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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066

EXCISE APPEAL BRANCH

Appeal No. E/88 /2012 - EX[DB] Date **22/05/2012**
E/STAY/93/2012-EX(DB)

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S KISHAN SAHKARI CHINI MILLS LTD.
KAIMGANJ, FARRUKHABAD (U.P.)

M/S KISHAN SAHKARI CHINI MILLS LTD. Appellant

Vs

C.E. LUCKNOW **Stay Order No. 839/2012EX(DB)** Respondent

I am directed to transmit herewith a certified copy of **Final order No. A /601 2012 EX[DB]** dated 9/5/2012 passed by the Tribunal under **Section 35-C(1)of Central Excises Act, 1944**

Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent
C.C.E. LUCKNOW
7-A, ASHOK MARG, LUCKNOW.

2. Adv. / Consult SH. PRABHAT KUMAR ADV.
B-51, SARVODAYA ENCLAVE
NEAR MOTHER INTERNATIONAL SCHOOL
NEW DELHI-17

3. C.D.R
4. Bar association. CESTAT. New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New Delhi
6. M/s Centax Publictions Pvt Ltd.,1512-B, Bhishm Pitamah marg,Opp. ICICI Bank of Defence Colony, 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 Rohtak Road, New Delhi - 110005
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file

Assistant Registrar
(Excise Appeal Branch)

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI, PRINCIPAL BENCH NEW DELHI

Date of Hearing/Decision:9.5.2012

Hon'ble Mr. Justice Ajit Bharihoke, President
Hon'ble Mr. Rakesh Kumar, 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.	
2	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	
3	Whether Their Lordships wish to see the fair copy of the Order?	
4	Whether Order is to be circulated to the Departmental authorities?	

Excise Stay Application No.93 of 2012 in
Excise Appeal No.88 of 2012

[(Arising out of Order-in-Appeal No.210/CE/LKO/2011 dated 25.08.2011 passed by the Commissioner of Central Excise (Appeals), Lucknow (U.P.)]

M/s. Kisan Sahkari Chini Mills Ltd. ...Appellant

Vs.

CCE, Lucknow (U.P.) ... Respondent

Coram: Hon'ble Mr. Justice Ajit Bharihoke, President
Hon'ble Mr.Rakesh Kumar, Member (Technical)

Appearance:

Shri S.S. Dabas, Advocate for the appellants.
Shri I.Beg, AR for the respondent.

STAY Order No. 839/2012-Ex (BR)
FINAL Order No. A/601/2012-EX (BR)

Per Justice Ajit Bharihoke:

The appellants are engaged in the manufacture of V.P. Sugar, molasses, rectified spirit and de-natured spirit falling under Chapter sub-heading No.17011190 and 17031000 respectively of the First Schedule to the Central Excise Tariff Act, 1985. In the process of manufacture, bagasse is produced as a bye-product which falls under Chapter sub-heading no.23032000 of the Central Excise Tariff Act and attracts nil rate of duty. The appellant was availing cenvat credit in respect of the excise duty paid on inputs used in or in relation to manufacture of the final products. The appellant during the period 1.12.2008 to 31.08.2009 cleared baggase without payment of duty and did not declare the sale in his ER-I Returns. The department was of the view that since baggase was manufactured by the appellant, he was required to pay excise duty in accordance with Rule 6 of the Cenvat Credit Rules, 2004. Accordingly, a show cause notice dated 17.11.2009 was issued to the appellant. The Adjudicating Authority vide order-in-original confirmed the demand of Rs.5,35,365/- under Rule 14 of Cenvat Credit Rules, 2004 read with Section 11 A of the Central Excise Act, 1944 with interest under Section 11 AB of the Central Excise Act, 1944. The Adjudicating Authority also imposed penalty of equal amount under Rule 15 of the Cenvat Credit Rules, 2004 read with Section 11 AC of the Central Excise Act, 1944 on the appellant. Aggrieved with the said order, the appellant preferred an appeal, which was rejected by the Commissioner (Appeals) vide impugned order dated 25.08.2011.

2. Feeling aggrieved of the impugned order, the appellant has preferred this appeal along with stay application.

3. Though today this matter is listed for hearing of stay application only, after hearing the matter for some time, we were of the view that since only a short issue is involved and the appeal itself can be disposed of finally, the requirement of pre-deposit is waived and with the consent of both the sides, the matter was heard for final disposal.

4. Ld. Counsel for the appellant has submitted that the impugned order as also the order-in-original suffers from infirmity as the order is based on

incorrect appreciation of facts and wrong application of Rule 6 of the Cenvat Credit Rules, 2004. It is submitted that the Adjudicating Authority as also the Appellate Authority have failed to appreciate that the baggase is waste generated in the process of manufacture of sugar, molasses and spirits at the initial stage of crushing of sugarcane for extracting the juice. The sugarcane being agricultural produce is not subject to excise duty and the appellant did not avail cenvat credit on the freight charges of sugarcane to the factory. Thus, it is contended that in respect of process of extracting juice from sugarcane, which generated baggase, no cenvat credit was availed by the appellant and Rule 6 of the Cenvat Credit Rules is not attracted in this case. Ld. Counsel further submits that otherwise also, the finding of the Adjudicating Authority which is confirmed by the Appellate Authority is based on unwarranted assumption and not on cogent evidence. Thus, ld. Counsel has summed-up that the impugned order is not sustainable in law and liable to be set aside.

