

Government of India
Ministry of Commerce & Industry
Directorate General of Foreign Trade
Udyog Bhawan, New Delhi -110011

F.No. 18/46/2018-19/ECA.I/ 367

Date of Order: .02.2019

Date of Dispatch: 14.03.2019

Name of the Appellant:

Larsen and Tourbro Ltd.,
L&T House, NM Marg,
Ballard Estate, Mumbai – 400 001

Order-in-Original passed by:

Dy. DGFT, Ahmedabad

Order-in-Appeal passed by :

Addl. DGFT, Mumbai

Order-in-Review passed by:

Shri Alok Vardhan Chaturvedi, DGFT

Order-in-Review

Larsen and Tourbro Ltd., Mumbai (hereinafter referred to as 'The Review Petitioner') has filed a Review petition dated 28.09.2018 under section 16 of Foreign Trade (Development & Regulation) Act, 1992 (amended in 2010) against Order-in-Appeal No. 03/16/144/00118/AM19/774 dated 23.08.2018 passed by the Appellate Authority and the Additional Directorate General of Foreign Trade, Mumbai.

2.0 Brief facts of the case are as under:

2.1 M/s. Larsen & Toubro Ltd., Mumbai, holding IEC No. 0388024011 had applied and obtained deemed export drawback from office of the Dy. Director General of Foreign Trade, Ahmedabad in respect of file No. 08/40/81/90/AM15 for Rs. 3,61,95,307/- on the basis of Para 8.2(d) with Para 8.3(b) of Foreign Trade Policy 2009-14 against various supplies made to the Project Authority namely Nuclear Power Corporation of India Ltd. (name of Project Authority amended to read as Chennai Metro Rail Ltd.) as per correction Order dated 12.06.2018 issued by Director General of Foreign Trade, Ahmedabad under section 17(4) of FTDR Act, 1992 as amended.

2.2 During test check of audit of refund of TED/DBK finalized by RA, Ahmedabad for the period from 2012-13 and 2014-15, the CAG office noticed as under:

"the contractor M/s L&T Ltd. has imported various items and supplied to projects under Paragraph 8.2(d) of the FTP. It was observed that the said contractor imported various items and supplied it as such to the Project Authority. As per above said provisions supply of goods by main/sub-contractors shall be regarded as 'Deemed Export' under FTP, provided goods are manufactured in India. This has resulted in to incorrect grant of Drawback (Brand Rate Fixation) of Rs.3,61,95,307/-. Further, it was also noticed that the project authority (Appendix-22C) dated 03.02.2015 has allowed import of only Rs. 12 Crore, however, the contractor has imported Rs.12,74,72,798/-. This has resulted excess import of Rs.74,72,798/- and its drawback amount of Rs. 19,31,793/-.

2.3 RA Ahmedabad issued a show cause notice dated 15.05.2017 inter alia calling upon the Petitioner to pay back the aforesaid amount with 18% interest taken by them as Drawback incorrectly. Since, the Petitioner failed to give a cogent reply to the issues

raised, Dy. DGFT, Ahmedabad proceeded to adjudicate the matter and passed an Order-in-Original dated 04.06.2018 under Section-11 of the FT(D&R) Act,1992, as amended directing it to pay the amount of Rs.3,61,95,307/- and imposing fiscal penalty of Rs.2,00,000/-(Rs. Two Lakh only) on it and Rs.80,000/-on each director of the Company. However, penalty imposed in the Order-in-Original dated 04.05.2018 was amended to read as " for the lack of response to the Show Cause Notice involving government revenue for more than 6 months, I impose a nominal penalty of Rs.2,00,000/- on the firm)".

