

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

Judgment reserved on: 06.02.2018
Judgment pronounced on: 12.07.2018

+ W.P.(C) No.6151/2016

M/S. MOTHERSON SUMI ELECTRIC WIRESPetitioner

Through: Mr. V. Lakshmi Kumaran with Mr.
Yogendra Aldak and Mr. Karan
Sachdev, Advocate.

versus

UNION OF INDIA & ORS.Respondents

Through: Ms. Shiva Laxmi, CGSC with Mr.
Sriram Krishna, Ms. Mahima Singh
and Mr. Siddharth Singh, Advocate.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J.

1. The short issue which arises for consideration in the instant matter is: whether the petitioner who has manufactured and supplied goods (after payment of excise duty via the CENVAT credit route) to a 100% Export Oriented Unit (EOU) is entitled to claim refund of Terminal Excise Duty (TED)?

2. In order to adjudicate upon the aforementioned issue the following broad facts are required to be noticed: -

2.1 The petitioner is a division of a company by the name of Motherson Sumi Systems Ltd. (MSSL). The petitioner is in the business of manufacturing excisable goods such as PVC insulated wires and cables. Over the years, the petitioner has been supplying these goods to other divisions of MSSL, which have a status of a 100% EOU. These goods are supplied by the petitioner on payment of excise duty, *albeit*, via CENVAT credit route. Since, according to the petitioner, supplies made to EOUs are classified as deemed export under the Foreign Trade Policy 2009-2014 (in short “FTP 2009-2014”) — for supplies made for the quarter April, 2011 to June, 2011 and July 2011 to September 2011 applications for refund of TED were preferred with the respondents. Likewise, for the quarter October, 2011 to December, 2011 an application was made for refund of TED, which was received by respondent no.3 on 12.12.2012.

2.2 Interestingly, insofar as the earlier two applications were concerned, refund of TED was allowed by the Policy Interpretation Committee (PIC) and/or Policy Relaxation Committee (PRC) vide its order dated 23.07.2014. Thus, for the quarter April, 2011 to June, 2011, the petitioner obtained a refund of Rs.20,21,241/- while for the July, 2011 to September, 2011 quarter, the petitioner, was refunded TED amounting to Rs.96,95,182/-.

2.3 However, curiously, for the period October, 2011 to December, 2011 the request made by the petitioner for refund of TED was rejected by respondent no.3. The petitioner had sought refund of TED amounting Rs.83,64,802.86; an amount which was paid by it at the time of clearance of goods. The rejection of the petitioner’s application by respondent no. 3

was based on the decision taken by the PRC/ PIC at its meeting held on 04.12.2012.

2.4 In view of the fact that the PRC had at its meeting held on 09.09.2014, cleared its request for refund of TED against supply of goods made to 100% EOUs, an application was filed with respondent no.4 on 23.09.2014 for refund of TED for October, 2011 to December, 2011. Reference in this application was made to the decision taken in the PRC meeting on 09.09.2014.

2.5 The record shows that the following objection by way of an endorsement was made on the petitioner's application itself, whereby, in effect, the petitioner's request for refund of TED was rejected: -

“Since PRC has cleared only those cases which have been admitted by Court and as per decision of judgment of Delhi High Court. As per courts order, only two cases have to be considered for refund of TED”

2.6 The petitioner, thereafter, on 11.10.2014 escalated the matter to the Chairperson PRC for processing its demand for refund of TED for the subject period and take in its earlier application based it on the decision of the PIC/ PRC dated 09.09.2014.

2.7 In response thereto, on 05.12.2014, respondent no.4 wrote to the petitioner. By virtue of this communication, certain information/ documents were sought from the petitioner.

2.8 The petitioner vide communication dated 10.12.2014, furnished the relevant information to respondent no.4.

2.9 It appears that there was no movement in the matter, which propelled the petitioner to send reminders to respondent no.3 on 19.03.2015 and 16.04.2015.

