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

REGIONAL BENCH - COURT NO.2

Excise Appeal No.76656 of 2018

(Arising out of Order-in-Original No.04/MP/Commissioner/2018 dated 16.02.2018 passed by Commissioner, Central GST & Central Excise, Patna-II Commissionerate.)

M/s. Harinagar Sugar Mills Limited
(West Champaran, Bihar-845103.)

...Appellant

VERSUS

Commissioner, Central GST & Central Excise, Patna-II Commissionerate

.....Respondent

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

APPEARANCE

Shri Arvind Baheti, Chartered Accountant for the Appellant (s)
Shri S.Mukhopadhyay, Authorized Representative for the Respondent (s)

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

FINAL ORDER NO. 75562/2020

DATE OF HEARING : 9 October 2020
DATE OF DECISION : 9 October 2020

P.K.CHOUDHARY :

Excise Appeal No. E/76656 of 2018 is directed against the 'Order-in-Original' No. 4/2018 dated 16 February 2018 passed by the Commissioner of Central Excise and Service Tax, Patna.

2. Briefly stated, the facts of the case are that the Appellant is a composite sugar factory engaged, inter alia, in the manufacture and clearance of dutiable excisable goods (i.e. sugar, molasses and industrial spirits) operating under the Cenvat Scheme. In the course of manufacturing sugar from sugarcane, Bagasse emerges as an agricultural waste. Since the combustion of Bagasse (which is a

carbon neutral fuel) is capable of generating electricity, the Appellant company had also set up a Cogeneration Power Plant within the factory premises. The electricity so generated from Bagasse as a fuel is captively used by the Appellant in its factory premises and the surplus power is wheeled out to the Bihar State Electricity Board at Ramnagar for a consideration without any levy of Central Excise Duty. Pursuant to an audit of records of the Appellant company from time to time, proceedings were initiated by a Show-cause Notice dated 28 November 2016 alleging violation of Rule 6 of the Cenvat Credit Rules and proposing recovery of 5% / 6% of the sale value of electricity for having allegedly used common Cenvat availed inputs and input services in the generation of electricity without maintenance of separate records. By following the due process of law, the Learned Commissioner vide 'OIO' No. 4 dated 16 February 2018 has confirmed the entire demand of Rs. 7,18,13,160/- under Rule 6(3)(i) of the CCR by invoking the extended period of limitation along with interest and penalty under Rule 15 and Rule 15A of the CCR.

3. Shri Arvind Baheti the authorised representative for the Appellant has assailed the Order, both on merits and limitation, on the following grounds:

A. Rule 6 had no application to non-excisable goods until the law in this regard was amended with effect from 1 March 2015 and electricity generated from Bagasse in the instant case being non-excisable, did not attract the provisions of Rule 6 of the CCR at all, by placing reliance on the following cases:

- Gularia Chini Mills Vs. UOI – 2014 (34) STR 175;
- UOI Vs. DSCL Sugar Ltd. – 2015 (322) ELT 769;
- Collector of CE Vs. M/s. Solaris Chemtech Ltd. – 2007 (214) ELT 481 (SC)
- CCE & ST Vs. M/s Palriwal Hydrocarbons & Chemicals Pvt. Ltd. – 2019 (4) TMI 1335;

- Satavahana Ispat Limited Vs. CCT, Tirupati GST – 2019 (3) TMI 100

B. The Learned Commissioner has sought to distinguish the binding judicial precedents at para A above, on superfluous grounds. The findings of the Learned Commissioner in this regard and the counter contentions of the Appellant are captured in the table below:

Commissioner's Findings	Contentions of the Appellant
(1) Observations of the Hon'ble Supreme Court in Solaris Chemtech that electricity is non-excisable is an obiter (para 4.2 and 4.4 of the 'OIO'). (2) The issue of classification of electrical energy generated from Bagasse was not being argued before the Hon'ble Allahabad High Court in Gularia Chini case and hence, the general rules of interpretation were not placed for consideration (para 4.6 of the 'OIO'). (3) Seeks to distinguish the Gularia Chini case on the ground that only Bagasse produced internally was	(1) Not an obiter. Further even an obiter of the Hon'ble Supreme Court has considerable weight and is binding. (2) Law declared by the Hon'ble High Court that electricity generated from Bagasse is non-excisable also endorsed by the Hon'ble Supreme Court by dismissing the appeal filed by the revenue. The Learned Commissioner should have followed the judicial discipline. (3) The technology for generating the electricity from Bagasse is uniform across sugar factories in India and it is technically impossible to not use other indirect items (not in the

used whereas in the instant case, Bagasse has been procured from outside and other inputs/input services have also been used (refer para 4.7 of the 'OIO').	nature of fuel), the Gularia Chini case itself uses the expression "no direct inputs are involved" (refer para 33 of the 'OIO'). Indirect input services were also involved in the Gularia Chini case as evident from para 5 of the said decision. Therefore, the distinction sought to be made does not exist as long as the raw material used for generating electricity is Bagasse. (4) The disputed question of law involved herein has been answered in favour of the assessee and against the revenue by the Hon'ble Delhi High Court in Nangalamal Sugar Complex reported in 2020 (371) ELT 501(refer para 26 and 64 of the said decision).

C. Even after the insertion of the explanation 1 to Rule 6(1) of the 'CCR' with effect from 1st March 2015, the provision of Rule 6(3)(i) does not get attracted as the main input i.e. Bagasse remains non-excisable and the Appellant had refrained from availing any Cenvat credit on the other indirect inputs by maintaining separate records as evident from the Certificate dated 22 February 2017 from the Chartered Accountant. There are no direct input services involved in power generation from

Bagasse. In so far as the common input services such as, telephone, internet, security etc. are concerned, these by their very nature are attributable to the entire business of manufacturing. Therefore, maintenance of separate accounts in respect of such input services was an impossibility and law could not require a person to perform an impossible act. In any event, the Appellant has also reversed the credit of common input services of Rs. 10,64,247/- in their returns for the month of March 2016 and such reversal is not disputed by the adjudicating authority. It is a settled law that suo moto reversal of credit amounts to non-taking of credit as held in the following cases:

- Texmo Pipes & Products Ltd. Vs. CCE & ST – 2020 (2) TMI 685;
- CCE & C Vs. Precot Meridian Ltd. – 2015 (325) ELT 234 (S.C.);
- CCE Vs. Mount Mettur Pharmaceuticals Ltd. – 2017 (356) ELT 184 (Mad.)

D. Since no Cenvat availed input/input service has been used in the generation of electricity from Bagasse, Rule 6(3)(1) shall have no application even after amendment to Rule 6(1) of the 'CCR' with effect from 1 March 2015 as consistently held by the Hon'ble Tribunal in the following cases in the context of the sugar factories only:

- Jakarya Sugar – 2018 (5) TMI 1665;
- The Ugar Sugar Works Ltd. – 2018 (11) TMI 913;
- M/s. Sitaram Maharaj Sakhar Karkhana Ltd. – 2019 (11) TMI 489;
- M/s. India Cane Power Ltd. – 2019-TIOL-1195- CESTAT-Bangalore.
- M/s. Dyanyogi Shri Shivkumar Swamiji Sugars Ltd. – 2019-TIOL-3516- CESTAT- Bangalore.

E. Demand for the period upto September 2015 is even otherwise hit by limitation as full facts were in the knowledge of the department consequent to the separate audits for the period 2011-12, 2012-13 & 2013-14 as well as a Notice dated 11 May 2015 having already been issued for the period 2013-14 without invocation of the extended period. Therefore, the subsequent Notice dated 28 November 2016 could not have been issued invoking the extended period of limitation as held by the Hon'ble Supreme Court in the case of Nizam Sugar Factory reported in 2008 (9) STR 314.

4. The Learned Departmental Representative supports the Order-in-Original and reiterates the findings of the adjudicating authority that electricity is an exempted excisable goods and that provisions of Rule 6(3)(i) of the CCR were applicable with respect to electrical energy sold to the Bihar State Electricity Board.

