

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 29.10.2018

(Reserved on 05.10.2018)

CORAM

THE HONOURABLE MRS.JUSTICE J.NISHA BANU

W.P(MD)Nos.18435 of 2018 to 18438 of 2018

and

W.M.P(MD)Nos.16317 to 16322 of 2018

M/s.Vedanta Limited,
Having office at SIPCOT Industrial Complex,
Madurai Bye pass Road TV Puram,
Tuticorin-628002
Rep by its Authorised Signatory
J.Janakiram

... Petitioner

vs.

1)Union of India,
Through Secretary,
Ministry of Finance (Department of Revenue),
No.137, North Block,
New Delhi-110 001.
2)The Directorate General of Foreign Trade,
Through the Director of General Foreign Trade,
North Block,
New Delhi-110 001.
3)The Department of Revenue Intelligence,
Through the Deputy Director, Kolkata Zonal Unit,
Ho-CHI-Minh Sarani, Kolkata-700001.
4)The Central Board of Indirect Taxes and Customs,
Through Chairman,
North Block,
New Delhi-110001.

... Respondents

Prayer in W.P.18435/18 : Writ Petition is filed under Article 226 of the Constitution of India, for issuance of a Writ of Declaration, declaring that condition imposed under Section 2(c) of Notification No.79/2017-Customs, dated 13 October 2017 issued by the 1st respondent is inter alia arbitrary,

unconstitutional and violative of Article 14 of the Constitution of India and that the same is liable to be quashed.

Prayer in W.P.18436/18 : Writ Petition is filed under Article 226 of the Constitution of India, for issuance of a Writ of Declaration, declaring that paragraph 1 of the Notification No.33/2015-2020, dated 13 October 2017 issued by the 2nd respondent is inter alia arbitrary, unconstitutional and violative of Article 14 of the Constitution of India and that the same is liable to be quashed.

Prayer in W.P.18437/18 : Writ Petition is filed under Article 226 of the Constitution of India, for issuance of a Writ of Certiorari, calling for the Notice bearing DRI/KZU/CF/(INT-09)/2017/1499 dated 15 March 2018 issued by the 3rd respondent and quash the same as being arbitrary, unconstitutional and violative of Article 14 of the Constitution of India.

Prayer in W.P.18438/18 : Writ Petition is filed under Article 226 of the Constitution of India, for issuance of a Writ of Mandamus, directing the respondents to allow the petitioner to import without payment of Integrated Tax under the Advance Authorisation licenses which were issued to it without enforcing the restrictive "pre-import" condition under S.No.2(c) of Notification No.79/2017-Customs, dated 13 October 2017 issued by the 1st respondent and Notification No.33/2015-2020, dated 13 October 2017 issued by the 2nd respondent.

!For Petitioner : Mr.Abhishek A.Rastogi

^For R1 & R2 : Shri.V.Kathirvelu

Assistant Solicitor General

Assisted by P.Subbiah

Central Government Counsel

For R3 & R4 : Mr.R.Aravindan

:COMMON ORDER

WP(MD)No.18435 of 2018

Prayer : To issue a Writ of declaration or any other appropriate directions declaring that the conditions S.No. 2(c) of Notification No 79/2017-Customs dated 13th October, 2017 is inter alia arbitrary, unconstitutional and violative of Article 14 of the Constitution of India and quash the same.

WP(MD)No.18436 of 2018

Prayer : To issue a Writ of declaration or any other appropriate directions declaring that paragraph 1 of of Notification No 33/2015-20 dated 13th October, 2017 is inter alia arbitrary, unconstitutional and violative of Article 14 of the Constitution of India and quash the same.

WP(MD)No.18437 of 2018

Prayer : To issue a Writ of Certiorari or any other order or any other appropriate Writ, Order or direction in the nature of Writ of Certiorari calling for the Notice bearing DRI/KZU/CF/(INT-09)/2017/1499 dated 15 March 2018 issued by the 3rd Respondent and quash the same as being arbitrary, unconstitutional and violative of Article 14 of the Constitution of India.

WP(MD)No.18438 of 2018

Prayer : To issue a Writ of Mandamus or any other order or any other appropriate Writ, Order or direction in the nature of Writ of Mandamus calling for directing the respondents to allow the petitioner to import without payment of Integrated Tax under the Advance Authorization licences which were issued to them without enforcing the restrictive ?Pre-Import? condition under S.No. 2(c) of Notification No 79/2017-Customs dated 13th October, 2017 and Notification No 33/2015-20 dated 13th October, 2017.

2.Heard the counsels for the petitioner and the respondents and perused the records and their submissions.

3.The petitioner M/s Vedanta Limited hold and operate Advance Authorizations (hereinafter will be referred as "AA") and avail import duty exemptions in terms of Para 4.01 (a) (i) of Foreign Trade Policy, 2015-20 (hereinafter will be referred as "FTP"). The petitioner avers that all of the impugned licenses were issued after 13.10.2017. Para 4.02 of FTP stipulates that the AA shall be issued in accordance with the policy and procedures as on the date of the issue of the Authorizations. Para 4.03 of FTP stipulates that the advance authorizations shall be allowed for duty free import of inputs which are physically incorporated in the exported goods. Para 4.13 empowers the government to issue pre-import conditions in respect of the exemption and remission schemes under Chapter 4 of FTP.

