CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 87743 OF 2013

[Arising out of Order-in-Appeal No: 252/MCH/DC/CC/2013 dated 8th April 2013 passed by the Commissioner of Customs (Appeals), Mumbai Zone – I.]

Ultratech Cement Ltd
Ahura Centre, 1st Floor, Mahakali Caves Road
Andheri (East), Mumbai - 400095 … ***Appellant***

versus

Commissioner of Customs (Import)
New Customs House, Ballard Estate, Mumbai - 400001 ***…Respondent***

APPEARANCE:

Shri T Viswanathan, Advocate with Ms Lakshmi Menon, Advocate for the appellant

Shri Bhushan Kamble, Assistant Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A / 87277 /2021

DATE OF HEARING: 05/10/2021
DATE OF DECISION: 05/10/2021

PER: C J MATHEW

Arising from the challenge to rejection of their application for registration of contract under Project Import Regulations, 1986, the appeal of M/s Ultratech Cement Ltd was dismissed by Commissioner of Customs (Appeals), Mumbai Zone–I, *vide* order-in-appeal no. 252/MCH/DC/CC/ 2013 dated 8th April 2013, on the very same ground that the adjudicating authority relied upon to deny registration, *viz.*, the lack of a valid recommendation letter issued by the designated official of the sponsoring authority.

2. The appellant, intending to substantially expand production capacity at Gulbarga (Rajashree Cement Works) from 4.2 MTPA to 8.7 MTPA registered the contract for work on the manufacturing plant under the Project Import Regulations, 1986 in September 2011 and, for the adjunct project to enhance the capacity of their 'captive power plant (CPP)' from 58.2 MW to 131.8 MW, sought registration by furnishing recommendation letter dated 12th September 2011 issued from F.No. EN76PPC/2011 by the Government of Karnataka in the Energy Department.

3. Without considering the admissibility of the contention of appellant herein that the said enhancement of the 'captive power plant (CPP)' is essential to implementation of the project for expansion of capacity of the cement plant and that, even without this associative relationship, the project is also independently eligible for registration as a separate contract in terms of serial no. 399(iii) in notification no. 21/2002-Cus dated 1st March 2002, the adjudicating authority refused registration for documentary deficiency. The first appellate authority

endorsed this view with the finding that

> *'it is settled law that an exemption notification has to be strictly applied according to the terms contained therein and the onus to prove eligibility lies on the claimant. Therefore the contention of the importer that their duty was limited to up to the submission of the application to the concerned department and the doctrine of OND On Door (sic) was applicable is not applicable. Also the certificate issued by the Deputy Secretary with the approval of the Additional Secretary cannot be deemed to have been issued by the Secretary of Karnataka for the legal purpose as required under PIR 1986'*

4. Before proceeding to deal with the submissions, it must be pointed out that the first appellate authority appears to have erroneously determined the dispute as pertaining to compliance with condition in exemption notification and has erred in recording the designation of the recommending authority as Additional Secretary in the impugned order. It would also appear that two documents, not made available to the original authority and intended as clarification on the recommendation process, was not comprehended in the proper prospective. These originated from Government of India in the Department of Industrial Policy and Promotion (DIPP) as 19(4)/2012-Cement dated 24th April 2012 relating to the expansion of the 'captive power plant (CPP)' and from Government of Karnataka in no. EN 76 PPC 2011 dated 31st May 2012 issued by the Deputy Secretary – Energy Department clarifying that the earlier letter dated 12th

September 2011 had the approval of the Principal Secretary to Government of Karnataka in the Energy Department.

5. We have heard Learned Counsel for the appellant who took us through the facts of the case and submitted that the certification issued initially could not have been discarded in view of the decision of the Tribunal in *Commissioner of Customs & Central Excise, Vadodara v. Lyphin Chemicals [1986 (88) ELT 147 (Tribunal)],* in *Commissioner of Central Excise, Rajkot v. Jupiter Cement Industries Ltd [2002 (148) ELT 561 (Tri.-Mumbai)]* and in *Karnataka Minerals and Manufacturing Company Ltd v. Commissioner of Central Excise, Bangalore [2003 (159) ELT 1042 (Tribunal)].* It is also contended that the decision of the Hon'ble Supreme Court in *Zuari Industries Ltd. v. Commissioner of Central Excise & Customs [2007 (210) ELT 648 (SC)],* followed by the Hon'ble High Court of Madras in *Coimbatore Pioneer Fertilisers Ltd v. Union of India [2009 (242) ELT 482 (Mad.)],* had accepted the indispensability of power expansion project to fertilizer capacity expansion.

