IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.04.2024

CORAM:

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

W.P.No.17902 of 2020
and W.M.P.No.22192 of 2020

M/s.Geo Foundations & Structures Pvt. Ltd.,
Rep. by its Director K.N.Madhusudanan Pillai,
No.89, 1st Main Road, Gandhi Nagar,
Adyar, Chennai – 600 020. ...Petitioner

-Vs -

1. The Director of General Foreign Trade
(PRC) Section,
Government of India,
Ministry of Commerce and Industry,
Udyog Bhavan H- Wing,
Maulana Azad Road,
New Delhi – 110 011.

2. The Additional Director General
of Foreign Trade,
Government of India,
Ministry of Commerce and Industry,
No.26, Haddows Road,
Shastri Bhavan Annexe,
Chennai – 600 006.

3. The Joint Secretary,
Department of Atomic Energy,
Anushakthi Bhavan,
Chatrapadi Shivaji Maharaj Marg,
Mumbai – 400 001. ... Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Ceritiorarified Mandamus, to call for the records relating to the impugned order passed by the first respondent in PH Case No.03 in F.No.01/60/162/907/AM20/PRC meeting No. 05/AM21 dated 16.07.2020 & 21.07.2020 and quash the same as arbitrary, unsustainable in law and passed without proper reasons and further direct the first respondent to order the grant refund of TDE (Terminal Excise Duty) claimed by the petitioner basing on the recommendation of Department of Atomic Energy dated 09.11.2015.

For Petitioner : Mr.K.Jayachandran
For Respondents
For R1 & R2 : Mr.K.Subbu Ranga Bharathi
Central Government Standing Counsel
For R3 : Mr.S.Senthilnathan

ORDER

This writ petition has been filed challenging the orders dated 16.07.2020 & 21.07.2020, passed by the first respondent, thereby rejecting the claim of refund of terminal benefits of excise duty.

2. The petitioner was the successful bidder for the tender floated by the third respondent for the work of construction of Tsunami bund and retaining wall for 500 Mwe Prototype Fast Breeder Reactor (hereinafter referred to as "PFBR") project at Kalpakkam. The petitioner quoted the price of Rs.32,96,82,350/- and accordingly, the petitioner was

issued with work order dated 03.06.2014. As per para 21 of the work order, the Terminal benefit of Excise Duty (hereinafter referred to as "TED") is applicable and the project certificate for claiming TED for applicable goods will be issued by the third respondent. After completion of work, the petitioner submitted application to claim TED as prescribed under Chapter 7 of the Foreign Trade Policy (hereinafter referred to as "FTP") by enclosing necessary documents which are applicable to claim TED on 04.01.2016. However, the second respondent without considering the documents, rejected the application by an order dated 08.02.2017 on the ground that construction of Tsunami protection bund and retaining wall cannot be considered as deemed exports.

3. Thereafter, the petitioner submitted several representations before the second respondent and he was advised to approach the Policy Relaxation Committee, the first respondent herein. Thereafter, once again, the first respondent, without giving any personal hearing and without considering the relevant documents, rejected the claim made by the petitioner and confirmed the order passed by the third respondent. Therefore, the petitioner challenged the said order before this Court in W.P.No.32916 of 2019 and this Court set aside the order and remanded

back the matter to the first respondent for fresh disposal after reexamining the case. Thereafter, the petitioner submitted an application seeking for personal hearing for redressal of grievance in Form ANF-2E and submitted written submission on 16.07.2020. Once again, the first respondent reiterated the very same earlier order and rejected the claim made by the petitioner. Hence, the present writ petition.

4. The learned counsel appearing for the petitioner submitted that once the supply of goods fall within the category of deemed export, the unit would be entitled for refund of TED. The claim was supported by relevant documents issued by the government authorities and as such the claim of the petitioner ought not to have been rejected since the refund of TED is an automatic. In fact, the government of India formulated the benefits available under Chapter 7 of FTP as applicable for the period of 2015-20. When the conditions prescribed are satisfied, the grant of refund of TED is automatic. The supplies to nuclear power projects are allowed to refund under Para 7.02(h) of the FTP. The construction of Tsunami protection bund and setting up of PFBR is also akin to setting up of nuclear power project. Whether it is a nuclear power project or not, is to be decided by the atomic energy department of

government of India. When the Joint Director of Atomic Energy Department, the competent authority, certified it as a nuclear power project, the petitioner is entitled for the benefit of TED. The first respondent cannot take a different stand because, the eligibility criteria is to be certified by the department of atomic energy and this having been done by the said authority. Therefore, the first respondent is only the implementing authority and cannot deny the benefit of TED.

