(2021) 10 CESTAT CK 0003

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Excise Appeal No. 1 Of 2020

Vijayaa Steels Limited — APPELLANT

Vs

Commissioner Of Central Excise-II — RESPONDENT

Date of Decision : 01-10-2021

Acts Referred:

Cenvat Credit Rules, 2004 — Rule 6(1), 6(2), 6(3), 6(4), 6(6), 6(6)(i), 14, 15
Central Excise Act, 1944 — Section 11A, 11AB, 11AC
Central Excise Tariff Act, 1985 — Chapter 72
Special Economic Zone Act, 2005 — Section 2(m), 2(m)(ii), 26, 53, 151

Citation : (2021) 10 CESTAT CK 0003

Hon'ble Judges : Delip Gupta, J;P.V. Subba Rao, Technical Member

Bench : Division Bench

Final Decision : Allowed

Judgement

1. This appeal is filed by the appellant assailing the order in original dated 5.10.2009, impugned order passed by the Central Excise, Bangalore-II whereby the show cause notice dated 13.2.2009 was adjudicated upon and an amount of Rs. 4,90,22,299/- being 10% of the price of the goods cleared by the appellant to Special Economic Zone, SEZ developers was confirmed under Rule 14 of Cenvat Credit Rules, 2004, CCR read with the proviso to section 11A of the Central Excise Act, Act. Interest has also been demanded on this amount under Rule 14 of CCR read with section 11AB of the Act. A penalty of Rs. 4,90,22,299/- was imposed upon the appellant under Rule 15 of CCR read with Section 11AC of the Act.

2. The undisputed facts of the case are that the appellant is a manufacturer of TMT bars, MS rolls and end cuttings falling under Chapter 72 of the Central Excise Tariff and is duly registered with the Central Excise Department and pays Central Excise duty. It also avails the benefit of Cenvat credit under CCR. During the period 28.12.2006 to 30.12.2008, it supplied some goods manufactured by it to SEZ developers under the provisions of Special Economic Zone Act, 2005. The show cause notice dated 13.2.2009 was issued alleging that the appellant was

clearing goods to SEZ developers by claiming exemption from payment of Central Excise duty and is also availing Cenvat credit on the inputs used in the manufacture of such goods. It is alleged that as per Rule 6(1) of CCR, Credit shall not be allowed on such quantity of inputs for input services which is used in the manufacture of exempted goods of provision of exempted services. If the manufacturer or provider of output service manufactures both dutiable and exempted goods, or, as the case may be, provides taxable and exempted services, it is required to maintain separate accounts for receipt, consumption and inventory of inputs used and the input services used in respect of the two categories of goods and services as per Rule 6(2) of CCR. If the appellant is unable to do so, Rule 6(3) requires that the appellant should pay an amount equal to 10% (during the relevant period) of the value of the exempted goods/ services.

3. Rule 6(6) however, makes an exemption to these provisions; it states that "The provisions of sub rule (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 SEZ; or

(ii) cleared to a 100% EOU............."

Therefore, if the CENVAT credit is availed on inputs and input services which are used to manufacture goods which are supplied to SEZ units the requirements of maintaining separate accounts or paying 10% of the value of the goods do not apply.

4. In this case, the appellant has not supplied the goods to SEZ units but has supplied them to SEZ developers. The case of the Revenue is, therefore, that the appellant is not entitled to the exemption from provisions of Rule 6(1), (2), (3) and(4) available under Rule 6(6)(i) of CCR. Since the appellant had not maintained separate accounts of inputs and input services, it is required to pay an amount equal to 10% of the value of the goods supplied to the SEZ developers. The show cause notice was issued in 2009 covering the period 28.12.2006 to 31.12.2008. In 2008, Rule 6(6)(i) was amended vide Notification No. 50/2008-CE(NT) dated 31.12.2008 to read as "cleared to unit in a Special Economic Zone or to developer of a Special Economic Zone for their authorised operations". In other words by the Notification dated 31.12.2008 supplies made to developers of SEZ have also been excluded from the provision of 6(1),(2), (3)and(4) and in case of such supplies, the supplier was not required to reverse the proportionate amount of CENVAT credit or pay an amount equal to 10% of the duty. The period of dispute in this case is from 28.12.2006 to 30.12.2008 during which period the supplies made to developers were not specifically covered by the exemption under Rule 6(6)(i). The appellant contested the demand before the Commissioner on various grounds both on merits and on limitation. Not agreeing with its contentions, the learned Commissioner passed the impugned order.

5. The question as to whether the notification dated 31.12.2008 giving exemption to supplies made to SEZ developers from Rule 6(1),(2),(3)&(4) will have retrospective application has been examined by the jurisdictional Hon'ble High Court of Karnataka in the case of Commissioner of Central Excise & Service Tax, Bangalore vs. Fosroc Chemicals (India) Pvt. Ltd, 2015 (318) E.L.T. 240 (Kar.). It has been held in paras 13, 14 and 15 as follows:

"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 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, 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."

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 no see any merit in these appeals.

15. The substantial question of law is answered in favour of the assessees and against the Revenue."

6. In other words, it has been held that the inclusion of SEZ developers under Rule 6(6)(i) is clarificatory and applies to the period prior to 30.12.2008 also. This judgment was subsequently followed by the High Court again in the case of CCE vs. Lotus Power Gears P. Ltd, 2017 (346) E.L.T. 347 (Kar.). It was also followed by the Hon'ble High Court of Chhattisgarh in Union of India vs. Steel Authority of India, 2013 (297) E.L.T. 166 (Chhattigarh) and Hon'ble High Court of Andhra Pradesh in the case of CCE vs. Dee Development Engineers P. Ltd, 2016 (339) E.L.T. 560 (P&H). We find that substantial question of law as to whether for the period prior to 31.12.2008 where the goods are manufactured and supplied without payment of duty by an assessee to a developer in the SEZ, they are required to follow Rule 6(1), (2), (3) and (4) of CCR has been decided in favour of the assessee by several High Courts including the jurisdictional High Court. Respectfully following the ratio of Fosroc Chemicals (India) Pvt. Ltd, we find that the appellant was not required to follow Rule 6(1), (2), (3) and (4) in respect of the supplies it made to the SEZ developers and hence it was not required to maintain separate accounts or pay an amount equal to 10% of the value of such supplies. As the demand in the impugned order cannot be sustained, neither can the demand of interest or the imposition of penalty be sustained.

7. The impugned order is, therefore, set aside and the appeal is allowed with consequential relief, if any.

(Pronounced in open Court on 01.10.2021)

