IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 11876 of 2014
With
SPECIAL CIVIL APPLICATION NO. 11881 of 2014
With
SPECIAL CIVIL APPLICATION NO. 11884 of 2014
With
SPECIAL CIVIL APPLICATION NO. 12652 of 2014
TO
SPECIAL CIVIL APPLICATION NO. 12654 of 2014
With
SPECIAL CIVIL APPLICATION NO. 13931 of 2014
With
SPECIAL CIVIL APPLICATION NO. 13932 of 2014
With
SPECIAL CIVIL APPLICATION NO. 14214 of 2014
With
SPECIAL CIVIL APPLICATION NO. 15064 of 2014
TO
SPECIAL CIVIL APPLICATION NO. 15066 of 2014

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE AKIL KURESHI

and
HONOURABLE MR.JUSTICE VIPUL M. PANCHOLI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as

to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MESSRS ANITA EXPORTS & 1....Petitioner(s)

Versus

UNION OF INDIA & 2....Respondent(s)

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Appearance:

MR PARESH M DAVE, ADVOCATE for the Petitioner(s) No. 1 - 2

MR DEVANG VYAS, ADVOCATE for the Respondent(s) No. 3

MR RJ OZA, ADVOCATE for the Respondent(s) No. 1 - 2

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CORAM: **HONOURABLE MR.JUSTICE AKIL KURESHI**
and
HONOURABLE MR.JUSTICE VIPUL M. PANCHOLI

Date : 20/11/2014

ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)

1. Short question which cannot wait indefinitely arises in this group of petitions. Though facts are slightly different in each case, the central question is as to which authority would be competent to entertain and dispose of the refund claims of units situated within the Special Economic Zones which claims arise out of over payments of customs duty, redemption fine or penalties under the Customs Act, 1962. As the facts would emerge, the respondents have brought about a situation where presently no authority is allowed to accept such refund claims. Neither the Commissioner(Customs) or his subordinate nor the authorities under the Special Economic Zones Act ("SEZ

Act" for short) are taking any responsibility for processing such refund claims of the SEZ units.

2. As a test case, we may record the facts arising in Special Civil Application No.11876/2014. M/s. Anita Exports is a partnership firm, petitioner no.1 is a SEZ unit located in Kandla SEZ. The unit imported certain raw materials at Kandla. The goods were declared as used garments. The Commissioner of Customs, Kandla, however, disputed the valuation as well as the declaration of the goods made by the petitioners. He was prima facie of the opinion that the valuation of the imported goods declared by the petitioners was undervalued and further that the consignment did not contain used and old garments. A show cause notice dated 1.3.2012 therefore, came to be issued by the Commissioner(Customs) on the premise that value of goods was not Rs.70,64,917/- as declared but actually was Rs.3,18,42,650/- and further that the imported consignment was not of worn clothes but clothes and other mixed goods. On such basis, he called upon the petitioners to show cause why :

"(a) the declared value of Rs.70,64,917/- for the goods imported in 25 containers and detailed in the annexure should not be rejected under Rule 12 and the value should not be re-determined in terms of the Custom Valuation Rules, 2007.

(b) the total assessable value of goods (595.713MT) of Worn clothing imported in 25 containers corresponding to 25 Bes should not be re-determined as Rs.318,42,650/- (Rupees Three Crores Eighteen Lacs Forty Two Thousand and Six Hundred Fifty Only).

(c) the goods having a re-determined value of Rs.318,42,650/- should not be confiscated under section 111(m) and section 111(d) of the Customs Act 1962.

(d) why penalty should not be imposed on the importer M/s. Anita Exports under section 112(a) of the Customs Act, 1962.

(e) why penalty should not be imposed on Shri Juned Yakub Nathani, Partner of M/s. Anita Exports under section 112(a) of the Customs Act, 1962."

