
(2021) 09 CESTAT CK 0060

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 30584, 30585 Of 2019

M/s Divi's Laboratories Ltd

APPELLANT

Vs

Commissioner Of Central Tax

RESPONDENT

Date of Decision : 03-09-2021

Acts Referred:

Special Economic Zone Act, 2005 — Section 26(1), 26(1)(e), 51, 55
Special Economic Rules, 2006 — Rule 22(2), 31, 47, 47(5)
Finance Act, 1994 — Section 65, 65(105), 93, 93(1)

Citation : (2021) 09 CESTAT CK 0060

Hon'ble Judges : Rachna Gupta, J

Bench : Single Bench

Final Decision : Allowed

Judgement

1. This order disposes of two appeals, issue and the appellant being common to both the appeals.
2. Appellant is a SEZ Unit, engaged in manufacturing and exporting of Bulk drugs and Drug Intermediates. They had obtained service tax registration vide registration No. AAACD6745JSD005 for the purpose of claiming refund of service tax paid on the input services utilized by them in connection with the authorized operations of their SEZ unit.
3. Appellant filed a refund claim electronically on 21.10.2017 claiming refund of service tax of Rs. 4,09,41,510/- (Four Crores Nine Lakhs Forty one Thousand Five Hundred and Ten only), for appeal no. ST/30585/2019 the refund claim of Rs. 5,20,83,175/- (Five Crores Twenty Lakhs Eighty Three Thousand One Hundred and Seventy Five only) was paid on 21.10.2017. Both claims were paid by them on input services used in their SEZ operations during the period from 01.04.2017 to 30.06.2017 under the provisions of Notification No. 12/2013-ST dated 01.07.2013 as amended. Refund was claimed on the various input services (37 in number) used in their SEZ operations are as listed in the show cause notice no. 18/22/2017 dated 08.12.2017. The Show Cause Notice proposed

rejection of the said refund claim but to the extent of Rs. 3,15,93,377/- (Three Crores Fifteen Lakhs Ninety Three Thousand Three Hundred Seventy Seven only) in appeal no. ST/30585/2019 and to the extent of Rs. 4,95,72,796/- (Four Crore Ninety Five Lakhs Seventy Two Thousand Seven Hundred and Ninety Six only) in appeal no. ST/30584/2019 on the ground that the said services are not approved by the Development Commissioner, VSEZ except for partial refund as shown in the list of invoices as per the provisions of Notification No. 12/2013-ST dated 01.07.2013. The said prayer was confirmed vide common O-I-O No. 26/2017-18 dated 16.01.2018 but only for the amount of Rs. 37,21,746/-. However the refund claim of Rs. 3,72,19,764/- (Three Crores Seventy Two Lakhs Nineteen Thousand Seven Hundred and Sixty Four only) was sanctioned.

4. The appeals thereof has been rejected vide common Order-in-Appeal No.VIZ-EXCUS-001-APP-015-19-20 dated 30.05.2019. The said order has been assailed before this Tribunal.

5. I have heard Learned Counsel for the Appellant Shri P. Dwarakanath, and Shri A V L N Chary, AR for the Respondent.

6. It is submitted on behalf of appellant that appellant is an SEZ Unit. The chief contention of the Department for the part-rejection of the refund claim relates to service tax amount paid by the appellant on ocean freight services which is not included/covered under the approved list by the approval committee and hence not included in the appellant's approved list of services. In this regard, the appellants submit that the issue of "ocean freight" was covered under the negative list until 01.06.2016. Further, the Notification No. 09/2016-Service Tax dated 01.03.2016, air freight was included in Notification No. 25/2012-Service Tax dated 20.06.2012, (Mega Exemption Notification), however, service of ocean freight has become taxable from 01.06.2016.

7. Further, the issue of ocean freight had undergone tumultuous amounts of changes through various notifications issued from time to time viz. Notification No. 14/2017, 15/2017 and 16/2017 dated 13.04.2017 and Notification No. 10/2017-CE NT dated 13.04.2017 and finally by way of the retrospective amendments, as mentioned has come to rest. In view of the above, the appellant could not immediately approach the Development Commissioner, Visakhapatnam Special Economic Zone for inclusion of ocean freight in their approved list of services.

