(2024) 02 CESTAT CK 0030

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Excise Appeal No. 30287 Of 2017, 30126 Of 2018, 30369 Of 2023

NSL Krishnaveni Sugars Ltd APPELLANT

Vs

Commissioner Of Central Tax Rangareddy RESPONDENT

Date of Decision : 16-02-2024

Acts Referred:

Cenvat Credit Rules, 2004 — Rule 2, 2(l), 2(l)(ii), 6, 6(1), 6(2), 6(3), 6(3)(i), 6(3A)(c)(i), 6(3A), 6(3A)(c)(iii), 14, 15
Central Excise Act, 1944 — Section 2(f)

Citation : (2024) 02 CESTAT CK 0030

Hon'ble Judges : Anil Choudhary, Member (J);P.V. Subba Rao, Member (T)

Bench : Division Bench

Advocate : B. Venugopal, Pradeep Saxena, A. Rangadham

Final Decision : Partly Allowed

Judgement

P.V. Subba Rao, Member (T)

1. M/s NSL Krishnaveni Sugars Ltd [Appellant] has files these Appeals assailing the impugned orders passed by the Commissioner as follows:

E/30287/2017:

Period of dispute

2011-12 to 2014-15

Date of Show Cause Notice

06.01.2016

Date of Order-in-Original

31.10.2016

Demands:

(i) Cenvat credit on Capital goods installed in Distillery plant and used exclusively for the manufacture of non-excisable goods under Rule 14 of CCR, 2004 read with Sec 11A(10) of CEA, 1944

(ii) Cenvat credit wrongly availed on Erection, Commissioning & Installation services (ineligible input services) post 1.4.2011 under Rule 14 of CCR, 2004 read with Sec 11A(10) of CEA, 1944

(iii) Central Excise duty not paid on 6284 MTs molasses cleared and consumed captively by wrongly availing the exemption under Not. No. 67/95-CE dt.16.3.1995 under Sec 11A(10) of CEA, 1944

(iv) Amount equal to 6% of value of the exempted goods payable in terms of Rule 6(3)(i) of the CCR, 2004 under Rule 14 of CCR, 2004 read with Sec

11A(10) of CEA, 1944

Rs.1,72,61,278/-

Rs.19,52,015/-

Rs.48,54,390/-

Rs.7,14,65,000/-

Interest under Rule 14 of CCR, 2004 and

Sec 11AA of CEA, 1944

As applicable

Penalty under Rule 15 of CCR, 2004 and

Sec 11AC of CEA, 1944

Rs.4,53,39,147/-

E/30126/2018:

Period of dispute

April 2015 to December 2016

Date of Show Cause Notice

01.05.2017

Date of Order-in-Original

20.10.2017

Demand on Central Excise duty not paid on 6284 MTs molasses cleared and consumed captively by wrongly availing the exemption under Not. No. 67/95-CE dt.16.3.1995 under Sec 11A(10) of CEA,

1944

Rs.2,07,41,625/-

Interest under Sec 11AA of CEA, 1944

As applicable

Penalty under Sec 11AC of CEA, 1944

Rs.20,00,000/-

E/30369/2023:

Period of dispute

January 2017 & March 2017

Date of Show Cause Notice (s)

07.02.2019 & 18.03.2019

Date of Order-in-Appeal

28.04.2023

Demand of Central Excise duty not paid on molasses cleared and consumed captively by wrongly availing the exemption under Not. No. 67/95-CE dt.16.03.1995 under Sec 11A(10) of

CEA, 1944

Rs.4,31,432/-

Interest under Sec 11AA of CEA, 1944

As applicable

Penalty under Sec 11AC of CEA, 1944

Rs.6,60,000/-

Since these three appeals deal with common issues, they are being disposed of together.

2. We have heard Shri B. Venugopal, learned Counsel for the Appellant and Shri Pradeep Saxena and Shri A. Rangadham, learned Authorized Representatives for the Respondent/Revenue and perused the records.

3. The issues which fall for consideration in these Appeals are as follows:

a) Whether the Appellant is entitled to Cenvat credit on the capital goods installed in the distillery plant used for manufacture of Ethyl Alcohol during the period from June 2011 to June 2012.

b) Whether the Appellant is entitled to Cenvat credit on the Erection, Commissioning & Installation services as input services availed after 01.04.2011 for setting up and installation of the distellery plant.

c) Whether the Appellant is entitled to claim exemption under Notification No. 67/1995-CE dt.16.03.1995 on the molasses consumed captively to manufacture Ethyl Alcohol.

d) Whether the Appellant is required to pay an amount equal to 6% of value of the exempted goods in terms of Rule 6(3)(i) of Cenvat Credit Rules, 2004[CCR, 2004] under Rule 14 read with Sec 11A of the Central Excise Act, 1944 [Act].

e) Whether the interest is chargeable under Rule 14 of CCR, 2004 on the above amount.

f) Whether the penalty is imposable under Rule 15 of CCR, 2004 and under Sec 11AC of the Act.

