

(2014) 11 GUJ CK 0017
In the Gujarat High Court

Case No : Special Civil Application No. 8869 of 2014

Roxul Rockwool Insulation India Pvt. Ltd.	APPELLANT
Vs	
Union of India	RESPONDENT

Date of Decision : 28-11-2014

Acts Referred:

Central Excise Tariff Act, 1985 — Section 3
Central Excises and Salt Act, 1944 — Section 3, 3(1), 5, 5A, 5A(1)
Customs Tariff Act, 1975 — Section 3, 3(1)
Special Economic Zones Act, 2005 — Section 2(i), 2(za), 26, 3, 30

Citation : (2015) 320 ELT 554 : (2015) 2 GLH 622 : (2015) 2 GLR 1383

Hon'ble Judges : V.M. Pancholi, J; Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : Kamal Trivedi, Sr. Adv., Hardik P. Modh and Vineet Nagla, Advocate for the Appellant; Devang Vyas, Assistant Solicitor General of India, Advocate for the Respondent

Judgement

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Akil Abdul Hamid Kureshi, J.—The petitioner has challenged an order dated 23rd January 2013 passed by the Specified Officer (SEZ) of Customs by which the said Officer rejected the petitioner's request for refund of the additional customs duty.

2. The brief facts are that the petitioner is engaged in the manufacture of stone-wool insulation products classified under Chapter 68 of the First Schedule to the Central Excise Tariff Act, 1975. The petitioner's manufacturing unit is situated at Dahej Special Economic Zone. The goods manufactured by the petitioner would be exported. However, subject to certain conditions, a portion of such goods are also allowed to be sold in the local market. These clearances by the Special Economic Zone ("SEZ" for short) unit to the Domestic Tariff Area ("DTA" for short) would be subject to certain conditions imposed by the Government. The question in the petition involves one of chargeability of additional customs duty or popularly referred to as Countervailing Duty ("CVD" for short) on such

clearances by the petitioner from its SEZ unit to a DTA. As per the petitioner, in view of the fact that the local manufacturers are not liable to pay any excise duty on manufacture of the said goods by way of exemption notification, no CVD can be collected from the petitioner. The SEZ authorities, however, held a different view. The petitioner, therefore, applied to the said authority for refund of such duty already collected, and for exemption from payment of such duty on the clearances made, where such duty was not so collected. On such application, the said authority passed the impugned order dated 23rd January 2013 holding that the petitioner is not exempt from payment of the CVD. He relied on Section 5A of the Central Excise Act, 1944 to argue that any exemption from payment of excise duty to a local manufacturer would not apply to a SEZ unit. Inter alia on such basis, the petitioner's application was dismissed. The petitioner, therefore, filed this petition and prayed for quashing of the said order. The petitioner has further prayed for a direction restraining the respondents from levying CVD on the goods cleared by the petitioner from its SEZ unit to DTA.

3. Learned Senior Counsel Shri Kamal Trivedi for the petitioner drew our attention to various statutory provisions, and argued that the petitioner being a SEZ unit, though would ordinarily have the liability of payment of CVD on its clearances to DTA, in view of the fact that local manufacturers are exempt from payment of excise duty, the petitioner cannot be saddled with such duty liability. He submitted that CVD is imposed to balance the excise duty burden of the local manufacturers, and when the local manufacturers have no such liability in view of the exemption notification, the SEZ unit cannot be saddled with the liability of excise duty component in terms of CVD.

4. Counsel further submitted that setting up of SEZ, the control of the units situated within such SEZs, and all related issues are now governed by the Special Economic Zones Act, 2005 ("the SEZ Act" for short). Corresponding amendments have been made in Section 3 of the Central Excise Act exempting SEZ units from payment of central excise duty. Merely because no amendment is made in Section 5 of the Central Excise Act, a liability which does not arise out of a charging provision cannot be fastened.

5. On the other hand, learned counsel Shri Devang Vyas for the Government opposed the petition contending that the Specified Officer has given the correct reasons. The petitioner is obliged to pay CVD on its DTA clearances. This is clearly provided in Section 30 of the SEZ Act. Section 5A of the Central Excise Act further amplifies this position.

