

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
HYDERABAD**

REGIONAL BENCH - COURT NO. – I

Excise Appeal No. 658 of 2012

(Arising out of **Order-in-Appeal** No.92/2011 (H-IV) CE dated 23.12.2011 passed by
Commissioner of Customs, Central Excise & Service Tax (Appeals-II), Hyderabad)

Thermopads Pvt Ltd.,

F-10B, 12B, 14A & B,
Phase-I, IDA,
Jeedimetla, Hyderabad,
Telangana – 500 055.

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APPELLANT

VERSUS

**Commissioner of Central Tax
Medchal - GST**

Medchal Commissionerate,
H.No. 11-4-649/B,
Opposite Mehdi Function Palace,
Above SBI Bazarghat Branch,
Lakdikapool, Hyderabad,
Telangana – 500 004.

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RESPONDENT

APPEARANCE:

Shri K Rajendran, Advocate for the Appellant.

Shri V R Pavan Kumar, Authorised Representative for the Respondent.

**CORAM: HON'BLE Mr. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE Mr. A.K. JYOTISHI, MEMBER (TECHNICAL)**

FINAL ORDER No. A/30414/2023

Date of Hearing:09.08.2023
Date of Decision:05.12.2023

[ORDER PER: A.K. JYOTISHI]

M/s Thermopads Private Limited., (herein after referred to as Appellant) are engaged in the manufacture of various items like heat tracers, storage tanks etc. The Appellant informed the Department that they would be clearing goods without payment of duty under Central Excise Notification No. 06/2006 dated 01.06.2006 and also submitted certain documents along with the same. The Department examined the matter and on assessment, it appeared that they intended to clear goods to Simhadri Super Thermal Power Project, Stage-II (2 x 500 MW) and NTPC Tamilnadu Energy Company Ltd., (a joint venture of NTPC Ltd., and TNEB), through BHEL (referred to as Principal Contractor is BHEL herein after). Both the projects were awarded to the Principal Contractor against International Competitive Bidding (ICB).

2. The following documents were submitted by the Appellant:

SIMHADRI SUPER THERMAL POWER PROJECT, STAGE-II (2 X 500 MW):

- (i) Project Authority Certificate (PAC), vide Ref No. CS 3530 110 2 POA, dated 04.02.2008 signed and issued by Shri R.K.S. Gahlowt, General Manager (CS/Th/I), Simhadri Super Thermal Power Project (2 x 500 MW) on behalf of NTPC Limited, wherein it is certified that M/s Bharat Heavy Electrical Limited, New Delhi have been awarded a contract for supply of certain goods; that the supply of the goods under the contract to be made to power project in India under the procedure of International Competitive Bidding in accordance with the provisions of paragraph 8.2(g) and 8.4.4 (iv) of the Foreign Trade Policy 2004-09.
- (ii) Letter No. 5/23/3006-ThII, dated 08.09.2006 issued by Ministry of Power, wherein the Ministry accorded mega power status to Simhadri Stage-II Power project by NTPC.
- (iii) Certificate by the Main Contractor to the Sub Contractor, vide Ref:BHE/PSSR/Proj/BOP/SIMH/Misc TANK, dated 14.12.2009 issued by Bharat Heavy Electrical Limited, wherein sub-contract for supply of materials valued at Rs. 80,84,067/- for site fabricated misc tanks (2 nos.) for 2 x 500 MW Simhadri Stage-II, Visakhapatnam has been awarded to M/s Thermopads Private Limited.

NTPC TAMILNADU ENERGY COMPANY LIMITED (A JOINT VENTURE OF NTPC LIMITED AND TNEB):

- i) Project Authority Certificate (PAC), vide Ref No. NTPC/BHEL/002 dated 28.02.2008 signed and issued by Shri A Radhakrishna, Cheif Executive Officer, Vallur Thermal Power Project (2 x 500 MW), NTPC, Tamilnadu Energy Company Limited (A Joint Venture of NTPC Limited and TNEB) wherein it is certified that M/s Bharat Heavy Electricals Limited, New Delhi have been awarded a contract for supply of certain goods, that the supply of the goods under the contract to be made to power project in India under the procedure of International Competitive Bidding in accordance with the provisions of paragraph 8.2(g) and 8.4.4 (iv) of the Foreign Trade Policy 2004-09.
- ii) Certificate No. 8/10/2006-State Thermal dated 10/11/2006 issued by Ministry of Power, wherein the Ministry accorded mega power status to the Thermal Power Plant (2 x 500 MW) being set up by

NTPC Tamil Nadu Energy Company Limited (a joint Venture of NTPC and TNEB)

- iii) Certificate by the Main Contractor to the Sub Contractor, vide Ref:BHE/PSSR/Proj/BOP/ENN/Misc TANK, dated 14.12.2009 issued by Bharat Heavy Electrical Limited, wherein sub-contract for supply of materials valued at Rs. 67,50,191/- for site fabricated misc tanks (2 nos.) for 2 x 500 MW Vallur Thermal Power Project has been awarded to M/s Thermopads Private Limited.

