

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST ZONAL BENCH : AHMEDABAD**

REGIONAL BENCH - COURT NO. 3

EXCISE Appeal No. 11725 of 2014-DB
CROSS Application No.: -**E/CROSS/15036/2014**

[Arising out of Order-in-Original/Appeal No BVR-EXCUS-000-APP-182-183-13-14 dated 28.02.2014 passed by Commissioner of Central Excise and Service Tax-BHAVNAGAR]

Commissioner of Central Excise & ST, Bhavnagar.... Appellant

Plot No.6776/B-1, Siddhi Sadan, Narayan Upadhyay
Marg, Beside Gandhi Clinic, Near Parimial Chowk,
Bhavnagar, Gujarat-364001

VERSUS

Ultratech Cement Limited

.... Respondent

PO : Kovaya, Taluka : Rajula,
AMRELI, GUJARAT.

APPEARANCE :

Shri Ajay Kumar Samota, Superintendent (AR) for the Appellant-Revenue
Shri Ishan Bhatt, Advocate for the Respondent-Assessee

CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)

DATE OF HEARING : 27.06.2023

DATE OF DECISION: 21.07.2023

FINAL ORDER NO. 11553/2023

RAMESH NAIR :

Brief facts of the case are that M/s. Ultratech Cement Limited is engaged in the manufacture and sale of cement at their factories located in Kovaya (Gujarat Cement Works) and Jafrabad (Narmada Cement Works). The appellant have cleared cement from above factories to developers of Special Economic Zone (SEZ) during April 2007 to December 2008. The said clearances of cement to Special Economic Zone developers were made without payment of excise duty under bond/LUT in accordance with the provisions of Section 26(1)(c) of the Special Economic Zone Act, 2005 read with Rule 30 of the Special Economic Zone Rules, 2006 and Rule 19 of Central Excise Rules, 2002. The case of the department is that during the relevant period the provisions of Rule 6 (3) of Cenvat Credit Rules, 2004 was

applicable in respect of supplies made to SEZ. Accordingly the respondent is liable to pay an amount equal to 10% of the value of the cement cleared to SEZ developers under Rule 6(3)(b) of Cenvat Credit Rules, 2004 during the period April 2007 to December 2008.

2. Shri Ajay Kumar Samota, learned Superintendent (AR) appearing on behalf of the Revenue/ Appellant submits that the relevant amendment in Rule 6(3) in respect of unit in SEZ or developers of SEZ was brought into effect vide Notification No.50/2008-CE (NT) dated 31.12.2008, therefore for the period prior to 31.12.2008 the respondent was liable to pay an amount equal to 10% of the value of goods supplied to SEZ in terms of Rule 6(3)(b) of Cenvat Credit Rules, 2004. Therefore, learned Commissioner (Appeals) has erred in dropping the demand under Rule 6(3)(b) which was rightly confirmed by the Adjudicating Authority. He also reiterated the grounds of appeal.

3. Shri Ishan Bhatt learned Counsel appearing on behalf of the respondent at the outset submits that the amendment in Rule 6(6)(i) of Cenvat Credit Rules, 2004 was brought by way of substitution therefore the same is clarificatory in nature and has retrospective effect. He relied upon the following judgments:-

- (a) Pankaj Extrusion Limited vs. C.C.E. - 2023 (6) TMI 586-CESTAT
- (b) Blue Star Limited vs. C.C.E. - 2019 (366) ELT 919 (Tri- Mum.)
- (c) Ultratech Cement Limited vs. C.C.E. - 2015 (315) ELT 238 (Tri.)
- (d) U.O.I. vs. Steel Authority of India Limited -2013 (297) ELT 166 (Chhattisgarh)
- (e) Commissioner vs. India Cements Limited - 2020 (34) GSTL 425 (Telangana)

- (f) C.C.E. vs. Dee Development Engineers Pvt. Limited - 2016 (339) ELT 560 (P & H)
- (g) C.C.E. vs. Fosroc Chemicals (India) Pvt. Limited - 2015 (318) ELT 240 (Kar.)
- (h) Vijayaa Steels Limited vs. C.C.E.- 2021 (10) TMI 185-CESTAT
- (i) Tulsyan Nec Limited vs. C.C.E. - 2022 (4) TMI 199-CESTAT
- (j) Saurashtra cement Limited vs. C.C.E. - 2013 (7) TMI 756-CESTAT
- (k) Sujana Metal Products Limited vs. CCE 0 2011 (273) ELT 112 (T)
- (l) Commissioner vs. Sujana Metal Products Limited - 2016 (342) ELT A115 (AP)
- (m) U.O.I. vs. Kamalakshi Finance Corporation Limited - 1991 (55) ELT 433 (S.C.)
- (n) C.C.E. vs. Lotus Power Gears (P) Limited - 2017 (346) ELT 347 (Kar.)

