Commissioner of Central Excise, Thane I Vs. the Tiger Steel Engineering (i) Pvt Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jul-08-2010

Judge : The Honourable Mr. P.G. Chacko, Member (Judicial) &Amp; the Honourable Mr. S.K. Gaule, Member (Technical)

Appeal No. : Appeal Nos. E/344, 345 & 346/09 (Arising out of Order-in-Appeal No. KKS/13 to 15/Th-I/09 da

Appellant : Commissioner of Central Excise, Thane I

Respondent : The Tiger Steel Engineering (i) Pvt Ltd.

Advocate for Pet/Ap. : For the Appellant : Shri K.M. Mondal, Consultant. For the Respondent : Shri Naresh C Thacker, Advocates.

Judgement :

Per: P.G. Chacko

1. These appeals filed by the Revenue are directed against the common order passed by the lower appellate authority in three appeals filed by the assessee. In three separate orders passed by the original authority, in adjudication of equal number of show-cause notices, six refund claims of the assessee, which were filed under Rule 5 of the Cenvat Credit Rules, 2004 had come to be rejected. Aggrieved, the assessee preferred appeals to the Commissioner (Appeals) and

the same were allowed by the appellate authority. Hence the present appeals of the Revenue.

2. The respondent was engaged, during the material period, in the manufacture of excisable goods namely Pre-fabricated Steel Buildings falling under Chapter 94 of the First Schedule to the Central Excise Tariff Act. They were also availing the benefit of CENVAT Credit on inputs under the relevant provisions of the CENVAT Credit Rules, 2004. During the period of dispute, which comprises six quarters specified in the Table given below, the respondent supplied their product viz Pre-fabricated Steel Buildings to Nokia India Pvt Ltd, a unit in Nokia Telecom Special Economic Zone (SEZ for short), Chennai. These clearances were effected under Letter of Undertaking without payment of duty in terms of Rule 19 of the Central Excise Rules, 2002:

Period

Date of filing refund claim

Amount of refund claim (in Rs)

January 2007 to March 2007

10.06.2008

39,13,832/-

April 2007 to June 2007

02.06.2008

84,32,797/-

July 2007 to September 2007

17.06.2008

60,52,189/-

October 2007 to December 2007

23.06.2008

16,31,142/-

January 2008 to March 2008

21.07.2008

2,95,34,954/-

April 2008 to June 2008

20.10.2008

1,48,99,006/-

Total

6,44,63,920/-

3. The respondent filed the above refund claims under Rule 5 of the CENVAT Credit Rules, 2004 on the premise that their clearances of finished goods to the SEZ units were ‘exports’ for the purpose of the said Rules. Show-cause notices were issued proposing to reject these refund claims on the ground that the claimant had not fulfilled the requirements of Rule 5 ibid. In these show-cause notices, it was alleged that the goods cleared by the respondent to the SEZ units were capital goods and not inputs and further that such clearances were not to be considered as physical exports. On this basis, the refund claims were proposed to be rejected. The respondent denied the above allegations and contested the above proposals. It was in adjudication of this dispute that the original authority rejected the refund claims filed by the respondent. The adjudicating authority rejected the reliance placed by the party on the Board s Circular No 29/06-Cus dated 27.12.2006 by observing that there was no mention of Rule 5 ibid in the circular. It also relied on the Tribunal’s decision in SV Business Pvt Ltd vs CCE 2006 (190) ELT 408 (Tri-Mum), as also on the decision in CCE vs Quality Screens

2008 (226) ELT 608 (Tri-Mum), wherein it had been held to the effect that, for a refund of unutilized MODVAT/CENVAT Credit under Rule 5 to a 100% EOU, the claimant (EOU) must have physically exported goods out of the country. The adjudicating authority also opined that the goods cleared by the respondent to the SEZ units were more in the nature of capital goods rather than inputs and the same had not been used in any manner in, or in relation to, the manufacture of the goods exported by the SEZ units. The substantive view taken by the adjudicating authority was that Rule 5 was not applicable where the 'exports' by the claimant were all deemed exports. Setting aside the orders of the original authority, the learned Commissioner (Appeals) heavily relied on certain provisions of the Special Economic Zones Act, 2005 and of the Rules framed thereunder and arrived at the conclusion that any supply of goods to SEZ unit by any unit in the Domestic Tariff Area (DTA), coming within the ambit of 'export' defined under Section 2 (1) (ii) of the SEZ Act, 2005, would satisfy the purpose of Rule 5 of the CENVAT Credit Rules, 2004. The learned Commissioner (Appeals) took the view that Circular No 29/06-Cus ibid is, mutatis mutandis, applicable to such supply of goods by a DTA unit to SEZ unit. The learned Commissioner (Appeals) also found that the proof of export by the respondent had been accepted by the department and further that it was not in dispute that the respondent has 'followed all the legal and procedural requirements as per Rule 5 of CENVAT Credit Rules, 2004 read with Notification No. 5/06-CE dated 14.3.06.' The appellate authority also relied on the Tribunal's decision in CCE vs Self Knitting Works 2007 (220) ELT 926 (Tri), wherein a learned Single Member of the Tribunal, following a Division Bench's decision viz Amitex Silk Looms Pvt Ltd 2006 (194) ELT 344 (Tri), held that deemed exports were to be treated as 'exports' for all purposes. Some of these findings of the lower appellate authority are presently under challenge.

