IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 02.12.2016

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THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

W.P.Nos.27873 and 33904 of 2014
and
M.P.Nos.1 and 2 of 2014

M/s.Huawei Telecommunications (India)
Company Pvt.Ltd.,
Plot No.K-24,
SIPCOT Industrial Park,
Chennai-602 105,
rep.by its Auhorized Signatory
Mr.Sheng Sheng
... Petitioner in WP.27873 of 2014

M/s.Huawei Telecommunications
(India) Company Pvt. Ltd.
Plot No.K-24 SIPCOT Industrial Park
Kancheepuram-602 105
Rep. by its Authorised Signatory
Mr.Ranmingyao
... Petitioner in WP.33904 of 2014

Vs

1. The Development Commissioner,
Office of the Development Commissioner,
MEPZ-Special Economic Zone,
NH-45, Administrative office Building,
Tambaram, Chennai-600 045,
India. ... 1st respondent in both the W.Ps.

2. The Authorized Officder,
Flextronics SEZ Unit
(Spl.Economic Zone),
Plot No.3, SIPCOT Industrial Part,
Sandavellur Village,
Sriperumbudur Taluk,
Kancheepuram District-602 106 ... 2nd respondent in W.P.No.27873 of 2014

3. The Specified Officer,
Flextronics SEZ Unit,
(Spl.Economic Zone),
Plot No.3, SIPCOT Industrial Park,
Sandavellur Village,
Sriperumbudur Taluk,
Kancheepuram District-602 106

... 3rd Respondent in W.P.No.27873 of 2014 and 2nd respondent in W.P.No.33904 of 2014

Prayer in W.P.No.27873 of 2014 : Writ Petition has been filed under Article 226 of the Constitution of India to issue Writ of mandamus to forbear the respondents from charging any Anti-Dumping Duty ('ADD') on clearances by the petitioner of Populated Circuit Board Assemblies ('PCBAs') from the Flextronics Special Economic Zone into the Domestic Tariff Area Unit of the petitioner under Section 30 of the Special Economic Zones Act, 2005 read with Notification No.125/2010-Cus, dated 16.12.2010 and Section 9A of the Customs Tariff Act, 1975.

Prayer in W.P.No.33904 of 2014 : Writ Petition has been filed under Article 226 of the Constitution of India to issue Writ of certiorarified mandamus to call for the records of the show cause notice dated 01.12.2014 in File No.05/SO/2014, issued by the respondent No.1 (hereinafter referred to as the 'impugned Notice') and quash the same, and forbear the respondents from charging Anti-Dumping Duty ('ADD') on clearances of Populated Circuit Board Assemblies ('PCBAs') from the Flextronics Special Economic Zone (SEZ) unit to the Domestic Tariff Area ('DTA') unit of the petitioner in relation to the period covered under the Impugned Notice dated 01.12.2014, i.e. from July 2011 to August 2014.

For Petitioners : Mr.P.S.Raman, Senior Counsel and Mr.Sathish Parasaran, Senior Counsel for Mr.Karthik Sundaram

For Respondents : Mr.G.Rajagopalan, Additional Solicitor General Assisted by Mr.Su.Srinivasan Assistant Solicitor General

ORDER

Heard Mr.P.S.Raman, the learned Senior counsel and Mr.Sathish Parasaran, the learned Senior counsel for Mr.Karthik Sundaram, learned counsel for the petitioner and Mr.G.Rajagoppalan, learned Additional Solicitor General, assisted by Mr.Su.Srinivasan, Assistant Solicitor General for the Respondents.

2. The petitioner has filed these writ petitions praying for the issuance of a writ of certiorarified mandamus to call for the records of the show cause notice dated 01.12.2014, issued by the first respondent and quash the same and to forbear the respondents from awarding any Anti-Dumping Duty (ADD) on clearances by the petitioner of Populated Circuit Board Assemblies (PCBAs) from the Flextronics Special Economic Zone to the Domestic Tariff Area Unit of the petitioner, under Section 30 of the Special Economic Zones Act, 2005 read with Notification 125/2010-Cus, dated 16.12.2010 and Section 9A of the Customs Tariff Act, 1975.

