CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH
Single Member Bench

Excise Appeal No. 85757 of 2020

(Arising out of Order-in-Appeal No. NSK/EXCUS/000/APPL/197/2019-20 dated 27.02.2020 passed by the Commissioner of GST & Central Excise (Appeals), Nashik)

M/s. Vikas SSK Ltd. **Appellant**
A/P-Tondar, Tal. Udgir,
Dist. Latur, Maharashtra 413 517.

Vs.

Commissioner of GST, Aurangabad **Respondent**
N-5, Town Centre, CIDCO,
Aurangabad 431 030.

Appearance:

Shri J.N. Somaiya, Advocate, for the Appellant
Shri Xavier Mascarenhas, Superintendent, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

Date of Hearing: 03.02.2023
Date of Decision: 03.02.2023

FINAL ORDER NO. A/85156/2023

This appeal is directed against Order-in-Appeal No. NSK/EXCUS/000/APPL/197/2019-20 dated 27.02.2020 passed by the Commissioner of GST & Central Excise (Appeals), Nashik. The Commissioner (Appeals) has upheld the Order-in-Original No. 07/CEX/Rural/Supdt./2018-19 dated 29.03.2019 passed by the Superintendent of Central GST & CX, Latur Rural Range, Nanded Division, holding as follows:-

"ORDER

i) I confirm an amount of Rs. 66,142/- (Rupees Fourty six thousand one hundred ninety three only) equal to 6% of Sale value of Bagasse and Press mud and to be recovered from them under provisions of Section 11A(1) of the Central Excise Act, 1944 read with Rule 14 of CENVAT Credit Rules, 2004.

ii) I confirm the recovery of Interest and to be recovered from them under Section 11AA of Central Excise Act, 1944 read with Rule 14 of CENVAT Credit Rules, 2004.

iii) I impose Penalty of Rs. 6,614/- upon them under Section 11AC of the Central Excise Act 1944 read with Rule 15(1) of CENVAT Credit Rules, 2004."

2.1 I have heard Shri J.N. Somaiya, Advocate for the appellant and Shri Xavier Mascarenhas, Superintendent, Authorised Representative for the Revenue.

3.1 Learned counsel for the appellant submits that the issues that arise for consideration are:

- Whether bagasse/press-mud are excisable products in terms of Section 2(d) of the Central Excise Act, 1944 and whether any manufacturing activity is involved in the manufacture of bagasse/press-mud, as defined under Section 2(f) of the Central Excise Act, 1944.
- Whether the bagasse/press-mud can be considered as final products in terms of CENVAT Credit Rules, 2004?
- Whether the appellant was required to pay an amount equal to 5% of the value of the exempted goods i.e. bagasse/press-mud, as pre Rule 6(3) of CENVAT Credit Rules, 2004, as the common inputs/input services were used for the manufacture of both dutiable goods(sugar and molasses) and exempted goods (bagasse/ press-mud) and the appellants were not maintaining separate accounts for the inputs/input services used in dutiable goods and exempted goods? Whether the inputs, capital goods, input services are used in the manufacture of dutiable sugar/molasses as well as exempted bagasse/ pres-mud?
- Whether the appellant is liable for penalty under Rule 15(2) of the CENVAT Credit Rules, 2004 read with Section 11AC of Central Excise Act, 1944.

3.2 Learned AR reiterates the findings recorded in the impugned order.

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

4.2 Both the lower authorities have held that since the appellant has availed CENVAT credit on various inputs going into the manufacture of the final products, and bagasse and press-mud arising during the course of manufacture and are exempt, CENVAT credit cannot be allowed.

4.3 I find that the issue is no more res integra as the question as to whether bagasse is manufactured under the provisions of Section 2(f) of the Central Excise Act, 1944 or otherwise and the CENVAT credit availed on the inputs which are used for the manufacture of sugar has to be denied or otherwise has been settled by the apex Court in the case of *DSCL Sugar Ltd. 2015 (322) ELT 769 (SC)*. Hon'ble Apex Court held as follows:

"3. Respondents herein are manufacturer of sugarcane and molasses falling under Chapter sub-heading 1701 11 90 and 1703 10 00 respectively, of the First Schedule to the Central Excise Tariff Act, 1985. In the process of manufacture of sugar, sugarcane is crushed, its juice is extracted and Bagasse emerges as residue/waste of sugarcane.