3. The record shows that, resultantly, on 17.04.2015, respondent no.4 forwarded the petitioner's claim for refund of TED to respondent no.3 for necessary action.

3.1 Once again, the petitioner, after waiting for nearly 7 months, took up the matter with respondent no.5 by sending a reminder on 05.11.2015 for refund of TED.

3.2 The petitioner's request for refund was declined by respondent no.3 vide communication dated 1/2.12.2015. However, while indicating to the petitioner that its claim for refund of TED was not admissible in view of the provisions of paragraph 7.04 of the Foreign Trade Policy (FTP), it was advised to file a reply within a period of 90 days from the date of issuance of the said communication.

3.3 The petitioner being aggrieved filed a writ petition in this Court which was numbered as W.P.(C) No.123/2016. This writ petition was, however, dismissed as withdrawn on 08.01.2016 to enable the petitioner to file a reply to the communication dated 1/2.12.2015. The Court while dismissing the petition observed that the authority concerned should consider the reply and pass an appropriate order as expeditiously as possible. The petitioner was also given the liberty to challenge the order, if any, passed by the concerned authority, in accordance with law.

3.4 Accordingly, the petitioner filed a reply dated 08.02.2016 with respondent no.3. The petitioner was also granted a personal hearing by respondent no.3 on 15.03.2016. Thereupon, respondent no.3 passed the impugned order dated 21.04.2016, whereby, the petitioner's request for refund of TED was declined. The reasons given for rejecting the petitioner's request for refund of TED qua goods supplied to a 100% EOUs were briefly as follows: -

- i) Firstly, since, *ab initio* exemption from excise duty was available *vis-à-vis* goods supplied to EOUs in terms of policy Circular No.16 (RE-2012/2009-2014) dated 15.03.2013, no refund of TED could be granted.
- ii) Secondly, the DGFT had clarified vide its letter dated 17.04.2015 that where a domestic supplier supplied goods to an EOU on which duty had been paid via the CENVAT credit route, no refund was permissible.

4. Being aggrieved, the petitioner has approached this Court, as indicated above, via the instant writ petition. Upon notice being issued in the writ petition on 20.07.2016, a common counter affidavit was filed on behalf of the respondents. The record shows that no substantial hearings were held in the matter till 30.01.2018. On this date, though, after I heard arguments for sometime, it emerged that the Government of India, Ministry of Commerce and Industries, Department of Commerce, DGFT had taken out a trade notice No.17 of 2016, dated 22.09.2016, which had a bearing on the matter.

4.1 Having been made cognizant of the same, the respondents' counsel sought accommodation to obtain instructions *vis-à-vis* the said trade notice. The matter was posted for further proceedings on 06.02.2018, when arguments were heard and judgment was reserved. Counsel for the parties were given time to file written submissions.

5. Since then, written submissions have been filed by both sides. The petitioner, during the course of hearing, was represented by Mr. V. Lakshmi Kumaran assisted by Mr. Yogendra Aldak and Mr. Karan Sachdev. The respondents, on the other hand, were represented by Ms. Shiva Laxmi, Central Government Standing Counsel assisted by Mr. Sriram Krishna, Ms. Mahima Singh and Mr. Siddharth Singh.

Submissions of counsel

6. On behalf of the petitioner, briefly, the following arguments were advanced: -

- i) The petitioner, admittedly, having supplied goods to a 100% EOU, which were, supplies not made against International Competitive Bidding (in short "ICB") mechanism, was eligible to seek refund of TED, being one of the benefits available under FTP 2009-2014.
- ii) That, the supplies made from Domestic Tariff Area (DTA) to EOU is treated as deemed exports, can be gathered upon a perusal of the provisions of paragraph 6.11(a) of the FTP 2009-2014 read with paragraph 6.11(a) and 8.2(b) of FTP

2009-2014. Furthermore, the fact that the petitioner would be entitled, *inter alia*, to a benefit of refund of TED could be gauged from a bare perusal of the contents of paragraph 8.3(c) read with paragraph 8.4 of the very same FTP. In support of the aforesaid submission reliance was placed on the judgment of this Court rendered in *Kandoi Metal Powders Mfg. Co. Pvt. Ltd. v. Union of India*, 2014 (302) E.L.T. 209 (Del.).

