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REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO OF 2026
(Arising out of Special Leave Petition (Civil) No.24729/2019)

ADANI POWER LTD. & ANR …APPELLANT(S)

VERSUS

UNION OF INDIA & ORS. …RESPONDENT(S)

J U D G M E N T

ARAVIND KUMAR. J,

1. Leave granted.

2. This appeal is directed against the judgment and order dated 28 June 2019 passed by the High Court of Gujarat in Special Civil Application No. 2233 of 2016. By the impugned judgment, the High Court declined to grant the reliefs sought by the appellant, Adani Power Limited, which had inter alia prayed for a declaration that no customs duty was leviable on electrical energy generated in its power plant located in a Special Economic Zone (SEZ) and supplied to the Domestic Tariff Area (DTA), and for consequential refund of amounts deposited towards such duty. The High Court took the view that its earlier judgment delivered in 2015 in favour of the appellant was confined to a particular notification and period, and could not be extended to the later period or to subsequent notifications issued by the Union. Aggrieved, the appellant has approached this Court.

3. The controversy is not merely fiscal. It raises, in our view, questions that bear upon three foundational aspects of our legal order: first, the limits of delegated legislation in matters of taxation; secondly, the discipline of judicial precedent and the obligation of co-ordinate Benches to adhere to settled law; and thirdly, the obligation of the State to give effect to judicial declarations instead of reasserting, in altered form, a levy already declared to be without authority of law.

4. We have heard Mr. Chidambaram, learned senior counsel appearing on behalf of the appellant and the learned Raghav Shankar Additional Solicitor General appearing on behalf of the Respondents and before proceeding to consider their arguments it would be of relevance to note the factual background and it reads:

I. FACTUAL BACKGROUND

5. The appellant operates a coal-based thermal power plant of about 5,200 MW capacity within the Mundra Special Economic Zone (SEZ) in the State of Gujarat. The appellant is a co-developer in that notified SEZ. The electricity generated at this plant is partly consumed within the SEZ and substantially supplied to buyers in the DTA, including State utilities.

6. Under the architecture of the Special Economic Zones Act, 2005 ("the SEZ Act"), an SEZ is afforded a special fiscal treatment to encourage manufacturing and infrastructure creation. Section 30 of the SEZ Act provides that any goods removed from an SEZ into the DTA shall be chargeable to duties of customs "as if such goods had been imported into India". The intent is to maintain parity between goods physically imported into India from abroad and goods cleared from an SEZ into the domestic economy.

7. Prior to 2009, electrical energy per se did not attract customs duty on import. The relevant tariff entry treated imported electricity at a nil rate. In consequence, though Section 30 of the SEZ Act deems removals from the SEZ into the DTA to be subject to customs duty "as if imported", electrical energy moving from an SEZ to the DTA bore, in practical terms, no customs duty. The fiscal neutrality in relation to electricity was maintained in a different way.

8. Rule 47(3) of the SEZ Rules, 2006 recognises that power generated in an SEZ may also be supplied to the DTA. To prevent misuse of duty-free inputs, Rule 47(3) provides that where electricity produced using duty-free inputs in the SEZ is cleared to the DTA, the SEZ unit would have to make good the customs duty benefit on that proportion of inputs relatable to the electricity so supplied out of the zone. In effect, the law captured the customs component in the inputs (for example, imported coal) to the extent the resulting electricity left the SEZ. The law did not, however, impose an independent customs duty on the electricity itself.

9. Matters changed in 2010. In the Union Budget of that year, the Central Government introduced a fiscal measure designed to impose customs duty on electrical energy cleared from an SEZ to the DTA. Clause 60 of the Finance Bill, 2010 (later enacted in the Finance Act, 2010) introduced changes to the general customs exemption notification regime such that electrical energy removed from an SEZ to the DTA would become liable to duty. What is of significance is that this was stated to operate retrospectively from 26 June 2009.

10. In anticipation of this change, on 27 February 2010, the Central Government issued Notification No. 25/2010-Cus. What this notification purported to do was, in form, to "grant an exemption"; in substance, it

introduced a liability. It stipulated that electrical energy cleared from an SEZ to the DTA would suffer customs duty at 16% ad valorem, with retrospective effect from 26 June 2009. On the very footing of this notification, the authorities raised demands upon the appellant for payment of duty at 16%, not merely prospectively but going back to June 2009.

11. The appellant challenged this levy by filing a writ petition before the High Court of Gujarat in 2010. The challenge was to the legality and constitutional validity of the impost on electrical energy so cleared. During the pendency of the writ petition, the High Court granted interim relief on 6 May 2010. The appellant was permitted to continue to clear electricity from the SEZ into the DTA without payment of the disputed duty, subject to furnishing a bank guarantee to secure the amount in dispute. The appellant furnished the bank guarantee accordingly. Thus, though immediate cash outflow was avoided, the alleged liability stood secured.

12. While the writ petition remained pending, the Union altered the duty structure. With effect from 16 September 2010, by Notification No. 91/2010-Cus., the earlier 16% ad valorem duty was replaced by a specific-rate duty of ₹0.10 (ten paise) per unit of electrical energy cleared from the SEZ to the DTA. Later, with effect from 18 April 2012, by Notification No. 26/2012-Cus., this was further reduced to ₹0.03 (three paise) per unit. These subsequent notifications functioned prospectively. They did not, however, undo the retrospective component of Notification No. 25/2010-Cus. for the period 26 June 2009 to 15 September 2010.

13. The effect of this shift was twofold. First, for the period 26 June 2009 to 15 September 2010, the authorities asserted a retrospective

customs duty at 16% ad valorem under Notification No. 25/2010-Cus. Secondly, for the period thereafter, the appellant was required to pay, and did pay, a per-unit customs duty on electrical energy cleared from the SEZ to the DTA, initially at ten paise per unit and later at three paise per unit, pursuant to Notification Nos. 91/2010-Cus. and 26/2012-Cus.

