

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE
TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA**

REGIONAL BENCH - COURT NO.2

Excise Appeal No.76323 of 2018

(Arising out of Order-in-Original No.02/MP/COMMISSIONER/2018 dated 29 January 2018 passed by Commissioner of CGST & Central Excise, Patna-II.)

M/s. Harinagar Sugar Mills Limited

(West Champaran, Bihar-845103.)

...Appellant

VERSUS

Commissioner of CGST & Central Excise, Patna-II

.....Respondent

(2nd Floor, CR Building (Annexe), Bir Chand Patel Path, Patna.)

APPEARANCE

Shri Arvind Baheti, Chartered Accountant for the Appellant (s)

Shri S.S.Chattopadhyay, Authorized Representative for the Respondent (s)

CORAM: HON'BLE SHRI P.K.CHOUDHARY, MEMBER(JUDICIAL)

HON'BLE SHRI BIJAY KUMAR, MEMBER(TECHNICAL)

FINAL ORDER NO. 76870/2019

DATE OF HEARING : 24 October 2019

DATE OF DECISION : 11 December 2019

P.K.CHOUDHARY :

Excise Appeal No. 76323/2018 is directed against the Order-in-Original dated 29 January 2018 confirming an excise duty demand of Rs. 3,53,96,437/- along with equivalent penalty and interest thereon.

2. Briefly stated the facts of the case are that the Appellant is engaged in the manufacture of Sugar and Molasses at its composite sugar factory situated at West Champaran, Bihar. The Appellant has also installed a Captive Power Plant (CPP) inside the said factory premises. The electricity generated from the CPP is captively used by

the Appellant for the manufacture of Sugar and Molasses and the rest is wheeled out to the Bihar State Electricity Board.

3. Pursuant to an audit of the Central Excise records for the financial year 2009-10 and 2010-11, the Appellant was served with a Show-cause Notice dated 30 April 2014 *inter alia* proposing denial of Cenvat credit aggregating Rs.3,16,59,172 in respect of the capital goods (involving credit of Rs.3,09,46,548) and input services (involving credit of Rs.7,12,624). Cenvat credit of Rs.33,32,155 availed on iron and steel articles such as Joist, Angles, Channels etc. as capital goods after 7 July 2009 was also sought to be denied on the ground that these items did not qualify as capital goods or inputs under Rule 2(a) or Rule 2(k) respectively of the Cenvat Credit Rules (CCR). It was further alleged that the Appellant had cleared capital goods as waste and scrap valued at Rs.39,33,111 without payment of an amount of equal to Central Excise duty aggregating Rs.4,05,110/- under Rule 3(5A) of the CCR. The demand comprised in all the 4 allegations was confirmed by the Adjudicating Authority vide Order-in-Original dated 29 January 2018. With respect to the First and Second issue, the Adjudicating Authority observed that credit on capital goods and input services used in the CPP could not be allowed under Rule 6(4) and Rule 6(5) respectively of the CCR having been exclusively used in the manufacture of electricity, which is an exempted goods. With respect to third issue, the Adjudicating Authority has observed that the iron and steel articles are general purpose items and their use in the repair and maintenance of capital goods do not make them eligible for Cenvat credit as capital goods or as inputs after 8 July 2009 and thereby confirmed the demand on both merits and on limitation. With respect to the fourth issue, the Adjudicating Authority has observed that sale of waste and scrap is an admitted fact and therefore, regardless of whether the said waste and scrap was of capital goods or otherwise excise duty was payable.

4. Shri Arvind Baheti, learned Chartered Accountant appearing on behalf the Appellant has assailed the Order-in-Original dated 29 January 2018 and his contentions issue-wise are as under:

First Issue – Cenvat credit on capital goods installed within the CPP

- Capital goods cannot be said to have been exclusively used in the manufacture of exempted goods when it is an undisputed fact that a major chunk of electricity generated from such capital goods was captively consumed for the manufacture of dutiable final products i.e. Sugar and Molasses. Our attention in this regard has been invited to a Circular No. 665/56/2002-CX dt. 25 September 2002 issued by the board.
- Reliance has also been placed on the following decisions to contend that if a part of the electricity generated from capital goods is used in the manufacture of dutiable goods within the factory premises, it cannot be said that such capital goods were exclusively used in the manufacture of exempted goods:
 - **Union of India Vs. HEG Ltd. reported in 2012 (275) ELT 316 (Chhattisgarh);**
 - **CCe Vs. United Phosphorous Ltd. reported in 2015 (315) ELT 360 (Guj.);**
 - **CCE Vs. Kothari Sugar reported in 2009 (239) ELT 237 (Mad.)**
- Alternatively, it is contended that electricity is a non-excisable goods and Rule 6 of the CCR did not apply to such non-excisable goods until the law in this regard was prospectively amended with effect from 1 March 2015 vide Notification No. 6/2015 when Explanation 1 was inserted. Reliance in this regard has been placed upon the following decisions:

- **CCE Vs. Solaris Chemtech Ltd. reported in 2007 (214) ELT 481 SC (Para 8);**
- **Gularia Chini Mills Vs. Union of India reported in 2014 (34) STR 175 (All.)**