3. The Department examined the provisions under Condition No. 19, which is required to be fulfilled for claiming exemption under Serial no. 19 of the Exemption Notification No. 6/2006-CE dated 01.03.2006. It essentially provides that if the goods are exempted from the duties of customs leviable under the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and the additional duty leviable under Section 3 of the said Customs Tariff Act, when imported into India, then only goods supplied against International Competitive Bidding (ICB) would be exempted.

4. Further, vide Serial No. 400 of Notification No. 21/2002-Customs dated 01.03.2002, the goods required for setting up of any Mega Power Project (MPP), certificate by an Officer not below the rank of a Joint Secretary to the Government of India in the Ministry of Power, will be entitled to exemption from basic customs duty and additional duty, subject to Condition No. 86. Condition 86, inter alia provides for certification by certain officers of Ministry of Power. For ease of reference, it is reproduced below:

86. (a) If an officer not below the rank of a Joint Secretary to the Government of India in the Ministry of Power certifies that –
- (i) the power purchasing State has constituted the Regulatory Commission with full power to fix tariffs;
 - (ii) the power purchasing State undertakes, in principle, to privatise distribution in all cities, in that State, each of which has a population of more than one million, within a period to be fixed by the Ministry of Power; and
 - (iii) The power purchasing State has agreed to provide recourse to that State's share of Central Plan allocations and other devolutions towards discharge of any outstanding payment in respect of purchase of power.

(b) In the case of imports by a Central Public Sector Undertaking, the quantity, total value, description and specifications of the imported goods are certified by the Chairman and Managing Director of the said Central Public Sector Undertaking; and

(c) In the case of imports by a Private Sector Project, the quantity, total value, description and specifications of the imported goods are certified by the Chief Executive Officer of such project.

5. The Appellant had submitted Project Authority Certificates, letter issued by the Ministry of Power regarding the status of MPP for these two projects and also certificates issued to them by BHEL as a sub-contractor to the main contractor i.e. BHEL for supply of goods. However, on perusal of the documents, it was observed by the Department that the Project Authority Certificates were not issued by the prescribed Authority i.e. Chairman and Managing Director of NTPC as required under Condition No. 86(b) of Serial No. 400 of Customs Notification No. 21/2002-Cus dated 01.03.2002. Therefore, it was felt that the Appellant failed to provide necessary certificate, duly signed by the Competent Authority, and accordingly a Show Cause Notice demanding duty of Rs. 8,88,913/- was issued to the Appellant along with proposal to impose penalty.

6. On adjudication, the entire demand was confirmed and equal penalty was also imposed under Rule 25 of Central Excise Rules, 2002. On appeal, the Commissioner (Appeals) upheld the Order except for reducing the penalty from Rs. 8,88,913/- to Rs. 1,50,000/-.

7. The Appellants are in appeal against the said Order of the Commissioner (Appeals). Learned Counsel on behalf of the Appellant has argued that the requirement of the Customs Notifications are required to be complied with only when the goods are imported to India but not when the domestic goods are supplied (deemed export) under relevant Central Excise Notification, unless the said Central Excise specifically calls for the compliance of the conditions under Customs Notification also. He has relied on the wordings of condition 19 of Notification No. 6/2006-CE dated 01.03.2006. Essentially, he argued that when there is any supply of imported goods as project import for an approved Mega Power Plant (MPP), the exemption notification provides for certification by Chairman and Managing Director, in case of such imports by the PSU. Therefore, the condition which is relevant for the imported goods meant for such project

cannot be made applicable, ipso facto, for the domestic goods cleared for the said project. It was also emphasised that the sub-contractors are also entitled for the benefit of the same notification, which exempts contractor from the payment of Central Excise duty, subject to amendment in the contract before supply or subsequent to supply. He has also relied on various case laws in support of argument that in the given circumstances, they were entitled for the benefit of Notification No. 6/2006-CE. The following case laws have been relied upon:

