

(2012) 04 MAD CK 0133

In the Madras High Court

Case No : Writ Petition No's. 16990, 17975, 17976, 18230, 18507, 18697, 18938, 19262, 19338-19345, 20610, 20684, 20867, 21533, 22321, 22413, 22254, 22645, 23947, 24638 and 26605 of 2008

Advait Steel Rolling Mills Pvt. Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 27-04-2012

Acts Referred:

Constitution of India, 1950 — Article 19(1)(g), 245, 246, 265, 266

Customs Act, 1962 — Section 12, 2, 2(18), 2(19)

Special Economic Zones Act, 2005 — Section 1, 15, 2, 2(c), 2(g)

Citation : (2012) 286 ELT 535

Hon'ble Judges : M. Jaichandren, J

Bench : Single Bench

Advocate : P.R. Renganath, R. Raghavan and N. Murali, for the Appellant; K. Ramakrishna Reddy, SCGSC, for the Respondent

Judgement

M. Jaichandren, J.—Heard the learned counsels appearing on behalf of the petitioners, as well as the learned counsels appearing on behalf of the respondents. The above writ petitions have been filed by the petitioners, being aggrieved by the levying of duty of customs on the goods moved from various places in India, situated outside the Special Economic Zones, into the Special Economic Zones in India. Some of the writ petitioners have challenged the Circular Bearing F. No. 6/2/2008-SEZ (pt), dated 30-6-2008, issued by the Department of Commerce (SEZ) Section, Ministry of Commerce and Industry, Government of India. According to the said Circular, the supply of steel products, by the units in Domestic Tariff Areas, to the Special Economic Zones, would be permitted only after the payment of the prescribed amount of duty.

2. It has been further stated that export duty was being levied, in respect of several iron and steel items, in accordance with the provisions of the Finance Act, 2008. However, vide Notification No. 66/2008-Customs, dated 10-5-2008, the effective rate of duty, leviable on goods exported out of India, had been reduced,

in respect of several items, which had been taxed under the Finance Act, 2008. Even though the said Notification No. 66/2008-Customs, dated 10-5-2008, sought to levy duties of customs, being export duties, only on goods exported out of India, in view of the provisions of the Customs Act, 1962, especially, Section 12 of the said Act, such duties were being levied and collected even in respect of the supplies made to Special Economic Zones situated within India. However, according to the clarifications issued, by way of certain circulars, the suppliers of steel items had been allowed to clear the goods supplied to Special Economic Zones without payment of duty of customs, on condition that such suppliers should execute the necessary bonds. Such a practice had also been recognized by the decision taken by the Export Promotion Council, Ministry of Commerce and Industry and it had been communicated by its Circular Bearing EPCES Circular No. 5, dated 12-5-2008. While so, by a Notification bearing Notification No. 77/2008-Customs, issued by the Department of Revenue, Ministry of Finance, Government of India, dated 13-6-2008, the rate of duty had been increased to 15%. However, the facility of the provisional assessment in terms of PD Bond was being continued until the impugned Circular Bearing F. No. 6/2/2008-SEZ (pt), dated 30-6-2008, had been issued. In view of the impugned Circular, the suppliers of steel items were required to pay duties of customs, at the rate of 15% ad valorem, for the supplies made to Special Economic Zones. Such a provision cannot be sustained in the eye of law, since, duties of customs, being export duties, levied under the provisions of the Customs Act, 1962, are required to be paid only when the goods are exported to places outside India, as per Section 12 of the said Act. Further, the definitions of the terms "Export", under Clause 18, "Export Goods", under Clause 19 and "Indian" under Clause 27 of Section 2 of the Customs Act, 1962, would make it clear that duties of customs would be applicable only in respect of goods, which are exported out of India.

