(2019) 10 DEL CK 0343

In the Delhi High Court

Case No : Central Excise Act Case No. 19 Of 2017

Commissioner Of Central Excise And Service Tax Ltu, Delhi — APPELLANT

Vs

Nangalamal Sugar Complex — RESPONDENT

Date of Decision : 31-10-2019

Acts Referred:

Constitution Of India, 1950 — Article 141
Cenvat Credit Rules, 2004 — Rule 2(d), 2(f), 2(t), 6, 6(2), 6(3), 6(3A), 6(3)(i), 6(3)(ii), 14
Central Excise Rules, 1944 — Rule 57A, 57A(1)
Cenvat Credit Rules, 2002 — Rule 2(g)
Central Excise Act, 1944 — Section 2(d), 2(f), 11(A)(1), 35H, 37
Finance Act, 2008 — Section 28
Central Excise Tariff Act, 1985 — Section 2
Central Excise Tariff Act, 1985 — Section 2

Citation : (2019) 10 DEL CK 0343

Hon'ble Judges : Dhirubhai Naranbhai Patel, CJ;C.Hari Shankar, J

Bench : Division Bench

Advocate : Amit Bansal, Aman Rewaria, Seema Dolo, Vipasha Mishra, Charanya Lakshmi Kumaran, Kunal Kapoor

Final Decision : Dismissed

Judgement

C. Hari Shankar, J

1. This appeal, at the instance of the Revenue and preferred under Section 35H of the Central Excise Act, 1944 (hereinafter referred to as "the Act") impugns Final Order, dated 24th November, 2016, passed by the Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred to as "the Tribunal") in Excise Appeals Nos. E/3753/2012 and E/3949/2012.

Statutory Backdrop

2. Before proceeding to the facts of the case, it would be apposite to chart the statutory backdrop, in which the controversy arises.

3. The Cenvat Credit Rules, 2004 (hereinafter referred to as "the Cenvat Credit Rules") were notified vide Notification 23/2004-CE (NT), dated 10th September, 2004, issued under Section 37 of the Act. The Cenvat Credit Rules contain the provisions governing availability of Cenvat Credit, of the duty paid on inputs, and service tax paid on input services, used in the manufacture of excisable goods, or providing of output services. The present appeal is concerned with Rule 6 of the Cenvat Credit Rules which, during the relevant period, read thus:

"6. Obligation of manufacturer of dutiable and exempted goods and provider of taxable and exempted services.-

(1) The CENVAT credit shall not be allowed on such quantity of input or input service which is used in the manufacture of exempted goods or for provision of exempted services, except in the circumstances mentioned in sub-rule (2).

Provided that the CENVAT credit on inputs shall not be denied to job worker referred to in rule 12AA of the Central Excise Rules, 2002, on the ground that the said inputs are used in the manufacture of goods cleared without payment of duty under the provisions of that rule.

(2) Where a manufacturer or provider of output service avails of CENVAT credit in respect of any inputs or input services, and manufactures such final products or provides such output service which are chargeable to duty or tax as well as exempted goods or services, then, the manufacturer or provider of output service shall maintain separate accounts for receipt, consumption and inventory of input and input service meant for use in the manufacture of dutiable final products or in providing output service and the quantity of input meant for use in the manufacture of exempted goods or services and take CENVAT credit only on that quantity of input or input service which is intended for use in the manufacture of dutiable goods or in providing output service on which service tax is payable.

(3) Notwithstanding anything contained in sub-rules (1) and (2), the manufacturer of goods or the provider of output service, opting not to maintain separate accounts, shall follow either of the following options, as applicable to him, namely:-

(i) the manufacturer of goods shall pay an amount equal to five per cent. of value of the exempted goods and the provider of output service shall pay an amount equal to six percent. of value of the exempted services; or

(ii) the manufacturer of goods or the provider of output service shall pay an amount equivalent to the CENVAT credit attributable to inputs and input services used in, or in relation to, the manufacture of exempted goods or for provision of exempted services subject to the conditions and procedure specified in sub-rule (3A).

Explanation I. - If the manufacturer of goods or the provider of output service, avails any of the option under this sub-rule, he shall exercise such option for all exempted goods manufactured by him or, as the case may be, all exempted services provided by him, and such option shall not be withdrawn during the remaining part of the financial year.

Explanation II. - For removal of doubt, it is hereby clarified that the credit shall not be allowed on inputs and input services used exclusively for the manufacture of exempted goods or provision of exempted service.

(3A) For determination and payment of amount payable under clause (ii) of sub-rule (3), the manufacturer of goods or the provider of output service shall follow the following procedure and conditions, namely:-

(a) while exercising this option, the manufacturer of goods or the provider of output service shall intimate in writing to the Superintendent of Central Excise giving the following particulars, namely:-

(i) name, address and registration No. of the manufacturer of goods or provider of output service;

(ii) date from which the option under this clause is exercised or proposed to be exercised;

(iii) description of dutiable goods or taxable services;

(iv) description of exempted goods or exempted services;

(v) CENVAT credit of inputs and input services lying in balance as on the date of exercising the option under this condition;

(b) the manufacturer of goods or the provider of output service shall, determine and pay, provisionally, for every month,-

(i) the amount equivalent to CENVAT credit attributable to inputs used in or in relation to manufacture of exempted goods, denoted as A;

(ii) the amount of CENVAT credit attributable to inputs used for provision of exempted services (provisional)= (B/C) multiplied by D, where B denotes the total value of exempted services provided during the preceding financial year, C denotes the total value of dutiable goods manufactured and removed plus the total value of taxable services provided plus the total value of exempted services provided, during the preceding financial year and D denotes total CENVAT credit taken on inputs during the month minus A;

(iii) the amount attributable to input services used in or in relation to manufacture of exempted goods or provision of exempted services (provisional) = (E/F) multiplied by G, where E denotes total value of exempted services provided plus the total value of exempted goods manufactured and removed during the preceding financial year, F denotes total value of taxable and exempted services provided, and total value of dutiable and exempted goods manufactured and removed, during the preceding financial year, and G denotes total CENVAT credit taken on input services during the month;

(c) the manufacturer of goods or the provider of output service, shall determine finally the amount of CENVAT credit attributable to exempted goods and exempted services for the whole financial year in the following manner, namely:-

(i) the amount of CENVAT credit attributable to inputs used in or in relation to manufacture of exempted goods, on the basis of total quantity of inputs used in or in relation to manufacture of said exempted goods, denoted as H;

(ii) the amount of CENVAT credit attributable to inputs used for provision of exempted services = (J/K) multiplied by L, where J denotes the total value of exempted services provided during the financial year, K denotes the total value of dutiable goods manufactured and removed plus the total value of taxable services provided plus the total value of exempted services provided, during the financial year and L denotes total CENVAT credit taken on inputs during the financial year minus H;

(iii) the amount attributable to input services used in or in relation to manufacture of exempted goods or provision of exempted services = (M/N) multiplied by P, where M denotes total value of exempted services provided plus the total value of exempted goods manufactured and removed during the financial year, N denotes total value of taxable and exempted services provided, and total value of dutiable and exempted goods manufactured and removed, during the financial year, and P denotes total CENVAT credit taken on input services during the financial year;

(d) the manufacturer of goods or the provider of output service, shall pay an amount equal to the difference between the aggregate amount determined as per condition (c) and the aggregate amount determined and paid as per condition (b), on or before the 30th June of the succeeding financial year, where the amount determined as per condition (c) is more than the amount paid;

(e) the manufacturer of goods or the provider of output service, shall, in addition to the amount short-paid, be liable to pay interest at the rate of twenty-four per cent. per annum from the due date, i.e., 30th June till the date of payment, where the amount short-paid is not paid within the said due date;

(f) where the amount determined as per condition (c) is less than the amount determined and paid as per condition (b), the said manufacturer of goods or the provider of output service may adjust the excess amount on his own, by taking credit of such amount;

(g) the manufacturer of goods or the provider of output service shall intimate to the jurisdictional Superintendent of Central Excise, within a period of fifteen days from the date of payment or adjustment, as per condition (d) and (f) respectively, the following particulars, namely:-

(i) details of CENVAT credit attributable to exempted goods and exempted services, month wise, for the whole financial year, determined provisionally as per condition (b),

(ii) CENVAT credit attributable to exempted goods and exempted services for the whole financial year, determined as per condition (c),

(iii) amount short paid determined as per condition (d), along with the date of payment of the amount short-paid,

(iv) interest payable and paid, if any, on the amount short-paid, determined as per condition (e), and

(v) credit taken on account of excess payment, if any, determined as per condition (f);

(h) where the amount equivalent to CENVAT credit attributable to exempted goods or exempted services cannot be determined provisionally, as prescribed in condition (b), due to reasons that no dutiable goods were manufactured and no taxable service was provided in the preceding financial year, then the manufacturer of goods or the provider of output service is not required to determine and pay such amount provisionally for each month, but shall determine the CENVAT credit attributable to exempted goods or exempted services for the whole year as prescribed in condition (c) and pay the amount so calculated on or before 30th June of the succeeding financial year.

where the amount determined under condition (h) is not paid within the said due date, i.e., the 30th June, the manufacturer of goods or the provider of output service shall, in addition to the said amount, be liable to pay interest at the rate of twenty four per cent. per annum from the due date till the date of payment.