2.4 Aggrieved by the Order-in-Original dated 04.06.2018 passed by Dy. DGFT, Ahmedabad, the Petitioner preferred an appeal under section 15 of the FT(D&R), Act,1992 with the Appellate Authority and Addl. DGFT, Mumbai. The findings of the Appellate Authority are as under:

- (i) Adjudicating Authority has passed the order imposing fiscal penalty as it was found during the audit conducted by the Comptroller and Auditor General's (CAG) office that the supply of items listed in file were not manufactured in India but imported and supplied to project "as it is". Audit team also pointed out that total import allowed as per Project Authority's permission was only Rs. 12 crore, against as actual import of Rs. 12.74 crore.
- (ii) Paragraph 8.1 of FTP 2009-14 clearly states that supply of goods by main/sub-contractors shall be regarded as "Deemed Exports" provided goods are manufactured in India. Further, Policy Circular No. 50 dated 28.12.2011 reiterates the same. Accordingly, if the goods have been imported by the contractor and supplied as such to the project authorities, then benefits claimed on such supplies cannot be considered in terms of Para 8.2 of FTP 2009-14.
- (iii) Chapter - 9 (Definitions) of FTP 2009-14 also defines in 9.22 "Drawback" in relation to any goods manufactured in India and exported, means rebate of duty chargeable on any imported material or excisable material used in manufacture of such goods in India. Thus, the appellant's claim of drawback are ineligible in terms of para 9.22 of FTP 2009-14.

2.5 In view of the above findings, the Appellate Authority, in exercise of the powers vested in it under Section 15 of the Foreign Trade (Development & Regulation) Act, 1992 as amended, dismissed the appeal vide Order-in-Appeal dated 23.08.2018.

3. Aggrieved by the Order-in-Appeal No. 03/16/144/00118/AM19/774 dated 23.08.2018, the appellant has filed the present Review petition. Personal hearing was given to the Petitioner on 29.11.2018 in which Shri P.R. Subramaniyan, Advisor-Indirect Taxes appeared. The Petitioner in its oral and written submissions has stated that the contract No. UAA-04 dated 28.01.2011 for 'Design and Construction of underground stations at Nehru Park, Kilpauk Medical College and Pachaippa's college and Associated tunnels' for 'Chennai Metro Rail Phase 1 was awarded to it on turnkey basis. The execution of the project was done at project site by assembling various indigenous/imported inputs. It imported spares (i.e. coupler Bartec Coupler Standard, FLRS cables, Segment Bolts, EPEM Gasket, Water Swelling Rubber gasket, Rubber sealing pack, non-return valves, communication cable, soil conditioning foam) and took them to the project site as per para 8.6.1 of FTP, 2009-14 for assembling the same. The imported items were essential inputs for the construction of the underground stations and associated tunnels. The Bill of Entry for import of such inputs was filed by it on its name after payment of duty. Further, it has not raised any invoice for supply of such items on the name of project authority rather billing for final permanent structure has been done on the project authority. Para 8.2(d) of FTP speaks installation of goods also which covers the turnkey projects. The final structure so built by the appellant is fully covered under the definition of Manufacturing under para 9.36 of FTP, 2009-14. It has already

submitted the amendment to the original PAC, enhancing the worth of duty free inputs from Rs. 12 Cr. to Rs. 15 Cr. Hence, the question of excess import to the extent of Rs. 74 Lac and availing DBK benefit for Rs. 19.31 lac is puerile and erroneous.

4. Comments of Policy Cell -VI of DGFT were also sought on the issue. Policy Cell -VI has stated that:

- (i) The issue of claiming Deemed Export benefits in cases of import made by the project authority was discussed in the meeting of Policy Interpretation Committee held on 15.03.2011. In para 3 of the minutes of the said meeting, it was decided that if the Bill of Entry is in the name of project authority, deemed export benefits would not be available (such cases will be ineligible for grant of Deemed Export benefits).
- (ii) In para 5 of the minutes of the said meeting, it was clarified that any supply made directly to the Project Authority by an entity other than the main contractor or the sub-contractor (details of such sub-contractor must have been endorsed in the contract and such endorsement must have been done prior to supply by the said sub-contractor) shall not be eligible for the deemed export benefits.
- (iii) Vide Policy Circular no. 50/2009-2014 dated 28.12.2011, it was clarified that in case Capital goods have been imported by the contractor/sub-contractor and supplied as such to project authority, then custom duties paid on such imports cannot be refunded back as deemed export drawback under paragraph 8.3(b) of FTP.
- (iv) As per para 8.2(d) of FTP, 2009-14, the supplies made to the projects funded by JICA were eligible for Deemed Export benefits under para 8.3 of FTP upto 31.03.2015.
- (v) In the case under consideration, L&T has been mentioned as main contractor in Project Authority Certificate. The Petitioner has stated to have imported spares (not the capital goods) and used them as inputs for construction of the underground stations and associated tunnels as per the contract. The Bill of Entry for import of such inputs is stated to have been filed by it on its name and not by the Project Authority.
- (vi) Vide letter No. Misc.8/AM-2001/DBK Cell dated 5.12.2000, it was clarified by DGFT to all RAs that :