3. It had been further stated that, even according to the provisions of the Special Economic Zones Act, 2005, there is no scope for the levying of duties of customs, in respect of goods, which are received by the Special Economic Zones from the manufacturers in India. Sections 1, 7, 26 and 30 of the Special Economic Zones Act, 2005, and Rule 27 of the Special Economic Zones Rules, 2006, would make it clear that duties of customs, being export duties, could be levied only in respect of goods, which are exported from a place within India, to a place outside India. As such, duties of customs cannot be levied on goods supplied from places that are within India, which are situated outside the Special Economic Zones, to the Special Economic Zones. Therefore, duties of customs cannot be levied on goods that are supplied from units, which are in Domestic Tariff Areas, to the Special Economic Zones. While so, by the impugned Circular Bearing F. No. 6/2/2008-SEZ (pt), dated 30-6-2008, duties of customs, being export duties, are sought to be levied and collected even on supplies made to Special Economic Zones situated within India.

4. It had been further stated that the contractors, who are having manufacturing

or processing units, within the Special Economic Zones, are refusing to reimburse the duties of customs, paid by the suppliers of steel items, having units in the Domestic Tariff Areas. As such, the suppliers of the goods are incurring heavy financial losses. The levying of duties of customs on the goods supplied from the Domestic Tariff Areas, to Special Economic Zones, is contrary to the basic objectives for which the Special Economic Zones have been established. When the Special Economic Zones have been established for export promotion, with a view to earn foreign exchange, by exempting the levy of taxes, duties and cess, it would not be appropriate for the authorities concerned to levy duties of customs on the goods supplied to the Special Economic Zones, from the Domestic Tariff Areas.

5. It has been further stated that the petitioners had transported steel items from the various places located outside the Special Economic Zones, for the purpose of fabrications and constructions and for other such uses in the Special Economic Zones. When such goods had been transported from the Domestic Tariff Areas, into the Special Economic Zones, the customs authorities concerned, who are the respondents in the writ petitions, had levied export duty on the goods transported by the petitioners stating that such transportation would fall under the definition of "Export", as defined u/s 2(18) of the Customs Act, 1962.

6. The main contention of the learned counsels appearing on behalf of the petitioners is that the definition of the term "Export" u/s 2(18) of the Customs Act, 1962, cannot be made use of by the customs authorities concerned to levy duties of customs, in respect of the productions, which are supplied from the Domestic Tariff Areas to the Special Economic Zones, as such goods are covered under the provisions of the Special Economic Zones Act. When the term Export defined u/s 2(m) of the Special Economic Zones Act, 2005, does not cover such goods the authorities concerned cannot borrow the definition of the term "Export", found in the Customs Act, 1962, to levy duties of customs in respect of the goods in question.

7. Based on the counter affidavits filed on behalf of the respondents, the learned counsels appearing for the respondents had submitted that the main points for consideration in the present batch of writ petitions are as to whether the supplies of goods made to the Special Economic Zones, from the Domestic Tariff Areas, are to be treated as "exports", and as to whether such supplies would attract export duty, and whether the impugned letter of the Secretary, Department of Revenue, Ministry of Finance, Government of India, dated 30-6-2008, is illegal and without the authority of law, and offending Articles 19(1)(g) and 265 of the Constitution of India.

8. It has been further submitted that, Section 2 of the Special Economic Zones Act, 2005, deals with the definitions. Section 2(c) defines "Authorized Operation" as such operations which may be authorized under sub-section (2) of Section 4 and sub-section (9) of Section 15 of the Act. As per Section 2(g), "Developer" means the person who, or a State Government which, has been granted by the

Central Government a letter of approval, under sub-section (10) of Section 3 and includes an Authority and a Co-Developer. Section 2(i) defines "Domestic Tariff Area" as the whole of India (including the territorial waters and continental shelf) but does not include the areas of the Special Economic Zones. "Export" has been defined u/s 2(m). Section 2(o) defines the term "Import". It states that the term "Import" means (i) bringing goods or receiving services, in a Special Economic Zone, by a Unit or Developer from a place outside India by land, sea or air or by any other mode, whether physical or otherwise; or (ii) receiving goods, or services by, Unit or Developer from another Unit or Developer of the same Special Economic Zone or a different Special Economic Zone. Section 2(z) states that a Special Economic Zone means each Special Economic Zone notified under the proviso to sub-section (4) of Section 3 and sub-section (1) of Section 4 (including Free Trade and Warehousing Zone) and includes an existing Special Economic Zone; Section 7 of the Act deals with the exemption from the taxes duties and cess.

