

(2015) 07 BOM CK 0030

In the Bombay High Court

Case No : Writ Petition No. 5125 of 2014

Sai Wardha Power Company Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 14-07-2015

Acts Referred:

Special Economic Zones Act, 2005 — Section 11, 13, 2(c)

Citation : (2015) 6 MhLj 563 : (2015) 39 STR 952

Hon'ble Judges : V.A. Naik, J;P.B. Shingne, J

Bench : Division Bench

Advocate : S.P. Dharmadhikari, Senior Counsel and C.S. Dharmadhikari, Counsel, for the Appellant; Rohit Deo, ASGI and F.T. Mirza, Counsel, Advocates for the Respondent

Judgement

V.A. Naik, J—Rule. Rule made returnable forthwith. The petition is heard finally with the consent of the learned counsel for the parties. By this petition, the petitioner Sai Wardha Power Company Limited, Warora seeks a direction to the respondent No. 2 - Deputy Commissioner, Customs, Central Excise & Service Tax, Chandrapur to forthwith issue the authorization in Form A-2 to the petitioner. A declaration that the petitioner is entitled to avail the benefit of ab initio exemption from Service Tax in terms of Notification No. 12 of 2013 is also sought.

2. Few facts giving rise to the petition are stated thus -

"The petitioner is a power generating unit in the Special Economic Zone (hereinafter referred to as "SEZ" for the sake of brevity) in Warora. The unit of the petitioner is governed by the provisions of the Special Economic Zones Act, 2005 (hereinafter referred to as "the Act of 2005"). By a Notification issued by the Government of India, Ministry of Finance in the year 2009, all SEZ units were exempted from payment of Service Tax utilized for the authorized operations of the SEZ units. Under the Notification of the year 2009, an SEZ unit was required to pay the Service Tax initially and then seek its refund by claiming exemption. A notification was issued by the Government, bearing Notification No. 17 of 2011

providing for an option to the SEZ units not to pay the Service Tax ab initio. Certain conditions were required to be complied while availing ab initio exemption from payment of Service Tax. Under Clause 2 of Notification No. 12 of 2013, the SEZ unit was required to get the list of taxable services for the authorized operations of the SEZ unit, approved by the "Approval Committee", a statutory body constituted under the provisions of Section 13 of the Act of 2005. The SEZ unit was required to furnish a declaration in Form A-1, verified by the Specified Officer of the SEZ along with the list of specified services. As per Notification No. 12 of 2013, on the basis of the declaration made in Form A-1, an authorization was liable to be issued by the Jurisdictional Deputy Commissioner of Central Excise or Assistant Commissioner of Central Excise, as the case may be, to the SEZ unit in Form A-2. The SEZ unit was required to furnish to the Jurisdictional Superintendent of Central Excise a quarterly statement, in Form A-3 furnishing the details of specified services received by it without payment of Service Tax. The notification further enjoined a duty on the SEZ unit to furnish an undertaking, in Form A-1 that in case the specified services on which the exemption had been claimed, were not exclusively used for the authorized operations or were not found to have been used exclusively for authorized operations, it would pay to the Government an amount that is claimed by way of exemption from Service Tax along with interest on delayed payment of Service Tax."

3. It is not in dispute that the petitioner-unit desired to seek the benefit of Notification Nos. 17 of 2011 and 12 of 2013 and claimed ab initio exemption from payment of Service Tax. It is not in dispute that the petitioner-unit furnished a declaration, in Form A-1, verified by the Specified Officer of the SEZ to the respondent No. 2, the Jurisdictional Deputy Commissioner, Customs, Central Excise & Service Tax for issuance of Form A-2. It is the case of the petitioner-unit that in view of Notification No. 7 of 2014, the respondent No. 2 was enjoined with a duty to issue Form A-2 in favour of the petitioner-unit within a period of fifteen days from the issuance of Form A-1. Despite the approval of the list of the specified services rendered by the SEZ unit of the petitioner by the Approval Committee and despite the issuance of Form A-1 by the Specified Officer concerned, it is the case of the petitioner-unit that the respondent No. 2 refused to issue Form A-2 in favour of the petitioner thereby depriving the petitioner of the benefit of the Government Notifications of the years 2011 and 2013. The respondent No. 2 asked the petitioner-unit to supply some documents. According to the petitioner, since the respondent No. 2 was not entitled to make any further enquiry in the matter after the issuance of Form A-1 and was enjoined with a duty to issue Form A-2, the petitioner has approached this Court, seeking the aforesaid relief.

4. Shri Dharmadhikari, the learned Senior Counsel appearing for the petitioner-unit, submitted that the respondent No. 2 has illegally refused to issue Form A-2 to the petitioner-unit on the ground that the petitioner-unit was involved in the activity of manufacture and sale of electricity and as sale of electricity did not fall