14. The appellant persisted with its challenge, maintaining that no customs duty at all could be lawfully imposed on the clearance of electrical energy from an SEZ into the DTA, having regard to the statutory scheme and constitutional limitations. The writ petition came to be finally heard by a Division Bench of the Gujarat High Court, which, by a judgment dated 15 July 2015, allowed the Writ petition.

15. The High Court's 2015 judgment is central or pivotal to the case on hand. The High Court held, first, that the statutory charge for customs duty lies in Section 12 of the Customs Act, 1962, read with Entry 83 of List I of the Seventh Schedule. Section 12 contemplates a levy on goods "imported into India". The High Court found that electrical energy generated within India in an SEZ and wheeled to buyers in the DTA is not, in substance, a case of "import into India". An SEZ, while fiscally distinct in treatment, is not a foreign territory. The legal fiction in Section 30 of the SEZ Act ("as if imported") allows ascertainment of the rate of duty applicable to comparable imports; it does not convert intra-national supply of electricity into an act of import. There was, therefore, no identifiable charging event to attract customs duty under Section 12 in respect of such electricity.

16. The High Court held, secondly, that Notification No. 25/2010-Cus., though couched as an "exemption" notification, in truth operated as an instrument to impose duty. Section 25 of the Customs Act empowers

the Central Government to exempt, in whole or in part, goods from duty that is otherwise leviable. That provision is beneficent in nature. It is a power to relax, not a power to create or levy tax. The High Court concluded that the Union could not, under the colour of exercising an exemption power, introduce a new levy at 16% ad valorem and then apply it retrospectively. The notification was, therefore, beyond the source of power: a colourable exercise of delegated authority.

17. The High Court held, thirdly, that the retrospective fastening of a 16% levy from 26 June 2009 violated the discipline of Article 265 of the Constitution which declares that no tax shall be levied or collected except by authority of law. The Court found that the executive could not, by subordinate legislation, retrospectively cast a tax liability for a past period absent of a clear charging sanction from Parliament. Once the basic levy was itself ultra vires, its retrospective application necessarily fails.

18. The High Court held, fourthly, that the structure of the levy created an arbitrary and unfair double burden. The SEZ Rules already ensured that, to the extent electricity left the zone for the DTA, the benefit of duty-free inputs was clawed back. If, in addition, customs duty were again recovered on the electricity so supplied, the same economic stream i.e., generation and sale of power would be subjected twice to customs incidence: once through neutralisation of duty on inputs, and again on clearance of the output. That, the Court held, was arbitrary.

19. For these reasons, the High Court in 2015 struck down the levy of customs duty on electrical energy cleared by the appellant from its SEZ unit into the DTA for the period 26 June 2009 to 15 September 2010. The offending notification and the enabling clause in the Finance Act were quashed to that extent as being ultra vires both the Customs Act and the

Constitution. The appellant's bank guarantee was directed to be released. The High Court thus, in substance, declared that, on the statutory scheme as it then stood, customs duty could not be demanded on the appellant's SEZ-to-DTA power clearances.

20. The Union of India carried the matter to this Court. On 20 November 2015, this Court declined to interfere with the judgment of the High Court. A subsequent review petition filed by the Union of India was dismissed in April 2016. The declaration of law made by the High Court, therefore, attained finality at least as between the parties, and in practical terms within the territorial jurisdiction of that High Court.

21. Thereafter, with effect from 16 February 2016, the Union issued Notification No. 9/2016-Cus. Under this measure, clearances of electrical energy from certain large SEZ-based generating stations (including the appellant's, which has capacity in excess of 1000 MW and was approved prior to 27 February 2009) into the DTA were placed at a nil rate of customs duty. Thus, prospectively from 16 February 2016, the levy itself was withdrawn insofar as the appellant was concerned.

22. What remained live, however, was the period between 16 September 2010 and 15 February 2016. For that period, the appellant had paid per-unit customs duty at ten paise and three paise pursuant to Notification Nos. 91/2010-Cus. and 26/2012-Cus. respectively. After the 2015 judgment, the appellant sought refund of those amounts, contending that once the High Court had declared that no customs duty could be imposed on SEZ–to–DTA electricity clearances, any amount collected under the same head, though at a different rate and prospectively, were liable to be refunded.

23. The appellant thereafter instituted Special Civil Application No. 2233 of 2016 before the High Court of Gujarat. In the said writ petition, the appellant prayed for (i) a declaration that no customs duty was leviable on clearances of electricity from its SEZ unit to the DTA for the subsequent period as well; (ii) directions restraining the authorities from seeking to recover such duty; and (iii) consequential refund of the amounts already deposited under protest towards such levy for the period after 15 September 2010 and prior to 16 February 2016.

24. The writ petition of 2016 came to be adjudicated by a Division Bench of the High Court and by judgment dated 28 June 2019, which is the subject of this appeal, the High Court dismissed the writ petition.

25. The reasoning of the High Court in 2019 was as follows:

The Court held that the 2015 judgment dealt with Notification No. 25/2010-Cus., which had imposed the 16% retrospective levy up to 15 September 2010, and that the relief granted was explicitly limited to said period only. The High Court observed that subsequent notifications, namely, Notification No. 91/2010-Cus. prescribing ten paise per unit, and Notification No. 26/2012-Cus. prescribing three paise per unit were not expressly struck down in the 2015 proceedings. The Court stated that unless the validity of those later notifications was specifically challenged, no refund could be ordered in respect of amounts paid thereunder. On that basis, the High Court refused to direct refund, and it declined to extend the protective declaration of 2015 into the later period.

