

(2013) 07 AHC CK 0115

In the Allahabad High Court

Case No : Writ Petition No. 1538 (M/B) of 2013 connected with Writ Petition (Tax) No's. 2134, 2898, 1934, 2426, 1892, 1893 (M/B) of 2013

Gularia Chini Mills

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 04-07-2013

Acts Referred:

Central Excise Tariff Act, 1985 — Section 2
Central Excises and Salt Act, 1944 — Section 2(d), 2(k), 3, 35B, 37
Constitution of India, 1950 — Article 226

Citation : (2013) 7 ADJ 248 : (2014) 44 GST 135 : (2013) 23 GSTR 161 : (2014) 34 STR 175

Hon'ble Judges : Rajiv Sharma, J; Arvind Kumar Tripathi, J

Bench : Division Bench

Advocate : Sudeep Kumar and Jai Prakash Tripathi, for the Appellant; Dipak Seth, for the Respondent

Judgement

1. Heard Mr. Bharat Ji Agarwal, Senior Advocate; assisted by Mr. Sudeep Kumar, Mr. Asit Srivastava, Mr. J.P. Tripathi, Mr. Rahul Agarwal and Mr. Parv Agarwal, learned Counsel for the petitioners, Mr. Deepak Seth, and Mr. Rajesh Singh Chauhan, learned Counsel for the Central Board of Excise & Customs and Mr. Ashit Kumar Chaturvedi, Mr. Ghaus Beg, learned counsel appearing for the Union of India. Through the above captioned writ petitions under Article 226 of the Constitution of India, petitioners challenge the impugned order-in-original passed by the Commissioner, Central Excise & Service Tax, Lucknow.

2. Shorn off unnecessary details the facts of the case are as under:

The sugar, which is being manufactured, falls under sub-heading No. 1701 of 1990 of First Schedule of Central Excise Tariff Act, 1985. The principal raw material of the petitioners' final product, namely, sugar, is the sugarcane, which is purely an agricultural product. During the course of manufacture of sugar, molasses (Sheera) emerges as a by-product, which attracts specific rate of duty

under the Tariff Heading 1703 of 1000 of the above Act. Admittedly, the Central Excise Duty on sugar, molasses and industrial alcohol is paid by the petitioners on their clearances from the factory, as per procedure prescribed under the Central Excise Rules, 2002. In the process of manufacture of sugar, sugarcane is crushed, its juice is extracted and "Bagasse" emerges as residue/waste of the sugarcane, which is said to be neither a manufactured product nor is a final product of the sugar industry. The waste of sugarcane, namely, Bagasse, so generated is mainly used as fuel in the factory for manufacture of final products and surplus, if any, is transferred to the sister concerns of the petitioner. The "bagasse" is classified under sub-heading 2303 2000 of Central Excise Tariff Act, 1985 (5 of 198) as "Beet-Pulp", "bagasse" and other waste of sugar manufacture" with NIL rate of duty.

3. According to petitioners they are using lubricant and grease to run the mills for crushing cane and extraction of juice in the process of which "Bagasse" emerges as residue/waste after extracting juice from sugarcane. The petitioners transport about 65% cane from cane centres and service tax is being paid by the petitioners on the transportation of the cane and for which the CENVAT credit is taken. Service tax is also paid on repair and maintenance to contractors and also to the various other services for which the credit is taken by the petitioners. The petitioners are availing credit of Central Excise Duty paid on inputs and capital goods as provided under Cenvat Credit Rules, 2004 for further payment of Central Excise Duty on final products, viz., Sugar and Molasses.

4. According to the petitioners, since electrical energy is not an excisable goods in view of definition of excisable goods in Section 2(d) of Central Excise Act, 1944 read with Section 2 of the Central Excise Tariff Act, therefore, it is not exempted goods within the meaning of Rule 2 (d) of CENVAT Credit Rules, 2004 but even then, the Commissioner, Central Excise issued notices to the petitioners under Rule 6(2) and Rule 6(3) of the Central Excise Tariff Act, demanding the duty in respect of the electrical energy, sold outside the factory.

