014 for supplies made to Lanco Infratech Gurgaon for setting up of a Thermal Power,,,,,

Project (2x507 .5 MW),,,,,

(iii) Application no. MFE/WE-802VIJ dated 28.02.2014 for supplies made to OIL India Limited for Petroleum Mining Lease,,,,,

(iv) Application no. MFE/CTC-166VIJ dated 28.02.2014 for supplies made to BHEL Noida for setting up of Thermal Power Project (1500 MW),,,,,

(v) Application no. MFE/SKID-132VIJ dated 28.02.2014 for supplies made to

BHEL Hyderabad for setting up of Thermal Power Project (1500 MW),,,,,

4. As per the Project Authority Certificate (hereinafter "PAC") in respect of some of the applications enumerated at serial No. (i), (ii), (iv) and",,,,,

(v) above, the petitioner was required to make supplies under para 8.2 (g) of the FTP. In respect of such supplies, Ministry of Finance had not notified",,,,,

any customs duty exemption and as such the PAC indicated that in respect of such supplies, appropriate duty of customs/excise would apply.",,,,,

Accordingly, as per the aforementioned PAC received from the project owner, the petitioner filed the refund applications seeking refund of TED in terms",,,,,

of para 8.3 (c) read with 8.4.4 (iv) of FTP. With respect to application enumerated at serial No. (iii) above, the project owner issued a PAC indicating",,,,,

that the goods are exempted from customs duty by virtue of Ministry of Finance notification issued in this respect and that deemed export benefit as",,,,,

contemplated under para 8.2 (f) would be available. Petitioner submits that since it was a regular practice of the Excise Department to deny the",,,,,

excise duty exemption on the sole basis that the pre-conditions of furnishing an essential certificate, as is necessary for availing customs duty",,,,,

exemption on imported goods was never furnished, petitioner instead paid the duty and thereafter claimed refund in respect of such duties as per the",,,,,

terms of the scheme.,,,,,

5. Respondent No.3 rejected the refund applications vide letter dated 31st March, 2014 placing reliance upon Circular No. 16 dated 15th March, 2013",,,,,

and contending that as supplies against ICB are ab initio exempted from payment of excise duty, the same are ineligible for refund.",,,,,

6. Aggrieved by the aforesaid rejection, petitioner vide letter dated 26th August, 2014 approached DGFT -Respondent No. 2. No action was taken on",,,,,

this representation. Thereafter, petitioner engaged in multiple correspondences with various officials of the respondents, repeatedly requesting for",,,,,

refund of TED. Such requests were not acted upon or responded to. Eventually, Deputy Director General of Foreign Trade (Respondent No. 4) vide a",,,,,

letter dated 31st March, 2015 denied the refund of TED on the ground that the supplies made by petitioner for the power projects are under ICB and",,,,,

therefore in terms of para 8.3 (c) of the FTP, as clarified by policy circular No. 16 dated 15th March 2013, the supplies were ab initio exempted from",,,,,

the payment of excise duty and were not eligible for refund. This was followed

with numerous correspondence exchanged with the respondents which,,,,
met the same fate of denial. Petitioner also brought the decision of this Court in M/s Alstom Transport India Limited (supra) to the notice of Deputy,,,,
Director General of Foreign Trade. Nevertheless, there was no favorable outcome. Aggrieved with the rejection of the claims, Petitioner has now" ,,,,
approached this Court by way of the instant petition.,,,,

7. Ms. Mannat Waraich, learned counsel for the petitioner has placed strong reliance on the judgment of this Court in M/s Alstom Transport India" ,,,,
Limited (supra) to contend that the issue raised in the present petition is squarely covered and the respondents therefore have no lawful justification to,,,,
refuse the refund. It is further argued that the respondentsâ? understanding of the circular dated 15th March, 2013 is flawed upon an erroneous" ,,,,
assumption of facts and law. Respondents have wrongly presumed that all supplies under ICB are ab initio exempted. In fact there are several,,,,
supplies which are not exempted from the payment of excise duty since they are not exempted from levy of customs duty. Resultantly, such supplies" ,,,,
do not qualify for ab initio exemption and thus the rejection of refund claims based on an erroneous understanding of law is completely misconceived,,,,
and untenable in law. Alternatively, it is argued that the petitioner may be entitled to ab initio exemption, but since it has chosen to pay excise duty, it is" ,,,,
entitled to refund under paragraph 8.3 (c) of the FTP.,,,,

8. Per contra Ms. Shiva Lakshmi, learned CGSC argued that notwithstanding the decision of this Court in M/s Alstom Transport India Limited (supra)," ,,,,
the petitioner is not entitled to the benefit sought in the present petition. She submitted that the aforesaid judgment is relevant only in respect of such,,,,
cases which are covered under paragraph 8.3 (c) of the FTP. The case of the petitioner falls under 8.2 (g) of the FTP and hence it cannot seek a,,,,
similar relief as has been granted in M/s Alstom Transport India Limited (supra).,,,,