Explanation I. - "Value" for the purpose of sub-rules (3) and (3A) shall have the same meaning assigned to it under section 67 of the Finance Act, 1994 read with rules made thereunder or, as the case may be, the value determined under section 4 or 4A of the Central Excise Act, 1944 read with rules made thereunder.

Explanation II. - The amount mentioned in sub-rules (3) and (3A), unless specified otherwise, shall be paid by the manufacturer of goods or the provider of output service by debiting the CENVAT credit or otherwise on or before the 5th day of the following month except for the month of March, when such payment shall be made on or before the 31st day of the month of March.

Explanation III. - If the manufacturer of goods or the provider of output service fails to pay the amount payable under sub-rule (3) or as the case may be sub-rule (3A), it shall be recovered, in the manner as provided in rule 14, for recovery of CENVAT credit wrongly taken.

(4) No CENVAT credit shall be allowed on capital goods which are used exclusively in the manufacture of exempted goods or in providing exempted services, other than the final products which are exempt from the whole of the duty of excise leviable thereon under any notification where exemption is granted based upon the value or quantity of clearances made in a financial year.

(5) Notwithstanding anything contained in sub-rules (1), (2) and (3), credit of

the whole of service tax paid on taxable service as specified in sub-clause (g), (p), (q), (r), (v), (w), (za), (zm), (zp), (zy), (zzd), (zzg), (zzh), (zzi), (zzk), (zzq) and (zzr) of clause (105) of section 65 of the Finance Act shall be allowed unless such service is used exclusively in or in relation to the manufacture of exempted goods or providing exempted services.

(6) The provisions of sub-rules (1), (2), (3) and (4) shall not be applicable in case the excisable goods removed without payment of duty are either-

(i) cleared to a unit in a special economic zone; or to a developer of a special economic zone for their authorized operations ; or

(ii) cleared to a hundred per cent. export-oriented undertaking; or

(iii) cleared to a unit in an Electronic Hardware Technology Park or Software Technology Park; or

(iv) supplied to the United Nations or an international organization for their official use or supplied to projects funded by them, on which exemption of duty is available under notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 108/95-Central Excise, dated the 28th August, 1995, number G. S R. 602 (E), dated the 28th August, 1995; or

(v) cleared for export under bond in terms of the provisions of the Central Excise Rules, 2002; or

(vi) gold or silver falling within Chapter 71 of the said First Schedule, arising in the course of manufacture of copper or zinc by smelting; or.

(vii) all goods which are exempt from the duties of customs leviable under the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and the additional duty leviable under sub-section (1) of section 3 of the said Customs Tariff Act when imported into India and are supplied,-

(a) against International Competitive Bidding; or

(b) to a power project from which power supply has been tied up through tariff based competitive bidding; or

(c) to a power project awarded to a developer through tariff based competitive bidding, in terms of notification No. 6/2006-Central Excise, dated the 1st March, 2006."

4. The provisions of Rule 6 of the Cenvat Credit Rules, as extracted hereinabove, are clear and categorical, and no paraphrasing, thereof is, therefore, necessary. Suffice it to state that, in a case in which common inputs, or input services, of the duty, or service tax, paid whereon Cenvat Credit has been taken, are used in the manufacture of dutiable, and exempted goods, or taxable, and exempted, services, the manufacturer, or service provider has, before him, three options, viz. either

(i) to maintain separate accounts for receipt, consumption and inventory of the quantity of inputs, and input services, meant for use in the manufacture of dutiable, and exempted goods, or providing of taxable, and exempted output services, and take Cenvat credit only of the duty, or service tax, paid on that quantity of input, or input service, which is intended for use in the manufacture of dutiable goods, or in providing output service on which service tax is payable [Rule 6 (2)], or

(ii) if the manufacturer of goods, or provider of output service, opts not to maintain separate accounts, then, either

(a) to pay an amount equivalent to the Cenvat credit attributable to inputs, and input services used in, or in relation to, the manufacture of exempted goods, or providing of exempted services, subject to the conditions and procedures stipulated in Rule 6 (3A) [Rule 6(3)(ii)], or

(b) to pay an amount equal to a percentage of the value of the exempted goods, or value of the exempted services, as prescribed by Rule 6(3)(ii).

5. During the period spanned by the dispute in the present appeal (1st January, 2007 to 31st March, 2011), the percentage stipulated in Rule 6(3)(ii) of the Cenvat Credit rules was 10%, till 6th July, 2009, and 5% thereafter.

6. "Exempted goods" are defined, in clause (d) of Rule 2 [hereinafter referred to as "Rule 2(d)"] of the Cenvat Credit Rules as meaning "excisable goods which are exempt from the whole of the duty of excise leviable thereon, and includes goods which are chargeable to "nil" rate of duty".

7. Rule 2(t) of the Cenvat Credit Rules is the standard provision, contained in similar definition clauses in other subordinate statutes, clarifying that words and expressions, used in the Cenvat Credit Rules, and not defined therein, but defined in the Act, would have the meanings respectively assigned to them in the Act.

8. The expression "excisable goods" is not defined in the Cenvat Credit Rules, but finds definition in Section 2(d) of the Act. By virtue of Rule 2(t) of the Cenvat Credit Rules, the definition of "excisable goods", as contained in Section 2(d) of the Act, would also apply to the said expression, as it finds place in the Cenvat Credit Rules. Section 2(d) of the Act defines "excisable goods" thus:

"(d) "excisable goods" means goods specified in the 1st Schedule and the 2nd 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 be capable of being bought and sold for consideration and such goods shall be deemed to be marketable."

The Explanation to Section 2(d) of the Act, as extracted hereinabove, was inserted, w.e.f. 10th May, 2006, by Section 28 of the Finance Act, 2008, and deemed goods, which were capable of being bought and sold, to be marketable. The insertion of this Explanation was obviously intended to cater to situations in which goods, which were otherwise regarded as worthless - or, to borrow the expression employed by the Supreme Court in U.O.I. v. Indian Aluminium Co. Ltd. 1995 (77) ELT 268 (SC) and Collector of Central Excise v. Tata Iron & Steel Co. Ltd 2004 (165) ELT 386 (SC), "rubbish" - were, nevertheless, capable of being bought and sold. Classically, goods have been regarded as "excisable" only if they are usable, movable, saleable and marketable. [Refer Moti Laminates Pvt. Ltd. v. Collector of Central Excise 1995 (76) ELT 241 (SC)] "Saleability" and "marketability" were, therefore, recognised as distinct, and different concepts, which were cumulatively required to be fulfilled, in order for an article to be excisable. This principle was reiterated in several decisions of the Supreme Court, of which the afore-cited decisions in Indian Aluminium Co. Ltd.1 and Tata Iron & Steel Co. Ltd2 underscored the position by ruling that, though even rubbish could be bought and sold, it would, nevertheless, not be a "marketable" commodity, so as to be exigible to duty under the Act. This argument is, however, no longer available to an assessee, after the insertion, in Section 2(d) of the Act, of the Explanation thereto, which deems any article, material or substance, which is capable of being bought and sold, to be marketable. The distinction between "saleability" and "marketability", which prevailed prior to the insertion of the said Explanation has, therefore, been eviscerated.

