CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
CHENNAI

Appeal No. E/335/2012

[Arising out of Order-in-Original No.19/2012 dt.27.02.2012 passed by the Commissioner of Central Excise, Chennai – III Commissionerate]

Bharat Heavy Electricals Ltd. Appellant

Versus

Commissioner of Central Excise
Chennai III Commissionerate. Respondent

Appearance:

Shri R.Parthasarathy, Advocate
For the Appellant

Shri A.Cletus, ADC (AR)
For the Respondent

CORAM :

Hon'ble Ms. Sulekha Beevi C.S. Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of hearing / decision : 27.4.2018

PER BENCH

FINAL ORDER No. 41755/2018

1. The brief facts are that the appellants are engaged in the manufacture of Electro-Static Precipitator, Industrial Fans, Pre-Heaters, Gates and Dampers etc. which are Boiler Auxiliaries. They were awarded a contract for supply of items to a project of 2 X 500

MW Thermal Power Plant at Chandrapur by M/s.Maharashtra State Power Generation Company Ltd. (MAHAGENCO) under International Competitive Bidding. Goods supplied to Mega Power Projects are entitled to excise duty exemption as well as exemption from the whole of Customs duties subject to the conditions prescribed. The excise duty exemption for goods supplied to Mega Power Projects is available under Sl.No.91 of notification 6/2006 CE dated 1.3.2002, subject to the following conditions :

a) The goods are supplied against International Competitive Bidding (ICB)

b) The goods, when imported into India are exempted from the duties of Customs leviable under the First Schedule to the Customs Tariff Act, 1975 and additional duty leviable under Section 3 of the Customs Tariff Act, 1975. Goods supplied to a Mega Power Project are entitled to exemption from the whole of customs duties including the additional duties of customs under Sl.No.400 of notification 21/2002 Cus dated 1/3/2002, subject to conditions, inter alia that an Officer not below the rank of a joint secretary to the Govt. of India, Ministry of Power issues Certificate.

2. The appellant availed the said exemption of goods cleared for the aforesaid project in terms of Sl.No.91 of notification No.6/2006-CE dt.1/3/2006. They commenced their suppliers to their project from 15/10/2009 onwards. MAHAGENCO forwarded the Mega Power Project Certificate dt.16/12/2009 issued by the Joint Secretary to Government of India, Ministry of Power to the appellant / New Delhi in January 2010 and also issued a Project Authority Certificate in March

2010 which was received by the appellant in April 2010. The Mega Power Project Certificate dt.16/12/2009 and Project Authority Certificate issued by MAHAGENCO were submitted to the jurisdictional Central Excise Authorities by the appellant in May 2010. The department was of the view that in the Joint Secretary's Certificate dt.16/12/2009, the project is mentioned as one for expansion and not for setting up of Mega Power Plant and therefore the requirement under S.No.400 of Notification No.21/2002 – Cus. Dt.1/3/2002 is not satisfied. That customs duty exemption is available only for setting up of Mega Power Projects and not for expansion of existing power project. The project having been mentioned in the bid documents as well as Joint Secretary Certificate dt.16/12/2009 as 'expansion', the appellants are not entitled for excise duty exemption under Sl.No.91 of Notification 6/2006-CE dt.1/3/2006. Show cause notice dt.7/12/2010 was issued proposing to deny the exemption under the notification and for recovery of duty for the period November 2009 to May 2010 alongwith interest and for imposing penalties. After due process of law, the Commissioner confirmed the payment of duty of Rs.10,18,31,467/- alongwith interest and imposed penalty of Rs.1,01,83,150/- under rule 25 of Central Excise Rules, 2002. The amount of Rs.4,66,29,644/- already paid by the appellant was ordered to be appropriated. Aggrieved, the appellants have filed this appeal.

