

(2023) 01 DEL CK 0145

In the Delhi High Court

Case No : Civil Writ Petition No. 7745 Of 2019

M/S Special Cables Pvt. Ltd

APPELLANT

Vs

Central Board Of Indirect Taxes And Customs & Ors.

RESPONDENT

Date of Decision : 31-01-2023

Acts Referred:

Central Excise Act, 1944 — Section 11A, 11B(2), 12C(2)(a)

Citation : (2023) 01 DEL CK 0145

Hon'ble Judges : Vibhu Bakhru, J; Amit Mahajan, J

Bench : Division Bench

Advocate : Dr. G. K. Sarkar, Malabika Sarkar, Prashant Srivastava, Sushil Kumar Pandey, Kuldeep Singh, Harpreet Singh, Suhani Mathur

Final Decision : Allowed

Judgement

Vibhu Bakhru, J

1. The petitioner has filed the present petition being aggrieved by denial of budgetary support under the "Scheme of Budgetary Support under Goods and Services Tax (GST) Regime to units located in State of Jammu & Kashmir, Uttarakhand, Himachal Pradesh and North-Eastern States including Sikkim" (hereafter 'the Scheme') notified in terms of the Notification dated 05.10.2017 issued by the Ministry of Commerce and Industry, Department of Industrial Policy and Promotion.
2. The petitioner is engaged in the business of manufacturing insulated wires and cables, ASCR conductors, copper wires, aluminium wires etc., at its unit located at Sector-3, II E Pant Nagar, Rudrapur, Uttrakhand.
3. The petitioner claims that it is entitled to the budgetary support under the Scheme as it was entitled to Area Based Exemption from Central Excise in terms of the Notification No.50/2003-CE dated 10.06.2003 as amended from time to time (hereafter referred to as 'the Notification'). The petitioner claims that it was entitled to such an exemption from the date of commencement of production at

its unit in Rudrapur, Uttarakhand till 01.07.2017, the date when the Notification ceased to apply with the roll out of the Goods and Service Tax regime. In terms of the Scheme, all budgetary support would be available to all eligible units under the erstwhile schemes in terms of the notifications as specified in paragraph 2 of the Scheme.

4. The respondents have denied the budgetary support under the Scheme to the petitioner on the ground that it did not fulfil the criteria of an 'Eligible unit' under the Scheme as it was not availing the Area Based Exemption under the Notification.

5. In view of the above, the principal question that needs to be addressed is whether the petitioner fulfilled the criteria as set out under the Scheme for being considered eligible for budgetary support.

6. Paragraph 1.2 of the notification dated 05.10.2017 in terms of which the Scheme was notified, expressly indicates that units which were eligible under the erstwhile Schemes and were in operation through exemption notifications issued by the Department of Revenue in the Ministry of Finance, as listed under para 2 of the said Notification would be considered eligible under the Scheme.

7. The Notification is specifically mentioned in sub-para 2.2 of the aforementioned notification dated 05.10.2017. Therefore, indisputably, those units, which were eligible for benefit of the Notification, would be eligible for the benefit under the Scheme.

8. Paragraph 4.1 of the Scheme defines the term 'eligible unit' and is set out below:

"4.1 'Eligible unit' means a unit which was eligible before 1st day of July, 2017 to avail the benefit of ab-initio exemption or exemption by way of refund from payment of central excise duty under notifications, as the case may be issued in this regard, listed in para 2 above and was availing the said exemption immediately before 1st day of July, 2017. The eligibility of the unit shall be on the basis of application filed for budgetary support under this scheme with reference to:

(a) Central Excise registration number, for the premises of the eligible manufacturing unit, as it existed prior to migration to GST; or

(b) GST registration for the premises as a place of business, where manufacturing activity under exemption notification no. 49/2003-CE dated 10.06.2003 and 50/2003-CE dated 10.06.2003 were being carried prior to 01.07.2017 and the unit was not registered under Central Excise."

9. The key question to be addressed is whether the petitioner's unit was entitled to the benefit of the Notification, and was availing the exemption immediately before the first date of July 2017.

