

**AUTHORITY FOR ADVANCE RULINGS  
(CENTRAL EXCISE, CUSTOMS AND SERVICE TAX)  
HOTEL SAMRAT, 4<sup>TH</sup> FLOOR, KAUTILYA MARG, CHANAKYAPURI  
NEW DELHI**

**PRESENT:  
Dr. Justice Arijit Pasayat (Chairperson)  
Mr. Y.G.Parande(Member)**

**The 27<sup>th</sup> May, 2013**

**Ruling No. AAR/Cus/01/2013  
in  
Application No. AAR/44/Cus/07/2012**

Applicant : **M/s. GE India Industrial Private Limited,**  
Building No. 7A, 6<sup>th</sup> Floor, DLF Cyber City,  
DLF Phase-III, Sector – 25A,  
Gurgaon – 122 002 (Haryana)

Commissioner Concerned : **The Commissioner of Customs (Export)**  
Jawaharlal Nehru Custom House,  
Nhava Sheva, Tal: Uran, District Raigad,  
Maharashtra – 400707

Present for the Applicant : Shri Sujit Ghosh, Advocate

Present for the Commissioner : Shri A.K.Jain, Commissioner (AR)

**RULING**

(By Hon'ble Chairperson)

By the present ruling, application filed by M/s. GE India Industrial Private Limited (hereinafter referred to as “the Applicant”), seeking advance ruling u/s.28H of the Customs Act, 1962 (in short the Act ) stands “disposed off”.

The factual scenario as projected by the applicant in the application is as follows:

The applicant is a wholly owned subsidiary of a Foreign Company GE Holding Luxembourg & Company Sarl, Luxembourg. The applicant falls under the definition of “applicant” under section 28E (c) (c) of the Act.

The applicant proposes to establish a unit in a Free Trade Warehousing Zone (hereinafter referred to as 'FTWZ') in the State of Maharashtra for warehousing the goods procured from outside India. The applicant proposes to establish its FTWZ unit in a FTWZ which is already notified or will be notified as SEZ by the Central Government as per Sec. 4(1) of the SEZ Act.

The Applicant proposes to import parts and components of wind operated electricity generators from outside India and store the same in the said FTWZ unit. The list of goods that the Applicant proposes to import and store in FTWZ unit is indicated. The aforesaid parts and components of wind operated electricity generators are covered under Schedule C (S.No.82 and 103 of the Maharashtra Value Added Tax Act, 2002 (hereinafter referred to as 'MAVT Act'). The relevant entries under Schedule C are as under :-

Sr. N	Name of the commodity	Conditions and Exceptions	Rate of Tax
(1)	(2)		(3)
82	Renewable energy devices as may be notified, from time to time, by the State Government in the Official Gazette and spare parts thereof		5%
103	Windmill for water pumping and for Generation of electricity and its Components, parts and accessories.		5%

The Maharashtra Government, vide Notification No. VAT-1505/CR-119/Taxation 1 dated April 1,2005 issued under Entry 82 in Schedule 'C' appended to the MVAT Act, has inter alia specified that the following devices as renewable energy devices for the purpose of entry 82. The rate of duty shall be 5% on such renewable energy devices:

S.No.	Devices
11	Wind mills and any specially designed services which run on wind mills.
12	Any special devices including electric generators and pumps running on wind Energy.

The parts and components of wind operated electricity generators are not exempted by the Maharashtra Government from the payment of value added tax and are subject to VAT @ 5%.

The Applicant proposes to clear the goods by way of stock transfer to their own manufacturing unit located in Pune, Maharashtra and pay the duties of customs in terms of Section 30 of SEZ Act and proposes to avail the benefit of exemption Notification No.45/2005 Cus dated May 16, 2005 that exempts goods cleared from the SEZ to DTA from payment of whole of the additional duty of customs leviable (hereinafter referred to as "SAD") under Section 3(5) of the Customs Tariff Act, 1975 (in short Tariff Act) subject to the fulfillment of the conditions mentioned in the proviso of the aforesaid notification.