9. Two conditions, alone, therefore, are required to be fulfilled, in order for goods to be regarded as "excisable", for the purposes of the Act - or, therefore, for the purposes of the Cenvat Credit Rules - viz. (i) that they are specified in the first, or the second, Schedule to the Central Excise Tariff Act, 1985, and (ii) that they are capable of being bought and sold for a consideration.

10. The process of production, undertaken by the respondent, results in the emergence of four products, namely sugar, molasses, bagasse and electricity. These are classifiable under Sub-Headings 1701 1190, 1703 1000, 2303 2000 and 2716 0000 of the first Schedule to the Central Excise Tariff Act, 1985 (hereinafter referred to as "the Tariff"), respectively. Under these Sub-Headings, sugar is exigible to duty @ 12.5% ad valorem, molasses are exigible to duty @ Rs. 1000 per tonne, and bagasse is exigible to duty at nil rate.

11. In the case of electrical energy/electricity, no rate of duty is prescribed against SH 2716 0000. This, by itself, may not, however, serve to except electrical energy/electricity from the ambit of the expression "excisable goods", in view of the following Additional Note to the General Rule of Interpretation of the Schedule, in respect of the Central Excise Tariff (Amendment) Act, 2004, whereby "electrical energy" was introduced in Chapter 27 of the Tariff:

"(c) "tariff item" means a description of goods in the list of tariff provisions accompanying either eight-digit number and the rate of the duty of excise or eight-digit number with blank in the column of the rate of duty."

(Emphasis supplied)

12. As we would have occasion to respectfully observe hereinafter, the High Court of Allahabad thinks otherwise. This difference in perception, however, does not impact the outcome of these proceedings, as would be apparent from the reasoning that follows.

13. In the above statutory background, we proceed to reconnoitre the facts.

Facts

14. The respondent Nangalamal Sugar Complex was engaged in the manufacture of cane sugar and molasses, on which appropriate duty, under the Act, was paid, and the goods were sold in the open market. Bagasse was generated during the process of manufacture. The bagasse was either captively consumed by the respondent, or was used to generate electricity. The electricity, too, was, in part, captively consumed by the respondent, and sold, in part, to M/s Uttar Pradesh Power Corporation Limited (UPPCL). Para 4(d) of the present appeal, filed by the Revenue, acknowledges this position, by the following recital:

"That during the course of audit of records of the Respondent Unit it was observed that in the course of manufacture of sugar, waste/residue in the form of Bagasse arisis, which was further used by the Respondent in the generation of electricity from the power plant installed in their own factory premises and some part of the electricity generated was also sold to M/s UPPCL outside the factory premises of the assessee without payment of duty."

(Italics supplied; underscored in original)

15. Cenvat credit, on the duty paid on inputs, capital goods and input services, commonly utilized by the respondent in the manufacture of the above goods, was availed by it.

16. The proceedings, in the present case commenced with the issuance, to the respondents, of Show Cause Notice dated 20th December, 2011. The Show Cause Notice alleged that, as the respondent was manufacturing dutiable goods (sugar and molasses) as well as exempted goods (bagasse and electricity), using common inputs and input services, the duty/service tax paid whereon Cenvat Credit had been availed; and was neither maintaining separate accounts and inventory, in respect of the inputs, and input services, used in the manufacture of the dutiable, and exempted goods; nor reversing the Cenvat Credit of the duty, and service tax, paid on the manufacture of the exempted goods (bagasse and electricity), in accordance with the procedure stipulated in Rule 6 (3A) of the Cenvat Credit Rules, the respondent was liable to pay an amount equal to 10% of the value of the exempted goods, for the period prior to 6th July, 2009, and 5% of the value of the exempted goods, for the period after 7th July, 2009. As bagasse was not sold by the respondent, the Show Cause Notice demanded, from the respondent, 10%/5% of the price at which it was selling electricity. Observing that, during the periods 2006-2007, 2007-2008, 2008-2009 and

2009-2010, the respondent had sold electricity valued at Rs. 111.44 Lakhs, Rs. 964.25 Lakhs, Rs. 522.63 Lakhs and Rs. 1062.28 lakhs respectively, the Show Cause Notice alleged that, for the period of dispute, an amount of, was payable by the respondent Rs. 2,81,82,486/-.

17. Though the Show Cause Notice also proposed other demands, the said demands do not constitute subject matter of controversy in the present appeal. Insofar as these proceedings are concerned, the Show Cause Notice required the respondent to show cause as to why Rs. 2,81,82,486/-, be not recovered from it under Section 11(A)(1) of the Act read with Rule 14 of the Cenvat Credit Rules, along with interest, and as to why penalty be not imposed on it.

18. The respondent showed cause, and was heard, following whereupon Order-in-Original dated 28th August, 2012, was passed by the Commissioner of Central Excise (hereinafter referred to as "the Commissioner"), confirming the aforesaid demand of Rs. 2,81,82,486/-, representing 10%/5% of the price at which the respondent had sold electricity, to UPPCL, during the period 1st January, 2007 to 31st March, 2011, along with penalty and interest.

19. In so directing, the Commissioner upheld the allegation that the respondent was using common inputs and input services in the manufacture of dutiable and exemptible products, and was not maintaining any separate accounts for receipt, consumption and inventory of inputs/input services so used, as required by Rule 6(2) of the Cenvat Credit Rules. Neither, it was noted, was the respondent paying an amount equivalent to Cenvat Credit attributable to the inputs and input services used in relation to the manufacture of exempted goods, in accordance with the procedure stipulated in Rule 6(3A), as contemplated by Rule 6 (3)(ii) of the said Rules.

20. The Commissioner also noted the contention, of the respondent, that it had reversed proportionate Cenvat Credit, of the inputs and input services used by it, in the manufacture of the electricity sold by it, which had been worked out, by the respondent, as Rs. 3,12,722/-, along with interest. Regarding this contention, however, the Commissioner observed that the respondent had not furnished the details of the value of the exempted electricity, the common inputs/ input services used in the manufacture of the dutiable and exempted products, or the amount of Cenvat Credit availed in respect of such common inputs/input services and had also not followed the procedure stipulated in Rule 6(3A). In such a situation, the Commissioner observed that he was unable to verify the veracity of the respondent"s contention regarding reversal, by it, of "proportionate" Cenvat Credit.

21. We may observe, here, that we have been unable to find, either in Rule 6 of the Cenvat Credit Rules, or elsewhere in the panoply of the Act or any Rules framed thereunder, any provision providing for reversal of "proportionate" Cenvat Credit. In fact, it was in order to mitigate the hardship, faced by assessees, who were using common inputs/input services, in the manufacture of exempted, as

well as dutiable goods, and were not in a position to identify the exact quantum of Cenvat Credit relatable to the inputs/input services used in the manufacture of the exempted goods, that the facility of reversal, in accordance with the formula set out in sub-Rule (3A), read with sub-Rule (3)(ii) of Rule 6 of the Cenvat Credit Rules, was introduced, by way of the Cenvat Credit (Amendment) Rules, 2008, notified vide Notification No 10/2008-CE (NT) dated 1st March, 2008. If, therefore, an assessee desires to reverse the Cenvat Credit, availed by it and relatable to inputs/input services used in the manufacture of exempted goods, but is unable to quantify the exact amount of Cenvat Credit so used, it has necessarily to follow the procedure prescribed in Rule 6(3)(i), read with Rule 6 (3A), of the Cenvat Credit Rules. No other manner of reversal of proportionate credit is permissible. This follows from the time-tested principle, enunciated as far back as in Taylor v. Taylor (1875) 1 Ch D 426 and famously followed by the Privy Council in Nazir Ahmed v. King Emperor AIR 1936 PC 253 as well as by the Supreme Court in a veritable deluge of pronouncements, of which State of Uttar Pradesh v. Singhara Singh AIR 1964 SC 358 is probably the most frequently quoted, that if a statute has conferred a power to do an act, and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed.

