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IN THE HIGH COURT OF DELHI AT NEW DELHI

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WRIT PETITION(CIVIL) No. 3909/2013

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Reserved on: 22nd January, 2018

Date of Decision: 30th July, 2018

XTRAA CLEANCITIES LTD.

..... Petitioner

Through Mr. Prashant Kumar, Mr. Rajeev
Singh and Mr. Amit Singh, Advs.

Versus

UNION OF INDIA & ORS

..... Respondents

Through Mr. Vikram Jetly, CGSC for Union
of India.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J.

M/s XTRAA Cleancities Limited, now known as M/s Nandan Cleantec Industries Limited, has filed the present writ petition for quashing and setting aside :-

(a) Gazette Notification Nos. S.O. 193(E) and 194(E) dated 6th March, 2000 issued by the Ministry of Commerce, Government of India.

(b) Order No.12013/2/2012/ADJ/AC dated 22nd April, 2013 passed by the Appellate Authority constituted under Section 15 of the Foreign Trade (Development and Regulation) Act, 1992 ('F.T. Act', for short).

2. The present litigation has a checkered and variegated history as there have been several rounds of earlier litigation. To avoid prolixity we would only refer to relevant facts in view of the limited issues raised and contested by the petitioner.
3. Order dated 16th December, 2013 passed in the present Writ Petition crystallises the two issues that arise for consideration. First issue relates to the jurisdiction of the Development Commissioner appointed under Section 11 of the Special Economic Zones Act, 2005 ('SEZ Act' for short) to pass an order imposing penalty under Section 11 (2) of the F.T. Act. Second issue relates to imposition of penalty, the submission of the petitioner being that the alleged violation did not have any concern with or violate the F.T. Act or the SEZ Act.
4. The petitioner consequent to letter of approval issued under Rule 19 of the Special Economic Zones Rules, 2006 ('SEZ Rules' for short) had established a unit for manufacturing biodiesel, blended biodiesel and glycerin in the Visakhapatnam, Special Economic Zone ('VSEZ' for short).
5. On 29th March, 2010, the petitioner made an application for issuance of two Generalised System of Preferences Certificates of Indian Origin ('GSP Certificate', for short) with the office of Development Commissioner, VSEZ, for export of Fatty Acid Methyl Ester (FAME), commonly known as biodiesel, to Switzerland. Application was supported by commercial invoice and Bill of Lading.
6. On the basis of the declaration made in the application and documents submitted by the petitioner, GSP certificates EI 32069058 (*GSP-2/2009-10*) for 11999.876 MT of biodiesel and EI 32069059 (*GSP-3/2009-10*) for 13000.415 MT of biodiesel both dated 29th March, 2010 were stamped and

issued.

7. Biodiesel was exported to Switzerland and allowed entry without duty in view of GSP certificates of Indian origin.

8. Subsequently, on 11th November, 2011 intelligence inputs were received from the Export Inspection Council of India ('EIC', for short) expressing doubts on the true origin of the consignments of biodiesel.

9. Consequent investigation, as per the Respondents, had confirmed that the petitioner had manufactured only 5700.647 MT of biodiesel in the VSEZ unit which was then moved to customs bonded warehouse in October, 2009 and February, 2010 for temporary storage prior to export. Balance 19299.644 MT of biodiesel was a non-SEZ manufactured cargo of American origin imported by the petitioner in December, 2009. The petitioner was not entitled to and had wrongly procured GSP certification for export to Switzerland as 19299.644 MT of American origin biodiesel was blended with 5700.647 MT of biodiesel of Indian origin manufactured by the petitioner. For GSP certification of Indian origin, blending proportion could not have exceeded 50% i.e. at least 50% of the blended biodiesel should have been of Indian origin. Petitioner had made false declaration in its application dated 29th March, 2010 pursuant to which wrong GSP Certificates of Indian origin were issued.

10. Thus, the petitioner as per the respondents had fraudulently exported 19299.644 MT American biodiesel along with 5700.647 MT of Indian biodiesel under false and wrong GSP Certification of Indian origin to avoid anti-dumping duties imposed by countries of European Union, Switzerland and others on American origin biodiesel.

11. In view of the said findings, show cause notice dated 14th November, 2011 was issued to the petitioner under Section 21 of the SEZ Act read with the F.T. Act. Petitioner submitted reply vide letter dated 12th December, 2011 and opportunity of personal hearing was granted.

12. The Development Commissioner, VSEZ upon consideration of facts vide order dated 21st December, 2011 cancelled the two GSP certificates dated 29th March, 2010. Penalty of Rs. 66.30 crores under Section 11(2) of the F.T. Act, being the value of the American origin biodiesel, which was three times undue profit earned by the petitioner, was also imposed. Personal penalty of Rs.3.30 crores under Section 11 (2) of F.T. Act was imposed on Mr. Motturi Srinivas Prasad, Chairman, Chief Executive Officer and Director of the petitioner. Penalty of Rs. 50 lakhs was imposed on Mr. S.V.H. Rao, Director and Chief Executive Officer of the Unit. Importer-Exporter Code of the petitioner was directed to be suspended for a period of 1 year from the date of the issue of the order or till the penalties were paid, whichever was later.

13. Aggrieved, the petitioner preferred an appeal before the Appellate Authority and also approached the High Court of Andhra Pradesh by filing a writ petition. The writ petition was subsequently withdrawn. The Appellate Authority vide order dated 14th February, 2012 upheld the order passed by the Development Commissioner, VSEZ.

14. The petitioner, thereupon, had filed Writ Petition (Civil) No.1022/2012 before the High Court of Delhi which was partly allowed with an order of remit to the Appellate Authority for fresh adjudication after giving proper hearing.

15. As the Importer-Exporter Code of the petitioner had been suspended, the petitioner had moved an application before the Appellate Authority to enable them to re-export 18047.687 MT biodiesel to avoid demurrage/loss. Appellate Authority vide order dated 23rd March, 2012 accepted this request, subject to the petitioner furnishing a bank guarantee equal to the value of the goods or in alternative furnish suitable financial security by way of first charge on assets equal to the value of the goods. This order was challenged by the petitioner in Writ Petition (Civil) No. 1788/2012 before this High Court stating that its assets were charged with SEZ authority. Writ Petition (Civil) No.1788/2012 was disposed of vide order dated 29th March, 2012 observing that the order dated 23rd March, 2012 had required the petitioner to furnish suitable security to the satisfaction of the Development Commissioner, VSEZ and this authority should be approached with offer of security bond.

