

THE HON'BLE SRI JUSTICE C.PRAVEEN KUMAR
AND

THE HON'BLE SMT. JUSTICE V. SUJATHA

Writ Petition No.13794 of 2020

ORDER:- *(per the Hon'ble Sri Justice C. Praveen Kumar)*

The present Writ Petition came to be filed to declare the Order – in - Original No.VIZ-CUSTOM-000-COM-009-20-21, dated 30.06.2020, passed by the 1st respondent pursuant to the reply given to the Show Cause Notice dated 11.12.2014, as illegal, arbitrary and without jurisdiction.

2. The circumstances, which lead to filing of the present Writ Petition, are as under:-

(a) The 1st petitioner is a private limited company engaged in manufacture of Bio-Diesel and Glycerine at Visakhapatnam Special Economic Zones (VSEZ). It was registered as a unit of Special Economic Zone (SEZ) with Visakhapatnam Special Economic Zone (VSEZ) *vide* Letter of Approval (LOA) dated 17.05.2006, granted by the Board of Approvals (BOA), New Delhi, for conducting authorized operations of manufacture of Bio Diesel and Glycerine. The Commerce Ministry issued another LOA dated 30.07.2009, allowing trading in Bio Diesel, as an authorized operation, by the 1st petitioner.

(b) It is seen from the Statement of Objects and Reasons of the Special Economic Zones Act, 2005 [for short, “**the Act**”], the Government of India has announced the Special Economic Zone scheme in April, 2000 with a view to provide internationally competitive environment for exports. The objectives of Special Economic Zones includes making available goods and services, free of taxes and duties supported by integrated infrastructure for export production, expeditious and single window approval mechanism and a package of incentives to attract foreign and domestic investments for promoting export lead growth. The SEZ units are put under the administrative control of the Development Commissioners under the Ministry of Commerce to grant necessary permissions, to provide other facilities and also to undertake investigation and impose penalties for violation of any of the provisions of the Act.

(c) Before introduction of SEZ Act, 2005, the working of SEZ was regulated by the provisions contained in Chapter XA of the Customs Act, 1962. As per Notification dated 14.03.2006, the provisions of Chapter XA of the Customs Act, 1962 were specifically made not applicable to the working of the SEZ. The Central Government through Ministry of Commerce and in exercise of the power granted under Section 21(1) of the SEZ Act, 2005 specified the officers with the powers of investigation, inspection or search or seizure as

provided under the said Act and the Development Commissioner of the respective SEZ has been made the Enforcement Officer under sub-section (2) of Section 21 of the Act. The officers of Customs are notified as proper officers under the SEZ Act, 2005 only with effect from 05.08.2016, with a condition that the said Officer is required to report before the 3rd respondent within seven days, the details of action if any, initiated by it. Therefore, any violation by a unit in SEZ was to be investigated under the SEZ Act, 2005 only by the Development Commissioner i.e., respondent no.3 herein till 05.08.2016.

(d) The petitioner has been undertaking authorized operations i.e., manufacture of Bio Diesel and export of the same and also trading of the said goods as permitted under the Letters of Approval, dated 17.06.2006 and 30.07.2009, from its manufacturing premises located within the SEZ area at Visakhapatnam. During 2009-10 and 2010-11, the petitioner imported four consignments of Fatty Acid Methyl Ester (FAME) of different grades from M/s. Natural Bio Energy LLC, USA and exported Bio Diesel manufactured with certain specifications, after undertaking blending and other operations on the imported FAME with the Bio Diesel of different grades manufactured at the factory situated in VSEZ.

(e) The petitioner imported four consignments by duly filing Bill of Entries, transferred and stored the material in the Bonded Warehouse of M/s.East India Petroleum Ltd (EIPL) at Visakhapatnam. It is also to be noted that the petitioner transferred the Bio Diesel manufactured at VSEZ factory to EIPL Bonded Warehouse after filing Shipping Bills for blending with imported FAME and after due process the petitioner exported the blended cargo from the bonded warehouse. Bio Diesel is also called as Fatty Acid Methyl Ester (FAME). The main raw materials for manufacture of Bio Diesel are vegetable acids, vegetable oils, fatty acids and also fatty acid methyl ester (FAME) which are imported from Malaysia, Indonesia and the U.S.A. as well as domestically procured material.

