
(2013) 08 KAR CK 0019
In the Karnataka High Court
Case No : C.E.A. No. 14 of 2008

Commissioner of C. EX., Cus. and S.T., Belgaum
Vs
Shree Renuka Sugars Ltd.

APPELLANT
RESPONDENT

Date of Decision : 06-08-2013

Acts Referred:

Citation : (2014) 302 ELT 33 : (2014) 26 GSTR 277

Hon'ble Judges : N. Kumar, J;H.S. Kempanna, J

Bench : Division Bench

Judgement

N. Kumar, J.—This appeal is preferred against the order passed by the CESTAT [2007 (218) E.L.T. 388 (Tribunal)] holding that Sugar Cess being a duty of excise in terms of Section 3(4) of the Sugar Cess Act, Cenvat Credit Rules are also applicable to Sugar Cess and therefore Cenvat credit taken on Sugar Cess paid as countervailing duty or CVD is proper and the assessee is entitled to the said benefit of Cenvat credit.

Factual Matrix

The assessee M/s. Renuka Sugars Ltd. imported 260450 quintals of raw sugar during October 2003 to Feb., 2004. They paid Rs. 36,46,300/- as cess leviable under Sugar Cess Act, 1982 (for short hereinafter referred to as "Act") as part of countervailing duty. They further availed Cenvat credit of the said amount paid as per Clause (vii) of Rule 3, sub-rule (1) of Cenvat Credit Rules, 2004. According to them the Manufacturer is allowed to take credit of additional duty leviable u/s 3 of the Customs Tariff Act, 1975, equivalent to the duty of excise specified under Clause (i), (ii), (iii), (iv), (v) and (vi) of Rule 3(1) of the said Rules.

2. Sugar Cess is not specified under Rule 3 of the Cenvat Credit Rules, 2004 as being eligible for being taken credit of. Therefore, a show cause notice dated 5-5-2006 was issued to the assessee asking them to show cause as to why the irregularly availed and utilized Cenvat credit should not be recovered under Rule

12 of the Cenvat Credit Rules, 2004 along with interest and why penalty should not be imposed for the said contravention. The assessee in the reply dated 7-6-2006 pleaded that cess on sugar is levied as a duty of excise and thus what is collected is duty of excise and availment of credit of such duty cannot be denied. That sugar cess has all characteristic features of Central Excise Duty and the provisions of the Central Excise Act, 1944 and the Rules made thereunder are mutatis mutandis applicable to cess paid under the Act. The new Cenvat Rules provide for credit to manufacturers and service providers for duties and taxes paid under the Central Excise and Service Tax Laws. The Cenvat Rules provide for credit to manufacturers for duties and taxes paid under the Central Excise Act and the countervailing duty paid under the Customs Law. In support of their contention they relied on several decisions.

3. The Additional Commissioner of Central Excise, Belgaum, vide his order-in-original dated 9-8-2006 observed, there exists explicit provision under Rule 3(1) (vii) of Cenvat Credit Rules, 2004 for allowing to take credit of additional duty of customs equivalent to specified duties and these specified duties are: Duty of Excise and Special Excise Duty, Additional Duty of Excise, National Calamity Contingent Duty and Education Cess specified under Central Excise Tariff Act, 1985; Section 3 of Additional Duties of Excise Act, 1979; Section 3 of the Additional Duties of Excise Act, 1957; Section 136 of the Finance Act, 2001; and Clause 81 read with Clause 83 of Finance Act, 2004 respectively. It is only those duties and additional duties which are eligible for availment of credit. The cess leviable under the provisions of the Act is not at all specified under Rule 3(1)(vii) of the said Rules as eligible for taking Cenvat credit. Therefore, he did not find any merit in the assessee's contention and upheld the demand raised in the show cause notice.

