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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of Decision: 28th July, 2015

+ LPA 192/2015

UNION OF INDIA & ORSAppellants

Versus

ALSTOM INDIA LIMITED Respondent

+ LPA 196/2015

UNION OF INDIA & ORS Appellants

Versus

ALSTOM INDIA LIMITED Respondent

Present:- Mr. Sanjay Jain, ASG with Mr. Sanjeev Narula,
CGSC, Mr. Ajay Kalra, Adv. for appellants.

Mr. Sujit Ghosh with Ms. Kanupriya Bhargava &
Ms. Pragya Awasthi, Adv. for respondent/Alstom
India Ltd.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE JAYANT NATH

MS. G. ROHINI, CHIEF JUSTICE:

1. These matters being inter-linked are heard together and disposed of by this common judgment.

2. The respondent in both the appeals, i.e. M/s Alstom India Limited is a company engaged in setting up of Power Plants including project engineering, procurement, construction and commissioning for its customers and supply of goods to various contractors and project

authorities. The said company (hereinafter referred to as 'the writ petitioner') filed W.P. No. 1331/2015 pleading that M/s National Thermal Power Corporation (**NTPC**) which is engaged in the project of setting up a Super Thermal Power Project in the State of Bihar awarded a contract to BHEL for the supply of steam generated package by following the procedure of International Competitive Bidding (**ICB**) and that the writ petitioner being a sub-contractor of BHEL supplied boiler components during the period from 23.09.2010 to 31.01.2011 to NTPC on payment of Terminal Excise Duty (**TED**). According to the writ petitioner, the goods so supplied against ICB are exempted from duty of excise and therefore an application was made for refund of TED. Alleging that the said claim was erroneously rejected by the Director General of Foreign Trade (DGFT), Ministry of Commerce & Industry, the writ petitioner filed W.P. No.1331/2015. The said writ petition was disposed of by the learned Single Judge by order dated 11.02.2015 with a direction to DGFT to pass a suitable order within two weeks in the light of the observations made therein.

3. In pursuance thereof, DGFT passed an order dated 24.02.2015 rejecting the refund claim of TED of the writ petitioner. The said order dated 24.02.2015 was challenged by the writ petitioner by filing W.P. No. 2344/2015 and the same was disposed of by the learned Single Judge by order dated 11.03.2015 thereby setting aside the order dated 24.02.2015 and directing the respondents to refund the TED to the writ petitioner within two weeks.

4. Hence, these two appeals by the Union of India and others who are the respondents in the writ petitions. While LPA No.192/2015 is directed against the order dated 11.03.2015 in W.P. No.2344/2015,

LPA No.196/2015 is directed against the order dated 11.02.2015 in the other writ petition, i.e. W.P. No.1331/2015.

5. We have heard Shri Sanjay Jain, learned ASG appearing for the appellants and Shri Sujit Ghosh, the learned counsel appearing for the respondent.

6. Section 5A of the Central Excise Act, 1944 (for short 'the Act') empowers the Central Government to grant exemption from duty of excise either absolutely or subject to such conditions as may be specified. In exercise of the powers conferred under Section 5A of the Act, the Central Government issued the Notification dated 01.03.2006. As per Entry 91 of the said Notification, all goods supplied against International Competitive Bidding (ICB) are exempted from duty of excise.

7. That apart, Export and Import Policy, 2009-2014 formulated by the Central Government in exercise of the powers conferred by Section 5 of the Foreign Trade (Development and Regulation) Act, 1992 (for short 'FTDR Act') also provides for certain exemptions. Chapter 8 specifically provides for "deemed exports" specified therein with reference to those transactions in which though the goods supplied do not leave the country, supplies made to the projects specified therein are treated equivalent to exports granting certain fiscal benefits. As per Paragraph 8.2(g) of the Foreign Trade Policy (FTP), the supply of goods to power projects and refineries under procedure for International Competitive Bidding are qualified as "deemed export". Paragraph 8.3 of FTP provides for various benefits available to the deemed exports including exemption from Terminal Excise Duty

(TED) where supplies are made against International Competitive Bidding (ICB) vide Clause (c) of Paragraph 8.3. It also provides for refund of terminal excise duty in other cases. For ready reference, Paragraph 8.3(c) of the Foreign Trade Policy may be reproduced hereunder:

“8.3(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 Authorisation if such manufacturer, in turn, supplies the product(s) to an ultimate exporter.”