9. We have given our thoughtful consideration to the submissions advanced by learned counsel for the parties. The controversy in the present case,,,,
surrounds the conditions of the FTP and it would thus be apposite to extract relevant paragraphs of the relevant FTP 2009-14 applicable to the period,,,,
during which the supplies were made by the petitioner. Paragraph 8.2 of the FTP as it existed at the relevant time reads as under:,,,,

8.2 Following categories of supply of goods by main /subcontractors shall be regarded as "Deemed Exports" under 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 I STP I EHTP I BTP;,,,,

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

(d) Supply of goods to projects financed by multilateral or bilateral Agencies/ Funds as notified by Department of Economic Affairs (DEA),",,,,

MoF under International Competitive Bidding (JCB) in accordance with procedures of those Agencies I Funds, where legal agreements",,,,,

provide for tender evaluation without including customs duty; Supply and installation of goods and equipment (single responsibility of,,,,

turnkey contracts to projects financed by multilateral or bilateral Agencies/Funds as notified by DEA, MoF under ICB, in accordance with",,,,,

procedures of those Agencies/Funds, which bids may have been invited and evaluated on the basis of Delivered Duty Paid (DDP) prices for",,,,,

goods manufactured abroad;,,,,

(e) Supply of capital goods, including in unassembled/disassembled condition as well as plants, machinery, accessories, tools, dies and such",,,,,

goods which are used for installation purposes till stage of commercial production, and spares to extent of 10% of FOR value to fertilizer",,,,,

plants;,,,,

(f) Supply of goods to any project or purpose in respect of which the MoF, by a notification, permits import of such goods at zero customs",,,,,

duty;,,,,

(g) Supply of goods to power projects and refineries not covered in (f) above;,,,,

(h) Supply of marine freight containers by 100% EOU (Domestic freight containers-manufacturers) provided said containers are exported,,,,

out of India within 6 months or such further period as permitted by customs;,,,,

(i) Supply to projects funded by UN Agencies; and,,,,

(j) Supply of goods to nuclear power projects through competitive bidding as opposed to ICB.,,,,,

Benefits of deemed exports shall be available under paragraphs (d), (e), (f) and

(g) only if the supply is made under procedure of ICB." , , , ,

However, in regard to mega power projects, the requirement of ICB would not be mandatory, if the requisite quantum of power has been" , , , ,

tied up through tariff based competitive bidding or if the project has been awarded through tariff based competitive bidding.â?? , , , ,

(emphasis supplied) , , , ,

10. Paragraph 8.3 and 8.4 of the FTP stipulates the benefits to be extended to â?? deemed exportsâ? and the relevant portion thereof is extracted , , , ,

hereinbelow: , , , ,

â??8.3 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 Authorisation holder to a manufacturer holding another , , , ,

Advance Authorization if such manufacturer, in turn, supplies the product(s) to an ultimate exporter." , , , ,

8.4. Benefits to the Supplier , , , ,

â? , , , ,

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." , , , ,

â? , , , ,

(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 I 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.â??",,,,

11. The sole ground for rejection of the claim in the impugned communication is that since the supplies made to power project under ICB, in terms of",,,,

para 8.3 (c) of the FTP, as clarified by policy circular No. 16 dated 15th March 2013, are ab initio exempted from payment of excise duty, the refund",,,,

of TED does not arise. At this juncture, it would also be worthwhile to take note of the policy circular No. 16 dated 15th March, 2013 which reads as",,,,

under:",,,,

91,Any chapter,"A I I goods supplied against International

Competitive Bidding",Nil,19

Thus, the petitioner could not have been entitled to any excise duty exemption on the strength of PAC. The claim of custom duty exemption or excise",,,,

duty exemption was impossible in view of the declaration made by the project owner in the PAC. The respondents cannot categorize the said supplies",,,,

to be ab initio exempt from excise duty and apply the impugned circular. The presumption drawn by the respondents to deny refund exhibits",,,,

unconditional latitude which is an erroneous understanding of the provisions of the FTP. Merely on the assumption that since the supplies made is",,,,

under ICB, they are not eligible for refund of TED is an erroneous assumption. Petitioner has demonstrated that there can be several supplies which",,,,

may qualify to be supplies under ICB, yet not be eligible for excise duty exemption on account of the fact that they are not eligible for customs duty",,,,

exemption. Even though the supplies made by the petitioner fall under ICB, it does not ipso facto mean that they are not supplies under the excise",,,,

notification. Ergo, since the supplies do not qualify as ab initio exempted supplies, the impugned circular dated 15th March, 2013 could not be invoked",,,,