22. Inasmuch as the respondent had neither maintained separate inventory and accounts, of the inputs and input services, of the duty/service tax paid whereon it had availed Cenvat Credit, and which had been used in the manufacture of dutiable, and exempted, goods, nor reversed "proportionate" Cenvat Credit in accordance with the formula and procedure prescribed in Rule 6(3A) of the Cenvat Credit Rules, the Commissioner, vide Order-in-Original dated 28th August, 2012, confirmed the demand of Rs. 2,81,82,486/-, proposed against the respondent, and also imposed penalty of an equivalent amount. The said Order-in-Original also disallowed Cenvat Credit, availed by the respondent, of Rs. 1,41,096/-, relatable to Cenvat Credit of service tax paid on insurance premia, but the said demand is not subject matter of controversy in the present appeal.

23. Appeals were preferred, by the respondent as well as the appellant, before the Tribunal, against the aforesaid Order-in-Original, dated 28th August, 2012. While the respondent challenged (vide Appeal No. E/3753/2012), the amounts confirmed against it by the Commissioner, the appeal of the Revenue (Appeal No. E/3949/2012) was an appeal merely in form, as it only sought to support the findings of the Commissioner. In effect, therefore, the only appeal, before the Tribunal, was Appeal No. E/3753/2012, filed by the respondent.

24. By the impugned Final Order No. A/55843-55844/2016-EX [DB], dated 24th November, 2016, the Tribunal has allowed Appeal No. E/3753/2012, of the respondent. In doing so, the Tribunal merely followed its earlier decision in DSM Sugar Mills Ltd. v. Commissioner of Central Excise 2014 (304) ELT 582, which, in turn, relied on the judgment of the High Court of Allahabad in Gularia Chini Mills v. UOI 2014 (34) STR 175 (All). Para 7 of the impugned Final Order passed by

the Tribunal reads thus:

"An identical issue has come up in Appeal No.58262/2013-EX(DB) in the case of DSM Sugar Mills Ltd. 2014 (304) ELT 582, where the Tribunal vide Final Order No.A/51042/2014-EX(DB) dated 24.02.2014 has observed as under:-

"The point of dispute in the case is that when there is a co-generation plant in the appellant"s sugar mill and the power generated, besides being used in the sugar mills for manufacture of dutiable final products (sugar and molasses), is also supplied to U.P. Power Corporation, whether in respect of the power sold to U.P. Power Corporation an amount equal to 5%/10% of the sale value of the electricity would be payable in terms of Rule 6(3) read with Rule 6(2) of the Cenvat Credit Rules, 2004, as according to the Department, certain common cenvat credit availed inputs such as lubricants, grease, chemicals, etc. had been used in or in relation to the generation of electricity. The crucial question to be decided in this case is as to whether electricity is an excisable goods and only if the electricity can be treated as excisable goods, the provisions of Rule 6(2) read with Rule 6(3) of Cenvat Credit Rules, 2004 would be applicable. This question stands decided by judgement dated 13.08.2013 of Hon"ble Allahabad High Court in respect of writ petitions filed by Gularia Chini Mills & Others (judgement dated 13.08.2013)8, wherein it was held that electricity is not an excisable goods and, hence, the provisions of Rule 6(2) read with Rule 6(3) are not applicable in respect of electricity sold by the sugar mill to U.P. Power Corporation. It is seen that for this reason only, the matter had been disposed of finally, as there is no dispute about the applicability about the judgement of Hon"ble Allahabad High Court to this case. Since in this case, as per the order sheet and as per the records of the Court Master, by the order pronounced, the stay application as well as appeal had been allowed, while as per the operative portion of the order - para 7 of the order only the stay application has been allowed, there is a mistake apparent from the record in para 7 of the order. The application for Rectification of Mistake is, therefore, allowed. Para-7 of the order No.51042/2014 dated 24.02.2014 is substituted by the following para:-

"The impugned order is, therefore, not sustainable. Though the matter was listed for hearing of the stay application only, since, the issue in this case stands decided in favour of the applicant by judgement of Hon'ble Allahabad High Court in the case of Gularia Chini Mills Gularia and others (judgement dated 13.08.2013)8, there is no point in keeping the appeal pending. Accordingly, the impugned order is set aside and the appeal as well as stay application is allowed"."

Following the ratio contained in the above passage from its earlier decision in DSM Sugar Mills Ltd. 2014 (304) ELT 582, the Tribunal allowed the appeal of the respondent.

25. Aggrieved thereby, the Revenue is in appeal before this Court, in the present proceedings.

Substantial Question of Law

26. Vide order dated 3rd December, 2018, the present appeal was admitted, on the following substantial question of law:

"Is the CESTAT correct in holding that as electricity is not excisable, Rules 6(2) & (3) of the CENVAT Credit Rules, 2004 are not applicable and consequently input credit is admissible in the facts and circumstances of the case?"

Rival Submissions

27. Detailed arguments were addressed, on the appeal, by Mr. Amit Bansal, learned Senior Standing Counsel appearing on behalf of the appellant, and by Ms. Charanya Lakshmikumaran, learned Counsel appearing for the respondent.

28. The Revenue, in its appeal, adopts the reasoning of the Commissioner, in his Order-in-Original dated 28th August, 2012 supra and submits, further, thus:

(i) The electricity, which was sold outside the factory to UPPCL, was not used in, or in relation to, the manufacture of final product (sugar) by the respondent. Consequently, the inputs and input services, used in the production of such electricity, which was sold outside, would not be eligible for credit, as they fell outside the ambit of "input and input services", as defined by the Cenvat Credit Rules.

(ii) The Supreme Court had held, in Maruti Suzuki Ltd. v. Commissioner of Central Excise 2009 (240) ELT 641 (SC), that Cenvat Credit of the duty paid on inputs, used in the production of electricity, sold outside the factory for consideration, was not admissible to the assessee. Reliance was specifically placed on paras 19 and 20 of the report.

(iii) Cenvat Credit was admissible, only on final products, on which duty was paid. As the respondent did not pay duty on the electricity sold to UPPCL, it was not entitled to avail Cenvat Credit of the duty paid on the inputs, or service tax paid on the input services, used in the production thereof. Reversal of the said credit was, therefore, imperative.

29. Additionally, Mr. Amit Bansal submitted, apropos the judgment of the High Court of Allahabad in Gularia Chini Mills 2014 (34) STR 175 (All), that the position in the Tariff, to which the High Court alluded was, apparently, different from the tariff position which obtained during the period of dispute in the present case. He drew attention to the finding, of the High Court, that electrical energy, obtained out of bagasse, was not excisable, and highlighted that Chapter 23 of the Tariff did not distinguish, in any manner, between electrical energy obtained from bagasse, and obtained otherwise. He submitted that, by virtue of the definition of "excisable goods", as contained in Section 2(d) of the Act, electricity, or electrical energy, was, unquestionably, "excisable goods". In fact, he points out that the respondent has, in its counter-affidavit filed before this Court, specifically admitted that electricity satisfied the definition of "exempted goods".

In fact, submits Mr. Bansal, the Tribunal proceeded on a ground which the respondent never urged. Mr. Bansal submits that it was never the case of the respondent that electricity was not "excisable goods", which is what the Tribunal has proceeded to hold in the impugned Final Order. Rather, the defence of the respondent, before the Tribunal, Mr. Bansal emphasises, was that it had reversed Cenvat Credit, "proportionate" to that utilised by it in production of the electricity sold to UPPCL. This submission, points out Mr. Bansal, was rejected by the Commissioner, in the passage to which reference is contained in para 20 supra. Resultantly, he submits, the appeal of the respondent ought to have been dismissed by the Tribunal.

30. In its counter-affidavit, filed in response to the appeal of the Revenue, the respondent has, on the other hand, contended thus:

(i) In view of the judgment of the High Court of Allahabad in Gularia Chini Mills 2014 (34) STR 175 (All), which stood affirmed by the Supreme Court in U.O.I. v. D. S. C. L. Sugar Ltd. 2015 (322) ELT 769 (SC)¸ electricity could not be regarded as "excisable goods". Gularia Chini Mills 2014 (34) STR 175 (All), moreover, had been followed, by the Tribunal, in DSM Sugar Mills Ltd. 2014 (304) ELT 582, the Civil Appeal, against which, stood dismissed by the Supreme Court [As reported in 2015 (324) ELT (A 80) (SC).]. Reliance has also been placed, in the counter-affidavit - though no reference, to the said decisions, was made during the course of arguments - on the judgments of the Supreme Court in Collector of Central Excise v. Solaris Chemtech Ltd. 2007 (214) ELT 481 (SC) and of the High Court of Allahabad in Balrampur Chini Mills v. U.O.I. 2014 (300) ELT 372 (All).