3. The reason for approaching this Court by way of these writ petitions was because the respondents, in particular, the first respondent, the Development Commissioner, was attempting to levy ADD on the clearances made by the petitioner of PCBAs from the Flextronics Special Economic Zone (SEZ) unit to the Domestic Tariff Area Unit of the petitioner.

4. This Court heard the matter elaborately on various dates and it would be worthwhile to refer to certain interim directions issued, so that there will be a cogency of facts and the ultimate directions which this Court proposes to issue in these writ petitions. Therefore, the interim orders dated 02.09.2016 and 5.10.2016 are extracted below in seriatim.

"Interim order deated 2.09.2016

> Heard Mr.P.S.Raman, learned Sernior Counsel and Mr.Sathish Parasaran, learned Senior Counsel assisted by Mr.Karthik Sundaram, learned counsel appearing for the Petitioner and Mr.G.Rajagopalan, learned Additional Solicitor General assisted by Mr.Su.Srinivasan, learned Assistant Solicitor General appearing for the respondents.
>
> 2.In these cases interesting questions of law have arisen for consideration. This court after elaborately hearing the learned senior counsel on either side finds that the controversy has narrowed down largely due to certain subsequent events which had taken

place during the pendency of these with petitions.

3.The primary contention raised by the petitioner is with regard to the jurisdiction of the Development Commissioner of the concerned Special Economic Zone (SEZ) to intiate proceedings against the petitioner for the purpose of imposing anti-dumping duty. The question would be as to whether the Development Commissioner can act as an adjudicating authority or otherwise as a Proper Officer Of Customs and Excise.

4.The learned Additional Soliciter General has reffered to the various provisions of the Special Economic Zone Act, 2005 (Central Act) and submits that the enactment is code by itself and the Development Commissioner is vested with all powers and he can exercise such powers as envisaged under the Act.

5.The submission of the learned Senior Counsel appearing on behalf of the petitioner is that in the light of the recent notification issued by the Government of India in S.O.Nos.2666(E) and 2667(E) both dated 05.08.2016 and the notification in G.S.R 772 (E) brining an amednment to the Special Economic Rules vide Amended Rules 2016 would show that the Jurisdictional Customs Commissioner or the Commissioner of Central Excise alone are entitled to initiate appropriate action under the provisions of the Customs Act or the Central Excise Act or the Finance Act, 1994.

6..Learned Senior Counsel appearing for the petitioner would further submit that the Department of Commerce (Directorate General of Anti-Dumping & Allied Duties (DGAD)) on a clarification sought for by the Development Commissioner through the Joint Secretary, Department of Commerce has sent an Office Memorandum dated 14.07.2015 which makes it clear that even as per the Office Memorandum dated 25.05.2015 of the DGAD component or parts imported on stand alone basis are outside the purview of the product under consideration for the levy of anti-dumping duty. Therefore the petitioner's endeavour is that they procure the products from M/s.Flextronics Technologies India Pvt. Ltd. which supplies PPCB'S to the petitioner which is situated in the Special

Economic Zone under the control of the first respondent and what is being imported by M/s.Flextronics Technologies India Pvt. Ltd. are stand alone components which are used for the manufacture of PPCBAs. Therefore, it is submitted that this is not as if the PPCBAs or synchronous and transmission enquipment is being imported and sold to the petitioner and the even as per the clarification issued by the DGAD all components or parts imported on standalone basis would not attract Anti-Dumping Duty.

7.Futher it is pointed out that the appropriate authority to conduct Anti-Dumping Circumvention Investigation in India is the DGAD and they have not received any application for investigating circumvention of duties.

8. After hearing the arguments of the learned Counsel appearing for the parties, this court is of the prima facie of the view that the Development Commissioner could not Act as an appropriate Officer or Adjudicating Authority under the provisions of the Customs Act or the Central Excise Act or the Finance Act as there is no such power conferred under Special Economic Zone Act on such officer. However, the impact of the recent amendment to the SEZ Rules by insertion of Sub-Rule (5) under Rule 47 as well as the effect of notification in S.O.Nos.2666(E) and 2667(E) dated 05.08.2016 have to be examined by this court to enable the Court to take a decision in the matter.

