

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH-COURT NO. 1

SERVICE TAX APPEAL NO. 52449 OF 2016

[Arising out of Order-in-Appeal No. 09/ST/LTU/DLH/2016 dated 09.05.2016 passed by the Commissioner (Appeals-I) Central Excise, Delhi]

M/S. SRF Limited

Indore Special Economic Zone,
Sector-3, Pithampur (District-Dhar)
Madhya Pradesh

Appellant

Versus

**Commissioner of Customs, Central
Excise & Service Tax, LTU
New Delhi**

Respondent

With

SERVICE TAX APPEAL NO. 52466 OF 2016

[Arising out of Order-in-Appeal No. 11/ST/LTU/DLH/2015 dated 30.05.2016 passed by the Commissioner (Appeals-I) Central Excise, Delhi]

M/S. SRF Limited

Uniteck Crest Building,
Block-C, Sector-45
Gurgaon, Haryana-122003

Appellant

Versus

**Commissioner of Customs, Central
Excise & Service Tax, LTU
New Delhi**

Respondent

With

SERVICE TAX APPEAL NO. 52488 OF 2016

[Arising out of Order-in-Appeal No. 12/ST/LTU/DLH/2016 dated 30.05.2016 passed by the Commissioner (Appeals-I) Central Excise, Delhi]

M/S. SRF Limited

Uniteck Crest Building,
Block-C, Sector-45
Gurgaon, Haryana-122003

Appellant

ST/ 52449, 52466, 52488, 52490/2016 & 51804/2021

Versus

**Commissioner of Customs, Central
Excise & Service Tax, LTU
New Delhi**

Respondent

With

SERVICE TAX APPEAL NO. 52490 OF 2016

[Arising out of Order-in-Appeal No. 13/ST/LTU/DLH/2015 dated 30.05.2016 passed by the Commissioner (Appeals-I) Central Excise, Delhi]

M/S. SRF Limited

Appellant

Uniteck Crest Building,
Block-C, Sector-45
Gurgaon, Haryana-122003

Versus

**Commissioner of Customs, Central
Excise & Service Tax, LTU
New Delhi**

Respondent

And

SERVICE TAX APPEAL NO. 51804 OF 2021

[Arising out of Order-in-Appeal No. IND-EXCUS-000-APP-144-19-20 dated 26.09.2019 passed by the Commissioner (Appeals) Customs, CGST and Central Excise Indore]

M/S. SRF Limited

Appellant

Indore Special Economic Zone,
Sector-3, Pithampur (District-Dhar)
Madhya Pradesh

Versus

**Commissioner of CGST, and
Central Excise, Indore**

Respondent

Manik Bagh Palace,
Indore MP 552001

Appearance

Shri R. Krishnan, Advocate for the appellant

Dr. Radhe Tallo, Authorised Representative for the Department Respondent

**CORAM: HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)**

**Date of Hearing: March 15, 2022
Date of Decision: March 28, 2022**

Final Order Nos. 50290-50294/2022

P.V. SUBBA RAO:

1. M/s SRF Limited¹ Indore SEZ, in Pitampur District of Madhya Pradesh holds service tax Registration No. AAACS0206PSTOIO. It had filed refund claims for the service tax paid by it on various services used by its unit located in Special Economic Zone², Indore. These applications were filed claiming benefit under service tax exemption notifications are ST-40/2012 dated 20.6.2013 and ST-12/2013 dated 1.7.2013. Its applications for refund were partly rejected by the original authority and the rejections were upheld by the Commissioner (Appeals). Aggrieved, the appellant filed these five appeals assailing impugned orders for different periods as below:

Sr No.	Appeal No.	Impugned order	Period Involved	Issue
1.	ST/52449/2016	Order-in-Appeal No. 09/ST/LTU/DLH/2016 dated 09.05.2016	July 2012 to September 2013	Issue pertains to rejection of refund claims for service tax paid by the appellant at Pitampur SEZ Zone, Madhya Pradesh
2.	ST/52466/2016	Order-in-Appeal No. 11/ST/LTU/DLH/2015 dated 30.05.2016		
3.	ST/52488/2016	Order-in-Appeal No. 12/ST/LTU/DLH/2015 dated 30.05.2016		
4.	ST/52490/2016	Order-in-Appeal No. 13/ST/LTU/DLH/2015 dated 30.05.2016		
5.	ST/51804/2021	Order-in-Appeal No. IND-EXCUS-000-APP-144-19-20 dated 26.09.2019	January 2016 to March 2016	

**1 Appellant
2 SEZ**

2. The specific grounds on which the refund claims have been rejected in these appeals and the submissions of the appellants before us in each of these appeals are in the paragraphs below.

Appeal No. ST/52449/2016-

3. The appellant filed application seeking refund of service tax paid on twelve services of which refund was rejected on service tax paid on three services as follows:

a) Commercial training service Rs. 3,708- This refund was rejected on the ground that the service was not approved by the Unit Approval Committee³. The appellant's submission before us is that the commercial training, though held not regularly, was conducted for employees of the SEZ unit as evidenced by Invoice No. 203 dated 19.7.2013. Thus, the service was consumed in the SEZ unit, though, by oversight, the service was not got approved. Non-approval is not fatal to the substantive right to claim refund as the SEZ Act overrides other laws and approval of the list is a contour of procedure only.

b) Storage and warehousing service Rs. 1,96,996 – This service was used to store and warehouse the material imported by the appellant at the Customs Port. The refund was rejected on the ground that the material could have been transported to the unit without being stored at the port. The appellant's submission before us is that the goods in question were raw material meant for use in SEZ unit which were stored or

warehoused in the customs port prior to clearance and warehousing charges. Therefore, these charges are directly relatable to SEZ operations only.

c) Services distributed proportionately through ISD mechanism- Rs. 20,79,874 – The head office of the appellant at Gurugram had distributed part of the credit to the appellant's SEZ unit through input Service Distributor Invoices (ISD invoices). As per the Service Tax Rules, when the services are used in the head office of any company (which, obviously does not manufacture goods or renders taxable services), the head office can register as input service distributor and distribute the credit so taken for the services used in the head office proportionately to its field units through ISD invoices. The appellant's SEZ unit also received some credit from its head office in Gurugram and sought refund which was rejected on the ground that the refund should have been claimed by the head office. The appellant's submission is that its head office cannot claim refund of credit in ISD register as the CENVAT Credit Rules do not allow any refund, ISD can only distribute credit. Appellant seeks to rely on Tribunal's Final Order No. 51230/2019 dated 29.07.2019 in its own case that rejects the stand of the department.

Appeal no. ST/52466/2016 period involved Jan 2013-Mar 2013-

4. In this case, refund was disallowed by the Revenue only on service tax paid on two services as follows:

a) **Proportionate Service tax distributed by the head office through the ISD mechanism Rs. 29,61,415-** the refund was rejected on the ground the head office of the appellant had taken credit initially and if it was not able to utilise the credit it should have claimed the refund and Notification no. 40/2012 does not provide for such distribution through ISD. It was also rejected on the ground that the approval committee also deferred approval of ISD invoice mechanism. The appellant's submission is that the ISD mechanism is intended to distribute proportionately the input service tax paid by the Head office which is allowed to be distributed proportionately to various manufacturing units based on turnover. Most of the common services are in the approved list dated 5.7.2013. Refund of services not entirely consumed in the SEZ unit obviously means the services related to the unit but not entirely consumed in the unit such as for instance, advertising service, management consultant service, Chartered accountant service, cost accountant service, courier service internet telecommunication service, IT services, travel agent service etc. ISD itself is not a service but the ISD invoice covers various services and hence there is no need to get specific approval for ISD distribution. Paragraph 2(b) of the notification permits proportionate credit based on turnover, in respect of services not wholly consumed in the SEZ unit. Also, the Tribunal's order dated 29.7.2019 allows such refund.

b) **Legal service, cleaning service and transport of goods through pipeline service - Rs. 13,92,232-** refund of this amount was disallowed on the ground that these services were approved later by the Unit Approval Committee on 5.7.2013. The appellant's submission before us is that subsequent approval is not fatal to the claim for refund as SEZ Act has overriding effect and that the Tribunal, has in its order dated 29.7.2019 allowed refund.