16. The petitioner had raised new/additional contentions before the Appellate Authority, including applicability of Unified Executive Instructions for issue of Certificate of Origin under Various Preferential Schemes by Export Inspection Agencies (EIAs) and whether the same were made applicable to units in SEZ.

17. The Appellate Authority vide order dated 17th April, 2012 remanded these issues to the Development Commissioner, VSEZ to examine the aforesaid aspects and whether necessary and proper checks were applied before the GSP Certificates of Indian origin were granted by the VSEZ officials. Directions were also made for release of the goods from the Development Commissioner, VSEZ/ Custom bounded area.

18. Petitioner had thereupon filed Writ Petition (Civil) No. 2434/2012 in this High Court apprehending that the remand order to the Development Commissioner would affect or negate the interim order passed by the Appellate Authority as modified by the High Court. The petition was disposed of by this High Court vide order dated 25th April, 2012 asking the petitioner to move an appropriate application before the Appellate Authority for clarification etc.

19. The application for clarification was disposed of by the Appellate Authority vide order dated 11th June, 2012 stating that the order dated 21st December, 2011 passed by the Deputy Commissioner VSEZ under challenge before it had not been set aside and the Adjudicating Authority had been asked to deliberate on the additional issues raised.

20. Petitioner had also filed Writ Petition (Civil) No. 2016/2012 challenging order dated 6th April, 2012 rejecting the bond submitted for export of biodiesel and direction to submit bank guarantee of Rs. 50 Crores and security bond covering the balance of Rs. 20 Crores by securitization of unencumbered assets. This writ petition was disposed of vide order dated 12th April, 2012 granting some relief by modifying impugned order dated 23rd March, 2012 in terms of directions given therein. The petitioner had filed application, C.M. No. 5366/2012 in Writ Petition (Civil) 2016/2012, which was disposed of vide order dated 2nd May, 2012 directing the respondents to treat the Importer-Exporter Code of the petitioner as valid for limited purpose of re-export of goods and subject to compliance of all the rules and regulations.

21. Alleging non compliance of the above order dated 12th April, 2012, the petitioner had filed a contempt petition in this High Court. However, the

respondents approached the Supreme Court vide Special Leave Petition (Civil) No. 17323-17324/2012, wherein vide order dated 24th May, 2012 direction was issued for restoration of the Import-Export Code with permission to re-export goods subject to restrictions imposed by the High Court. The Supreme Court had also directed that contempt proceedings initiated against the respondents and its officials would be kept at abeyance. The contempt proceedings in the High court were thereafter disposed of, on 28th May, 2012.

22. The Deputy Commissioner, VSEZ vide order dated 7th December, 2012 has held that the EIC (i.e. Export Inspection Council of India) instructions based on the requirements of the European Union and member countries for issuing GSP Certificate for Origin under GSP Scheme were binding on the SEZ, whereas the Unified Executive Instructions to form guidelines issued by the EIC to Export Inspection Agencies (EIA) and its sub-offices were mandated and required for issue of Certificate of Origin. In case of SEZ units, latter instructions were not applicable for issuance of Certificate of Origin and as per applicable rules, the GSP certificates were to be issued to the petitioner by the SEZ officer based on self declaration in terms of Rules 75 of the SEZ Rules. Relevant portion of the order dated 7th December, 2012, reads:-

“4. Discussion:

4.1 Certificate of Origin is a certificate issued by any Indian Government authorised agency on a specific form which will act as an evidence of material originating in India. A certificate of origin is to be issued only if the goods are meeting the rules of origin prescribed by the

importing (preference giving) country. Certificate of Origin is issued as per the guidelines in compendium of various requirements of donor countries, which are required to followed (sic) by agency of Government of India while issuing a certificate of origin, to the satisfaction of the donor country. Therefore, the instructions based on requirements of European Union & the member countries for issuing Certificate of Origin under GSP Scheme are binding on the SEZ.

4.2 SEZs are essentially meant for promotion of exports and, therefore, the SEZ Act/Rules provide for simplified procedures for setting up Units and conducting business by the Unit including simplified compliance procedure and documentation with emphasis on self certification. The SEZ Act/Rules permit export/import transactions by SEZ Units on self certification basis. BEZ Act, 2005 and SEZ Rules, 2006 do not provide any instruction to issue of GSP (Certificate of Country of Origin) by the SEZ Officials. The Development Commissioner is overall in charge of SEZ in terms of section 12(2)(3) of SEZ Act and has to discharge function under the SEZ Act in terms of Section 12 of SEZ Act. However, in terms of Section 12 (4) of SEZ Act, Development Commissioner has also to discharge such functions and exercise such powers as may delegated to him by general or special order by the Central Government or State Government concerned, as the case may be. The Development commissioner has also been authorized to issue GSP Certificate of origin by the Central Government under Foreign Trade Policy as referred in Appendix 4 A of the hand book of procedures for "SEZ cargo". The Ministry of Commerce & Industry vide their letter No.

C.8/3/2009-SEZ Dated 20.08.2009 (Instruction No.33) has directed the Development Commissioner to issue GSP Certificate on the same date.

The entire SEZ framework is based on providing a conducive environment to the exporter to manage his business free from controls so that there is no time lost in meeting his export obligations. Accordingly Instruction No - 33 (F. No. C.8/3/2009-SEZ Dated 20.08.2009) of Ministry of Commerce & Industry provides for issuance of the GSP on the same day. This instruction clearly places the importance laid on the trust placed on the SEZ unit in self regulating his business. The EIA are external bodies who have to exercise due diligence before issuance of GSPs to the units as they have no direct control on them. In the case of SEZ units, this is not the case, as the DC's office is in day-to-day touch with the units. The units are expected to keep this office informed of the stoppage of work etc. In this case the fact is the unit is in the business of bio-diesel and was up and running. Therefore the self-certification was presumed to be true. It very clearly therefore places the full onus of the unit to ensure that their self-certification is paramount and verified.