That Rule 6 had no applicability to non-excisable goods also stood clarified vide Circular dt. 23 December 2013 and that the insertion of the explanation was only prospective in nature is also supported by Circular No. 1027 dt. 25 April 2016 and the decision of the Tribunal in **CCE Vs. Palriwal Hydrocarbons & Chemical Pvt. Ltd. reported in 2019 (4) TMI 1335.**

Second Issue – Cenvat credit on input services used in the Captive Power Plant

- Cenvat credit of input services pertains to the common input services covered by Rule 6(5) of the CCR having an overriding effect over Rule 6(1) to Rule 6(3) of the CCR. Such services were used in relation to the entire activity of the Appellant and could not be co-related with any particular revenue stream, while inviting out attention to CBEC Circular Nos. 137/203/2007 dt. 1 October 2007 and 868/6/2008-CX dt. 9 May 2008.
- Services covered by Rule 6(5) of the CCR could not be said to have been exclusively used in the manufacture of exempted goods i.e. electricity in the instant case when it is admitted that a part of such electricity was used in the manufacture of dutiable goods by inviting our attention to the decisions of the Tribunal in the case of **Indo Rama Synthetics (I) Ltd. Vs. CCE reported in 2015 (39) STR 300.**

Third Issue – Cenvat credit on iron and steel articles used for repair and maintenance of capital Goods

- Iron and steel articles were used for repair/maintenance of replacement of worn out parts of various capital goods identified as Exhibit “D” of the Appeal Petition and therefore, qualified as component parts and accessories of capital goods under Rule 2(a)(A) (iii) of the CCR.
 - **Bajaj Hundustan Ltd. Vs. CCE, Lucknow – 2013 (294) ELT 581 (Tri.);**
 - **J K Sugar Ltd. Vs. CCE, Meerut – 2008 (224) ELT 480 (Tri.);**
 - **Vishwanath Sugars Ltd. Vs. CCE, Belgaum – 2009 (236) ELT 289 (Tri.)**
- Alternatively, it has been argued that the demand is hit by limitation as full facts were within the knowledge of the department consequent to earlier audits conducted for the self-same period and proceedings initiated on identical issue involving eligibility of credit on structural items have been dropped by the Additional Commissioner for the period 2010 – 11 and the Appellate Commissioner for the period 2009 – 10 vide Order-in-Original dt. 10 February 2014 and Order-in-Appeal dt. 24 September 2013 respectively. Therefore, the present Notice could not have been issued invoking the extended period drawing support from the decision of the **Hon’ble Supreme Court** in the case of **Nizam Sugar Factory Vs. CCE reported in 2008 (9) STR 314.**

Fourth Issue – Sale of Scrap

- No capital goods were cleared as waste and scrap during the Financial Year 2009 – 10 and 2010 – 11 as evident from **Exhibit “F”** of the Appeal Petition so as to warrant

invocation of the provisions of Rule 3(5A) of the CCR. The Chief General Manager of the factory had also affirmed an Affidavit to the effect that no capital goods were sold as waste and scrap. Alternatively, it has been argued that the goods which were cleared as waste and scrap were procured even prior to commencement of the MODVAT Scheme in 1994 and when no Cenvat was availed on the procurement of such goods and neither is there any allegation of such waste and scrap having emerged out of manufacturing activities undertaken by the Appellant, the demand confirmed under Rule 3(5A) of the CCR cannot sustain. Reference in this regard has been invited to the decision of the Tribunal in the case of **CCE Vs. UP State Sugar Corporation reported in 2012 (279) ELT 76.**

Finally, it has been argued that the demand comprised in all the above issues is also hit by the normal period of limitation.

5. The learned Authorized Representative appearing on behalf of the Respondent Revenue supports the Order-in-Original and reiterates the findings of the Learned Adjudicating Authority.

6. Heard both sides and perused the appeal records.

7. We find that the following 4 issues arise for our consideration in the present appeal.

- (a) Whether Cenvat credit of Rs.3,09,46,548/- availed by the Appellant on capital goods used in the CPP for production of electricity is admissible to them in terms of the CCR.
- (b) Whether Cenvat credit of Rs.7,12,624/- is available on the 17 specified services covered by Rule 6(5) of the CCR used in the generation of electricity within their CPP.

- (c) Whether Cenvat credit of Rs.33,32,155/- availed on iron and steel articles used in repairs and maintenance of plant and machinery is available to the Appellant under the CCR.
- (d) Whether the Appellant was liable to pay an amount of Rs.4,05,110/- under Rule 3(5) of the CCR on the clearance of waste and scrap.