10. The aforesaid controversy arises in the following factual context:

a. The petitioner had set up its unit at Pant Nagar in Rudrapur and in compliance with the Notification, issued a letter dated 09.10.2009 informing the Jurisdictional Commissioner that the petitioner was entitled to avail the exemption of excise duty in respect of newly established manufacturing units as available under the Notification. Thereafter, the petitioner commenced commercial production from its unit on 27.03.2010 and informed the concerned Assistant Commissioner of excise of such commencement of production. The petitioner also enclosed copies of the first invoice regarding the first clearance along with its letter dated 28.03.2010.

b. There is some controversy with regard to the receipt of the aforementioned intimation. According to respondent no.3, he did not receive the said intimations and therefore, denied the petitioner's exemption under the Notification. This was communicated to the petitioner by a letter dated 18.05.2010. Thereafter, the Assistant Commissioner, Rampur issued a Show Cause Notice dated 22.03.2011, calling upon the petitioner to show cause as to why it should not be denied the benefit of exemption from payment of Central Excise under the Notification and the excise duty on goods manufactured and cleared by the petitioner during the period of January 2010 to September 2010 not be recovered under Section 11A of the Central Excise Act, 1944 along with penalty and interest.

c. The petitioner responded to the Show Cause Notice by its letter dated 13.07.2011 enclosing therewith, the intimations dated 09.10.2009 sent to the concerned authority. The petitioner claimed that it had complied with the requirements of the Notification and was entitled to exemption from payment of excise duty.

d. The Assistant Commissioner of Central Excise, Rampur did not accept the petitioner's claim and passed an order of adjudication dated 24.08.2011 denying the Area Based Exemption under the Notification on the ground of non-receipt of the intimation dated 09.10.2009.

e. In view of the above, the petitioner applied for Central Excise Registration but informed the Assistant Commissioner that it would take legal recourse against the adjudication order dated 24.08.2011. According to the petitioner, it had also informed the Assistant Commissioner that the excise duty as demanded would be paid under protest.

f. The petitioner paid the excise duty as demanded albeit under protest. This was also informed to the Jurisdictional Assistant Commissioner. The petitioner also informed the concerned Assistant Commissioner, by its letter dated 03.10.2011, that it was paying the duty under protest. The petitioner appealed the adjudication order dated 24.08.2011 to the learned Commissioner (Appeals).

g. The petitioner prevailed in its appeal before the learned Commissioner (Appeals). The learned Commissioner found that the intimation dated 20.10.2009 was acknowledged by the Deputy Commissioner (Tech.), Customs and Central Excise, Meerut-II and therefore, the petitioner was entitled to

exemption from excise duty under the Notification. Accordingly, the learned Commissioner (Appeals) allowed the petitioner's appeal by an order dated 23.12.2011 and set aside the adjudication order dated 24.08.2011 with consequential relief.

h. The Revenue assailed the order dated 23.12.2011 passed by the Commissioner (Appeals) before the Central Excise and Service Tax Appellate Tribunal (hereafter 'CESTAT'). Although the order dated 23.12.2011 was not stayed, the Department issued several show cause notices to the petitioner demanding excise duty for goods cleared after September 2010. The petitioner states that in view of the above, it continued to pay excise duty under protest.

i. The Revenue's appeal against the order dated 23.12.2011 passed by the Commissioner (Appeals) was rejected by the learned CESTAT by an order dated 07.11.2017. Admittedly, the said order has been accepted and the Revenue has not taken any steps to challenge the same. The show cause notices issued by the authorities after the learned Commissioner (Appeals) had passed an order dated 23.12.2011 being show cause notices dated 05.01.2012, 29.03.2012, 09.07.2012 and 04.10.2012 were dropped. The petitioner also sought refund of Rs. 84,79,750/- being the excise duty paid under protest. The petitioner's application for refund was allowed by the learned Joint Commissioner in terms of the order dated 28.04.2022. However, the said amount had been directed to be credited in the Consumer Welfare Fund in terms of Section 11B(2) of the Central Excise Act, 1944.

j. The petitioner has not accepted the said order and has challenged the same to the extent that it directs the refund to be credited in the Consumer Welfare Fund.

11. It is apparent from the above that the controversy whether the petitioner was entitled to avail Area Based Excise Exemption under the Notification is fully resolved. Undisputedly, the petitioner was entitled to the benefit of the Notification. As noted above, in terms of paragraph 4.1 of the Scheme, a unit, which was eligible before the first day of July 2017 to avail the exemption under the Notification as specified in paragraph 2 of the Scheme and was availing such exemption before the cut-off date of first July 2017, would fall within the definition of the term 'eligible unit'. In view of the orders dated 23.12.2011 passed by the Commissioner (Appeals) and the order dated 07.11.2017 passed by the learned CESTAT, it cannot be disputed that the petitioner was eligible for benefit under the Notifications ab-initio.