4.3 The Unified Executive Instructions is a guidelines given by the Export Inspection Council of India to EIA and its sub-offices for issue of Certificate of Origin. These Instructions has been issued by the Export Inspection Council of India and not by the Government of India. The Unified Executive Instructions are not applicable to SEZ officials for issuing the Certificate of Origin for SEZ cargo. The matter has also been examined and it has been, ascertained that GSP Certificates,

(being export related certifications accompanying the goods exported), have been issued to the applicant M/s. Xtraa Clean cities Ltd by SEZ officer based on the self-declaration made by the SEZ Unit in terms of Rule 75 of the SEZ Rules. Rule 46(1)(c) also provides that the goods shall not be subjected to routine examination and 'Let Export Order' shall be given on the basis of self-certification by the Unit. Concealing vital information amounts to willful wrong declaration. Thus the Unit misled the VSEZ office and fraudulently obtained the GSP Certificates of Indian origin from the VSEZ office.

4.4 The GSP Certificates of Origin fraudulently obtained by the Unit facilitated entry of these goods into the European Union without attracting customs duty, countervailing duty and antidumping duty which it would have otherwise attracted had the Unit not deliberately concealed that it contained a large portion of US origin biodiesel. This activity has brought severe disrepute not only to VSEZ but also to the country. Such illegal activities can lead to withdrawal of the GSP benefit extended by EU to Indian exporters. Hence it definitely amounts to an activity that is gravely prejudicial to the trade relations of India with the European Union and constitutes an offence under Section 8(1) (b) of the Foreign Trade (Development and Regulation) Act, 1992. India is one of the major beneficiaries of the GSP and as per statistics released by the European Union (Memo/11/284 Brussels, 10 May 2011), The 2 GSP Certificates of Indian origin fraudulently obtained for export of 11999.876 MT and 13000.415 MT of Bio-diesel (FAME) under false cover of SEZ transaction and by falsely declaring that the goods fulfill the Origin requirements as specified in the GSP, Rule 14 of

the Foreign Trade (Regulation) Rules, 1993 framed under the FTDR Act, 1992 provides that no person shall employ any corrupt or fraudulent practice for the purposes of obtaining any licence or importing or exporting any goods. This action on the part of the SEZ Unit being gravely prejudicial to the trade relations of India with the European Union, also constitutes an offence under Section 8 (1)(b) of the FTDR Act, 1992.

4.5 The Hon'ble High Court of Delhi vide order dated 02.5.2012 in C.M No 5366 of 2012 (for directions) in W.P. (Civil) No 2016/2012 has restrained the Applicant company and its Directors mentioned in the order dated 12th April 2012 from, till the issue of penalty is at large, doing any other act prejudicially affecting the securities aforesaid and/or affecting the rights aforesaid of the petitioners (Union of India) therein. Even spite of the such order, the Applicant company has extended its corporate guarantee of Rs.45.00 Crores approx as against the loans availed by MIs. Nandan Cleantec Ltd. and violated the order of Hon'ble High Court of Delhi.

5. Penalties:

In view of the foregoing, I again confirm the Order-in-Original NO.9/SEZ/187NSEZ/2006 dated 21st December, 2011.”

23. In the meanwhile Special Leave Petition (Civil) Nos. 17323-17324/2012 were disposed of by the Supreme Court permitting the petitioner to file additional memo of appeal before Appellate Authority (as per correction carried out by the Supreme Court vide order dated 13th March, 2013).

24. Appellate Authority after hearing held on 2nd April, 2013 passed the impugned order dated 22nd April, 2013 upholding the factual findings against the petitioner. However, penalty imposed on the petitioner was reduced from Rs.66.30 crore to Rs.22.60 crore and personal penalties on the Chairman, CEO and Director of the petitioner company were waived. Import-Export code of the petitioner was to be restored only upon the recovery of the reduced penalty amount.

25. The petitioner, as noted above has filed the present writ petition impugning the order of the Appellate Authority dated 22nd April, 2013.

26. We have also previously noted the two issues raised by the petitioner in the present writ petition as recorded in the order dated 6th December, 2013.

Jurisdiction of the Development Commissioner under Section 13 and validity of the penalty order under Section 11 of the F.T. Act.

Section 11 of the F.T. Act, before it was substituted by Act 25 of 2010 with effect from 27th August, 2010, was as under:-

“11. Contravention of provisions of this Act, rules, orders and export and import policy.- (1) No export or import shall be made by any person except in accordance with the provisions of this Act, the rules and orders made thereunder and the export and import policy for the time being in force.

(2) Where any person makes or abets or attempts to make any export or import in contravention of any provision of this Act or any rules or orders made thereunder or the export and import policy, he shall be liable to a penalty not exceeding one thousand rupees or five times the value of the goods in respect of which any contravention is made or attempted to be made, whichever is more.

(3) Where any person, on a notice to him by the Adjudicating Authority, admits any contravention, the Adjudicating Authority may, in such class or classes of cases and in such manner as may be prescribed, determine, by way of settlement, an amount to be paid by that person.

(4) A penalty imposed under this Act may, if it is not paid, be recovered as an arrear of land revenue and the Importer-exporter Code Number of the person concerned, may, on failure to pay the penalty by him, be suspended by the Adjudicating Authority till the penalty is paid.

(5) Where any contravention of any provision of this Act or any rules or orders made thereunder or the export and import policy has been, is being, or is attempted to be, made, the goods together with any package, covering or receptacle and any conveyances shall, subject to such requirements and conditions as may be prescribed, be liable to confiscation by the Adjudicating Authority.

(6) The goods or the conveyance confiscated under sub-section (5) may be released by the Adjudicating Authority, in such manner and subject to such conditions as may be prescribed, on payment by the person concerned of the redemption charges equivalent to the market value of the goods or conveyance, as the case may be.”

