

(2017) 01 GUJ CK 0205

In the Gujarat High Court

Case No : 6107 of 2015, 6117 of 2015, 6167 of 2015

IMPERIAL OVERSEAS PRIVATE LIMITED

APPELLANT

Vs

UNION OF INDIA & 2 ORS

RESPONDENT

Date of Decision : 24-01-2017

Acts Referred:

[Special Economic Zones Act, 2005](#), [Section 8](#), [Section 30](#), [Section 5](#), [Section 55](#), [Section 55\(2\)](#), [Section 2\(w\)](#), [Section 2\(l\)](#), [Section 15\(8\)](#), [Section 55\(2\)\(o\)](#), [Section 55\(2\)\(za\)](#) - Constitution of Board of Approval - Domestic clearance by Units - Guidelines for notifying Special Economic Zone - Power to make rules - Power to make rules - Definitions - Definitions - Setting up of Unit - Power to make rules - Power to make rules
[Special Economic Zones Rules, 2006](#), [Rule 53](#), [Rule 53](#), [Rule 48](#), [Rule 48](#), [Rule 49](#), [Rule 49](#), [Rule 18\(4\)](#), [Rule 18\(4\)](#), [Rule 51](#), [Rule 51](#), [Rule 47](#), [Rule 47](#), [Rule 52](#), [Rule 52](#), [Rule 50](#), [Rule 50](#), [Rule 18\(4\)\(a\)](#), [Rule 18\(4\)\(a\)](#), [Rule 53A\(n\)](#), [Rule 53A\(n\)](#)

Citation : (2017) 01 GUJ CK 0205

Hon'ble Judges : A J Desai

Bench : Single Bench

Advocate : Mihir Thakore, Salil M Thakore, Devang Vyas, P Y Divyeshvar

Final Decision : Disposed

Judgement

1. The petitioners in each petition, who are in the business of manufacturing recycled plastic raw material from the imported plastic scrap since years together, have challenged a Policy dated 17.9.2013 issued by the Ministry of Commerce and Industries, Department of Commerce Government of India (SEZ

division) by which several conditions have been imposed upon the existing plastic raw material manufacturing units, mainly on the ground that the Policy is contrary to provisions of The Special Economic Zones Act, 2005 (in short "SEZ Act") and The Special Economic Zones Rules, 2006 (in short "SEZ Rules") and also on the ground of having not followed the procedure prescribed under the SEZ Act and SEZ Rules for imposing or issuing guidelines as per Section 5 of the SEZ Act as referred in the Policy itself.

2. Pursuant to the notice issued by this Court, the respondents have filed their affidavits-in-reply and opposed grant of any relief. Rejoinders thereto have also been filed by each of the petitioners.

3. Since the issues involved in these petitions are common, facts of each petitions are not referred date wise and the same have been dealt in general.

3.1 Since around 1997, about 20 units have been manufacturing recycled plastic raw material from the imported plastic scrap in the zone which was earlier known as Kandla Free Trade Zone. These units were established in the area which was treated as an Export Processing Zone (EPZ). Permission to each petitioner was granted for establishing the units on certain terms and conditions.

3.2 In the year 2000, the Government of India came out with a special economic zone scheme under the Export Import Policy. Under the scheme, SEZs were set up in India for the first time. The Government of India issued a public advertisement and declared that certain Zones including Kandla, Santacruz (Mumbai), Kochi and Surat which were Export Processing Zones, to be converted into Special Economic Zones. In the said advertisement, certain features were described to attract the manufacturers to invest money by establishing different types of manufacturing units which were subsequently incorporated under the SEZ Act. Accordingly, a Resolution was issued by the Government of India on 1.11.2000, as far as Kandla Free Trade Zone is concerned. As per the said publicity made by the Government of India, the units which were in existence in Special Economic Zone on 1.11.2000, is to be a positive Net Foreign Exchange earner within a period of 3 years, as well as, permitted to sell of the manufactured goods in Domestic Tariff Area (DTA) on payment of full custom duty subject to import policy in force. The petitioners having found attractive benefits, continued to manufacture the plastic raw material and to sell the products in domestic tariff area subject to the exports policy existence at the relevant time.

