

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 25.10.2021

+ **W.P.(C) NO.662/2017**

M/S MOSER BAER INDIA LTD.

..... Petitioner

versus

UNION OF INDIA & ANR.

..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Pramod Kumar Rai and Mr Deepak Anand, Advocates.

For the Respondent : Ms Suparna Srivastava & Ms Sanjna Dua, Advocates for R-1&2.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner has filed the present petition under Article 226 of the Constitution of India impugning an order dated 28.12.2016 passed by the Board of Approval, whereby the petitioner's appeal against an order dated 18.04.2016 passed by the Unit Approval Committee, NOIDA SEZ was rejected. The petitioner also prays that the petitioner may be allowed benefits under Section 26 of the Special Economic Zones Act, 2005 (hereafter 'the SEZ Act') in respect of maintenance and duty free imports of raw materials and consumables for operation

and maintenance of the power plant (hereafter ‘O&M benefits’). In addition, the petitioner also prays that it should be allowed duty free transfer of surplus power generated by it to the Export Oriented Units (hereafter ‘EOU’).

Factual Context

2. The petitioner is a company, *inter alia*, engaged in generation of electricity, which is captively consumed and also supplied to other units in the Special Economic Zone (SEZ Units). The petitioner had submitted its proposal for seeking approval for its power generating unit in MBIL-SEZ. The said proposal was accepted and by a Letter of Approval dated 08.10.2009 (hereafter ‘the LoA’), the Development Commissioner, Noida SEZ (Approval Committee) approved the same and extended all facilities and entitlements, as admissible to a unit in the Special Economic Zone (SEZ) subject to the terms of the SEZ Act and the Rules made thereunder, for undertaking “Authorised Operations”. The said approval was subject to certain terms and conditions as stipulated in the LoA including that, the approval was valid for a period of one year from the date of issue, within which the petitioner was obliged to implement the project and commence production. It was also stipulated that the LoA would be valid for a period of five years from the date of commencement of production. It is relevant to note that the petitioner’s proposal was for it to be treated as an SEZ unit in terms of the Guidelines issued by the Department of Commerce by its letter dated 27.02.2009 (hereafter referred to as ‘the 2009 Guidelines’).

3. The petitioner continued to operate its power generation unit in the SEZ for the period 08.10.2009 to 20.03.2012. During this period, it was granted and availed all benefits under Section 26 of the SEZ Act including O&M benefits in terms of the 2009 Guidelines.

4. On 21.03.2012, Government of India, Ministry of Commerce and Industry, Department of Commerce issued fresh guidelines for power generation in SEZ (hereafter referred to as the '2012 Guidelines'), which superseded the 2009 Guidelines. The said Guidelines continued till 31.03.2015 and during this period the petitioner continued to operate its unit and availed O&M benefits as available under Section 26 of the SEZ Act. In the meanwhile, with the expiry of five years, the LoA expired and in terms of the letter dated 04.12.2014, the LoA was renewed for a further period of five years, that is, till 08.10.2019.

5. Thereafter, by a letter dated 06.04.2015 (P6/3/2006-SEZ), Department of Commerce, Government of India communicated its decision to withdraw the 2012 Guidelines with immediate effect (that is, with effect from 01.04.2015) and restore the 2009 Guidelines (Guidelines issued in terms of the letter dated 27.02.2009). The said letter expressly stated that the 2009 Guidelines would be the basis for the relevant policy and operational decisions. A copy of the said letter is annexed as Annexure P-8 to the petition, and it is not disputed that the same contains a typographical error inasmuch as the letter dated 27.02.2009 (the 2009 Guidelines) is referred to as a letter dated 27.02.2012.

6. The Government of India also issued another letter dated 06.04.2015 addressed to all Development Commissioners, Special Economic Zones informing them that, henceforth, setting up of power plant shall be allowed only in non-processing area of SEZs. It further stated that processing power plants presently situated in the processing area would be demarcated as non-processing areas and no O&M benefits would be available to such power plants.

7. Thereafter, on 16.02.2016, the Government of India, Ministry of Commerce issued fresh guidelines (hereafter referred to as the '2016 Guidelines') extending the O&M benefits to power generating units in the processing zone subject to certain conditions. The petitioner states that it has been operating under the said guidelines and, has been extended the O&M benefits subject to the condition proscribing duty free transfer of power to EOUs.

8. In the meanwhile, the petitioner submitted its proposal for a fresh Letter of Approval for a power plant unit in the non-conventional energy SEZ, MBIL-SEZ. The same was placed before the Approval Committee at its meeting held on 01.04.2016. The Approval Committee was of the view that a fresh Letter of Approval was not required as the petitioner's unit was already approved for power generation. However, it noted that O&M benefits were not allowed to the petitioner's unit during the period 01.04.2015 to 15.02.2016 under the 2009 Guidelines as restored by the Government of India by its letter dated 06.04.2015. Accordingly, it directed that the said O&M benefits be recovered from the petitioner. The Approval Committee also decided that the petitioner

would be entitled to O&M benefits subject to the condition that duty free transfer of power to its EOU shall not be allowed. The said conditional approval was communicated to the petitioner by a letter dated 18.04.2016. The relevant extract of the said letter setting out the said conditions is reproduced below:-

