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

Date of decision: 14th SEPTEMBER, 2022

IN THE MATTER OF:

\+ **LPA 476/2022&CM APPL. 35496/2022**

M/S DELTON CABLES LIMITED ..... Appellant

Through: Mr. P C Patnaik, Mr. Manoj Kumar Dwivedi, Mr. Hemant Mishra, Mr. J N Patel and Mr. Pradeep, Advocates.

versus

UNION OF INDIA & ORS ..... Respondents

Through: Ms. Nidhi Raman, CGSC with Mr. Zubin Singh, Advocate.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

SUBRAMONIUM PRASAD, J

1. The present LPA has been preferred by the Appellant, with prayers to set aside the Impugned Order dated 27.04.2022, passed by the Ld. Single Judge in W.P. (C) 1712/2021; with directions to the Respondents to refund Terminal Excise Duties for a sum of Rs. 42,50,643/- under the Foreign Trade Policy 2009-14, in light of the Policy Circular No. 11/2015-20 dated 23.07.2018 issued by Respondent No. 2/DGFT.

2. The facts, in brief, leading up to the present LPA are that the Appellant/Delton Cables Ltd., a company registered under the Companies Act, 1956, is engaged in the business of manufacturing and supplying PVC

and other categories of wires and cables for gas pipeline projects. The present dispute emanates out of a contract dated 20.12.2004, bearing No. BkTPP/12/(MP-3: INDIAN SUPPLY)/04-05, executed between Bharat Heavy Electricals Ltd. ("Main Contractor") and West Bengal Power Development Corporation Limited ("Project Authority") for supply of equipment and materials towards the establishment and setting up of Bakreswar Thermal Power Project, West Bengal. The Main Contract was entered into through the process of International Competitive Bidding ("ICB"). As per the conditions stipulated in the Main Contract, a Vendors List was issued on 11.02.2005. The list contains details of work orders for supply of materials for the purpose of establishing the Project. The Appellant is one such party whose name is mentioned against work orders to be executed. Subsequently, the Project Authority issued a Project Authority Certificate ("PAC") dated 05.04.2005, confirming BHEL to be the Main Contractor for the purpose of supplying materials and equipment to the Project. The document also mentions that the Project is to be sponsored by an international agency, i.e. the Japanese Bank for International Cooperation (JBIC) and that the process of awarding the contract should be through International Competitive Bidding procedure.

3. The cables and materials supplied by the Appellant are listed in entries against their names in the Vendors List dated 11.02.2005, issued by the Project Authority. It is established under clause 8.2(d) of the FTP 2009-14 that supply of materials to projects funded by foreign sponsoring agencies such as the JBIC are to be treated as Deemed Exports. Clause 8.2(d) of the FTP 2009-14 is reproduced below:-

"8.2 Following categories of supply of goods by main/subcontractors shall be regarded as "Deemed Exports" under FTP, provided goods are manufactured in India:

(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 agreements provide for tender evaluation without including customs duty."

4. The Project Authority Certificate further states that the supplies in lieu of the Main Contract are to be made to a project sponsored by a foreign agency notified by the Department of Economic Affairs, Ministry of Finance, and that said supplies have to be made through the procedure of International Competitive Bidding approved by the said foreign agency. For reference, clause 1(a) of the Project Authority Certificate is reproduced as under: -

"It is certified :-

(a) That supplies under contract No.BkTPP/12/(MP-3: INDIAN SUPPLY)/04-05 dated 20.12.2004 are to be made in India to a project financed by multilateral or bilateral Agencies/Funds namely Japanese Bank for International Cooperation Japan (JBIC) which has been notified by the Department of Economic Affairs, Ministry of Finance vide their Reference No. Public notice No.-1(FT)/DEA/2000 dated 09.08.2000 and the same is under the procedure of International Competitive Bidding in accordance with the procedure of the above mentioned Agency/Fund, legal agreement of which provides for tender evaluation without including the customs duty and that the import content of the order is US $ 26,411,800 and Euro 15,242,930 (Dollars Twenty Six Million, Four Hundred Eleven Thousands and Eight Hundred and Euro Fifteen Million, Two Hundred Forty Two Thousands and Nine Hundred Thirty"

5. The approved agency for sponsoring the Project in this instance is the Japanese Bank for International Cooperation, Japan (JBIC). The Appellant's name was mentioned against work orders in the Vendors List dated 11.02.2005, in the capacity of an approved vendor.

