

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ W.P.(C) 4452/2008

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Judgment pronounced on 31st May, 2011.

M/s Jindal Stainless Limited & Anr. Petitioners
Through : Mr. S. Ganesh, Sr. Adv. with Mr. Tarun
Gulati and Mr. Tushar Gulati, Adv.

versus

Union of India & Ors. Respondents
Through : Mr. Rakesh Tiku and Mr. Aditya Bhardwaj,
Adv.

CORAM:
HON'BLE MR. JUSTICE G.S.SISTANI

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not?
3. Whether the judgment should be reported in the Digest?

} yes -

G.S.SISTANI, J.

1. The present petition has been filed under Article 226 of the Constitution of India and is directed against the impugned Circular dated 03.04.2008, issued by the Additional Director, Directorate General of Export Promotion, Government of India.
2. The brief facts as set out in the petition are that petitioner No.1 is a public limited company registered under the Companies Act, 1956, and is engaged, inter alia, in the business of manufacture and trade of stainless steel and allied products. Petitioner No.1 is stated to be the largest and the only integrated stainless steel and ferro-alloys producer in India.

(3)

3. With a view to encourage and promote exports, generate additional economic activities and employment opportunities, promote investment and development of infrastructural facilities in the country, the Government of India introduced the concept of Special Economic Zone (hereinafter referred to 'SEZ') in India. Such zones are specifically delineated duty free enclaves, which are deemed to be a foreign territory for trade operations, duties and tariff purposes. In order to increase the competitiveness of exporters, the SEZs have been accorded special status and are provided with a number of tax concessions and exemptions. In order to give effect to the assurances made by respondent No.2, which included the exemption from payment of service tax, respondent No.1 issued notification No.17/2002-ST, dated 21.11.2002, for an exemption from the whole of payment of service tax on services provided to a Developer or Units of SEZ by any service provider, for the purposes of development, operation and maintenance of SEZ or for setting up of a SEZ Unit or for manufacture of goods by the SEZ Unit, on the satisfaction of certain conditions. This notification was superseded by a subsequent notification No.4/2004-ST dated 31.03.2004 which provided for an exemption from the payment of whole of service tax on the services provided to a Developer or a Unit for consumption of services within the SEZ subject to certain conditions.

4. Initially for the first time on 01.04.2000, the concept of SEZs was introduced under the Export and Import Policy (Now referred to as 'Foreign Trade Policy'). The Foreign Trade Policy is issued by respondent No.2 which provides for exemptions and concessions from the payment of various taxes and duties. To give more clear and emphatic approach to the aspect of SEZs, a separate Special Economic Zones Act, 2005 (the 'SEZ Act') and the Special Economic Zone Rules, 2006 (the 'SEZ Rules') were brought into effect from 10.02.2006. The provisions of the SEZ Act and the SEZ Rules include the substantive law and the relevant procedures relating to SEZs in one legislation. The SEZ Act in terms of Section 51 of the SEZ Act provides for a non-obstante provision, which is extracted hereunder:

"Act to have overriding effect

The provisions of this Act shall have effect notwithstanding anything inconsistent herewith contained in any other law for the time being in force or in any other instrument having effect by virtue of any law other than this Act."

5. Since the focus of the petitioner was to export stainless steel products from India, they decided to set up a SEZ taking into consideration various direct and indirect tax benefits. Land was identified in the State of Orissa and during the course of the year 2007, requisite clearances from State and Central Govt. were obtained. The SEZ was notified by the Central Govt. on 28.11.2007

and the petitioner started carrying out the default authorized operations in its capacity of a Developer and availed services of various service providers.

6. Vide the impugned circular dated 03.04.2008, Respondent No.3 issued various internal guidelines seeking to deny tax benefits to service provided outside the SEZ. Consequently, service providers who are providing services to the petitioner are insisting upon charging service tax despite the tax exemptions available to the petitioner under the SEZ Act, 2005 and the SEZ Rules, 2006.
7. Counsel for the petitioner submits that on 15.05.2008, M/s KSMN & Co., Chartered Accountants, having their office in New Delhi, raised an invoice of Rs.5,00,000/- (Five lakhs) charging a service tax of Rs.60,000/- on the petitioners for providing services in relation to the accounting to the petitioners. The petitioners wrote a letter to the Chartered Accountants from Delhi requesting them to cancel the invoice issued by them as Section 26(1)(e) of the SEZ Act read with Rule 31 of the SEZ Rules provides for a service tax exemption on the rendition of such services. M/s. KSMN & Co., Chartered Accountants, New Delhi replied to the letter of the petitioners stating that they are aware of the provisions of the SEZ Act and the SEZ Rules. However, service tax has been charged in the invoice in view of the impugned circular issued by respondent No.3 which provides that service tax exemption will not be provided if the

