
(2014) 02 DEL CK 0140

In the Delhi High Court

Case No : W.P. (C) 4455/2013 and CM Appl. 10299/2013, 836/2014

Simplex Infrastructure Ltd.

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 26-02-2014

Acts Referred:

Central Excises and Salt Act, 1944 — Section 37

Constitution of India, 1950 — Article 246, 265

Customs Act, 1962 — Section 75

Finance Act, 1994 — Section 93A, 94

Foreign Trade (Development and Regulation) Act, 1992 — Section 15, 16, 19, 3, 5

Citation : (2014) 27 GSTR 179

Hon'ble Judges : S. Ravindra Bhat, J; R.V. Easwar, J

Bench : Division Bench

Advocate : Sujit Ghosh and Ms. Kanupriya Bhargava, Advocate for the Appellant; Sumeet Pushkarna, Advocate for the Respondent

Judgement

S. Ravindra Bhat, J.—This writ petition impugns the legality of orders demanding the recovery of terminal excise duty ("TED") of Rs. 12,26,55,979 earlier refunded to the petitioner, Simplex Infrastructure ("Simplex"). Simplex provides construction services, and has been awarded various civil works contracts. For the execution of these projects, Simplex procured construction goods from local manufacturers. The local manufacturers paid excise duty to the Revenue on the goods supplied to Simplex, and in turn, passed on the burden of the excise duty to Simplex. The claim for refund of the TED was thus claimed by Simplex. This claim was made under Paragraph 8.2 of the Foreign Trade Policy ("the policy") of the Central Government, made under the Foreign Trade (Development and Regulation Act), 1992, (hereafter "the Act") which provides various benefits in relation to "deemed exports". This refers to those transactions in which goods supplied do not leave the country, but fiscal benefits attached to exports are provided nonetheless. The intention thus is to treat supplies to such projects are equivalent to exports, with the same benefits. Paragraph 8.3 of the policy lists refund of TED as one of the benefits that may be claimed. Accordingly, Simplex

filed applications for refund of TED, in the requisite ANF 8 forms. After the removal of deficiencies, the refund was granted. The refund against these applications was sanctioned for the period of 12th May, 2010 to 8th March, 2011, for an amount of Rs. 12,26,55,979, which was released on 29th March, 2011.

2. The first Respondent is the Union of India, through the Ministry of Commerce; the second Respondent is the Director General of Foreign Trade ("DGFT"); the third Respondent is the Joint Director General of Foreign Trade ("Joint DGFT"), and the fourth Respondent is the Deputy Director General of Foreign Trade ("Deputy DGFT"). On 30th March, 2012, the Joint DGFT passed an order seeking the recovery of the TED earlier disbursed to Simplex. Simplex appealed to the Deputy DGFT, which was dismissed on 2nd April, 2013. Simplex today impugns these orders.

3. The background of the impugned orders becomes clear from the meeting of the Policy Interpretation Committee ("PIC") under the aegis of the DGFT, held on 15th March, 2011. In relation to non-mega power projects, the PIC clarified that except as provided under Paragraph 8.2.(d) of the policy, the supply of cement and steel would not be eligible for deemed export benefits. This view was reiterated in the PIC meeting dated 9th September, 2011. This led to a show-cause notice to Simplex on 28th April, 2012, which ultimately culminated in the two impugned orders. Simplex also challenges the minutes of the two PIC meetings referred to above.

4. Various grounds have been urged by Simplex. It is first argued that the PIC was constituted by an amendment to the policy in 2012, and thus, the PIC does not have the authority to concern itself with the application of the policy before its constitution. The amendment to paragraph 2.3 of the policy, which forms the basis of the legal authority of the PIC, came into existence after the refund of the TED in this case. On this ground, it is argued that the actions of the PIC, which form the basis of the impugned orders of the Deputy and Joint DGFT are void. Independently, and in the alternative, Simplex also challenges the vires of paragraph 2.3 of the policy, on the ground that the power to interpret the policy under the governing legislation lies with the DGFT. The 2012 amendment to the policy traverses beyond the FTDR Act, by providing the PIC an unfettered authority to interpret the provision to the policy. Further, it is argued that the show-cause notice itself notes that the TED was lawfully refunded to Simplex, and thus, any subsequent change in interpretation cannot upset settled legal rights that accrue in favour of Simplex under the policy. It is argued that such action is arbitrary, in that settled legal rights are ignored, by a unilateral change in interpretation that was not known to Simplex, nor could have been known in the circumstances. Further, it is argued that the power to review an order under the policy is granted to the DGFT u/s 16 of the Act, which in this case was impermissibly exercised by the Deputy DGFT.

5. At this juncture, the attention of the Court is also drawn to the decision of the Gujarat High Court in *Alstom India Limited v. Union of India and Another*, Special

Civil Application No. 11031/2013, where various provisions of the policy were challenged. One of the ground of challenge in that case was that:

[t]he FTDR Act or FTP does not grant power to the Respondent No. 2 and its subordinates to re-determine or re-verify the deemed export benefits once such benefits have been approved or granted as per the provisions of the FTR. In the absence of power under FTDR Act or FTP, the Respondent No. 2 and its subordinates cannot assume quasi-judicial power such as power to re-determine or re-verify under administrative guidelines i.e. Para 7 of the ANF-8 Form. Therefore, Para 7 of the ANF-8 is usurpation of quasi-judicial power by the Respondent No. 2 and its subordinates and thus, travels beyond the provisions of the FTDR Act as well as FTP and hence, liable to be struck down.