3. On behalf of the appellant, the Ld.Counsel, Sh.R.Parthasarathy submitted that the contract awarded to the appellant by MAHAGENCO is for setting up of independent thermal power plant namely Unit 8 and 9. The word 'expansion' was used in the documents only to identify

the project from amongst the units already existing at Chandrapur. This is very much clear from the Mega Power Project Certificate dt.16/12/2009 issued by the Joint Secretary, Ministry of Power, wherein it is mentioned that the power plant is 'being set up' by M/s.Maharashtra State Power Generation Company Ltd., Mumbai (MAHAGENCO). As the department was of the view that appellants are not eligible for the exemption as per the notification, the appellants took up the issue with MAHAGENCO, who in turn approached the Ministry of Power for a clarification. The Ministry of Power vide their letter dt.26.10.2010 clarified that the said power project is an independent power project and not an expansion project of a Mega Power Project in terms of notification No.137/2009 Cus. dated 11.12.2009. He submitted that as per Sl.No.507 of notification No.12/2012 Cus. Dt.17/3/2012, the goods required for "setting up" of Mega Power Project enumerated in List 32A of the said Notification are exempt from payment of excise duty. "Chandrapur Expansion, Maharashtra – 2 X 500 = 1000 MW (MSPGCL)" is specified in Entry 53 of the List 32A of this notification. Therefore it is clear that the project has been recognised/has been accepted by the Government to be a Mega Power Project being set up by MAHAGENCO.

3.1 It is further submitted by the Ld.Counsel that in the appellants own case (Tiruchi Unit) a similar Show cause notice was issued and vide Order-In-Original No.2/2013 dt.26/3/2013, the demand was dropped in respect of the same project for the subsequent period March 2011 and February 2012. That to the knowledge of appellants, the department has not filed any appeal against the aforesaid Order-In-Original and therefore the decision stands accepted by the department. It is a settled legal decision that if the issue has attained finality, the department is not permitted to take a different stand especially in the case of the same assessee. To support this argument, he relied upon the decision in the case of ***Boving Fouress Ltd. Vs Commissioner of Central Excise, Chennai, 2006 (202) E.L.T.389 (S.C.)***. He therefore prayed that the appeal may be allowed.

4. The Ld.AR, Sh.A.Cletus supported the findings in the impugned order. He submitted that in the Bid Documents and Letter of Award of Contract as well as the Project Authority Certificate and the Certificate dt.16.12.2009, the project is mentioned as 'Chandrapur Expansion Power Plant / Expansion of Chandrapur Thermal Power Station'. Thus it cannot be said that the power plant is a standalone project. Thus the denial of exemption is legal and proper.

5. Heard both sides.

6. The main dispute to be analysed is whether power project in respect of which supplies were made by the appellants is a standalone project which was newly set up or whether it is an expansion of existing power project. The department has sought to deny the benefit of exemption alleging that the power project is only an expansion of existing unit at Chandrapur. This is because the word 'expansion' was used in the bid documents, Project Authority Certificate as well as the Certificate issued by the Joint Secretary

dt.16/10/2009. It would be worthwhile to reproduce the relevant portion of the Certificate issued by Joint Secretary dt.16/12/2009.

F.No.5/6/2008-S.Th
Government of India
Ministry of Power

Shram Shakti Bhavan, Rafi Marg,
New Delhi, dated 16th December, 2009

TO WHOM IT MAY CONCERN

a) Certified that Chandrapur Expansion Power Plant being set up by Maharashtra State Power Generation Co. Ltd. Mumbai (MAHAGENCO) is a Thermal Power Plant of capacity of 1000 MW (2x500 MW).

b) Certified that (i) the power purchasing States have constituted the Regulatory Commissions with full powers to fix tariff; (ii) the power purchasing States shall undertake to carry out distribution reforms as laid down by Ministry of Power.

Sd/-
(I.C.P.Keshari)
Joint Secretary to the Government of India

7. It can be seen that even though the word expansion is used, it is clearly stated that the power project is being set up by MAHAGENCO. The appellants had taken up the issue with MAHAGENCO and the Ministry has issued clarification vide letter dt.26.10.2010. The relevant portion of the said letter is reproduced as under :-

F.No.5/6/2008-S.Th
Government of India
Ministry of Power

Shram Shakti Bhavan, Rafi Marg,
New Delhi,
Dated 26th October, 2010

To,

Shri Subrat Ratho
Managing Director
Maharashtra State Power Generation Company Ltd. (MAHAGENCO)
Prakashgad, Plot No.G-9,
Prof.Anant Kanekar Marg, Bandra (East) Mumbai 400 051.

Sub : Mega Power Project Status granted 2x500 MW (Units 8 & 9) Chandrapur Expention Project of Maharashtra State Power Generation Co. Ltd (MAHAGENCO) under the Mega Power Policy in terms of notification No.137/2009-Customs dated 11th December, 2009.

