

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.10.2016

CORAM

THE HONOURABLE Mr.JUSTICE T.S.SIVAGNANAM

W.P.Nos.23507 to 23509 of 2014 &
M.P.No.1 & 2 OF 2014 in W.P.No.23509 of 2014

M/s. Lenovo (India) Pvt. Ltd.
Rep. by Mr.Baminee Viswanat
Company Secretary

.. Petitioner in all W.Ps.

Vs

- 1 Union of India
Rep. by its Secretary Ministry of Commerce
Department of Foreign Trade New Delhi-
110001.
- 2 The Director General of
Foreign Trade Ministry of Commerce & Industry
Government of India
Udyog Bhawan,
New Delhi.
- 3 The Joint Director of Foreign Trade
No.19-C 2nd Cross Jawahar Nagar
Boomianpet
Puducherry-605005.
- 4 The Commissioner of Central Excise
No.1 Gouber Avenue
Beach Road
Puducherry- 605001.

.. Respondents in all W.Ps.

COMMON PRAYER in W.P.Nos.23507 & 23508 of 2014: Writ petitionS filed under Article 226 of the Constitution of India to issue Writ of Certiorari to call for the records relating to the impugned orderS dated 13.08.2013 issued by the 3rd Respondent, quash the same and direct the 3rd Respondent to sanction refund of Terminal Excise Duty to the Petitioner.

PRAYER in W.P.No.23509 of 2014: Writ petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified mandamus to call for the records relating to the Policy Circular No.16, dated 15.03.2013, issued by the second respondent, quash the same and direct the third respondent to sanction refund of Terminal Excise Duty to the Petitioner.

For Petitioner : Mr.P.S.Raman,Sr.Counsel
(in all W.Ps) for Mr.Lakshmikumaran

For Respondents : Mr.J.Madanagopal Rao -R1 to R3
(in all W.Ps) Senior Panel Counsel

Mr.V.Sundareswaran - R4
Senior Panel Counsel

COMMON ORDER

Heard Mr.P.S.Raman, learned Senior Counsel, appearing for the petitioner in all Writ Petitions, Mr.J.Madanagopal Rao, learned Senior Panel Counsel appearing for respondents 1 to 3 and

Mr.V.Sundareswaran, learned Senior Panel Counsel appearing for the fourth respondent. With the consent of the learned counsel appearing on either side, the Writ Petitions are taken up for disposal.

2.The petitioner-Company has filed W.P.Nos.23507 and 23508 of 2014 challenging the rejection of their refund claims and W.P.No.23509 of 2014, has been filed, questioning the Policy Circular No. 16 dated 15.03.2013.

3.The issue which falls for consideration is as to whether the petitioner is entitled for refund of the Terminal Excise Duty. The fourth respondent namely the Commissioner of Central Excise, has taken a stand that the petitioner is not entitled for refund. However, the claim for refund has been rejected by the third respondent by an order dated 13.08.2013, by which the petitioner's Applications have been returned, by referring to the Policy Circular No.16 dated 15.03.2016, which is impugned in W.P.No.23509 of 2014. By the said Policy Circular, the second respondent has stated that in cases where the relevant taxes should not have been collected at the beginning, if there has been an error or oversight committed, then the agency collecting the tax would refund it, rather than seeking reimbursement from another

agency. Accordingly, it was clarified that that in respect of supplies, the supply of goods under invalidation letter issued against the Advance Authorisation; supply of goods under ICB and supply of goods to EOUs, no refund of TED should be provided by the Regional Authorities and the DGFT, because such supplies are *ab-initio* exempted from payment of excise duty.

4.Though the petitioner has challenged the Circular No.16, during the course of arguments, the learned Senior Counsel appearing for the petitioner would submit that the petitioner would give up the challenge to the Policy Circular and would not seriously canvass the same, as their endeavour is that the third respondent should consider their Applications for refund without reference to Policy Circular No.16, as admittedly, the refund claim was for an anterior period. Thus, the contention of the petitioner is to read down the Policy Circular so as to make it effective prospectively, by which, the petitioner could be in a position to process the refund claim before the third respondent.