4. In these appeals, it is the submission of the department that, for purposes of Rule 5 of the CENVAT Credit Rules, 2004, the meaning of 'export' has to be derived from the Central Excise Act, 1944 and the Customs Act, 1962 and accordingly 'exports' would not be anything other than 'taking goods out of India'. In this context, the appellant has relied on the Tribunal's decision in Quality Screen's case (supra). It is submitted by the appellant that the learned Commissioner (Appeals) did not consider the Tribunal's decision in Quality

Screens (supra). The learned Consultant for the appellant has amplified the grounds of these appeals by extensive reference to various provisions of law as well as case law. His arguments have also been summarized in a synopsis filed today and the same are as under:-

(a) Though the term ‘export’ has not been defined either in the Central Excise Act or the Central Excise Rules, 2002, the term ‘export’ used in Rule 5 of the CENVAT Credit Rules, 2004 is to be understood in its ordinary and natural sense i.e. ‘taking goods physically out of India to a place outside India’. This legal position is clear from the Explanation to Rule 18 of the Central Excise Rules, 2002, which reads:

‘export’ includes goods shipped as provision or stores for use onboard a ship proceeding to a foreign port or supplied to a foreign-going aircraft.’

(b) The relevant provisions of the SEZ Act and the SEZ Rules are meant for the benefit of SEZ unit. The benefits available to a DTA unit supplying raw materials or capital goods to SEZ units are limited to the extent specified under para 7.9 of the Foreign Trade Policy;

(c) Neither SEZ Act or the Rules make any express provision for refund of accumulated (unutilized) CENVAT Credit under Rule 5 of the CENVAT Credit Rules, 2004 and therefore, the benefit of Rule 5 will not be available to a DTA supplier supplying goods to a SEZ unit or developer;

(d) The Board’s Circular No 29/06-Cus dated 27.12.2006 did not touch Rule 5 of the CENVAT Credit Rules, 2004 and hence cannot be relied upon by the respondent in the context of claiming a refund of unutilized CENVAT Credit under Rule 5;

(e) The Tribunal’s decision in Amtex Silk Mills’s case (supra), which was followed in the case of Self Knitting Works (supra) is not applicable to the facts of the present case inasmuch as it did not pertain to any supply of goods by a DTA unit to SEZ unit;

(f) In the case of Essar Steels Ltd vs Union of India 2010 (249) ELT 3 (Guj), the Hon’ble High Court, after considering the various provisions of the SEZ Act and the SEZ Rules, held that export duty could not be levied under the Customs Act in respect of goods supplied by a DTA unit to SEZ unit. For purposes of levy of such duty, the export should be physical export out of the country. In the present case, the supply of goods by the respondent to SEZ units was only a ‘deemed export’ within the meaning of this expression as expounded by the Hon’ble Madras High Court in the case of BAPL Industries Ltd vs Union of India 2007 (211) ELT 23 (Mad).

On the above grounds, the learned Consultant prays for setting aside the order of the lower appellate authority and upholding the orders-in-original.

