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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Order reserved on	01.08.2024
Order pronounced on	06.11.2024

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THE HONOURABLE MR. JUSTICE SENTHILKUMAR RAMAMOORTHY

W.P.Nos. 768 & 769 of 2018

&

WMP Nos. 933 & 934 of 2018

In both WPs

M/s. Huawei Telecommunications (India) Company Pvt. Ltd,

Plot No. K-24,

SIPCOT Industrial Park,

Chennai-602 105

.....Petitioner

vs

1. The Principal Commissioner of Customs

Chennai VII, Commissionerate (Air Cargo)

New Customs House, Meenambakkam

Chennai- 600 027

2. The Development Commissioner

Office of the Development Commissioner

MEPZ- Special Economic Zone

NH45, Administrative Office Building

Tambaram, Chennai-600 045, India

.....Respondents



Prayer in W.P. No. 768 of 2024: Writ petition filed under Article 226 of the Constitution of India to issue a writ of Certiorari or a writ in the nature of Certiorari, or any other appropriate Writ, Order or direction, calling for the records of the Order bearing order-in-original no. 689/2017-AIR, and, dated 30.12.2017 issued by the Respondent no. 1 and quash the same.

Prayer in W.P. No. 769 of 2024: Writ petition filed under Article 226 of the Constitution of India to issue a writ of Certiorari or a writ in the nature of Certiorari, or any other appropriate Writ, Order or direction, calling for the records of the Order bearing order-in-original no. 688/2017-AIR, and, dated 30.12.2017 issued by the Respondent no. 1 and quash the same.

In both WPs

<i>For Petitioner:</i>	Mr. Satish Parasaran, Sr. Advocate, assisted by Mr. Karthik Sundaram
For Respondents:	ARL. Sundaresan, ASG assisted by Mr.A.P. Srinivas for R1, and Mr. B. Rabu Manohar for R2.



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COMMON ORDER

Factual Background:

By these writ petitions, the petitioner assails the Orders-in-Original (OIOs), both dated 30.12.2024 and issued by the first respondent, demanding Anti-Dumping Duty (ADD) of Rs. 146,72,95,243/- and Rs. 189,76,79,197/-, respectively, along with interest and penalty applicable thereto.

2. The petitioner-company, Huawei Telecommunications (India) Company Pvt. Ltd. ('petitioner'), is engaged in the business of manufacture and sale of telecom related equipment in India. The Special Economic Zone (SEZ) unit of Flextronics Technologies (India) Pvt. Ltd. ('Flextronics SEZ unit') imported the goods, described by the petitioner as stand-alone parts/components, into India from Huawei, China. After the PCBAs were populated using Surface



Mounting Technology (STM) at the abovementioned SEZ unit, they were procured in a domestic tariff area (DTA) by the petitioner. Since the goods were moved from a SEZ to a DTA, bills of entry were filed and the goods were cleared after paying customs duty. The PCBAs were then used for further assembly of telecommunication equipment in the petitioner's DTA unit and sold to the petitioner's customers in India.

Notification 125/2010:

3. After receiving an application from the domestic industry represented by a manufacturer, Tejas Network Ltd. (Tejas), alleging that the Synchronous Digital Hierarchy Transmission equipment (SDH equipment), originating in or exported from the People's Republic of China and Israel were being dumped in the Indian market causing them material injury, the Directorate General of Anti-dumping and Allied Duties (DGAD) conducted Anti-Dumping investigations concerning the import of these SDH equipment. Pursuant to its investigations, the DGAD, in its preliminary findings,



recommended the imposition of ADD on the imports of these goods *vide* notification No.14/2/2009-DGAD dated 07.09.2009; and provisional anti-dumping duties were imposed on this basis *vide* Notification No. 132/2009- Customs dated 8.12.2009 issued by the Ministry of Finance (Department of Revenue). Subsequently, the DGAD issued its final findings and recommendations through its notification No.14/2/2009-DGAD dated 19.10.2010 ('DGAD Final Findings'). On the basis of the recommendations, by notification no. 125/2010- Customs dated 16.12.2010 (the ADD Notification), ADD was imposed for a period of five years beginning from the date of imposition of the provisional duty, i.e., 8.12.2009 - 7.12.2014. Note 1 to the said Notification clarifies the meaning of product under consideration (PUC). It includes *inter alia* SDH equipment, Populated Circuit Boards (PCB) (for application in SDH), parts or components imported as a part of equipment or its assemblies or sub-assemblies but excludes from its purview components imported on a stand-alone basis.



