IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 18.06.2024

Pronounced on : 27.06.2024

CORAM:

THE HONOURABLE MR. JUSTICE **G.K.ILANTHIRAIYAN**

W.P.No.13075 of 2021
and
WMP.No.13882 of 2021

M/s.Beardsell Limited
Represented by its Chief Marketing Officer,
S.Dhandapani,
47, Greams Road,
Chennai 600 006 ... Petitioner

Vs.

1.Union of India,
Represented by Commerce Secretary,
Ministry of Commerce & Industry,
(Department of Commerce),
Udyog Bhavan,
New Delhi 110 011

2.The Deputy Secretary,
Ministry of Commerce & Industry,
(Department of Commerce),
Udyog Bhavan,
New Delhi 110 011 ... Respondents

PRAYER: Writ Petition is filed under Article 226 of Constitution of India praying to issue a Writ of Certiorarified Mandamus calling for the records on the file of the second respondent in relation to rejection of claim of the petitioner company for Cash Compensatory Support and Duty Draw Back vide its Order dated 09.01.2020 file No.K-53018(12)1/2019-EP-ENGG-Doc and quash the same with consequential direction directing the respondents herein to grant the relief of cash compensatory support and duty draw back aggregating Rs.24,37,730/- with interest to the petitioner company herein.

For Petitioner : Mrs.P.Jayalakshmi

For Respondents : Mr.AR.L.Sundaresan,
Additional Solicitor General of India
Assisted by
Mr.J.Madanagopal Rao,
Senior Panel Counsel

ORDER

This writ petition has been filed challenging the order passed by the second respondent dated 09.01.2020 thereby rejected the claim of the petitioner for cash compensatory support and duty draw back.

2. The petitioner was a sub contractor for M/s.National Aluminium Company Limited (hereinafter called as 'NALCO') to complete the project in the year 1987. NALCO required longest conveyor system for conveying ore from mines to the processing unit. Therefore,

global tender was issued, in which M/s.Cable Belt Limited (hereinafter called as 'CBL'), United Kingdom was awarded contract. In turn, CBL had selected the petitioner for execution of the said work as a sub contractor as per the quotation submitted by the petitioner to the NALCO. Accordingly, the petitioner had proceeded with the execution of work and completed the same in the month of December 1987. Thereafter, the petitioner approached the respondents to avail benefits such as duty draw back and cash compensatory support (hereinafter called as 'CCS'). However, the petitioner was informed that the project for NALCO was funded by Overseas Development Agency (hereinafter called as 'ODA') of Government of United Kingdom, is an institution which was not included in the list of multilateral / bilateral external agency as specified in Circular No.1(6)/79-EAC dated 16.11.1982.

2.1 As recommended by the Engineering Export Promotion Council for inclusion of the petitioner with ODA for the purpose of export benefits, the petitioner applied for grant of CCS on supplies made by it to the project. However, it was rejected by an order dated 15.10.1992 on the ground that the contract with CBL was not registered with an authorised dealer in foreign exchange as prescribed in Ministry of Commerce circular No.12 (21)76-EAC dated 04.09.1976. Further supplies were not made on the basis of international competitive bidding or limited tender procedure as required by the respondents' circular No.1 (6)/79-EAC dated 11.12.1981. It was challenged before this Court in WP.No.18632 of 1993. This Court by order dated 25.07.2003 set aside the order dated 15.10.1992 and remanded the matter to the first respondent for fresh disposal after considering all aspects and contentions to be raised by the petitioner after giving opportunity of hearing and for passing orders on merits within a period of eight weeks. Once again, the second respondent rejected the claim made by the petitioner by an order dated 04.02.2004. It was challenged by the petitioner before this Court in WP.No.9692 of 2004. This Court by an order dated 19.09.2017, allowed the writ petition and once again remanded the matter to the respondents and also issued positive direction to allow the request made by the petitioner.

