

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 26.02.2020

Pronounced on : 19.05.2020

CORAM:

THE HONOURABLE MR.JUSTICE C.SARAVANAN

**W.P.Nos.25837 and 25838 of 2016**

**and**

**W.M.P.Nos.22135 and 22136 of 2016**

M/s.DLF Utilities Ltd.

(previously DLF Utilities (P) Ltd.)

represented by its Assistant General Manager,

Mr.V.Jagadeesan

Co-Developer, IT/ITES Special Economic Zone,

1/124, Shivaji Gardens, Manapakkam,

Ramapuram, Mount Poonamallee Road,

Chennai – 600 089.

..Petitioner

Versus

1.Union of India,

represented by Under Secretary,

Ministry of Commerce & Industry,

Department of Commerce, (SEZ Section),

Udyog Bhavan, New Delhi – 110 011.

2.The Development Commissioner,

Ministry of Commerce & Industry,

Department of Commerce,

Office of the Development Commissioner,

Madras Export Processing Zone, SEZ,

NH-45, Tambaram, Chennai – 600 045.  
3.The Authorized Officer,  
DLF/IT/ITES – Special Economic Zone,  
1/124, Shivaji Gardens,  
Mount Poonamallee Road, Manappakkam,  
Ramapuram, Chennai – 600 089.

..Respondents 1 to 3 in  
both petitions

4.Commissioner of Central Excise  
Large Taxpayer Unit  
1775, Jawaharlal Nehru Inner Ring Road,  
Anna Nagar Western Extension,  
Chennai – 600 101.

...4<sup>th</sup> Respondent in W.P.  
No.25838/2016

**Prayer in W.P.No.25837 of 2016:** Writ Petition filed under Article 226 of the Constitution of India praying to issue Writ of Certiorari, for quashing the impugned Guidelines No.P6/3/2006-SEZ issued by the 1<sup>st</sup> respondent dated 06.04.2015.

**Prayer in W.P.No.25838 of 2016:** Writ Petition filed under Article 226 of the Constitution of India praying to issue Writ of Prohibition, prohibiting the 2<sup>nd</sup> respondent from adjudicating the impugned Show Cause Notice No.25/SO/2015-MPEZ-SEZ, dated 30.03.2016.

For Petitioner

: Mr.Raghavan Ramabadran &  
D.Santhana Gopalan for

M/s.Lakshmikumar Association

For Respondents

: Mr. Madana Gopal CGSC

for RR1 & 2 in both petitions

Mr.T.Pramod Kumar Chopda,  
standing counsel for R4 in W.P.

No.25838 of 2016

**ORDER**

By this common order both the writ petitions are being disposed.

2.In W.P No. 25837 of 2016 the petitioner has challenged the impugned Guideline dated 6.4.2015 bearing Reference No. P.613/2006-SEZ of the 1<sup>st</sup> respondent. The impugned guidelines seeks to restore earlier Guideline dated 27.2.2009 bearing reference P.6/2003-SEZ of the 1<sup>st</sup> respondent. As a result of the impugned Guideline, the petitioner was required to procure High-Speed Diesel Oil (HSD) on payment of excise duty during the period in dispute between 1.4.2015 and 15.02.2016.

3.Since the petitioner had procured HSD Oil from Indian Oil Corporation Ltd. (IOCL)without payment of excise duty between 1.4.2015 and 3.10.2015, the 2<sup>nd</sup> respondent, the Development Commissioner, MEPZ, Chennai- 45 has issued the impugned SCN dated 30.3.2016 bearing reference No. 25/SO/2015-MP EZ-SEZ to the petitioner and has called upon the petitioner to pay a sum of Rs.11,13,78,979/- in

terms of Rule 27(3) of Special Economic Zone Rules, 2006 read with Section 26 of the Special Economic Zones Act,2005.

4.The petitioner has therefore challenged the aforesaid show cause notice dated 30.3.2016 bearing reference No. 25/SO/2015-MPEZ- SEZ (hereinafter referred to as the impugned show cause) issued by the 2<sup>nd</sup> respondent, the Development Commissioner, MEPZ, Chennai- 45 in W.P.No 25838 of 2016.

5.The petitioner is a Co-Developer of Information Technology/Information Technology Enabled Services located in a Special Economic Zone (SEZ) in Pour, Chennai.

6.The petitioner was approved as a co-developer by the Board of Approval, Ministry of Commerce by an approval order dated 17.6.2008 and 7.10.2008 to generate 84 MW power for being supplied to units located in SEZ, that was being developed by DLF Info City Developers (Chennai) Ltd.

7.The petitioner was procuring High-Speed Diesel (HSD) without

payment of excise duty from a local refinery in terms of Section 26(1)(c) of the Special Economic Zones Act, 2005 read with Rule 27 of the SEZ Rules, 2006 for carrying on authorised operation in the “Processing Area”.

8.It is the case the petitioner that the impugned 2015 Guidelines cannot deny the exemptions provided under the provisions of the Special Economic Zones Act, 2005 and the aforesaid Rules by altering the location of the power plant of the petitioner to an area in a “Non Processing Area” to make all the procurements dutiable for generation of electricity for being supplied to units located in the Special Economic Zones. It is submitted that the impugned Show Cause Notice dated 30.3.2016 by the 2<sup>nd</sup> respondent seeking to recover an amount of Rs.11,13,78,979/- as excise duty from the petitioner on HSD Oil supplied between 1.4.2015 to 2.10.205 was liable to be quashed.