4. Aggrieved by the said order the assessee preferred an appeal before the Commissioner (Appeals), Mangalore. The appeal came to be rejected by an order dated 3-1-2007 upholding the demand of the Additional Commissioner. Aggrieved by the said order the assessee preferred an appeal to the CESTAT. The Tribunal held that, when the provisions of the Central Excise Act and the Rules made thereunder are made applicable to the Sugar Cess Act in terms of Section 3(4) thereof, then it goes without saying that the provisions of Cenvat Credit Rules would also be applicable. The Cenvat Credit Rules are framed by virtue of the powers derived from the Central Excise Act. Therefore, there is nothing wrong in taking credit of the sugar cess paid as countervailing duty on imported sugar and when such credit is utilized for payment of duty when the final product are cleared from the factory. Therefore, the Tribunal set aside the order of the authorities below and upheld the action of the assessee in availing Cenvat credit. Aggrieved by the said order of the Tribunal, the Revenue is in appeal.

Substantial question of law

5. This appeal came to be admitted on 11-3-2008 to consider the following substantial question of law, which reads as under:

(1) Whether the assessee is entitled for Cenvat credit, on the Sugar Cess [under Section 3(4) of the Sugar Cess Act, 1982] as the same is not one of the duties allowed for Cenvat credit under Rule 3(1) of the Cenvat Credit Rules, 2004?

Rival contentions

6. The learned counsel appearing for the Revenue assailing the impugned order of the Tribunal contended that the cess levied and collected under the Act does not partake the character of a duty of excise. It is in the nature of a fee, for rendering specific service as contemplated under the Sugar Development Fund Act, 1982 and therefore the assessee is not entitled to the benefit of Cenvat credit. Secondly he contended, to be eligible to claim Cenvat credit the cess paid under the Act should have been included in Rule 3 and a reference to the Act is conspicuously missing in Rule 3 of the Cenvat Credit Rules. Therefore the Tribunal committed a serious error in extending the benefit of Cenvat credit to the assessee for the cess paid under the Act.

7. Per contra, the learned counsel appearing for the assessee contended that, the cess levied and collected under the Act is nothing but a duty of excise on the sugar produced by the assessee; the levy of such cess is an addition to the duty of excise leviable on sugar under the Central Excise Act, 1944 or any other law for the time being in force. Sub-section (4) of Section 3 of the Act incorporates the provisions of the Central Excise Act and the Rules made thereunder in relation to the levy and collection of duty of excise on sugar in the Act. Therefore, by virtue of Section 2A of the Central Excise Act, 1944 the cess paid under the Act which is in the nature of a duty of excise shall be construed to include Central Value Added Tax, i.e., Cenvat. Therefore, the assessee is entitled to the benefit of Cenvat credit as held by the Tribunal.

Fee or Tax

8. In order to answer the aforesaid substantial question of law, first it is necessary to find out whether the cess paid under the Act is a fee or a tax. The Act was enacted to provide for imposition of cess on sugar for the development of sugar industry and for matters connected therewith. Section 3 is the charging section. It reads as under:-

3. Imposition of cess. - (1) There shall be levied and collected as a cess, for the purposes of the Sugar Development Fund Act, 1982, a duty of excise on all sugar produced by any sugar factory in India, at such rate not exceeding fifteen rupees per quintal of sugar, as the Central Government may, by notification in the Official Gazette, specify from time to time:

Provided that until such rate is specified by the Central Government, the duty of excise shall be levied and collected at the rate of fourteen rupees per quintal of sugar.

(2) The duty of excise levied under sub-section (1) shall be in addition to the duty of excise leviable on sugar under the Central Excises and Salt Act, 1944 (1

of 1944) or any other law for the time being in force.

(3) The duty of excise levied under sub-section (1) shall be payable by the occupier of the sugar factory in which sugar is produced.

(4) The provisions of the Central Excises and Salt Act, 1944 (1 of 1944) and the rules made thereunder, including those relating to refunds and exemptions from duty, shall, so far as may be, apply in relation to the levy and collection of the said duty of excise as they apply in relation to the levy and collection of the duty of excise on sugar under that Act.

9. It is clear from the aforesaid provisions that the cess is imposed for the purpose of the Sugar Development Fund Act, 1982. The Sugar Development Fund Act, 1982 was enacted to provide for the financing of activities for development of sugar industry and for matters connected therewith or incidental thereto. The purpose of establishment of the said fund is for making loans for facilitating the rehabilitation and modernization of any sugar factory or any unit thereof or the undertaking of any scheme for development of sugarcane in the area in which a sugar factory is situated; for making loans to any sugar factory or any unit thereof for bagasse based co-generation power projects with a view to improve their viability; for production of anhydrous alcohol or ethanol from alcohol with a view to improve their viability; for any research project aimed at development of sugar industry for maintenance of buffer stocks of sugar with a view to stabilizing price of sugar; for defraying the expenditure on internal transport and freight charges to the sugar factories on export shipments of sugar with a view to promoting its export and for defraying any other expenditure for the purpose of this Act.

