IN THE CUSTOMS, EXCISE AND SERVECE TAX APPELLATE TRIBUNAL, WEST ZONAL BENCH AT MUMBAI
COURT NO. IV

APPEAL NO. E/86639 & 86655/2018

(Arising out of Order-in-Appeal Nos. NGP-II/APPL/17/2017-18 dated 08.03.2018 & NGP-II/APPL/21/2017-18 dated 09.03.2018 passed by the Commissioner, CGST & Central Excise, Nagpur-II.)

M/s Shri Vitthalsai S.S.K. Ltd. Appellant

Vs.

Commissioner of GST & Central Excise, Aurangabad Respondent

Appearance:

Shri H.S. Shirsat, Consultant for Appellant

Shri A.B. Kulgod, Assistant Commissioner (AR) for Respondent
Shri M.R. Melvin, Superintendent (AR)

CORAM:

HON'BLE SHRI AJAY SHARMA, MEMBER (JUDICIAL)

Date of Hearing: 08.10.2018
Date of Decision: 17.10.2018

ORDER NO. A/87647-87648/2018

Per: Ajay Sharma

These appeals have been filed against the Order-in-Appeal Nos. NGP-II/APPL/17/2017-18 dated 08.03.2018 & NGP-II/APPL/21/2017-18 dated 09.03.2018 passed by the Commissioner, CGST & Central Excise, Nagpur-II.

2. The brief facts of the matter is that the Appellant is engaged in manufacture of Sugar & Molasses and they are availing facility of CENVAT credit under CENVAT Credit Rules, 2004, for input and capital goods credit

as well as input service credit. During the course of manufacture of dutiable Sugar & Molasses, “Bagasse” emerges as a waste/by-product, which was being cleared by the Appellant at ‘Nil’ rate of duty.

3. According to the department, the Appellant is availing CENVAT credit on “Bagasse” and during the period from September, 2014 to June, 2015 they have neither maintained separate CENVAT credit account for the dutiable product and exempted product as required under Rule 6(2) of the CENVAT Credit Rules, 2004, nor followed the procedurel under Rule 6(3A) of the CENVAT Credit Rules, 2004 and therefore a show-cause notice dated 10.11.2015 was issued to the Appellant as to why:

> *“(a) An amount of Rs.14,75,046/- (Rs. Fourteen Lakhs Seventy Five thousands and Forty Six only) equal to 6% of sale value of Bagasse should not be demanded and recovered from them under Rule 14 of CENVAT Credit Rules, 2004 read with Section 11A(1) of the Central Excise Act, 1944.*
>
> *(b) The interest on amount of Rs. 14,75,046/- should not be charged and recovered from them under Section 11AA of Central Excise Act, 1944 read with Rule 14 of CENVAT Credit Rules, 2004.*
>
> *(c) The penalty should not be imposed upon them under the provisions of Rules 15(2) of CENVAT Credit Rules, 2004.”*

4. The adjudicating authority vide Order-in-Original dated 28.12.2016 dropped the demand for the period from September, 2014 to February, 2015, in view of the decision of Hon'ble Supreme Court in the matter of *Union of India and Others Vs. DSCL Sugar Ltd.* reported in *2015 (322) ELT 769 (S.C.)* but confirmed the demand of Rs.5,48,023/- for the period from March, 2015 to June, 2015, in view of the amendment made in Rule 6 of CENVAT Credit Rules, 2004 w.e.f. 01.03.2015, along with interest and penalty. On filing the appeal by the Appellant, the Learned Commissioner, CGST & Central Excise,

Nagpur-II upheld the order passed by the adjudicating authority and rejected the appeal.

5. I have heard Learned Consultant for the Appellant and Learned Authorised Representative for the Revenue and perused the records. Learned Consultant for the Appellant submits that the duty has been demanded from them under the provisions of Rule 6 of the CENVAT Credit Rules, 2004 on the ground that they have not paid the specified amount of sale value of “Bagasse” under Rule 6(3)(i) of CENVAT Credit Rules, 2004. He further submitted that “Bagasse” is nothing but waste of the finished goods i.e. Sugar and Molasses and therefore no amount is required to be paid to the department. He cited a numbers of decisions of the Hon'ble Supreme Court as well as of the Hon'ble High Court and also of this Tribunal in support of his arguments that no amount is to be paid and also that reversal of CENVAT credit under Rule 6 of CENVAT Credit Rules, 2004 is not required in respect of waste or by-product or refuse generated during the process of manufacturing. The list of cases cited by him are as under:-

(i) Union of India & Others Vs. DSCL Sugar Ltd. 2015 (322) ELT 769 (SC)

(ii) Rallis India Ltd. Vs. Union of India - 2009 (233) ELT 301 (HC-Bom.)