by the Respondents so as to deny the refunds. The rejection has no legal or sound reasoning and is not in consonance with the FTP, and is liable to be",,,,

set aside.,,,,

14. Now coming to the supplies made to Oil India Limited, mentioned at serial No. (iii) in paragraph 3 of this order, we feel that the petitioner should",,,,

also be given similar relief in respect of the supplies thereof, since it has elected to pay the excise duty and not claim exemption. Petitioner has",,,,

explained that in its past experience, excise duty exemption was often denied and thus it went on to pay the excise duty instead of claiming refund. In",,,,

this context, it is essential to note that paragraph 8.3(c) of FTP 2009-14 was amended vide notification No. 4 dated 18th April, 2013. For the sake of",,,,

convenience, the amended para 8.3(c) of the FTP 2009-14 is extracted hereinafter:",,,,

â??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.â??",,,,

Contrasting this with the erstwhile provision, it can be noticed that by virtue of the notification No. 4 dated 18th April, 2013, a condition was",,,,

incorporated stipulating that categories of supplies which are exempt ab initio would not be eligible to receive refund of TED. In the present case, the",,,,

supplies were made during the period from 15th December, 2009 to 10th February, 2011 and thus during the relevant period, there was no such",,,,

condition in the FTP.",,,,

It may also be noted that the aforementioned notification is substantive and not clarificatory and therefore cannot be applied retrospectively. Thus, even in",,,,

this situation, in our view, the petitioner is entitled to refund of TED under para 8.3 (c) of the FTP as the exemption was not availed by the petitioner",,,,

and it opted to pay the excise duty.",,,,

15. We may further note that the respondents have also issued a policy circular No. 11/2015-20 dated 23rd July, 2018, which reads as under:",,,,

â??New Delhi, dated: 23.07.2018",,,,

Policy Circular No. 11/ 2015-20,,,,

To,,,,

All Regional Authorities,,,,

All Development Commissioners, SEZ" ,,,,

All Export Promotion Councils/Commodity Bodies,,,,

Subject: Grant of Deemed Export Benefits for supplies to the projects funded by Organizations such as JICA etc. under para 8.2(d) of the,,,,

Foreign Trade Policy, 2009-14." ,,,,

Department of Economic Affairs vide Public Notice No. 1(FT)/DEA/2010 dated 05.05.2010 notified six organizations viz. International Bank,,,,

of Reconstruction and Development (IBRD) & International Development Association (IDA), International Fund for Agricultural" ,,,,

Development (IF AD), Asian Development Bank (ADB) Organization of Petroleum Exporting Countries (OPEC). Yet credit channelized" ,,,,

through Japan International Co operational Agency (JICA) [Development component only] and Swedish international development agency,,,,

(SIDA) for the purpose of deemed export benefits under para 8.2(d) of FTP, 2009-14 subject to the condition that the supplies to projects" ,,,,

were made under ICB procedure only. To give effect to the DEA's Public Notice, DGFT vide Public Notice No. 67 on 25th May, 2010" ,,,,

incorporated these agencies in the Appendix 13 of HBP Vol. I appearing in para 8.2(d) of FTP 2009-14 to be eligible for deemed export,,,,

benefits under para 8.3 of FTP 2009-14.

2. However, the deemed export benefits for supplies made to the projects funded by these agencies were discontinued in the new FTP 2015-" ,,,,

20notified on 1.4.2015 and only three agencies viz. International Bank of Reconstruction and Development (IBRD) and International,,,,

Development Association IDA); and Asian Development Bank (ADB) (as listed in Appendix -7A) were continued to be eligible agencies for,,,,

deemed Export Benefits in terms of para 7.02 (e) of FTP 2015-20.

3. Under para 8.3 of FTP 2009-14, deemed export supplies were eligible for any/all of the 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 Authorisation holder to a manufacturer holding another.,,,,

Advance Authorization if such manufacturer, in turn, supplies the product(s) to an ultimate exporter.",,,,

4. The supplies to the projects funded by JICA notified vide DGFT's Public Notice No.67 dated 25th May, 2010 were made against ICB and",,,,

hence were eligible for ab-initio exemption from payment of terminal excise duty under para 8.3(c) of FTP. 2009-.,,,,

14. However, several representations were received stating that the supplies to projects funded by JICA were not getting exemption from",,,,

TED from Jurisdictional excise authorities. The issue was taken up with Department of Revenue. At field level, the exemption from payment",,,,

of Terminal Excise Duty for supplies to these agencies other than IBRD, IDA and ADB were not available under relevant excise notifications",,,,

even though the supplies were under ICB. Further, since the projects were under ICB, the RAs were not considering the application for",,,,

refund of TED in accordance with the provisions of FTP.,,,,

5. The issue of refund/exemption of TED for supplies to the Projects funded by JIGA etc. (other than IBRD, IDA and ADB) under para",,,,