9.It is further submitted that even if excise duty has to be collected, it has to be collected from the manufacturer /refinery concerned which supplied HSD Oil to the petitioner and therefore the proposed demand was contrary to the well known canons of law and contrary to the provisions of

the Act.

10.It is further submitted that there is no method provided either under the Act or the Rules made thereunder to order recovery of the excise duty from the recipient like the petitioner even if it is assumed procurement was without any authority of law.

11.It is further submitted that, the Large Tax Unit of the Excise Department has issued a notice dated 6.4.2016 to Chennai Petroleum Corporation Ltd. for supplies effected without payment of duty to similarly placed person. It is therefore submitted that at best notice could have been issued to the supplier who supplied HSD Oil to the petitioner without duty. As such, the impugned show cause notice was without the authority of law.

12.It is further submitted that the impugned 2015 Guidelines dated 6.4.2015 was later replaced with a new Guidelines dated 16.9.2016 as a result of which the status quo-ante that was prevailing immediately prior to

the impugned 2015 Guideline has been partly restored.

13.It is therefore submitted that all procurement after 16.9.2016 are without payment of tax. It is therefore submitted that benefit of Guidelines dated 16.9.2016 should be allowed retrospectively. Under these circumstances, it is therefore submitted that even if the impugned 2015 Guidelines in valid, it is liable to be read down. Consequently, the demand proposed in the impugned show cause notice is liable to be quashed.

14.Learned counsel for the petitioner relied on the following case laws:

**i.GMR Aerospace Engineering Ltd. V. UOI - 2019-VIL-489-TEL**

**ii.Mahavir Prasad & Ors. - (1999) 8 SCC 266.**

**iii.Jindal Stainless Limited Vs. UOI - 2017(51) S.T.R. 130(Del.)**

15.The respondents have filed a detailed counter wherein it has been stated that exemptions, concessions and drawback incentives etc. as provided for in Section 26(1) of the SEZ Act, 2005 are subject to conditions prescribed. It is submitted that the Central Government may prescribe the

manner in which, and the terms and conditions subject to which, the exemption, concession, drawback or other benefits shall be granted to the developer or entrepreneur under subsection (1).

16.It is submitted that for the aforesaid purpose the Special Economic Zone Rules, 2006 (SEZ Rules 2006) has been framed by the Central Government. It is submitted that as per Rule 27(3) of the aforesaid Rules, “no duty free material shall be permitted for operation and maintenance of infrastructure and other facilities set up in “non-processing area” and since by virtue of the impugned guidelines powerplants situated in “Processing Areas” were directed to be demarcated as “Non-Processing Areas”, question of the petitioner claiming exemption from payment of excise duty on HSD Oil procured from Domestic Tariff Area cannot be countenanced.

17.I have considered the arguments advanced on behalf of the petitioner and the respondent. The petitioner is co-developer of DLF Info City Developers (Chennai) Ltd.

18.Initially, the petitioner was given an approval on 17.6.2008 for setting up a co-generation plant by installing and commissioning gas turbine based power generating sets by setting up an energy centre to provide electricity as a single source and to generate chilled water using vapour absorption machine.

19.By another letter dated 17.6.2008, the petitioner was allowed to set up 48 MW capacity power plant in the Non-Processing Area” of the IT Facility infrastructure being set up by the Developer of Special Economic Zone namely DLF Info City Developers (Chennai) Ltd.

20.It mandated that procedure prescribed in the Special Economic Zones Rules, 2006 must be followed for availing the benefit of any exemption, drawback or concession.

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21.By another approval dated 7.10.2008, the petitioner was informed that the Board of Approval of 1<sup>st</sup> respondent in its meeting held on

22.9.2008 had approved for modification in the authorised operations to be carried out by the petitioner.

22.By virtue of the aforesaid communication, the capacity of production was altered to 48 MW from 84 MW. The location of the power plant was demarcated within the “Non Processing Area” of Special Economic Zone which is now being altered in the impugned Guideline.

Thus, the power plant installed by the petitioner fell within the “Processing Area” of the said Special Economic Zone. Thus, all procurements of HSD oil for O & M operation by the petitioner were without payment of excise duty. A reference to the impugned Guideline will be made in the succeeding paragraph of this Order. The impugned guideline restores the position in 2009 Guidelines.

23.In 2009, the 1<sup>st</sup> respondent issued 2009 Guidelines dated 27.02.2009 under section 5 of the SEZ Act, 2005 read with Rule 12 of the Special Economic Zone Rules, 2006,. As per the aforesaid guidelines,a power plant to be set up by a Developer in a SEZ as a part of

infrastructure facility was to be located in the Non-Processing area of SEZ and the developer which included co-developer like the petitioner were entitled to only certain fiscal benefits for initial setting up.

24.It clarified that no fiscal benefit would be admissible for operations and maintenance under rule 27(3) of the SEZ Rules, 2006. It also further stipulated that there will be no obligation to achieve positive Net Foreign Exchange Earning (NFE) for such power plants.

25.However,the 2009 Guideline was modified by 2012 Guideline dated 21.3.2012. Importantly it gave certain relaxation and stated as follows:-

**"i)** Such a power plant set up in a **processing area** will be entitled to all the benefits available to developers/co-developers, including fiscal benefits under section 26 of the SEZ Act, 2005 including benefits for initial setting up, duty-free imports of raw materials, **components and consumables for operation and maintenance of power plant and generation of power plant.**

**ii)** However, a power plant set up by a developer/co-developer in an SEZ as part of infrastructure facility in the **non-processing area** of an SEZ as part of infrastructure facility in **non-processing area** will be entitled to fiscal benefit 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 SEZ Rules. There will be no obligation to achieve positive Net Foreign Exchange Earning (NFE) for such power plants.”

