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(2016) 6 BCR 401 : (2016) 341 ELT 22

BOMBAY HIGH COURT

Case No: Writ Petition No. 2927 of 2015.

Sandoz Private Limited, a company incorporated under the provisions of the] Companies Act, 1956, having one of its factory, inter alia, at Plot No.8A/2, 8B/2,] 8-8A/1/1, Kalwe, MIDC, Dighe, Navi Mumbai - 400 708 - Petitioner @HASH The Union of India, th

APPELLANT

Vs

RESPONDENT

Date of Decision: Aug. 1, 2016

Acts Referred:

- Constitution of India, 1950 - Article 226
- Foreign Trade (Development and Regulation) Act, 1992 - Section 5

Citation: (2016) 6 BCR 401 : (2016) 341 ELT 22

Hon'ble Judges: S.C. Dharmadhikari and Dr. Shalini Phansalkarjoshi, JJ.

Bench: Division Bench

Advocate: Mr. Prakash Shah with Mr. Prasad Paranjape and Mr. Jas Sanghavi, Advocates i/b M/s. PDS Legal, for the Petitioners in both the Writ Petitions; Mr. Anil C. Singh, Additional Solicitor General with Mr. Beni Chatterjee, senior counsel, Mr. Pradeep S. Jetly a

Final Decision: Disposed Off

Judgement

S.C. Dharmadhikari, J.(Oral) - These petitions involve common questions of fact and law. They are heard together and are being disposed of by this common judgment.

2. Rule in both the petitions. Respondents waive service. By consent, Rule made returnable forthwith.

3. Since both sides relied on the pleadings in Writ Petition No.2927 of 2015, we would take the facts and events from that petition.

4. The petitioner in this petition claims to be a 100% Export Oriented Unit ("EOU" for short) engaged, inter alia, in the manufacture of goods falling under Chapter 30 of the Schedule to the Central Tariff Act, 1985, and for that purpose they have a factory, inter alia, at the address mentioned in the cause title. They also have another factory in District Raigad, particularly in the Maharashtra Industrial Development Corporation ("MIDC" for short) area at Mahad. Respondent No.1 is the Union of India and respondent Nos. 2 to 4 are officers exercising powers under the Foreign Trade (Development and Regulation) Act, 1992 ("FTDR" for short).

5. The brief facts leading to the petition are that the petitioner No.1 has been receiving supplies of what is called intermediate products from its sister concern in the Domestic Tariff Area Unit ("DTA" for short). It is claimed that the said unit has been supplying these goods, on payment of cenvat duty under claim for rebate, to the petitioners EOU unit. The petitioners case is that these goods are used in the manufacture of goods cleared for export. The fact that the petitioners final products of the EOU unit have been exported is not disputed.

6. Relying upon the Foreign Trade Policy ("FTA" for short) of 2004-2009/2009-2014 (Paras 8.1, 8.2, 8.3 and 8.5) it is urged that in terms of para 8.1 of the FTP, those transactions in which the goods supplied do not leave the country and payment for such supplies is received either in Indian rupees or in free foreign exchange, is a deemed export. In terms of para 8.3 of the FTP, deemed export shall be eligible for any/all of the benefits in respect of manufacture and supply of goods qualifying as deemed exports, subject to terms and conditions as found in the Handbook of Procedure, Volume-I. In terms of para 8.5 of the FTP, supply of goods will be eligible for refund of terminal excise duty ("TED" for short) in terms of para 8.3(c) of the FTP, provided recipient of goods does not avail cenvat credit of duty paid by the DTA unit under the provisions of the Cenvat Credit Rules, 2004. The petitioners DTA unit did not claim benefit of TED refund and to this effect the DTA unit has issued its disclaimer certificate to enable the petitioners EOU to claim the refund of the TED paid on goods cleared by the DTA unit. Annexure-B is a specimen copy of the disclaimer certificate issued by the supplier unit.