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4. Initially, the petitioner imported SDH equipment directly from Huawei, China. In respect thereof, ADD was demanded under the ADD Notification. The petitioner paid ADD of Rs. 52,15,09,653/- along with interest of Rs.1,67,16,885 under protest for the period from September 2010 to December 2010 in April 2011. This continued until June 2011. From July 2011, the Flextronics SEZ unit imported goods described by the petitioner as stand-alone parts/components from Huawei, China. After being populated at the said SEZ unit, assembled PCBAs were purchased by the petitioner and entered the DTA under bills of entry after clearing the goods by paying customs duty.

Show cause notices and preceding writ petitions:

5. Against this backdrop, Show Cause Notice dated 1.12.2014 (SCN-I) regarding levy of ADD for the period July, 2011 to August, 2014, Show Cause Notice dated 28.10.2015 (SCN-II) regarding levy of ADD for the period 14.11.2014 to 31.08.2015 and Show Cause Notice



dated 15.7.2017 (SCN-III) regarding levy of ADD for the period i) 01.09.2015 to 7.12.2015; and ii) 26.4.2016 to 2.12.2016 were issued to the petitioner. Four writ petitions challenging the aforementioned SCNs were filed prior to the current petitions. Before setting out the details of the challenge, it is germane to note that after the lapse of the ADD Notification, Notification No.1/2015 – Cus. (ADD) dated 05.01.2015 (Second ADD Notification) was issued to amend the original ADD Notification to extend the latter's operation till 7.12.2015; and Notification No. 15/2016- Cus. dated 26.04.2016 (Third ADD Notification) which was issued post sunset review to levy ADD for a period of 5 years, i.e., from 26.4.2016 to 25.4.2021. The following table sets out the details of these SCNs, the challenges thereto and the outcome thereof:

SCN	Period of demand of ADD	Particulars of WP and outcome thereof
SCN dated 1.12.2014	July, 2011 to August,	SCN-I was challenged in WP 33904/2014; WP 27873/2014 was



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SCN	Period of demand of ADD	Particulars of WP and outcome thereof
(SCN-I)	2014	filed to restrain the Development Commissioner and Authorized Officer of the Flextronic SEZ Unit (respondents therein) from levying ADD on PCBA clearance from SEZ into DTA under section 30, Special Economic Zones Act, 2005 (the SEZ Act) read with the ADD Notification and Section 9, Customs Tariff Act, 1975. <u>Common order dated 2.12.2016 of the Hon'ble High Court in WP 33904 and WP 27873/2014:</u> While declining to determine whether the Development Commissioner has jurisdiction to act as the adjudicating authority, the Court transferred the file to the jurisdictional customs officer to decide the matter, including the jurisdictional issue, after providing hearing opportunity to the parties pursuant to the respondents therein agreeing to such transfer without conceding jurisdiction.



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SCN	Period of demand of ADD	Particulars of WP and outcome thereof
		<u>Current Proceedings:</u> OIO No.688/2017 passed by the first respondent herein dated 30.12.2017 and emanating from SCN-I stayed in WP 769/2018 via interim order dated 11.1.2018.
SCN dated 28.10.2015 (SCN-II)	14.11.2014 to 31.08.2015	WP 22770/2017 was filed challenging SCN III and to restrain the Principal Commissioner of Customs from charging ADD for the period from 8.12.2014 to 26.4.2016; In WP 22771/2017, the petitioner prayed for a direction to the respondents therein to refund the ADD collected in terms of the ADD Notification and to return the bank guarantee furnished for the period 8.12.2014 to 26.4.2016. Common order dated 6.10.2017 in W.P. 22770/2017 and W.P. 22771/2017 was issued setting aside the demand for the period 8.12.2014 to 31.08.2015 and the Development Commissioner, the Specified Officer, and the



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SCN	Period of demand of ADD	Particulars of WP and outcome thereof
		Authorized Officer of the SEZ were restrained from demanding ADD for the said period holding that the ADD Notification cannot be extended after it elapsed. The writ appeal (W.A. 1498/2018) preferred by the Principal Commissioner of Customs against the order dated 6.10.2017 in WP 22770/2017 was dismissed by holding that the validity of the ADD Notification cannot be extend after its expiry. As regards the prayer for refund made in WP 22771 of 2017, the petitioner was directed to pursue the application for refund before the authority. <u>Current Proceedings:</u> OIO No.689/2017 passed by the respondent and emanating from SCN-II has been stayed by interim order dated 11.1.2018 (WP No. 768/2018)
SCN dated 15.7.2017 (SCN-III)	1) 1.9.2015 to 7.12.2015 2) 26.4.2016	In the common order dated 6.10.2017 in W.P. 22770/2017 and W.P. 22771/2017, WP 22770 was allowed by setting aside the



SCN	Period of demand of ADD	<i>Particulars of WP and outcome thereof</i>
	to 2.12.2016	demand for the period from 1.09.2015 to 7.12.2015.