12. Mr Harpreet Singh, learned counsel appearing for the respondents states that notwithstanding that the petitioner was eligible to avail the benefits under the Notification, it was, in fact, not availing the same prior to the cut-off date of 07.07.2017 and therefore, would be disentitled to the budgetary support under the Scheme.

13. A plain reading of paragraph 4.1 of the Scheme indicates that for a unit to qualify as an 'eligible unit', it is required to satisfy two conditions. First that it

was eligible before first date of July 2017 to avail the benefit of ab initio exemption or exemption by a refund for payment of central excise duty in terms of notification as specified in paragraph 2 of the Scheme. And, second, that the unit was availing such exemption immediately before the 01.07.2017. In the present case, there is no dispute that the petitioner was eligible to avail the benefits of the Notification (Notification No.50/2003-CE dated 10.06.2003), which was one of the Notifications as mentioned in paragraph 2 of the Scheme.

14. As noted above, the said controversy stands settled by the order dated 23.12.2011 passed by the learned Commissioner (Appeals) and the order of the learned CESTAT dated 07.11.2017. The contention that the petitioner does not satisfy the second condition of availing the said exemption before first day of July 2017 is unmerited. The fact that the petitioner was denied the benefit at the material time, cannot be read to mean that the petitioner was not availing the same. The petitioner had claimed such benefit from commencement of commercial production and had pursued the matter with the concerned authorities. As noted above, the petitioner was not granted the benefit and therefore, had paid the duty of central excise under protest but at the same time, had continued to pursue its right to exemption under the Notification. The petitioner had finally prevailed and was found entitled to the said exemption. The petitioner's application for refund of duty paid under protest was also partly allowed by an order dated 28.04.2022. In terms of the said order, the Joint Commissioner, CGST had sanctioned the refund claim of Rs. 84,79,750/- (eighty four lacs seventy nine thousand seven hundred and fifty only) but had directed the same to be credited in the Consumer Welfare Fund in terms of Section 11B(2) read with Section 12(C)(2)(a) of Central Excise Act, 1944. The controversy whether the said amount is to be refunded to the petitioner or to be deposited in the Consumer Welfare Fund is a contested one as the petitioner has not accepted the same. However, insofar as the sanction of refund of excise duty is concerned, there is no controversy that the goods cleared by the petitioner from its unit at Rudrapur were exempt from excise duty ab initio by virtue of the Notification. Since the petitioner has also secured an order sanctioning refund of the said duty, there can be no doubt that the petitioner has availed of the benefit under the Notification.

15. There is no doubt that in the given facts as obtaining in the present case, it is clear that the petitioner had from inception indicated its intention to avail of the benefits of the Notification. It had further pursued its right to such exemption. The petitioner had prevailed before the Commissioner (Appeals) prior to the roll out of the GST Regime. The fact that the respondents had carried the matter to learned CESTAT and in the meantime, had insisted on collecting the central excise duty, which was paid by the petitioner under protest, cannot be construed to hold that the petitioner had not availed of the benefits immediately prior to 01.07.2017.

16. The second limb of the condition that the unit must be availing of the benefit

of the Notifications as mentioned in paragraph 2 of the Scheme immediately prior to 01.07.2017 is to merely distinguish those units that have elected not to avail of the area-wise exemption or the term for which such benefit was available has expired.

17. The said condition cannot be read to exclude entities that have asserted their claim for such exemption but the same has flowed to them subsequently in view of the Revenue contesting the same.

18. It is material to note that it is not disputed that but for the controversy whether the petitioner was availing the benefit of the Notification, as noted above, there is no other reason for denying the petitioner's claim for budgetary support under the Scheme.

19. In view of the above, we direct the respondents to release the budgetary support amount as assessed to the petitioner in terms of the Scheme as expeditiously as possible but in any event within a period of six weeks from today. Respondent no.3 is also directed to grant registration to the petitioner to enable it to file online claims as prayed for by the petitioner.

20. The appeal is allowed in the aforesaid terms.

21. The parties are left to bear their own costs.