(ii) Of the total Cenvat credit on inputs and input services, availed by it, the respondent had reversed credit, proportionate to the quantity of inputs and input services used in the production of electricity which was sold outside the factory. No further demand, therefore, could be raised against the respondent under Rule 6 of the Cenvat Credit rules.

(iii) The Supreme Court had, in its judgment in Chandrapur Magnet Wires Pvt. Ltd. v. C.C.E.14, held that, where the assessee was unable to segregate the common inputs that went into the dutiable and exempted products, and was reversing credit accordingly, thereby restoring the credit availed by it, to the Revenue when the exempted final product was cleared, the Credit entry, for the duty paid on the inputs utilised in the manufacture of the exempted final product would stand deleted, in which situation it could not be said that the assessee had taken credit for the duty paid on the inputs utilised in the manufacture of the exempted final product. Copies of the challans, whereby the respondent has, purportedly, reversed "proportionate" Cenvat credit, of the duty paid on the inputs and input services which went into the manufacture of the electricity which was sold, have also been annexed to the counter-affidavit.

(iv) On the same issue, for the subsequent period, the Commissioner held in favour of the respondents, vide Order-in-Original dated 10th September, 2013.

In the said case, even while observing that the respondent had not complied with the procedure stipulated in Rule 6(3A) of the Cenvat Credit Rules, the Commissioner, following the judgment of the Supreme Court in Chandrapur Magnet Wires Pvt. Ltd. 1996 (81) ELT 3 (SC), held that, as proportionate credit had been reversed by the assessee, the assessee had, in fact, not taken credit at all, so that the demand, under Rule 6 (3)(i) of the Cenvat Credit Rules was unsustainable. Reliance was also placed, in the counter-affidavit, for this proposition, on the judgment of the Supreme Court in C.C.E. v. Bombay Dyeing & Manufacturing Ltd 2007 (215) ELT 3 (SC) and of the High Court of Allahabad in Hello Minerals P Ltd v. U.O.I 2004 (174) ELT 422 (All).

31. Supplementing the above submissions, Ms. Lakshmikumaran, appearing for the respondent, drew our attention to the manufacturing process, by which bagasse and electricity came into existence, highlighting the position that electricity was produced from bagasse, and not directly from the inputs, or input services, originally used by the respondent. She submits that the only manufactured final product of the respondent was sugar. The input used, for production of electricity was, therefore, she submits, bagasse. She relies on para 20 of the judgment of the Supreme Court in Swadeshi Polytex Ltd v. C.C.E. 1989 (44) ELT 794 (SC), which reads thus:

"On an analysis and comparison of aforesaid, it is clear that the clarification in the form of trade notice issued by the Pune Collectorate in respect of Rule 56A was as much applicable to that rule as to Notification No. 201/79. In the premises, it is clear that the Tribunal should have held that even though a part of the ethylene glycol was contained in the by-product methanol, yet the credit of duty could not be reduced to the extent of the ethylene glycol contained in the methanol as ineligible. It is true that when in a fiscal provision, if benefit of exemption is to be considered, this should be strictly considered. But the strictness of the construction of exemption notification does not mean that the full effect to the exemption notificaion should not be given by any circuitous process of interpretation. After all, exemption notifications are meant to be implemented and trade notices in these matters clarify the stand of the Government for the trade. It is clear, therefore, that the Tribunal failed to interpret the words of the exemption notification No. 201/79 properly and fully. The said notification exempted all excisable goods on which the duty of excise was leviable and in the manufacture of which any goods falling under Tariff Item 68 (i.e. inputs) had been used from so much of the duty of excise leviable thereon as was equivalent to the duty of excise already paid on the inputs. It is clear, however, that ethylene glycol was used in the manufacture of polyester fibre. It appears that methanol arises as a part and parcel of the chemical reaction during the process of manufacture when ethylene glycol interacts with DMT to produce polyester fibre. It is not possible to use a lesser quantum of the ethylene glycol to prevent methanol from arising for producing a certain quantity of polyester fibre. Thus, the quantity of ethylene glycol required to produce a certain quantum of polyester fibre is determined by the chemical reaction. It may be mentioned herein that it is not as if the appellants have used excess ethylene glycol wantedly to produce the methanol. It is clear that the appellants are not engaged in the production of methanol but in the production of polyester fibre. That position is undisputed. Therefore, it appears that the Tribunal erred when it held that the appellants were not entitled to a part of the credit of duty since ethylene glycol when it interacts with DMT also gives rise to methanol. This construction would frustrate the object of exemption if something which evidently arises out of the interaction. Even prior to amendment to notification No. 201/79 with effect from 11-4-87, the only situation where the credit of the duty paid on the inputs could be denied was only where the final products were wholly exempt from the duty of excise or chargeable to nil rate of duty. In the present case, the excisable goods, namely, polyester fibre were not wholly exempt from duty nor chargeable to nil rate of duty. It cannot be read in the notification that the notification would not be available in case non-excisable goods arise during the course of manufacture. In fact, the Tribunal seems to have erred in not bearing in mind that exemption notification was pressed in service in respect of polyester fibre which is excisable goods and not in respect of methanol which arises as a by-product as a part and parcel of chemical reaction. It appears further on a comparison of the Rule 56A and the Notifn. No. 201/79 that these deal with the identical situation."

32. In fine, Ms. Lakshmikumaran submits that there is no merit in the appeal of the Revenue, which deserves, therefore, to be dismissed.

Analysis

33. The Tribunal has proceeded on one solitary ground, i.e., that electricity could not be regarded as "excisable goods". The sequitur would, therefore, be that electricity would not be "exempted goods", either, for the purposes of the Cenvat Credit Rules, "exempted goods" being, per definition, excisable goods, which are either exempt from duty, or on which duty is chargeable at nil rate.

34. Mr. Bansal has voiced a preliminary objection, to the impugned Final Order of the Tribunal, to the effect that the excisability of electricity, never having been contested by the respondent, the Tribunal erred in allowing the respondent"s appeal on that ground. Mr. Bansal has endeavoured to point out that the only ground, on which the respondent premised its case, before the Tribunal, was that it had reversed "proportionate" credit, vis-à-vis the total Cenvat Credit availed by it, of the inputs and input services utilised in the manufacture of the goods manufactured/produced by it. Mr. Bansal submitted that the said contention, which was also advanced before the Commissioner, was rejected by the Commissioner on the ground that the respondent had not produced sufficient material, to enable him to verify the correctness of the submission. The "excisability" of electricity, not having been disputed by the respondent, Mr. Bansal objected to the Tribunal having held, in favour of the respondent, on that ground.

35. Juxtaposed with this submission, Mr. Bansal also drew attention to the averments, in the counter-affidavit filed by the respondent, before this Court, in response to the appeal of the Revenue, in which the excisability of electricity was admitted. To this, the response of Ms. Lakshmikumaran was that the litigant could not be bound by an admission, in law, even if made before a Court. Admissions of fact bind, she submits, but not admissions of law.

36. We are unable to accede to the submission, of Mr. Bansal, that the Tribunal was limited by the stand taken by the parties before it. The endeavour, of every judicial, and quasi-judicial authority, is, in the ultimate analysis, the dispensation of justice to the litigants before it and, in a larger perspective, in rem. In striving to achieve that end, the judicial authority is required to apply the law, as is known to it. No judicial authority can be constrained, insofar as application of the law is concerned, by pleadings of parties, or by submissions urged at the bar. The legal position, as it exists, is required to guide the judicial authority; not the legal position as is urged before it. A point of law, which is relevant to the adjudication of the lis before it, cannot be ignored by a judicial authority, even if it is not urged by either party. No doubt, if a judicial authority comes across a nice legal point, which has not been urged by either litigant before it, but which could impact the outcome of the proceedings, it may be appropriate, depending on the situation that obtains, for the authority to place the point before the parties, before adjudicating on that basis. This is obviously for the reason that the interests of justice would warrant that a party be not taken by surprise, as it is quite possible that the litigant, against whom the point of law operates, may have a satisfactory response thereto. That, however, would be a call, to be taken by the judicial authority, depending on the facts of the case, and the point involved, and no iron-cast rule, or principle, can be postulated in this regard. Suffice it to state, at the cost of repetition that, in the ultimate analysis, justice must be done, after grant of free and fair opportunity to all parties before the court.