Counsel and their contentions:

Petitioner's Contentions:

6. Oral arguments on behalf of the petitioner were advanced by learned senior counsel, Mr. Satish Parasaran, assisted by Mr Karthik Sundaram. The petitioner also filed brief written submissions.

7. The first contention of Mr. Satish Parasaran was that the impugned order in W.P.No.768 of 2018 is contrary to and disregards the common order dated 06.10.2017 in W.P.Nos.22770 and 22771 of 2017 insofar as it pertains to the imposition of ADD for the period running from 08.12.2014 to 31.08.2015. He submitted that the above order was placed before the Principal Commissioner of Customs and



was referred to at paragraph 33 of the impugned order. He also pointed out that the writ appeal against the order was dismissed subsequently by order dated 17.02.2022. Consequently, learned senior counsel contended that the impugned order cannot be sustained and is liable to be set aside. Even with regard to the imposition of ADD for the period running from 14.11.2014 to 07.12.2014, he contended that the impugned order cannot be sustained on other grounds common to W.P.No.769 of 2017.

On Jurisdiction

8. His second contention was that the Development Commissioner of the SEZ did not have the jurisdiction to issue the show cause notices because Rule 47(5) of the Special Economic Zones Rules, 2006 (the SEZ Rules) was only notified on 05.08.2016, thereby conferring jurisdiction on customs officers. Likewise, he contended that offences under *inter alia* sections 28, 28A and 28AAA of the Customs Act, 1962 (the Customs Act) were notified as offences under the Special Economic Zones Act, 2005 (the SEZ Act) only with effect



from 05.08.2006. Relying on an order of the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) order dated 17.11.2016 in CESTAT Appeal No. E/41901/2015, he contended that the Chennai Bench of CESTAT held that the SEZ Act had no provision for demand of duty that was short paid or not paid at the time of clearance for the relevant period from 22.9.2010 to 16.12.2010. He also submitted that CBEC's Circular dated 31.3.2017 only clarifies the existing legal position and does not detract from the position that the relevant amendments in the SEZ Act and Rules regarding recovery and adjudication were introduced with effect from 05.08.2016.

9. Even after the introduction of Rule 47(5), he contended that only the jurisdictional customs officer and not the SEZ Development Commissioner has the jurisdiction to recover ADD in terms of section 30, SEZ Act read with Rule 47(5) of the SEZ Rules. Under the Customs Act, he pointed out that the power of recovery can be exercised only by a customs officer and not by authorized officers



under the SEZ Act. Since the Development Commissioner is not a 'proper officer of customs' under section 2(34) of the Customs Act, he submitted that the issuance of SCNs was without jurisdiction.

10. His third contention was that the clearance of goods from an SEZ to the DTA is not an import either under section 2(o) of the Foreign Trade Development and Regulation Act, 1992 (the FTDRA) or under section 2(e) of the SEZ Act. Consequently, he contended that the Development Commissioner did not have the jurisdiction to issue the show cause notices under section 21(1) of the SEZ Act read with section 14(1) of the FTDRA. On both these jurisdictional grounds, he submitted that no findings were recorded by the Principal Commissioner in spite of this Court directing him to adjudicate on the question of jurisdiction by common order dated 02.12.2016 in W.P.Nos.22873 of 2014 and W.P.No.33904 of 2014.

Other contentions including on merits

11. Learned senior counsel next submitted that stand-alone



components are outside the scope of the ADD Notification. In spite of raising the argument that Flextronics SEZ imported PCBs as stand-alone components, he contended that no determination was made on this aspect. He also pointed out that the import of the same components were considered as stand-alone in the case of Tejas. In a separate note filed by the petitioner on the issue of 'standalone parts/components', the petitioner referred to the DGAD's Final Findings that formed the basis for the ADD Notification. By referring to paragraphs 51-55 of the DGAD's Final Findings, it was submitted that the ADD Notification excludes the import of stand-alone parts from ADD levy even if they are imported from China as they do not form part of the PUC.

12. By referring to and comparing the impugned orders with the written submissions of the respondents, he further contended that these orders are a reproduction of the written submissions. He also pointed out, in this regard, that the petitioner's written submissions



were provided to the respondents, but the respondents' written submissions were not provided to the petitioner until after the impugned orders were issued. Learned senior counsel contended that this was in breach of principles of natural justice.

