

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD**

Single Member Bench

Court – I

Excise Appeal No. 30603 of 2018

(Arising out of Order-in-Appeal No.HYD-EXCUS-RRC-APP-016 & 017-17-18 (APP-I)
dt.18.10.2017 passed by CC & CT (Appeals-I), Hyderabad)

M/s Adani Power Ltd,
Achalraj, Opp Mayor Bunglow,
Law Garden, Ahmedabad,
Gujarat – 380 006

.....Appellant

VERSUS

**Commissioner of Central Tax –
Rangareddy - GST**

Posnett Bhavan, Ramkoti,
Hyderabad, Telangana – 500 001

.....Respondent

with

Excise Appeal No. 30513 of 2018

(Arising out of Order-in-Appeal No.HYD-EXCUS-MD-ADI-018-17-18 dt.22.02.2018 passed
by Commissioner, Audit-I Commissionerate (Appeal Cell), Hyderabad)

M/s Adani Power Ltd,
Achalraj, Opp Mayor Bunglow,
Law Garden, Ahmedabad,
Gujarat – 380 006

.....Appellant

VERSUS

**Commissioner of Central Tax –
Medchal - GST**

H.No.11-4-649/B, Opp Mehdi Function
Palace, Above SBI Bazarghat Branch,
Lakdikapool, Hyderabad, Telangana – 500 004

.....Respondent

and

Excise Appeal No. 30898 of 2018

(Arising out of Order-in-Appeal No.31/2017-18 dt.28.02.2018 passed by Commissioner,
Audit-II Commissionerate, Hyderabad)

M/s Adani Power Ltd,
Achalraj, Opp Mayor Bunglow,
Law Garden, Ahmedabad,
Gujarat – 380 006

.....Appellant

VERSUS

**Commissioner of Central Tax –
Secunderabad - GST**

Kendriya Shulk Bhavan, L.B. Stadium Road,
Basheerbagh, Hyderabad, Telangana – 500 004

.....Respondent

Appearance

Shri Joseph Prabhakar, Advocate for the Appellant.

Shri V.R. Pavan Kumar, Authorized Representative for the Respondents.

Coram:

HON'BLE MR. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER No. A/31018-31020/2019

Date of Hearing: 04.10.2019

Date of Decision: 05.11.2019

[Order per: P.V. SUBBA RAO.]

1. These three appeals are on the same issue and hence are being disposed of together.

2. Heard both sides and perused the records. The appellant M/s Adani Power Ltd, Gujarat are co-developers of Multi-Product Special Economic Zone in Gujarat. They procured stores, spares and consumables from M/s HBL Power Systems Ltd (HBLPSL), Kothur Division, Hyderabad-II. Appropriate excise duty was paid while clearing the goods to the appellant. It appeared to the appellant that they are not liable to pay excise duty and hence they filed refund applications with the jurisdictional Central Excise Officer of the supplier which were rejected. Aggrieved, the appellant appealed to the first appellate authority, who, vide the impugned orders rejected their appeals. Hence, these appeals.

3. Learned counsel for the appellant submits that in terms of the Special Economic Zone (SEZ) Act, 2005, they are entitled to procure goods and services required for undertaking the authorized operations without any duty or tax liability in terms of section 7 and section 26 of the SEZ Act. The SEZ Act is a self-contained code and provides for the mode and the mechanism for claiming exemption from payment of different duties. Insofar the supply of goods from Domestic Tariff Area (DTA) to SEZ unit is concerned, such supplies would be exempt from payment of duty and such exemption has to be claimed by the developer/entrepreneur after executing an appropriate bond-cum-legal undertaking as per Rule 22 of the SEZ Rules. They are also

required to maintain proper accounts, financial year wise, which should indicate the value of the goods imported or procured from DTA, their consumption, etc. On receipt of the goods at the SEZ gate, in respect of which exemptions, drawback or concession are to be claimed by the developer for undertaking authorized operations, a Bill of Export is required to be filed by the unit/developer on behalf of the supplier which has to be assessed by the authorized officer. Upon such assessment the goods are admitted into the SEZ and the bill of export copy is endorsed by the authorized officer. However, where the unit or the developer has not claimed any exemption, drawback or concession at the time the goods are brought into the SEZ, the goods procured from the DTA can be brought into the SEZ on the basis of invoice or a transport document issued by the DTA supplier. As per Rule 25 of the SEZ Rules a developer/entrepreneur is liable to refund the exemption, drawback or concession claimed by it under the Customs Act, Central Excise Act etc., if the goods have not been used for the authorized operations. In their case, they have procured the goods on the strength of normal commercial invoice and the goods were cleared by their suppliers after paying appropriate duty.

4. Thereafter, they filed refund applications under section 11B of the Central Excise Act which were rejected by the authorities. Hence, these appeals.