26. It is this approach which is under challenge before us.

II. SUBMISSIONS OF THE PARTIES

27. Shri. Chidambaram, Learned senior counsel appearing for the appellant submitted that the High Court, under the impugned judgment, failed to give effect to its own prior declaration of law. It was urged that the judgment of 15 July 2015 did not merely grant a one-time relief confined to a single notification; rather, it declared, as a matter of principle, that on the statutory framework as it then existed, customs duty could not be levied on the clearance of electrical energy from an SEZ to the DTA. That declaration, affirmed by this Court, was binding on the subsequent co-ordinate Bench of the High Court. It was submitted that there was no change in the law or in the underlying facts between 15 September 2010 and 15 February 2016. Consequently, the same legal consequence ought to have followed for that entire period.

28. Learned senior counsel further submitted that Section 30 of the SEZ Act requires parity of treatment. Goods removed from an SEZ into the DTA are to bear the same customs duty "as if imported into India". Imported electrical energy has consistently stood at a nil rate of customs duty. Therefore, electrical energy cleared from an SEZ to the DTA must equally attract nil customs duty. Imposing duty on SEZ-generated electricity while imported electricity carries no duty produces an artificial and constitutionally suspect classification. It was urged that such a differential treatment directly defeats the object of the SEZ Act and violates Article 14 of the Constitution.

29. It was next contended for the appellant that the Union could not, by issuing successive notifications at progressively lower rates (16% ad valorem; thereafter ten paise per unit; thereafter three paise per unit), achieve indirectly that which the High Court had already pronounced to

be ultra vires. The appellant referred to the doctrine that a levy which is fundamentally unauthorised does not become lawful merely because the rate is altered, or because it is framed as prospective rather than retrospective. If the source is bad, every derivative iteration is equally bad.

30. Learned senior counsel also drew attention to the manner in which the levy was originally structured. Notification No. 25/2010-Cus. purported, on its face, to be an "exemption" notification. In reality, it operated as a charging instrument, introducing for the first time a 16% duty on electricity routed from the SEZ to the DTA, and doing so with retrospective effect. It was submitted that the power conferred by Section 25 of the Customs Act is a power to exempt goods from duty otherwise leviable; it is not a power to create a fresh levy in the first place. The use of an exemption notification to impose duty was, therefore, a colourable exercise of delegated legislation and fell foul of administrative law principles. According to the appellant, the High Court in 2015 correctly interdicted that exercise, and the same vice afflicts the subsequent notifications.

31. Learned senior counsel for the appellant submitted that the High Court in 2019 erred in accepting the plea of the respondents that no relief could be granted unless the subsequent notifications (Nos. 91/2010-Cus. and 26/2012-Cus.) were specifically impugned. It was urged that the appellant's 2016 writ petition was not a fresh challenge launched in isolation; it was a sequel proceeding seeking enforcement of the 2015 declaration of law and refund of amounts deposited under protest pursuant to a levy that had already been held to be without authority of law. Once the foundational illegality of the levy was judicially determined, the State could not insist that each successive notification, though resting on the same ultra vires premise, must be struck down afresh before relief could

follow. Such a view, it was submitted, would elevate procedural form over substantive illegality and would compel endless cycles of litigation on the same point.

32. It was lastly urged on behalf of the appellant that the doctrine of finality in adjudication, and the principle that litigation must at some stage come to an end, require that constitutional courts give effect to their own pronouncements in substance and not permit executive re-litigation of what has already been decided. The appellant, having succeeded in 2015 and having seen that decision withstand challenge before this Court, ought not to have been denied consequential relief merely because the levy later reappeared at a different numerical rate.

33. Per contra, Shri. Raghav Shankar , the learned Additional Solicitor General, appearing for the Union of India and the customs authorities, supported the impugned judgment. The thrust of the Union's submission was that the 2015 judgment of the High Court was concerned with Notification No. 25/2010-Cus., which imposed a levy of 16% ad valorem duty with retrospective effect up to 15 September 2010. It is further submitted that the relief granted in that case was expressly circumscribed to that period.

34. The learned Additional Solicitor General contended that the subsequent notifications, namely Notification No. 91/2010-Cus. (ten paise per unit) and Notification No. 26/2012-Cus. (three paise per unit), operated prospectively for later periods and at nominal specific rates. According to the Union, those notifications represented a different fiscal measure with a distinct objective: namely, to recoup, in part, the customs duty benefit on duty-free inputs where power so generated was supplied

into the DTA. It was urged that these later notifications were not placed under specific challenge in the first writ petition decided in 2015.

35. The Union further submitted that even in the appellant's 2016 writ petition, the later notifications were not, in form, separately impugned. On that basis, it was contended that the High Court in 2019 was correct in refusing to quash those notifications or to direct refund of the amounts paid pursuant thereto, as no court can strike down a statutory instrument or direct restitution on its basis unless that instrument is first subjected to judicial review.

36. It was also submitted on behalf of Union of India that the appellant had, for years, paid the reduced per-unit duty without protest in respect of the post-September 2010 period, and that a belated attempt to seek refund, after success in respect of an earlier, different notification, ought to be viewed with circumspection.

37. It was lastly submitted that, with effect from 16 February 2016, the policy had already been calibrated by Notification No. 9/2016-Cus., which exempted power from large SEZ units such as the appellant's. Thus, according to the Union, the grievance substantially stood redressed prospectively. What remained, in its submission, was a monetary claim for an intervening period, which the High Court correctly declined to entertain in the absence of a specific and direct challenge to the notifications governing that period on these grounds he sought for rejection of the appeal.

III. ISSUES FOR DETERMINATION

38. From the rival submissions and the record before us, the following questions arise for consideration:

I. Firstly, what, in law, did the Gujarat High Court decide in its judgment dated 15 July 2015, and what is the true scope of that decision?

II. Secondly, whether, in the period subsequent to 15 September 2010 and prior to 16 February 2016, there was any material changes in the statutory position or factual footing that would justify a different result from that arrived at in 2015 judgment?