8.In this regard, the learned Additional Solicitor General is requested to take appropriate instruction from the concerned Ministry and place the same in the form of short affidavit, three days before the next hearing date.

9.List the matter for further hearing on 22.09.2016.

Interim order dated 05.10.2016

Heard Mr.P.S.Raman, learned Senior Counsel and Mr.Sathish Parasaran, learned Senior counsel assisted by Mr.Karthik Sundaram, learned counsel appearing for the petitioner and Mr.Su.Srinivasan, learned Assistant Solicitor General appearing for the respondents.

2.The learned Senior counsels appearing for the petitioner would submit that elaborate discussions and conferences were held with the petitioner and it appears that the petitioner would be inclined to go before the jurisdiction Officer of the Customs and Centrral Excise, so far as the adjudication of show cause notice is concerned. However, there is a caveat on this stating that the petitioner would place reliance on the decision in the M/s.Flextronics Technologies India Pvt., and to that extent make certain submission.

3.The learned Assistant Solicitor General is directed to get written instructions from the appropriate authority as to whether they are willing to transfer the entire files to the Jurisdictional Officer of Customs/Central Excise.

The second issue would be whether if the respondent agrees for such a transfer, what orders could be passed by this Court and prima facie, this Court is of the view that it can place on record the submissions of the petitioner indicating the legal position as pleaded by them and leave the rest to be decided by the Adjudicating Authority.

Likewise, the learned Assistant Solicitor General will also take instructions on the Officer Memorandum F.No.15/20/2014-DGAD, dated 14.07.2015, issued by the Directorate General of Anti-Dumping Duty."

5. Pursuant to the above orders, an affidavit has been filed by the Development Commissioner, dated 14.11.2016, to which an affidavit in reply has been filed by the petitioner dated 17.11.2016 and a counter affidavit to the reply affidavit has been filed by the Development Commissioner, dated 28.11.2016.

6. After the above referred two affidavits have been filed and after hearing the learned Senior counsels for the petitioner, this Court passed the interim order dated 24.11.2016, which is to the following effect.

Heard Mr.P.S.Raman, learned Senior counsel and Mr.Sathish Parasaran, learned Senior Counsel assisted by Mr.Karthik Sundaram, learned counsel appearing for the petitioner.

2.Pursuant to the order passed by this Court, dated 05.10.2016, an affidavit has been filed by the Assistant Commissioner gof Customs, Specified Officer (SEZ) in the office of the first respondent on behalf of the respondents. On a perusal of the affidavit, it is seen that the respondents are agreeable for the case files to be transferred to the jurisdictional Customs Commissioner to be decided on merits and certain other issues have been raised in the affidavit, to which an affidavit in reply has been filed by the petitioner. The learned Senior Counsel has referred to the salient features in both the affidavits and seeks for appropriate direction by transferring the files to the jurisdictional Customs Commissioner.

3.The learned counsel appearing for the respondents submits that the Additional Solicitor General is to appear and requested the matter may be posted on 30.11.2016.

4.List the writ petitions on 30.11.2016."

7. Today, the matter has been listed and a counter to the reply affidavit has been filed by the Development Commissioner.

8. As indicated by this Court in the earlier interim orders, the first question to be decided is as to whether the Development Commissioner would have jurisdiction to act as an adjudicating authority under the provisions of the Customs Act or the Central Excise Act. This issue need not be decided in these writ petitions for the reason that the parties have arrived at a concensus on this issue subject to certain riders.

9. In the affidavit filed by the Development Commissioner, dated 14.11.2016, it has been stated that the respondents 1 and 2 have no objection for this Court to transfer the files to the jurisdictional Customs Officer and the acceptance for transfer shall not be construed that the respondents have agreed for the lack of jurisdiction of the Development Commissioner, in such cases. Further it is stated that the case files should be transferred for adjudication by the jurisdictional customs officer in toto as a regular case for adjudication based on its merits without any conditions and all issues raised in the notices shall be decided by the adjudicating authority without any condition or limitation and the petitioner may be directed to submit their plea/conditions before the adjudicating authority by way of reply/further reply to the show cause notices issued by the department. Further it is submitted that the validity of the show cause notices shall not be affected by any time bar provisions and any plea on this

count by the petitioner before the adjudicating authority shall not be entertained. Further it is submitted that this Court may place on record the submissions of both the petitioner and the respondents, indicate the legal position and leave the rest to be decided by the adjudicating authority, further specifying in the order that the issue of jurisdiction of the Development Commissioner in such cases has not been decided by this Court in this matter. A further direction is sought for to direct the petitioner to continue to pay the ADD, as directed by this Court earlier in W.P.No.27873 of 2014, till the adjudication is completed. The affidavit closes in paragraph No.8 with the following prayer.

