

(2015) 09 GUJ CK 0005
In the Gujarat High Court
Case No : Tax Appeal No. 614 of 2015

State of Gujarat		APPELLANT
	Vs	
Shandong Tiejun Electric Power Engineering Company Ltd.		RESPONDENT

Date of Decision : 11-09-2015

Acts Referred:

Gujarat Value Added Tax Act, 2003 — Section 11(1), 2(37), 5A, 78, 80
Special Economic Zones Act, 2005 — Section 21(1)

Citation : (2016) 54 GST 194 : (2016) 88 VST 83

Hon'ble Judges : Harsha Devani and Abdullah Gulamahmed Uraizee, JJ.

Bench : Division Bench

Advocate : Maithili Mehta, Assistant Government Pleader, for the Appellant;
Uchit N. Sheth, Advocate, for the Respondent

Judgement

Harsha Devani, J.—The appellant State of Gujarat in this appeal under section 78 of the Gujarat Value Added Tax Act, 2003 (hereinafter referred to as "the Act") has challenged the order dated 19.2.2015 passed by the Gujarat Value Added Tax Tribunal, Ahmedabad (hereinafter referred to as "the Tribunal") in Second Appeal No. 358 of 2014 by proposing the following two questions stated to be substantial questions of law:--

"(1) Whether the Hon"ble Tribunal in the facts and circumstances has erred in law and in facts in holding that the dealer is entitled to claim exemption under section 5A despite of failure to obtain endorsement of custom authority on the bill as required by Rule 42(2A)?

(2) Whether the Hon"ble Tribunal in the facts and circumstances has erred in deleting levy of interest and penalty?"

2. The respondent assessee is engaged in the business of execution of construction contracts. The assessee entered into a contract with Adani Power Limited for design, engineering, erection, fabrication, testing, commissioning and construction of power project in the Special Economic Zone (hereinafter referred

to as "the SEZ") as well as for construction management service. The assessee was to execute a part of the contract on its own, while a part of it was to be executed through sub-contractors. The assessee filed an application under section 80 of the Act for determination on the question as to whether any tax is payable by it on the sale of goods in the course of execution of works contract to Adani Power Limited in the SEZ. The determining authority held that the assessee was not liable to pay tax on the sale of goods in the SEZ to Adani Power Limited in view of section 5A of the Act which provides for exemption of sale of goods to developer, co-developer or unit of SEZ. The determining authority, however, observed that there should be an endorsement of the customs authority to prove that the sale was made to the developer or co-developer of SEZ. The assessee, accordingly, claimed exemption from payment of tax on the sale of goods in the course of execution of works contract to Adani Power Limited in the SEZ. The Assistant Commissioner of Commercial Tax for the year 2008-09 denied exemption under section 5A of the Act on sale of goods to Adani Power Limited and demanded tax with interest and penalty under the Act. The assessee went in appeal to the Deputy Commissioner of Commercial Tax (hereinafter referred to as "the first appellate authority", before whom it was submitted that the goods were sold to Adani Power Limited which is a co-developer and, therefore, the assessee was entitled to exemption as zero rated sale under section 5A of the Act. It was brought to the notice of the first appellate authority that the purchase bills were endorsed by the customs/SEZ authorities before their entry into the SEZ for use in execution of the works contract. The first appellate authority, however, dismissed the appeal on the ground that the running bills which were issued by the assessee to Adani Power Limited did not bear the endorsement of the customs/SEZ authority. For this purpose, the first appellate authority placed reliance upon rule 42(2A) of Gujarat Value Added Tax Rules, 2006 (hereinafter referred to as "the rules) and accordingly, confirmed the levy of tax on the sales made to Adani Power Limited as well as the interest and penalty imposed by the assessment order. The assessee carried the matter in further appeal before the Tribunal, which, by the impugned order, allowed the appeal by holding that while rule 42(2A) of the rules prescribe a procedure to the effect that if the tax invoice is endorsed by the Customs/SEZ authority, then the sale will be treated as a zero rated sale under section 5A of the Act. The Tribunal held that however, rule 42(2A) of the rules is simply a procedural rule and does not lay down any condition precedent that only on fulfillment of such condition, the sale has to be treated as zero rated sale. The Tribunal accordingly held that rule 42(2A) of the rules to be directory in nature, non compliance of which would not deprive the assessee of the right to claim zero rated sale under section 5A of the Act. The Tribunal further held that section 21(1) of the SEZ Act grants exemption from payment of tax on sale or purchase of goods in the SEZ and since tax was not leviable on the sales in question, there was no question of charging interest or levying penalty.