3. After considering the reply by the petitioners, the Commissioner of Customs passed his order-in-original dated 17.10.2012. In such order he confirmed that there was mis-declaration of the valuation of goods. The correct value was redetermined at Rs.3,18,42,650/-. He also held that the imported consignment was clothes and other mixed goods which were mis-declared as old and used clothes. On such basis, he ordered confiscation of goods, but offered redemption of fine of Rs.30 lakhs. He imposed a penalty of Rs.10 lakhs on the firm under section 112(a) of the Customs Act, 1962. He also imposed a personal penalty of Rs.2,50,000/- under the said provision. The operative portion of this order reads as under :

"(i) The declared value of Rs.70,64,917/- for the 25 containers is hereby rejected under Rule 12 and the value is re-determined in terms of the Customs Valuation Rules, 2007.

(ii) The total assessable value of goods (595.713 Mts) of Worn clothing imported in 25 containers corresponding to 25BEs is re-determined as 3,18,42,650/-(Rupees Three

Crores Eighteen Lacs Forty Two Thousand and Six Hundred Fifty Only) in terms of the Rule 9 of Customs Valuation Rules, 2007.

(iii) I order confiscation of the imported 'clothes and other mixed goods' declared as 'Old and Used clothes' valued at Rs.70,64,917/-(Rupees Seventy Lakhs Sixty Four Thousand & nine hundred seventeen only) under section 111(d) and (m0 of the Custom Act, 1962. I give an option to the importer to redeem the goods on payment of fine of Rs.30,00,000/-(Rupees Thirty Lakhs only) under section 125(1) of the Customs Act, 1962.

(iv) I impose a penalty of Rs.10,00,000/-(Rupees Ten Lakhs only) under section 112(a) of the Custom Act, 1962 on M/s. Anita Exports.

(v) I also propose a penalty of Rs.2,50,000/-(Rupees Two lakhs fifty thousand only) under section 112(a) of the Customs Act, 1962 on Shri Juned Yakub Nathani, Partner of M/s. Anita Exports."

4. Since during the adjudication of the show cause notice, the petitioners had deposit an ad-hoc amount of Rs.25 lakhs with the Customs authority, the Commissioner of Customs passed addendum to the order-in-original appropriating such amount already deposited by the petitioners.

5. The petitioners challenged such order of the Commissioner(Customs) before the Customs Excise & Service Tax Appellate Tribunal ("the Tribunal" for short). The Tribunal allowed the appeal of the petitioners in part. Insofar as the goods which were in conformity with the letter of authority, the Tribunal was of the opinion that the Commissioner(Customs) did not have the power to

adjudicate the issue concerning confiscation of such goods. To such extent, the order of the Commissioner was set aside. However, with respect to the goods which were mis-declared or were not declared which included items like leather bags, purses, jackets and carpets, the Tribunal upheld the power and authority of the Commissioner and also his order confiscating the same. The Tribunal ordered part release of the detained goods.

6. Such order of the Tribunal was challenged by the department before the High Court. The High Court admitted the appeal. In Civil Application for stay on 23.1.2014, the Court passed the following order :

"*Inter alia*, on the basis of such observation and other material on record, the Tribunal was pleased to allow the appeals of the importers. Having heard learned counsel for the parties, observations and declaration of law made by the Tribunal in the above noted portion is stayed. It is, however, clarified that there is no stay against the final direction of the Tribunal reversing the judgment of the Commissioner of Customs, Kandla. Resultantly, the respondent would get the benefit of release of goods as per the final order of the Tribunal. *Nevertheless*, the declaration of legal position propounded by the Tribunal in the impugned order and noted above shall stand stayed."

7. Since the order of the Commissioner of Customs was substantially reversed by the Tribunal and operative portion of the order of the Tribunal was not stayed by the High Court, the petitioners moved an application for refund of the said sum of Rs.25 lakhs appropriated by the Commissioner of Customs towards the redemption fine and the penalties. In such application dated 7.2.2014, the

petitioners requested as under :

"During the pendency of this controversy, we have deposited a total sum of Rs. 25,00,000/- and therefore, this sum of Rs.25,00,000/- may also be returned/refunded to us because there is no confirmed liability against us in this case. The amount deposited by us to show our bona fide during inquiry, investigation and adjudication could no longer be retained by the Department; and therefore, the amount so deposited by us may also be released/refunded forthwith and oblige."

