

(2009) 11 GUJ CK 0020

In the Gujarat High Court

Case No : Special Civil Application No's. 9656, 9713, 9792, 9806, 10444 to 10446, 11032, 11057, 11909, 12176 and 13298 of 2008 and Civil Application No. 12705 of 2008

Essar Steel Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 04-11-2009

Acts Referred:

Central Excise Rules, 2002 — Rule 18, 19
Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 — Rule 2, 6
Central Excises and Salt Act, 1944 — Section 4, 4(1)
Customs Act, 1962 — Section 12, 22, 25, 28(1), 30
Customs Tariff Act, 1975 — Section 12, 14, 14(1), 17, 18
Finance Act, 2007 — Section 114, 99
Motor Vehicles Act, 1988 — Section 38, 38(1)
Special Economic Zones Act, 2005 — Section 1, 12, 15(9), 2, 2(1)
Special Economic Zones Rules, 2006 — Rule 21, 23, 24, 27, 27(1)
Trade Marks Act, 1999 — Section 28

Citation : (2010) 1 GLH 52 : (2010) 24 STT 121

Hon'ble Judges : K.A. Puj, J;A.L. Dave, J

Bench : Division Bench

Advocate : K.S. Nanavati, Mihir H. Joshi and Keyur Gandhi, for the Appellant;
P.S. Champaneri and R.M. Chhaya, for the Respondent

Judgement

K.A. Puj, J.—Since common issue is involved in all these petitions, and since they are heard together, they are being disposed of by this common judgment and order.

2. Special Civil Application Nos. 9656 & 9713 of 2008 are filed by Domestic Tariff Area Units and goods are cleared to SEZ units under LUT/Bond and/ or rebate.

3. Special Civil Application Nos. 11032 & 9806 of 2008 are filed by SEZ Developers and remaining 8 petitions are filed by SEZ Units. The Domestic Tariff Area Suppliers followed the procedure of LUT/Bond while clearing the goods to

SEZ Units.

4. In Special Civil Application Nos. 9656, 9713, 10444, 10445, 10446, 13298, 11032 and 11909 of 2008, Mr. K.S. Nanavati and Mr. Mihir H. Joshi, learned Senior Advocates appeared with Mr. Keyur Gandhi for Nanavati Associates for the petitioners.

5. In Special Civil Application Nos. 9792 & 9806 of 2008, learned advocates Mr. Vikram Nankani with Mr. Uday Joshi with Mr. Hardik Gupta of M/s. Trivedi and Gupta Advocates and Mr. Hardik Modh appeared for the petitioners.

6. In Special Civil Application No. 11057 of 2008, Mr. B.D. Karia, learned advocate appeared for the petitioners. In Special Civil Application No. 12176 of 2008, learned advocate Mr. Hasit Dave appeared for the petitioners.

7. For the sake of brevity and convenience, facts are taken from Special Civil Application No. 9656 of 2008.

8. The petitioners in Special Civil Application Nos. 9656 & 9713 of 2008, being DTA units have prayed for writ of Mandamus restraining the respondents from levying and demanding export duty for supplies of Iron Ore Pellets made by the Vizag Pellet Unit of the petitioner to the SEZ unit of the Company located at Essar Special Economic Zone, Hazira, Surat and for supplies of Iron Ore Pellets and Calibrated Lump Ore by the petitioner of Special Civil Application No. 9713 of 2008 to the SEZ unit of the Company located at Essar Special Economic Zone, Hazira, Surat. They have also prayed for quashing and setting aside the letter dated 30-6-2008 of the respondent No. 3 at Annexure C, letter dated 8-7-2008 of the respondent No. 4 at Annexure P and letter dated 9-7-2008 at Annexure R, in each of these two petitions. By way of an interim relief, the petitioners have prayed for suspension of the operation and implementation of letters dated 30-6-2008, 8-7-2008 and 9-7-2008 of the respondents and direction to continue the arrangement regarding supply of goods to the SEZ Units as contained in the letter dated 1-2-2008 at Annexure F to the petitions. Alternatively, the petitioners have prayed for stay against respondent No. 4 restraining him from refusing admission/entry of goods supplied by the petitioners being a Domestic Tariff Area Unit to the SEZ Unit of Essar Steel Limited only on the ground of non-payment of export duty.

9. Likewise, in Special Civil Application No. 10444 of 2008 and other petitions filed by DTA Units, more or less, same prayers are made.

10. The brief facts giving rise to the present group of petitions are as under :

The petitioner has been supplying the required quantities of Iron Ore Pellets to the SEZ Unit by following the procedure for the same under Rule 30 of the SEZ Rules, from time to time under cover of ARE-1 "s and by following the procedure in Notification No. 42/2001-CE, dated 26-6-2001. The petitioner filed the Bills of Export with the Authorized Officer of the SEZ being the respondent No. 4, who after assessment of the same permitted the goods into the zone. By virtue of

Section 114(n) read with the 3rd Schedule to the Finance Act, 2007, Heading No. 11 of the Second Schedule - Export Tariff to the Customs Tariff Act, 1975 was substituted with effect from 1-3-2007 so as to read "Iron ores and concentrates, all sorts" in place of "Iron ores, all sorts" and the same were subject to export duty at the rate of Rs. 300 per ton. After the Entry No. 11 in the Second Schedule to the Customs Tariff Act, 1975 was amended with effect from 1-3-2007, the ARE-I's Bills of Export for supply of Iron Ore Pellets by the petitioner to the SEZ unit continued to be assessed and the subject goods were permitted for acceptance by the SEZ unit without any demand for export duty. The petitioners addressed a letter dated 12-3-2007 to the Director in the SEZ Section of Ministry of Commerce requesting for clarification/confirmation for the effect that no export duty will be leviable on sale of iron ore/iron ore pellets to SEZ Units in view of Rule 27 of the SEZ Rules, 2006. The Superintendent of Central Excise, Range-I, Surat-I Commissionerate had also sought clarification from the petitioners vide his letter dated 24-10-2007 regarding levy of export duty on iron ore pellets. The petitioners' Hazira Unit had, vide its letter dated 25-10-2007 clarified the matter by pointing out that no export duty was leviable on supplies of pellets to the SEZ Unit, particularly in view of Rule 21 of the SEZ Rules, 2006, it was also clarified that the provisions of Section 12 of the Customs Act, 1962 were inapplicable for the purpose of levying export duty for the aforesaid movement of goods, as such movement could not be considered as that of "goods exported from India" for the purpose of Section 12. The petitioners submitted that at the relevant time, the authorities were satisfied with the explanation given, as is evident from the fact that the Bills of Export filed for supply of pellets to the SEZ Unit continued to be assessed without levy of any export duty.

