
(2014) 12 MAD CK 0263

In the Madras High Court

Case No : Writ Petition No. 1468 of 2013 and M.P. Nos. 1 and 2 of 2013

Raja Crowns and Cans Pvt. Limited

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 08-12-2014

Acts Referred:

Citation : (2015) 317 ELT 40

Hon'ble Judges : T.S. Sivagnanam, J

Bench : Single Bench

Judgement

T.S. Sivagnanam, J.—In this writ petition, the petitioner seeks for issuance of a writ of certiorarified mandamus to quash the minutes of the decision taken in the meeting held on 04.12.2012 by the second respondent.

2. The question which fell for consideration before the second respondent, which is the Policy Interpretation Committee, was whether the terminal excise duty paid by a DTA unit on supplies made to 100% EOU under Para 8.2(b) of Foreign Trade Policy should be interpreted in the manner sought for by the petitioner.

3. The second respondent stated in terms of Para 6.11(2)(II) of the Foreign Trade Policy, read with CBEC Circular No. 851/9/2007 dated 03.05.2007 supply of goods to EOU is exempted for payment of Terminal Excise Duty, hence, the supplier was not required to pay any duty while removing the goods for supply the same to EOU. Further, it was stated that in terms of Para 6.2(b) of the Foreign Trade Policy, EOU may import goods from DTA unit without payment of duties hence EOU was not required to pay duty. Further, it was stated that refund of CENVAT credit provisions are available under the Excise Rule and CENVAT Rules hence refund of such credit by DGFT does not arise. Therefore, the Committee opined that no policy interpretation is required in the matter.

4. The petitioner is a registered manufactures of "Printed Coffee Cans" falling under heading 7310 2990 of the First Schedule to the Central Excise Tariff Act, 1985 and they have been clearing the said cans on payment of applicable central

excise duty. The petitioner was also availing CENVAT Credit benefit of the duties paid on inputs and capital goods and service tax paid on input services procured by them. During the period from 01.01.2010 to 31. 03.2010, the petitioner cleared certain quantity of cans to three 100% Export Oriented Units (EOU) on payment of central excise duty. The petitioner contended that supplies made to EOU is construed as "Deemed Exports" in terms of Para 8.2(b) of the Foreign Trade Policy and in terms of Para 8.4.2, such supplies to EOU shall be entitled to the benefits listed in paragraphs 8.3(a) to (c) of the Foreign Trade Policy, whichever is applicable. Based on the Foreign Trade Policy, the petitioner claimed refund of terminal excise duty of Central Excise Duty of Rs.12,50,738/-, Rs.2,73,089/- and Rs.29,93,042/- which according to them was paid during the supplies which were made to the three EOUs. The third respondent rejected the refund claimed by order dated 09.09.2010 on the ground that the supplies made to 100% EOUs are exempted from the payment of terminal excise duty under the CT3 procedures. Aggrieved by the same, the petitioner filed a representation before the second respondent which is a Committee constituted for the purpose of interpretation of the policy guidelines. The said request made by the petitioner came to be disposed of by the second respondent by the impugned order.

5. The petitioner has challenged the impugned proceedings by contending that the supplies made to EOUs are construed as "Deemed Exports" in terms of Para 8.2(b) of FTP and all benefits accrued as a consequence of Deemed Exports are available to the petitioner. It has further contended that in terms of Para 8.3(c) of FTP, exemption from terminal excise duty is applicable where supplies are made against ICB and in all other cases, refund of terminal excise duty is applicable and in other words, except for supplies made against ICB, in all other cases of Deemed Export, refund of terminal excise duty is the only benefit available under clause (c) of para 8.3 of FTP, irrespective of whether any exemption is available for such supplies under revenue notification or not. The petitioner further submitted that the second respondent rejected the claim of refund of terminal excise duty paid on the ground that the supplies to EOU's are entitled for exemption by following CT3 procedures under revenue notification, especially when their supplies to EOUs are not made against ICB. Further, it was contended that the CBEC circular No. 851/9/2007 dated 03.05.2007 referred to in the impugned decision of the second respondent provides for the procedure to be followed in case if the benefit of exemption provided for under Notification 22/2003 CE dated 01.03.2003 is sought to be claimed by the EOU. In terms of the above procedure, the EOU intending to procure the goods under exemption from DTA under the notification shall obtain and furnish a certificate in the form CT3 to the manufacturer of goods, which is a pre-requisite for claiming exemption, and based on such CT3 the manufacturer is entitled to claim the exemption under the above notification. It was further submitted that in respect of all the clearances of goods made by the petitioner to the EOU on payment of duty, no such CT3 had been obtained and furnished by the EOU. As such, the petitioner is not entitled for the exemption at all and therefore, on this ground

also, the second respondent held that the supplier is not required to pay any duty while removing the goods to EOU.

