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

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Date of Decision: 08.10.2018

+ W.P.(C) 10526/2017

HINDUSTAN TIN WORKS LIMITED Petitioner
Through Mr. R.K. Krishnan, Adv.

versus

UNION OF INDIA & ORS. Respondents
Through Mr. Roshan Lal goel and Ms. Anju
Gupta, Adv. for UOI/R-1.
Mr. Harpreet Singh, Sr. Sanding
Counsel with Ms. Suhani Mathur,
Adv. for R-2 & R-3

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE A.K.CHAWLA

S.RAVINDRA BHAT, J. (ORAL)

1. The petitioner seeks a direction to consider its application for refund of Terminal Excise Duty (in the sum of `46,54,295/-) vis-a-vis deemed exports made to Vimal Agro Products Pvt. Ltd. and TATA Coffee Ltd.

2. The petitioner manufactures tin containers, which had been supplied to various Export Oriented Units (EOUs). Those EOUs in turn exported the final product using tin containers as packaging

material. Such supplies made were being treated as deemed export under the provisions of Foreign Trade Policy 2009-14 framed under the Foreign Trade (Development and Regulation) Act. It is alleged that Terminal Excise Duty (TED refund claims) were entertained by the Director General of Foreign Trade and refund sanctioned as the containers were ultimately used for export. While doing so, circular no.16 was issued on 15.03.2013, stating that in the case of supply of goods *inter alia* to 100% EOUs no refund of Terminal Excise Duty (TED) will be provided by the DGFT authorities. This was on the premise that the supplies were exempted from payment of excise duty and that if there was any error or oversight in the collection of tax, the concerned agency would refund it rather seeking reimbursement from DGFT. This was subsequently followed by another notification dated 18.04.2013 which sought substitution of para 8.3 (c) of the Foreign Trade Policy and provided that refund of TED would be given if exemption is not available; since exemption from CVD was available for supplies. The petitioner contended that an application was filed for refund of TED paid to the office of the Joint DGFT in respect of supply of tin containers to Vimal Agro Products Pvt. Ltd. against payment of Terminal Excise Duty (TED) during January 2012 to March 2013 i.e. prior to the issue of Circular No.16 dated 15.03.2013. This application was returned. Subsequently, another refund application (covering the period April, 2012 to January, 2013) made in respect of TATA Coffee Ltd. too was not taken into consideration. The petitioner then applied refund claim with Central Excise Department for the same on 11.03.2014. The Dy. Commissioner of

Excise thereafter issued a show cause notice on 01.10.2014 proposing to disallow the refund claim, which was contested. The refund claim was rejected by the excise authority by order-in-original dated 29.05.2015. Aggrieved, the petitioner approached the Dy. Commissioner in appeal, which was rejected on 16.11.2016. The petitioner unsuccessfully approached the CESTAT, which in its Chandigarh Bench, rejected the appeal.

3. It is contended by Mr. R. Krishnan, Advocate on behalf of the petitioner that the claim made by the excise authorities was by way of an alternative as the DGFT primarily was responsible for the refund of TED paid. On the contention of DGFT, excise officials were approached for refund. He relied upon the judgment of this Court in *Kandoi Metal Powders Mfg. Co. Pvt . Ltd. vs. Union Of India*, (2014) 302 ELT 209 (Del), where after noticing the various provisions of the Foreign Trade Policy 2009-14 framed under the Foreign Trade Development and Regulations Act, 1992, the Court held, as follows :

7. *The eligibility for refund is provided by para 8.5 in the following terms:*

“8.5 Eligibility for refund of terminal excise duty/drawback

Supply of goods will be eligible for refund of terminal excise duty in terms of Para 8.3(c) of FTP, provided recipient of goods does not avail CENVAT credit/rebate on such goods. A declaration to this effect, in Annexure II of ANF 8, from recipient of goods, shall be submitted by applicant.

Similarly, supplies will be eligible for deemed export drawback in terms of para 8.3(b) of FTP of Central Excise Duty paid on inputs/components, provided CENVAT credit/rebate has not been availed of such duty paid by supplier of goods. A declaration to this effect, in Annexure III of ANF 8, from supplier of goods, shall be submitted by applicant. Such supplies shall however be eligible for deemed export drawback on customs duty paid on inputs/components.

