IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH AT CHENNAI

Appeal No. E/00196/2012

(Arising out of Order-in-Original No. 09/2011 – CE.Adj dated 30.11.2011 passed by the Commissioner of Central Excise and Service Tax, Tiruchirapalli)

M/s. Bharat Heavy Electricals Ltd, Tiruchirapalli : Appellant

Vs.

The Commissioner of Central Excise, Tiruchirapalli : Respondent

Appearance:-

Shri. D. Santhana Gopalan, Advocate
for the Appellant

Shri. B. Balamurugan, AC (AR)
for the Respondent

CORAM:

Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)
Hon'ble Shri P Dinesha, Member (Judicial)

Date of Hearing/Decision:**18.06.2018**

Final Order No. 42145 / 2018

Per Bench,

The appellant is a manufacturer, *inter alia*, of Boilers (8402 1100), Steam Generators (8402 1100), Pressure Vessels and Heat Exchangers (8419 5010). The appellant was awarded a contract for supply of items to a project for setting up independent 2 X 500 MW thermal power plant at *Chandrapur and Bhusawal* by M/s Maharashtra State Power Generation Co. Ltd. (MAHAGENCO) under International Competitive Bidding. The appellant availed excise duty exemption on goods cleared for the aforesaid project in terms of Sl. No. 91 of Notification no. 06/2006-CE dt. 01.03.2006. According to the said Notification, excise duty is exempted if the customs duty is exempt on such goods when imported. The goods required for *setting up of Mega Power Project* are exempt from payment of customs duty on import under Sl. No. 400 of Notification No. 21/2002-Cus. dt. 01.03.2002.

1.2 A Show Cause Notice dt. 07.07.2011 was issued to the assessee by the Revenue proposing to deny exemption claimed by the assessee under Notification No. 06/2006 – CE dt. 01.03.2006 on the following grounds namely : -

a) Mega Power Project certificate dt. 16.12.2009 issued by the Joint Secretary, Ministry of Power wherein it was mentioned as *"Certified that Chandrapur Expansion power plant **<u>being set up by</u>** Maharashtra State Power Generation Co. Ltd. Mumbai (MAHAGENCO) is a thermal power plant of capacity of 100MW (2x500MW)."*

b) Clarification dt. 26.10.2010 issued by the Joint Secretary to Government of India, Ministry of Power, wherein it was categorically stated that *"(ii) the units 8 & 9 of 500 MW each at Chandrapur Project of MAHAGENCO is an independent power project and not an expansion of a Mega Power Project in terms of Notification 137/2009-Customs dt. 11th December, 2009."*,

c) As per Sl. No. 507 of Notification No. 12/2012-Cus dt. 17.03.2012, the goods required for 'setting up' of Mega Power Projects enumerated in List 32A of the said Notification are exempt from payment of excise duty. The **'Chandrapur Expansion, Maharashtra – 2x500 = 1000 MW (MSPGCL)'** is specified in Entry 53 of the List 32A. Therefore, the impugned project has been recognized / accepted by the Government to be a 'Mega Power Project' being set up by MAHAGENCO,

d) The Ld. C.C.E., Trichy in the Appellant's own case, vide Order-in-Original No. -02/2013 – CE dt. 26.03.2013 has accepted the aforesaid reasoning and dropped the demand in respect of the same project for the subsequent period March 2011 to February 2012, etc.

1.3 The assessee-appellant in response to the above Show Cause Notice filed its detailed reply, *inter alia* contending that its claim was in order. The Ld. Commissioner-adjudicating authority vide impugned order dated 30.11.2011 however, rejected the explanation/submissions of the appellant and confirmed the demand as proposed by him in the Show Cause Notice. Seriously aggrieved by the same, the assessee is in appeal before this forum.

2. Heard Shri. D. Santhana Gopalan, Ld. Advocate for the assessee and Shri. B. Balamurugan, Ld. Department Representative for the Revenue.

3. During the course of hearing, the Ld. Advocate for the assessee submitted that on an identical set of facts, this Bench of the Tribunal has examined a similar issue in the appellant's own case in E/335/2012 and after examining the exemption claim in terms of Notification No. 06/2006 (*supra*), has ruled in favour of the assessee vide Final Order No. 41755/2018 dt. 27.04.2018

4. *Per contra*, Ld. DR supported the findings of the Original Authority.

5.1 We have considered the rival contentions and have also gone through the earlier Final Order No. 41755/2018 dt. 27.04.2018 of this Bench, the relevant paragraphs of which are reproduced below:

"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 is an independent power project and not an expansion project 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 Expansion 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."*

5.2 We find that the facts in the present appeal are *pari materia* to the above decision. In fact, but for the change in the name of the project, the contractor, contractee and the purpose of the contract examined in the earlier Final Order remain the same. Going therefore by the maxim *res judicata pro veritate accipitur*, we have to hold that the appellant should succeed.

5.3 Our view also stands fortified by fact that for the subsequent period i.e., March 2011 to February 2012 in respect of the same project where the demand in very same dispute proposed in the SCN has been dripped by the adjudicating authority in Order-in-Original 2/2013 dated 26.03.2013

6. In view of the above, we set aside the impugned order of the Ld. Commissioner and allow the appeal, with consequential reliefs, if any.

(Operative part of the order was
pronounced in open Court)

(P Dinesha)	**(Madhu Mohan Damodhar**)
Member (Judicial)	Member (Technical)

Sdd