III. Thirdly, whether the High Court, in its impugned judgment of 28 June 2019, was justified in holding that no relief could be granted to the appellant in the absence of a specific and fresh challenge to Notification Nos. 91/2010-Cus. and 26/2012-Cus?

IV. Fourthly, whether, in view of the 2015 declaration of law and its affirmation, the High Court in 2019 was at liberty, being a co-ordinate Bench, to deny relief by narrowing the effect of the earlier pronouncement?

V. Fifthly, what order/direction?

IV. ANALYSIS

39. Before proceeding with the analysis of the issues framed above, it would be necessary to reproduce certain relevant statutory provisions which would be necessary for the adjudication of these issues. Accordingly we have reproduced all the relevant statutory provisions.

40. Section 12 of the Customs Act, 1962 for reference:

> 12. Dutiable goods.—(1) Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, on goods imported into, or exported from, India. (2) The provisions of sub-section (1) shall apply in respect of all goods belonging to Government as they apply in respect of goods not belonging to Government.

41. Section 30 of The Special Economic Zones Act, 2005 for reference:

> 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 (b) the rate of duty and tariff valuation, if any, applicable to goods removed from a Special Economic Zone shall be at the rate and tariff valuation in force as on the date of such removal, and where such date is not ascertainable, on the date of payment of duty.

42. Rule 47 of The Special Economic Zones Rules, 2006 for reference:

> 47. Sales in Domestic Tariff Area—
>
> (1) A Unit may sell goods and services including rejects or wastes or scraps or remnants or broken diamonds or by products arising during the manufacturing process or in connection therewith, in the Domestic Tariff Area on payment of Customs duties under section 30, subject to the following conditions, namely-
>
> (a) Domestic Tariff Area sale under sub-rule (1), of goods manufactured by a Unit shall be on submission of import licence, as applicable to the import of similar goods into India, under the provisions of the Foreign Trade Policy:
>
> Provided that goods imported or procured from the Domestic Tariff Area and sold as such without being subjected to any manufacturing process shall be subject to the provisions of the Foreign Trade Policy as applicable to import of similar goods into India.
>
> (b) Domestic Tariff Area sale under sub-rule (1) of rejects or scrap or waste or remnants arising during the manufacturing process or in connection there-with by the Unit shall not be subject to the provisions of the Import Trade Control (Harmonized System) of Classification of Export and Import Items:
>
> Provided that the Central Government may notify restrictions, as it deems fit on all or any class of such goods mentioned under this clause.

(2) Scrap or dust or sweeping of gold or silver or platinum may be sent to Government of India Mint or Private Mint from a Unit and returned in standard bars in accordance with the procedure specified by Customs authorities or may be sold in the Domestic Tariff Area on payment of duty on the gold or silver or platinum content in the said scrap:

Provided that the value of samples of gold or silver or platinum sweepings or scrap or dust taken at the time of clearance and sent to the Government Mint or Private Mint for assaying and assessment shall be finalized on the basis of reports received from the Government Mint or Private Mint, as the case may be.

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

(a) proposal for sale of surplus power received by the Development Commissioner shall be examined in consultation with the State Electricity Board, wherever considered necessary: Provided that consultation with State Electricity Board shall not be required for sale of power within the same Special Economic Zone;

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

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

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

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

(4) Valuation and assessment of the goods cleared into Domestic Tariff Area shall be made in accordance with Customs Act and rules made there under. 160

(5) Refund, Demand, Adjudication, Review and Appeal with regard to matters relating to authorised operations under Special Economic Zones Act, 2005, transactions, and goods and services related thereto shall be made 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 there under or the notifications issued there under.

43. Section 25 of The Customs Act, 1962 for reference:

25. Power to grant exemption from duty.—(1) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette, exempt generally either absolutely or subject to such conditions (to be fulfilled before or after clearance) as may be specified in the notification goods of any specified description from the whole or any part of duty of customs leviable thereon.

(2) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, may, by special order in each case, exempt from the payment of duty, under circumstances of an exceptional nature to be stated in such order, any goods on which duty is leviable.

(2A) The Central Government may, if it considers it necessary or expedient so to do for the purpose purpose of clarifying the scope or applicability of any notification issued under sub-section (1) or order issued under sub-section (2), insert an explanation in such notification or order, as the case may be, by notification in the Official Gazette, at any time within one year of issue of the notification under sub-section (1) or order under sub-section (2), and every such explanation shall have effect as if it had always been the part of the first such notification or order, as the case may be.

(3) An exemption under sub-section (1) or sub-section (2) in respect of any goods from any part of the duty of customs leviable thereon (the duty of customs leviable thereon being hereinafter referred to as the statutory duty) may be granted by providing for the levy of a duty on such goods at a rate expressed in a form or method different from the form or method in which the statutory duty is leviable and any exemption granted in relation to any goods in the manner provided in this sub-section shall have effect subject to the condition that the duty of customs chargeable on such goods shall in no case exceed the statutory duty.

Explanation.—"Form or method‖, in relation to a rate of duty of customs, means the basis, namely, valuation, weight, number, length, area, volume or other measure with reference to which the duty is leviable.

(4) Every notification issued under sub-section (1) or sub-section (2A) shall, unless otherwise provided, come into force on the date of its issue by the Central Government for publication in the Official Gazette.

* * * * *

(6) Notwithstanding anything contained in this Act, no duty shall be collected if the amount of duty leviable is equal to, or less than, one hundred rupees.

> (7) The mineral oils (including petroleum and natural gas) extracted or produced in the continental continental shelf of India or exclusive economic zone of India as referred to in section 6 and section 7, respectively, of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976 (80 of 1976), and imported prior to the 7th day of February, 2002 shall be deemed to be and shall always be deemed to have been exempted from the whole of the duties of customs leviable on such mineral oils and accordingly, notwithstanding anything contained in any judgment, decree or order of any court, tribunal or other authority, no suit or other proceedings in respect of such mineral oils shall be maintained or continued in any court, tribunal or other authority.
>
> (8) Notwithstanding the exemption provided under sub-section (7), no refund of duties of customs paid in respect of the mineral oils specified therein shall be made.