In the light of the above facts, the Applicant seeks to obtain an advance ruling from this Authority on the following question:

Whether the goods stock transferred by the Applicant from the SEZ unit to its DTA unit would be eligible for exemption from the payment of SAD under Notification No. 45/2005 Cus dated May 16, 2005?

The Revenue has contended as noted below:

The Applicant has submitted a copy of Chart prepared by them and countersigned by Company Secretaries M/s. V.K. Chaudhary & Co. ( CP No.4548) indicating 13.94% holdings by M/s. GE Pacific Pte. Ltd. Singapore and balance 86.06% holdings by M/s. GE Energy Europe BV Netherlands which are intermediate holding Companies of M/s. GE Holdings Luxembourg & Co. Sarl, Luxembourg. However as per Balance Sheet for 2010-11 as submitted by Applicant vide their letter dated 3.8.2012, the ultimate Holding Company is General Electric Company USA. In this regard the Applicant has not submitted any other documentary evidence. It appears that the copy of Memorandum and Articles of Association also do not have any provision in this regard.

The Applicant has sought the clarification as to whether the stock transfer by the Applicant from the SEZ/FTWZ Unit to its DTA Unit would be eligible for exemption from the payment of SAD under Notification No. 45/2005 Cus dated May 16, 2005? In this regard it is stated that as per present practice, the benefit of said notification is being extended to all Units in FTWZ-Arshiya including their Clients subject to the condition that item/goods cleared from FTWZ should not be exempted from payment of Central Sales-tax under Central Sales-tax Act, 1956 (in short CST Act)/VAT as provided in proviso to the notification. The said benefit is being extended to all importers (Units or Clients of Units) for clearance of all goods from FTWZ to DTA irrespective of the status of importer being a trader or manufacturer or service provider or any other person. There is no discrimination on the ground whether the clearance to DTA unit is on the basis of Sale or Stock Transfer. However, in all cases the importer has to submit evidence that the goods in specific are not exempted from CST/VAT, otherwise an

undertaking to the effect that the goods are not exempted from CST/VAT is also accepted from the importer. Therefore, the activity in respect of which the present advance ruling has been sought is an 'ongoing' activity in case of other importers.

The Applicant has submitted a letter No. nil dated 21.05.2012 to the Commissioner of Customs (Exp), JNCH, Nhava-Sheva on 22.05.2012 seeking clarification on two issues. The first issue under heading 'Transaction 1' of the Annexure of said letter is same in respect of which the Applicant is seeking advance ruling. In this regard it is stated that the Applicant was informed about the position in this regard.

In a similar matter, the Commissioner (Appeals) Central Excise, Pune-III vide Order in Appeal No. PIII/VM/266/2009 dated 14.12.2009 issued from F.No.V-23PIII (Appeals) Cus/211/09 allowed the appeal of SEZ Unit M/s. Serum Institute of India Ltd. In said case the Commissioner (Appeals) held that since no notification exempting the goods from sales tax was issued by State Government, it could be concluded that the goods cleared by appellant by way of stock transfer were not exempted from payment of sales tax and hence the condition of notification 45/2005 could be considered to have been fulfilled. However, it could not be ascertained whether the said Order-in-Appeal was challenged before CESTAT or not.

No documentary proof from any authority to prove that the applicant is a wholly owned subsidiary of a foreign company GE Holdings Luxemburg & Co. Sarl, Luxemburg is submitted by Applicant.

As per Minutes of the 45<sup>th</sup> meeting of Approval Committee for section specific SEZ for Free Trade and Warehousing section held on 01<sup>st</sup> August, 2012 at SEEPZ, SEZ Mumbai, the committee has approved the proposal for setting up FTWZ Unit of the Applicant in FTWZ-Arshiya, Panvel.

The Applicant has not submitted any evidence that the goods in question are not exempted from payment of CST/VAT. Further the goods mentioned in Application are not figuring in the goods mentioned in minutes of Approval Committee meeting as above.