26. Since, the petitioner's power plant had already been earmarked and fell within the “Processing Area”, the petitioner procured HSD Oil without payment of excise duty from a local supplier namely the Indian Oil Corporation Ltd. (IOCL) located in the Domestic Tariff Area (DTA). This guideline was withdrawn. The relevant portion of the impugned Guidelines dated 6.4.2015 which has been challenged in W.P.No 25837 of 2016) reads as under:-

“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 21<sup>st</sup> March, 2012 have been withdrawn by the Government with immediate effect i.e. 1<sup>st</sup> April, 2015. Further, the Power Guidelines issued vide this Department's letter of even number dated 27<sup>th</sup> February, 2009 have been restored. 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 to the matter may be furnished to this Department.”

27.However, with effect from 1.4.2015, in the light of the 2015 Guidelines dated 6.4.2015(Impugned in W.P.No 25837 of 2016) of the 1<sup>st</sup>respondent, petitioner has been issued with the impugned show cause notice dated 30.3.2016.

28.The impugned show cause notice challenged in W.P.No 25838 of 2016) calls upon the petitioner to show cause as to why

“i.The power plants owned and operated by M/s.DLF Utilities Ltd., Co-developer, DLT IT/ITES situated in the processing area of M/s.DLF IT/ITES SEZ should not be considered as situated in Non processing area in as much as the Co Developer viz., M/s.DLF utilities Ltd., have failed to adhere to the conditions stipulated in the Ministry’s guidelines dated 27.02.2009 as discussed above;

ii. The exemption for Central Excise duty on the High Speed Diesel procured from DTA should not be held as ineligible as discussed above in terms of Rule 27(3) of SEZ Rules, 2006 read with Section 26 of the SEZ Act, 2005;

iii.An amount of Rs.11,13,78,979/- (Rupees Eleven crores thirteen lakhs seventy eight thousand nine hundred and seventy nine only) towards the Central Excise duty involved on the quantity of 10856 KLs of High Speed Diesel procured by them from DRA under ARE-1s during the period from 01.04.2015 to 03.10.2015 and detailed in the Annexure to this notice should not be demanded in terms of Rule 27(3) of

SEZ Rules, 2006 read with Section 26 of the SEZ Act, 2005 as discussed above;

iv. Why interest at appropriate rates on the amount of exemption availed by them should not be demanded in terms of Section 28AA of the Customs Act, 1962.

v. Why a penalty should not be imposed on them in terms of Section 117 of the Customs Act, 1962 for the irregular/wrong availment of exemption under Rule 27(3) of the SEZ Rules, 2006 read with Section 26 of the SEZ Act, 2005.”

29. The impugned Guidelines of 2015 was further modified in 2016 vide Guideline dated 16.02.2016. Relevant portion of the 2016 Guidelines reads as under:-

“(iv) With respect to the IT/IT ES SEZs, which require continuous power wherever generation of power has been approved by the BoA, as authorised operations, to the Developer/Co-developer within the processing area, and in respect of which there is statutory requirement on the developer/co-developer to supply 24 hours uninterrupted quality power supply at stable frequency in the zone, in terms of Rule 5A of the SEZ Rules, 2006, in such cases generation of power will be carried out as a unit within the processing area, and such power plant including nonconventional energy 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 duty-free import of raw materials and consumables for**

**generation of the power. Such duty-free imports of capital goods, raw materials and consumables et cetera would be counted towards NFE obligations of the unit.**

- vi) Those Power Plants in SEZ which were approved prior to 27.2.2009, and subject to show of Power Guidelines and provisions of SEZ Act and Rules, either as an infrastructural facility by Developer/Co-Developer or as a unit in the processing area, will be permitted to operate. It is relevant that during the period of installation of such plants, due to benefits and capital investment of mega power plants were available under the then prevalent policy guidelines even in the DTA area.

**Hence, such power plant will be allowed O&M benefits only with regard to the average monthly power supply to entities within the same S EZ during the preceding year. Henceforth, no O&M benefits including service tax exemption will be allowed for power supplied to DTA/other S EZ/EOU's from such power plants. The surplus power generated in such power plants may be transferred to DTA without payment of duty, keeping in consideration of the fact that no duty-free benefits on raw materials consumables et cetera 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 1.3.2002 will be required to pay duty for sale in DTA, on account of duty-free import of capital goods as determined by DoR.”

30.As far as exemptions under the Special Economic Zones Act, 2005 is concerned, there are two provisions which grant exemptions to Developers/Co-Developers in a Special Economic Zones. They are Section 7 in Chapter II and Section 26 in Chapter VII of the Act. They are reproduced below:

Special Economic Zones Act, 2005.	
<p><b>Chapter II:</b></p> <p><b>EXEMPTION FROM TAXES, DUTIES OR CESS.</b></p>	<p><b>Chapter VII:</b></p> <p><b>SPECIAL PROVISION FOR FISCAL ECONOMIC ZONES.</b></p>
<p><b>Section 7:</b></p> <p>Any goods or services exported out of, or imported into, or procured from the Domestic Tariff Area by, -</p> <p style="padding-left: 20px;">(i) a Unit in a Special Economic Zone; or</p> <p style="padding-left: 20px;">(ii) a <u>Developer</u>;</p> <p>shall, subject to such terms, conditions and limitations, as may</p>	<p style="text-align: center;"><b>Section 26:</b></p> <p>(1)Subject to the provisions of sub-section (2), every <b><u>Developer</u></b> and the entrepreneur shall be entitled to the following <b>exemptions, drawbacks and concessions, namely: -</b></p> <p style="padding-left: 20px;">(a)exemption from any duty of customs, under the Customs Act, 1962 or the Custom Tariff Act, 1975 or any other law for the time being in force, on goods imported into, or service provided in, a Special Economic Zone or a Unit, to carry on the authorised operations by the Developer or entrepreneur;</p>