RE: QUESTION I – SCOPE AND EFFECT OF THE 2015 JUDGMENT

44. We turn first to the 2015 judgment. The High Court there did four things of significance. It examined (i) the constitutional and statutory basis of the levy; (ii) the character of the notification said to impose it; (iii) the retrospective enforcement of that levy; and (iv) the arbitrariness inherent in the structure of the levy.

45. On the constitutional and statutory basis, the High Court held that the levy was ultra vires because there was, in substance, no "import into India" that could trigger the charge under Section 12 of the Customs Act. This went to the very root of the matter. The Court was not deciding a mere technical irregularity. It held that the alleged taxable event did not exist in law. The absence of a taxable event is a jurisdictional defect.

46. On the character of the notification, the High Court found that the Union had attempted, by Notification No. 25/2010-Cus., to employ the language of an "exemption" notification to in fact impose and quantify a new levy of 16% on SEZ–to–DTA power clearances. The High Court held

that Section 25 of the Customs Act is a power to relax duty, not a power to invent it. This was a finding on the limits of delegated legislation.

47. On retrospectivity, the High Court found that fastening a 16% ad valorem duty with effect from 26 June 2009 through delegated action offended Article 265 of the Constitution, which requires authority of law for every tax levy and collection.

48. On arbitrariness, the High Court found that the structure of the levy burdened the appellant twice over i.e., once by drawback of duty on inputs under Rule 47(3) of the SEZ Rules, and then again by demanding customs duty on the final electricity output itself.

49. These findings were not casual or incidental. They were the foundation upon which the High Court granted relief. The Court did not say merely that Notification No. 25/2010-Cus. Suffered from a drafting defect. It said, in substance: (i) there is no lawful charging event in respect of this commodity when cleared from an SEZ to the DTA; (ii) the Union cannot use an exemption notification to create a duty that Parliament has not imposed; (iii) retrospective demand without statutory sanction violates Article 265; and (iv) the structure produces arbitrary double burden.

50. We are of the clear view that these four propositions together constitute the ratio decidendi of the 2015 judgment. It follows that the 2015 judgment was not confined, in principle, to a single notification or to a particular cut-off date. The declaration of law extended to the very authority to levy customs duty on electrical energy cleared from an SEZ to the DTA in the statutory setting then prevailing. Absence a change in that setting, that declaration governed all periods standing on the same footing.

51. Accordingly we hold that the judgment of the Gujarat High Court dated 15 July 2015 was not a limited adjudication confined to the validity of one notification or to a closed span of time. It was a declaration of law founded on constitutional and statutory interpretation, determining that on the then-existing legal framework no customs duty could be levied on electrical energy transmitted from an SEZ to the DTA. The reasoning of said decision went to the very root of the taxing power i.e., it identified the absence of a charging event, the misuse of the exemption power, and the inherent arbitrariness of the scheme. Once such a declaration of law was rendered and affirmed by this Court, it acquired binding normative force and governed all transactions resting on the same legal footing. The essence of that pronouncement was not temporal but structural; it struck at the authority to levy, not merely at the rate or the period. The ***2015 judgment*** therefore stands as a general exposition of law, and its ratio decidendi covers the subsequent period ***unless a demonstrable change in the legal foundation is shown.***

RE: QUESTION 2 – WHETHER ANY CHANGE IN STATUTORY OR FACTUAL FOOTING JUSTIFIED A DIFFERENT RESULT

52. We next turn to an aspect which, in our view, requires emphasis: the use of an "exemption" notification to impose, in substance, a levy.

53. Section 25 of the Customs Act authorises the Central Government, if it is satisfied that it is necessary in the public interest so to do, to exempt generally either absolutely or subject to conditions goods of any specified description from the whole or any part of customs duty leviable thereon. The premise of Section 25 is that there is a duty "leviable thereon" in the first place. The function of an exemption notification is, therefore, to relax or remit a duty already otherwise attracted by law.

54. What Notification No. 25/2010-Cus. did, however, was precisely the reverse. It purported to declare, for the first time, that electrical energy cleared from an SEZ to the DTA would be subjected to customs duty at the rate of 16% ad valorem. The instrument was dressed in the garb of an exemption, but its true operation was to create a duty where none existed, and to quantify that duty, and to apply it retrospectively.

55. In administrative law terms, this is a classic instance of a colourable exercise of delegated power. A delegate cannot do indirectly what it has no authority to do directly. The power to exempt is not a power to tax. The two stand on opposite constitutional planes. The essential legislative function of imposing a tax or duty rests with Parliament and must be located in a charging provision. The executive cannot, by subordinate instrument, enlarge the field of taxation under the pretext of tailoring an exemption.

56. We consider it necessary to state this principle clearly. Delegated legislation is subject to judicial review not only for substantive unreasonableness, but also for purpose. Where the dominant purpose for which a delegated power is conferred is departed from, and the power is pressed into service to achieve an end for which it was never granted, the exercise is ultra vires. The immunity of a fiscal notification from scrutiny is no greater than that of any other form of subordinate legislation.

57. The High Court in 2015 correctly detected that inversion: a provision designed to grant relief (exemption) had been inverted to impose a burden (levy). Such inversion is not a mere irregularity; it is an illegality at source. The said finding of the High Court is in consonance with settled principles of law declared by this Court. Hence, we affirm said finding.