5. On account of demand notices issued by the Commissioner, Central Excise, number of writ petitions were filed before this Court under Article 226 of the Constitution. A Division Bench of this Court vide order dated 18th May, 2012 passed in writ petition No. 11791 of 2010: Balrampur Chini Mills Ltd. v. Union of India and others, quashed the circular of Central Board of Excise & Customs dated 28.10.2009 and circular dated 3.10.2009 issued by the Chief Commissioner, Central Excise and a direction was issued not to realize any duty under Rule 6 of CENVAT Credit Rules, 2004. However, some of the petitioners have preferred objections/reply to the show-cause notice. Ultimately, Commissioner, Central Excise passed the impugned orders confirming the demand so raised.

6. Hence these writ petitions.

7. On behalf of the respondents, a preliminary objection has been raised that

there is a provisions for filing statutory appeal u/s 35-B of the Central Excise Act, 1944 against the impugned order before the Customs Excise & Service Tax Appellate Tribunal, New Delhi but without availing the said remedy, petitioners have rushed to this Court straightaway, which is against the settled norms and as such, the writ petition is liable to be dismissed on the ground of availability of alternative remedy.

8. In contrast, Counsel for the petitioners contends that there is no blanket ban in approaching the High Court and in exceptional circumstances, the writ petition is entertainable. He submits that though a Division Bench of this Court, vide order dated 18th May, 2012 passed in 11791 (M/B) of 2010 and connected writ petitions, while recording the findings that the "bagasse" is an agricultural waste of sugarcane, though marketable product, but the duty cannot be imposed as it does not involve any manufacturing activity simply by adding an explanation u/s 2(d) of the Central Excise Act, 1944, whereby the definition of "goods" has been defined will not make bagasse, which, as stated hereinabove, is an agricultural waste to be a dutiable item, but the Chief Commissioner vide Circular dated 3.10.2009 had nullified the judgment and order dated 21.7.2010 rendered in Civil Appeal No. 2791 of 2005 and took a different view. Surprisingly, the Commissioner, Central Excise, Lucknow, vide impugned orders, overreached the judgment of this Court dated 18th May, 2012 and held that even though bagasse falls outside the scope of CENVAT Credit Rules, the inputs or input services used in the generation of bagatelle, which is in turn used an input for the generation of electricity would continue within the CENVAT chain without appreciating that the judgment dated 18th May, 2012 breaks the chain at intermediate stage and cannot be so distinguished and refused to be followed by the Commissioner. Submission is that in view of the facts that the Commissioner, Central Excise has followed the order of Tribunal in the case of Geetanjali Woolens. Thus, filing of an appeal would be an empty formality as mentioned in para 13.8 of the impugned order. Moreover, it would be highly difficult to take a different view than the view already expressed by him. Therefore, the writ petitions are maintainable against impugned orders.

9. It is not in dispute that pursuant to the order passed by a Division Bench of this Court, objections to show-cause notice were filed but the Commissioner, without appreciating the submissions so raised on behalf of the petitioners, rejected their plea by placing reliance upon Geetanjali Woolen's case passed by the Tribunal, which is against the judicial propriety and discipline. Thus, it is beyond doubt that the impugned orders suffers from the vice of arbitrariness. As stated hereinabove, a Division Bench of this Court has already provided to petitioners to approach this Court in case authority concerned while adjudicating the controversy after receipt of the objections filed by the petitioners commits any illegality.

10. The question whether the Court should entertain the writ petition under Article 226 of the Constitution of India even though alternative remedy is

available, the Court has to exercise its jurisdiction looking to the facts of each and every case. In view of the proposition of law laid down by the Apex Court in *The State of Uttar Pradesh Vs. Mohammad Nooh*, ; *A.V. Venkateswaran, Collector of Customs, Bombay Vs. Ramchand Sobhraj Wadhwani and Another*, ; *Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others*, ; the rule of alternative remedy does not oust the jurisdiction of this Court under Article 226 of the Constitution of India, if it is found necessary for promotion of justice and prevention of injustice.