6. In order to avail deemed export benefits arising out of payment of excise duty on the completion of supply of materials to the Project, the Appellant filed three applications seeking refund of Terminal Excise Duty ("TED") to the tune of Rs. 42,50,643/- along with an interest of 18% per annum under the provisions of Foreign Trade Policy 2009-14.

7. The Main Contractor/BHEL issued a Certificate bearing reference no. PE/MM/PG-II/BKR/P-297/06/PAC-01 on 25.04.2007, stating *inter-alia,* that the Appellant was recognized as a sub-contractor under the Main Contract.

8. On 13.11.2008, the Appellant preferred an application before the appropriate authority being the Zonal Joint DGFT with a request to refund the Terminal Excise Duty, which the Appellant claims was erroneously paid to the Excise Department.

9. The Zonal Joint DGFT sent a letter of reference to the DGFT *vide* a letter dated 07.02.2011, seeking clarifications on whether the Appellant whose name was not mentioned as a sub-contractor would be eligible to claim payment of TED. In a reply to the clarification letter dated 07.02.2011, it was communicated to the Appellant *vide* a letter dated 07.09.2011 of their ineligibility to claim refund on payment of TED on account of the fact that their name was not mentioned as that of a sub-contractor in the Main Contract.

10. The Policy Interpretation Committee of the Respondent No. 2/DGFT in their meeting No. 10 dated 15.03.2011 rejected the claim for refund of excise

duty, in terms of paragraph 5 of the Minutes of Meeting. The clarification is reproduced as under:-

> *"It was clarified that any supply made directly to the Project Authority by any entity other than the main contractor or the sub-contractor (details of such sub-contractor must have been endorsed in the contract and such endorsement must have been done prior to supply by the said sub-contractor) shall not be eligible for the deemed export benefits."*

11. The Policy Relaxation Committee of the Respondent No.2/DGFT denied the Appellant's request for refund in the meeting No. 39/AM13, held on 12.02.2013, on account of two reasons – firstly, that requirements as per clause 8.6.2 of the FTP 2009-14 was not satisfied on account of their name not being included as a sub-contractor in the Main Contract or in documents consequent thereto and secondly, that the supply of materials was made under an ICB contract which exempted payment of excise duties *ab-initio*. On these grounds, the Regional Authority would not be liable to grant refund.

12. The Appellant submitted an application dated 08.04.2011 before the Zonal Joint Director General for Foreign Trade, with yet another request to refund payment of terminal excise duty. On 25.05.2011, the request was rejected on account of the name of the Appellant not being directly endorsed as that of a sub-contractor in the Main Contract, prior to the delivery of supplies to the Project. In reply to the rejection letter 25.05.2011, the Appellant intimated the concerned authorities of a communication issued by the Project Authority/WBPDCL dated 21.07.2011, which confirms that the Main Contractor/BHEL appointed M/s Delton Cables Ltd. as a sub-contractor for the Main Contract.

13. A meeting of the Policy Interpretation Committee of the DGFT while examining a factually similar case in M/s Haryana Conductors Pvt. Ltd.

issued their Minutes of Meeting on 07.12.2012. It was clarified in the course of proceedings of the Meeting that if the names of suppliers of goods were endorsed in the Project Authority Certificate before the date of supply of materials, they would be eligible for deemed export benefits, irrespective of their name appearing as a sub-contractor or a sub-vendor.

