CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Excise Appeal No.70203 of 2020

(Arising out of Order-in-Appeal No.MRT/EXCUS/000/APPL-MRT/292/2019-20 dated 19.12.2019 passed by Commissioner (Appeals) CGST, Meerut)

M/s Daurala Sugar Works, **.....Appellant**
(A Unit of DCM Shriram Industries Ltd.
Daurala, Distt. Meerut U.P.)

VERSUS

Commissioner of Central GST, Meerut **....Respondent**
(Opposite CCS University,
Mangal Pandey Nagar, Meerut)

APPEARANCE:

Shri S.C. Kamra, Advocate for the Appellant
Shri A. K. Choudhary, Authorized Representative for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO.- 70409/2024

DATE OF HEARING : 21 March, 2024
DATE OF DECISION :

P. K. CHOUDHARY:

The appeal has been filed by the Appellant assailing the Order-in-Appeal No.MRT/EXCUS/000/APPL-MRT/292/2019-20 dated 19.12.2019 passed by Commissioner (Appeals) CGST, Meerut. This is the second round of litigation before the Tribunal.

2. The facts of the case in brief are that the Appellant is engaged in the manufacture of excisable goods viz., cane sugar and molasses falling under Chapter 17 of CETA, 1995. The Appellant is availing CENVAT credit on input, input services and capital goods used in the manufacture of these excisable goods in their factory. That the Appellant is also generating electricity in their factory using bagasse generated in-house as fuel. The bagasse arises out of crushing of sugarcane in the Mill House of the sugar plant. The bagasse is not a manufactured product. It is merely an agricultural waste as held by the Hon'ble Supreme

Court in the case of **Union of India Vs. DSCL Sugar Ltd. reported in 2015 (322) E.L.T. 769 (S.C.).** That the electricity generated by the Appellant is captively used partly in the manufacture of excisable products and surplus quantity of the electricity is sold by the Appellant to UP Power Corporation Ltd.[1] against sale consideration without payment of excise duty for the reason that the electricity falling under CESTH 2716.00.00 is non-excisable goods. That the Appellant is using inputs such as lubricating oils, greases, chemicals etc. in the manufacture of excisable goods i.e. sugar and molasses. Since electricity produced in the factory was partly wheeled out to UPPCL, the Appellant was under erroneous belief that they were required to reverse CENVAT credit in proportion to the electricity units wheeled out of the factory under Rule 6(3A) of Cenvat Credit Rules, 2004. Accordingly, the Appellant reversed CENVAT credit of Rs.39,78,832/- during the F.Y. 2009-10 to 2013-14. The Appellant intimated the reversal amounts to the Supdt.(Prev), Central Excise, Meerut-I vide their letters dated 14.03.2014 and 19.03.2014. That however, the Department took a view that the inputs and input services were commonly used by the Appellant in production of sugar, molasses, pressmud, bagasse and electricity. As per the Department, the Appellant was required to maintain separate records for receipt, consumption and inventory of inputs meant for use in the manufacture of exempted goods (electricity) under Rule 6(2) of CENVAT Credit Rules, 2004[2]. Since the Appellant was not maintaining separate accounts, the Commissioner, Central Excise, Meerut-I issued a Show Cause Notice[3] dated 25.04.2014 to the Appellant demanding an amount of Rs.6,04,07,447/- @ 5% / 6% of sale value of electricity sold by the Appellant during the period in dispute. The CENVAT credit of Rs.39,78,832/- already reversed by the Appellant was sought to be appropriated against the said demand as is clear from para 1.9 of the SCN. The demand was proposed by the Department by pressing Rule 6(3)(i) of CCR,

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[1] UPPCL
[2] CCR
[3] SCN

2004. SCN dated 25.04.2014 issued by the Commissioner in demand proceedings.

3. That the Appellant challenged the SCN before Hon'ble Allahabad High Court by way of writ petition. The Hon'ble High Court vide order dated 18.08.2015 allowed the writ petition and quashed the SCN dated 25.04.2014 issued by the Commissioner to the Appellant. The High Court relied upon their own judgment in the case of **Gularia Chini Mills & Others Vs. Union of India reported in 2014 (300) E.L.T. 372 (All.)** and subsequently affirmed by the Hon'ble Supreme Court vide their judgment dated 24.07.2015 **[Union of India Vs. DSCL Sugar Ltd. & Others reported in 2015 (322) E.L.T. 769 (S.C.)].** That since the entire proceedings initiated under the SCN were quashed by the Hon'ble Allahabad High Court, the Appellant became entitled to consequential relief in respect of proportional CENVAT credit of Rs.39,78,832/- reversed by them and appropriated by the Commissioner in the SCN. That the Appellant filed refund application claiming refund of Rs.39,78,832/- in respect of input duty and input service tax credit reversed by them in the past erroneously. That the jurisdictional Assistant Commissioner, Division-I, Meerut issued SCN to the Appellant and sought to reject the refund claim on the ground that

(a) the duty was not paid under protest;

(b) the Appellant claimed refund of duty on 04.03.2016 which was paid during the period Nov, 2009 to Feb, 2014 voluntarily. The refund claim is barred by limitation of one year from the relevant date as provided in section 11B of CEA, 1944.