(f) The petitioner imported 42,137.424 MTs of FAME and imported consignments and blended it with 6,022.762 MTs of Bio Diesel manufactured by it to export the blended Bio Diesel as per the specifications of its clients. Since the petitioner does not have sufficient storage capacity to store huge quantity of bio diesel imported, in some cases, blending was done in the tanks located in the Customs Private Bonded warehouse. Further, in the year 2011, the petitioner filed shipping bill with VSEZ for export consignment of 27,000 MT of Bio Diesel. The same was manufactured by the petitioner

using 26,044.06 MT of FAME imported from M/s.Natural Bio Energy LLC, USA vide Bill of Entry dated 21.02.2011.

(g) After filing the Shipping bill on 10.03.2011, for export of Bio Diesel cleared by the authorized officer of SEZ to the storage tanks of EIPL, the officers of the 2nd respondent visited the bonded warehouse of EIPL on 11.03.2011 and drawn samples of the said export material on the ground that the petitioner was attempting to export bio diesel imported *vide* Bill of Entry dated 21.02.2011, without undertaking any process and without even bringing the imported material to the factory premises in SEZ and by wrongly obtaining Certificate of Origin as India, to certain clients in European Union facilitating them to avoid anti-dumping duty being imposed by the European Union on bio diesel which originated in USA.

(h) Subsequently, the officers detained the material to an extent of 27,000 MTs under panchanama, dated 19.04.2011, under Section 110 of the Customs Act, 1962. The detention was subsequently converted into seizure on 20.04.2011 under a panchanama, dated 20.04.2011, on the ground that the value of the imported FAME was grossly undervalued. Later, the petitioner addressed a letter to respondent no.2 to take action against the illegal seizure of the export goods and also requested for release of the consignment as the same was meant for export. The 2nd

respondent allowed release of the goods on production of bond equivalent to the value of the seized goods i.e., Rs.132,91,00,000/- and on retention of 1500 MT of Bio Diesel as security.

(i) On due investigation, a show cause notice dated 11.12.2014 was issued to the petitioner answerable to the respondent no.1. The said show cause notice was also issued to the 2nd petitioner, Managing Director of the 1st petitioner proposing penalty under Section 112(a) and 114 of the Customs Act, 1962. On 05.06.2015 the petitioner gave interim reply to the respondent no.1 and final reply on 20.08.2019. In his reply, the petitioner stated that the impugned order came to be passed with many factual errors evidencing the fact that the respondent no.1 had mechanically passed the order without application of mind.

3. The main plank of argument is that the respondent no.2 had no jurisdiction to initiate any action against a unit situated in SEZ as the offences under the Customs Act are not yet notified to be investigated by the DRI and any offence in a SEZ unit are to be dealt with only by the Development Commissioner under the SEZ Act i.e. respondent no.3. Hence, issuance of show cause notice is bad in law.

4. Counters came to be filed by the respondent nos.1 and 2 denying the allegations made in support of the affidavit filed in the Writ Petition, mainly contending that the petitioner has admitted that he has filed wrong declarations in Form-A for issue of GSP Country of Origin (Preferential) obtained from Development Commissioner of VSEZ and Export Inspection Agency (EIA) that the product under export is a product of Indian Origin. It is averred that the mis-declarations of the values, Country of origin, slight change in the descriptions of the same product and routes etc., by the petitioner are clear indications of the modus operandi adopted and there is enough material available which confirm that no manufacturing activity took place and VSEZ has been utilized for fraudulent purpose. As the SEZ unit was being mis-utilised to pursue the fraudulent intentions, causing irreparable damage to the reputation of Indian Nation and harming other domestic industry in the name of providing jobs to a few people in their factory in order to carry out their design, thereby defeating the very purpose for which the SEZ Scheme has been brought into force, the action under Customs Act, 1962 has been initiated by the DRI in the interest of the Nation.

5. The respondent no.3 filed counter, contending that he has no role to play nor concerned with the matter and the Adjudication Order was passed by the Principal

Commissioner, Customs against the petitioner as the issue involved is outside the purview of SEZ area.

6. Relying upon the answers given by the 2nd petitioner during investigation by the customs authorities, the learned counsel for the respondents would contend that everything done was outside the SEZ area and hence the Customs Authorities get jurisdiction to issue the Show Cause Notice.

7. Sri N. Harinath, learned Assistant Solicitor General, for respondent no.4 mainly argued that since no processing was done, the petitioners herein has violated the conditions of licence and also violated the provisions of the SEZ.