6. Learned Authorised Representative reiterated the proposition adopted by both the lower authorities that the conditions in an exemption notification are to be strictly administered and that the said letter, upon which the appellants had relied for claiming the benefits of project imports, does not suffice. According to him, the nominating of the sponsoring authority by designation left no room

for flexibility to accept certification by any other authority in the specified organization.

7. The principle of strict application of conditions in notification is settled by several rulings but admits coverage only to the extent that it grants exemption from, or concession in, rate of duty upon fulfillment of conditions. Though, while narrating the context of the present dispute, Learned Counsel did refer to the import of ‘gear boxes for steam turbine with its accessories’ against bill of entry no. 6248760/23.03.2012 in which duties of customs had been discharged ‘under protest’ for denial of concession in duty, that the nub of the controversy was the rejection of application for registration of the contract under Project Import Regulations, 1986 has not been addressed in the findings of the first appellate authority and has been ignored in the arguments of Learned Authorized Representative.

8. Registration of contracts is *sine qua non* for the particular privilege, extended to implementing agencies of ‘project imports’ from as far back as 1965, of now claiming umbrella coverage under a single classification corresponding to heading 9801 of First Schedule to Customs Tariff Act, 1975 without having to segregate the various articles and of omnibus appraisal of the value of the project as a whole for assessment. In accordance with the taxation policy of the Central Government, the rate of duty may vary from the standard rate in the tariff, as notification no. 21/2002-Cus dated 1st March 2002 does, but

that is secondary to the principal privilege of classification and valuation flowing from registration under Project Import Regulations, 1986. The effective rate of duty too flows from having been registered and, while the grant of concessional rate of duty/exemption may be subject to condition of registration, registration itself is a statutory prescription that not only nullifies the standard rate of duty, if so provided, but is also the critical condition for applying the effective rate of duty. The decision of the Hon'ble Supreme Court in *Gammon India Ltd v. Commissioner of Central Excise & Service Tax, Mumbai [2011 (269) ELT 289 (SC)]*, as referred to in the impugned order, and in *Commissioner of Customs (Import), Mumbai v. Dilip Kumar & Company [2018 (361) ELT 577 (SC)]* placed before us by Learned Authorized Representative has the effect of duty payment at the standard rate without disturbing the classification which is not the consequence of denial of registration that excludes classification under heading 9801 of First Schedule to Customs Tariff Act, 1975. That significance does not appear to have impressed itself upon the first appellate authority.

9. At this stage, we are only concerned with the disposal of the application for registration which was denied on the ground that the certification, as made available to the original authority, was not in conformity with the prescription of serial no. 3 in the Table annexed to Project Imports Regulations, 1986 enumerating the 'sponsoring

authority' for the purposes of regulation 5(2) and 5(4) as defined in regulation 3(6) of Project Imports Regulations, 1986. Regulation 4 therein stipulates registration for entitlement to claim the rate of duty against heading 9801 of First Schedule to Customs Tariff Act, 1975 on the value of the project and the disposal of application for registration in

> *'Regulation 5. Registration of Contracts.-*
>
> *1) Every importer claiming assessment of the goods falling under the said heading No. 98.01, on or before their importation shall apply in writing to the proper officer at the port where the goods are to be imported or where the duty is to be paid for registration of the contract or contracts, as the case may be :*
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> *Provided that in the case of consignments sought to be cleared through a Custom House other than the Custom House at which the contract is registered, the importer shall produce from the Customs House of registration such information as the proper officer may require.*
>
> *2) The importer shall apply, as soon as may be, after he has obtained the Import trade control licence wherever required for the import of articles covered by the contract and in case of imports covered by the Open General Licence or imports made by Central Government, any State Government, statutory corporation, public body or Government undertaking run as a joint stock company (hereinafter referred to as "Government Agency") as soon as clearance from the concerned Administrative Ministry or Department, as the case may be, has been obtained.*
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> *3) The application shall specify -*

(a) the location of the plant or project;

(b) the description of the articles to be manufactured, produced, mined or explored;

(c) the installed or designed capacity of the plant or project and in the case of substantial expansion of an existing plant or project the installed capacity and the proposed addition thereto;

(d) such other particulars as may be considered necessary by the proper officer for purposes of assessment under the said heading.

4) The application shall be accompanied by the original deed of contract together with a true copy thereof, the import trade control licence, wherever required, and an approved list of items from the Directorate General of Technical Development or the concerned sponsoring authority.