13. His last contention was that the respondents have proceeded on the implied basis that the petitioner had circumvented ADD by entering into purchase transactions through Flextronics SEZ. In order to do so, he contended that a determination that there was circumvention is an essential pre-requisite and that such determination can only be made by the designated authority.

14. The petitioner cited the following precedents in support of the propositions set out below in WP 768/2018:

i) Levying ADD for the period that was already set aside by the High Court amounts to judicial indiscipline, as held in *UOI v Kamalakshmi Finance Corp. Ltd.* 1991 (55) ELT 433 (SC) and *Pushpanjali Silks Pvt. Ltd v CC, Chennai, Chennai*, 2007 (211) ELT 206.



ii) The demand for the period 8.12.2014 to 31.8.2015 is contrary to the Supreme Court decision in *UOI & Ors v Kumho Petrochemicals Pvt. Ltd.*, (2017) 351 ELT 65 (SC).

The following precedents were relied on in support of the propositions set out below in WP 769/2018:

iii) The first respondent failed to take into account the detailed submissions of the petitioner, which clearly shows that he acted in a pre-meditated manner while passing the order contrary to the principles of natural justice as discussed by the Supreme Court in *Oryx Fisheries (P) Ltd. v. UOI*, 2011 (26) ELT 422 (SC) and *Seimens Ltd v. State of Maharashtra*, 2007 (207) ELT 168 (SC).

iv) *Kranti Associates Pvt Ltd v. Masood Ahmed Khan*, 2011 (273) ELT 345 (SC) holds that the pretence of reasons or “rubber-stamp” reasons is not to be equated with a valid decision-making process

v) A writ petition will lie where the proceedings initiated by a



quasi-judicial authority are without authority: *Harbanslal Sahnia and*

Anr v Indian Oil Corporation Ltd & Ors (2003) 2 SCC 107

vi) A writ petition would lie where principles of natural justice were violated: *Whirlpool Corporation v Registrar of Trademarks, Mumbai, (1988) 8 SCC 1* and *UOI v. Tania Construction Pvt. Ltd., (2011) 5 SCC 697*.

vi) *M/s. Raza Textiles Ltd, Rampur v The Income Tax Officer, Rampur, AIR 1973 SC 1362* lays down that a quasi-judicial authority cannot confer jurisdiction upon itself by determining a jurisdictional fact wrongly and that the question whether a jurisdictional fact has been rightly decided or not is a question for determination by the High Court.

vii) The Development Commissioner is not a 'proper officer of customs' under section 2(34) of the Customs Act, 1962 and therefore issuance of SCN I is without jurisdiction as per *Commissioner of Customs v. Sayed Ali, 2011 (265) ELT 17 (SC) ('Sayed Ali')*.

viii) According to *Essar Steel Ltd. v UOI 2010 (249) ELT 3 (Guj)*,



SEZ is a territory wholly within India.

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ix) *Flextronics Technologies (India) Pvt. Ltd. v The State of Tamil Nadu ('Flextronics'), 2016-VIL-230-MAD*, holds that a) the leviability of ADD should be determined when the goods are imported for the first time into the SEZ from outside India, and not when goods are cleared from the SEZ into the DTA; b) the fundamental pre-condition for ADD levy is not satisfied as clearance from SEZ to DTA cannot be regarded as an export of a product from outside India into India; and therefore, the PCBA which originates wholly for the first time only within the Flextronics SEZ which is a part of the Indian territory cannot be regarded as a product exported into India from China or Israel or any other foreign country.

Respondents' contentions:

15. Oral arguments were advanced by Mr. ARL. Sundaresan, learned Additional Solicitor General (ASG), assisted by learned senior standing counsel, A.P. Srinivas, for the first respondent. Mr. Rabu Manohar appeared for the second respondent.



WEB COPY 16. As regards the impugned OIO in W.P.No.768 of 2018, learned ASG submitted that the ADD demand also covers the period between 14.11.2014 and 07.12.2014, which is squarely within the validity period of the ADD Notification *de hors* the extension notification.

17. As regards the jurisdictional objections, learned ASG submitted that both parties consented to the relevant files being transferred to the jurisdictional customs officer for adjudication. Hence, he submitted that the impugned orders can longer be assailed on the ground that the Development Commissioner did not have jurisdiction to issue the show cause notices. He also submitted that the impugned OIOs dated 30.12.2017 were issued after providing sufficient hearing opportunity on 5.3.2017 and 28.10.2017 and by considering the submissions of the petitioner. He further submitted that the petitioner raised the same jurisdictional objections in WP



Nos. 27873 and 33904 of 2014 and that writ jurisdiction was wrongly invoked in the present cases without resorting to the appellate remedy.