Ref : (i) MAHAGENCO's Letter No.DG/CHN 2x500 MW/MPP/1471 dated 15.10.2010
(ii) MAHAGENCO's letter dated January 24, 2008 seeking Mega Power Project status for Chandrapur Units 8 & 9.
(iii) Mega Power status certificate vide No.5/6/2008 – S. Th. Dated 16th December, 2009.

Sir,

I am to refer to your letter No.DG/CHN 2x500 MW /MPP/1471 dated 15.10.2010 regarding Mega Power Project Status granted 2x500 MW (Units 8 & 9) Chandrapur Expention Project of Maharashtra State Power Generation Co. Ltd (MAHAGENCO) vide certificate No.5/6/2008 – S. Th dated 16th December, 2009.

2. As regards view taken by excise authorities that the Project is not a Mega Power Project but merely an expansion of a Mega Power Project and not extending benefits linked with the Mega Power Project status particularly the terminal excise duty exemption on supplies made by the vendors (BHEL, etc) to the Project, it hereby stated that :

(i) the mega certificate has been issued to the aforesaid project on the basis of the proposed installed capacity and fulfilment of other applicable conditions as evidenced from the documents submitted by the MAHAGENCO Project.

(ii) the Units 8 & 9 of 500 MW each at Chandrapur Project of MAHAGENCO <u>is an independent power project and not an expansion project</u> of a Mega Power Project in terms of notification No.137/2009-Customs dated 11th December,2009. This is also corroborated by the fact that the existing facilities (i.e., Units 1 to 7) have not been certified as a Mega Project.

Sd/-
(I.C.P.Keshari)
Joint Secretary to the Government of India

8. Thus it is unequivocally clarified by the Ministry that power project is not a mere expansion of existing power project, but is an independent power project, which is newly setup. Further as per notification 12/2012-Cus. Dt.17/3/2012, the said power project is specified in Entry 53 of the List 32A.

9. In addition, in the appellants own case vide Order-In-Original No.2/2013 dt.26/3/2013, the Show cause notice issued raising the very same allegation has been dropped, observing that the power project is an independent one newly set up and not an expansion of an existing project. The relevant discussion in the aforesaid Order-In-Original is reproduced as under :-

4.15 It is pertinent to note that Column 3 of Notification No.12/2012-Cus, describing the exempted goods starts as "Goods required for **setting up** of any Mega Power Project specified in List 32A", Sl.Nos.53 and 55 specify Chandrapur Expansion (2 x 500 MW) and Busawal Expansion (2 x 500 MW). Thus the Finance Ministry have specifically accepted the very same Ëxpansion projects" as "setting up" of projects. The only condition is that Joint Secretary, Ministry of Power should certify so, and indeed it has been so certified by the said officer. Taking any other view will bring about an incongruous position. Imports made for these two projects will enjoy duty exemption on the status of "setting up", whereas indigenous supplies for the very same projects will be denied duty exemption holding that it is only "expansion" and not "setting up". One single project cannot have two different statuses. I am inclined to follow the status as recognized by the Ministry of Finance itself under Sl.No.507 of Notification No.12/2012-Cus as amended on 10.09.2012. This does not amount to any retrospective exemption. The effect of the amendment dated 10.09.2012 is only to communicate and clarify the status of the projects, which should be taken to mean that it was always meant to be so.

4.16 In view of the above discussion, I hold that the goods supplied by M/s.BHEL against ICB to the Chandrapur and Bhusawal Mega Power Projects during the period from March 2011 to February 2012 qualify for the exemption under Notn.No.6/2006-C.E. dated 01.03.2006 (Sl.No.91 read with Condition No.19), as the goods, if imported into India, would be exempted from customs duties under Notn.No.21/2002-Cus. Dated 01.03.2002 (Sl.No.400), as the goods have been supplied for **"setting up"** of the two Mega Power Projects. Consequently, the demand proposed in the SCN does not survive, and is required to be dropped.

10. From the above discussions and after perusal of the documents and evidences places before us, we are convinced that the denial of exemption is without any basis, and therefore the duty demand cannot sustain. In the result, the impugned order is set aside. The appeal is allowed with consequential reliefs, if any.

(Operative part of the order pronounced in open court)

(Madhu Mohan Damodhar)
Member (Technical)

(Sulekha Beevi C.S)
Member (Judicial)

vsr