Appeal No.52488/2016 Period involved - April 2013 to June 2013-

5. This appeal is filed only assailing rejection of refund on two services as follows.

a) **Input services distributed through the ISD mechanism - Rs. 5,25,232** whose refund is rejected on the ground the head office had taken credit initially and if it was not able to utilise the credit it should have claimed the refund and that Notification no. 40/2012 does not provide for such distribution thro ISD. It was also rejected on the ground that the unit approval committee approved the ISD mechanism much later. The appellant's submission in this regard is that the ISD mechanism is intended to distribute proportionately input tax paid by the Head office to various manufacturing units based on their turnover. It is also submitted that most of the common services in question were in the approved list dated 5.7.2013. It has further been submitted that refund of services not entirely consumed in the SEZ unit means the services related to the unit but not entirely consumed

in the unit such as for instance, advertising service, management consultant service, Chartered accountant service, cost accountant service, courier service internet telecommunication service, IT services, travel agent service etc. ISD itself is not a service but the ISD invoice covers various services and hence there is no need to get specific approval for ISD distribution.

b) Legal service, cleaning service and transport of goods through pipeline service Rs. 3,45,449- The credit on these services were disallowed on the ground that they were approved subsequently on 5.7.2013. The appellant's submission is that subsequent approval of the list of services is not fatal to the claim for refund as SEZ Act has overriding effect and Tribunal's order dated 29.7.2019 covers both the above situations.

Appeal No. 52490/2016 period involved July 2013-Sept.2013-

6. This appeal assails rejection of refund in respect of the two services:

a) Transport of goods by road services (GTA) for exports and for DTA clearances Rs. 1,13,84,384- Refund of service tax was rejected on the ground that CENVAT credit is admissible only for inward transportation of goods and credit of service tax paid for transport of goods beyond the factory gate is not admissible under the CENVAT Credit Rules. Further, Rs. 25,03,230 of Service tax was on GTA services valued at Rs. 88,81,153 was paid as per order of Commissioner of Central

Excise Indore vide order-in-original no. 23/commr/ind/ST/2013 dated 22.8.2013 pertaining to the period October, 2008- March, 2012 and is not related to the authorised operations in the SEZ unit. As long as that order subsists refund cannot be claimed. The appellant's submissions before us are that the GTA service was approved long ago in the list dated 24.7.2009 and in the approved list dated 5.7.2013. It is further his submission that although GTA services were utilised during October 2008 to March 2012 tax was not paid on the same and so a show cause notice was issued resulting in the order in original by the Commissioner Indore dated 22.8.2013 confirming the demand under reverse charge of Rs. 88,81,153. The said order affirms that the tax which was paid was also being appropriated. In the said order-in-original it is also clearly mentioned that the GTA service pertains to both clearances for export and for DTA clearances. The refund under the notification is given only after the tax is paid first and therefore tax paid on 26.7.2013 has been claimed in the subsequent quarter correctly though the services was used in the SEZ unit in the prior period. Similarly Tax on GTA service of Rs. 25,03,230 was paid on 22.7.2013 in respect of services utilised during April 2012 to March 2013. The delay in payment was by oversight and ignorance. But refund is given only when the tax has been actually paid and not when the service was utilised. Thus the refund of total service tax paid on GTA of Rs. 1,13,84,384 paid on 26.7.2013 and 22.7.2013 could not have been denied. Tax paid GTA service refund had all along

been granted as refund in the period prior to after the period involved in the present appeal both on inward and outward transportation as the very purpose of transportation is related to the authorised operations in the SEZ Unit - goods manufactured therein have to be sold from the unit, which is the very *raison d'être* of the very SEZ UNIT SCHEME. Also, the impugned order goes beyond the reason and findings of the adjudicating authority in Paragraph 13 wherein the adjudicating authority observed:

-that the service was originally approved on 24.7.2009 but in the approval granted on 5.7.2013 all previous approvals issued under previous notifications stand cancelled and fresh approvals need to be taken

- further that since the services were utilised before 5.7.2013 the claim was not admissible.

OIA is thus not sustainable for going beyond the scope of the findings in the OIO.

b) **Business Auxiliary Service - refund of Rs. 4178-.** There is no finding in the impugned order, but order in original states that the address was not that of the SEZ unit on the invoice. The appellant's submission before us is that the tax was paid on the bill raised by the shipping agency which issued the invoice on the corporate office. The documents pertaining to the clearance of the goods from port evidenced by the shipping bill, bill of lading

and the invoice raised give a clear correlation with the SEZ unit only.

Appeal no. 51804/2021 period involved Jan 2016 March 2016

7. Refund was denied in this appeal only on two grounds as follows:

a) **Refund claim in respect of 8 services totalling Rs.**

1,94,431 was disallowed on the services on the strength of ISD invoices on the ground that the services in the ISD invoice were not covered in the default list of approved services. The appellant's submission is that of the 8 services, 6 services were covered in the list of approved services as can be seen from the approved list. Only "other taxable services (Rs. 11,126) and sponsorship service (Rs. 22,289) were not in the approved list. Therefore, refund in respect of 6 services totalling Rs.1,61,016 should not have been disallowed. Even for the other two services totalling Rs. 33,105 (Rs. 11,126 plus Rs. 22,289) which were not in the approved list, refund should not have been disallowed as SEZ Act supersedes all other laws as per the orders of the Tribunal.

b) **Claim not filed in the same quarter - Rs. 94,699-** This claim was disallowed as the claim was filed beyond one year from the relevant date and as per notification claim should be filed for the same quarter and the delay has not been condoned by the Adjudicating Authority. The appellant's submission is that the invoice for this service is dated 21.8.2014 but it was paid on

26.10.2015 and thus the claim should have been filed in December 2015 quarter but the claim was filed in Jan 2016 quarter with a delay of one month from the date of payment of the tax on the invoice. A request was made to condone the delay. However, if the date of payment is considered, there was no delay at all. Carrying forward refund by one quarter is purely a procedural aspect which cannot adversely impact the substantial right to claim refund.

8. Learned Counsel for the appellant also submits that in their own case refunds were sanctioned to them for the previous period in Service Tax Appeal No. 52274/2016 decided by this Tribunal by Final Order No. 51230/2019 dated 29.07.2019 and, therefore, on the same ground present refund may also be sanctioned. Learned Counsel for the appellant also submits that if services are supplied to any unit in the SEZ, such services are exempted by virtue of Special Economic Zones Act, 2005⁴ itself and, therefore, any exemption notification by the Department of Revenue under the Finance Act, 1994 is not necessary for refund. Consequently, it does not matter whether the conditions of the exemption notification were fulfilled or not because SEZ Act itself has overriding provisions which prevail over any other law insofar as the service rendered to the SEZ unit is concerned. He relies on the following case laws;

**(i) Makers Mart vs. Commissioner of Central Excise & ST.,-
Jaipur II⁵**

4 SEZ Act

5 2016 (44) STR 126 (Tri.-Del.)