7. It is stated that in terms of the provisions of the FTP, the petitioners EOU unit regularly filed the applications with the Development Commissioner (Respondent No.3) claiming refund of the TED paid by the petitioners" DTA unit on the goods supplied to the petitioners EOU. These applications were granted from time to time, except the refund applications dated 20th April, 2012, 29th October, 2012 and 4th April, 2013, involving the period commencing from January, 2012 to December, 2012. It is claimed that all the

export documents were supplied along with these applications but the same were rejected on the ground that there is a policy circular dated 15th March, 2013, by which the Director General of Foreign Trade ("DGFT" for short - respondent No.2) purported to clarify, inter alia, that no refund of TED should be provided by the Development Commissioners/DGFT as supplies are ab-initio exempted from payment of excise duty. Annexure-E is a copy of this policy circular.

8. From paragraph 15 of the petition, the circular is analysed, but it is urged that the refund applications at the initial stage were not granted. Writ Petition No.9312 of 2013 was filed in this Court to challenge even this policy circular but on 23rd September, 2014, this Court disposed of the writ petition directing the respondent No.3 to pass a fresh order in accordance with law. Annexure-G is a copy of this order. Then, the time to dispose of refund applications was extended by this Court and subsequently, written submissions were filed. The refund claims were rejected on 6th January, 2015, and a copy of this order is Annexure-I.

9. It is aggrieved and dissatisfied with this order that the present writ petition has been filed.

10. The impugned order proceeds on the footing that the petitioners refund applications cannot be entertained and the reasons for the same are to be found from paragraph 9 at page 66 of the paper-book. It is held that the policy circular issued by DGFT is a mere clarification which is effective from the date of issuance of the FTP and not from the date of issuance of the circular. The DGFT by the policy circular dated 15th March, 2013, has not amended but only clarified the provisions of para 6.2(b) and 6.11(c)(ii) of the FTP stating that no refund of TED should be provided by the Regional authorities of the DGFT/office of the Development Commissioners because such supplies are ab-initio exempted from payment of excise duty.

11. It is the correctness of this conclusion and for the reasons to be found from paragraphs 9 to 14 that is assailed in this writ petition.

12. An affidavit-in-reply has been filed on behalf of the respondents by one P.S. Raman working as a Joint Development Commissioner in the office of the Development Commissioner, SEEPZ, Special Economic Zone, Mumbai. After referring to the factual aspects, the affidavit highlights the FTP. It then supports the conclusion that Rule 5 of the Cenvat Credit Rules, 2004, does not speak of any deemed export but physical export. It is apparent that such a claim as is raised now on the basis of the Cenvat Credit Rules was not maintainable. Secondly, it is stated that the policy circular is binding. From paragraph 19, the FTDR Act, the ambit and scope of its provisions and the FTP is highlighted and then in paragraph 23, it is stated that the supplies made by a unit in DTA to an EOU is treated as deemed exports as per para 8.2(b) of the FTP. It is also admitted that para 8.3(c) of the FTP extends the benefit under deemed exports for the supplies which qualify as deemed exports. The qualified deemed exports are undoubtedly eligible

for the corresponding benefits, as applicable. One of the benefits is the TED refund. Para 8.3.(c) of the FTP covers both TED refund as well as exemption from TED for different types of cases. TED refund is allowed where TED exemption is not available. On one hand the provisions contained in Chapter 8 of the FTP pertains to deemed exports, however, on the other hand there is an exclusive Chapter i.e. Chapter No.6 in the FTP, which is in consonance with the scheme of EOU. Thus the emphasis is that the policy circular has not introduced any new conditions/provisions but it is merely clarificatory. For these and other statements that are set out in this affidavit, it is submitted that the conclusion in the impugned order is correct. Reliance is also placed on CBEC Circular dated 3rd May, 2007, copy of which is annexed as Exhibit-E to the affidavit.