10. Relying on these provisions it was contended by the Revenue, the cess is levied to set it apart and appropriate it specifically for the purpose of the aforesaid specified purposes; for levy of the said cess, an element of quid pro quo for the service rendered is extended; and therefore it is not a tax, it is a fee. Therefore, the assessee is not entitled to Cenvat credit.

11. The wordings used in Section 3 of the Act makes it clear that, although a cess is levied and collected for the purpose of the Sugar Development Fund Act, 1982, it is in the nature of a duty of excise on all sugar produced by any sugar factory in India. The duty of excise levied under sub-section (1) shall be in addition to the duty of excise leviable on sugar under the Central Excise Act or any other law for the time being in force as is clear from sub-section (2). The way sub-section (2) is worded makes it clear that what is levied and collected as a cess under sub-section (1) of Section 3 is characterized as a "duty of excise" levied under "the Central Excise Act". Further, sub-section (4) makes it clear that the provisions of the Central Excise Act and the Rules made thereunder including those relating to refunds and exemptions from duty shall, so far as may be, apply in relation to the levy and collection of the said duty of excise as they apply in relation to the levy and collection of the duty of excise on sugar under

that Act. In other words, the provisions of the Central Excise Act and the Rules made thereunder are read into the Act. Levy and collection of cess under the Act is treated as levy and collection of a duty of excise on sugar under the Central Excise Act.

12. The effect of such incorporation is clear from the judgment of the Supreme Court in *Barnagore Jute Factory Co. and Others Vs. Inspector of Central Excise and Others*, wherein the observations made by Lord Esher M.R. in 1886 31 Chancery Division 607/615 were referred to in para 18 of the judgment which reads as under:

If a subsequent Act brings into itself by reference some of the clauses of a former Act, the legal effect of that Act, as has been held, is to write those Sections into the new Act just as if they had been actually written in it with the pen or printed in it, and, the moment you have those clauses in the later Act, you have no occasion to refer to the former Act at all.

13. In this case it is not that some of the provisions of the Central Excise Act, 1944, were incorporated under the Act. What is incorporated is the provisions of the Central Excise Act, 1944, i.e., the entire enactment and also the Rules made thereunder including those relating to refunds and exempting from duty. After so incorporating the entire Central Excise Act of 1944 and the Rules made thereunder Section 4 of the Act deals with the cess so collected and how it should be dealt with. Section 4 reads as under:

4. Crediting proceeds of duty to Consolidated Fund of India.- The proceeds of the duty of excise levied u/s 3 shall be credited to the Consolidated Fund of India.

14. This Act does not provide for appropriation of the said sum collected. Appropriation is dealt with under the provisions of the Sugar Development Fund Act, 1982 u/s 3 which reads as under:

(1) There shall be formed a fund to be called the Sugar Development Fund;

(2) An amount equivalent to the proceeds of the duty of excise levied and collected under the Sugar Cess Act, 1982 (3 of 1982), reduced by the cost of collection as determined by the Central Government, together with any moneys received by the Central Government for the purpose of this Act, shall after due appropriation made by the Parliament by law, be credited to the said Fund;

(3) The Fund shall consist of the amounts credited under sub-section (2) and any income from the investment of such amounts.

15. The learned counsel appearing for the Revenue relying on the judgment of the Supreme Court of India in the case of *Dewan Chand Builders and Contractors Vs. Union of India (UOI) and Others*, contended, when the amount levied and collected under the Act is credited to the Sugar Development Fund after appropriation by the Parliament it is clear quid pro quo is established and therefore the cess partakes the character of a fee.