8.2(d) of FTP 2009-14 has been considered in this Directorate in consultation with Department of Revenue and Department of Economic.,,,,

Affairs. To honour the commitment made in the erstwhile FTP 2009-14, it has been decided, in relaxation of the provisions of para 8.3(c), to",,,,

allow the refund of Terminal Excise Duty, where exemption from payment of TED under relevant excise notifications was not available, in",,,,

respect of supplies made to the projects funded by JICA etc. (other than IBRD, IDA and ADB) notified vide DGFT's Public Notice No.67 on",,,,

25th May, 2010 for supplies made upto 31.3.2015.",,,,

6. All the Regional Authorities are advised to dispose the claims of applicants for

the supplies made up to 31.03.2015 under para 8.2(d) of,,,,

FTP 2009-14 by way of refund of Terminal Excise Duty (TED) for the. projects funded by JICA etc. (other than IBRD, IDA and ADB)",,,,,

provided those supplies are otherwise eligible under FTP, 2009-14.",,,,

7. This issues with approval of Competent Authority,,,,,

(Shobhit Gupta),,,,,

Deputy Director General of Foreign Trade,,,,,

Tel. No. 23061562 Ext 341,,,,,

shobhit.gupta@gov.in,,,,,

[Issued from File No. 01/92/180/16/AM-15/PC-VI]â??,,,,,

(emphasis supplied),,,,,

16. In terms of the above circular, it appears that DGFT has now identified the issue viz-a-viz the non-refund of excise duty paid by the suppliers. This",,,,,

circular in our view now recognizes the provisions of the FTP in the right perspective, that exemption from TED was not available for certain supplies",,,,,

even though the same were under ICB. There is thus no impediment in granting the refund to the Petitioner. In view of the above discussion, we hold",,,,,

that the impugned circular has no application to the case of the petitioner and it is lawfully entitled to refund of TED in terms of para 8.3 (c) read with,,,,,

para 8.4.4. (iv) of the FTP.,,,,,

17. Before parting, we may also note that in M/s Alstom Transport India Limited (supra), this Court relying upon the decision of the Supreme Court in",,,,,

DG of Foreign Trade v. Kanak Exports, (2016) 2 SCC 226, considered a similar fact situation and concluded that certain ICB supplies made were",,,,,

dutiable and accordingly entitled to TED refund. The relevant portion of the said judgment reads as under:,,,,,

â??19. It is quite clear therefore, that both the central excise and customs exemption notifications would spell out that no customs duty",,,,,

exemption to goods supplied to the Chennai Metro Rail Project was given to the petitioner; it cannot be said that such exemption was ever,,,,,

enjoyed by it. Therefore, the respondents' argument that excise duty was exempt â??ab initioâ? in respect of supplies made under the",,,,,

contracts funded by JICA, to the Chennai Metro, are factually incorrect. The exemption was not â??ab initioâ? (i.e. per se) exempt; it was",,,,,

conditional upon availability of customs duty exemption, by virtue of Note 41 to the Excise Duty exemption notification. However, the",,,,

customs duty exemption notification restricted duty exemption only to supplies made to specified contracts relating to the Delhi Metro Rail",,,,

Corporation. Thus, the respondent authorities, in the opinion of the court, proceeded on an entirely erroneous premise.",,,,

xxx xxx xxx",,,,

22. For a fuller appreciation of the issue, it was necessary for the respondent authorities to determine whether under the relevant central",,,,

excise notification, the goods were (or were not) exempt, or were exempt subject to any condition. Per se exemption, (or to put it, in the",,,,

language of the respondent's pleadings and notifications, ab initio exemption) could only mean unconditional exemption from payment of",,,,

duty. In the present case, a combined reading of the central excise exemption notification and the customs duty exemption notification made",,,,

it clear that such unconditional exemption was not extended to the goods. Rather, unconditional exemption was given only to goods supplied",,,,

under contracts funded to the Delhi Metro Rail Corporation. This meant that the goods in question, supplied by the petitioner were dutiable.",,,,

Clearly, therefore it was entitled to terminal excise duty refund, on a plain analysis of Para 8.3 of FTP 2009-2014.â??",,,,

18. For the foregoing reasons, the impugned orders/letters denying refund of TED are hereby quashed. The respondents are directed to process",,,,

petitionerâ??s claim for TED refund in respect of the applications enumerated in paragraph 3 of this order and release the amounts which they are",,,,

entitled to in respect of the supplies made hereunder within a period of eight weeks from today.",,,,

19. The writ petition is allowed in the above terms and the pending application accordingly stands disposed of.",,,,