11. In view of the aforesaid facts and after hearing the parties, the preliminary objection raised by the respondents is not well founded and in our view relegating the petitioner to avail the alternative remedy would not be an efficacious remedy but a futile attempt.

12. As far as merit of the case is concerned, Sri Bharat Ji Agarwal, Senior Advocate, appearing on behalf of the petitioners submits that impugned order of Commissioner, Central Excise in respect of electrical energy generated from bagasse and sold to U.P. Power Corporation Ltd. is arbitrary and without jurisdiction inasmuch as Rule 6 of the CENVAT Credit Rules, 2004 [hereinafter referred to as the "2004 Rules"] is not applicable in respect of "electricity". On the strength of the decisions rendered in *Collector of Central Excise Vs. Solaris Chemtech Limited and Others*, and *Maruti Suzuki Ltd. Vs. Commissioner of Central Excise, Delhi-III*, , he contended that Rule 6 of the 2004 Rules will come into picture when a manufacturer manufactures both the excisable dutiable final products and also manufactures excisable exempted goods. According to him, merely because bagasse is used in boiler as a fuel for generation of steam and electrical energy and the electrical energy is sold to U.P. Power Corporation, neither Rule 6(2) nor Rule 6(3) of 2004 Rules would be applicable.

13. Elaborating his submission, Sri Agarwal submits that the Commissioner, while passing the impugned order, has committed a jurisdictional error in observing that the case law being cited does not give support to the noticee's case for the reason that the cases listed deal with the period that is prior to 28.2.2005 i.e. the date electricity was inserted into the Schedule appended to the Tariff Act. Submission is that "electrical energy was introduced in the Tariff which is only a technical move with no intention to make "electrical energy" excisable. Furthermore, the said tariff came into force from 28.2.2005 and was aligned with eight digit custom tariff. Therefore, it was merely a technical change and does not incorporated any tax liability.

14. Sri Agarwal submits that in the case of customs, 8 digit classifications code was adopted w.e.f. 1.2.2003. To bring parity and to make the thing simpler, eight digit classification was also sought to be introduced in the Central Excise Tariff for which the Central Excise Tariff (Amendment) Bill, 2003 was prepared. The bill was finally introduced as the Central Excise Tariff (Amendment) Bill, 2004 (Bill No. 47 of 2004) and was passed by both the House of the Parliament and received the assent of the President and became law as Central Excise Tariff

(Amendment) Act, 2004 (5 of 2005) w.e.f. 28.2.2005. According to him, the purpose of the said introduction of eight digit classification in the Central Excise Tariff was to bring parity with Customs tariff, for easy identification of the goods and to reduce the number of disputes and the same was by no stretch of imagination introduced for the purpose of generation of revenue.

15. Sri Agarwal has submitted that even the statement of objects and reasons of the Central Excise Tariff Amendment Bill, 2004 (Bill No. 47 of 2004) categorically states that the proposed changes does not make any changes in the existing rate of central excise duties and hence the proposed changes do not involve any revenue implications and changes would be merely technical in nature as has been clarified through Circular No. 808/05/2005-CX dated 25.2.2005.

16. Lastly, Sri Agarwal has urged that the department has admitted in its letter dated 30.1.2013 of the Assistant Commissioner, Central Excise that petitioners are not availing CENVAT Credit in boiler and turbine where bagasse is burnt to produce steam and steam runs the turbine to generate electricity. This fact has also been confirmed by the Commissioner, Central Excise vide its letter dated 21.2.2003 received by the petitioner on 28.2.2013. Therefore, decision of the Supreme Court that electricity is not an excisable goods and Rule 6 of the CENVAT Rules is not applicable is still binding on the authorities and the decision given by the Commissioner, Central Excise is apparently in the teeth of the said decision given by the Supreme Court and the Division Bench of this Court dealing with bagasse. Hence, the writ petition is liable to be allowed.