1. “You will refund an amount of Rs. 1,55,76,751/- being the duty foregone on material procured from DTA & imported for operation & maintenance of power plant for the period of 01.04.2015 to 15.02.2016, within a period of 15 days from the date of issue of this letter.
 2. You will comply with the extant Power Guidelines as issued by DOC vide letter No. P6/3/2006-SEZ (vol-III) dated 16.02.2016.
 3. No duty free benefits for transfer of power to EOU shall be allowed.
 4. All other terms and conditions of LOA dated 08.10.2009 shall remain unchanged.
 5. You shall execute fresh/additional Bond-cum-LUT within 15 days of this letter.
 6. You shall confirm acceptance of the above terms and condition to this office immediately.”
9. Aggrieved by the aforesaid decision, the petitioner preferred an appeal to the Board of Approval constituted under Section 8 of the SEZ Act.
10. In its appeal, the petitioner raised two issues. First, it claimed that it was entitled to O&M benefits during the period 01.04.2015 to 15.02.2016 under Section 26 of the SEZ Act and the Rules made

thereunder. The petitioner claimed that such benefits could be denied in terms of instructions issued by the Government of India. It also claimed that on correct interpretations of the communication dated 06.04.2015, the benefit of the 2009 Guidelines were not denied to the petitioner.

11. Second, it claimed that it was entitled to sell surplus power under Rule 47(3)(c) of the Special Economic Zone Rules, 2006 (hereafter 'the SEZ Rules') and the Approval Committee had no power to demand the duties imposed on inputs consumed by an SEZ unit. The petitioner claimed that it was entitled to such duty free procurement on its inputs irrespective of whether the goods manufactured were cleared for export in the Domestic Tariff Area (DTA).

12. The Board of Approval rejected the petitioner's appeal by the impugned order dated 28.12.2016. And, this led the petitioner to file the present petition.

Reasons and Conclusion

13. It is apparent from the above that the controversy involved in the present petition relates to the questions, (a) whether the petitioner is entitled to O&M benefits (fiscal benefits covered under Section 26 of the SEZ Act in respect of maintenance and duty free import to raw materials and consumables for generation of power) for the period 01.04.2015 to 15.02.2016; and (b) whether the condition that no duty free benefits for transfers to EOU is contrary to the SEZ Act and the Rules made thereunder.

14. Insofar as the validity of the condition that no duty free benefits would be allowed for transfer of power to EOU is concerned, it is common ground that the interpretation of Rule 47(3) of the SEZ Rules is dispositive of the said controversy. Rule 47(3) of the SEZ Rules, is set out below:

“47(3) Surplus power generated in a Special Economic Zone’s Developer’s Power Plant in the SEZ or Unit’s captive power plant or diesel generating set may be transferred to Domestic Tariff Area on payment of duty on consumables and raw materials used for generation of power subject to the following conditions, namely:—

(a) proposal for sale of surplus power received by the Development Commissioner shall be examined in consultation with the State Electricity Board, wherever considered necessary;

Provided that consultation with State Electricity Board shall not be required for sale of power within the same Special Economic Zone;

(b) norms for production of a unit of power shall be approved by the Approval Committee;

(c) sale of surplus power to other Unit or Developer in the same or other Special Economic Zone or to Export Oriented Unit or to Electronic Hardware Technology Park Unit or to Software Technology Park Unit or Bio-technology Park Unit, shall be without payment of duty;

(d) for sale of surplus power in Domestic Tariff Area, the Unit shall obtain permission from the Specified Officer and the State Government authority concerned;

(e) duty on sale of surplus power to the Domestic Tariff Area shall be as provided for in this rule.”

15. Sub-rule (3) of Rule 47 of the SEZ Rules clearly specifies that surplus power generated in SEZ Developer's plant or an SEZ Unit's captive power plant may be transferred to Domestic Tariff Area on payment of duty on consumables and raw materials used for generation of the power. The reference to the duty under Clause (c) of Sub-rule (3) of Rule 47 of the SEZ Rules is clearly a reference to duty on sale of surplus power under Rule 47 of the SEZ Rules. It is averred in the petition that Rule 47 of the SEZ Rules is *ultra vires* to Section 26 of the SEZ Act, which permits duty free procurement of raw material. However, the learned counsel for the petitioner did not press the said challenge to Rule 47 of the SEZ Rules and, had confined his submissions to the question whether the petitioner was entitled to O&M benefits under the 2009 Guidelines as restored with effect from 01.04.2015. According to the petitioner, it was entitled to such benefits in terms of the LoA and the provisions of the SEZ Act and the Rules made thereunder.