<p>be prescribed, be exempt from the payment of taxes, duties or cess under all enactments specified in the First Schedule.</p>	<p>(b) exemption from any duty of customs, under the Customs Act, 1962 or the Customs Tariff Act, 1975 or any other law for the time being in force, on goods exported from, or services provided, from a Special Economic Zone or from a Unit, to any place outside India:</p> <p>(c) <u>exemption from any duty of excise, under the Central Excise Act, 1944 or the Central Excise Tariff Act, 1985 or any other law for the time being in force, on goods brought from Domestic Tariff Area to a Special Economic Zone or Unit, to carry on the authorised operations by the Developer or entrepreneur;</u></p> <p>(d) drawback or such other benefits as may be admissible from time to time on goods brought or services provided from the Domestic Tariff Area into a Special Economic Zone or Unit or services provided in a Special Economic Zone or Unit by the service providers located outside India to carry on the authorised operations by the Developer or entrepreneur; 32 of 1994. 23 of 2004.</p> <p>(e) exemption from service tax under Chapter-V of the Finance Act, 1994 on taxable services provided to a Developer or Unit to carry on the authorised operations in a Special Economic Zone;</p> <p>f) exemption from the securities transaction tax leviable under section 98 of the Finance (No. 2) Act, 2004 in case the taxable securities transactions are entered into by a non-resident through the International Financial Services Centre;</p> <p>g) exemption from the levy of taxes on the sale or purchase of goods other than newspapers under the Central Sales Tax Act, 1956 if such goods are meant to carry on the authorised operations by the Developer or entrepreneur.</p>
	<p>2) The Central Government may prescribe the manner in which, and the terms and conditions subject to which, the exemptions, concessions, drawback or other benefits shall be granted to the Developer or entrepreneur under sub-section (1).</p>

31.As per Section 7 any goods or services exported out of, or imported into, or procured from the Domestic Tariff Area by either by a (i) a Unit in a Special Economic Zone; or (ii) a Developer shall, subject to such terms, conditions and limitations, as may be prescribed, be exempt

from the payment of taxes, duties or cess under all enactments specified in the First Schedule.

32. In the First Schedule only the following enactments are specified:

1. The Agricultural Produce Cess Act, 1940 (27 of 1940).
2. The Coffee Act, 1942 (7 of 1942).
3. The Mica Mines Labour Welfare Fund Act, 1946 (22 of 1946).
4. The Rubber Act, 1947 (24 of 1947). 5. The Tea Act, 1953 (29 of 1953).
6. The Salt Cess Act, 1953 (49 of 1953).
7. The Medicinal and Toilet Preparations (Excise Duties) Act, 1955 (16 of 1955).
8. The Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957).
9. The Sugar (Regulation of Production) Act, 1961 (55 of 1961).
10. The Textiles Committee Act, 1963 (41 of 1963).
11. The Produce Cess Act, 1966 (15 of 1966).
12. The Marine Products Export Development Authority Act, 1972 (13 of 1972).
13. The Coal Mines (Conservation and Development) Act, 1974 (28 of 1974).
14. The Oil Industry (Development) Act, 1974 (47 of 1974).
15. The Tobacco Cess Act, 1975 (26 of 1975).
16. The Additional Duties of Excise (Textile and Textile Articles) Act, 1978 (40 of 1978).

17. The Sugar Cess Act, 1982 (3 of 1982).
18. The Jute Manufactures Cess Act, 1983 (28 of 1983).
19. The Agricultural and Processed Food Products Export Cess Act, 1985 (3 of 1986).
20. The Spices Cess Act, 1986 (11 of 1986).
21. The Research and Development Cess Act, 1986 (32 of 1986).

33. Since Central Excise Act, 1940 and Central Excise Tariff Act, 1985 are not specified in the 1<sup>st</sup> schedule of the SEZ Act, 2005, the petitioner is not entitled to procure HSD from a unit located in DTA without payment of duty under the aforesaid provision.

34. Therefore, the petitioner could claim exemption only under Section 26 of SEZ Act, 2005. As per Section 26(1)(c) of the Act, developer and an entrepreneur can procure goods from a Domestic tariff area in to the SEZ to carryout authorised operation. The expression 'authorized operation' is developed in Section 2(c) of the Act as follows:

“(c) “authorised operations” means operations

which may be authorised under sub-section (2) of section 4 and sub-section (9) of section 15”

35. In section 26(2), the phrased used is **“the Central Government may prescribe the manner in which, and the terms and conditions subject to which, the exemptions, concessions, drawback or other benefits shall be granted to the Developer or entrepreneur under sub-section (1)”**.

36. Expressions “export” and “import” have been defined in section 2 (m) and section 2(o) of the Special Economic Zones Act, 2005.

