IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.09.2019

CORAM

THE HONOURABLE Dr. JUSTICE ANITA SUMANTH
W.P.No.23194 of 2009

M/s.Manali Petrochemical Limited,
Represented by is Head (Accounts),
E.N.Rangaswami,
Ponneri High Road,
Manali, Chennai 600 068. .. Petitioner

Vs.

1.The Addl. Director General of Foreign Trade,
Ministry of Commerce & Industry,
Udyog Bhavan, New Delhi.

2.The Zonal Joint Director General of Foreign Trade,
Shastri Bhavan, CPWD Annexe Building, 4th floor,

No.26, Haddows Road, Chennai - 600 006. .. Respondents

Prayer:- Writ Petition filed under Article 226 of the Constitution of India, praying for the issuance of a Writ of Certiorarified Mandamus, calling for the records comprised in Order No.F.No.11/3/2009-10ECA.I/1808 dated 23.09.2009 on the file of the first respondent, quash the same and consequently direct the second respondent to refund the Terminal excise duty paid by the petitioner.

For Petitioner : Ms.P.Jayalakshmi

For Respondents : Mr.Dr.G.Babu
Central Government Standing Counsel

O R D E R

The petitioner has challenged an order dated 23.09.2009 passed by the Additional Director General of Foreign Trade (in short R1) rejecting its claim for refund of terminal excise duty paid and confirming the order passed by the 2nd respondent, the Zonal Joint Director General of Foreign Trade (R2).

2.The petitioner was awarded a contract for supply of 400 Metric Tonnes of Composite Polyol - 78 for onward supply to Oil and Natural Gas Commission, against its purchase order. The supply was in connection with petroleum operations undertaken under petroleum exploration licenses/mining leases and were conducted on international competitive bidding, in line with the provisions of paragraph 8.2(f) and 8.4.4 (iii) of the Foreign

Trade Policy (in short FTP) stating as follows:

'CHAPTER-8

DEEMED EXPORTS

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Categories of Supply 8.2 .....

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(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;

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(h) ....

(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 to the Supplier 8.4.1 .....

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8.4.4 (i) In respect of supplies made under paragraphs 8.2(d), (f) and (g) of FTP, supplier shall be entitled to benefits listed in paragraphs 8.3(a), (b) and (c), whichever is applicable.

(ii) In respect of supplies mentioned in paragraph 8.2(d), supplies to projects funded by such agencies alone, as may be notified by DEA, MoF, shall be eligible for deemed export benefits. A list of such agencies/funds is given in Appendix 13 of HBP v1.

(iii) Benefits of deemed exports under para 8.2(f) of FTP shall be applicable in respect of items, import of which is allowed by DoR at zero customs duty subject to fulfillment of conditions specified under Notification No.21/2002-Customs dated 1.3.2002, as amended from time to time.'

3. The policy makes it clear that in cases of supply pursuant to international competitive bidding, relating to a project or purpose in respect of which the Ministry of Finance by Notification has permitted import of such goods, levy of customs duty shall be at zero rate. The petitioner has placed on record a certificate issued by the Project Authority i.e. the Oil and Natural Gas Corporation Limited, which certifies as follows:

'It is certified:-

That supply of goods required in connection with petroleum operations undertaken under petroleum exploration licences or mining leases under international competitive bidding is made in accordance with the provisions of paragraph 8.2 (f) and 8.4.4 (iii) of the policy and the import content of the order Rs. NIL.

PARTICULARS OF SUPPLIES TO BE MADE-FOR ELIGIBLE PEL/ML AREA.

Sr. No. Item	Description of (Exworks) in KG	Qty	Total order Value (in Rs.)
1.	POLYOL-78	4,00,000.00	3,24,00,000.00

(In words Rupees: Three Crore Twenty Four Lakhs only)

It is also certified that no other similar certificate to any other party has been granted for the same supplies as detailed above, under the same contract referred to above.'

4.The claim for refund before the 2nd respondent was dismissed on the ground that since there was an exemption from terminal excise duty, the petitioner is not entitled to the claim of refund, as sought. In appeal, this conclusion was reiterated by the appellate authority. It is relevant to state, as a fact, that both the original as well as appellate authorities have concurred with the petitioner that the methodology for supply has been only through international competitive bidding.

5. The officer, in the appellate order notes certain discrepancies in the documentation supplied and there is also reference to documentation such as supply invoices, certificate from central excise, etc. not having been produced by the petitioner. However in conclusion, the claim is rejected only on account of there being no enabling provision under para-8.3 (c) of the Foreign Trade Policy.

6.The relevant provisions of the Foreign Trade Policy make it apparent, in my view, that the benefit of deemed export is available in where the MoF has, by Notification, permitted import at zero customs duty, if the suppliers were pursuant to the procedure of ICB.

7. Both the original and appellate authorities reject the claim on the ground that the commodity in question is entitled for exemption from duty, and thus only an exemption may be claimed and not the relief of refund.

8. I am unable to agree. There are several situation were duel reliefs are extended to an assessee, both of an exemption as well as of refund. In a case where both reliefs are available, the option to select the relief of its choice vests with the assessee. This position is no longer res integra. The Supreme Court in H.C.L. Limited vs. Collector of Customs, New Delhi (130 E.L.T. 405) states as follows:

> 'The question in these appeals is covered in favour of the appellant by the order of this Court in Collector of Central Excise, Baroda v. Indian Petro Chemicals [1997 (92) E.L.T. 13]. Where there are two exemption notifications that cover the goods in question, the assessee is entitled to the benefit of that exemption notification which gives him greater relief, regardless of the fact that that notification is general in its terms and the other notification is more specific to the goods.
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> 2. The civil appeals are allowed and the orders under appeal are set aside.
> 3. No order as to costs.'

9. Revenue also argues that that the writ petition is not maintainable in the light of the fact that the impugned order is subject to a revision in terms of Regulation 16 of the Foreign Trade (Development and Regulation Act) 1992. However, since the issue arising for consideration is squarely covered by the judgment of the Supreme Court (supra) followed consistently by this Court (see Lenovo (India) Pvt. Ltd. Vs. Union of India [2017 (346) E.L.T. 12 (Mad.)], M/s.Agnice Fire Protection Limited Vs. The Additional General of Foreign Trade Ministry of Commerce and Industry, Zonal Joint Director General of Foreign Trade [2019 (5) TMI 86] and SAME DEUTZ-FAHR INDIA (P) Ltd. Vs. Union of India [2017(12) TMI 1114]), I see no reason to relegate the petitioner to alternate statutory remedy.

10.I find no merit in the stand of the revenue and this writ petition is allowed. Consequently, the refund shall be paid over within a period of four weeks from date of receipt of a copy of this order. No costs.

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

vs
To

1.The Additional Director General of Foreign Trade,
Ministry of Commerce & Industry,
Udyog Bhavan, New Delhi.

2.The Zonal Joint Director General of Foreign Trade,
Shastri Bhavan, CPWD Annexe Building, 4th floor,
No.26, Haddows Road, Chennai - 600 006.

+1cc to Mr.S,Muthu venkateswaran , Advocate SR.No. 79271
+1cc to Mr.G.Babu , Advocate SR.No. 79440
+1cc to Mr.G.Babu , Advocate SR.No. 79440 (20/01/2020)

W.P.No.23194 of 2009

A.SK(18/12/2019)