6. The SEZ Act was enacted with a view to provide an internationally competent environment for exports and for promoting export led growth. It was noticed that there were several SEZs in existence. Some of them were setup by the Central Government, and some by private or joint sectors. These economic zones were being controlled through various notifications and circulars issued by the Ministry. It was felt that in order to give a long term stable policy framework with minimum regulatory regime, a single mechanism through a Central Act was

necessary. The SEZ Act was, therefore, enacted with the above objects in mind. The term "Domestic Tariff Area" was defined in Section 2(i) as 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 "Special Economic Zone" was defined in Section 2(z) as to mean an economic zone notified under the proviso to sub-section (4) of section 3 and sub-section (1) of section 4, including Free Trade and Warehousing Zone, and includes the existing Special Economic Zones. Chapter VI of the SEZ Act pertains to special fiscal provisions for SEZs. Section 26 contained in the said Chapter grants exemptions, drawbacks and concessions to every developer and entrepreneur, such as, exemption from payment of any customs duty, excise duty, etc. Section 30 pertains to domestic clearances by a SEZ unit and 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."

7. Section 51 of the SEZ Act provides that the provisions of the Act shall have 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 this Act. Sub-section (1) of Section 53 provides that a SEZ 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.

8. It can thus be seen that for giving a philip to the exports and to bring within a Central Legislation, all the activities related to existing SEZs, the SEZ Act was enacted. The SEZ Act envisages a deeming fiction where a SEZ area would be considered outside the customs area of the country. We may also notice that Section 30 of the SEZ Act permits under certain conditions DTA clearances to a SEZ unit. One of the conditions being the goods removed from a SEZ to a DTA would 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.

9. Section 3 of the Customs Tariff Act pertains to levy of additional duty equal to excise duty, sales tax, local taxes and other charges. Subsection (1) of Section 3, which is relevant for our purposes, reads as under:-

"(1) Any article which is imported into India shall, in addition, be liable to a duty

(hereafter in this section referred to as the additional duty) equal to the excise duty for the time being leviable on a like article if produced or manufactured in India and if such excise duty on a like article is leviable at any percentage of its value, the additional duty to which the imported article shall be so liable shall be calculated at that percentage of the value of the imported article:

Provided that in case of any alcoholic liquor for human consumption imported into India, the Central Government may, by notification in the Official Gazette, specify the rate of additional duty having regard to the excise duty for the time being leviable on a like alcoholic liquor produced or manufactured in different States or, if a like alcoholic liquor is not produced or manufactured in any State, then, having regard to the excise duty which would be leviable for the time being in different States on the class or description of alcoholic liquor to which such imported alcoholic liquor belongs.

Explanation.--In this sub-section, the expression "the excise duty for the time being leviable on a like article if produced or manufactured in India" means the excise duty for the time being in force which would be leviable on a like article if produced or manufactured in India or, if a like article is not so produced or manufactured, which would be leviable on the class or description of articles to which the imported article belongs, and where such duty is leviable at different rates, the highest duty."

10. It is not in dispute that by virtue of exemption Notification No. 3 of 2005-CE dated 24th February 2005, the product in question, namely, stone-wool insulation product was exempted from payment of whole of the excise duty payable under the Central Excise Act. This notification was replaced by Notification No. 12 of 2012-CE dated 17th March 2012, under which also the said total exemption continued.

11. In the erstwhile Central Excise Act, 1944, in Section 3 pertaining to levy and collection of duty, a proviso was added providing that the duties of excise, which shall be levied and collected on any excisable goods, which are produced or manufactured in a free trade zone or a special economic zone, and brought to any other place in India, shall be an amount equal to the aggregate of the duties of customs, which would be leviable under the Customs Act, 1962, or any other law for the time being in force, on like goods produced or manufactured outside India, if imported into India, and where the said duties of customs are chargeable by reference to their value, the value of such excisable goods shall, notwithstanding anything contained in any other provision of this Act, be determined in accordance with the provisions of the Customs Act, 1962 and the Customs Tariff Act, 1975.

12. Section 5A of the Central Excise Act pertains to the power of the Central Government to grant exemption of payment of excise duty. Sub-section (1) empowered the Central Government in public interest by issuance of a notification in Official Gazette to exempt generally either absolutely or subject to

such conditions from the whole or any part of the excise duty leviable on any excisable goods. Proviso to sub-section (1) of Section 5A, however, provided that unless specifically provided in such notification, no exemption therein shall apply to excisable goods, which are produced or manufactured, besides others, in a free trade zone or a special economic zone and brought to any other place in India.