As per existing SEZ Act 2005 and SEZ Rules 2006, there is no specific provision for transfer of goods by way of stock transfer to a DTA Unit, however it is presumed that the same is covered under clearance to DTA Units. As far as a Free Trade and Warehousing Zone (FTWZ)( which is different from a SEZ, is concerned, the process of formulation of separate FTWZ rules is going on and all the issues related with trading and warehousing will be dealt with which are not dealt in the existing SEZ rules. Therefore, it appears that it would be a pre-mature stage for an interpretation by Authority for Advance Rulings as the exemption under notification 45/2005-cus itself is based on the interpretation of Act and Rules. It is also clear from the text of the notification “clearance from SEZ in accordance with SEZ Act 2005 and SEZ Rules 2006” that the main emphasis is given on SEZ Act and SEZ Rules.

As per prevailing practice at FTWZ-Arshiya, Panvel, all the Units including their Clients are being allowed the benefit of said notification subject to conditions of

the notification; the benefit would be given to the applicant also as being given to similarly placed Units/Clients. The notification in question is of general nature and is applicable to all goods cleared from SEZ/FTWZ and eligibility is based on description of the goods and the applicability of CST/VAT in a particular State where goods are taken for sale/use/other purpose.

There is no dispute as far as conditions of the notification are concerned. However depending upon the description of the goods and the state where goods are to be taken, the importer is required to prove that the goods in question are not exempted from payment of CST/VAT.

The Applicant has not submitted any evidence that the goods in question are not exempted from payment of CST/VAT by Maharashtra Government. It is incorrect on the part of the Applicant to say that no VAT can be levied on stock transfer and thus can not be exempted from VAT/CST. The condition of the notification is that no exemption shall be applicable if such goods, when sold in Domestic Tariff Area (DTA), are exempted by State Government from payment of CST or VAT. Hence, in case of stock transfer also the importer has to prove that if such goods when sold would not be in CST/VAT exempted category of the concerned state.

On the issue of stock transfer it is stated that in section 30 of SEZ Act 2006 as well as in the notification in question the words are "goods cleared from SEZ" and not 'Sale' or 'Stock Transfer'. Therefore, it is not correct statement of the

Applicant that in case of stock transfer the proviso to the notification would not apply as the proviso to the notification is applicable in all cases of clearance from SEZ.

The Applicant has not submitted any evidence of non-exemption of specific goods from CST/VAT. In para 31 it is a false statement that the Government has specifically extended the benefit of notification in respect of goods transferred by a SEZ Unit to its Units in DTA on stock transfer basis. The applicant has tried to mislead the authority. The applicant would be eligible for the benefit of notification in relation to specific goods only after complying with the proviso thereof. The notification 114/2003 has no co-relation with the present notification and the benefit of any notification is dependent on fulfillment of the conditions of the notification.

Accordingly the respondent revenue has prayed for rejecting the application both on the grounds non-maintainability and also on merits.

The applicant has filed its rebuttal to the grounds raised by the respondent. It has been inter-alia stated as follows:

According to the department, the Applicant has filed a chart (certified by the Company Secretary) indicating that M/s. GE Pacific Pte Limited, Singapore (GE Singapore) and M/s. GE Energy Europe BV Netherlands (GE Netherlands) are intermediate holding companies of the Applicant and which in turn are wholly owned subsidiaries of M/s GE Holdings Luxembourg & Co. Sarl, Luxembourg ('GE Luxembourg'). However, the Balance sheet of the Applicant provides that GE Electric Company USA ('GE USA') is an ultimate holding company of the Applicant.

According to the department, no other documentary evidence has been provided to prove the status of the Applicant.

The Applicant submitted that GE USA is an ultimate holding company of all the GE entities. In other words, the Applicant is held by intermediate companies i.e. GE Singapore and GE Netherlands which in turn are wholly owned by GE Luxembourg. Similarly, GE Luxembourg through various intermediaries is wholly owned by GE USA. Therefore, the Balance Sheet provides that GE USA is the ultimate holding company of the Applicant. The Applicant is a wholly owned subsidiary of GE Luxembourg as well as GE USA. The Applicant enclosed a chart certified by the Company Secretary.

