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

+ **Date of Decision: 01.05.2023**

% **LPA 362/2019 & CM APPLs. 24661-62/2019 & 8299-8300/2020**

UNION OF INDIA & ORS Appellant

versus

AUROBINDO PHARMA LTD Respondent

% **LPA 65/2019 & CM APPLs. 4621-23/2019 & 8297-98/2020**

UNION OF INDIA & ORS Appellants

versus

M/S MOTHERSON SUMI ELECTRIC WIRES Respondent

% **LPA 616/2018 & CM APPLs. 45510-12/2018 & 8211-12/2020**

UNION OF INDIA & ORS Appellants

versus

M/S DEEPAK ENTERPRISES Respondent

MEMO OF APPEARANCE:

Ms. Shivalakshmi, CGSC with Ms. Ridhima Malhotra and Ms. Srishti Rawat, Advocates for the Appellants/ UOI.

Mr. V. Lakshmikumaran, Ms. Charanya Lakshmi Kumaran, Mr. Yogendra Aldak and Mr. Kunal Kapoor, Advocates for the Respondents.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

SATISH CHANDRA SHARMA, C.J. (ORAL)

1. Regard being had to the controversy involved in the aforesaid three cases, they were heard analogously and a common judgment is being passed in these matters. The facts of LPA 616/2018 titled ***Union of India & Others Vs. M/s Deepak Enterprises*** are being dealt with hereunder.

2. M/s Deepak Enterprises is a manufacturer of Motor Vehicle Parts (Back Plates) having a unit located in a Domestic Tariff Area (DTA). The Respondent herein filed a writ petition before this Court claiming that during the period January, 2012 to April, 2013, it supplied Back Plates to two 100% Export Oriented Units (EOU's), namely, M/s Danblock Brakes India Pvt. Ltd and M/s Roulands Braking (India) Pvt. Ltd. It was further stated in the writ petition that the said goods were excisable goods and were cleared on payment of excise duty by the aforesaid EOUs and the said EOUs did not provide CT-3 certificates to the Petitioner.

3. It was further stated that it was permissible to supply the goods on payment of Terminal Excise Duty (TED) and subsequently claim refund. The Respondent herein/ Petitioner applied for refund of TED aggregating to Rs.67,18,748/- in respect of goods supplied during the period January, 2012 to 17.04.2013. However, the said claim was rejected by the Joint Director General of Foreign Trade on 05.06.2013 with the endorsement – “*as supply is made to 100% EOU, TED is not admissible in terms of policy circular dated 15.03.2013*”.

4. It is pertinent to note that on 18.04.2013, the Central Government published Notification No. 4 (RE-2013)/2009-2014 in exercise of powers

conferred by Section 5 of the Foreign Trade (Development & Regulation) Act, 1992 amending the FTP by substituting paragraphs 8.3(c) and 8.4 of the FTP.

5. The Respondent herein/ Petitioner resubmitted its claim for refund of TED relying on the judgment delivered in the case of ***Kandoi Metal Powders Mfg. Co. Pvt. Ltd. v. Union of India & Ors***, 2014 (302) E.L.T. 209 (Del.), which was delivered by a Division Bench of this Court on 11.02.2014. The Respondent herein/ Petitioner's subsequent claim was also rejected by a communication dated 28.08.2014 clarifying that the Policy Relaxation Committee (PRC) had allowed the refund of TED only to Kandoi Metal Powers Manufacturing Pvt. Ltd.

6. The Respondent herein/ Petitioner being aggrieved by the orders dated 05.06.2013, 23.01.2014 & 28.04.2014 and also the minutes of the meeting of the Policy Interpretation Committee held on 04.12.2012, preferred a writ petition and the learned Single Judge has allowed the said writ petition vide judgment dated 19.01.2018. The relevant portion of the said judgment – as contained in paragraphs 20 to 27, reads as under:

“20. In Kandoi Metal Powders MFG. Co. Pvt. Ltd. (supra), the Division Bench of this Court had held that the Cenvat regime under the Central Excise Act, 1944 operate on its own terms and is independent on the rights and liabilities of the parties under the import export policies framed under the Act. The said decision squarely covers the controversy in the present case.

21. In Joint Director general of Foreign Trade v. IFGL Refractories Ltd.: 2002 (143) ELT 294 (Cal) - which was also referred to by this Court in Kandoi Metal Powders Mfg Co. Pvt. Ltd's case - the Calcutta High Court had held once the policy

provides for refund of TED, the said right could not be taken away for want of a procedure under the Hand Book of Procedures. The court further held that “In case of refund of terminal excise duty, the concerned authority is DGFT to whom petition has been moved for refund of terminal excise duty. Therefore, there is no question to approach the excise department for refund of any excise duty”.

