CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Applications involved:

Central Excise Early Hearing Application No.20371 of 2021
in
Central Excise Appeal No. 219 of 2010

[Arising out of Order-in-Original No. 19/09 dated 03.11.2009 passed by the Commissioner of Central Excise, Bangalore.]

ALUFIT (INDIA) PVT LTD
17-A, PHASE II,
PEENYA INDUSTRIA AREA,
BANGALORE 560 058

Appellant(s)

VERSUS

Commissioner of Service Tax
1ST TO 5TH FLOOR,
TTMC BUILDING, above BMTC BUS STAND,DOMLUR
BANGALORE - 560071,
KARNATAKA

Respondent(s)

Appearance:

Mr. Solomon C. Raj, Advocate (SOLOMON C ASSOCIATES) for the Appellant.

Shri P. Gopakumar, Additional Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE SHRI RAMESH NAIR, JUDICIAL MEMBER
HON'BLE SHRI P. ANJANI KUMAR, TECHNICAL MEMBER

Final Order No. 20153__ /2022

Date of Hearing: 28/03/2022
Date of Decision: 01/04/2022

Per : RAMESH NAIR

This appeal is directed against the Order-in-Original No. No. 19/09 dated 03.11.2009 whereby demand of Rs.1,97,01,669/- being 10% of the price of the goods cleared to SEZ Developers under Rule 14 of CENVAT Credit Rules, 2004 read with proviso to Section 11A of Central Excise Act, 1944 was confirmed and consequently, interest and equivalent penalty was also confirmed.

2. Shri Solomon C. Raj, learned counsel appearing on behalf of the appellant submits that the issue is no longer under dispute in the light of the retrospective amendment made in the Finance Act, 2012 under Section 144 whereby it was amended to the extent that excisable goods supplied to SEZ Developers, the provision of subrule (1), (2), (3) and (4) of Rule 6 of CENVAT Credit Rules, 2004 shall not applicable. He also places reliance on the judgment of this Tribunal in the case of Saint Gobian Gyproc India Ltd. vs. CCE, Thane-I vide Final Order No. A/ 85396/2019 dated 27.2019 in Appeal No. E/775/2011 and Sujana Metal Products Ltd. vs. CCE, Bangalore: 2011-TIOL-1173-CESTAT-BANG.

3. Shri P. Gopakumar, learned Authorised Representative appearing on behalf of the Revenue reiterates the findings of the impugned order.

4. We have carefully considered the submissions made by both sides and we find that as regards the demand of Rs.1,97,01,669/-, we find that the demand was made on the ground that the appellants are supplying excisable goods to SEZ developer, which is exempted under the Notification No.4/2004-ST and the appellant is required to reverse 10% of the value of the exempted excisable goods, in terms of Rule 6 of CENVAT Credit Rules, 2004. We find that by the Finance Act, 2012 under Section 144, Rule 6 was amended as under:

> **"144. Amendment of rule 6 of CENVAT Credit Rules, 2004.** -(7) In the CENVAT Credit Rules, 2004, made by the Central Government in exercise of the powers conferred by section 3 7 of the Central Excise Act, 1944, (1 of 1944). sub-rule (6A) of rule 6 as inserted by clause (ix) of rule 5 of the CENVAT Credit (Amendment) Rules, 2011, published in the Official Gazette vide notification of the Government of India in the Ministry of Finance (Department of Revenue) number GS.R. 134(E), dated the 1st March,2011 shall stand amended and shall be deemed to have been amended retrospectively, in the manner specified in column

(2) of the Eighth Schedule, on and from the date specified in column (3) of that Schedule, against the rule specified in column (1) of that Schedule.

(2) Notwithstanding anything contained in any judgment, decree or order of any court, tribunal or other authority, any action taken or anything done or purported to have been taken or done, on and from the 10th day of February, 2006, relating to the provisions as amended by sub-section (1), shall be deemed to be and deemed always to have been, for all purposes, as validly and effectively taken or done as if the amendments made by sub-section (1) had been in force at all material times.

(3) For the purpose of sub-section (1), the Central Government shall have and shall be deemed to have the power to make rules with retrospective effect as if the Central Government had the power to make rules under section 37 of the Central Excise Act, 1944, (1 0f 1944). retrospectively, at all material times.

The Eight Schedule
(See Section 144)

Provisions of CENV AT Credit Rules, 2004 to be amended	Amendment	Period of effect of amendment
(1)	(2)	(3)
Sub-rule (6A) of rule 6 of the CENV AT Credit Rules, 2004 as inserted by CENV AT Credit (Amendment) Rules, 2011 vide notification number GS.R 134(E), dated the 1st March,2011 [312011-Central Excise (N.T.), dated the 1st March, 2011].	In the CENVAT Credit Rules, 2004, in rule 6, after sub-rule (6), the following sub- rule shall be inserted with effect from the 10th day of February, 2006, namely.	From 10th February, 2006 to 28th February, 2011.
	"(6A) The provisions of sub-rules (1), (2), (3) and (4) shall not be applicable in case the taxable services are provided without payment of service tax, to a Unit in a Special Economic Zone or to a Developer of a Special Economic operations"	

6. From the above amendment through Finance Act, 2012 in the CENVAT Credit Rules, 2004, which has retrospective effect from 10.02.2006, the payments as prescribed under subrule (1), (2), (3) and