3.3 The Parliament of India enacted SEZ Act in the year 2005 and most of the provisions of the SEZ Act came into force on 10.2.2006. Most of the Rules of the SEZ Rules also came into force on 10.2.2006. The units of the petitioners were treated as existing units as per Section 2 (I) of the SEZ Act and, therefore, the SEZ Act and the SEZ Rules were and are applicable to the petitioners.

3.4 As per Section 8 of SEZ Act, the Board of Approval was constituted. A meeting of Board of Approval was held on 8.2.2006 under the Chairmanship of

the Special Secretary, Department of Commerce, to consider proposal for setting up Special Economic Zones. The members of the approval Board after verifying the material available, found that the manufacturer of recycled plastic units have no more export potential and, therefore, it was decided that no such new units should be allowed to set up in this zone. It was also observed that the units are paying full duty on clearance of DTA and there are about 5,000 people employed by such units, extension of letter of approval to be issued to such units and accordingly, letters were issued to each of the petitioner. The letters of approval were granted to each of the petitioners for a period of five years subject to the provisions of SEZ Act and SEZ Rules and particularly, Rule 53 of the said Rules which compels a unit to achieve positive Net Foreign Exchange (for short "NFE").

The petitioners continued to manufacture the plastic raw material and did follow the conditions imposed by the letter of approval in accordance with Act and Rules and always maintained the positive NFE.

3.5 The manufacturing units were permitted to broad band the additional products by permission letters in the year 2003, 2004, 2007 etc. However, the Government of India (Department of Commerce, SEZ Division) distinguished the additional products which were permitted for broad banding into related and unrelated products and accordingly, a communication dated 4.11.2010 was issued to all the Development Commissioners. After issuance of the said letter, the respondent No.3 suspended all proceedings of broad banding of additional products granted to the petitioner and directed the petitioner to follow all the conditions of the said letter which is treated as Instruction No.69.

3.6 The petitioners requested the authority to permit to do broad banding as far as related Projects are concerned which was accepted by the authority by a communication dated 25.10.2012. However, a specific instruction was granted that the unit has to fetch the positive NFE on completion of 5th year block.

3.7 The respondent No.1 through Ministry of Commerce and Industry, Development of Commerce (SEZ Division) came with Policy dated 17.9.2013 with regard to the units who were engaged in the business of manufacturing recycled plastic raw material from imported plastic scrap or waste established in SEZ Area. By the said Policy, all the units have been compelled to follow the conditions referred in the said Policy. As per certain terms and conditions, the Units have been restrained from carrying out any broad band activity with regard to unrelated products, all the manufactured goods are required to be physically exported out of country gradually from second year onwards and from fifth year onwards, 100% of goods manufactured in the SEZ is to be physically exported. Some penal actions have also been referred in the Policy for breach of any conditions.

3.8 Having found the practical incapability of the units to physically export the manufactured goods, made several representations to Union of India and brought to the notice that if the sale in DTA is not permitted, the units are likely

to be closed and there would be unemployment of 5,000 workers who are working in such 40 units. The petitioners did file their objections in detail, however, had executed a bond since the petitioners intended to continue the manufacturing work. Since the respondent No.1 did not withdraw or modify the conditions of the Policy, the present petitions have been filed.

4. Mr. Mihir Thakore, learned Senior counsel assisted by Mr. Salil M. Thakore, learned advocate appearing for the petitioners vehemently submitted that SEZ Act and SEZ Rules empowers the Government setting up a Unit in a SEZ zone on the terms and conditions which may be prescribed by Central Government and unit has to undertake to obey such prescribed terms and conditions. He would submit that the word "prescribed" is defined under Section 2 (w) of the SEZ Act which describes that the Central Government only can prescribe the Rules.

