

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE**

REGIONAL BENCH - COURT NO. 1

Central Excise Appeal No. 1021 of 2009

[Arising out of Order-in-Original No. 18/09 dated
26/10/2009 passed by CCE, Bangalore]

**Greenesol Power Systems Pvt
Ltd.**

No.995, Service Road, Rpc Layout,
Vijayanagar
Bangalore

Appellant(s)

560040

VERSUS

C.C.E.-Bangalore-ii

PB 5400 CR BUIDING...QUEENS ROAD,
BANGALORE,
KARNATAKA
560001

Respondent(s)

Appearance:

Shri B.N.GURURAJ ADV
"Rathna Krupa" No.20/A National High
School road,V.V. PURAM
Bangalore
Karnataka
560004

For the Appellant

Shri Rama Holla, Superintendent(AR)

For the Respondent

CORAM:

HON'BLE SHRI S.S GARG, JUDICIAL MEMBER

HON'BLE SHRI P. ANJANI KUMAR, TECHNICAL MEMBER

Date of Hearing: 27/09/2019

Date of Decision:09/01/2020

Final Order No. 20039 /2020

Per : S.S GARG

The present appeal is directed against the impugned order
dt. 26/10/2009 passed by the Commissioner of Central Excise whereby

the Commissioner has confirmed the demand of amount of Rs.58,41,780/- under Rule 14 and also imposed equal penalty. The Commissioner has also demanded interest under Section 11AB but the amount of interest has not been quantified.

2.1. Briefly the facts of the present case are that the appellants are engaged in the manufacture of excisable goods viz. control panels and parts thereof, falling under chapter heading 853710 and 853810 of the schedule to the CETA, 1985 and are availing the benefits under CENVAT Credit Rules, 2004. On scrutiny of monthly ER1 returns filed by the appellant with the Range Officer, it was noticed that the appellant has cleared the finished goods at 'nil' rate of duty, to their customer viz. M/s. Vikas Telecom Ltd., Devarabeesanahalli, Varthur Hobli, Bangalore – 560 037, in terms of the provisions of Rule 6(6) of CENVAT Credit Rules, 2004 claiming that the goods were cleared to an SEZ unit. However, a detailed verification of the records by the officers revealed that the said M/s. Vikas Telecom Ltd., was not a SEZ unit but a SEZ developer. The total value of the goods cleared by the assessee to M/s. Vikas Telecom Ltd. without payment of duty during the period 04/12/2007 to 31/03/2008 is Rs.5,44,20,000/-. Appellants were issued two show cause notices. The allegation in both the show-cause notices are stated herein below:-

Show-cause notice dt. 30.07.2009:-

- i. An amount of Rs.54,42,000/- being the amount equivalent to 10% of the value of the excisable goods amounting to Rs.5,44,20,000/- cleared to SEZ developer during the period from 04.12.2007 to 31/03/2008, should not be demanded from them in terms of the provisions of Rule 14 of the CENVAT Credit Rules, 2004 read with proviso to Section 11A of the Central Excise Act, 1944.
- ii. Interest should not be demanded from them in terms of Rule 14

of CENVAT Credit Rules, 2004 read with Section 11AC of the Central Excise Act, 1944 and

- iii. Penalty should not be imposed on them in terms of Rule 15(2) of CENVAT Credit Rules 2004 read with Section 11AC of the Central Excise Act, 1944.

Show-cause notice dt. 04/08/2009:-

- i. An amount of Rs.3,99,780/- being the amount equivalent to 10% of the value of the excisable goods amounting to Rs.39,97,800/- cleared to SEZ developer during the months of August 2008 and September 2008 should not be demanded from them in terms of the provisions of Rule 14 of CENVAT Credit Rules, 2004 read with Section 11A of the Central Excise Act, 1944;
- ii. Interest should not be demanded from them in terms of Rule 14 of CENVAT Credit Rules, 2004 read with Section 11AB of the Central Excise Act, 1944 and
- iii. Penalty should not be imposed on them in terms of Rule 15(1) of CENVAT Credit Rules, 2004.

2.2. The appellant filed detailed reply to the show-cause notices and raised the defence in support of their claim that supplies to the SEZ developer are exports and entitled to all exports benefits. The appellant in their reply have also given the decisions of various courts whereby their case is covered in their favour. After considering the submissions of the appellant, the Commissioner has rejected the defence of the appellant and confirmed the demand.

