

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
OLD RED BUILDING, 38, M.G. Marg, CIVIL LINES, ALLAHABAD

Dated: 04/03/2016

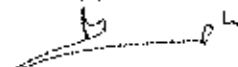
To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/70095/2016 DB dated 19/01/2016

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 35-C(1) of the Central Excise and Salt Act, 1944.


Asstt. Registrar

Application	Appeal	Name and Address of Appellant
	1255276/2013	BAJAJ HINDUSTHAN LTD UNIT- BILAI, BILNOR UP
		COMMISSIONER OF CENTRAL EXCISE, MEERUT EXCISE CHOWK, UNIVERSITY ROAD MANGAL PANDEY NAGAR, MEERUT

Other Appellants and Respondents as per Annexure

Copy To

3 Advocate(s) / Consultant(s) SH PRADEEP KUMAR MITTAL, ADV
171, CHITRA VIHAR
DELHI-92

4 Bar Association, CESTAT, ALLAHABAD

5 Director Publications, Customs, Excise, I.P. Estate, Delhi

6 M/s Centax Publications Pvt. Ltd., 1512-B, Blushm Pitamsh Marg, New Delhi-3

7 Company Law Institute of India Pvt. Ltd., No.2 (old no 36), Vaithyaram Street, T. Nagar, Chennai-17

8 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohitak Road, New Delhi-110005

9 Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Satellite Road, Ahmedabad-15

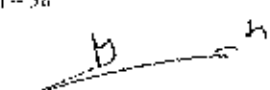
10 LAWCRUX Advisors Pvt. Ltd., LAW House, I-8, Sector-10, Faridabad 121003 (Haryana)

11 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

12 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad - 38

13 The ICFAI society, S2, Nagarjuna Hill, Panjagutta Hyderabad.-500082

14 C.D.R. 15 Office Copy 16 Guard File


Asstt. Registrar
Regional Bench, Allahabad

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
REGIONAL BENCH : ALLAHABAD

Ex. Appeal No.55276/13

Arising out of O/O No.35/Commr./MRT.1/2012 dated 25.09.2012
passed by Commr. (Appeals) of Customs & Central Excise, Meerut.

For approval and signature:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. H. K. THAKUR, MEMBER (TECHNICAL)

1. Whether Press Reporters may be allowed to see
the Order for publication as per Rule 27 of the
CESTAT (Procedure) Rules, 1982? : No
2. Whether it should be released under Rule 27 of the
CESTAT (Procedure) Rules, 1982 for publication
in any authoritative report or not? : Yes
3. Whether His Lordship wishes to see the fair copy
of the Order? : Seen
4. Whether Order is to be circulated to the Departmental
Authorities? : Yes

M/s Bajaj Hindusthan Ltd.

.. APPELLANT(S)

VERSUS

CCEx., Meerut I

RESPONDENT (S)

APPEARANCE

Shri P. K. Mittal, Adv. for the Appellant (s)
Shri Raj Kumar Maji, Asstt. Commr. (A.R.) for the Department

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. H. K. THAKUR, MEMBER (TECHNICAL)

DATE OF HEARING & PRONOUNCEMENT : 19. 01. 2016

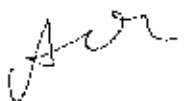
Final ORDER NO. 70095/2016



Per Mr. Anil Choudhary :

Appellant is engaged in manufacture of sugar and molasses and is in appeal against order in original dated 25.09.2012, passed by Commissioner of Central Excise, Meerut I.

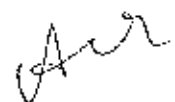
2. The facts in brief are that that in the course of audit for the period January,2007 to December,2008, it was noticed that the appellants have not made the payment of 10% of the amount of sale price of exempted final product, that is electricity sold to U.P.Power Corporation Ltd. nor have made reversal of proportionate Cenvat credit availed on inputs, input services used and consumed in generation of electricity sold, in terms of rule 6(3) of CCR 2004. It was observed that the appellant was availing Cenvat credit on inputs like lubricants, greases, coolant, chemicals et cetera and input services used and consumed commonly in the manufacture of sugar and molasses which are chargeable to duty as well as in the generation of electricity which is exempted. Besides, use of electricity generated in the plant, same is also being sold to U.P.Power Corporation Ltd. as well as used in residential colony, guest house, bank, canteen et cetera, that is, being used for non-manufacturing activity. It was noticed that the appellant did not maintain separate account for the receipt, consumption and inventory of inputs and input services meant for use in the manufacture of dutiable final products and the quantity of inputs meant for use in the manufacture of exempted goods or non-manufacturing activities. As because electricity have been incorporated in CET with effect from 28/2/05, however, column of rate of duty is



