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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07-09-2021

CORAM

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

WP No.4156 of 2014

GE India Industrial Pvt. Ltd.,
401, 402, 4th Floor,
Aggarwal Millennium Tower,
E-1,2,3, Netaji Subhash Place,
Wazirpur,
New Delhi - 110 034 Represented by
its Vice President Mr.Atul Gupta.

...Petitioner

vs.

1. Union of India Represented by its
Secretary, Ministry of Finance,
Department of Revenue,
North Block,
New Delhi - 110 001.
2. Central Board of Excise and Customs,
Department of Revenue,
Ministry of Finance,
Represented by its Chairman,
North Block,
New Delhi - 110 001.
3. Commissioner of Customs and Central Excise,
M.H.U. Complex,
692, Anna Salai,
Nandanam,
Chennai-600 035.
4. Specified Officer,
J Matadee Free Trade Zone,
Mannur Village,
Sriperumbudur Taluk,
Kanchipuram District,
Tamil Nadu - 602 105.



5. Authorised Officer,
J Matadee Free Trade Zone,
Mannur Village,
Sriperumbudur Taluk,
Kanchipuram District,
Tamil Nadu - 602 105.

...Respondents

Writ Petition is filed under Article 226 of the Constitution of India, praying for the issuance of a Writ of Certiorari, calling for the records culminating in the Circular No.44/2013 - Customs dated 30.12.2013 of the second respondent and the consequential Letter No.JMFTWZ/DHL/ MISC/GE-2014 dated 03.02.2014 of the fourth respondent, signed by the fifth respondent, purportedly issued on the basis thereof and quash them as being legally and constitutionally invalid, being ultra vires the provisions of the Customs Act, 1962 and being unconstitutional as being violative of Article 14 and 19(1)(g) of the Constitution of India.

For Petitioner : Mr.Tushar Jarwal for
Mr.Rahul Sateeja,
Mr.Deepak Thackur,
Mr.Vrinda Bagaria and
Mr.B.Giridhara Rao.

For Respondents : Mr.T.Pramodkumar Chopda,
Senior Panel Counsel.

O R D E R

The writ on hand is filed questioning the validity of the Circular No.44/203-Customs dated 30.12.2013 issued by the second respondent and the consequential letter No.JMFTWZ/DHL/MISC/GE-214 dated 03.02.2014 passed by the fourth respondent and quash the same.

2. The petitioner is a Private Limited Company engaged, inter alia, in the business of manufacturing, trading, services of many products, including equipment for Wind Operated Electricity Generators. The petitioner regularly imports goods, which are used by it for its manufacturing purposes. The petitioner imports the goods through JMFTWZ unit of DHL Logistics Private Limited, located in the Free Trade Warehousing Zone (FTWZ). The petitioner clears the goods to its units located in the Domestic Tariff Area (DTA) as stock transfers for the purpose of trading as well as carrying out certain manufacturing activities. The petitioner states that a FTWZ is a Special Economic Zone (SEZ), wherein mainly trading, warehousing and other activities related thereto are carried out.



3. The learned counsel, appearing on behalf of the petitioner, mainly contended that the Advance Ruling dated 27.05.2013 in petitioner's own case had been ignored by the respondents, while passing the impugned order dated 03.02.2014. The Notification dated 16.05.2005 with reference to the Bill of Entries (8 in Nos.) from 10.01.2014 to 28.01.2014 were not considered with reference to the Advance Ruling rendered in the case of the petitioner. During the pendency of the writ petition, another 13 Bill of Entries were filed by way of miscellaneous application in the writ petition.

4. The petitioner has stated that the implication of the Advance Ruling with reference to the provisions of the Customs Act, 1962 (hereinafter referred to as the 'Act', in short) and its binding nature is the question. Despite the fact that the said Advance Ruling is binding on the respondents, they have ignored it without any valid reason and therefore, the impugned order is untenable and in violation of the provisions of the Act.

5. The learned counsel for the petitioner reiterated that process is to clear the goods by way of stock transfer to the own manufacturing unit of the petitioner. An admitted fact is that when the nature of stock transfer is not disputed between the parties, the application of Advance Ruling cannot be denied and therefore, the petitioner is eligible for exemption and such an exemption is rejected contrary to the Advance Ruling rendered.

6. The learned counsel for the petitioner drew the attention of this Court with reference to the Advance Ruling in Rule No.AAR/ Cus/01/2013 dated 27.05.2013, wherein the petitioner was granted exemption. The process to clear the goods by way of stock transfer was considered by the Authority for Advance Ruling. Therefore, the Authorities have no reason to take a decision which is not in consonance with the Advance Ruling, which was issued based on the nature of stock transfer.

