IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI

APPEAL NO: E/775/2011

[Arising out of Order-in-Appeal No: SB/54/Th-I/2011 dated 1st February, 2011 passed by the Commissioner of Central Excise (Appeals), Mumbai Zone – I.]

For approval and signature:

Hon'ble Shri C J Mathew, Member (Technical)
Hon'ble Dr Suvendu Kumar Pati, Member (Judicial)

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	:	Yes
2.	Whether it should be released under Rule 27 of CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	:	Yes
3.	Whether Their Lordships wish to see the fair copy of the Order?	:	Seen
4.	Whether Order is to be circulated to the Departmental authorities?	:	Yes

Saint-Gobain Gyproc India Ltd … ***Appellant***

versus

Commissioner of Central Excise
Thane – I …***Respondent***

Appearance:

Ms Anjali Hirawat, Advocate for appellant

Shri RK Dwivedi, Assistant Commissioner (AR) for respondent

CORAM:

Hon'ble Shri C J Mathew, Member (Technical)
Hon'ble Dr Suvendu Kumar Pati, Member (Judicial)

Date of hearing: 30/01/2019
Date of decision: 27/02/2019

ORDER NO: A/85396 / 2019

Per: C J Mathew

This appeal lies against order-in-appeal no. SB/54/Th-I/2011 dated 1st February, 2011 of Commissioner of Central Excise (Appeals), Mumbai Zone – I upholding recovery of ₹ 15,78,172/-, along with interest under section 11AB of Central Excise Act, 1944, and imposing penalty of like amount under section 11AC of Central Excise Act, 1944 read with rule 15(2) of CENVAT Credit Rules, 2004. According to Learned Counsel for the appellant, the goods on which CENVAT credit had been availed was deployed for the manufacture of excisable goods, *viz.*, 'gypsum board', 'jointing compound' and 'gypboard moisture resistant ultra' which was, *inter alia*, being cleared to developers of Special Economic Zone and, in view of the exemption granted to such clearance manufactured out of duty-paid inputs on which CENVAT credit had been availed, it was held that rule 6(3) of CENVAT Credit Rules, 2004 mandated payment of an amount equal to 10% of the sale value if separate accounts of inputs was not being maintained.

2. Learned Counsel points out that the issue itself had been decided by the Tribunal in *Sujana Metal Products Ltd v. Commissioner of Central Excise, Hyderabad [2011 (273) ELT 112 (Tri.Bang.)]*, affirmed by the Hon'ble High Court of Andhra Pradesh, by the Hon'ble High Court of Chattisgarh in *Union of India v. Steel Authority of India Ltd [2013 (297) ELT 166 (Chattisgarh)]* and by the Tribunal in *Ultratech Cement Ltd v. Commissioner of Central Excise, Nagpur [2015 (315) 238 (Tri.Mumbai)]* all of which had held that the clearances to Special Economic Zones are exports and, therefore, did not require specific exclusion in rule 6(6) of CENVAT Credit Rules, 2004 for escapement from rule 6(3) of CENVAT Credit Rules, 2004.

3. Learned Authorised Representative contends that the impugned order was correct in law as developers of special economic zone were brought to the purview of this exclusion only subsequently, *i.e.* with effect from 31st December 2008, implying that it was a deliberate omission till then. It is also contended that the claim for exclusion as export would also not be tenable as the definition of 'export' in Central Excise Rules, 1944 does not cover such transactions.

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

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.

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

> *'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*

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.'

6. Considering the above, we find that the impugned order has erred in upholding the liability of the appellant which we, therefore, set aside and allow the appeal.

(Pronounced in Court on 27/02/2019)

(Dr Suvendu Kumar Pati) | **(C J Mathew)**
Member (Judicial) | ***Member (Technical)***

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