37. Both the definitions are extracted as under:-

<b>Section 2 (m) of the Special Economic Zones Act, 2005</b>	<b>Section 2(o) of the Special Economic Zones Act, 2005</b>
<p>(m) “export” means –</p> <p>(i) taking goods, or providing services, out of India, from a Special Economic Zone, by land, sea or air or by any other mode, whether physical or otherwise; or</p> <p>(ii) supplying goods, or providing services, from the</p>	<p>(o) “import” means-</p> <p>(i) bringing goods or receiving services, in a Special Economic Zone, by a Unit or Developer from a place outside India by land, sea or air or by any other mode, whether physical or otherwise; or</p>

Domestic Tariff Area to a Unit or Developer; or	(ii) receiving goods, or services by, Unit or Developer from another Unit or Developer of the same Special Economic Zone or a different Special Economic Zone;
(iii) supplying goods, or providing services, from one Unit to another Unit or Developer, in the same or different Special Economic Zone;	

38.An export is said to take place within the meaning of section 2

(m) of the Special Economic Zones Act, 2005 under the following circumstances:-

“i.if goods are taken out or services supplied are exported by land, sea or air or any other mode, whether physical or otherwise from a Special Economic Zone; or

ii.if there is a supply of goods or provision of services to unit or a developer situated in Special Economic Zone by a unit situated in Domestic Tariff Area ; or

iii.in the case of supply of goods or there is a provision of service from one unit to another unit or Developer, within the same or different Special Economic Zone.”

39.Thus, supply of goods from a Domestic Tariff Area qualifies as an“export”.Therefore, a supplier in DTA can supply HSD without payment of duty.

40.Receiving of goods or service intra-unit or intra-developer from

another unit or developer of the same Special Economic Zone or a different Special Economic Zone also qualifies as an import. Similarly receipt of goods or services by a Unit or its Developer in SEZ from a place outside India by land, sea or air or by any other mode, whether physical or otherwise alone is import.

41. In other words, receipt of goods or services from a DTA is not an “import” in the hands of such Unit or Developer located in the Special Economic Zone though the same supply would qualify as “export” in the hands of such DTA unit.

42. Procurement of HSD Oil from the IOCL by the petitioners was purportedly in terms of Section 26(1)(c) of the SEZ Act, 2005 as per which Developers (which definition includes Co-Developers like the petitioner) are entitled to exemption from duty of excise, under the Central Excise Act, 1944 or the Central Excise Tariff Act, 1985 or any other law for the time being in force, on goods brought from Domestic Tariff Area to a Special Economic Zone or Unit, to carry on the authorised operations by the

Developer or entrepreneur. The procedure prescribed for the aforesaid purpose is under Special Economic Zones Rules, 2006.

43.The expression “authorized operations” is defined in Section 2(c) of the Act as follows:-

**Section 2(c):** “authorised operation” means operations which may be authorised under sub-section (2) of section 4 and sub-section (9) of section 15.

44.Thus, there are two kinds of “authorized operations” referred to in Section 2(c) of the Act. They are as follows:-

i.**By Board of Approval:** Such authorised operations which are authorised by the Board of Approval under section 4(2) of the Act authorizing a developer to under take in a Special Economic Zone which the Central Government may authorise;

and

ii.**By Development Commissioner:** Such authorised operations which are authorised by the Development Commissioner under Section 15(9) of the Act in a letter of approval pursuant to approval of proposal under Section 15(3) of the Act.

45.For the sake of convenience, both sub-section (2) of section 4 and sub-section (9) of section 15 of the Act are reproduced below:-

Section 4 (2)	Section 15 (9)
After the appointed day, the Board may, authorise the Developer to undertake in a Special Economic Zone, “ <b>such operations</b> ” which the Central Government may authorise.	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 “ <b>such operations</b> ” which the and every such operation so authorised shall be mentioned in the letter of approval.

46.As per Section15(3), the Approval Committee [constituted under Section 13(1)] 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 section 15(8)of the Act.

47.Thus, the “authorized operations” contemplated in Section 4(2) is the operations which the Central Government i.e. the 1<sup>st</sup> respondent may authorise a Developer. The Petitioner was given such a final approval and authorisation by the 1<sup>st</sup> respondent vide approval dated 7.10.2008 to locate 48MW capacity power plant in the “processing area”.

48.As per section 15(8) the Central Government may prescribe the terms and condition, subject to which a Unit shall undertake the authorised operation and the obligations and entitlements.

49.The impugned Guidelines of 2015 which has been purportedly issued under section 5 of the Act sought not only restricts the future location/setting up of the power plant only in a Non-Processing Area but also stated that those power plants which were already in existence and were located/situated in the Processing Areas of SEZs shall be demarcated as Non-Processing Areas. It also stated that no operation and maintenance "(O& M) benefits will be available for such power plant and an action may be taken and the report may be furnished to the Department.

50.The power exercised under Section 5 of the Act by the the Central Government is for issuing general guidelines for notifying any area as a Special Economic Zone or an Additional Area to be included in the existing Special Economic Zone. While discharging its function under the

Act, the Central Government shall be guided by the following, namely:-

- (a) generation of additional economic activity;
- (b) promotion of exports of goods and services;
- (c) promotion of investment from domestic and foreign sources;
- (d) creation of employment opportunities;
- (e) development of infrastructure facilities;
- (f) maintenance of sovereignty and integrity of India, security of the State and friendly relations with foreign states

51. Thus, the power exercised under Section 5 of the Act can only serve as a guideline for the Central Government while notifying any area as a Special Economic Zone or while including an additional area in the Special Economic Zone. The power to demarcate an area within the Special Economic Zones into “processing area” and “non-processing area” is vested with the Central Government only under Section 6 of the Act.

52. As per section 6, a processing and non processing areas are demarcated in the following manner:-

- (a) the processing area for setting up Units for activities, being the manufacture of

goods, **or rendering service**; or

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

(c) the non-processing area for activities other than those specified in clause (a) or clause (b).

