

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 01.12.2020

Pronounced on : 19 .01.2021

CORAM

THE HONOURABLE DR. JUSTICE ANITA SUMANTH

W.P. No.28894 of 2019
and WMP.Nos.28634 & 28635 of 2019

M/s. L & T Hydrocarbon Engineering Limited,
Represented by its Head-Finance & Accounts,
P.Ganesan
Kattupalli Village, Ponneri Taluk,
Tiruvallur District 600 120.Petitioner

Vs

- 1.Union of India,
Department of Commerce,
Ministry of Commerce & Industry,
North Block, New Delhi - 110 001.
- 2.Office of the Development Commissioner,
MEPZ - Special Economic Zone,
GST Road, Tambaram,
Chennai-600 045.
- 3.The Authorised Officer/Superintendent of Customs (Preventive),
L&T Shipbuilding Limited - Special Economic Zone,
Kattupalli Village, Ponneri Taluk.Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to Writ of Certiorarified Mandamus to quash Letter Bearing No.K.43014(16)26/2018-SEZ and dated 01.05.2019 from the 1st Respondent as it is contrary to the provisions of the Special Economic Zones Act, 2005 and Special Economic Zones Rules, 2006 and to direct the 2nd and 3rd Respondents to permit duty-free procurement of diesel in respect of both own and leased equipments for the authorized operations.

For Petitioner : Mr.R.Parthasarathy

For Respondents : Mr.N.Ramesh (for R1 & R2)
Senior Panel Counsel
Mr.V.Sundareswaran (for R3)

ORDER

The petitioner is engaged in the manufacture of Offshore Structures such as platforms, jackets and decks for the Oil and Gas Sector and has set up a unit, L & T Hydrocarbon Engineering Limited within a Special Economic Zone (SEZ), L & T Shipbuilding Limited, in 2010. The activities carried out by the petitioner are governed by the provisions of the Special Economic Zone Act, 2005 (Act) and the Special Economic Zones Rules, 2006 (Rules).

2. The Act provides for an exemption from payment of taxes, duties and cess in respect of goods and services exported from, imported into, or procured from the Domestic Tariff Area (DTA) by a unit in an SEZ or a developer of an SEZ. The issue that arises in this writ petition is the eligibility or otherwise to exemption of High Speed Diesel Oil (HSD)/fuel purchased from suppliers including the Indian Oil Corporation Limited, Chennai (IOCL), for operating equipment leased from contractors and sub-contractors, and exclusively used in authorized operations, from the payment of Duty under the Central Excise Act, 1944.

3. The authorized operations of the petitioner are set out in the approval granted, as follows:

*Government of India, Ministry of Commerce
and Industry,*

.....

*Lr.No.8/2/2010/L & T Shipbuilding SEZ-II
Dt. 31/3/2010*

To

M./s.Larsen & Toubro Limited,

.....

*Sub: Your proposal for setting up a unit in the Special
Economic Zone.*

Ref: Your application dated 5/3/2010.

Dear Sirs,

*With reference to the above mentioned application,
Development, Commissioner, MEPZ Special Economic Zone
is pleased to extend to you all the facilities and
entitlements admissible to a unit in a Special Economic
Zone subject to the provisions of the Special Economic
Zones Act, 2005 and the rules and orders made there-
under and for the establishment of your unit at L & T*

shipbuilding Ltd. - Heavy Engineering sector SEZ at Kattupalli Village, Ponneri Taluk, Thiruvallur District in the State of Tamil Nadu for undertaking authorized operations, namely, Manufacture, assembly, quality assurance/quality control, test & trial and load out of "Offshore platforms and products: Piles, Jackets, Topsides and parts thereof, Floating production and storage units: FPSO, Semi-submersible, TLP, SPAR, Jack-up Rig and parts thereof as under:-

Authorized Operations:-

a) Items (s) of manufacture: Manufacture, assembly, quality assurance/quality control, test & trial and load out of "Offshore platforms and products: Piles, Jackets, Topsides and parts thereof, Floating Production and storage units: FPSO, Semi-submersible, TLP, SPAR, Jack-up Rig and parts thereof.

b) Service activities: ...