8. Appellant further submitted that sub-section (1) (e) of Section 26 of the Special Economic Zones Act, 2005 read with Rule 31 of Special Economic Rules, 2006 provide exemption from payment of service tax for a SEZ unit. Hence no service tax is liable to be paid on any service provided to a Developer or a Unit in SEZ. The provisions of Notification No. 12/2013-Service Tax dated 01.07.2013 which provides for exemption shall be overridden by the SEZ Act, 2005 and rules made thereunder and hence, basing on a technical reason as contained in the said Notification, the Department has wrongly denied the exemption to the

appellant.

9. The Learned Counsel for appellant has relied upon the case of DLF Assets Pvt Ltd., Vs Commissioner of Service Tax, Delhi-I [2021 (45) G.S.T.L. 176 (Tri.-Del)] wherein it was held that the Commissioner was not justified in examining whether the conditions set out in Notification were satisfied or not for grant of exemption from service tax. Reliance is also upon Metlife Global Operations Support Center (P.) Ltd., Vs COMMR., Service Tax, New Delhi reported in [2021 (46) G.S.T.L. 418 (Tri.-Del.)], wherein also it was held that service tax is not liable to be paid in view of Section 26(1) of the SEZ Act, 2005 which has an overriding effect even on the Finance Act, 1994. The order under challenge is accordingly prayed to be set aside and appeal is prayed to be allowed.

10. To rebut these contentions Learned DR has mentioned that the ocean freight is not covered under approved list. Sub clause (5) as inserted to Rule 47 of The Special Economic Zones Rules, 2006 w.e.f. 08.08.2016 is impressed upon to be applicable to the impugned refund as against the overriding effect of Section 51 of said SEZ Rules. Learned DR has relied upon the decision in Dilip Kumar case as has been referred by adjudicating authorities.

11. While rebutting it is mentioned that Hon'ble High Court of Andhra Pradesh has dealt with the amended 47(5) of SEZ Rules and has given decision in favour of the assessee.

12. After considering the rival contentions, the appeal record and the referred case laws, I observe and held as follows:

The issue that arises for consideration in the appeal is about exemption from service tax on the services rendered to the SEZ units.

According to the appellant, the impugned services were utilized for authorized operations by the recipient SEZ units, there was no necessity to pay any service tax. The Department, however, alleged that though the exemption provided under the SEZ Act is contained in the Notification dated March 3, 2009, but the service as that of ocean freight was not covered under the approved list.

In order to appreciate the contentions advanced by Learned Counsel for the appellant and the Learned Authorized Representative of the Department, it will be appropriate to refer to the relevant provisions. Section 26 of the SEZ Act deals with exemptions, drawbacks and concessions to every Developer and entrepreneur. The relevant provisions are reproduced below :

"Exemptions, drawbacks and concessions 26. to every Developer and entrepreneur. Subject to the provisions of - (1) sub-section (2), every Developer and the entrepreneur shall be entitled to the following exemptions, drawbacks and concessions, namely : -

(a) *****

(b) *****

(c) *****

(d) *****

(e) exemption from service tax under Chapter V of the Finance Act, 1994 (32 of 1994) on taxable services provided to a Developer or Unit to carry on the authorized operations in a Special Economic Zone;

(f) *****

(g) *****

(2) The Central Government may prescribe the manner in which, and the terms and conditions subject to which, the exemptions, concessions, drawback or other benefits shall be granted to the Developer or entrepreneur under sub-section (1)."

Section 51 of the SEZ Act further provides overriding effect to the provisions of the SEZ Act and it is reproduced below:

"Act to have overriding effect. 51. - The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."

Section 55 of the SEZ Act gives power to the Central Government to make rules for carrying out the provisions of the Act. In exercise of the aforesaid powers, the Central Government made "The Special Economic Zones Rules, 2006" Rule 31 deals with the exemption from payment of service tax and is reproduced below :

The exemption from payment of service tax on taxable services under Section 65 of the Finance Act, 1994 (32 of 1994) rendered to a Developer or a Unit (including a Unit under construction) by any service provider shall be available for the authorized operations in a Special Economic Zone."