5. Shri I. Beg, Authorised Representative for the respondent submits that common inputs on which cenvat credit has been availed by the appellant have been used for manufacture of various products and also the resultant baggase. Admittedly, the appellant has failed to maintain separate accounts for inputs used in the manufacture of baggase and other products (in view of Rule 6(3) of the Cenvat Credit Rules), Adjudicating Authority was right in requiring the appellant to pay 10% of the price of baggase at the time of clearance from the factory. As such, the duty demand has been rightly confirmed and the interest and penalty have been rightly imposed on the appellant.

6. We have carefully considered the rival contentions and perused the record.

7. The demand against the appellant has been confirmed with the aid of Rule 6(3) (i) & 6(3)(ii) on the basis of 10% of transaction value of bagasse cleared by the manufacturer. Thus, for the purpose of this appeal, we are mainly concerned with Rule 6(1), Rule 6(2) and Rule 6(3) (i) and 6(3)(ii) of Cenvat Credit Rules, 2004 which are reproduced thus:

> "6. Obligation of a manufacturer or producer of final products and a provider of taxable service].—
>
> (1) The CENVAT credit shall not be allowed on such quantity of inputs used in or in relation to the manufacture of exempted goods or for provision of exempted services, or input service used in or in relation to the manufacture of exempted goods and their clearance upto the place of removal or for provision of exempted service except in the circumstances mentioned in sub-rule (2).
>
> Provided that the CENVAT credit on inputs shall not denied to job worker referred to in rule 12AA of the Central Excise Rules, 2002, on the ground that the said inputs are used in the manufacture of goods cleared without payment of duty under the provisions of that rule.
>
> (2) Where a manufacturer or provider of output service avails of CENVAT credit in respect of any inputs or input services and manufactures such final products or provides such output service which are chargeable to duty or tax as well as exempted goods or services, then, the manufacturer or provider of output service shall maintain separate accounts for—
>
> (*a*) the receipt, consumption and inventory of inputs used—
> (*i*) in or in relation to the manufacture of exempted goods;
> (*ii*) in or in relation to the manufacture of dutiable final products excluding exempted goods;
> (*iii*) for the provision of exempted services;
> (*iv*) for the provision of output services excluding exempted services; and
>
> (*b*) the receipt and use of input services—
>
> (*i*) in or in relation to the manufacture of exempted goods and their clearance upto the place of

removal;
(*ii*) in or in relation to the manufacture of dutiable final products, excluding exempted goods, and their clearance upto the place of removal;
(*iii*) for the provision of exempted services; and
(*iv*) for the provision of output services excluding exempted services, and shall take CENVAT credit only on inputs under sub-clauses (*ii*) and (*iv*) of clause (*a*) and input services under sub-clauses (*ii*) and (*iv*) of clause (*b*).]

(3) Notwithstanding anything contained in sub-rules (1) and (2), the manufacturer of goods or the provider of output service, opting not to maintain separate accounts, shall follow 71[any one] of the following options, as applicable to him, namely:—

(i) pay an amount equal to six per cent of value of the exempted goods and exempted services; or
(ii) pay an amount as determined under sub-rule (3A) or
(iii) --"

8. On bare reading of above rules, it is apparent above referred rule shall be attracted only in a situation where manufacturer has availed cenvat credit in respect of inputs which are used for or in relation to manufacture of final products. Thus, before confirming the demand, under Rule 6(3) (i) & 6(3)(ii), the department is required to establish that some cenvat credit was availed by the appellant in respect of inputs which were used for the production of bagasse at the first stage of manufacture i.e. crushing of sugar cane to extract juice. We have gone through show cause notice wherein it is vaguely mentioned at page 2 that the appellant has used cenvatable inputs i.e. lubricant, etc. without giving details. Use of the words "used lubricant, etc." in the show cause notice gives an impression that the authority issuing show cause notice was not clear about cenvatable inputs used in the production of bagasse. Further, on perusal of the order in original, it transpires that although the adjudicating authority

has observed that the appellant has used cenvatable inputs "lubricant, etc". in the manufacture of bagasse (liable to nil rate of excise duty), the adjudicating authority has not referred to any evidence which formed basis of this conclusion. Thus in our view the findings of the Authority is not supported by evidence and is based on unwarranted assumption. Thus in our view the department has failed to establish that the appellant used cenvatable inputs for production of baggase. Once it is concluded that the department has failed to establish that the appellant used cenvatable inputs for manufacture of bagasse, Rule 6(2) and Rule(3) (i) (ii) of Cenvat Credit Rules, 2004 are not attracted. As such, we are of the view that the adjudicating authority as well as appellate authority have fallen in error to base their finding on the aforesaid rules.

9. In view of the above, we are unable to sustain the impugned order confirming the duty demand, interest and penalty imposed on the appellant. Appeal is therefore accepted and the impugned order as well as order-in-original are set aside.

10. The appeal as well as stay petition is disposed of in the above terms.

(Justice Ajit Bharihoke)
President

(Rakesh Kumar)
Member (Technical)

Ckp.