3. Heard both sides and perused the records.

4. Learned counsel for the appellant submitted that the

impugned order is not sustainable as the same has been passed without properly appreciating the facts and the law. He further submitted that in reply to the show-cause notices, the appellant raised various defence but the same have not been considered by the Commissioner while passing the impugned order. He further submitted that SEZ scheme is equally applicable both to the developer of SEZ and the SEZ unit and no disparity can be made in the treatment of the two entities insofar as the benefit of exemption is concerned. He further submitted that sales made by the DTA to SEZ units or to a developer were treated as physical exports and DTA are exempted from payment of tax. He further submitted that the appellant's supplies to SEZ developer are exports and not exempt goods and the Department cannot treat such supplies as exempted supplies and demand of 10% amount from the appellant as they had not maintained separate account for inputs used in its manufacture. He also submitted that supply to SEZ developer cannot be equated to removal of exempted goods as defined under Rule 2(d) of the CENVAT Credit Rules, 2004. He also submitted that sub-rule 6 of Rule 6 excludes exports from the operation of Rule 6(1) and when the supplies are under LUT bond without payment of duty, the credit taken is saved under clause (v) of Rule 6(6). He also submitted that when the law treats supplies to SEZ developer as exports, the Department cannot compel the appellant to follow Rule 6(2) of the CCR. He also submitted that though SEZ Act and Rules recognizes that DTA supplies to the developer as exports, the exclusion clause (i) of sub-rule 6 of Rule 6 contained only SEZ unit. The Revenue realized this lapse and amended the clause to include SEZ developer also by Notification No.50/2008-CE(NT) dt. 31/12/2008. He further submitted that the amendment carried out vide Notification No.50/2008 is applicable retrospectively as the said amendment is by way of substitution whereas the Commissioner in the impugned order has held that this amendment is prospective in nature and whereas the period of dispute in the present case is prior to 31/12/2008. Therefore as per the

Commissioner, the appellants are not entitled for the benefit of the same. Learned counsel also submitted that this issue is no more res integra and has been settled by the High Court of Karnataka in the case of CCE&ST, Bangalore Vs. Fosroc Chemicals (India) Pvt. Ltd. [2015(318) ELT 240 (Kar.)] wherein it has been held by the Hon'ble High Court that the amendment carried out in Rule 6(6)(i) by way of Notification No.50/2008-CE is applicable retrospectively.

5. On the other hand, the learned AR defended the impugned order and submitted that the appellant had made clearances to M/s. Vikas Telecom Ltd. which is a SEZ developer without payment of Central Excise duty and availed the cenvat credit on the inputs used for the manufacture of such goods. He further submitted that the appellant did not maintain a separate account of inputs used for the manufacture of dutiable goods and exempted goods. Therefore the demand of 10% of the price of the goods supplied to SEZ developer is sustainable in view of Rule 6. He further submitted that subsequently the Rule 6(6)(i) was amended by Notification No.50/2008 to include the supplies made to SEZ developers also; but the amendment carried out by the Notification No.50/2008 is not available to the appellant since the period of dispute is prior to this amendment and the said amendment is prospective in nature and cannot be applied retrospectively.

6. After considering the submissions of both the parties and perusal of the material on record, we find that the only issue to be decided in both the show-cause notices dt. 30/07/2009 and 04/08/2009 is whether the assessee is required to pay an amount of 10% of the value of the goods as per Rule 6 of CCR in respect of items manufactured and sold to the SEZ developer during the period from 04/12/2007 to 31/03/2008 and August, 2008, September 2008 respectively. Further we find that the appellant have made supplies to SEZ developer and not a unit in SEZ but his contention is that supplies