13. In unamended form relevant portion of Section 3(1) and Section 5A(1) of Central Excise Act read as under:

"Section 3. Duties specified in First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 to be levied. - (1) There shall be levied and collected in such manner as may be prescribed,-

(a) a duty of excise to be called the Central Value Added Tax (CENVAT)] on all excisable goods which are produced or manufactured in India as, and at the rates, set forth in the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986);

(b) a special duty of excise, in addition to the duty of excise specified in clause (a) above, on excisable goods specified in the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) which are produced or manufactured in India, as, and at the rates, set forth in the said Second Schedule.

Provided that the duties of excise which shall be levied and collected on any excisable goods which are produced or manufactured,-

(i) in a free trade zone or a special economic zone and brought to any other place in India; or

(ii) by a hundred per cent export-oriented undertaking and brought to any other place in India, shall be an amount equal to the aggregate of the duties of customs which would be leviable under the Customs Act, 1962 (52 of 1962) or any other law for the time being in force, on like goods produced or manufactured outside India if imported into India, and where the said duties of customs are chargeable by reference to their value; the value of such excisable goods shall, notwithstanding anything contained in any other provision of this Act, be determined in accordance with the provisions of the Customs Act, 1962 (52 of 1962) and the Customs Tariff Act, 1975 (51 of 1975)."

Section 5A Power to grant exemption from duty of excise. - (1) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette exempt generally either absolutely or subject to such conditions (to be fulfilled before or after removal) as may be specified in the notification, excisable goods of any specified description from the whole or any part of the duty of excise leviable thereon:

Provided that, unless specifically provided in such notification, no exemption therein shall apply to excisable goods which are produced or manufactured--

(i) in a free trade zone or a special economic zone and brought to any other place in India; or

(ii) by a hundred per cent export-oriented undertaking and brought to any place in India."

14. These provisions contained in Central Excise Act were amended after enactment of the SEZ Act, and currently sub-section (1) of Section 3 of the Central Excise Act provides for levy of a duty of excise called Central Value Added Tax (CENVAT) on all excisable goods, which are produced or manufactured in India, excluding goods produced or manufactured in SEZs. Likewise clause (b) of Sub-section (1) of Section 3 provides for a special duty of excise in addition to above duty of excise specified in clause (a). The Second Schedule to the Customs Tariff Act also excludes those goods produced or manufactured in SEZs. The proviso to sub-section (1) is also amended, and it is now confined to collection of duty of excise in goods manufactured under free trade zone and brought to any other place in India. The reference to the goods manufactured in SEZ is omitted.

15. Section 5A continues in the same form unamended. Thus, giving power of exempting duty of excise on any class of goods, the proviso continues to state that such exemption would not apply to any goods produced or manufactured in free trade zone or SEZ and brought to any other place in India, unless specifically so provided.

16. In the present form relevant portion of Section 3(1) and Section 5A(1) read as under:

"Section 3. Duties specified in First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 to be levied. - (1) There shall be levied and collected in such manner as may be prescribed, -

(a) a duty of excise to be called the Central Value Added Tax (CENVAT)] on all excisable goods (excluding goods produced or manufactured in special economic zones) which are produced or manufactured in India as, and at the rates, set forth in the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986);

(b) a special duty of excise, in addition to the duty of excise specified in clause (a) above, on excisable goods (excluding goods produced or manufactured in special economic zones) specified in the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) which are produced or manufactured in India, as, and at the rates, set forth in the said Second Schedule.

Provided that the duties of excise which shall be levied and collected on any excisable goods which are produced or manufactured, -

(i) in a free trade zone and brought to any other place in India; or (ii) by a hundred per cent export-oriented undertaking and brought to any other place in India, shall be an amount equal to the aggregate of the duties of customs which would be leviable under the Customs Act, 1962 (52 of 1962) or any other law for

the time being in force, on like goods produced or manufactured outside India if imported into India, and where the said duties of customs are chargeable by reference to their value; the value of such excisable goods shall, notwithstanding anything contained in any other provision of this Act, be determined in accordance with the provisions of the Customs Act, 1962 (52 of 1962) and the Customs Tariff Act, 1975 (51 of 1975)."

