

**IN THE HIGH COURT OF JUDICATURE AT CALCUTTA
SPECIAL JURISDICTION (CENTRAL EXCISE)
ORIGINAL SIDE**

RESERVED ON: 11.07.2022
DELIVERED ON: 21.07.2022

CORAM:

**THE HON'BLE MR. JUSTICE T.S. SIVAGNANAM
AND
THE HON'BLE MR. JUSTICE BIVAS PATTANAYAK**

**IA NO. GA/02/2022
IN
CEXA NO. 01 OF 2022**

**PRINCIPAL COMMISSIONER OF CGST & CENTRAL EXCISE
VERSUS
M/S. HIMADRI SPECIALITY CHEMICAL LIMITED**

Appearance:-

Mr. Bhaskar Prosad Banerjee, Adv.

Mr. Abhradip Maity, Adv.

.....For the Appellant.

Mr. Rajeev Kumar Agarwal, Adv.

.....For the Respondent.

JUDGMENT***(Judgment of the Court was delivered by T.S.SIVAGNANAM, J.)***

1. This appeal by the revenue filed under Section 35 C of the Central Excise Act, 1944 (the Act) challenges the order dated 17.12.2019 passed by the Customs, Excise and Service Tax Appellate Tribunal, East Regional Bench, Kolkata (tribunal) in final order No. 76933 of 2019. The revenue has raised the following substantial questions of law for consideration:-

- (a) Whether the respondent is liable to pay the amount calculated at the rate of 6% of the sale value of electricity sold outside the factory when admittedly the respondent has reversed the proportionate credit of inputs and input services attributable to sale of electricity?*
- (b) Whether the respondent is liable to pay the amount in question as per Rule 6(3) of the Cenvat Credit Rules?*
- (c) Whether the electricity generated from waste gas / tail gas is classifiable under Chapter Heading 27 16 00 00 and whether the same can be said to be 'exempted goods'?*
- (d) Whether the Learned Tribunal erred in not considering that 'waste gas or tail gas' as obtained from process of manufacture as defined in Section 2 (f) of the Central Excise Act, 1944 and that from 'waste gas or tail gas' there was transformation to a new and different article i.e. electricity having a distinct name, character and have commercial identity generated out of process of deliberate skilful manipulation of the inputs or the raw materials?*
- (e) Whether the Learned Tribunal erred in not considering that the appellant has made out a case on the issue for invoking the extended period of limitation on the Respondent regarding suppression of material facts and withholding information from the Department regarding non-reversal of the proportionate credit and that mere statutory requirement*

under any other law does not exonerate the Respondent from complying with their liability in accordance with law?

2. The respondent assessee filed an appeal before the learned tribunal challenging the Order-in-Original dated 25.06.2019 passed by the Commissioner, CGST and Central Excise, Howrah confirming the demand of Central Excise duty of Rs. 2,33,14,093/- along with the interest and penalty. The respondent assessee is engaged in the manufacture of carbon black on which Central Excise duty is remitted. In the course of manufacture, waste gas is generated and such waste gas as it cannot be flared into open air as it would cause pollution, it is mandated that the respondent has to generate electricity from the waste gas. The electricity so generated is captively consumed in part and the other part is wheeled out to the grid. Show cause notice dated 31.08.2016 was issued raising a demand of Central Excise Duty to be calculated at 6 % on the value of the electricity sold by invoking Rule 6 (3) of the Cenvat Credit Rules, 2004 on the ground that electricity is 'exempted goods' and the assessee did not reverse the proportionate Cenvat Credit availed on inputs and input services. The assessee contested the show cause notice by submitting elaborate reply both on merits as well as placing reliance on certain decisions of the High Courts. However, the Commissioner did not accept the explanation submitted by the assessee and by order dated 25.06.2019 confirmed the demand. Aggrieved by such order, the respondent had preferred appeal before the Tribunal. The tribunal by the impugned order has allowed the appeal and challenging the same, the revenue is before us by way of this appeal raising the aforementioned substantial questions of law.

