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

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DECIDED ON: 28.11.2016

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W.P. (C) 6064/2000

M/S. MALANA POWER CO.LTD.

..... Appellants

Through: Mr. Manish Kumar with Mr. Piyush
Kaushik, Advocates.

Versus

DIR. GENERAL OF FOREIGN TRADE (POLICY) & ORS.

..... Respondents

Through: Mr. Kirtimaan Singh, CGSC for Resp-
1/DGFT with Mr. Karan Jain, Advocate.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

S.RAVINDRA BHAT, J.

1. The petitioner in these proceedings challenges as illegal and arbitrary paragraph 10.11 of the Hand Book of Procedure notified for the period 1.4.1999-31.03.2000 inasmuch as it denies the benefit of refund of terminal excise duty in relation to capital goods supplied to power projects; additionally it is urged that the amendment is *ultra vires* provisions of the Foreign Trade (Development and Regulation) Act, 1992 (hereafter referred to as "Act").

2. Under Section 5 of the Act, the Central Government is empowered to notify the Export Import Policy ("ExIm Policy"). Traditionally, the Central Government has been resorting to this power and notifying Export Import

Policies for a block period of 5 years each. The policy (hereafter referred to as "ExIm Policy") was published on 31.03.1997 for the period 1997-2002. It was amended on 1.4.1999. One of the amendments in Chapter 2 defined what are deemed exports as those transactions in which goods supplied do not leave the country (paragraph 10.1). Paragraph 10.2 defined the categories for such deemed exports. Paragraph 10.2 (g) included the category of supply of goods to the Power, Oil and Gas sector including Refineries not covered in (f). One of the benefits available under paragraph 10 for deemed exports was terminal excise duty refund [paragraph 10.3 (c)]. The paragraph 4.11 of the policy - effective for 1999-2000 is reproduced below: -

"Procedure

4.11 The Director General of Foreign Trade may, in any case or class of cases, specify the procedure to be followed by an exporter or importer or by any licensing, competent or other authority for the purpose of implementing the provisions of the Act, the Rules and Orders made thereunder and this Policy. Such procedures shall be included in the Handbook (Vo.I), Handbook (Vol.2) and ITC (HC) Classifications of Export and Import Items, and published by means of a Public Notice. Such procedures may, in like manner, be amended from time to time".

3. Exercising its powers under paragraph 4.11 of the policy, the first respondent, i.e., Director General of Foreign Trade (DGFT) by public notice dated 22.4.1999 further amended paragraph 10.11 to read as follows: -

"10.11 The supply of capital goods alone to the power projects in terms of paragraph 10.2 (g) shall be entitled for deemed export benefits provided the same is certified by the Central Electricity Authority and the International Competitive Bidding procedures have been followed for supply of such capital goods to the power

projects. The domestic supplier shall be eligible for the benefits given in paragraphs 10.3(c) and (d) only."

4. On 26.4.1999, the petitioner issued a letter of intent to the third respondent Bharat Heavy Electricals Limited (BHEL) for supply of capital goods for manufacture by it in India to supply to its (the petitioner's) power projects. It is urged that the petitioner took into account while considering the competitive bids received. The fact that BHEL was entitled to claim benefit of deemed export and was entitled to refund of terminal excise duty resulting in reduction in the sale price of the goods to the petitioner. On 31.3.2000, the category of deemed exports and what they were eligible to was amended to read as follows: -

"10.2 The following categories of supply of goods by the main/sub-contractors shall be regarded as "deemed Exports" under this Policy, provided the goods are manufactured in India:

- (a) supply of goods against Advance Licence/DFRC under the Duty Exemption/Remission Scheme;*
- (b) supply of goods to Export Oriented Units (EOUs) or units located in Export Processing Zones (EPZs) or Special Economic Zones (SEZs) or Software Technology Parks (STPs) or to Electronic Hardware Technology Parks (EHTPs) or to Electronic Hardware Technology Parks (EHTPs);*
- (c) supply of capital goods to holders of licences under the Export Promotion Capital Goods (EPCG) Scheme;*
- (d) supply of goods to projects financed by multilateral or bilateral agencies/funds as notified by the Department of Economic Affairs, Ministry of Finance under International Competitive Bidding in accordance with the procedures of those agencies/funds, where the*

legal agreements provide for tender evaluation without including the customs duty;