within the list of specified services, the petitioner was not entitled to Form A-2. It is submitted that the appellate Authority, i.e. the Commissioner (Appeals) Central Excise and Customs, Nagpur has held in the appeals filed by the petitioner-unit that an unit would be required to sell the goods that have been produced and the observation of the subordinate authority that the sale of electricity is a separate business, is incorrect. It is stated that the decision of the appellate authority, dated 29-10-2013 was accepted by the respondent No. 2, inasmuch as the respondent No. 2 has observed in the communication issued to the petitioner-unit that production and sale of electricity constitute only one business. It is submitted that on a reading of Notification Nos. 17 of 2011 and 12 of 2013, it is clear that the respondent No. 2 is obliged to issue an authorization in Form A-2 on the basis of the declaration made by the petitioner in Form A-1. It is stated that it is apparent from the notifications and also from the provisions of the Act of 2005, that the respondent No. 2 is not empowered to make any further enquiry after the list of specified services is approved by the Approval Committee and a declaration in Form-A, verified by the Specified Officer of the SEZ is tendered to the respondent No. 2 for issuance of the authorization, in Form A-2. The learned Senior Counsel took this Court through the relevant provisions of the Act of 2005, specially, the provisions of Section 2(c), Section 11 and Section 13 and Rule 2(zd) of the Rules of 2006 to substantiate his submission. It is submitted that in view of the provisions of Rule 54, the performance of the petitioner-SEZ unit is required to be monitored only by the Approval Committee and the respondent No. 2 could not have refused authorization, in Form A-2 for the reasons mentioned in the impugned communication. It is submitted that the respondent No. 2 could not have refused to grant the authorization in Form A-2 merely because some claims of the petitioner for refund of Service Tax were rejected in the past and the petitioner had not achieved the Positive Net Foreign Exchange as per Rule 53 of the Rules of 2006. It is submitted that the reason for refusal of authorization in Form A-2 on the ground that M/s. Krishnapatnam Port Company Limited, that provides some services to the petitioner, had not paid the Service Tax is fallacious. In the circumstances stated herein above, the learned Senior Counsel sought for the relief.

5. Shri Mirza, the learned counsel for the respondent Nos. 2 and 3, supported the action of the respondent No. 2 and submitted that before granting authorization in favour of the petitioner in Form A-2, the respondent No. 2 wanted to ensure whether the authorization could be so granted. It is, however, admitted that the issue whether the manufacture and sale of electricity are different businesses stands answered in favour of the petitioner by the judgment of the appellate authority, dated 29-10-2013 in the appeals filed by the petitioner-unit. It is stated that some of the claims of the petitioner-unit for refund of the Service Tax had been rejected in the past and, therefore, the respondent No. 2 had directed the petitioner to produce certain documents to substantiate its claim for issuance of authorization under Form A-2. The learned counsel sought for the dismissal of

the writ petition.

6. On hearing the learned counsel for the parties and on a perusal of the concerned notifications, it appears that the respondent No. 2 was not justified in refusing authorization to the petitioner, in Form A-2 for availing ab initio exemption from payment of Service Tax. On a perusal of the notifications, it is clear that the petitioner had an option to either pay the Service Tax in advance or not to pay the same, subject to the conditions provided in the notifications. For seeking ab initio exemption, the petitioner-unit was required to secure the approval of the list of services, as are required for the authorized operations of the unit on which the unit desires to claim exemption from Service Tax from the "Approval Committee". The Approval Committee constituted under the provisions of Section 13 of the Act of 2005 and which comprises of responsible officers had granted approval to the list of services for which the petitioner desired to claim exemption from Service Tax. Admittedly, the petitioner-unit also furnished a declaration, in Form A-1 verified by the Specified Officer of the SEZ along with the list of specified services. Once, the SEZ unit secures the approval of the "Approval Committee" to the list of the services on which the SEZ unit wishes to claim exemption from Service Tax and furnishes a declaration, in Form A-1 verified by the Specified Officer of the SEZ, it is rightly submitted on behalf of the petitioner that the respondent No. 2 or for that matter, any Jurisdictional Deputy Commissioner of Central Excise or Assistant Commissioner of Central Excise is enjoined with a duty to issue the authorization, in Form A-2. It is clear from Notification No. 12 of 2013, under which the petitioner-unit has exercised an option not to pay the Service Tax ab initio, that the respondent No. 2 was obliged to issue the authorization, in Form A-2 to the petitioner-unit in the circumstances of the case. Mere issuance of Form A-2 by the respondent No. 2 would not absolve the petitioner-unit of its liability to pay the Service Tax and cesses along with interest on delayed payment, if it is subsequently found that the petitioner-unit has not used the services exclusively for the authorized operations as per the undertaking, in Form A-1. In terms of Notification No. 12 of 2013, the petitioner-unit is enjoined with a duty to submit to the Superintendent of Central Excise, a quarterly statement, in Form A-3, furnishing the details of specified services received by it without payment of Service Tax. If that is so, the respondent No. 2 could not have refused the authorization to the petitioner-unit in Form A-2 on the ground that some of the claims made by the petitioner for refund had been rejected in the past. Ample safeguards are provided by Notification No. 12 of 2013 for recovery of sales tax and cesses along with interest on delayed payment if it is found that the specified services on which the exemption has been claimed, have not been used exclusively for authorized operations. We find that the respondent No. 2 was not justified in refusing the authorization in Form A-2 to the petitioner-unit for the reasons recorded in the impugned communication. There is nothing in Notification No. 12 of 2013 that prohibits an SEZ unit from availing the option of not paying the Service Tax ab initio, if the Positive Net Foreign Exchange is not achieved. At least, the

respondent No. 2 has not pointed out any material in that regard. We do not find any propriety in the action on the part of the respondent No. 2 in refusing the authorization to the petitioner-unit in Form A-2 merely because M/s. Krishnapatnam Port Company Limited had failed to pay the Service Tax in respect of some services rendered to the petitioner-unit in the past. We find on a perusal of the documents annexed to the petition and the communications exchanged between the parties that the respondent No. 2 has illegally denied the benefit of Notification No. 12 of 2013 to the petitioner-unit. Hence, for the reasons aforesaid, the writ petition is allowed. The impugned communication is quashed and set aside. Rule is made absolute in terms of prayer Clauses (i) and (ii). In the circumstances of the case, no order as to costs.