On 18-1-2008, the officers from the office of the Directorate of Revenue Intelligence caused a search of the factory of the petitioner on the basis that it had been exporting Iron Ore Pellets to the SEZ unit without payment of applicable export duties. The SEZ Unit at Hazira addressed a letter dated 28-1-2008 to the Respondent No. 4 contending that though the DR was examining the applicability of levy of export duty to SEZ Unit, the said Unit was of the view that export duty was not applicable for supplies to SEZ and that the office of the said respondent No. 4 was also of the same view when the issue was raised earlier. The Petitioner in the said letter requested that the supplies of Iron Ore Pellets and also Calibrated Lump Ore (CLO) supplied by the Hazira DTA unit of Essar Steel Limited be permitted on provisional basis without charging export duty. The respondent No. 4 vide its letter dated 1-2-2008 informed the SEZ unit that the matter had been examined and that he had been directed that the supplies of Iron Ore Pellets and CLO should be allowed into the SEZ provisionally upon the DTA supplier executing a Bond backed up by a bank guarantee (10 per cent of bond value) till the matter regarding leviability of the export duty on such DTA supplies was resolved by the Ministry. Pursuant to the directions of the respondent No. 4, Essar Steel Limited, for its Hazira DTA unit and Vizag Pellet

Unit, has furnished three Bonds till date of Rs. 20 crores each, backed up by bank guarantees of 10 per cent. Thereafter, the Bills of Export filed on behalf of the petitioner were provisionally assessed by the respondent No. 4 and the goods were permitted for acceptance by the SEZ unit.

Despite the above fact situation, a show-cause notice came to be issued by the DRI on 28-2-2008 calling upon the petitioner to show cause to the Commissioner of Central Excise & Customs, Surat as to why the supply of Iron Ore Pellets by it to the SEZ unit under various Bills of Export should not be treated as goods exported and as to why export duty at the rate of Rs. 300 per ton should not be demanded u/s 28(1) of the Customs Act, 1962. In a parallel development, export duty was imposed on specified iron and steel items with effect from 10-5-2008 and the effective rates of export duty on various items were prescribed through Notification No. 66/2008-Cus., dated 10-5-2008. Representations were made regarding the applicability of the said Notification with regard to levy of export duty on certain steel products supplied from DTA to SEZ. Pursuant to the representations, a Circular was issued on 14-5-2008 by the respondent No. 3 stating that the matter was under active consideration of the respondent No. 2 and till such time a clarification was received all such DTA supplies would be chargeable to export duty. By Office Order dated 17-5-2008, the said Circular dated 14-5-2008 was amended and it was ordered that the subject goods would be provisionally assessed on furnishing a suitable PD bond with surety/security and the goods would be allowed to be admitted in the SEZ until further orders. The respondent No. 2 had also directed the Development Commissioners of SEZ throughout the country, vide its Circular letter dated 23-5-2008 to allow supply of steel products on submission of bond and bank guarantee. Notifications were issued by the respondent No. 1 on 13-6-2008. By Notification No. 77/08 certain amendments were made in Notification No. 66/2008-Cus., referred to above, substituting the rate of export duty in respect of certain goods. Vide Notification No. 78/2008-Cus., the export duty in respect of the Iron Ores and, concentrates was increased from Rs. 300 per ton to 20 per cent ad valorem. By Notification No. 79/2008-Cus., the effective rate of duty was prescribed and it was provided that the duty in excess of the amount calculated at the rate of 15 per cent ad valorem in respect of Iron Ores and concentrates was exempted.

The respondent No. 2 vide his letter dated 30-6-2008 directed all Development Commissioners that the supply of steel products on which export duty was still applicable should be permitted only after payment of the prescribed amount of duty and the earlier instructions conveyed vide letter dated 23-5-2008 stood modified.

Based on the aforesaid letter dated 30-6-2008, the respondent No. 3 addressed a letter dated 8-7-2008 to all Specified Officers including the respondent No. 4 that, in view of the letter dated 30-6-2008, the supply of subject goods from DTA to SEZ should be permitted only after payment of the prescribed amount of duty and the office circular dated 17-5-2008 would stand modified accordingly.

Pursuant to this, the respondent No. 4 had addressed a letter to the SEZ unit on 8-7-2008 asking payment of export duty as applicable on all steel items and other goods as covered under the Notification No. 66/2008-Cus., dated 10-5-2008 as well the Export Tariff. Similarly, the respondent No. 4 addressed a letter dated 9-7-2008 to the petitioner directing it to pay export duty involved on all the goods being Iron Ore Pellets and CLO supplied henceforth to the SEZ unit in view of the clarification of the Ministry of Commerce & Industry. The petitioner has filed its reply on 17-7-2008, in response to the DRFs show-cause notice dated 28-2-2008, contending that export duty is not leviable on petitioner due to several counts.

11. It is at this stage, the present petitions were filed before this Court.

12. This Court vide its detailed order dated 25-7-2008 admitted the petitions and granted ad interim relief in terms of paragraph 28C(n) whereby the operation and implementation of letters dated 30-6-2008 of the respondent No. 2, letter dated 8-7-2008 of the respondent No. 3 and letter dated 9-7-2008 were suspended and arrangement regarding supply of goods to the SEZ unit as contained in the letter dated 1-2-2008 was ordered to be continued. This ad interim relief was continued with certain modifications. Even in Special Civil Application Nos. 10444 of 2008, 10445 of 2008 and 10446 of 2008, the Court has passed separate order on 14-8-2008 and granted ad interim relief despite the fact that it was urged on behalf of the revenue that there are certain distinguishing features in all these three petitions. The Excise Department has challenged the said order before the Apex Court. Even the earlier order dated 25-7-2008 passed by this Court was challenged before the Apex Court and the Apex Court vide its order dated 9-4-2009 dismissed the SLP by observing that the said SLP is against an interim order and hence, there is no reason to interfere. However, this Court was requested by the Apex Court to take up the matter for final hearing as the matter is of an important nature. The Apex Court further observed that the views expressed by the High Court in the impugned order are to be treated as tentative views.

It is in the above background of the matter, the entire group was taken up for final hearing.

13. The main thrust of the arguments of learned Senior Counsels appearing for the petitioners in all these petitions is that the supply of goods from a DTA unit to a SEZ unit being a supply of goods within the territory of India, no export duty is leviable under the provisions of Section 12 of the Customs Act, 1962 since such duty can only be imposed in respect of goods which are to be taken out of India to a place outside India. The levy of export duty u/s 12 is attracted only if the goods are exported from India. Since SEZ is located within India, the supplies to the SEZ cannot be considered as goods "exported from India". The respondents have overlooked the significance of the words "from India" while construing Section 12 and have instead mis-directed themselves by only reading the definition of the term "export" in the SEZ Act, 2005 and the Customs Act,

1962. It is also contended before the Court that the export duty being a levy under the Customs Act, 1962 must be supported only by the provisions of the said Act, which should be strictly construed being a taxing statute, failing which, such levy would be ultra vires and illegal and in the instant case, the levy is unsupported by law since the transaction is not one of export. The Unit located in a SEZ is one located within India and, therefore, supplies made to such a Unit cannot be considered as goods "exported from India".

14. In support of these submissions, following decisions are relied upon:

In *A.V. Fernandez Vs. The State of Kerala*, it is held that in construing fiscal statutes and in determining the liability of a subject to 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 satisfies the Court that the case falls strictly within the provisions of the law, the subject can be taxed, 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 intentions of the Legislature and by considering what was the substance of the matter.

In *Commissioner of Wealth Tax, Gujarat-III, Ahmedabad Vs. Ellis Bridge Gymkhana*, , it is held that the rule of construction of a charging section is that before taxing any person, it must be shown that he falls within the ambit of the charging section by clear words used in the section. No one can be taxed by implication. A charging section has to be construed strictly. If a person has not been brought within the ambit of the charging section by clear words, he cannot be taxed at all.

