

EOU not entitled to claim refund of TED on its own, may avail of the entitlements of DTA supplier specified in FTP

The Supreme Court of India in the matter of *Sandoz Private Limited v. Union of India [Civil Appeal No. 3358 of 2020 dated January 4, 2020]* upheld the decision of the Bombay High Court that Export Oriented Unit (“EOU”) is not entitled to claim refund of Terminal Excise Duty (“TED”) on its own, however, adds a caveat that EOU may avail of the entitlements of Domestic Tariff Area (“DTA”) supplier specified in Chapter 8 of Foreign Trade Policy (“FTP”) on condition that it will not pass on that benefit back to DTA supplier later on.

Facts:

M/s Sandoz Private Limited (“the Appellant”) claims to be hundred per cent EOU engaged in the manufacture of goods falling under Chapter 30 of the Schedule to the Central Excise Tariff Act, 1985.

The Appellant had applied for refund from TED in respect of excisable goods procured from its unit in DTA, as it did in the past and was granted refund from time to time between 2006 and 2012. The instant refund application was disallowed, which decision is the subject matter of appeal in the present case. It is known that TED was paid by the DTA Unit from where the goods in question were procured or supplied to the Appellant for its EOU during the relevant period.

Circular bearing No.16 (RE-2012/2009-14) dated March 15, 2013 (“the Circular”), was issued by the Director General of Foreign Trade (“DGFT”) to clarify that no refund of TED should be provided by the Office of DGFT/Development Commissioners, as supplies made by DTA Unit to EOU are ab initio exempted from payment of excise duty. The Development Commissioner eventually rejected the refund claim set forth by the Appellant and informed the Appellant in that regard vide letter dated April 1, 2013.

The Appellant challenged the legality and validity of the Circular issued by DGFT and the rejection of the refund application.

Issue:

Challenged the legality and validity of the Circular issued by DGFT and the rejection of the refund application.

Held:

The Supreme Court in *Civil Appeal No. 3358 of 2020 dated January 4, 2020*, held as under:

- Agreed with the conclusion reached by Bombay High Court that EOU is not entitled to claim refund of TED on its own, however, adds a caveat that “EOU may avail of the entitlements of DTA supplier specified in Chapter 8 of FTP on condition that it will not pass on that benefit back to DTA supplier later on”
- Clarified that refund claim needs to be processed by keeping in mind the procedure underlying the refund of CENVAT credit/rebate of excise duty obligations i.e., if CENVAT credit utilised by DTA supplier or EOU, cannot be encashed, there is no question of refunding the amount in cash and in that case, equal amount must be reversed to CENVAT credit account of concerned entity instead of paying cash.
- The Circular was held to be clarificatory of the obvious position in law in nature.
- On the question as to which appropriate authority is to be approached for refund claim, answers that since the refund claim is founded on the FTP and not in reference to the provisions of the 1944 Act or the rules framed thereunder, it is the obligation of authority responsible to implement the subject FTP (which has had consciously accorded such entitlements/benefits for promoting export and earning foreign exchange) to deal with refund claim of concerned entities. Going by FTP scheme as applicable at the relevant period, elucidates that “it is crystal clear that EOUs were entitled to ab initio exemption from payment of Central Excise duty on goods procured from DTA. That, however, did not preclude the EOU from availing of the entitlement of DTA supplier under Chapter 8 upon obtaining a suitable disclaimer from DTA supplier.
- Remarked that *“scheme of FTP is explicit and not ambiguous nor silent in respect of benefits and entitlements of the concerned entities. It needs no elaboration. Thus, an argument having potential of defeating the intent of the applicable FTP, in any manner, ought to be negated”*; Asserts that *“the fact that the concerned entity had unsuccessfully applied for refund to the Authorities under the 1944 Act and the rules made thereunder, that would not denude it of its entitlement to get refund of TED under the FTP, ... It is so because it is well settled that the assessee is free to take benefit of more beneficial regime”*

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