13. The petitioners have filed an affidavit-in-rejoinder and apart from reiterating the arguments in the writ petition so also the grounds thereof, what is urged is that the refund claims in the past have been granted. It is submitted that the recipient EOU with the disclaimer from DTA supplier is entitled to refund of the duty paid by the suppliers in terms of para 8.3 subject to the condition that no Cenvat credit is taken by the EOU. The petitioners have not taken credit of duty paid on the goods cleared by the DTA unit on payment of duty. Then, reliance is placed upon Exhibit-1 to the affidavit in rejoinder which is a specimen copy of a form containing declarations. The petitioners submit that the requisite declarations having been submitted that there is a complete compliance with the FTP and the above rules. In the rejoinder affidavit it is contended that the policy circular cannot be held to be clarificatory and, therefore, no retrospective effect can be given to it. It is submitted that the approach of the respondents is contrary to the judgment of the Delhi High Court in the case of **Kandoi Metal Powders Mfg. Co. Pvt. Ltd. v. Union of India, 2014 (302) E.L.T. 209**. For these reasons it is submitted that the petitions be allowed.

14. Mr. Shah appearing on behalf of the petitioners submits that the applications for refund of the duty paid on imports received by the EOU are rejected by the Development Commissioner solely relying upon the policy circular dated 15th March, 2013. The said circular purports to clarify that in respect of deemed exports with regard to only three categories mentioned therein, namely, supply against advanced authorisation, supply against international competitive bidding and supply of goods to EOU, no refund should be provided by the Development Commissioner because such supplies are ab initio exempt from payment of excise duty. Mr. Shah submits that there is now another contention raised to the effect that the petitioners have attempted to encash the cenvat credit by seeking refund under para 8.3 (c) of the FTP and refund of cenvat credit under Rule 5 of the Cenvat Credit Rules is not permissible for deemed export and is permissible for physical export. Mr. Shah submits that another ground is made out and by a statement in the affidavit-in-reply.

15. Apart therefrom, this contention of the respondents and based on para 8.2(b) of the FTP is inaccurate simply because it is admitted by the respondents in the affidavit-in-reply that the supply of goods to an EOU is deemed export under para 8.2 of the FTP and

refund of duty paid therein is admissible. Para 6.11 provides for entitlement for supplies from the DTA. Clause (a) provides that supplies from DTA to EOU/EHTP/STP/BTP units will be regarded as "deemed exports" and DTA suppliers shall be eligible for relevant entitlements under Chapter 8 of FTP, besides discharge of export obligations, if any, on the supplier. Notwithstanding the above, EOU/EHTP/STP/BTP units, on production of suitable disclaimer from DTA supplier, are eligible for obtaining entitlement specified in chapter 8 of the FTP. For claiming deemed export duty drawback, they shall get brand rates fixed by the Development Commissioner wherever all industry rates of drawback are not available. Mr. Shah relies upon the language of paras 8.3 and 8.5 of the FTP to submit that the same permits refund of TED except supplies made against ICB. He would submit that on a combined reading of para 6.11 together with para 8.3 and 8.5, an EOU with the disclaimer of the DTA supplier is eligible to refund of terminal duty. The EOU cannot be denied the refund of TED on the ground that the goods can be procured without payment of duty.

16. Mr. Shah then submits that in any event, the respondents cannot deviate from the past and consistent practise of granting refund of TED on goods supplied to EOU. He relied upon the several orders passed in that behalf. He points out that there was never any suppression or misrepresentation as the respondents were aware that the DTA unit is the supplier to the EOU. The DTA unit having issued an authorisation in favour of the petitioners which is an EOU that EOU is entitled to apply for and claim the refund. This is not a case of any double duty or dual refund nor is it a case of excess cenvat credit being utilised by a backdoor or oblique method.

17. He submits that even the circular and which is relied upon cannot be applied in this case for it is not clarificatory, but purports to create additional grounds and for dealing with the applications of the present nature. This circular, therefore, cannot have any retrospective operation. Mr. Shah also relies upon the principle that the DGFT has no power or jurisdiction to amend the policy. Its powers are limited, namely, to interpret and implement a FTP. The power to amend it vests exclusively in the Central Government. Once the refund claim pertains to a period prior to the amendment, then, the earlier provisions must govern the same.