53. Thus, any area within a Special Economic Zone where any manufacturing activity or any services is rendered may be demarcated as a “processing area”. A non processing area is an area where neither of the activities specified in section 6(a) and (b) are carried out. Where any manufacturing activity or any service is rendered within a Special Economic Zone, it has to be necessarily declared as a processing area.

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

definition of manufacture being very wide, both generation of power and supply qualifies as manufacture and supply of services respectively being the petitioner.

55. The power that is exercised by the Central Government under section 15(8)(b) of the Special Economic Zones, 2005 is different from the power vested with the Central Government to issue guidelines under section 5 and 6 of the said Act.

56. The power to issue Guidelines under Section 5 of the Act by the Central Government cannot be in confused with the power to demarcate an area within a Special Economic Zone under Section 6 of the Act or the power to be exercised under section 15(8)(b) of the Act.

57. Further, it is not as if the petitioner was entitled receive goods for its authorised operation in the proceeding area under 2012 Guidelines dated 21.03.2012 of the 1<sup>s</sup> respondent. The said Guideline merely recognised the principal in the Act that a unit in a Domestic Tariff Area (DTA) could supply goods without payment of Central Excise Duty in terms of section 26(1)(c) of the Act read with rule 30 of the SEZ

Rules, 2006.

58. The 2012 Guidelines dated 21.3.2012 which was withdrawn vide impugned 2015 Guidelines dated 06.04.2015 has later reintroduced the same content vide 2016 Guideline dated 16.09.2016 with the modifications. However, mere withdrawal of the 2012 Guideline vide the impugned Guideline of 2015 did not alter the position under the Act. Therefore, the impugned Guideline of 2015 is neither sustainable nor enforceable against the petitioners.

59. Under section 26(1)(c) of the Act, every Developer and the entrepreneur is entitled for exemptions, drawbacks and concession from any duty of excise, under the Central Excise Act, 1944 or the Central Excise Tariff Act, 1985 or any other law for the time being in force on goods brought from Domestic Tariff Area into a Special Economic Zone or Unit, to carry on “authorised operation “ by the Developer or entrepreneur.

60. However, Section 26(1)(c) fails to note that excise duty is

payable on the manufacture of goods. Excise levy/ charge under Section 3 of the Act is postponed to the time and place of removal under Section 4 of the Central Excise Act,1944 read with the Central Excise Rules, 2000.

61. The liability to pay excise duty is on the manufacturer and not the buyer though burden of such duty is passed on to the buyer. There is no provision under the Central Excise Act,1944 by virtue of which excise duty is payable on reverse charge basis by the buyer. Therefore, interpretation of the provision of Special Economic Zones Act, 2005 cannot be in direct violation of the provisions of the Central Excise Act, 1944. Duty if any, is payable only by the manufacturer.

62. Further, the exemption under Section 26(1) is subject to the restriction in section 26(2) of the Act. The phrase used in section 26(2), is “the Central Government may prescribe the manner in which, and the terms and conditions subject to which, the exemptions, concessions, drawback or other benefits shall be granted to the Developer or entrepreneur under sub-section (1)”.

63. Rule 30 of the SEZ Rules, 2006 prescribes the manner in which and the terms and conditions subject to which the benefit can be granted to a Developer or an entrepreneur while procuring goods from the Domestic Tariff Area. Rule 30 of the SEZ Rules, 2006 reads as under:

**“30. Procedure for procurements from the Domestic Tariff Area.—**

“(1) The Domestic Tariff Area supplier supplying goods to a Unit or Developer shall clear the goods, as in the case of exports, either under bond or as duty paid goods under claim of rebate on the cover of ARE-1 referred to in Notification number 42/2001-Central Excise (NT) dated the 26th June, 2001 in quintuplicate bearing running serial number beginning from the first day of the financial year.

(2) Goods procured by a Unit or Developer, on which Central Excise Duty exemption has been availed but without any availment of export entitlements, shall be allowed admission into the Special Economic Zone on the basis of ARE-1.

(3) The goods procured by a Unit or Developer under claim of export entitlements shall be allowed admission into the Special Economic Zone on the basis of ARE-1 and a Bill of Export filed by the supplier or on his behalf by the Unit or Developer and which is assessed by the Authorised Officer before arrival of the goods: Provided that if the goods arrive before a Bill of Export has been filed and assessed, the same shall be kept in an area designated for this purpose by the Specified Officer and shall be released to the Unit or Developer only after completion of the assessment of the Bill

of Export.

(4) A copy of the ARE-1 and/or copy of Bill of Export, as the case may be, with an endorsement by the authorized officer that goods have been admitted in full into the Special Economic Zone shall be forwarded to the Central Excise Officer having jurisdiction over the Domestic Tariff Area supplier within forty-five days failing which the Central Excise Officer shall raise demand of duty against the Domestic Tariff Area supplier.

(5) Where a Bill of Export has been filed under a claim of drawback or Duty Entitlement Pass Book, the Unit or Developer shall claim the same from the Specified Officer and jurisdictional Development Commissioner respectively and in case the Unit or Developer does not intend to claim entitlement of drawback or Duty Entitlement Passbook Scheme, a disclaimer to this effect shall be given to the Domestic Tariff Area supplier for claiming such benefits:

Provided that the Duty Entitlement Passbook Scheme may be claimed by Domestic Tariff Area supplier from the Development Commissioner or their jurisdictional Regional Licensing Authority of the Directorate General of Foreign Trade.

