

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.SURENDRA MOHAN

TUESDAY, THE 3RD DAY OF MARCH 2015/12TH PHALGUNA, 1936

WP(C).No. 25428 of 2004 (B)

PETITIONER(S) :

M/S.COVEMA WOOD PLAST
BY MR.VINOD SAHAI, CHAIRMAN, 41-D
COCHIN SPECIAL ECONOMIC ZONE, KAKKANAD, COCHIN-30.

BY ADVS.SRI.E.K.NANDAKUMAR
SRI.K.JOHN MATHAI
SRI.P.BENNY THOMAS
SRI.P.GOPINATH
SRI.V.J.ANAND

RESPONDENT(S) :

1. STATE OF KERALA
REPRESENTED BY SECRETARY (TAXES), TRIVANDRUM.

2. INSPECTING ASST.COMMISSIONER,
SALES TAX CHECK POST, WALAYAR, PALAKKAD.

3. SALES TAX INSPECTOR, SALES TAX
CHECK POST, WALAYAR.

4. UNION OF INDIA,
REPRESENTED BY SECRETARY
MINISTRY OF COMMERCE & INDUSTRY, NEW DELHI.

5. THE DEVELOPMENT COMMISSIONER,
COCHIN SPECIAL ECONOMIC ZONE, KAKKANAD, COCHIN-37.

6. M/S.KUMAR ARCH TECH (P) LTD.,
E-37, GUDLI, DISTRICT UDAIPUR
RAJASTHAN.

R,R4,5 BY ADV. SRI. N.NAGARESH, ASSISTANT SG
R, BY SPL. GOVERNMENT PLEADER SHRI. GEORGE MECHERIL

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
03-03-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX IN WPC 25428/2004

PETITIONER'S EXTS:

EXT.P1: A TRUE COPY OF THE LETTER ISSUED BY THE 4TH RESPONDENT
DT.29.5.2001

EXT.P2: -DO- GREEN ARD BY R5 DT.18.11.2002

EXT.P3: -DO- BOND EXECUTED BY THE PETITIONER DT.6.3.2002

EXT.P4 SERIES: TRUE COPIES OF THE EXTRACTS FROM IMPORT AND EXPORT
POLICY UP TO 28.1.2004

EXT.P5: A TRUE COPY OF THE AGREEMENT BETWEEN PETITIONER AND R6
DT.23.1.2004

EXT.P6: -DO- OF THE APPLICATION BY THE PETITIONER TO R5
DT.21.5.2004

EXT.P7: -DO- PERMISSION BY R5 DT.24.5.2004

EXT.P8: -DO- CERTIFICATE ISSUED TO R6 BY SUPERINTENDENT, CE, UDAIPUR
DT.28.5.2004

EXT.P9SERIES: TRUE COPIES OF THE BILLS OF ENTRY FOR WAREHOUSING
ISSUED BY R5

EXT.P10: A TRUE COPY OF THE SEPARATE DECLARATIONS AND INVOICE AND
PACKING LISTS DT.15.6.2004

EXT.P11 SERIES: TRUE COPIES OF THE NOTICES ISSUED UNDER
NOS:136A,137A, 138A, 139A, 140A, 141A, 142A, 143/A 04-05 BY R3
DT.16.6.2004

EXT.P12: A TRUE COPY OF THE NOTICE BY R2 DT.29.6.2004

EXT.P13: -DO- JUDGMENT IN WPC NO:19871/04 DT.7.7.2004

EXT.P14: -DO- OF WRITTEN SUBMISSION BY PETITIONER DT.9.7.2004

EXT.P15: -DO- OF THE ORDER OF THE INSPECTING ASST.COMMISSIONER,
COMMERCIAL TAXES, CHECK POST, WALAYAR (R2) DT.9.7.2004

EXT.P16: -DO- LETTER ISSUED BY THE FIFTH RESPONDENT DT.21.7.2004

EXT.P17: -DO- NOTIFIED POLICY REGARDING SPECIAL ECONOMIC ZONE IN THE
STATE OF KERALA BY R1 DT.17.6.2003

EXT.P18: -DO- JUDGMENT IN W.A.NO:1375/2004 DT. 26.7.2004

EXT.P19: -DO- IN WPC 23402/04 DT.9.8.2004

EXT.20: -DO- AMENDED SEC.4(6) OF CST ACT, 1956.

