

(2009) 12 GUJ CK 0036

In the Gujarat High Court

Case No : Special Civil Application No. 504 of 2008

Bharti J. Gandhi

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 07-12-2009

Acts Referred:

Customs Act, 1962 — Section 14

Special Economic Zones Act, 2005 — Section 2, 20, 21, 22, 23

Special Economic Zones Rules, 2006 — Rule 53

Citation : (2010) 257 ELT 168

Hon'ble Judges : Ravi R. Tripathi, J; J.C. Upadhyaya, J

Bench : Division Bench

Advocate : Kamal Trivedi, for Trivedi and Gupta, for the Appellant; Amee Yajnik, for the Respondent

Judgement

Ravi R. Tripathi, J.—In the morning, a request was made on behalf of Ms. Amee Yagnik, learned advocate for the respondent for keeping the matter back, no reason was mentioned as to why the matter is required to be kept back. The matter is notified at item No. 1 on the "admission notice board". Besides, the learned Senior advocate Mr. Kamal B. Trivedi appearing for the petitioner has inconvenience as he has other matter fixed at 2.00 PM.

2. The matter is filed in the year 2008. Reply is also filed. The matter has remained pending at admission stage right from 18th January 2008. We are on 7th December 2009, i.e. almost for two years. From the reply it is not clear as to under which provision, the authorities have issued Show Cause Notice.

3. Heard learned Senior advocate Mr. Trivedi for the petitioner. The learned senior advocate for the petitioner invited attention of the Court to the "Statement of Objects and Reasons" to the Special Economic Zones Act, 2005 ("SEZ Act" for brevity). The learned senior advocate for the petitioner also invited attention of the Court to various definitions provided u/s 2 of the SEZ Act. The learned senior advocate for the petitioner also invited attention of the Court to Sections 20, 21

and 22 of the SEZ Act. Besides, the learned senior advocate for the petitioner invited attention of the Court to Rule 53 of The Special Economic Zones Rules, 2006.

The learned Senior advocate for the petitioner also invited attention of the Court to the Show Cause Notice which is produced at page 43, the relevant part is page 61. Besides, the learned senior advocate for the petitioner invited attention of the Court to page 69, communication dated 3rd August 2007 from Central Institute of Plastics Engineering and Technology addressed to the present petitioner. Last but not the least, the learned senior advocate for the petitioner invited attention of the Court to the certificate issued by the Cost Accountants, a copy of which is produced at page 169.

4. Prima facie, there is no reason for which the petitioner can be said to have over-valued the goods in question. The figure which is suggested in Show Cause Notice is Rs. 6000/-, per unit of the product, whereas, according to the Central Institute of Plastics Engineering and Technology the cost of the petitioner-unit is Rs. 3,50,000/-, according to the Cost Accountants the same comes to Rs. 5,89,632/- per unit. Thus, there is no comparison of the "cost per unit" suggested by the two experts vis-a-vis "cost per unit" suggested in the Show Cause Notice.

5. The learned Senior advocate for the petitioner relied upon a decision of the Hon'ble the Apex Court in the matter of Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, . The learned senior advocate for the petitioner invited attention of the Court to paras 10 and 11 and thereafter, paras 17 to 21. The Court is of the opinion that the present authority issuing Show Cause Notice figures nowhere in the provisions of the SEZ Act. Therefore, prima facie, the Court is of the opinion that the authority has issued the Show Cause Notice without there being jurisdiction for issuance of such notice. The matter requires closer scrutiny. Hence Rule. Ad interim relief granted earlier to continue.