services are not rendered within the SEZ. The Chartered Accountants further stated that since the liability to pay service tax to the Government lies on them, they do not want to take a chance by not paying now and be required to pay by the Department later without recovering it from the petitioners. The petitioner-company issued another letter dated 30.05.2008 to M/s KSMN & Company, Chartered Accountants, submitting that the petitioners have been advised by the petitioner's internal legal team and the lawyers that the impugned guidelines are for the Departmental Officers and are not binding on the assesses. The Chartered Accountants replied to the petitioners stating that the matter is not free from doubt and that the Department may in accordance with the impugned guidelines demand service tax from them. This has led to the filing of the present petition.

8. It is contended by learned counsel for the petitioner that Section 58 of the SEZ Act provides that any notification, etc., issued under a Central Act would continue to have effect only if it was not inconsistent with the provisions of the SEZ Act. Section 26(1)(e) of the SEZ Act specifically grants an exemption from service tax on taxable services provided to a Developer or Unit to carry on the authorized operations by the Developer and the Entrepreneur/Unit. The authorized operations are those operations which have been approved by the Board of Approval (hereinafter referred to as the

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'BoA') for a Developer and the Development Commissioner for a Unit

9. Mr. Ganesh states that Section 26(2) of the SEZ Act provides the power to the Central Government to prescribe the manner in which and subject to the terms and conditions to which the exemptions shall be granted to the Developer or Unit under Section 26(1). Further, Section 55 of the Act provides a general power to the Central Government to make rules to carry out the provisions of the Act. Under the powers of Section 55 of the SEZ Act, the Central Government has introduced the SEZ Rules. Rule 31 of the SEZ Rules prescribes the manner in which, and the terms and conditions, subject to which, the service tax exemption is available to a Developer or a Unit. This Rule provides that exemption from service tax shall be available on the rendition of all taxable services by any service provider to a Developer or a Unit for the purpose of carrying on authorized operations of the SEZ. Rule 31 of the SEZ Rules is extracted hereunder:

"Exemption from service tax

"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."

(35)

10. Learned counsel for the petitioner next submits that a combined reading of Section 26(1)(e) of the SEZ Act with Rule 31 of the SEZ Rules would show that the only condition required for availing exemption from payment of Service Tax by a developer/Entrepreneur is that the taxable service should be used for the carrying on the authorized operations by the Developer/Entrepreneurs. The location of the service provider or the place of service is entirely irrelevant for the purpose of this exemption. It is submitted by learned counsel for the petitioner that Respondent No.3 by issuing the impugned circular dated 03.04.2008 has virtually directed the departmental officers to deny tax exemptions to SEZs in accordance with its views. Therefore, the departmental officers, who are bound by such clarifications, are seeking to deny the tax benefits which are otherwise available to SEZs under the statutory provisions of the SEZ Act and the SEZ Rules. Similarly, service providers, who are providing services to the petitioners are insisting on charging service tax despite the fact that there is a clear exemption from service tax available to the petitioners under the statutory provisions of the SEZ Act/Rules. The impugned circular, inter alia, clarified the following in paras 8 and 10.

"9. The SEZ Act and Rules do not permit any exemption to services provided by a SEZ unit to any individual inside an

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SEZ as it does not get covered under the export of services. Similarly, regarding exemption of service tax on services availed by units/developers in SEZs and regarding taxability of service rendered to an SEZ unit in respect of authorized operations by a DTA service provider in DTA, it may be kept in mind that service tax is exempted only for services rendered within the area of SEZ.

10. CENVAT credit is not available for the inputs used in the finished product supplied to "Developer" of SEZ in terms of Rule 6(6) of CENVAT Credit Rules, 2004.