4.Prior to the introduction of GST on 01.07.2017, duty free exemption under AA issued, was available to most/all the duties leviable at the point of import and the same was governed by Notification No 18/2015-Customs dated 01.04.2015. With the advent of the GST regime, the exemption to IGST/ Compensation cess portion of import duties leviable respectively under Sec 3 (7) and 3(9) of the Customs Tarrif Act got withdrawn to the AA holders. This change was given effect by Notification No 26/2017 ? Cus dated 29.06.2017 that amended the parent notification No.18/2015-Cus. For administrative exigencies, the relief in respect of these portion of taxes are extended as Input Tax Credits which can be utilized for paying taxes on finished goods or shall be drawn as refund in the event they are exported. In other words, the full exemptions enjoyed by the petitioners against the AAs continued for all import duties at the point of import except for the GST Component of import duties, where the exemption is deferred to a later date. The new regime required the importers to first pay IGST at the time of Imports and then offset the same as Input Tax Credit if used in the manufacture.

5. So in effect, the introduction of GST laws, that is preceded by a constitutional Amendment Act, resulted in the benefit of exemption on the IGST and Cess component of Import duties under the AAs being deferred to a later date. It cannot be disputed that the deferment will affect the cash flow of the petitioner and will burden a cost on the AA holders. The interest burden on the deferred exemption is an added cost to the petitioner under the new regime. Be that as it may, on 13.10.2017, vide notification No.79/2017, the IGST exemption at the time of import was restored temporarily up to 31.03.2018 by suitable amendment to the parent notification No 18 / 2015-Cus that was further extended up to 30.09.2018 vide notification no 35/2018-Cus dated 28.03.2018. The above notifications are issued in consequence of the issue of Amendment Notification No 33/2015-20 dated 13.10.2017 to the FTP issued by DGFT and to give effect to the same. The restoring of the exemption to the IGST portion of import duties and taxes, however, was subject to two conditions viz.

- i. The export obligation shall be fulfilled by physical exports only.
- ii. That the exemption from IGST is subject to pre import condition.

6. In effect, the exemption to IGST and compensation cess on imported goods under AAs was completely unavailable with the advent of GST regime and the same temporarily restored for the period from 01.10.2017 to 30.09.2018 through an array of notifications issued under DGFT and Customs with conditions and with sun set clauses. The intentions of the government is therefore clear and there is no ambiguity that the blanket allowing of IGST exemption on imports against AAs is not desirable in the new GST regime and have adversative effect on revenue. Interestingly and pertinently, the unavailability of the said exemption during the period 01.07.2017 to 12.10.2017 is neither agitated by the petitioner nor assailed as arbitrary before this court. It could be obvious that the imports during the said period is cleared on payment of IGST.

7. In the instant case, it appears that the petitioner fulfils Export obligation (EO) and then obtained AA for duty free import of inputs. Therefore the import is actually a replenishment of inputs used in the already exported goods. As such, it was averred that complying with condition No.1 cannot be fulfilled by the petitioner at the time of import of inputs. Similarly, the petitioner expresses difficulty in fulfilment of pre- import conditions in the absence of explicit definition for pre- import condition. Para 4.13 of FTP and Appendix 4J of HBP deals with pre import conditions. A harmonious reading of the above provisions together with the concepts of physical export and actual user condition indicate that pre-import simply means import of raw materials before export of the finished goods to enable the physical export and actual user condition possible and negate the revenue

risk that is plausible by diverting the imported goods in the local market. In the perspective of revenue risk, it is not out of place to point out that the eligibility of AAs is determined on the basis of SION Norms or self declaration of the licence holder which may not reflect the actual quantity of inputs gone into the manufacture of exported goods on a case by case basis.

8. Under the FTP 2015-20, DFIA scheme under Chapter 4 alone will suit the existing operation of the petitioner in the GST regime. And under DFIA, there is no exemption of IGST and compensation cess at the time of imports. A careful reading of the Foreign Trade policy indicates that the actual user condition or physical export is imposed with an intention not to allow diversion of imported raw materials to the local market apparently on the prudence that allowing the same is fraught with revenue risks. Post export AA can act as a conduit for substituting local raw materials into manufacturing export goods and for diverting the imported inputs in the local market and that is sought to be negated by the flurry of the notifications issued consequent to the implementation of GST. It is clearly the policy of the government and it is the same to all the tax paying assesses/exporters of the same class and not discriminatory.

9. The FTP provides exemption and remission schemes for different export operations. The Advance Authorization scheme for post export benefits in the GST regime does not allow exemption from IGST at the point of import. While DFIA is specifically a post export scheme that is tailored to the likes of the petitioner. It is not open for the petitioner to choose one scheme and insist the government to modify that scheme to its convenience. Least, the Court can be persuaded to interfere with the policy matters of the government, particularly when the government is better placed to take the decisions in the matter involving revenue risks.