16. The Constitution Bench of the Apex Court in the case of Kewal Krishan Puri and Others Vs. State of Punjab and Another, in which it was held, the quid pro quo must exist between the payer of the fee and the special services rendered. It was observed:

that a fee is a charge for special services rendered to individuals by the Governmental Agency and therefore for a levy of fee an element of quid pro quo for the service rendered was necessary; service rendered does not mean any personal or domestic service and it meant service in relation to the transaction, property or the institution in respect of which the fee is paid. The element of quid pro quo may not be possible or even necessary to be established with arithmetical exactitude but even broadly and reasonably it must be established, with some amount of certainty, reasonableness or preponderance of probability that quite a substantial portion of the amount of fee realized is spent for the special benefit of its payers. Each case has to be judged from a reasonable and practical point of view for finding an element of quid pro quo.

17. The Constitution Bench of the Apex Court in the case of The Hingir-rampur Coal Co. Ltd. and Others Vs. The State of Orissa and Others, explained the different features of tax, a fee and cess in the following passage.

The neat and terse definition of Tax which has been given by Latham, C.J., in *Matthews v. Chicory Marketing Board* - (1938) 60 C.L.R. 263 is often cited as a classic on this subject. "A Tax", said Latham, C.J., "is a compulsory exaction of money by public authority for public purposes enforceable by law, and is not payment for services rendered". In bringing out the essential features of a tax this definition also assists in distinguishing a tax from a Fee. It is true that between a tax and a fee there is no generic difference. Both are compulsory exactions of money by public authorities; but whereas a tax is imposed for public purposes and is not, and need not, be supported by any consideration of service rendered in return, a fee is levied essentially for services rendered and as such there is an element of quid pro quo between the person who pays the fee and the public authority which imposes it. If specific services are rendered to a specific area or to a specific class of persons or trade or business in any local area, and as a condition precedent for the said services or in return for them cess is levied against the said area or the said class of persons or trade or business the cess is distinguishable from a tax and is described as a fee. Tax recovered by public authority invariably goes into the consolidated fund which ultimately is utilised for all public purposes, whereas a cess levied by way of Fee is not intended to be, and does not become, a part of the consolidated fund. It is earmarked and set apart for the purpose of services for which it is levied.

It was further held that,

It is true that when the Legislature levies a fee for rendering specific services to a specified area or to a specified class of persons or trade or business, in the last analysis such services may indirectly form part of services to the public in

general. If the special service rendered is distinctly and primarily meant for the benefit of a specified class or area the fact that in benefiting the specified class or area the State as a whole may ultimately and indirectly be benefited would not detract from the character of the levy as a fee. Where, however, the specific service is indistinguishable from public service, and in essence is directly a part of it, different considerations may arise. In such a case it is necessary to enquire, what, is the primary object of the levy and the essential purpose which it is intended to achieve. Its primary object and the essential purpose must be distinguished from its ultimate or incidental results or consequences. That is the true test in determining the character of the levy.

18. Again, yet another Constitution Bench of the Apex Court in the case of *The State of West Bengal Vs. Kesoram Industries Ltd. and Others*, explained the distinction between the terms "tax and fee" in the following words:

The term cess is commonly employed to connote a Tax with a purpose or a tax allocated to a particular thing. However, it also means an assessment or levy. Depending on the context and purpose of levy, cess may not be a tax; it may be a fee or fee as well. It is not necessary that the services rendered from out of the fee collected should be directly in proportion with the amount of Fee collected. It is equally not necessary that the services rendered by the Fee collected should remain confined to the person from whom the fee has been collected. Availability of indirect benefit and a general nexus between the persons bearing the burden of levy of fee and the services rendered out of the fee collected is enough to uphold the validity of the fee charged.

19. Again the Apex Court in the case of *Sreenivasa General Traders and Others Vs. State of Andhra Pradesh and Others*, held as under:

The traditional view that there must be actual quid pro quo for a fee has undergone a sea change in the subsequent decisions. The distinction between a tax and a fee lies primarily in the fact that a tax is levied as part of a common burden, while a fee is for payment of a specific benefit or privilege although the special advantage is secondary to the primary motive of regulation in public interest. If the element of revenue for general purpose of State predominates, the levy becomes a tax. In regard to fees there is, and must always be, correlation between the fee collected and the service intended to be rendered. In determining whether a levy is a fee, the true test must be whether its primary and essential purpose is to render specific services to a specified area of class; it may be of no consequence that the State may ultimately and indirectly be benefited by it. The power of any legislature to levy a fee is conditioned by the fact that it must be "by and large" a quid pro quo for the services rendered. However, corelationship between the levy and the services rendered (sic or) expected is one of general character and not of mathematical exactitude. All that is necessary is that there should be a "reasonable relationship" between the levy of the Fee and the services rendered.