11. The impugned circular has clarified that service tax is exempted on the provision of only such services which are rendered by the service providers to the Developer or the Unit for its authorized operation within the area of the SEZ. This interpretation given by the impugned circular is clearly contrary to the provisions of the SEZ Act and the SEZ Rules as the statutory provisions which do not require that only such services which are physically rendered within the SEZ are allowed for an exemption from service tax. The impugned circular has sought to introduce new conditions which are not prescribed by the statutory provisions.
12. Learned counsel for the petitioner submits that the petitioner is availing a number of services which are not physically rendered within the SEZ but are used for the authorized operations of the Developer and the Unit. Learned counsel for the petitioner submits that even though these services are to be used for carrying out the authorized operations of the petitioners, service tax is being charged on them by the service provider as they have not been

rendered within the SEZ. Learned counsel for the petitioners submits that the SEZ Act has a non-obstante provision contained in Section 51 which expressly provides that the provisions of this Act will have effect and will override any other law for the time being in force which is inconsistent with the provisions of the Act. Therefore, a reading of Section 51 would clear that the provisions of SEZ Act/SEZ Rules are paramount and anything contrary to the said provisions will be overridden. In view of the fact that para 9 of the impugned circular contains provisions contrary to the provisions of the SEZ Act/SEZ Rules, the impugned circular is illegal and are liable to be overridden by the provisions of Section 51 read with Section 26(1)(e) of the SEZ Act read with Rule 3 of the SEZ Rules.

13. Learned counsel for the petitioners has strongly urged before this Court that the provisions of an Act which provide for an exemption from a tax have to be interpreted strictly. It is a well settled legal principle that in a taxing statute, one has to look merely at what is clearly said. There is no room for any intendment. These principles have been laid down by the Hon'ble Supreme Court in *CIT Vs. Ajax Products*, reported at 55 ITR 741, 747 (SC); *CIT Vs. Shahzada Nand*, reported at 60 ITR 392, 400 (SC) and *State of Punjab Vs. Jaswant*, reported at 186 ITR 655. In view of the plain language of the SEZ Act/SEZ Rules, there is no scope of an

interpretation of such provisions to include a condition that the exemption would be available only if the services are rendered within a SEZ. Mr. Ganesh has strongly urged before this Court that the impugned circular has been issued and/or inserted without proper application of mind and in colourable and mechanical exercise of powers. The impugned circular has no nexus with the object and purpose of SEZ Act and SEZ Rules which was to provide impetus to exports. By the impugned circular, respondent No.3 has virtually attempted to defeat the object with which the SEZ Act/SEZ Rules were formed.

14. Learned counsel for the petitioner further submits that it is a well settled legal principle that no additional condition can be read into an exemption notification when there exists no such condition and that an exemption has to be interpreted strictly. This principle has been laid down by the Hon'ble Supreme Court in *Hansraj Gordhandas Vs. H.H. Dav, Asstt. CCE*, reported at Surat 1969 (2) SCR 253, and *CCE, Baroda Vs. Vipul Shipyard*, reported at 1997 (10) SCC 337. The exemption from service tax has been provided in the SEZ Act and SEZ Rules for carrying out the authorized operations of the developer/Unit. Further, the impugned circular issued by respondent No.3 purports to add a new condition in the exemption provided by the statutory provisions of the SEZ Act read with SEZ Rules which never existed in the provisions.

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15. It is vehemently argued by learned counsel for the petitioners that proposition of law being whether that the Department can add a new condition to a notification thereby either restricting the scope of the exemption notification or whittling it down when the notification itself did not provide for the same by issuing a Circular came before the Hon'ble Supreme Court in the case of *Tata Teleservices Ltd. Vs. Commission of Customs*, reported at (2006) 1 SCC 746 and in the case of *Union of India & Ors. Vs. Inter Continental (India)*, reported at C.A. 6529/2002. The Hon'ble Supreme Court observed that such circular sought to impose a limitation on the exemption notification which the exemption notification itself did not provide and therefore it was not open to the Board to whittle down the exemption notification in such a manner.
16. Learned counsel for the petitioners further submits that it is a settled law that Circulars/Guidelines are administrative in nature and are issued in exercise of executive powers. Similarly, the power of respondent No.1 to issue guidelines can only be exercised to prescribe procedure. Such Guidelines cannot have the effect of adding new and fresh conditions in the SEZ Act or SEZ Rules. It is submitted that by means of the impugned circular, the respondents have also arbitrarily sought to negate the excise duty benefits available to the SEZ Developers like the petitioners. It has been

erroneously stated in Para 10 of the impugned circular that input credit is not available to manufacturers making supplies to SEZ developers. By making this erroneous clarification which is contrary to the statutory provisions, the impugned circular has virtually taken away the excise duty benefit available to SEZ developers as suppliers would substantially lose the excise duty benefit available to them for making such supplies.