58. That conclusion has a direct bearing on the respondent's present defence. If the very manner in which the levy was introduced was beyond the scope of delegated authority, then subsequent notifications which continue to demand duty on the same taxable fiction namely, that SEZ-to-DTA electricity is to be treated as exigible to customs duty cannot be insulated merely because they altered the rate from 16% to ten paise to three paise, or because they framed the imposition of customs duty prospectively. In other words, where the root is ultra vires, the branch cannot claim legitimacy by altering its foliage.

59. We must also underline a basic proposition of fiscal jurisprudence: a tax or duty can only be levied where there is (i) a clear charging provision enacted by competent legislature; (ii) an identifiable taxable event; and (iii) a statutory rate-making mechanism. The machinery provisions may regulate assessment and collection. Exemption notifications may relax or remit the levy. But neither machinery provisions nor exemption notifications can substitute for the absence of a charge.

60. Section 12 of the Customs Act is the charging provision. It contemplates a duty on goods imported into India. Section 30 of the SEZ Act says that goods cleared from an SEZ to the DTA "shall be chargeable to duties of customs as leviable on such goods when imported". This is a parity clause. It says: treat SEZ-to-DTA clearances as if they bore the same duty as comparable imports. It does not say: regard every SEZ-to-DTA clearance as an "import into India" for all purposes of Section 12, irrespective of physical reality, and irrespective of whether such imports actually bear any duty.

61. The High Court in 2015 correctly held that electrical energy generated within India and wheeled into the DTA is not, in truth, a case of

import into India. The deeming fiction of Section 30 of the SEZ Act is intended to align duty treatment, not to expand the scope of the charging section beyond what Parliament has enacted. A deeming fiction cannot be pressed beyond the purpose for which it was enacted.

62. Put differently: Section 30 of the SEZ Act does not create a new customs levy. It only says that if (and to the extent that) such goods would have attracted customs duty had they physically crossed the border, then the same incidence will apply when those goods move from the SEZ to the DTA. If, on actual import, electrical energy attracts no customs duty, then, by force of Section 30, the same result i.e., no customs duty must follow for SEZ clearances of electrical energy. Nothing in Section 30 either authorises or contemplates the imposition of a fresh or differential levy singling out SEZ-generated power.

63. This parity logic sits at the centre of the scheme. Imported electricity bore no customs duty. SEZ electricity a like commodity was nonetheless subjected to duty. That differential treatment violates both the statutory parity mandated by Section 30 of the SEZ Act and the equality guarantee under Article 14. The High Court in 2015 captured this, and we reaffirm it.

64. The Union urged before us that the per-unit duties of ten paise and three paise were meant to recoup, in part, the benefit of duty-free inputs such as imported coal. That argument does not survive scrutiny. Rule 47(3) of the SEZ Rules already obliges the SEZ power generator, when electricity leaves the SEZ, to neutralise the customs duty foregone on inputs to that extent. The scheme already accounts for input duty benefit. Having so neutralised, to then impose an additional customs duty on the

electricity output itself is to double count. That offends fairness and constitutional discipline.

65. On a plain application of the principles governing the power to tax, we are satisfied that the levy on electricity generated in the Special Economic Zone and supplied to the Domestic Tariff Area, as sought to be enforced against the appellant, has no sanction in law. The charge does not find support in the statutory scheme. We also find that, even after the decision rendered in 2015, there has been no change either in the law or in the relevant facts which could justify taking a view different from the one already taken. The legal position having remained the same, the conclusion reached earlier must continue to hold the field. Section 30 of the SEZ Act continued unchanged; the Customs Tariff continued to prescribe a nil rate on imported electrical energy; and the constitutional parameters of Articles 14 and 265 remained constant. The subsequent notifications merely varied the form and rate of duty; they did not cure the fundamental absence of authority to tax. The attempt of the executive to reintroduce the very same levy through the route of an "exemption" notification cannot be sustained. What could not be done directly has been sought to be achieved indirectly, which is impermissible in law and contrary to the limits of delegated power. Section 25 of the Customs Act confers a power to exempt, not to impose. To use it as an instrument of levy transgresses the limits of delegated legislation and amounts to usurpation of the legislative function. The Court's duty of judicial review extends to restraining such misuse of delegated authority. ***Hence, in substance and in law,*** the position after 2015 remained identical to what it was before; the same illegality persisted, and the same conclusion necessarily follows.

RE: QUESTION III – RE: GRANT OF RELIEF IN THE ABSENCE OF A SEPARATE CHALLENGE TO THE EXEMPTION NOTIFICATIONS

66. We now turn to what was pressed by the respondents both before the High Court in 2019 and before us: namely, that the later notifications (Notification No. 91/2010-Cus. prescribing ten paise per unit and Notification No. 26/2012-Cus. prescribing three paise per unit) were not specifically impugned by the appellant, and therefore, absent a direct attack on their validity, no relief could be granted in respect of amounts paid thereunder.

67. We are unable to accept said contention. It proceeds on a misconception of what was before the High Court in 2016 and what was finally decided in 2015.

68. The appellant's 2016 writ petition was not an abstract attempt to launch a fresh constitutional challenge to each successive notification in isolation. It was a sequel proceeding.

69. In administrative law, where a court of competent jurisdiction has struck down the foundation of a levy as ultra vires, that declaration renders all successive and derivative attempts to enforce the same levy equally unenforceable, unless the statutory or factual basis has materially changed. The State cannot defend the continuation of the same vice by saying, this is a different notification number. The Court is bound to look past the label and examine the substance.

70. To insist that the appellant ought to have challenged Notification No. 91/2010-Cus. and Notification No. 26/2012-Cus. afresh, when those notifications do no more than perpetuate the same unauthorised levy in

altered denomination, is to elevate form over substance. Constitutional adjudication does not proceed on technical formalism when illegality has already been declared in principle.