7. The learned counsel for the petitioner relied on Section 28E of the Act, wherein sub-clause (b) defines the 'Advance Ruling'. Section 28J of the Act, speaks about the 'applicability of Advance Ruling'.

8. It is contended that under the said provision, it is binding on all the Authorities across the country and therefore, the respondents cannot adopt any other opinion, which is in contravention to the findings given by the Advance Ruling Authority. It is further contended that the manner in which the order impugned passed would show that the respondents had not shown any sanctity on the Advance Ruling, more specifically, in



the case of the petitioner. Thus, at the outset, the impugned order is void in limine and therefore, preferring an appeal in the present case would be a futile exercise.

9. In support of the said contention, the learned counsel for the petitioner relied on the judgment in the case of Union of India vs. Ahmedabad Electricity Company Ltd [2003 (158) ELT 3 (SC)], wherein the Supreme Court held that once the circular is under challenge in the writ proceedings, preferring an appeal would be a futile exercise, as the Appellate Authority may not be in a position to quash the circulars. In such circumstances, the writ petition is entertainable and compelling an aggrieved person to go before the Appellate Authority, would do no service to the cause of justice. Therefore, it is contended that the subsequent judgment of this Court and in various other judgments, the Apex Court repeatedly held that no fruitful purpose would be served in such circumstances by directing the petitioner to approach the Appellate Authorities, in view of the fact that in the present case the circular itself is under challenge.

10. Though the learned counsel for the petitioner referred line of judgments on this, the principles are not in dispute that when the provisions of the Act or the Rules or the circulars issued by the Ministry of Finance is under challenge, then the Subordinate Authorities may not be in a position to contravene or take a different view than that of the issues decided and communicated by way of circulars. Thus, it is not necessary to repeat all those judgments as the principles are not disputed on this aspect.

11. The learned counsel for the petitioner is of an opinion that the circular impugned issued is in violation of the Notification dated 16.05.2005 as it contravenes the decision taken by the Government of India.

12. The learned Senior Panel Counsel, appearing on behalf of the respondents, disputed the contentions raised on behalf of the petitioner, by stating that the binding nature of the Advance Ruling has been erroneously interpreted by the petitioner. The applicability of the Advance Ruling as contemplated under Section 28J of the Act is to be applied in all respects, 'The Principal Commissioner of Customs' within whose jurisdiction the issue falls and it cannot be construed that such Advance Ruling would be binding all over India against all the Authorities and in such circumstances, it may not be possible and there may not be any further scope for adjudication of facts and circumstances of each case. Thus, the Legislative intention in adopting the language employed is 'The Principal Commissioner of Customs' or 'The Commissioner of Customs'. Thus,



it is to be applied with reference to the person whose case the Advance Ruling is given and also the nature of the subject, which was discussed. Thus, it is contended that such Advance Rulings are to be confined only with reference to the party against whom such Advance Ruling is delivered and with reference to the Authority, who was a party to that proceedings. In other words, it is contended that the Advance Ruling may not have such general implications, so as to bind all the Customs Authorities across the country. That is not the Legislative intention and in the event of such an interpretation, the very purpose and the object of adjudication under the provisions of the Act, would be defeated.

13. The learned Senior Panel Counsel for the respondents reiterated by stating that the circular impugned is also made clear that it was issued to avoid double taxation. When the circular was issued on the basis of the issue raised, whether the benefit of exemption from SAD (Special Additional Duty) under this Notification would be available when a DTA unit imports goods and routes it through SEZ/FTWZ for self-consumption i.e., in the nature of stock transfer from SEZ/FTWZ. Therefore, the circular and its application is to be decided based on certain facts and circumstances prevailing in a particular stock transfer and for that purpose, an adjudication is imminent.

14. In the present case, the petitioner has challenged the order passed based on the representation submitted by the petitioner and the adjudication is yet to be completed. If at all the petitioner is of an opinion that he is entitled for an exemption, the petitioner is at liberty to place all these factors along with the judgments, enabling the Authorities to adjudicate the facts and circumstances involved in the case of the petitioner. Contrarily, in this writ petition, the petitioner cannot claim exemption directly and in such an event, the respondents are deprived from adjudicating the disputed issues. This apart, the petitioner in order to get further clarification or otherwise, may approach the Appellate Authorities.