9. Likewise, Section 26 of the Act deals with exemptions, draw backs and concessions granted in favour of every Developer and Entrepreneur. Section 51 of the Act stipulates that the provisions of the Special Economic Zones Act, 2005, would have an over riding effect over the provisions contained in any other law or instrument, which are inconsistent with the provisions of the Special Economic Zones Act, 2005. It had also been stated that Section 55 of the Act provides the power to the Central Government to make rules for carrying out the provisions of the said Act. It has also been mentioned that Rule 30 of the Special Economic Zones Rules, 2006, stipulates the procedure for procurement of goods from the Domestic Tariff Areas.

10. It had been further stated that, prior to the enactment of the Special Economic Zones Act, 2005, and the Special Economic Zones Rules, 2006, the Central Board of Excise and Customs, New Delhi, had stipulated the procedures relating to the operation of the units in the Special Economic Zones, vide Circular No. 51/2000-Cus., dated 26-5-2000. Paragraph 2 of the said Circular states that the most important feature of the Scheme is that the Special Economic Zones areas shall be deemed to be foreign territories for the purpose of levying of duties and taxes. Therefore, the goods supplied to the Special Economic Zones, from the Domestic Tariff Areas, would be treated as deemed exports. Likewise, the goods brought from the Special Economic Zones to the Domestic Tariff Areas would be treated as imported goods.

11. It had also been stated in the said circular that, as per paragraph 9.30 of the EXIM Policy, goods may be imported/procured from the Domestic Tariff Areas, without payment of duties, for the purpose of manufacturing of goods and services, and for production, processing, assembling, trading, repair, reconditioning, re-engineering, packaging or in connection therewith and export thereof. As such, it was made clear that certain Circulars and Notifications had been issued to implement such policy provisions. However, it was made clear

that the duty free import was not applicable to certain prohibited goods, under the EXIM Policy.

12. It had also been submitted that the Circular, dated 26-5-2000, had been superseded by Circular No. 92/2000-Cus., dated 20-11-2000, wherein details of the other salient features of the Special Economic Zone Schemes had been given. Even in the said Circular it had been stated that the Special Economic zones Areas were to be treated as foreign territories, for the purpose of duties and taxes, and the goods supplied to the Special Economic Zones, from the Domestic Tariff Areas, were to be treated as Deemed Exports.

13. It had also been stated that the areas in the Special Economic Zones had been treated as Customs Stations and all the functions relating to the enforcement of the Customs Act, 1962, were to be controlled by the Commissioner of Customs, with the assistance of the other officers concerned. The goods which were entering the Special Economic Zones, from the Domestic Tariff Areas, were to be covered under Bills of Export. The Bills shall be registered in the Special Economic Zones Customs Formation and they would be assigned serial numbers. Thereafter, the goods shall be examined by the customs officers, posted in the Special Economic Zones, as in the case of normal export consignments. The goods shall be eligible for drawback at the all industry rates and brand rates, as the case may be. The draw back shall be disbursed to the Special Economic Zone units, receiving supplies from the Domestic Tariff Areas, on the basis of the disclaimer certificates issued by the Domestic Tariff Area units in favour of the Special Economic Zone units. Thereafter, a Circular, bearing Circular No. 29/2006-Cus., dated 27-12-2006, had also been issued on the same lines.

14. It had also been stated that the Customs Act, 1962, was in force until the Special Economic Zones Act, 2005, was implemented, during the month of March, 2006. Consequently, the supplies from the Domestic Tariff Areas, to the units in the Special Economic Zones, or to the developers therein, for their authorized operation inside such zones, notified under sub-section (1) of Section 4 of the Act, were treated as exports. It has been further stated that in Instruction No. 6/2006, dated 3-8-2006, issued by the Ministry of Commerce and Industry, it had been clarified that, by virtue of Section 51 of the Special Economic Zones Act, 2005, read with the provisions of the Special Economic Zones Rules, 2006, the provisions of the Special Economic Zones Act, 2005, would have overriding effect over the provisions contained in any other Act. Hence, the term "export", as defined in Section 2(m) of the Special Economic Zones Act, 2005, would only be applicable to a unit or a Developer in the Special Economic Zones and therefore, supply of goods from the Domestic Tariff Areas to the units or developers in the Special Economic Zones would tantamount to export.

