CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH
COURT No.

Excise Appeal No. 85807 of 2014

(Arising out of Order-in-Appeal No. AV (321) 284/2013 dated 18.12.2013 passed by the Commissioner of Central Excise & Customs, Aurangabad)

M/s. Shri Dnyaneshwar SSK Ltd. **Appellant**
Dnyaneshwarnagar,
Post – Bhende SK 414 605,
Tal: Newasa, Dist. Ahmednagar

Vs.

Commissioner of CE & ST, Aurangabad **Respondent**
Town Centre, N-5, CIDCO,
Aurangabad 431 003.

Appearance:

Shri Abhay P. Kolte, Advocate, for the Appellant
Shri Sunil Kumar Katiyar, Assistant Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)
HON'BLE MR. ANIL G. SHAKKARWAR, MEMBER (TECHNICAL)

Date of Hearing: 08.11.2023
Date of Decision: 10.01.2024

FINAL ORDER NO. 85026/2024

PER: ANIL G. SHAKKARWAR

The brief facts of the case are that the appellant is engaged in the manufacture and sale of sugar, molasses, ethyl alcohol, fusel oil etc. The entire factory complex of the appellant is registered under one single registration certificate issued under the Central Excise Rules. Thus, the entire complex of the appellant is one single factory of production within the meaning of the Central Excise Rules. The molasses which is in fact a waste product unavoidably emerging during the manufacturing process of sugar is consumed captively by the appellant in its distillery for the manufacture of ethyl alcohol or denatured ethyl alcohol. Such captive consumption is effected by the appellant by way of transfer of molasses by pipeline on payment of appropriate Central Excise duty. The appellant availed cenvat credit of the duty paid on molasses. For the sake of operational convenience, the appellant was maintaining two separate accounting registers for the purpose of accounting of modvat/cenvat credit availed by it in the sugar division and a separate register was kept in the distillery division. However, being the single legal entity and single factory of production, all the registers were consolidated at one final register and the accounts of the appellant were prepared and finalised accordingly. At the material time, the cenvat credit registers were called as RG 23 Part II registers. The appellant utilized amount of credit from the register of distillery division to the extent of Rs.77,59,089/- for the payment of Central Excise duty on sugar cleared from the sugar division, during the period from September 2001 to December 2001. The jurisdictional Deputy Commissioner, Central Excise & Customs, Ahmednagar Division, issued a notice to show cause cum demand to the appellant having Centralized Serial No. 156/CEX/2002 and divisional Serial No. 117/CEX/2002 dated 8.4.2002 directing the appellant to show cause as to why the cenvat credit utilized from the cenvat credit register of the distillery division amounting to Rs.77,59,089/- should not be treated as incorrect utilization of cenvat credit. The Deputy Commissioner, Ahmednagar Division, Ahmednagar adjudicated the matter and passed his order in original No.29/2002 dated 8.7.2002 whereby he has withdrawn the show cause notice dated 8.4.2002. Revenue preferred an appeal against the said order in original No.29/2002 before the Commissioner (Appeals) Aurangabad. The same was registered as Appeal No. learned V(EA-2)MOD/03/2003. The learned Commissioner (Appeals) decided the department's appeal with another appeal vide his common order No. BPS (207)/2003 dated 23.7.2003 whereby the learned Commissioner (Appeals) dismissed the department's appeal upholding the order in original passed by the Deputy Commissioner. Revenue preferred further appeal before this Tribunal against the order-in-appeal dated 23.7.2003. The appeal was registered as Appeal No. E/3343/03-MUM. The appeal was decided by this Tribunal by a final order dated 8.3.2011 having No. A/417/11/EB/C-II whereby the appeal filed by Revenue was dismissed. Revenue then filed an application for Rectification of Mistake (ROM) in respect of the said order dated 8.3.2011 which was registered as Application No. E/ROM/1401/2011 in Appeal No. E/3343/03-MUM. In the said ROM application, Revenue has stated that this Tribunal has initially appreciated the contention of Revenue but dismissed the appeal as mentioned in last three lines of para 4 of the order and therefore it is desirable to have clarification in respect of said-para to arrive at the clear order in the matter. This Tribunal heard the ROM application on 28.2.2013 and held that there is a merit in the ROM Application filed by Revenue and, therefore, directed that for the sentence "On factual aspect in this regard there being no dispute applying the law to the said fact, no interference is called for in the impugned order. Hence the appeal fails and is hereby dismissed the following sentence shall be substituted "On factual aspects in this regard there being no dispute applying to the law to the said facts, the appeal succeeds and is allowed. Accordingly, the matter is remanded back to the original adjudicating authority for re-determination of the demand in accordance with the law". The appellant preferred a Central Excise Appeal before the Hon'ble High Court of Bombay, Bench at Aurangabad, which was registered as Central Excise Appeal No. 5 of 2013. By an order dated 11.7.2013 the Hon'ble High Court was pleased to dispose the appeal with direction to the adjudicating authority to consider all objections those may be raised by the appellant to the demand notice issued by revenue and proceed to decide the appeal in accordance with law. The Assistant Commissioner then passed his OIO No. 06/CEX/AC/2013-14 dated 29.08.2013. By the said order, the Assistant. Commissioner has confirmed the demand of Rs.77,59,089/- and has imposed penalty of equal amount besides ordering interest. Being aggrieved, the appellant preferred an appeal before the Commissioner (Appeals), who by his impugned OIA No. AV (321) 284/2013 dated 18.12.2013 rejected the appellant's appeal. Aggrieved by the said order, the appellant is before this Tribunal.