8. We find that it is an undisputed and admitted position in the Notice dated 30 April 2014 as well as the Order-in-Original dated 29 January 2018 challenged before us that the electricity generated in the CPP was used within the factory premises, *inter alia*, in the manufacture of dutiable goods. If that be, so we are unable to appreciate the finding in the Order-in-Original that the capital goods within the CPP were exclusively used in the manufacture of exempted goods. The electricity generated using the capital goods, in that case, acquires the nature of an intermediate product and even if such intermediate product is exempt from excise duty, Cenvat credit on the capital goods cannot be denied in terms of para 3 of the Board Circular dated 25 September 2002. An identical question had also fallen for consideration of the Hon'ble Chhattisgarh High Court in **HEG case (supra)** where similar arguments were advanced on behalf of the revenue at para 5 thereof. The Court held in **para 11 and 12** as under:

“(11) The only question to be decided in this appeal is whether the Tribunal was justified in allowing Cenvat Credit to the respondent for capital goods used in the power plant when major portion of the electricity generated was sold to the MPEB?”

(12) Plain reading of Rule 6(4) of the Rules makes it abundantly clear that Cenvat Credit in respect of capital goods shall not be allowed on capital goods which are used “exclusively” in manufacture of exempted goods. In the instant case, though major

portion of the generated electricity from the power plant was sold to MPEB through its grid, however, it cannot be said that capital goods were exclusively used in manufacture of exempted goods (electricity) sold to MPEB as a portion of electricity generated in the power plant is also utilized in manufacture of final products "sponge iron" of the respondent factory, which is leviable to be excise duty and is not exempted goods."

We are inclined to follow the circular and the decision extracted above. Having allowed the credit of capital goods used within the CPP, we do not deem it necessary to deal with the other alternate contentions advanced by the Appellant on this aspect.

9. With respect to the second issue, we find that it is not in dispute that the services with reference to which credit has been taken by the Appellant are covered by Rule 6(5) of the CCR set out below:

"(5) Notwithstanding anything contained in sub-rules (1), (2) and (3), credit of the whole of service tax paid on taxable service as specified in sub-clauses (g), (p), (q), (r), (v), (w), (za), (zm), (zp), (zy), (zzd), (zzg), (zzh), (zzi), (zzk), (zzq) and (zzr) of clause (105) of section 65 of the Finance Act shall be allowed unless such service is used exclusively in or in relation to the manufacture of exempted goods or providing exempted services."

The Board at para 2 of its Circular dated 1 October 2017 has clarified that the purpose of identifying the 17 specified services for special dispensation is these services are similar in nature to capital goods, that cannot be apportioned for maintaining separate records. Since these input services were undisputedly used in the manufacture of electricity further used, *inter alia*, in the manufacture of dutiable goods within the factory premises, it cannot be said that such services

were exclusively used in the manufacture of exempted goods. Therefore, the treatment to these services in so far as credit is concerned can be no different than capital goods and the Indo Rama case cited (supra) squarely covers the issue in favour of the Appellant. Accordingly, this issue is decided in favour of the Appellant.

10. With respect to the third issue, we find that Cenvat credit was sought to be denied on similar items for the same very period albeit concerning other invoices, also arising out of audit. While the demand for the period 2010 – 11 was dropped by the Adjudicating Authority himself vide order dated 10 February 2014, the demand for the period 2009 – 10 was dropped by the Appellate Commissioner vide order dated 24 September 2013, these orders have also not been appealed against. Having audited the records for the relevant period earlier and accepted the orders dropping the demand raised during the said period, full facts were within the knowledge of the department and Revenue now cannot claim suppression on the part of the Appellant while issuing the subsequent Notice dated 30 April 2014, with which we are concerned in the present proceedings, to justify invocation of extended period of limitation. The Commissioner misdirected himself in negating the challenge to invocation of extended period on the ground that the same set of invoices were not covered by the earlier proceedings. That would have been a case of duplication of demand, which could not have sustained even otherwise. Accordingly, we drop the demand on this count being barred by limitation by following the decision of the Hon'ble Supreme Court in the Nizam Sugar Factory case (supra). Having allowed the appeal on limitation we refrain from examining other contentions of the Appellant on merits.

11. With respect to Fourth issue, we find ourselves in agreement with the learned Chartered Accountant for the Appellant that the provision of Rule 3(5A) of the CCR cannot apply to waste and scrap other than waste and scrap of capital goods on which credit stood originally availed by the Appellant. The affidavit affirmed by the Chief

General Manager of the Appellant that the waste and scrap was not of capital goods has not at all been questioned by the Adjudicating Authority. The statement referred as Exhibit "F" in the Appeal Petition and the sample invoices also do not suggest that this scrap was of capital goods. The Commissioner has clearly travelled beyond the Notice in so far as he holds that even if it is assumed that sold waste and scrap were not capital goods and the provision of Rule 3(5A) was not applicable still the Appellant was liable to pay duty under Section 11A of the Central Excise Act. In the absence of any allegation in the Notice that such waste and scrap was the result of the manufacturing process, the demand for central excise duty could not sustain. The decision of the Tribunal in UP State Sugar case (supra) also supports the case of the Appellant. Accordingly, we set aside the demand raised in respect of this issue.

The appeal is allowed in the above terms.

(Order pronounced in the open court on 11 December 2019.)

SD/
(P.K.CHOUDHARY)
MEMBER (JUDICIAL)

SD/
(BIJAY KUMAR)
MEMBER (TECHNICAL)