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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 JDGFT v. IFGL Refractories Limited, 2002 (143) ELT 294 (Cal). 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".

4. The respondents, especially the DGFT in its counter affidavit insists that the refund claims were correctly not entertained and that appropriate agency that could have been possibly approached was Central Excise Authorities. The stand of the DGFT, may be gathered from its preliminary submissions in the counter affidavit filed, which are as under :

“10. The Respondents have issued the Policy Circular No.16 dated 15.03.2013, with the approval of the Director General of Foreign Trade (DGFT) which clarifies the provisions of the FTP which have already been in existence. The circular has not introduced any amendment or new provisions or new conditions in the FTP. Any amendment made in the FTP, 2009-14, is duly done only through a Notification issued by the Government of India and not through a policy circular. The Chapter 6 of FTP, 2009-14 contains the provisions for setting up of Export Oriented Units (EOUs), import & import by them and allied governing provisions. Para 6.2(b) of FTP, 2009-14 clearly provides that an EOU may import/procure from Domestic Tariff Area (DTA), all types of goods, without payment of duty. The said provision has been further strengthened by Para 6.11(C)(ii), which provides that the goods procured by an EOU from the DTA would be exempted from payment of Central Excise Duty. Applicant can take benefit under FTP subject to the conditions given in FTP/HBP. If FTP provides for exemption from payment of TED, it cannot, on its decide to pay duty and claim refund.

11. That para 8.3(c) of FTP 2009-14, provides for benefit of the Terminal Excise duty (TED). This covers both – TED refund as well as TED exemption, as applicable for different types of cases. TED refund is allowed where TED exemption is not available. The

Respondent submit that these provisions have been clarified vide Policy Circular No.16 dated 15.03.2013 issued by DGFT. The Respondents also submit that this policy circular has not introduced any new conditions/provisions, it has merely clarified the provisions of Para 8.3(c) of FTP-2009-14, which has already been in existence.

12. That none of the provisions laid down in the Handbook of the Procedure or the Foreign Trade Policy permits an exporter to make a choice on the method of seeking benefit regarding the TED. It is nowhere mentioned that the exporter may first opt for the payment of TED and thereafter he may seek refund of the same. TED exemption or refund is to be taken as provided for in FTP 2009-14, by reading various provisions of FTP 2009-14, in a harmonious manner.

13. It is also admitted that Para 8.3(c) extends the benefits under deemed exports for the supplies which qualify as deemed exports. The qualified Deemed Exports are undoubtedly eligible for the corresponding benefits, as applicable under Para 8.3 (c), one of the benefits is the TED. Para 8.3 (c) of FTP 2009-14, covers both TED refund as well as exemption from TED for different types of cases. TED refund is allowed where TED exemption is not available.

5. The DGFT argued that by virtue of circular no.16 of 15.03.2013 the provisions of FTP have been in existence. To clarify, it is stated that the policy circular did not introduce any amendment or new provision. The DGFT states that Chapter 6 of the FTP contains provisions to set up EOUs, import and export by them as well as allied governing the provisions. Para 6.2(b) of FTP 2009-14 clearly provides that the goods procured by an EOU from Domestic Tariff

Area (DTA) shall be exempted from payment of duty. It is further strengthened by para 6.11(c) (ii), which stipulates that the goods procured by an EOU from the DTA would be exempted from payment of Central Excise Duty. It is therefore reiterated that the petitioner could have taken the benefit under the FTP subject to the conditions provided in the FTP/Handbook of Procedure (HBP). If HBP provides for exemption from payment of TED, the concerned unit cannot therefore, on its own decide the duty claimed for refund.