8. It is not in dispute that the supplies made by the writ petitioner to NTPC were under ICB and therefore the supplies are exempted from payment of TED. However, the writ petitioner had paid the excise duty and thereafter made a claim for refund of the excise duty paid. The application for refund was purportedly filed under Paragraph 8.3(c) of the FTP, 2009-2014.

9. W.P. No.1331/2015 was filed on the basis of certain file notings made on the application of the writ petitioner to the effect that the application for refund was not maintainable. Having taken note of the fact that no order was passed rejecting the claim for refund but the prayer in the writ petition was to set aside the file notings made by the Joint Director General of Foreign Trade which were admittedly not communicated, the learned Single Judge held that the interference by this court is not warranted till rejection of the writ petitioner's claim for refund is formally communicated. Therefore, the learned Single

Judge disposed of the writ petition with a direction to DGFT to pass a suitable order within two weeks. However, certain observations were made by the learned Single Judge in Paragraphs 16 and 17 of the order with regard to the rival contentions of the parties and in Paragraph 19 Zonal DGFT was directed to examine the case of the writ petitioner keeping in mind the said observations and the judgment of this Court titled ***Kondoi Metal Powders Mfg. Pvt. Ltd. v. Union of India & Ors., W.P.(C) NO.5160/2013 dated 11.02.2014*** and the judgment of the High Court of Gujarat in ***Spl.Civil Appn.No.11031/2013*** titled ***M/s Alstom India Ltd. v. Union of India & Ors.; 2014 (301) ELT 446.*** Paragraphs 16 to 19 of the order of the learned Single Judge dated 11.02.2015 read as under:-

“16. Insofar as prayer (b) is concerned, which pertains to the applicability of circular dated 15.03.2013, according to me, the said circular does not need to be struck down. The circular is based on an administrative interpretation of the FTP. The FTP, according to me, is clear, that where exemption has been availed of, no refund is payable to such an applicant.

17. As indicated above, the common case of parties before me, is that, exemption was not availed of by the petitioner, instead the petitioner ended paying TED. Therefore, the petitioner had two options: First, to seek refund of the Excise Duty from the Excise Department. Second to seek refund from the respondent herein. The petitioner has chosen the latter. The FTP, as it then existed, did not de-bar the petitioner from seeking a refund from one of the two departments, subject to fulfilment of other conditions.

18. In view of this position, I do not see any necessity of dealing with the circular dated 15.3.2013.

19. Keeping in mind the foregoing discussion and the judgments referred to above, respondent No.3, will examine the case of the petitioner and pass a suitable order thereafter.”

10. As stated above, in pursuance of the order of this Court in W.P. No.1331/2015, DGFT passed the order dated 24.02.2015 rejecting the claim of the writ petitioner for refund of the TED stating that in view of the amended FTP exempted categories of supplies are not eligible for refund of the TED paid. Challenging the said order, the writ petitioner filed W.P. No.2344/2015 and the learned Single Judge by order dated 11.03.2015 set aside the rejection order dated 24.02.2015 and directed refund of TED to the writ petitioner within two weeks.

11. It is submitted by Shri Sanjay Jain, learned ASG appearing for the appellants that Paragraph 8.3(c) of Foreign Trade Policy provides for both exemption of TED and refund of TED as applicable for different types of cases. It is sought to be explained that refund is allowed only where supplies were not made against ICB as clarified in the circular dated 15.03.2013 issued by DGFT. It is further submitted that the FTD does not permit an exporter to make a choice on the method of seeking benefit regarding TED. In other words, the contention of the learned ASG is that it is not permissible to an exporter who paid the TED for supplies made against ICB to claim refund by making an application under Paragraph 8.3(c) of FTP.