- i) M/s Kanta Rubber Pvt Ltd., Vs CC, CE & ST, Hyderabad – IV [2017 SCC Online CESTAT 4119]
- ii) M/s Jai Fasteners (P) Ltd., Vs CC, CE & ST, Hyderabad – I [2016 SCC Online CESTAT 3080]
- iii) Studio Printall (New Delhi) Pvt Ltd., Vs Commissioner of C.Ex, Delhi-I [2014 SCC Online CESTAT 5077: (2015) 315 ELT 79]
- iv) Hindustan Colas Ltd., Vs Commissioner of C.Ex, Vadodara – I [2007 SCC Online CESTAT 2201: (2007) 219 ELT 430]
- v) CG Power & Industrial Solutions Ltd., Vs CGST, CC & CE [2018 SCC Online CESTAT 10033]
- vi) Hindustan Steel Ltd., Vs State of Orissa [(1969) 2 Supreme Court Cases 627]
- vii) Kent Intro Pvt Ltd., Commissioner of Central Excise [2013 SCC Online CESTAT 2394: (2014) 301 ELT 84]
- viii) CST Ltd., Vs Commissioner of Central Excise, Hyderabad [2008 SCC Online CESTAT 2766: (2008) 230 ELT 85]

8. On the other hand, the Learned Departmental Representative is mainly contesting that the notification must be construed strictly, as has been held under various judgments of the Hon'ble Supreme Court including in the case of Dilip Kumar & Co., [2018 (361) ELT 577 (SC)] and as well as in a recent case of Krishi Upaj Mandi Samiti, New Mandi Yard, Alwar Vs Commissioner of Central Excise & Service Tax, Alwar [2022 (2) TMI 1113 (SC)].

9. Heard both the parties and perused the records.

10. The main issue to be decided is whether the Appellants were eligible for the exemption under Notification No. 6/2006-CE, dated 01.03.2006 or otherwise. It is an admitted fact that they have cleared the goods on

instruction from M/s BHEL, who is a contractor who has been awarded the contract for certain work under ICB route by the Simhadri Super Thermal Power Project, Stage-II (2 x 500 MW) and NTPC Tamilnadu Energy Company Ltd., (a joint venture of NTPC Ltd., and TNEB). It is also an admitted fact that these two Power Projects have been duly granted necessary status as MPP by the Ministry of Power. It is also an admitted fact that the Appellants have submitted Project Authority Certificate issued to the main contractor by these projects as also letter from the Ministry of Power to MPS Simhadri Stage – II Power Project (2 x 500 MW) by NTPC and TNEB in Tamil Nadu. They also submitted amendments made to the Project Authority certificates including their name as sub-contractors for aforesaid projects/supplies.

11. Serial No. 91 of Notification No. 6/2006-CE exempts all goods supplied against ICB, subject to condition No. 19. The condition under Serial No. 19 is "if the goods are exempted from the duties of customs leviable under the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and the additional duty leviable under Section 3 of the said Customs Tariff Act when imported into India".

12. On the other hand, Notification No. 21/2002-CUS, at serial no. 400 exempts "goods imported as project imports under heading 9801 for setting up of any Mega Power Project, subject to condition no. 86". The condition no. 86, inter alia, provides for certification from Chairman and Managing Director of the PSU, in case the imports are by the PSU certifying the quantity, the total value description and specification of the imported goods etc. It is obvious that there is no cross reference to customs Notification No. 20/2002-CUS in Central Excise Notification No. 6/2006 or vice versa.

13. Thus, when the admitted position is that the project to which the supplies have been made by the sub-contractor is against the ICB and the condition No.19, merely provides for one condition that is the goods should be otherwise exempted from the customs duty when exported into India. In the instant case, the said projects were otherwise eligible for exemption for project imports and were entitled for exemption in respect of such items, which would have been imported as projects imports, in terms of Notification No. 21/2002, subject to following the conditions stipulated therein. The argument advanced by the Appellant that the conditions of the certification of the Chairman and Managing Director is a must for Notification No. 6/2006

is correct for exported goods, however, in the case of domestic goods, when intended for use in project either directly or indirectly by the Contractor, who has been awarded the contract through ICB, the exemption should be available, irrespective of whether it is signed by Chairman & Managing Director or anyone duly authorised to issue such certificate as there is no specific prescribed procedure for certification etc., under Notification No. 6/2006.

