CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH

Excise Appeal No. 1549 of 2012

(Arising out of Order-in-Original No. Belapur/Bel.II/RI/KA/Commr/2012-13/Bel dated 02.08.2012 passed by Commissioner of Central Excise, CBD Belapur)

Commr. of Central Excise, Belapur **Appellant**
1st floor, CGO Complex,
CBD Belapur,
Navi Mumbai 400 614.

Vs.

M/s. BASF India Ltd. **Respondent**
C-68, MIDC Turbhe,
Navi Mumbai 400 613.

Appearance:

Shri Anil Choudhary, Authorised Representative for the Appellant
Ms. Anjali Hirawat, Advocate for the Respondent

CORAM:

Hon'ble Mr. S.K. Mohanty, Member (Judicial)
Hon'ble Mr. P. Anjani Kumar, Member (Technical)

FINAL ORDER NO. A/**88529/2018**

Date of Hearing: 02.11.2018
Date of Decision: 02.11.2018

PER: S.K. MOHANTY

Briefly stated, the facts of the case are that the respondent herein is engaged in the manufacture of chemicals, falling under Chapter sub-heading No.3824 of the Central Excise Tariff Act, 1985. During the period from 28.07.2006 to 31.12.2008, the respondent had cleared the finished goods manufactured by it under ARE-1 to the "developers" of Special Economic Zone (SEZ), without payment of duty on the strength of letter of undertaking issued in terms of Rule 19 of the Central Excise Rules, 2002. Since the respondent did not maintain separate records as provided under Rule 6(2) of the Cenvat Credit Rules, 2004 and did not pay the amount equal to 10% of value of the exempted goods in terms of Rule 6(3) *ibid*, the department initiated show cause proceedings against the respondent, seeking for recovery of an amount of Rs.63,03,648/- along with interest and for imposition of penalty. The matter was adjudicated vide the impugned order dated 02.08.2012, wherein the proposals made in the show cause notice were dropped. In support of dropping of the show cause notice, the learned adjudicating authority has recorded the following observations:-

"23. In view of above, I hold that the goods cleared by the assessee to SEZS Developers are exported goods within the meaning of Section 2(m) of the SEZ Act, 2005 read with Rule 30 of the Rules ibid and all such removal of goods made by the assessee to the SEZ Developers are covered under clause (v) of sub rule (6) of the Rule 6 of the Cenvat Credit Rules, 2004 and hence the provisions of Rule 6(1)(2)(3) and (4) are not applicable to these clearances. Thus for the period prior to 31.12.2008 also the assessee is not liable to pay the amount equivalent to 10% of value of the goods cleared to SEZ Developers as they are covered under the exceptions clause 6 (6v)) of the CCR, 2004. Hence the demand made in the impugned SCN is not sustainable. As the demand itself is not sustainable, the question of demanding interest and imposing penalty does not arise."

2. Revenue has assailed the impugned order on the ground that the goods supplied to SEZ developers cannot be equated with exports and as such, the provisions of sub-rule (1), (2), (3) and (4) of Rule 6 are applicable for maintenance of separate records and for payment of amount equal to 10% of value of exempted goods cleared

from the factory. It has further been contended that the amendments made in sub-rule (6) of Rule 6 of the Cenvat Credit Rules, 2004 vide Notification No.50/08-C.E. (N.T.) dated 31.12.2008 shall not be retrospectively applied for providing the benefit of removal of excisable goods to a developer of SEZ.

3. Learned AR appearing for Revenue has reiterated the grounds urged in the appeal filed by Revenue. He further submitted that the decision of the Tribunal in the case of *Sujana Metal Products Ltd. vs. CCE, Hyderabad – 2011 (273) ELT 112 (Tri.-Bang.)*, holding that Rule 6(6)(i) *ibid* shall be retrospectively applicable, has been appealed against by Revenue before the Hon'ble High Court of Andhra Pradesh and as such, the said decision of the Tribunal cannot be relied upon to decide the present issue.

4. On the other hand, learned Advocate appearing for the respondent submitted that as per the provisions contained in the Special Economic Zones Act, 2005 and Special Economic Zones Rules, 2006, supply of goods to SEZ developers will be considered as exports and thus, the benefit provided under sub-rule (6) of Rule 6 *ibid* should be available for non-payment of the amount of exempted goods prescribed under sub-rule (3) of Rule 6 *ibid*. She further submitted that the amendment in Rule 6(6)(i) *ibid* vide Notification No.50/08-C.E. (N.T.) dated 31.12.2008 shall be retrospectively applicable to supply of goods to the developer of SEZ. In this context, she has relied upon the following judgments delivered by the judicial forums:

(i) *Sujana Metal Products Ltd. vs. CCE – 2011 (273) ELT 112 (Tri.-Bang.)* affirmed by Hon'ble High Court in 2016 (342) ELT A115 (AP);

(ii) *Advait Steel Rolling Mills Pvt. Ltd. vs. UOI – 2012 (286) ELT 535 (Mad.)*;

(iii) *UOI vs. Steel Authority of India Ltd. – 2013 (297) ELT 166 (Chattisgarh)*;

(iv) *Indo Alusys Industries Ltd. vs. CCE – 2015 (11) TMI 1742-CESTAT NEW DELHI*;

(v) *CCE vs. Fosroc Chemicals (I) Pvt. Ltd. & ors – 2014 (9) TMI 633 – KARNATAKA HIGH COURT*;

(vi) *Ultratech Cement Ltd. vs. CCE – 2015 (315) ELT 238 (T)*.

5. Heard both sides and perused the records.

6. Rule 6 of the Cenvat Credit Rules, 2004 deals with the situation of manufacture of dutiable as well as exempted goods. Sub-rule (1) of Rule 6 *ibid* provides that in respect of manufacture of exempted goods, no cenvat credit shall be allowed on the inputs used in such manufacture. Sub-rule (2) of Rule 6 *ibid* provides for maintenance of separate records for receipt, consumption and inventory of inputs meant for use in the manufacture of dutiable final product and the quantity of inputs meant for use in the manufacture of exempted goods and the manufacturer is only permitted to avail cenvat credit on such quantity of inputs which are intended for use in the manufacture of dutiable goods. An option has been provided under sub-rule (3) of Rule 6 to the manufacturer for payment of amount, in the event of non-maintenance of separate records. However, sub-rule (5) of Rule 6 *ibid* provided that the embargo created in sub-rule (1), sub-rule (2) and sub-rule (3) shall not be applicable, in case the goods are cleared to a unit in the Special Economic Zone. The said sub-rule (5) of Rule 6 was substituted by Notification No.50/08-C.E. (N.T.) dated 31.12.2008, wherein sub-rule (5) was renumbered as sub-rule (6). The effect of the amendment was that the developer of Special

Economic Zone was inserted. Now, the issue involved in this appeal for consideration by the Tribunal is, whether such amendment by way of substitution of Rule 6 would be applicable with retrospective effect or the same will be considered having prospective effect. The issue arising out of the present dispute is no more *res integra* in view of the above judgments relied upon by the learned Advocate for the respondent. By considering the provisions contained in SEZ Act and the Rules, various judicial forums have held that the amendment made in Rule 6(6)(i) in 2008 has to be construed as retrospective in nature and the benefit of amendment should be extended to the goods cleared to a developer of SEZ for the authorized operations.

7. In view of the well settled position of law, we do not find any infirmity in the impugned order passed by the learned adjudicating authority. Accordingly, the appeal filed by Revenue is dismissed.

(Pronounced in the open court)

(S.K. Mohanty)
Member (Judicial)

(P. Anjani Kumar)
Member (Technical)

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