4. The question of Cenvat credit availed on capital goods used in setting up the distillery plant and the Cenvat credit availed on the input services used in Erection, Commissioning & Installation of the distillery plant are issues in dispute only in appeal E/30287/2017, and not in the remaining two appeals. The other issues in dispute are common to all three appeals.

5. The appellant manufactures sugar which is an excisable goods. During the process, molasses emerges as by-product, which is also excisable and duty has to be paid if it is cleared from the factory. However, the Appellant does not clear the molasses on payment of Excise duty. Instead, it set up a distillery plant (unit) within its factory and used the molasses captively in its distillery plant to produce Ethyl Alcohol. Ethyl Alcohol meant for human consumption is subject to regulation and taxation by the State Excise Authorities (being listed in the State List of the Seventh Schedule of the Constitution of India), whereas, Alcohol, which is denatured and unfit for human consumption is subject to Central Excise duty (being listed in the Union List of the Seventh Schedule to the Constitution). There is no dispute about this legal position. The Appellant used the molasses manufactured, in its distillery plant to produce Alcohol which it, either cleared on payment of State Excise duty or it cleared it after denaturing it on payment of Central Excise duty. The denatured Alcohol becomes unfit for human consumption, because of the denaturants. In the present case, the denaturant which was used was Methanol which the buyers of denatured alcohol bought on account of the appellant and carried it in the tankers to the distillery of the appellant. The appellant filled ethyl alcohol in these tankers and the methanol which was already in the tankers, mixed with the ethyl alcohol and it became denatured alcohol, and was cleared as such from the distillery after paying appropriate central excise duty.

CENVAT credit on capital goods used in setting up the distillery plant

7. The case of the Department is that since the capital goods used in setting up the distillery plant were used in the manufacture of an exempted product, viz., Ethyl Alcohol, no Cenvat credit was admissible to the Appellant and although part of the ethyl alcohol was (after denaturing) cleared as denatured Alcohol, after

paying central Excise duty, the process of denaturing took place in the tanker and not in the distillery. It is the case of the Department that since the Appellant does not take part in any process of manufacture of denaturation, no Cenvat credit on the capital goods used in setting up the distillery is admissible.

8. The case of the Appellant is that it is entitled to Cenvat credit for the reason that the distillery is used to manufacture denatured Alcohol, although the last stage of addition of denaturant takes place in the tanker and not in the machinery of distillery. Without the production of Alcohol, denatured Alcohol cannot be manufactured or sold. Denatured Alcohol is an excisable good on which it has already paid Central Excise duty. Therefore, Cenvat credit cannot be denied on the capital goods.

9. We have considered the submissions of both sides with respect to this part of the demand. The undisputed fact is that the distillery produces Ethyl Alcohol, which, if cleared as such, is chargeable to State Excise duty and goes out of the purview of the Central Excise duty. On the other hand, if it is denatured before clearing, the denatured Alcohol is chargeable to Central Excise duty instead. While it is true that in the process of manufacture of the excisable goods, viz, denatured Alcohol, Ethyl Alcohol, which is otherwise not chargeable to central excise duty arises at an intermediate stage, and the last step of denaturing takes place in tankers itself. The manner in which the goods have left the factory is what matters with respect to central excise duty, whether it is a question of payment of central excise duty or the admissibility of CENVAT credit on the capital goods, inputs or input services. There is no good reason as to why the Cenvat credit on capital goods used in the distillery should be denied to the Appellant. In our considered view, neither the factor that an exempted good, viz, Ethyl Alcohol comes into existence prior to the manufacture of denatured Alcohol nor the fact that denatured Alcohol is not produced within the distillery machines, but in the tankers within the factory, should make any difference to the entitlement of Cenvat credit. Nothing in the CCR determines the eligibility of CENVAT credit based on at what stage the final goods become liable to central excise duty, and so long as the goods which are cleared from the factory are excisable goods, CENVAT credit on the capital goods cannot be denied. We, therefore, find in favour of the Assessee and against the Revenue, in so far as the issue of Cenvat credit on capital goods used in distillery is concerned.

10. Learned AR for Revenue relied on the decision of Division Bench of this Tribunal in Appeal E/50804/2019 of Rai Bahadur Narain Singh Sugar Mills Ltd vs Commissioner of Central GST, Dehradun, decided by Final Order No. 51568/2023 dt.29.11.2023 to assert that no Cenvat credit can be given on capital goods used in the manufacture of a distillery unit. We have examined the decision in Rai Bahadur Narain Singh Sugar Mills. The facts in that case were different. The Assessee in that case was entitled to an Area based exemption notification, which it availed and hence it would not have been entitled to CENVAT credit on captial goods. However, it paid some amount as Excise duty on the CO2 and

denatured Alcohol cleared by it and claimed the Cenvat credit on the entire capital goods. A coordinate bench of this Tribunal held that the molasses and Ethyl Alcohol manufactured by the Assessee were exempted by the area based exemption notification, and for that reason held that it was not eligible to avail Cenvat credit on the capital goods used in the distillery because there was no provision in the exemption notification to pay duty on some goods while claiming exemption under the same notification for some other goods. Thus, all the final products including CO2 and denatured alcohol were exempted in that case and therefore, it was held the CENVAT credit on capital goods was not available. In this case, there is no exemption for denatured Alcohol and CO2 manufactured by the Appellant from duty and there is no dispute that duty was liable to be paid and was paid. Since the present case is different on facts, we find that the decision relied upon by the Revenue will not come to its rescue.