14. Further, since the exemption from the customs duty can be on various accounts, including exemption for project imports for Mega Power Projects, what is important to note is that as long as the project is entitled to import goods duty free, the same project is also entitled to procure similar goods domestically, if the supplier of the goods has got the contract through ICB route. In the instant case, it is not denied that M/s BHEL has won the contract under ICB from eligible Mega Power Projects for supply of goods, which in turn he has also part sub-contracted to the Appellant. It is also not disputed that the name of the sub-contractors can be included in the main contract awarded to the main contractor for supply against ICB to the designated mega power projects. In the instant case, even if such inclusion was done at a later date, it does not take away the merit that they were sub-contractors supplying to or through the BHEL who was the main contractor having won the contract for designated Mega Power Project under ICB route.

15. Therefore, what is relevant to note is whether the goods supplied by the Appellants were against ICB or not and also whether the similar goods were also otherwise exempted from the customs duty and CVD under the Customs Act or not. This has already been discussed in earlier paras that same goods, if imported by these projects, would have been exempted under the project import (9801) under the Notification No. 21/2002-CUS dated 01.03.2002 and that is also not disputed by the Department. Therefore, only the short question is whether when these goods have been supplied against the ICB by an authorised persons would be eligible for benefit of Notification No. 6/2006 dated 01.03.2006.

16. We have perused the records and the documents submitted by the Appellants. Certificate dated 04.04.2008 has been issued by the General Manager, Simhadri Super Thermal Power Project, who has been duly authorised to issue certificate certifying that M/s BHEL, Neyvelli have been

awarded a contract for supply of goods to power projects in India under the procedure of ICB. They have also specified that this is for supply of goods for SSTPP Stage-II (2x500 MW). There is also a certificate issued by Ministry of Power to NTPC certifying that Simhadri Stage-II (1000 MW), being set up by the NTPC in Andhra Pradesh is a Thermal Power Project of capacity of 1000 MW or more. It also certified that the power purchasing states have constituted Regulatory Commissionerate with full powers to fix tariff.

17. Similar certificate has also been issued by CEO, NTECL in respect of M/s BHEL, who is duly authorised to issue such certificate. It was also clarified that this is meant for NTPC, TNECL (Vallur TP Stage-I (2x500 MW)). It was also certified that the supply of goods under the contract is to be made to the power project in India is under the procedure of ICB. In this case also, the Ministry of Power has also given the due certificate certifying that the Power Project being set up by NTPC, Tamilnadu Energy Company Ltd., (Joint Venture of NTPC & TNEB) is a State Power Plant and fulfilling other conditions like power projects etc. In both these projects authority certifies, there is a provision for adding the name of sub-contractor at a later date.

18. We have also perused certificate issued by the Main Contractor i.e. M/s BHEL dated 14.12.2009, whereby the main contractor BHEL has indicated the Appellant as their sub-contractor for supply of materials for the said power projects.

19. Therefore, a holistic appreciation of all these documents will clearly indicate that the supplies made by the Appellants were for the projects, meets all the stipulated criteria specifically awarding of contract under ICB route. Further, there is a provision for supply through sub-contractor also, even though the sub-contractor might not have directly participated in the process of ICB for getting the contract, which was obtained by the main contractor namely BHEL in this case. It is also now clear that both these projects were Mega Power Projects in terms of certificates issued by the Ministry of Power and that these two projects would have been entitled for exemption under Customs Notification No. 21/2002-CU (serial no. 400). The wordings in the certificate issued by the Ministry of Power clearly matches with the wordings at serial no. 400 of this Notification.

20. Therefore, there is no specific requirement for signing of the Certificate by Chairman not of the PSU which is only in relation to the goods imported into India. In the case of goods procured domestically, the exemption is available as long as the supplies have been made against ICB and projects are meeting the criteria. In this case, the supplies have been made by the sub-contractor through contractor to the project duly recognised for entitlement of exemption from the customs duty also, in case they import goods for said project. Thus, there are sufficient documents on record to prove that the Appellants were not required to pay any duty and were clearly entitled for benefit of Notification No. 6/2006. The reliance placed by the Appellants on certain case laws cited supra also support this view that when there is substantive compliance, even in case where such certification is by a person other than designated authority, benefits cannot be denied. Therefore, in the facts of the case, they are meeting the criteria for availing the exemption under Notification No. 6/2006. Accordingly, no duty is leviable on clearances made to these two projects through the main contractor M/s BHEL. Since the duty is not leviable, the penalty is also not imposable on the Appellants.

21. Accordingly, the appeal is allowed with consequential benefits, if any, as per law.

(Order Pronounced in open court on 05.12.2023)

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

(A.K. JYOTISHI)
MEMBER (TECHNICAL)