22. *Mr Narula’s contention that the said decision did not refer to the policy circular dated 15.03.2013 and, therefore, ought to be distinguished cannot be accepted. A plain reading of the said decision indicates that the Division Bench had taken note of the policy circular dated 15.03.2013. More importantly, the reasons as indicated in the said circular were rejected. The relevant extract of the said decision is as under:-*

“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.”

23. Mr Narula also referred to the decision of the Bombay High Court in Sandoz Private Limited and Lupin Limited v. Union of India: 2016 (341) E.L.T. 22 (Bom.) and contended that the Court had distinguished the decision of the Division Bench of this Court in Kandoi Metal Powders Mfg. Co. Pvt. Ltd. (supra) and the same was not applicable in the facts of this case. However, a closer examination of the decision of the Bombay High Court indicates that the Court has in fact differed from the view expressed by this Court in Kandoi Metal Powders Mfg. Co. Pvt. Ltd. (supra). The Bombay High Court was of the view that the Court was unable to comprehend “the rationale of the decision of the second and third respondents”. The Court was also of the view that the policy circular dated 15.03.2013 was merely clarificatory and the DGFT had the power to interpret and implement the policy. This is different from the view of this Court in Kandoi Metal Powders Mfg. Co. Pvt. Ltd. (supra), wherein the Court had opined that Cenvat regime under Central Excise operates in its own terms and is independent of the rights and liabilities of the parties under the

FTP. This Court is also unable to concur with the view of the Bombay High Court that the Policy Circular dated 15.03.2013 clarifies an obvious position. Plainly, in such case, there was no requirement to amend the FTP.

24. *Mr Narula had also referred to the decision of the Division Bench of this Court in Union of India and Ors. v. Alstom India Limited: 2015 (325) ELT 72 (Del) and on the strength of the said decision contended that the Division Bench had not accepted the earlier decision in Kandoi Metal Powders Mfg. Co. Pvt. Ltd. (supra). He further stated that the Court had set aside the observations of the learned Single Judge directing the authorities to examine the case of the Alstom India Ltd. keeping in mind certain observations and the judgment of this Court in Kandoi Metal Powders MFG. Co. Pvt. Ltd. (supra), and therefore, the said decision could be distinguished. The said contention is plainly without any merit. A plain reading of the decision of the Division Bench in Union of India and Ors. v. Alstom India Ltd. (supra) indicates that the Court had not expressed any opinion on any of the issues involved in the present petition. The observations made by the learned Single Judge in that case had been set aside only on the principle that a Court cannot direct a statutory authority to exercise discretion in a particular matter. The Division Bench held that since the learned Single Judge had held that no interference of the Court is warranted at that stage, the learned Single Judge ought not to have directed the DGFT to pass an order keeping in mind the observations made by the learned Single Judge. Although, this Court has certain reservations as to the said decision, the same are not relevant for the purpose of the present case. However, it is clear that the Court had not expressed any final opinion on the issue at hand.*

25. *It is also relevant to note that in that case Alstom India Ltd. had supplied goods against the International Competitive Bidding (ICD). Paragraph 8.3(c) of the FTP, expressly provided that such supplies would be exempted from TED and in other cases refund of TED would be given. Thus, Union of India and Ors. v. Alstom India Ltd. (supra) would have little application in the facts of the present case.*

26. *In view of the above, the petition is allowed. The impugned orders/communications - orders dated 05.06.2013, 23.01.2014 and 28.08.2014 - rejecting the petitioner's claim for refund of TED in respect of the goods supplied between January, 2012 and 17.04.2013 on the ground that the said goods were exempted from excise duty, are set aside. The minutes of Policy Interpretation Committee dated 04.12.2012 and the Policy Circular dated 15.03.2013 insofar as the same are relied upon to reject the claim of the petitioner for refund of TED are set aside. The respondents are directed to process the petitioner's claim for refund of TED.*

27. *The pending application is also disposed of."*

7. The Appellants/ Union of India (UOI) have preferred the present writ appeals being aggrieved by the aforesaid judgment of the learned Single Judge, whereby the claim of the DTAs for refund of TED paid by them at the time of supply of the goods to EOUs by utilizing their CENVAT credit, has been allowed.