JJ

/TRUE COPY/

P.S.TO JUDGE

C.R.

K. SURENDRA MOHAN, J.

W.P(C) NO: 25428 OF 2004

Dated this the 3rd March, 2015.

JUDGMENT

The petitioner has filed this writ petition challenging Exts. P11, P12 and P15 proceedings of the respondents holding that goods transported by the petitioner were liable to be assessed to sales tax under the Central Sales Tax Act, 1956. The short facts of the case are the following.

2. The petitioner is an industrial unit set up within the Cochin Special Economic Zone ('CSEZ' for short). The same is a company incorporated under the Companies Act, 1956. It had set up the industrial unit in the CSEZ in the year 2001 for the manufacture and export of PVC Free Foam Sheets. Ext.P1 is a copy of the permission granted to the petitioner to set up the manufacturing unit on 29.5.2001. A copy of the green card issued to the petitioner is Ext.P2. For the purpose of their manufacturing process, the petitioner imported the

necessary machinery, without paying any Customs Duty. This is for the reason that, the Special Economic Zone is treated as foreign territory under the Export-Import Policy. Ext.P3 is a copy of the bond that the petitioner had executed with the Customs Department. As per Ext.P3, the petitioner was permitted to retain the goods within the Special Economic Zone under bond with the Customs Department, without being cleared for home consumption. Accordingly, the goods were retained under bond with the Customs Department. However, the petitioner could not commence production.

3. In the above circumstances, as per Ext.P5 agreement dated 23.1.2004 the petitioner agreed to give the machinery on lease to the sixth respondent, another export oriented unit located in a similar Special Economic Zone in Rajasthan. For the purpose of transporting the machinery to Rajasthan, the petitioner submitted Ext.P6 application for permission to the fifth respondent. Ext.P7 is the sanction dated 24.5.2004 granted by the fifth respondent. The petitioner also obtained

Ext.P8 concurrence from the Superintendent of Central Excise Udaipur. Thereafter, the machinery was transported to the sixth respondent on the strength of Bills of Entry for warehousing. However, when the goods reached the Walayar Check Post, they were detained by the third respondent on 15.6.2004, alleging that the goods were taxable under the Central Sales Tax Act (CST Act for short). The petitioner was thereafter issued with notices under Section 29A(2) of the Kerala General Sales Tax Act, 1963 ('KGST' Act for short). The said notices are Ext.P11. Ext.P11 notices were followed up with Ext.P12 alleging that Sales Tax under the CST Act was payable in respect of the goods.

4. The petitioner thereupon challenged the said proceedings before this Court in WPC 19871/2004. As per Ext.P13 judgment dated 7.7.2004 this Court directed the second respondent to pass final orders in the matter under Section 29A of the KGST Act. Accordingly, the matter was considered by the second respondent and Ext.P15 order has

been passed holding that, the petitioner is liable to pay Sales Tax under the CST Act in respect of the goods that were detained. As per Ext.P16 proceedings dated 21.7.2004 the petitioner was also directed to produce the warehousing certificate in respect of the machinery that was detained. The present writ petition was filed in the above circumstances, challenging the action of respondents 2 and 3.