- iii) The respondents having granted the petitioner refund of TED for the two quarters of 2011 i.e. April, 2011 to June, 2011 and July, 2011 to September, 2011, could not have denied the refund of TED for the quarter spread over October, 2011 to December, 2011. The respondents were required to adhere to the consistency and not change course midway. In support of this submission reliance was placed on the judgment of the Supreme Court rendered in *Damodar J. Malpani v. CCE*, 2002 (146) E.L.T. 483 (S.C.).
- iv) Paragraph 8.3(c) of the FTP 2009-2014 which provided for refund of TED where supplies were not made against ICB was amended via notification described as M.C. & I (DC) Notification No.4 (RE-2013)/2009-14 dated 18.04.2013 (in short “18.04.2013 Notification”). The said amendment made to paragraph 8.3 of the FTP could not impact refund of TED sought for supplies made prior to that date i.e. for the period spanning between October, 2011 and December, 2011. In

other words, notification dated 18.04.2013 could operate only prospectively.

- v) The reliance placed by the respondents on the policy Circular No.16(RE-2012/2009-2014), dated 15.03.2013, is erroneous, inasmuch as the said circular is, firstly, not consistent with the provisions of paragraph 8.3 read with paragraph 8.4 of FTP 2009-2014 and secondly, the said circular, if at all, can have effect only prospectively. In this behalf, the submission made was that the circular which is beneficial to the assessee can apply retrospectively and that which is oppressive or against the interest of assessee can apply only prospectively. For this proposition, reliance was placed on the judgment of the Supreme Court in *Suchitra Components Ltd. v. Commissioner of Central Excise*, 2008 (11) S.T.R. 430 (S.C.).
- vi) The petitioner, under the extant regime, had the option of either availing an exemption or seeking a refund, and having chosen the latter course, its request for refund could not have been declined. In support of this submission, reliance was placed on the following judgments:
 - a) *HCL Ltd. vs. Collector of Customs*, 2001 (130) E.L.T. 405 (S.C.); and
 - b) *Share Medical Care v. Union of India*, 2007 (209) E.L.T. 321 (S.C.).

- vii) The respondents' contention that because duty was paid utilizing CENVAT credit and, therefore, refund of TED was not available is an unsustainable objection. Reliance with regard to this submission was placed on the judgment of the Supreme Court rendered in *Jayaswal Neco Ltd. vs. Commissioner of Central Excise*, 2015 (322) E.L.T. 587 (S.C.).
- viii) In case refund of TED is denied to the petitioner, it would lead to export of taxes and duty which is contrary to the intent of the provisions of Rule 5 of CENVAT Credit Rules, 2005. The said rule provides for refund of unutilized CENVAT credit. While Rule 18 of the Central Excise Act, 1984 provides for rebate of duty in case of export.
- ix) Lastly, even if it is assumed without admitting that exemption was available on goods supplied by a DTA supplier to an EOU, the collection of duty by the respondents would be without authority of law as it would be contrary to Article 265 of the Constitution.

7. On the other hand, on behalf of respondents the following broad submissions were made: -

- i) The petitioner was not entitled to refund of TED in view of the fact that qua supplies of goods made by it to a 100% EOU, *ab initio* exemption was available from payment of excise duty. In other words, the petitioner was not required to pay excise

duty in the first instance and, therefore, there was no reason for it to first pay duty via the CENVAT credit route, and then, monetise the same by seeking refund of TED. In this behalf, reference was made to paragraphs 6.2(b) and (d) of FTP 2009-2014 which, *inter alia*, provided that EOU could import or procure all types of goods including capital goods from a DTA supplier without payment of duty.