6. As is evident from the above discussion, the refund of TED claim in this case pertains to export and transaction *prior to* 15.03.2013. The crucial clarificatory circular was issued on that day. Two applications made in respect of sales to the EOUs (Vimal Agro Products Pvt. Ltd. and TATA Coffee Ltd.) covered various periods prior to 15.03.2013. This aspect is of significance and appears to have completely lost sight off. The DGFT – as well as Central Excise Authorities have not principally denied that the supplies were made to EOUs (Vimal Agro Products Pvt. Ltd. and TATA Coffee Ltd.). In these circumstances, the question is what constitutes the entitlement of such unit that supplied the goods to Export Oriented Units. This can be gained from the extracts of FTP, which are reproduced below :

“8.2 Categories of Supply - Following categories of supply of goods by man/sub-contractors shall be regarded as “Deemed Exports” under FTP, provided goods are manufactured in India :

(a) Supply of goods against Advance Authorisation/Advance Authorisation for annual requirement/DFIA;

- (b) *Supply of goods to EOU/STP/EHTP/BTP;*
- (c) *Supply of capital goods to EPCG Authorisation holders;*
- (d) *Supply of goods to projects financed by multilateral or bilateral Agencies/Funds as notified by Department of Economic Affairs (DEA), MoF under International Competitive Bidding (ICB) in accordance with procedures of those Agencies/Funds, where legal agreement provide for tender evaluation without including 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 stage of commercial production, and spare to extent of 10% of FOR value to fertilizer plants;*
- (f) *Supply of goods to any project or purpose in respect of which the MoF, by a notification, permits import of such goods at zero customs duty;*
- (g) *Supply of goods to power projects and refineries not covered in (f) above;*
- (h) *Supply of marine freight containers by 100% EOU (Domestic freight containers-manufacturers) provided said containers are exported out of India within 6 months or such further period as permitted by customs;*
- (i) *Supply to projects funded by UN Agencies; and*
- (j) *Supply of goods to nuclear power projects through competitive bidding as opposed to ICB.*

Benefits of deemed exports shall be available under paragraphs (d), (e), (f) and (g) only if the supply is made under procedure of ICB.

However, in regard to mega power projects, the requirement of ICB would not be mandatory, if the requisite quantum of power has been tied up through tariff based competitive bidding or if the project has been awarded through tariff based competitive bidding.

8.3 Benefits for Deemed Exports- *Deemed exports shall be eligible for any / all of following Exports 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 Authorization if such manufacturer, in turn, supplies the product(s) to an ultimate exporter.

8.4.3 *In respect of supplies made under paragraph 8.2(c) of FTP, supplier shall be entitled to the benefits listed in paragraphs 8.3(a), (b) and (c) of the Policy, whichever is applicable.*

7. The judgment in *Kandoi Metal's* (supra) was concerned with the clarification given by the Policy Interpretation Committee's decision of 04.12.2012 which stated that refund of Cenvat credit

provisions were available under Central Excise Act and the Rules which should be availed of rather claiming refund.

8. In the present case too, DGFT has rejected the petitioner's claim on the ground that the benefit of refund is available to it under the provisions of Central Excise Act and Rules. Clearly this premise is erroneous. In the event, there is no dispute – as it appears to be having regard to the pleadings – that the supplies were made to EOU/EHTP/STP/BTP (categorically spelt out in 8.2). Benefit of deemed export under para 8.3 i.e. advance authorization [clause (a)], deemed export drawback [clause (b)] or exemption from TED – in case of supplies made against International Competitive Bidding (ICB) or in other case of *refund of TED*. Clause (c) accrues to the concerned party i.e. supplier to EOU/STP. In this case, the petitioner's primary claim is that it is the supplier to such EOUs and that such supplies were made before 15.03.2013. This clear aspect has been completely overlooked and lost sight off by the respondent DGFT, which appears to initially reject the claim on the ground that the benefit the petitioners seeks entitlement of, was inadmissible because Central Excise benefit could be claimed. As is evident from the record, Central Excise officials when approached held that no refund could be made and the basic excise duty was admissible and correctly so. What the petitioner claims, was refund of duty in terms of clause 8.3(c) of FTP 2009-13 as it stood prior to 15.03.2013.

9. In view of the foregoing discussion, the court is of the opinion that the petitioner's claim has to succeed. A direction is issued to the respondents to entertain the petitioner's refund applications returned to it; the refund applications shall be processed within eight weeks and interest shall be payable for the past three years @ 9% per annum.

10. The writ petition is allowed in the above terms.

S. RAVINDRA BHAT, J

A. K. CHAWLA, J

OCTOBER 08, 2018

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