

OD-1

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

CEXA/16/2021
IA NO. GA/1/2021, GA/2/2021
COMMISSIONER OF CUSTOMS, CENTRAL EXCISE AND SERVICE TAX,
DURGAPUR
-VS-
M/S. PHILIPS CARBON BLACK LIMITED AND ANR.

BEFORE :
THE HON'BLE THE CHIEF JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
Date : 12th May, 2023

Appearance :
Mr. Bhaskar Prasad Banerjee, Adv.
Mr. Abhradip Maity, Adv.
...for appellant
Mr. Rahul Dhanuka, Adv.
...for respondent

The Court : - Heard learned Counsel on either side.

There is a delay of 384 days in filing this appeal. We have perused the affidavit filed in support of the condone delay petition and find sufficient cause has been shown for not preferring the appeal within the period of limitation.

The application is allowed and the delay in filing the appeal is condoned.

The revenue has filed this appeal under Section 35G of the Central Excise Act, challenging the order passed by the Customs, Excise and Service Tax Tribunal, East Zonal Bench, Kolkata dated 17.12.2019. The revenue has raised the following substantial questions of law for consideration :-

- (i) Whether the Learned Tribunal erred in not holding that availing credit by the Respondent cannot be substantive right since the

availment of such credit is subject to compliance of procedural requirement ?

- (ii) Whether the Learned Tribunal erred in law by holding that the Rule 6(1) of Credit Rules is clearly not aimed at revenue maximization but credit neutralization and Rule 6(2) and Rule 6(3) of the said Rules are aimed at securing compliance with the substantive provision contained in the Rule 6(1) of the said Rules ?

Identical substantial questions of law were considered in the case of *Principal Commissioner of CGST & Central Excise, Howrah –versus- M/s. Himadri Speciality Chemical Private Limited* in CEXA/1/2022 dated 21.7.2022 and the appeal filed by the revenue is dismissed and the substantial questions of law were answered against the revenue. The operative portion of the judgement reads as follows :-

“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*** 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 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 Central 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** 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 judgement 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 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 judgement 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 to 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.**, wherein the Hon'ble Supreme Court held as follows :

6.The aforesaid judgement 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-

- (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 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. “

The learned Advocate appearing for the respondent/assessee submitted that the decision in the case of *Principal Commissioner of CGST & Central Excise, Howrah –versus- M/s. Himadri Speciality Chemical Private Limited* have been accepted by the department. To substantiate the same a copy of the information is furnished under the Right to Information Act by the CP 10 and Assistant Commissioner of Central Tax, Howrah CGST Commissionerate dated 28.2.2023. In the said information it has been stated that the decision rendered in the case *M/s. Himadri Speciality Chemical Private Limited (Supra)* in CEXA/1/2022 dated 21st July, 2022 has been accepted by the competent authority.

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

The stay application also stands dismissed.

(T.S. SIVAGNANAM)
CHIEF JUSTICE

(HIRANMAY BHATTACHARYYA, J.)