4.1 He would further submit that the Central Government has power to make Rules under Section 55 of the SEZ Act and as per Section 55 (2) (o), the unit is obliged to obey the conditions imposed under Section 15 (8)(b) of the Act by which the Central Government has to prescribe the terms and conditions. He would further submit that DTA is defined under Section 2 (i) of the Act and under Rule 47, a unit is permitted to sell the goods in DTA on payment of custom duties under Section 30 of the Act. He would submit that the purpose of giving benefits to the Units which are established in SEZ is to achieve maximum Foreign Exchange and, therefore, under Rule 53, a unit has to achieve positive NFE which the petitioners in each case are strictly following and getting positive NFE. Rule 53 (n) also makes it clear that the supply of the goods to DTA should be against payment in Foreign Exchange only and, therefore, the policy in question by condition is imposed to the units to physically export 100% manufactured goods is contrary to the provisions of the SEZ Act as well as SEZ Rules. He would submit that the SEZ Act and SEZ Rules themselves permit sale of the goods manufactured in SEZ in DTA subject to payment of custom duty and that too in foreign currency. Therefore, there was no reason for the respondent No.1 to issue the policy under challenge without amending the Act and Rules. By taking me through the provisions of Section 55 (3) of the Act, he would submit that even if the Central Government intends to amend the Rules, the same is required to be placed before the House of Parliament and on agreement by the Houses, the Rule can only be modified or amended which is not the case here. Instead of following the procedure prescribed under the Act and without modifying the Rules, the conditions have been imposed by the impugned Policy qua the units who are manufacturing recycled plastic raw material from the imported plastic scrap.

4.2 In support of his submissions, Mr. Thakore has relied upon a decision of the Hon'ble Supreme Court in the case of Captain Sube Singh and others v. Lt. Governor of Delhi and others, 2004 6 SCC 44 0. He would submit that when a Statute itself vests certain powers to be exercised in a particular manner and method, the authorities is bound to follow the statutory provisions and cannot

vary or add conditions which are contrary to the provisions of the concerned Act and Rules. He has also relied upon the decision in the case of CIT, Mumbai v. Anjum M. H. Ghaswala and others, 2002 1 SCC 633, Dhanajaya Reddy v. State of Karnataka, 2001 4 SCC 9, which are relied upon by the Hon'ble Supreme Court while deciding the case of Captain Sube Singh .

4.3 He would further submit that the object of establishing the units in SEZ is to fetch maximum foreign currency which is being followed by each of the petitioner unit by following Rule 53 i.e. getting positive NFE. He would submit that certain clauses of the impugned Policy do not find any support from the provisions of the SEZ Act or the SEZ Rules.

4.4 He would submit that when the then Government had published an advertisement way back in the year 2000 and attracted the units to continue the manufacturing activities in certain areas, the Government cannot impose such conditions which are not backed by any provisions of the concerned law and that too, without following mandatory provisions of law of getting nod from House of Parliament.

4.5 He would submit that the Development Commissioner of Kandla was aware about the practical difficulties of the manufacturing units and, therefore, informed the Government of India by communication on 2.9.2014 that there are all chances that the units may have to close down if the conditions referred in the Policy are made compulsory. He would submit that all the units have made representations in detail. However, when the letter of permission was granted in favour of the petitioners, all those conditions referred in the Policy have been imposed which would create closure of the units and would affect 5,000 employees working in different units.

4.6 He would further submit that the Policy is unreasonable and arbitrary since the Central Government is not going to lose any Foreign Exchange earnings. He would submit that the units manufacturing recycled plastic raw material from the imported plastic scrap have huge demand in India, especially in the agriculture sector and when the units are selling the goods in DTA and paying the custom duty as well as the transactions are being entered in foreign currency only, imposition of such conditions is an arbitrary one. The objectives of Section 5 of the Act are totally frustrated by imposing such condition and that too only to plastic unit manufacturers. He, therefore, would submit that the Policy be quashed and set aside and the respondents be directed to issue fresh Letter of Allotment in accordance with the SEZ Act and SEZ Rules.