4. That the Appellant contested the SCN. However, the Assistant Commissioner rejected the entire refund claim on the following grounds:-

(a) No direction or order was passed by the High Court so as to grant refund of amount reversed by the Appellant during the period Nov, 2009 to Feb, 2014.

(b) Even if it is accepted that the refund arose as a natural consequence out of order passed by the Hon'ble Allahabad High Court dated 18.08.2015, in that case also the refund is barred by limitation in as much as the duty / amount reversed was not within last one year preceding the refund claim. By treating the day of payment / reversal of credit as relevant date, the Assistant Commissioner has rejected the refund claim on the grounds of limitation.

5. That on appeal, the Commissioner (Appeals) upheld the OIO by holding that the amount of CENVAT credit reversed by the Appellant from time to time represents the credit not admissible to them for the reason that part of the electricity was not used by the Appellant in their factory but sold for a price. Therefore, the contention of the Appellant that the refund was filed within one year from the date of order of the High Court is not tenable as no such relief flows from the High Court order dated 18.08.2015. That being aggrieved, the Appellant filed second appeal before the Tribunal. The Tribunal remanded the matter to the Commissioner (Appeals) to consider the submission of the Appellant that on identical issue the Department has sanctioned refund of CENVAT credit of Rs.1,83,560/- for the subsequent period March, 2014 to Dec, 2014 under similar circumstances when the SCN demanding duty of Rs.1,14,09,360/- under Rule 6(3)(i) was dropped by the Commissioner. The Final Order No.A/71114/2018-SM dated 15.06.2018 was passed by the Tribunal remanding the matter to the Commissioner (Appeals). That as per directions of the Tribunal, the Appellant approached the Commissioner (Appeals) and filed written submissions in support of refund claim of Rs.39,78,832/- claimed by the Appellant as the refund arose out of order dated 18.08.2015 passed by the Hon'ble Allahabad High Court. That the Commissioner (Appeals) has now passed impugned order and he has decided the matter against the Appellant on the following grounds :-

(a) The amount reversed by the Appellant from time to time represents the amount of CENVAT credit which was not admissible to them since part of the electricity was not used in the factory but sold by them for a price. Therefore, the contention of the Appellant that refund claim was filed within one year from the date of the order of the High Court is not tenable as no such relief flows from the order dated 18.08.2015 passed by the High Court.

(b) As regards order passed by the Lower Authority sanctioning refund of CENVAT credit under similar circumstances for the subsequent period March, 2014 to Dec, 2014, the order passed by the subordinate Adjudicating Authority could not be made the basis for allowing refund of amount which had been reversed voluntarily by the Appellant u/r 6 of CCR, 2004

Hence the present appeal before the Tribunal.

6. Learned Advocate appearing on behalf of the Appellant submits that the Appellant was not required to reverse CENVAT credit on inputs and input services which were used in the manufacture of main excisable goods viz. sugar and molasses produced by the Appellant. The input bagasse arising as waste product out of crushing process is used as fuel in the generation of steam and power. Since bagasse is an agricultural waste as held by the Hon'ble Supreme Court in the case of **Union of India Vs. DSCL Sugar Ltd. reported in 2015 (322) E.L.T. 769 (S.C.),** the same does not suffer any excise duty and therefore the question of availing CENVAT credit in respect of bagasse used in the boiler does not arise. On this reasoning, the Hon'ble Supreme Court set aside the demand raised by the Department on sale of electricity to UPPCL. The relevant para 13 from the judgment is reproduced below:-

> *"13. Cenvat Credit in respect of electricity was denied only on the premise that Bagasse attracts*

> *excise duty and consequently Rule 6 of the Cenvat Credit Rule is applicable. Since this action of the appellant is found to be erroneous, all these appeals of the Revenue also stand dismissed."*

7. In the light of the above ruling, the Commissioner (Appeals) erred in holding that the amount reversed by the Appellant from time to time was not admissible to them since part of the electricity was not used by the Appellant in the factory but was sold for a price. That since the SCN demanding duty under Rule 6(3)(i) of CCR and appropriating the CENVAT credit of Rs.39,78,832/- against the duty demand of Rs.6,04,07,447/- was quashed in *toto* by the Hon'ble Allahabad High Court, the Appellant became entitled to natural or consequential relief flowing from the Hon'ble High Court's order dated 18.08.2015. That the trigger point for claiming consequential refund of CENVAT credit is date of the Hon'ble High Court's order (18.08.2015). This date is the relevant date as defined in the Explanation (B) to section 11B as under:-

> *"(B) **"relevant date"** means, -*
>
> *(a) in the case of goods exported out of India where a refund of excise duty paid is available in respect of the goods themselves or, as the case may be, the excisable materials used in the manufacture of such goods, -*
>
> *(i) if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves India, or*
>
> *(ii) if the goods are exported by land, the date on which such goods pass the frontier, or*
>
> *(iii) if the goods are exported by post, the date of despatch of goods by the Post Office concerned to a place outside India;*
>
> *xx xx xx*
>
> *(ec) **in case where the duty becomes refundable as a consequence of judgment, decree, order or direction of appellate authority, Appellate Tribunal or***

any court, the date of such judgment, decree, order or direction*;*

(f) in any other case, the date of payment of duty."