5. The learned Counsel for the respondent has contested the above submissions of the learned Consultant. His arguments are summarized below:

(a) Rule 5 of the CENVAT Credit Rules, 2004 allows refund of CENVAT Credit in respect of inputs and input services used in the manufacture of final product which is cleared for export under Bond or Letter of Undertaking. The term ‘export’ used in this rule has not been defined under the Central Excise Act or any Rules framed thereunder. Therefore, in respect of goods supplied to SEZ unit, it should be understood as defined under the SEZ Act;

(b) According to the definition of ‘export’ given under Section 2 (1) (ii) of the SEZ Act, supply of goods from the Domestic Tariff Area to a unit in SEZ is ‘export’. This deeming fiction under Section 2 (1) (ii) of the SEZ Act read with section 53 of the Act needs to be given full effect and, if so, its benefit would be available to the DTA supplier. In the context of urging that full effect be given to a deeming fiction, support is claimed from the Hon’be Supreme Court’s judgments in Clariant International Ltd and Anr vs Securities and Exchange Board of India (2004) 8 SCC 524 and Commissioner of Commercial Taxes vs Swarn Rekha Cokes and Coals (P) Ltd and Ors (2004) 6 SCC 689;

(c) Board’s Circular No. 29/06-Cus dated 27.12.2006 read with instructions No. 6/06 dated 3.8.2006 issued by the Ministry of Commerce and Industry to the Chief Commissioners of Customs and Central Excise would strongly support the respondent’s contention that their supply of goods to SEZ units should be considered to be in the nature of export for purposes of Rule 5 of the CENVAT Credit Rules, 2004 and, for that matter, the respondent, as DTA supplier, would be exporter for the present purpose. The Hon'ble High Court's decision in the case of Essar Steel Ltd vs Union of India (supra) will not be applicable to the present case inasmuch as, in the said case, the question considered by the High Court related to leviability of export duty under Section 12 of the Customs Act with reference to the definition of 'export' given under the SEZ Act;

(d) Circular No. 6/2010 dated 19.3.2010 issued by the CBEC to all Chief Commissioners of Customs and Central Excise clarified that a DTA supplier could claim rebate under Rule 18 of the Central Excise Rules, 2002 in respect of supplies to SEZ unit in terms of the earlier Circular No. 29/06-Cus. If, for purposes of Rules 18 and 19 of the Central Excise Rules, 2002, the supplies from a DTA unit to SEZ unit can be deemed to be 'exports', they should be considered likewise for purposes of Rule 5 of the CENVAT Credit Rules, 2004;

(e) The issue involved in the instant case is squarely covered by the Tribunal's decision in Self Knitting Works' case (supra).

6. We have given careful consideration to the submissions. The refund claims, in question, were filed under Rule 5 of the CENVAT Credit Rules, 2004, which (without the provisos thereto) reads as under:

'5. Refund of CENVAT credit

Where any input or input service is used in the manufacture of final product which is cleared for export under bond or letter of undertaking, as the case may be, or used in the intermediate product cleared for export, or used in providing output service which is exported, the CENVAT credit in respect of the input or input service so used shall be allowed to be utilized by the manufacturer or provider of output service towards payment of,

(i) duty of excise on any final product cleared for home consumption or for export on payment of duty; or

(ii) service tax on output service, and where for any reason such adjustment is not possible, the manufacturer or the provider of output service shall be allowed refund of such amount subject to such safeguards, conditions and limitations, as may be specified, by the Central Government, by notification: ‘

7. Admittedly, this claim was made in respect of the duty paid on the inputs used in the finished goods (Pre-fabricated Buildings) cleared by the party to SEZ units. Whether the finished goods so cleared to the SEZ units were to be used by them as capital goods or inputs in their factory is not material. What matters is whether the clearance of the finished goods under Letter of Undertaking to the SEZ units amounted to ‘export’ by the respondent for the purposes of Rule 5. We shall, therefore, address this question first.

8. The learned Counsel for the respondent has heavily relied on the provisions of the SEZ Act and SEZ Rules in his bid to establish that the clearances made by them to the SEZ units are to be considered to be ‘export’ for purposes of Rule 5 ibid. On the other hand, it has been argued by the learned Consultant for the appellant that ‘export’ for purposes of Rule 5 ibid should be understood in the sense the term has been defined under the Customs Act. In this connection, he has relied on the Hon’ble High Court’s judgment in Essar Steel’s case (supra). On a perusal of the provisions of the SEZ Act, we have come across the following definition of ‘export’ under Section 2 of the Act:

‘(m) ‘export’ means’

(i) ---

(ii) supplying goods, or providing services, from the Domestic Tariff Area to a Unit or Developer; or;

(iii) ----

No doubt, the supply of goods by a DTA unit to SEZ unit is export for purposes of the SEZ Act. This legal position is evident from the provisions of Rule 30 of the SEZ Rules, which provides the procedure for procurements by a SEZ unit from the DTA. Sub-rule

(1) of rule 30 provides that a DTA supplier supplying goods to a Unit or Developer shall clear the goods, as in the case of exports, either under bond (apparently in terms of Rule 19 of the Central Excise Rules, 2002) or as duty-paid goods under claim of rebate (apparently in terms of Rule 18 of the Central Excise Rules, 2002). This sub-rule also stipulates that such clearance of goods should be under the cover of ARE-1 referred to in notification No. 40/01-CE (NT) dated 26.6.