5. Heard both sides and perused the appeal records.

6. The crux of the issue involved herein is the applicability of Rule 6 of the CCR on the electricity generated from Bagasse as the source of fuel and cleared to the State grid for a consideration. We find that the self-same issue had fallen for consideration of the Hon'ble Allahabad High Court in the Gularia Chini Mills case wherein the Hon'ble Court observed that electrical energy generated from Bagasse is not covered under Chapter 27 of the CETA and is therefore, non-excisable thereby not attracting the provisions of Rule 6 at all as observed from para 22, 26 & 32 thereof. The said decision has also been upheld by the Hon'ble Supreme Court in the DSCL Sugarcase reported in 2015 (322) ELT 769. The adjudicating authority has been at pains to distinguish the decision of the Allahabad High Court in the Gularia Chini Mills case on the pretext that no other inputs or input services were used in the generation of electricity in the said case whereas the Certificate dated 22 February 2017 from the Chartered Accountant goes to show the usage of other inputs. We have perused the Certificate dated 22

February 2017 referring to a few other indirect inputs (not in the nature of fuel). We are not persuaded with the distinction sought to be made and find force in the contention of the Appellant that the technology for generating electricity from Bagasse is uniform across sugar factories in India and it is technically impossible to not use other indirect items (not in the nature of fuel).The Gularia Chini case itself uses the expression “no direct inputs are involved” (refer para 33 of the said decision). Indirect input services were also involved in the Gularia Chini case as evident from para 5 of the said decision. Therefore, the distinction sought to be made does not exist as long as the raw material used for generating electricity is Bagasse.Since the issue involved before us is no more res integra, we are inclined to drop the demand under Rule 6 of the CCR for the period upto 1 March 2015 by following the decisions cited supra.

7. Even after the insertion of the Explanation 1 Rule 6 of the CCR with effect from 1 March 2015 equating non-excisable goods with exempted goods for the purpose of Rule 6 of the CCR, the factual position remains that no Cenvat availed inputs were used by the Appellant in the generation of electricity from Bagasse. Bagasse remains non-excisable and the question of availing any credit thereon does not arise. That the Appellant had maintained separate records and refrained from availing any credit on the other indirect inputs is also evidenced from the CA Certificate dated 22 February 2017 which has been sought to be refuted by the Adjudicating Authority on the ground that the same is limited to non-availment of credit on few inputs only. However, the adjudicating authority has not referred to any other inputs over and above, those mentioned in the CA Certificate. Therefore, the Certificate of the expert could not have been discarded without any specific and cogent evidence concerning the disputed period. In so far as the common input services are concerned, we are in agreement with the contention of the Appellant that the maintenance of separate records was impossibility and that the suo moto reversal of proportionate credit for common input

services for the year 2015-16 was sufficient compliance with the provisions of Rule 6(1) and Rule 6(2) of the CCR as the objective thereof is not revenue maximization but credit neutralization. Since no Cenvat availed inputs / input services have been used in the generation of electricity from Bagasse, demand under Rule 6(3)(i) cannot sustain even after 1 March 2015. We are also supported by the decision of the Division Bench of the Tribunal in Jakarya Sugar case – 2018 (5) TMI 1665.

8. Coming to the aspect of the limitation, we find that the Adjudicating Authority himself has accepted at para 4.31 that a Notice for the prior period was issued on the self-same issue for the period 2013-14 and the demand covering of 6% under Rule 6(3) was dropped by the Adjudicating Authority therein. Under these circumstances, the subsequent Notice could not have been issued invoking the extended period of limitation in view of the decision of the Hon'ble Supreme Court in the Nizam Sugar Factory case.

9. In view of the above, the impugned Order is set aside, and the Appeal is allowed on merits as well as limitation, with consequential relief, if any.

(Operative part of the order was pronounced in the open Court.)

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

SD/

(P.ANJANI KUMAR)
MEMBER (TECHNICAL)

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