1. Setting up, operation, maintenance and expansion of the unit.

.

Asst. Development Commissioner

For Development Commissioner

4. The petitioner sought a clarification from the competent authority on 02.11.2016 as to the eligibility of HSD/fuel for exemption from Central Excise Duty. By letter dated 05.01.2017, the authorized officer responded confirming that HSD/fuel could be procured without payment of duty, so long as it was not utilized for internal/external transport to employees and goods provided by service providers and sub-contractors' equipments. Baring the aforesaid, procurement of HSD for authorized operations at nil duty was permissible.

5. The petitioner again wrote to the Development Commissioner on 30.01.2017 emphasising that the authorized operations required deployment of capital equipment such as hydras, cranes, lifts, winches, trailers, forklift and compressors to be used exclusively for manufacturing activity within the SEZ unit and such equipment was procured both by way of direct purchase as well as hire from contractor/sub-contractors. The requirement for exemption from Duty in respect of HSD/fuel purchased for running the capital equipment, was reiterated.

6. By letter dated 08.03.2017, the Development Commissioner invoked Rule 27 of the Rules to reject the claim stating that

the proviso to Rule 27 granted an exemption from duty for goods and services of contractors only so far as they were utilized for setting up and maintenance of the factory building and not for regular production of finished goods.

7. On 14.09.2017 the petitioner reiterated its request yet again and on 01.05.2019, the impugned order has come to be passed in the following terms:

'No.K 43014(16)/26/2018-SEZ

Government of India

Udyog Bhavan New Delhi

Dated 1st May 2019

To

L&T Hydrocarbon Engineering Ltd.

Subject: Seeking clarification for the usage of diesel for hired equipment for manufacturing activity.

Sir,

I am directed to refer to your letter dated 13.11.2018 on the subject mentioned above and to state that the issue was earlier examined in consultation with DGEP. DGEP has opined that Diesel is consumable item and in view of the definition of the term consumable provided in Rule 2(1)(g) of SEZ Rules, 2006 diesel can be used only where manufacturing takes place. Since no manufacturing activity arose in the instant proposal, diesel is not admissible as consumable.

2. Accordingly, the proposal for usage of duty free diesel for non manufacturing activity cannot be acceded to.

3. This issues with the approval of the competent authority.

The present writ petition is filed challenging the aforesaid order.

8. The admitted facts are (i) the petitioner holds an approval for the manufacture, assembly, quality control, test trial and load out of off-shore platforms and products (ii) the

authorised operations of the petitioner comprise of manufacturing activity as defined under Section 2(r) of the Act, extracted below:

Section 2(r): "manufacture" means to make, produce, fabricate, assemble, process or bring into existence, by hand or by machine, a new product having a distinctive name, character or use and shall include processes such as refrigeration, cutting, polishing, blending, repair, remaking, re-engineering and includes agriculture, aquaculture, animal husbandry, floriculture, horticulture, pisciculture, poultry, sericulture, viticulture and mining.'

(iii) It deploys equipment in the eligible manufacturing activity, such equipment being self-owned as well as hired from contractors.

(iv) Such equipment constitute capital goods as defined below:

Section 2(e): 'capital goods' means any plant, machinery, equipment or accessories required for manufacture or production, either directly or indirectly, of goods or for rendering services, or for development of Special Economic Zone, including those required for construction, replacement, modernization, technological upgradation or expansion and also include material handling equipment, packaging machinery and equipments, refractories for initial lining, refrigeration equipment, power generating sets, machine tools, equipment and instruments for testing, research and development, quality and pollution control system, for use in manufacturing, construction, mining, agriculture, aquaculture, animal husbandry, floriculture, horticulture, pisciculture, poultry, sericulture and viticulture, and in the services sector.