- (ii) **Wardha Power Co. Ltd. vs. Commissioner of Central-Excise, Nagpur⁶**
- (iii) **Lupin Ltd. vs. Commissioner of Customs, CGST & C.EX.,-Indore⁷**
- (iv) **SRF Limited vs. Commissioner of C. Ex., & ST(LTU),-Delhi⁸**
- (v) **Wabco India Ltd. vs. Commissioner of GST & C.EX.,-Chennai⁹**
- (vi) **M/s DLF Assests Pvt Ltd. vs. The Commissioner, Service-Tax, Delhi I, Service Tax Appeal No. 50368 of 2016.¹⁰**

9. Learned Departmental Representative submits that the Adjudicating Authority and the Commissioner (Appeals) have rejected the refund applications on the following grounds:

- (i) The list of services was not approved by the UAC of SEZ
- (ii) invoice pertaining to ISD are neither approved nor is a service;
- (iii) Branches of banks are outside the SEZ unit in case of refund application for banking service.
- (iv) Address do not pertain to SEZ unit
- (v) Services were not wholly consumed within the SEZ unit.

10. We have considered the arguments on both sides and perused the records.

11. The question which falls for our consideration is whether the appellant is entitled to refund of service tax paid on various input services provided for authorised operations of its unit in the SEZ, Indore. Some of these services were directly provided to and paid for

6 2013 (30) STR 520 (Tri.-Mumbai)

7 2020 (41) GSTL 368 (Tri.-Del)

8 2017 (3) GSTL 347 (Tri.-Del.)

9 2021 (54) GSTL 37 (Tri.-Chennai)

10 Final Order No. 50853 of 2020 dated 22.09.2020

by the SEZ unit and certain other services were provided to the head office of the appellant in Gurugram which was registered as an input service distributor¹¹ under the Service Tax Rules and distributed the CENVAT credit on the services used in the head office to its various units including to the SEZ unit at Indore. The claims for refund were filed under the Service Tax exemption notifications issued for services provided to the developers and units located in the SEZs. The claims were partly rejected for not meeting the requirements under the exemption notifications. Before going into the specifics of this case, it is important to examine the relevant laws.

12. The Special Economic Zones are created under the SEZ Act which effectively treats the SEZ as if it is an area outside India for the purpose of taxes. Section 26 of the SEZ Act provides for exemptions drawbacks and concessions to every developer and entrepreneur. Subject to sub-section (2) of Section 26 of this Act, clause (e) of sub-section (1) provides exemption from service tax leviable under Chapter V of the Finance Act, 1994 on the taxable services provided to a developer or unit to carry on the authorised operations in a Special Economic Zone. Sub-section (2) of this Section states the Central Government may prescribe the manner and the terms and the conditions subject to which the exemptions, concessions drawback or other benefits shall be granted to the developer or entrepreneur under sub-section (1). Section 51 of SEZ Act states that the provisions of this Act shall have effect notwithstanding in any inconsistent there with contained in any other law for the time being

11 ISD

in force or in any instrument having affect by virtue of any law other than this Act. Section 55 of the Act gives a Central Government the power to make the rules under the SEZ Act. The Special Economic Zones Rules, 2006¹² have been framed under this Section. Rule 31 of the SEZ Rules provides the exemption from payment of service tax on taxable services under the Finance Act, 1994 rendered to a developer or a unit by any service provider shall be available for the authorised operations in special economic Zones.

13. Thus, the SEZ Act itself provides for exemption from payment of service tax in respect of the services provided for authorised operations to either a developer or to any unit located in the SEZ. This exemption is subject to the manner and the terms and conditions which the Central Government may prescribe.

14. The questions which arise are what is the meaning of an "authorised operation" and what is the meaning of 'prescribed' under the SEZ Act and what such prescriptions are and whether they have been fulfilled. According to **Section 2(c), "authorised operations" means operations which may be authorised under sub-section (2) of section 4 and sub-section (9) of section 15.** For ease of reference, we reproduce these two sections below:

4. Establishment of Special Economic Zone and approval and authorisation to operate it to, Developer.—

(1) The Developer shall, after the grant of letter of approval under sub-section (10) of section 3, submit the exact particulars of the identified area referred to in sub-sections (2) to (4) of that section, to the Central Government and thereupon that Government may, after satisfying that the requirements, under sub-section (8) of section 3

and other requirements, as may be prescribed, are fulfilled, notify the specifically identified area in the State as a Special Economic Zone:

Provided that an existing Special Economic Zone shall be deemed to have been notified and established in accordance with the provisions of this Act and the provisions of this Act shall, as far as may be, apply to such Zone accordingly: Provided further that the Central Government may, after notifying the Special Economic Zone, if it considers appropriate, notify subsequently any additional area to be included as a part of that Special Economic Zone.

(2) After the appointed day, the Board may, authorise the Developer to undertake in a Special Economic Zone, such operations which the Central Government may authorise.

15. Setting up of Unit.—

(1) Any person, who intends to set up a Unit for carrying on the authorised operations in a Special Economic Zone, may submit a proposal to the Development Commissioner concerned in such form and manner containing such particulars as may be prescribed: Provided that an existing Unit shall be deemed to have been set up in accordance with the provisions of this Act and such Units shall not require approval under this Act.

(2) On receipt of the proposal under sub-section (1), the Development Commissioner shall submit the same to the Approval Committee for its approval.

(3) The Approval Committee may, either approve the proposal without modification, or approve the proposal with modifications subject to such terms and conditions as it may deem fit to impose, or reject the proposal in accordance with the provisions of sub-section (8):

Provided that in case of modification or rejection of a proposal, the Approval Committee shall afford a reasonable opportunity of being heard to the person concerned and after recording the reasons, either modify or reject the proposal.

(4) Any person aggrieved by an order of the Approval Committee, made under sub-section (3), may prefer an appeal to the Board within such time as may be prescribed.

(5) No appeal shall be admitted if it is preferred after the expiry of the time prescribed therefor:

Provided that an appeal may be admitted after the expiry of the period prescribed therefor if the appellant satisfies the Board that he had sufficient cause for not preferring the appeal within the prescribed time.

(6) Every appeal made under sub-section (4) shall be in such form and shall be accompanied by a copy of the order appealed against and by such fees as may be prescribed.

(7) The procedure for disposing of an appeal shall be such as may be prescribed: Provided that before disposing of an appeal, the appellant shall be given a reasonable opportunity of being heard.

(8) The Central Government may prescribe,—

(a) the requirements (including the period for which a Unit may be set up) subject to which the Approval Committee shall approve, modify or reject any proposal referred to in sub-section (3);

(b) the terms and conditions, subject to which the Unit shall undertake the authorised operations and its obligations and entitlements.

(9) The Development Commissioner may, after approval of the proposal referred to in sub-section (3), grant a letter of approval to the person concerned to set up a Unit and undertake such operations which the Development Commissioner may authorise and every such operation so authorised shall be mentioned in the letter of approval.

