# CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

## REGIONAL BENCH

## EXCISE APPEAL NO: 87464 of 2018

[Arising out of Order-in-Appeal No: NSK/EXCUS/000/APPL/273-275/17-18/716 dated 28TH February 2018 passed by the Commissioner of Central Tax & Central Excise (Appeals), Nasik.]

Saikrupa Sugar & Allied Industries Ltd
Devdaithan, Tal: Shrigonda,
Dist: Ahmednagar – 413 702 ... ***Appellant***

*versus*

Commissioner of Central Tax & Central Excise
Plot No. 155, Sector 34, NH Jaistha – Vaishakh, ***...Respondent***
CIDCO, Nashi – 422 008

**WITH**

## EXCISE APPEAL NO: 87468 of 2018

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Saikrupa Sugar & Allied Industries Ltd
Devdaithan, Tal: Shrigonda,
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*versus*

Commissioner of Central Tax & Central Excise
Plot No. 155, Sector 34, NH Jaistha – Vaishakh, ***...Respondent***
CIDCO, Nashi – 422 008

*APPEARANCE:*

Shri JN Somaiya, Advocate for the appellant

Shri Anil Chaudhary, Deputy Commissioner (AR) for the respondent

**CORAM:**

**HON'BLE MR. ASHOK JINDAL, MEMBER (JUDICIAL)**

**FINAL ORDER NO: A/87285-87286/2019**

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| DATE OF HEARING: | 10/12/2019 |
| DATE OF DECISION: | 10/12/2019 |

The appellant is aggrieved against the impugned order wherein demand under Rule 6(3) of CENVAT Credit Rules, 2004 has been confirmed against the appellant on electricity sold to outside the factory @ 6% of the value of electricity.

2. The facts of the case are that the appellant is a manufacturer of sugar and molasses. During the course of manufacturing activity, the appellant also generates electricity. The electricity is exempt from payment of duty and the same has been sold outside the factory. Therefore, Revenue is seeking an amount @ 6% is payable by the appellant in terms of Rule 6(3) of the CENVAT Credit Rules, 2004 as appellant is not maintaining separate account for usage of the inputs and input services used for manufacture of electricity. In these terms, two show cause notices were issued to the appellant after 01/03/2015 and demand @ 6% of the value of the electricity was confirmed in terms of Rule 6(3) of the CENVAT Credit Rules, 2004. Against the said order, the appellant is before me.

3. Learned Counsel for the appellant submits that the same

issue came up before the Tribunal in the case of *Jakarya Sugars Ltd v. Commissioner of Central Excise, Pune – II 2018 (5) TMI 1665 – CESTAT MUMBAI* wherein it was held that provisions of Rule 6 of CENVAT Credit Rules, 2004 are not applicable to the facts of the case.

4. On the other hand, Learned Authorised Representative submits that, as contended by the Learned Counsel for the appellant that the show cause notices were vague, therefore, the matter be remanded to the adjudicating authority for ascertaining the facts of the case and for deciding the issue.

5. Heard the parties and considered the submissions.

6. The plea made by the Learned Authorised Representative are not acceptable at this stage as, show cause notice is the foundation of the case and if there is a lacuna in the show cause notice, the same cannot be rectified at the appellate stage or in remand proceedings. Therefore, the request made by the Learned Authorised Representative is rejected.

7. Now, I come to the issue in hand. I find that the same issue came up before this Tribunal in *Jakarya Sugars Ltd (supra)* wherein the facts of the case are as under:

> "1. The facts of the case are that the appellants are engaged in the manufacture of sugar and molasses and cleared the same on payment of Central Excise duty. During the manufacture of said product, bagasse is

> generated. The said bagasse is used for captive generation of electricity within the factory. The electricity so generated is partly used for the manufacturing process within the factory and partly sold out to Maharashtra State Electricity Distribution Co. Ltd. (MSEDCL). The case of the department is that the electricity sold out to the electricity company is liable to payment of 6% amount in terms of Rule 6(3)(i) of Cenvat Credit Rules, 2004."

and this Tribunal observed as under:

> "4. We have carefully considered the submissions made by both sides. We find that though electricity can be considered as exempted goods as non-excisable but the facts of the present case is that the electricity is generated from by-products, i.e. bagasse, which is neither a dutiable goods nor liable for payment of 6% in terms of Hon'ble Supreme Court judgement in the case of DSCL Sugar Ltd. – 2015 (322) ELT 769 (SC). For the generation of electricity, except the use of bagasse no any cenvatable input is used. Therefore, the Rule 6 does not come into play. Rule 6 (3) (i) is applicable only when a common input, on which cannot availed is used in the manufacture of exempted and dutiable goods. As discussed above, no cenvatable input was used for generation of electricity. Therefore, the demand under Rule 6 does not sustain. This issue has been considered by the Hon'ble Allahabad High Court in the case of Gularia Chini Mills – 2014 (34) STR 175 (All.), wherein the Hon'ble High Court has ruled as under:
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> > 24. On perusal of the above judgment and order dated 18th May, 2012, it is clear that Rule 6 of 2004 Rules will only apply where a manufacturer manufactures both the excisable dutiable final products and also manufactures excisable exempted goods. Furthermore, for the applicability of Rule 6, manufacture of dutiable goods and manufacture of exempted goods are condition precedent. Thus, the law is well settled that bagasse is not manufactured goods but is a waste product, which emerges/comes into existence in the process of manufacture of sugar. Hence, it is not manufacture of

exempted goods. Similarly, electricity is not exempted excise goods as held by the Supreme Court in Solaris Chemicals Ltd. (supra).