8. At the outset, the main argument advanced by learned counsel for the respondents is with regard to maintainability of the Writ Petition when the petitioners have an alternative remedy of appeal.

9. It is not in dispute that a remedy of appeal is available, but here is a case where jurisdiction of the authority in issuing the Show Cause Notice is questioned. The Hon'ble Supreme Court in ***Radha Krishan Industries vs. State of Himachal Pradesh and others***¹ has laid down certain guidelines as to when a Writ Petition would lie before the

¹ 2021 SCC Online SC 334

Court though there is a remedy of appeal, the same are, as under:

“27. The principles of law which emerge are that:

27.1. The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well.

27.2. The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternate remedy is available to the aggrieved person.

27.3. Exceptions to the rule of alternate remedy arise where : (a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; (b) there has been a violation of the principles of natural justice; (c) the order or proceedings are wholly without jurisdiction; or (d) the vires of a legislation is challenged.

27.4. An alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternate remedy is provided by law.

27.5. When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion.

27.6. In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with.”

10. From the judgment of the Hon'ble Supreme Court, it is very much clear that a Writ Petition can be entertained by this Court though an alternate remedy is available when the authority issuing the Show Cause Notice has no jurisdiction to issue the same. Hence, we have no hesitation in coming to the conclusion that in the given set of circumstances, Writ Petition can be entertained.

11. The 1st petitioner is a unit situated in Visakhapatnam SEZ. *Vide* proceedings dated 17.05.2006, the petitioner unit was permitted to carry on manufacture of Bio Diesel with Glycerin as bi-product. Later, on 30.07.2009, permission granted to the petitioner was amended by including trading of Bio Diesel and blended Bio Diesel as permissible activity.

12. It would be appropriate to extract the contents of the two licences, which are as under:-

F.No.9/SEZ/187/VSEZ/2006/2973 Date: 17/05/2006.

To,
M/s.Cleancities Biodiesel India Pvt. Ltd,
No.8, Prashansannagar,
Road No.72, Jubilee Hills,
Hyderabad – 500 033.
E-mail: Prasad.moturi@cleancities.in

Subject: Your proposal for setting up a unit in the
Visakhapatnam Special Economic Zone for
manufacture of Biodiesel for Export – reg.

Reference: Your application No.2956, dated 17/05/2006.

* * *

Dear sirs,

With reference to the above mentioned, application, Development Commissioner, Visakhapatnam Special Economic Zone is pleased to extent to you all the facilities and

entitlements admissible to a unit in a Special Economic Zone subject to the provisions of the Special Economic Zones Act, 2005 and the rules and orders thereunder and for the establishment of a unit at Visakhapatnam Special Economic Zone in the State of Andhra Pradesh for undertaking authorized operations, namely manufacturing as under:-

Item (s) of manufacture	Unit	Annual capacity
Bio Diesel	Tons	112500
Bi Product: Glycerin	Tons	11000

This approval is subject to following terms and conditions:

I. You shall export the goods manufactured as per provisions of the Special Economic Zones Act, 2005 and Rules made thereunder for a period of five years from the date of commencement of production/service activities. For this purpose, you shall execute the bond-cum-Legal Undertaking as prescribed under the Special Economic Zone Rules, 2006.

II. You shall fulfill the pollution control requirements, as may be prescribed by the pollution Control authorities.

* * *

F.No.9/VSEZ/187/VSEZ/2006/9422

Dated 30th July, 2009

To
M/s.Cleancities Biodiesel India Ltd.,
Phase-II, Special Economic Zone (VSEZ),
Duvvada,
Visakhapatnam – 500 049.

Sub:LOP No.9/VSEZ/187/VSEZ/2006/ dated 17.05.2006 issued for manufacture of Biodiesel and its Bi-product Clycerin – Amendment of LOP – Inclusion of Trading Activity in the LOP – Regarding.

* * *

Sirs,

I am directed to refer to your letter dated 29.07.2009 on the subject mentioned above and to convey the approval of the Development Commissioner, Visakhapatnam Special Economic Zone for amendment of LOP including Trading of Biodiesel and Blended Biodiesel.

All other terms and conditions stipulated in the Letter of permission No.9/VSEZ/187/VSEZ/2006/ dated 17.05.2006 shall remain unchanged.