15. Thus, 'authorised operations' under the SEZ Act are those operations of a developer authorised by the Board under sub-section (2) of Section 4 or those operations of a unit authorised by the Development Commissioner under sub-section (6) of section 9. As per section 2(e), "Board" means the Board of Approval constituted under sub-section (1) of section 8. As per section 2(h) "Development Commissioner" means the Development Commissioner appointed for one or more Special Economic Zones under sub-section (1) of section 11. There is no dispute in these appeals as to what is the Board or who the Development Commissioner was. Thus, as long as the operations by the Developer are authorised by the Board or, as the case may be, so long as the operations by the unit are authorised by the Development Commissioner, the exemption under section 26 of the SEZ Act applies. Neither section 26 nor section 4 or section 15 provide for authorisation of the inputs or input services to be used in the operations. The only authorisation required is of the operations of the developer or the unit i.e. what the developer or the unit does and not what inputs or input services are used by the developer or unit. Once this authorisation is obtained, all inputs and input services

which are used for such operations get exempted by virtue of section 26.

16. **Section 26(1) however, provides that these exemptions are 'subject to the provisions of sub-section (2)'**. Sub-section (2) reads as follows:

Section 26:

(1).....

(2) The Central Government may prescribe, the manner in which, and, the terms and conditions subject to which, the exemptions, concessions, drawback or other benefits shall be granted to the Developer or entrepreneur under sub-section (1).

17. Thus, the first requirement for exemption under section 26 is the authorisation of the operations of the developer or the unit. The second requirement is **the manner, terms and conditions prescribed** subject to which the exemptions are granted to the developer or the unit. The term '**prescribed**' has been defined in section 2(w) as follows:

Section 2

(w) "prescribed" means prescribed by rules made by the Central Government under this Act;

18. Thus, the manner, terms and conditions can be prescribed under the Rules framed under SEZ Act, i.e., under the SEZ Rules.

19. To sum up, if a developer has to enjoy the exemptions available under section 26 of the SEZ Act, its operations should be authorised by the Board under section 4 and it should meet the manner, terms and conditions laid down under the SEZ Rules. Similarly, if a unit located in the SEZ has to enjoy the exemptions available under

Section 26, its operations must be authorised by the Development Commissioner under Section 9 and it should meet the manner, terms and conditions prescribed under the SEZ Rules.

20. For exemption from the service tax, the concerned SEZ Rules are Rules 22 and 31 which read as follows.

Rule 22. Terms and conditions for availing exemptions, drawbacks and concessions to every Developer and entrepreneur for authorized operations

(1) Grant of exemption, drawbacks and concession to the entrepreneur or Developer shall be subject to the following conditions, namely:—

(i) the Unit shall execute a Bond-cum-Legal Undertaking in Form H, with regard to its obligations regarding proper utilization and accountal of goods, including capital goods, spares, raw materials, components and consumables including fuels, imported or procured duty free and regarding achievement of positive net foreign exchange earning;

(ii) the Developer and Co-developer shall execute the Bond-cum-Legal Undertaking in Form D with regard to their obligations regarding proper utilization and accountal of goods, including goods procured or imported by a contractor duly authorized by the Developer or Co-developer, as the case may be;

(iii) the Bond-cum-Legal Undertaking shall be jointly accepted by Development Commissioner and by the Specified Officer: Provided that the Bond-cum-Legal Undertaking executed by the Unit or the Developer including Co-developer shall cover one or more of the following activities, namely:—

(a) the movement of goods between port of import or export and the Special Economic Zone;

(b) the authorized operations, as applicable to Unit or Developer;

(c) temporary removal of goods or goods manufactured in Unit for the purposes of repairs or testing or calibration or display or processing or sub-contracting of production process or production or other temporary removals into Domestic Tariff Area without payment of duty;

(d) re-import of exported goods.

(iv) The procedure for execution of Bond-cum-Legal Undertaking shall be as under:—

(a) the Bond-cum-Legal Undertaking, where the entrepreneur or Developer is a company shall be executed by the Managing Director of the company or

the Director(s) or any person who has or have been duly authorized for this purpose by a resolution of the Board of Directors of the company and shall be affixed with the common seal of the company; where the entrepreneur is a partnership firm, Bond-cum-Legal Undertaking shall be executed by all the partners or authorized partner(s); where the entrepreneur is a Hindu Undivided Family, the Bond-cum-Legal Undertaking shall be executed by the Kartha; and where the entrepreneur is a proprietorship concern, the Bond-cum-Legal Undertaking shall be executed by the proprietor;

(b) the value of the Bond-cum-Legal Undertaking shall be equal to the amount of effective duties leviable on import or procurement from the Domestic Tariff Area of the projected requirement of capital goods, raw materials, spares, consumables, intermediates, components, parts, packing materials for three months as applicable but which will not be levied on account of admission of such goods into the Unit or the amount of effective duties leviable on import or procurement from Domestic Tariff Area of the projected requirements of goods for the authorized operation by the Developer but will not be levied on account of admission of such goods into the Special Economic Zone;

(c) where the value of Bond-cum-Legal Undertaking executed falls short on account of requirement of additional goods, the Unit or the Developer shall submit additional Bond-cum-Legal Undertaking;

(d) there shall be no debit and credit, the Bond-cum-Legal Undertaking amount shall be monitored quarterly or yearly on the basis of Quarterly Progress Report or Annual Progress Report submitted by the Developer or Unit, as the case may be, and in case of any shortfall in the Bond-cum-Legal Undertaking amount, a fresh or additional Bond-cum-Legal Undertaking shall be furnished;

(e) the original of Bond-cum-Legal Undertaking shall be maintained by the office of Development Commissioner and certified copies shall be given to the Specified Officer and Unit or Developer;

(f) the value of the Bond-cum-Legal Undertaking in respect of gems and jewellery units shall be calculated on rates as notified by the Central Government, from time to time;

(g) duly completed Bond-cum-Legal Undertaking executed by the Unit or Developer, in accordance with the rules above, as the case may be, shall be deemed to have been accepted, if no communication is received within seven working days from the date of its submission.

(2) Every Unit and Developer shall maintain proper accounts, financial yearwise, and such accounts which should clearly indicate in value terms the goods imported or procured from Domestic Tariff Area, consumption or utilization of goods, production of goods, including by-products, waste or scrap or remnants, disposal of goods

manufactured or produced, by way of exports, sales or supplies in the domestic tariff area or transfer to Special Economic Zone or Export Oriented Unit or Electronic Hardware Technology Park or Software Technology Park Units or Bio-technology Park Unit, as the case may be, and balance in stock: Provided that unit and developers shall maintain such records for a period of seven years from the end of relevant financial year: Provided further that the unit engaged in both trading and manufacturing activities shall maintain separate records for trading and manufacturing activities.

(3) The Unit shall submit Annual Performance Reports in the Form I, to the Development Commissioner and the Development Commissioner shall place the same before the Approval Committee for consideration.

(4) The Developer shall submit Quarterly Report on import and procurement of goods from the Domestic Tariff Area, utilization of the same and the stock in hand, in Form E to the Development Commissioner and the Specified Officer and the Development Commissioner shall place the same before the Approval Committee.

Rule 31. The exemption from payment of service tax on taxable services under section 65 of the Finance Act, 1994 (32 of 1994) rendered to a Developer or a Unit (including a Unit under construction) by any service provider shall be available for the authorized operations in a Special Economic Zone.

21. In these appeals there is no dispute that the operations of the appellant were authorised by the Development Commissioner under the SEZ Act nor is any allegation that any of the conditions laid down in Rules 22 and 31 were violated.