20. From the aforesaid judgments it is clear that the traditional view that there must be actual quid pro quo for a fee has undergone a sea change in the recent years. The tax recovered by a public authority invariably goes into the Consolidated Fund, which ultimately is utilized for all public purposes. Whereas, a cess levied by way of fee is not intended to be, and does not become, a part of the Consolidated Fund. It is earmarked and set apart for the purpose of services for which it is levied.

21. Article 266 of the Constitution of India deals with Consolidated Funds and public accounts of India and of the States. It reads as under:

266. (1) Subject to the provisions of Article 267 and to the provisions of this Chapter with respect to the assignment of the whole or part of the net proceeds of certain taxes and duties to States, all revenues received by the Government of India, all loans raised by that Government by the issue of treasury bills, loans or ways and means advances and all moneys received by that Government in repayment of loans shall form one consolidated fund to be entitled "the Consolidated Fund of India" and all revenues received by the Government of a State, all loans raised by that Government by the issue of treasury bills, loans or ways and means advances and all moneys received by that Government in repayment of loans shall form one consolidated fund to be entitled "the Consolidated Fund of the State."

(2) All other public moneys received by or on behalf of the Government of India or the Government of a State shall be credited to the public account of India or the public account of the State, as the case may be.

(3) No moneys out of the Consolidated Fund of India or the Consolidated Fund of a State shall be appropriated except in accordance with law and for the purposes and in the manner provided in this Constitution.

22. Similarly, Article 270 deals with taxes levied and distributed between the Union and the State which reads as under:

270. Taxes levied and distributed between the Union and the States. -

(1) All taxes and duties referred to in the Union List, except the duties and taxes referred to in articles (268 and 269), respectively, surcharge on taxes and duties referred to in article 271 and any cess levied for specific purposes under any law made by Parliament shall be levied and collected by the government of India and shall be distributed between the Union and the States in the manner provided in clause (2);

(2) Such percentage, as may be prescribed, of the net proceeds of any such tax or duty in any financial year shall not form part of the Consolidated Fund of India, but shall be assigned to the States within which that tax or duty is leviable in that year, and shall be distributed among those States in such manner and from such time as may be prescribed in the manner provided in clause (3);

(3) In this article, "prescribed" means -

(i) until a Finance Commission has been constituted, prescribed by the President by order, and

(ii) after a Finance Commission has been constituted, prescribed by the President by order after considering the recommendations of the Finance Commission.

23. The aforesaid provisions make it very clear that no money out of the Consolidated Fund of India shall be appropriated except in accordance with law and for the purposes and in the manner provided in the Constitution.

24. Article 270 of the Constitution of India provides for distribution of all taxes and duties, surcharge on taxes and duties and any cess levied for specific purposes under any law made by the Parliament and distribution of the said amount which forms part of Consolidated Fund of India between the Union and the State in the manner provided in Clause (2).

25. Any cess levied and collected in order to constitute a fee after such collection should go into a special fund earmarked for carrying out the purpose of the Act. The said fund so set apart should be appropriated specifically for the performance of the specified purpose and it should not be merged in the public revenues. In other words, the cess levied by way of fee is not intended to be and does not become a part of the Consolidated Fund. It should be earmarked and set apart for the purpose of services for which it is levied. Then only it should be described as a fee and not tax. If the cess levied and collected is credited to the Consolidated Fund of India and it has to be appropriated by the Parliament by law and then only the said amount could be credited to the Fund; it ceases to be a fee and partakes the character of a duty or a tax.