4.7 Mr. Thakore also argued that imposing condition of not allowing broad banding of unrelated products is also contrary to provisions of SEZ Act and SEZ Rules. He would submit that if condition Nos.9 and 10 of the Policy are perused, the same cannot be maintained in view of the only mandatory provisions of Rule 53 of the SEZ Rules. The only intention of the statute makers was to get more foreign exchange revenue by maintaining positive NFE.

He would submit that when the unit established in SEZ is carrying on transaction in foreign currency and when it sells the product in DTA, he has to pay the custom duty provided under Section 30 of the SEZ Act.

4.8. By taking me through the meaning of "export" defined under Section 2 (m), he would submit that export includes supply of goods or providing services from one unit to another unit or developer in the same different Special Economic Zone, that means even if the goods produced in SEZ can be sold to another unit established in Special Economic Zone and, therefore, imposing condition No.10 i.e. asking a unit to fully export the goods is contrary to the meaning given in the statute and therefore also, said condition is required to be quashed and set aside. He would submit that when letters of approval were issued in favour of the units, the same conditions which are referred in the policy, have been imposed which are required to be quashed and set aside in view of the specific provisions made in SEZ Act and SEZ Rules.

4.9 He would further submit that the policy is arbitrary, unreasonable and violative of Article 14 of the Constitution of India on the ground that the condition that units are required to export out of the country a minimum percentage of their total turnover has not been imposed on all industries established in SEZ. For reasons that are not clear, the industry of plastic recycling units is being picked and discriminated amongst the units established in SEZ. If the said condition has not been imposed on all, but only a few, it is nothing but discrimination and a violation of Article 14. It is also not made clear that for what purpose and for whose benefit the Government has come out with such an unusual policy qua plastic manufacture units only. He would further submit that in India, there is a huge demand for plastic raw material. These plastic recycling units are supplying the recycled plastic raw material to small scale manufacturers within the country and meeting with the huge domestic demand for plastic raw material.

The units are thereby contributing in reducing the dependence on import of recycled plastic raw material from other countries and also reducing the foreign exchange outflow of the Government on procuring imported raw material. Further, the petitioner and the other units in the area produce raw material at a lower cost in view of which the Indian small scale manufacturers that buy plastic raw material from them are able to procure raw material at a lower cost than in case of purchase of imported raw material. Therefore, the supply of raw material manufactured by plastic recycling units in SEZs is in the interest of the public, the Indian consumers of plastic raw material and the country in general. The impugned policy directs that the plastic recycling unit must send their entire turnover out of the country and is unreasonable and against public interest. The impugned policy results in discouraging Indian manufacturers and encouraging foreign manufacturers as the demand for imported raw material will naturally go up if the Indian SEZ Units are not permitted to sell in India. The impugned policy results in a situation where the Indian small scale manufacturers will be made to

import raw material and pay a higher price for the same though the same can be purchased from Indian SEZs.