22. While the SEZ Act itself provides for exemption from service tax (as well as Central Excise duty and Customs duty), exemption notifications were also issued by the Government under the respective laws. These exemption notifications were also issued with some conditions. Thus, there is duplication inasmuch as the goods and services provided to authorised operations of developers and units in the SEZs are exempted from Customs duty, Central Excise duty and the service tax by the SEZ Act itself (subject to the manner which may be prescribed) and there are also exemption notifications under the respective tax laws which are also subject to some

conditions. The exemption notifications in dispute in this case are service tax exemption notifications ST-40/2012 dated 20.6.2013 and ST-12/2013 dated 1.7.2013. This contradiction and duplication of exemption under the two provisions viz, SEZ Act and Rules and the exemption notifications under the Finance Act, 1994 were discussed at length by a bench of the Tribunal in case of **DLF Assets**, the relevant extract of which is below.

" 10. According to the appellant, as the aforesaid services were utilized for authorized operations by the recipient SEZ units, there was no necessity to pay any service tax. The Department, however, alleged that though the exemption provided under the SEZ Act is contained in the Notification dated March 3, 2009, but the appellant did not follow the conditions prescribed therein and, therefore, was liable to pay service tax on renting of immovable property services to SEZ units. The Department also alleged that since the appellant had classified signage as sale of space or time for advertisement, it was not entitled to claim exemption.

11. In order to appreciate the contentions advanced by learned Counsel for the appellant and the learned Authorized Representative of the Department, it will be appropriate to refer to the relevant provisions. Section 26 of the SEZ Act deals with exemptions, drawbacks and concessions to every Developer and entrepreneur. The relevant provisions are reproduced below:

"26. Exemptions, drawbacks and concessions to every Developer and entrepreneur.—

(1) Subject to the provisions of sub-section (2), every Developer and the entrepreneur shall be entitled to the following exemptions, drawbacks and concessions, namely:—

(a) *****

(b) *****

(c) *****

(d) *****

(e) exemption from service tax under Chapter V of the Finance Act, 1994 (32 of 1994) on taxable services provided to a Developer or Unit to carry on the authorized operations in a Special Economic Zone;

(f) *****

(g) *****

(2) The Central Government may prescribe the manner in which, and the terms and conditions subject to which, the exemptions, concessions, drawback or other benefits shall be granted to the Developer or entrepreneur under sub-section (1)."

12. Section 51 of the SEZ Act further provides overriding effect to the provisions of the SEZ Act and it is reproduced below:

"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."

13. Section 55 of the SEZ Act gives power to the Central Government to make rules for carrying out the provisions of the Act. In exercise of the aforesaid powers, the Central Government made "The Special Economic Zones Rules, 2006¹³". Rule 31 deals with the exemption from payment of service tax and is reproduced below:

"31. The exemption from payment of service tax on taxable services under Section 65 of the Finance Act, 1994 (32 of 1994) rendered to a Developer or a Unit (including a Unit under construction) by any service provider shall be available for the authorized operations in a Special Economic Zone."

14. The impugned order has confirmed the demand of service tax on the ground that for the period from

March 3, 2009 upto May 19, 2009, exemption on services rendered to SEZ units was available only by way of refund and thus the appellant was not eligible for ab-initio exemption, which was introduced subsequently by amendment of Notification dated March 3, 2009 by Notification No. 15/2009-ST w.e.f May 20, 2009. It would, therefore, be necessary to reproduce the aforesaid two Notifications. The relevant portion of the Notification dated March 3, 2009 is reproduced below:

Notification No. 09/2009-Service Tax : Dated March 3, 2009

G.S.R. 146 (E) - In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994), and in supersession of the Notification of the Government of India, Ministry of Finance (Department of Revenue), No. 4/2004-ServiceTax, dated the 31st March, 2004, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) dated the 31st March, 2004, vide, G.S.R.248(E), dated the 31st March, 2004, except as respects things done or omitted to be done before such supersession, the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby **exempts the taxable services specified in clause (105) of section 65 of the said Finance Act, which are provided in relation to the authorised operations in a Special Economic Zone, and received by a developer or units of a Special Economic Zone, whether or not the said taxable services are provided inside the Special Economic Zone, from the whole of the service tax leviable thereon under section 66 of the said Finance Act:**

Provided that—

(a) *****

(b) *****

(c) **the exemption claimed by the developer or units of Special Economic Zone shall be provided by way of refund of service tax paid on the specified services used in relation to the authorised operations in the Special Economic Zone;**

(d) *****

(e) *****

(f) *****

(g) *****

2. *****

(emphasis supplied)

15. Proviso (c) to the aforesaid Notification dated March 3, 2009 was amended by Notification dated May 20, 2009. The amended proviso (c) is reproduced below:

"(c) the exemption claimed by the developer or units of Special Economic Zone shall be provided by way of refund of service tax paid on the specified services used in relation to the authorised operations in the Special Economic Zone except for services consumed wholly within the Special Economic Zone;"

16. It would, therefore, be seen that prior to May 20, 2009 the exemption could be claimed by way of refund of service tax paid on the specified services used in relation to the authorized operations in the SEZ. However, proviso (c) was amended by Notification dated May 20, 2009. The amended proviso (c) stipulates that the exemption claimed by the developer or units of SEZ shall be provided by way of refund of service tax paid on the specified services, except for services consumed wholly within the SEZ.

17. The Notification dated March 3, 2009 has been issued in exercise of the powers conferred by section 93 (1) of the Finance Act. It is for this reason that it has been contended by learned Counsel for the appellant that the said Notification dated March 3, 2009 would not have any relevance to the case of the appellant when it sought exemption from payment of service tax under the provisions of section 26(1)(e) of the SEZ Act read with rule 31 of the SEZ Rules.

18. The contention advanced by the learned Counsel for the appellant has force. As noticed above, section 26(1) of the SEZ Act provides that subject to the provisions of the sub-section (2), every Developer shall be entitled to exemptions and the exemption at (e) exempts every Developer from service tax under Chapter-V of the Finance Act on taxable services provided to a Developer or unit to carry on the authorized operations in a SEZ. Section 51 of the SEZ Act provides for an overriding effect to the provisions of the SEZ Act. The provisions of section 26 read with rule 31 of the SEZ Rules thus, have overriding effect over anything inconsistent contained in any other law for the time being in force, which would include the Finance Act. It needs to be noted that the Notification dated March 3, 2009 has been issued in exercise of the powers conferred by section 93 of the Finance Act. Thus, when the services rendered by the appellant are fully exempted from service tax in terms of the provisions of the SEZ Act, the condition of exemption by way of refund imposed under the Notification issued under the Finance Act would be inconsistent with the provisions of the SEZ Act. It also needs to be noted that the SEZ Act was enacted in 2005, much after the enactment of the Finance Act in 1994.

19. This issue was examined by the Telangana and Andhra Pradesh High Court in **GMR Aerospace Engineering Limited and another Vs. Union of India and Others**¹⁴. The second petitioner, a Developer of GMR Hyderabad Aviation SEZ, entered into a sub-lease agreement with the first petitioner for rendering certain services. It, however, claimed examination on the ground that under section 26(1)(e) of the SEZ Act, every Developer was entitled to exemption from service tax under Chapter-V on the Finance Act on taxable services provided to a Developer or unit to carry on the authorized operations in a SEZ and the same was not dependent upon the conditions stipulated in the Notification issued under section 93 of the Finance Act.