Sub-section 1 to Section 11 of the F.T. Act states that no export or import shall be made by a person except in accordance with the provisions of the Act, rules and orders made thereunder and export and import policy for the time being in force. Sub-section (2) stipulates that where a person makes or abets or attempts to make any export or import in contravention of the Act, rules, orders or export and import policy, he shall be liable to pay penalty not exceeding one thousand rupees or five times the value of the goods in respect of which any contravention is made or is attempted to be

made, whichever is more. Sub-section (3) relates to cases of the person admits violation before the Adjudicating Authority and power to settle vested with the said authority. Sub-section (4) deals with recovery. Sub-sections (5) and (6) pertain to right of confiscation of goods, conveyance etc. and their release on payment of redemption charges equal to market value of the goods or conveyance, as the case may be. Sub-section 3 to 5 to Section 11 of the F.T. Act were substituted and Sub-Sections 7 to 9 were added by Act 25 of 2010 with effect from 27th August, 2010, but we need not refer to the amended provisions as in the present case the charge and allegation against the petitioner relate to violation of Sub-Section 2 to Section 11 of the F.T. Act. The violation was in respect of GSP certification and exports made prior to 27th August, 2010.

27. Section 11 does not specify the authority empowered to pass orders under Sub-Section (3) to Section 11 of the F.T. Act. Section 13 of the F.T. Act deals with Adjudicating Authority and reads as under:-

“13. Adjudicating Authority.- Any penalty may be imposed or any confiscation may be adjudged under this Act by the Director-General or, subject to such limits as may be specified, by such other officer as the Central Government may, by notification in the Official Gazette, authorise in this behalf.”

The aforesaid section states that any penalty may be imposed or confiscation may be adjudged by the Director-General or subject to such limits as may be specified, by such other officer as the Central Government by a notification in the Official Gazette would authorise.

28. In terms of the power conferred under Section 13 of the F.T. Act, the Government of India had issued Notification No. SO 194 (E) dated 6th

March, 2000 appointing Development Commissioners, Export Processing Zones as Adjudicating Officers under Section 11 without limit in respect of export oriented units and units in export processing zone under their jurisdiction. The notification states that the same has been issued for the purpose of exercising powers under Section 13 read with Section 11 of the F.T. Act and amends earlier Notification No.SO 1059(E) dated 31st December, 1993.

29. By Notification No. S.O. 193(E) also dated 6th March, 2000, Additional Secretary, Ministry of Commerce aided by two Joint Secretaries and a Director of that Ministry were bestowed with powers to function as Appellate Authority under clause (b) to sub-Section (1) of Section 15 of the F. T. Act against the orders passed by the Development Commissioners, Export Processing Zones as Adjudicating Authorities under Section 13 of the F.T. Act.

30. Notification No. 102 (RE-2008) 2004-09 dated 17th April, 2009, supersedes several earlier notifications, including Notification No. S.O.194(E) dated 6th March, 2000 and specifies different officers, subject to limits as specified, who would act as Adjudicating Authority for exercising power under Section 13 read with 11 of the F.T. Act. As per serial No. 7 of the notification, Development Commissioner, Special Economic Zones have been authorised to exercise power under Section 11 of the F.T. Act without limit in respect of export oriented units and units in SEZs.

31. In terms of Notification No.102 (RE-2008) 2004-09 dated 17th April, 2009 it cannot be doubted and debated that Development Commissioner of the VSEZ, was the notified Adjudicating Authority under Section 13 empowered and authorised to pass order(s) under Section 11 of the F.T.Act.

32. The petitioner, however, rely upon Gazette of India Notification No. S.O. 76 (E) dated 13th January, 2010, issued under the SEZ Act and refers to Section 21(1) of the said Act. As per the said Notification, acts or omissions permissible under the F.T. Act have been notified as offences for the purpose of the SEZ Act. Another Notification No.SO 77(E) dated 13th January, 2010 issued by the Central Government in exercise of powers conferred under sub-section (2) to Section 21 of the SEZ Act states that the Development Commissioners of the jurisdictional SEZ shall be Enforcement Officers in respect of notified offences committed in the SEZs. Submission of the petitioner is that in terms of Notification SO No.76(E) acts and omissions under the F.T. Act have been notified as offences for purposes of Section 21(1) of the SEZ Act and SO No.77(E), authorises Development Commissioners of the jurisdictional Special Economic Zones to act as Enforcement Officers under sub-section (2) to Section 21 of the SEZ Act. Consequently, infringement of provisions of Section 11 of the F.T. Act cannot be punished or penalised by way of penalty by the Adjudicating Authority appointed in terms of Section 13 of the F.T. Act, albeit the violations can only be punished by way of criminal prosecution and trial before the criminal court in terms of Section 23 of the SEZ Act. Reliance is placed on Sections 49 and 51 of the SEZ Act.

33. Referring to the Gazette Notifications No. S.O. 193(E) and 194(E) both dated 6th March, 2000 issued by Ministry of Commerce, Government of India, it was submitted by the petitioner that the said notifications were inconsequential and would not confer any right on the specified authorities, in view of the Section 23 of the SEZ Act. These notifications were issued prior to enforcement of the SEZ Act, w.e.f. 23rd June, 2005, and therefore

would not be applicable. Reliance placed by the respondents on Notification No.102 (RE2008)2004-09 dated 17th April, 2009, for identical reason and ground would be fallacious and contrary to law. Section 23 of the SEZ Act would prevail and has primacy.

34. We would now like to refer to Sections 20, 21, 22 and 23 of the SEZ Act, which read as under:-

“20. Agency to inspect- Notwithstanding anything contained in any other law for the time being in force, the Central Government may, by notification, specify any officer or agency to carry out surveys or inspections for securing of compliance with the provisions of any Central Act by a Developer or an entrepreneur, as the case may be, and such officer of agency shall submit verification and compliance reports, in such manner and within such time as may be specified in the said notification.

21. Single enforcement officer or agency for notified offences – (1) The Central Government may, by notification, specify any act or omission made punishable under any Central Act, as notified offence for the purpose of this Act.

(2) The Central Government may, by general or special order, authorise any officer or agency to be the enforcement officer or agency in respect of any notified offence or offences committed in a Special Economic Zone.

(3) Every officer or agency authorised under sub-Section (2) shall have all the corresponding powers of investigation, inspection, search or seizure as is provided under the relevant Central Act in respect of the notified offences.

