



SEZ to DTA sale - Eligible for CVD exemption as available to local manufacturer

Tax Alert
December 08, 2014

Roxul Rockwool Insulation India Pvt. Ltd. vs. Union of India & Others¹ – Gujarat High Court

JUDGMENT OF THE GUJARAT HIGH COURT

The issue before the Hon'ble Court was, the effective rate of additional duty of customs ['CVD' - levied under Section 3(1) of the Customs Tariff Act, 1975('CTA')] applicable on clearance of goods from a Special Economic Zone ('SEZ') unit to a Domestic Tariff Area ('DTA') unit in terms of section 30 of the Special Economic Zones Act, 2005 ('SEZ Act').

The division bench of the Gujarat High Court in a significant judgment has held that the SEZ unit will not be liable to pay the component of CVD on clearances in terms of section 30 of the SEZ Act, if a local manufacturer of like goods is exempt from payment of Central Excise Duty.

FACTS

1. The Company (Petitioner) operates as an SEZ unit in Gujarat, and is engaged in the manufacture of stone wool insulation products classified under chapter sub-heading 6806 10 00 of the First Schedule to the Central Excise Tariff Act, 1985 ('CETA') as also under the CTA.
2. The Company supplies goods from its SEZ unit to DTA unit and on such clearances in terms of section 30 of the SEZ Act, claimed 'Nil' rate of CVD on the basis that the rate of Central Excise Duty on subject goods is 'Nil' in terms of exemption notification (No.03/2005-CE, dated 24.02.2005, Sr.No.58, as amended) issued under Section 5A of the Central Excise Act, 1944 ('Excise Act').
3. The Specified Officer (Customs Officer posted in the SEZ) rejected this claim of the Company, on the basis that the proviso to Section 5A(1) of the Excise Act restricts applicability of exemption notification issued under the said section to SEZs, unless specifically provided for in the notification itself.
4. The Company preferred appeals against the order of Specified Officer with the Commissioner of Customs (Appeals) but, the appeals were not entertained for want of jurisdiction. It was suggested that appeals be filed with the Development Commissioner of the concerned SEZ ('DC'). Subsequently, the appeals were filed with the DC but, the same were also not entertained by the DC citing lack of appellate provisions against the order of the Specified Officer, under the SEZ Act.
5. In these circumstances, the Company preferred a writ petition before the Hon'ble Gujarat High Court.

RULING OF THE HON'BLE COURT

The Hon'ble Court allowed the writ petition filed by the Company, and *inter-alia* held that:

1. Section 30 of the SEZ Act, permits under certain conditions clearances from a SEZ unit to a DTA, which clearances would be chargeable to duties of customs including CVD, antidumping & safeguard duties under the CTA, as leviable on such goods when imported. By virtue of section 30 of the SEZ Act, a SEZ unit on its clearance of goods to a DTA invites duty of customs, including CVD where applicable as leviable on such goods when imported.
2. In order to determine the applicable CVD rate on subject goods at the time of import, Sec 3(1) of the CTA must be referred to, which provides for CVD equivalent to the Central Excise Duty for the time being leviable on a like article, if manufactured or produced in India.
3. If by virtue of an exemption notification, the whole of the excise duty payable as prescribed in the CETA is exempt for the local manufacturers for subject goods, no CVD would be payable under section 3(1) of the CTA on import of such goods. Consequently, no CVD would be payable by the Company on clearance of subject goods from its SEZ unit to DTA.
4. Post the framing of the SEZ Act, matching amendments were made in the Excise Act. Section 3 of the Excise Act for instance, now contains an exclusion clause for goods produced or manufactured in SEZs from payment of CENVAT ('Central Excise duty').
5. The omission to omit the reference to a SEZ in the proviso to section 5A of the Excise Act appears to be a legislative oversight.

¹ Special Civil Application No. 8869 of 2014

This would not alter the situation since in the charging section- section 3 of the Excise Act itself a specific exclusion is contained providing that the duty of Central Excise and the additional duty liability would be excluded on goods produced or manufactured in SEZs. Whether the liability to pay CVD would continue on SEZ units when local manufacturers were exempt, is therefore to be gathered from the language used in Section 30 of SEZ Act and not from the proviso to Section 5A(1) of Excise Act.

6. The entire legislative scheme has undergone a change by introduction of the SEZ Act and the changes made in the Excise Act post such introduction. The legislative intention emerging is that a SEZ unit will not have to liability to pay CVD, if the local manufacturer of like goods is exempt from payment of whole of such excise duty.

ELP COMMENTS

This judgment of the Gujarat High Court, is effectively the first definitive pronouncement on the issue of applicable rate of CVD at the time of removal of goods from a SEZ unit to the DTA under section 30 of the SEZ Act, and will govern and impact all clearances made from SEZ units to DTA units that involve the issue of applicability of an exemption notification issued under the Excise Act.

The High Court has clearly held that the levy of duty on clearances from a SEZ unit to a DTA is governed by section 30 of the SEZ Act, 2005, read along with Section 3(1) of the CTA. The liability to pay CVD on clearances from a SEZ unit to a DTA (*under section 30 of the SEZ Act*) would not arise, if the local manufacturer of like goods is exempt from payment of whole of excise duty and this position will not be affected by the provisions of section 5A of the Excise Act. In view of the change in the entire legislative scheme post the introduction of the SEZ Act (*wherein no excise duty is now leviable on goods produced or manufactured in a SEZ under the Excise Act*), there will be no applicability of proviso to Section 5A(1) of the Excise Act in determining the effective rate of CVD on clearances made from a SEZ unit to DTA.

The legal position set out in the said decision is also reflective of the view of the Director General of Export Promotion, set out vide its letter No. DGEP/SEZ/19/2008/935, dated 15.04.2008, on the issue of applicability of exemption notifications issued under Excise Act, to clearances made from SEZ unit to DTA.

On a separate note, it requires attention that lack of appeal provisions under the SEZ Act, 2005 against an order of the Specified Officer, and also absence of provisions dealing with refund of any excess Customs duty paid by SEZ unit are concerns with respect to the SEZ enactment, especially as these issues involves both the Customs Department and the SEZ authorities. In another recent decision of the Gujarat High Court (dated 20.11.2014), passed in the case of **M/s. Anita Exports vs. Union of India & Others**², it has been held that, unless proper mechanism is framed under the SEZ laws and statutory provisions are enacted/amended, the Commissionerate of Customs would continue to hold the authority under Section 27 of the Customs Act, 1962, to entertain refund claims of excess payment of Customs duty, redemption fine or penalties as the case may be, adjudicated and collected by the Customs authority under the Customs Act, 1962, even with respect to units situated in SEZ areas. The new Government would do well to examine the situation, and whilst repealing archaic laws, also look into contemporary laws (such as the SEZ Act, 2005) which in their present form lack suitable provisions related to issues of appeal, refund etc.

ELP'S ROLE

ELP had been involved in the matter from the very inception. The team devised strategies, advised client, drafted pleadings, briefed the senior advocate and appeared along with him before the Hon'ble Gujarat High Court.

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² Special Civil Application No.11876, 11881,11884,12652,12654,13931,13932,14214,15064,15066 of 2014