IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.10.2018

CORAM :

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

C.M.A. No.2700 of 2015

The Commissioner of Central Excise
Chennai II Commissionerate,
M.H.U.Complex,
No.692, Anna Salai,
Nandanam,
Chennai-600 035 ... Appellant

-vs-

1.M/s.S.P.Fabricators Pvt Ltd.,
No.B-6, Ambattur Industrial Estate,
Chennai-600 058

2.The Customs Excise and Service
Tax Appellate Tribunal,
South Zone Bench,
Shastri Bhavan Annex 1st Floor,
26, Haddows Road,
Chennai-600 006 ... Respondents

Civil Miscellaneous Appeal filed under Section 35G of Central Excise Act, 1944 against the Final Order No.40862 of 2014, dated 06.08.2014, in Appeal No.E/727/2009-DB, on the file of the Customs Excise and Service Tax Appellate Tribunal, Chennai Bench, Chennai.

For Appellant : Mr.A.P.Srinivas

For Respondent : Mr.D.Santhana Gopalan

J U D G M E N T

[Judgement of the Court was Delivered by T.S.Sivagnanam, J.]

This appeal by the Revenue, filed under Section 35-G of the Central Excise Act, 1944, is directed against the final order passed by the Customs Excise and Service Tax Appellate Tribunal, (the 'Tribunal' for brevity), South Zonal Bench, Chennai, in final order No.40862 of 2014, dated 06.08.2014.

2.Heard Mr.A.P.Srinivas, learned Counsel for the Appellant and Mr.D.Santhana Gopalan, learned counsel for the Respondent.

3.This Appeal has been admitted, vide order dated 03.12.2015, on the following Substantial Questions of Law:

> "(a)Whether the CESTAT is right in holding that amendment of Rule 6(6) of the CENVAT Credit Rules under Notification 50/2008-CE (N.T.), dated 31.12.2008 is clarificatory and therefore retrospective in nature?
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> 2)When common inputs are used and the assessee has not maintained separate accounts, whether the assessee/1st respondent is liable to pay 10% of the value of goods cleared to SEZ developers as per Rule 6(6) of the CENVAT Credit Rules prior to 31.01.2008?”

4.The assessee is a manufacturer of Aluminium Composite panels with glass, falling under Chapter Sub-heading 7610 1000 of the Central Excise Tariff Act, 1985. The assessee is registered with the Central Excise and are availing input credit of duty under CENVAT Credit Rules, 2004, on the inputs used by them or in relation with the manufacture of final products cleared by them. The respondent/assessee, while clearing their final products, viz., Aluminium Composite (glass fitted) panels made out of Aluminium panels and glass, to local buyers, pay appropriate duty. For the final products cleared to the developers of SEZ, viz., M/s.DLF Infocity, M/s.Tata Consultancy and M/s.HCL Technology, no duty is paid.

5.The case of the Revenue is that prior to 01.04.2008, the manufacturer who uses common inputs for both exempted and dutiable goods should maintain separate accounts of inputs as per Rule 6(2) of the CENVAT Credit Rules, 2004, failing which they should pay 10% of the value of the exempted goods cleared, as per Rule 6(3)(b) of the CENVAT Credit Rules, 2004. On and from 01.04.2008, the manufacturer has an option of following the procedure laid down under Rule 6(2)(a) of the Rules or pay 10% of the value of the exempted goods cleared as per Rule 6(3)(i) of the said Rules.

6.According to the Revenue, the exception from restrictions imposed on the use of the goods, for the manufacture of the exempted products, as provided under Rule 6(6) of the Rules, is available only to to the clearances made to “SEZ Unit' and not to 'SEZ Developer', as the developers of SEZ were brought into the ambit of the Rules only from 31.12.2008, vide Notification No.50/2008 (NT), dated 31.12.2008. On such interpretation, show cause notice dated 22.01.2009 was issued to the respondent/assessee, demanding an amount equivalent to 10% of the transaction value on the goods cleared to SEZ developers/Co-developers, for the period January 2008 to December, 2008 and an amount of Rs.34,19,210/- was demanded for the period January 2008 to March 2008 and a sum of Rs.37,75,461/- for the period April 2008 to December 2008.

