CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH

Excise Appeal No. 86407 of 2018

(Arising out of Order-in-Appeal No. PUN-CT-APPII-000-348&349-2017-18 dated 25.01.2018 passed by Commissioner of Central Tax (Appeals), Pune-II)

M/s. Jakraya Sugar Ltd. **Appellant**
At Watwate, Tal. Mohol,
Solapur, Maharashtra 413 253.

Vs.

Commissioner of Central Tax, Pune-II **Respondent**
ICE House, 41/A, Sassoon Road,
Pune, Maharashtra 411 001.

Appearance:

Shri Deepak Marne, Advocate, for the Appellant
Shri N.N. Prabhudesai, Superintendent, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO. **A/86670/2021**

Date of Hearing: 02.08.2021
Date of Decision: 02.08.2021

PER: SANJIV SRIVASTAVA

This appeal is directed against Order in Appeal No. PUN-CT-APPII-000-348&349-2017-18 dated 25.01.2018 of the Commissioner (Appeals), Central Tax, Pune-II. By the impugned order, the Commissioner (Appeals) has upheld the order in original No 14/CGST-Solapur/2017-18 dated 25th October 2017 of the Assistant Commissioner of Central Goods and Service Tax, Solapur Division, holding as follows:

i. *I confirm the demand for Rs 18,00,577 (Rupees Eighteen Lakhs five hundred and seventy seven only) under Rule 14 of CCR, 2004 read with Section 11A (10) of Central Excise Act, 1944.*

ii. *I confirm the demand of interest at applicable rate on the above confirmed demand under Rule 14 of CCR, 2004 read with Section 11A A of Central Excise Act, 1944*

iii. *I impose a penalty of Rs 18,00,577 (Rupees Eighteen Lakhs five hundred and seventy seven only) under Rule 15 (1) of CCR, 2004 read with Section 11AC (1)(a) of Central Excise Act, 1944. The assessee are eligible for payment of reduced penalty at 25% of the above mentioned penalty amount in terms of section 11AC (1) (b) of the Central Excise Act, 1944.*

iv. *I impose a penalty of Rs 5000/- under Rule 27 of the Central Excise Rules, 2002 for failure to furnish the information relating to sale of electricity.*

2.1 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).

2.2 As per revenue, the electricity sold out to the electricity company is liable to payment of 6% of amount received from MSEDCL towards sale of electricity, in terms of Rule 6 (3) (i) of Cenvat Credit Rules, 2004. During the period January to March 2016, appellants received Rs 3,00,09,618/- (excluding taxes) from MSEDCL

2.3 A show cause notice dated 02.08.2017 was issued to the appellant asking them to show cause as to why-

i. *An amount of Rs 18,00,577 (Rupees Eighteen Lakhs five hundred and seventy seven only) for the period from January 2016 to March 2016 should not be demanded and recovered from them in accordance with the provisions of Rule 14 of CCR, 2004 read with Section 11A (10) of Central Excise Act, 1944.*

ii. *Interest should not be demanded and recovered from them on the amount demanded as above in accordance with the* *provisions of Rule 14 of CCR, 2004 read with Section 11A A of Central Excise Act, 1944*

iii. *Penalty should not be imposed upon them under the provisions of Rule 15 (1) of CCR, 2004 read with Section 11AC (1)(a) of Central Excise Act, 1944.*

iv. *Penalty should not be imposed upon them under the provisions Rule 27 of the Central Excise Rules, 2002 for failure to furnish the information relating to sale of electricity.*

2.4 The show cause notice was adjudicated by the order in original of Assistant Commissioner referred in para 1, supra. Appeal filed by the appellant before Commissioner (Appeals) against this order was dismissed by the impugned order in appeal.

2.5 Aggrieved appellants have preferred this appeal.

3.1 We have Shri Deepak Marne, Advocate, for the appellants and Shri N N Prabhudesai, Superintendent, Authorized Representative for the revenue.

3.2 Learned counsel submits that on the same issue for earlier period the matter has been considered by the tribunal in their own case and decided in their favour by order No A/86516/2018 dated 24.05.2018. Following this order the appeal should be decided in their favour.

3.3 Learned Authorized Representative re-iterates the findings of the lower authority and asks for dismissal of the appeal.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 In the case of Appellants themselves tribunal has vide its order reported at 2018-TIOL-1845-CESTAT-MUM, Mumbai bench of tribunal held as under,

"3. Shri A.B. Kulgod, Ld. Asst Commissioner (AR) appearing on behalf of the Revenue reiterates the findings in the impugned order. He further submits that as per instructions of explanation-1 vide Notification No.06/2015-CE (NT) dated 01/03/2015 in Rule 6 of Cenvat Credit Rules, 2004 for the purpose of Rule 2 (d)

and (h) of Cenvat Credit Rules, 2004, even non-excisable goods shall be considered as exempted goods. Therefore, the electricity supplied out of the factory is exempted goods and Rule 6 (3) (i) of Cenvat Credit Rules, 2004 is applicable. Hence, the appellant is liable for payment equal to 6% of value of electricity sold to the electricity company.

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. bagass, 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) = 2015-TIOL-240-SC-CX. 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.) = 2013-TIOL-568-HC-ALL-CX, wherein the Hon'ble High Court has ruled as under:

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.

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."

4.3 As seen from para 3 of this order of the tribunal, the arguments made by the learned Authorized Representative by referring to the amendments made in CENVAT Credit Rules, 2004 in 2015, were taken by the Authorized Representative in the appeal decided by the tribunal. No other argument has been advanced, to persuade us to differ from the earlier order referred above.

4.4 Though the Commissioner (Appeals) has decided appeals against two orders-in-original No. 05/CGST-Solapur/2017-18 dated 21.08.2017 and 14/CGST-Solapur/2017-18 dated 25.10.2017, this appeal has been filed only against upholding of order-in-original No. 14/CGST-Solapur/2017-18 dated 25.10.2017. It has been confirmed by the counsel for the appellant that no appeal has been filed against the upholding of second order-in-original i.e. 05/CGST-Solapur/2017-18 dated 21.08.2017. Therefore, this order is limited to the order appealed against.

5.0 In view of our discussions and respectfully following the earlier order referred above we allow this appeal.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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