22. Investigation, inspection and search or seizure- The agency or officer specified under section

20 or section 21, may, with prior intimation to the Development Commissioner concerned, carry out the investigation, inspection and search or seizure in the Special Economic Zone or in a Unit if such agency or officer has reasons to believe (reasons to be recorded in writing) that a notified offence has been committed or is likely to be committed in the Special Economic Zone.

Provided that no investigation, inspection and search or seizure shall be carried out in a Special Economic Zone by any agency or officer other than those referred to in sub-section (2) or sub-section (3) of section 21 without prior approval of the Development Commissioner concerned.

Provided further that any officer or agency, if so authorised by the Central Government, may carry out the investigation, inspection and search or seizure in the Special Economic Zone or Unit without prior intimation or approval of the Development Commissioner.

23.Designated courts to try suits and notified offences-

(1) The State Government, in which the Special Economic Zone is situated, may, with the concurrence of the Chief Justice of the High Court of that State, designate one or more courts—

(a) to try all suits of a civil nature arising in the Special Economic Zone; and

(b) to try notified offences committed in the Special Economic Zone.

(2) No court, other than the court designated under sub-section (1), shall try any suit or conduct the trial of any notified offence referred to in that sub-section: Provided that the courts, in which any suit of a civil nature in a Special Economic Zone had been filed before the commencement of this Act, shall continue to try such suit after such commencement:

Provided further that the courts in which any trial of any notified offence is being conducted before the commencement of this Act, shall continue to conduct the trial of such offence after the commencement of this Act:

Provided also that the courts competent to try any notified offence, before the commencement of this Act, shall conduct the trial in respect of such offence after the commencement of this Act until the courts have been designated under sub-section (1) and all such cases relating to such trials shall thereafter be transferred to such courts so designated which shall conduct the trial from the stage at which such cases were so transferred.”

35. Section 20 empowers the Central Government to specify by way of Notification, any Officer or Agency to carry out surveys or inspections for securing compliance with the provisions of any Central Act by a Developer or an entrepreneur, as the case may be, and such officer or agency shall submit verification and compliance reports with respect to the time and manner specified under the Notification. Surveys and inspection can be for securing compliance with provisions of any Central Act.

36. Section 21 empowers the Central Government to specify by way of Notification, any act or omission made punishable under any Central Act as notified offence for the purpose of the SEZ Act. Further sub-section (2) of Section 21 states that the Central Government by a general or special order can authorise an officer or agency to be the enforcement officer or agency in respect of any notified offence or offences committed in the Special Economic Zones. Such officer as per sub-section (3) of Section 21, will have all the corresponding powers of investigation, inspection, search or seizure as is provided under the relevant Central Act in respect of the

notified offences. By the Notification SO No. 77(E), the Development Officers have been notified as enforcement officers of the respective SEZs.

37. Section 22 of the SEZ Act relates to investigation, inspection and search or seizure in respect of the notified offences in the SEZ or in a unit by the agency or officer specified under section 20 or section 21. Such action requires such agency or officer should record reason to believe that notified offence has been committed or is likely to be committed and prior intimation is to be sent to the Development Commissioner of the SEZ. The first proviso to Section 22 states that search and seizure can be carried out by any other agency or officer other than those in sub-sections (2) and (3) of Section 21 of the SEZ Act with prior approval of the Development Commissioner. Second proviso states that officer or agency when authorised by the Central Government would carry out investigation or search and seizure within the SEZ without prior intimation or approval of the Development Commissioner.

38. Section 23 of the SEZ Act states that the state government concerned with the concurrence of the Chief Justice of the State High Court concerned may constitute designated courts to try civil suits arising in the SEZs and notified offences committed in the SEZs. Sub-section (2) states that no court other than the court designated under sub-section (1) shall try any suit or conduct the trial of any notified offence. First and the second proviso stipulate that a suit of a civil nature in the SEZ filed before commencement of the Act or trial of any notified offence instituted before commencement of the Act, shall continue to be conducted after commencement of the Act. The third proviso states that the court competent to try any notified offence before the commencement of this Act shall

conduct the trial in respect of such offence after commencement of the Act till courts have been designated under sub-section (1) and thereupon the proceedings shall be transferred to the courts so designated, which shall then conduct the trial from the stage at which the said trial was so transferred.

39. It is an accepted and admitted position that designated courts under Section 23 of the SEZ Act have not been notified in respect of the Visakhapatnam SEZ (VSEZ). Constitution of the special courts under Section 23 of the SEZ Act is optional and not mandatory.

40. We would record that Section 24 of the SEZ Act deals with appeals to the High Court from the designated court under sub-section (1) to Section 23. Section 25 of the SEZ Act deals with offences by the companies and liability of the person in charge of and responsible for conduct of business of the company and states that such person or company shall be deemed to be guilty of the offence and shall be liable to be proceeded with against and punished accordingly.

41. Even otherwise there is a fundamental flaw in the argument raised by the petitioner, for Section 23 of the SEZ Act refers and uses the term “offence” with reference to trial before the criminal courts and civil proceedings before the Court. Proceedings under Section 11 of the F.T. Act is not a civil suit and adjudication by the designated authority under Section 13 of the F.T. Act is not adjudication by a civil court. Reference to civil courts in Section 23 of the F.T. Act is to civil court established and having jurisdiction in terms of Section 9 of the Code of Civil Procedure. Section 23 of the SEZ Act also refers to trial of an "offence" before the criminal court, to which provisions of the Code of Criminal Procedure, 1973 apply and not mere violations, acts and omissions punishable under Section 11 of the F.T.

Act, which are to be adjudicated and punishment in nature of fine or penalty is imposed by the Adjudicating Authority i.e. the Director General or notified officer.

42. Once Section 23, does not apply there is no question of any conflict between SEZ Act and the provisions of the F.T. Act.

43. We are not dealing with the notified offence committed under the SEZ Act. We are dealing with the charges with respect to violation of foreign trade policy and the provisions relating to Sections 11 and 13 of the F. T. Act. The Development Commissioner has been authorized to act as an Adjudicating Authority under Section 13 read with Section 11 of the F.T. Act.