- (i)(a) The fact that goods manufactured in India and supplied from DTA to EOUs were exempt from Central Excise Duty was sought to be emphasized by referring to the provisions of paragraph 6.11(c) of FTP 2009-2014. Furthermore, reliance was also placed in this behalf on the CBEC Circular No.851, dated 03.05.2007. This circular, *inter alia*, provides exemption from payment of excise duty by a DTA supplier of goods upon the EOU furnishing a CT-3 form to a DTA supplier.
- (ii) The fact that TED refund was granted to the petitioner for two quarters would not necessarily lead to a conclusion that the petitioner ought to be granted refund for the third quarter as well. As to why a decision was taken not to grant the petitioner refund for the subsequent quarter, was considered by the respondent no.1 in its meeting held on 17.03.2015. Respondent no.1, for good reason, has declined to accept the request of the petitioner for refund of TED.

- (iii) The policy Circular No.16, dated 15.03.2013, was only clarificatory in nature. The clarification was necessary as persons/ entities who had supplied goods from DTA to 100% EOUs had paid duty on that via the CENVAT credit route and by seeking refund of TED were monetizing the duty against deemed exports whereas, refund of duty in cash was available only against physical-exports.
- (iii)(a) This aspect was reflected in the policy circular No.16 of 15.03.2013 which, *inter alia*, exemplifies the fact that prudent financial management and adherence to discipline, which is its object, would be compromised if refund is provided even in cases where *ab initio* exemption is available.
- (iii)(b) The 2013 amendment notification provided for what was already incorporated in chapter 6 of the FTP 2009-2014, which is, that *ab initio* exemption would be available for supply of goods by a DTA unit to an EOU.
- (iii)(c) Therefore, in that sense, the amendment to paragraph 8.3 was only clarificatory and not retrospective in nature.
- (iv) Furthermore, in support of the respondents' stand reliance was placed on Excise Notification No.22/2003-CE dated 31.03.2003 and Excise Circular No.10/2009-Cus dated 25.02.2009. According to the respondents, a perusal of the said notification would show that goods supplied by the DTA unit to an EOU which was categorized as deemed exports

were exempted from payment of excise duty. The argument was, when *ab initio* exemption from payment of excise duty to facilitate trade and to lessen the burden on the supplier and the EOUs was in place, then it was not understood as to why the petitioner had chosen to pay the duty and then seek refund. In support of their submissions, the respondents chose to rely upon the following decisions: judgment dated 28.07.2015, passed in LPA No.192/2015, titled: *UOI & Ors. v. Alstom India Ltd.* and a common judgment dated 01.08.2016, passed by the Bombay High Court, in W.P.(C) No.2926/2015, titled: *Lupin Limited v. Union of India & Ors.* and W.P.(C) No.2927/2015, titled: *Sandoz Pvt. Ltd. v. UOI and Ors.*

Reasons

8. I have heard learned counsel for the parties and perused the record. According to me, what emerges from the record, briefly, is as follows: -

- i) The petitioner had supplied goods to 100% EOUs after payment of excise duty.
- ii) However, excise duty was paid by the petitioner by taking recourse to the CENVAT credit route.
- iii) The petitioner had filed three separate applications with the Joint Director of Foreign Trade for refund of TED. The period and the amount of refund sought qua each of the applications, as it emanates from the record, is as follows: -

Sl. No.	Period	Amount (in Rs.)
a).	April to June, 2011	20,21,241.00
b).	July to September, 2011	96,95,182.00
c).	October to December, 2011	83,64,802.86

- iv) The applications for April to June, 2011 and July to September, 2011 were rejected, in the first instance, by the licensing authority vide their communication dated 28.12.2012, on the principal ground that the EOU could have received the goods from the petitioner without payment of excise duty, and hence, applications for refund were not maintainable.
- (iv)(a) This conclusion of the licensing authority was based on the decision taken at the PIC meeting held on 04.12.2012. At this meeting, the PIC, *inter alia*, concluded that refund of TED was not available since paragraph 6.11 of FTP 2009-2014 provided that EOU could obtain goods without payment of excise duty and that refund of excise duty was allowed under CENVAT Credit Rules.
- v) Against the said decision, appeals were preferred to the Directorate General of Foreign Trade (DGFT), which were dismissed on 23.08.2013 on the ground that these were not appealable orders under Section 15(1) of Foreign Trade (Development and Regulation) Act, 1992 (“1992 Act”).