12. Pointing out that the writ petitioner had paid the excise duty through CENVAT Credit Account, the learned ASG vehemently contended that the refund sought to be claimed by the petitioner under FTP is to circumvent the provisions of CENVAT Credit Rules, 2004. He also submitted that refund of CENVAT Credit is not permissible for “deemed exports” under FTP since “deemed exports” do not come within the definition of exports under CENVAT Credit Rules.

13. The learned counsel for the respondent/the writ petitioner raised a preliminary objection that the appellants are barred from urging new grounds for the first time in the present appeals. It is submitted by the learned counsel that none of the grounds urged by the learned ASG, particularly, the ground that the refund is impermissible under law since the respondent had paid the excise duty through CENVAT Credit, were urged in the writ proceedings before the learned Single Judge nor before the statutory authorities before whom the claim for refund was made by the writ petitioner. It is also contended that in the light of the specific finding recorded by the learned Single Judge that the petitioner who had not availed of exemption from TED is entitled for refund, it is not permissible for the appellants to go beyond the said finding and take a completely new ground to reject the petitioner’s claim for refund. In support of the said submission, learned counsel placed reliance upon various decisions including *Eklara China Clay Works and Three Ors. v. Ashwin & Co. and Three Ors.*, AIR 1976 Delhi 283; *Delhi Development Authority v. Shyama Prasad Mukherjee Park Holders Welfare Association & Ors.* 75 (1998) DLT 169; *J.K Cotton Spinning & Weaving Mills Co. Ltd. v. CCE* 1998 (99) ELT 8 (SC); *National Insurance Co. Ltd. v. Smt.Saroj & Ors.*

(2009) 13 SCC 508; Kadi Municipality v. New Chhotalal Mills Company Ltd. AIR 1965 Guj. 293; M.S.Gill v. Chief Election Commissioner, (1978) 1 SCC 405; Gem Sanitary Appliances Pvt. Ltd. v. Chief Commissioner Income Tax Delhi – IV & Ors. (2012) 342 ITR 238 (Delhi); Oryx Fisheries Private Ltd. v. Union of India 2011 (266) ELT 422 (S.C.)

14. On merits, it is contended by the learned counsel that refund cannot be held to be impermissible under law since either FTP or the Foreign Trade (Development and Regulation) Act, 1992 (for short ‘the FTDR Act’) does not expressly prohibit refund of TED on the ground that the excise duty has been paid through CENVAT Credit Account. In support of the said submission, the learned counsel relied upon ***Commissioner of Income Tax v. Nufoam Industries, (2001) 252 ITR 697 Gujarat***. Placing reliance upon ***Mohd. Ali Khan v. CWT, AIR 1997 SC 1165***, the learned counsel further contended that since the legislative intent to refund the TED in respect of the exempted supplies is clear from the language of Para 8.3(c) of the FTP, the appellants are bound by the same and the restrictions which have not been provided in the FTP cannot be read into.

15. We have given our thoughtful consideration to the rival submissions made on behalf of the parties. At the cost of repetition, it may be stated that the fact that the supplies that were made by the writ petitioner to NTPC against ICB are exempted from excise duty under the Central Excise Duty, 1944 is not in dispute. It is also not in dispute that similar exemption is provided under Paragraph 8.3(c) of FTP for the supplies made against ICB. However, the writ petitioner had not availed the exemption and the supplies were made to NTPC on

payment of TED. Subsequently, the writ petitioner claimed refund of the TED paid and made an application under Paragraph 8.3(c) of FTP. During the process of his application, certain file notings were made that the application for refund was not maintainable and even before any order of rejection was passed, the writ petitioner approached this court. Though the learned Single Judge had rightly held that the interference at that stage is not warranted, certain observations were made interpreting the purport of Paragraph 8.3(c) of FTP and the DGFT was directed to examine the case of the writ petitioner keeping in mind the said observations.

16. This procedure adopted by the learned Single Judge appears to be fallacious in the light of the well settled principle of law that the Court cannot direct the statutory authority to exercise the discretion in a particular manner. As held in *U.P.State Road Transport Corporation & Anr. v. Mohd. Ismail & Ors.*, (1991) 3 SCC 239, the Court cannot dictate the decision of the statutory authority that ought to be made in exercise of discretion in a given case but the Court can only command the statutory authority by a writ of mandamus to perform its duty by exercising the discretion according to law. Therefore, we are of the view that having held that the interference of the Court is not warranted in the absence of an order rejecting the claim of the writ petitioner for refund, the learned Single Judge ought not to have directed DGFT to pass an order keeping in mind the observations made therein.