18. On the merits, learned ASG submitted that PCBA is covered by the ADD Notification and that disputed questions of fact are involved in adjudicating as to whether the imports by Flextronics SEZ are excluded from the purview of the ADD Notification. Consequently, he contended that this aspect can only be raised in statutory appeal and not under Article 226 of the Constitution.

19. In support of the contention regarding the availability of an alternative remedy to the petitioner, the respondents relied on the following precedents:

i) M/s Siddhi Vinayak Syntex Pvt Ltd vs Union of India-2017(352) E.L.T. 455(Guj)

ii) M/s Rational Business Corporation Pvt Ltd vs Union of India



2017 (346) E.L.T. 247 (P &H);

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iii) *M/s Srao International Fright system vs Commissioner of Customs, Chennai VIII 2016(334) E.L.T. 289(MAD);*

iv) *M/s Viahsl Lubetech Corporation vs Additional Commissioner of Customs -2016(342) E.L.T. 201 (MAD);*

v) *M/s British India Steam Navigational Company PVT Ltd vs Additional CC Calcutta 1999(110) E.L.T. 266(SC).*

Discussion, analysis and conclusion:

ADD levy from 08.12.2014 to 31.8.2015 in the OIO challenged in W.P.No. 768 of 2018

20. The impugned OIO challenged in W.P. No. 768 of 2018 levies ADD from 14.11.2014 to 31.08.2015. The first issue to be examined is whether the imposition of ADD for the period commencing on 08.12.2014 and ending on 31.8.2015 is in violation of common order dated 06.10.2017 in W.P. Nos. 22770 and 22771 of 2017. The admitted position is that the validity period of the ADD



Notification was a five year period from 8.12.2009 to 7.12.2014. The

Second ADD Notification was admittedly issued on 05.01.2015, after the lapse of the ADD Notification, and purports to extend the validity of the ADD Notification till 7.12.2015. The Supreme Court examined the validity of the Second ADD Notification in *Kumho Petrochemicals* and held as under:

*“ 40. Two things which follow from the reading of the Section 9A(5) of the Act are that not only the continuation of duty is not automatic, such a duty during the period of review **has to be imposed before the expiry of the period of five years**, which is the life of the Notification imposing anti-dumping duty. Even otherwise, Notification dated January 23, 2014 amends the earlier Notification dated January 2, 2009, which is clear from its language, and has been reproduced above. However, when Notification dated January 2, 2009 itself had lapsed on the expiry of five years, i.e., on January 1, 2014, and was not in existence on January 23, 2014 question of amending a non-*



existing Notification does not arise at all. As a sequitur, amendment was to be carried out during the lifetime of the Notification dated January 2, 2009. The High Court, thus, rightly remarked that Notification dated January 2, 2009 was in the nature of temporary legislation and could not be amended after it lapsed."
(emphasis added)

After noticing the judgment in *Kumho Petrochemicals*, this Court held as under in paragraph 26 of the common order dated 06.10.2017 in W.P.Nos.22770 and 22771 of 2017:

"Therefore, the demand of ADD under the above show cause notice dated 28.10.2015, for the period from 08.12.2014 to 26.04.2016 is not sustainable. The said show cause notice has been issued seeking ADD payable on PCBAs for the period from 14.11.2014 to 31.08.2015. The Notification No.125 of 2010 was in vogue till 07.12.2014. In the light of the decision of the Hon'ble Supreme Court, in Kumho Petrochemicals Pvt. Ltd. (supra), such Notification cannot be extended after it had lapsed. Consequently, the demand of ADD



for the period from 08.12.2014 to 26.04.2016 is not sustainable. Therefore, the ADD demanded in the show cause notice dated 28.10.2015, for the period from 08.12.2014 to 31.08.2015 has to be held to be without jurisdiction. Hence, the second issue is answered in favour of the petitioner."

21. While the matter was being heard by the Principal Commissioner, the above mentioned common order was issued. The order was also placed before the authority, and this fact is recorded in paragraph 33 of the impugned order at internal page 77 thereof. There is, however, nothing to indicate that the order was considered. In view thereof, the demand of ADD for the period commencing on 08.12.2014 and ending on 31.08.2015 cannot be sustained. Subsequently, by judgment dated 17.02.2022, the common order dated 06.10.2017 was affirmed in writ appeal. In the operative part of the order impugned in W.P. No.768 of 2018, a consolidated sum of Rs,146,72,95,243 was imposed as ADD for the period commencing on 14.11.2014 and ending on 31.08.2015. Out of this period, by virtue of



the common order of this Court, the ADD claim could not have been made for for the period commencing on 08.12.2014 and ending on 31.08.2015. As regards the prior period (14.11.2014 to 07.12.2014), no break-up of either ADD liability or penalty has been provided. Therefore, interference with the impugned OIO in W.P. No.768 of 2018 is warranted. As regards the prior period (14.11.2014 to 7.12.2014), a conclusion can be drawn only after deciding on the other objections of the petitioner.