44. The two notifications Nos.SO 76(E) and SO 77(E) both dated 13th January, 2010 have been issued under Section 21 of the SEZ Act to empower and authorise the Development Commissioner of SEZs to act as enforcement officer and to notify offences for the SEZ Act. These two notifications in no way override provisions of the F.T. Act and the notification No.102 (RE-2008), 2004-09 dated 17th April, 2009 under the F.T. Act. Notification of offences is for the purpose of SEZ Act and to authorize Development Officers to act as an enforcement officer in respect of notified offences. These notifications do not conflict and negate or affect the power conferred on the Development Commissioners to act as Adjudicating Authority in respect of violations of Section 11 of the F.T. Act. Two notifications have restricted application and relate to the SEZ Act. The Notification SO Nos. 76(E) and 77(E) are empowering and bestow and authorise the Development Commissioners with additional powers and do not abridge and repudiate power and authority to adjudicate violations of

Section 11 of the F.T. Act as Adjudicating Authority under Section 13 of the F.T. Act.

45. In the context, we would also refer to and examine Sections 49, 51 and 58 of the SEZ Act, which read as follows:-

"49. Power to modify provisions of this Act or other enactments in relation to Special Economic Zones-

(1) The Central Government may, by notification, direct that any of the provisions of this Act (other than sections 54 and 56) or any other Central Act or any rules or regulations made thereunder or any notification or order issued or direction given thereunder (other than the provisions relating to making of the rules or regulations) specified in the notification--

(a) shall not apply to a Special Economic Zone or a class of Special Economic Zones or all Special Economic Zones; or

(b) shall apply to a Special Economic Zone or a class of Special Economic Zones or all Special Economic Zones only with such exceptions, modifications and adaptation, as may be specified in the notification.

Provided that nothing contained in this section shall apply to any modifications of any Central Act or any rules or regulations made thereunder or any notification or order issued or direction given or scheme made thereunder so far as such modification, rule, regulation, notification, order or direction or scheme relates to the matters relating to trade unions, industrial and labour disputes, welfare of labour including conditions of work, provident funds, employers' liability, workmen's compensation, invalidity and old age pensions and maternity benefits

applicable in any Special Economic Zones.

(2) A copy of every notification proposed to be issued under sub-section (1), shall be laid in draft before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in disapproving the issue of the notification or both Houses agree in making any modification in the notification, the notification shall not be issued or, as the case may be, shall be issued only in such modified form as may be agreed upon by both the Houses."

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"51. **Act to have over riding effect** - (1) The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

XXXX

"58. **Savings.**—All rules made or purporting to have been made or all notifications issued or purporting to have been issued under any Central Act relating to the Special Economic Zones shall, in so far as they relate to matters for which provision is made in this Act or rules made or notification issued thereunder and are not inconsistent therewith, be deemed to have been made or issued under this Act as if this Act had been in force on the date on which such rules were made or notifications were issued and shall continue to be in force unless and until they are superseded by any

rules made or notifications issued under this Act."

46. Section 49 of the SEZ Act states that the Central Government by a notification may direct that any of the provisions of the SEZ Act other than Sections 54 and 56 or any other Central Act, Rules, Regulations, notification, order or directions given other than the provisions relating to making of the rules and regulations, shall not apply or shall apply, subject to exceptions, modifications and adaptation. Sub-section 2 to Section 49 requires every such notifications to be laid in draft before each Houses of Parliament while it is in session or two or more successive sessions and on non-approval or modification of both the houses, the provision shall cease to operate or would be modified. It is not the case of the petitioner that any notification under Section 49 of the SEZ Act has been issued making the provisions of the F.T. Act inapplicable. In fact the argument predicated on Section 49 of the SEZ Act would not assist and help the petitioners, but support the case of the respondents that the provisions of the F.T. Act shall continue to apply and would be effective, notwithstanding, the fact that violations under the F.T. Act have been designated as notified offences under the SEZ Act.

47. Section 51 of the SEZ Act states that the provisions of the said Act shall have effect notwithstanding anything inconsistent contained in any other law for the time being in force or any instrument having any effect by virtue of any law. There is no inconsistency or repugnancy between the provisions of the F.T. Act and the SEZ Act. All offences under the F.T. Act on being designated as notified offences under the SEZ Act, the two Acts in a way complement each other and ensure that there is no conflict.

Notification No. SO 77 (E) dated 13th January, 2010 empowers Development Commissioners to act as enforcement officers under the SEZ Act and gives them power to investigate, conduct, search and seizure operations etc. Investigating power and adjudicating power can vest in the same authority and this is not unusual or abnormal. Quasi judicial adjudicator can at times have power to verify and investigate, especially in cases of statutory adjudication like the Income Tax Act. In the absence of repugnancy, primacy of the SEZ Act, as suggested, is not conferred by Section 51 of the SEZ Act with reference to section 11 of the F. T. Act. Section 11 read with Section 13 of the F.T. Act would continue to apply. Section 11 of the F.T. Act has not been expressly or impliedly repealed with respect to SEZ units, with enactment of the SEZ Act, or Notification Nos. SO 76 (E) and 77(E) both dated 13th January, 2010, issued for purpose of sub-sections (1) and (2) of Section 21 of the SEZ Act.

48. Section 58 of the SEZ Act states that all the rules or notifications made or purported to have been made or issued under any Central Act relating to the SEZs, to the extent that they are not inconsistent with the provisions of the SEZ Act, shall be deemed to have been made or issued under the SEZ Act and they shall remain in force until and unless, they are superseded by any rule and notification issued under the SEZ Act. This Section shields and insulates action in terms of Sections and Notification under the F.T. Act, to the extent they are not inconsistent with the provisions of the SEZ Act or superseded by any rule and notification issued under the SEZ Act.