37. In the present case, however, the impugned Final Order was dictated in open court. It cannot, therefore, be said that either party, before the Tribunal, was taken by surprise. Moreover, no objection, by the Departmental Representative, who represented the Revenue before the Tribunal, to the effect that the Tribunal was deciding the appeal on a point not urged by the respondent, was taken. We are not, therefore, inclined to accept the preliminary objection, of Mr. Bansal, to the Tribunal having proceeded on a point not urged by the respondent.

38. In any event, the point on which the learned Tribunal has decided the appeal is a point of law, i.e., the excisability, or otherwise, of electricity. It is required to be decided on the basis of the prevalent statutory position, as reflected in the Act, read with the Tariff and the law laid down on the point, and is not dependent on adjudication of any disputed question of fact.

39. We have already pointed out, hereinbefore, that the statutory provisions, if read, clearly indicate that electrical energy/electricity fell within the ambit of the

expression "excisable goods", as defined in the Act, as

(i) the twin criteria, requiring satisfaction in order for an item to qualify as "excisable goods", within the meaning of the expression as defined in Section 2(d) of the Act, are

(a) that the item finds place in the Tariffs, and

(b) that the item is marketable - which would include every case where the item is bought or sold for a consideration, and

(ii) both these indicia stand satisfied in the case of electricity/electrical energy, inasmuch as

(a) Sub-Heading 2716 0000 of the Tariff specifically covers "electrical energy", and

(b) the respondent is, admittedly, selling the electricity, in part, to UPPCL.

40. Statutorily, therefore, there is no escape from the position, in law, that "electricity", or "electrical energy", is excisable.

Gularia Chini Mills

41. Adverting, now, to Gularia Chini Mills 2014 (34) STR 175 (All), the fact-situation which obtained, in the said case, is substantially similar to that which obtains in the appeal before us. In Gularia Chini Mills 2014 (34) STR 175 (All), too, the appellant (hereinafter referred to as "Gularia") was engaged in the manufacture of sugar, out of sugarcane. As in the present case, molasses emerged as a by-product. Sugar and molasses were cleared, by Gularia, on payment of duty under the Act. However, bagasse also emerged as a residue/ waste of sugarcane. The bagasse so generated was used as fuel, to generate electricity. As in the present case, a demand, under Rule 6(3)(i) of the Cenvat Credit Rules was raised, against Gularia, on the sale price of the electricity sold by it. Gularia contended, in opposition to the demand, that electrical energy did not conform to the definition of "excisable goods", as contained in Section 2(d) of the Act read with Section 2 of the Central Excise Tariff Act. Reliance was placed, for this proposition, on Solaris Chemtech Ltd 2007 (214) ELT 481 (SC).

42. The High Court of Allahabad framed the issue, arising before it for consideration, in para 22 of the report as "whether electrical energy generated from bagasse and sold to U.P. Power Corporation Ltd is excisable or not". It is immediately apparent that the facts, as well as the issue, in Gularia Chini Mills 2014 (34) STR 175 (All), are identical to those in the present appeal.

43. Before paraphrasing the grounds on which the High Court held in favour of Gularia, the relevant passages, from the report, may be reproduced thus:

"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 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 Chemtech Ltd 2007 (214) ELT 481 (SC).

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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 nor it is exempted goods as defined in Rule 2(d) of the 2004 Rules.

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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 of dutiable and exempted final products then the assssee 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 2007 (214) ELT 481 (SC)

29. The above fact has been admitted even in the circular of the Chief Commissioner, Central Excise dated 3-10-2009 that bagasse is not a manufactured final product in view of the judgment of the Hon"ble Supreme Court. But the Chief Commissioner, Central Excise has erred in law in holding that because of the explanation added to Section 2(d) with effect from 13th May, 2008, the judgment of the Supreme Court stands nullified. Since the Circular of Board and that of Chief Commissioner dated 2-1-2010 is binding upon the assessing authority, the petitioner has informed the jurisdictional Central Excise Authority that even though Rule 6 is not applicable and the petitioner is not liable for payment of any Central Excise Duty or reversal of 5% of the amount of bagasse sold, still the petitioner has deposited the amount of duty under protest.

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32. The definition of "excisable goods" given in Section 2(d) means the goods,

which are specified in the First or Second Schedule and which are subjected to duty of excise, can only be treated as excisable goods. A proposition has also been accepted by the Commissioner in its findings. A perusal of Section 2(d) of Central Excise Act shows that the excisable goods are only those goods which are subjected to duty of excise as specified in the First Schedule or Second Schedule of the Central Excise Tariff Act. Since Column of rate of duty is blank, therefore, in view of Section 2 of the Central Excise Tariff Act, 1985, electrical energy is not being subjected to excise duty for the purposes of being excisable goods under Section 2(d) of the Central Excise Act. Furthermore, Rule 6 of the 2004 Rules, which is applicable only to excisable goods, can alone be treated as exempted goods for the purposes of Rule 6(3) of 2004 Rules, does not apply to electrical energy.

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. ... 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 as 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."

(Emphasis supplied)

44. The above passages, from Gularia Chini Mills 2014 (34) STR 175 (All), reveal that the High Court has held, in favour of Gularia, on the following grounds:

(i) Bagasse is not manufactured goods, but is a waste product, which emerges/ comes into existence in the process of manufacture of sugar.

(ii) Electricity, too, could not be regarded as exempted excisable goods, for the following reasons:

(a) The Supreme Court had held, in Solaris Chemtech Ltd 2007 (214) ELT 481 (SC), that electrical energy did not constitute "excisable goods".

(b) Chapter 27 of the Tariff covered only electrical energy generated from mineral fuels, mineral oils and products of their distillation, bituminous substances, mineral waxes, etc. Electrical energy generated from bagasse was not covered by Chapter 27 of the Tariff.

(c) This position was not altered by the explanation, added to Section 2(d) of the Act, w.e.f. 13th May, 2008. Neither did the said explanation nullify the judgment of the Supreme Court in Solaris Chemtech Ltd 2007 (214) ELT 481 (SC).

(d) Section 2(d) of the Act defines "excisable goods" as goods subjected to a duty of excise as specified in the first Schedule or the second Schedule of the Tariff. In the case of electrical energy, the column, relating to the rate of duty payable thereon, as contained in Chapter 27 of the Tariff, was blank. Electrical energy did not, therefore, constitute "excisable goods", as defined in Section 2(d) of the Act.

(iii) The only input, which went into the generation of electricity, was bagasse. Bagasse was a waste product. The electrical energy, which emerged from bagasse, and was sold to UPPCL could not, therefore, be regarded as "excisable goods".

45. Before proceeding to examine the judgment of the High Court of Allahabad in Gularia Chini Mills 2014 (34) STR 175 (All), and to analyse the effect of the said decision on the present appeal, it would be appropriate to refer to two other judgments.

Solaris Chemtech Ltd.

46. The first decision, to which reference requires to be made, is the judgment of the Supreme Court in Solaris Chemtech Ltd 2007 (214) ELT 481 (SC), on which extensive reliance has been placed by the High Court in Gularia Chini Mills 2014 (34) STR 175 (All), for the proposition that electricity/electrical energy did not constitute "excisable goods". In Solaris Chemtech Ltd 2007 (214) ELT 481 (SC), the respondent-assessee - hereinafter referred to as "Solaris" - was using Low Sulphur Heavy Stock (LSHS) and furnace oil to generate electricity, which was captively consumed for manufacture of final products such as caustic soda and cement. Solaris desired to avail Modvat Credit, under Rule 57A of the Central Excise Rules, 1944, of the duty paid on the furnace oil and LSHS. For this purpose, reliance was placed, by Solaris, on clause (c) in the Explanation to Rule 57A(1), which was inserted vide Notification 4/1994, dated 1st March, 1994, which included, in "inputs", "inputs used as fuel". Solaris contended that LSHS was eligible to be regarded as "inputs used as fuel". The revenue contended, per contra, that LSHS was used for manufacturing electricity, which was not excisable and that, therefore, LSHS could not be treated as an input used as fuel. It was also contended that, though LSHS generated electricity, it could not be

said that LSHS was used in, or in relation to, the manufacture of the final products, namely caustic soda and cement. Electricity, it was contended, was not the final product, and Modvat Credit of the duty paid on LSHS was not admissible. Essentially, therefore, the Revenue sought to contend that generation of electricity, by heating of LSHS, was a process which was independent of the process of manufacture of cement and caustic soda. The generation of electricity from LSHS, according to the Revenue in that case, did not result in the manufacture of cement and caustic soda and, consequently, Modvat Credit, of the input used to generate electricity, could not be availed.