4.10. By taking me through the description with regard to cost and foreign exchange outflow with regard to plastic raw material, he would submit that the plastic raw material produced from the imported recycled plastic would be available to public at huge quantity at a cheaper rate and, therefore, the conditions imposed by the Central Government by issuing a Policy would create such a situation that the public in India shall get the finished goods at a higher price. He would further submit that condition Nos.16, 17, 18, 21, 22, 24 and 25 imposed under the letter of extension are illegal, beyond the powers of the authorities and contrary to the SEZ Act and SEZ Rules. The grounds raised above are applicable to the said conditions and are reiterated in connection with the conditions imposed under the letter of extension. That no terms and conditions can be imposed on units on the basis of a policy and the action of respondent No.3 of doing so is contrary to the SEZ Act and SEZ Rules. So far as condition No.17 is concerned, the said condition is also contrary to Section 16 of the SEZ Act considering that under Section 16 of the SEZ Act, the Approval Committee may cancel the letter of approval only if it has reason or cause to believe that the entrepreneur has persistently contravened any of the terms and obligations subject to which the letter of approval was granted and not otherwise. Condition No.18 is also contrary to Rule 54. Condition No.22 is contrary to the Act and Rules considering that the condition sought to be imposed is nowhere found in the Act or the Rules and the respondent No.3 has absolutely no power to impose the said condition. In fact, condition No.22 goes even beyond the policy which does not provide for any such condition. Condition No.24 is bad in law as it imposes on the units conditions provided under a policy which has no sanctity in law. Condition No.25 is contrary to the Act and the Rules in as much as it says that the authorized operations are restricted to the unit to carry out the business of recycling of plastic. Neither the SEZ Act nor the SEZ Rules put any such restriction. Broadbanding and diversification have always been permitted and are permissible. Condition No.25 also goes beyond the impugned policy in as much as the policy does not say that the authorized operations are restricted to the business of recycling of plastic. Condition No.25 is also in breach of the principles of promissory estoppel for the same reasons as are mentioned in the above ground on promissory estoppel and legitimate expectation. Respondent No.3 has no power to impose conditions not prescribed under the Act or the Rules. The contents of this paragraph are without prejudice to the submission that the letter of extension is bad in law to the extent the same is contrary to or goes beyond the Act, the Rules and Form G of the Rules and to the extent the same imposes conditions that are contrary to or go beyond the Act, the Rules and Form G of the Rules.

4.11. He, therefore, would submit that there is no satisfactory answer in the affidavit-in-reply filed by the respondent authorities about imposing such conditions and hence, the petitions be allowed.

5. On the other hand, Mr. P. Y. Divyeshvar, learned Central Government Standing Counsel appearing for the respondents would submit that the Government has to follow the guidelines referred in Section 5 of the SEZ Act. He would further submit that imposing certain conditions for the units established in SEZ would be subject to achieve certain guidelines referred therein like generating additional economic activity, permission of export of goods and services, permission of investment from domestic and foreign sources, creation of employment opportunities, development of infrastructure facility etc. 5.1 He would further submit that a Board of Approval has been constituted under Section 8 of the Act and Section 9 imposes duties, powers and functions of the Board and, therefore, the Board can perform such functions which may be assigned to it by the Central Government. He would submit that under Rule 18 (4) of the SEZ Rules, the Board of Approval is empowered to take a decision about the extension of letter of permission or approval (LOA). The conditions can be imposed upon the units. He would submit that the Board would have rejected the extension of letter of approval in the year 2013 i.e. subsequent to the Policy in question.

He would submit that the Board is empowered to reject the extension of LOA under Rule 18 (4) of the SEZ Rules. Therefore, the submission made on behalf of the petitioners that no such conditions should have been imposed have no bearing in the eyes of law. He would submit that there is no conflict between prescribing certain percentage of physical export including 100% export at the end of 5 year with the provisions of the SEZ Act and SEZ Rules. He would further submit that the plastic recycling units are not common SEZ Units since special provision has been made under Rule 18 (4) of the SEZ Rules. He would submit that under Rule 18 (4) of the SEZ Rules, a mandatory provision is made that no units for recycling of plastic scrap or waste shall be permitted to establish and, therefore, having considered the peculiar project by the petitioner units, the conditions have been imposed while issuing letter of approval which have been issued according to the Policy. He would submit that the petitioners in each case has agreed for following the conditions and have executed bond and, therefore, the petitioners cannot now challenge the LOA under the guise of challenging the Policy itself. He would submit that the reason for imposing such a condition is to promote exports of goods and services and, therefore, if such units are permitted to supply goods in domestic market and getting benefits having established the unit in SEZ market, the whole intention of developing certain areas would be frustrated.

5.2 He would submit that the Ministers and highest Officers from the concerned departments have considered various aspect and has issued the policy and, therefore, the Court would be at loath to interfere with such decision. By relying upon a decision in the case of Government of Andhra Pradesh and others v. Smt. P. Laxmidevi, 2008 2 GLH 167, he would submit that there is a question of interpretation of statute and particularly with regard to physical and economic statute, the scope of Courts would be limited. Therefore, the Court should not exercise its power under Article 226 of the Constitution of India in the present

case also.