3. Ms. Maithili Mehta, learned Assistant Government Pleader assailed the

impugned order by submitting that there is a basic flaw in the impugned judgment of the Tribunal, inasmuch as, the Tribunal has failed to appreciate the provisions of sub-rule (2A) of rule 42 of the rules in proper perspective. It was submitted that sub-rule (2A) of rule 42, specifically requires that the copy of the bill should be endorsed by the customs authority for the assessee to be entitled to exemption of tax under section 5A of the Act. It was submitted that in the facts of the present case, the running bills which were submitted by the assessee were not endorsed by the customs/SEZ authority and that it was the purchase bills which had been endorsed by the concerned authority. Therefore, in view of the provisions of rule 42(2A) of the rules, the respondent assessee was required to furnish duplicate of the invoice bill endorsed by the customs authority for the purpose of obtaining exemption under section 5A of the Act. It was accordingly submitted that the appeal deserves to be admitted on the questions as proposed or as may be formulated by this court.

4. On the other hand, Mr. Uchit Sheth, learned advocate appearing on behalf of the respondent assessee supported the impugned order passed by the Tribunal by submitting that on both counts, the impugned order passed by the Tribunal is just, legal and proper. It was submitted that the assessee is engaged in the execution of works contracts and that having regard to the nature of the contract in question, it was not possible to obtain endorsement of the customs authority on the running bills submitted to Adani Power Limited. It was submitted that the Tribunal, in the facts and circumstances of the case, has rightly construed the provisions of sub-rule (2A) of rule 42 of the rules to be directory in nature. According to the learned advocate, even if it were to be accepted that there was non-compliance of sub-rule (2A) of rule 42 of the rules, in the light of the provisions of section 21 of the Gujarat SEZ Act, 2004, which exempts all sales and transactions within the processing area of the zone or in the demarcated area or between the units in the processing area and the demarcated area, from all taxes, cess, duties, fees or any other levies under any State law to the extent specified therein, even otherwise, such transactions were not amenable to tax. The attention of the court was invited to the decision of this court in the case of Torrent Energy Limited Vs. State of Gujarat, wherein the court has held that by virtue of the non-obstante clause contained in section 22 of the 2004 Act, such provision has effect notwithstanding anything contained in any other law for the time being in force. The expression "for the time being in force" would include even legislations made at a later point of time and such expression would be akin to the law for the time being in force. The non-obstante clause contained in section 22 of the 2004 Act, thus, would give overriding effect to the provisions of the State Acts, those not only existing, but made later on. The court, accordingly, held that the demand raised by the respondent authorities for payment of purchase tax under section 9(5) of the Act on zero rated goods purchased by the petitioners and consumed in their SEZ units to be invalid and impermissible. The learned advocate submitted that the Tribunal has rightly applied the above decision to the facts of the present case while holding that

even otherwise the sale transaction was exempted from the provisions of the Gujarat Value Added Tax Act.

5. From the facts and contentions noted hereinabove, it is apparent that the respondent assessee was executing a works contract entered into with Adani Power Limited in SEZ area. Pursuant to the application under section 80 of the Act made by the assessee, the determining authority had held that the assessee was not liable to pay tax on the sale of goods in the SEZ to Adani Power Limited by virtue of section 5A of the Value Added Tax Act, which provides for zero rated sale for the purpose of the Act and tax credit on the purchase related to sale of goods to the Developer, Co-developer or unit of Special Economic Zone as defined in the Gujarat Special Economic Zone Act, 2004. The determining authority, however, observed that the deemed sale of goods is considered to be sale in the execution of a works contract as per the definition of sale under the VAT Act and for the purpose of proving that such sale has been made to the Developers/Co-developer, endorsement of the customs authority is necessary.