Section 5A Power to grant exemption from duty of excise.-

(1) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette exempt generally either absolutely or subject to such conditions (to be fulfilled before or after removal) as may be specified in the notification, excisable goods of any specified description from the whole or any part of the duty of excise leviable thereon:

Provided that, unless specifically provided in such notification, no exemption therein shall apply to excisable goods which are produced or manufactured --

(i) in a free trade zone or a special economic zone and brought to any other place in India; or

(ii) by a hundred per cent export-oriented undertaking and brought to any place in India.

Explanation. -- In this proviso, "free trade zone", "special economic zone" and "hundred per cent export-oriented undertaking" shall have the same meanings as in Explanation 2 to sub-section (1) of section 3."

17. From the above statutory provisions, it can be seen that by virtue of Section 30 of the SEZ Act, a SEZ unit on its clearance of goods to any DTA invites duty of customs, including CVD where applicable as leviable on such goods when imported. Such DTA clearance by a SEZ unit would, thus, be treated as imports for computation of CVD. We may recall CVD is authorized under Section 3(1) of the Customs Tariff Act providing for a collection of additional duty on any article imported into India. A duty equal to the excise duty for the time being leviable on a like article, if produced or manufactured in India, and if such excise duty on a like article is leviable at any percentage of its value the additional duty, to which the imported article shall be so leviable, shall be calculated at that percentage of the value of the imported article. Explanation to sub-section (1) of Section 3 of the Customs Tariff Act explains the expression "the excise duty for the time being leviable on a like article if produced or manufactured in India" as to mean the excise duty for the time being in force, which would be leviable on a like article, if produced or manufactured in India, or if a like article is so produced or manufactured, which would be leviable on the class or description of articles to which the imported article belongs, and where such duty is leviable at different rates, the highest duty.

18. Section 30 of the SEZ Act only imposes a condition for a SEZ unit to clear the goods to a DTA. Such condition is payment of authorized duties including CVD as

provided in the Customs Tariff Act as applicable and leviable on such goods when imported. By reference, therefore, the charging Section 3(1) of the Customs Tariff Act and such CVD would be leviable as if the goods cleared by SEZ unit to the DTA are in the nature of imports. If, therefore, by virtue of an exemption notification the whole of the excise duty payable as prescribed in the Central Excise Tariff Act is exempt for the local manufacturers, no CVD would be payable under Section 3(1) of the Customs Tariff Act on import of such goods. Section 3(1) uses the expression "excise duty for the time being leviable on a like article if produced or manufactured in India". The explanation explains the expression "excise duty for the time being leviable on a like article if produced or manufactured in India" as to include the duty, which would be leviable on class or description of articles to which the imported article belongs, if such article is not produced or manufactured in India. However, the central concept remains the same, namely, the importer would have to pay CVD equivalent of the excise duty payable on a like article if produced or manufactured in India. In the present case, by virtue of the exemption notifications on a like article produced or manufactured in India there is no duty of excise payable or leviable is leviable. In other words, excise duty levied on such articles manufactured in India being nil, the CVD also, in terms of Section 3(1) of the Customs Tariff Act, would be nil.

19. In the case of Hyderabad Industries Ltd. and Another Vs. Union of India and Others, the Apex Court observed that even though the imports under Section 3 is not called a countervailing duty, there can be little doubt that its levy under Section 3 is with a view to levy additional duty on an imported article so as to counter-balance the excise duty leviable on the like article indigenously made. In other words, Section 3 of the Customs Tariff Act has been enacted to provide for a level playing field to the present or future manufacturers of the like articles in India. It was concluded that the levy of additional duty being with a view to provide for counter-balancing the excise duty leviable, the additional duty can be levied only if on a like article excise duty could be levied. It was observed that the observation in the case of Khandelwal Metal and Engineering Works and Another Vs. Union of India (UOI) and Others, suggesting that, even if no process of manufacture or production has taken place, the imported articles can as well be subjected to the levy of additional duty, does not appear to be correct.

20. In the case of Lucky Star International Vs. Union of India (UOI), , the petitioner had challenged a circular issued by the Government of India providing that reprocessing and handling done in Kandla Free Trade Zone or Export Processing Zone not being done in India, the benefits of exemption notifications would not be available. In such case also, the excisable goods produced or manufactured in India other than in Kandla Free Trade Zone or Export Processing Zone were exempted from payment of excise duty. The petitioners contended that they were not claiming exemption of payment of excise duty, but questioned the liability to pay countervailing duty under Section 3 of the Customs Tariff Act, in view of the fact that such goods manufactured in India were not liable to any excise duty collection. The Division Bench of this Court relying on a decision in

the case of Hyderabad Industries Ltd. (supra) upheld the challenge, and declared that the circular issued was not in accordance with law.

