CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL CHENNAI

Regional Bench – Court No. IV

Excise Appeal No. 356 of 2012

(Arising out of Order-in-Appeal No. 30/2012 dated 16.03.2012 passed by the Commissioner of Central Excise (Appeals), Lal Bahadur Shashtri Marg, Central Revenue Buildings, Madurai – 625 002)

M/s. Rajshree Sugars & Chemicals Ltd., Unit – I, : **Appellant**
Varadaraja Nagar, Periyakulam Taluk,
Theni District – 625 562

VERSUS

The Commissioner of G.S.T. & Central Excise, **: Respondent**
Madurai Commissionerate,
Lal Bahadur Shastri Marg,
Central Revenue Building,
Madurai – 625 002

APPEARANCE:

Shri. H.Y. Raju, Advocate for the Appellant

Shri. B. Balamurugan, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. MADHU MOHAN DAMODHAR, MEMBER(TECHNICAL)
HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)

FINAL ORDER NO. 40679 / 2019

DATE OF HEARING: 05.04.2019

DATE OF DECISION: **26.04.2019**

PER P. DINESHA :

The appellant is in the manufacture of mainly Sugar and also Denatured Spirit and Molasses, apart from Rectified Spirit, Extra Neutral Alcohol and Anhydrous Alcohol Denatured, some of which are exempted from duty per Notification No. 03/2005-CE dated 24.02.2005, as amended. It is also an admitted fact that they are generating non-dutiable product namely, electricity in their co-generation power plant, used captively in their factory and the excess power is sold to Tamil Nadu Electricity Board

(TNEB). Molasses is being purchased by the assessee-appellant on payment of duty from other units and accordingly, the assessee avails CENVAT Credit of the duty paid and this is used as the common input in the manufacture of both dutiable and exempted final products.

2.1 Entertaining a doubt, *inter alia*, that the assessee are not maintaining separate accounts for the above reasons as required under Rule 6(2) of the CENVAT Credit Rules, 2004, a Show Cause Notice dated 21.04.2010 was issued proposing to demand Rs. 44,45,540/- being the amount equal to the attributable CENVAT Credit availed on the input services used in the manufacture of exempted products for the period from April 2005 to March 2009, apart from appropriating the amount reversed by the assessee voluntarily, interest at appropriate rate and penalty under Section 11AC of the Central Excise Act, 1944 read with Rule 15 of the CENVAT Credit Rules, 2004.

2.2 The appellant thereafter seriously contested the Show Cause Notice *inter alia* pleading *bona fides* with regard to the applicability of Rule 6, as also invoking the larger period of limitation, since, according to it, the periodical Central Excise Audits were conducted right from 2005 up to 2009 and hence, there was no suppression as the Revenue was aware of the activities of the appellant of manufacturing both dutiable and exempted goods and the availment of CENVAT Credit thereon.

2.3 The adjudicating authority vide Order-in-Original No. 02/2011 partially accepted the case of the appellant inasmuch as the organic manure or press mud was held to be a non-excisable commodity which would not form part of the exempted turnover for arriving at the attributable credit used in the manufacture of exempted goods. Accordingly, the demand was restricted to the attributable credit in respect of electricity. The assessee preferred an appeal before the Commissioner of Central Excise (Appeals), Madurai, against the partial demand, thereby contesting the same on both grounds i.e.,

(i) Invoking the extended period of limitation; and

(ii) The inclusion of attributable credit in respect of electricity to the exempted turnover.

2.4 The first appellate authority however vide impugned Order-in-Appeal dated 16.03.2012 being not convinced with the plea of the assessee, rejected the appellant's case, thereby upholding the demand per Order-in-Original. Aggrieved, the assessee has come in appeal.

3. Today when the matter was taken up for hearing, Ld. Advocate Shri. H.Y. Raju appeared on behalf of the appellant and Ld. AC (AR) Shri. B. Balamurugan appeared on behalf of the Revenue. We have heard the rival contentions, gone through the case records and the decisions relied on during the course of arguments.