Further Notification No. 9/2009-Service Tax dated March 3, 2009 reads as follows:

G.S.R. 146(E) - In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994), and in supersession of the Notification of the Government of India, Ministry of Finance (Department of Revenue), No. 4/2004-Service Tax, dated the 31st March, 2004, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), dated the 31st March, 2004, vide, G.S.R.248(E), dated the 31st March, 2004, except as respects things done or omitted to be done before such supersession, the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable services specified in clause (105) of section 65 of the said Finance Act, which are provided in relation to the authorised operations in a Special Economic Zone, and received by a developer or units of a Special Economic Zone, whether or not the said taxable services are provided inside the

Special Economic Zone, from the whole of the service tax leviable thereon under section 66 of the said Finance Act :

Provided that -

(a) *****

(b) *****

(c) the exemption claimed by the developer or units of Special Economic Zone shall be provided by way of refund of service tax paid on the specified services used in relation to the authorised operations in the Special Economic Zone :

(d) *****

(g) *****

(f) *****

(g) *****

....." 2.

Proviso (c) to the aforesaid Notification dated March 3, 2009 was amended by Notification dated May 20, 2009. The amended proviso (c) is reproduced below :

the exemption claimed by the developer or "(c) units of Special Economic Zone shall be provided by way of refund of service tax paid on the specified services used in relation to the authorised operations in the Special Economic Zone except for services consumed wholly within the Special Economic Zone;"

As noticed above, Section 26(1) of the SEZ Act provides that subject to the provisions of the sub-section (2), every Developer shall be entitled to exemptions and the exemption at (e) exempts every Developer from service tax under Chapter-V of the Finance Act on taxable services provided to a Developer or unit to carry on the authorized operations in a SEZ. Section 51 of the SEZ Act provides for an overriding effect to the provisions of the SEZ Act. The provisions of Section 26 read with Rule 31 of the SEZ Rules thus, have overriding effect over anything inconsistent contained in any other law for the time being in force, which would include the Finance Act. It needs to be noted that the Notification dated March 3, 2009 has been issued in exercise of the powers conferred by Section 93 of the Finance Act. Thus, when the services rendered by the appellant are fully exempted from service tax in terms of the provisions of the SEZ Act, the condition of exemption by way of refund imposed under the Notification issued under the Finance Act would be inconsistent with the provisions of the SEZ Act. It also needs to be noted that the SEZ Act was enacted in 2005, much after the enactment of the Finance Act in 1994.

This issue was examined by the Telangana and Andhra Pradesh High Court in GMR Aerospace Engineering Limited and another v. Union of India and Others [2019 (8) TMI 748 = 2019 (31) G.S.T.R. 596 (A.P.)].

The Andhra Pradesh High Court observed as follows :

"22. It may be noted that sub-section (1) of section 26 begins with the words "subject to the provisions of sub -section (2)". Sub -section (2) authorizes the Central Government to prescribe the manner in which and the terms and conditions subject to which exemptions shall be granted to the developer or entrepreneur under sub-section (1).

23. As rightly pointed out by Sri S. Niranjan Reddy, Learned Senior Counsel appearing for the petitioner, the word "prescribe" appearing in sub-section (2) of section 26 has to be understood with reference to the definition of the word "prescribed" appearing in section 2(w) of the SEZ Act, 2005.

Section 2(w) of the Act reads as follows :

"prescribed means prescribed by rules made by the Central Government under this Act."

24. Therefore, the terms and conditions subject to which the exemptions are to be granted under sub-section (1) of section 26 should be prescribed by the Rules made by the Central Government under the SEZ Rules, 2006 issued in exercise of the power conferred by section 55 of the SEZ Act. It is not necessary to extract rule 22, since there is no dispute about the fact (1) that the petitioners have complied with the prescriptions contained in rule 22 of the SEZ Rules, 2006, and (2) that rule 22 of the SEZ Rules, 2006 does not stipulate the filing of Forms A1 and A2 as prescribed in the three Notifications issued under section 93 of the Finance Act, 1994.

29. The contention of Smt. Sundari R. Pisupati, Learned Senior Standing Counsel is that there is no inconsistency between (i) the terms and conditions prescribed in the Notifications issued under section 93 of the Finance Act, 1994, and (ii) the terms and conditions prescribed in rules 22 and 31 of the SEZ Rules, 2006, and that therefore, section 51 of the SEZ Act, 2005 cannot be pressed into service. But this contention is unacceptable.