(e) supply of capital goods, including in unassembled/disassembled condition as well as plants, machinery, accessories, tools, dies and such goods which are used for installation purposes till the stage of commercial production and spares to the extent of 10% of the FOR value to fertiliser plants;

(f) supply of goods to any project or purpose in respect of which the Ministry of Finance, by a notification, permits the import of such goods at zero customs duty coupled with the extension of benefits under this chapter to domestic supplies;

(g) supply of goods to the power and refineries not covered in (f) above and coal, hydrocarbon, rail, road, port, civil aviation, bridges and other infrastructure projects provided minimum specific investment is Rs.100 crores or more;

(h) supply of marine freight containers by 100% EOU (Domestic freight containers-manufacturers) provided the said containers are exported out of India within 6 months or such further period as permitted by the Customs; and

(i) supply to projects funded by UN agencies.

The benefits of deemed exports shall be available under paragraph (d) (e) (f) and (g) only if the supply is made under the procedure of International Competitive Bidding (ICB).

10.3 Deemed exports shall be eligible for the following benefits in respect of manufacture and supply of goods qualifying as deemed exports;

- (a) Advance Licence for Intermediate supply/deemed export;*
- (b) Deemed Exports Drawback;*
- (c) Refund of terminal excise duty."*

5. In the Hand Book of Procedure applicable for period 2000-2001, the benefit of refund of terminal excise duty was omitted. The relevant part of the Hand Book of Procedures applicable for 2000-2001 reads as follows:-

"10.11 The supply of capital goods and spares upto 10% of the FOR value of the capital goods to the power projects in terms of paragraphs 10.2(g) shall be entitled for deemed export benefits provided the same is certified by the Central Electricity Authority and the International Competitive Bidding Procedures have been followed, at IPP stage, for supply of such capital goods to the power projects. The domestic supplier shall be eligible for the benefits listed in paragraphs 10.3 (a) or (b) of the Policy. The benefits of deemed exports shall also be available for renovation/modernization of power plants.

However, supply of goods required for setting up of any mega power projects specified in S.No.338 of Department of Revenue notification No.16/2000 dated 1/3/2000, as amended from time to time, shall be eligible for deemed exports benefits as mentioned in paragraph 10.3 (a) (b) and (c) of the policy, if such mega power project is - (a) an inter state thermal plant of a capacity of 1000 MW or more; or (b) an inter-state hydel power plant of a capacity of 500 MW or more - as certified by an officer not below the rank of a Joint Secretary, Government of India in the Ministry of Power.

Supplies under paragraph 10.2 (g) of the Policy to the new refineries being set up during the Ninth plan period, shall be entitled for deemed export benefits provided items and equipments are covered under S.No.204 of Customs Notification No.16/2000 dated 1.3.2000, as amended from time to time. The domestic supplier shall be eligible for the benefits given in paragraph 10.3 (a) or (b) of the Policy.

10.11A. The supplies of goods to projects funded by UN agencies shall be eligible for the benefits given in paragraph 10.3(a) or (b) of the Policy."

6. It is stated that though the petitioner remained eligible under the original and the amended policy, the BHEL was apparently informed by DGFT that supply of goods to the power sectors would be ineligible for deemed export benefits i.e. terminal excise duty refund under paragraph 10.3(c) by virtue of paragraph 10.11 of the Hand Book of Procedure which did not enable such benefit or refund. In view of this communication, the BHEL insisted - in a letter of 28.6.2000 - upon the payment of terminal excise duty. The petitioner submits that it repeatedly sought clarification from the DGFT but was unsuccessful in eliciting any appropriate response. In this premise, it is urged that the withdrawal of terminal excise duty refund benefit is both beyond the power conferred under paragraph 4.11 of the ExIm Policy and Section 5 of the Act. It is besides urged that such alteration is arbitrary and violative of the principle of promissory estoppel which is part of article 14 of the Constitution of India.

7. Learned counsel Mr. Manish Kumar besides reiterating the grounds argued that the judgment of the Supreme Court in *Director General of Foreign Trade and Ors. v. Kanak Exports and Ors.* (2016) 2 SCC 226 is conclusive in this regard. Learned counsel particularly highlighted paragraph 97, 98 & 99 of the said judgment which reads as follows: -

97. Now, we advert to the issue pertaining to Notification dated April 28, 2004. The question here is as to:

Whether subsequent Notification dated April 21, 2004, read with Notification dated April 28, 2004, seeking to exclude the export performance related to class of goods covered by para 2 of the Public Notice dated April 28, 2004, by way of Notes 6 to para 3.7.2.1 of the EXIM Policy, would relate back to the date of Public

Notice dated January 28, 2004 or is to be given prospective effect from the date of issuance of Notifications on April 21 and 23, 2004.