18. Mr. Shah has placed heavy reliance on the judgment of the Delhi High Court in Kandoi (supra) to submit that there the respondents had taken up similar defence, but the Division Bench rejected it. Thereafter, the Division Bench judgment was followed by the respondents and relief was granted to M/s. Kandoi. It is in these circumstances that Mr. Shah would submit that this is a case where identical view should be taken by the respondents. Once the petitioner No.1 is an EOU and it is entitled to some benefits which may be dual in nature, then, the option is not with the respondents but with the assessee and it can choose the benefit which it desires to claim. For all these reasons, Mr. Shah would submit that the writ petition be allowed.

19. Mr. Shah has taken us through the entire FTP 2009- 2014 and the Notification dated 18th April, 2013 and 1st March, 2015 from the compilation of the documents.

20. On the other hand, the learned Additional Solicitor General of India appearing on behalf of the respondents would urge that there is no merit in any of these contentions of Mr. Shah. It is submitted by the learned Additional Solicitor General that this is a clear attempt to obtain a benefit and contrary to the FTP and the law. Something which is exempt from inception cannot be made the basis for claim of refund of TED. This is a clear modus operandi and which stands exposed. There is nothing additional but the reasons which have already been assigned in the impugned order are merely explained in the affidavit. It is not an attempt to supply additional reasons nor is it an attempt to get over something which binds the respondents. Once the policy circular was issued and it is merely clarificatory, then, neither the earlier orders of refund nor the judgment of the Delhi High Court would govern the controversy and can be of any assistance to the petitioners. For these reasons it is submitted that the petition be dismissed.

21. For properly appreciating the rival contentions, we would make a reference to the FTDR Act. The FTDR Act, 1992 is an Act to provide for the development and regulation of foreign trade by facilitating imports into and augmenting exports from India and for matters connected thereto or incidental therewith. Chapter 1 of this Act contains the preliminary provisions in which appears section 2 titled ''Definitions''. After defining the relevant terms, including the words "import" and "export" what is then pointed out is that the import and export in relation to the goods, services and technology regarding Special Economic Zone or between two such Zones shall be governed in accordance with the provisions contained in the Special Economic Zones Act, 2005.

22. Before us, there is no dispute that the authority which has passed the impugned order was so empowered. It had the necessary power and jurisdiction to pass the impugned order. By Chapter III, the Central Government has powers to make orders and announce the FTP. Section 3 falling in Chapter II confers power to make provisions relating to imports and exports. Subsection (1) itself clarifies that the whole emphasis is to facilitate imports and increase the exports. Sub-section (2) empowers the Central Government to make provisions for prohibiting, restricting or otherwise regulating in all cases or in specified classes of cases and subject to such exceptions, if any, as may be made by or under the order, the import or export of goods or services or technology. There is an amendment carried out and to the Act in the year 2010 by Act No.25 of 2010. The FTP is dealt with by section 5. It reads as under :

"5. Foreign Trade Policy.- The Central Government may, from time to time, formulate and announce, by notification in the Official Gazette, the foreign trade policy and may also, in like manner,amend that policy:

Provided that the Central Government may direct that, in respect of the Special Economic Zones, the foreign trade policy shall apply to the goods, services and technology with

such exceptions, modifications and adaptations, as may be specified by it by notification in the Official Gazette."

23. A bare perusal of the same would indicate that it is the prerogative of the Central Government to formulate and announce, by notification in the Official Gazette, the foreign trade policy and it may also, in like manner, amend that policy. The proviso to section 5 clarifies that the Central Government may direct that, in respect of the Special Economic Zones, the foreign trade policy shall apply to the goods, services and technology with such exceptions, modifications and adaptations, as may be specified by it by notification in the Official Gazette. The appointment of Director General and his functions are covered by section 6 and by sub-section (2) of the same, it is his duty to advise the Central Government in the formulation of the FTP and he shall be responsible for carrying out that policy.