14. Being aggrieved by rejections of their request for refund of payment of TED by the authorities, the Appellant filed a petition bearing W.P.(C) 6438/2013 before this Hon'ble Court on 05.10.2013. This Court on 03.12.2015 directed the Respondent No. 2/DGFT herein, to grant a personal opportunity of hearing to the Appellant. The Appellant Authority was also directed to consider as to whether the Orders in the case of M/s Gammon India Ltd and M/s Voltamp Transforms Ltd. passed on 29.05.2012 and 10.07.2012 would be applicable in the case of the Appellant or not.

15. In compliance with the Order dated 03.02.2015 passed by this Court, the DGFT/Respondent No.2 granted a personal opportunity of hearing to the Appellant. The case of the Appellant was rejected by the DGFT and it was held that in terms of Para 8.6.2 of the FTP 2009-2014, the name of a sub-contractor needs to be endorsed in the Main Contract or the documents issued consequently, in order for the supplies to be eligible for availing deemed export benefits in terms of the FTP 2009-14. The second leg of reasoning rejecting the case of the Appellant as recorded by the DGFT is that in terms of paragraph 8.3(c) of the FTP, supplies made for contracts made through the International Competitive Bidding process are *ab-initio* exempted from refund of Terminal Excise Duty.

16. Against this Order, an appeal was preferred before the Respondent No. 1/Appellate Authority/Ministry of Commerce and Industry. The Respondent No.1 upheld the findings delivered in the DGFT's Order thereby rejecting the

case for request of refund *vide* an Order dated 14.05.2018. Subsequently, the Appellant filed fresh applications before the Respondent No.1/Ministry of Commerce and Industry and Respondent No. 2/DGFT on 05.11.2018 (with enclosed copies of the Policy Circular dated 23.07.2018 and the Clarification Letter dated 05.10.2018) and 06.11.2018 respectively, for considering their request for refund of payment of Terminal Excise Duties.

17. It is stated that the Ministry of Commerce and Industry/Respondent No. 1 issued a Policy Circular no. 11/2015-20 dated 23.07.2018 clarifying that JBIC funded projects would also be entitled to the benefit of deemed exports. It is further stated that a clarification letter bearing no. WBPDCL/Corp./SGMP3/BKTPP/3979 was issued by the Project Authority/WBPDCL to the Appellant on 05.10.2018, which *inter alia* equates the position of a vendor to that of a sub-contractor in terms of the Vendors List dated 11.02.2005. The relevant part of the said letter is reproduced below:-

> *"…the term 'Vendor' wherever it appears in the letter Ref. WBPDCL/Ping/Bk TPP-4 & 5/MP3/Vendor/700, dated 11.02.2005 shall have the same meaning and read as Sub-contractor."*

18. The Respondent No.3/Additional DGFT issued a letter dated 12.04.2021, which mentioned that rejection of the Appellant's case was based on reasons expounded in the DGFT's oral Order dated 21.03.2016. The reasoning laid down in the abovementioned order were also re-affirmed in the findings of the Appellate Authority's Order dated 14.05.2018. In addition, the letter also clarifies that the Policy Circular issued on 23.07.2018 does not support the case of the Appellant as it is not applicable to the immediate factual circumstances that the Appellant finds themselves in.

19. The Appellant preferred Writ Petition bearing No. W.P. (C) 1712/2021 with prayers to issue directions for quashing the Appellate Order dated 14.05.2018, delivered by the Respondent No. 1/Ministry of Commerce and Industry.The Order passed by the Ld. Single judge in W.P. (C) 1712/2021, dated 27.04.2022 rejected the Appellant's case for grant of refund.