98. It is no doubt that the Central Government has the power to amend the Policy and, therefore, it could do so vide Notifications dated April 21 and 23, 2004. The only question is as to whether these Notifications are bad in law on the ground that they seek to apply retrospectively.

99. We start with the premise that there was complete justification for excluding the four items insofar as grant of benefit under scheme is concerned. The Union of India has been able to demonstrate the same in full measure. This aspect has already been discussed in detail at the outset itself."

8. The Central Government in its counter affidavit as well as through the counsel appearing on its behalf highlighted that in the present case, the letter of intent was issued on by the petitioner 26.4.1999 and that the deemed benefit under paragraph 10.2 of the ExIm policy of 1997-2002 relating to the power sector enumerated in paragraph 10.11 of the Hand Book of Procedure was corrected by a public notice dated 22.4.1999 to read as follows: -

"The supply of capital goods alone to the power projects in terms of paragraph 10.2 (g) shall be entitled for deemed export benefits provided the same is certified by the Central Electricity Authority and the International Competitive Bidding procedures have been followed for supply of such capital goods to the power projects. The domestic supplier shall be eligible for the benefits given in paragraphs 10.3(c) and (d) only."

9. Explaining that under the deemed export chapter, the ExIm policy merely defined the term "deemed export" and further categorized and enumerated what shall be regarded as deemed export and what set of benefits are to be available for what category of exports, it is stated that the sector specific benefits have to be spelt out because the nature of

transactions are co-related with the duty. It is further stated that the five years policy was announced in 1992 for the first time; the second five-year policy was announced in 1997. Both these contain certain basic policy elements and detailed provisions regarding entitlement of sector specific benefits spelt out in the Hand Book of Procedures of 1997-2002. The Hand Book, therefore, had to be read as part of the policy effectuating it. The Deemed Export Promotion Benefit Scheme (DEPB) is given in the policy but its rates are calculated on the basis of the customs duty available on inputs enumerated in Appendix 28 of the Hand Book. The policy defines for duty neutralization but that does not imply that each and every project gets DEPB benefits. Only those listed in the Appendix apply. For instance REP license through the scheme for gems and jewellery is given in the policy but REP rates are given in Appendix 30 of the Handbook. It is submitted that deemed export benefits are co-related with the incidence of duty. In this regard, it is stated that since under the policy three benefits of deemed exports were given, i.e., 10.3 (a) (b) and (c) to supplies against advance intermediate license and for supplies of EoUs/EPZ units and further since supplies against advance intermediate license were exempted from terminal excise duty and supplies to EOUs/EPZ as against CT-3 forms, they were disentitled for terminal excise duty refund.

10. Learned counsel highlights that if the benefit is to be given to the petitioner, the refund would flow despite no duty having been paid by the supplier. Learned counsel relied upon the terms of the counter affidavit to say that this will have grave impact on public interest inasmuch as hundreds of crores of rupees would become eligible for refund irrespective of whether the unit did or did not suffer any duty liability.

11. The short question involved, therefore, is whether paragraph 10.11 of the Hand Book of Procedures to the extent it is challenged is to be declared as arbitrary and *ultra vires*. The previous discussion would show that the letter of intent in this case was issued on 26.4.1999. The definition of deemed export applied to supplies made to the Power, Oil and Gas sectors including Refineries. Paragraph 10.3 (c) stated that refund of terminal duty was a benefit available to deemed exports. The Notification dated 22.4.1999 - it is also evident - had for the first time amended the Hand Book of Procedures and included that domestic suppliers would be eligible for benefits given in paragraph 10.3 (c) and (d) only with further stipulation that refund of terminal excise duty under paragraph (c) would be restricted to the amount that would have been payable as excise @ 3%. It reads as under: -

"5. The paragraph 10.11 shall be corrected to read as under: -

"The supply of capital goods alone to the power projects in terms of paragraph 10.2 (g) shall be entitled for deemed export benefits provided the same is certified by the Central Electricity Authority and the International Competitive Bidding procedures have been followed for supply of such capital goods to the power projects. The domestic supplier shall be eligible for the benefits given in paragraphs 10.3(c) and (d) only.