24. The Central Government may, by order published in the Official Gazette, direct that any power exercisable by it under the FTDR other than the powers under sections 3, 5, 16 and 19 may also be prescribed in such cases and subject to such conditions by the Director General or such other officer subordinate to the Director General as may be specified in the order.

25. We need not refer to any judgment once the statutory scheme is clear. The power to make and amend the FTP vests exclusively with the Central Government. The Director General and others would be responsible for carrying out that policy. It is undisputed before us that he can interpret the said policy or any of such stipulations in the nature thereof during the course of its implementation.

26. For the present proceedings Chapter VI and VIII of the FTP are relevant. They have been compiled for our benefit by the petitioners'' counsel.

27. Chapter VI of the FTP 2009-2014 deals with EOUs, Electronics, Hardware, Technology Parks etc. Para 6.1 deals with Eligibility. Units undertaking to export their entire production of goods and services (except permissible sales in DTA) may be set up under the EOU scheme for manufacture of goods, including repair, remaking etc. The trading units are not covered under these schemes. Para 6.2 deals with export and import of goods. Clause (a) thereof states that a EOU/EHTP/STP/BTP unit may export all kinds of goods and services except items that are prohibited in ITC (HS). Export of special chemicals, organisms, materials, equipment and technologies shall be subject to fulfilment of the conditions indicated in ITC (HS). Clause (b) of this paragraph is important for our purpose and it reads as under:-

"(b) An EOU/EHTP/STP/BTP unit may import and/or procure, from DTA or bounded warehouses in DTA/international exhibition held in India, without payment of duty, all types of goods, including capital goods, required for its activities, provided they are not prohibited items of import in the ITC (HS). Any permission required for import under any

other law shall be applicable. Units shall also be permitted to import goods including capital goods required for approval activity, free of cost or on loan/lease from clients. Import of capital goods will be on a self certification basis. Goods imported by a unit shall be with actual user condition and shall be utilised for export production."

28. A bare perusal of this clause would indicate that an EOU may import and/or procure from domestic tariff area or bonded warehouse in DTA/international exhibition held in India without payment of duty all type of goods including capital goods required for its activities, provided they are not prohibited items of import in the ITC (HS). We are not concerned with the import by an EOU. In this case, we are concerned with the procurement by the petitioner No.1 from domestic tariff area (DTA). It is its own unit which has been supplying the materials. We have noted that the emphasis of the respondents is on the words "without payment of duty" appearing in clause (b). Para 6.11 deals with the entitlement for supplies from DTA. Clause (a) thereof reads thus :-

"**6.11 Entitlement for supplies from the DTA.**

(a) Supplies from DTA to EOU/EHTP/STP/BTP units will be regarded as "deemed exports" and DTA supplier shall be eligible for relevant entitlements under chapter 8 of FTP, besides discharge of export obligation, if any, on the supplier. Notwithstanding the above, EOU/EHTP/STP/BTP units shall, on production of a suitable disclaimer from DTA supplier, be eligible for obtaining entitlements specified in chapter 8 of FTP. For claiming deemed export duty drawback, they shall get brand rates fixed by DC wherever All Industry Rates of Drawback are not available."

29. From a reading thereof, it is apparent that supplies from DTA to EOU units will be regarded as deemed exports and DTA supplier shall be eligible for relevant entitlements under chapter 8 of FTP, besides discharge of export obligation, if any, on the supplier. Notwithstanding the above, EOU/EHTP/STP/BTP units shall, on production of a suitable disclaimer from DTA supplier, be eligible for obtaining entitlements specified in chapter 8 of FTP. For claiming deemed export duty drawback is something which is also referred to in this para/clause.