6. The learned counsel for the petitioner reiterated the stand taken in the affidavit filed in support of the writ petition and submitted that based on the impugned decision, in respect of another assessee viz., Kandoi Metal Powders Manufacturing Company, which claimed a similar benefit, was rejected. This was challenged on the identical grounds raised by the petitioner herein and the Hon'ble Division Bench of the Delhi High Court, in the case of Kandoi Metal Powders Manufacturing Company Private Limited V. Union of India and others reported in 2013-TIOL-230-HC- DEL-EXIM, allowed the writ petition and while doing so, took note of the decision of the Division Bench of the Calcutta High Court in Joint Director General of Foreign Trade Vs. IFGL Refractories Ltd., . Therefore, it is submitted that the issue is fully covered by the said decision.

7. The learned counsel for the respondents 2 and 3, by relying upon the counter affidavit, reiterated the stand taken in the impugned proceedings and it is contended that the petitioner's interpretation that besides getting terminal excise duty exemption, they are entitled to terminal excise duty refund also (if exemption is not availed), is not acceptable. As per para 2.3 of Foreign Trade Policy, Director General of Foreign Trade in consultation with PIC, who is competent authority, has already clarified this aspect and its decision is final and binding in terms of para 2.3 of FTP. Further, it is submitted that if the petitioner had not obtained CT3 form from EOUs, it is their lapse and he is liable to bear the consequential loss, if any. It is further contended that the claim of deemed exports are essentially guided by the provision of Foreign Trade Policy. It makes clear provision regarding exemption from terminal excise duty for supply of goods to EOUs. Further, the provisions of CBEC's circular quoted by the firm do not mention that in such cases, terminal excise duty refund is available.

8. The stand taken by the respondents 2 and 3 are also adopted by the learned counsel for the first respondent.

9. After hearing the learned counsel for the parties and perusing the materials placed on record, it is seen that an identical set of facts, the Division Bench of the Delhi High Court took a decision in favour of the manufacturer. In fact, in the said case arose out of a decision taken pursuant to the resolution dated 04.12.2012 which is impugned in this writ petition. Therefore, the cause of action in the case before the Delhi High Court was the impugned resolution. Therefore, the decision rendered by the Delhi High Court binds the respondents and the Delhi High Court quoted with the approval in the decision of the Division Bench of the Calcutta High Court in JDGFT V. IFGL Refractories Limited (cited supra). At this stage, it would be beneficial to refer to the operative portion of the Judgment:

"8.It would thus be seen that supplies made to EOUs in terms of para 8.2(b) are entitled to be regarded as deemed exports. The benefits for deemed exports

include inter alia exemption from TED where supplies are made against ICD (a term which means "International Competitive Bidding"). In the present case, concededly, the petitioner did not make any supplies against the ICD. Therefore, it would be covered by latter part of para 8.3(c), i.e. Cases where refund of TED will be given. This intention is given effect by the second entry in column (a) of para 8.4 read with corresponding benefits spelt-out in column (c) which states that entitlement in terms of para 8.3 to refund is permissible. The eligibility for refund, therefore, would be in terms of these provisions and the unit has to apply for such refund under para 8.5.

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 Joint Director General of Foreign Trade Vs. IFGL Refractories Ltd., 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.

10. In view of the above discussion, the impugned orders are hereby quashed. The respondents are hereby directed to process and pass appropriate orders in accordance with the 2009 policy in respect of the petitioner's refund claims made through its applications dated 29. 08.2012 and 16.11.2012 within three months from today. The writ petition is allowed in the above terms. No costs".

10. In the light of the above finding, it is held that the issue involved in this writ petition is covered by the decision of the Delhi High Court and since the case before the Delhi High Court arose out of the order which was passed pursuant to

the resolution impugned in this writ petition, the decision of the Delhi High Court binds the respondents. Thus, following the above referred decision, this Writ Petition is allowed and the impugned order is quashed and the third respondent is directed to process the refund claim in accordance with the 2009 Policy by taking into consideration the petitioner's refund application dated 16.08.2010 and pass appropriate orders in accordance with law, within a period of three months from the date of receipt of a copy of this order. No costs. Consequently, connected Miscellaneous Petitions are closed.