Jurisdictional objections apropos ADD levy from 14.11.2014 to 7.12.2014 in the OIO challenged in W.P.No. 768 of 2018 and for the period July 2011-August 2014 in the OIO challenged in W.P.No. 769 of 2018:

22. The contention that the Development Commissioner did not have jurisdiction to issue SCN I for the period July 2011 to August 2014 or SCN II for the period 14.11.2014 to 31.08.2015 was raised in



the earlier round of litigation in W.P. Nos. 27873 and 33904 of 2014.

With regard to the transfer of the files to the jurisdictional Commissioner of Customs, the following statements from the petitioner's affidavit were set out in this Court's order:

“10.The petitioner further submits that if the case is transferred to the jurisdictional Commissioner of Customs, the adjudicating authority should decide the issue independently, after giving due opportunity of personal hearing and file a written submissions to the present petitioner, without being influenced by any of the findings on merits in this Court....”

In this context, after taking note of the rival contentions and affidavits, this Court concluded, in relevant part, as under:

“14. The first respondent/Development Commissioner shall transfer all the files to the jurisdictional customs officer to enable the jurisdictional Customs Officer to take up cases for adjudication as a regular case based on merits and in accordance with law. The files pertaining to the show cause notice dated 28.10.2015 in File



No.05/2014/SO-Part-II, also be transferred to the jurisdictional Customs Officer. The jurisdictional Customs Officer shall afford the petitioner an opportunity to submit their objections and thereafter take the show cause notices for adjudication. The jurisdictional Customs Officer, while adjudicating the show cause notices, shall adjudicate as to whether the Development Commissioner has jurisdiction to issue the show cause notices or to adjudicate the matter in issue. Apart from the same, the other issues which have been raised in the show cause notices shall also be adjudicated. For this purpose, the Development Commissioner shall be heard by the jurisdictional Customs Officer."

Thus the transfer of the files to the jurisdictional customs officer was by consensus between the rival parties.

23. Pursuant to the order of this Court, the Principal Commissioner of Customs examined whether the Development Commissioner had the jurisdiction to issue the show cause notice and



recorded the following findings in the impugned OIO in W.P. No.769 of 2018. Identical findings were also recorded in the impugned OIO in W.P. No.768 of 2018:

“36. I find that the Notice has been issued under Section 30 of the SEZ Act, 2005 inter alia the provisions of Foreign Trade Development Regulation Act (FTDR), and the Customs Act. The Special Economic Zone Act, 2005 (SEZ Act, 2005) and Special Economic Rules, 2006 (SEZ Rules, 2006) are independent Act/Rules incorporated exclusively for governing the Functions of SEZ Zones. Sub Section (a) of Section 30 of the SEZ Act, 2005 clearly provides for levy of ADD duty on the goods cleared from SEZ; and the demand has been issued under Section 30 of SEZ Act, 2005 in addition to the Customs Provisions;

37. I find that the SEZ Act and the Rules Provides from collection of applicable customs duty by the Authorized officer. Consequently, the customs officer derives the power to demand any short levy automatically under the customs Act 1962 even if



there is no provision in the SEZ Act. The Development Commissioner being the administrative head of the SEZ can also exercise the powers of the customs officers working under him. Thus the Notice issued by the Development Commissioner is in order."

24. The petitioner contended that the above and other related findings are incorrect on about three grounds. First, it was contended that offences under sections 28, 28A and 28AA of the Customs Act were notified as offences under the SEZ Act only with effect from 05.08.2016 under notification bearing S.O. 2665(E) of the Ministry of Commerce and Industry dated 05.08.2016. Since the show cause notices were issued prior thereto, it was contended that the Development Commissioner had no authority. Secondly, it was contended that Rule 47(5) of the SEZ Rules was incorporated with effect from 05.08.2006 by notification bearing G.S.R. 772(E) of the Ministry of Commerce and Industry. Consequently, only with effect from 05.08.2016, were the jurisdictional customs officers empowered



to deal with refund, demand, adjudication, etc. in relation to operations under the SEZ Act.