"It is not possible for a single contractor to manufacture himself all the items required for completion of such projects and hence certain items, either imported or indigenous have necessarily to be procured from the other sources. These items are often directly supplied to the project for assembly, commissioning erection, testing, etc. at site. It is, therefore, clarified that for all such directly supplied items whether imported or indigenous as are used in the project, the condition of 'manufacture in India', a pre-requisite for grant of deemed export benefits, is satisfied in view of the fact that the aforesaid activities being undertaken at the project site constitute 'manufacture' as per the definition given in para 3.31 of the Exim Policy and accordingly the duties (customs and central excise) suffered on such goods shall be refunded through the DBK route."

5. I have perused the adjudication order dated 04.06.2018 passed by Dy. DGFT, Ahmedabad, Order-in-Appeal dated 23.08.2018 passed by the Appellate Authority, oral/written submissions made by the petitioner, report/comments of Policy Cell-VI and all other aspects relevant to the case. It is noted that the petitioner has claimed that it has imported spares/inputs, used them for construction of underground Metro stations for Chennai Metro Rail Phase 1 for which contract was given to it on turnkey basis under para 8.2(d) of FTP, 2009-14 and sought refund of DBK. The petitioner has further

claimed that it has neither supplied the capital goods to the project nor generated any invoice for supply of spares/inputs on the name of project authority but raised the 'Interim Payment Certificate (IPC)' for whole project. The Bill of Entry for import of such inputs was filed by the petitioner on its name. The Petitioner has submitted various documents to substantiate that the goods imported by it were spares/inputs only and not capital goods. Therefore, the submissions made by the Petitioner and documents submitted by it require examination/verification by the adjudicating authority in the light of applicable policy/procedure provisions and clarifications issued from time to time including policy clarification given by PIC. It would not be justifiable if the above mentioned aspects, having the legal bearing on the case, are not considered while deciding the case.

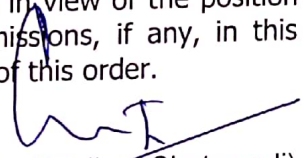
6. In view of the above, in exercise of the powers vested in me under Section 16 of the Foreign Trade (Development & Regulation) Act, 1992 (as amended in 2010), I pass the following order:

Order

F.No. 18/46/2018-19/ECA.II

Dated: .02. 2019


Order-in-Original No. 08/CRA-Audit/TED-DBK/LAR-108/HM9/1201 dated 4.6.2018 passed by the Dy. DGFT Ahmedabad and Order-in-Appeal no 03/16/144/00118/AM 19/774 dated 23.08.2018 are set aside and the case is remanded back to RA Ahmedabad for de-novo consideration as per policy in view of the position given in para 4 and 5 above. The Petitioner may make submissions, if any, in this regard to the adjudicating authority within 30 day of the receipt of this order.


(Alok Vardhan Chaturvedi)
Director General of Foreign Trade

Copy To:

- ✓ (1) Larsen and Tourbro Ltd., L&T House, NM Marg, Ballard Estate, Mumbai – 400 001
- (2) Additional Directorate General of Foreign Trade, Mumbai.
- (3) Dy. DGFT, Ahmedabad

~~(Alok Dwivedi)~~
~~Dy. Director General of Foreign Trade~~


14-03-19
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