17. Lastly, learned counsel for the petitioners submits that the power to issue clarifications rests only with the Central Board of Excise and Customs (hereinafter referred to as the 'Board') under Section 37B of the Central Excise Act, 1944. Thus, the impugned circular is illegal so far as they have not been issued by the Board and, in any event, are also beyond the scope of even the Boards' powers.
18. Per contra, learned counsel for the respondents submits that the present writ petition is liable to be dismissed as the same amounts to an abuse of the process of law. Counsel submits that by this petition, the petitioners are trying to seek anticipatory declaration regarding the leviability of service tax in respect of certain transactions. Further there is adequate mechanism provided in the Act itself, and should there arise any dispute by any assessee, it is open for him to take recourse to the adjudication mechanism as provided under the Act. Thus, the writ petition is legally misconceived.

19. Learned counsel for the respondents has also challenged the locus standi of the petitioners to file the present petition and it is submitted that the liability to pay service tax is on the service provider which is M/s KSMN and Company, Chartered Accountant, for the taxable service provided. It is for the said service provider to decide whether to pass or not to pass on the service tax liability to its client, namely, the petitioners. The liability to pay service tax is on M/s KSMN and Company, Chartered Accountants, and any relief from levy of service tax on the taxable services provided by it, should be sought only by the aggrieved party, namely, M/s KSMN and Company, Chartered Accountants, and not by the petitioners. It is to be noted that in the present case the levy or denial of exemption is challenged not by the person who is liable to pay service tax but by another person on the assumption that service tax levied has been passed on to him. Accordingly, the petitioners have no *locus standi* to challenge the levy of the service tax. Further the petitioners have not been able to show the existence of any legal right, which is threatened to be violated by the said impugned circular dated 03.04.2008. Learned counsel for the respondent contends that there is no legal right shown by the petitioners, therefore, there cannot be any legal injury and consequently writ petition filed by the petitioners is utterly misconceived and liable to be dismissed. Counsel further submits

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that the letter dated 03.04.2008 is in the nature of internal guidelines intended to provide guidelines to the departmental officers so as to enable them to take a uniform stand on matter pertaining to tax relief. No challenge can be sustained against the impugned letter dated 03.04.2008 at the instance of the petitioners. Even otherwise the said letter dated 03.04.2009 is perfectly within the parameters of the special mechanism which is the Act and the Rules framed thereunder.

20. The counsel next submits that the dispute is between the petitioners and M/s KSMN & Company, Chartered Accountants, and for disputes between two parties various legal remedies are available and filing of writ petition against tax collecting authorities is not maintainable.
21. Learned counsel for the respondents submits that the impugned circular is in fact a letter F.No.DGEP/SEZ/473/2006 dated 03.04.2008 issued by the Additional Director General, Directorate General of Export Promotion, respondent No.3 herein, to all the Chief Commissioners, which correctly interprets the provisions of Special Economic Zones Act and Rules, and provides internal guidelines to the departmental officers representing department of Revenue in the Approval Committees of SEZs, so as to enable them to take uniform stand on matters pertaining to tax revenue/exemptions related to Special Economic Zones at the

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meetings of the Approval Committee. Further Section 26(1)(e) of the Special Economic Zones Act, 2005, and Rule 31 of the Special Economic Zones Rules, 2006 clearly state that the Service Tax exemption is available only if the services are provided to carry on authorized operation in a Special Economic Zone.

22. Learned counsel for the respondents submits that the Notification No.17/2002-ST, dated 21.11.2002 provides conditional exemptions from Service Tax to the developer or unit of a Special Economic Zone for the taxable services provided to a developer or unit of Special Economic Zone by any service provider for the purposes of development, operation and maintenance of Special Economic Zone, or for manufacture of goods by the Special Economic Zone unit provided that the said taxable services have been authorized to be rendered by the service provider, by a committee headed by the Commissioner of Customs having jurisdiction over the said Special Economic Zone. Condition No.3, required the developer or unit of a Special Economic Zone to maintain proper account of receipt and utilization of said taxable services. Further it is correct that the above notification No.17/2000-ST dated 21.11.2002 was superseded by Notification No.4/2004 dated 31.03.2004 issued by the Central Board of Excise and Customs, Department of Revenue and provided for an exemption from the payment of all of Service Tax on the services provided to a developer for a unit for

consumption of services within such Special Economic Zones, subject to certain conditions. Thus, it is clear that the Department of Revenue, which is responsible for administering service tax all along provided that exemption from the payment of Service Tax would be available for services provided to a developer or a unit for consumption of services within such Special Economic Zones.