Please keep this letter attached to the Original Letter of Permission and acknowledge the receipt.

Yours faithfully,

(T.G.K. Jagannadham)
Asst. Development Commissioner.

Copy to the Asst. Commissioner of Customs, VSEZ,
Visakhapatnam.

13. From the above, it is clear that the petitioner herein has licences to trade as well. Ergo, it cannot be said that there was any violation of any of the provisions of the Act or terms of licence, if the material seized was not processed but found in SEZ.

14. The next point that arises for consideration now is, ***whether the DRI officials have jurisdiction to seize goods though found outside SEZ area but in relation to a SEZ unit?***

15. The petitioners have imported FAME/Bio Diesel from U.S.A. and exported the same to Europe in the years 2009-10. It is further alleged that the petitioners have imported another consignment of FAME/Bio Diesel from U.S.A. weighing 26,044 MTs and filed bill of entry for warehousing. When the stock was inspected by the Officers of Directorate of Revenue Intelligence [for short, **“DRI”**], it was found that the goods were kept for export in a bonded warehouse, which is outside the SEZ, the samples said to have been drawn

prior to goods being moved to SEZ and after the process, establish that no manufacturing activity was undertaken and as such, the same constitutes violation of Customs Act, 1962. Accordingly, a Show Cause Notice dated 11.12.2014 came to be issued which is as under:-

“F.No.VIII/26/04/2011-DRI-HRU

Dated 11/12/2014.

SHOW CAUSE NOTICE

Sub: Customs – Import of FAME (Bio-Diesel) from U.S.A. by resorting to under-valuation and re-export of the same to European Union by Mis-Declaring it as product as Indian Origin by M/s.Xtraa Cleancities Limited, by falsely procuring the Country of Origin certificates – Issue of Show Cause Notice – Regarding.”

16. As stated earlier, the main grounds urged by Sri B. Adinarayana Rao, the learned Senior Counsel for the petitioners is that the DRI Officers have no jurisdiction to inspect and seize goods relating to a SEZ Unit and consequently Show Cause Notice issued is without jurisdiction. He would contend that whether the goods have undergone manufacturing process or whether the said goods were imported for trade, may not matter much as Officers of DRI has no jurisdiction to issue the Show Cause Notice.

17. Sri Suresh Kumar Routhu, learned Standing Counsel for respondent nos.1 to 3 and Sri N. Harinath, learned Assistant Solicitor General for respondent no.4 fairly stated across the Bar that if the alleged violations is in SEZ, the

respondent authorities have no jurisdiction to issue the Show Cause Notice, as the amendment authorizing the Customs Officer to deal with violation in SEZ area came into effect in the year 2016.

18. In order to find out as to whether the DRI Officers have jurisdiction to seize the goods imported by a unit situated in SEZ, it would be just and proper for us to refer to certain undisputed facts, which are as under:-

(i) The Writ Petitioner has licences to trade (import & export) and also to import, treat the product and then export. This aspect is not in dispute.

(ii) The fact that the product is not stored in SEZ area, is also not in dispute.

(iii) The fact that the product imported is not in dispute.

(iv) It was stored in a Bonded Warehouse of M/s.East India Petroleum Ltd. (EIPL), Visakhapatnam near the port for export.

(v) The fact that enough space is not available in SEZ area to store the imported product is not in dispute.

(vi) The fact that it was imported for trade as contended has to be accepted for the reason that the product was not treated at the time of inspection.

(vii) The place of storage is near the Port area, from where it has to be exported.

19. In order to appreciate the rival contention, it would be appropriate for us to refer certain provisions of the SEZ Act, which are as under:-

“The Special Economic Zone Act, 2005 (‘SEZ Act’ for brevity) provides for establishment, development, and management of special economic zones for the promotion of exports. Under Section 11 of SEZ Act, a Development Commissioner would be appointed, to perform the functions specified in Section 12 of SEZ Act. The SEZ Act was given overriding effect and Section 51 of the Act reads as under:

51. 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.”

20. Having regard to the wordings used in Section 51 of the Act, which we have referred to earlier, it is clear that SEZ Act prevails over other enactments to the extent of special provisions being made under SEZ Act. Therefore, the SEZ Act would prevail over the Customs Act, 1962 in all aspects in view of the non-obstinate clause. It would also be appropriate to refer Section 53 of the Act, which is as under:-

“53. Special Economic Zones to be ports, airports, inland container depots, land stations, etc., in certain cases.—A Special Economic Zone 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 authorised operations.