10. What is disallowed to the petitioner and allowed to others of the same class should be demonstrated by the petitioner. That is the test for arbitrariness. The petitioners had no occasion to demonstrate their case in the test of arbitrariness. Needless to mention, GST laws are a self contained legislations. The laws were promulgated after necessary constitutional amendments. The proposition that the GST levy subsumes the erstwhile levies of CVD and SAD in lieu of Excise duty and VAT can be of no avail to the petitioner. More so, the petitioner is estopped from claiming relief in view of Para 4.02 of the FTP that AAs are issued in accordance with the policies and procedures in force as on the date of the issue of Advance Authorization.

11. Even by not allowing exemption of IGST at the time of import, no benefit in the AA scheme is altered by the Government, though collateral costs get fastened on the petitioner and the likes by way of blockages in cash flow and attendant interest liabilities. And clearly, it is a matter of

public policy. And rightly, the choice of policy is for the decision maker, in this case the Government, to make and not for the Court. Nor has been established before this court that the decision suffers from perversity, irrationality or arbitrariness.

12. In view of the above factual and legal matrix of the case, I find that the case laws relied by the petitioners are out of place. The petitioner's plea of vagueness in the definition of pre-import condition is hollow. The intent and purpose of pre-import condition can be made out from Para 4.03 of FTP and Annexure 4 J of the HBP. The multiple schemes available in the FTP is only to have a fine balance between the policy entitlements of the exporters and to safeguard the interests of revenue. The Govind Saran Ganga Saran case relates to levy. The instant case pertains to exemption and the deferment of exemption of IGST and therefore distinguishable. While the petitioner pleads in the Writ affidavit that all the AAs are issued after 13.10.2017, in the additional submissions, the plea of old AAs is advanced, in the context of advancing the argument of the impossibility of fulfilling pre-import conditions retrospectively mandated on old AAs through amendment notifications. The pleading that there is no reason for differential treatment of BCD and IGST under AA Scheme is ill founded. BCD is a levy at the customs point of import and ends there. No credit flows in the supply chain. But IGST is levied at multiple points including point of import and the credit flows along the supply chain till consumption. Therefore, a differential treatment is necessary and therefore a DFIA scheme is carved out in the FTP. IGST is levied under the IGST Act, 2017 and for convenience, it is collected at the customs point through the machinations under the relevant Customs Acts and therefore the contentions of primacy of one act over the other is not tenable. The N.S.Ratnam Case is not relevant as the treatment of post exports and pre exports is discernible and intelligible. More so, under the AA Scheme for post exports in the GST regime, the exemption is deferred to the point of export. For the discussions regarding revenue risks and the difficulty in arriving at the real time exemption allowance for issue of AAs under the post export scheme, the Roopchand Adlakha case and P.R.Sriramulu case law is totally distinguishable. The principles of Lex Non Cogitadimpossibilia does not apply in this case as the scheme is an option and not a compulsion. Therefore, Raj Kumar Dey case relied by the petitioner is of no avail to them. The decision of the Hon'ble High Court of Delhi in the case of Narendra Plastic and others following the decision in Jindal Dychem Industries Private Limited pertains to issues raised before the issue of the impugned amendment notifications and therefore distinguishable. In view of no perversity or arbitrariness is made out in the impugned notifications, the necessity to import the principles laid down in the decisions of the Delhi Development Authority case, Laxmi Khandsari case, Jai Singh Case and Welfare Association ARP vs Ranjit P.Kohil case into the

instant case does not arise. As discussed, since GST is a self contained law with a more rational and modern tax policy the case of Food Corporation of India will support the case of the revenue than the petitioner.

13. In Writ Petition No 18437 of 2018 the notice issued by the Directorate of Revenue Intelligence is challenged. The enquiry appears to be initiated on 15.03.2018. Subsequently on 05.04.2018, as averred in the affidavits, an amount of Rs. 7,05,14,929/- is paid by the petitioner equivalent to IGST benefit on 3302 MT of copper. For the enquiry to go to the logical end, the participation of the petitioner in the enquiry is imperative. The petitioner is directed to cooperate with the enquiry and DRI is directed to complete the enquiry at the earliest possible time. While conducting the investigations, it shall be borne in mind by the respondents that GST is a nascent legislation and a lot of notices are issued to different exporters on the very same issue. As admitted by both sides, the exemption is deferred under the scheme and not unavailable to count as loss of revenue, notwithstanding the interest on delay.

These Writ Petitions are dismissed with the above directions to the petitioner and Respondent No.3. No costs. Consequently, connected miscellaneous petitions are closed.

To

- 1) Union of India,
Through Secretary,
Ministry of Finance (Department of Revenue),
No.137, North Block, New Delhi-110 001.
- 2) The Directorate General of Foreign Trade,
Through the Director of General Foreign Trade,
North Block,
New Delhi-110 001.
- 3) The Department of Revenue Intelligence,
Through the Deputy Director, Kolkata Zonal Unit,
Ho-CHI-Minh Sarani, Kolkata-700001.
- 4) The Central Board of Indirect Taxes and Customs,
Through Chairman,
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