- vi) Against this decision the petitioner preferred a writ petition to the High Court. This writ petition was numbered as W.P.(C) No.8160/2013. The said writ petition was disposed of by this Court vide order dated 27.03.2014. This Court remanded the matter to the DGFT to decide the appeal, as according to it, the provisions of Section 15(1) of the 1992 Act were wide enough to entertain an appeal against the order of the original/ licensing authority. Accordingly, vide order dated 23.07.2014, after recording in detail the submissions advanced on behalf of the petitioner, the court directed that the matter be placed before PRC for appropriate orders. Resultantly, the PRC on 22.09.2014 concluded as follows: -

“Decision:

The committee after detailed deliberation on the issue decided to allow refund of TED in light of Hon’ble High Court of Delhi order dated 27.03.2014 passed in the W.P. No.(c)8160 of 2013 and CM Appl 17222/2013 filed by the applicant. RA, however, while granting benefit shall ensure that no CENVAT credit or rebate has been availed by the recipient unit against such supplies.”

- vii) Despite the PRC taking a decision on 09.09.2014 to allow the petitioner’s application for refund of TED for April, 2011 to June, 2011 and July, 2011 to September, 2011, respondent no.4 returned the petitioner’s application for the quarter October, 2011 to December, 2011, which was filed to seek refund of TED amounting to Rs.83,64,802.86 based on an earlier decision of the PRC dated 04.12.2012.

- viii) The petitioner sought to bring this anomaly to the notice of respondent No.3 vide communication dated 23.09.2014. However, on the said application an endorsement was made that PRC's decision dated 09.09.2014 pertains to only those cases qua which writ petition was filed by the petitioner.
- ix) Consequently, the petitioner escalated the matter to the Chairman, PRC vide communication dated 11.10.2014 wherein, *inter alia*, it was pointed out that notification No.4 dated 18.04.2013 could not impact its application for refund of TED for quarter October, 2011 to December, 2011.
- x) Despite information and documents being sought by respondent no.4 vide its communication dated 05.12.2014, which though furnished, did not bear fruit.
- xi) As a result thereof, after several reminders and pursuant to the directions obtained from this Court via another writ petition i.e. W.P.(C) No.123/2016, respondent no.3, ultimately, rejected the petitioner's claim for refund vide the impugned order dated 21.04.2016.

9. Therefore, apart from anything else what emerges from the record is that the PRC's decision is neither consistent nor even handed. Though the petitioner obtained refund of TED for the quarter April, 2011 to June, 2011 and July, 2011 to September, 2011 despite PRC's earlier decision of 04.12.2012, the third application for the quarter October, 2011 to

December, 2011 was rejected despite the facts and circumstances of the case being *pari materia* with other two quarters.

9.1 The argument sought to be put forth on behalf of the respondents' on merits is also unsustainable which I would shortly demonstrate in view of the provisions which obtain in the FTP of 2009-2014.

9.2 Therefore, before I proceed further, let me advert to the relevant provisions of the FTP 2009-2014.

9.3 Chapter 6 of the FTP 2009-2014 pertains to EOUs. Para 6.2(b) of the FTP 2009-2014, on which great emphasis has been placed by the respondents, *inter alia*, provides that an EOU may import and/ or procure from DTA or bonded warehouses in DTA/ International exhibition, held in India, goods which include capital goods, that is, those required for its activities, without payment of duty provided the goods are not prohibited items of import under ITC (HS).