Therefore, the chart as certified by the Company Secretary submitted by the Applicant to support that the Applicant is a wholly owned subsidiary of GE Luxembourg and the statement in the Balance Sheet that the ultimate holding company of the Applicant is GE USA stands true.

As per the definition of 'subsidiary' under Section 4(1) (c) of the Companies Act, 1956, (in short "Companies Act") the Applicant would qualify as a 'subsidiary' of GE Luxembourg as well as GE USA.

Therefore, twice removed subsidiary is also a subsidiary of the first company. The Applicant is a wholly owned subsidiary of GE Luxembourg. Since, GE Luxembourg in turn is a wholly owned subsidiary of the GE USA, in terms of Section 4 (1) (c) of the Companies Act, the Applicant is a wholly owned subsidiary of GE Luxembourg as well as GE USA.

Since the ultimate holding company of the Applicant is GE USA, in terms of Section 4(1)(c) of the Companies Act, the Applicant is a wholly owned subsidiary of a foreign company and therefore is entitled to file an Application before the Authority for Advance Rulings.

According to the department, as per the present practice, the benefit of Notification No. 45/2005 Cus dated May 16, 2005 ('Custom Notification') is extended to the units in FTWZ-Arshiya including their clients, subject to the condition that the items/goods cleared from FTWZ should not be exempted from payment of CST/VAT as provided in the proviso of the notification. Applicant states that if the benefit of the Custom Notification has been extended to FTWZ-Arshiya as well as its clients, the same should also be available to the Applicant.

The department has put forth that the benefit of Custom Notification has been extended to all the clearances to DTA including stock transfer. The Applicant therefore, submits that even in the present case, the department should extend the benefit of the Custom Notification to the goods stock transferred by the Applicant from the FTWZ to its unit located in the DTA subject to the conditions mentioned in the Notification.

The department has sought for an evidence to prove that the goods cleared by the Applicant are not exempted from the payment of VAT/CST or an undertaking that the goods cleared from the FTWZ unit are not exempted from the payment of VAT. The Applicant submits that in Para 4 to 6 and 12 to 15 of the

Application, the Applicant has already submitted that the goods cleared from their FTWZ Unit are not exempted from the payment of VAT/CST neither under the SEZ Act nor under the VAT/CST laws.

As already stated above, the parts and components of wind operated electricity generators (as listed above) are not exempted by the Maharashtra Government from the payment of the value added tax and are subject to VAT @ 5%. Further, the Maharashtra Government has not issued any order to exempt sale of goods stock transferred by the Applicant. Further, even the department could not produce any evidence to show that the goods cleared by the Applicant are exempted from the payment of VAT/CST. The Applicant submitted vide Para 4 to 6 of Annexure I and Para 12 to 15 of the Application that the said goods are not exempt from VAT/CST.

The department has further stated that the activity in respect of which the present advance ruling is sought is an 'ongoing' activity in case of other importers. The Applicant submits that Section 96A(b) of the Finance Act provides for the category or class of persons who can file an advance ruling. Section 96C is that the activity on which advance ruling is sought should be a proposed business activity. It nowhere provides that the Applicant cannot file an advance ruling if such an activity is an ongoing activity for other importers. Therefore, the above contention of the department is baseless and hence incurred.

The department has stated that the Applicant has sought a clarification dated May 21, 2012 from the department on the present issue and was informed

about the position taken by the department. The Applicant in their letter has sought the guidance from the department on the present issue; however, the department did not communicate its position in writing. Further, the Commissioner is not statutorily bound to issue clarification. In other words, the Commissioner, in the capacity of a Customs officer does not have the power to issue clarification to the Applicant. The authority to issue any instruction, direction etc. vests with the CBEC. Therefore, the guidance sought from the Commissioner cannot be equated with the question pending before the Customs officer. Hence, the present application before the Hon'ble AAR is not barred by proviso (a) to Section 28-I of the Custom Act.