25. In order to understand the scope of notification bearing S.O. 2665(E), it is necessary to examine section 21 of the SEZ Act, which is as under:

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

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

(3) Every officer or agency authorised under sub-section 92) shall have all the corresponding powers of investigation, inspection, search or seizure as is provided under the relevant Central Act in respect of the notified offences.”



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When viewed in light of section 21, it is clear that the object and purpose of notification bearing S.O. 2665(E) was to notify the violation of specific provisions of the Customs Act as offences under the SEZ Act so as to confer powers of investigation, inspection, search and seizure in relation thereto. Therefore, it has no bearing on the validity of the show cause notices.

26. I deal with the second contention on jurisdiction next. As a result of the amendment of Rule 47 of the SEZ Rules by the introduction of sub-rule (5), with effect from 05.08.2016, jurisdictional customs, central excise and other tax authorities were empowered to deal with refunds, demands, adjudications, etc. arising out of operations under the SEZ Act. By Circular No.11/2017-Cus, a clarification was provided with regard to the amendment. In respect of adjudication, it was stated therein as follows:

“ All pending demands shall be adjudicated by the



appropriate authority as prescribed under the Customs, Central Excise, Service Tax or GST laws and the rules made there under including demands issued prior to 05.08.2016 because the act of adjudication is prospective in nature.”

The conclusion that follows from the amendment and clarification thereto is that jurisdiction is vested in the jurisdictional officer of the customs, central excise, GST departments, as the case may be, to issue show cause notice and adjudicate refunds, demands, adjudications arising out of operations under the SEZ Act on or after 05.08.2016. If show cause notice had been issued prior to 05.08.2016, adjudication would be undertaken by the appropriate officer from and out of the above list if the adjudication is taking place on or after 05.08.2016. In this case, both the show cause notices were issued prior to 05.08.2016 and the adjudications took place after 05.08.2016. Therefore, the adjudications were in order and, significantly, it cannot be concluded that this amendment had the effect of invalidating the notices issued



by the Development Commissioner.

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27. The third contention on jurisdiction was that clearance from the SEZ to the DTA does not qualify as an import either under section 2(o) of the SEZ Act or section 2(e) of the FTDRA and, therefore, ADD should not have been imposed on goods cleared from the SEZ into the DTA. The petitioner also relied on the judgment of the Division Bench of this Court in *Flextronics* to contend that ADD is only applicable when goods are cleared for import into India. As regards section 2(o) of the SEZ Act, the petitioner is correct in contending that the definition of import only covers bringing goods into a SEZ from a place outside India or receiving goods or services from another SEZ unit or another SEZ. This should, however, be considered in the light of section 30 of the SEZ Act. Clause (a) thereof is as under:

“30. Domestic clearance by units – Subject to the conditions specified in the rules made by the Central Government in this behalf, -



*(a) any goods removed from a Special Economic Zone to the Domestic Tariff Area shall be chargeable to duties of customs including anti-dumping, countervailing and safeguard duties under the Customs Tariff Act, 1975 (51 of 1975), where applicable, **as leviable on such goods when imported; and***
(emphasis added)

The statute, therefore, provides for the imposition of duties of customs, including ADD, on goods that are removed from a SEZ to a DTA in the same manner as leviable on such goods when imported. Therefore, the fact that the definition of import does not cover removal of goods from a SEZ to a DTA is immaterial. As regards *Flextronics*, as contended by learned ASG, the ratio of the said judgment was that VAT should be included while determining ADD. Especially in view of the unambiguous statutory prescription in section 30 of the SEZ Act, it cannot be construed as holding that ADD cannot be levied on goods removed from a SEZ into a DTA.



28. In sum, as regards jurisdiction, the SEZ Act clearly envisages the imposition of ADD on goods removed from a SEZ to a DTA. On and from 5.08.2016, the jurisdiction to issue show cause notices and adjudicate the matter has been vested in the jurisdictional customs officers. As the administrative head of the SEZ, who is empowered to take all steps to discharge his functions under the SEZ Act under section 12(1) of the SEZ Act, the Development Commissioner issued the show cause notices. Section 30 of the SEZ Act was in the statute when the show cause notices were issued. If the contention of the petitioner on jurisdiction were to be accepted, neither the Development Commissioner nor customs officers could have issued the show cause notices prior to 5.08.2016. This contention cannot be countenanced. Hence, all the jurisdictional objections are rejected and the findings in the impugned OIOs thereon are upheld.