47. Dealing with the contention, the Supreme Court, in para 8 of the report, commenced with a clarification that "electricity is not an excisable item". It went on to hold that "fuel either utilised directly or for generating electricity, as an intermediary product, integrally connected with several operations which resulted in the emergence of the final product, namely cement/caustic soda". It was emphasised, by the Supreme Court, that, "without utilisation of LSHS, it is not possible to manufacture cement/caustic soda", inasmuch as "the electrolysis process is dependent on continuous flow of electricity". As such, it was held, LSHS came within the ambit of the expression "used in or in relation to the manufacture of the final product". The utilisation of the captively generated electricity, in the production of the final product, it was observed, was crucial, and, therefore, Modvat Credit, on the LSHS used in the production of electricity, could not be denied. The Supreme Court went on to expound on the concept of usage "in or in relation to the manufacture of final products", especially the expression "in relation to". In view of the wide ambit of this expression, the Supreme Court held that Modvat Credit, of the duty paid on LSHS, was available to Solaris.

48. Though the judgment of the Supreme Court in Solaris Chemtech Ltd 2007 (214) ELT 481 (SC) does not set out the period, to which the demand in that case pertained, it is obvious that it was prior to 1st April, 2000, as it dealt with Modvat Credit, which was replaced by Cenvat Credit with effect from the said date. The position in the Tariff, as it existed during the period to which Solaris Chemtech Ltd 2007 (214) ELT 481 (SC) related is, therefore, not known. It is also to be borne in mind that the Explanation, to Section 2(d) of the Act, whereby goods which were bought and sold were, ipso facto, deemed to be marketable, was introduced only w.e.f. 10th May, 2008. Prior thereto, it was necessary to establish, as an independent fact, the "marketability" of any item, in order to regard it as "excisable". Inasmuch as the judgment in Solaris Chemtech Ltd 2007 (214) ELT 481 (SC) was itself rendered prior to the addition of the Explanation to Section 2(d) of the Act, and the period of dispute, in the said case, was prior to 1st April, 2000, it is doubtful whether the "clarification", in the opening sentence of para 8 of the report in the said decision, that "electricity is not an excisable item" could operate as a precedent, for all times to come, under Article 141 of the Constitution of India.

49. We are, of course, aware of the fact that, in Gularia Chini Mills 2014 (34) STR 175 (All), the High Court expressly rejected the specific contention, advanced before it, that the insertion of the Explanation to Section 2(d) of the Act diluted the applicability of the judgment in Solaris Chemtech Ltd 2007 (214) ELT 481 (SC). We are not, however, aware of the exact reason for such rejection, as it is not forthcoming from the judgment. To us, it appears that, after the addition of the Explanation to Section 2(d), in the Act, the declaration of the law, in Solaris Chemtech Ltd 2007 (214) ELT 481 (SC), that electricity is not an excisable item, would not continue to hold good, as (i) electrical energy finds specific place in Sub-Heading 2716 0000 of the Tariff, and (ii) electricity was, in fact, bought and sold by the respondent.

D. S. C. L. Sugar Ltd.

50. The judgment of the Supreme Court, in D.S.C.L. Sugar Ltd.2015 (322) ELT 769 (SC) assumes importance, as one of the Special Leave Petitions, dismissed vide the said judgment (as reported) was SLP (C) 3344 of 2014, which was preferred against the judgment of the High Court of Allahabad in Gularia Chini Mills 2014 (34) STR 175 (All),. In this comparatively short decision, the Supreme Court noted the fact that the dispute, before it, pertained to a period prior to the insertion, in Section 2(d) of the Act, of the Explanation thereto, in 2008. The Supreme Court noted the legal position that, after the addition of the said Explanation in Section 2(d), a deeming fiction, whereby all goods, which were capable of being bought and sold for consideration, were deemed to be marketable, had been introduced. The Supreme Court proceeded to hold, in the first instance, that bagasse was only agricultural waste and residue, which was not the result of any process and could not, therefore, be treated as the outcome of a process of "manufacture", as defined in Section 2(f) of the Act. Not being the product of the process of "manufacture", the Supreme Court held that bagasse would not be treated as excisable. The following passages, from the judgment of the Supreme Court, merit reproduction, in extenso:

"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 bought 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 capable of being bought or sold for consideration and as such goods shall be deemed to be marketable. Thus, it introduce 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 of 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.

11. Since it is not a manufacture, obviously Rule 6 of the Cenvat Rules, 2004, shall have no application as rightly held by the High Court."

Proceeding therefrom, the Supreme Court went on to dismiss the Special Leave Petition, preferred against the judgment of the High Court of Allahabad in Gularia Chini Mill8, along with eight other Special Leave Petitions/Civil Appeals, in the following words (in para 13 of the report):

"Cenvat Credit in respect of electricity was denied solely on the premise that the

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

51. The dismissal, in the case of Gularia Chini Mills 2014 (34) STR 175 (All), was of the Special Leave Petition preferred against the said decision, before grant of leave therein and, therefore, before conversion, of the SLP, into a Civil Appeal, albeit with reasons, though brief. Dealing with the applicability of the doctrine of merger, vis-à-vis Article 141 of the Constitution of India, in the matter of an order dismissing a Special Leave Petition with reasons, the Supreme Court, in its well-known decision in Kunhaiyammed v. State of Kerala (2000) 6 SCC 359 held thus (in para 27 of the report):

"A petition for leave to appeal to this Court may be dismissed by a non-speaking order or by a speaking order. Whatever be the phraseology employed in the order of dismissal, if it is a non-speaking order, i.e., it does not assign reasons for dismissing the special leave petition, it would neither attract the doctrine of merger so as to stand substituted in place of the order put in issue before it nor would it be a declaration of law by the Supreme Court under Article 141 of the Constitution for there is no law which has been declared. If the order of dismissal be supported by reasons then also the doctrine of merger would not be attracted because the jurisdiction exercised was not an appellate jurisdiction but merely a discretionary jurisdiction refusing to grant leave to appeal. We have already dealt with this aspect earlier. Still the reasons stated by the Court would attract applicability of Article 141 of the Constitution if there is a law declared by the Supreme Court which obviously would be binding on all the courts and tribunals in India and certainly the parties thereto. The statement contained in the order other than on points of law would be binding on the parties and the court or tribunal, whose order was under challenge on the principle of judicial discipline, this Court being the Apex Court of the country. No court or tribunal or parties would have the liberty of taking or canvassing any view contrary to the one expressed by this Court. The order of Supreme Court would mean that it has declared the law and in that light the case was considered not fit for grant of leave. The declaration of law will be governed by Article 141 but still, the case not being one where leave was granted, the doctrine of merger does not apply."

(Emphasis and underscoring supplied)

52. Where, therefore, the Supreme Court dismisses a Special Leave Petition , without granting leave but with reasons, there is no merger, but the reasons adduced by the Supreme Court for dismissing the SLP, nevertheless, constitute declaration of the law, within the meaning of Article 141 of the Constitution of India, which would be binding on all courts and Tribunals subordinate to the Supreme Court, and no such Court or Tribunal would be at liberty to take a view different from that of the Supreme Court.

Returning to Gularia Chini Mills 2014 (34) STR 175 (All),

53. The facts, and the controversy, arising in Gularia Chini Mills 2014 (34) STR 175 (All), are, as already noted hereinbefore, identical to those in the present appeal, before us.