16. The respondent has contested the same and contends that in terms of the statutory scheme, the Board of Approval is required to follow the guidelines issued by the Central Government. In its reply to the petition, the respondent has briefly alluded to the scheme of the SEZ Act and the Guidelines issued by the Central Government. It is the respondent's contention that an SEZ unit would be eligible for O&M benefits only for "authorised operations" and only as so long as the said operations are considered as "authorised operations" by the Central Government. Second, it is stated that in terms of Section 6 of the SEZ

Act, the Central Government is entitled to demarcate the ‘processing’ and ‘non-processing’ area of the SEZ and since the petitioner’s unit was required to be demarcated as a non-processing area for the period 01.04.2015 to 15.02.2016, O&M benefits would not be available to the petitioner’s unit. Third, it was contended that in terms of Sub-section (2) of Section 26 of the SEZ Act, the Central Government has the powers to prescribe the manner and the terms and conditions subject to which benefits under Section 26(1) of the SEZ Act are to be granted. Lastly, it was submitted that the Board of Approval was bound by the policy decisions. It is also stated that the Central Government had the power to issue directions on questions of policy and in terms of Section 9(6) of the SEZ Act, the Board of Approval was bound by the same. Before examining the scheme of the SEZ Act and before addressing the aforesaid issues, it would be relevant to refer to the relevant Guidelines.

17. As noted above, the petitioner had sought approval for its power generating unit in the ‘processing area’ of the MBIL-SEZ in terms of the 2009 Guidelines. The approval as sought for by the petitioner was granted by the LoA dated 08.10.2009. The petitioner was granted all the facilities and benefits as admissible to a unit in an SEZ, subject to the provisions of the SEZ Act and the Rules made thereunder.

18. The 2009 Guidelines made a distinction between a power plant set up by a developer/co-developer in the non-processing area of an SEZ as a part of the infrastructure facility and, a unit set up in the SEZ to generate power as a product or as a captive power plant, located in the ‘processing area’. Whereas a power plant set up by a developer/co-

developer as a part of the infrastructure facility was entitled to fiscal benefits for its initial setting up; it was not entitled to fiscal benefits in regard to its operation and maintenance activities, in terms of Rule 27(3) of the SEZ Rules.

19. The relevant extracts of the 2009 Guidelines are set out below:

“Generation, transmission and distribution of power in SEZs.

i) Power plant set up by developer/Co-developer

A power plant to be set up by developer/co-developer in an SEZ as part of infrastructure facility will be in the non processing area of SEZ and will be entitled to fiscal benefits only for its initial setting up and no fiscal benefit would be admissible for its operation and maintenance in terms of Rule 27(3) of the SEZ Rules. There will be no obligation to achieve positive Net Foreign Exchange Earning (NFE) for such power plants.

Constituents to whom it can supply power

Such a power plant can supply power to other facilities located in the non processing area of the same SEZ/facilities located in the non processing area of other SEZs, SEZ units located in the processing area of the same SEZ/SEZ units located in the processing area in other SEZs, facilities located in the processing area of the same SEZ/facilities located in the processing area of other SEZs and also Domestic Tariff Area (DTA).

ii) A unit set up within the SEZ

A unit can be set up within the SEZ to generate power as a product or have a captive power plant and will be located in the processing area. Such a power plant will be entitled to all the fiscal benefits covered under section 26

of the SEZ Act including the benefits for initial setting up, maintenance and the duty free import of raw materials and consumables for the generation of the power in such plants.

With respect to SEZs in sectors such as IT/ITES, Gem and Jewelry, Biotech, etc. where a minimum built up area is stipulated under the SEZ Rules and in respect of which generation of power has been approved by the Board of Approval as authorized operation to the Developer/Co-developer within the processing area, in such cases generation of power will be carried out as a unit without any separate demarcation of the area for that purpose. However, such unit will maintain separate accounts as a power generating unit.

These units will enjoy duty free import of capital goods, raw materials and consumables for the generation of power and such duty free imports of capital goods, raw material and consumables etc. would be counted towards the NFE obligations of the unit.

Constituents to whom it can supply power

Such a unit can supply power to other SEZ Units located in the processing area of the same SEZ/SEZ units located in the processing area of other SEZs, facilities located in the non processing area of the same SEZ/ facilities located in the non processing area of other SEZs, facilities located in the processing area of the same SEZ/ facilities located in the processing area of other SEZs and DTA.

iii) A single power plant in an SEZ

A single stand alone power plant can be set up in an SEZ in which there would be no other units. Such a power plant will be treated as a unit in the processing area and will be entitled to all fiscal benefits covered under Section 26 of the SEZ Act including benefits for initial setting up,

maintenance and the duty free imports of raw material and consumables for generation of power in such a plant.

The duty free import of capital goods, raw material and consumables etc. would be counted towards the NFE obligation of the unit as applicable to such units under Rule 53 of the SEZ Rules, 2006.

Constituents to whom it can supply power

Such a power plant can supply power to the facilities in the non processing area of the same SEZ/facilities in the non processing area of other SEZs, SEZ units located in other SEZs and DTA.”

20. The 2009 Guidelines were superseded by the 2012 Guidelines. In terms of the said Guidelines, O&M benefits were extended to power generating units set up by developers/co-developers as a part of the infrastructure facilities in the processing zone. Such benefits were not available to units set up in the ‘non-processing’ area of the SEZ.

21. Insofar as the petitioner is concerned, the 2012 Guidelines did not materially affect the petitioner’s entitlement to O&M benefits under Section 26 of the SEZ Act.