15. It had also been stated that Section 7 of the Special Economic Zones Act, 2005, read with Section 26 of the said Act, would make it clear that the goods or

services procured by a Developer or a Special Economic Zone Unit, from the domestic market, shall be exempted from taxes, subject to the fulfillment of certain conditions. The said provisions are given effect to by Rule 27 of the Special Economic Zones Rules, 2006.

16. It had been further stated that Rule 23 of the Special Economic Zones Rules, 2006, states that the supplies from the Domestic Tariff Areas to the Units or Developers, for their authorized operations, shall be eligible for export permit, as admissible under the Foreign Trade Policy, based on the definition of "export" in Section 2(m) of the Act. As such, subject to the provisions of sub-Section 2 of Section 26, every Developer and an Entrepreneur shall be entitled to the exemptions, draw backs and concessions, as contemplated in Section 26(1) of the Act and the procedures established for the procurements made from the Domestic Tariff Areas, has been prescribed in Rule 30 of the Special Economic Zones Rules, 2006. Thus, the exemption, as contemplated in Section 26(1), is subject to Section 26(2) of the Act, and it would be governed by the procedures contemplated under Rule 30 of the said Rules. Therefore, the authorities concerned are right in holding that supplies to Special Economic Zones, from Domestic Tariff Areas, would amount to exports and therefore, it would attract export duty, in respect of the supplies made from Domestic Tariff Areas.

17. The main contention of the learned counsels appearing on behalf of the petitioners is that the goods transported by the petitioners, from the Domestic Tariff Areas, for various purposes, into the Special Economic Zones, cannot be said to be export of goods, for the levying of export duty. The word "export" has been given a wider meaning, u/s 2(m) of the Special Economic Zones Act, 2005, only for the purpose of granting certain privileges in favour of the exporters of goods from the Special Economic Zones, with a view to encourage export of goods to places outside India.

18. The exporters, who export goods from Special Economic Zones, are granted certain concessions and privileges to enable the exporters to make the goods competitive in the world market. The export of goods is also encouraged for the purpose of augmenting the foreign exchange reserves of India and to give a boost to the economic growth of the country. While so, it would not be open to the customs authorities concerned to levy export duty on the clearances made in respect of the goods transported into the Special Economic Zones, from the Domestic Tariff Areas located outside such zones.

19. It has been further stated that a reading of the statements and objects and the preamble of the Special Economic Zones Act, 2005, would make it clear that the said Act had been enacted only for the promotion of exports. To use the definition of the term "export" incorporated in the Special Economic Zones Act, 2005, in conjunction with the provisions of the Customs Act, 1962, to impose a levy, in respect of the goods in question, would clearly be against the intention of the legislature. It had also been stated that by imposing the levy on the goods in question, the Special Economic Zone unit would be made to bear an additional

burden, contrary to the intention of the makers of the law, which is to encourage export of goods from the Special Economic Zones.

20. It had been further stated that the levy of customs duty, by the authorities concerned, is clearly apposed to the statement made in the preamble to the Import-Export Policy (2004-2009). The objectives of the policy is to neutralize incidents of all levies and duties on inputs used in export products. Section 12 of the Customs Act, 1962, enables the levying of the customs duties only in respect of goods exported from India to a place outside India. As such, the definition of Section 2(19) of the Customs Act, 1962, would confirm that the levy could be made only in respect of goods taken out of India, to a place outside India. Further, the Notification issued on behalf of the Department of Revenue, Ministry of Finance, Government of India, in Notification No. 66/2008-Customs, dated 10-5-2008, would show that the levy of duty of customs, being an Export Duty, would apply only in respect of goods exported to a place situated outside India.