20. It is in light of culmination of the aforesaid facts and after multiple rounds of adjudication that the present LPA has been preferred by the Appellant herein before this Bench, with the following prayers:-

> *(i) To set aside the impugned Order dated 27.04.2022 passed by the ld. Single Judge of this Hon'ble Court in Civil Writ Petition No. 1712/2021.*
>
> *(ii) Allow the LPA formulating a substantial question of law thereby directing the Respondents to refund TED for Rs. 42,50,643/- under Foreign Trade Policy 2004-09, in light of Policy Circular No. 11/2015-20 dated 23.07.2018*

22. Heard learned Counsels appearing for the Parties and perused the material on record.

23. The ld. Counsel for the Appellant submits that supplies made to Domestic Tariff Zones attracts deemed export benefits in terms of clause 8.2(d) of the FTP 2009-14. It is further submitted by the Counsel for the Appellant that representations of the Appellant to consider their case for refund of TED in pursuance of FTP 2009-14 have, in the course of multiple rounds of adjudication, been rejected by concerned authorities without completely perusing all the material placed on record supporting their claim of eligibility to be eligible for availing deemed export benefits in terms of clauses 8.2(d), 8.6.2, 8.3(c) and other provisions made in exercise of the

FTP 2009-14. Clauses 8.6.2 and 8.3(c) of the FTP 2009-14 are reproduced as under-

> *"**8.6.2** Supplies made by an Indian sub-contractor of an Indian or foreign main contractor directly to the designated projects/Agencies, shall also be eligible for deemed export benefits provided name of sub-contractor is indicated either originally or subsequently in the main contract (but before the date of supply of such goods) and payment certificate is issued by project authority in the name of sub-contractor as in Appendix 22C of HBP v1 and secondly, in terms of paragraph 8.3(c) of the FTP."*
>
> *"**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:-*
>
> *.....(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."*

24. It is the contention of the ld. Counsel for Appellant that the Certificate issued by BHEL/Main Contractor dated 25.04.2007 confirms the name of the Appellant as a sub-contractor, which satisfies the criteria of being recognised as a sub-contractor for the purposes of the Main Contract, as required under clause 8.6.2 of the FTP 2009-14. In addition, the ld. Counsel for the Appellant proceeds to rely upon clarifications elucidated in the meeting of the Policy Interpretation Committee of the DGFT/Respondent No. 2 dated 07.12.2012, with respect to a factually similarly case in M/s Haryana

Conductors Ltd. In the proceedings of the said meeting, it was noted that subject to endorsement of the supplier's name in the Project Authority Certificate, all deemed export benefits were to accrue to the supplier irrespective of their role as a vendor or a sub-contractor in the Main Contract, if such endorsement had happened before the supply of goods. The supplies to the Project were carried out in accordance with the work orders stipulated in the Vendors List dated 11.02.2005. The relevant part of the clarification issued in the PIC meeting mentioned above is reproduced below:-

> *"It is clarified that if the name of supplier of goods is endorsed in the Project Authority Certificate before the supply of goods, supplier shall be eligible for deemed export benefits irrespective of the fact that his name was mentioned as sub-contractor or sub-vendor"*

25. The Ld. Counsel for the Appellant relies on an Order dated 12.11.2020, delivered by a Co-ordinate Bench of this Hon'ble Court in another factually similarly situated case in W.P. (C) 9899/2020 titled as KEI Industries Ltd. vs Union of India and Ors., which in lieu of the DGFT/Respondent No. 2 Policy Circular dated 23.07.2018, adjudicated in favour of the Petitioner therein by allowing their case for grant of refund on the strength of the aforementioned Policy Circular. Relevant extract of the said Order is reproduced as under:-

> "*Admittedly, the petitioner has not made* any *claim based on the said Circular with the respondent. In view of the said the present petition is disposed of granting liberty to the Petitioner to reply upon the Circular in the Appeal pending before the Appellant Authority. The Appellant Authority shall consider the effect thereof while passing the order. A decision on the Appeal be taken within a period of 8 weeks from today. Needless to say, in case the petitioner is aggrieved of the decision, it shall be open to the petitioner to challenge in accordance with law*"

26. The Ld. Counsel for Appellant also places strong reliance upon the Clarification Letter dated 05.10.2018, issued by the Project Authority. It is argued that the terms of the letter equate the position of a Vendor as it appears in the Vendors List issued by the Project Authority/WBPDCL, to that of a sub-contractor *vis-à-vis* the Main Contract. The relevant part of the letter is reproduced below: -

> *"…the term 'Vendor' wherever it appears in the letter Ref. WBPDCL/Ping/Bk TPP-4 & 5/MP3/Vendor/700, dated 11.02.2005 shall have the same meaning and read as Sub-contractor."*

27. The approved Vendors List was issued on 11.02.2005, i.e., before the date the Appellant supplied materials to the Project. On the strength of the Certification dated 25.04.2007 in the letter issued by BHEL/Main Contractor, the ld. Counsel for the Appellant submits that the letter firmly establishes the position of the Appellant as being a sub-contractor in terms of the Main Contract.