kept blank, electricity becomes taxable goods although no duty had been specified. As no date of duty has been indicated for electrical energy, the said item as per revenue, is to be treated as exempted goods. Accordingly, show cause notice was issued as it appeared to revenue that the appellant is required to reverse the attributable credit on the inputs and input services consumed for generation of electricity used in colony, guest house, bank, canteen et cetera for non-manufacturing activity or pay an amount equal to 10% of sale price of such electricity sold to U.P.Power Corporation Ltd. Accordingly, show cause notice dated 28/9/11 was issued invoking extended period of limitation proposing to recover Rs.1,97,96,236/- under Rule 14 of CCR 2004, read with proviso to sub-section 1 of Section 11A of the Central Excise Act, 1944, with proposal to appropriate amount already paid by way of debit to Cenvat account totalling Rs.1,60,002/- along with interest and further, penalty was proposed under Rule 15 of CCR read with section 11AC of the Act.

3. The appellant appeared and contested the show cause notice. Vide order-in-original, the reduced amount of Rs.1,57,55,793/- was confirmed along with proposed appropriation of Rs.1,60,002/- with interest and further penalty of equal amount was imposed under Rule 15 of CCR read with Section 11 AC of the Act .

4. Being aggrieved, the appellant is before this Tribunal on the grounds that the appellant manufactured dutiable goods namely, sugar and molasses and the electricity, a non-excisable item is produced primarily for running the sugar mill, wherein a small quantity of inputs



being turbine oil and lubricants are used in generation of electricity. Credit is available to the appellant on the turbine oil and lubricants as they had been used indirectly in the manufacture of dutiable final products. It is further contended that sugar is the final product and molasses is bye-product and as such Cenvat credit is rightly taken. Only the surplus electricity so generated, as it cannot be stored, is sold to U.P. Power Corporation Ltd. It is further urged that the interpretation of the revenue on the basis of clause 1 (c) of Additional Notes of General Rules for the interpretation of the first schedule to hold that "as no rate of duty is indicated for electrical energy it is exempted goods". But this interpretation is not sustainable as per specific definition given under Cenvat credit Rules. In the facts and the circumstances that the electricity is primarily generated for captive consumption and not for sale or clearing outside the factory, the provisions of Rule 6 are not attracted. However, it is not the final product of the appellant and at best it is an intermediate product. It is further contended that electricity having been inserted vide the Finance Act, 2005 under the CET first schedule but till date it is neither chargeable to any duty, nor nil rate of duty as Column 4 meant for rate of duty has been left blank in the tariff entry. Thus, the essential ingredient of chargeable to duty being absent electricity can neither be taken as taxable nor exempted goods. The learned Counsel further relies on the ruling of SMB Bench of this Tribunal in Ex.Appeal No.E/52882/2014-Ex (SM), wherein vide Final Order No.51791/2015-Ex (SM) relating to the period 01.04.2007 to 31.03.2008, wherein similar demand was under consideration. This Tribunal have allowed



the appeal in favour of the appellant. The relevant paragraphs are reproduced below for ready reference :

"5. In this case the short issue is to be decided by me whether the appellant is required to pay 10% of the value of electrical energy produced from bagasse which is sold to M/s U.P.Power Corporation Ltd., or not.

6. Whether the appellant has already reversed the credit attributable on bagasse which was used in manufacturing of final exempted product as per Rule 6 of the Cenvat Credit Rules, 2004, or not. The contention of the Revenue is that as electricity is excisable goods and exempted from duty, therefore, as per Rule 6 (3) of the Cenvat Credit Rules, 2004, the appellant is required to pay 10% of the value of electric energy sold. To say the same, the Id.A.R. relied on the decision in the case of Geetanjali Woollens (supra), Aldec Corporation (supra), Maruti Suzuki Ltd. (supra) and Orient Paper and Industries Ltd. (supra). It is also submitted by her that electricity is a tariff item as per Chapter 27 of the Central Excise Tariff Act. But, she has failed to explain that whether electricity generated from bagasse is covered under Chapter 27 of Central Excise Tariff Act or not. As in this case, the electricity is generated from bagasse. Further, whether the bagasse is a manufactured product of the appellant or not she has not answered this issue and the said issue came up before the Hon'ble High Court of All. In the case of Gularia Chini Mills : 2014 (34) STR 175 wherein the Hon'ble High Court has observed as under :

25. It is not in dispute that petitioners do not avail Cenvat credit on any input and input services used in generation of electricity insofar as this fact has been admitted by the Assistant



Commissioner as well as Commissioner, Central Excise, Lucknow vide letters dated 30-1-2013 and 21-2-2013, respectively. In order to become any goods to be an 'excisable goods', it has to fulfil the following conditions :

- "(1) Goods must be manufactured;
- (2) Must be specified in the First or Second Schedule of the Central Excise Tariff,
- (3) It must be subjected to tariff."