(4) of Rule 6 of CENVAT Credit Rules, 2004 are not required to be made by the appellant, in cases, where the services have been supplied under exemption to the SEZ Developers. This Tribunal, even without the aforesaid amendment, has taken a view that the supplies made to SEZ Developer amounts to export, therefore, the appellant is not required to pay any amount in terms of Rule 6 of CENVAT Credit Rules, 2004. The relevant judgments are reproduced below:

Saint Gobian Gyproc India Ltd. vs. CCE, Thane-I:

> "4. The requirement of neutralisation of ineligible CENVAT credit is waived for certain categories of clearances including exports and clearances to units in special economic zones without, admittedly, covering developers of special economic zones. With the coming into force of Special Economic Zones Act, 2005, effective from 10th 4 E/775/2011 February 2006, exemption of duties on goods cleared from the domestic tariff area for use of developers or units in special economic zone is accorded by that special statute which does not distinguish between a unit and a developer. The gap in operationalising of the exemptions between two different arms of the Central Government, i.e., Ministry of Finance and Ministry of Commerce, should not have created an artificial, and uncontemplated, distinction between such clearances effected to special economic zones. Section 2(m) of the Special Economic Zones Act, 2005 includes supply from domestic tariff area to a unit or developer in the definition of 'export' and section 51 of Special Economic Zones Act, 2005 mandates that this statute would prevail over any other in the event of a conflict.
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> 5. Therefore, notwithstanding a subsequent amendment in rule 6(6) to the CENVAT Credit Rules, 2004, to include developer of special economic zones within the escapement covered of rule 6 of the said Rules, the categorization as exports would itself suffice to exclude the applicability of the liability prescribed therein. In the decision in re Sujana Metal Products Ltd, it was held that:
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>> *'11. In the present case, taking into account the provisions of the erstwhile SEZ in Chapter XA of the Customs Act, the provisions in the SEZ Act and the clarifications of the Board (except the clarification dated 7-1-2009), it is apparent that the intention was to make available the benefits to SEZ developer for the authorized operations in addition to SEZ 5 E/775/2011*

> *units and therefore the amendment No. 50/2008-C.E. (N.T.), dated 31-12-2008 Cenvat Credit Rules, 2004 is applicable retrospectively. However, as the amendment by No. 50/2008 is only to Rule 6 of Cenvat Credit Rules, 2004, the question of extending the benefit of amendment to Cenvat Credit Rules, 2002 does not arise.'*

Likewise, in re Steel Authority of India Ltd it was held that:

> *'50. It is clear from the nature of the excise duty as it has been traditionally understood to be duty only on the manufacture of those goods that are to be consumed within the country and not on the goods to be exported. This is also framework of the Excise Act. As the supply of the goods to a developer of SEZ is treated to be export, there appears to be no reason why this benefit was not there, except that it was due to a mistake or inadvertence that the word developer was not initially included in the sub-rule 6(6)(i) of the 2004-Rules and the developers and units were not given same treatment.'*

Sujana Metal Products Ltd. vs. CCE, Bangalore:

"13. From the above, the following emerges.

a. For the period upto 9-2-2005, the supplies made to SEZ units are to be treated as export both for extending export benefits and for levy of duty in terms of SEZ provisions contained in Chapter XA of the Customs Act.

b. For the period from 10-2-2006, the definition of the term "export" under the Customs Act is not consistent with the definition of the term "export" under the SEZ Act. However, the definition of the term "export" under the SEZ Act shall prevail over the definition of term "export" under the Customs Act. Therefore, supplies made to SEZ from DTA units shall be treated as export.

c. Since both during the period prior to and w.e.f. 10-2-2006, the supplies made to SEZ are held to be "export", the application of provisions of Cenvat Credit Rules for recovery of amounts on goods supplied to SEZ units in terms of Rule 6 of CCR, 2002/CCR, 2004 does not arise.

d. The amendment to Rule 6(1) of the CCR, 2004 by the amending Notification No. 50/2008-C.E. (N.T.), dated 31-12-2008 shall be applicable w.e.f. 10-9-2004 when the CCR, 2004 came into existence and, therefore, exception provided under Rule 6(6) of Cenvat Credit Rules, 2004 shall be applicable to

> supply of exempted goods both to SEZ units and SEZ developers/promoters.
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> e. Appeals of the assessees deserve to be allowed and the appeals of the Department deserve to be rejected.
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> f. Incidentally, in the facts and circumstances of the case, the question of invoking extended period of limitation for demand of amounts and imposition of penalties does not arise."

7. From the above judgments and the amendment by Section 144 of the Finance Act, 2012, it is settled that the appellants are not required to pay any amount under Rule 6 in respect of supplies made to SEZ Developers, the appellant is not required to pay any amount in terms of Rule 6 of CENVAT Credit Rules, 2004. Accordingly, demand of Rs.1,97,01,669/- and corresponding interest and penalty are not sustainable. Hence, the impugned order is set aside. Appeal is allowed in above terms. The miscellaneous application for early hearing of the appeal filed by the appellant, also stands disposed of.

(Order pronounced in the Open Court on **01/04/2022**.)

RAMESH NAIR
JUDICIAL MEMBER

P. ANJANI KUMAR
TECHNICAL MEMBER

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