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21. The only question now remains is whether a continued mention of Special Economic Zone in the proviso to sub-section (1) of Section 5A of the Central Excise Act, 1944 would alter these conclusions. The answer has to be in the negative for multiple reasons. We have noticed that before the Special Economic Zones Act was enacted, there were Special Economic Zones governed under the notifications issued by the Government of India. At such time, Section 3 of the Central Excise Act, 1944, as it stood then, did not exclude the goods manufactured in Special Economic Zone from payment of duty. The proviso to Section 3 required such units to pay on goods manufactured or produced in Special Economic Zone and brought to any other place in India, the aggregate of the duties of customs, which could be leviable under the Customs Act or any other law for the time being in force on similar goods manufactured or produced outside India, if so imported. It was in connection with this requirement that proviso to sub-section (1) of Section 5A of the Central Excise Act, 1944, as it stood at that time, provided that any exemption by the Central Government, unless specifically so provided in such notification, shall not apply to excisable goods, which are produced or manufactured in a Special Economic Zone and brought to any other place in India.

22. However, with the framing of the Special Economic Zones Act, different existing SEZ units were brought within the fold of the Special Economic Zones under the provisions of sub-section (4) of section 3 and sub-section (1) of section 4 contained in the Special Economic Zones Act and even the new units would be governed by such statutory provisions. Matching amendments were made in the Central Excise Act, 1944. Section 3, for example, which contained clauses (a) and (b) both, now contain an exclusion clause for goods produced or manufactured in Special Economic Zones from payment of CENVAT. Section 5A, however, continued without corresponding change. In the proviso in clause (1), the reference to "or a Special Economic Zone" continued. It appears that the same was to be omitted from a date to be notified. Such notification has not been issued. Today, therefore, Section 5A of the Central Excise Act, 1944 continues to contain a reference to a Special Economic Zone in the proviso providing that any exemption granted by a notification under Section 5A would not apply to any goods produced or manufactured in Special Economic Zone and brought to any other place in India. This omission to omit the reference to Special Economic Zone from said proviso appears to be a legislative oversight.

23. This, however, would not alter the situation since in the charging Section 3 of the Central Excise Act, 1944 itself a specific exclusion is contained providing that the duty of CENVAT and the additional duty liability would be excluded on goods produced or manufactured in SEZs. Even the proviso to Section 3, which previously required the payment of the duties of excise on goods produced or

manufactured in Free Trade Zones or Special Economic Zones and brought to any other place in India, now has been amended, dropping reference to Special Economic Zone.

24. To summarise, before enactment of SEZ Act, by combined reading of Section 3(1) and Section 5A of the Central Excise Act, DTA clearance of SEZ units invited excise duty payable by local manufacturers on like goods when produced or manufactured in India. Any exemption to local manufacturer issued under Section 5A would not apply to such clearances of SEZ units to DTA, unless the notification itself provided so. After SEZ Act was enacted, this liability was done away with. Section 3(1) of the Central Excise Act was thus amended. On DTA clearance of SEZ unit, liability of countervailing duty under Section 30 of SEZ Act was imposed. This countervailing duty was equivalent to excise duty component to be paid by local manufacturer of like goods when produced or manufactured in India. Whether such liability would continue on SEZ units when local manufacturers were exempt has seen to be gathered from the language used in Section 30 of SEZ Act and not from proviso of sub-section (1) of Section 5A of Central Excise Act. Even otherwise, Section 51 of SEZ Act gives overriding effect to the provisions of the Act. Thus, the entire legislative scheme has undergone a change by introduction of SEZ Act and the changes made in the Central Excise Act in this regard. As discussed earlier, legislative intention emerging is that a SEZ unit will have to liability to pay countervailing duty, if the local manufacturer of like goods is exempt from payment of whole of such duty.

25. In the result, the petition is allowed. The impugned order dated 23rd January 2013 at Annexure B to the petition is quashed. The petition is disposed of accordingly.