(6) The Bill of Export shall be assessed in accordance with the instructions and procedures, including examination norms, laid down by the Department of Revenue as applicable to export goods:

Provided that at the time of assessment, it shall be specifically examined whether the goods are required for the authorized operations by the Unit or Developer, with reference to the Letter of Approval or the list of goods approved by the Approval Committee for the Developer.

(7) On arrival of the goods procured from the Domestic Tariff Area at the Special Economic Zone gate, the Authorized

Officer shall examine the goods in respect of description, quantity, marks and other relevant particulars given in the ARE-1, invoice, Bill of Export of packing list and also as per the examination norms laid down in respect of export goods in cases where the goods are being procured under claim of an export entitlement.

(8) Drawback or Duty Entitlement Pass Book credit against supply of goods by Domestic Tariff Area supplier shall be admissible provided payments for the supply are made from the Foreign Currency Account of the Unit.

Provided that the reimbursement of duty in lieu of drawback or Duty Entitlement Pass Book credit against supply of goods by Domestic Tariff Area supplier to Special Economic Zone developers shall be admissible even if payment is made in Indian Rupees. Reimbursement of duty in lieu of drawback against supply of goods to Special Economic Zone developer shall be made as per the procedure prescribed by the Central Government.

(9) A copy of the Bill of Export and ARE-1 with an endorsement of the Authorised Officer that the goods have been admitted in full in the Special Economic Zone, shall be treated as proof of export.

(10) Where the goods are to be procured by a Unit or Developer from a Domestic Tariff Area supplier who is not registered with the Central Excise authorities, or is a trader or merchant exporter, the procedure under sub-rules (1) and (2) above shall apply, mutatis mutandis, except that the goods shall be brought to the Special Economic Zone under the cover of an invoice and the ARE-1 shall not be required.

(11) The Unit or Developer may also procure goods from Domestic Tariff Area without availing exemptions, drawbacks and concessions on the basis of invoice or transport documents, issued by the supplier:

Provided that such invoices or transport documents shall be endorsed to the effect that no exemptions, drawbacks and concessions have been availed on the said supplies.

(12) Procedure for procurement from warehouse shall be as under:—

(a) where goods are to be procured from warehouse, a Unit or Developer shall file a Bill of Entry with the Specified Officer;

(b) the Unit or Developer shall submit Bill of Entry assessed by the Authorized Officer to the Customs Officer in charge of the warehouse from where the Special Economic Zone Unit or Developer intends to procure the goods;

(c) the Customs Officer in charge of the warehouse shall allow clearance of the goods from the warehouse for supply to the Unit or Developer without payment of duty on the cover of exbond Shipping Bill and on the basis of Bill of Entry duly assessed by the Authorized Officer;

(d) where the re-warehousing certificate by way of endorsement by the Authorized Officer on the copy of ex-bond Shipping Bill is not received by the Customs Officer in charge of warehouse within forty-five days from the date of clearance of the goods from the warehouse, the Customs Officer in charge of the warehouse shall proceed to demand applicable duty from the supplier:

Provided that for procurement of goods from Nominated Agency located in Special Economic Zone, the procedure as specified by Specified Officer shall be followed and there shall be no requirement of assessment of Bill of Entry or transfer of the goods under the cover of ex-bond Shipping

Bill.

(13) A Special Economic Zone Unit or Developer may also procure goods from international exhibitions held in India following the procedures under sub-rule (12).

(14) A Unit or Developer may also procure goods or services, without payment of duty from an Export Oriented Unit or Software Technology Park Unit or Bio-Technology Park Unit, by following procedures under sub-rule (12).

(15) A Unit or Developer may procure goods and services from another Unit located in the same or any other Special Economic Zone, subject to following conditions, namely:—

(i) the receiving Unit or Developer shall file Bill of Entry for home consumption with the Authorized Officer, in quintuplicate, giving description of the goods along with an invoice and packing list for assessment;

(ii) on the basis of such assessed Bill of Entry, the goods shall be allowed to be transferred to the receiving Unit or Developer under transshipment permit;

(iii) there shall be no requirement to file any additional document or bond(s) for the purpose of transshipment of goods and the transshipment permission shall be stamped on the Bill of Entry itself;

(iv) the supplying Unit shall submit the re-warehousing certificate to the Specified Officer having jurisdiction over the supplying unit within forty-five days, failing which the Specified Officer of the supplying Unit shall write to the Specified Officer having jurisdiction over the receiving Unit

or Developer for demand of duty from the receiving Unit or Developer;

(v) where the supplying and receiving Units or Developer are located in the same Special Economic Zone, the provisions of subrules (i) and (iv) shall not apply and the movement of goods shall be allowed and such transactions shall be recorded in the regular books of accounts of the receiving Unit or Developer and the supplying Unit and no Bill of Entry shall be required to be filed.

(16) Procurement of cut and polished diamonds and precious and semiprecious stones from Domestic Tariff Area —A gem and jewellery Unit may procure cut and polished diamonds and precious and semi precious stones from the Domestic Tariff Area, as per the following procedure, namely:

(i) the parcel shall be brought into the Zone in a sealed condition by the authorized representative of the Domestic Tariff Area supplier or Customs House Agent, who shall present the invoice clearly marked original, duplicate and triplicate to the Authorized Officer at the gate;

(ii) the Authorized Officer shall register the invoice at the gate of Special Economic Zone and endorsing the registration number on the original and duplicate copies of the invoice and the parcel shall be allowed to be taken into the premises of the Unit and such goods shall be separately accounted for by the Unit.

(iii) the duplicate copy of the invoice with the endorsement of the Authorized Officer shall be forwarded to the supplier in the Domestic Tariff Area for claiming Replenishment Licence from the Development Commissioner of the Special Economic Zone.”