8. Learned Counsel for the Appellants/ UOI has stated before this Court that a common issue arises in all the three appeals, i.e. whether the DTA Units who had paid Excise Duty at the time of supply of goods to the EOU's, utilizing their CENVAT Credit, can claim refund of the same in light of the provisions of the FTP (2209-2014).

9. It has been stated before this Court that the said issue stands covered by the judgment delivered by the Hon'ble Supreme Court in ***Sandoz Private Limited Vs. Union of India & Others***, 2022 SCC OnLine SC 10, wherein the Hon'ble Supreme Court while allowing the claim for refund of TED has held that in the case of DTA supplier of goods to EOU, if TED has been paid by utilizing CENVAT credit, the refund would be in the form of reversal of commensurate amount of CENVAT credit amount. The

operative portion of the said judgment delivered by the Hon'ble Supreme Court – as contained in paragraphs 44 to 59, reads as under:

“44. We thus agree with the conclusion reached by the Bombay High Court that the EOU is not entitled to claim refund of TED on its own. However, we add a caveat that EOU may avail of the entitlements of DTA supplier specified in Chapter 8 of FTP on condition that it will not pass on that benefit back to DTA supplier later on. In any case, the refund claim needs to be processed by keeping in mind the procedure underlying the refund of CENVAT credit/rebate of excise duty obligations. If CENVAT credit utilised by DTA supplier or EOU, as the case may be, cannot be encashed, there is no question of refunding the amount in cash. In that case, the commensurate amount must be reversed to the CENVAT credit account of the concerned entity instead of paying cash.

45. If, the claim for refund by DTA supplier under the scheme of FTP is allowed, it can be in cash if TED had been paid in cash. Else, it can be in the form of reversal of commensurate CENVAT credit amount to the concerned account of DTA supplier.

46. As regards the refund claim of DTA supplier, as noted earlier, it needs to be processed by the authorities under the FTP keeping in mind the purport of stipulations spelt out in Chapter 8 of subject FTP, such as the goods imported or supplied to EOU shall be with actual user condition and shall be utilised for export production and that the EOU did not avail CENVAT credit or rebate in relation to the goods supplied to EOU. Similarly, if the DTA supplier has utilised the CENVAT credit, commensurate amount needs to be reversed to its CENVAT credit account, in which case, there is no question of refunding the amount in cash to the DTA supplier.

47. We shall now revert to the judicial pronouncements dealing with the subject FTP. Except the decision of the Bombay High Court commended to us, which is under challenge in the first two appeals pertaining to refund claim by EOU, all other reported decisions are in respect of DTA supplier of specified

goods/services.

48. *The earliest decision is that of the learned Single Judge of the Calcutta High Court in IFGL Refractories Limited (2001) 132 ELT 545 (Cal.). The High Court noted that the Export and Import Policy for the relevant years was adopted amongst other to promote export of Indian products to foreign countries aiming at to earn foreign exchange and to increase global market. The scheme was propounded to encourage indigenous supplier by providing certain benefits and entitlements, either by way of exemption from payment of excise duty or to get refund of excise duty, if already paid. The object of the scheme was to provide exporters duty-free input for production of export materials and for that reason, it exempted supplier from payment of any excise duty and, if paid, to provide for refund of TED. The High Court further noted that merely because such refund was not permissible to the DTA supplier under the 1944 Act and the rules framed thereunder, that would not deprive the DTA supplier to avail of the entitlements and benefits under the FTP. It held that it is open to the assessee to take advantage of any law, particularly which is more beneficial. Accordingly, learned Single Judge issued directions to pay the refundable amount along with interest at the rate of 12 % per annum. The appeal filed by the Department against the said decision was rejected by the Division Bench of the Calcutta High Court in Joint Director General of Foreign Trade (2002) 143 ELT 294 (Cal.). The Division Bench, however, directed the DGFT to refund TED amount as it was the concerned Authority under the FTP, subject to assessee completing necessary formalities as provided for in the FTP. This decision was then affirmed by this Court consequent to dismissal of special leave petition being S.L.P. (C) No. 5368 of 2002, on 7.10.2002.*

49. *The next decision is of the High Court of Gujarat in the case of Commissioner of Central Excise and Customs v. NBM Industries (2012) 276 ELT 9 (Guj.). The Division Bench of the High Court considered the question whether DTA supplier of goods to EOU is entitled for refund of the CENVAT credit despite Rule 5 of the 2004 Rules, dealing with refund of CENVAT credit. The Authorities had held that not being a case*

of export of goods out of India, the assessee was not entitled for refund of CENVAT credit amount utilised in respect of subject goods supplied to EOU. The High Court relying on its earlier decision in Commissioner of Central Excise v. Shilpa Copper Wire Industries (2011) 269 ELT 17 (Guj.), negated that stand of the Department. Instead, the High Court held that the claim for refund was in reference to the applicable FTP and not on the basis of the provisions of the 1944 Act and the rules framed thereunder. The entitlement of DTA supplier was specified in the applicable FTP being deemed exports which in law are regarded as physical exports for the purpose of entitling refund of unutilised CENVAT credit.