22. The 2012 Guidelines were withdrawn with effect from 01.04.2015 and the 2009 Guidelines were restored in terms of the letter dated 06.04.2015 issued by the Government of India. The said letter is reproduced below:

**“No. P 6/3/2006- SEZ
Government of India
Ministry of Commerce & Industry
Department of Commerce
(SEZ Division)**

Udyog Bhawan, New Delhi

Dated- 6th April, 2015

Subject: Guidelines for Power Generation in Special Economic Zone- regarding

1. The undersigned is directed to say that guidelines for power generation transmission and distribution in Special Economic Zone issued vide this Ministry's letter of even number dated 21st March, 2012 stand withdrawn with immediate effect i.e. 1st April, 2015.
2. The guidelines for Power Generation, Transmission and Distribution in Special Economic Zone issued vide this Department's letter of even number dated 27th February, 2012 [*sic* 27th February 2009] are hereby restored and will, henceforth, be the basis for relevant policy and operational decisions.

Sd/-
Under Secretary to
the Govt. of India
Tel- 011- 23062496
e-mail: kabirai.sabar@nic.in

1. Chief Secretaries of all States/UT's
2. All Development Commissioners of SEZs
3. Ministry of Power, Govt. of India, Shram Shakti Bhawan, Rafi Marg, New Delhi
4. Department of Revenue{CBDT/CBEC} Govt. of India
5. DG, EPCES"

23. The aforesaid letter (also referred to as 'the First Letter') clearly indicates that the Government of India had decided to withdraw the 2012 Guidelines and restore the 2009 Guidelines without any additional condition. The aforesaid decision of the Government of India to withdraw the 2012 Guidelines would have no material impact on the

petitioner insofar as the O&M benefits are concerned as undisputedly, it was entitled to the same in terms of the 2009 Guidelines. However, according to the respondents, the O&M benefits were no longer available to the petitioner by virtue of another letter of the same date (letter dated 06.04.2015) that was circulated to all the Development Commissioners of Special Economic Zones. The said letter is also referred to as the Second Letter. The contents of the said letter dated 06.04.2015 are at the centre of the controversy in the present petition.

24. The said letter is reproduced below:

“No.
P.6/3/2006-SEZ
Government of India
[Ministry of Commerce & Industry
Department of Commerce
(SEZ Division)

Udyog Bhawan, New Delhi
Dated: 6th April, 2015

To

Ail Development Commissioners
Special Economic Zones

Subject: Guidelines for Power Generation in Special Economic Zones-regarding.

Sir/Madam

1. With reference to subject cited above, I am directed to inform that the above-mentioned guidelines issued vide this Department's letter of even number dated 21st March, 2012 have been withdrawn by the Government with immediate effect i.e, 1st April, 2015. Further, the Power Guidelines issued vide this Department's letter of even number dated 27th February, 2009 have been resorted. A copy of the communication in this regard is enclosed.

2. In pursuance of the above cited decision, you are informed that henceforth setting up of power plants shall be allowed only in the Non-Processing Area of SEZs. Further, those power plants which are presently situated in Processing Areas of SEZs, shall be demarcated as Non-Processing Areas and no operation and maintenance (O&M) benefits will now be available for such power plants. An action taken report in the matter may be furnished to this Department.

End. As above

Yours faithfully,
(Kabiraj Sabar)
Under Secretary to the Govt. of India
Tel. 011-23062496
e-mail: kabiraj.sabar@nic.in

Copy to: Department of Revenue (CBDT/CBEC) Govt. of India”

25. On 16.02.2016, the Government of India issued fresh guidelines (the ‘2016 Guidelines’). The relevant extract of the said Guidelines are set out below:

- i. “A power plant, including non-conventional energy power plant to be set up by the developer/ co-developer in an SEZ as part of infrastructure facility will be in the Non Processing Area of SEZ only and will be entitled to fiscal benefits only for initial setting up and no fiscal benefit would be admissible for its operation and maintenance. There will be no obligation to achieve positive Net Foreign Exchange (NFE) for such power plants. Such a power plant can supply power to DTA after meeting the power requirement of the SEZ subject to payment of customs duty as determined by DoR keeping in view the duty foregone on initial setting up of the power plant.

- ii. Henceforth no single stand-alone power plant will be permitted to be set up in to SEZ in which there would be no other units.
- iii. Henceforth setting up of captive power plant including non conventional energy power plant, can be permitted in Processing Area as a unit, and it will be subject to NFE obligations. Such a power plant will be entitled to all the benefits covered under section 26 of the SEZ Act including the benefits of initial setting up maintenance and the duty free import of raw materials and consumables for the generation of the power. They can sell power to DTA on payment of customs duty as determined by DoR keeping in view the duty on installation, as well as O&M, and including service tax exemptions.

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- vi. Those Power Plants In SEZs which were approved prior to 27.02.2009, and subject to issue of Power Guidelines and Provisions of SEZ Act & Rules, either as an infrastructure facility by Developer/Co-developer or as a unit in the Processing Area, will be permitted to operate. It is relevant that during period of installation of such plants, duty benefits on capital investment of mega power plants were available under the then prevalent policy guidelines even in the DTA area.