In *Commissioner of Income Tax, Bangalore Vs. Venkateswara Hatcheries (P) Ltd. etc. etc.*, , it is held that neither the word "produce" nor the word "article" has been defined in the Act. Therefore, it may be permissible to refer to a dictionary. But where the dictionary gives divergent or more than one meaning of a word it would not be safe to construe the said word according to the suggested dictionary meaning. In such a situation, the word has to be construed in the context of the provisions of the Act having regard to the legislative history of the provisions of the Act and the scheme of the Act. It is a settled principle of interpretation that the meaning of the words occurring in the provisions of the Act must take their colour from the context in which they are so used.

15. The provisions of Section 53 of the SEZ Act, 2005 do not provide that the SEZ is located outside "India". The said provision refers to the expression "customs territory of India", which expression, though not defined in the SEZ Act or the Customs Act, finds reference in the GATT Agreement. The said section does not state that a SEZ is outside India. The Respondents have committed a gross error in equating the expression "Customs territory, with India." It is further contended that SEZ is located within India is evident from Section 1(ii) of the SEZ Act, which clearly states that the same extends to the whole of India.

There is no provision in the SEZ Act, 2005 for levy of export duty on supplies made by a DTA unit to the SEZ. The legislative intent of not levying export duty on supplies from DTA to SEZ is manifest from the difference in the charging provisions, i.e., Section 76F(a) of the Customs Act, 1962 that existed in relation to SEZ scheme, prior to the enactment of SEZ Act, 2005. Section 76F(1) provided for levy of export duty on supplies from DTA to SEZ and also provided or levy of import duty on removal from SEZ to DTA. Section 76F(1) was rescinded and on the SEZ Act, 2005, coming into force, the only levy provided was in Section 30, which required payment of an amount equal to import duty, on goods removed from the SEZ to the DTA. The provision for levy of export duty on removal from DTA to SEZ was not incorporated in the SEZ Act, 2005. This manifest intention of the Legislature of not levying export duty on supplies made from DTA to SEZ is now sought to be frustrated by the respondents. It is also contended that the levy of export duty on supplies made to a SEZ unit is clearly contrary to Rule 27 of the SEZ Rules, 2006, which entitles a SEZ unit to procure goods from the DTA, "without payment of duty, taxes or cess". It is further contended that the statement of objects and reasons which were presented before the Parliament, when the SEZ Act, was introduced clearly states that the objective of creating a Special Economic Zone was to make available goods and services "free of taxes and duties" for promoting export-led growth. It is in consonance with this stated objective that the SEZ Act does not provide for any levy on export of goods or movement of goods from Domestic Tariff Area to SEZ and the SEZ Rules clarify that all supplies to a SEZ unit will be "without payment of duty, taxes or cess".

16. It is further contended that the definition of the term "Export" in the SEZ Act, being an artificial definition for certain purposes as contemplated under the said Act, it should be restricted to the said Act for the contemplated purposes and cannot be extended or applied for any other purpose. The definition contained in one Act cannot be adopted for the purposes of another Act more particularly when the other Act contains a definition of the term for the purposes of that Act. The duties of customs which have a definite connotation in the economy, legislation and the Constitution, cannot be levied by an artificial extension of the term "Export" since the same would offend the Constitution. It is, therefore, contended that export duty is not levied under the provisions of the SEZ Act and, therefore, cannot be justified by any provision thereunder. The purported decisions of the respondent Nos. 1 and 2 regarding liability of export duty in case of supplies by a Domestic Tariff unit to a SEZ unit are contrary to law and deserve to be quashed. The said decisions suffer from the vice of non-application of mind since the same do not contain any reasons and are based only upon the fact of issuance of subsequent Notifications stipulating the effective rate of duty in respect of specified steel products, which fact is wholly extraneous and irrelevant to the issue.

17. For the proposition that a deeming fiction or an ambit of deemed provisions should be restricted to the section which creates it and cannot be extended

beyond the purpose for which it has been created. Reliance is placed on the following decisions:

In the case of *State of Karnataka Vs. K. Gopalakrishna Shenoy and Another*, wherein it is held that the deeming provision in Section 38(1) of the Motor Vehicles Act cannot be extended to Section 3(1) and the Explanation thereto of the Taxation Act. The very terms of Section 38 of the Motor Vehicles Act limit the deeming effect caused by the absence of a certificate of fitness to the rights conferred u/s 22 of that Act pursuant to the registration of a vehicle. The words "for the purpose of this Act" in the Explanation to Section 38 make it clear that the deeming effect conferred by it will have overriding force on Section 3(1) of the Taxation Act. Section 38 has been provided so as to effectively prevent an owner or person having possession or control of a motor vehicle from carrying passengers or goods in it in spite of the vehicle not being in a fit condition and not carrying a certificate of fitness and thereby endangering the safety of the public. The deeming effect on the Certificate of Registration of a vehicle when it is not carrying a certificate of fitness is to ensure that the safety of the public is not jeopardised by anyone driving or using a vehicle without a certificate of fitness for carrying passengers or goods and trying to take umbrage for the violation by contending that he was entitled to make such use because of the Certificate of Registration issued to the vehicle being current. It has also to be noticed that Section 38 contains a safety measure while Section 3 of the Taxation Act pertains to a compensatory measure. The former cannot therefore limit the operation of the latter, i.e., Section 3(1) of the Taxation Act and the Explanation thereto.

In the case of *Mancheri Puthusseri Ahmed and Others Vs. Kuthiravattam Estate Receiver*, it is held that in interpreting a provision creating a legal fiction the Court is to ascertain for what purpose the fiction is created, and after ascertaining this, the Court is to assume all those facts and consequences which are incidental or inevitable corollaries to the giving effect to the fiction. But in so construing the fiction it is not to be extended beyond the purpose for which it is created, or beyond the language of the section by which it is created. It cannot also be extended by importing another fiction. However, beneficial may be the scope and ambit of the legal fiction created by the Legislature while enacting Section 4A such fiction can arise only when the express language of the section laying down the conditions precedent for raising of such a fiction is complied with by the mortgagee-in-possession concerned seeking the benefit of such a deeming fiction. Such a fiction cannot be extended by the Court on analogy or by addition or deleting words not contemplated by the Legislature.

In *State of West Bengal Vs. Sadan K. Bormal and Another*, it is held that Legislature may sometimes create a chain of fictions by the same Act or by succeeding Acts. If the Legislature is competent to enact a provision creating a legal fiction, there is no reason why it cannot create a chain of fictions if necessity arises. It is true that in interpreting a provision creating a legal fiction

it is not open to the court to import another fiction.

In *Meghraj Biscuits Industries Ltd. Vs. Commissioner of Central Excise, U.P.*, It is held that the grant of registration certificate under the Trade Marks Act will not automatically provide benefit to the SSI unit. The Registrar, Trade Marks, can issue registration certificate u/s 28 of the Trade Marks Act with retrospective effect. But the effect of making the registration certificate applicable from retrospective date is based on the principle of deemed equivalence to public user of such mark. This deeming fiction cannot be extended to the Excise Law. It is confined to the provisions of the Trade Marks Act. Therefore, issuance of registration certificate with retrospective effect from 30-9-1991 will not tantamount to conferment of exemption benefit, under the excise law once it was found that the appellants had wrongly used the trade mark of somebody.