(v) Fuel/HSD is required to run the capital equipment and no dispute has been raised by the respondents for exemption from duty in respect of the fuel/HSD procured and used in the equipment owned by the petitioner. The claim has been rejected only in regard to the fuel/HSD procured to run leased equipment.

9. The SEZ Act has been enacted to provide a fillip to economic activity and Section 7 of the Act exempts all goods and services exported out of or imported into or procured from the domestic tariff area by a unit therein or a developer, from all taxes, duties or cess. Section 26 of the Act extends available exemptions, drawbacks and concessions under all enactments to developers and entrepreneurs of an SEZ and exemption from any

duty of excise, under the Central Excise Act, 1944 (1 of 1944) or the Central Excise Tariff Act, 1985 (5 of 1986) or any other law for the time being in force, on goods brought from Domestic Tariff Area to a Special Economic Zone or Unit is in terms of clause (c) thereof.

10. Rule 27(1) of the SEZ Rules extends the benefit of exemption to all types of goods including capital goods, both new and second hand, raw materials, semi-finished goods, components, consumables, spares and materials for making capital goods that are required for the authorised operations except where such items are prohibited. The proviso to Rule 27 extends the eligibility to exemption to contractors and sub-contractors appointed by SEZ unit. Since this writ petition calls for an interpretation of this Rule, I extract the same hereunder:

27 Import and Procurement. -

(1) A Unit or Developer may import or procure from the Domestic Tariff Area without payment of duty, taxes or cess or procure from Domestic Tariff Area after availing export entitlements or procure from other Units in the same or other Special Economic Zone or from Export Oriented Unit or Software Technology Park unit or Electronic Hardware Technology Park unit or Bio-technology Park unit, all type of goods, including capital goods (new or second hand), raw materials, semi-finished goods, (including semi-finished Jewellery) component, consumables, spares goods and materials for making capital goods required for authorized operations except prohibited items under the Import Trade Control (Harmonized System) Classifications of Export and Import Items:

Provided that exemptions from payment of duty, taxes or cess, drawbacks and concessions on all types of goods and services, required for setting up and maintenance of the factory building, allowed to a unit shall also be available to the contractors appointed by such unit and all the documents in such cases shall bear the name of the unit along with the contractor and these shall be filed jointly in the name of the unit and the contractor:

Provided further that the unit shall be responsible and liable for proper utilization of such goods and services in all cases

Provided also that items prohibited for import can be procured by a Special Economic Zone unit or Developer

from a place outside India to the Special Economic Zone with the prior approval of Board of Approval.]

.....

11. The respondent is seen to be taking differing stands in rejecting the claim for exemption. In the first reply dated 05.01.2017 the respondent states as follows:

'The usage of HSD/fuel for Internal/External transports to employees and goods provided by service providers and sub-contractors equipment's are NOT allowed.'

12. When the request was reiterated, the petitioner received yet another rejection dated 08.03.2017 wherein the reason stated is that the exemption is applicable only for setting up and maintenance of the factory building and not for regular production of finished goods. A cohesive reading of the provisions of the SEZ Act, Rule 27 and the proviso thereto reveals that the activities of setting up of an SEZ unit and carrying out of authorised operations are intended to be free of the fetters of taxation, subject of course, to strict compliance with all Rules, Regulations, terms and conditions.

13. In my understanding, the Rule grants a wide range of exemptions to a unit or developer, such exemptions covering the procurement of various goods, equipments, consumables, components, spaces and materials as required for authorized operations. The provisio extends such exemption to contractors appointed by the unit as well upon condition that the goods and services, procured are used only for setting up and maintenance of the factory building. The intention is evidently to ensure that contractors who play a role in the setting up and maintenance of the SEZ unit are given the benefit of exemption as well.

14. In the present case there is no dispute on the position that the fuel/HSD is used only for running the capital equipment for authorized operations. The Contractor plays no role except as the lessor of the capital equipment receiving lease rentals.