17. Per contra, Sri Deepak Seth, learned Counsel for the respondents submits that in the impugned adjudication order, it has been held that CENVAT is to be reversed even if electricity is held to be not an "Excisable good". The Hon'ble Supreme Court in the case of Maruti Suzuki (supra) has held that even if electricity is not an excisable good even then CENVAT attributable to inputs used in the generation of electricity that is sold outside is to be reversed. Therefore, the petitioner has wrongly interpreted the impugned adjudication order by saying that the respondent No. 4 is trying to overreach the judgment of this Court dated 18th May, 2013. As a matter of fact, the adjudicating authority has rightly drawn the difference between the two, which the petitioners are trying to misinterpret.

18. Elaborating his submission, Sri Seth has submitted that merely because the bagasse is a waste as such it is not necessary to reverse proportionate CENVAT Credit that has been availed on the goods and services that have been used in the mill house. There is no basis of the claim that generation of bagasse as an intermediate product immunised the goods and services that have been used in the mill house from the process of reversal of CENVAT. He further submits that the petitioner is misinterpreting the judgment of this Court dated 18th May, 2012 passed in writ petition No. 11791 of 2010 (M/B) alongwith connected writ petitions inasmuch as in the said judgment, this Court held that CENVAT Credit reversal is not to be done on bagasse which is sold outside, whereas the Adjudicating Authority in the present case has held that CENVAT reversal is

required to be done on inputs/input services attributable to bagasse that got utilized in generation of electricity that was sold outside.

19. Lastly, Sri Seth contended that allegation of the petitioner that the adjudicating authority has tried to overreach the judgment of this Court dated 18th May, 2012 in respect of bagasse, is totally misconceived insofar as the scope of the operation of the judgment as determined by the adjudicating authority is narrower than what the petitioner has claimed and so the overreach is being made by the petitioner. The question posed before this Court was different from the question that has been posed before the adjudicating authority in the present case. He submits that before this Court the question posed was the treatment needed to be meted out to inputs and input services attributable to bagasse that was sold outside, whereas the question posed before the adjudicating authority is the treatment needed to be meted out to inputs and input services attributable to electricity that was sold outside. Thus, there is no illegality in the impugned order and all the writ petitions are liable to be dismissed.

20. Having heard learned Counsel for the petitioners and perused the records, since the question involved in the above captioned writ petitions are that whether electrical energy generated from bagasse and sold to U.P. Power Corporation Ltd. is excisable or not, with the consent of the parties' counsel, they are being taken up together with and decided by a common order.

21. The question whether bagasse which is a waste and not a manufactured produce can be subjected to any duty under the Central Excise Act was considered and decided on 21.7.2010 by the Hon"ble Supreme Court in the case of Balrampur Chini Mills Ltd. in Civil Appeal No. 2791 of 2005 and on the basis of the said judgment, a Division Bench of this Court in which one of us (Hon"ble Rajiv Sharma, J.) is a Member, in a bunch of writ petitions, leading writ petition No. 11791 (M/B) of 2010: Balrampur Chini Mills Ltd. v. Union of India and others, decided the writ petitions on 18.5.2012. In the said judgment and order dated 18.5.2012, while considering Rule 6 of CENVAT Credit Rules and various decisions of the Hon"ble Supreme Court, it has been held that neither the penalty nor the interest can be charged from the petitioners in view of the fact that the petitioners are not liable to duty either by payment or by reversal in respect of bagasse sold by the petitioners.

22. 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

Chemicals Ltd. (supra).

23. It is not in dispute that petitioners do not avail CENVAT Credit on any input and input services used in generation of electricity insofar as this fact has been admitted by the Assistant Commissioner as well as Commissioner, Central Excise, Lucknow vide letters dated 30.1.2013 and 21.2.2013, respectively. In order to become any goods to be an "excisable goods", it has to fulfill the following conditions:

- (1) Goods must be manufactured;
- (2) Must be specified in the first or second Schedule of the Central Excise Tariff,
- (3) It must be subjected to tariff.

24. 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.

25. It is also relevant to mention here that Rule 6(1) provides that CENVAT Credit shall not allow on such quantity of inputs which is used in the manufacture of exempted goods. For applicability of Rule (2), the following ingredients must exist:

- (i) where a manufacturer avails CENVAT credit on any input (as defined in Section 2(k)
- (ii) and manufactures such final products which are chargeable to duty and
- (iii) also manufactures such final products which are exempted goods.