(2) A Special Economic Zone shall, with effect from such date as the Central Government may notify, be deemed to be a port, airport, inland container depot, land station and land customs stations, as the case may be, under section 7 of the Customs Act, 1962 (52 of 1962):

Provided that for the purposes of this section, the Central Government may notify different dates for different Special Economic Zones”.

21. A reading of the above provisions makes it clear that the Customs authorities (DRI officials) have no power or jurisdiction to inspect or seize goods in respect of units situated in SEZ area. The power to investigate in respect of any offence committed in SEZ unit is conferred on Officers empowered under Section 22 of the SEZ Act.

22. Further, section 52 of the Act also spells out that the Customs Act is not applicable in respect of units situated in SEZ unit. It would be appropriate to extract Section 52 of the Act, which is as under:-

“52. Certain provisions not to apply.—(1) The provisions contained in the Chapter XA of the Customs Act, 1962 (52 of 1962) and the Special Economic Zones Rules, 2003 and the Special Economic Zones (Customs Procedure) Regulations, 2003 made thereunder shall not, with effect from such date as the Central Government by notification appoint, apply to the Special Economic Zones.

(2) Notwithstanding anything contained in sub-section (1), all offences committed, before the commencement of this Act, under any provisions of the Customs Act, 1962 (52 of 1962) and the Special Economic Zones Rules, 2003 and the Special Economic Zones (Customs Procedure) Regulations, 2003 made

thereunder, shall continue to be governed by the said Act or rules, as the case may be.

(3) Anything done or any action taken or purported to have been done or taken including any rule, notification, inspection, order or notice made or issued or any permission or authorisation or exemption granted or any document or instrument executed under the said provisions of the Act, rules and regulations referred to in sub-section (1) shall, in so far as they are not inconsistent with the provisions of this Act, be deemed to have been done or taken or made or issued or granted under the corresponding provisions of the Act or rules or regulations referred to in that sub-section.”

23. In exercise of power under Section 52 of the Act, the Central Government by its Notification dated 14.03.2006 declared that the provisions contained in Chapter XA of the Customs Act, 1962 shall not apply to Special Economic Zone, the same is as under:

Notification – SEZ – Special Economic Zone
Ministry of Commerce and Industry
Department of Commerce
New Delhi

Dated 14/03/2006

S.O. 320(E) – In exercise of the powers conferred by Sub-Section (1) of the Special Economic Zones Act, 2005 (28 of 2005), the Central Government hereby appoints the 14th day of March, 2006 as the date from which the provisions contained in the Chapter XA of the Customs Act, 1962 and the Special Economic Zones Rules, 2003 and the Special Economic Zones (Customs Procedure) Regulations, 2003 shall not apply to the Special Economic Zones.

24. Probably for the reason, the Central Government in exercise of powers conferred under Sections 21 and 22 of the

Act issued a Notification dated 05.08.2016, authorizing the Additional Director General, Directorate of Revenue Intelligence to investigate into offences under Customs Act committed in a SEZ. The said notification is as under:

Notification – SEZ – Special Economic Zone
Ministry of Commerce and Industry
(Department of Commerce)
NOTIFICATION

New Delhi, the 5th August, 2016

S.O. 2666(E):- In exercise of the powers conferred by sub-section (2) of section 21 and second proviso to section 22 of the Special Economic Zones Act, 2005 (28 of 2005) (hereinafter referred as the Act), the Central Government hereby authorizes the Additional Director General, Directorate of Revenue Intelligence for offences under the Customs Act, 1962 (52 of 1962) and the Additional Director General, Directorate General of Central Excise Intelligence for offences under the Central Excise Act, 1944 (1 of 1944) and the Finance Act, 1994 (32 of 1994) to be the enforcement officer (s) in respect of any notified offence or offences committed or likely to be committed in a Special Economic Zone. The enforcement officer(s), for the reasons to be recorded in writing, may carry out the investigation, inspection, search or seizure in the Special Economic Zone or Unit and shall intimate the details of any action initiated under sub-section (3) of section 21 of the Act to the Joint Secretary in charge of Special Economic Zones Division in the Department of Commerce immediately and in any case not later than seven days of initiation of any action.