26. Admittedly, none of these conditions are attracted in the instant case insofar as electrical energy, which is mentioned in Chapter 27 of the Central Excise Tariff Act, covers only those electrical energy which are generated from mineral fuels, mineral oils and products of their distillation, bituminous, substances, mineral waxes, etc. The electrical energy generated from Bagasse is not covered under Chapter 27. Similarly, Chapter 27 does not cover electrical energy produced by solar power, hydro power, wind power or from bagasse. Therefore, we are of the view that electrical energy is not an excisable goods nor it is exempted goods as defined in Rule 2(d) of the 2004 Rules.

28. Hence, manufacture is referred to both dutiable/excisable goods and exempted goods, which are final products. Only then, it is necessary for the manufacturer to maintain separate accounts. Rule 6 of the Cenvat Credit Rules, 2004, (which is *pari materia* to the erstwhile Rule 57CC) provides that if Cenvat

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credit has been taken on the inputs which are used for manufacture of dutiable and exempted final products then the assessee is required to reverse the proportionate credit or pay 10%/5% amount of the value of the exempted final products. Electricity is not excisable goods under Section 2(d) of the Act, hence Rule 6 of the Cenvat Credit Rules, 2004 is not applicable as held by the Apex Court in the case of *Solaris Chemtech Ltd.* (supra).

32. The definition of 'excisable goods' given in Section 2(d) means the goods, which are specified in the First or Second Schedule and which are subjected to duty of excise, can only be treated as excisable goods. A proposition has also been accepted by the Commissioner in its findings. A perusal of Section 2(d) of Central Excise Act shows that the excisable goods are only those goods which are subjected to duty of excise as specified in the First Schedule or Second Schedule of the Central Excise Tariff Act. Since Column of rate of duty is blank, therefore, in view of Section 2 of the Central Excise Tariff Act, 1985, electrical energy is not being subjected to excise duty for the purposes of being excisable goods under Section 2(d) of the Central Excise Act. Furthermore, Rule 6 of the 2004 Rules, which is applicable only to excisable goods, can alone be treated as exempted goods for the purposes of Rule 6(3) of 2004 Rules, does not apply to electrical energy.

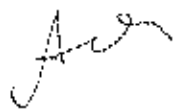
34. For the discussions made hereinabove, it is clear that *Geetanjali Woolens Mill* judgment relied upon by the Commissioner in the impugned orders have no relevance as



Geetanjali Woolens Mill's judgment was in respect of customs duty and was only concerned with the tariff item and not with respect to the 'excisable goods' as defined under Section 2(d) of Central Excise Act, 1944. The bagasse, which emerges as a residue of sugarcane, admittedly, is a waste product and this bagasse is used in boiler as a fuel for generation of steam for running the turbine and for boiling the juice for the manufacture of sugar. Turbine generates electrical energy which is used for running the plant and machinery and surplus energy is sold to the U.P. Power Corporation Ltd. Furthermore, bagasse is used as fuel in the factory for manufacture of final product and no specific input is used up to the stage of emerging of bagasse which is a waste and which emerges on the crushing of sugarcane. Thus, we have no hesitation to say that electrical energy emerges from the bagasse and sold to U.P. Power Corporation Ltd. does not fall within the ambit of excisable goods.

35. Accordingly, all the writ petitions are liable to be allowed, which is hereby allowed. The orders/show cause notice impugned in respective writ petitions are hereby quashed. The respondents are directed not to realize any excise duty on electrical energy which was sold to U.P. Power Corporation Ltd.

8. This Tribunal has also got an opportunity to examine the said issue in the case of *Sharad SSK Ltd.* (supra) wherein this Tribunal observed as under :



