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IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
ORIGINAL SIDE

WPO/274/2020

M/S. ALOM POLY EXTRUSIONS LTD. AND ANR.
VS.
STATE OF WEST BENGAL AND ORS.

BEFORE :
THE HON'BLE JUSTICE SABYASACHI BHATTACHARYYA
Date : 15th June, 2023.

<u>Appearance</u> :
Mrs. Noelle Dey [Banerjee], Barrister,
Mr. Farhan Ghaffar, Adv.,
Mrs. Swati Bhattacharyya, Adv.
...for petitioner.
Md. T. M. Siddiqui, AGP,
Md. F. Ali, Adv.
...for WBIDC.

The Court : - The petitioners' contention is that the petitioners are entitled to subsidies/incentives under a Scheme floated by the State of West Bengal, being The West Bengal State Support for Industries Scheme, 2008 [as amended up to December 31, 2010]. The petitioners were granted sanction for such subsidy on December 2, 2011. Thereafter, in the year 2015, interest subsidy was also granted to the petitioners by the respondent Authorities. However, the subsidies were never disbursed in favour of the petitioners.

Learned counsel contends that as per clause 16.10 of the Scheme, in cases where it is not possible to fully adjust the subsidy against VAT paid by the unit on year basis, balance entitlement at the close of the 9th year shall be paid to the unit through account payee cheque at the 10th year. In the present case, the petitioners are governed by the second limb of clause 16.10, since the petitioners are not liable to pay VAT at all.

It is contended that the petitioners were informed by the respondent Authorities themselves that there was a communication on the part of the Additional Commissioner of Commercial Taxes, West Bengal, which clearly indicated that the VAT payability of the petitioners was being reduced to nil, due to inflated duty structure characterized by higher rates of taxes on inputs [raw materials] locally purchased and lower rates of taxes on intra-state sales of final products.

As such, the communication, which was annexed to the letter sent by the respondent Authorities to the petitioners, also mentioned that the petitioner no. 1 be treated not as an EOU dealer but as a "situation where the applicant dealer is not in a position to fully/partly adjust VAT payable with the sanctioned amount of capital and interest subsidies" as per the Scheme.

Learned counsel appearing for the respondent Authorities vociferously argues that a privilege is not a matter of right. Since a subsidy under a Scheme of the State is merely a privilege, it is well within the discretion of the respondent Authorities to disburse the same or not. That apart, it is argued that the payment of VAT [Value Added Tax] is an essential pre-requisite of an applicant to get the benefit of the subsidy under the Scheme.

In support of such contention, learned counsel places reliance on clause 16 of the Scheme, which relates to the mode of payment. By stressing upon the mention of payment of VAT in the said clause and its sub-clauses, it is argued by the respondent Authorities that the petitioners never paid VAT to the State of West Bengal and, as such, are not entitled to the benefits under the Scheme at all.

Upon hearing the learned counsel for the petitioners, it transpires from the records that the Scheme in question was floated for the purposes of extending certain additional financial support for promotion of large and medium scale industries in the background regions of the State, as mentioned in the very first paragraph of the Notification dated February 28, 2011, which contains the Scheme.

In the said Gazette Notification, clause 16 is one of the modes of payment but not an eligibility criterion. Eligibility criteria for incentive under the Scheme are stipulated in clause 6 of the Scheme. There is nothing in the said clause to indicate that the payment of VAT to the State is a necessary pre-requisite for getting benefit of the Scheme.

Clause 6.1 stipulates that a unit in the large and medium scale sector, to which this Scheme applies, shall be eligible for securing a RC provided that:

6.1.1. The project is covered by a detailed feasibility report/project report prepared for the purpose;

6.1.2. The project has been approved and sanctioned by any FI;

6.1.3. While in the case of projects with an arrangement of finance from own resources, issue of RC shall be considered only if the WBIDC is satisfied with the arrangement and recommends issuing RC.

Moving on to Clause 16, which specifies merely the mode of payment, it transpires from the sub-clauses thereunder that, on commencement of commercial production, the unit in question will have to submit an application to the Managing Director of the WBIDC in the prescribed form praying for release of incentives. The question of VAT comes in certain provisions of the said clause. However, the requirement in such mode of payment as prescribed in Clause 16.9 is that export oriented units and certain units exempted from paying VAT/CST will be entitled to FCIS only as are admissible under the Scheme. Payment towards such subsidy would be made by the WBIDC directly to the unit.