15. The learned Senior Panel Counsel, appearing on behalf of the respondents, drawn the attention of this Court with reference to the decision made by the Advance Ruling Authority in Ruling No.AAR/Cus./01/2013 dated 27.05.2013. The said Ruling unambiguously states that the answer to the question formulated by the applicant as on the facts as projected by the applicant is in the affirmative. However, as noted supra, if at the time of adjudication, the Adjudicating Authority finds that the claim of stock transfer of goods is not legally supportable, it would be open to the Authority to arrive at such conclusion



as is available in law. Thus, liberty is granted to adjudicate the facts.

16. In the present case, Advance Ruling was given with reference to the transaction within the State of Maharashtra with reference to the Maharashtra Value Added Tax Act. Thus, the facts and circumstances with reference to the Tamil Nadu Value Added Tax Act may be different, which requires an elaborate adjudication by the Authorities Competent. Thus, the respondents have not violated either the provisions of the Customs Act or the findings of the Advance Ruling Authority and therefore, the writ petition is liable to be rejected.

17. Considering the arguments as advanced on behalf of the parties to the lis on hand, let us consider the scope of Section 28J of the Customs Act, 1962, which reads as under:-

"28J. Applicability of advance ruling.-

(1) The advance ruling pronounced by the Authority under section 28-I shall be binding only- (a) on the applicant who had sought it;

(b) in respect of any matter referred to in sub-section (2) of Section 28H;

(c) on the Principal Commissioner of Customs or Commissioner of Customs, and the customs authorities subordinate to him, in respect of the applicant.

(2) The advance ruling referred to in sub-section (1) shall be binding as aforesaid unless there is a change in law or facts on the basis of which the advance ruling has been pronounced."

18. Sub-section (1) denotes that the Advance Ruling pronounced by the Authority under Section 28J shall be binding only with reference to sub-clauses (a), (b) and (c). Therefore, the applicability of the Advance Ruling cannot be expanded beyond the scope of Section 28J of the Customs Act.

19. The contention that the Advance Ruling is applicable against all the Authorities all over the Nation, deserves no merit consideration. However, the applicability and its binding nature are to be confined with reference to the conditions stipulated under Section 28J of the Act. Accordingly, the Advance Ruling is binding on the applicant, who had sought it and in respect of any matter referred to in sub-section (2) of Section 28H. Section 28H of the Act, speaks about the 'application for Advance Ruling'. Therefore, it denotes that the



issue raised in the application filed under Section 28H of the Act and the decision rendered in respect of such issue alone is binding. Sub-section (2) of Section 28H provides the question on which the Advance Ruling is sought for shall be in respect of six sub-clauses i.e., (a) to (f), which are extracted as under:-

"(2) The question on which the advance ruling is sought shall be in respect of, -

(a) classification of goods under the Customs Tariff Act, 1975 (51 of 1975);

(b) applicability of a notification issued under sub-section (1) of section 25, having a bearing on the rate of duty;

(c) the principles to be adopted for the purposes of determination of value of the goods under the provisions of this Act.

(d) applicability of notifications issued in respect of tax or duties under this Act or the Customs Tariff Act, 1975 (51 of 1975) or any tax or duty chargeable under any other law for the time being in force in the same manner as duty of customs leviable under this Act or the Customs Tariff Act;

(e) determination of origin of the goods in terms of the rules notified under the Customs Tariff Act, 1975 (51 of 1975) and matters relating thereto.

(f) any other matter as the Central Government may, by notification, specify."

Thus, application may be submitted for Advance Ruling under Section 28H of the Act and the question on which the Advance Ruling is sought for shall be in respect of sub-clauses contemplated under (a) to (f) alone.

20. Coming back to Section 28J of the Act, the binding nature is to be confined only in respect of any matter referred to in sub-section (2) of Section 28H. Thus, matters discussed and findings offered beyond the scope of sub-section (2) of Section 28H by the Advance Ruling Authority are not binding. Those findings are also not falling within the ambit of Section 28J, so as to form an opinion regarding the binding nature. Thirdly, sub-clause (c) to sub-section (1) of Section 28J contemplates the Advance Ruling shall be binding on the Principal Commissioner of Customs or Commissioner of Customs and



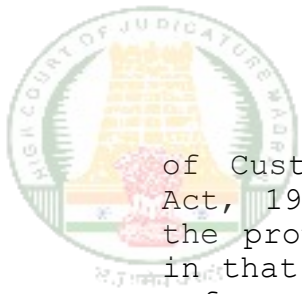
the Customs Authorities subordinate to him, in respect of the applicant.