7.The assessee submitted their reply dated 18.5.2004. The Commissioner, who adjudicated the show cause notice, vide order in original dated 22.09.2009, rejected the stand taken by the respondent/assessee and confirmed the demand with appropriate interest. Aggrieved by the same, the respondent/assessee preferred an appeal to the Tribunal contending that the amendment introduced to Rule 6(6)(i) of Cenvat Credit Rules, 2004, adding developers of SEZ, vide Notification dated 31.12.2008, is retrospective in nature. The Tribunal, by placing reliance on the decision of the Chhattisgarh High Court in the case of Union of India vs. Steel Authority of India Ltd., [2013(297) ELT 166(Chhattisgarh), allowed the assessee's case. Aggrieved by the same, the Revenue is on appeal before us.

8.The issue to be decided in the instant appeal is as to whether an amount equal to 10% of the value of the final product cleared by the respondent/assessee, without payment of duty, to developers of SEZ, has to be paid by the assessee in terms of Rule 6(3)(b)/Rule 6(3)(i), since the assessee did not maintain separate accounts and that Rule 6(6) of the Rules does not give any exception to the clearances made to developers of SEZ from operation of Rule 6(3)(b)/6(3)(i) of the said Rules.

9.Identical issue was considered by the High Court of Chhattisgarh in Steel Authority of India (supra), wherein one of the questions, which was framed for consideration was whether the Tribunal erred in holding the amendment notification 50/2008, dated 31.12.2008 as retrospective, when admittedly the said notification provides that the same shall come into force on their publication in official gazette?.

10.The Court, on interpretation of the provisions of SEZ Act, held that the amendment being a 'substitution' is retrospective. The operative portion of the judgement in Steel Authority of India (supra) reads as follows:

> "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.
>
> 38.In case, the general principle as well as the framework of the Customs Act or Excise Act is to be understood, in that event, there should not be any excise duty on anything which is supplied to a unit or developer. The principle that is applicable to the unit in the SEZ should also apply to the developer as well.
>
> 39.The SEZ Act treats the unit as well as the developer on the same footing. The obligations arising under the Excise Act or the 2002-Rules or the 2004-Rules for a unit in SEZ should be same for a developer of SEZ; they should have same liabilities, same benefits. However, this was not so; there was some distinction in the 2004-Rules as they were initially framed.
>
> 43.Initially, sub-rule 6(6)(i) provided that the provisions of sub-rules 6(1) to 6(4) of the 2004-Rules will not be applicable in case the excisable products are removed without

payment of duty and cleared to a unit in a SEZ.

44.The relevant point to note is that the 2004-Rules as initially envisaged provided benefit to the goods cleared to a unit in SEZ only and not to the developer though under the SEZ Act the position of the developer as well as the unit was one and the same; they were in the same class, entitled to the same treatment. This appears to be an inadvertent omission.

45.It appears that the aforesaid mistake was realised by the Government and Rule 6(6)(i) of the 2004-Rule was substituted by the following new sub-rule(see Appendix-2).

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.

52.In our opinion, the rule is clarificatory, corrects an obvious mistake, removes discrimination and provides correct legal principle. Its prospective enforcement would leave it to be suspect at the touchstone of Article 14 of the Constitution. Considering this aspect it is proper to hold that the substituted sub-rule 6(6)(i) came into force from the date the 2004-Rules were enforced.

53.Our conclusions are as follows:

(a) . . . . .

(b)The amended rule is merely clarificatory, corrects an obvious mistake, removes discrimination between developers and units in special area zones. It merely clarifies or explains the existing law of providing non-imposition of excise duty on goods that are held to be export under the Special Area Zone Act;

(c)The substituted sub-rule 6(6)(i) is enforced from the date the 2004-Rules came into force."

11.It is submitted by the learned counsel for the Revenue that an appeal has been preferred against the aforementioned decision before the Hon'ble Supreme Court and the same is pending.

12.Identical view was taken by the High Court of Karnataka in the case of Commissioner of Central Excise and Sales Tax, Bangalore vs. Fosroc Chemicals (India) Pvt.Ltd., [2015 (318) E.L.T.240 (Kar)]. The question which was framed for consideration was whether the amendment to the Cenvat Credit Rules 2004, by substituting clause (i) of sub-rule (6) of Rule 6 of Cenvat Credit Rules, 2004, by way of notification No.50/2008-C.E.(N.T.), dated 31.12.2008 is prospective in operation or retrospective?