30. This is for the reason that section 26(1) of the SEZ Act made the entitlement to certain exemptions subject to provisions of subsection (2) of section 26. Section 26(1) did not make the entitlement of a developer to certain exemptions, subject to the provisions of something else other than the provisions of sub-section (2). Therefore, the fifth respondent cannot read section 26(1) to mean that the exemptions listed therein are (1) subject to the provisions of sub-section (2) of section 26, and (2) also subject to the terms and conditions prescribed in the Customs Act, 1962, the Customs Tariff Act, 1975, the Central Excise Act, 1944, the Central Tariff Act, 1985 and the Finance Act, 1994. This is especially so, since the authority of the Central Government to prescribe the terms and conditions subject to which exemptions may be granted under section 26(1), flows only out of sub-section (2) of section 26. The word "prescribe" is verb. Generally no enactment defines the word "prescribe" but the SEZ Act 2005

defines the word "prescribe" under section 2(w) to mean the rules framed by the Central Government under the SEZ Act, 2005. The space is also not left unoccupied, as the Central Government has issued a set of rules known as "the Special Economic Zones Rules, 2006", wherein the Central Government has prescribed the terms and conditions for grant of exemptions under rule 22. Therefore, there is no question of comparing the terms and conditions prescribed in rule 22 with the terms and conditions prescribed in the Notifications issued under any one of the five enactments listed in section 26(1) to find out whether there was any inconsistency.

34. The benefit of exemptions granted under the Notifications issued under section 93 of the Finance Act, 1994, are available to any one and not necessarily confined to a unit in a special economic zone. Section 93 of the Finance Act, in that sense is a general power of exemption available in respect of all taxable services. But, section 26(1) is a special power of exemption under a special enactment dealing with a unit in a special economic zone. Therefore, the Notifications issued under section 93 of the Finance Act, 1994 cannot be pressed into service for finding out whether a unit in a SEZ qualifies for exemption or not."

This Tribunal in DLF Assets Pvt. Ltd., placed reliance upon the aforesaid decision of the Andhra Pradesh High Court in GMR Aerospace Engineering Ltd., and observed that the conditions set out in the notification dated March 3, 2009 were not required to be examined in view of the provisions of the SEZ Act. The relevant portion of the decision is reproduced below:

"18. The contention advanced by the Learned Counsel for the appellant has force. As noticed above, section 26(1) of the SEZ Act provides that subject to the provisions of the sub-section (2), every Developer shall be entitled to exemptions and the exemption at (e) exempts every Developer from service tax under Chapter-V of the Finance Act on taxable services provided to a Developer or unit to carry on the authorized operations in a SEZ. Section 51 of the SEZ Act provides for an overriding effect to the provisions of the SEZ Act. The provisions of section 26 read with rule 31 of the SEZ Rules thus, have overriding effect over anything inconsistent contained in any other law for the time being in force, which would include the Finance Act. It needs to be noted that the Notification dated March 3, 2009 has been issued in exercise of the powers conferred by section 93 of the Finance Act. Thus, when the services rendered by the appellant are fully exempted from service tax in terms of the provisions of the SEZ Act, the condition of exemption by way of refund imposed under the Notification issued under the Finance Act would be inconsistent with the provisions of the SEZ Act. It also needs to be noted that the SEZ Act was enacted in 2005, much after the enactment of the Finance Act in 1994.

21. Thus, what follows is that the Commissioner was not justified in examining whether the conditions set out in the Notification dated March 3, 2009 were satisfied or not for grant of any exemption from service tax. Section 26(2) of the

SEZ Act does provide that the Central Government may prescribe the manner in which, and the terms and conditions subject to which, the exemptions shall be granted to the Developer under sub-section (1) but what is important to notice, and as was also observed by the Andhra Pradesh High Court, the word "prescribe" would mean "prescribed by rules made by the Central Government under the SEZ Act," in view of the definition of "prescribed" under section 2(w) of the SEZ Act. The Notification dated March 3, 2009, which has been issued under section 93 of the Finance Act, therefore, has no application."