5) The importer shall also furnish such other documents or other particulars as may be required by the proper officer in connection with the registration of contract.

6) The proper officer shall, on being satisfied that the application in the order register the contract by entering the particulars thereof in a book kept for the purpose, assign a number in token of the registration and communicate that number of the importer and shall also return to the importer all the original documents which are no longer required by him.'

and, while doubtlessly conferring eligibility for application after obtaining clearance of the 'sponsoring authority', the documentary satisfaction is limited to approved list of items. The sequencing of these regulations appears to have have led the lower authorities to misconstrue the requirement for registration as pertaining to the list which too must be produced for availing exemption, if any, at the time of clearance.

10. It is seen that though the letter dated 12th September 2011 purports to be communication of recommendation of Additional Chief Secretary to the Government of Karnataka, it bears the signature of the Deputy Secretary for certifying the essentiality of import of ‘steam turbine and accessories’ valued at US $ 2,500,000/-. It is on record that the said Regulations do not stipulate any particular format for the said certification and, while some of the sponsoring authorities are described by designation, others are merely specified as organizations. It is seen that the projects, other than those of small scale industry units, power, drinking water supply, urban rail and water supply which are to be sponsored exclusively by state government concerned, may or would have to be sponsored by the administrative ministry or department of the Government of India; it is in pursuance thereof that appellant had obtained the recommendation from the Government of India in the Department of Industrial Policy and Promotion for the cement plant expansion which merited acceptance and was registered in accordance with the Regulations. It can be conjectured that, in anticipation of impediments from customs authorities in imports pertaining to the sub-project of

‘power plant’ enhancement, the appellant had, *vide* their letter dated 23rd December 2010, sought for, and obtained, the referred letter from the Government of Karnataka in the Department of Energy. Hence the issue at hand narrows down to the conformity of the said letter to suffice, for the purpose of serial no.3 of the Table annexed to Project Imports Regulations, 1986, as clearance from the sponsoring authority and according validity to list of approved items for acceptance of the application for registration of contract. According to the Project Import Regulations,

> ‘*(b) sponsoring authority’ means the authority specified in the table annexed to these regulations.*

and the manner of enumeration must be comprehended in this context. There is neither a requirement that the said certificate be addressed to any individual or authority in the customs house and nor is there any discretion accorded to the customs authorities for requiring that approvals of the competent authority be authenticated. Under the scheme of exercise of presidential/gubernatorial authority conferred by the Constitution of India, and in accordance with Article 116 thereof, rules for regulating the manner in which business of government – of states and of the Centre – are to be transacted are notified. So far as Government of Karnataka is concerned, the Karnataka Government (Transaction of Business) Rules, 1977 defines ‘Secretary’ to include, among others, Deputy Secretary.

Consequently, the communication issued by the Deputy Secretary in the Energy Department is in conformity with the description of the sponsoring authority in the Project Imports Regulations, 1986.

11. Further, though not brought to the knowledge of the original authority, the first appellate authority had, by clarification dated 31st May 2012 from the Government of Karnataka in the Energy Department, been intimated that the earlier recommendations had been approved by the Principal Secretary to the Government of Karnataka. This factual elaboration has clearly been overlooked by the first appellate authority. Furthermore, from a provenance unspecified, the first appellate authority appears to have examined the appropriateness of approval by Additional Secretary when such was that of Additional Chief Secretary. Additional Chief Secretary is a hierarchically superior rank but, in relation to particular departments entrusted to them, they exercise duties and functions devolving on Secretaries. Thus the adequacy of the certification is beyond question.

12. As a further assurance, the communication of the Department of Industrial Policy and Promotion, and, here we may hasten to add, without having to be issued under the authority of any designated official in the said table of Project Import Regulations, 1986, should have sufficed, even without the additional certification from the Government of Karnataka, for eligibility to effect imports within the contract already registered for substantial expansion of the cement

plant.

13. In view of the incorrect appreciation of the adequacy of the certificate for registration of the contract under the Project Import Regulations, 1986 and, thereby, of eligibility for assessment under heading no. 9801 of the First Schedule to the Customs Tariff Act, 1975, the rejection of the application for registration is set aside. The rejection of the application for registration mandated by regulation 5 and 6 of Project Imports Regulations, 1986 being *non-est* and as one of the two options available under Project Import Regulations, 1986 between the alternative of registration as a separate contract or as amendment of the registered contract, we allow the appeal by restoration of the application for completion of registration by the competent authority.

(Operative part of the order pronounced in open court on 5th October 2021)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*