30. Then, our attention is invited to Chapter 8 which deals with deemed exports. Para 8.1 of this chapter deals with deemed exports. It defines them to mean those transactions in which goods supplied do not leave the country and payment for such supplies is received either in Indian rupees or free foreign exchange. Mr. Shah submits that para 8.2 deals with categories of supply of goods by main/sub contractors which shall be regarded as deemed exports under FTP, provided goods are manufactured in India and supply of such goods is at EOU. Mr. Shah then relies upon para 8.3 which deals with Benefits for Deemed Exports. The deemed exports shall be eligible for any/all of following benefits in respect of manufacture and supply of good qualifying as deemed exports subject to terms and conditions as in HBP v1: The terms and conditions that we are concerned with are to be found in clause (c) of para 8.3. That grants exemption from terminal excise duty where

supplies are made against ICB. In other cases, refund of terminal excise duty will be given. Exemption from TED shall also be available for supplies made by an advance authorisation holder to a manufacturer holding another advance authorisation if such manufacturer, in turn, supplies the product(s) to an ultimate exporter. Mr. Shah submits that para 8.4.2 of the of FTP states that the supplier shall be entitled to benefits listed in para 8.3(a), (b) and (c) of the FTP whichever is applicable in respect of supply of goods to EOU.

31. Benefits to the supplier are set out in para 8.4.1. Mr. Shah also relies upon para 8.5 which reads as under :-

"8.5 Eligibility for refund of terminal excise duty/drawback.

Supply of goods will be eligible for refund of terminal excise duty in terms of para 8.3(c) of FTP, provided recipient of goods does not avail CENVAT credit/rebate on such goods. Similarly, supplies will be eligible for deemed export drawback in terms of para 8.3(b) of FTP on Central Excise paid on inputs/components, provided CENVAT credit facility/rebate has not been availed by applicant. Such supplies will however be eligible for deemed export drawback on customs duty paid on inputs/components."

32. A bare perusal of para 8.5 would reveal as to how it deals with eligibility for refund of terminal excise duty/drawback.

33. Since heavy reliance is placed by both sides on the circular dated 18th April, 2013, we would reproduce the relevant paragraph for our purpose :

"**(i) Existing Paragraph 8.3(c)**

"Exemption from terminal excise duty where supplies are made against ICB. In other cases, refund of terminal excise duty will be given. Exemption from TED shall also be available for supplies made by an Advanced Authorisation holder to manufacturer holder another Advance Authorisation if such manufacturer, in turn, supplies the product(s) to an ultimate exporter."

Amended Paragraph 8.3(c)

"Refund of terminal excise duty will be given if exemption is not available. Exemption from TED is available to the following categories of supplies :

(i) Supplies against ICB;

(ii) Supplies of intermediate goods, against invalidation letter, made by an Advance Authorisation holder; and

(iii) Supplies of goods by DTA unit to EOU/EHTP/STP/BTP unit.

Thus such categories of supply which are exempt ab initio will not be eligible to receive refund of TED."

34. Mr. Shah submits that the subject of this circular is amendment in para 8.3(c) and para 8.4 of the FTP pertaining to deemed export scheme. Thus he would submit that this is an amendment of the FTP by the Government of India and the power conferred by sections 3 and 5 of the FTDR Act has been exercised in this case. The existing paragraph 8.3(c) was dealing with exemption from TED where supplies are made against ICB and in other cases refund of TED will be given. Now para 8.3(c) says that refund of TED will be given if exemption is not available. Exemption from TED is available to the various categories of supplies, inter alia, supplies of goods by DTA unit to the EOU and, therefore, such categories of supplies which are exempt ab initio will not be eligible to receive refund of TED.

35. We would prefer to rest our conclusion on this part of the controversy as the petitioners are submitting that the respondents are trying to support the impugned order by additional reasons and which are set out in the affidavit-in-reply.

36. Whether this is a merely clarificatory provision or it purports to amend and substantively the paragraph 8.3 and, therefore, it would not govern the period during which refund is claimed by the petitioners is thus the essential controversy.