5.3 He has also relied upon the decision in the case of P.T.R. Exports (Madras) Private Limited v. Union of India, 1996 AIR(SC) 3461 and submitted that it has been held by the Apex Court that the Court would not interfere with the change in policy by the Government. He, therefore, would submit that the petitions be dismissed.

6. Having heard learned advocates appearing for the respective parties, the question involved in the present petitions is with regard to the mandatory directions issued by the Department of Commerce, Government of India by its Policy dated 17.9.2013 with regard to the units established in SEZ carrying on recycling of plastic scrap or waste and incorporating the same while issuing LOA to each unit.

7. Before the enactment of the SEZ Act, 2005, import and export of goods and services were controlled by several Acts. The Government of India had also demarcated certain area as Export Processing Zone (EPZ). In the year 2000, the Ministry of Commerce and Industry, Government of India announced its first Special Economic Zones in India to boost the exports. By publishing a news item in details, Kandla, Santacruz (Mumbai), Kochi and Surat were converted from EPZ to SEZ from 1.11.2000. The public advertisement suggest that the intention of the Union of India to introduce or to convert EPZ to SEZ was to have the fullest benefit with regard to export potentials of the Units already established in EPZ or intended to establish new type of different manufacturing units in SEZ. It was declared that the Units in SEZ should be positive Net Foreign Exchange earner and was also permitted the domestic sale on full duty subject to import policy in force in the year 2000. It was also declared that unlike EPZ, no minimum export performance or Net Foreign Exchange earning prescribed percentage of exports would be necessary. Unlimited DTA sales on full duty was also permitted according to the advertisement.

8. This advertisement was announced to provide the unit holders an internationally competitive environment for exports. The object of the SEZ was to include making available goods and services free of taxes and duties supported by encouraged infrastructure for export production, expeditious and single window approval mechanism as well as package of incentives to attract foreign and domestic investments for permitting export led growth.

9. The Government introduced Special Economic Zone Bills, 2005 in order to give a long term and stable policy framework with minimum regulatory region. Thereafter, the SEZ Act came in force from 23.6.2005.

10. It is not in dispute that each of the petitioner units were set up in the year between 1995 to 1998 in Kandla area which was an Export Processing Zone when the Kandla area was declared as Special Economic Zone from 1.11.2000. Each petitioner continued its activity of exporting the plastic raw material which were manufactured from imported plastic scrap. By a Resolution dated 1.11.2000

itself, the Government of India declared that Kandla Free Trade Zone is converted to Special Economic Zone. It was also resolved that the units in SEZ shall be obliged to achieve positive NFE earnings and certain facilities shall be given to those units.

11. When the SEZ Act came into force, the petitioners were manufacturing the goods and, therefore, can be treated as existing unit as defined under Section 2 (I) of the SEZ Act. Since a mandatory provision was enacted in Rule 18 (4) of SEZ Rules that a proposal shall not be considered for setting up a new unit in SEZ for recycling of plastic scrap or waste, a meeting of Board of approvals was held on 8.8.2006 as per proviso to Rule 18 (4) (a) of the SEZ Rules. The issue with regard to the extension of letter of approval was discussed in the meeting headed by Special Secretary of Department of Commerce and decided to extend such approvals by recording following facts :-

"(iv) Extension of Letter of Proposals of the Plastic Units in the Kandla SEZ.

It was informed that SEZ Rules, 2006 provide that cases of extension of Plastic recycling units shall be considered by the BOA on a case to case basis. Accordingly, plastic units have been granted ad-hoc extensions thrice, once for six months and twice for three months, pending decision by the BOA.

Present extension is valid till 31.10.2006. It was further informed that since no industry can function on ad-hoc extensions a final view needs to be taken in this matter.