6.1 As regards the question whether the electricity is exempted goods or not, we find that the issue is already settled in favour of the appellant in the case of *Gularia Chini Mills* case cited (supra). In the said decision, the issue for consideration was whether electrical energy is excisable goods as defined in Section 2(d) of the Central Excise Act and whether Rule 6 of the CENVAT Credit Rules, 2004 would be applicable in respect of inputs/input services used in the manufacture of electricity. The Hon'ble Allahabad High Court held that electrical energy which is mentioned in Chapter 27 of the Central Excise Tariff Act covers only such electrical energy which is generated from mineral fuels, mineral oil and products obtained therefrom and electrical energy produced from bagasse is not covered under Chapter 27 and hence, such electrical energy is not excisable goods nor is it exempted goods as defined in Section 2(d) of the Act. It was further held that Rule 6 of the CENVAT Credit Rules, 2004 refers to both dutiable/excisable goods and exempted goods. Only then, it is necessary for the manufacturer to maintain separate accounts. Rule 6(3) of the said Rules provides that when CENVAT credit is taken on the inputs/input service which are used for manufacture of dutiable as well as exempted final products, then the assessee is required to reverse proportionate credit or pay 5% amount of the value of the exempted final products. As regards electricity which is not excisable goods, the provisions of Rule 6 would not *ab initio* apply. In the present case, it is an admitted fact that the appellant has generated electricity from bagasse. Bagasse on burning generates heat and with the help of heat, steam is generated which is used to



rotate turbines as a result of which electricity is generated. In view of the above, the impugned demands confirmed against the appellant @ 5% of the value of the electricity supplied to MSEB is clearly unsustainable in law.

6.2 However, since electricity is not "excisable goods", the appellant is not eligible to take any CENVAT credit on the inputs/input services used in the generation of such non-excisable electricity sold to MSEB. CENVAT credit is available only when input/input services are used in or in relation to the manufacture of excisable goods or for providing taxable services. Inasmuch as the appellant has utilized part of the inputs/input services in or in relation to the generation of electricity which has been sold, to that extent the appellant would not be eligible for taking of CENVAT credit on such inputs/input services used in the generation of electricity which has been sold to MSEB. Therefore the appellant would be liable to reverse the credit, if any, taken on such inputs/input services which have been used in the generation of electricity which have been sold to MSEB.

8. Further, the issue before me is that in case the appellant is not maintaining separate account of input/input services used in manufacturing of final dutiable as well as exempted goods and reversed the credit on inputs attributable to exempted final goods then the appellant is required to pay 100% of the value of exempted final goods as per Rule 6 of the Cenvat Credit Rules, 2004.

9. As none of the cases relied upon by the Id.A.R. have dealt with the issue of generation of electricity from bagasse, therefore, the



said decisions are not applicable to the facts of this case. Further, the facts of the case in hand are similar to the facts of the case of Gularia Chini Mills (supra) wherein the Hon'ble High Court as well as this Tribunal has held that electricity generated from bagasse is not an excisable goods and does not qualify as tariff item as per Chapter 27 of the Central Excise Act, 1984. In these circumstances, the issue is answered in favour of the appellant is not required to pay 10% of the value of the electricity sold to M/s U.P.Power Corporation Ltd. Further, I also find that appellant has already reversed the Cenvat credit attributable to input/input services used in generation of electricity sold to M/s U.P.Power Corporation Ltd. which is an essential requirement of Rule 6 (3) of the Cenvat Credit Rules, 2004 and same has not been dealt by both the lower authorities. In these circumstances, I hold that as the appellant has already reversed the Cenvat Credit on input/input services attributable to generation of electricity sold to M/s U.P.Power Corporation Ltd. is sufficient in compliance to provisions of Rule 6 of the Cenvat Credit Rules, 2004, therefore, the appellant is not required to pay 10% of the value of electricity sold to M/s U.P.Power Corporation Ltd.

10. In these circumstances, I set aside the impugned order and allow the appeal with consequential relief, if any."

Accordingly, the Id. Counsel for the appellant, prays for allowing the appeal.

5. Heard Id. AR for the revenue, who supports the impugned order. But on query from the bench, whether the revenue have filed further appeal in respect of the aforementioned ruling of this Tribunal, the Id.



A.R. stated that he is not aware about the same. The Id. Counsel for the appellant submits that till date, they have not received any notice in respect of any appeal filed by revenue before Higher Court.

6. Having considered the rival contentions, we find that the issue in this appeal, is no longer *res-integra* and the same is covered by aforementioned decision vide Final Order dated 8/8/2015 passed by this Tribunal in the appellant's own case in Ex.Appeal No. E/52882/2014-EX (SM). Accordingly, we allow the appeal and set aside the impugned order.

(Pronounced in the open Court)



(H.K.THAKUR)
MEMBER (TECHNICAL)



(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

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प्रमाणित प्रति / Certified True Copy
15.2.16
सहायक पंजीयन / Asstt. Registrar
सीमाशुल्क, जमानतशुल्क एवं सेवा कर
अपिल अधिकरण / (C.E.S.T.A.T.)
38, एम. जी. मार्ग, अलाहाबाद-211001
38, M. G. MARG, ALAHAABAD-211001