But, the same cannot be invoked in the instant case as the alleged violation was prior to 2016.

25. An objection came to be raised by Sri N. Harinath, learned Assistant Solicitor General that the issue raised by

the learned Senior Counsel for the petitioners with regard to jurisdiction is pending adjudication before the Hon'ble Apex Court in ***M/s.Mangali Impex vs. Union of India***. But after going through the judgment of the Delhi High Court, against which an appeal is preferred before the Hon'ble Apex Court, we feel that the issue therein relates to validity of Section 28(11) of the Customs Act, 1962. Infact, the judgments rendered by CESTAT (though not binding) would show that Officers of Customs have no jurisdiction to confiscate the goods and impose penalties in respect of SEZ unit. The two judgments of CESTAT in ***(1) Morgan Tectronics Limited vs. Commissioner of Customs, New Delhi***² and ***(2) Shri Imran Ahmed, M/s.Modern Metal Overseas, Mohd. Arif vs. Commissioner of Customs, Central Excise & Service Tax, Hapur***³, support the said proposition. It was informed by the counsel that the ratio laid down in the above judgments has become final as it was not challenged by the department.

26. At this stage, Sri Suresh Kumar Routhu, learned Standing Counsel and Sri N. Harinath, learned Assistant Solicitor General in one voice state that if the offence is committed in respect of a unit in SEZ area, the Customs authorities have no jurisdiction, but since the goods were not

² 2015 (316) E.L.T. 276 (Tri.-Del)

³ 2018 (8) TMI 431 – CESTAT ALLAHABAD

seized from SEZ area, the provisions of Sections 51 and 52 of the Act have no application.

27. The dispute now is, ***whether the property can be said to be in Special Economic Zone?***

28. The fact that the goods were imported from U.S.A. is not in dispute. Even assuming that the goods imported were not subjected to physical process in view of the report of the Analyst, but, as observed by us earlier, the petitioner has licence to import and trade in Bio Diesel as well, which fact is not disputed. Therefore, processing of the imported material is not mandatory as the petitioner has licence to trade.

29. It is also an admitted fact that movement of goods from VSEZ to Visakhapatnam Port, for export, has to pass through a distance. Rule 46 prescribe the procedure for export and it reads as under:-

“46. Procedure for Export:- (1) The procedure for export from Special Economic Zone through seaports or airports or Inland Container Depot or Container Freight Station or Land Customs Station or by Post or by Courier or by Personal Carriage, as the case may be, shall be as under:-

(a).....

(b).....

(c).....

(d).....

(e) the Unit may export through Inland Container Depot located in the Special Economic Zone, or through any port or airport or Inland Container Depot:

Provided that in case of export of large quantities of cargo where it may not be possible to ship the cargo from the Special Economic Zone in one consignment, the Specified Officer may allow the export of such cargo on execution of a Bond for the duty involved subject to the condition that the Unit shall submit the proof of export within ninety days of removal of such cargo under Bond, failing which applicable duty on the goods not exported shall be payable in terms of the Bond”.

30. A reading of the above makes it clear that the passage of goods from SEZ to a Port has to necessarily take place for the purpose of export, more so, when there is no enough space for storage of these goods in SEZ area, which is also an admitted fact. Merely, because, the goods were taken out from SEZ area to be transported to Port or to a storage unit before they are exported cannot be brought within the purview of Customs authority.

31. As seen from the record, in the show cause notice, it is alleged that insofar as consignment exports in the years 2009-10, there was no movement of goods from SEZ to outside SEZ. Learned Senior Counsel for the petitioner placed material on record to show that in respect of such consignments, Development Commissioner of Visakhapatnam, SEZ initiated proceedings under the SEZ and imposed penalty and the said matter is pending before the Hon’ble Supreme Court in SLP (C) No.24086 of 2018.