In *Moriroku UT India (P) Ltd. Vs. State of U.P. and Others*, the Apex Court while considering the question whether Section 4 of the 1944 Act read with Rule 6 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 (the Excise Valuation Rules, 2000) could be read into Section 3 of the U.P. Trade Tax Act, 1948, the Apex Court held that in the case of excise law the taxable event is manufacture, which is not related to commercial transaction. On the other hand, commercial transaction is the basis of the price structure in the sales tax laws. The levy of excise duty is on manufacture while levy of sales tax by its very nature arises at the stage beyond manufacture, namely, the sale of the article. In cases of captive consumption, Section 4(1)(a) of the Central Excise Act is not attracted. What is attracted in such cases is Section 4(1)(b), which refers to "deemed value" and which requires valuation to be done in terms of the Excise Valuation Rules, 2000. Thus, the said Rules are limited and restricted in their application. The concept of amortised cost is undoubtedly an accounting concept. However, accounting for costs differs according to the object and the purpose for which the exercise is undertaken. The concept of depreciation (amortisation) differs from enactment to enactment. Therefore, when excise law seeks to tax the value, the concept therein cannot be bodily lifted and incorporated in Section 3 of the U.P. Trade Tax Act, 1948, which essentially deals with ascertainment of the price structure depending upon the negotiations between the parties.

In *Rajindra Dyeing and Printing Mills Vs. Union of India*, this Court held that the term "exported" appearing in Rule 2(a) of the Rules will have to be held that when the export goods go out of control of the person exporting them and they cease to be available for consumption within the country, they can be said to have been exported. Therefore, though the term "India" is defined by the Act as including "territorial waters of India" in the context of the drawback Rules, the term "India" will have to be interpreted to mean landmass of India only.

In *Union of India v. Rajindra Dyeing & Printing Mills Ltd.* [2004] 10 SCC 187 it is held that when there is movement of the goods outside the territorial waters of India, it is then that an export may be said to have taken place. In the instant

case, the cargo was destroyed when the vessel sank within the territorial waters of India. There was, therefore, no export of the said cargo. Accordingly, no duty drawback was available in respect of the said cargo.

In *Qazi Noorul H.H.H. Petrol Pump v. Dy. Director, ESI Corporation* AIR 2009 SCW 5490, it is held that the words "manufacturing process" in different statutes have different meanings. For instance, in the Central Excise Act, 1944, the word "manufacture" means bringing into existence a different commodity, though this is not the definition of "manufacturing process" in the Factories Act, 1948. The definition of "manufacturing process" in one Statute cannot be applied to another Statute.

18. On behalf of the respondents, Mr. P.S. Champaneri, learned Assistant Solicitor General with Mr. R. M. Chhaya, learned Senior Standing Counsel with Mr. Nishant Lalakiya and Mr. A.V. Naik appeared. Initially, an affidavit-in-reply was filed by Mr. S.N. Patil, Joint Development Commissioner, Dahej Special Economic Zone as well as Joint Development Commissioner, Essar Special Economic Zone on 2-9-2008 for the purpose of opposing the confirmation of interim relief. Another affidavit-in-reply was filed by Mr. Rakesh Misra, Commissioner of Central Excise, Surat on 30-3-2009.

19. Based on these affidavits, Mr. Champaneri has submitted that prior to enactment of the Customs Act, 1962, the Sea Customs Act laid down the basic-law relating to customs, which was enacted prior to about 80 years of the enactment of the Customs Act, 1962. The said Sea Customs Act was amended from time to time and some important amendments were made to the Sea Customs Act by the Sea Customs (Amendment) Act, 1955. It was felt that several provisions of the Act had become obsolete and difficulties had also been experienced in the implementation of certain other provisions of the Sea Customs Act coupled with the fact that the trade had been pressing for certain changes and facilities. At the relevant time in the year 1962, smuggling, consequent to controlled economy, had presented new problems and, therefore, to meet with the said requirements, it had become necessary to revise the Sea Customs Act. The Land Customs Act was passed in the year 1924 which was also not a self-contained Act and applied by reference, provisions of the Sea Customs Act to land customs with certain modifications. There was no separate law relating to air customs, and the administration of air customs was governed by certain rules made under the Indian Aircrafts Act, 1911. Therefore, while revising the provisions of the Sea Customs Act, at the time of enactment of the Customs Act, 1962, it was proposed to consolidate the provisions relating to sea customs, land customs and air customs into one comprehensive measure. With that statement of objects and reasons in mind, the Parliament enacted the Customs Act, 1962 being an act to consolidate and amend the law relating to customs.

20. Mr. Champaneri has further submitted that u/s 2(15), the term "duty" is defined to mean a duty of customs leviable under the said Act. The term "export" is defined u/s 2(18) to mean with its grammatical variations and

cognate expression, taking out of India to a place outside India. The term "export goods" is defined u/s 2(19) to mean any goods which are to be taken out of India to a place outside India and the term "exporter" is defined u/s 2(20) to mean in relation to any goods at any time between their entry for export and the time when they are exported, includes any owner or any person holding himself out to be the exporter. The term "goods" is defined u/s 2(22). The term "import" is defined u/s 2(23) to mean with its grammatical variations and cognate expressions, bringing into India from a place outside India and the term "imported goods" is defined u/s 2(25) to mean any goods brought into India from a place outside India but does not include goods which have been cleared for home consumption. The term "importer" is defined u/s 2(26) to mean in relation to any goods at any time between the importation and the time when they are cleared for home consumption, includes any owner or any person holding himself out to be the importer. The term "India" is defined u/s 2(27) to include the territorial waters of India. Mr. Champaneri further submitted that Section 12 contained in Chapter V of the said Act provides that except as otherwise provided in the said Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under the Customs Tariff Act, 1975 or any other law for the time being in force, on goods imported into, or exported from India. Section 14 of the said Act provides for the valuation of the goods for the purposes of assessment and it is provided therein that for the purposes of the Customs Tariff Act, 1975 or any other law for the time being in force, whereunder a duty of customs is chargeable on any goods by reference to other value, the value of such goods shall be deemed to be the price at which such or like goods are ordinarily sold, or offered for sale, for delivery at the time and place of importation or exportation, as the case may be, in the course of international trade, where the seller and the buyer have no interest in the business of each other or one of them has no interest in the business of the other and the price is the sole consideration for the sale or offer for sale. The proviso to Sub-section (1) of Section 14 provides that such price shall be calculated with reference to the rate of exchange as in force on the date on which a bill of entry is presented u/s 46 or a shipping bill or bill of export, as the case may be, is presented u/s 50. Section 17 of the said Act provides for assessment of duty and Section 18 provides for provisional assessment of duty.