01. Sub-rule

(2) allows admission of such goods into SEZ unit on the basis of ARE-1 where exemption from payment of Central Excise duty has been availed by the DTA supplier without availment of export entitlements. Sub-rule

(3) allows admission of such goods into a SEZ unit on the basis of ARE-1 and Bill of Export filed by the supplier or, on his behalf, by the SEZ unit itself where the procurements by the SEZ unit is under claim of export entitlements. This Bill of Export has to be assessed by the authorized officer before arrival of the goods in the normal course. The sub-rules

(4) to

(8) deal with various aspects such as assessment of Bill of Export, Grant of drawback or DEPB credit etc. Sub-rule

(9) provides that a copy of the Bill of Export and ARE-1 with an endorsement of the authorized officer that the goods have been admitted in full in the SEZ shall be treated as proof of export. The remaining sub-rules deal with various aspects which are not of relevance to the issue at hand. The learned Counsel for the respondent has submitted that they followed the above procedure in respect of the goods supplied to SEZ units and, therefore, such goods should be deemed to have been exported for purposes of Rule 5 of the Central Excise Rules, 2004. Yet another provision referred to by the learned Counsel is Section 51 of the SEZ Act which gives overriding effect to the provisions of the Act vis--vis any other law for the time being in force. It has laid down that 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. The learned Counsel has also referred to Section 53 of the SEZ Act, which provides that a Special Economic Zone shall be deemed to be a territory outside the customs territory of India for the purposes of undertaking the authorized operations and that it shall also be deemed to be a port, airport, inland container depot, land station and land customs stations, as the case may be, under Section 7 of the Customs Act. On the strength of these provisions, the learned Counsel has argued that the clearances, in question, were made to a place which was deemed to be a territory outside the Customs territory of India and the same were covered by the definition of export given under Section 2 (m) (ii) of the said Act, and therefore, the respondent, as the exporter of the goods, should get the benefit of Rule 5 of the CENVAT Credit Rules, 2004. On the other hand, the learned Consultant has argued that the respondent cannot claim any benefit on the strength of the provisions of the SEZ Act or the Rules made thereunder in relation to any transaction covered by any of the provisions of the said Act/Rules. He has pressed into service the definition of export given under the Customs Act.

9. On a perusal of the provisions of the SEZ Act, we find that it is a special statute enacted by Parliament to benefit manufacturing units in Special Economic Zones. It is a special legislation which is intended to benefit such units only. The various provisions of the SEZ Act are to be considered as vehicles which convey such benefits to SEZ units. The definition of the term export given under Section 2 (m) of the SEZ Act and the various related provisions of the Act have to be considered in this perspective. Undisputedly, the definition ‘export’ given under Section 2 (m) (ii) of the SEZ Act is a deeming provision inasmuch as it purports to designate as ‘export’ a transaction which is not recognized as export under the Customs Act. Section 2 (18) of the Customs Act defines ‘export’ thus:-

‘export’ with its grammatical variations and cognate expressions, means taking out of India to a place outside India;’

The above provision of the Customs Act embodies the popular sense of the word ‘export’. On the other hand, Section 2 (m) (ii) of the SEZ Act would consider as ‘export’ a transaction wherein SEZ unit procures goods from the DTA. Export as defined under the SEZ Act must mean export by SEZ unit. The nitty- gritty of the procedure can be had from Rule 30 of the SEZ Rules. According to this procedure, a Bill of Export will be filed by a DTA supplier or, on his behalf, by the SEZ unit itself.