He submits that this issue is no more *res-integra* as of now and is settled in the case of Pankaj Extrusion Limited (*supra*) as well as by different benches of Tribunal and High Courts and held that Notification No. 50/2008-CE (NT) dated 31.12.2008 shall operate with retrospective effect. As a result the supplies made to SEZ developers shall also be eligible for Rule 6(6)(i) of Cenvat Credit Rules, 2004 even for the period prior to 31.12.2008.

4. We have carefully considered the submissions made by both the sides and perused the record. We find that limited issue to be decided in the present case is that whether the amendment made in Rule 6(6)(i) of Cenvat Credit Rules, 2004 vide Notification No. 50/2008-CE(NT) dated 31.12.2008 can be applied retrospectively and consequently the demand of an amount equal to 10% value of cement supplied to SEZ developers is liable or otherwise. For the ease of reference the amendment in Rule 6(6)(i) of Cenvat Credit Rules, 2004 is reproduced as under:-

Cenvat Credit Rules, 2004 — Third amendment of 2008

In exercise of the powers conferred by section 37 of the Central Excise Act, 1944 (1 of 1944) and section 94 of the Finance Act, 1994 (32 of 1994), the Central Government hereby makes the following rules further to amend the CENVAT Credit Rules, 2004, namely :-

1. (1) These rules may be called the CENVAT Credit (Third Amendment) Rules, 2008.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. In the CENVAT Credit Rules, 2004, in rule 6, in sub-rule (6), for clause (i), the following clause shall be substituted, namely :-

“(i) cleared to a unit in a special economic zone or to a developer of a special economic zone for their authorized operations; or”.

5. From the above amendment, it can be seen that amendment is by way of substitution in Rule 6 (6)(i) of Cenvat Credit Rules, 2004. It is settled law that any amendment brought by way of substitution is treated as if the said amendment was existing even prior to the date of amendment and accordingly the benefit of said amendment can be extended for the past period retrospectively. Moreover, in the present case, the supplies made to SEZ is always considered as export therefore, against the export demand equal to 10% value of goods supplied to SEZ is otherwise not sustainable. This issue has been considered in various following decisions.

(a) In the case of Pankaj Extrusion Limited (supra), the Tribunal passed the following order;

“04. We have carefully considered the submissions made by both the sides and perused the records. As regard first issue that whether the appellant is liable to pay 10% on the value of the goods supplied to SEZ in terms of Rule 6(3) of Cenvat Credit Rules, 2004, the supplies made to SEZ is considered as export even as per the SEZ Act therefore even though by Notification No. 50/2008-CE (N.T.) in Rule 6(6) specific clause (v) was added, before that also the supplies made to SEZ is considered as export of goods. In **case** of export of goods neither the duty on inputs/input service nor duty on the final product are exported. Moreover, keeping in view that the supplies made to SEZ is export, the legislature has incorporated a specific entry by Clause (v) of Rule 6(6) of Cenvat Credit Rules, 2004 by way of substitution therefore, this amendment may be taken as retrospective also. This issue is covered by the judgment cited by the appellants hereinabove accordingly, we are of the clear view that in respect of supplies made to SEZ, payment of 10% in terms of Rule 6(3) of Cenvat Credit Rules, 2004 does not apply. Accordingly, demand on this ground is set aside.”

(b) In the case of Blue Star Limited (*supra*), a similar view has been taken by the Tribunal. The order is reproduced below:

“The issue involved in the present case is that whether demand under Rule 6(3)(b) of Cenvat Credit Rules, 2004 is maintainable in respect of goods supplied to SEZ Developers during the period 2005-08.

2. Shri Narendra Pati, Learned C.A. appearing on behalf of the appellant submits that this issue has been settled by various judgments of this Tribunal according to which the demand of Cenvat credit under Rule 6 is not sustainable, even prior to 31-12-2008 when the Rule 6 was amended vide Notification No. 50/2008-C.E. (N.T). He placed reliance on the judgment of the Hon’ble Karnataka High Court in the case of *Commissioner of Central Excise, Bangalore-III v. Lotus Power Gears (P) Ltd.* - [2017 \(346\) E.L.T. 347](#) (Kar.).

3. Shri A.B. Kulgod, Learned Asstt. Commissioner (AR) appearing on behalf of the Revenue reiterates the findings of the impugned order.

4. On careful consideration of the submissions made by both sides and perusal of the records, we find that the issue is no longer *res integra* as the same is settled in various judgments including the judgment cited by the Learned Counsel in the case of *Lotus Power Gears (P) Ltd.* (*supra*). The Tribunal has taken consistent view that the supply made to the SEZ Developers is considered as export even prior to Notification No. 15/2008-C.E. (N.T.) applying the provisions of SEZ Act, 2005. Therefore, the impugned order is not sustainable, hence the same is set aside. Appeal is accordingly allowed.”