5. Regarding the refund application not having been filed with the jurisdictional Central Excise Officer as per Rule 47(5) of SEZ Rules, he would submit that this Rule pertains to sales in DTA by the SEZ and it does not pertain to procurement of goods by the SEZ unit/developer. As per Rule 47(5), refund, demand adjudication, review and appeal, with regard to matters relating to authorized operations under SEZ Act, 2005, transactions and goods and services related thereto, shall be made by the jurisdictional Customs & Central Excise authorities in accordance with the relevant provisions contained in the Customs Act, 1962, Central Excise Act, 1944 and the Finance Act, 1994 and the rules made there under or notifications issued there under. He would submit that this reference to the jurisdictional excise officer or customs officer having jurisdiction over the SEZ unit for the purpose of clearance of goods by the SEZ units to the DTA. In the present case, the goods were cleared by their supplier in Hyderabad to the SEZ unit.

Therefore, the appropriate officer before whom the application for refund can be filed is the jurisdictional officer of Central Excise in Hyderabad. He would submit that in their own case, CESTAT-Kolkata held so in Final Order No. F/76332-76339/2017 dt.30.07.2017. He would submit that in this order the Tribunal has held that a refund under section 11B can be filed not just by the assessee by any person who suffers Central Excise duty which is not payable as per the law. Therefore, he would urge that they are entitled to refund and the impugned orders may be set aside and they may be allowed refund. He further submits that they are also entitled to interest at appropriate rate from the date of filing of the refund claims till the date of payment of the refund amounts.

6. Learned departmental representative, on the other hand, reiterates the findings of the lower authorities and asserts that there is no provision under which the SEZ unit/developer can claim refund of duties paid by their supplier. He draws the attention of the bench to Rule 30 of the SEZ Rules which reads as follows:

"30. Procedure for procurements from the Domestic Tariff Area.— (1) The Domestic Tariff Area supplier supplying goods to a Unit or Developer shall clear the goods, as in the case of exports, either under bond or as duty paid goods under claim of rebate on the cover of ARE-1 referred to in Notification number 42/2001-Central Excise (NT) dated the 26th June, 2001 in quintuplicate bearing running serial number beginning from the first day of the financial year.

(2) Goods procured by a Unit or Developer, on which Central Excise Duty exemption has been availed but without any availment of export entitlements, shall be allowed admission into the Special Economic Zone on the basis of ARE-1.

(3) The goods procured by a Unit or Developer under claim of export entitlements shall be allowed admission into the Special Economic Zone on the basis of ARE-1 and a Bill of Export filed by the supplier or on his behalf by the Unit or Developer and which is assessed by the Authorised Officer before arrival of the goods:

Provided *that if the goods arrive before a Bill of Export has been filed and assessed, the same shall be kept in an area designated for this purpose by the Specified Officer and shall be released to the Unit or Developer only after completion of the assessment of the Bill of Export.*

(4) A copy of the ARE-1 and/or copy of Bill of Export, as the case may be, with an endorsement by the authorized officer that goods have been admitted in full into the Special Economic Zone shall be forwarded to the Central Excise Officer having jurisdiction over the Domestic Tariff Area supplier within forty-five days failing which the Central Excise Officer shall raise demand of duty against the Domestic Tariff Area supplier.

(5) Where a Bill of Export has been filed under a claim of drawback or Duty Entitlement Pass Book, the Unit or Developer shall claim the same from the

Specified Officer and jurisdictional Development Commissioner respectively and in case the Unit or Developer does not intend to claim entitlement of drawback or Duty Entitlement Passbook Scheme, a disclaimer to this effect shall be given to the Domestic Tariff Area supplier for claiming such benefits:

Provided that the Duty Entitlement Passbook Scheme may be claimed by Domestic Tariff Area supplier from the Development Commissioner or their jurisdictional Regional Licensing Authority of the Directorate General of Foreign Trade.

(6) The Bill of Export shall be assessed in accordance with the instructions and procedures, including examination norms, laid down by the Department of Revenue as applicable to export goods:

Provided that at the time of assessment, it shall be specifically examined whether the goods are required for the authorized operations by the Unit or Developer, with reference to the Letter of Approval or the list of goods approved by the Approval Committee for the Developer.

(7) On arrival of the goods procured from the Domestic Tariff Area at the Special Economic Zone gate, the Authorized Officer shall examine the goods in respect of description, quantity, marks and other relevant particulars given in the ARE-1, invoice, Bill of Export of packing list and also as per the examination norms laid down in respect of export goods in cases where the goods are being procured under claim of an export entitlement.

(8) Drawback or Duty Entitlement Pass Book credit against supply of goods by Domestic Tariff Area supplier shall be admissible provided payments for the supply are made from the Foreign Currency Account of the Unit.

