(2014) 07 KAR CK 0109

In the Karnataka High Court

Case No : C.E.A. Nos. 12, 29, 31, 34, 35, 36, 59/2012, 4, 5, 6, 27, 28, 30 and 31/2014

Commissioner of Central Excise — APPELLANT

Vs

Impact Safety Glass Works Pvt. Ltd.
 The Commissioner of Commissioner Excise and Service Tax Vs Fosroc Chemicals (India) Pvt. Ltd. — RESPONDENT

Date of Decision : 30-07-2014

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11AC, 2(m), 2(m)(ii), 37, 4
Finance Act, 1994 — Section 94
Special Economic Zones Act, 2005 — Section 26

Citation : (2015) 318 ELT 240 : (2015) 31 GSTR 50

Hon'ble Judges : N. Kumar, J;B. Manohar, J

Bench : Division Bench

Advocate : N.R. Bhaskar, CGSC, Jeevan. J. Neeralgi, Chandrashekara Reedy M.V. and M.V. Chandrashekar Reddy, Advocate for the Appellant; Harish V.S., Advocate for DNS Law House, B.N. Gururaj, B.G. Chidananda Urs, Harish R., Neethu James, K.S. Ravishankar and T. Suryanarayana, Advocate for the Respondent

Judgement

N. Kumar, J.—In all these appeals, the common question of law that arises for consideration is,

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?

Therefore, all these cases are taken up together and disposed of by this common order.

2. For proper understanding, we have set out the facts in CEA. No. 29 and 59 of 2012.

3. The assessee M/s. Fosroc Chemicals (India) Pvt. Ltd., is having its registered office at "PSR ID" #38, III Floor, 12th Cross, CBI Road, Ganganagar North, Bangalore-560032. They are having their manufacturing units - one at Kuluvanahalli Post in Nelamangala Taluk, Bangalore and other at Ankleshwar, Gujarat. They are manufacturers of Admixtures, resin products and powder products falling under tariff headings 38244010, 38244090, 34031900, 32141000 etc., of Central Excise Tariff Act, 1985. The assessee was availing Cenvat Credit of the duty paid on inputs used in both dutiable and exempted final products cleared by them but were not maintaining separate accounts for receipt, consumption and inventory of the inputs as required under Rule 6(2) of the Cenvat Credit Rules, 2004. The assessee had cleared their final products to SEZ developers without payment of duty against letters of undertaking (LUT) during the period from January 2006 to December 2008 (Ankleshwar Unit) and June 2006 to December 2008 (Bangalore Unit). During the course of verification of the returns of the assessee it was seen that the assessee had not exercised an option to pay an amount equivalent to credit attributable to inputs used in the manufacture of goods cleared to SEZ Developers, nor had paid an amount equal to 10% of the total price, excluding sales tax and other taxes. Therefore, the assessee was issued show-cause notice by the Additional Commissioner and the Commissioner, LTU, Bangalore, demanding payment. After receipt of the explanation, the demand was confirmed under the provisions of section 11AC of the Central Excise Act, 1944 read with Rule 15(2) of the Cenvat Credit Rules 2004 along with interest and penalty. Aggrieved by the said order, the assessee preferred appeal before the CESTAT, Bangalore. The appeal was allowed by the Tribunal relying upon the decision of the Bench in 2011 (273) ELT 112by holding that it squarely covered the issue in favour of the respondent. The Tribunal held that the said amendment to Rule 6(6) by Notification No. 50/2008-CE is clarificatory in nature and therefore retrospective. As such, the assessee is entitled to the said benefit. Aggrieved by the said order, the revenue has preferred these appeals.

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 Vs. The District Magistrate, Thana, Bombay and Others, , 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 and Another Vs. Ram Kumar and Another, , 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 vs. 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 and Others Vs. Indian Tobacco Association, , 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 construed."

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 CE, 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 CBEC 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."

Therefore, it is clear, the said amendment has to be construed as retrospective in nature and the benefit of Rule 6(6)(1) 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 no see any merit in these appeals.

The substantial question of law is answered in favour of the assessees and against the revenue.

Accordingly, the appeals are dismissed.