37. In the case of Kandoi (supra) the Hon"ble High Court at Delhi was dealing with the petitioner ï¿½ manufacturer of metal powders. That metal powder suffers excise duty. It claimed to have supplied manufactured goods to 100% EOU in consonance with the FTP. Claiming that it was entitled to refund of TED for the supplies made during the relevant period January 2012 to March 2012 and April 2012 to June 2012, the petitioners made applications to the third respondent to that writ petition. The applications for refund were made on 29th August, 2012, and 16th November, 2012. By orders passed separately in October and November, 2012, these refund claims were denied. In compliance with the provisions of the policy, the petitioners wrote to the second respondent claiming relaxation and these letters were addressed in December, 2012. These were also turned down on 14th May, 2013.

38. The argument as noted by the Division Bench in paragraph 3 was that the unit and the supplies were entitled to be termed as deemed export as defined by para 6.11 of the 2009 policy in question. Then paragraphs 8.2 and 8.3 which have been heavily relied upon by Mr. Shah before us are referred. Then, it is submitted before the Delhi High Court that such category of units do not have to even deposit or pay TED, but are entitled to claim complete exemption. The relevant Notifications have been relied upon. The relevant amendment carried out by the circular to the earlier FTP of 2009 with material particulars is relied upon. On the other hand, the respondents relied upon the averments in the counter affidavit as well as a letter addressed by the third respondent on 31st May, 2013, directing consequential instructions to be issued to field formations in the light of

the amended circular dated 15th March, 2013. The argument was that in case the petitioner wishes to seek refund, the relevant statutory regime would be under the control of the Central Excise Act. Then, the policy stipulations are referred in paragraphs 5, 6, and 7 and in paragraph 8, the Division Bench held that in the case before it, the petitioners did not make any supplies against international competitive bidding. The supplies made to the EOU were entitled to be regarded as deemed exports. The petitioners did not make any supplies against ICD and, therefore, its case would be covered by para 8.3 (c), i.e. in which refund of TED will be given. The Division Bench in paragraph 9 held that the respondents passed an adverse order on the footing that some clarification was given by the Policy Interpretation Committee in its meeting of 4th December, 2012. The reasoning appears to have prevailed with the Policy Interpretation Committee, but the Court was unable to comprehend the rationale of the decision of the second and third respondents who seemed to have suggested that the petitioners should approach the DGFT for appropriate relief or clarification. Paragraph 9 of the decision, therefore, essentially dealt with the issue before the Division Bench where the refund claims were not processed. The refund claims were not processed, but the petitioners before the Delhi High Court were directed to approach the DGFT for appropriate relief or clarification. The Division Bench ruled that when none of the respondents disputed the factual position, then, there was no reason for such an approach. That is why the Division Bench quashed the orders and directed to process and pass appropriate orders on the refund application in terms of the 2009 policy.

39. To our mind, the Division Bench did not at all deal with the contentions as have been noted by us in the foregoing paragraphs of this judgment. We would have to, therefore, deal with this issue and independent of this judgment. Once we find that the export and import of goods and particularly by EOU is dealt with by para 6.2, then, we must find out whether the respondents are right in relying upon the policy circular dated 15th March, 2013 by terming it as merely clarificatory. In our view, para 6.2(b) specifically says that an EOU unit may import and/or procure from DTA or bonded warehouses in DTA/international exhibition held in India, without payment of duty, all types of goods, including capital goods, required for its activities, provided they are not prohibited items. In the instant case, the whole foundation as noted by the respondents and of the claim for refund is the assertion of the petitioners that they are 100% EOU engaged, inter alia, in the manufacture of goods falling under chapter 3 of the Schedule to the Central Excise Tax Act, having a factory at Navi Mumbai. The letters dated 20th April, 2012, 20th October, 2012 and 4th February, 2013, vide which three TED refund claims were made were filed in the office of the Development Commissioner, SEEPZ, Special Economic Zone for the period/quarters January-March, 2012, July-September, 2012 and October-December, 2012 in accordance with paragraph 8.5 of the FTP. They requested for sanction of these refund claims by pointing out that the relevant paragraphs are 8.1 to 8.3 and 8.5 of the FTP of 2004-2009/2009-2014. It has been asserted that the petitioners are not claiming or availing cenvat credit of duty paid by DTA unit under the provisions of the Cenvat Credit Rules, 2004. The DTA unit did not claim the benefit of the TED refund.