8. Initially, the office of the Commissioner (Customs) asked for further documents and details from the petitioners which were duly supplied. However, ultimately on 23.7.2014, the Deputy Commissioner(Refund), Customs, Kandla, conveyed to the petitioners that under a communication dated 1.11.2012 issued by the Additional Director, Director General of Export Promotion (Ministry of Finance), New Delhi all the refund applications are required to be returned to the applicants whose units fall under the SEZ. The petitioners were requested therefore, to approach the Department of Commerce for refund. Along with this communication, a copy of said letter dated 1.11.2012 was also annexed. It would be necessary to record the contents of the said letter which reads as under :

"Kindly refer to DGEP letter F.No.DGEP/SEZ/25/2011 dated 03.05.2010 on the above subject requesting for view on issue regarding proper officer for sanction of refund of Customs Duties paid on clearances made from SEZ. The reports received from the Chief Commissioner indicate that in some zones refund claims relating to excess Customs

Duty paid by SEZ entities have been received. Such refund claims are reportedly not being disposed of by the CBEC field formations on the ground that as per Section 27 of the Customs Act, 1962 all refund of customs duties are to be dealt with by the Deputy/Asst. Commissioner of Customs in whose jurisdiction the goods are imported and that the refund claims that arise out of such Bills of Entry should be submitted to the Specified Officer of the SEZ not to any officer as defined in the SEZ Rules. The Board's Circular No.53/2005-Customs dated 29.12.2005 on administrative control was issued before the SEZ Rules came into force in 2006. As per section 51 of the SEZ Act(Act to have overriding effect) the provisions of this 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. On the other hand, the SEZ officers are not accepting/disposing off refund claims due to lack of any provision in the SEZ laws to deal with refund claims.

2. **In view of the above, the matter has been taken up with Department of Commerce for incorporation of provisions relating to refunds as well as appeal and review in the SEZ law to ensure disposal of cases related to these issues. In the light of the same it is requested that in case any such refund application/request is received or is pending, these may be returned to the concerned parties and they may be suitably advised to approach the Department of Commerce as the issue has already been taken up with DOC by DOR, for speedy settlement of their cases. Similarly, if any appeal/request for accepting appeal is received or is pending, the parties may be similarly advised to approach DOC for settlement of their case."**

9. Under the advise from the office of the

Commissioner(Customs) Kandla, the petitioners therefore, approached the Deputy Collector of Customs, Kandla SEZ, under a communication dated 11.8.2014 and prayed for refund of the said amount of Rs.25,00,000/-. In response to this letter, the said Deputy Commissioner, Kandla SEZ replied to the petitioners under his letter dated 12.8.2014. He conveyed to the petitioners that in absence of explicit provisions in SEZ Act, he was unable to process the refund claim of the petitioner unless statutory provisions are incorporated in SEZ Act and the Rules made thereunder. He stated as under :

"In this context, it is to inform you that as on date there is no provision in the SEZ Act & Rules or Regulations made thereunder for refund of excess Customs Duty/Fine/penalty/Security Deposit etc. paid by the SEZ Units. Reference in this regard has been made by this office to the Ministry of Commerce from time to time requesting to make explicit provisions in the SEZ Act and Rules made thereunder for refund of excess Customs Duty/ Fine/Penalty/Security Deposit etc. The issue is under consideration at inter-ministerial level to devise a proper framework for refund, review and appeal in respect of the same. Therefore, at present this office has no jurisdiction over processing and sanction of refund claims.