21. Therefore, the Advance Ruling and its applicability is restricted on The Principal Commissioner of Customs or Commissioner of Customs and the Customs Authorities subordinate to him, in respect of the applicant. The word 'in respect of the applicant' could not be broadened, so as to include the transactions of the applicant in various other States or Union Territories or otherwise, wherein the Local Tax Laws are different and distinct.

22. Even in cases, where principles of law is decided by the Advance Ruling Authority, then such principles may have persuasive value and cannot have binding authority, more specifically, with reference to Section 28J of the Customs Act. In case the petitioner persuades the principles decided by the Advance Ruling Authority in respect of certain transactions in other States and more specifically, with reference to the Local Tax Law in force in that particular State, then the Authorities may consider the same, however, cannot be construed as binding with reference to Section 28J of the Act. The Authorities Competent in such circumstances are bound to apply the principles with reference to the facts and circumstances established and independently. Thus, adjudication in such circumstances are of paramount importance, more specifically, with reference to the facts and circumstances as well as the Local Tax Law applicable to the particular State or Union Territories, as the case may be.

23. As far as the case of the petitioner is concerned, it is contended that the petitioner clears the goods to its units located in the Domestic Tariff Area (DTA) as stock transfers for the purpose of trading as well as carrying out certain manufacturing activities. The Notification dated 16.05.2005 unambiguously states that no exemption shall be applicable in such goods when sold in Domestic Tariff Area (DTA), are exempted by the State Government from payment of Sales Tax or Value Added Tax.

24. As far as the Advance Ruling is concerned, the facts would reveal that the Ruling was given based on the Maharashtra Government Notification and the Maharashtra State Value Added Tax Act. The findings would further reveal that the applicant proposes to clear the goods by way of stock transfer to their own manufacturing unit located in Pune, Maharashtra and pay the duties of Customs in terms of Section 30 of SEZ Act and proposes to avail the benefit of exemption Notification No.45/2005 Customs dated 16.05.2005 that exempts goods cleared from the SEZ to DTA from payment of whole of the additional duty



of Customs leviable under Section 3(5) of the Customs Tariff Act, 1975 subject to the fulfilment of conditions mentioned in the proviso of the aforesaid Notification. Thus, stock transfer in that particular case was within the State of Maharashtra with reference to the exemption Notification No.45/2005 dated 16.05.2005.

25. The issue considered by the Advance Ruling Authority is that "Whether the goods stock transferred by the applicant from the SEZ unit to its DTA unit would be eligible for exemption from the payment of SAD under Notification No.45/2005 Customs dated 16.05.2005".

26. No doubt, the said Notification is relied on by the petitioner in this writ petition also. However, the stock transfer made with reference to the Maharashtra Value Added Tax Act, is also to be taken note of. With reference to the said issue, the Advance Ruling Authority made a finding that when such goods are sold in Domestic Tariff Area (DTA), are exempted by the State Government from payment of Sales Tax or Value Added Tax. Such an exemption is not available and this finding would be applicable with reference to the State of Maharashtra under the Tax Law in force in the State of Maharashtra. That was further clarified under Serials 82 and 103 of the Schedule C of Maharashtra Value Added Tax Act (MAVT Act) the parts and components of wind operated electricity generators are subject to tax @ 5%. Therefore, it was considered as not a sale as defined under Section 2(24) of the MAVT Act. Under these circumstances, the Advance Ruling Authority formed an opinion clearly stating that "if during any proceeding initiated under the MAVT Act, it is found that the claim of the applicant is not factually supportable, the Revenue Authority can decide that issue in accordance with law".

27. It is therefore made clear that the present Advance Ruling relied on being rendered by treating the transaction on the factual scenario as projected by the applicant and not on analysis of the factual position. It is significant to note that Section 6(A) of the Central Sales Tax Act deals with the burden of proof etc., in case of transfer of goods claimed otherwise than by way of sale. To put it differently, Section 6A of the Central Sales Tax Act, mandates that stock transfer of goods is not covered within the definition of 'sale' and as such Central Sales Tax is not levied on stock transfer of goods.