50. Then came the decision of the High Court of Delhi in Kandoi Metal Powders Manufacturing Company Private Limited (2014) 302 ELT 209 (Del.). Even, this was a case of supplier manufacturing goods supplied to EOU in reference to the applicable FTP. The High Court not only relied on the decision of the Division Bench of the Calcutta High Court in Joint Director General of Foreign Trade (2002) 143 ELT 294 (Cal.), but independently opined that DGFT having formulated the FTP, the claim of the assessee was governed by the entitlements specified therein in paras 8.2, 8.3, 8.4 and 8.5 as applicable at the relevant time. Accordingly, the High Court allowed the writ petition and relegated the writ petitioner before the Authority concerned for deciding the refund claim of the petitioner. This judgment has been followed in subsequent decisions, not only by the coordinate Benches of the High Court of Delhi, but also by other High Courts.

51. The Madras High Court in the case of Raja Crowns and Cans Pvt. Limited v. Union of India (2015) 317 ELT 40 (Mad.) dealt with similar claim of the DTA supplier of goods to EOU and whilst following the decisions of the High Court of Delhi and Calcutta High Court referred to above, opined that the assessee was entitled to maintain an application for refund of TED. The High Court, accordingly, directed the Authorities concerned to consider the refund application of the writ petitioner. Later on, the Madras High Court took the same view in Lenovo (India) Pvt. Ltd. (2017) 346 ELT

12 (Mad.) and Manali Petrochemical Limited v. Additional Director General of Foreign Trade, New Delhi W.P. No. 23194 of 2009, decided on 16.9.2019.

52. As aforesaid, the decision in Kandoi Metal Powders Manufacturing Company Private Limited (2014) 302 ELT 209 (Del.) has been subsequently followed by the High Court of Delhi in Union of India v. Alstom India Limited (2015) 325 ELT 72 (Del.), Commissioner of Central Excise, Delhi II v. Welspring Universal (2018) 359 ELT 635 (Del.), Deepak Enterprises v. Union of India (2018) 360 ELT 905 (Del.), Alstom Transport India Ltd. v. Union of India (2018) 363 ELT 69 (Del.), Motherson Sumi Electric Wires v. Union of India (2018) 364 ELT 91 (Del.), Multitex Filtration Engineers Limited v. Union of India (2020) 373 ELT 68 (Del.) and Hindustan Tin Works Limited v. Union of India (2020) 373 ELT 217 (Del.).

53. The view taken by the Calcutta High Court and followed by the High Court of Delhi commended even to the High Court of Karnataka in Acer India Pvt. Ltd. (2018) 361 ELT 44 (Kar.).

54. The view taken in these decisions at the instance of the DTA supplier of specified goods to EOU is in consonance with the view taken by us in this judgment. To that extent, we affirm these decisions and hold that the DTA supplier of goods to EOU would be entitled for refund of TED on the basis of applicable para 6.11(a) read with paras 8.3(c), 8.4.2 and 8.5 of the FTP under consideration. The modality of refund, however, ought to be in the form of reversal of commensurate amount in the CENVAT credit account of the DTA supplier, if the DTA supplier had utilized CENVAT credit account in respect of goods supplied to EOU; and if it had paid the amount in cash, the DTA supplier would be entitled for refund of cash with simple interest at the rate of 6% per annum as provided in para 8.5.1 of the applicable FTP on delay in refund of duty drawback and TED under deemed exports scheme.