3. We have heard Mr. Bhaskar Prosad Banerjee, learned standing counsel along with Mr. Abhradip Maity, learned advocate for the appellant and Mr. Rajeev Kumar Agarwal, learned advocate for the respondent.
4. The assessee's first contention before the learned tribunal was that the adjudicating authority has committed a factual mistake by mentioning as if the assessee produces "coal gas" during the manufacturing process which is a by-product and the said "coal gas" is used for the purpose of generating electricity. It is the specific case of the assessee that no coal gas is generated but "waste gas" is generated which is used to generate electricity. Thus, the assessee contended that the show cause notice proceeds on a wrong assumption of fact and consequently the question of manufacture of exempted goods does not arise and this submission though made before the adjudicating authority was not considered. Further the assessee contended that the "waste gas" is not an excisable product, where electrical energy generated from waste gas is also not classified under Chapter Heading 2716 00 00 and it is neither excisable nor exempted for the purpose of Rule 6 of the Cenvat Credit rules. Reliance was placed on the decision of the Delhi Tribunal in the case of **Hi-Tech Carbon Versus CCE, Allahabad** ¹ which was upheld by the High Court of Allahabad in the decision reported in 2018 17 GSTL 398 (Allahabad). Reliance was also placed on the decision in the case of **Gularia Chini Mills Versus Union of India**² wherein it was held that electricity generated from bagasse which is a waste product cannot be classified under Chapter 27 and cannot be stated to be excisable. Further it

¹2003 (161) E.L.T. 407

² 2014 (34) STR 175 (All)

is the submitted that the said decision was affirmed by the Hon'ble Supreme Court in ***Union of India Versus DSCL Sugar Limited*** ³. Further it was contended there was no justification to demand an amount calculated at 5 % or 10 % of the sale value of electricity when the assessee has already reversed the proportionate credit attributable to sale of electricity even though the procedure prescribed under Rule 6 (3) has not been followed by the assessee. Further the assessee contended that the proceedings were barred by limitation by stating that the department is very well aware that the assessee manufactures product from "carbon black" and they have been subjected to regular departmental audits and also their production is being regularly monitored by the State Pollution Control Board, the sale of electricity is also properly accounted and necessary disclosures are made in the audited financial statements. Therefore, it was submitted that the question of suppression would not arise and the show cause notice could not have been issued and penalty also could not have been imposed. Further it is submitted that the Cenvat availed by the assessee during the period in question i.e. 2010-2011 to 2015-2016 is only Rs. 11.20 lakhs whereas the department has raised the demand for a sum of Rs. 2.33 crores which is not sustainable. Therefore, it was contended that the assessee cannot be fastened with a duty demand which is grossly disproportionate to the credit availed by the assessee.

5. The stand taken by the department before the Tribunal was that the assessee did not follow the procedure for reversal of proportionate credit of inputs and input services for use in generation of electricity sold outside the

³2015 (322) E.L.T. 769 (SC)

factory and, therefore, they were made liable to pay Cenvat Credit calculated at 6% of the sale value of electricity as prescribed in Rule 6(3) of the Cenvat Credit rules. The learned Tribunal after hearing both sides, noted that the adjudicating authority has committed a factual mistake in observing that the by-product generated during the production is “coal gas”. The Tribunal also noted that the assessee had given his explanation to the show-cause notice pointing out the factual error specifically, stating that no “coal gas” is generated and what is generated is “waste gas” and they are mandated to use the “waste gas” for generating electricity as the said gas cannot be flared in the open air as it would cause pollution. The Tribunal noted that this factual aspect though pointed out by the assessee was not dealt with by the adjudicating authority. Further, the Tribunal took note of the amendment made in the definition of “exempted goods” with effect from 1st March, 2015 to include non-excisable goods. Therefore, the Tribunal held that for the purpose of reversal of Cenvat credit, non-excisable goods would be considered to be exempted goods and the assessee would be liable to reverse the proportionate credit with effect from 1st March, 2015 onwards and not for the prior period. The Tribunal also faulted the adjudicating authority for seeking reversal of the credit in terms of Rule 6 of the Cenvat Credit Rules and to support such contention, several decisions of the coordinate Bench of the Tribunal were referred to. Further, with regard to the aspect regarding limitation for initiating proceedings, the Tribunal agreed with the submissions made on behalf of the assessee and that they being subjected to periodic departmental audit and their manufacturing activities being closely monitored by various Governmental agencies, there cannot be any

allegation of suppression and specifically, pointed out that in the adjudication order there is no ingredient brought about to show that the assessee had wilfully suppressed any information from the department and merely not following the procedure under Rule 6 of the Cenvat Credit Rules to reverse the proportionate credit that too only with effect from 1st March, 2015 cannot lead to the conclusion that the assessee had wilfully suppressed any material information.