Provided that the reimbursement of duty in lieu of drawback or Duty Entitlement Pass Book credit against supply of goods by Domestic Tariff Area supplier to Special Economic Zone developers shall be admissible even if payment is made in Indian Rupees. Reimbursement of duty in lieu of drawback against supply of goods to Special Economic Zone developer shall be made as per the procedure prescribed by the Central Government.

(9) A copy of the Bill of Export and ARE-1 with an endorsement of the Authorized Officer that the goods have been admitted in full in the Special Economic Zone, shall be treated as proof of export.

(10) Where the goods are to be procured by a Unit or Developer from a Domestic Tariff Area supplier who is not registered with the Central Excise authorities, or is a trader or merchant exporter, the procedure under subrules (1) and (2) above shall apply, *mutatis mutandis*, except that the goods shall be brought to the Special Economic Zone under the cover of an invoice and the ARE-1 shall not be required.

(11) The Unit or Developer may also procure goods from Domestic Tariff Area without availing exemptions, drawbacks and concessions on the basis of invoice or transport documents, issued by the supplier:

Provided that such invoices or transport documents shall be endorsed to the effect that no exemptions, drawbacks and concessions have been availed on the said supplies.

(12) Procedure for procurement from warehouse shall be as under:—

(a) where goods are to be procured from warehouse, a Unit or Developer shall file a Bill of Entry with the Specified Officer;

(b) the Unit or Developer shall submit Bill of Entry assessed by the Authorized Officer to the Customs Officer in charge of the warehouse from where the Special Economic Zone Unit or Developer intends to procure the goods;

(c) the Customs Officer in charge of the warehouse shall allow clearance of the goods from the warehouse for supply to the Unit or Developer without payment of duty on the cover of exbond Shipping Bill and on the basis of Bill of Entry duly assessed by the Authorized Officer;

(d) where the re-warehousing certificate by way of endorsement by the Authorized Officer on the copy of ex-bond Shipping Bill is not received by the Customs Officer in charge of warehouse within forty-five days from the date of clearance of the goods from the warehouse, the Customs Officer in charge of the warehouse shall proceed to demand applicable duty from the supplier:

Provided that for procurement of goods from Nominated Agency located in Special Economic Zone, the procedure as specified by Specified Officer shall be followed and there shall be no requirement of assessment of Bill of Entry or transfer of the goods under the cover of ex-bond Shipping Bill.

(13) A Special Economic Zone Unit or Developer may also procure goods from international exhibitions held in India following the procedures under sub-rule (12).

(14) A Unit or Developer may also procure goods or services, without payment of duty from an Export Oriented Unit or Software Technology Park Unit or Bio-Technology Park Unit, by following procedures under sub-rule (12).

(15) A Unit or Developer may procure goods and services from another Unit located in the same or any other Special Economic Zone, subject to following conditions, namely:—

(i) the receiving Unit or Developer shall file Bill of Entry for home consumption with the Authorized Officer, in quintuplicate, giving description of the goods along with an invoice and packing list for assessment;

(ii) on the basis of such assessed Bill of Entry, the goods shall be allowed to be transferred to the receiving Unit or Developer under transshipment permit;

(iii) there shall be no requirement to file any additional document or bond(s) for the purpose of transshipment of goods and the transshipment permission shall be stamped on the Bill of Entry itself;

(iv) the supplying Unit shall submit the re-warehousing certificate to the Specified Officer having jurisdiction over the supplying unit within forty-five days, failing which the Specified Officer of the supplying Unit shall write to the Specified Officer having jurisdiction over the receiving Unit or Developer for demand of duty from the receiving Unit or Developer;

(v) where the supplying and receiving Units or Developer are located in the same Special Economic Zone, the provisions of subrules (i) and (iv) shall not apply and the movement of goods shall be allowed and such transactions shall be recorded in the regular books of accounts of the receiving Unit or Developer and the supplying Unit and no Bill of Entry shall be required to be filed.

(16) Procurement of cut and polished diamonds and precious and semiprecious stones from Domestic Tariff Area—A gem and jewellery Unit may procure cut and polished diamonds and precious and semi precious stones from the Domestic Tariff Area, as per the following procedure, namely:—

(i) the parcel shall be brought into the Zone in a sealed condition by the authorized representative of the Domestic Tariff Area supplier or

Customs House Agent, who shall present the invoice clearly marked original, duplicate and triplicate to the Authorized Officer at the gate;

(ii) the Authorized Officer shall register the invoice at the gate of Special Economic Zone and endorsing the registration number on the original and duplicate copies of the invoice and the parcel shall be allowed to be taken into the premises of the Unit and such goods shall be separately accounted for by the Unit.