(c) A similar view was taken in the appellant’s own case of their other unit by Mumbai Bench of this Tribunal in Ultratech Cement Limited (*supra*), is reproduced:

“5.2 In the present case, it is undisputed that the finished goods manufactured and cleared by the appellants to the contractors of SEZ units/SEZ developers are subject to a rate of duty under the First Schedule to the Central Excise Tariff Act, 1985 and are not wholly exempt from payment of duty. Further, there is no notification issued under Section 5A(1) of the Central Excise Act, which grants exemption from excise duty to goods manufactured and cleared by a DTA unit to the contractors of SEZ units/SEZ developers. Therefore, it is submitted that both the conditions required to be fulfilled for the goods in question to qualify as ‘exempted goods’ under Rule 2(d) of the Cenvat Credit Rules, are not satisfied in the present case. Hence, the finished goods cleared by the appellants to the contractors of SEZ units/SEZ developers are not exempted goods. Accordingly, the provisions of Rule 6(1), 6(2) and 6(3) of Cenvat Credit Rules, 2004 are not attracted in the present case.

6. The appellant also relies on the ruling of the Hon’ble High Court of Chhattisgarh in the case of *UOI v. Steel Authority of India Ltd.* - [2013 \(297\) E.L.T. 166](#) (CG), wherein the question involved was whether “the benefit provided by the substituted sub-rule 6(6)(i) in the 2004 Rules can be availed on the date prior to its substitution in the 2004 Rules or not and whether the substituted sub-rule 6(6)(v) is retrospective or not.” The facts in that case are that the assessee was engaged in manufacture of Iron & Steel products both dutiable as well as exempted goods and supplied by them to the developers of SEZ. However, it neither maintained separate account as required under

sub-rule 6(2) nor it had paid 10% of the value of the exempted goods under sub-rule 6(3)(2) of the Cenvat Credit Rules, 2004. The Revenue issued show cause notice as to why 10% of the total value of the exempted goods be not recovered from it under sub-rule 6(3)(b) of the 2004 Rules and same was upheld on the ground that at the relevant time the clearances of the goods to the developers of SEZ was not covered by sub-rule 6(6)(i), the substituted sub-rule 6(6)(i) was prospective and the assessee cannot take benefit of the same. The Hon'ble High Court examined the difference between the tax and duty, nature of excise and customs duties. The following paragraphs of the judgment are worth taking note of :-

“32. The Government of India introduced a policy on 1-4-2000 for setting up of the Special Economic Zones (SEZ), with a view to provide an internationally competitive and hassle free environment for exports. The units could be set up in the SEZ for manufacture of goods and rendering services. They were to be net foreign exchange earner and were not to be subjected to any pre-determined value addition or minimum export performance requirements.

33. Initially, in order to implement the aforesaid policy, the Customs Act was amended and Chapter XA with Sections 76A to 76H was inserted. Subsequently, the SEZ Act was enacted and Chapter XA of the Customs Act was deleted.

34. Section 2 of the SEZ Act is titled 'Definitions'. It provides as follows :

- Sub-section (g) of Section 2 [sub-section 2(g)] of the SEZ-Act defines 'developer'. It means a person or a State, which is granted a letter of approval under sub-section (10) of section 3 [Section 3(10)] of the SEZ Act by the Central Government and includes an authority and a co-developer;
- Sub-section (m) of Section 2 [sub-section 2(m)] defines the word 'export'. It means supplying goods, or providing services, from the domestic tariff area to a unit or developer.
- Sub-section (zc) of Section 2 [sub-section 2(zc)] defines the words 'existing unit' and 'unit'. It means, a unit which has been set up by an entrepreneur in a SEZ and includes an existing unit.

35. Section 51 of the SEZ Act is titled 'Act to have overriding effect'. It provides that the SEZ Act will have effect notwithstanding anything contained in any other law for the time being in force or in any other instrument. It has overriding effects over any other law and in case of conflict, the SEZ Act is to prevail.

36. The SEZ Act is within the territorial limits of the country; the goods supplied to the unit or to the developer in SEZ do not go outside the country, yet, in view of the definition in Section 2(m) of the SEZ Act, they are to be treated as export.

37. In the present case, the assessee had supplied goods from the domestic tariff area to a developer and it is to be treated as an export in view of sub-section 2(m) of the SEZ Act. In case it is treated to be export then all benefits as given to export under any other law should be given.”

7. The learned Addl. Commissioner (AR) appearing for the Revenue relies upon the impugned orders.

8. Having considered the rival contentions, we are in agreement with the reasoning and findings recorded by the Hon'ble High Court of Chhattisgarh in *Steel Authority of India Ltd.* (supra) holding that the amendment, under Rule 6(6)(i) made on 31-12-2008 is

clarificatory in nature and is applicable retrospective from the date when the 2004 Rules were implemented. Accordingly, the impugned orders are set aside and the appeals are allowed with consequential relief, if any, in accordance with law.”

6. In view of the above judgments it can be seen that the issue is no longer *res-integra* as the same has been decided in favour of the assessee. Accordingly, the impugned order is upheld and the Revenue’s appeal is dismissed. Cross objection also disposed of.

(Pronounced in the open court on 21.07.2023)

(Ramesh Nair)
Member (Judicial)

(C L Mahar)
Member (Technical)

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