The Member CBEC opined that number of issues relating to non-adherence to environmental norms keep coming up and that moreover these units do not have any export potential and that therefore there is no reason for allowing continuation of these units under the SEZ scheme. It was however informed that the very same issues were considered by the Export Promotion Board in March 1998 under the Chairmanship of Cabinet Secretary and it had been decided that no new units will be allowed to be set up in EPZ and EOUs. DGFT also has in consultation with the Ministry of Chemicals and Petrochemicals and Ministry of Environment & Forests issued detailed guidelines governing these imports vide Public Notice 392(92-97) dated 01.01.1997 which is binding on SEZ units also. It was further informed that imports by these SEZ units are not eligible for "no routine examination" norm of the SEZ Policy and are examined as prescribed. It was also informed that the finished products of these units (primarily agglomerates and recycled granules) are freely importable and have to pay full Import Duty on clearances to DTA. The Board was further informed that prior to these units being set up in India, these goods were being imported in finished form from Dubai etc. The value addition, employment of over 5000 people and resultant gains are now to the Indian economy."

12. By enacting Section 5 of the SEZ Act, the Central Government was asked to follow certain guidelines while notifying Special Economic Zone. Section 5 of the SEZ Act reads as under :- "5. Guidelines for notifying Special Economic Zone :-

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 the following, namely :-

- (a) generation of additional economic activity;
- (b) promotion of exports of goods and services;
- (c) promotion of investment from domestic and foreign sources;
- (d) creation of employment opportunities;
- (e) development of infrastructure facilities; and
- (f) maintenance of sovereignty and integrity of India, the security of the State and friendly relations with foreign States."

13. From the above provision, the Central Government while notifying any area as Special Economic Zone etc. has to consider generation of additional economic activity, permission of export of goods and services referred herein above. It is true that the important feature of establishing SEZ is to promote the activities of export on goods and services but it does not prevent the units established in SEZ to sell such goods in domestic tariff area (DTA). The DTA is defined under Section 2 (i) of the SEZ Act which reads as under :- "2 (i) "Domestic Tariff Area" means the whole of India (including the territorial waters and continental shelf) but does not include the areas of the Special Economic Zones;"

14. The units which are established in Special Economic Zone, if remove the goods from SEZ to DTA, would be subject to conditions specified in Rules as per Section 30 of the SEZ Act. Section 30 of the SEZ Act reads as under :-

"30. Domestic clearance by Units :- Subject to the conditions specified in the rules made by the Central Government in this behalf :-

- (a) 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 (51 of 1975), where applicable, as leviable on such goods when imported; and
- (b) 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 such removal, and where such date is not ascertainable, on the date of payment of duty."

15. The Central Government is empowered to make Rules by notification for carrying out the provisions of this Act under Section 55 of the Act. In sub-Section (2) of Section 55, it is made clear that certain matters are required to be covered while framing the Rules. As far as present case is concerned, Sections 55 (2) (o) and 55 (2) (za) of the SEZ Act are relevant and read as under :- "55. Power to make Rules :-

(1) The Central Government may, by notification, make rules for carrying out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may, provide for all or any of the following matters, namely :-

(a) to (n)

(o) the terms and conditions for the Unit subject to which it shall undertake authorised operations under clause (b) of sub-section (8) of section 15 and the obligations and entitlements of the Unit;

(p) to (z)

(za) the conditions subject to which the Units shall be entitled to sell the goods manufactured in a Special Economic Zone to the Domestic Tariff Area under section 30;"

16. Section 15 (8) of the SEZ Act reads as under :- "15. Setting up of Unit -

(1) to (7)

(8) The Central Government may prescribe, -

(a) the requirements (including the period for which a Unit may be set up) subject to which the Approval Committee shall approve, modify or reject any proposal referred to in sub-section (3);

(b) the terms and conditions, subject to which the Unit shall undertake the authorized operations and its obligations and entitlements."

17. Therefore, several provisions have been made for removing the goods from SEZ to DTA subject to payment of duties under Section 30 of the Act. Chapter V of Economic Zone Rules deals with conditions subject to which goods can be removed from SEZ to DTA that means the goods manufacturing in SEZ can be removed in accordance with Rules 47 to 52 of Chapter V of the said Rules.