71. This Court, while exercising jurisdiction under Article 136, and the High Court, while exercising jurisdiction under Article 226, are vested with ample power to mould appropriate relief. Once a levy has been held to be beyond the authority of law, a constitutional court is not expected to remain a silent spectator while the very same levy is sought to be continued through successive or similar notifications. The jurisdiction of a constitutional court is remedial in nature and extends to ensuring that what has been declared unlawful is not brought back in another form. The contention that "no relief can be granted unless each successor notification is separately struck down" is inconsistent with that remedial character, and would reward repetition of illegality. We reject it.

72. We also find that there is no material factual distinction between the levy struck down in 2015 and the levy sought to be enforced thereafter against the appellant for the period between 16 September 2010 and 15 February 2016. The commodity is the same (electrical energy). The movement is the same (SEZ to DTA). The asserted source of power is the same (customs levy under colour of Section 25 of the Customs Act read with Section 30 of the SEZ Act). The only difference lies in the numerical rate and the period for which it applies. Those differences do not cure the fundamental absence of a lawful charging event and the misuse of an exemption mechanism to impose duty. The levy is the same in character, and it is that character which was condemned.

73. In our view, the High Court, in its judgment of 2019, fell into error in accepting the submission of the Union that the later notifications

continued to operate merely because they were not specifically set aside in the decision of 2015. Once the levy itself had been held to be without authority of law, its continuance through subsequent notifications could not be sustained. The invalidity goes to the root and does not depend upon the form or sequence of the notifications. We reject the respondents' contention that the appellant could not be granted relief because the later notifications were not independently impugned.

74. We accordingly hold that where a levy has been declared to be without authority of law, a subsequent petition seeking enforcement of that declaration and consequential relief cannot be treated as a fresh challenge merely because the levy is sought to be continued under later or similar notifications. ***In the absence of any new statutory basis, such notifications do not create a new cause of action. A constitutional court is entitled to grant effective relief without insisting upon separate challenges to each such notification. The High Court, in the impugned judgment of 2019, erred in taking a contrary view.***

RE: QUESTION IV – EFFECT OF A BINDING DECLARATION ON A LATER CO-ORDINATE BENCH

75. There remains one further aspect of principle. The High Court's judgment of 15 July 2015 striking down the levy of customs duty on SEZ-to-DTA electrical energy was delivered by a Division Bench of that Court. The Union of India challenged that judgment before this Court. This Court declined interference. The High Court's judgment thereby attained finality, both as between the parties and as a binding declaration of law within that jurisdiction.

76. The writ petition filed in 2016 by the appellant came to be heard in 2019 by another Division Bench of the same High Court. That Bench,

while noting the existence of the 2015 judgment, proceeded on the basis that the earlier decision was confined to Notification No. 25/2010-Cus. and to the period ending 15 September 2010. Having so read it down, the Bench in 2019 declined to extend relief to what it viewed as a "different" set of notifications.

77. The discipline expected of coordinate Benches does not permit such an approach. This Court, in ***State of Uttar Pradesh v. Ajay Kumar Sharma (2016) 15 SCC 289***, has reiterated that once a coordinate Bench of a High Court has settled a question of law, a subsequent Bench of equal strength is bound to follow that view when confronted with the same issue. If the later Bench believes that the earlier view is so manifestly erroneous or inapplicable that it ought not to be followed, the later Bench must refer the matter to a larger Bench for reconsideration. What it cannot do is to sidestep or whittle down the earlier pronouncement by confining it artificially or by treating it as a fact-specific indulgence.

78. The discipline of precedent is not a matter of personal predilection; it is an institutional necessity. ***Stare decisis et non quieta movere*** which means to stand by what is decided and not to disturb what is settled, is a working rule which secures stability, predictability and respect for judicial outcomes. The law cannot change with the change of the Bench.

79. In the present case, if the Division Bench in 2019 was of the opinion that the 2015 decision could not, or ought not, apply to the later notifications or to the later period, the proper course was to request that the question be placed before a larger Bench of the High Court. The Bench in 2019 did not do so. Instead, it narrowed the effect of the 2015 judgment and declined relief for the subsequent years. That course was

impermissible. The 2019 Bench was bound by the declaration of law in 2015, unless duly referred to a larger Bench.

80. We accordingly hold that the Division Bench of 2019 acted contrary to the settled doctrine of judicial discipline. When a coordinate Bench of a High Court has already determined a question of law, a subsequent Bench of equal strength is bound to follow that view; if it doubts its correctness, the only permissible course is to refer the matter to a larger Bench. This rule, has been reaffirmed by this Court in ***State of U.P. v. Ajay Kumar Sharma*** **(2016) 15 SCC 289**, is not procedural etiquette but a structural safeguard against judicial inconsistency. The discipline of *stare decisis* ensures coherence and predictability in law, which are indispensable to the legitimacy of adjudication. The 2019 Bench, by confining the earlier decision to a narrow time frame without referring the matter to a larger Bench, effectively unsettled a settled proposition and undermined the authority of precedent. Such a course was impermissible. The coordinate Bench was duty-bound to apply the ratio of the 2015 judgment to the appellant's case, and its failure to do so vitiates the impugned decision.

81. We now turn to an aspect which goes beyond the immediate dispute between the parties. The case also concerns the obligation of the administration to give full effect to judicial decisions once they have attained finality. The authority of the rule of law rests not only in the pronouncement of judgments but equally in their proper implementation. It is therefore necessary to briefly recall the principles that govern the conduct of the executive after a court has finally settled the legal position.

82. When a High Court of competent jurisdiction declares a levy to be ultra vires and unconstitutional, and this Court declines to interfere, that

declaration cannot be treated as a one-time indulgence for a closed period. It is incumbent upon the authorities thereafter to conform their conduct to the law so declared. They cannot, consistent with constitutional discipline, continue to enforce the same levy for a later period on the strength of slightly altered subordinate instruments and then resist restitution on grounds of technical pleading.