2. Heard the learned counsel for the appellant. Learned counsel for the appellant has submitted that the show cause notice issued by Revenue states that molasses are not inputs for the manufacture of sugar and, therefore, cenvat credit availed of

duty paid on molasses cannot be utilized for payment of central excise duty on sugar. He has submitted that the period involved was from September 2001 to December 2001. During the relevant period, Cenvat Credit Rules, 2001 were in operation. Sub-rule (3) of Rule 3 of Cenvat Credit Rules, 2001 provided that cenvat credit availed by the manufacturer can be utilized for payment of duty of excise on any final products. He has further argued that through the said show cause notice, Revenue has not raised any objection to the availment of cenvat credit by the appellant on molasses and, therefore, as per sub-rule (3), it was eligible to be utilized for payment of central excise duty on sugar. He has further submitted that Hon'ble Bombay High Court had occasion to deal with the issue in First Appeal No.810 of 2004 at its Bench at Aurangabad in the case of CCE, Aurangabad vs. Terna SSK Ltd. Hon'ble Bombay High Court Bench at Aurangabad through its order dated 28.09.2017 has answered the question of law framed before the said Hon'ble High Court in favour of assesse. The question framed by the Hon'ble High Court was whether the credit earned on molasses can be used for payment of duty on sugar when molasses are bye-product of sugar and not input required for manufacture of sugar. He has further submitted that in the assessee's own case for subsequent period from January 2002 to July 2002 and August 2002 to June 2003, demands were raised on identical grounds and the same were dropped by Joint Commissioner of Central Excise following the ruling by Hon'ble Bombay High Court Bench at Aurangabad in the case of Terna SSK Ltd. and the said orders passed by Joint Commissioner are upheld by learned Commissioner (Appeals) through common order-in-appeal dated 11.04.2019.

3. Heard the learned AR who has supported the impugned order.

4. We have carefully gone through the record of the case and submissions made during the hearing. We note that Revenue has not raised any objection to the availment of cenvat credit on molasses received by the appellant. The only objection raised by Revenue was that cenvat credit availed on molasses was not

admissible to be utilized for payment of central excise duty on sugar for the reason that molasses were not input for manufacture of sugar. We note that the very issue has been settled by Hon'ble Bombay High Court Bench at Aurangabad in the relied upon First Appeal No.810 of 2004 through its order dated 28.09.2017. For the sake of ready reference, we reproduce the relevant portion of the said order as follows:-

"PER COURT:

This First Appeal was admitted on the following substantial question of law.

"Whether the order dated 09.10.2003 passed by the CESTAT, is not legal and proper as per the provisions of Central Excise and Customs Act and Rules, 1944, when the molasses is bye product arising in the course of manufacturer of sugar and it is used for other dutiable as well as non dutiable goods. The credit earned on Molasses (either cleared by their own unit on payment of duty or procured from market) cannot be used for payment of duty payable on sugar as molasses is a bye product of sugar and is not an input required for manufacturer of sugar as such credit earned on molasses cannot be utilized towards payment of duty on sugar?"

2. Learned counsel for the parties invited our attention to the Judgment delivered by the Madras High Court in the case of Commissioner of Central Excise, Madurai Vs. Rajshree Sugars and Chemicals Ltd. [in Civil Misc. Appeal No. 2533 of 2005 and CM.P No. 13308 of 2005] and particularly on paragraphs Nos 10 to 13 and would submit that issue involved in this First Appeal is covered by the aforesaid Judgment of Madras High Court and same would apply to the facts of this case. Statement is accepted.

3. The substantial question of law framed on 18th February, 2015 is accordingly answered in the negative, in favour of the assessee and against the revenue.

4. The First Appeal is disposed of in aforesaid terms. No order as to costs."

5. By following the ruling of Hon'ble Bombay High Court, we hold that the impugned order-in-appeal is not sustainable.

6. We, therefore, set aside the impugned order and allow the appeal.

(Order pronounced in the open court on 10.01.2024)

(Anil G. Shakkarwar)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

tvu