5. According to the counsel for the petitioner, the statute of a Special Economic Zone is that of a foreign territory. The goods permitted to be brought into a Special Economic Zone without being charged with Customs Duty are meant to be retained within the said Zone itself, for being utilised there. As per the provisions of the Export-Import Policy, the petitioner is permitted to import capital goods without paying Customs Duty for their manufacturing activity within the Special Economic Zone. It is for the said purpose that the machinery in the present case was imported. Such capital goods are also permitted to be transported to another

Special Economic Zone within the country for being put to similar uses that are permitted. It was in accordance with the above provisions that, the goods were sought to be transported to the sixth respondent at Rajasthan. The goods were under bond with the Customs authorities. They were in warehoused condition. They had not been brought into the territory of India. Therefore, they were not subject to any of the taxation laws of the country. For the above reason it is contended that, no tax is payable on the said capital goods. In view of the above, according to the counsel for the petitioner Exts.P11, P12 and P15 are unsustainable and liable to be set aside. The counsel also places reliance on the decisions of the Hon'ble Supreme Court to support his contentions.

6. A counter affidavit has been filed on behalf of respondents 2 and 3. According to the counter affidavit, the petitioner does not have a registration under either the KGST or the CST Acts. It is stated that, the goods have actually

been sold to the sixth respondent and that the transaction is an interstate sale worth Rs.4.75 crores. The tax due thereon is to the tune of Rs.65.66 lakhs. Therefore, detention of the goods demanding security for the tax that is due, is perfectly in terms of Section 29A of the KGST Act. According to the counter affidavit, only the goods manufactured or produced by the petitioner qualify for exemption from the various enactments. In the present case the petitioner has not commenced production though he had imported the machinery to his unit. Therefore it is contended that this writ petition is only to be dismissed.

7. The Special Govt. Pleader (Taxes) appears for respondents 2 and 3. According to the learned Special Govt. Pleader, the petitioner is not a unit set up in Special Economic Zone and the sale of machinery items cannot be treated as sale of capital goods from the unit. Permission of the Development Commissioner is necessary for such transfer. Therefore, according to the learned Special Govt. Pleader the

writ petition is only to be dismissed.

8. Heard. A perusal of Ext.P1 shows that the petitioner had been granted permission to set up a unit at the CSEZ for manufacture and export of PVC Free Foam Sheets. Ext.P2 is a copy of the green card issued to the petitioner approving it as a 100% export oriented unit entitled to top priority treatment from all the concerned Central and State Government departments and every organisation in relation to the project. It is not in dispute that, the petitioner had imported machinery for the purpose of use in their unit for the manufacture of their products. Ext.P3 shows that, the goods are under bond with the Customs Department. Ext.P3 has been executed in favour of the Deputy Commissioner, Customs and Central Excise at CSEZ. The bond shows that, the Deputy Commissioner has granted permission for deposit of the goods imported by the petitioner at plot No:41-D treating the same as a private warehouse unit where dutiable goods imported or sourced indigenously could be deposited.

Therefore, the goods were warehoused in accordance with the terms of Ext.P3 bond with the Deputy Commissioner of Customs, CSEZ, Cochin. In other words, the goods were continuing to remain in a customs warehouse, without crossing the customs frontiers of India.

9. As per Ext.P4 Export-Import Policy units within the Special Economic Zone are entitled to exemption from Central Sales Tax as evident from paragraph 7.9, apart from the various other concessions granted. The expression “capital goods” is defined in Clause 9.10 which reads as under:-

“9.10 'Capital Goods' means any plant, machinery, equipment or accessories required for manufacture or production, either directly or indirectly, of goods or for rendering services, including those required for replacement, modernisation, technological upgradation or expansion. Capital goods also include packaging machinery and equipment, refractories for initial lining, refrigeration equipment, power generating sets, machine tools, catalysts for initial

charge, equipment and instruments for testing, research and development, quality and pollution control. Capital goods may be for use in manufacturing, mining, agriculture, aquaculture, animal husbandry, floriculture, horticulture, pisciculture, poultry, sericulture and viticulture as well as for use in the services sector.”

