
(2023) 09 CESTAT CK 0038

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Excise Appeal No. 60107 Of 2013

M/S Souvenior Ceramics

APPELLANT

Vs

Commissioner Of Central Excise, Delhi-IV

RESPONDENT

Date of Decision : 22-09-2023

Acts Referred:

Customs Tariff Act, 1975 — Section 3

Citation : (2023) 09 CESTAT CK 0038

Hon'ble Judges : S. S. Garg, Member (J); P. Anjani Kumar, Member (T)

Bench : Division Bench

Advocate : Vivek Kumar, Ravinder Jangu

Final Decision : Allowed

Judgement

P. Anjani Kumar, Member (T)

1. M/s Souvenior Ceramics, the appellants, are manufacturers of castable refractory goods and have supplied goods to Bhusawal Thermal Power Station Project; claiming that they have paid Central Excise duty by mistake, they filed a refund claim for Rs.1,45,742/- on the grounds that the supplies were against International Competitive Bidding and thus, exemption under Notification No.06/2006-CE dated 01.03.2006 was applicable; the exemption under Notification No.20/2002 is also applicable as the goods were supplied to power projects. A show cause notice dated 09.03.2012 was issued proposing to reject the claim for the reason that the project had two different units of 500 MW each whereas the exemption is applicable only to power projects of a capacity of 1000 MW. The show cause notice was confirmed vide OIO dated 02.07.2012 and it was upheld vide OIA dated 26.07.2013. Hence, this appeal.

2. Shri Vivek Kumar, learned Counsel for the appellants, submits that Department committed a serious error in assuming that the project was of a capacity of less than 1000 MW and thus, exemption is not applicable; in fact, the project is of 1000 MW only consisting of two turbines of 500 MW each; the same

was certified by a competing authority, in the Ministry of Power, Government of India, vide Letter dated 16.12.2009; M/s BHEL, their customer have also written a Letter dated 07.05.2011 to Commissioner of Central Excise, Faridabad that the appellant is entitled for exemption; further CBEC vide F.No.232/225/2009-CX7 dated 25.07.2012 has intimated that "Ministry of Power has clarified that the Mega/Ultra Mega power projects wherein the capacities of number of units total up to at least 100 MW in one go are eligible to get the requisite benefits under mega status certificates". Learned Counsel further argues that learned Appellate Authority held that exemption contained under Notification No.21/2002-Cus dated 01.03.2002 was not applicable, whereas the refund was claimed in terms of Central Excise Notification; learned commissioner misread the refund to be of terminal excise duty.

3. Shri Ravinder Jangu, learned Authorized Representative for the Department, reiterates the findings of OIA and OIO.

4. Heard both sides and perused the records of the case. We find that Notification No.06/2006 at Sl. No.91 mentions as follows:

Sl.No.

Chapter or heading or sub-heading or tariff item of the First Schedule

Description of excisable goods

Rate

Condition

91

Any Chapter

All goods supplied against International Competitive Bidding.

Nil

19

Condition No.19 prescribes that if the goods are exempted from the duties of customs leviable under the First Schedule to the Customs Tariff Act, 1975(51 of 1975) and the additional duty leviable under Section 3 of the said Customs Tariff Act when imported into India.

5. We find that the show-cause notice proposes to deny the benefit for the reasons that

(i) the project is not a mega project with more than 1000 MW power;

(ii) the Condition No.19 of the NotificationNo.06/2006 is not satisfied as the goods are not exempted, when imported, vide Notification No.21/2002-Cus as amended by Notification No.49/2009-Cus

(iii). the appellant was not a party to the International Bidding and as a sub-contractor of the BHEL, they are not eligible for the exemption.

6. The original adjudicating authority holds that the appellants though, promised during the personal hearing on 30.9.2011, did not produce any document like purchase order etc to prove that they are supplying under international competitive bidding; Purchase Order issued by M/s BHEL mentioned that the payment will be inclusive of Excise Duty plus 2% of CST and therefore, it cannot be claimed that the appellants have not collected the duty paid from their Customers. The appellate authority holds that the name of the project itself is Bhusawal Expansion Power Plant and hence, exemption available for installation of project cannot be extended; as per Notification No 21/2002-Cus as amended by Notification No.49/2009-Cus prescribes Customs Duty @2.5% and therefore, Condition No.19 of the NotificationNo.06/2006 is not satisfied.

7. Regarding the allegation that the Project in question is not a 1000MW project, we find that Joint Secretary, Ministry of Power, Government of India, vide certificate dated 16-12-2009, certified that it is a case of setting up of Power plant of Capacity of 1000 MW. This should put to rest the speculation that the impugned project is of capacity of 1000 MW and not two projects of 500 MW each. We find that CBEC vide F.No.354/2007/2011-TRU dated 06.07.2012 has clarified that: "FM's approval has been obtained for the issuance of suitable instructions to the Central Excise authorities based on clarification received from Ministry of Power in this case directing them to dispose of protective demand notices in the light of this clarification."