23. It is further submitted that the authorized operations are always those operations which are to be carried out inside the Special Economic Zones, hence, it is evident that the words "In Special Economic Zone" in sub-Section 26(1)(e) are to be read with taxable services provided in a Special Economic Zone and not to be read with "*authorized operations*" only because if so read it would make the wordings " In Special Economic Zone" superfluous since the authorized operations by very definition are already such operations that are carried out inside Special Economic Zones. Further the exemption from levy of Service Tax under the Special Economic Zones Act is available only for taxable services consumed within Special Economic Zones. Relief from any tax on services consumed outside Special Economic Zones but relatable to export is available not under the Special Economic Zones but under the provisions contained in the Central Excise Act and the Finance Act, 1994 (Service Tax), as per notification 41/2007-ST dated 06.10.2007 and notification 43/2007-ST dated 29.11.2007. The

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exemption from Service Tax under Special Economic Zones Act is for consumption of Services within Special Economic Zones Act cannot provide Service Tax exemption merely on the ground that the recipient of service is a Unit or Developer of Special Economic Zones. The counsel for respondent further submits that the Special Economic Zones Act, by its very nature, does not envisage enforcement of Special Economic Zone Rules cannot go and actually has not gone beyond this scheme of SEZ Act.

24. The counsel for respondent strongly contends that exemption from levy of service tax under the Special Economic Zones Act is available only for taxable services consumed within Special Economic Zones. Relief from any tax on services consumed outside SEZ but relatable to export is available not under the SEZ Act but under the provisions contained in the Central Excise Act and the Finance Act, 1994 as per notification 41/2007-ST dated 06.10.2007 and notification 43/2007-ST dated 29.11.2007. It is submitted by the counsel for respondent that area under the SEZ is distinct from Domestic Tariff Area for the purpose of taxation and under the SEZ Act, taxable services provided to a developer or a unit for consumption in SEZ is treated as export. Services are intangible and are taxed in a place where they are consumed and because of intangible nature of services, place of consumption of service generally known as place of supply of service is to be determined in

accordance with the principles enunciated in relevant Rules. The scheme of the SEZ Act recognises the intangible nature of services and envisages exemptions only for those services which are consumed within a Special Economic Zone and therefore, the Department of Revenue is consistent of the view that exemption from payment of Service tax is not available for the services provided outside Special Economic Zones.

25. It is vehemently argued by counsel for respondent that the interpretation given in the impugned circular is consistent with the scheme of the SEZ Act and does not introduce any new condition which is not prescribed by the statutory provisions. It is the contention of the counsel for respondent that under section 26(2) of the SEZ Act, the Central Government has been empowered to 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) of section 26. The impugned circular is not giving any new interpretation to the words of a statute and is only in the form of internal guidelines to the departmental officers merely clarifying the existing provisions of a statute. It only clarifies the existing statutory provision without adding any new condition or provision.

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26. The counsel also submits that from the invoice dated 15.05.2007 raised by M/s KSMN & Co., Chartered Accountants charging a service tax of Rs. 50,000 on accounting services rendered by them to the petitioner, it cannot be made out that the services rendered are anywhere related to any authorised operation as defined in section 2(c) of the Special Economic Zones Act.
27. Refuting the contention of the counsel for petitioner that only Central Board of Excise & Customs can pass such circular, the counsel for respondent submits that the aforesaid section is not relevant for the present case since the said section empowers the Central Excise & Customs to issue clarifications where it considers it necessary for purpose of uniformity in the classification of excisable goods or with respect to levy of duties of excise on such goods, to issue such orders, instructions and directions to Central Excise Officers as it may deem fit. In the present case, the impugned circular is a letter dated 03.04.2008 that is in the form of internal guidelines on matters relating to Special Economic Zone to departmental officers to enable them to take a uniform stand while attending meetings of approval committee. It is next submitted that it is not a clarification under section 37B of Central Excise Act. It is only a letter which reiterates some of the legal provisions of Special Economic Zones Act and Rules and does not in any way

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impose or add any condition or denied any right of exemption bestowed under the Special Economic Zones Act and Rules.