2.2 Aggrieved by the same, the respondents filed appeal in WA.No.1005 of 2019 and the Hon'ble Division Bench of this Court by order dated 28.03.2019, partly allowed the writ appeal and remanded the matter to the second respondent for fresh consideration and to pass orders as directed by this Court in WP.No.18632 of 1993. Thereafter, the second respondent rejected the claim made by the petitioner by the order dated 09.01.2020.

3. The learned counsel for the petitioner would submit that the the order impugned in this writ petition is clear violation of the direction issued by the Hon'ble Division Bench of this Court in WA.No.1005 of 2019. The claim of the petitioner was rejected on the ground that the contract of the petitioner with CBL was not registered with authorised dealer in foreign exchange as per the circular dated 04.09.1976. The supplies were not made on the basis of international competitive bidding or limited tender procedure as required by the respondents' circular dated 11.12.1981 for qualifying to claim CCS.

3.1 She further submitted that the petitioner acted as sub contractor to the main contractor CBL and completed the entire work.

Though CBI was the main contractor, the entire work was entrusted to the petitioner as sub contractor and successfully executed the contract. Therefore, the benefits of CCS and duty draw back are entitled by the petitioner. This Court while setting aside the order passed by the second respondent, in WP.No.18632 of 1993 dated 25.07.2003, specifically directed the second respondent to consider the issue in the light of facts as stated supra and the other grounds raised by the petitioner with regards to the requirement of registration with the authorised dealer in foreign exchange. Further observed that as far as the objection in relation to the alleged absence of international competitive bidding being one of the reasons stated in the impugned order, it is found to be without any basis and therefore, the said grounds shall stand set aside.

3.2 She further submitted that once again, the second respondent without considering the above direction specifically issued by this Court, mechanically rejected the claim made by the petitioner. In fact, in the second round of challenge against the order passed by the second respondent, this Court in WP.No.9692 of 2004 by an order dated

19.09.2017, set aside the order and allowed the writ petition by stating that the relief sought for by the petitioner has to be granted. In fact, the Hon'ble Division Bench of this Court, while partly allowing the writ appeal, directed the second respondent to consider the submissions and documents and to pass speaking order on merits and in accordance with law. However, once again, without considering the same, the second respondent rejected the claim made by the petitioner.

4. Heard, the learned counsel appearing on either side.

5. On perusal of the counter filed by the respondents and on hearing the submissions made by the learned counsel appearing on either side, revealed that admittedly the petitioner is a sub contractor of CBL who was awarded main contract on global tender for execution of the work cable belt conveyor system. After completion of the said contract work, the petitioner applied for grant of CCS on supplies made by them in the project which fell in the category of deemed exports. Further, the contract with CBL was not registered with authorised dealer in foreign

exchange as prescribed in Ministry of Commerce circular dated 04.09.1976. Further, the supplies were not made by the petitioner on the basis of international competitive bidding or limited tender procedure as required by the respondents by the circular dated 11.12.1981 for qualifying to claim CCS. On perusal of circular dated 16.11.1982 revealed that seven multilateral / bilateral agencies were listed for the purpose of granting export benefits. However, the financial assistance provided to the petitioner by overseas development administration, United Kingdom was not registered under the circular dated 16.11.1982. Though the case of the petitioner was recommended by Engineering Export Promotion Council, no documents relating to inclusion of ODA in the list of multilateral agencies, eligible for benefits under circular dated 11.12.1981 produced by the petitioner. Therefore, the petitioner failed to satisfy the condition imposed in the circular dated 11.12.1981.