15. In the impugned order, the respondent states that diesel, being a consumable, should be used directly in the activity of manufacture to be eligible for exemption. Moreover, since, according to the respondent, no manufacturing activity has taken place in the SEZ unit, and diesel/HSD is not used as a consumable, but as a fuel for running the equipment, the claim was rejected.

16. Section 2(g) defines a consumable as being any item, (including fuels, high speed diesel oil, light diesel oil and other such petroleum products) required in the manufacturing process, which may or may not be substantially or totally consumed during the process but does not necessarily form part of the end product. In the present case, Fuel/HSD is used to run the capital equipment deployed directly in the manufacturing process. No exemption is sought for fuel used in running of vehicles/other equipment not connected with the eligible activity. The capital equipment deployed have a direct nexus with the manufacturing process as, in their absence, the equipment cannot be run and there would, consequently, be no manufacture/eligible activity. HSD/fuel is thus consumed in the running of the capital equipment which is intrinsic to the process of manufacture itself. The respondent has itself accepted this position as exemption is granted with demur to fuel/HSD used in running vehicles owned by the petitioner and denied only to leased equipment.

17. The argument of the revenue also ignores the fact that the exemption under Rule 27(1) is extended to 'all types of goods' and the width of language employed would include diesel/HSD so long as the goods are used towards/in authorised operations and excepting where the goods are prohibited. Thus, there is no justification in law to deny exemption to HSD/diesel, used as it is, in the running of the capital equipment deployed in the manufacturing process.

18. Yet another ground raised is that the petitioner purchases the fuel/ HSD/ claiming exemption from duty but charges consideration for the same. It is unclear as to how the respondent arrives at this conclusion. Samples of the purchase order, invoice and documents of lease have been filed by the petitioner indicating that charges have been paid only towards lease of the equipment. The narration in the invoice is 'leasing or rental services with or without operator, without any transfer of title and crane service charges with charges for overtime use'. Prior to the onset of GST, service tax was paid under the head 'use of crane service for the supply of tangible goods'. This appears to be the only consideration paid.

19. The preamble to the Act states that the SEZ Act provides for the establishment, development and management of the Special Economic Zones for the promotion of exports and for matters connected therewith or incidental thereto. The Supreme Court in the case of *Bajaj Tempo Limited, Bombay V. Commissioner of Income Tax* (196 ITR 188) considered the interpretation to be accorded to a provision granting exemption, concluding that where the exemption was intended for the encouragement of

specified sectors, activities or areas, the interpretation of such provisions should be liberal and not narrow.

A provision in a taxing statute granting incentives for promoting growth and development should be construed liberally; and since a provision for promoting economic growth has to be interpreted liberally, the restriction on it too has to be construed so as to advance the objective of the provision and not to frustrate it.

20. The respondent has raised the plea of alternate remedy and states that the petitioner ought to have exhausted the remedy of approaching the Unit Approval Committee and Board of Approval for addressing its grievances rather than rushing to this Court by way of present writ petition. The petitioner has raised a question of interpretation of the SEZ Act and Rules and, there are, admittedly, no disputes on facts. I thus see no reason to relegate the petitioner to alternate remedy. The writ petition is held to be maintainable.

21. This Writ Petition is allowed. No costs. Connected Miscellaneous Petitions are closed.

Sd/-

Assistant Registrar (CS.VII)

/True Copy/

Sub Assistant Registrar

To

1. The Secretary, Union of India,
Department of Commerce,
Ministry of Commerce & Industry,
North Block, New Delhi - 110 001.
2. Office of the Development Commissioner,
MEPZ - Special Economic Zone,
GST Road, Tambaram,
Chennai-600 045.
3. The Authorised Officer/Superintendent of Customs (Preventive),
L&T Shipbuilding Limited - Special Economic Zone,
Kattupalli Village, Ponneri Taluk.

+1cc to M/s.Lakshmi Kumaran, Advocate SR.No.2551

AKM/23.2.21 /9P-5C/

W.P. No.28894 of 2019
and WMP.Nos.28634 & 28635 of 2019
19.01.2021