28. It is further submitted that the terms of Clause 8.3(c) of the FTP 2009-14 were, by way of the Policy Circular dated 23.07.2018, relaxed to the extent that refund on payment of TED was to henceforth be allowed for supplies made to JBIC sponsored projects under ICB contracts up to the period of 31.03.2015, i.e. before which date no relevant excise notifications had been issued.

29. The ld. Counsel for the Respondents, at the outset, submits that the power of the DGFT to interpret and implement the provisions of the FTP 2009-14 flows from Section 6(2) of the Foreign Trade (Development and Regulation) Act, 1992. It is further submitted by the ld. Counsel for the Respondents that all disputes arising out of interpretation of FTP shall be

referred to the office of DGFT for their consideration. In addition, as per para 2.3 of the FTP 2009-14, the Policy Interpretation Committee is chaired by the DGFT who also holds the power to approve the Minutes of Meeting of the PIC. The ld. counsel then draws to the conclusion that the DGFT is well within their powers to implement and execute the provisions of Chapter 8 of the FTP 2009-14. In extension of this power, it is averred that in the facts of the immediate case, the DGFT is the competent authority to interpret also the nature of supplies that would attract and be entitled for claiming deemed export benefits. This power, it is submitted, also includes deciding the questions of grant of refund on the payment of TED.

30. The Ld. Counsel for the Respondents refers to the decision of the PRC meeting No. 39AM/13, dated 12.02.2013 and reiterates the two-pronged reasoning, being firstly that in terms of paragraph 8.6.2, the sub-contractor's name (the Appellant herein) ought to have been directly endorsed in the Main Contract, for the supplies to be made amenable for availing deemed export benefits in terms of Chapter 8 of the FTP 2009-14. This condition, it is submitted, was not satisfied as there is no material on record directing to the endorsement of the Appellant as a sub-contractor in terms of the Main Contract. The second leg of reasoning is that as per Clause 8.3(c), all supplies made to contracts formulated under International Competitive Bidding process are exempted from payment of excise duties *ab-initio.* The supplies made by the Appellant to the Main Project were to a Project sponsored by the JBIC, a notified international sponsoring agency. Therefore, it is submitted, that the Appellant wrongfully paid terminal excise duties.

31. The Ld. Counsel for the Respondents then draws the attention of this Court on documentary evidence placed for consideration in multiple rounds of adjudication, specifically the Project Authority Certificate issued on

11.02.2005 and the Main Contract dated 20.12.2004. A perusal of the terms of the Main Contract reveals that the Appellant was never endorsed as a sub-contractor. To buttress this submission, reference is made to Paragraph 2 of the Project Authority Certificate which contains an appended note, providing for a space for names of sub-contractors to be added subsequently. There is nothing on record to show that the name of the Appellant was added originally or subsequently as that of a sub-contractor in the Main Contract.

32. *Per contra,* the above argument, the Ld. counsel for the Appellant submits that no addendum in terms of paragraph 2 of the Project Authority Certificate was ever issued at any subsequent date after the Main Contract came into effect.

33. It is further argued by the ld. Counsel for the Respondents that the status of the Appellant cannot be accepted as that of a sub-contractor endorsed under the Main Contract, as their name appears only in the Vendors List dated 11.02.2005. Further, the Project Authority in its Certificate dated 21.07.2011 merely clarifies that the Main Contractor, and not the Project Authority, appointed the Appellant as a sub-contractor. In conclusion, it is submitted that in the absence of a formal appointment process, the Main Contractor does not stand on an equal footing with the Project Authority. Additionally, there exists a stark difference between “appointment” and “endorsement” as a sub-contractor to the Main Contract.