25. It is not in dispute that petitioners do not avail Cenvat credit on any input and input services used in generation of electricity insofar as this fact has been admitted by the Assistant Commissioner as well as Commissioner, Central Excise, Lucknow vide letters dated 30-1-2013 and 21-2-2013, respectively. In order to become any goods to be an 'excisable goods', it has to fulfil the following conditions :

"(1) Goods must be manufactured;

(2) Must be specified in the First or Second Schedule of the Central Excise Tariff,

(3) It must be subjected to tariff."

26. Admittedly, none of these conditions are attracted in the instant case insofar as electrical energy, which is mentioned in Chapter 27 of the Central Excise Tariff Act, covers only those electrical energy which are generated from mineral fuels, mineral oils and products of their distillation, bituminous, substances, mineral waxes, etc. The electrical energy generated from Bagasse is not covered under Chapter 27. Similarly, Chapter 27 does not cover electrical energy produced by solar power, hydro power, wind power or from bagasse. Therefore, we are of the view that electrical energy is not an excisable goods nor it is exempted goods as defined in Rule 2(d) of the 2004 Rules.

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28. Hence, manufacture is referred to both dutiable/excisable goods and exempted goods, which are final products. Only then, it is necessary for the manufacturer to maintain separate accounts. Rule 6 of the Cenvat Credit Rules, 2004, (which is pari materia to the erstwhile Rule 57CC) provides that if Cenvat credit has been taken on the inputs which are used for manufacture of dutiable and exempted final products then the assssee is required to reverse the proportionate credit or pay 10%/5% amount of the value of the exempted final products. Electricity is not excisable goods under Section 2(d) of the Act, hence Rule 6 of the Cenvat Credit Rules, 2004 is not applicable as held by the Apex Court in the case of Solaris Chemtech Ltd. (supra).

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> 33. At the cost of repetition, we may add that the electrical energy generated from Naphtha, furnace oil, coal, etc., has been included under Chapter 27 as excisable goods on which the excise duty is being paid and the credit is taken in respect of the excise duty paid on such inputs but in the instant case, no direct inputs are involved nor any input services have been availed/used and the Commissioner, Central Excise, without any basis observed that the petitioners have admitted that they have availed the Cenvat credit on inputs and input services used in relation to generation of electricity. The petitioner has only used bagasse as raw material which is a waste product, as already held by this Court in writ petition No. 11791 of 2010 and no other inputs or input services has ever been used by the petitioner for generation of electricity which was only generated from bagasse.
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> 34. For the discussions made hereinabove, it is clear that Geetanjali Woolens Mill judgment relied upon by the Commissioner in the impugned orders have no relevance as Geetanjali Woolens Mill's judgment was in respect of customs duty and was only concerned with the tariff item and not with respect to the 'excisable goods' as defined under Section 2(d) of Central Excise Act, 1944. The bagasse, which emerges as a residue of sugarcane, admittedly, is a waste product and this bagasse is used in boiler as a fuel for generation of steam for running the turbine and for boiling the juice for the manufacture of sugar. Turbine generates electrical energy which is used for running the plant and machinery and surplus energy is sold to the U.P. Power Corporation Ltd. Furthermore, bagasse is used as fuel in the factory for manufacture of final product and no specific input is used up to the stage of emerging of bagasse which is a waste and which emerges on the crushing of sugarcane. Thus, we have no hesitation to say that electrical energy emerges from the bagasse and sold to U.P. Power Corporation Ltd. does not fall within the ambit of excisable goods.

5. From the above judgement, we observed that the Hon'ble High Court has held that since in the generation of electricity from bagasse, no other inputs or input service used. Therefore, the electrical energy is neither excisable under Section 2 (b) of the Central Excise Act, nor exempted goods. Hence, Rule 6 is not applicable. We, therefore, following the ratio of the above High Court judgement, set aside the impugned order and allow the appeal."

8. As the issue has already been settled by the Tribunal in the case of *Jakarya Sugars Ltd (supra),* therefore, I hold that the provisions of Rule 6(3) of CENVAT Credit Rules, 2004 are not applicable to the facts of the case. Accordingly, demand of 6% of the value of electricity on the appellant is not sustainable.

9. In view of the above, the impugned order deserves no merits. Accordingly the same is set aside and the appeals allowed with consequential relief.

(Dictated and Pronounced in open court)

**(Ashok Jindal)**
***Member (Judicial)***

**/as10121012*