28. I have heard the counsel for parties and have carefully perused the pleadings on record and the written submission filed by both the parties.

29. Before proceeding further, it would be relevant to reproduce section 26(1) (e) of the SEZ Act, 2005 and Rule 31 of the SEZ Rules, 2006. Section 26 (1)(e) reads as under:

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

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

(a).....

(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 authorised operation in a Special Economic Zone;

(f).....

(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).

Rule 31 of the SEZ Rules, 2006 reads as under:

"The exemption from payment of service tax on taxable services under section 65 of Finance Act, 1994 (32 of 1994) rendered to a Developer or a Unit (including a Unit under

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construction) by any service provider shall be available for the authorised operations in a Special Economic Zone".

30. It is contended by the counsel for respondent that since the expression "*authorised operations*" refers to those operations which are to be carried out inside the Special Economic Zones, hence the words "*in Special Economic Zone*" as they appear in section 26 and Rule 31 are to be read with "*taxable services*" so as to mean that the exemption is available only with regard to those services that are rendered in a special economic zone. The aforementioned argument of the counsel for respondent has no basis. It is a well established law that statutes have to be given strict interpretation. If the words of a statute are precise and clear, they must be accepted as declaring the express intention of the legislature. It is equally well-settled that a subject is not to be taxed unless the words of a taxing statute unambiguously impose the tax on him. In **Ajmera Housing Corpn. v. CIT** reported at (2010) 8 SCC 739, the Apex Court observed as under:

"36. It is trite law that a taxing statute is to be construed strictly. In a taxing Act one has to look merely at what is said in the relevant provision. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. There is no room for any intendment. There is no equity about a tax. (See *Cape Brandy Syndicate v. IRC*¹ and *Federation of A.P. Chambers of Commerce & Industry v. State of A.P.*²) In interpreting a taxing statute, the court must look

¹ (1921)1 KB 64

² (2000)6 SCC 550

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squarely at the words of the statute and interpret them. Considerations of hardship, injustice and equity are entirely out of place in interpreting a taxing statute. (Also see *CST v. Modi Sugar Mills Ltd*³)"

31. A similar view was expressed in ***Hansraj & Sons v. State of J&K***, reported at (2002) 6 SCC 227. The relevant portion reads as under:

"22. A Constitution Bench of this Court in the case of *A.V. Fernandez v. State of Kerala*⁴ observed: (AIR p. 661, para 29)

"29. It is no doubt true that in construing fiscal statutes and in determining the liability of a subject to tax one must have regard to the strict letter of the law and not merely to the spirit of the statute or the substance of the strictly within the provisions of the law, the subject can be taxed. If, on the other hand, the case is not covered within the four corners of the provisions of the taxing statute, no tax can be imposed by inference or by analogy or by trying to probe into the intentions of the legislature and by considering what was the substance of the matter. We must of necessity, therefore, have regard to the actual provisions of the Act and the rules made thereunder before we can come to the conclusion that the appellant was liable to assessment as contended by the Sales Tax Authorities."

"In that case this Court noted with approval, the following observations of Lord Russell of Killowen in *IRC v. Duke of Westminster*⁵, AC at p. 24: (AIR p. 661, para 27)

"I confess that I view with disfavour the doctrine that in taxation cases the subject is to be taxed if in accordance with court's view of what it considers the substance of the transaction, the court thinks that the case falls within the contemplation or spirit of the statute. The subject is not taxable by inference or by analogy, but only by the plain words of a statute applicable to the facts and circumstances of his case."

³ AIR 1961 SC 1047 : (1961)2 SCR 189

⁴ AIR 1957 SC 657 : 1957 SCR 837

⁵ 1936 AC 1: 1935 All ER Rep 259: 104 LJ KB 383 (HL)

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The observations of Lord Russel in the aforementioned case were also referred by the Privy Council in *Bank of Chettinad Ltd. v. CIT*⁶. The Privy Council did not accept the suggestion that in revenue cases "the substance of the matter" may be regarded as distinguished from the strict legal position.