21. It had also been stated that there is no sanction, in the Special Economic Zones Act, 2005, to levy customs duty, as it was available, u/s 76F of the Customs Act, 1962, as it stood earlier. Section 30 of the Special Economic Zones Act, 2005, which is equivalent to Section 76F of the Customs Act, 1962, had specifically omitted the levy of duty of customs on goods received in the Special Economic Zones, from a manufacturer in India located outside the Special Economic Zones. Further, Section 7, read with Section 26 of the Economic Zones Act, 2005, makes it clear that the parliament of India did not contemplate the levying of any tax, duty or cess on the goods admitted or received within the Special Economic Zones. From a reading of Section 1 of the Special Economic Zones Act, 2005, it is clear that it applies to the whole of India, which would mean that the Special Economic Zones are not areas, which are situated outside India. As such, the levying of customs duties on goods admitted into Special Economic Zones, from a manufacturer situated outside such Zones, cannot be held to be valid in the eye of law.

22. It has been further stated that the purpose of granting of concessions and privileges, in respect of goods exported from the Special Economic Zones, would be nullified by imposing customs duty on the goods, which had been transported from the Domestic Tariff Areas into the Special Economic Zones.

23. It has been further stated that the Parliament of India, while enacting the Special Economic Zones Act, 2005, did not intend to levy customs duty on clearances from Domestic Tariff Areas, into the Special Economic Zones, as such a levy would, either be beyond its legislative competence or the appropriation of the proceeds therefrom would be in a manner contrary to what had been contemplated under the Constitution of India. It had been submitted that the legislative power to levy customs duties is traceable to Articles 245 and 246 read with Entry 83 of List-1 of Schedule VII of the Constitution of India. The said Entry reads as "Duties of Customs, including Export Duties". The terms "Customs" and "Export Duties" are nomen juris and it cannot be altered by assigning an artificial

meaning, when such terms of law have well recognized meanings.

24. It had also been stated that customs duties would only refer to duties imposed on goods coming into a country, from other countries, or to goods which are going out of a country, to other countries. As such, an intra-country clearance cannot be subject to customs duties, relying on the definition of "Exports" found in the Special Economic Zones Act, 2005. Any levy made on goods transported from a Domestic Tariff Area unit, to a Special Economic Zone unit, would be equivalent to imposing a tax on intra-state sales, which is the preserve of the State Legislature, under Entry 52, List-II, Schedule-VII of the Constitution of India. The imposing of a levy, if it had been done, as per Entry 97 of List-I of Schedule-VII, it should clearly be an Entry which had not been enumerated, either in List-II or in List-III. Further, the clearances of goods into a Special Economic Zone, from a Domestic Tariff Area, otherwise than by way of sale, would be covered by the legislative field enumerated in Entry 52 of List-II of Schedule-VII of the Constitution of India, and such clearances would be beyond the legislative competence of the Parliament.

25. Further, when the clearances are occasioned from a Domestic Tariff Area Unit in one State, to a Special Economic Zone in another State, on account of a sale, a levy on such clearance would be in the nature of tax on inter-state sale of goods, under Articles 245, 246 and 269(3), read with Entry 92A, List-I, Schedule-VII of the Constitution of India. While the Parliament may have the power on the levy of such clearances, any such revenue obtained from a tax on inter-state sales cannot form a part of the Consolidated Fund of India, under Article 269(1) (g), read with Article 269(2), and it would have to be assigned to the States concerned. However, where such levy is imposed as customs/export duty, as in the present case, the same would form part of the Consolidated Fund of India, under Article 266 of the Constitution of India, with no requirement of assignment to the states. Therefore, a levy of customs/export duties, in cases where only a tax on inter-state sale is leviable, would therefore, be a colourable exercise of power.

26. It had been further stated that in cases where the clearances are occasioned from a Domestic Tariff Area Unit in one State, to a Special Economic Zone Unit in another State, otherwise than on account of a sale, then a levy on such clearances would be in the nature of tax on inter-consignment of goods, under Articles 245, 246, 269 (3), read with Entry 92B, List-I, Schedule-VII. While parliament may have the power to levy a tax on such clearances such revenue from tax on inter-state consignments cannot form a part of the Consolidated Fund of India, under Article 269(1)(h), read with Article 269(2), and it would have to be assigned to the States concerned. However, where such levy is imposed as customs/export duty the same would form part of the Consolidated Funds of India, under Article 266 of the Constitution of India. As such, the levy of customs/export duties on clearance from a Domestic Tariff Area, into a Special Economic Zone, is not permissible in law. As such, the levying of the duties, by

the customs authorities concerned, is arbitrary and illegal.