5. The first and second respondents filed counter and the learned Standing Counsel for Central Government submitted that the claim for refund has been made against the supply for construction of Tsunami protection bund and retaining wall which is not part and parcel of the nuclear power project. The supplies to nuclear power projects are allowed refunds under Para7.02(h) of the FTP. Further as per Para 7.08 of the FTP, refund on supplies of steel is made only if such supplies are made under Sub-para (a)(b) and (e) of Para 7.02 of the FTP and refund on supplies of cement are made, if such supplies are made as per para 7.02 (e) of the FTP. Therefore, the petitioner is not entitled for any deemed export benefits such as TED or deemed export drawback. Even if such supplies are made under Para 7.02 (e) of the FTP, that service

portion of civil construction work even in a turn-key project would not be eligible for deemed export benefits.

5.1. He further submitted that as per para 7.01 of the FTP refers deemed export to those transactions in which the goods supplied do not leave the country and the payment for such supplies is received either in Indian rupees or in free foreign exchange. Therefore, the construction of Tsunami protection bund and retaining wall cannot be construed as deemed export. The goods which were supplied for the ineligible project of civil construction work of Tsunami protection bund and retaining wall itself are not manufactured by the petitioner firm, as the petitioner firm itself had confessed that the goods were manufactured by a third party and directly supplied to the project site. Therefore, the petitioner does not come under the FTP and any other law for claiming refund of TED.

5.2. Supplies of goods will be eligible for refund of TED in terms of para 8.3(c) of the FTP, provided recipient of goods does not avail CENVAT credit/rebate on such goods. Similarly, supplies will be eligible for deemed export drawback in terms of para 8.3(b) of the FTP on Central Excise paid on inputs/components. Therefore, the claim of refund has been made against the supplies for construction of Tsunami protection bund & retaining ball, which is no part and parcel of the nuclear project. Hence, the claim made by the petitioner rightly rejected by the respondents.

6. Heard the learned counsel appearing on either side and perused the materials placed before this Court.

7. The policy relating to deemed exports is given in Chapter 7 of the FTP. It specifically states that supply of goods to nuclear power project are deemed exports provided that :-

(i) such goods are required as specified in the list 33 at Sl.No.511 of notification No.12/2012- cus dated 17.03.2022

(ii) the project should have a capacity of 440 MW or more

(iii) a certificate to the effect is required to be issued by an officer not below the rank of Joint Secretary to Government of India, in department of Atomic Energy.

8. The term deemed export is a creation of Export Import Policy and not defined under Central Excise Law. The benefits available to physical exports are also available to the deemed exports and the deemed exports are treated on par with physical export. In fact, in the physical export, the exporters is entitled to get refund of the excise duty paid on the raw materials. Likewise, under the deemed exports, by the Export Import Policy, TED is allowed. Therefore, the claim of the petitioner cannot be rejected on the ground that the goods supplied by the petitioner cannot be deemed exports.

9. That apart, on perusal of the counter filed by the third respondent revealed that as per the terms of contract, the petitioner is entitled for the TED and the third respondent required to forward a certificate issued by the beneficiary of the contract viz., M/s. Bharatiya Nabhikiya Vidyut Nigam Limited, to the first respondent. On perusal of letter dated 09.11.2015, issued by the third respondent also revealed that the refund clause of the FTP under which the petitioner is entitled for the claim of TED, sufficiently proved and satisfy the discharge of the

obligations on the part of the third respondent. However, the petitioner unable to obtain the benefits from the first respondent.

10. In view of the above discussions, the impugned order cannot be sustained and it is liable to be quash. Accordingly, the orders dated 16.07.2020 & 21.07.2020, passed by the first respondent in PH Case No.03 in F.No.01/60/162/907/AM20/PRC meeting No.05/AM21, are hereby quashed. The first respondent is directed to pass appropriate orders granting refund of TED as claimed by the petitioner based on the recommendation of atomic energy department dated 09.11.2015, within a period of twelve weeks from the date of receipt of a copy of this Order.

11. With the above directions, the Writ Petition stands allowed. Consequently, connected miscellaneous petition is closed. There shall be no orders as to costs.

10.04.2024

Index : Yes/No
Speaking/Non Speaking order
Neutral Citation : Yes/No
rts

G.K.ILANTHIRAIYAN. J,

rts

To
1. The Director of General Foreign Trade
   (PRC) Section,
   Government of India,
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