23. A similar view was taken in *CWT v. Ellis Bridge Gymkhana*⁷ in which it was observed:

"5. The rule of construction of a charging section is that before taxing any person, it must be shown that he falls within the ambit of the charging section by clear words used in the section. No one can be taxed by implication. A charging section has to be construed strictly. If a person has not been brought within the ambit of the charging section by clear words, he cannot be taxed at all."

24. Again in the case of *Diwan Bros. v. Central Bank of India*⁸ a three-Judge Bench of this Court, construing the principles of interpretation of fiscal statutes, quoted with approval, the observations in *A.V. Fernandez v. State of Kerala* and in *State of Maharashtra v. Mishrilal Tarachand Lodha*⁹ in which it was observed: (AIR p. 459, para 9)

"The Act is a taxing statute and its provisions therefore have to be construed strictly, in favour of the subject litigant."

25. Following the ratio in the aforementioned decisions it was observed: (SCC p. 807, para 7)

"7. These observations manifestly show that the courts have to interpret the provisions of a fiscal statute strictly so as to give benefit of doubt to the litigant. The principles deducible from the decisions referred to above are well established and admit of no doubt."

26. From the discussions in the foregoing paragraphs, the position that emerges is that Notification No. SRO 348 in which the additional toll tax was levied was clearly beyond the purview of Section 3 of the Act. Further, the finding of

⁶ AIR 1940 PC 183 : (1940)8 ITR 522

⁷ (1998)1 SCC 384

⁸ (1976)3 SCC 800

⁹ AIR 1964 SC 457 : (1964)5 SCR 230

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the High Court that in the context of facts and circumstances of the case, processing of the dry fruits like almonds, walnuts and walnut kernels did not come within the expression "manufacture" cannot be said to be erroneous. The judgment of the High Court upholding the levy of additional toll tax in the case is also unsustainable."

32. A plain grammatical reading of section 26(1) (e) of the SEZ Act, 2005 makes it clear that taxable services provided by a service provider to a Developer or a Unit/entrepreneur to carry out authorised operations in a Special Economic Zone are exempted from levy of service tax. Similarly, a bare perusal of Rule 31 of the SEZ Rules, 2006 make it abundantly clear that the exemption from service tax is available on services rendered to a developer or a unit/entrepreneur for carrying out authorised operations. Further, from a combined reading of section 26(1)(e) with Rule 31 makes it evident that the only condition that is required to be satisfied to avail the service tax benefit under the said provisions is that the services must be rendered for the purpose of carrying out the *"authorised operations in a special economic zone"*. Had it been the intention of the legislature that only those services are exempted from levy of service tax that are rendered within the special economic zones, the legislature would have categorically and clearly stated so in the statute. In the absence of such express intention, the court cannot add words to the statute to lead to an



interpretation which could not have been the intention of the legislature.

33. The counsel for petitioner has vehemently argued before this Court that in the absence of any such condition under the parent statute, the impugned circular being administrative in nature cannot impose a new condition nor can it supersede the parent statute which in the present case is section 26(1) (e) of the SEZ Act, 2005 read with Rule 31 of the SEZ Rules, 2006. The relevant portion of the impugned circular reads as under:

"9. The SEZ Act and Rules do not permit any exemption to services provided by a SEZ unit to any individual inside an SEZ as it does not get covered under the export of services. Similarly, regarding exemption of service tax on services availed by units/developers in SEZs and regarding taxability of service rendered to an SEZ unit in respect of authorized operations"

34. A plain reading of the impugned circular makes it clear that as per the circular; only those services are exempted from service tax which are rendered to a Developer or a Unit/Entrepreneur within the Special Economic Zone. Thus, while the SEZ Act and the rules framed thereunder provide for tax exemption to all services provided to a Developer/ Entrepreneur operating in a Special Economic Zone but vide the impugned circular the Government has sought to prescribe an additional condition that the parent statute, which in the present case is the SEZ Act, 2005, does not prescribe. The impugned circular curtails the tax exemption granted to a

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service provider providing services to a Developer or a Unit/Entrepreneur operating in a Special Economic Zone to only those services that have been rendered within the Special Economic Zone, which in clear terms, is inconsistent with Section 26(1)(e) of the SEZ Act.