32. The fact that goods were stored in a Customs bonded warehouse, is not in dispute. During the transit, the goods

will be stored at such Customs bonded warehouse and for bulk export, the goods will be stored in the Customs bonded warehouse till availability of vessel for loading. When the question regarding such removal of goods was brought to the notice of the Government of India, instructions came to be issued *vide* Instruction No.63, dated 10.08.2010, which reads as under

“I am directed to say that representations have been received in the Department seeking clarification on procedure for removal of goods to Bonded Warehouse under Rule 46 (13) of SEZ Rules, 2006. The matter has been examined in consultation with Directorate General of Export Promotion, Department of Revenue and the following procedure is prescribed for removal of goods to bonded warehouse:

- i) The Unit shall file yellow Bill of Entry (YBE) to SEZ Customs with copy of invoice, packing list etc. besides Space Utilization/Availability Certificate from the Customs Officer – in – charge of the bonded warehouse.
- ii) The goods will move from SEZ to the bonded warehouse on the strength of fifth copy of YBE containing the SEZ Customs report regarding verification marks, numbers etc.
- iii) The Customs officer in charge of the bonded warehouse will retain the fifth copy of the YBE for his record and issue re-warehousing certificate for the goods received.
- iv) The SEZ unit shall submit the said re-warehousing certificate immediately to SEZ Customs.
- v) If the SEZ unit fails to submit the re-warehousing certificate within 45 days from the date of clearance of the goods from the Zone, the SEZ Customs shall initiate appropriate action to realize duty and interest on the goods in question.”

33. A reading of the undertaking issued in the year 2010 would makes it clear that the goods can be moved from SEZ to bonded warehouse which shall be informed to Customs Department within 45 days. The delivery challans show that the goods were moved after filing shipping and delivery challans [not disputed]. The endorsement made by the Preventive Officer of SEZ Customs also evidences the same. The delivery was at East India Petroleum Private Limited, which is a bonded warehouse. Therefore, removal of the goods from SEZ area or storage of goods in bonded warehouse for the purpose of export, imported under a licence issued for the said purpose as and when vessel is available or otherwise, in our view, cannot be brought within the purview of DRI officials under the Customs Act and it is only officials under SEZ Act, who would be bestowed with jurisdiction to initiate the proceedings.

34. At this stage, Sri N. Harinath, learned Assistant Solicitor General and Sri Suresh Kumar Routhu, learned Standing Counsel took us to the answers given to question Nos.28 and 29 by the petitioner when he was examined by DRI officials to show that the petitioner has violated the provisions of the Customs Act and the terms of the licence. But, the answers to questions 34 and 35 would clearly indicate that the documents were filed before the concerned at the time of export and the goods were moved from SEZ and

the shipping bills were filed before the concerned in respect of the goods which were to be exported/ moved out of SEZ area, for loading. It would be appropriate to refer to the same.

Q.34) What are the documents submitted to Customs/SEZ authorities at the time of export of goods by XCL?

Ans. Commercial Invoice, Packing List, Bill of Lading, contract agreement with the overseas buyer, Country of origin certificates etc. to the Customs Authorities at the time of export of goods. The same documents are being submitted to SEZ.

Q.35) Whether all the goods exported by your company were moved from your SEZ unit or not?

Ans. The goods which moved from SEZ, the shipping Bills were filed at SEZ. In respect of the goods exported from outside SEZ, the shipping bills were filed at the port of loading.

Q.36) What are the goods exported from SEZ and what are the goods exported from outside SEZ?

Ans. FAME is exported from both SEZ and outside SEZ.

35. From the answers given, as held and as the petitioner is having licence to trade, storage of goods outside the SEZ area namely in a bonded warehouse, for the reasons stated earlier, cannot automatically confer power on the DRI Officers to initiate proceedings under the Customs Act. The judgment of the Hon'ble Supreme Court in **M/s.Canon India Private Limited** squarely applies to the facts in issue, but however, learned Assistant Solicitor General would contend that a Bill is being introduced in the Parliament making suitable amendments, but no information about the same is placed before this Court.

36. For all the aforementioned reasons, we hold that the DRI officials have no jurisdiction to issue the impugned show cause notice and accordingly, the Writ Petition is ***allowed***, quashing the show cause notice dated 11.12.2014 and the consequential order dated 30.06.2020, passed in Order-in-Original No.VIZ-CUSTOM-000-COM-009-20-21, dated 30.06.2020. There shall be no order as to costs.

Miscellaneous petitions pending, if any, shall stand closed.

JUSTICE C.PRAVEEN KUMAR

JUSTICE V. SUJATHA

Date: 05.05.2022

MS

THE HON'BLE SRI JUSTICE C.PRAVEEN KUMAR
AND
THE HON'BLE SMT. JUSTICE V. SUJATHA

Writ Petition No.13794 of 2020
(per the Hon'ble Sri Justice C. Praveen Kumar)

Date: 05.05.2022

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