6. The Court accepted the submission, and held that there is no power to review previous refunds, otherwise than u/s 16 of the FTDR Act. The Court held as follows:

28. We find that the Respondent No. 2, namely, DGFT through Para 8.3.6 of the HOP has incorporated by reference the provisions of Duty Drawback Rules mutatis mutandis to the FTP and HOP. We find substance in the contention of Mr. Ghosh that the HOP is nothing but an administrative guideline as would appear from a combined reading of Para 2.4 of the FTP and Section 6 of the FTDR Act. We have already pointed out that Section 3 of the FTDR Act grants power to the Respondent No. 1 to make provisions relating to imports and exports and the Respondent No. 1 u/s 5 of the FTDR Act can formulate and announce the foreign trade policy. It further appears from Section 6(3) of the FTDR Act that of the powers conferred upon the Respondent No. 1 under the FTDR Act, except those provided in Sections 3, 5, 15, 16 and 19, all others can be delegated to the Respondent No. 2 by order published in the Official Gazette. We find that the Respondent No. 2 through Para 8.3.6 of the HOP has sought to incorporate the provisions of Duty Drawback Rules to deemed exports mutatis mutandis which is not permissible in view of the fact that no power has been granted to the DGFT under the FTDR Act to legislate either directly or by way of incorporation by reference. It is now a settled law that the separation of power between the legislature and executive forms part of the basic structure of the Constitution of India and any attempts by the executives to legislate without appropriate authority under the law would amount to violation of the basic structure of the Constitution of India. The power to legislate is incorporated under Article 246 of the Constitution of India and such power has been conferred on the Parliament and the State Legislature. Moreover, the power to frame Duty Draw Back Rules under the FTDR Act can be legislated by the Central Government only in exercise of power conferred u/s 19 in the manner prescribed under the FTDR Act and the same cannot be delegated to the Respondent no. 2 as expressly prohibited by Section 6(3) of the above Act.

29. Thus, find that any attempt by the executives to legislate without the authority of law should be branded as a colourable device and therefore, the

same is in violation of Article 246 of the Constitution of India. If we accept the contention of Mr. Raval that the Respondent No. 2 is authorized to incorporate the duty drawback Rules by reference, it would amount to acceptance of the proposition that the Respondent No. 2 is authorized to deal with under the FTDR Act, the similar matters relating to duty and tax refunds as provided u/s 75 of the Customs Act, Section 37 of the Central Excise Act and Section 93A read with Section 94 of the Finance Act, 1994 although not authorized under the FTDR Act. We are in agreement with Mr. Ghosh, the learned advocate for the petitioner, that the conferment of such power to the Respondent No. 2 to adopt the duty drawback rules without any power to legislate either expressly or otherwise would amount to permitting the levy or collection of tax without authority of law in violation of Article 265 of the Constitution of India.

XXX XXX XXX

31. On going through the provisions of the FTDR Act, we find that those do not grant power to the Respondent No. 2 or its subordinates to re-determine or re-verify the deemed export benefits if such benefits have been approved or granted as per the provisions of the FTDR Act except by way of review as provided in Section 16. In the absence of any power under FDR Act, the Respondent No. 2 or its subordinates cannot assume quasi-judicial power for instance, the power to re-determine or re-verify under the administrative guidelines i.e. Para 7 of the ANF-8 Form. Therefore, by virtue of Para 7 of the ANF-8, the Respondent No. 2 is deriving the quasi-judicial power which is beyond the provisions of FTDR Act. We have already pointed out that according to Section 6 of the FTDR Act, the Respondent No. 2 or the officer subordinate to him cannot usurp the power under Sections 3, 5, 15 and 19 ...

32. Section 15 of the FTDR Act provides for Appeal and, according to the said section, any person aggrieved by any decision or order made by the Adjudicating Authority may prefer an appeal where the decision or order has been made by the Director General, to the Central Government: or where the decision or order has been made by an officer subordinate to the Director General, to the Director General or to any officer superior to the Adjudicating Authority authorized by the Director General to hear the appeal within a specified period mentioned therein. The said Section, however, gives power to the Appellate Authority to condone the delay in preferring the appeal on sufficient cause being shown. The said section puts certain other restrictions on preferring the appeal.

32.1 Section 16. on the other hand, authorizes the Central Government, in the case of any decision or order made by the Director General, or the Director General in the case of any decision or order made by any officer subordinate to him, to act on its own motion or otherwise, by calling for and examining the records of any proceeding for the purpose of satisfying itself or himself, as the case may be, as to the correctness, legality or propriety of such decision or order and make such orders thereon as may be deemed fit. The proviso. however, says that no decision or order shall be varied u/s 16 so as to prejudicially affect any

person unless such person has, within a period of two years from the date of such decision or order, received a notice to show cause why such decision or order shall not be varied and has been given a reasonable opportunity of making representation, and, if he so desires, of being heard in defence.

7. In this case, the impugned order-in-original, which acted upon the decision taken by the PIC, is of the Joint DGFT, dated 30th March, 2012. Clearly, in terms of the decision in *Alstom* (supra), with which this Court concurs, there can be no review of an earlier refund except in accordance with the provision of Section 16 of the FTDR Act, which only permits the DGFT or the Central Government (in case the original order was by the DGFT) to exercise the power of review. The declaration in paragraph 7 of ANF-8, that Simplex will return any excess duty refunded, cannot eclipse the narrow statutory power to review provided under the Act. Thus, the impugned order of 30th March, 2012, and subsequent recovery proceedings on the basis of this order, exceeds the authority granted by law under the FTDR Act. Taking this view of the matter, the Court does not return any findings as to the legality of the decisions of the PIC, or the legality of paragraph 2.3 of the policy. For the above reasons, the writ petition has to succeed and is accordingly allowed. The impugned order of the Joint Director General is hereby quashed. There shall be no order as to costs.