21. Mr. Champaneri has further submitted that Chapter X-A incorporating special provisions relating to Special Economic Zone were enacted by Act 20 of 2002 effective from 11-5-2002 and have been omitted vide Section 99 of the Finance Act, 2007 with effect from 11-5-2007. Section 76B as was operative during the above mentioned periods, provided that the provisions of the said Chapter and other Chapters shall apply to goods admitted to a Special Economic Zone but in the event of conflict between the provisions of this Chapter and other Chapters, the provisions of this Chapter shall prevail. Section 76E provided for exemption from duties of customs and Section 76F provided for levy of customs. The Special Economic Zone had been one of the latest measures adopted by the Government

of India to promote exports from India. It was in March, 2000 that the then Union Commerce and Industry Minister took a visit to China to get first hand information about the functioning of Special Economic Zones. This led to the announcement of SEZs in India through the annual Export-Import Policy of March, 2000. It took the Government almost 6 years to put/place an all encompassing legislation to take care of the concept. An Act for Special Economic Zone was passed and the Special Economic Zones Act, 2005 received the Presidential assent in June, 2005 and became effective from 10-2-2006. The Rules under the Act were notified on 10-2-2006 and were further amended by amendment Rule, 2006 dated 10-8-2006. He has, therefore, submitted that the Government of India viewed the SEZs as engines of growth and increased growth and economic activity through increased foreign investment. For achieving the said purpose, the Government encouraged the establishment of SEZs by the State Government themselves or the private sector or in the joint sector. In fact, the Finance Minister while addressing the media after the Union Budget 2006, remarked that the Special Economic Zones are not Economic Zones but integrated townships in themselves. The Preamble of the Act of 2005 states that it is an Act to provide for the establishment, development and management of the Special Economic Zones for the promotion of exports and for matters connected therewith or incidental thereto.

22. Mr. Champaneri has referred to some of the relevant provisions of the Special Economic Zones Act, 2005. Section 2(a) defines "appointed day" with reference to a Special Economic Zone to mean the date on which the Special Economic Zone is notified by the Central Government under Sub-section (1) of Section 4. The term "authorized operations" to mean operations which may be authorized u/s 4(2) and Section 15(9) of the Act of 2005. Section 2(i) defines "Domestic Tariff Area" to mean the whole of India (including the territorial waters and continental shelf) but does not include the areas of the Special Economic Zones. The term "entrepreneur" is defined u/s 2(j) to mean a person who has been granted a letter of approval by the Development Commissioner under Sub-Section (9) of Section 15, The term "existing Special Economic Zone" is defined u/s 2(k) to mean every Special Economic Zone which is in existence on or before the commencement of the Act of 2005. Similarly, the term "existing unit" is defined u/s 2(1) to mean every unit which has been set up on or before the commencement of the Act, 2005 in an existing Special Economic Zone. The term "export" which assumes significance in the Act of 2005 is defined u/s 2(m) to mean taking goods or providing services, out of India, from a Special Economic Zone, by land, sea or air or by any other mode, whether physical or otherwise, or supplying goods, or providing services, from the Domestic Tariff Area to a unit or a developer or supplying goods, or providing services, from one unit to another unit or developer, in the same or different Special Economic Zone. The term "import" is defined u/s 2(d) to mean 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

receiving goods, or services by a Unit or Developer from another Unit or Developer of the same Special Economic Zone or a different Special Economic Zone. The term "manufacture" is defined u/s 2(r). The term "Special Economic Zone" is defined u/s 2(za) to mean each Special Economic Zone notified under the proviso to Sub-section (4) of Section 4 and Sub-section (1) of Section 4 (including Free Trade and Warehousing Zone) and includes an existing Special Economic Zone. The term "unit" is defined u/s 2(zc) to mean a unit set up by an entrepreneur in a Special Economic Zone and includes an existing unit, an offshore Banking unit and a unit in an International Financial Services Center, whether established before or established after the commencement of the Act. Section 2(zd) provides that all other words and expressions used and not defined in this Act but defined in the Central Excise Act, 1944, the Industries (Development and Regulation) Act, 1951, the Income Tax Act, 1961, the Customs Act, 1962 and the Foreign Trade (Development & Regulation) Act, 1992 shall have the meanings, respectively assigned to them in those Acts.

23. Mr. Champaneri has, therefore, submitted that specific definitions which are contained in Section 2 shall have precedence considering the provisions of the Act of 2005 over the definitions contained in the other Acts referred to in Section 2(zd). He has, therefore, submitted that so far as the term "export" and "import" are concerned, they will have to be governed by the definitions contained in Sections 2(m) and 2(o) of the Act of 2005 without regard to their respective definitions under the Customs Act, 1962.

24. Section 3 contains the provisions for establishment of Special Economic Zone and Section 4 provides for establishment of Special Economic Zone and approval and authorization to operate it to developer. Section 5 contains guidelines for notifying Special Economic Zone. Section 7 which assumes importance in the context of the present controversy provides for exemption from taxes, duties and cess. It is provided therein that goods or services exported out of, or imported into, or procured from the Domestic Tariff Area by a unit in a Special Economic Zone or a developer shall, subject to such terms, conditions and limitations, as may be prescribed, be exempt from the payment of taxes, duties or cess under all enactments specified in the First Schedule. The reference to the First Schedule is, therefore, very relevant. A perusal of the First Schedule to the Act of 2005 shows that neither the Central Excise Act, 1944 nor the Customs Act, 1962 is mentioned therein. He has, therefore, submitted that in view of the provisions of Section 7 of the Act, demands of taxes, duties or cess under the Central Excise Act, 1944 or the Customs Act, 1962 are not exempt when any goods or services exported out or imported into or procured from the Domestic Tariff Area. In view of the provisions contained in Section 7 read with the First Schedule and conscious non-inclusion of the Central Excise Act, 1944 and the Customs Act, 1962 in the First Schedule make the intention of the Parliament clear not to exempt taxes, duties and cess leviable under the Central Excise Act, 1944 and the Customs Act, 1962.

25. Mr. Champaneri has further submitted that Section 26 of the Act of 2005 also assumes importance. Section 26(1) provides that every developer and the entrepreneur shall be entitled to the exemptions, drawbacks and concessions contained therein. Exemption from any duty on customs under the Customs Act, 1962 or the Customs Tariff Act, 1975 or any other liability for the time being in force, is available on goods imported into or services provided in a Special Economic Zone or an Unit to carry on the authorized operations by the developer or entrepreneur. Similarly, exemption from any duty of customs under the Customs Act, 1962 or the Customs Tariff Act, 1975 or any other law for the time being in force on goods exported from or services provided from a Special Economic Zone or from a unit, to any place outside India is available. Similarly, under Clause (2), exemption from any duty, excise, under the Central Excise Act, 1944 or the Central Excise Tariff Act, 1985 or any other law for the time being in force on goods, brought from Domestic Tariff Area to a Special Economic Zone or unit, to carry on the authorized operations by the developer or entrepreneur is entitled. Section 26(1)(d) provides that drawback or such other benefits as may be admissible from time to time on goods brought or services provided from the Domestic Tariff Area into a Special Economic Zone or Unit by the service providers located outside India to carry on the authorized operations by the developer or entrepreneur are admissible. Sub-section (2) of Section 26 confers power on the Central Government to prescribe the manner in which, and, the terms and conditions subject to which, the exemptions, concessions, drawback or other benefits shall be granted to the developer or entrepreneur under Sub-section (1) of Section 26.

26. Mr. Champaneri has further submitted that Section 30 of the Act of 2005 provides that subject to the conditions specified in the Rules made by the Central Government in this behalf, any goods removed from a Special Economic Zone to the Domestic Tariff Area shall be chargeable to duties of customs including anti-dumping, countervailing and safeguard duties under the Customs Tariff Act, 1975, where applicable, as leviable on such goods when imported and the rate of duty and tariff valuation, if any, applicable to goods removed from a Special Economic Zone shall be at the rate and tariff valuation in force as on the date of removal, and where such date is not ascertainable, on the date of payment of duty. Section 51 of the Act of 2005 provides that the provisions of the Act of 2005 shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrumental having effect by virtue of any law other than the Act of 2005.