13. Learned authorized representative of the Department has, however, placed reliance upon sub-rule (5) of Rule 47 of the SEZ Rules that was inserted w.e.f. August 5, 2016 to contend that the aforesaid two notifications issued under Finance Act would be applicable. This submission of Learned authorized representative of the Department cannot be accepted. It is by a notification dated August 5, 2016 that in Rule 47, sub-rule (5) was inserted after Rule (4) and the same is reproduced below :

"47(5) Refund, Demand, Adjudication, Review and Appeal with regard to matters relating to authorized operations under Special Economic Zones, Act, 2005, transactions and goods and services related thereto, shall be made by the Jurisdictional Customs and Central Excise Authorities in accordance with the relevant provisions contained in the Customs Act, 1962, the Central Excise Act, 1944 and the Finance Act, 1994 and the rules made thereunder of the notifications issued thereunder."

Sub-rule (5) of rule 47 has no retrospective application and, therefore, it is only w.e.f. August 5, 2016 that the notifications issued under Section 93 of the Finance Act may be applicable to units situated in SEZ carrying out authorized operations under the SEZ Act. In any case, the conditions imposed by the notifications issued under the provisions of the Finance Act are merely directory in nature.

14. This issue has been considered time and again. In *Mast Global Business Services India Pvt. Ltd. v. Commissioner of Central Tax* [2018-TIOL-3115-CESTAT-BANG], the Tribunal held that the SEZ Act had an overriding effect, in view of the provisions of Section 51 of the SEZ Act, over all other laws and, therefore, the ground for rejecting the refund claims was not tenable in law and even otherwise, approval from UAC was only procedural in nature and not a mandatory condition. The relevant portion of the decision of the Tribunal is reproduced below :

"The other grounds on which the refund claims have been rejected by the impugned order is that the appellant has not produced the approved list of specified input services from the UAC to SEZ which is a mandatory condition as per the Commissioner (Appeals). In reply to this argument, the Learned Counsel submitted that in view of the settled legal position by various decisions relied upon by him, condition in respect of approval from UAC of SEZ is not a

mandatory requirement as the SEZ Act vide Section 51 of SEZ Act will have overriding effect over the provisions of any other law. Therefore, keeping in view, the intention of the Government in enacting the SEZ Act and giving special fiscal concessions to SEZs, I am of the considered opinion that this is only a procedural and is not a mandatory condition as held by the Commissioner (Appeals). Further the decisions relied upon by the appellant clearly hold that the SEZ Act has a overriding effect over other laws. Therefore, this ground on the basis of which refund claims have been rejected is not tenable in law."

15. It was also held in M/s. ONGC Mangalore Petrochemicals Limited v. Commissioner of Central Excise & Central Tax, Mangalore Commissionerate [2019-VIL-140-CESTAT-BLR-ST], the Tribunal again held :

After considering the submissions of both "6. the parties and perusal of the material on record, I find that the appellant being SEZ is entitled to refund of Service Tax paid on input service used for authorized operations. Further, I find that as per Notification No. 12/2013-S.T., dated 1-7-2013, the only requirement is that the appellant is required to file the list of approved services which have been used by them for authorized operations. Further, in this case, I find that the appellant has subsequently obtained the approval from the Unit Approval Committee of the SEZ and the said certificate is placed on record but the Commissioner (A) has held that the said approval was obtained from the competent authority on 25-10-2011 and therefore, after the approval, he has allowed the refund and prior to that he has rejected the same. Further, I find that in view of the settled legal position by various decisions relied upon by the appellant, conditions of approval from UAC is not a mandatory requirement as per SEZ Act vide section 51 of the SEZ Act which has an overriding effect over the provisions of any other law. Further, I find that it is only a procedural requirement to get the approval from the Unit Approval Committee and is not a mandatory condition as per the SEZ Act which has an overriding effect over other laws."

16. In view of the entire above discussion, the finding of Commissioner (Appeals) that since ocean freight service has been included in the list of services with SEZ services authorities only on 27.11.2017 i.e. subsequent to their refund application, the retrospective application can not be allowed is not sustainable. Learned Commissioner is held to have failed to appreciate the judicial precedents. Order under challenge accordingly is hereby set aside. Consequent thereto both the appeals are ordered to be allowed.

(Order pronounced on 03.09.2021 in open court)