Henceforth, such power plants will be allowed O&M benefits only with regard to the average monthly power supplied to entities within the same SEZ during the preceding year. Henceforth, no O&M benefits including service tax exemption will be allowed for power supplied to DTA/other SEZs/EOUs from such power plants. The surplus power generated in such power plants may be transferred to DTA, without payment of duty, keeping inconsideration of the fact that no duty free benefits on raw materials, consumables, etc have been availed for

generation of such power. However, those power plants not having the capacity of the mega power plant, as given in DoR Notification No. 21/2002-Customs dated 01.03.2002, will be required to pay duty for sale in DTA, on accounts of duty free import of capital goods, as determined by DoR.

2. These guidelines would be effective with effect from 16th February, 2016.”

26. In the aforesaid backdrop, the first and foremost question to be addressed is whether the operations carried out by the petitioner cease to be “authorised operations” by virtue of the letter dated 06.04.2015, whereby the 2012 Guidelines were superseded. It is necessary to note that by the LoA dated 08.10.2009, the petitioner was extended the facilities and entitlements as admissible to a unit in the SEZ for undertaking ‘authorised operations’. The LoA also expressly specified the authorised operations as under:

“Authorised Operations

Setting up of Power Plant in Processing area for generating Power (Electrical energy) 1740 MW.”

The LoA also specified the Projected Annual Exports for the entire five year term of the LoA.

27. It is also material to note that there is no dispute that the petitioner’s generating unit is located in ‘the processing zone’ of MBIL-SEZ.

28. The expression “authorised operations” is defined under Section 2(c) of the SEZ Act to mean *“operations which may be authorised under sub-section (2) of section 4 and sub-section (9) of section 15.”* Section 4(2) of the SEZ Act empowers the Board of Approval to authorize the Developer to undertake the operations in an SEZ as may be authorized by the Government. Sub-section (9) of Section 15 of the SEZ Act expressly provides that the Development Commissioner may issue a letter of approval to the person concerned to set up a unit and undertake such operations, which the Development Commissioner may authorise and such operations would be mentioned in the letter of approval.

29. The word “Developer” is defined under Section 2(g) of the SEZ Act as under:

“(g) “Developer” means a person who, or a State Government which, has been granted by the Central Government a letter of approval under sub-section (10) of section 3 and includes an Authority and a Co-Developer.”

30. It is also relevant to refer to the definition of the term ‘entrepreneur’ as defined under Section 2(j) of the SEZ Act. Section 2(j) of the SEZ Act reads as under:

“2(j) “entrepreneur” means a person who has been granted a letter of approval by the Development Commissioner under sub-section (9) of section 15.”

31. Section 3 of the SEZ Act contains provisions for the procedure for making a proposal to establish an SEZ Zone. Any person who intends to set up an SEZ is required to make a proposal to the State Government for the purpose of setting up the SEZ. The State Government may on receipt of the proposal shall forward the same with its recommendation to the Board of Approval within such period as may be prescribed in terms of Section 3(7) of the SEZ Act. The Board of Approval, upon receipt of the proposal, may approve the said proposal subject to such terms and conditions as it may deem fit to impose or modify or reject the proposal. In terms of Section 3(8) of the SEZ Act, the Central Government may prescribe the requirement for establishing an SEZ including the terms and conditions, subject to which the developer shall undertake the “authorised operations” and his obligations and entitlements.

32. In the event the Board of Approval approves the proposal without any modification or approves the same with modifications, which are accepted by the concerned person or the State Government, it is required to communicate the said approval to the Central Government. Section 3(10) of the SEZ Act provides that on receipt of such communication from the Board of Approval, the Central Government shall issue a letter of approval on such terms and conditions as may be approved by the Board, to the developer.

33. It is relevant to note that the letter of approval as mentioned under Section 3(10) of the SEZ Act is with respect to the proposal to set up an SEZ and not a unit within an existing SEZ.

34. Section 4 of the SEZ Act provides for the establishment of an SEZ by a developer after grant of the letter of approval under Section 3(10) of the SEZ Act. Sub-section (2) of Section 4 of the SEZ Act entitles the Board of Approval to authorise a developer to undertake such operations that may be authorised by the Central Government in the SEZ. It is clear from the Scheme of the SEZ Act that the ‘authorised operations’ under Section 4(2) of the SEZ Act are such operations that a developer who establishes the SEZ in terms of the letter of approval issued under Section 3(10) of the SEZ Act is entitled to carry out in the SEZ.

35. Section 15 of the SEZ Act contains provision regarding setting up a unit in an SEZ. In terms of Sub-section (1) of Section 15 of the SEZ Act, any person, who intends to set up a Unit for carrying on the “authorised operations” in an SEZ is required to submit a proposal to the Development Commissioner. The Development Commissioner is required to submit the same to an Approval Committee for its approval. If such approval is granted in terms of Sub-section (9) of Section 15 of the SEZ Act, the Development Commissioner is required to issue a letter of approval to the person concerned to set up a unit and undertake such operations, which the Development Commissioner may authorise. Sub-section (8) of Section 15 of the SEZ Act entitles the Central Government to, *inter alia*, prescribe the requirements subject to which the Approval Committee shall approve, modify or reject the proposal. It is also entitled to prescribe the terms and conditions subject to which a unit shall undertake the “authorised operations”. The relevant extract of Section 15 of the SEZ Act is set out below:

“15. (1) Any person, who intends to set up a Unit for carrying on the authorised operations in a Special Economic Zone, may submit a proposal to the Development Commissioner concerned in such form and manner containing such particulars as may be prescribed:

Provided that an existing Unit shall be deemed to have been set up in accordance with the provisions of this Act and such Units shall not require approval under this Act.