20. It is in this context that the Andhra Pradesh High Court observed as follows:

"22. It may be noted that sub-section (1) of section-26 begins with the words "subject to the provisions of sub-section (2)". Sub-section (2) authorizes the Central Government to prescribe the manner in which and the terms and conditions subject to which exemptions shall be granted to the developer or entrepreneur under sub-section (1).

23. As rightly pointed out by Sri S. Niranjan Reddy, learned senior counsel appearing for the petitioner, the word "prescribe" appearing in sub-section (2) of section 26 has to be understood with reference to the definition of the word "prescribed" appearing in section 2(w) of the SEZ Act, 2005. Section 2(w) of the Act reads as follows:

"prescribed means prescribed by rules made by the Central Government under this Act."

24. Therefore, the terms and conditions subject to which the exemptions are to be granted under sub-section (1) of section 26 should be prescribed by the Rules made by the Central Government under the SEZ Rules, 2006 issued in exercise of the power conferred by section 55 of the SEZ Act. It is not necessary to extract rule 22, since there is no dispute about the fact (1) that the petitioners have complied with the prescriptions contained in rule 22 of the SEZ Rules, 2006, and (2) that rule 22 of the SEZ Rules, 2006 does not stipulate the filing of Forms A1 and A2 as prescribed in the three Notifications issued under section 93 of the Finance Act, 1994.

29. The contention of Smt. Sundari R. Pisupati, learned senior standing counsel is that there is no inconsistency between (i) the terms and conditions prescribed in the Notifications issued under section 93 of the Finance Act, 1994, and (ii) the terms and conditions prescribed in rules 22 and 31 of the SEZ Rules, 2006, and that therefore, section 51 of the SEZ Act, 2005 cannot be pressed into service. But this contention is unacceptable.

30. This is for the reason that section 26(1) of the SEZ Act made the entitlement to certain exemptions subject to provisions of sub-section (2) of section 26. Section 26(1) did not make the entitlement of a developer to certain exemptions, subject to the provisions of something else other than the provisions of sub-section (2). Therefore, the fifth respondent cannot read section 26(1) to mean that the exemptions

listed therein are (1) subject to the provisions of sub-section (2) of section 26, and (2) also subject to the terms and conditions prescribed in the Customs Act, 1962, the Customs Tariff Act, 1975, the Central Excise Act, 1944, the Central Tariff Act, 1985 and the Finance Act, 1994. This is especially so, since the authority of the Central Government to prescribe the terms and conditions subject to which exemptions may be granted under section 26(1), flows only out of sub-section (2) of section 26. The word "prescribe" is verb. Generally no enactment defines the word "prescribe" but the SEZ Act 2005 defines the word "prescribe" under section 2(w) to mean the rules framed by the Central Government under the SEZ Act, 2005. The space is also not left unoccupied, as the Central Government has issued a set of rules known as "the Special Economic Zones Rules, 2006", wherein the Central Government has prescribed the terms and conditions for grant of exemptions under rule 22. Therefore, there is no question of comparing the terms and conditions prescribed in rule 22 with the terms and conditions prescribed in the Notifications issued under any one of the five enactments listed in section 26(1) to find out whether there was any inconsistency.

34. The benefit of exemptions granted under the Notifications issued under section 93 of the Finance Act, 1994, are available to any one and not necessarily confined to a unit in a special economic zone. Section 93 of the Finance Act, in that sense is a general power of exemption available in respect of all taxable services. But, section 26(1) is a special power of exemption under a special enactment dealing with a unit in a special economic zone. **Therefore, the Notifications issued under section 93 of the Finance Act, 1994 cannot be pressed into service for finding out whether a unit in a SEZ qualifies for exemption or not."**

(emphasis supplied)

21. Thus, what follows is that the Commissioner was not justified in examining whether the conditions set out in the Notification dated March 3, 2009 were satisfied or not for grant of any exemption from service tax. Section 26(2) of the SEZ Act does provide that the Central Government may **prescribe** the manner in which, and the terms and conditions subject to which, the exemptions shall be granted to the Developer under

sub-section (1) but what is important to notice, and as was also observed by the Andhra Pradesh High Court, the word "**prescribe**" would mean "prescribed by rules made by the Central Government under the SEZ Act," in view of the definition of "prescribed" under section 2(w) of the SEZ Act. The Notification dated March 3, 2009, which has been issued under section 93 of the Finance Act, therefore, has no application."

23. Thus, the legal position is that SEZ Act overrides any other law because of Section 51 of the SEZ Act. The question is what part of the tax law have been overridden by the SEZ Act. To answer this question, we proceed to examine the requirement under the Constitution of India to levy taxes and the relevant legal provisions of the Central Excise Act and Customs Act and Chapter V of the Finance Act, 1994 under which Service Tax is levied.

24. Taxes can be levied only as per Article 265 of the Constitution of India which reads as follows:

265. Taxes not to be imposed save by authority of law.—No tax shall be levied or collected except by authority of law.

25. This authority of law to levy and collect taxes is in the form of charging sections of the Acts- such as Section 3 of the Central Excise Act, 1944, Section 12 of the Customs Act, 1962 and Sections 66, 66A and Section 66B of Chapter V of the Finance Act, 1994 (for collection of Service Tax). While section 66 provides for levy of service tax on forward charge basis by the service provider, section 66A provides for charge of service on reverse charge basis by the service recipient in certain cases. Section 66B provides for levy of service tax on all services other than those in the negative list after 2012. The levy and collection of these taxes and duties are further modified by some

machinery provisions of these Acts, including those which enable the Government to issue exemption notifications.

26. Section 3 of the Central Excise Act, 1944 is the charging section by virtue of which the central excise duty is levied at the rates set forth in the Schedule to the Central Excise Tariff Act. It reads as follows:

Section 3. Duties specified in the 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(excluded 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:

.....

27. The Central Excise Act and Central Excise Rules themselves made some exceptions to this levy and collection as follows:

- (i) Section 5A empowers the Central Government to, by notification, exempt the duty of excise either conditionally or unconditionally.
- (ii) Rule 18 of the Central Excise Rules provides for rebate of duty in case of exports.

- (iii) Rule 19 of the Central Excise Rules provides for export of goods under bond without paying the duty at all.

28. Thus, Central Excise duty leviable under section 3 at the rates specified in the Central Excise Tariff gets reduced to the extent any exemption notification is issued under section 5A of the Central Excise Act.

29. Section 12 of the Customs Act, 1962 is the charging section by which duties of Customs are charged at the rates set forth in the Customs Tariff. It reads as follows:

Section 12. Dutiable goods. -

(1) Except as otherwise provided in this Act, or any other law for the time being in force, **duties of customs shall be levied at such rates as may be specified under the Customs Tariff Act, 1975 (51 of 1975)**, or any other law for the time being in force, on goods imported into, or exported from, India.

(2) The provisions of sub-section (1) shall apply in respect of all goods belonging to Government as they apply in respect of goods not belonging to Government.

30. Some exceptions have been made to this levy under the Customs Act as follows:

- (i) Section 25 empowers the Central Government to, by notification, exempt the Customs duties wholly or partially and either conditionally or unconditionally.
- (ii) Sections 74 provides for drawback of the duties paid if the imported goods are re-exported.
- (iii) Section 75 provides for drawback of duties of imported materials used in manufacture of exported goods.