5.9. Kind attention is also invited to F.No.232/25/2009-CX7 dated 25.07.2012 of Commissioner (PAC) CBEC (copy enclosed with appeal) wherein it has been intimated as under:

"Ministry of Power has clarified that the Mega/Ultra Mega power projects wherein the capacities of number of units total up to at least 1000 MW in one go are eligible to get the requisite benefits under mega status certificates"

8. We find further, that project authority certifies the requirement of procurement of Main Plant equipment and other items to be supplied and that the list of the Sub-Contractor along with items to be supplied with quantities shall be intimated later. It is not the case of the department that the appellant is not a sub-contractor. This Tribunal in the case of CST Ltd.-2008 (230) E.L.T. 85 (Tri. - Bang.) and 2007 (217) E.L.T. 513 (Tri. - Bang.) held that exemption is available to the sub-contractors also. Tribunal held that:

3. We have carefully considered the submissions. We notice that this very issue was the subject matter in assessee's own case and this Bench by final order No. 636-637/07, dated 6-6-2007 [2007 (217) E.L.T. 513 (T)] decided the matter in assessee's favour. The finding recorded in para 6 are reproduced herein below

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"6. The learned Advocate brought to our notice the relevant conditions of the exemption Notification. In terms of Notification No. 48/2004, against Sl. No. 301, "all goods supplied against International Competitive Bidding, falling under any Chapter" are exempted subject to condition 64 of the Notification. Condition 64 reads as follows :-

"64. the goods are exempted from the duties of customs leviable under the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and the additional duty leviable under Section 3 of the said Customs Tariff Act when imported into India."

It is not in dispute that the goods imported for supply to Mega Projects are entitled to whole duty exemption under Customs Tariff Act. The next thing to be examined is whether the goods supplied are against International Competitive Bidding. The appellants are a sub-contractor of M/s. BHEL. M/s. BHEL is executing the Mega Project for Kahalgaon Super Thermal Power Project by International Bidding. The appellants have submitted all the relevant records. The appellants are also found in the list of sub-contractors. Since the goods are supplied by the appellants to BHEL, who are executing the project by International Competitive Bidding, it is very clear that the goods cleared by the appellants should be considered as "goods supplied against International Competitive Bidding". There is absolutely no need that the appellants themselves should have been the bidder in International Competitive Bidding. In huge projects, the main contractor does not do everything. There is always a system of sub-contractors. If we take a view that the goods cleared by sub-contractors are not entitled for exemption on the ground they are not the bidders, the very purpose of the Notification would be defeated because the main contractor will be having hundreds of sub-contractors in Mega Projects. In our view, inasmuch as the appellants had supplied the goods to M/s. BHEL, who are the bidders of International Competitive Bidding, the condition of the Notification is satisfied and there is no justification for denying the exemption notification to the appellant. The Tribunal, in the case of Automatic Electric Ltd. v. CCE, Mumbai - 2004 (178) E.L.T. 524 (Tri.-Mumbai), has held that the benefit of exemption under Notification 108/95-C.E. is available to a sub-contractor when M/s. BHEL is the main contractor of an approved project. The fact that there was a contract between the main contractor and the subcontractor will ensure that supplies made eventually reach the project site. The ratio of the above case is clearly applicable to the present case. In these circumstances, we set aside the impugned order and allow the appeals with consequential relief, if any."

9. Coming to the allegation that Condition No.19 of Notification no.06/2006 is not satisfied since as per Notification No 21/2002-Cus as amended by Notification No.49/2009-Cus prescribes Customs Duty @2.5%. We find that learned Commissioner has erred in looking at the Customs duty applicable to the project imports falling under CTH 9801 whereas the appellants have supplied castable refractory goods falling under Chapter 69 and 38 of Central Excise Tariff Act. To this extent, we find that the findings of the Commissioner are erroneous.

Learned Counsel for the appellants also submits that they have paid duty for a brief period i.e January 2011 to March 2011 and have accordingly filed a refund claim. They have not paid duty before January 2011 and after March 2011 and the Department has not objected to the same. Moreover, Department has not also issued any show-cause notice to the similarly placed sub-contractor-suppliers involved in the same project. Once the Department has accepted non-payment of duty for the previous and subsequent periods, it is not open for the Department to deny refund, if otherwise in order, for the short period during which the appellants have paid duty under mistaken notion of law. The Ld. Counsel also submits that the appellants are, alternatively eligible for exemption under Notification No.20/2002 as the goods were supplied to power projects.

10. In view of the above and in the facts and circumstances of the case, we are of the considered opinion that the impugned order is not sustainable and is liable to be set aside. We do so and allow the appeal.