

(2011) 02 KAR CK 0053

In the Karnataka High Court

Case No : W.A. No"s. 3210, 4881 and 3208-3209 of 2010 and Miscellaneous
Writ No"s. 835 of 2011 and 11226-11227 of 2010

Commissioner of C. Ex

APPELLANT

Vs

Biocon Ltd.

RESPONDENT

Date of Decision : 09-02-2011

Acts Referred:

Customs Act, 1962 — Section 25, 53

Special Economic Zones Act, 2005 — Section 2 (g), 2 (j), 26 (1) (a) (b) (c)

Citation : (2011) 267 ELT 28

Hon'ble Judges : Ravi Malimath, J;N. Kumar, J

Bench : Division Bench

Advocate : K.N. Mohan, for the Appellant; K.S. Ravi Shankar, for the Respondent

Final Decision : Dismissed

Judgement

N. Kumar, J.—Misc.W. No. 835/2011 is filed seeking condonation of delay of 7 days in filing the appeal. Accepting the cause shown in the affidavit filed in support of the application seeking condonation of delay, delay is condoned. Misc.W. No. 835/2011 is allowed.

2. The revenue has preferred these appeals, challenging the order passed by the learned Single Judge, who has held that, the instructions issued by Respondent No. 3 in these appeals under the impugned notification are wholly illegal and cannot be sustained and accordingly declared that, no export duty is payable for supply of goods by the parties in the Domestic Tariff Area (for short, hereinafter referred to as "DTA") to the Petitioners in the Special Economic Zone (for short, hereinafter referred to as "SEZ"] and all proceedings initiated in this regard are liable to be quashed.

3. For the purpose of convenience, parties would be referred to, as they are referred to in the original writ petitions.

4. The Petitioners before the learned Single Judge were all developers and

entrepreneurs u/s 2(g) and Section 2(j) of the Special Economic Zones Act, 2005 (for short, hereinafter referred to as "the Act") respectively. Section 26(1)(a)(b) (c) of the Act provides for exemption from payment of customs duties or excise duties in respect of the goods or services procured or imported to carry on the authorized operations by the developers/entrepreneur as envisaged in the said provision.

5. The case of the Petitioners is, on 23-5-2008, the 1st Respondent, acting through the Director of the SEZ Section, issued a communication to all the Deputy Commissioners, including 2nd Respondent, stating that, export duty had been levied on export of steel products and the 2nd Respondent was to allow supply of steel products to SE Zs on submission of a bond and a bank guarantee to the effect that, duty would be finally payable/chargeable. On 30-6-2008, the 1st Respondent modified the earlier instructions of 23-5-2008 and stated that the supply of steel products should be permitted upon payment of export duty. The resultant position would be, the Customs Exemption Notification issued u/s 25 of the Customs Act, 1962 was construed as a levying provision, enabling levy of customs duty on export by the 1st Respondent and which is clear on a reading of the instructions dated 23-5-2008 issued by the 1st Respondent.

6. The effect of the said instructions would be, to treat the supply of goods to SEZ by units of the DTA, as export of goods, despite the fact that both the DTA units and SEZ units were intended to be developed by the Petitioners being physically situated within the territory of India. The order has the effect of levying duty on export of goods which are factually not leaving out of the territory of India as export of goods outside India and import of goods from outside India into India, which is illegal and unconstitutional. Therefore, they preferred writ petitions challenging the aforesaid instructions.

7. The Respondents filed their counter, contending that, Section 53 of the Act provides that, a SEZ shall be deemed to be a territory outside the customs territory of India, for purpose of undertaking authorized operations. Accordingly, in view of the deeming provisions for authorized objectives, the SEZ or territories outside India, for purposes of application of Customs Act, 1962, removal of steel products from DTA to SEZ, is declared to be for carrying out operations. Although the Customs Act defines "Export" to mean, taking any goods to a place outside India, because of the deeming provisions of Section 53 of the Act, supply to SEZ from DTA becomes "export" for the purposes of Customs Act.

8. After referring to various definitions and other provisions, it was contended that, the basic object of levying export duty is to discourage export of steel items and augment domestic availability. The export of any item from the SEZ to a place outside India is statutorily exempted from export duty u/s 26(1)(d) of the Act. If the duty is also not applied to supply of steel made from DTA to SEZ, then the entire transaction for such supply, would escape without any levy of export duty and the basic object to the levy would be defeated. Therefore, the instructions issued by Respondents 1 and 7 is well within the ambit of law and

does not violate or infringe the rights guaranteed to the Petitioners under Article 19(1)(g) of the Constitution of India. Therefore, they sought to justify the instructions issued.

9. After hearing the parties, the learned Single Judge, by the impugned order, referring to the authorized provisions held, that the levy of export duty is neither expressly nor impliedly contemplated under the Act. The movement of goods from DTA to SEZ is treated as an export under the Act only by a legal fiction for purposes of the Act, namely, for making available benefits as in the case of actual exports like duty draw back and other export benefits to the SEZ units or the developer or a DTA supplier at their option. To construe this movement of goods as entailing a liability of payment of duty, would run counter to the purpose for which the legal fiction is created under the SEZ Act. The levy of export duty as is evident arises under the Customs law and not under the SEZ Act. The levy of customs duty on exports is sanctioned by Entry 83 of List I of the VII Schedule to the Constitution. The Respondents, seeking to rely on the provisions of the SEZ Act, would render the provisions unconstitutional as levy of customs duty on export of goods from India cannot be with reference to the provisions of the SEZ Act. The authorities under the Act are without jurisdiction in seeking to enforce the liability which could arise only under the Customs Act and therefore, he has quashed the notifications as well as the proceedings initiated in pursuance of the notification and declared that no duty shall be payable for supply of goods by the parties in the DTA to the Petitioners in the SEZ.