Further order:

6. At this juncture, learned advocate Ms. Ameer Yagnik appears and tenders apology for being late on account of some personal difficulty. The learned advocate is allowed to make submissions. The learned advocate for the respondents invited attention of the Court to the contents of paras 10 and 11 of the surrejoinder affirmed on 15th September 2009. For ready perusal said paras 10 and 11 are reproduced herein below:

10. It is further submitted that the Customs Act, 1962 is a complete code in itself containing detailed procedure for adjudication of the Show Cause Notice and to make detail inquiry/investigation to find out offences committed under the Act and also for initiation of criminal prosecution for the offences committed thereunder. As submitted hereinabove, Sections 20, 21 and 22 of the SEZ Act, 2005 are yet to be operationalized. Till similar provision is framed under the SEZ Act by declaring the Sections 20, 21 and 22 of the Act effective, and till the

Designated Courts are appointed to try offences and other proceedings under the Act u/s 23 of the said Act, the Commissioner of Customs, Kandla will be the competent authority to issue Show Cause Notice and to adjudicate the same. Therefore, the contention raised by the petitioner that the provisions of the Customs Act, 1962 are not applicable to unit situated in SEZ is totally misconceived and unjustified. It is further submitted that Circular No. 32/97-Cus., dated 1-9-1997 has been issued for adjudication of cases pertaining to Export Processing Zone (EPZ) and the same would also apply to SEZ units till a detailed regulation is framed under the SEZ Act in this regard and till Sections 20, 21 and 22 of the Act are made applicable. The above mentioned Notification No. 15/2002-Cus. (N.T.) read with Notification No. 87/2006-Cus. (N.T.) are self explanatory with regard to the power of adjudication by the Commissioner of Customs, Kandla. It is submitted that although the Development Commissioner is vested with administrative control of the units of SEZ, he cannot adjudicate and prosecute for the offences committed by the units under the Customs Act, 1962. It is only the Commissioner of Customs, Kandla who can adjudicate and initiate prosecution for the violation of the provisions of the Customs Act, 1962.

11. It is further submitted that the contention of the petitioner with regard to non-applicability of Section 14 of the Customs Act to the valuation of export goods is not legally correct and the same is absolutely unjustified. The said issue has already been settled by the Hon''ble Supreme Court of India in its decision in the case of Om Prakash Bhatia Vs. Commissioner of Customs, Delhi, which was subsequently relied on in the matter of Commissioner of Central Excise and Customs, A.P. Vs. Suresh Jhunhunwala and Others, and Commissioner of Custom, New Delhi Vs. Brooks International and Others, It is held by the Hon''ble Supreme Court that even if no duty of customs is leviable, provision of Section 14 would be applicable to the valuation of export goods.

The learned advocate for the respondents is not able to satisfy the Court as to how a Circular dated 1st September 1997 will be applicable to the facts of the present case after SEZ Act, 2005 came into force. Besides, the learned advocate for the respondents was put a specific query as to what prejudice is caused, to whom by the so called over-valuation of the "cost of petitioner-unit". The learned advocate for the respondents submitted that the case of the respondent is that "valuation of product per unit" will attract Section 14 of the Customs Act. Therefore, it will be in fitness of things if the petitioner is directed to explain the same to the authority who issued the Show Cause Notice in question.

The submission is prima facie, found to be not acceptable for the simple reason that after SEZ Act, 2005 coming into force wherein specific authorities are provided. The Court is of the opinion that the Customs authorities seems to have been rendered functus officio so far as the matter pertaining to the conduct of a unit situated in SEZ is concerned.

7. In view of the decision of the Hon''ble the Apex Court in the matter of Whirlpool Corporation v. Registrar of Trade Marks, Mumbai (supra) until the

authority issuing Show Cause Notice is able to satisfy the Court about its "locus standi" and its jurisdiction, authority cannot be allowed to usurp the power to issue Show Cause Notice. Otherwise, the entire object and purpose of establishment of Special Economic Zone will stand frustrated.

8. Hence as recorded hereinabove the matter requires consideration. The order of issuing rule is maintained. At the request of the learned senior advocate for the petitioner Rule is made returnable on 16th December 2009. Ad interim relief granted on 18-1-2008 is ordered to continue till final disposal of the petition.