6. Further, the circular indicates that it was beneficial in nature as it allowed benefits of scheme of registration of contract as outlined by

the circular dated 04.09.1976 insofar as grant of CCS for the supplies made to project by multilateral or bilateral external assistance. Therefore, the claim made by the petitioner was rightly rejected by the second respondent. Further as directed by the Hon'ble Division bench of this Court, the petitioner was served with notice and was given opportunity of hearing. The submissions made by the petitioner failed to produce supporting documents to claim the benefits of CCS. It is relevant to extract a portion of the order passed by this Court in WP.No.18632 of 1993 dated 25.07.2003 hereunder:

> *"8. I have considered the submissions of both sides in the context the first objection in the impugned order viz.. absence of registration with authorised dealer in foreign exchange and as a fact, it is not disputed that the petitioner has not registered himself with any authorised dealer. The question which arises for consideration is as to whether all the conditions stipulated in circular dated 4.9.1976 would be automatically applicable to sub-contractors whose supplies will be treated as "deemed" exports in terms of the circular dated 11.12.1981. A perusal of the circular dated 11.12.1981 shows that there is no specific*

requirement on the part of the sub contractor to be registered with the authorised foreign exchange dealers. The purpose of registration with foreign exchange would arise only if any negotiation takes place through them. But on the facts of the contract in question the petitioners claim that there has been no negotiation through any of the dealers in foreign/exchange. Requirement for such registration in the said background appears prima facie to be an unnecessary formality. However, this issue has to be considered by the Authorities in a detailed manner. The request of the petitioner for availing CCS is based on the promise which was projected through circular dated 11.12.1981 and it cannot be disputed that the petitioner while negotiating for the contract would have taken into account the benefit of CCS also in their mind while making the bid for the contract. Therefore the Government would not be justified in adopting rigid formula while interpreting the requirements under a beneficial circular viz., dated 11.12.1981 but should be interpreted in a liberal manner vide the following judgments of the Supreme Court:

1) The Broach District Co.Op. Society Limited vs The Commissioner of Income Tax- A.I.R. 1989 SC 1493

9(b) .... Therefore the petitioner is directed to file a comprehensive representation before the first respondent dealing with the issue relating to absence of registration with foreign exchange dealers at the earliest and on receipt of such representation, the first respondent is directed to consider all the aforementioned aspects and contentions to be raised by the petitioner in their representation and after giving a hearing to the petitioner and pass orders within a period of 8 weeks after receiving the representation from the petitioner. This writ petition is partly allowed, subject to the above observations."

7. As directed by this Court, the second respondent considered the representation submitted by the petitioner on the grounds raised by the petitioner and finally rejected the claim of the petitioner by order dated 04.02.2004. It also revealed that the petitioner had not registered their contract with authorised foreign exchange dealer as required under the scheme of registration of contract by the circular dated 04.09.1976 or any other licencing authority. Further, the Hon'ble Division Bench particularly allowed the appeal preferred by the respondents and

remanded the matter to the second respondent for fresh disposal. Further observed that the learned writ court has no jurisdiction to grant reimbursement on the deemed export benefit as it can only test the correctness of the decision making process. Undoubtedly, there is severe flaw in the decision making process which culminated in the order dated 04.02.2004 passed by the second respondent. Therefore, the second respondent rightly held that the registration of contract was necessary in the case of the petitioner, even when the supplies were domestic in nature and had not required any negotiation with the foreign exchange dealer. Further, observed that such registration was not only required for the benefit of the application to protect it from the adverse changes in CCS rates, it was also crucial for the Government for its protection from claim of undue benefit. Non registration of the contract prevented the Government from exercising such control.

8. In view of the above, this Court finds no infirmity or illegality in the impugned order dated 09.01.2020 passed by the second respondent. As such, this writ petition is liable to be dismissed.

Accordingly, this writ petition is dismissed. Consequently, connected miscellaneous petition is closed. There shall be no order as to costs.

27.06.2024

Neutral Citation:Yes/No
Index: Yes/No
Speaking/Non-speaking order
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To
1.Commerce Secretary,
Union of India,
Ministry of Commerce & Industry,
(Department of Commerce),
Udyog Bhavan,
New Delhi 110 011
2.The Deputy Secretary,
Ministry of Commerce & Industry,
(Department of Commerce),
Udyog Bhavan,
New Delhi 110 011

G.K.ILANTHIRAIYAN, J.

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