The above definition clearly shows that, the machinery, equipments and accessories required for manufacture, form capital goods, Clause c of Part 7.11 permits inter-unit transfer of capital goods, which provision reads as follows:–

“c. Capital goods imported/procured may be transferred or given on loan to another SEZ/EOU/EHTP/STP unit with prior permission of the Development Commissioner and Customs authorities concerned.”

Appendix 14-II specifies the status of a Special Economic Zone. Clause 3.1 provides as follows:–

“3.1 Status of SEZs.--Special Economic Zone (SEZ) is a specifically delineated duty free enclave

and shall be deemed to be foreign territory for the purposes of trade operations and duties and tariffs.”

10. A combined reading of the above provisions shows that, the Special Economic Zone is treated to be a foreign territory for the purposes of trade operations, duties and tariffs. Units like that of the petitioner are permitted to import capital goods without paying Customs Duty to the Special Economic Zone for the purpose of manufacture of their products. Such capital goods are also permitted to be transferred to other units located in similar Special Economic Zones with the permission of the fifth respondent. The petitioner has obtained Ext.P7 permission from the fifth respondent permitting such transfer. Ext.P5 is the agreement pursuant to which, the goods were being transported. Therefore, the goods that were exported to the Special Economic Zone which is to be treated as a foreign territory for the purposes of trade and tariffs, had not crossed the customs frontiers of India. It was for the said reason that they were

retained in warehoused condition by the Department of Customs and Central Excise under Ext.P3 bond. The goods would become exigible to tax under either the CST Act or the KGST Act only after they cross the customs frontiers of India. In other words the goods would become taxable under the domestic enactments only after they are released for home consumption by the Customs authorities after payment of Customs Duty. The said eventuality not having taken place yet, it is held that the goods have not become liable to tax under the Act that is relied upon. It is also worth noticing that the Special Economic Zones Act, 2005 is given an overriding effect over other enactments. Section 51 of the Act is reproduced hereunder for convenience of reference:—

“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.”

Section 53 further clarifies the status of a Special Economic Zone in the following words:-

“53. Special Economic Zones to be Ports, airports, inland container depots, land stations, etc., in certain cases.--(1) A Special Economic Zone shall, on and from the appointed day, be deemed to be a territory outside the customs territory of India for the purposes of undertaking the authorised operations.

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

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

In view of the above provisions of law as well as the terms of the Export – Import Policy, there cannot be any doubt regarding the fact that the goods are not liable to tax under

the Sales Tax Act of our country. The counsel for the petitioner has placed reliance on the dictum of the Hon'ble Supreme Court in *Kiran Spinning Mills v. Collector of Customs* [1999(113) ELT 753(SC)]. It has been held in the said decision that it is on the date on which the goods cross the customs barriers of the country that they become liable to be taxed under the relevant enactments. It has been held that, when the goods are in the warehouse condition they do not cross the customs barriers. The said decision has been followed in a later decision of the Supreme Court in *L.M.L.Ltd. v. Collector of Central Excise, Kanpur* [2002(142)ELT 273 (SC)]. Paragraph 5 of the said judgment reads as under:–

“5. The point to note is that for the purposes of customs duty, the taxable event occurs on the date on which the goods are cleared from a bonded warehouse for house consumption. It is that date which is relevant for the purposes of the rate of customs duty and any additional duty thereon. In the present cases, on the dates on which the goods were cleared from

the bonded warehouses the special additional duty, introduced on 1st June, 1998, was already in existence and the assessee was correctly made liable to pay the same.”

The said taxable event of the goods clearing the customs barriers has not occurred in the case of the capital goods of the petitioner, in this case. Therefore the goods have not come into the territory of India. For the said reason they are not liable to be taxed under the CST Act. In view of the above, Exts.P11, P12 and P15 are unsustainable. They are therefore set aside. This writ petition is allowed as above.

The amount deposited by the petitioner for release of the goods detained shall be refunded.

Sd/-
K. SURENDRA MOHAN
Judge

jj

/True copy/