5.At this juncture, the learned counsel for the fourth respondent/Commissioner of Central Excise, pointed out that the Policy Circular has been upheld by the Hon'ble Division Bench of the High

Court of Bombay in the case of *SADOKZ PVT LTD., v. THE UNION OF INDIA AND ORS* [2016-TIOL-1753-HC-MUM-CUS]. At this stage, it would be relevant to point out that some what an identical issue was considered by this Court in the case of *RAJA CROWNS AND CANS PVT. LTD., v. UNION OF INDIA AND ORS* [2015 (310) E.L.T.40(Mad.)]. In the said Writ Petition, the prayer sought for was to quash the decision taken by the Policy Interpretation Committee of the DGFT dated 04.12.2012. In the said meeting, the question which fell for consideration was whether the Terminal Excise Duty (TED) paid by DTA unit on supplies made to 100% EOU should be interpreted in the manner sought for the petitioner. The Court after taking into consideration the decision of the Hon'ble Division Bench of the Delhi High Court in the case of *KONDOI METAL POWERS MFT. CO. PVT. LTD., v. UNION OF INDIA* [2014 (302) E.L.T. 209(Del)], allowed the Writ Petition. At this stage it would be beneficial to refer to the operative portion of the order in *RAJA CROWNS AND CANS PVT. LTD.*, which reads as follows:

9. After hearing the learned counsel for the parties and perusing the materials placed on record, it is seen that an identical set of facts, the Division Bench of the Delhi High Court took a decision in favour of the manufacturer. In fact, in the said case arose out of a decision taken pursuant to the resolution dated 04.12.2012 which is impugned in this writ petition.

Therefore, the cause of action in the case before the Delhi High Court was the impugned resolution. Therefore, the decision rendered by the Delhi High Court binds the respondents and the Delhi High Court quoted with the approval in the decision of the Division Bench of the Calcutta High Court in *JDGFT V. IFGL Refractories Limited* (cited supra). At this stage, it would be beneficial to refer to the operative portion of the Judgment:

"8.It would thus be seen that supplies made to EOUs in terms of para 8.2(b) are entitled to be regarded as deemed exports. The benefits for deemed exports include inter alia exemption from TED where supplies are made against ICD (a term which means "International Competitive Bidding"). In the present case, concededly, the petitioner did not make any supplies against the ICD. Therefore, it would be covered by latter part of para 8.3(c), i.e. Cases where refund of TED will be given. This intention is given effect by the second entry in column (a) of para 8.4 read with corresponding benefits spelt-out in column (c) which states that entitlement in terms of para 8.3 to refund is permissible. The eligibility for refund, therefore, would be in terms of these provisions and the unit has to apply for such refund under para 8.5.

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.

10. In view of the above discussion, the impugned orders are hereby quashed. The respondents are hereby directed to process and pass appropriate orders in accordance with the

2009 policy in respect of the petitioner's refund claims made through its applications dated 29.08.2012 and 16.11.2012 within three months from today. The writ petition is allowed in the above terms. No costs."

10. In the light of the above finding, it is held that the issue involved in this writ petition is covered by the decision of the Delhi High Court and since the case before the Delhi High Court arose out of the order which was passed pursuant to the resolution impugned in this writ petition, the decision of the Delhi High Court binds the respondents. Thus, following the above referred decision, this Writ Petition is allowed and the impugned order is quashed and the third respondent is directed to process the refund claim in accordance with the 2009 Policy by taking into consideration the petitioner's refund application dated 16.08.2010 and pass appropriate orders in accordance with law, within a period of three months from the date of receipt of a copy of this order. No costs. Consequently, connected Miscellaneous Petitions are closed."

6. As noticed above, the decision of the Delhi High Court would squarely cover the case on hand, as the Court took into consideration of the fact that subsequent amendment was made to the existing regime which in effect liberalised the position further and exempted payment of TED altogether cannot surely be a reason for denying the scheme for refund of payment already made.

7. In the light of the above -

(i) W.P.Nos.23507 & 23508 of 2014 are allowed and the impugned order is set aside and the third respondent is directed to process the refund claim in accordance with 2009 Policy, by taking into consideration the petitioner's refund Application and pass appropriate orders, within a period of three months from the date of receipt of a copy of this order.

(ii) In the light of the above direction, there would be no necessity to test the correctness of the Policy Circular No.16 dated 15.03.2016 and accordingly, W.P.No.23509 of 2014, stands closed.

No costs. Consequently, connected Miscellaneous Petitions are closed.

24.10.2016

RPA

To

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Department of Foreign Trade New Delhi-
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T.S.SIVAGNANAM, J.
RPA

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