9.4 Para 6.2(d) makes a similar provision for certain specified goods to enable EOU to create a central facility.

9.5 Para 6.11(a) speaks, *inter alia*, about supplies received by a EOU from a DTA being categorized as deemed exports. The said provision goes on to say, explicitly, that the DTA supplier would be eligible for relevant entitlements under Chapter 8 of the FTP 2009-2014. Sub-clause (ii) of clause (c) of paragraph 6.11 of the FTP provides, *inter alia*, that an EOU shall be entitled to exemption from payment of central excise duty on goods procured from a DTA qua goods manufactured in India.

10. Therefore, at this juncture it would be pertinent to quote that relevant provisions of Chapter 8 which deals with deemed exports. I am consciously, at this point, referring to the unamended provisions of Chapter 8 of the FTP. Clause (b) of paragraph 8.2, *inter alia*, provides that goods supplied by the main contractor or a sub-contractor to an EOU will be regarded as deemed exports. Paragraph 8.3 which adverts to the benefits available against deemed exports, and is most crucial for the purposes of this case, is extracted in its entirety hereafter: -

“8.3 Benefits for Deemed Exports

Deemed exports shall be eligible for any/ all of following benefits in respect of manufacture and supply of goods qualifying as deemed exports subject to terms and conditions as in HBP v1: -

- (a) Advance Authorisation/ Advance Authorisation for annual requirement/ DFIA.*
- (b) Deemed Export Drawback.*
- (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.”*

11. A careful perusal of the aforesaid extract of para 8.3, in particular, clause (c) would show that goods which qualify as deemed exports are exempt from TED where supplies are made against ICB. However, where

supplies are not made against ICBs refund of TED is to be given. This fact is reiterated in para 8.4 which speaks about various benefits available to supplier under paras 8.3(a), (b) & (c) to suppliers. Paragraph 8.5 of the FTP 2009-2014 also alludes to the fact that the supply of goods would be eligible for refund of TED in terms of paragraph 8.3(c) of the FTP provided the recipient of the goods does not avail of CENVAT credit or rebate on such goods.

11.1 A declaration to that effect in the prescribed form is required to be filed by the applicant while seeking refund. In other words, the DTA supplier can seek refund only if the EOU has not availed of CENVAT credit or rebate on such goods.

12. As indicated above, paragraph 8.3 of the FTP 2009-2014 was amended vide notification No.4 dated 18.04.2013. For the sake of convenience, the amended para 8.3 of the FTP 2009-2014 is extracted hereafter: -

“8.3 Benefits for Deemed Exports

Deemed exports shall be eligible for any / all of following benefits in respect of manufacture and supply of goods qualifying as deemed exports subject to terms and conditions as in HBP v1:-

- (a) Advance Authorisation/Advance Authorisation for annual requirement/DFIA.*
- (b) Deemed Export Drawback.*
- (c) Refund of terminal excise duty will be given if exemption is not available. Exemption from TED is available to the following categories of supplies:*

(i) Supplies against ICB;

(ii) Supplies of intermediate goods, against invalidation letter, made by an Advance Authorisation holder to another Advance Authorisation holder; and

(iii) Supplies of goods by DTA unit to EOU/EHTP/STP/BTP unit

Thus such categories of supply which are exempt ab initio will not be eligible to receive refund of TED.”

12.1 As would be evident that the issuance of notification No.4 dated 18.04.2013 brought about an amendment in clause (c). The amendment brought about is to the effect that refund of TED would be given only if exemption is not available. Furthermore, exemption from TED was made available, *inter alia*, qua supply of goods by a DTA unit to an EOU. Clearly, the amendment sought to do away with the provision in the unamended clause (c) of para 8.3 of the FTP 2009-2014 which granted exemption from TED only where supplies were made against ICB, with an added provision for grant of refund of TED in all other cases.

13. Therefore, as rightly appreciated by the PRC in its decision dated 09.09.2014, the petitioner's claim for refund of TED for the period of April, 2011 to June, 2011 as also for the quarter July, 2011 to September, 2011 quarter was sustained as the aforementioned amendment had not kicked in.

