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

REGIONAL BENCH - COURT NO.2

Excise Appeal No.79258 of 2018

(Arising out of Order-in-Appeal No.118/Pat/C.Ex/Appeal/2017-18 dated 06.09.2018 passed by Commissioner(Appeals) of Customs, Central GST & Central Excise, Patna.)

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

...Appellant

VERSUS

Commissioner of CGST & CX, Patna-I Commissionerate
.....Respondent
(2nd Floor, C.R. Building (Annexe), Birchand Patel Path, Patna.)

APPEARANCE

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

Shri H.S. Abedin, 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. 75976/2021

DATE OF HEARING : 7 December 2021
DATE OF DECISION : 7 December 2021

P.K.CHOUDHARY :

Excise Appeal No. 79528 of 2018 is directed against Order-in-Appeal bearing No. 118 dated 6 September 2018.

2. The undisputed facts of the case are that the Appellant is a composite sugar factory engaged, inter alia, in the manufacture of dutiable and non-dutiable excisable goods operating under the Cenvat Credit Scheme. The Appellant had set up a Cogen Power Plant within the said factory premises in 2011 for the purposes of generating electricity by the combustion of bagasse (which is a carbon petrol fuel). The electricity so generated from bagasse is being captively consumed by the Appellant within its factory premises and the surplus power is wheeled out to the grid of Bihar State Electricity Board (BSEB) for a consideration.

3. Pursuant to an audit of Central Excise records for the year 2013-14, the Appellant was served with a Show-cause Notice dated 11 May 2015 comprising four different issues as under:

(a) Alleged irregular availment of Cenvat credit of Rs. 2,30,437/- in respect of select services not qualifying as an input service under Rule 2(l) of the CCR.

(b) Alleged non-payment of excise duty of Rs. 51,504/- in respect of scrap sold amounting to Rs. 4,16,704/- in violation of Rule 3(5A) of the CCR.

(c) Non-payment of 6% of the value of alleged exempted goods i.e. electricity sold to 'BSEB' in violation of Rule 6(3)(i) of the CCR involving an amount of Rs. 1,48,63,546/-.

(d) Non-payment of 6% of the value of alleged exempted goods i.e. bio compost in violation of Rule 6(3)(i) of the CCR involving an amount of Rs. 15,89,524/-.

The said Notice was adjudicated by an Order dated 21 April 2017 partly in favour of the Appellant herein. However, pursuant to a review petition filed by the department, the Ld. Appellate Commissioner confirmed the demand comprised in **Point No. (c) and (d)** above along with interest and 50% penalty. Further, a penalty of 50% was also confirmed by the Order-in-Appeal dated 06.09.2018 ('OIA') in respect of the issue referred at **Point No. (b)** above.

4. The Ld. Chartered Accountant, Mr. Arvind Baheti, appearing on behalf of the Appellant has assailed the 'OIA' dated 6 September 2018 and his issue-wise contentions against the demands confirmed therein are as under.

Sl. No.	**Issue Involved**	**Amount Confirmed vide the OIA**	**Contentions of the Appellant**
1.	Applicability of Rule 6(3)(i) on sale of excess electricity generated from the Captive Power Plant to the State Grid for the year 2013-14.	Duty of Rs. 1,48,63,546/-with interest thereon and penalty of Rs. 74,31,773/-	• Electricity being non-excisable is not covered by the definition of exempted goods and consequently Rule 6 of CCR does not apply. • Issue involved is squarely covered by the decision of this Hon'ble Tribunal rendered in Appellant's own case covering a larger period (November 2011 to March 2016) including the period involved in these proceedings.

			• Duplication of duty demand as the period 2013-14 covered by the above Order of the CESTAT **(refer page 5A, Page 6 & 2 of the Index**).
2.	Applicability of Rule 6(3)(i) on sale of bio-compost for the period 2013-14	Duty of Rs. 15,89,524/- with interest thereon and penalty of Rs. 7,94,762/-	• Bio-compost is a non-excisable waste product arising out of admixture of two non-excisable waste products (Press mud and spent wash not involving any manufacturing process) and consequently the provisions of Rule 6 of CCR were not applicable prior to 1 March 2015. • Issue involved is squarely covered by the decision of the Tribunal in **PurtiSarkhar case** [2019 (5) TMI 322] and **Magadh Sugar case** [2018 (7) TMI

			313] • Although not required the Appellant has reversed Cenvat credit of Rs. 7,34,301/- on services (i.e. packaging and transportation) attributable to clearance of bio-compost vide Entry No. 1 to 101 in June 2015.
3.	Imposition of penalty equal to 50% of the duty of Rs. 51,505/- alleged to be evaded on scrap of capital goods cleared during the period 2013-14, in violation of Rule 3(5a) of the CCR.	Rs. 25,752.50	• Duty and interest paid immediately on being pointed out by Audit even prior to issuance of the Show-cause Notice. No intend to evade so as to justify invocation of penalty under Section 11AC. Considering this aspect, the Ld. Adjudicating Authority had also dropped the penalty