Issues regarding written submissions

29. The petitioner contended that interference with the



impugned orders is called for because the written submissions of the respondents were not provided to the petitioner before the conclusion of proceedings and that the impugned orders are no more than a minor modification of such written submissions. As regards the first of these aspects, written submissions are intended to capture the oral arguments in writing so as to facilitate the adjudicator to consider the arguments while issuing the order of adjudication. Since written submissions, unlike pleadings, do not require a response from the counter party, the alleged failure to provide a copy of the written submissions to the petitioner in time for the petitioner to respond thereto is immaterial. On examining the impugned orders closely, I find that the discussion and analysis is elaborate and such orders are not vitiated on the ground of some commonality of language between the written submissions of the respondents and the impugned orders.

Applicability of ADD to the subject goods

30. The last aspect to be examined is whether the goods fall



within the scope of the ADD Notification. The relevant paragraph 35(g) of the DGAD Final Findings, which can also be found in paragraph 18(vii) in DGAD's further final findings dated 10.12.2012, is as follows:

“35. Scope of Product Under Consideration

g. Populated Circuit Boards/cards- The cards/PCB's are populated as per the design developed by the manufacturer and thereafter, apart from loading of software, there is only a need to arrange them in a shelf and adjust them to a circuit. Since Populated Circuit Boards are propriety of the manufacturer, the same are within the scope of Product under consideration. It is however clarified that in case PCB or cards are meant for production/ assembly of a product other than SDH equipment, the same is beyond the scope of the product under consideration. PCB and cards are within the scope of the product under consideration only if such PCB or cards are meant for production of SDH equipment.”



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Paragraph 36 of the DGAD Final Findings which can also be found in

Note 1 to the ADD Notification describes the PUC as hereinunder:

“36. Having regard to the petition, initiation notification, preliminary findings, arguments raised by the domestic industry and opposing interested parties, the Authorities holds that the scope of the product under consideration is as follows:

"Synchronous Digital Hierarchy transmission equipments, viz STM-1 STM-4, STM-16, STM-64, STM-256 in assembled, CKD, SKD form, its assemblies and sub-assemblies or fitted with eventual broadband/ cellular equipment. Product under consideration will also include Add Drop Multiplexers (ADM) (For SDH Application only), Multiple Add Drop Multiplexers (MADM) (For SDH Application only), and Digital Cross Connect (DXC) (For SDH Application only), Populated Circuit Boards (For SDH Application Only) and parts/components imported as a part of equipment, so long they are imported along with



the equipment or its assemblies / sub-assemblies. The Product under consideration will also include Software meant for SDH, which is an integral part of these equipments, which may be bought either as a part of the equipment or separately. However components/ parts imported on a standalone basis are outside the purview of Product under Consideration."

31. From the above extracts, it is clear that the determination whether the relevant goods were stand-alone components or SDH equipment in some form is a determination involving disputed questions of fact. Likewise, the determination as to whether ADD was imposed because the business model of the petitioner involved circumvention of the ADD Notification would also involve detailed examination of disputed questions of fact. Such determinations would further entail detailed consideration of evidence. In the impugned OIOs, there is detailed consideration and analysis followed by conclusions in paragraphs 48 to 76. Hence, it is inappropriate to consider and determine this issue in exercise of



summary and discretionary jurisdiction under Article 226 especially when a statutory remedy is prescribed. Since interim protection was granted when these writ petitions were filed and these cases were pending for about 7 years, it is just and necessary to grant leave to the petitioner to file a statutory appeal on merits within a specified time line.

32. For reasons set out above, I conclude as under:

(i) Impugned OIO No.689/2017-AIR dated 30.12.2017 is set aside by leaving it open to the respondents to initiate action in respect of only the period running from 14.11.2014 to 7.12.2014 in accordance with law.

(ii) The jurisdictional objections in respect of both the impugned orders are rejected.

(iii) The petitioner is granted leave to file a statutory appeal against OIO No.688/2017-AIR dated 30.12.2017 within 30 days from the date of receipt of a copy of this order. If filed within such time



limit, such appeal shall be received and adjudicated on merits without going into the questions of limitation or jurisdiction.

(iv) Both the writ petitions are disposed of on the above terms without any order as to costs.

(v) Consequently, the miscellaneous petitions are closed.

06.11.2024

Index : Yes/No

Internet : Yes/No

NC : Yes/No

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To

1. The Principal Commissioner of Customs
Chennai VII, Commissionerate (Air Cargo)
New Customs House, Meenambakkam
Chennai- 600 027

2. The Development Commissioner
Office of the Development Commissioner
MEPZ- Special Economic Zone
NH45, Administrative Office Building
Tambaram, Chennai-600 045, India



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SENTHILKUMAR RAMAMOORTHY J.

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Pre-delivery order made in
W.P.Nos. 768 & 769 of 2018
&
WMP Nos. 933 & 934 of 2018



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