27. Mr. Champaneri has further submitted that Section 53(1) provides that a Special Economic Zone shall, on and from the appointed day, be deemed to be a territory outside the customs territory of India for the purposes of undertaking the authorized operations and Sub-section (2) thereof provides that a Special Economic Zone shall, with effect from such date as the Central Government may notify, be deemed to be a port, airport, inland container depot, land station and land customs stations, as the case may be, u/s 7 of the Customs Act, 1962.

28. Mr. Champaneri has further submitted that in exercise of powers conferred u/s 55 of the Act of 2005, the Central Government had made the Special Economic Zones Rules, 2006 as originally enacted on 10-2-2006 and amended on 10-8-2006. The Rules cannot go beyond the legislative enactment nor the Rules can provide for anything which is inconsistent with what is manifest in the statutory provisions. Rule 27 makes provisions for import and procurement. Rule 27(1) provides that the unit or developer may import or procure from the Domestic Tariff Area without payment of duty, taxes or cess or procure from Domestic Tariff Area after availing export entitlements or procure from other units in the same or other Special Economic Zone or from Export Oriented Unit or Software Technology Park Unit or Bio-technology Park unit, all types of goods, including capital goods (new or second-hand), raw materials, semi-finished goods (including semifinished jewellery), component, consumables spares goods and materials for making capital goods required for authorized operations except prohibited items under the Import Trade Control (Harmonized System) Classifications of Export and Import Items. He has, therefore, submitted that the entitlement of importing or procuring from the Domestic Tariff Area without payment of duty though may be available to a unit or a developer in the Special Economic Zone, there is no provision which exempts the levy of export duty under the Customs Act, 1962 read with the Special Economic Zones Act, 2005, any export duty that is leviable and to be collected from the unit which is outside the Special Economic Zone, i.e., in other words in the Domestic Tariff Area. What is demanded and levied is export duty in terms of the Customs Act, 1962 by a unit in Domestic Tariff Area which has supplied to a unit or developer in the Special Economic Zone. Considering the provisions of Section 53(1) which provides that a Special Economic Zone shall, on and from the appointed day, be deemed to be a territory outside the customs territory of India, levy of export duty on a Domestic Tariff Area unit, which supply goods into Special Economic Zone cannot be claimed to be outside the scope, authority and jurisdiction to levy export duty on a unit in Domestic Tariff Area.

29. Mr. Champaneri has further submitted that the exemptions, drawbacks and concessions entitled u/s 26(1) of the Act of 2005 is only to a developer as defined u/s 2(g) to mean a person who, or a State Government which, has been granted by the Central Government a letter of approval under Sub-section (1) of Section 3 and includes an authority and a co-developer and to an entrepreneur as defined u/s 2(j) to mean a person who has been granted a letter of approval by the Development Commissioner u/s 15(9). He has, therefore, submitted that the exemption that is available to a developer under the Act or an entrepreneur as defined under the Act of 2005. Any unit in a Domestic Tariff Area is neither a developer within the meaning of Section 2(g) or an entrepreneur within the meaning of Section 2(j) and, therefore, exemption available only to a developer or an entrepreneur u/s 26(1) including exemption from the duty of customs or the duty of excise cannot be available to a unit in Domestic Tariff Area which does not come within the ambit of definition of developer or entrepreneur. He

has, therefore, submitted that the writ petitions filed by the Units in the Domestic Tariff Area challenging the applicability of export duty on the Domestic Tariff Area supplies made by a Unit in the Domestic Tariff Area to units in the Special Economic Zone cannot be entertained by this Court.

30. Mr. Champaneri has further submitted that having regard to Section 2(m)(ii) of the Act of 2005 defining "export" to, inter alia, mean supplying goods or providing services, from the Domestic Tariff Area to a unit or developer, export duty is applicable particularly when Section 51 of the Act stipulated that the provisions of the Act shall have the effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than the said Act. Furthermore, having regard to Section 53 of the Act of 2005, providing that a Special Economic Zone shall be deemed to be a territory outside the customs territory of India, in view of the deeming provisions, for the authorized operations the Special Economic Zones are territories outside India and, therefore, for the purposes of application of the Customs Act, 1962, removal of steel products from DTA to SEZ would become export and although the Customs Act defines the "export" to mean taking any goods to a place outside India, because of the deeming provisions of Section 53, supply to Special Economic Zone from Domestic Tariff Area becomes export for the purpose of the Customs Act, 1962 as well. Furthermore, the definition of "export" as defined in Section 2(m) of the Act of 2005 would prevail over the definition of the term under the Customs Act, 1962 when there is a transaction between a Domestic Tariff Area unit and Special Economic Zone. In cases of such transaction, for the purpose of levy of export duty, the definition of term "export" as contained u/s 2(m) read with the provisions of Section 53 and the provisions of Section 7 read with Section 26 will assume importance. In view of the same, an Unit in Domestic Tariff Area will not be entitled to successfully contend before the Court that export duty cannot be leviable. He has, therefore, submitted that this contention is wholly unsustainable.

31. Mr. Champaneri has further submitted that there is no exemption from levy of customs duty for the goods supplied from a Domestic Tariff Area to an unit in SEZ. The term "exported" and "exportation out of India" have also been used in Rules 18 and 19 of the Central Excise Rules, 2002 and the notifications issued thereunder, whereby rebate of Central Excise Duty paid on the goods and their raw materials is granted on supplies by Domestic Tariff Area units to Special Economic Zones. If a view is taken that export implies only export out of India, then supplies to SEZs from DTA would not be export out of India, and therefore, no rebate under these Rules would be admissible. The petitioners are claiming rebate on the supplies made by them to Special Economic Zone units on the ground that the supplies made by the DTA unit to SEZ unit are exports. He has, therefore, submitted that the petitioners apart from their conduct are disentitled to contend that the activity of supply of goods from DTA to SEZ is not export and consequently the challenge in the petition deserves to be turned down in view of

the stand taken by the petitioners themselves while claiming rebate as regards the duty of excise levied while the DTA units are supplying goods to SEZ units and are themselves exports for the purpose of Rules 18 and 19 of the Central Excise Rules, 2002. He has, therefore submitted that supplies from DTA to SEZ are eligible for various export benefits such as drawback DEPB or towards fulfilment of advance license obligations, etc. If these supplies from a place in India to another place in India are not treated as export, such benefits would not be admissible. He has, therefore, submitted that the combined reading of all these provisions leads to a conclusion that supplies made by a DTA unit to units/developers in SEZ are to be treated as exports and they do not enjoy any exemption from export duty.

32. Mr. Champaneri has further submitted that the exemption available u/s 26(2) cannot be claimed to be an exemption from levy and payment of export duty by a DTA unit. The basic objective 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 exempt from export duty u/s 26(1)(b) of the Act of 2005. However, this exemption will be available only to SEZ unit and not to DTA unit. Furthermore, if export duty is not applied to supplies of steel made from the DTA to SEZ, then the entire chain of transactions for such supplies would escape without any levy of export duty and the basic objective of the levy would be defeated.

33. In view of the above submissions, Mr. Champaneri has submitted that the petitioners are not entitled to any relief and hence, all these petitions deserve to be dismissed and the petitioners be directed to pay the relevant duty as confirmed by the appropriate authorities.