(iii) M/s Indreshwar Sugar Mills Ltd. & Others etc. Vs. CCE, Pune-III – Final Order No. A/90687-90703/17/SMB, dated 15.11.2017

(iv) Athani Sugars Ltd. & Others etc. Vs. CCE, Pune-III 2017-TIOL-4280-CESTAT-MUM

(v) Sahakar Shiromani Vasantrao Kale SSK Ltd. Vs. CCE, Pune-III - 2017-TIOL-4127- CESTAT-MUM

(vi) M/s. ECO Cane Sugar Energy Ltd. & Others etc. Vs. CCE, Kolhapur - 2017 (12) TMI 950- CESTAT-MUMBAI

(vii) M/s Shivratna Udyog Ltd. & Others etc. Vs. Commissioner of Customs & Central Excise - 2017 (9) TMI 985- CESTAT MUMBAI

(viii) Shree Narmada Khand Udyog, Sahakari Mandli Ltd. Vs. Commissioner (Appeals) - 2018 (8) TMI 1075 - CESTAT AHMEDABAD

(ix) *M/s Simbhaoli Sugar Ltd. Vs. CCE, Noida - 2018 (8) TMI 160 – CESTAT ALLAHABAD*

(x) *M/s Triveni Engineering & Industries Ltd. Vs. C.C. & C.E. & S.T. – Noida - 2018 (8) TMI 6 - CESTAT ALLAHABAD*

6. The Learned Authorised Representative on behalf of the Revenue reiterated the finding in the impugned order and submitted that the subsequent Circular of the Board, being Circular No. 1027/15/2016-CX dated 25.04.2016, issued after amendment made in Rule 6(1) of CENVAT Credit Rules, 2004 w.e.f. 01.03.2005 clarifies that "Bagasse" cleared for consideration from the factory need to be treated like exempted goods for the purpose of reversal of credit of input and inputs services in terms of Rule 6 of CENVAT Credit Rules, 2004, and therefore the Learned Commissioner has rightly rejected the appeal of the Appellant.

7. The adjudicating authority has dropped the demand on the waste/by-product, "Bagasse" for the period prior to 01.03.2015. But since an explanation was inserted to Rule 6 of CENVAT Credit Rules, 2004 vide notification dated 01.03.2015, a view was taken by the Revenue that "Bagasse" being non-excisable goods and since it was cleared from the factory against consideration, therefore it would come within the scope of Rule 6 of the CENVAT Credit Rules, 2004. The said explanation to Rule 6 read as under:-

> *"Rule 6(1) The Cenvat credit shall not be allowed on such quantity of inputs used in or in relation to the manufacture of exempted goods or for provision of exempted services, or input service used in or in relation to the manufacture of exempted goods and their clearance upto the place of removal or for provisions of exempted service except in the circumstances mentioned in sub-rule(2):*
>
> *Provided that the CENVAT credit on inputs.....*

> ***<u>Explanation 1</u>:- For the purposes of this rule, exempted goods or final products as defined in clauses (d) and (h) of Rule 2 shall included non-excisable goods cleared for a consideration from the factory."***

Reading the aforesaid explanation-I reveals that non-excisable goods cleared for consideration, would fall within the scope of the said Rule. The contention of the Revenue is that since, the "exempted goods", "final products" defined under the CENVAT Credit Rules, 2004 in clause (d) and clause (h), respectively include non-excisable goods, which is cleared for consideration from factory, hence Rule 6(1) is applicable to the by-product bagasse. Clause (d) and (h) of the said Rule reads as follows:-

> *"(d) "exempted goods" means excisable goods which are exempt from the whole of the duty of excise leviable thereon, and includes goods which are chargeable to "Nil" rate of duty;*
>
> *(h) "final products" means excisable goods manufactured or produced from input, or using input service;"*

The Hon'ble Supreme Court's decision in the matter of *DSCL Sugar Ltd. (supra)* has clearly laid down that bagasse is agricultural waste of sugarcane and the waste and residue of agricultural products, during the process of manufacture of goods cannot be said to be result of any process. There is no manufacturing process involved in Bagasse's production. "Bagasse" is not 'goods' but merely a waste or by-product, therefore Rule 6 of CENVAT Credit Rules, 2004 is not applicable in the present case. "Bagasse" is bound to come into existence during the crushing of the sugarcanes and is an unavoidable agricultural waste. For two reasons the Board's Circular dated 25.04.2016 has no application on the facts of the instant case, firstly no Circular can override the Rules as well as the law laid down by the Hon'ble Supreme Court and the orders of this Tribunal, and secondly the said Circular

was issued on 25.04.2016 i.e. on a later date, whereas the period in dispute is March, 2015 to June, 2015.