In view of the above, your refund cannot be processes by this office until the incorporation of statutory provision in the SEZ Act or Rules made thereunder that authorizes Deputy Commissioner of Customs/Specified Officer or any such officer of this office to sanction the refund of excess Customs Duty/Fine/Penalty/Security Deposit etc till that time you may approach to the jurisdictional Customs Authority(Refund) to file your refund claim. Accordingly, your aforesaid original

application for refund claim along with all enclosures are returned herewith."

10. At that stage, the petitioners filed this petition and prayed for a declaration that the Customs authorities functioning under the Customs Act, 1962, would be the proper authority to decide the refund claim of the petitioners. Further prayer was made for a direction to the respondents to refund the petitioners sum of Rs.25 lakhs with interest.

11. In response to the notice issued by this Court, the respondents have appeared and filed replies continuing the confusion and impasse created by the Ministry of Commerce. Respondent no.2, the Deputy Commissioner of Customs, Kandla, in his affidavit dated 1.10.2014 has taken a stand that in view of communication dated 1.11.2012 from the Ministry of Finance, the Commissioner of Customs, Kandla or his subordinate would not be in a position to accept the refund applications of the petitioners. This is in addition to opposing the prayer of refund on merits contending that by virtue of the order passed by this Court in the stay application filed by the department in the tax appeal, the petitioner cannot claim refund at this stage.

12. On the other hand, in affidavit dated 29.9.2014, the Deputy Commissioner of Customs, Kandla, SEZ has taken a stand that he is not empowered to grant refund of any amount to the petitioners since no provisions have been enacted with respect to the same under SEZ Act and secondly, the penalty was collected by the Customs

authority under the Customs Act, 1962.

13. From the above, it can be seen that on account of the said letter dated 1.11.2012 issued by the Ministry of Finance, a situation has arisen where neither the Commissioner of Customs nor the Commissioner of SEZ are left in a position to decide the refund claims of SEZ units or in some cases buyers of the goods. We would advert to the legal position shortly. However, we must observe that the Government cannot bring about a situation where no authority is left with the power to decide refund applications of the importers. This situation was brought about by the Ministry in its letter dated 1.11.2012. In the letter, as we have noted, while noticing that SEZ Act has overriding effect over other laws, it was also noticed that the SEZ officers were not accepting or disposing the refund applications due to lack of any provision in the SEZ laws for dealing with the same. The issue was therefore, taken up with the Department of Commerce for incorporation of provisions leading to refund as well as appeal and review in the SEZ law to ensure disposal of cases related to this issue. Under the circumstances, pending refund applications had to be returned to the applicants with a advise to approach the Department of Commerce. It was further conveyed that if any appeal was pending, same may also be returned for approaching the Department of Commerce.

14. Two things immediately emerge from this letter. Firstly, that the Ministry of Finance also recognised that there was no mechanism under the SEZ Act and Rules

framed thereunder for entertaining refund applications and secondly, that the Ministry was of the opinion that such a set up was required to be made by making suitable changes in law. In fact the communication does not stop short at covering refund applications for such treatment. It refers to appeals and reviews of proceedings concerning SEZ units. All such applications would be returned to the parties who would be advised to approach the Department of Commerce.

15. In our opinion, the entire approach was thoroughly incorrect. Firstly, without making statutory changes, it was simply not possible for the Ministry of Finance by a mere communication to stop the Commissioner of Customs from processing refund claims which was his statutory duty. Secondly, if such mechanism was to be changed for SEZ units from the authorities of the Customs Commissionerate to Commissionerate(SEZ), there had to be matching provisions providing such mechanism under the SEZ law. This admittedly was not done. In fact, till date it has not been done. Thirdly, all the refund claims, appeals and reviews were to returned with an advise to approach the Ministry of Commerce. We may recall this communication was issued by the Ministry of Finance. We wonder what Ministry of Commerce would do with such refund applications, appeals and reviews. There is no clarification whatsoever in this connection. The Ministry of Commerce per-se did not have any statutory power either to process the refund claims or entertain appeals or reviews. Appeals and reviews are also creation of statute. Provisions for refund are made in the Customs Act and