18. Chapter VI of the Rules which is an important Chapter, deals with Foreign Exchange earning requirements and monitoring thereof. In my opinion, by incorporating Rule 53, the intention of the legislating Act is followed since each unit is bound to achieve positive NFE to be calculated referred under the said Rule itself. Rule 53 A (n) of the SEZ Rules is reproduced herein below :- "53. Net Foreign Exchange Earnings :-

The Unit shall achieve Positive Net Foreign Exchange to be calculated cumulatively for a period of five years from the commencement of production according to the following formula, namely :-

Positive Net Foreign Exchange = $A - B > 0$ where :

A : is Free on Board value of exports, including exports to Nepal and Bhutan against freely convertible currency, by the Unit and the value of following

supplies of their products, namely :-

(a) to (m)

(n) supply of goods to Domestic Tariff Area against payment in foreign exchange from the Exchange Earners Foreign Currency account of the Domestic Tariff Area buyer or Free Foreign Exchange received from overseas;"

19. Section 55 of the SEZ Act empowers the Central Government to make Rules for carrying out the provisions of the Act. However, any rule made by the Central Government is required to be placed before each House of Parliament as provided under sub-Section (3) of Section 55. Section 55 (3) of the SEZ Act reads as under :- "(1) & (2)"

(3) Every rule made by the Central Government under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule."

20. Now, as per the relevant provisions discussed and reproduced herein above, the conditions imposed by the Authority while issuing the LOA to each petitioner are in consonance with the guidelines of 2013. The relevant conditions which are referred to herein above are not in consonance with the Rules since none of the Rules prohibit the unit established in SEZ to remove the goods in DTA. Under Section 55 (3) of the SEZ Act, no rules are amended and, therefore, when the petitioner units are following the rules, particularly, Rule 53 of the Rule and in accordance with Section 30 of the Act and paying the custom duty in foreign currency, there was no need to impose conditions as per the guidelines of 2013. It is not the case of the respondent that any of the petitioner unit has committed breach of any provisions of other Act or Rules and not earned net foreign exchange earnings and has not paid custom duty in foreign currency.

21. Therefore, in my opinion, the policy in question which imposes certain restrictions which are contrary to the Act and Rules would not sustain. I do not find any substance in the submissions of Mr. Divyeshvar that policy is issued for generation of additional economy since the Government is neither losing any foreign currency or any custom duty and particularly, when the units are following the provisions of the Act and Rules.

22. When Section 30 itself provides the payment of custom duty with regard to removal of goods manufactured in SEZ to Domestic Tariff Area and the conditions specified in the Rules, there is no reason for the Authority to issue a Policy with

regard to plastic manufacturers only and compelling them to remove the goods out of India.

23. It is true that when a Policy is laid down by the Government, the High Court would be at loath to interfere with the same. However, if mandatory provisions are enacted to frame Rules, and are not followed by the authority, as in the present case, the Court can quash and set aside such Policy. Therefore, in my opinion, the ratio laid down by the Hon"ble Supreme Court in the case of Captain Sube Singh and others v. Lt. Governor of Delhi and others, 2004 6 SCC 440, CIT, Mumbai v. Anjum M. H. Ghaswala and others, 2002 1 SCC 633, Dhanajaya Reddy v. State of Karnataka, 2001 4 SCC 9 .

24. In the result, the petitions are allowed. The policy on units in SEZs carrying on recycling of plastic scrap or waste dated 17.9.2013 (No. C.6/10/2009-SEZ) issued by respondent No.1 and conditions in the letter of extension (LOA) issued by respondent No.3 to each of the petitioner which are based on the impugned Policy and/or contrary to the provisions of The Special Economic Zones Act,2005 or The Special Economic Zones Rules, 2006 are hereby quashed and set aside. Rule is made absolute to the above extent. The parties to bear their own costs.

25. In view of disposal of main petitions, Civil Applications also stand disposed of.