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(3) The Approval Committee may, either approve the proposal without modification, or approve the proposal with modifications subject to such terms and conditions as it may deem fit to impose, or reject the proposal in accordance with the provisions of sub-section (8):

Provided that in case of modification or rejection of a proposal, the Approval Committee shall afford a reasonable opportunity of being heard to the person concerned and after recording the reasons, either modify or reject the proposal.

(4) Any person aggrieved, by an order of the Approval Committee, made under sub-section (3), may prefer an appeal to the Board within such time as may be prescribed.

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(8) The Central Government may prescribe,-

(a) the requirements (including the period for which a Unit may be set up) subject to which the Approval Committee shall approve, modify or reject any proposal referred to in subsection (3);

(b) the terms and conditions, subject to which the Unit shall undertake the authorised operations and its obligations and entitlements.

(9) The Development Commissioner may, after approval of the proposal referred to in sub-section (3), grant a letter of approval to the person concerned to set up a Unit and undertake such operations which the Development Commissioner may authorise and every such operation so authorised shall be mentioned in the letter of approval.”

36. It is apparent from Sub-section (8) of Section 15 of the SEZ Act that the Central Government has ample powers to impose certain terms and conditions subject to which a unit can carry out its operations.

37. In view of the above, it is clear that the Central Government can introduce terms and conditions by notifying Rules or issuing guidelines in terms of which an approval may be granted.

38. The letter of approval as contemplated under Section 15(9) of the SEZ Act is required to be issued by the Development Commissioner pursuant to the proposal submitted under Section 15(1) of the SEZ Act. The person who is granted the letter of approval falls within the definition of an “entrepreneur” within the meaning of Section 2(j) of the SEZ Act. Section 15(9) of the SEZ Act makes it specifically clear that the letter of approval shall mention the operations that the concerned person is authorised to undertake. Thus, the scope of the expression “authorised operations” is well defined and the same has to be stated in the letter of approval.

39. In the present case, the letter of approval dated 08.10.2009 expressly indicates the operations/activities that the petitioner is authorised to undertake. In the aforesaid circumstances, the contention that the operations of generating electricity were rendered unauthorised by the Central Government by the letter dated 06.04.2015 whereby the 2009 Guidelines were reinstated, is unpersuasive. There is nothing to indicate either in the three Guidelines (2009 Guidelines, 2012 Guidelines and the 2016 Guidelines) that the effect and the import of the said guidelines was to render the operations being carried out by the concerned unit as unauthorised operations. The letter of approval has been granted specifying the authorised operations and the same cannot be altered by general guidelines, which at best qualify to be a policy decision by the Central Government.

40. It is next contended that the Central Government is entitled to demarcate processing areas and non-processing areas and the unit established by the petitioner had ceased to be a unit in the processing area whereby rendering it ineligible for O&M benefits. The said contention is also not supported by the scheme of the SEZ Act.

41. Section 6 of the SEZ Act requires that the Central Government may demarcate the areas falling within the SEZ into the processing area and non-processing areas. Section 6 of the SEZ Act is set out below:

“6. The areas falling within the Special Economic Zones may be demarcated by the Central Government or any authority specified by it as-

(a) the processing area for setting up Units for activities, being the manufacture of goods, or rendering services; or

(b) the area exclusively for trading or warehousing purposes; or

(c) the non-processing areas for activities other than those specified under clause (a) or clause (b).”

42. Rule 11 of the SEZ Rules expressly provides that the Development Commissioner would demarcate the area and issue a demarcation order under Section 6 of the SEZ Act for specifying the survey numbers and boundaries of the SEZ as specified in the notification as well as the processing areas and the non-processing areas. In the present case, there is no dispute that the processing areas and non-processing areas had been demarcated. The petitioner had applied for and was granted the letter of approval for its unit in the processing area.

43. It is also relevant to refer to Rules 18 and 19 of the SEZ Rules. Rule 18 of the SEZ Rules sets out the provisions regarding consideration of proposals for setting up a unit in the SEZ under Section 15 of the SEZ Act. Rule 19 of the SEZ Rules contains provisions regarding the letter of approval for setting up a unit. Rule 19(2) of the SEZ Rules expressly provides that the letter of approval would specify the items of manufacture or particulars of service activity. Rule 19(3) of the SEZ Rules expressly provides that only an entrepreneur holding the letter of approval shall be entitled to set up a unit in the processing area of the SEZ. The proviso also expressly provides that proposals for

setting up a unit in the SEZ would be entertained only after the processing area has been demarcated under Rule 11 of the SEZ Rules.

44. The import of the contentions advanced on behalf of the respondent is that notwithstanding that specific provisions have been made under the SEZ Act and the Rules for demarcation of processing and non-processing zones prior to the issuance of the letter of approval; the Central Government can re-demarcate the areas under the SEZ Zone as a measure to deny the benefits available to a unit in terms of the SEZ Act. Plainly, this militates against the scheme of the SEZ Act and the SEZ Rules and thus, the said contention is unsustainable.