Central Excise Act. They can be taken away by statutory amendments. The powers can be shifted into another authority if a valid law is made in order to do so. By a mere letter, Ministry of Finance could not have suspended the power of Commissioner(Customs) to exercise his statutory functions. It is undisputed that duty was collected by the Commissioner of Customs. Whatever be the character of the duty, the Commissioner of Customs collected the same on a perceived opinion that unit concerned was required to pay such customs duty, redemption fine or penalties as the case may be. If later on such duty, fine or penalty is declared illegal, the person from whom the same has been collected would have a right to seek refund thereof. Such right would be covered by statutory provisions particularly, section 27 contained in the Customs Act, 1962. Such refund application would have to be made within the time permitted under section 27 of the Customs Act, 1962. It may also be subject to verification on the question of unjust enrichment. Many issues may arise which are not clear to us. But one thing is clear that such issues can be decided only by the authority under the Customs Act.

16. Section 27 of the Customs Act, 1962 pertains to claim for refund of duty. Sub-section(1) thereof provides for an application to be made by person claiming duty or interest in prescribed form to the prescribed authority within the prescribed time. Sub-section(2) of section 27 authorises the Assistant Commissioner of Customs or the Deputy Commissioner of Customs, if he is satisfied that whole or part of the duty or interest paid by the applicant is refundable, to make an order accordingly. Proviso to

sub-section(2) statutorily embodies the principle of unjust enrichment.

17. In case of **Mafatlal Industries Ltd. and ors. v. Union of India and ors.** reported in (1997) 5 Supreme Court Cases 536, the Constitution Bench of Supreme Court considered the statutory provisions under the Customs Act, 1962 and the Central Excise Act and held that any claim for refund would be covered by section 27 of the Customs Act or 11-B of the Excise Act as the case may be. It was observed as under :

"(i) Where a refund of tax/duty is claimed on the ground that it has been collected from the petitioner/plaintiff – whether before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991 or thereafter- by misinterpreting or misapplying the provisions of the Central Excises and Salt Act, 1944 read with Central Excise Tariff Act, 1985 or Customs Act, 1962 read with Customs Tariff Act or misinterpreting or misapplying any of the rules, regulations or notifications issued under the said enactments, such a claim has necessarily to be preferred under and in accordance with the provisions of the respective enactments before the authorities specified thereunder and within the period of limitation prescribed therein. No suit is maintainable in that behalf. While the jurisdiction of the High Courts under Article 226- and of this Court under Article 32 -cannot be circumscribed by the provisions of the said enactments, they will certainly have due regard to the legislative intent evidenced by the provisions of the said Acts and would exercise their jurisdiction consistent with the provisions of the Act. The writ petition will be considered and disposed of in the light of and in accordance with the provisions of Section 11-B.

This is for the reason that the power under Article 226 has to be exercised to effectuate the rule of law and not for abrogating it."

18. Under the circumstances, in our opinion, the directives issued by the Ministry of Finance in its letter dated 1.11.2012 are invalid and would have no force of law. It is declared that unless proper mechanism is framed under the SEZ laws and statutory provisions are enacted/amended, the Commissionerate of Customs would continue to hold the authority under section 27 of the Customs Act, 1962 to entertain refund claims of excess payment of customs duty, redemption fine or penalties as the case may be, adjudicated and collected by the Customs authority under the Customs Act, 1962, even with respect to units situated in SEZ areas. Whatever refund claims being returned to the petitioners by the Customs Commissionerate, the petitioners would represent the same to the appropriate authority. If the petitioners do so latest by 15.12.2014, all such applications shall relate back to the first presentation before the Customs authority. The period of limitation for presenting such application and computation of interest in case eventually the refund is granted, shall be reckoned from such date.

19. All the petitions are disposed of in above terms.

(AKIL KURESHI, J.)

(VIPUL M. PANCHOLI, J.)

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