6. In the present case, having regard to the nature of the contract between the petitioner and the Adani Power Limited, which is in the nature of a works contract, when construction materials are purchased by the assessee, they are purchased for sale in the course of execution of works contract, which is to take place at a later point of time on the principle of accretion. Therefore, at the time of entry of goods into the SEZ area, there is no sale to the SEZ unit or to the developer, but the sale takes place at a later point of time. In view thereof, the assessee with a view to ensure compliance with the provisions of the SEZ law as well as requirement of endorsement of bills with a view to claim exemption from tax as zero rated sale, obtained the endorsement of the concerned authority on the purchase bills for goods which entered the SEZ area. Such goods were used in the execution of the works contract, which is not even disputed by the appellant. The assessee raised running bill to Adani Power Limited on achievement of milestone as stipulated in the works contract. Since the bills were raised after the goods had entered the SEZ area and after they had been used in the execution of the works contract, endorsement of the customs authority/SEZ authority on such running bills was not possible. However, the State authorities have adopted an adamant and hyper-technical approach in insisting upon endorsement of the customs authority on the invoices itself. The appellate authority has failed to appreciate the fact that it is not possible to abide by sub-rule (2A) of rule 42 of the rules having regard to the nature of the contract which is a works contract wherein the goods which are sold to the buyer, are used in the execution of the works contract and it is only after execution that the invoices are raised. This court is, therefore, in agreement with the view adopted by the Tribunal that rule 42(2A) of the rules cannot be held to be mandatory in nature and that the endorsement on the purchase bills obtained by the respondent assessee is sufficient compliance with the provisions of sub-rule (2A) of rule 42 of the rules.

7. Moreover, on the second count also, it cannot be said that there is any infirmity in the impugned order passed by the Tribunal whereby it has merely followed the decision of the jurisdictional High Court in the case of Torrent Energy Limited v. State of Gujarat (supra) wherein it is held thus:

"It can, thus, be seen that after April 1, 2008, the VAT Act has made provisions for collection of purchase tax even from units located in SEZ areas in relation to "zero rated sale". The legislative scheme appears to be that the sales which fall under the "zero rated sales" would invite no sales tax to be borne by the seller, but the purchaser would have to pay the purchase tax and, in turn, would be entitled to take tax credit as provided under section 2(37) and section 11(1) of the VAT Act. Whatever be the intention, in our opinion, without there being any clear provision giving such statutory provisions primacy over section 21 of the SEZ Act, no such tax can be levied. As noted above, in a fiscal statute, there is no room for intendment. If the statute validly permits the State to levy tax, the same must be allowed to be collected, no matter how harsh the consequences may be. Conversely, if in the plain terms the statute does not permit collection of tax, the same cannot be authorised by falling back upon any legislative intent. Section 21 of the SEZ Act in clear terms exempts all State taxes on sale or purchase of goods, other than those specified in Schedule III to the Act, luxury tax, entertainment tax payable on sales and other transactions within the areas specified in sub-section (1) of section 21 of the Act. By virtue of a non obstante clause contained in section 22 of the SEZ Act, such provision would have effect notwithstanding anything contained in any other law from the time being in force."

8. In the light of the exposition of law contained in the above decision, in view of the provisions of section 21 of the Gujarat Special Economic Zone Act, the assessee is even otherwise entitled to exemption of tax on sale or purchase of goods within the SEZ area. Under the circumstances, it cannot be said that the impugned order passed by the Tribunal suffers from any legal infirmity so as to give rise to any question of law, much less, a substantial question of law as proposed or otherwise. The appeal, therefore, fails and is, accordingly summarily dismissed.