(iii) the duplicate copy of the invoice with the endorsement of the Authorized Officer shall be forwarded to the supplier in the Domestic Tariff Area for claiming Replenishment Licence from the Development Commissioner of the Special Economic Zone.

7. He would assert that there is no exemption for supply of goods to SEZ units just as there is no exemption notification for export of goods. In fact, SEZ is treated, for all purposes, as a place outside India and it is for this reason goods are procured by filing an ARE-1 by the supplier and a Bill of Export before the goods enter the SEZ unit. Therefore, the supplies to SEZ developer/unit are at par with the exports. The mechanism provided for such supply in the SEZ Rules only provides for supply against a bond or legal undertaking after following the process and procedure indicated therein. Any SEZ unit claiming a refund is like an overseas buyer of exported goods claiming refund of Central Excise duty for which there is no legal provision. He would submit that the assessee has not made out a case to show under what law they have claimed refund of the excise duty. He would further urge that the Hon'ble Supreme Court has, in the case of Priya Blue Industries Ltd [2004-TIOL-78-SC-CUS] and Flock India Pvt Ltd [2000 (6) SCC 650], clearly held that no refund can be claimed in respect of the goods which have already been assessed unless the assessment itself has been challenged. In this case there is no evidence, whatsoever, that the assessment of the goods by the supplier M/s HBLPSL, Hyderabad to the appellant has been challenged either by M/s HBLPSL themselves or by the appellant. In view of the above, the question of refund does not arise.

8. He further submits that as decided by the Hon'ble Apex Court in the case of Dilip Kumar & Co. and others (Civil Appeal No. 3327/2007) when the appellant is claiming an exemption notification, it must be strictly construed and any benefit of doubt must be given to the revenue and decided against the assessee. In this particular case, the SEZ Rules do not provide for refund of duty in respect of goods which have been procured from DTA at all and neither does the Central Excise Act or Rules provided for such refund. The

exemption which is available under SEZ Rules is only through the process of bond/legal undertaking. Therefore, the appeal needs to be dismissed both on merits and on the grounds of lack of jurisdiction.

9. I have considered the arguments on both sides and perused the records. The appellant, a developer of SEZ unit has procured goods from a DTA unit which he could have also procured without payment of excise duty if he had followed the appropriate procedure prescribed under SEZ Act and Rules. SEZ area is treated for all practical purposes as a place outside India. For this reason, goods which are imported into SEZ are not subject to customs duties. Goods from DTA which are supplied to SEZ units are treated at par with exports. In fact, documents such as ARE-1 and Bill of Export which are usually filed in case of exports are also filed in case of SEZ units. In case of actual exports, Central Excise Act provides for two options viz., (1) Export under Bond under Rule 19 and (2) Export under claim for rebate under Rule 18 of Central Excise Rules, 2002. The SEZ Rules, however, have only provided a mechanism for clearance of goods under bond. I find that there is no mechanism under SEZ Rules for claiming rebate/refund on goods procured from the DTA.

10. In the absence of any specific provision for exemption by way of refund in the SEZ Rules or under Central Excise Rules, I find that the appellant is not entitled to refund of the duty. I find that in the assessee's own case decided by the CESTAT-Kolkata, vide Final Order No. F/76332-76339/2017 dt.30.07.2017, this issue does not appear to have been contested by the revenue or discussed. In the light of the judgment of the Constitutional Bench of the Hon'ble Apex Court in the case of Dilip Kumar & Co. and others (supra), I find that no exemption by way of refund can be sanctioned to the appellant in the absence of any explicit provisions.

11. I also find that the assessment by the supplier of goods has not been challenged. At least, there is nothing on record to indicate so. It has been held by the Hon'ble Apex Court in the case of Priya Blue Industries Pvt Ltd (supra) and Flock India Pvt Ltd (supra) that unless the order of assessment has been challenged no claim for refund under section 11B can be made. These judgments were distinguished by the Hon'ble High Court of Delhi in

the case of Aman Medical Products Pvt Ltd [2009-TIOL-566-HC-DEL-CUS] and Micromax Informatics Ltd [2016 (355) ELT 446 (Del)]. However, the Larger Bench of the Hon'ble Supreme Court has now decided in the case of ITC Ltd [2019-TIOL-418-SC-CUS-LB] that the ratio of Priya Blue Industries Pvt Ltd (supra) and Flock India Pvt Ltd (supra) applies in every case and no refund can be sanctioned even in cases of self assessment unless such assessment itself is appealed against before the Commissioner (Appeals). In view of the above, I find that the assessee is not entitled to refund at all in the present case, both on account of lack of explicit provision for such refund as well as on the ground that the assessments were not challenged by the appellant.

12. In view of the above, appeals are rejected.

(Order pronounced in the open court on 05.11.2019)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)