34. Having heard the learned Counsels appearing for the parties and having gone through their rival submissions as well as pleadings in light of the statutory provisions and decided case law on the subjects, we are of the view that the moot question for our consideration is as to whether the levy of export duty on goods supplied from the Domestic Tariff Area to the Special Economic Zone is justified under law. Dealing with this question, three important aspects are to be borne in mind :

Whether export duty can be imposed under the provisions of the Customs Act, 1962?

Whether Export Duty can be levied under the provisions of the Special Economic Zones Act, 2005?

Whether export duty can be imposed under the Customs Act, 1962 by incorporating the definition of the term "Export" under the SEZ Act, 2005 into the Customs Act, 1962?

35. These three questions are to be dealt with hereunder:

1. Whether such duty can be imposed under the provisions of the Customs Act,

1962?

35.1 Export Duty is a duty of customs leviable under the Customs Act, 1962 on goods exported from India, u/s 12 read with Section 51 of the said Act and Section 2 read with Second Schedule of the Customs Tariff Act, 1975. Such duty is a condition precedent to sending goods out of the country to other lands. Export Duty is an impost with reference to the movement of property by way of export, particularly with a view to regulating trade and commerce with foreign country insofar as such matters are within the competence of the Parliament. Reference is made to the decision of the Apex Court in the case of Sea Customs Act, 1878 AIR 1963 SC 1760.

35.2 The various terms used in Section 12 of the said Act, which is the charging section for the purpose of levy of duty, have been defined under the said Act itself, Section 2(18) defines export to mean taking out of India to a place outside India; Section 2(19) defines export goods as goods which are to be taken out of India to a place outside India; Section 2(27) defines India as including the territorial waters of India. Therefore, the taxable event contemplated under the Customs Act, 1962 for the purpose of levy of Export Duty is taking the goods out of the territorial waters of India to a place outside India, in which case the goods would be dutiable goods as contemplated u/s 12 of the said Act and attract levy of export duty, to be paid at the time of exportation of such goods. Export under the Customs Act, 1962, therefore, can be said to have taken place only upon movement of the goods outside the territorial waters of India. Reference is made to the decision of the Apex Court in the case of Rajindra Dyeing & Printing Milk Ltd. (supra).

35.3 In the absence of any amendment of 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 movement of goods from the Domestic Tariff Area to the Special Economic Zone as a taxable event entailing a levy of Export Duty as in the case of export, the levy of Export Duty cannot be justified under the provisions of the Customs Act, 1962.

35.4 The very fact that such a charging provision, i.e., Section 76F had to be introduced by inserting Chapter X-A in the Customs Act, 1962 containing Sections 76A to 76N being Special Provision Relating to Special Economic Zone, clearly indicates that in the absence of the newly added provision, the said movement of goods was not a taxable event attracting levy of Export Duty under the provisions of the said Act. The entire Chapter has been omitted by the Finance Act, 2007 with effect from 11-5-2007 and, therefore, the aforesaid movement of goods is no longer a taxable event under the said Act.

36. Whether Export Duty can be levied under the provisions of the Special Economic Zones Act, 2005?

36.1 The Department has demanded Export Duty on the subject goods by

invoking the provisions of Section 12 of the Customs Act, 1962 read with Section 2 and Second Schedule-Export Tariff (Heading No. 11) of the Customs Tariff Act, 1975 and for the purpose of considering the effective rate of duty, has taken into account Notifications issued u/s 25 of the Customs Act, 1962. Therefore even as per the Department, the levy and the procedure adopted for recovery thereof is under the Customs Act, 1962 and the aforesaid issue does not arise for consideration on the stand of the Department itself.

36.2 The provisions of the SEZ 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 provision providing for the levy and imposition of Export Duty, and the said Act does not contain any provisions for recovery of such duty. In construing fiscal statutes and in determining the liability of a subject to 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 the probe into the intention of the Legislature and by considering what was the substance of the matter. Reference is made to the decision of the Apex Court in the case of E.V. Fernandez (supra).

36.3 The contention that levy of Export Duty is impliedly contemplated under the SEZ Act, principally on account of the fact that unlike other levies, the levy of Export Duty has not been specifically exempted under the provisions of the said Act, is wholly misconceived. In the first place, as stated above, there cannot be a levy of tax by implication. Secondly, the necessity for exemption would arise if the subject is liable to tax in the first place. In any case an overall view of the provisions of the SEZ Act and the Rules would establish that levy of Export Duty on the movement of goods from the Domestic Tariff Area to the Special Economic Zone is not at all provided for or contemplated thereunder, which will be evident from the following facts.

36.4 The Statement of Objects and Reasons of the SEZ Act, 2005 indicates that the policy for setting up of Special Economic Zones had been adopted by the Government of India with a view to provide an internationally competitive environment for export. The objectives of the Special Economic Zones include making available (to the Unit) goods and services free of taxes and duties for export production, supported by integrated infrastructure.

36.5 In line with the aforesaid objective of providing goods and services free of taxes and duties to the Unit in the Special Economic Zone or to a Developer for the purpose of establishing an integrated infrastructure for export production, provisions have been made in the SEZ Act, 2005 granting exemption from taxes and duties, which would otherwise have been leviable in the absence of any provision for exemption from such duties.

36.6 Section 7 of the Act exempts goods or services exported out of or imported into or procured from the Domestic Tariff Area by a Unit or Developer from the payment of taxes, duties or cess under the enactments specified in the First Schedule.

36.7 Chapter VI of the Act provides for Special Fiscal Provisions for Special Economic Zone. Section 26 thereunder provides for exemptions, drawbacks and concessions specified therein. Sub-clause (1)(a) provides for exemption from any duty of customs on goods imported into a Special Economic Zone, which would otherwise have been leviable on the importer-Special Economic Zone Unit. Sub-clause (1)(b) provides for exemption from any duty of customs on goods exported from a Special Economic Zone to any place outside India which would otherwise have been leviable on the exporter-Special Economic Zone Unit. Sub-clause (1)(c) provides for exemption from any duty of excise on goods brought within the Special Economic Zone from the Domestic Tariff Area which would otherwise have been payable by the manufacturer-Domestic Tariff Area Unit. Sub-clause (1)(d) grants benefits of drawback etc. on goods brought from the Domestic Tariff Area into a Special Economic Zone. Drawback is admissible under Chapter X of the Customs Act, 1962 read with the Customs & Central Excise Duties Drawback Rules, 1995 and means a rebate of a specified percentage of duty paid at the time of the importation of goods which are re-exported or used in the manufacture of goods which are exported, which repayment is to the exporter-Domestic Tariff Area Unit. The rebate contemplated under the aforesaid provisions is that of customs duty paid at the time of importation of the subject goods from outside India into India by the Domestic Tariff Area Unit and not of any purported Export Duty paid on movement of goods into the Special Economic Zone. Sub-clauses (1)(e), (f) and (g) similarly grant exemption from various taxes specified therein, which would otherwise have to be paid by persons other than the Special Economic Zone Unit/Developer.

36.8 Rule 23 of the SEZ Rules, 2006 provides that supplies from the Domestic Tariff Area to the Special Economic Zone would be eligible for export benefits as admissible under the Foreign Trade Policy. This would include Duty Entitlement Pass Book Scheme and other benefits/concessions under the Policy. The procedure for claiming drawback and DEPB benefits is provided in Rule 24 and Rule 30.