14. Thus, by the same measure, PRC and the respondent no.3 should have acceded to the petitioner's request for grant of TED for the quarter October, 2011 to December, 2011 as it was a period which fell prior to the issuance of the amendment notification No.4 dated 18.04.2013. Circular

No.16, dated 15.03.2013, which is, portrayed as clarificatory in nature, to my mind, cannot impact the application(s) for refund pertaining to the period prior to 18.04.2013.

14.1 Importantly, it needs to be emphasized that the petitioner's entitlement to refund of TED will be governed by the relevant provisions of the FTP as obtaining in the relevant period for which the claim was made. The fact that the petitioner could or could not get refund under the CENVAT Credit Rules or under the provisions of the Central Excise Act is, in my view, not relevant for adjudicating upon the issue at hand. The Court, for adjudicating the issue at hand, is in my opinion, required to look at only the relevant provisions of the FTP.

15. I may also note that the petitioner has contended that it was not possible for it to avail of exemption from Central Excise Duty under the notification No.22/2003-CE, dated 31.03.2003 till such time 100% EOU provides a CT-3 certificate. That being stated, in my opinion, it may not be necessary to deliberate on this aspect of the matter as at the relevant point in time the worst that could be said against the petitioner is that it had available to it two options, first, to claim exemption and second, to pay duty and claim refund. This is, especially so, in view of the fact that in the instant case supplies of goods were made by the petitioner to other divisions of MSSL which had a status of EOUs. The pivotal point is that the FTP 2009-2014 conferred a right on the petitioner, who, admittedly, was a DTA supplier, at the relevant point in time, to seek refund of TED, as the supplies had been made to 100% EOUs, albeit, under a non-ICB route.

15.1 To my mind, the argument that since excise duty was not paid via cash but was paid by utilizing the CENVAT credit route and hence, the petitioner would not be entitled to claim refund is unsustainable as there is no bar in law in paying duty by utilizing CENVAT credit (See paragraph 17 of *Jayaswal Neco Ltd.*).

15.2 For the very same reason, I am not impressed by the argument advanced on behalf of the respondents that the refund of TED would result in monetization of CENVAT credit. The object of the FTP is to provide impetus to export either by direct physical export or via the deemed export route. In case refund of TED is not given qua deemed export, it would result in export of duties, which, in the long run would be detrimental to the cause of the exporters and the Indian economy.

16. Insofar as the judgment in *Alstom India Ltd.* is concerned, the same is not applicable to the facts and circumstances obtaining in the present case. One of the crucial differences between the instant case and the *Alstom's* case, is that in that case the writ petitioner before the Court had made supplies to NTPC against ICB and, therefore, payment of excise duty was exempt. Such a situation does not obtain in the present case. Furthermore, it may be noted that the Court did not in any manner upset the decision of the coordinate Bench in *Kandoi Metal Powders Mfg. Co. Pvt. Ltd. v. Union of India*, 2014 (302) ELT 209 (Del.).

17. The Division Bench, ultimately, directed the DGFT to consider the application for refund keeping in mind the provisions of the CENVAT Credit Rules and the FTP.

18. Likewise, the judgment of the Division Bench of the Bombay High Court in *Sandoz Pvt. Ltd.* can have no application to the facts of this case as in that case a 100% EOU had approached the Court to seek refund and not the DTA supplier. In any event, the said judgment can have only persuasive value for this Court.

19. Thus, for the foregoing reasons I am inclined to allow the writ petition. Accordingly, the impugned communication dated 21.04.2016, issued by respondent no.3, whereby the petitioner's claim for refund was declined is set aside. The respondents are directed to refund TED to the petitioner, albeit, to the tune of Rs.83,64,802.86 for the period spanning between October, 2011 and December, 2011 after due verification, within two (2) weeks of receipt of the copy of the judgment.

20. There shall be, however, no order as to cost.

RAJIV SHAKDHER
(JUDGE)

JULY 12, 2018

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