13.The Substantial Question of Law was answered in favour of the assessee holding that the said amendment is retrospective. The operative portion of the judgement in Fosroc Chemicals (India) Pvt.Ltd.,(supra) reads as follows:

"13. . . . . 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, 1961, 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."

14.The High Court of Karnataka in Central Excise Appeal No.54 of 2015, decided on 24.02.2016, decided the question in favour of the assessee in the following manner:

"4.We may record that in CEA No.54/2015, this Court observed thus:

"The present appeal is directed against the order dated 1.6.2015, passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Bangalore (hereinafter referred to as 'Tribunal', for short) in Final Order No.21234/2015, whereby the Tribunal has set aside the Order and has allowed the appeal.

2.We have heard Mr.Jeevan J.Neeralgi, learned counsel for the appellant-Revenue.

3.The contention raised on behalf of the appellant was that the decision of the Tribunal in the case of 'Sujana Metal Products Limited v. CCE, Hyderabad', reported in [2011 (273) E.L.T.112 (Tri-Bang)] is carried before the Apex Court and the Apex Court is seized with the matter, this Court may entertain the appeal.

4.We are not at all impressed by the submission for the simple reason that the tenor of the order shows that practically there was consensus including on behalf of the appellant-Revenue that the issue is already covered by the earlier decision of the Tribunal in the case of Sujana Metal Products Limited's (supra). If such was the position and based on the same, the Tribunal has passed the order, it cannot be said that there would be any substantial question of law. However, in the event the appellant succeeds in the proceedings before the Apex Court and a different view is taken, the question may be required to be considered by the Competent Authority and at that stage, rights and contentions of both the sides should remain open.

Hence, subject to the aforesaid observation, the appeal is not entertained and disposed of”.

15.The aforementioned decision of the High Court of Karnataka in Central Excise Appeal No.54 of 2015 was followed in Principal C.C.E.Bangalore-I vs. Power Control Equipments (Unit-II) [2016 (336) E.L.T.284(Kar.)] and the appeal filed by the Revenue was disposed of on the same lines as per the observations contained in the judgement in Central Excise Appeal No.54 of 2015. In the case of Commissioner of Central Excise vs. DEE Development Engineers Pvt.Ltd., [2016(339) E.L.T.560(P & H), the identical question was decided in favour of the assessee. The operative portion of the judgement reads as follows:

“2.At the very outset, it was not disputed by learned counsel for the parties that identical issue was gone into by three different High Courts in 'Commissioner of Central Excise & Customs, Raipur v. M/s.Steel Authority of India Ltd., Bhilai Steel Plant, Bhilai, 2013-TIOL-384-HC-Chhattisgarh-CX=2013 (297) E.L.T.166 by Chhattisgarh High Court, which was followed by Andhra Pradesh High Court in CEA No.40 of 2012, the Commissioner of Customs & Central Excise, Hyderabad v. M/s.Sujana Metal Products Ltd., decided on 2.7.2013 and further followed by Karnataka High Court in Commissioner of C.Ex & S.T., Bangalore v. Fosroc Chemicals (India) Pvt.Ltd. - 2015 (318) E.L.T.240(Kar.), and the issue was decided against the revenue and in favour of the assessees.

3.As the issue raised in the present appeal has already been gone into by three different High Courts and the opinion expressed is against the revenue, for the reasons assigned in those judgements, we deem it appropriate to follow the same to maintain consistency as the Central Excise Act is a Central Statute. Accordingly no substantial question of law arises."

16.Notification No.50 of 2008-CE(N.T.) dated 31.12.2008 states that in exercise of the powers conferred under 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". (Notification NO.50/2008-C.E.(N.T), dated 31.12.2008."

17.On a reading of the above amendment, it is evident that clause (i) of sub-rule 6 of Rule 6 was substituted, thereby, the provisions of sub-rules (1), (2), (3) and (4) shall not be applicable in case the excisable goods removed without payment of duty or either cleared to a unit in a special economic zone or to a developer of a special economic zone for their authorised operations. Thus, the question would be as to what would be the meaning of the word 'substitute';.

18.The Hon'ble Supreme Court in the case of Government of India vs. Indian Tobacco Association [2005(187) E.L.T.162(S.C.) explained the meaning of the word 'substitute' on the following lines:

> "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."

19.Thus, the 'substitution' by way of an amendment dated 31.12.2008 has to be read to put in place instead of the Rule, which was in existence prior to the said Notification. In other words, it has to be read as a replacement of an existing Rules.