The provisions of Rule 30 also indicate that a copy of the Bill of Export and ARE-1 with an endorsement of the authorized officer that the goods have been admitted in the SEZ shall be treated as proof of export. Although, prima facie, it may appear that the DTA unit is the exporter, it has to be discerned from the SEZ Scheme that it is only an illusion created by the deeming provisions. We reiterate that any ‘export’ as defined under Section 2 of the SEZ Act purports to be an export by that unit just as an ‘import’ as defined under the Act purports to be an import by the same unit. One should not be misled by the deeming provisions. It has to be borne in mind that, if the supply of goods by DTA unit to SEZ unit is considered to be an export by the DTA unit, then it should be an import by the SEZ unit. But the definition of ‘import’ under Section 2 (o) of the SEZ Act does not recognize the transaction to be an import for the SEZ unit. On the other hand, the transaction squarely falls within the definition of ‘export’ under Section 2 (m). It is an export for the SEZ unit. All the deeming provisions of the SEZ Act and the Rules framed thereunder cumulatively aim at granting benefits to SEZ units. None of these provisions can be construed as having been enacted to confer benefits on any DTA unit. Looking at the issue from this angle, we are of the view that the respondent, as DTA supplier, cannot claim any benefit under Rule 5 of the CENVAT Credit Rules, 2004 as complementary to any benefit accruing to SEZ unit out of the same transaction.

10. The learned Counsel has cited two judgments of the Hon’ble Supreme Court in the context of urging that the deeming provisions of the SEZ Act should be given full effect to. We have perused the text of each of these judgments. In the case of Clariant International (supra), the Hon’ble Supreme Court held thus: ‘Purpose and object of creating a legal fiction is well known. Once a fiction is created upon imagining a certain state of affairs, the imagination cannot be permitted to be boggled when it comes to the inevitable corollaries thereof.’ In the case of Swarn

Rekha Cokes and Coals (supra), Their Lordships held: thus ‘It is well settled that in interpreting a provision creating a legal fiction, the court must ascertain the purpose for which the fiction is created and having done so, to assume all those facts and consequences which are incidental or inevitable corollaries to the giving effect to the fiction.- In the instant case, by a legal fiction, procurements made by a SEZ unit from a DTA unit are ‘exports’ by the SEZ unit. Again, by way of extension of this legal fiction, the SEZ Rules require the DTA unit to file a Bill of Export. The legal fiction cannot be extended beyond its statutory object. The object enshrined in the provisions of the SEZ Act and the Rules made thereunder, insofar as a procurement of goods effected by SEZ unit from the DTA is concerned, is that such procurement is an ‘export’ for the SEZ unit so that the unit can claim all the export benefits available under the SEZ Scheme. In this context, useful reference may be made to Rule 23, which provides that ‘supplies from the DTA to a Unit or Developer for their authorized operations shall be eligible for export benefits as admissible under the Foreign Trade Policy. - The policy (vide Chapter-7 thereof) as amended with effect from 1.4.2006, laid down thus: The policy relating to Special Economic Zones is governed by SEZ Act 2005 and the Rules framed thereunder. But the SEZ Act or the SEZ Rules did not confer any export benefits on DTA suppliers. The ‘export benefits’ referred to under Rule 23 ibid are benefits available to SEZ Unit/Developer inasmuch as supplies from the DTA to SEZ Unit/Developer are deemed to be exports made by the latter. We reject the contention of the learned Counsel that the respondent as DTA supplier was exporting goods to the SEZ unit. The filing of Bill of Exports by the DTA unit would not ipso facto make them exporter. Such filing of Bill of Exports by the DTA supplier is only a convenient procedure and the same cannot detract from the deeming provisions taking effect to the benefit of SEZ unit. Rules are subsidiary to Sections of the parent Act and cannot be the basis of interpretation of the latter. In none of the cases cited by the learned Counsel did the Supreme Court grant the benefit of any deeming provision to a party other than the party for whose benefit the provision was made. The deeming provisions under the SEZ Act and/or the SEZ Rules are, as we have noted, exclusively for the benefit of SEZ units. The DTA unit, by the mere activity of supplying goods to SEZ unit, cannot claim any complementary benefit on the strength of the deeming provisions of the SEZ

Act/Rules. It is also pertinent to note that it was not the policy of the Government to grant benefits under the Central Excise Act or any Rules thereunder to DTA unit supplying goods to SEZ unit. Such benefits cannot be claimed by the DTA unit unless it is expressly provided for under the Central Excise Act or any Rules thereunder.