Supplies under paragraph 10.2 (g) of the Policy to the Oil and Gas sectors (excluding refineries) shall be entitled for deemed export benefits provided items of such supplies are covered under customs notification 11/97 dt.1.3.97 (S.No.152), as amended from time to time for import of on-shore and off-shore Oil and Gas explorations and exploration project and such supplies are made under ICB or limited global tender, without reference to bid evaluation methodology. The domestic supplier shall be eligible for the benefits given in paragraph 10.3 (c) and (d) only with further stipulation that the refund of Terminal Excise Duty under paragraph 10.3 (c) would

be restricted to the amount that would have been payable as excise @ 3%.

Supplies under paragraph 10.2 (g) of the policy to the new refineries being set up during the Ninth plan period, shall be entitled for deemed export benefits provided items and equipments are covered under customs notification No.55/97 dt.13.6.97, as amended from time to time and such supplies are made under ICB or limited global tender without referring to bid evaluation methodology. The domestic supplier shall be eligible for the benefits given in paragraph 10.3 (a) (b) and (d) of the policy."

12. It is quite clear that firstly the eligibility - called entitlement by the petitioner to the refund and terminal duty as a deemed export benefit was introduced for the first time through an amendment of the Hand Book of Procedures. Thus, the question of its being *ultra vires* the Act or the Policy would not arise. Secondly, paragraph 10.11 which spelt out the eligibility to receive refund of terminal excise duty itself established the linkage i.e. payment of excise duty as an existing condition and further restricted the quantum to 3%.

13. In this case, the question is whether the withdrawal of benefit under 10.3, i.e., of refund of terminal excise duty is arbitrary or violates the principle of promissory estoppel. As noticed earlier, the linkage between payment of excise by the supplier and entitlement of the deemed export for duty refund was clearly established even before the entering into of contractual bargain and issuance of the letter of intent. In other words when the petitioner issued the letter of intent on 26.4.1999, it was fully aware of the fact that the benefit was introduced on 22.4.1999 and further that this

was conditioned upon the existence of the excise duty incidence that could be refunded to the tune of 3%.

14. The Central Government's counter affidavit recounts that the withdrawal of terminal excise duty refund benefits arose because of the report of the Committee. The Committee has stated that imports for a particular sector were exempted for basic custom duty. The corresponding suppliers of domestic goods too had to be provided duty free access to raw materials needed for the manufacture of such goods in the form of Special Imprest License. Alternatively, the domestic supplier will be able to take duty drawback on the duties paid. If import of the goods were exempted for payment of additional duty then the domestic supplier was entitled to refund of terminal excise duty. On the basis of these principles, it was decided that if any additional custom duty was imposed, the terminal excise duty refund had to be denied. The Committee was informed by the Department of Revenue that in the power sector, countervailing duty had been increased from 0 to 16 % and, therefore, terminal excise duty could not be given. In the present case, therefore, since there was a justification and even a strong public interest element in the denial of terminal excise duty benefits, the question of its being arbitrary does not arise.

15. So far as the question of reliance on *Kanak Exports (supra)* goes, the Court is of the opinion that the analogy drawn between the kind of amendment involved in that case and what we are concerned with here is inapt.

16. The Supreme Court has repeatedly held that whilst the doctrine of promissory estoppel bars the State or Government agencies from setting up imperative and necessity as defense, nevertheless if on the facts it can be

shown that whole promissor to its word would be inequitable having regard to the larger public interest, such estoppel cannot be a ground for claim (see *Shree Sidhballi Steels Ltd. v. State of Uttar Pradesh & Ors.* (2011) 3 SCC 193; *State of Rajasthan v. J.K. Udyog Ltd.* (2004) 7 SCC 673 and *Pawan Alloys & Casting Pvt. Ltd. v. Uttar Pradesh State Electricity Board*, (1997) 7 SCC 251. In the present case too, this Court is of the opinion that since the duty refund eligibility was linked to the payment of duty, to offset the competitive additions that imported goods would have over domestically manufactured ones, the parity achieved by another policy compelled the government to amend the Hand Book of Procedures in the manner it did. There is clearly neither any arbitrariness nor violation of doctrine of promissory estoppel.

17. For the forgoing reasons, the Court is of the opinion that on merits, the writ petition has to fail; it is accordingly dismissed without any order as to costs.

S. RAVINDRA BHAT
(JUDGE)

DEEPA SHARMA
(JUDGE)

NOVEMBER 28, 2016
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