26. 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 assessee is required to reverse the proportionate credit or pay 10%/5% amount of the value of the exempted final products. Electricity is not excisable goods u/s 2(d) of the Act, hence Rule 6 of the CENVAT Credit Rules, 2004 is not applicable as held by the Apex Court in the case of Solaris Chemtech Ltd. (supra).

27. 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.

28. It is relevant to mention here that a notification, bearing No. 7/2005-Central Excise (N.T.) was published in Part II, Section 3, sub-section (1) of the Gazette of India, Extraordinary, dated 24.2.2005, which reads as under:

In exercise of the powers conferred by Section 37 of the Central Excise Act, 1944 (1 of 1944), the Central Government hereby makes the following rules to amend all the rules made under the said section and all the notifications issued under the said rules and for the time being in force on the date of commencement of the Central Excise Tariff (Amendment) Act, 2004 (5 of 2005), except as respects things done or omitted to be done before such amendments, namely:

1.(1) These rules may be called the Central Excise (Removal of Difficulties) Rules, 2005.

(2) They shall come into force on the date of the commencement of the Central Excise Tariff (Amendment) Act, 2004 (5 of 2005).

2. In each of the rules made u/s 37 of the Central Excise Act, 1944 (1 of 1944), and in each of the notifications issued under these rules, for any reference to the Chapter, heading or sub-heading of the First Schedule or the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), as the case may be, relating to any goods or class of goods, wherever referred to in the said rules or notifications, the corresponding reference to the Chapter, heading or sub-heading or tariff item, of the First Schedule or the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), as amended by the Central Excise Tariff (Amendment) Act, 2004 (5 of 2005) shall be deemed to have been substituted.

No. 4/3/2002-CX.I (Pt.II)

Abhay Kumar Srivastav Deputy Secretary to the Government of India

Note: This notification intends to take care of the technical changes adopted in the numbering scheme for Central Excise classification through the Central Excise Tariff (Amendment) Act, 2004 (5 of 2005). These amendments do not involve any substantive changes in the existing rules, so the particulars of each rule have not been indicated.

Furthermore, during debate in Lok Sabha on the said Central Excise Tariff (Amendment) Bill, 2004, the then Hon'ble Minister of Finance in regard to the

purpose of introduction of eight digit classification has stated that "the purpose of the Bill is very limited. On the custom side, we already have an eight-digit classification. It is, therefore, necessary that on the Excise side also we have the same eight digit classification. What we have found is that eight digit classification helps both trade and revenue department to identify a particular product and heading under which it falls. Immediately, the number of disputes comes down very sharply....."

29. A perusal of the "Note" appended below the Notification dated 24.2.2005 as well as the statement made by the Hon'ble Finance Minister in Parliament, as referred to above, clearly establishes that the notification has taken care of the technical changes adopted in the numbering scheme of 6 digits Central Excise classification, which has been aligned with the Custom tariff of 8 digits with effect from 28.2.2005.

30. 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 u/s 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.

31. 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 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.

32. For the discussions made hereinabove, it is clear that Geetanjali Woolens Mill judgment relied upon by the Commissioner in the impugned orders have no relevance as Geetanjali Woolens Mill's judgment was in respect of custom duty and was only concerned with the tariff item and not with respect to the "excisable goods" as defined u/s 2(d) of Central Excise Act, 1944. The bagasse, which emerges as a residue of sugarcane, admittedly, is a waste product and this

bagasse is used in boiler as a fuel for generation of steam for running the turbine and for boiling the juice for the manufacture of sugar. Turbine generates electrical energy which is used for running the plant and machinery and surplus energy is sold to the U.P. Power Corporation Ltd. Furthermore, bagasse is used 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. Accordingly, all the writ petitions are liable to be allowed, which is hereby allowed. The orders/show-cause notice impugned in respective writ petitions are hereby quashed. The respondents are directed not to realize any excise duty on electrical energy which was sold to U.P. Power Corporation Ltd.

No order as to costs.