> "8. In view of the submissions above it is respectfully prayed that this Hon'ble Court may be pleased to
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> i. Order transfer of all the case files to the jurisdictional Customs Commissioner hif the Hon'ble Court decides so; subject to the condition that the adjudication shall be on all aspects of the allegations in the notice on merit and not limited to any specific issue or limitations. Further, in case of transfer, the Hon'ble Court may specifically direct that the notice issued shall not be hit by any time bar provision.
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> ii. the acceptance of the respondents shall not be construed as admittance by the respondents of lack of jurisdiction of the Development Commissioner and the Hon'ble Court may clearly specify in the order that the issue of jurisdiction of the Development Commissioner in such cases has not been decided.
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> iii. may direct the petitioner to continue to pay the ADD as decided by the Hon'ble Court earlier in W.P.No.27873 gof 2014 till he adjudication is completed.
>
> iv. may also direct that the averment of the petitioner regarding components and parts and applicability of circumvention of ADD etc.shall also be decided during the process of adjudication."

10. The petitioner has filed an affidavit in reply, in which, the petitioner has relied upon the decision of the Hon'ble Division Bench of this Court in Flextronics Technologies (India) Private Limited v. The State of Tamil Nadu [2016-VIL-230-MAD], so as to interpret Section 30 of the Special Economic Zones Act, 2005 and the above interpretation is being put forth as a legal submissioin or in other words, a preliminary submission on their behalf. Further it is stated that the

impugned show cause notices seek to re-agitate the issues, which have already been decided in favour of the petitioner in the final findings and Sun Set Review Findings issued by the DGAD. The petitioner further submits that in terms of Rules 25 to 28 of the ADD Rules, 1995, the exclusive jurisdiction to investigate any allegation of circumvention of ADD is exclusively vested with the Designated Authority (DA/DGAD) and cannot be done by any other authority. In support of such contention, the office memorandum dated 14.07.2015, issued by the DGAD has been referred to. Therefore, the petitioner's contention is that the DGAD is the appropriate authority to investigate and determine the allegations in the nature of circumvention of ADD. The petitioner further submits that if the case is transferred to the jurisdictional Commissioner of Customs, the adjudicating authority should decide the issue independently, after giving due opportunity of personal hearing and file a written submissions to the present petitioner, without being influenced by any of the findings on merits in the form of affidavit/counter affidavit of the respondents before this Court. Further it is submitted that since the case is in the adjudication stage, no authority can make a demand or make recovery on ongoing basis and no ADD can be demanded on ongoing clearances of PCBAs from the Flextronics SEZ to the DTA unit of the petitioner till the adjudication is completed and the petitioner should be allowed to make clearances without making any pre-deposit amounts representing ADD. Further, it is submitted that any direction issued in these writ petitions should also be made application to the show cause notice dated 28.10.2015 in File No.05/2014/SO-Part-II.

11. A counter to the reply affidavit has been filed, in which, the respondent/Development Commissioner contended that the decision of the Division Bench of this Court in M/s.Flextronics Technologies (India) Private Ltd., is not about the leviability of ADD on the goods cleared from a SEZ, but it is about "Whether the Antidumping Duty paid by the DTA importer for the goods imported from SEZ formed part of the sale price of the goods manufactured and sold for the purpose of payment of VAT".

12. Apart from the above contentions, several other contentions have been raised in reply to the stand taken by the petitioner in their affidavit.

13. In the light of the stand taken in the affidavit filed by the Development Commissioner, agreeing for transfer of the files to the jurisdictional Customs Officer, this Court does not propose to examine the factual or legal contentions put forth on either side and they have been set out in the preceding paragraph with a view to keep the jurisdictional Customs Officer

informed about the contentions raised by the petitioner though not elaborately, but to give a broad over view of the respective contentions. Thus, in the light of the above developments and taking note of the affidavits referred to above, the writ petitions are disposed of by issuing the following directions.