55. Reverting to the case of EOU considered by the Bombay High Court in the impugned judgment, we hold that EOU is entitled only for ab initio exemption from payment of central

excise duty in terms of para 6.11(c)(ii) of the FTP; and obliged to import the goods from DTA supplier without payment of duty in terms of para 6.2(b) of the FTP. The arrangement provided in para 6.11(a) is, however, in the nature of “benefit” given to EOU in the event it had paid the amount towards TED in relation to goods procured by it to DTA supplier. In that case, EOU will be eligible only for obtaining entitlements of DTA supplier as specified in Chapter 8 of the FTP upon obtaining a suitable disclaimer from DTA supplier. Accordingly, in addition to ab initio exemption, the EOU is additionally eligible to receive entitlements of DTA supplier as specified in Chapter 8 of the FTP subject to complying with necessary requirements and formalities. In other words, EOU is not entitled for refund of TED on its own accord, but can avail of the entitlements of DTA supplier on complying essential procedure. As mentioned earlier, the interest on the refundable amount, if paid in cash ought to be refunded with simple interest at the rate of 6% per annum as provided in para 8.5.1 of the applicable FTP, even in the case of application for refund by EOU.

56. The next question is : the refund claim should be set up before which Authority? As noted earlier, since the entitlement of exemption and refund of TED flows from the provisions of 1992 Act and FTP framed thereunder by the Central Government, which is an independent dispensation than the one provided in the 1944 Act and the rules framed thereunder, with the avowed purpose of promoting export and earning foreign exchange, it is the obligation of Authority responsible to implement the subject FTP, to deal with refund claim of the concerned entities. For, it is not a case of refund under the 1944 Act or 2002 Rules or 2004 Rules as such, but under the applicable FTP.

57. In conclusion, we hold that the EOU entities, who had procured and imported specified goods from DTA supplier, are entitled to do so without payment of duty [as in para 6.2(b)] having been ab initio exempted from such liability under para 6.11(c)(ii) of the FTP, being deemed exports. Besides this, there is no other entitlement of EOU under the applicable FTP. Indeed, under para 6.11(a) of the FTP, EOU is additionally

eligible merely to avail of entitlements of DTA supplier as specified in Chapter 8 of the FTP upon production of a suitable disclaimer from the DTA supplier and subject to compliance of necessary formalities and stipulations. It would not be a case of entitlement of EOU, but only a benefit passed on to EOU for having paid such amount to the DTA supplier, which was otherwise ab initio exempted in terms of para 6.11(c)(ii) of the FTP coupled with the obligation to import the same without payment of duty under para 6.2(b).

58. Besides, if the DTA supplier as well as EOU had utilized its CENVAT credit for importing goods in question, the refund would be in the form of reversal of commensurate amount of CENVAT credit to the account of the concerned entity. However, if TED has been paid in cash by the EOU, the EOU may get refund of that amount from Authority implementing the applicable FTP in cash with simple interest at the rate of 6% per annum for the delayed refund of duty (para 8.5.1) on condition that it would not pass on that benefit to the DTA supplier owing to such refund/rebate.

59. As regards DTA supplier of goods to EOU, it is entitled to receive the refund of TED in terms of para 8.3(c) read with paras 8.4.2 and 8.5 of the applicable FTP subject to complying necessary formalities and stipulations provided therein, being a case of deemed exports. Even, in the case of DTA supplier of goods to EOU, if TED has been paid by utilizing CENVAT credit, the refund would be in the form of reversal of commensurate amount in its CENVAT credit account. And if the amount towards TED has been paid in cash by the DTA supplier to the Authorities under the 1944 Act, the refund of TED amount would be made by the Authority implementing the applicable FTP in cash with simple interest at the rate of 6% per annum for the delay in refund of TED as per para 8.5.1. ”

10. Learned Counsel for the parties are *ad idem* that the issue involved in the present case stands concluded on account of the judgment delivered by the Hon'ble Supreme Court in **Sandoz Private Limited** (supra). However, it has been argued before this Court that with the introduction of Goods &

Services Tax Regime, the erstwhile concept of CENVAT credit register has been done away with. He has further stated that in cases where the duty was paid through credit, there is no way that the refund can now be granted in credit account and, therefore, the refund has to be made in terms of Section 142(3) of the Central Goods and Services Tax Act, 2017 which provides that any amount of refund accruing to any assessee shall be paid in cash.

11. This Court has carefully gone through the judgment delivered by the Hon'ble Supreme Court in *Sandoz Private Limited* (supra) and the issue involved in the present case stands concluded on account of the said judgment. Therefore, the Respondent herein/ Petitioner shall be entitled for refund in accordance with law.

12. The present LPAs are, accordingly, disposed of.

SATISH CHANDRA SHARMA, CJ

SUBRAMONIUM PRASAD, J.

MAY 01, 2023

B.S. Rohella