6. We find the facts as noted by the Tribunal has been rightly culled out from the materials which were available on record and we cannot be called upon to substitute our opinion on those facts as the scope of the present appeal is to decide as to whether any substantial question of law arises for consideration. The decision in ***Tiara Advertising Versus Union of India***⁴ would also assist the assessee as to what can be done by the authority in the event the assessee fails to follow the procedure under Rule 6(3) of the Cenvat Credit Rules. The Court held as follows:

14. Further, we may reiterate the rule 6(3) of the Cenvat Credit Rules, 2004, merely offers options to an output service provider who does not maintain separate accounts in relation to receipt, consumption and inventory of inputs/ input services used for provision of output services which are chargeable to duty/ tax as well as exempted services. If such options are not exercised by the service provider, the provision does not contemplate that the Service Tax authorities can choose one of the options on behalf of the service provider. As rightly pointed out by Sri S. Ravi, Learned Senior Counsel, if the petitioner did not abide by the provisions of Rule 6(3) of the Cenvat Credit Rules, 2004, it was open to the

⁴ 2019 (30) G.S.T.L. 474 (Telengana)

authorities to reject its claim as regards the disputed Cenvat Credit of Rs. 17,15,489/-.

15. We may also note that in the event the petitioner was found to have availed Cenvat Credit wrongly, rule 14 of the Cenvat Credit rules, 2004 empowered the authorities to recover such credit which had been taken or utilised wrongly along with interest. However, the second respondent did not choose to exercise power under this rule but relied upon rule 6(3)(i) and made the choice of the option thereunder for the petitioner, viz., to pay 5% / 6% of the value of the exempted services. The statutory scheme did not vest the second respondent with the power of making such a choice on behalf of the petitioner. The Order-in-Original, to the extent that it proceeded on these lines, therefore cannot be countenanced.

7. The decision in ***Gularia Chini Mills Versus Union of India***⁵ which was affirmed by the Hon'ble Supreme Court in **2015 (322) ELT 769 (SC)** will also aid the case of the assessee. It was held that bagasse was a "waste" and hence, it was not manufactured of exempted goods and electricity generated from bagasse was neither excisable under Section 2(d) of the Central Excise Act, 1944, nor exempted good under rule 2(d) of the Cenvat Credit Rules 2004 and hence, Rule 6 of the said Rules is not applicable. The relevant paragraphs of the judgment are as hereunder:

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

⁵ 2014 (34) S.T.R. 175 (All.)

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).

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 not it is exempted goods as defined in Rule 2(d) of the 2004 rules.

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 or dutiable and exempted final products then the assessee 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)

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 a fuel in the factory for manufacture of final product and no specific input is used up t 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.

8. As pointed out, the said decision was affirmed by the Hon'ble Supreme Court in ***Union of India Versus DSCL Sugar Ltd.***⁶, wherein the Hon'ble Supreme Court held as follows:

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 brought 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 which is capable of bought or sold for consideration and as such goods shall be deemed to be marketable. Thus, it introduces 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-

⁶ 2015 (322) E.L.T. 769 (SC)

- (i) *Incidental or ancillary to the 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 or 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.

9. In the light of the above discussion, we hold that the Tribunal rightly allowed the appeal filed by the assessee and set aside the order of adjudication.

10. In the result, the appeal filed by the revenue is dismissed and the substantial questions of law are answered against the revenue.

(T.S. SIVAGNANAM, J.)

I agree.

(BIVAS PATTANAYAK, J.)

(P.A.-PRAMITA/SACHIN)

OD-1

CEXA/1/2022
IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction
ORIGINAL SIDE

PRINCIPAL COMMISSIONER OF CGST
AND CENTRAL EXCISE

-Versus-

M/S. HIMADRI SPECIALITY
CHEMICAL LIMITED

Appearance:

*Mr. Bhaskar Prosad Banerjee, Adv.
Mr. Abhradip Maity, Adv.
...for the appellant.*

*Mr. Rajeev Kumar Agarwal, Adv.
...for the respondent.*

BEFORE:

The Hon'ble Justice T.S. SIVAGNANAM

-And-

The Hon'ble Justice BIVAS PATTANAYAK

Date : 25th November, 2022.

The Court: This matter has been listed today under the caption 'To Be Mentioned'.

It is submitted that there is a mistake in the cause-title where the word 'HOWRAH' occurring for the appellant and the word 'PRIVATE' in the name of the respondent/assessee have to be deleted and, accordingly, the same stand deleted.

This order shall form part of the judgment and order dated 21st July, 2022.

(T.S. SIVAGNANAM, J.)

(BIVAS PATTANAYAK, J.)

A/s./S. Pal