20.The Hon'ble Supreme Court in the case of Zile Singh vs. State of Haryana and Others [(2004) 8 SCC pg.1 brought about the distinguishing features between 'substitution' and 'supersession' and explained the same as under:-

> "24.The substitution of one text for the other pre-existing text is one of the known and well-recognised practices employed in legislative drafting. "Substitution" has to be distinguished from "supersession" or a mere repeal of an existing provision.
>
> 25.Substitution of a provision results in repeal of the earlier provision and its replacement by the new provision (see Principles of Statutory Interpretation, ibid.,p.565). If any authority is needed in support of the proposition, it is to be found in West U.P.Sugar Mills Assn.v. State of U.P. [(2002)2 SCC 645], State of Rajasthan v. Mangilal Pindwal [(1996) 5 SCC 60], Koteswar Vittal Kamath v. K.Rangappa Baliga and Co. [(1969)1 SCC 255] and A.L.V.R.S.T.Veerappa Chettiar v. S.Michael [AIR 1963 SC 933]. In West U.P.Sugar Mills Assn. Case a three Judge Bench of this Court held that the State Government by substituting the new rule in

place of the old one never intended to keep alive the old rule. Having regard to the totality of the circumstances centring around the issue the Court held that the substitution had the effect of just deleting the old rule and making the new rule operative. In Mangilal Pindwal case, this Court upheld the legislative practice of an amendment by substitution being incorporated in the text of a statute which had ceased to exist and held that the substitution would have the effect of amending the operation of law during the period in which it was in force. In Koteswar case, a three-Judge Bench of this Court emphasised the distinction between 'supersession' of a rule and 'substitution' of a rule and held that the process of substitution consists of two steps: first, the old rule is made to cease to exist and, next, the new rule his brought into existence in its place."

21.We may also note that Circular No.29/2006-Cus, dated 27.12.2006, issued by Central Board of Excise & Customs, New Delhi, pertaining to implementation of Special Economic Zone Act, 2005 and Special Economic Zone Rules, 2006, has notified 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.

5.The existing SEZs, i.e., the ones notified under Section 76A of Chapter XA of the Customs Act, 1962, shall be deemed to have been notified under Section 4 hof the Act. Supplies from DTA to SEZ shall be exempt from payment of any Central Excise duty under Rule 19 of Central Excise Rules, 2002. Similarly, such supplies shall be eligible for claim of rebate under Rule 18 of Central Excise Rules, 2002, subject to the fulfilment of conditions laid thereunder. The provisions relating to exports under Central Excise Act, 1944 and rules made thereunder may be applied, mutatis mutandis, in case procurement by SEZ units and SEZ developer from DTA for their authorized operations."

22.In the light of the above, we are in respectful agreement with the decision in the case of Steel Authority of India Ltd., and in the case of FOSROC Chemicals India (P) Ltd. The learned counsel for the Revenue pointed out that the decision in the case of Steel Authority of India has been challenged before the Hon'ble Supreme Court and the same is pending as well as the decision of the Tribunal in the case of Sujana Metal Products Limited, which was confirmed by the High Court of Andhra Pradesh in the case of Commissioner vs. Sujana Metal Products Ltd [2016 (342) E.L.T.A115 (A.P.], Therefore, we are inclined to dispose of this appeal by answering the Substantial Questions of Law framed for consideration in favour of the Respondent/assessee and at the same time giving liberty to the Revenue, as granted by the High Court of Karnataka in Central Excise Appeal No.54 of 2015, dated 24.02.2016 and in the case of Principal C.C.E.Bangalore-I vs. Power Control Equipments (Unit-II).

23.In the result, the appeal filed by the Revenue is dismissed and the Substantial Questions of Law framed for consideration are answered in favour of the respondent/assessee. However, in the event the Revenue succeeds in the appeals, which are now pending before the Hon'be Supreme Court and different view is taken, the questions may be required to be considered by the competent authority and at that stage the rights and contentions of both sides shall remain open. It is made clear that either party will not be entitled to raise the plea of limitation in such a contingency. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

The Customs Excise and Service
   Tax Appellate Tribunal,
South Zone Bench,
Shastri Bhavan Annex 1st Floor,
26, Haddows Road,
Chennai-600 006

+1cc to M/s.Lakshmi Kumaran, Advocate sr.no.70748

C.M.A.No.2700 of 2015

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