64.Further, Supplies from the Domestic Tariff Area to a Unit or Developer for their authorized operations are eligible for export benefits as admissible under the Foreign Trade Policy.

65.Thus, the DTA supplier is not only entitled to the exports benefits under the Foreign Trade Policy in terms of Rule 23 of Special Economic Zone Rules, 2006 but was also entitled to clear the goods under bond or claim rebate of tax/duty paid by it in terms of Rule 30 of the aforesaid Rules.

66.That apart procurement of HSD by the petitioner from IOCL did not qualify as an import within the meaning of Section 2(o) of the Special Economic Zones Act, 2006. Therefore, there cannot be a demand for customs duty and interest thereon on the excise duty foregone by IOCL at the time of clearance of HSD from its factory/refinery to the petitioner under section 28 or 28AA of the Customs Act, 1962.

67.Though, in a slightly different context, the Honourable Supreme Court In **WPIL Industries versus Commissioner of Central Excise 2005** (181) ELT 359 (SC) while dealing with scope of Notification No. 46/94-CE dated 1.3.1994 and Notification No. 95/94-CE dated 25.4.1994 issued under Section 5A of the Central Excise Act, 1944, held that “*In view of the*

*consistent policy of the Government of exempting parts of power driven pumps utilised by the factory within the factory premises, it could not be said that while issuing Notification No. 44/96 of 01/03/1994, the exemption in respect of the said item which was operative was either withdrawn or revoked. The action was taken only with the view to rescinding several notifications and by issuing a composite notification. The policy remained as it was and in view of the demands being made by the Department, a representation was made by the industries and on being satisfied, the central government issued a clarificatory Notification No. 95/94 on 25.4.19 94. It was held to be not a new notification granting exemption for the 1<sup>st</sup> time in respect of parts of power driven pumps to be used in the factory of manufacture of pumps but clarified the position and made the position explicit which was implicit”.*

68.The Hon’ble Supreme Court there held that the notification was clarificatory and was therefore retrospective nature in the light of the decision of the Honourable Supreme Court in **Collector of Central Excise versus Woodcraft Products Limited (1995) 3 SCC 454**

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69.Further, Rule 47(5) of the Special Economic Zones Rules, 2006

has been inserted vide GSR 772 (E) dated 5.8.2016 with effect from 8.8.2016. As per the above provision, “Refund, Demand, Adjudication, Review and Appeal with Regard to Matters Relating to Authorised Operations under the Special Economic Zones Act, 2005, transactions, and goods and services related thereto, shall be made only by the jurisdictional Customs and Central Excise Authorities in accordance with the relevant provisions contained in the Customs Act, 1962, the Central Excise Act, 1944 and the Finance Act, 1994 and the rules made the render or notification issued under”.

70.The impugned show cause notice is also liable to be declared as without jurisdiction. Even if, it is assumed that the clearance of HSD Oil was without the authority of law by the DTA supplier (IOCL). Only the jurisdictional officer concerned under the Central Excise Act, 1944 within whose jurisdiction IOCL is registered is competent to issue a show cause notice to recover the excise duty under section 11A of the Central Excise Act, 1944.

71. Therefore, on this count also the impugned show cause notice issued by the 2<sup>nd</sup> respondent is unsustainable and the demand proposed is liable to be quashed.

72. As such the Development Commissioner appointed under section 11 of the Special Economic Zones Act, 2005 is neither a “proper officer” within the meaning of Section 2(34) the Customs Act, 1962 nor a Central Excise Officer for the purpose of Section 11A of the Central Excise Act, 1944, to demand excise duty vide impugned show cause notice.

73. Further, the demand proposed is revenue neutral in as much as the duty paid by the supplier is available by way of rebate under the provisions of the Central Excise Rules, 2002.

74. Even otherwise in view of the consistent policy of Government to allow procurement of goods from 2012 vide 2012 Guidelines dated 21.3.2012 and thereafter 2016 Guidelines dated 16.09.2016, denial of the benefit of procurement of goods without payment of duty is unsustainable

under the impugned 2015 Guidelines dated 6.4.2015.

75. Even otherwise there is no rationale in recognising exemption vide 2012 Guidelines and withdrawing the same the year 2015 vide impugned 2015 Guideline and thereafter reintroducing the same in the year 2016 with slight modification.

76. In the light of the above discussion both the writ petitions stand allowed. Connected miscellaneous petitions are closed. No cost.

19.05.2020

Arul

Index : Yes/No

Internet: Yes/No

To

1. Under Secretary,  
Union of India,  
Ministry of Commerce & Industry,  
Department of Commerce, (SEZ Section),  
Udyog Bhavan, New Delhi – 110 011.

2. The Development Commissioner,  
Ministry of Commerce & Industry,

41/43

Department of Commerce,  
Office of the Development Commissioner,  
Madras Export Processing Zone, SEZ,  
NH-45, Tambaram, Chennai – 600 045.

3.The Authorized Officer,  
DLF/IT/ITES – Special Economic Zone,  
1/124, Shivaji Gardens,  
Mount Poonamallee Road, Manappakkam,  
Ramapuram, Chennai – 600 089.

4.Commissioner of Central Excise  
Large Taxpayer Unit  
1775, Jawaharlal Nehru Inner Ring Road,  
Anna Nagar Western Extension,  
Chennai – 600 101.



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**C.SARAVANAN.J.**

W.P.No.25837 of 2016

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**W.P.Nos.25837 and 25838 of 2016**

**19.05.2020**

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