10. In coming to the said conclusion, the learned Single Judge also relied on the judgment of the Gujarat High Court in the case of *Essar Steel Limited v. Union of India* reported in 2010 (249) E.L.T. 3 (Guj.). Thereafter, considering the provisions of the Act, as well as the Customs Act where it was held, that the customs duty is a duty on customs leviable under the Customs Act, 1962 on goods exported from India, u/s 12 r/w Section 51 of the said Act and the second schedule to the Export Tariff of the Customs Tariff Act, 1975, such duty is a condition precedent to sending goods out of the country to other lands. The export duty is imposed with reference to the movement of property by way of export, particularly, in our view, regulating trade and commerce with a foreign country by way of export, in so far as such matters are within the competence of the Parliament.

11. In the absence of any amendment to the definitions of the terms "export" and "India" in the Customs Act, 1962 or any amendment in the charging section i.e., Section 12 or insertion of a charging provision contemplating the movement of goods from the Domestic Tariff Area to the Special Economic Zone is a taxable event, levy of export duty cannot be justified under the provisions of the Customs Act, 1962. To depart is, seeking to levy and recover the duty under the Customs Act, 1962. However, the provisions of the Act do not envisage the movement of goods from the Domestic Tariff Area to the Special Economic Zone

to be a taxable event as the said provisions do not contain any charging provisions providing for the levy and imposition of export duty and the said Act does not contain any provisions for recovery of such duty.

12. As fiscal legislation have to be strictly construed, there cannot be any imposition of tax by implication. Keeping in mind, the object for which the Act was enacted, it was held, the definition contained in the Act has to be construed, keeping in mind, the aforesaid facts and if any export duty is levied, it would run counter to the very object of Act. Therefore, from the aforesaid well considered judgment of the learned Single Judge as well as the judgment of the Gujarat High Court, which has now been affirmed by the Apex Court, it is clear, there is no charging provision under the Act to levy export duty on the Petitioners.

13. It is not in dispute that the preamble to the Act makes it clear, that this enactment was passed to provide for the establishment, development and management of the Special Economic Zone for the promotion of exports and for matters connected therewith or incidental thereto.

14. Section 5 of the Act makes it further clear, that the Central Government while notifying any area as a Special Economic Zone or an additional area to be included in the Special Economic Zone and discharging its functions under this Act, shall be guided by factors, namely, generation of additional economic activity, promotion of exports of goods and services, promotion of investment from domestic and foreign sources, creation of employment opportunities, development of infrastructure facilities and maintenance of sovereignty and the integrity of India, the security of the State and friendly relations with foreign states. Therefore, the main object behind this legislation is to generate economic activity, which in turn, shall promote investment from domestic and foreign sources and also provide employment opportunities, apart from development of infrastructure facilities. Any export made from these units situated in SEZ, outside the territory of India are completely exempted from Customs Act. Under the Act, if goods are procured from DTA, such imports are also exempted from payment of tax which is in the nature of an incentive under the plan of the Government. As these Petitioners are not paying export duty, the persons who are supplying materials, though they are not liable to pay excise duty, they are liable to pay customs duty. Otherwise, according to the Respondents, these Petitioners would go scot-free. This understanding of the department runs counter to the object for which the very enactment was passed and in particular, Section 5 which is incorporated in the said Act. The whole objective is to improve the economic activity, increase the exports, provide employment, develop infrastructural activities, intended to give benefits by way of exemption from export duty and this Act provides incentive by way of exemption from payment of import duty and export duty. The department without properly appreciating the object for which the Act was passed, has issued this notification, which is only to defeat the object of the passing of the Act. In the Act there is no charging provision. For that, they rely on the Customs Act, 1962. As held by the Apex

Court, in construing fiscal statutes and in determining the liability of a subject tax, one must have regard to the strict letter of the law and not merely to the spirit of the statute or the substance of the law. If the revenue establishes that the case falls strictly within the provisions of the law, the subject can be taxed and if, on the other hand, the case is not covered within the four corners of the provisions of the taxing statute, no tax can be imposed by inference or analogy or by trying to probe into the intention of the legislature and by considering, what was the substance of the matter.

15. Similarly, the statement of objections indicate that, the policy for setting up particular Special Economic Zones had been adopted by the Government with a view to provide an internationally competitive environment for export. The objectives of the Special Economic Zones includes making available to the unit, goods and services free of taxes and duties for export production, supported by integrated infrastructure. In line with the aforesaid objective of providing goods and services free of taxes and duties in the Special Economic Zone or to a developer for purpose of establishing an integrated infrastructure for export production, provisions have been made in the Act, granting exemption from taxes and duties which could otherwise have been leviable in the business of any production for exemption from such duty. Therefore, the instructions issued by the department, as rightly held by the learned Single Judge, not only runs counter to the aforesaid policy but is without authority of law, illegal and rightly set aside by the learned Single Judge.

16. In that view of the matter, we do not find any merit in these appeals. Accordingly, appeals are dismissed.

17. As the appeals itself are dismissed on merits, Misc. Nos. 11226/2010 & 11227/2010 filed for stay are also dismissed.