9. Almost all the decisions cited by Learned Counsel for the appellant are on identical issue and in all the decisions, this Tribunal has taken a consistent view that Rule 6 of CENVAT Credit Rules, 2004 has no application in given facts. For instance, in the matter of M/s *Shivratna Udyog Ltd. & Others (supra)*, while allowing the appeal, the following order has been passed by this Tribunal :-

> *"I have carefully considered the submissions made by both sides. The fact of the case is that the appellants' goods in dispute are bagasse, press-mud, boiler ash and compost which are either waste or by-products. The issue is to be decided is whether in terms of Rule 6(3) an amount of 6% is required to be paid on the clearance of such waste/by product. The issue has been considered in various judgments. In the case of Rallies India Ltd. Vs. Union of India 2009 (233) ELT 301 (Bom.) the Hon'ble Bombay High Court has held that the provisions of Rule 57CC which pari materia to Rule 6 of the Cenvat Credit Rules 2004, in case of waste arising during the course of manufacture of final product, Rule 57CC is not applicable. It was also held in the said judgment that liability under Rule 57CC arises only for final product and not for waste the Hon'ble High Court also considered the provisions of Rule 6 of Cenvat Credit Rules 2004. The similar issue was considered in the case of Union of India vs. Hindustan Zinc Ltd. (supra) wherein it was held that the Sulfuric Acid which is generated as a by product recovery of 8% under Rule 6 of Cenvat Credit Rules 2004 is not correct. In view of the above judgments the issue whether Rule 6(3) is applicable in case of removal of non-dutiable waste or by product is settled in favour of the assessee. As regard the submissions made by Ld. ARs that after insertion of explanation in Rule 6(1), even in case of non-excisable goods, the reversal under Rule 6(3) is required. In this regard he referred to the Hon'ble Supreme Court judgment in the case of DSCL Sugar Ltd.(supra). Wherein the Hon'ble Supreme Court has held that in case of non-manufactured/non-excisable goods under Rule 6(3) would not apply and after the amendment in Rule 6(1) by inserting explanation, the ratio of the Hon'ble Supreme Court judgment will not applicable for the period after amendment. On*

careful consideration of this submission, I find that the issue before the Hon'ble Supreme Court in DSCL Sugar Ltd. was that whether Rule 6(3) is applicable in case of non-excisable goods. However, in the present case all the goods which are cleared without payment of amount under Rule 6(3) are either by product or waste. In case of by product or waste the decision of Jurisdictional High Court of Bombay in the case of Rallies India Ltd.(supra) settled the issue that case of by product or waste cenvat credit cannot be denied. As provided in para 3.7 of Chapter 5 of CBEC Circular which reads as under:

> *"3.7 CENVAT credit is also admissible in respect of the amount of inputs contained in any of the waste, refuse or bye product, Similarly, CENVAT is not to be denied if the inputs are used in any intermediate of the final product even if such intermediate is exempt from payment of duty. The basic idea is that CENVAT credit is admissible so long as the inputs are used in or in relation to the manufacture of final products, and whether directly or indirectly".*

From the above para, it is clear that if any input is contained in waste by product or goods the cenvat credit shall not be denied. If rule 6(3) is made applicable in these goods this clarification will stand redundant. If legislator has intention even to apply Rule 6(3) on waste or by-product, refuse then either this para should have been amended or omitted. Since this clarification is still in force the Cenvat credit either by way of Rule 6(3) or otherwise cannot be denied. As per my above discussion, I am of the considered view that in case of removal of waste or by-product Rule 6(3) has no application. Accordingly, the impugned orders are set aside. The appeals are allowed.

10. In view of the above, the appeals filed by the Appellant are allowed.

(Pronounced in Court on 17.10.2018)

(Ajay Sharma)
Member (Judicial)

Prasad