4. Facts are not in dispute. The Show Cause Notice was issued alleging that the appellant was manufacturing both dutiable and exempted goods using common inputs and input services. There is no dispute with regard to the dutiable goods; there is also no dispute with regard to the dropping of demand in respect of organic manure/press mud since the adjudicating authority has followed the binding instruction issued vide Circular No. 730/46/2003-CX dated 31.07.2003. Hence, the only issue to be decided is the includibility of attributable credit in respect of electricity used in the manufacture of exempted goods.

5. We find, however, that even that issue has been laid to rest by this very Bench, in the case of ***M/s. India Cements Ltd. Vs. Commissioner of Central Excise and Service Tax, Tirunelveli reported in 2018-TIOL-1996-CESTAT-MAD*** wherein, this Bench after following the decision of the Hon'ble Supreme Court in the case of ***M/s. Maruti Suzuki Ltd. Vs. C.C.E., Delhi reported in 2009-TIOL-94-SC-CX*** has held as under :

> *"6. In the light of the discussions herein above, we do not find any infirmity in the decision of the adjudicating authority that the appellants are liable to pay an amount of Rs. 2,66,09,847/- being the amount equal to 6% of the value of the electricity not used within the factory of production, along with interest at appropriate rates thereof."*

Therefore, the issue on merits will have to be decided against the assessee, which we hereby do.

6. On the issue of invoking the extended period of limitation, however, the assessee has placed on record the notices issued by the Revenue proposing periodical audits, which fact justifies that the Revenue was in the know of the appellant's activities right from 2005. Moreover, the issue is one of factual, which was explained by the assessee to be because of *bona fide belief* entertained by it and the fact that the retrospective amendment to Rule 6 brought in vide the Finance Act, 2010 made the reversal of

CENVAT Credit attributable to the manufacturing of exempted goods or providing exempted service mandatory. For the above reasons, we have to hold that there was no justification for the Revenue to invoke the larger period of limitation and hence, the demand cannot survive for the entire period. Therefore, the demand, if any, will have to be restricted to the normal period and for this limited exercise of determining the duty liability for the normal period, we are remanding the matter to the file of the adjudicating authority.

7. With regard to the penalty, in the case of *M/s. India Cements Ltd. (supra)* at paragraph 7 it has been held as under :

> *"7. However, on the imposition of penalty, we find that the aspect of eligibility or otherwise of inputs used in generation of electricity wheeled out to vendors was mired in litigation for quit sometime. On this very issue, the Hon'ble Supreme Court in p-21 of their judgment in Maruti Suzuki Ltd. Vs. CCE, Delhi - 2009 (240) ELT 641 (SC) waived the penalty. The relevant portion is reproduced as under:-*
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> > *21. Before concluding, it may be clarified that on account of repeated amendments in the CENVAT Credit Rules, huge litigation in the country stands generated. In the circumstances, we are of the view that penalty is not leviable on appellant/assessee, particularly when in large number of other cases, on account of conflict of views expressed by various Tribunals/High Court, the assessees have also succeeded. Hence, although M/s. Maruti Suzuki Ltd. (appellant) has failed in their civil appeals the Department will not impose penalty.*
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> *We find that the same mitigating factors are applicable to the facts of the present case also. We therefore of the considered opinion that the ingredients attracting imposition of penalty equal to tax demanded under Rule 15 (1) of CCR are not attracted to the facts of the present case. This being so, we set aside the equal penalty imposed under Rule 15(1)."*

We are inclined to set aside the penalty imposed under Rule 15 ibid following the above ruling.

8. The appeal is treated as partly allowed on the above terms.

(Order pronounced in the open court on **26.04.2019**)

(MADHU MOHAN DAMODHAR)
MEMBER (TECHNICAL)

(P. DINESHA)
MEMBER (JUDICIAL)

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