			(**refer para 10.3 and 10.7 of the 'OIO'**). • Burden to establish malafide is on the revenue so as to justify invocation of Section 11AC and merely observing that had the audit not pointed out the amount would not be recovered from the Appellant is not sufficient. (Refer **Landis + GYR Ltd. Vs. CCE, Kolkata-V [2017 (49) STR 637 (Tri.-Kol)]** and **CCE & CUS., Aurangabad Vs. AtraPharmaceuticals Ltd. [2016 (342) ELT 39 (Bom.)]**

5. Shri H.S. Abedin, Ld. Authorised Representative for the Respondent department supports the impugned 'OIA' and prays that the assessee's Appeal be dismissed being devoid of any merit.

6. Heard both sides through Video conferencing and perused the appeal records.

7. The following issues arise for our consideration in this appeal.

Sl. No.	Issue involved	Amount Involved
1.	Applicability of Rule 6(3)(i) on sale of excess electricity generated from the Captive Power Plant to the state Grid for the year 2013-14.	Duty of Rs.1,48,63,546/- with interest thereon and penalty of Rs.74,31,773/-
2.	Applicability of Rule 6(3)(i) on sale of bio-compost for the period 2013-14	Duty of Rs.15,89,524/- with interest thereon and penalty of Rs.7,94,762/-
3.	Imposition of penalty equal to 50% of the duty of Rs.51,505/- alleged to be evaded on scrap of capital goods cleared during the period 2013-14, in violation of Rule 3(5a) of the CCR	Rs.25,752.50

8. In so far as the first issue as regards applicability of **Rule 6(3)(i) of the CCR** on sale of electricity is concerned, we find that the self-same issue covering the self-same period with respect to the self-same assessee was gone into and examined by this Tribunal in another proceeding arising out of the Order-in-Original No. 4.2018 dated 16 February 2018 covering the period November 2011 to March 2016 and the same was allowed in favour of the assessee vide **Final Order No. 75562 of 2020 dated 9 October 2020** passed in **Excise Appeal No. 76656 of 2018**. In view of the overlapping period and the duplication in the duty demand with respect to the self-same issue, we are inclined to follow our earlier Order dated 9 October 2020 and accordingly set aside the demand comprised in the first issue.

9. With respect to the second issue as regards non-applicability of Rule 6(3)(i) of the CCR in respect of clearance of bio compost manure, which is obtained through an admixture of two non-excisable waste products i.e. press mud and spent wash, we find that the Tribunal in **PurtiSakharKarkhanaCase**(supra)in a similar situation set aside the demand under Rule 6(3) by relying upon the ratio of the judgement of the Hon'ble Supreme Court in **UOI Vs. DSCL [2015(332) ELT 769]** and the Bombay High Court in **Rallis India Ltd. Vs UOI [2009(233)ELT 301]**. To the same effect is the decision of the Tribunal in the case of **Magadh Sugar & Energy (supra)** that waste products do not come within the ambit of Rule 6(3) of the CCR. Moreover, the amendment to Rule 6 of the CCR so as to cover non-excisable waste products within the fold of exempted goods for the purposes of reversal of credit of input and input services was introduced only with effect from 1 March 2015 and we do not find ourselves in agreement with the observations of the Ld. Appellate Commissioner as regards retrospective applicability of the said amendment in the absence of any express provision to that effect. Since the demand in the instant case pertains to the period prior to 1 March 2015, we set aside the applicability of Rule 6 on the sale of bio compost fertilizer by following the ratio of the decisions cited supra. In any event, the Appellant has already reversed the credit of input services to the tune of Rs. 7,34,301/- attributable to sale of bio compost which is not being contested and should therefore, meet the ends of justice.

10. As regards the third issue, we find that the duty demand of Rs. 51,505/- along with interest thereon stood paid immediately on being pointed out by audit even before issuance of the Show-cause Notice. There is enough force in the contention of the Appellant that the burden to establish mala fide so as to justify invocation of penalty under **Section 11AC** was upon the revenue and merely observing that had the audit not pointed out, the amount would not be recovered

from the Appellant is not sufficient. In fact, the charging **Section 11A(1)(b)** recognizes that the person chargeable with duty may pay such duty prior to issuance of the Notice either on his own ascertainment or on the basis of duty ascertainment by the Central Excise Officer, and in which case no Notice shall be served upon such person for the duty so paid.Since the revenue has failed to discharge the burden of proving *mala fide*, we set aside the penalty under Section 11AC by following the decision of this Tribunal in **Landis + Gyr Ltd. (supra).**

In view of the above discussion, the Appeal filed by the Appellant is allowed with consequential benefits, as per law.

(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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