26. In the instant case, Section 4 of the Act explicitly provides that the proceeds of the duty of excise levied u/s 3 shall be credited to the Consolidated Fund of India. Sub-section (2) of Section 3 of the Sugar Development Fund Act, 1982, provides that the amount so credited, shall after due appropriation made by Parliament by law be credited to the Sugar Development Fund. Thus the cess collected under the Act invariably goes to the Consolidated Fund, which ultimately is utilized for all public purposes. Therefore, there is no quid pro quo between the cess levied and collected and the services rendered for such payment. On the contrary, the proceeds are credited to the Consolidated Fund of India which is meant to be utilized for all public purposes, may be including the purpose contemplated under the Sugar Development Fund Act, 1982. In the light of the aforesaid statutory provisions, the cess imposed under the Act is a duty of excise or a tax. The contention that it is a fee and the assessee is not entitled to Cenvat credit has no substance. Therefore, the sugar cess paid under the Act is tax, and to be precise it is Duty of Excise and not Fee.

27. Insofar as the contention that, to be eligible for Cenvat credit, is it necessary that the Act should have been mentioned in Rule 3 of the Cenvat Credit Rules, is

concerned, the answer is found in Section 3 of the Central Excise Act, 1944 which is the charging Section. It reads as under:

3. Duties specified in the Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 to be levied. - (1) There shall be levied and collected in such manner as may be prescribed -

(a) a duty of excise to be called the Central Value Added Tax (CENVAT) on all excisable goods (excluding goods produced or manufactured in special economic zones, which are produced or manufactured in India as, and at the rates, set forth in the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986);

(b) a special duty of excise, in addition to the duty of excise specified in clause (a) above, on excisable goods (excluding goods produced or manufactured in special economic zones) specified in the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) which are produced or manufactured in India, as, and at the rates, set forth in the said Second Schedule;

28. Section 37 in Clause (2) and sub-clause (xvia) provide for the credit of duty paid or deemed to have been paid on the goods used in or in relation to the manufacture of excisable goods which reads as under:-

37. Power of Central Government to make rules. -

(1) The Central Government may make rules to carry into effect the purposes of this Act;

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may -

(xvia) provide for the credit of duty paid or deemed to have been paid on the goods used in, or in relation to, the manufacture of excisable goods;

29. The credit is given to the duty paid or deemed to have been paid under the Central Excise Act of 1944. Section 2A was inserted in the Central Excise Act, 1944 by Act No. 10 of 2000 with effect from 12-5-2000 which reads as under:

2A. References to certain expression. - In this Act, save as otherwise expressly provided and unless the context otherwise requires, references to the expressions "duty", "duties", "duty of excise" and "duties of excise" shall be construed to include a reference to "Central Value Added Tax (CENVAT)"

30. Therefore, it is clear from the aforesaid provision that, the expression, "duty, duties, duty of excise, and duties of excise" shall be construed to include a reference to Cenvat, i.e., Central Value Added Tax.

31. It is to give effect to the aforesaid object that the Cenvat Credit Rules are framed. The Cenvat Credit Rules, 2004 were framed in exercise of powers conferred by Section 37 of the Central Excise Act, 1944 in supersession of the Cenvat Credit Rules, 2002 except as things done or omitted to be done before such supersession. Rule 3 of the Cenvat Credit Rules, 2004 deals with Cenvat

credit, and reads as under:

Rule 3. CENVAT credit. - (1) A manufacturer or producer of final products shall be allowed to take credit (hereinafter referred to as the CENVAT credit) of, -

(i) the duty of excise specified in the First Schedule to the Tariff Act, leviable under the Act;

(ii) the duty of excise specified in the Second Schedule to the Tariff Act, leviable under the Act;

(iii) the additional duty of excise leviable u/s 3 of the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 (40 of 1978),

(iv) the additional duty of excise leviable u/s 3 of Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957);

(v) the National Calamity Contingent duty leviable u/s 136 of the Finance Act, 2001 (14 of 2001), as amended by Section 169 of the Finance Act, 2003 (32 of 2003);

(vi) Education Cess on excisable goods leviable u/s 91 read with Section 93 of the Finance (No. 2) Act, 2004;

(vii) the additional duty leviable u/s 3 of the Customs Tariff Act, equivalent to the duty of excise specified under clauses (i), (ii), (iii), (iv), (v) and (vi) above; and

(viii) the additional duty of excise leviable u/s 157 of the Finance Act, 2003 (32 of 2003),

paid on any inputs or capital goods received in the factory on or after the first day of March, 2002, including the said duties paid on any inputs used in the manufacture of intermediate products, by a job-worker availing the benefit of exemption specified in the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 214/86-Central Excise, dated the 25th March, 1986, published vide number G.S.R. 547(E), dated the 25th March, 1986, and received by the manufacturer for use in, or in relation to, the manufacture of final products, on or after the first day of March, 2002.