17. It is also relevant to note that under Section 6(2) of the FTDR Act, 1992 the Director General of Foreign Trade is made responsible for carrying out the policy meaning thereby that the dispute if any with

regard to implementation of the policy has to be resolved/clarified by DGFT. In the light of the power expressly conferred by the statute for carrying out the FTP, it appears to us that the question whether TED paid for the supplies made against ICB, i.e., an exempted item, can be refunded or not is a matter which requires consideration by the DGFT in accordance with law on proper interpretation of the provisions of the FTP. No doubt, the decision taken by the DGFT is amenable to judicial review, however, even before a decision is taken by the DGFT, in our considered opinion, the learned Single Judge ought not to have directed the statutory authority that the decision be taken in a particular manner.

18. Yet another aspect we have observed is that W.P.(C)No.1331/2015 was disposed of at the threshold in the absence of the counter. It is pointed out by the learned counsel for the writ petitioner/respondent before us that the counsel for the appellants himself opted to argue the petition without counter on the basis of the material placed on record. Thus, it is contended that it is not open to the appellants to urge new grounds at the appellate stage.

19. We found that in both the orders impugned in the present appeals it was recorded that the counsel for the respondents/appellants herein expressed his willingness to argue the matter on the basis of the material placed on record. There can be no dispute that the parties are bound by the statements made on their behalf by the counsel engaged by them. However, in the facts and circumstances of the case, we are unable to hold that the appellants are precluded from contesting the entitlement of the writ petitioner to claim refund on the grounds urged in the appeals. It may be noted that the contentions advanced by the

appellants have nothing to do with the facts but the whole controversy is with regard to interpretation of the provisions of the statutory policy.

20. As mentioned above, the specific case of the appellants is that refund under Paragraph 8.3 (c) of FTP is not available at all for supplies made against ICB. In the case of supplies made against ICB, according to the appellants, the TED is exempted and therefore an exporter may avail the benefit of exemption while making the supplies but he cannot claim refund on payment of TED. It is thus contended by the appellants that the writ petitioner who failed to avail the exemption for the supplies made against ICB is not eligible to claim refund under FTP. We are of the opinion that the issue raised being a pure question of law, the appellants cannot be precluded from urging the same in the Appeal merely on the ground that they failed to urge it in the writ proceedings.

21. It is also relevant to note that the writ petitioner has not disputed the fact that the TED against the exempted supplies was paid by availing CENVAT Credit Account in terms of the CENVAT Credit Rules, 2004 made by the Central Government in exercise of the powers conferred by Section 37 of the Central Excise Act. The entitlement of an exporter who made the supplies availing CENVAT Credit Account to claim refund under Paragraph 8.3(c) of FTP, according to us needs deeper consideration on proper appreciation of the provisions of the CENVAT Credit Rules vis-a-vis the FTP. It would be appropriate that such exercise, in the first instance, is allowed to be made by the competent statutory authority.

22. For the aforesaid reasons, we are constrained to interfere with the orders under appeal. Accordingly, both the order dated 11.02.2015 in W.P. No.1331/2015 and the order dated 11.03.2015 in W.P. No.2344/2015 are set aside. Consequently, the order of the DGFT dated 24.02.2015 which was passed in compliance of the directions in W.P.(C) No.1331/2015 shall also stand set aside. The DGFT will now consider the application of the writ petitioner for refund in terms of the provisions of the FTP, 2009-2014 and pass an appropriate order in accordance with law. Such exercise shall be made within six weeks from today after giving an opportunity of being heard to the writ petitioner. In case the application for refund has been returned to the writ petitioner pursuant to the order dated 24.02.2015, the same be re-submitted by the writ petitioner within one week from today.

23. Both the appeals are accordingly disposed of. There shall be no order as to costs.

CHIEF JUSTICE

JAYANT NATH, J

JULY 28, 2015

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