made to SEZ developer is also considered as export because the appellant has cleared the goods to the SEZ developer under Rule 19 of CCR 2002 by filing ARE1 form and necessary proof of exports were being filed with the Department. Further we find that prior to the amendment in Rule 6(6)(i) by way of notification No.50/2008, it is only the SEZ unit which was mentioned in the Rule 6(6) for exclusion and not SEZ developer. Subsequently vide the said Notification No.50/2008, the said notification has amended the Rule 6(6)(i) of CCR by substituting the word cleared to unit in a Special Economic Zone or a developer in SEZ for their authorized operations. As per the appellant, this amendment within the Rule 6(6)(i) is applicable retrospectively whereas as per the Department, it is applicable prospectively. This issue is now no more res integra in view of the decision of the Karnataka High Court in the case of Fosroc Chemicals (India) Pvt. Ltd. wherein it has been held that the amendment carried out in Rule 6(6) by way of Notification No.50/2008 was retrospective. Here, it is pertinent to reproduce the substantial question of law framed by Hon'ble High Court in para 4 of the said judgment and subsequent findings by the Hon'ble High Court which is reproduced herein below:-

4. The question that arises for our consideration in these appeals are,

Whether the Third amendment of 2008 to the Cenvat Credit Rules, 2004, extending the benefit of exemption from reversal of Cenvat credit on inputs used for manufacture in case of excisable goods, removed without payment of duty which are either cleared to a unit in a special economic zone or to a developer of a special economic zone for their authorized operation, is to be construed as prospective in operation or retrospective?

5. Rule 6 of Cenvat Credit Rules 2004 which provide the said benefit prior to amendment reads as under :

“6. Obligation of manufacturer of dutiable and exempted goods and provider of taxable and exempted services.

.....

Sub-rule (6) clause (i) reads as under :

Sub-rule (6) The provisions of sub-rules (1), (2), (3) and (4) shall not be applicable in case the excisable goods removed without payment of duty are either-

(i) cleared to a unit in a special economic zone.”

6. *As is clear from the aforesaid provision, the benefit of non-reversal/ maintenance of separate inventory was extended when the excisable goods were cleared to a “unit” in a special economic zone. The said benefit was not extended when the excisable goods removed without payment of duty or cleared to a “developer” of a special economic zone for their authorized operation. However, 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 amended the Cenvat Credit Rules, 2004 by issue of a notification as under :-*

Notification: 50/2008-C.E. (N.T.) dated 31-Dec-2008

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 “.

Therefore, from 31-12-2008 the date of notification, the said benefit was also extended to excisable goods cleared to a “developer” of a special economic zone for their authorised operation.

7. *The contention of the Revenue is that the statutory provision of the notification referred to supra became effective from 31-12-2008 as per para 1(2) of the notification issued by the Government of India and therefore, the finding of the Tribunal that the notification is effective retrospectively from 10-9-2004 is beyond the scope of statutory provision and therefore, the impugned order is liable to be*

set-aside.

8. *Per contra*, the learned counsel appearing for the assessee supported the impugned order.

9. *What is the effect of “substitution” of a provision in the place of an existing one is no more res-integra. The Constitution Bench of the Hon’ble Apex Court in the case of Shamarao V. Parulekar v. The District Magistrate, Thana, Bombay & Others reported in AIR 1952 SC page 324, dealing with the scope of substitution of a provision by way of amendment held as under :-*

“When a subsequent Act amends an earlier one in such a way as to incorporate itself or a part of itself into the earlier, then the earlier Act must thereafter be read and construed (except where that would lead to a repugnancy, inconsistency or absurdity) as if the altered words had been written into the earlier Act with pen and ink and the old words scored out so that there is no need to refer to the amending Act at all.”

10. *Yet another Constitution Bench of the Hon’ble Supreme Court in the case of Shyam Sunder & Others v. Ram Kumar & Another reported in AIR 2001 SC page 2472, while dealing with the question whether a substituted provision necessarily means the amended provision is retrospective in nature has held as under :*

“A substituted section in an Act is the product of an amending Act and all the effects and consequences that follow in the case of an amending Act the same would also follow in the case of a substituted section in an Act.”

11. *In fact,, the Division Bench of this Court in the case of SHA Chunnilal Sohanraj v. T. Gurushantappa reported in 1972 (1) MYS. L.J. PAGE 327 DB has held as under :*

“When an amending Act has stated that the old sub-section has been substituted by the new sub-section the inference is that the Legislature intended that the substituted provision should be deemed to have been part of the Act from the very inception.”