31. Sections 66, 66A and 66B of the Finance Act, 1994 are the charging sections by which service tax is levied on services. These read as follows:

SECTION 66. Charge of service tax

There shall be levied a tax (hereinafter referred to as the service tax) at the rate of twelve per cent. of the value of taxable services referred to in sub-clauses (a), (d), (e), (f), (g,) (h), (i), (j),(k), (l), (m), (n), (o), (p), (q), (r), (s), (t), (u), (v), (w), (x), (y), (z), (za), (zb), (zc), (zh), (zi), (zj), (zk),(zl), (zm), (zn), (zo), (zq), (zr), (zs), (zt), (zu), (zv), (zw), (zx), (zy), (zz), (zza), (zzb), (zzc), (zzd), (zze), (zzf), (zzg), (zzh), (zzi), (zzk), (zzl), (zzm), (zzn), (zzo), (zzp), (zzq), (zzr), (zzs), (zzt), (zzu), (zzv), (zzw), (zzx), (zzy), (zzz), (zzza), (zzzb), (zzzc), (zzzd), (zzze), (zzzf), (zzzg,) (zzzh), (zzzi), (zzzj), (zzzk), (zzzl), (zzzm), (zzzn), (zzzo), (zzzp), (zzzq), (zzzr), (zzzs), (zzzt), (zzzu), (zzzv), (zzzw), (zzzx), (zzzy), (zzzz), (zzzza), (zzzzb), (zzzzc), (zzzzd), (zzzze), (zzzzf), (zzzzg), (zzzzh), (zzzzi), (zzzzj), (zzzzk), (zzzzl), [(zzzzm), (zzzzn), (zzzzo), (zzzzp),(zzzzq), (zzzzr), (zzzzs), (zzzzt), (zzzzu), (zzzzv) (zzzzv) and (zzzzw) of clause (105) of section 65 and collected in such manner as may be prescribed

66A. Charge of service tax on services received from outside India

(1) Where any service specified in clause (105) of section 65 is, - is, -

(a) provided or to be provided by a person who has established a business or has a fixed establishment from which the service is provided or to be provided or has his permanent address or usual place of residence, in a country other than in India, and

(b) received by a person (hereinafter referred to as the recipient) who has his place of business, fixed establishment, permanent address or usual place of residence, in India, such service shall, for the purposes of this section, be taxable service, and such taxable service shall be treated as if the recipient had himself provided the service in India, and accordingly all the provisions of this Chapter shall apply:

Provided that where the recipient of the service is an individual and such service received by him is otherwise than for the purpose of use in any business or commerce, the provisions of this sub-section shall not apply:

Provided further that where the provider of the service has his business establishment both in that country and elsewhere, the country, where the establishment of the provider of service directly concerned with the provision of service is located, shall be treated as the country from which the service is provided or to be provided.

(2) Where a person is carrying on a business through a permanent establishment in India and through another permanent establishment in a country other than in India, such permanent establishments shall be treated as separate persons for the purposes of this section.

Explanation 1. - A person carrying on a business through a branch or agency in any country shall be treated as having a business establishment in that country.

Explanation 2. - Usual place of residence, in relation to a body corporate, means the place where it is incorporated or otherwise legally constituted.

SECTION 66B. Charge of service tax on and after Finance Act, 2012.— There shall be levied a tax (hereinafter referred to as the service tax) at the rate of fourteen percent. on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed.

32. Some exceptions have been made to the levy of Service Tax as follows:

- (i) Section 93 empowers the Central Government to, by notification, exempt the service tax wholly or partially and either conditionally or unconditionally.
- (ii) Section 93A provides for rebate of service tax if the services are used in manufacture of exported goods.

33. Thus, the exemption notifications issued by the Central Government under section 5A of the Central Excise Act, section 25 of the Customs Act and Section 93 of the Finance Act, 1994 reduce the duties and tax from what is leviable as per the respective charging sections, subject to conditions, if any, in the notifications.

34. Often, these exemptions are provided for various purposes. A few examples are:

- (a) export promotion under various export promotion schemes of the Foreign Trade Policy formulated under the Foreign Trade (Development and Regulation) Act, 1992,

(b) to encourage development of specific areas (area based exemption notifications), and

(c) for specific use (such as hospitals, research institutions, etc.)

35. While various policies are formulated by the Government, in order to provide exemption envisaged in the policies, a notification under the respective Act has to be issued so that the charge of duty or tax under the Act is modified appropriately. For instance, several schemes are formulated and licenses are issued under the Foreign Trade Policy such as Export Promotion Capital Goods Scheme, Duty Entitlement Exemption Certificate. For each policy, a corresponding exemption notification is issued under the Customs Act because the Foreign Trade Policy itself cannot provide any exemption from the Customs duties, etc.

Supplies of goods and services to SEZ developers and units

36. Special Economic Zones created under the SEZ Act are on a different footing because the SEZ Act itself exempts goods and services supplied for authorised operations to developers and units in the SEZs from the Customs Duty, Central Excise Duty and Service Tax. The provisions of SEZ Act prevail over any other law. Section 26 (1) of the SEZ Act, 2005 reads as follows:

26. (1) Subject to the provisions of sub-section (2), **every Developer and the entrepreneur shall be entitled to the following exemptions, drawbacks and concessions, namely: -**

(a) **exemption from any duty of customs, under the Customs Act, 1962 or the Custom Tariff Act, 1975 or any other law for the time being in force, on goods imported into, or service provided in, a**

Special Economic Zone or a Unit, to carry on the authorised operations by the Developer or entrepreneur;

(b) **exemption from any duty of customs, under the Customs Act, 1962 or the Customs Tariff Act, 1975 or any other law for the time being in force, on goods exported** from, or services provided, from a Special Economic Zone or from a Unit, **to any place outside India:**

(c) **exemption from any duty of excise, under the Central Excise Act, 1944 or the Central Excise Tariff Act, 1985 or any other law for the time being in force**, on goods brought from Domestic Tariff Area to a Special Economic Zone or Unit, to carry on the authorised operations by the Developer or entrepreneur;

.....

(e) **exemption from service tax under Chapter-V of the Finance Act, 1994 on taxable services provided** to a Developer or Unit to carry on the authorised operations in a Special Economic Zone;

.....

37. Thus, Section 26(1) of the SEZ Act is inconsistent with the three charging sections viz., Section 3 of the Central Excise Act, 1944, Section 12 of the Customs Act, 1962 and Sections 66, 66A and 66B of Chapter V of the Finance Act, 1994. In addition to the general principle of a specific law (pertaining to SEZ) prevailing over the general law (levying customs, central excise or service tax) and the later enactment (such SEZ Act, 2005) prevailing over the earlier enactments (Central Excise Act, 1944, Customs Act, 1962 and Finance Act, 1994), in the SEZ Act, the Parliament has explicitly resolved this inconsistency between the laws. Section 51 of the SEZ Act states that the provisions of SEZ Act override any other provisions of other laws. It reads as follows:

51. (1) 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.

38. Thus, insofar as supplies for authorised operations of SEZ developers and units are concerned, Section 26 of the SEZ Act overrides the charging sections in all the three Acts.

39. The charging sections, having been overridden by the SEZ Act passed by the Parliament, no legal authority to levy and collect central excise duty, customs duty or service tax for goods or services supplied for authorised operations of SEZ developers and units covered by Section 26 remains. Without such a legal authority, no tax or duty can be either levied or collected in view of article 265 of the Constitution of India.