11. In the present case, the respondent claimed refund of accumulated CENVAT Credit under Rule 5 of the CENVAT Credit Rules, 2004. For this benefit, they had to satisfy mainly two conditions viz. (i) the Cenvated inputs should have been used in or in relation to the manufacture of the finished goods supplied to SEZ unit by way of export under Bond/Letter of Undertaking and (ii) the CENVAT Credit taken on the inputs was practically not capable of being utilized for payment of duty on any final product. The finished goods, in this case, were admittedly supplied to SEZ units under Letter of Undertaking. However, the question arises as to whether such supply of goods to SEZ units was an 'export.' At no time was the term 'export' defined under the Central Excise Act or any Rules framed thereunder. The definition of 'export' given under the Customs Act has been traditionally adopted for purposes of the Central Excise Act and the Rules thereunder. Therefore, in the absence of a definition of 'export' under the Central Excise Act, the Central Excise Rules or the CENVAT Credit Rules, 2004, we hold that, for purposes of the CENVAT Credit Rules, 2004, one should look for its definition given under the Customs Act. The fictionalized definition of 'export' under Section 2 (m) (ii) of the SEZ Act cannot be looked for as it purports only to make the SEZ unit an exporter. In other words, the term 'export' used in Rule 5 of the CENVAT Credit Rules, 2004 stands for 'export', which is 'physical export' out of the country, envisaged under the Customs Act. We take this view because, as we have already indicated, anybody other than SEZ unit can not be allowed to claim any benefit under the SEZ Act/Rules. Viewed from this angle, the respondent cannot be held to be entitled to refund of accumulated CENVAT Credit on the inputs used in or in relation to the manufacture of the 'pre-fabricated buildings' supplied by them to the SEZ units.

12. We are of the considered view that the decision taken by the learned Single Member in the case of Self Knitting Works (supra) is not in accordance with the

purport of the law. Noticeably, the learned Single Member chose to follow an earlier decision of the Tribunal which pertained to 100% EOU. With reference to the provisions of the Exim Policy as applicable to 100% EOU, the Tribunal had, in the earlier case, held that clearances made by the EOU to DTA against payment in foreign currency were also to be added to physical exports for the purpose of determining NFEP (Net Foreign Exchange earning as a Percentage of exports). The SEZ Scheme, undisputedly, is an entirely different self-contained scheme which is intended to benefit the SEZ units. The policy provisions relating to 100% EOU cannot be applied to SEZ units, for which there is separate statute and a body of rules framed thereunder. The Board's circular relied on by the learned Counsel did not offer any clarification on whether a DTA supplier who supplies goods to SEZ could be allowed to claim refund of accumulated CENVAT Credit on inputs used in the manufacture of such goods. The Board's clarification is in the context of applicability of Rules 18 and 19 of the Central Excise Rules, 2002 to a DTA supplier who might claim duty-free clearance of goods under Bond/Letter of Undertaking or rebate of duty paid on such goods or on raw materials used therein. Such limited clarification offered by the Board cannot be applied to the instant case where the issue under consideration is altogether different.

13. Both sides have referred to the Hon'ble High Court's decision in Essar Steel (supra) in support of their respective arguments. The Hon'ble High Court was dealing with the question whether the goods supplied by the DTA unit to SEZ unit were chargeable to export duty under the Customs Act. The Revenue, in that case, argued that, as such clearance of goods was covered by the definition of 'export' given under the SEZ Act, export duty was leviable thereon. This contention was negatived by the High Court which held that, for the levy of export duty on any goods, the goods should be shown to have been physically exported out of the country as envisaged under the provisions of the Customs Act. Their Lordships did not permit the provisions of the SEZ Act to be applied to chargeability of export duty under the Customs Act. This approach of the Hon'ble High Court is, in our view, working in favour of the Revenue in the present case, wherein, unlike in the case of Essar Steel, the Revenue has chosen to exclude the provisions of the SEZ Act/Rules from the purview of the Central Excise provision viz. Rule 5 of the CENVAT Credit Rules, 2004. Thus the view which was taken against the Revenue

in Essar Steel s case works in their favour in the instant case.

14. In this case, we also find that certain factual findings recorded by the lower appellate authority do not stand the test of evidence. It was held that it was not in dispute that the respondent had fulfilled all the legal requirements of Rule 5 read with Notification No. 05/06-CE (NT). This finding would amount to holding that the respondent established that they were not in a position to utilize the CENVAT Credit in question. But we have not found any material in the impugned order to indicate that the respondent could so establish. Be that as it may, the first and foremost point recorded by the learned Commissioner (Appeals), which is to the effect that the clearance of goods by the respondent to the SEZ Unit amounted to ‘export’ for the purpose of Rule 5, has been negatived by us and, therefore, his order cannot be sustained in law.

15. In the result, the impugned order is set aside and all these appeals are allowed.