12. *Recently, the Hon’ble Apex Court in the case of Government of India v. Indian Tobacco Association reported in 2005 (187) E.L.T. PAGE 162 (S.C.), while dealing with the exemption notification which was issued by way of substitution., held as under :*

“15. The word ‘substitute’ ordinarily would mean ‘to put (one) in place of another’, or ‘to replace’. In Black’s Law Dictionary, Fifth Edition, at page 1281, the word ‘substitute’ has been defined to mean ‘To put in the place of another person or thing’ or ‘to exchange’. In Collins English Dictionary, the word ‘substitute’ has been defined to mean ‘to serve or cause to serve in place of another person or thing; ‘to replace (an atom or group in a molecule) with (another atom or group)’; or ‘a person or thing that serves in place

of another, such as a player in a game who takes the place of an injured colleague’.

16. By reason of the aforementioned amendment no substantive right has been taken away nor any penal consequence has been imposed. Only an obvious mistake was sought to be removed thereby.

17. There cannot furthermore be any doubt whatsoever that when a person is held to be eligible to obtain the benefits of an exemption notification, the same should be liberally consumed.”

13. The Parliament has enacted the Special Economic Zones Act, 2005 (The SEZ Act for short) to provide for the establishment, development and management of the Special Economic Zones for the promotion of exports and for matters connected therewith or incidental thereto. Section 53 of the Act declares that a special economic zone shall, on and from the appointed day, be deemed to be a territory outside the Customs territory of India for the purposes of undertaking the authorized operations. The word “export” has been defined under Act at Section 2(m). According to the definition of the word export, vide Section 2(m)(ii) “export” means supplying goods or providing services, from the Domestic Tariff Area to a Unit or Developer. Such exports were exempted from duty of Central Excise under Section 26 of the SEZ Act, 2005 and consequently application of Cenvat Credit Rules. Section 151 of the Special Economic Zones Act, 2005, overrides the provision of all other laws for the time being in force, notwithstanding anything inconsistent therein with the provision of the Special Economic Zones Act, 2005. This section therefore overreaches and eclipses the provisions of any other law containing provisions contrary to the SEZ Act, 2005. Though the definition of the word “export” in the SEZ Act, in Sec. 2(m) included supply of goods to a “Unit” or “Developer”, in clause (i) of sub-rule (6) of Rule 6 of the Cenvat Credit Rules, 2004 the word “Developer” was conspicuously missing and only “unit” was included before the 2008 amendment. It is in that context the aforesaid amendment by Notification No. 50/2008 C.E. (N.T), dated 31-12-2008 was brought in, to clarify the doubt. As the said amendment is clarificatory in nature, that is the reason why it was brought by way of “substitution”. The effect of the said “substitution” is that the Cenvat Rules 2004 are to be read and construed as if the altered words had been written into the Rules of 2004 with pen and ink and the words “to a developer of the SEZ for their authorized operation” was there from the inception. This is the understanding of the Government as is also clear from the circular issued by the C.B.E.&C. bearing No. 29/2006-Cus., dated 27-12-2006 wherein clause 4 reads as under :-

”4. In the light of the aforesaid provisions, with effect from 14-3-2006, Chapter XA of the Customs Act, 1962, the SEZ Rules, 2003, the SEZ (Customs Procedure) Regulations, 2003, and the exemption Notification No. 58/2003-C.E., dated 22-7-2003 regarding the

supply of goods to SEZ units & SEZ developers have become redundant. Consequently the supplies from DTA to a SEZ unit, or to SEZ developers for their authorized operations inside a SEZ notified under sub-section (1) of Section 4 of the Act, may be treated as in the nature of exports.”

14. Therefore, it is clear, the said amendment has to be construed as retrospective in nature and the benefit of Rule 6(6)(i) as amended in 2008 has to be extended to the goods cleared to a “developer” of a Special Economic Zone for their authorized operations. Therefore, we do not see any merit in these appeals.

15. The substantial question of law is answered in favour of the assessee and against the Revenue.

7. The ratio of the above said decision is squarely applicable in the present case. Therefore by following the ratio of the said decision, we are of the considered view that the impugned order is not sustainable in law and therefore we set aside the impugned order by allowing the appeal with consequential relief, if any.

(Order was pronounced
in Open Court on **09/01/2020**)

(S.S GARG)
JUDICIAL MEMBER

(P. ANJANI KUMAR)
TECHNICAL MEMBER

Raja...