34. The Ld. Counsel for the Respondents submits that terms of clause 8.3(c) of the FTP 2009-14 provides for either the benefit of exemption, or refund of Terminal Excise Duty subject to the condition of supplies otherwise qualifying for availing deemed export benefits. Referring to the Policy Circular no. 16 dated 15.03.2013, issued by Respondent No. 2/DGFT, it is argued that the said circular only clarifies, and doesn’t expand, the scope of

clause 8.3(c). It is explained that under the clause, two situations are contemplated -- refund and exemption of TED. Refund may be sought only when exemption is not envisaged and when excise duties have been paid. In concluding their argument, it is reiterated from their submissions that the supplies were made pursuant to an ICB contract exempting the payment of excise duties *ab-initio*.

35. It is further submitted that the Respondent No. 2/DGFT, in their reply dated 23.12.2012 to the reference letter dated 07.09.2011 clarified that the Project Authority/WBPDCL had to name sub-contractors to the Main Contract before the date the supplies were made. On the strength of the clarification letter dated 23.12.2012, the conclusion drawn is that a sub-contractor appointed by the Main Contractor would not satisfy the above conditions, and hence would not be entitled to claim deemed export benefits. It is also submitted that the Appellant is unable to substantiate their claim of holding status as a sub-contractor under the Main Contract and appointed in such capacity by the Project Authority.

36. The Ld. Counsel for the Respondents submits that the Appellant has wrongly availed the CENVAT credit facility available to exporters. Further, it is submitted that no provision exists in the FTP or the accompanying Handbook of Procedure that stipulates a unique condition whereby on wrongful payment for supplies exempted from payment *ab-initio*, the exporter may be permitted to subsequently submit a claim for refund. Doing this, it is submitted that, would amount to circumvention of CENVAT Credit Rules, 2004, inasmuch as it would amount to wrongful encashment of CENVAT Credit. The Ld. Counsel for the Respondent in their submissions proceeds to draw the attention of the Court to E.R.-I forms appended to the application of the Appellant, which reveals that at the time of payment of

excise duties, the Appellant availed unutilized CENVAT Credit facilities. Relying on this fact, the argument thus forwarded is that approaching the DGFT for refund would amount to contravention of the provisions of CENVAT Credit Rules, 2004 and consequently the Central Excise Act, 1944, premised on the reasoning that granting a request refund on payment of excise duties where payment was made through CENVAT credit facilities would be unjustified. The rationale is that refund of CENVAT credit is nowhere contemplated nor mentioned for deemed exports under the provisions of CENVAT Credit Rules, 2004. In addition, the CENVAT Credit Rules are formulated and implemented by the Central Board of Excise and Customs, and not the DGFT. The Customs Authorities working under the CBEC are vested with the powers to consider and grant refund of CENVAT Credit. Therefore, the DGFT is not the appropriate authority to be approached for claiming refund of CENVAT Credit.

37. It is noted that as per paragraph No.2 of the Project Authority Certificate dated 05.04.2005, no list of sub-contractors for the supply of materials was ever issued. We find no valid record that can confirm the role of the Appellant as a sub-contractor under the Main Contract. In our view, the appointment of the Appellant as a sub-contractor by the Main Contractor/BHEL does not have the same effect as against appointment in the same role by the Project Authority.