45. It is material to note that two letters dated 06.04.2015 have been placed on record. The First Letter communicates the decision of the Government of India to withdraw the 2012 Guidelines with effect from 01.04.2015. The second paragraph of the said letter communicates the decision to restore the 2009 Guidelines and further directs that the same would *“henceforth, be the basis for relevant policy and operational decisions”*. There is no ambiguity in the language of this letter. The use of the word ‘henceforth’ clearly indicates that the decision as communicated in the said letter is required to be applied prospectively and the 2009 Guidelines would be the basis for all relevant policy and operational decisions.

46. It appears that this letter was forwarded under the cover of the Second Letter. This letter as noted before is at the centre of the controversy. The last line of the first paragraph of the Second Letter

indicates that the copy of the communication regarding the decision of the Government to withdraw the 2012 Guidelines and restore the 2009 Guidelines is enclosed. It is thus apparent, that the First Letter was sent under the cover of this letter. Insofar as the first paragraph of this letter is concerned, there is no controversy. The second paragraph of the Second Letter also indicates that the communication contained therein is pursuant to the Government's decision as communicated under the First Letter dated 06.04.2015. This is clear from the opening words of the second paragraph which reads as "*in pursuance of the above cited decision*". This letter was circulated to all Development Commissioners informing them that "*henceforth setting up of power plants shall be allowed only in the non-processing area of SEZs*". There is no cavil with this direction as well. The dispute essentially relates to the second sentence of the second paragraph of this letter (the Second Letter dated 06.04.2015) which directs that those power plants which are presently situated in the processing areas of the SEZ would be demarcated as non-processing areas and no O&M benefits would be available to such power plants. Clearly, this does not follow from the decision of the Government of India as communicated in the First Letter. On the contrary, this direction runs contrary to that decision. In terms of the 2009 Guidelines, which were directed to be restored by the First Letter, permitted setting up of power plants in the processing areas of the SEZ and specified that O&M benefits would be available to such units. Thus, there is a clear repugnancy between the First Letter and the Second Letter.

47. This Court is of the view that this is an apparent error as the Second Letter was addressed to all Development Commissioners forwarding the First Letter. As noticed above, the opening words of the second paragraph of the Second Letter indicates that it is in pursuance to the decision to withdraw the 2012 Guidelines and restore the 2009 Guidelines as contained in the communication enclosed – the First Letter dated 06.04.2015. The First Letter does not contain any decision that the processing areas of the SEZ would be re-demarcated to place those units which are operating in the processing area of the SEZ to be placed in a non-processing area. The purport of the Second Letter dated 06.04.2015 appears to be essentially to amplify the decision as communicated by the First Letter. Read in the aforesaid context, the import of the direction that the power plants which are situated in processing areas of the SEZ would be demarcated as non-processing areas could only be applicable to those power plants in the processing areas in respect of which a letter of approval had not been issued or if issued, was not renewed. As noticed above, the exercise of demarcation is required to precede the issuance of the letter of approval.

48. Under the 2009 Guidelines, a power plant could be set up by the developers/co-developers as a part of the infrastructure facilities only in the non-processing area of the SEZ. However, under the 2012 Guidelines this condition was relaxed and therefore, with the reinstatement of the 2009 Guidelines such units would now require to be placed in the non-processing area. The Second Letter thus, would be applicable only to such units and not the ones that were other-wise

permissible to be established in the processing areas under the 2009 Guidelines.

49. It is essential to note that one of the principal difference between the 2009 Guidelines and the 2012 Guidelines is that, whereas under the 2009 Guidelines, a power plant set up by a developer/co-developer as a part of infrastructure facility was required to be placed only in a non-processing Area of the SEZ and would not be entitled to any O&M benefits. However, a power plant or unit set up within the SEZ to generate power as a product or as a captive power plant could be located in a processing area and if this was done, the power plant would be entitled to fiscal benefits under Section 26 of the SEZ Act. The 2012 Guidelines expanded the benefit. In terms of the 2012 Guidelines, O&M benefits were also extended to power generating units set up by the developers/co-developers as a part of the infrastructure facility in the processing area. With the restoration in the 2009 Guidelines, the power units set up by developers/co-developers as a part of the facility of the SEZ were required to be placed in the non-processing areas. It is apparent that it is in that context that the second paragraph of the Second Letter dated 06.04.2015 mentions that those power plants situated in processing areas are required to be demarcated as non-processing areas. Keeping apart the question whether such a direction is valid, it is clear that this would be the logical sequitur for restoring the 2009 Guidelines in respect of those power units. However, the petitioner's unit was granted approval in the processing area under the 2009 Guidelines, and therefore, restoration of the 2009 Guidelines cannot possibly require the

petitioner's unit to be demarcated as a non-processing area. As stated above, the direction in the second paragraph of the Second Letter must be read as applicable only to those power plants which are set up by developers/co-developers as a part of the facility or utility for the SEZ and, not as a separate unit set up within the SEZ to generate power as a product or as a captive power plant in terms of Clause (ii) of the 2009 Guidelines as set out above.