36.9 Rule 27 permits an Unit or Developer to import or procure from the Domestic Tariff Area all types of goods, without payment of duty or procure from the Domestic Tariff Area such goods after availing export entitlements. This means that the export entitlements available on account of the export of goods from the Domestic Tariff Area to the Special Economic Zone are available either to the Domestic Tariff Area supplier or the Special Economic Zone Unit/Developer at their option. Therefore, duty drawback or DEPB and/or other export benefits would be available to either party at their option. The sweeping exemption granted under this provision renders the contention of the Department regarding

liability of the goods to levy of Export Duty, academic since this provision exempts the goods brought in by the Special Economic Zone Unit from all levies and duties. Since the duty is leviable on the goods, it would be irrational to contend that the export from the Domestic Tariff Area to the Special Economic Zone should be taxed while the inward movement of the goods from the Domestic Tariff Area to the Special Economic Zone, would be exempt.

36.10 The aforesaid provisions clearly establish the legislative intention recorded in the Statement of Objects and Reasons of making available goods and services to the Developer/Unit situated in the Specific Economic Zone, free of taxes and duties. A levy of export duty is neither expressly nor impliedly contemplated under the Act and cannot be read in by purported intendment, which in any case, is clearly to the contrary.

36.11 This is further evident from the provisions of Section 30, which provides for imposition of duties of Customs including anti-dumping, countervailing and safeguard duties on goods removed from a Special Economic Zone into the Domestic Tariff Area. This again establishes the legislative intent of encouraging movement of goods/services into the Special Economic Zone and operations within the Special Economic Zone for the purpose of export from the Special Economic Zone to a place outside India. Additionally, such a provision emphasises that where any levy was contemplated, the Act is express and specific in this respect and in the absence of a similar provision regarding export duty, levy thereof is wholly unjustified.

36.12 As stated above, Chapter X-A in the Customs Act, 1962 containing Sections 76A to 76N being Special Provision Relating To Special Economic Zone including the charging provision (Section 76F) providing for levy of export duty on goods supplied from the Domestic Tariff Area to the Special Economic Zone has been omitted by the Finance Act, 2007 with effect from 11-5-2007 and no corresponding provision akin to Section 76F has been enacted in the SEZ Act, 2005 which categorically rules out reading in a purported intendment to levy duty. It is significant that the charging provision in Section 76A was retained verbatim by enacting Section 30 of the SEZ Act, 2005.

37. Whether export duty can be imposed under the Customs Act, 1962 by incorporating the definition of the term "Export" under the SEZ Act, 2005 into the Customs Act, 1962?

37.1 The term "export" having been defined in the Customs Act, 1962, for the purposes of that Act, there is no question of adopting or applying the meaning of the said term under another enactment for any purpose of levying duty under the Customs Act, 1962. In other words, a definition given under an Act cannot be displaced by a definition of the same term given in another enactment, more so, when the provisions of the first Act are being invoked. Even in the absence of a definition of the term in the subject statute, a definition contained in another statute cannot be adopted since a word may mean different things depending on

the setting and context. Reference is invited to the decisions of the Apex Court in the case of Ellis Bridge Gymkhana (supra), Venkateswara Hatcheries (P.) Ltd.'s case (supra) and Qazi Noorul H.H.H. Petrol Pump s case (supra). In fact, the interpretation canvassed by the department is not merely the adoption of a definition of another statute, but the incorporation of a taxable event itself, which is impermissible under the law.

37.2 The movement of goods from the Domestic Tariff Area to the Special Economic Zone has been treated as export by a legal fiction created under the SEZ Act, 2005. A legal fiction is to be restricted to the statute which creates it. Reference is made to the decisions of the Apex Court in the case of Sadan K. Bormal (supra), Meghraj Biscuits Industries Ltd.'s case (supra), Moriroku UT India (P.) Ltd.'s case (supra). Moreover, such legal fiction should be confined to the purpose for which it has been created. Reference is made to the decisions of the Apex Court in the case of K. Gopalakrishna Shenoy (supra); Mancheri Puthusseri Ahmed's case (supra). As stated above, such movement has been treated as export under the SEZ Act, 2005 for the purpose of making available benefits as in the case of actual exports like duty drawback, DEPB benefits, etc. to the Special Economic Zone Unit/Developer or the Domestic Tariff Area supplier at their option. Construing this movement of goods as entailing a liability of payment of duty runs absolutely counter to the purpose of the legal fiction created under the SEZ Act, 2005.

37.3 Section 51 of the SEZ Act, 2005 providing that the Act would have overriding effect does not justify adoption of a different definition in the Act for the purposes of another statute. A non obstante clause only enables the provisions of the Act containing it to prevail over the provisions of another enactment in case of any conflict in the operation of the Act containing the non obstante clause. In other words, if the provision/s of both the enactments apply in a given case and there is a conflict, the provisions of the Act containing the non obstante clause would ordinarily prevail. In the present case, the movement of goods from the Domestic Tariff Area into the Special Economic Zone is treated as an export under the SEZ Act, 2005, which does not contain any provision for levy of export duty on the same. On the other hand, export duty is levied under the Customs Act, 1962 on export of goods from India to a place outside India and the said Act does not contemplate levy of duty on movement of goods from the Domestic Tariff Area to the Special Economic Zone. Therefore, there is no conflict in applying the respective definitions of export in the two enactments for the purposes of both the Acts and therefore, the non obstante clause cannot be applied or invoked at all.

37.4 Similarly, reliance on Section 53 of the SEZ Act, 2005 to contend that a Special Economic Zone is a territory outside India, is misconceived. Section 53 provides that the Zone would be deemed to be a territory outside the customs territory of India for the purposes of undertaking the authorized operations. The term "customs territory" cannot be equated to the territory of India and in fact,

such term has been defined in the General Agreement of Tariffs & Trade, to which India is a signatory, to mean an area subject to common tariff and regulations of commerce and that there could be more than one customs territory in a country. Moreover such an interpretation would lead to a situation where a Special Economic Zone would not be subject to any laws whatsoever. The entire SEZ Act, 2005 would be rendered redundant since it is stated to extend the whole of India. In any case, various provisions of the SEZ Act would be rendered redundant and unworkable if the Special Economic Zone was to be considered an area outside India. This is apart from the fact that such a declaration would be constitutionally impermissible.

38. In view of the above discussion and findings arrived at as well as conclusion drawn, the levy of export duty on goods supplied from the Domestic Tariff Area to the Special Economic Zone is not justified. The petitioners are, therefore, not to be called upon to pay export duty on movement of goods from Domestic Tariff Area to Special Economic Zone units or developers.

39. All these petitions, therefore, stood allowed to the above extent. Rule made absolute without any order as to costs.

40. In view of disposal of Special Civil Application No. 9656 of 2008, Civil Application No. 12705 of 2008 does not survive and it is accordingly disposed of.

41. On pronouncement of the judgment, Mr. Chhaya learned Senior Standing Counsel for the Central Government requests for suspension of operation of this judgment for a period of four weeks.

42. Heard. In the facts and circumstances of the case, the operation of the judgment pronounced today is suspended for a period of four weeks on condition that the protection enjoyed by the petitioners shall continue to.