35. It is trite law that a subordinate legislation has to conform to the parent statute and any subordinate legislation inconsistent to the provisions of the parent statute is liable to be set aside. It is equally well settled that circulars being executive/administrative in character cannot supersede or override the Act and the statutory rules. A division Bench of this Court in decision dated 04.03.2011 in ***Federation of Indian Airlines v. Union of India (WP (C) No. 8004/2010)*** has elaborately discussed the above proposition of law. the relevant extract of the judgment reads as under:

“67. The basic test is to determine whether a rule to have effect must have its source of power which is relatable to the rule making authority. Similarly, a notification must be in accord with the rules, as it cannot travel beyond it. In this context, we may refer with profit to the decision in ***General Officer Commanding-in-Chief v. Dr. Subhash Chandra Yadav***, AIR 1988 SC 876 wherein it has been held that before a rule can have the effect of a statutory provision, two conditions must be fulfilled, namely (1) it must conform to the provisions of the statute under which it is framed; and (2) it must also come within the scope and purview of the rule making power of the authority framing the rule. If either of these two conditions is not fulfilled, the rule so framed would be void.

68. In **Additional District Magistrate (Rev.), Delhi Administration v. Shri Ram** AIR 2000 SC 2143, it has been held that it is a well recognized principle that conferment of rule making power by an Act does not enable the rule making authority to make a rule which travels beyond the scope of the enabling Act or which is inconsistent therewith or repugnant thereto.

69. In **B.K. Garad v. Nasik Merchants Co-op. Bank Ltd**, AIR 1984 SC 192, it has been held that if there is any conflict between a statute and the subordinate legislation, the statute shall prevail over the subordinate legislation and if the subordinate legislation is not in conformity with the statute, the same has to be ignored.

70. In **Ashok Lanka v. Rishi Dixit** (2005) 5 SCC 598, it has been laid down that although the State may delegate its power to an administrative authority, yet such a delegation cannot be made in relation to the matters contained in the rule-making power of the State. The matters which are outside the purview of the Rules only could be the subject-matter of delegation in favour of the authority. Their Lordships have further opined that a subordinate legislation must be framed strictly in consonance with the legislative intent.

71. In **Dilip Kumar Ghosh v. Chairman** AIR 2005 SC 3485, their Lordships have expressed the view that it is well settled principle of law that Circular cannot override the rules occupying the field and if there is a clash between the Rule and the circular, the circular has to be treated as non est.

72. In **Punjab Water Supply and Sewerage Board v. Ranjodh Singh** AIR 2007 SC 1082; their Lordships have observed that a Scheme under Article 162 of the Constitution of India would not prevail over the statutory rule. Their Lordships have further clearly held that any departmental letter or executive instruction cannot prevail over the statutory rule."

36. In **Godrej & Boyce Mfg. Co. Ltd. V. State of Maharashtra** reported at (2009)5 SCC 24, the Apex Court held that circulars are administrative in nature and cannot alter the provisions of a statute

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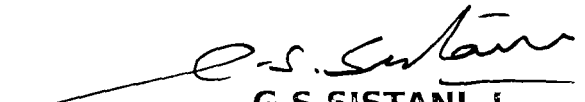
nor can they impose additional conditions. Para 64 of the judgment of the judgment reads as under:

"64. Having regard to the nature of the law the submission advanced on behalf of the municipal authority would lead to palpably unjust and inequitable results. The landowner whose land is designated in the development plan as reserved for any of the purposes enumerated in Section 22 of the Act or for any of the amenities as defined under Section 2(2) of the Act or Regulation 2(7) [*sic* Regulation 3(7)] of the Regulations is not left with many options and he does not have the same bargaining position as the municipal authority. Therefore, surrender of the land in terms of clause (b) of Section 126(1) of the Act cannot be subjected to any further conditions than those already provided for in the statutory provisions. It is of course open to the legislature to add to the conditions provided for in the statute (or for that matter to do away with certain conditions that might be in existence). But it certainly cannot be left in the hands of the executive to impose conditions in addition to those in the statutes for accepting the offer to surrender the designated land."

37. Thus, applying the settled position of law to the facts and circumstances of the present case, I find that the impugned circular dated 03.04.2008 seeks to impose a condition that was not the intention of the legislature as expressed in the SEZ Act or in the SEZ Rules framed thereunder and thus, is liable to be set aside.

38. The writ petition is disposed of in above terms.

MAY 31st, 2011
'ssn/msr'


G.S.SISTANI, J.