4. It is not in dispute that Bagasse is otherwise classified under Chapter sub-heading No. 2303 20 00 of the First Schedule to the Central Excise Tariff Act, 1985 and attracts nil rate of duty.

5. However, show cause notices were issued to the respondents herein stating that Bagasse would be subject to duty under the Central Excise Act, 1944, as "other products". These show cause notices were issued to the respondents in terms of the provision contained in Rule 6(3) of the Cenvat Credit Rules, 2004 demanding various amounts. The said show cause notices were challenged by the respondents filing writ petitions in the High Court of Allahabad. The High Court has allowed these writ petitions holding that Bagasse being a waste and not a manufactured product, no duty is payable thereupon. For arriving at this conclusion, the High Court also have relied upon the judgment of this Court in Balrampur Chini Mills Ltd. in C.A. No. 2791 of 2005 decided on 21-7-2010 [2015 (320) E.L.T. A258 (S.C.)].

6. The aforesaid judgment was pronounced by this Court related to the period before 2008. In the year 2008 there was an amendment in Section 2(d) as well as in Section 2(f) of the Act which defines 'excisable goods' and 'manufacture' respectively. Section 2(d) with the said amendment reads as under :

Section 2(d) - "excisable goods" means goods specified in [The First Schedule and the Second Schedule] to the Central Excise Tariff Act, 1985 (5 of 1986) as being subject to a duty of excise and includes salt;

Explanation - for the purposes of this clause, "goods" includes any article, material or substance which is capable of being bought and sold for a consideration and such goods shall be deemed to be marketable."

7. As per the aforesaid explanation, "goods" would now include any article, material or substance capable of being bought or sold for consideration and as such goods shall be deemed to be marketable. Thus, it introduce the deeming fiction by which certain kind of goods are treated as marketable and thus excisable.

8. However, before the aforesaid fiction is to be applied, it is necessary that the process should fall within the definition of "manufacture" as contained in Section 2(f) of the Act. The relevant portion of amended Section 2(f) reads as under :

Section 2(f) - "manufacture" includes any process -

(i) incidental or ancillary to be completion of a manufactured product;

(ii) which is specified in relation to any goods in the section or Chapter notes of [The First Schedule] to the Central Excise Tariff Act, 1985 (5 of 1986) as amounting to [manufacture; or]

(iii) which in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or labelling or re-labelling of containers including the declaration or alteration of retail sale price on it or adoption of

any other treatment on the goods to render the product marketable to the consumer;

and the word "manufacture" shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production of manufacture on his own account;"

9. The Revenue sought to cover the case under sub-clause (ii) as per which the process which is satisfied in relation to any goods in the Section or Chapter notices of the First Schedule to the Central Excise Tariff Act, 1985 would amount to 'manufacture'. Here again, fiction is created by including those goods as amounting to manufacture in respect of which process is specified in the Section or Chapter notices of the First Schedule.

10. In the present case it could not be pointed out as to whether any process in respect of Bagasse has been specified either in the Section or in the Chapter notice. In the absence thereof this deeming provision cannot be attracted. Otherwise, it is not in dispute that Bagasse is only an agricultural waste and residue, which itself is not the result of any process. Therefore, it cannot be treated as falling within the definition of Section 2(f) of the Act and the absence of manufacture, there cannot be any excise duty.

11. Since it is not a manufacture, obviously Rule 6 of the Cenvat Rules, 2004, shall have no application as rightly held by the High Court."

4.4 This decision of the Hon'ble Apex Court has been followed subsequently in following cases:-

- Kisan Sahakari Chini Mills[2017(355) ELT 156 (T-All)]
- Vasantdada Shetkari Sahakari Sakhar Karkhana Ltd [2017-TIOL-1613-CESTAT-MUM]
- Balrampur Chini Mills Ltd. [2019 (368) ELT 276 (ALL)]
- Nangalamal Sugar Complex [2020 (371) ELT 501 (Del)]
- Jakraya Sugar Ltd. [2018-TIOL-1845-CESTAT-Mum]

5.1 Following the judgment of the Hon'ble Apex Court, the appeal is allowed and the impugned order set aside.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

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