49. It may be relevant here to refer to Section 12 of the F.T. Act, which reads as under:-

"12. Penalty or confiscation not to interfere with other punishments. - No penalty imposed or confiscation made under this Act shall prevent the imposition of any other punishment to which the person affected thereby is liable under any other law for the time being in force. "

As per the said Section, penalty imposed or confiscation made under the F.T. Act is in addition to and would not prevent imposition of any other punishment to which the said person is liable under any other law for the time being in force. Constitutional *vires* of Section 12 of the F.T. Act is not under challenge. Question of double jeopardy is not alleged. Penalty under provisions of the SEZ Act has not be imposed. We are, therefore, of the opinion that in the factual matrix of the present case, it cannot be said that the Development Commissioner and the Appellate Authority lacked jurisdiction to impose penalty under Section 11 read with Sections 13 and 15 of the F.T. Act, for vide Notification No. SO 76 (E) and SO No.77 (E) both dated 13th January, 2010, acts and omissions under the F.T. Act have been also declared and made designated offences for purpose of Section 21(1) of the SEZ Act and Development Commissioner has been authorized to act an Enforcement Officer under Section 21(2) of the SEZ Act.

50. For the detailed reasons given above, the first contention is rejected.

Violation of Section 11 of the F.T. Act

51. Hand Book of Procedures (Volume-I) for the period 27th August, 2009 to 31st March, 2014, would apply to the exports in question. Paragraph 2.21 of the said Procedures reads:-

“2.21 Certificate of Origin (CoO) - Certificate of Origin (CoO) is an instrument to establish evidence on

origin of goods imported into any country. There are two categories of CoO viz. (1) Preferential and (2) Non preferential.

2.21.1 Preferential arrangement / schemes under which India is receiving tariff preferences for its exports are Generalised System of Preferences (GSP), Global System Of Trade Preferences (GSTP), SAARC Preferential Trading Agreement (SAPTA), Asia-Pacific Trade Agreement (APTA), India-Sri Lanka Free Trade Agreement (ISLFTA) and Indo-Thailand Free Trade Agreement. These arrangements / agreements prescribe Rules of Origin which have to be met for exports to be eligible for tariff preference.

Authorised agencies shall provide services relating to issue of CoO, including details regarding rules of origin, list of items covered by an agreement, extent of tariff preference, verification and certification of eligibility. Export Inspection Council (EIC) is agency authorised to print blank certificates. Authorised agencies may charge a fee, as approved by DoC, for services rendered.

Generalised System of Preferences (GSP) (a) GSP is a non-contractual instrument by which industrialized (developed) countries unilaterally and based on non-reciprocity extend tariff concessions to developing countries. Following countries extend tariff preferences under their GSP Scheme:

- (i) United States of America,
- (ii) New Zealand
- (iii) Belarus
- (iv) European Union,
- (v) Japan
- (vi) Russia
- (vii) Canada,

- (viii) Norway
- (ix) Australia (only to LDCs)
- (x) Switzerland
- (xi) Bulgaria

GSP schemes of these countries detail sectors / products and tariff lines under which benefits are available, including conditions and procedures governing benefits. These schemes are renewed and modified from time to time. Normally Customs of GSP offering countries require information in Form 'A' (prescribed for GSP Rules Of Origin) duly filled by exporters of beneficiary countries and certified by authorized agencies. List of agencies authorised to issue GSP CoO is given in Appendix-4A.

Global System of Trade Preferences (GSTP) (b) Under agreement establishing GSTP, tariff concessions are exchanged among developing countries, who have signed agreement. Presently, 46 countries are members of GSTP and India has exchanged tariff concessions with 12 countries on a limited number of products. EIC is sole agency authorised to issue CoO under GSTP.”

Paragraph 2.21 of the Hand Book of Procedures (Volume-I) defines and expounds the term “Certificate of Origin” and states that it was a certificate to establish evidence of origin of goods imported in a country and was of two types, preferential and non-preferential. The difference in the two being whether the GSP issued would make the export eligible for tariff preference under the agreed arrangements/agreements. Clause (a) of Paragraph 2.21.1 states that GSP was a non-contractual instrument by which industrialized (developed) preferential countries unilaterally and based on non-reciprocity, had extended tariff concessions to developing countries. Paragraph had

enlisted and referred to countries that had extended tariff preferences under their GSP Scheme. The countries listed included Switzerland. GSP Scheme of these countries had detailed and stated the sectors and the products and tariff lines under which benefits were available, including conditions and procedures governing benefits. Customs of GSP offering countries required information in Form 'A' duly filled by exporters of beneficiary countries and certified by their authorized agencies. List of agencies eligible and entitled to issue GSP Certificate was mentioned.

52. Tariff concessions were exchanged by India with twelve countries on limited number of products who had signed agreement to establish evidence on origin of goods imported into the said country. EIC was the sole agency in India, authorized to issue GSP certificates of Indian origin. However, as elucidated below, in respect of SEZ units, a different and self-certification procedure was adopted. We would elaborate.

53. The petitioner has filed on record the declaration forms filled by them for issue of GSP Certificates of Indian origin filed in the office of the Development Commissioner, VSEZ. Relevant portion of the declaration form reads as under:-

“Procedure for claiming preference. A declarant on the certificate of origin form must be prepared by the exporter of the goods and submitted in duplicate together with a GSP application form to the certifying authority of the country of exportation which will. If satisfied certify the top copy of the certificate of origin and return it to the exporter for transmission to the importer in the country of destination. The certifying authority will at the same time return to the exporter for his retention the duplicate copy of the certificate of

origin. but will itself retain the GSP application form duly completed and signed by the exporter.

B. Sanctions Persons who furnish or cause to be furnished information which relates to origin or consignment and which is untrue in a matter at particular are liable to legal penalties and to the suspension of facilities for their goods to obtain preference.”

Part B of the GSP certification provides as under:-

"persons who furnish or cause to be furnished information which relates to origin or consignment and which is untrue in a material particular are liable to legal penalties and to the suspension of facilities for the goods to obtain preference.”

54. The aforesaid form was filled up and self certified by the petitioner. It was counter-signed by the Assistant Development Commissioner, VSEZ.

55. The impugned order explains and set out the procedure for issue of GSP Certificate in the case of SEZ units. As per the procedure GSP certificates were issued on basis of self certification by the export units located in the SEZs. GSP Certification for the SEZ units was processed and certified on self declaration. Respondents on the basis of the self declaration or certification given by the units located in the SEZ, would endorse and stamp the certificate. Reference was appropriately made to Rule 75 of the SEZ Rules which reads as under:-

"75. Self Declaration - Unless otherwise specified in these rules all inward or outward movement of goods into or from the Zone by the Unit or Developer shall be based on self declaration made and no routine examination of these goods shall be made unless

specific orders of the Development Commissioner or the Specified Officer are obtained".