32. Rule 3 of the Cenvat Credit Rules provides that a manufacturer or producer of a final product shall be allowed to take credit of the duty of excise. Therefore, once a duty of excise is paid, the manufacturer or producer of the final product is entitled to take Cenvat credit. The reference to the Tariff Act is for the purpose of calculating the rate at which such a duty of excise is payable. But once it is established that what is paid is excise duty or in other words a tax and then under Rule 3, the assessee is entitled to the Cenvat credit.

33. Section 2 of the Customs Tariff Act, 1975 sets out the rates at which duties of Customs should be levied under Customs Act, 1962. Section 3 of the said enactment provides for levy of additional duty equal to Excise duty, Sales tax, local taxes and other charges. It reads as under:

Section 3. Levy of additional duty equal to excise duty, sales tax, local taxes and other charges. - (1) Any article which is imported into India shall, in addition, be liable to a duty (hereafter in this section referred to as the additional duty) equal to the excise duty for the time being leviable on a like article if produced or manufactured in India and if such excise duty on a like article is leviable at any percentage of its value, the additional duty to which the imported article shall be so liable shall be calculated at the percentage of the value of the imported article.

34. In view of the aforesaid provisions, when an assessee imports goods into India in addition to payment of basic Customs Duty, he shall be liable to pay additional duty of customs equal to the excise duty for the time being leviable on a like article if produced or manufactured in India and if such excise duty on a like article is leviable at any percentage of its value, the additional duty to which the imported article shall be so liable shall be calculated at that percentage of the value of the imported article. Therefore, on imported goods or articles, in addition to basic Customs Duty, an assessee is also liable to additional duty of customs, equivalent to excise duty. The excise duty is leviable under the Central Excise Act, 1944 and also the Sugar Cess Act, 1982.

35. It was fairly submitted by the learned counsel for the Revenue that if the cess paid under the Act is held to be a duty of excise or a tax, then the assessee is entitled to the credit of such duty tax paid.

36. In this connection it is also useful to refer to the judgment of the Apex Court in the case of Barnagore Jute Factory Co. and Others Vs. Inspector of Central Excise and Others, where the Apex Court was considering the nature of a "cess" levied and collected under the provisions of the Jute Manufacturers Cess Act, 1983, where identical provisions came up for consideration. After referring to the provisions of the Act and various judgments, the Apex Court has held as under:

17. It is then argued that if we arrive at the above conclusion on the basis of the language employed in Section 9, it would lead to an anomalous situation viz., while the jute yarn industry would not be within the purview of the Act (i.e., would not be subject to control and regulation provided by the Act) its products would be liable to pay cess u/s 9. This cannot be, says the learned Counsel. We are not impressed. Firstly, it is not the case of any of the petitioners that any of them is engaged in the production of jute yarn alone. All of them are engaged in manufacture of jute textile and are, therefore, scheduled industries. Jute yarn is an intermediate product for them. It is not even stated by the petitioners that there are any factories or industries engaged in production of jute yarn alone. In the circumstances, this argument of Mr. Salve is hypothetical in nature and need not detain us. We cannot also accede to Mr. Salve's argument that intermediate products of a scheduled industry cannot be subjected to cess on the ground that it would amount to multistage levy. Section 9 speaks of levy on all goods manufactured or produced in a scheduled industry. Jute yarn is goods known to market. Therefore, they are goods manufactured in a scheduled industry. The fact that such yarn is captively consumed in the manufacture of jute textile is of

no relevance. In fact, this question is concluded by the decision of this Court in J.K. Cotton Spinning and Weaving Mills Ltd. and Anr Vs. Union of India (UOI) and Ors, , a decision rendered under the Central Excises and Salt Act.....