The department has relied upon an order of the Commissioner (Appeals) Pune, in the case of M/s. Serum Institute of India Limited wherein it was held that since no notification exempting the goods from sales tax was issued by the State Government, the goods cleared by the assessee by way of stock transfer were not exempted from payment of sales tax and hence the condition of Customs Notification could be considered to have been fulfilled, and the aforesaid decision is in favour of the Applicant.

Heard learned counsel of the applicant and the respondent. It is clear that the only question which needs to be adjudicated is as follows :

“Whether the goods stock transferred by the applicant SEZ unit to its DTA unit would be eligible for exemption from the payment of SAD under Notification No. 45/2005 Cus dated May 16, 2005?”

According to the applicant the goods are sent by way of stock transfer from the SEZ unit to its DTA unit. The position is crystal clear that Notification No. 45/2005 Cus exempts all goods cleared from the SEZ and brought to any of the place in India from the SAD levied thereon under Section 3(5) of the Tariff Act.

However, when such goods are sold in domestic tariff area and are exempted by the State Government from the payment of sales-tax or VAT such exemption is not available. The applicant makes a positive statement that such goods when sold in domestic tariff area are not exempted by the State Government from payment of sales-tax or VAT.

It is pointed out that under serials 82 and 103 of the Schedule C of MAVT Act the parts and components of wind operated electricity generators are subject to tax @ 5%. It is conceded position that goods imported by the applicant are not exempted by the State Government from the payment of VAT. It is to be noted that in case of stock transfer two persons are not involved, as the stock transfer is between the units of same legal entity. It is not a "sale" as defined under Section 2(24) of the MAVT Act, The inevitable conclusion is that VAT which is a tax on sale of goods within the state cannot be levied on stock transfer. The position whether there is a sale involved or mere stock transfer as claimed by the applicant has to be adjudicated by the concerned authorities. But so far as, present application is concerned the ruling is being given by holding the position that being a stock transferred no VAT is chargeable. However, if during any proceeding initiated under the MAVT Act it is found that the claim of the applicant is not factually

supportable, the Revenue Authority can decide that issue in accordance with law. It is therefore made clear that the present ruling is being rendered by treating the transaction on the factual scenario as projected by the applicant and not on analysis of the factual position. It is significant to note that section 6(A) of the CST Act deals with the burden of proof etc. in case of transfer of goods claimed otherwise than by way of sale. To put it differently, section 6A mandates that stock transfer of goods is not covered within the definition of “sale” and as such Central Sales-tax is not levied on stock transfer of goods. In this context a decision of the Hon’ble Supreme Court in A.V.Fernandez v. State of Kerala as [(1957) 8 STC 561]

“...There is a broad distinction between the provisions contained in the statute in regard to the exemptions of tax or refund or rebate of tax on the one hand and in regard to the non-liability to tax or non-imposition of tax on the other. In the former case, but for the provisions as regards the exemptions or refund or rebate of tax, the sales or purchases would have to be included in the gross turnover of the dealer because they are prima facie liable to tax and the only thing which the dealer is entitled to in respect thereof is the deduction from the gross turnover in order to arrive at the net turnover on which the tax can be imposed. In the latter case, the sales or purchases are exempted from taxation altogether. The legislature cannot enact a law imposing or authorizing the imposition of a tax thereupon and they are not liable to any such imposition of tax. If they are thus not liable to tax, no tax can be levied or imposed on them and they do not come within the purview of the Act at all. The very fact of their non-liability to tax is sufficient to exclude them from the calculation of the gross turnover as well as the

next turnover on which sales tax can be levied or imposed...  
**(Underlined for emphasis)**

Therefore the answer to the question formulated by the applicant on the facts as projected by the applicant is in the affirmative. However, as noted supra if at the time of adjudication, the adjudicating authority finds that the claim of stock transfer of goods is not legally supportable, it would be open to the Authority to arrive at such conclusion as is available in law.

The application is accordingly disposed of.

Sd/-  
(Y.G.Parande)  
Member

Sd/-  
(Dr. Justice Arijit Pasayat)  
Chairman