Reference was also made to Rule 46 1 (C) and Rule 27 (10) of the SEZ Rules, which read as under:-

46. Procedure for Export - (1) The procedure for export from Special Economic Zone through seaports or airports or Inland Container Depot or Container Freight Station or Land Customs Station or by Post or by Courier or by Personal Carriage, as the case may be, shall be as under:-

(c) the goods. shall not be subjected to routine examination and

(Let Export Order' shall be given on the basis of self Certification by the Unit:

PROVIDED that goods may be sealed after examination, as per the norms prescribed for free shipping bills, at the option of the Unit, by the Authorized Officer:

Provided further that if services are exported in non-physical - form, the export value is to be furnished by the Unit on self certification basis as per the instructions of the Reserve Bank of India.

Explanation : "Self certification" means the certification

regarding sealing of container or package of goods under export-given .by the Unit and includes the certificate regarding contents and sealing of the container or package given by the owner or the working partner or the Managing Director or the Company Secretary of the said Unit or any person authorized in this behalf by the owner or company or working partner, as the case may be, on the copies of Shipping Bill stating that the package or container in

respect of goods under export have been sealed in his presence;

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Rule 27 (10): The Assessment of imports and domestic procurement' by a Developer or Unit, shall be on the basis of, self declaration and shall not be subjected to routine examination.

56. We are in agreement with the respondents that the self certification/declaration, the procedure for issue of GSP certification for units in the SEZ, was adopted and implemented for providing conducive environment to avoid and curtail loss of time so as to not delay exports on account of compliances and formalities. The procedure was based on faith and trust. It required honesty and probity on the part of the declarants. Act and omissions of the petitioner must be judged on the said parameters.

57. Thus, the impugned order rightly holds that in case of SEZ units, the Development Commissioner did not carry out actual verification exercise and the petitioner had self certified that biodiesel to be exported was eligible for the GSP certification as goods of Indian origin. Aforesaid observations should not be interpreted to accept that the authorities under the SEZ or Development Commissioner cannot carry out any investigation and verification. That would not be barred and prohibited. However, self certification was the norm i.e. the normal and accepted procedure for the SEZ units. This becomes clear from lucid analysis made by the Development Commissioner in his order dated 21st December, 2011, wherein he has dealt with said aspect in detail.

58. The Appellate Authority had also dealt with the said argument and observed as under:-

“10. The Committee heard all the arguments and the documents submitted by both the parties. The main issue under consideration in the present case is whether the Unified Executive Instructions issued by EIC for issue of GSP certificates of origin will be applicable or the provisions of SEZ Act/Rules will apply. The Committee referred to a. communication, which was also shared with the Appellant, wherein the EIC has clarified that the Unified Executive instructions on issue of GSP certificates of origin are, internal instructions of EIC and have not been approved by the Government/Department of Commerce. This clarifies the position that these instructions will not be applicable to SEZs. Hence the action taken by the adjudicating authority under the SEZ Act/Rules and FR(D&R) Act are correct.

GSP is an instrument through which countries extend tariff concessions. This is a major benefit for the exporters of the country which exports the product under GSP. Issue, of GSP certificate which is factually incorrect affects the credibility of the country which is receiving the benefits under the scheme. The Committee feels that any such wrong should be dealt strongly and should act as a deterrent to others to attempt such a measure since the credibility of the country is at stake.

In the present case there is no doubt that a false certificate has been issued which has also been detected by the European Union Customs Authorities. Part responsibility for such a lapse also lies on the SEZ officials who did not carry out due diligence before issue of a wrong certificate. The Committee feels that the SEZ Division in Department of Commerce should

put proper system in place along with, elaborate instructions on the precautions and the procedures to be followed for issue of such certificates. The firm cannot wash away its responsibility of giving incorrect information and declaration. In the present case though the firm has indicated that they have blended the imported and indigenous product but have failed to indicate that they have crossed the threshold which is acceptable under the GSP.

The Committee went through the orders dated 21 December 2011 of the Adjudicating Authority. The Adjudicating Authority has calculated that by using the GSP certificates the firm made an "undue profit" of Rs.22.60 crore. (The said 'profit also includes an interest element of 10% per annum). The Adjudicating Authority decided to impose a penalty of Rs. 66.30 crore, to meet the ends of justice, which is the value of the US origin imported biodiesel which was used under these GSP certificates and this penalty is equivalent to about three times the "undue profit" as calculated by the Adjudicating Authority.

The Committee deliberated on the issue in detail and decided that recovery 'of the "undue profit" earned by the firm, which is RS.22.60 crore as calculated by the Adjudicating Authority, shall meet the ends of justice. The Committee does not find any justification to impose personal penalties on the Directors of the company. The IEC code of the firm should be restored only when this reduced penalty amount has been recovered.”

Aforesaid quotation also refers to and elucidates loss and adverse consequences for India, because of false and wrong certification given by the petitioner on Indian origin of the goods. The petitioner had earned “undue profit”, at the risk and peril of the country’s reputation. Wrong and

fraudulent certification could have affected our credibility and sanctity of GSP certification issued and stamped by Indian authorities. It could have resulted in withdrawal of benefits under the GSP scheme. Consequences and impact were far-reaching and immense. Appellate Authority had also issued directions that the SEZ Division in the Department of Commerce should put proper system in place along with elaborate instructions on the precautions and procedures to be followed for GSP certification for SEZ units.

59. The Appellate Authority has rightly observed that the petitioner cannot wash away its responsibility and failure to furnish correct information and declaration on the origin of goods. Petitioner had made false declaration to procure wrong GSP certification. They were beneficiaries of the wrong declaration, which had jeopardised and harmed the country's prestige and reputation. Penalty was justified. Second contention is therefore, rejected.

60. In view of the aforesaid discussion, we do not find any merit in the present writ petition and the same is dismissed. Respondents would be also entitled to costs, as per the Delhi High Court Rules.

-sd-

(SANJIV KHANNA)
JUDGE

-sd-

(CHANDER SHEKHAR)
JUDGE

JULY 30th, 2018
B/ssn/VKR