54. Mr. Bansal has emphasised the fact that the observation, in paras 26 and 33 of the judgment of the High Court of Allahabad in Gularia Chini Mills 2014 (34) STR 175 (All), that Chapter 27 of the Tariff "covers only those electrical energy which are generated from minerals fuels, mineral oils and products of the distillation, bituminous substances, mineral waxes, etc.", and did not cover electrical energy generated from bagasse, indicated that the position of the Tariff, which was before the High Court, was different from the Tariff position as it exists in the present case. He points out that Chapter 27 of the Tariff, in the present case, does not limit "electrical energy", as classifiable thereunder, to electrical energy generated from a particular source or sources.

55. It is true that Sub-Heading 2716 0000, in the Tariff, does not specify the source of "electrical energy", classifiable thereunder. It is also true that there is no Chapter Note in Chapter 27, or Section Note in Section V of the Tariff (which includes Chapter 27), limiting "electrical energy", classifiable under Sub-Heading 2716 0000, in any manner. However, we find that Chapter 27 is itself titled "Mineral Fuels, Mineral Oils and Products of their distillation; Bituminous substances; Mineral Waxes". Apparently, therefore, the High Court of Allahabad, while opining as it did in paras 26, and 33, of its judgment in Gularia Chini Mills 2014 (34) STR 175 (All), was interpreting Sub-Heading 2716 0000 in the light of the Heading of Chapter 27. This answers the objection of Mr. Bansal, regarding the observations of the High Court in paras 26 and 33 of Gularia Chini Mills 2014 (34) STR 175 (All),.

56. The High Court, in Gularia Chini Mills 2014 (34) STR 175 (All), proceeded on three grounds, viz. that

(i) bagasse, being in the nature of waste, was not "excisable goods", and, therefore, the sale of electricity, generated directly from bagasse, could not justify a demand under Rule 6(3)(i) of the Cenvat Credit Rules,

(ii) as no rate of duty was stipulated against Sub- Heading 2716 0000, applying Section 2(b) of the Central Excise Tariff Act, read with Section 2(d) of the Central Excise Act, electricity could not be regarded as "excisable goods" and

(iii) even otherwise, Chapter 27 of the Tariff covered electricity only if it was generated from mineral fuels, mineral oils and products of their distillation, bituminous substances, mineral waxes, etc.

57. Regarding ground (ii), we reiterate our view that the non-specification of any rate of duty, against a particular Sub-Heading of the Tariff, would not result in the product becoming "non-excisable". To the extent that the judgment of the High Court of Allahabad, in Gularia Chini Mills 2014 (34) STR 175 (All) opines to the contrary, therefore, we respectfully record our disagreement.

58. Our disagreement on this score does not, however, impact the outcome of these proceedings, as the Supreme Court has, in its judgment in D. S. C. L. Sugar Ltd.10, upheld dismissed the Special Leave Petition, preferred against the judgment of the High Court of Allahabad in Gularia Chini Mills 2014 (34) STR 175 (All), by upholding ground (i). The Supreme Court has held that bagasse was in the nature of non-marketable and, consequently, non-excisable waste/residue and that, as the electricity, which was sold to UPPCL, was entirely generated from such non-excisable bagasse, the said sale could not constitute the basis for a demand under Rule 6(3)(i) of the Cenvat Credit Rules. The said reasoning, as postulated by the Supreme Court as the ground to dismiss the SLP, constitutes "law declared", within the meaning of Article 141 of the Constitution of India, and it is not open to us to depart, or differ, therefrom.

59. As the issue stands covered by Gularia Chini Mills 2014 (34) STR 175 (All), we do not deem it necessary to refer to the order of the Tribunal in DSM Sugar Mills Ltd. 2014 (304) ELT 582, on which the respondent has placed reliance. In any event, the said order was passed on an application for waiver of pre-deposit, and does not, therefore, have any real precedential value.

60. We would be failing in our duty if we do not take note of the decision of the Supreme Court in Maruti Suzuki Ltd. 2009 (240) ELT 641 (SC), as considerable reliance was placed, by Mr. Amit Bansal, on the said decision. Particular emphasis was placed, by Mr. Bansal, on paras 19 and 20 of the report which read thus :

"19. The question which still remains to be answered is : whether an assessee would be entitled to claim CENVAT credit in cases where it sells electricity outside the factory to the joint ventures, vendors or gives it to the grid for distribution? In the case of Collector of Central Excise v. Rajasthan State Chemical Works 1991 (55) ELT 444 (SC) the test laid down by this Court is whether the process and the use are integrally connected. As stated above, electricity generation is more of a process having its own economics. Applying the said test, we hold that when the electricity generation is a captive arrangement and the requirement is for carrying out the manufacturing activity, the electricity generation also forms part of the manufacturing activity and the "input" used in that electricity generation is an "input used in the manufacture" of final product. However, to the extent the excess electricity is cleared to the grid for distribution or to the joint ventures, vendors, and that too for a price (sale) the "process and the use test" fails. In such a case, the nexus between the process and the use gets disconnected. In such a case, it cannot be said that electricity generated is "used in or in relation to the manufacture of final product, within the factory". Therefore, to the extent of the clearance of excess electricity outside the factory to the joint ventures, vendors, grid etc. would not be admissible for CENVAT credit as such wheeled out electricity, cleared for a price. would not fall within the definition of "input" in Rule 2(g) of the CENVAT Credit Rules, 2002. This view is also expressed in para 9 of the judgment of this Court in the case of Collector of Central Excise v. Solaris Chemtech Limited 2007 (214) ELT 481 (SC). Further, our view is supported by the observations of this Court in the case of Vikram Cement v, Commnr of Central Excise, Indore 2006 (194) ELT 3 (SC) - which is quoted below :-

"It appears to us on a plain reading of the clause that the phrase "within the factory of production" means only such generation of electricity or steam which is used within the factory would qualify as an immediate product. The utilization of inputs in the generation of steam or electricity not being qualified by the phrase "within the factory of production" could be outside the factory. Therefore, whatever goes into generation of electricity or steam which is used within the factory would be an Input for the purposes of obtaining credit on the duty payable thereon."

20. To sum up, we hold that the definition of "input" brings within its fold, inputs used for generation of electricity or steam, provided such electricity or steam is used within the factory of production for manufacture of final products or for any other purpose. The important point to be noted is that, in the present case, excess electricity has been cleared by the assessee at the agreed rate from time to time in favour of its joint ventures, vendors etc. for a price and has also cleared such electricity in favour of the grid for distribution. To that extent, in our view, assessee was not entitled to CENVAT credit. In short, assessee is entitled to credit on the eligible inputs utilized in the generation of electricity to the extent to which they are using the produced electricity within their factory (for captive consumption). They are not entitled to CENVAT credit to the extent of the excess electricity cleared at the contractual rates in favour of joint ventures, vendors etc., which is sold at a price."

61. From the discussion hereinabove, it is obvious that the decision in Maruti Suzuki Ltd. 2009 (240) ELT 641 (SC) cannot advance the case of the Revenue. Maruti Suzuki Ltd. 2009 (240) ELT 641 (SC), was not a case in which electricity was generated out of bagasse, no issue regarding the applicability of Rule 6(3)(i) of the Cenvat Credit Rules, in the context of electricity generated from bagasse and sold by the assessee, arose in that case. The Supreme Court has, in D.S.C.L. Sugar Ltd.2015 (322) ELT 769 (SC), clearly held that bagasse is not an excisable item and, that, therefore, a demand under Rule 6 of the Cenvat Credit Rules, on the ground of sale of electricity generated from bagasse, could not sustain. Maruti Suzuki Ltd. 2009 (240) ELT 641 (SC), does not affect this legal position in any manner.

62. The inevitable sequitur of the above discussion is that the decision of the Tribunal, to allow the appeal of the respondent on the basis of the judgment of the High Court of Allahabad in Gularia Chini Mills 2014 (34) STR 175 (All), was justified, albeit for the reason that, as the electricity sold by the respondent was generated entirely from bagasse, and bagasse itself was in the nature of non-excisable waste/residue, no demand, posited on Rule 6(3)(i) of the Cenvat Credit Rules, could sustain against the respondent.

63. In view thereof, it is not necessary for us to express any opinion on the other contentions, advanced before us by either side.

Conclusion

64. Resultantly, the question of law, framed, in these proceedings on 3rd December, 2018, is answered in the affirmative, and against the Revenue.

65. The appeal is, consequently, dismissed.