83. It is well settled that in the public interest there must be an end to litigation. The appellant succeeded in 2015. The Union failed in its challenge before this Court. The appellant then approached the High Court in 2016 essentially seeking implementation of the declaration already made. To deny relief on the footing that it is a new notification or that period was not expressly mentioned is to frustrate finality and to compel the citizen to engage in repetitive litigation to secure, in practice, what has already been recognised in principle.

84. Accordingly we hold that once the 2015 judgment had declared the levy to be ultra vires and this Court had declined interference, it was incumbent upon the administrative authorities to conform their conduct to that declaration. Judicial pronouncements are not advisory opinions; they are binding commands of law. When the executive continues to enforce, under new guise, a levy that has been judicially struck down, it acts in defiance of constitutional discipline and erodes public confidence in the rule of law. Finality of adjudication is an essential component of good governance. The repetition of an invalidated levy through successive notifications compels needless litigation, burdens the courts, and subjects citizens to prolonged uncertainty. The authorities in this case were obliged to treat the matter as concluded and ought to have extended the benefit of the 2015 decision uniformly to all subsequent periods until the law was altered by legislative action. Their failure to do so justified judicial

intervention. The doctrine *interest reipublicae ut sit finis litium* which essentially means, that it is in the public interest that there be an end to litigation would squarely apply; the State must exemplify obedience to judgments, not resistance to them.

85. This litigation has spanned more than a decade. The substantive question at its core was only this: whether, in the absence of a clear charging section, customs duty could be imposed on electrical energy cleared from an SEZ into the DTA? And, according to our observations above it stood answered in 2015 and that answer withstood scrutiny by this Court also. What ought to have followed thereafter was faithful implementation, not renewed resistance.

86. Accordingly, we summarise our conclusions as follows:

(i) The Gujarat High Court's judgment dated 15 July 2015, as a matter of law, declared that customs duty could not be levied on electrical energy cleared from the appellant's SEZ unit to the DTA, having regard to the absence of a lawful charging event under Section 12 of the Customs Act, the limited scope of Section 25 of that Act, the parity requirement of Section 30 of the SEZ Act and the constitutional constraints of Articles 14 and 265 is squarely applicable to the judgment and order dated 28.06.2019.

(ii) That declaration was not confined in principle to Notification No. 25/2010-Cus. or to the period ending 15 September 2010. It went to the authority to levy customs duty on SEZ-to-DTA electricity clearances in the statutory setting then obtaining.

(iii) The subsequent notifications namely, Notification No. 91/2010-Cus. prescribing ten paise per unit and Notification No. 26/2012-Cus.

prescribing three paise per unit, did not create a new levy on a new footing. They merely continued the same levy in altered form. The change in arithmetical rate by prospective character does not cure the lack of authority in principle.

(iv) The argument that no relief could be granted in the absence of a fresh and specific challenge to each later notification is untenable. The appellant's 2016 writ petition was a sequel, seeking enforcement of the prior declaration and refund of amounts deposited under protest. Constitutional courts are empowered to secure compliance with their own pronouncements and are not bound to insist on repetitive challenges to substantially identical measures.

(v) There was no material change in law or fact between 15 September 2010 and 15 February 2016 that would justify a departure from the 2015 ruling. Section 30 of the SEZ Act remained unaltered. Imported electrical energy bore no customs duty under the Customs Tariff Act, 1975. The same parity logic applied to S.C.A. No. 2233 of 2016 disposed of on 28.06.2019

(vi) The Division Bench of the High Court in 2019, being a co-ordinate Bench, was bound either to follow the 2015 decision or, if it doubted its correctness or applicability, ought to have referred the question to a larger Bench. It could not have circumvented that discipline by artificially narrowing down the earlier ruling. Its refusal to extend the 2015 declaration to the later period was therefore contrary to law.

(vii) Once it is held that the levy itself was without authority of law, the State cannot retain the amount collected under such levy. Restitution is a necessary incident of the finding of illegality.

CONCLUSION:

87. We declare that the levy of customs duty on electrical energy cleared by the appellant from its SEZ unit to the DTA during the relevant period, as sought to be enforced through Notification No. 25/2010-Cus., Notification No. 91/2010-Cus., Notification No. 26/2012-Cus., and similar instruments, was without authority of law.

88. We accordingly hold that the impugned judgment of the High Court dated 28 June 2019 cannot be sustained. In view of the foregoing discussion, the appeal is allowed. The judgment and order dated 28 June 2019 of the High Court of Gujarat in Special Civil Application No. 2233 of 2016 is set aside.

RE: QUESTION V – WHAT DIRECTIONS ?

89. The respondents, namely the Union of India through the concerned Ministry and the jurisdictional customs authorities, shall, after due verification, refund to the appellant such amount that has been deposited in cash or through encashment of security or otherwise under protest by the appellant, towards customs duty on the clearance of electrical energy from SEZ unit into the DTA for the period in question, namely, 16 September 2010 to 15 February 2016. It is made clear that the said refund shall not carry any interest.

90. The verification and refund exercise shall be undertaken and be completed by the jurisdictional Commissioner of Customs within a period of eight (8) weeks from the date of this judgment. The appellant shall cooperate by furnishing the particulars of such deposits made if sought for by the authorities for the aforesaid period. The authorities shall not raise

any hyper-technical objections so as to defeat the substance of this direction.

91. It is further directed that no further demand shall be enforced against the appellant in respect of customs duty on electrical energy cleared from its SEZ unit to the DTA for the period covered in this appeal, as the levy having been held unsustainable. For the avoidance of doubt, we clarify that we express no opinion as to any future legislative regime that Parliament may enact. Our findings are confined to the aforesaid period and statutory framework arising in the present appeal.

92. In view of the directions issued above, we do not consider it necessary to make any order as to costs and it is made easy. All pending applications, stands disposed of.

……., J.
[ARAVIND KUMAR]

……., J.
[N.V. ANJARIA]

New Delhi;
January 05th, 2026.