27. The learned counsels appearing on behalf of the petitioners had relied on the following decisions in support of their contentions:

- (1) Union of India (UOI) and Others Vs. Shri R.C. Jain and Others,
- (2) Essar Steel Ltd. Vs. Union of India (UOI),
- (3) Shyamaraju and Co. (India) Pvt. Ltd. Vs. Union of India (UOI),
- (4) Commissioner of C. Ex Vs. Biocon Ltd.,

28. In view of the submissions made by the learned counsels for the parties concerned, and on a perusal of the records available, and in view of the decisions cited supra, this Court is of the considered view that the definition of the term "Export" contained in Section 2(18) of the Customs Act, 1962, would be applicable only in respect of goods taken out of India, to a place outside India. The duties of customs levied u/s 12 of the Customs Act, 1962, could be levied only in respect of such goods which are exported to a place outside India, from an area within India. The said definition cannot be made applicable to such goods, which are supplied to the Special Economic Zones, from the Domestic Tariff areas. Further, the definition of "export goods", u/s 2(19) of the Customs Act, 1962, means any goods which are to be taken out of India to a place outside India. As such, it is clear that only in respect of such goods, which are taken out of India, to a place outside India, the levy, u/s 12 of the Customs Act, 1962, is applicable. Notification No. 66/2008-Customs, dated 10-5-2008, issued by the Secretary, Department of Revenue, Ministry of Finance, Government of India, states that the levy of duties of customs, being export duty, would be applicable only in respect of goods which are exported outside India.

29. It is also noted that there is no provision in the Special Economic Zones Act, 2005, to levy duties of customs. Though such a provision was available, u/s 76F of the Customs Act, 1962, it had been omitted in the Special Economic Zones Act, 2005. Section 30 of the present Special Economic Zones Act, 2005, which is equivalent to the erstwhile Section 76F of the Customs Act, 1962, specifically omits the levy of duties of customs, being export duties, on goods received in the Special Economic zones, from any manufacturer situated in India, outside the Special Economic Zone. It is also noted that Section 7, read with Section 26 of the Special Economic Zones Act, 2005, makes it clear that there was no intention on the part of the legislature to levy any tax, duty or cess on goods admitted or received within the Special Economic Zones. As such, it is clear that the levy of customs duties cannot be in respect of goods removed to the Special Economic Zones, by a manufacturer in India, situated outside the Special Economic Zones. The export duty cannot be made applicable to the goods supplied by the units in the Domestic Tariff Areas to the Special Economic Zones, by way of a Circular Bearing F. No. 6/2/2008-SEZ (pt), dated 30-6-2008, issued by the Department of Commerce (SEZ) Section, Ministry of Commerce and Industry, Government of

India. As there is no movement of goods from India to a place outside India, export duty cannot be levied. In fact, there is no "export" of goods, as per the relevant provisions of the Customs Act, 1962. When the Special Economic Zones Act, 2005, is a separate Code, it would not be open to the respondents to levy duties of customs on goods moved from Domestic Tariff Areas into Special Economic Zones, as per the definition found in Section 2 of the Customs Act, 1962. Further, when the definition of term "export" in Section 2(m) of the Special Economic Zones Act, 2005, is clear and specific, the definition of "export", found in Section 2(18) of the Customs Act, 1962, cannot be made applicable for the levy of duties of customs on goods supplied from the Domestic Tariff Areas to the Special Economic Zones. As such, it would not be proper on the part of the respondents to levy duties of customs on goods supplied from the Domestic Tariff Areas to the units situated in the Special Economic Zones. If levy of duties of customs are to be made applicable to such goods it could only be by way of appropriate amendments introduced in the Customs Act, 1962, as well as in the Special Economic Zones Act, 2005. As such it is clear that it would not be open to the respondents to levy duties of customs on such goods, by way of Notifications or Circulars. The writ petitions are ordered accordingly. No costs.