14. The first respondent/Development Commissioner shall transfer all the files to the jurisdictional Customs Officer to enable the jurisdictional Customs Officer to take up the cases for adjudication as a regular case based on merits and in accordance with law. The files pertaining to the show cause notice dated 28.10.2015 in File No.05/2014/SO-Part-II, shall also be transferred to the jurisdictional Customs Officer. The jurisdictional Customs Officer shall afford the petitioner an opportunity to submit their objections and thereafter take up the show cause notices for adjudication. The jurisdictional Customs Officer, while adjudicating the show cause notices, shall adjudicate as to whether the Development Commissioner has jurisdiction to issue the show cause notices or to adjudicate the matter in issue. Apart from the same, the other issues which have been raised in the show cause notices shall also be adjudicated. For this purpose, the Development Commissioner shall be heard by the jurisdictional Customs Officer.

15. It is made clear that in the preceding paragraph, the legal position as canvassed by the petitioner and as counted by the respondent/Development Commissioner has been set out and it is for the adjudicating authority to adjudicate upon those legal issues as well, after considering the submissions of the parties.

16. The Development Commissioner has sought for a direction upon the petitioner to continue to pay ADD till the adjudication process is over. The direction which was issued in W.P.No.27873 of 2014 was an interim direction at the time when the writ petition was heard for admission. Now that the show cause notices have been directed to be adjudicated, pending adjudication, no conditions or fetters can be imposed on the petitioner for the clearances that may be effected by them to the Domestic Tariff Area Unit from the Flextronics Special Economic Zone and it shall await the final adjudication of the show cause notices and the order in original to be passed. It is made clear that this Court has not expressed any opinion on the factual issues raised and the legal issues which have been canvassed, have been set out in the preceding paragraph to give a broad over view of the contentions of the parties and it is the jurisdictional Customs Officer who has to adjudicate the show cause notices as would be regularly done by him in other cases.

17. Pursuant to the interim orders granted by this Court in W.P.No.27873 of 2014, it is submitted that the petitioner has so far paid a sum of Rs.33 Crores as Anti Dumping Duty for the clearances effected by them from the Flextronics Special Economic Zone to their Domestic Tariff Area Unit. Since the show cause notices have been directed to be adjudicated by the jurisdictional Customs Officer, these payments effected by the petitioner, pursuant to interim orders passed by this Court, in the said writ petition, shall abide by the final orders of adjudication to be passed by the jurisdictional Customs Officer.

18. Since the Revenue implication appears to be large and the learned Additional Solicitor General requests some protection for the Revenue, this Court is of the view that the jurisdictional Customs Officer shall endeavour to complete the adjudication as expeditiously as possible, preferably within a period of two months from the date of receipt of a copy of this order, and the petitioner shall extend full co-operation.

19. The writ petitions are disposed of accordingly. No costs. Conneted miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

msk

To

1. The Development Commissioner,
   Office of the Development Commissioner,
   MEPZ-Special Economic Zone,
   NH-45, Administrative office Building,
   Tambaram, Chennai-600 045,
   India.

2. The Jurisdictional Customs Officer,
   (The Commissioner), Customs,
   Customs House,
   Parrys Corner,
   Chennai 01.

3. The Authorized Officder,
   Flextronics SEZ Unit
   (Spl.Economic Zone),
   Plot No.3, SIPCOT Industrial Part,
   Sandavellur Village,
   Sriperumbudur Taluk,
   Kancheepuram District-602 106

4. The Specified Officer,
   Flextronics SEZ Unit,
   (Spl.Economic Zone),
   Plot No.3, SIPCOT Industrial Park,
   Sandavellur Village,
   Sriperumbudur Taluk,
   Kancheepuram District-602 106.

+5cc's to Mr.T.Balachandran, Advocate, S.R.No.71626
+2cc's to Mr.S.Karthik, Advocate, S.R.No.71545

W.P.Nos.27873 and 33904 of 2014

UG(CO)
CA(23/12/2016)