50. In view of the above, even assuming that the Central Government had the power to re-demarcate areas post-issuance of the letter of approvals, the Second Letter on the basis of which the petitioner has been denied the O&M benefits with effect from 01.04.2015 to 16.02.2016, cannot be construed in the manner so as to be applicable to the petitioner's unit which was granted the LoA under the 2009 Guidelines.

51. Insofar as the respondent's contention that the Board of Approval is required to follow the policy decisions of the Central Government is concerned, there is no dispute that it is required to do so. Section 9 of the SEZ Act contains provisions regarding the duties, powers, functions of the Board of Approval. Section 9 of the SEZ Act is set out below:

“9. Duties, powers and functions of Board.-(1) Subject to the provisions of this Act, the Board shall have the duty to promote and ensure orderly development of the Special Economic Zones.

(2) Without prejudice to the generality of the provisions contained in sub-section (1), the powers and functions of the Board shall include –

(a) granting of approval or rejecting proposal or modifying such proposals for establishment of the Special Economic Zones;

(b) granting approval of authorised operations to be carried out in the Special Economic Zones by the Developer;

(c) granting of approval to the Developers or Units (other than the Developers or the Units which are exempt from obtaining approval under any law or by the Central Government) for foreign collaborations and foreign direct investments, (including investments by a person resident outside India), in the Special Economic Zone for its development, operation and maintenance;

(d) granting of approval or rejecting of proposal for providing infrastructure facilities in a Special Economic Zone or modifying such proposals;

(e) granting, notwithstanding anything contained in the Industries (Development and Regulation) Act, 1951, a licence to an industrial undertaking referred to in clause (d) of section 3 of that Act, if such undertaking is established, as a whole or part thereof, or proposed to be established, in a Special Economic Zone;

(f) suspension of the letter of approval granted to a Developer and appointment of an Administrator under subsection (1) of section 10;

(g) disposing of appeals preferred under subsection (4) of section 15;

(h) disposing of appeals preferred under subsection (4) of section 16;

(i) performing such other functions as may be assigned to it by the Central Government.

(3) The Board may if so required for purposes of this Act or any other law for the time being in force relating to Special Economic Zones, by notification, decide as to whether a particular activity constitutes manufacture as defined in clause (r) of clause 2 and such decision of the Board shall be binding on all Ministries and Departments of the Central Government.

(4) The Board may delegate such powers and functions as it may deem fit to one or more Development Commissioners for effective and proper discharge of the functions of the Board.

(5) Without prejudice to the foregoing provisions of this Act, the Board shall, in exercise of its powers or the performance of its functions under this Act, be bound by such directions on the questions of policy as the Central Government may give in writing to it from time to time.

(6) The decision of the Central Government whether a question is one of policy or not shall be final.”

52. It is apparent from the plain language of Section 9(5) of the SEZ Act that the Board of Approval would “*in exercise of its powers or performance of its functions*” be bound by the directions of the Central Government on the questions of policy under the SEZ Act. Clearly, if the policy of the Central Government is not to permit power plants to be set up in processing areas, the Board of Approval is required to ensure that no letter of approval is granted to a unit or a developer to do so. However, that does not mean that the Board of Approval is required to proceed to cancel an existing letter of approval even though there is no default on the part of the entrepreneur in complying with the terms and conditions or its obligations subject to which, the letter of approval was granted to him. As noticed above, the letter of approval granted to an entrepreneur can be cancelled if the conditions as stipulated under Section 16(1) of the SEZ Act are met and not otherwise. The letter of approval granted to a developer for setting up an SEZ may also be suspended in terms of Section 10 of the SEZ Act.

53. However, the Board of Approval cannot for the purpose of cancelling a letter of approval, re-demarcate the processing areas and non-processing areas in an SEZ. Demarcation of such areas is not to be done for the purpose of cancelling existing letter of approvals.

54. Section 26 of the SEZ Act provides for certain exemptions, drawbacks and concessions available to developers and entrepreneurs. Sub-section (2) of Section 26 of the SEZ Act also provides that the Central Government may prescribe the manner and the terms and conditions subject to which the exemptions, concessions, drawback or other benefits shall be granted to a developer or an entrepreneur under Section 26(1) of the SEZ Act. Chapter IV of the SEZ Rules prescribes the terms and conditions for availing exemptions, drawbacks and concessions and there is no dispute that the petitioner would require to meet those terms and conditions. As noted above, the controversy in this case is not regarding the petitioner complying with any terms and conditions for grant of concessions under Section 26(1) of the SEZ Act. Such concessions are available by virtue of Section 26 of the SEZ Act as well as the SEZ Rules. The dispute in the present case relates to the direction to re-demarcate the petitioner's power plant as a non-processing unit for the purposes of the 2009 Guidelines. The direction to re-demarcate is clearly not traceable to Section 26(2) of the SEZ Act.

55. In view of the above, the present petition is allowed to the limited extent that the condition imposed by Unit Approval Committee of refunding the O&M benefits obtained by the petitioner during the period 01.04.2015 to 15.02.2016 by its letter dated 18.04.2016, is set

aside. The impugned order upholding the said condition of the Unit Approval Committee is also set aside.

56. The petition is disposed of in the aforesaid terms.

VIBHU BAKHRU, J

OCTOBER 25, 2021
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