18. But the language of Rule 3 of Jute Cess Rules is altogether different. It indicates a continuing applicability of the provisions of the Central Excise Act and the Rules. What was levied was a "duty of excise" and it was to be levied and collected in accordance with the provisions of the Central Excise Act and the Rules. The effect is as if the words "for the time being in force" were thereafter the words "the provisions of Central Excises and Salt Act, 1944 (1 of 1944) and the Rules made thereunder" in Rule 3. We are, therefore, of the opinion that the amendment of Rules 9 and 49 made in 1982 (with retrospective effect from 1944) is equally applicable in the matter of levy and collection of cess under the Act. The contentions urged by Sri Ganesan are accordingly rejected. In this view of the matter, it is not necessary to dwell upon the difference between cases where the provisions of another Act are incorporated by reference and cases where a mere reference is made to another Act a distinction pointed out in a recent decision of this Court in Bhatinda Improvement Trust Vs. Balwant Singh and others, .

19.The nature of the cess imposable u/s 9 is really that of duty of Central Excise, as emphasised hereinbefore. Evidently, for that reason the principle obtaining under the Central Excise Act has been adopted by this Act in the matter of levy of cess. We cannot agree with Sri Salve that according to Section 9, the cess can be levied on the basis of value alone and on no other basis. The main limb of Section 9(1) does not indicate any particular basis for levy of cess. It is only the proviso which says, "no such rate shall in any case exceed two annas per cent of the value of the goods." Sri Salve wants us to read the proviso into the main limb and on that basis, hold that Section 9(1) contemplates levy of cess only ad valorem".....

37. Section 3 of the Act provides for levy and collection as a cess for the purpose of Sugar Development Fund Act, 1982, a duty of excise on all sugar produced by any sugar factory in India. Therefore, the cess leviable and collected is at the stage of production of sugar in the sugar factory. Because it is a tax on production, it is described as a duty of excise.

38. The aforesaid discussion makes it very clear that a manufacturer or producer of final products shall be allowed to take credit of the additional duty which is commonly known as CVD leviable u/s 3 of the Customs Tariff Act equivalent to the duty of Excise specified under sub-clause (i), (ii), (iii), (iv), (v) and (vi) of Rule 3(1) of the Cenvat Credit Rules, 2004. Though it is called as Excise Duty, this Excise Duty is paid under the Customs Tariff Act, which is described as an additional duty (CVD) u/s 3 of the Customs Tariff Act, 1975. Though the duty payable u/s 2 of the Customs Act is not eligible for Cenvat credit, the additional duty paid and payable under the Customs Tariff Act, 1975 are eligible for Cenvat credit as is clear from clause (vii) of sub-rule (1) of Rule 3 of the Cenvat Credit

Rules, 2004. It is that additional customs duty collected u/s 3 of the Customs Tariff Act, 1975, which is referred to as the excise duty under the Central Excise Act, 1944 and also the Sugar Cess Act, 1982.

39. In the instant case, it is not in dispute that this duty of excise is not collected as a cess at the time of production of the sugar in the assessee's sugar factory in India. It is not also in dispute that it is also collected at the time of importing raw sugar. At the time of importing raw sugar the assessee has paid the additional Customs duty or CVD (countervailing duty) as prescribed u/s 3 of the Customs Tariff Act of 1975. If the Article imported is a like article produced or manufactured in India and if excise duty on such like article is leviable, the assessee is liable to pay the additional duty. The Excise Duty on sugar is payable under two enactments, i.e., (1) Section 3 of Central Excise Act of 1944, at the rate prescribed in the Central Excise Tariff Act, 1985. In addition, the assessee is also liable to pay cess as a duty of excise under the Sugar Cess Act of 1982. On such additional duty or CVD paid at the time of import by the assessee, apart from the Basic Customs Duty, he is entitled to the Cenvat credit in terms of clause (vii) of Rule 3 of Cenvat Credit Rules, 2004.

40. Therefore, in the light of the above discussion, we are of the view that the assessee was entitled to claim Cenvat credit in respect of the cess paid as additional duty (CVD) on raw sugar imported under the Sugar Cess Act of 1982 read with Section 3 of the Customs Tariff Act, 1975. Therefore, the substantial question of law is answered in favour of the assessee and against the Revenue. There is no merit in this appeal. Hence, we pass the following:

ORDER

Appeal dismissed. No costs.