40. Therefore, there is no need for any exemption notifications under any of these three Acts nor is it necessary to fulfil any conditions of any of the conditions laid down in exemption notifications, if any, issued for the purpose. **Thus, the charge of excise duty under Section 3 of the Central Excise Act, the charge of Customs Duty under section 12 of the Customs Act and the charge of service tax under sections 66, 66A and 66B of the Finance Act, 1994 will not apply to goods and services supplied to developers and units for authorized operations in the SEZ areas by virtue of the overriding provisions of the SEZ Act. Any exemption notifications and conditions therein are therefore, redundant because, the Parliament itself has, through section 51 of the SEZ Act, overridden the charge in the other laws.**

41. The status of exemption notifications which are issued when the tax sought to be levied is out of the ambit of charging section itself was considered by the Supreme Court in **Commissioner of Central Excise and Customs, Kerala vs. Larsen & Toubro Limited**¹⁵. The case before the Supreme Court, in brief, was as follows. Service tax was levied under Chapter V of the Finance Act, 1994 on taxable services. The list of taxable services was defined under section 65(105) and this list was expanded from time to time. If the taxable service was provided as a part of a composite contract which involved both rendering the service and transfer or deemed transfer of goods, exemption notifications were issued by the Government towards abatement of the value of the goods used in the services. Later, on 1.6.2007, Works Contract Service, itself was introduced as a service. The question before the Supreme Court was whether works contract service could have been taxed under various other heads prior to this date. The Supreme Court held that there was no charge on works contract service prior to 1.6.2007 because Works Contracts Services were a separate specie of contract known to commerce and there was no levy on such contracts prior to 1.6.2007. It was pleaded on behalf of the Revenue that abatements were given through various exemption notifications. Supreme Court held as follows:

43. We need only state that in view of our finding that the said Finance Act lays down no charge or machinery to levy and assess service tax on indivisible composite works contracts, such argument must fail. This is also for the simple reason that there is no subterfuge in entering into composite works contracts containing elements both of transfer of property in goods as well as labour and services.

44. We have been informed by counsel for the revenue that several exemption notifications have been granted *qua* service tax "levied" by the 1994 Finance Act. We may only state that whichever judgments which are in appeal before us and have referred to and dealt with such notifications will have to be disregarded. Since the levy itself of service tax has been found to be non-existent, no question of any exemption would arise. With these observations, these appeals are disposed of.

42. The refunds in these appeals were also rejected by the impugned orders on a few other grounds which we now proceed to examine. It has been asserted that either the approval of the UAC was not obtained for the services at all or that it was obtained after the invoice for which the refund was claimed. The approval of the UAC for the input services is a requirement under the exemption notifications. As we have found that the exemption notifications themselves are redundant and that the exemption was available under section 26 of the SEZ Act itself, this cannot be a ground for rejection of refund.

43. With respect to the claim of refund of service tax paid on warehousing charges at the Customs Port, it has been held in the impugned order that it was not necessary to warehouse the goods at the port and they could have been directly brought to the SEZ unit. We find that it may have been possible to conduct the business affairs of the appellant differently and even more efficiently. However, the exemption from service tax under section 26 of the SEZ Act is for the services for authorised operations of the SEZ unit and NOT what the SEZ unit could have or should have used. How the SEZ unit or SEZ developer conducts its authorised operations is upto it and it is not

open to others to either decide how the business could have been or should have been conducted nor can the exemption from service tax be denied on such views.

44. In respect of the refund claimed on the basis of the ISD invoices issued by the head office of the appellant in Gurugram, it has been rejected on the ground that the head office at Gurugram should have claimed the refund. It is necessary to discuss in a little detail about the ISD invoices. Usually when a service is rendered to a manufacturer or to a service provider, an invoice is raised in its name. Some services, however, are provided at the head office of the assessee. The head office usually is a corporate or registered office which neither manufactures any goods nor provides any services by itself. Only its field units do so. The Service Tax law considers the services provided in the head office as input services to the field units and permits the head office to distribute proportionately, the service rendered at the head office to the field formations. For this purpose, the head office needs to register as an ISD and thereafter it can distribute the service rendered at the head office to the field formations. This enables the field offices which indirectly profit from these services to take CENVAT credit on the strength of the ISD invoices. It is somewhat like a shared taxi where two or three people travel together to the same destination in the same taxi and split the fare between them. Likewise, the service rendered at the head office, is in effect, the service rendered in part to various field formations who get their share of the service and an ISD invoice. In this case, the head office is located in Gurugram and it is not an SEZ unit. A

portion of the services received in Gurugram are for the authorised operations of the appellant in its SEZ unit in Indore and to that extent, the ISD invoice issued by the head office distributes the service to the appellant. Since it is a service rendered for the authorised operations of the appellant to the extent indicated in the ISD invoice, to that extent, service tax cannot be charged in view of section 26 of the SEZ Act. The service tax paid to that extent needs to be refunded to the appellant. The head office could not have claimed the refund for two reasons. Firstly, it is not an SEZ unit nor does it have any authorised operations. Secondly, the head office would have paid service tax on the total input service invoice and only a portion of which it is distributed to the appellant through an ISD invoice. The appellant is, therefore, entitled to the refund.

45. Another ground on which the service tax has been denied is that the goods were transported from the SEZ unit, i.e., beyond the factory gate after the goods have been removed. As per the CENVAT Credit Rules, credit of input services on transportation of goods from the place of removal was allowed for some time and thereafter, it was restricted to transportation of goods up to the place of removal. Thus, no CENVAT credit of service tax paid on outward transportation of goods was allowed. However, as far as SEZ units are concerned, so long as the service is for authorised operation of the SEZ unit, there is no scope for making any distinction based on the place of removal under section 26 of the SEZ Act. Refund can be denied or service tax can be charged only if the service is not for authorised operations of the SEZ unit. There is no such allegation in the present case.

46. Refund has been denied in one case on the ground that the address of the SEZ unit was not on the invoice. However, learned counsel for the appellant has demonstrated to us with the corresponding Bill of Lading and other documents that the service was, indeed rendered for the SEZ unit only. Therefore, refund cannot be denied on this count.

47. In one case, the claim for refund was alleged to have been filed beyond one year from the date of the invoice and it was not filed in the same quarter as required under the exemption notification. So far as the requirement of filing in the quarter under the exemption notification is concerned, this condition is irrelevant as the exemption notification itself is not necessary and the service tax is exempted by Section 26 of the SEZ Act itself. As far as the period of one year for filing refund of service tax is concerned, learned counsel submits that although the invoice is dated 21.8.2014, it had paid the service tax only on 26.10.2015 before which it could not have claimed refund. The claim was made in January 2016. We, therefore, find that there was no delay in filing the refund claim.

48. Thus, as the charge of service tax under the Finance Act, 1994 on the services provided for authorised operations of the appellant are overridden by section 51 of the SEZ Act, 2005, any exemption notifications for such services as well as the conditions laid down in them are redundant. Service tax, if any, paid on such input services for authorised operations need to be refunded to the appellant. We

also find no force in the other grounds raised for denying the refund of service tax paid and discussed above.

49. The denial of refund of service tax to the appellant in these five appeals is not sustainable and, accordingly, we find that appeals need to be allowed and the impugned orders need to be set aside.

50. All five appeals are allowed and the impugned orders are set aside with consequential relief to the appellant.

(Order pronounced on **March 28, 2022**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P. V. SUBBA RAO)
MEMBER (TECHNICAL)