The petitioners were regularly filing applications with the Development Commissioner claiming refund of TED paid by the DTA of the goods supplied to them. Previously all such refund claims were sanctioned. The petitioners" assertion was that the TED refund claims were filed before the issuance of the policy circular dated 15th March/18th April, 2013. In any event, the policy circular cannot apply to the claim filed for the period prior thereto and it cannot be given retrospective effect as FTP 2009-2014 published on 18th April, 2013, has not amended the relevant provision. Reliance was placed before us on that further stipulation. We are not concerned with this for the simple reason that we are dealing with an issue whether this policy circular operates and governs the refund claims in question. Relying upon the stipulations in the FTP the petitioners contended that the supplied goods to EOU is deemed export and is eligible for refund. The impugned circular does not dispute that the goods supplied to EOU is deemed export and the petitioners have not claimed the credit of cenvat duty paid on the goods supplied by the DTA unit to them and they are eligible for refund thereof. Then, without prejudice it was urged that the policy circular also admits that if the duty is paid, then, it should be refunded.

40. The respondents in dealing with all these contentions, to our mind, have rightly taken note of the provisions of the FTP and Handbook procedure Volume I 2009-2014 and the clarification issued by the DGFT. It is common ground that the interpretation and implementation of the policy by the DGFT is a permissible exercise and does not run counter to the scheme of the FTDR Act. After para 6.2 of the FTP is reproduced and particularly clause (b) thereof so also para 6.11 of the FTP which states that the EOU shall be entitled to exemption from payment of central excise duty on goods procured from DTA on goods manufactured in India, what the respondents have held is that the policy circular is merely clarificatory. We have no hesitation in accepting this contention for the simple reason that para 6.2(b) and 6.11(c)(ii) of the FTP states that no refund of TED should be provided by Regional authorities of the DGFT or the office of the Development Commissioners because such supplies are ab initio exempted from payment of excise duty. The harmonious reading of this policy and particularly the paragraphs referred to above enabled the respondents to arrive at the conclusion that the refund was not admissible. While it is true that M/s. Kandoi"s judgment was heavily relied upon and the respondents have abided by the same in the case of Kandoi, we do not think that in Kandoi this essential controversy, as dealt with by us, was dealt with.

41. Once there was a clear stipulation in the policy itself, then, all that the circular does is to clarify this obvious position. If there was no obligation to pay duty, then, there is no question of claiming a refund in the manner done. If this is what has been held and appears to be the essential finding, then, that is not in any manner contrary to the mandate of the provisions and particularly of section 5 of the FTDR Act. This is not a case where anything is being stated and for the first time so as to term it as an amendment to the policy and, therefore, would apply prospectively. Insofar as the subject issue is concerned, all that the respondents have done is to clarify that para 8.3(c) and para 6.2(b) and 6.11(c)(ii) of the FTP read harmoniously and together imply that no refund on

supplies under para 8.3 is admissible. When there is an exemption, then, this refund claim was rightly disallowed. We do not think that any individual decision and in the case of a distinct assessee would, therefore, be of assistance to the present petitioners.

42. Though in the past such claims have been granted does not mean that the practise or the past orders should govern the issue necessarily. When the petitioners themselves were aware of a policy circular and sought to urge that it would not be governing the controversy and for the period for which refund is claimed, then, it is clear that they were required to overcome the said stipulations and the circular itself. That having found rightly to be clarifying the obvious position, we have no hesitation in concluding that the refund applications were properly and correctly disallowed.

43. As a result of the above discussion, both the writ petitions fail. Rule is discharged therein. There shall be no order as to costs.