28. A close reading of the above finding would clarify that the Revenue authority can decide the issue in accordance with law and the Ruling itself is confined by treating the transaction on the factual scenario as projected by the applicant and not on analysis of the factual position. Thus, the

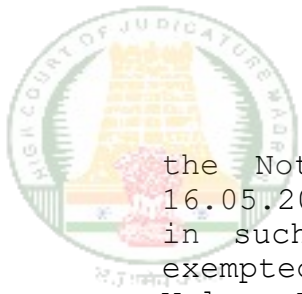


Advance Ruling Authority themselves confined the scope of the Advance Ruling, so as to avoid any undue usage in respect of other transactions made by the applicant. When such a clarification is rendered in unequivocal terms, it is necessary that a factual adjudication is warranted.

29. The final decision of the Advance Ruling Authority would also clarify that the answer to the question formulated by the applicant on the facts as projected by the applicant is in the affirmative. However, as noted supra, if at the time of adjudication, the Adjudicating Authority finds that the claim of stock transfer of goods is not legally supportable, it would be open to the Authority to arrive at such conclusion as is available in law. The application of Advance Ruling Authority itself is narrowed down with reference to the transaction established before the Advance Ruling Authority and undoubtedly, not intended for its application in respect of the other Customs Authorities or in respect of different business/sale transactions.

30. The binding nature is to be decided with reference to the nature of decisions by the Advance Ruling Authority. It is not as if that every finding of the Advance Ruling Authority is binding on all the Authorities across the country. The application of mind by the Competent Authority is the scope under the Customs Act in each and every case and the binding nature is undoubtedly confined in certain circumstances and more specifically, based on the nature of the decision rendered by the Advance Ruling Authority. When the Advance Ruling Authority themselves clarified that the decision is given to the answer to the question formulated by the applicant on the facts as projected by the applicant and further, it is clarified that it would be open to the party to arrive such a conclusion at the time of adjudication, there is no ambiguity in respect of the decision as such Advance Ruling cannot have any binding nature under Section 28J of the Customs Act, as far as the case of the petitioner is concerned.

31. As far as the circular impugned is concerned, the issue raised before the Department of Revenue, Ministry of Finance was that whether the benefit of exemption from SAD (Special Additional Duty) under this Notification would be available when a DTA unit imports goods and routes it through SEZ/FTWZ for self-consumption i.e., in the nature of stock transfer from SEZ/FTWZ. It was clarified that the benefit of SAD exemption on goods cleared from the SEZ/FTWZ unit into DTA unit on stock transfer basis for self-consumption i.e., otherwise than for sale as such, is not available under Notification No.45/2005-Customs dated 16.05.2005. In such cases, SAD would be leviable. The said circular cannot be construed as contravening



the Notification No.45/2005, as the said Notification dated 16.05.2005 clarifies that no such exemption shall be applicable in such goods when sold in Domestic Tariff Area (DTA), are exempted by the State Government from payment of Sales Tax or Value Added Tax. The clarification is issued based on the Notification in order to form an opinion that Notification cannot be blindly applicable in all cases wherein the benefit of SAD exemption on goods cleared from the SEZ/FTWZ unit into DTA unit on stock transfer basis for self-consumption i.e., otherwise than for sale as such, is not available under Notification No.45/2005-Customs dated 16.05.2005. Therefore, one cannot arrive a conclusion that the clarification is running counter to the Notification. However, application of Notification requires an adjudication of facts and on such adjudication if the applicant is entitled for exemption or not, is to be decided based on the Notification and on connected provisions.

32. As rightly pointed out by the learned Senior Panel Counsel for the respondents, the order impugned dated 03.02.2014 is issued based on the complaint given by the petitioner vide letter dated 31.01.2014 regarding denial of exemption from payment of additional duty of customs (SAD) leviable under Section 3(5) of the Customs Tariff Act, 1975. However, the issues are yet to be adjudicated as during the pendency of the writ petition also, the petitioner filed other Bill of Entries, which all are pending for adjudication. Thus, the Authorities Competent are bound to consider the disputed facts between the parties and take a decision on merits and in accordance with law by following the procedures as contemplated.

33. However, with reference to the challenge made in the writ petition, this Court do not find any infirmity, as such, in respect of the circular dated 30.12.2013 and the order passed, which is impugned. Thus, the Competent Authority is bound to conduct adjudication by following the procedures as contemplated and in accordance with law. It is made clear that the bonds furnished by the petitioner are subject to the final orders to be passed by the Authorities Competent.

34. With the above observations, the writ petition stands disposed of. However, there shall be no order as to costs.

Sd/-

Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar



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1. The Secretary,
Union of India,
Ministry of Finance,
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North Block,
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+1cc to Mr.B.Giridhara Rao, Advocate, S.R.No.45474

+1cc to Mr.T.Pramodkumar Chopda , Advocate, S.R.No.45959

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