However, clause 6.10 is the relevant provision which governs the present petitioners. The said sub-clause provides that subsidy on Fixed Capital Investment for units other than that mentioned in paragraph 16.9 shall be paid in ten equal annual instalments by way of adjustment against VAT paid by the unit in the previous year. The crucial limb of the said clause, in the context of the present case, however, is the subsequent sentence therein which specifies that in case it is not possible to fully adjust the subsidy against VAT paid by the units on year basis, balance entitlement at the close of the 9th year shall be paid to the unit through account payee cheque at the 10th year.

The reliance of the respondent Authorities on the Sanction Letter dated December 2, 2011, annexed at page 95 of the writ petition, is entirely misplaced for the proposition sought to be advanced by the respondent. Clause [c] thereof provides that the Company has to submit relevant certificate from Commissioner, Commercial Taxes, West Bengal certifying that the unit has not defaulted in the matter of payment of VAT dues under the Act before release of incentives.

It is extremely important to note that the language of the said clause is not that the unit is not liable to pay VAT and/or has not paid VAT. The specific phrase used is, "the unit has not defaulted in the matter of payment of VAT dues under the Act".

Taking into account the relevant components of the said phrase, the unit, in the first place, has to be liable to pay VAT. Since, in the present case, the petitioners are not liable to pay VAT, there could not be any accumulation of VAT dues and, in turn ,of the unit having defaulted in payment of such non-existent dues.

Moreover, it is clear from the communication of the respondent Authorities themselves to the petitioners dated May 24, 2018, as annexed at page 74 of the writ petition, that the said Authorities had enclosed a communication from the Additional Commissioner of Commercial Taxes, West Bengal, which, according to the respondent Authorities, spoke for itself.

The said communication, also annexed to the writ petition at the very next page, i.e., page 75, clearly shows that the Additional Commissioner opined that in the entire period in question the net VAT payable by the petitioners was reduced to nil, due to the reasons as stipulated therein. In view of such specific reasons, it was further observed and advised by the Additional Commissioner that the situation of nil VAT payability being reduced to nil arises due to inflated duty structure characterized by higher rates of taxes on inputs locally purchased and lower rates of taxes on intra-state sales of any final product. It was also explained categorically that, thus, there is always an accumulation of excess ITC even after setting off against VAT liability.

An empirical statement generated from the data base of the Commercial Tax Department on the basis of the quarterly returns filed for each of the four quarters of the consecutive financial years reflects the tax payment behaviour of the dealer, in the light of which the Additional Commissioner opined that the present case be treated not as an EOU dealer but as a situation where the applicant dealer is not in a position to fully/partly adjust VAT payable with the sanctioned amount of capital and interest subsidies as per the T&C [Terms and Conditions] of the WBISS 2008 Scheme.

In view of such clarification, there is no scope of the petitioners being liable to pay any further VAT dues under the Scheme. Hence, as the petitioners are otherwise eligible to get the benefit of the Scheme and have already being admitted to be so twice, once for the subsidy under the Scheme and once for the interest subsidy by the respondent Authorities themselves, there is no impediment on the part of the respondent Authorities at all in disbursing the entire subsidy to the petitioners, including the interest subsidies, as already sanctioned.

It is seen that a reply filed by the petitioners was previously taken on record. However, in view of no affidavits having been filed by the respondents at all, such reply has not been looked into and be deemed to be expunged from the records.

Accordingly, WPO/274/2022 is allowed on contest, thereby directing the respondent Authorities to immediately disburse the entire amount of the subsidy which the petitioners are entitled to get under the West Bengal State Support for Industries Scheme, 2008 [as amended up to December 31, 2010] to the petitioners within an outer limit of three months from date.

In the event such payment is not made by the respondent Authorities to the petitioners within the said date, the respondent Authorities shall pay the entire amount of subsidies due to the petitioners along with interest calculated @ 12% per annum till the date of payment of such amount to the petitioners.

No order as to costs.

(SABYASACHI BHATTACHARYYA, J.)

pkd.