38. In our opinion, the bone of contention in the immediate facts of this case revolve around the issue of the appointment of the Appellant as a sub-contractor by the Project Authority/WBPDCL for the supply of materials to the Project in pursuance of the Main Contract, in light of the provisions of the Foreign Trade Policy 2009-14. In order to be ordained eligible for claiming deemed export benefits, clause 8.6.2 of the FTP 2009-14 lays down

the condition of inclusion of a party's name as a sub-contractor under the Main Contract only. The Appellant through the course of proceedings in multiple adjudications before concerned authorities has relied on a slew of documents to support and advance their claim of eligibility for refund of payment of TED. However, none of the documents submitted can confirm the Appellant's status as that of a sub-contractor under the Main Contract, and appointed in such capacity by the Project Authority. At the cost of repetition, it is our view that endorsement of name as a sub-contractor is a necessary pre-requisite to satisfy the criteria stipulated in clause 8.6.2.

39. Secondly, clause 8.3(c) of the FTP 2009-14 in clear terms exempts the requirement of payment of terminal excise duties for supplies made under ICB contracts for projects sponsored by foreign agencies. The Main Contract was signed under the process of International Competitive Bidding, and the Project at Bakreswar Thermal Power Plant was sponsored by a notified foreign agency, being the JBIC. We are, therefore, inclined to concur with the submissions of the Respondent in dismissing the claim of Appellant at multiple stages on this ground.

40. The questions placed for consideration before this Court in the current LPA are presented in the following terms:-

> *"A. Whether goods supplied by the Appellant in the capacity of Vendor vide Vendor list dated 11.02.2005 issued by the Project Authority (WBPDCL) is eligible for refund of Terminal Excise Duty under deemed exports Scheme of Foreign Trade Policy 2004-2009 on the strength of subsequent Letter dated 05.10.2018 issued by the said Project Authority (WBPDCL) certifying and confirming that the term 'Vendor' wherever it appears in the letter dated 11.02.2005 to have the same meaning and read as Subcontractor.*

B. Whether the Certificate dated 25.04.2007 issued by the main Contractor BHEL- an agency of Government of India qua contract No. BKTPP/12 (MP-3: Indian supply)/04-05dated 20.12.2004 (contract towards the subject Project)certifying and confirming the name of the Appellant as a Sub-Contractor suffice the requisite necessities in terms of paragraph 8.6.2 of the FTP 2004-2009."

41. To address the first question presented in the above terms, the clarification letter dated 05.10.2018 was issued to the Appellant, on the strength of which the Appellant equates the role of a sub-vendor to that of a sub-contractor for purposes of the Main Contract. In our opinion, the letter has the effect of providing a clarification, which was issued at the instance of the Appellant as a reply to a request for clarification. Therefore, the letter cannot be accepted as a valid document issued under the Main Contract or subsequent thereto that satisfies conditions in clause 8.6.2. In response to the second question posed above, the Certificate contained in the letter dated 25.04.2007 was issued by the Main Contractor/BHEL and not the Project Authority/WBPDCL. The Appellant has not produced any document issued by the Project Authority that can conclusively confirm their position as a sub-contractor in terms of paragraph 2 of the Project Authority Certificate either originally or subsequently.

42. The DGFT/Respondent No.2 is empowered under Section 6(1) and 6(2) of the Foreign Trade (Development and Regulation) Act, 1992 to advise the Central Government in formulating and implementing the foreign trade policy.

43. The finding of the Ld. Single Judge in W.P.(C) 1712/2021 that the claim of refund of Terminal Excise Duty is dependent upon the name of the Appellant being duly endorsed by the Project Authority, and that the

Appellant has been unsuccessful in showing any provision under the Foreign Trade Policy 2004-09 in terms of which endorsement of certification by the main contractor was envisaged sufficient for the purpose of refund of Terminal Excise Duty and, therefore, in the absence of such certification, the benefits as contemplated in Clause 8.6.2 of the FTP 2009-14 cannot be extended to the Appellant herein does not require any interference. The Ld. Single Judge while exercising jurisdiction under Article 226 of the Constitution of India was, therefore, justified in coming to the conclusion that the finding of the DGFT in its Order dated 21.03.2016 did not require any interference.

44. The LPA is dismissed, along with pending application(s), if any.

SATISH CHANDRA SHARMA, C.J.

SUBRAMONIUM PRASAD, J

SEPTEMBER 14, 2022
S. Zakir..