8. Since the Appellant filed the refund claim on 04.03.2016 i.e. within 6 months from the date of Hon'ble High Court's order (18.08.2015), the Appellant's claim was within the statutory period of one year from the relevant date as specified in Section 11B of CEA, 1944. The Commissioner(Appeals) erroneously held that refund claim in respect of amounts voluntarily reversed during the period in dispute is barred by limitation of time. That since in the generation of electricity (non-excisable goods), the Appellant have used bagasse which itself was non-dutiable nor manufactured product, the provisions of Rule 6(3) calling for reversal of CENVAT credit were not applicable. Whatever amount of CENVAT credit reversed by the Appellant, the same is in the nature of **revenue deposit** and the limitation period of Section 11B does not apply to refund of revenue deposit. That w.r.t. reversal of duty under the provisions of Rule 6(3) of CCR, 2004, in respect of inputs used in the manufacture of bagasse which is non-dutiable and non-manufactured product, the Tribunal, in the case of **Triveni Engineering & Industries Ltd. Vs. CCE, Lucknow reported in 2018 (363) E.L.T. 331 (Tri.-All.)** has held that since bagasse is not a dutiable item and not a manufactured item, as held by the Supreme Court, there was no question of duty under Rule 6(3) of CCR, 2004. In such a case, the amount reversed by the Assessee under Rule 6(3) is in the nature of revenue deposit on which the refund provisions of Section 11B are not applicable. The Appellant rely upon this ruling to plead that the entire credit of Rs.39,78,832/- reversed by them erroneously under Rule 6(3A) of CCR, 2004 was in the nature of revenue deposit and the same became refundable to the Appellant as the natural remedy out of order passed by the Hon'ble Allahabad High Court in the Appellant's case.

9. That as regards refund of CENVAT credit of Rs.1,83.560/- allowed by the Lower Authority to the Appellant under similar situation involving sale of electricity during the subsequent

period March, 2014 to Dec, 2014, the Appellate Authority has held that the order passed by the subordinate Adjudicating Authority could not be the basis for allowing refund of amount which was reversed by the Appellant voluntarily under the provisions of Rule 6(2) of CCR, 2004. The reasons advanced by the Appellate Authority are in contrast to the ruling of the Hon'ble Supreme Court in the case of **CCE, Mumbai Vs. Bigen Industries Ltd. reported in 2006 (197) E.L.T. 305 (S.C.).** The Hon'ble Supreme Court has held that when the earlier decision of the Tribunal between the parties on the same facts for the period 12.08.1989 to 25.08.1989 have attained finality in favour of the Assessee, the Revenue is precluded from taking a different stand for the subsequent period 26.08.1991 to March, 1993.

10. Learned Authorized Representative appearing for the Revenue reiterates the discussions and findings of the impugned order.

11. Heard both sides and perused the appeal records.

12. I find that the issue is no more *res integra* and is squarely covered by the decision of the Tribunal in the case of Triveni Engineering & Industries Ltd. vs. CCE, Lucknow reported in 2018 (363) E.L.T. 331 (Tri.-All.). I find that Hon'ble Supreme Court in the case of Union of India vs. DSCL Sugar Ltd. – 2015 (322) E.L.T. 769 (S.C.) that Bagasse being only an agricultural waste and not being a result of any process, not covered in definition of manufacture under Section 2(f) of the Act and there being no Chapter note or Section note in the Central Excise Tariff declaration process in respect of Bagasse as amounting to manufacture. Thus, notwithstanding the amendment in 2008 in Section 2(d), creating a fiction of deemed marketability, Bagasse is not excisable, as it does not pass through the test of manufacture. Accordingly, whatever amount the Appellant-assessee have paid by way of reversal is in the nature of revenue deposit and there is no limitation attracted for refund of such revenue deposit. Reference is also invited to the ruling of Hon'ble Allahabad High Court in the case of CCE vs. M/s Kisan

Sahakari Chini Mills Ltd. reported at 2014 (302) E.L.T. 346 (All.) wherein also it has been held that Bagasse is not a manufacture item and hence not dutiable and does not attract Rule 6(3) of CCR, 2004. It is my considered view that the Revenue should have *suo-motu* refunded the amount paid by them on clearance of Bagasse under the provisions of Rule 6(3) of CCR, 2004. Further, there is no question of any limitation being attracted.

13. In view of the above discussions, I hold that under the fact and circumstances of the case, Bagasse is not a dutiable item and not a manufactured item, as held by the Hon'ble Supreme Court, there was no question of any reversal of duty under the provision of Rule 6(3) of CCR, 2004. Under such facts and circumstances, I hold that the amount reversed by the Appellant under Rule 6(3) of CCR was in the nature of revenue deposit.

The impugned order is set aside and the appeal filed by the Appellant is allowed with consequential relief, as per law.

(Order pronounced in open court on……..)

(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

LKS