CENVAT credit on the input services used in installation of capital goods in the distillery plant

11. The second question is the eligibility of Cenvat credit on the Erection, Commissioning & Installation services used in erecting the plant and machinery after 01.04.2011, when CCR, 2004 were amended and the definition of input service. Prior to this date, the defintion of 'input service' had a 'means' part and an 'includes' part and the 'includes' part of the definition specifically included services which are used in installation of plant and machinery. With effect from 1.4.2011, the defintion was revised completely and it had a 'means' part, a' includes part' and an 'excludes part'. Services related to setting up and installation of plant and machinery was neither in the includes part nor in the excludes part.

12. The case of the Department is since the services were used for commissioning and installation of the distillery plant, after 01.04.2011, and such services were removed from the 'includes part' of the defintion of 'input services' with effect from 1.4.2011, no Cenvat credit is admissible. Learned authorised representatives for Revenue laid emphasis on the 'Hayden's Mischief Rule of statutory interpretation' and asserted that since the services used in setting up and installation of plant and machinery were specifically removed from the includes part of the defintion of 'input service' the purport of the amendment is to deny the CENVAT credit on these services. Thus, the appellant cannot take CENVAT credit on these services.

13. The case of the Appellant is that it was entitled to Cenvat credit. According to the learned counsel for the appellant, the defintion of 'input service' has three parts and the 'means' part of the defintion is moderated by the 'includes' part and the 'excludes' part. The 'includes' part enlarges the 'means' part while the 'excludes' part restricts it. What is already in the 'means' part need not be again included in the 'includes' part. Once the service is covered in the 'means' part, CENVAT credit will be admissible unless it is excluded by the 'excludes' part of the definition. The services in dispute were undisputedly used in erection and

commisioning and installation of the distillery plant. Without these services and the plant, manufacture of the ‘denatured alcohol’- an excisable goods is impossible. Therefore, the services were used in or in relation to the manufacture of denatured alcohol and hence CENVAT credit is admissible as per the means part of the defintion itself. Learned Counsel relies on the case of Pepsico India Holdings (Pvt) Ltd vs CCT, Tirupati [2022 (56) GSTL 22 (Tri-Hyd)].

14. We have considered the submissions on both sides with respect to this part of the dispute. We find that this Bench held in Pepsico India that after 01.04.2011, although the services rendered in relation to installation and commissioning of the plant were not in the inclusive part of the definition but they were not excluded either and the main part of the definition of input service is broad enough to include the input services used in setting up and installation of the plant and machinery and hence CENVAT credit is admissible.

Para 14 to Para 22 of this Order are reproduced below:

“14. The appellants had entered into agreements to lease the land and to get various common facilities in the private industrial township called Sri City to set up their factories. It cannot be argued that manufacturing can take place without a factory nor can it be argued that a factory can be set up without the services in question. It is also not in dispute that M/s. Sri City, the service provider, paid service tax on the services.

15. The department wants to deny them the benefit of the CENVAT credit on the ground that ‘services related to setting up of a factory’ which were specifically included prior to 1.4.2011 were no longer specifically included post 1.4.2011.

16. We find that the definition of ‘input service’ prior to 1.4.2011 had two parts- a main part of the definition and an inclusive part of the definition. This inclusive part specifically included the services availed for setting up the factory. After 1.4.2011, it has three parts- a main part, an inclusive part and an exclusive part. The services used for setting up the factory are neither in the inclusive part of the definition nor the exclusive part of the definition. Therefore, such services were neither specifically included nor were specifically excluded.

17. It takes us to the main part of the definition which must be examined. If it is wide enough to cover the services in question, CENVAT credit will be available, otherwise it will not be available. The main part includes “services used by a manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products up to the place of removal.” The term manufacture is not defined in the Rules.

18. The definitions as per rule 2 of CCR 2004 reads as follows:

RULE 2. Definitions. — (1) In these rules, unless the context otherwise requires,

(a)

(b)…

(l)

(2) The words and expressions used in these rules and not defined but defined in the Excise Act shall have the meanings respectively assigned to them in the Excise Act.

19. Since the term 'manufacture' is not defined in the Rules, the definition under the Central Excise Act, 1944 must be considered. Section 2(f) of the Central Excise Act defines 'manufacture' as follows:

2(f) " manufacture" includes any process

(i) incidental or ancillary to the completion of a manufactured product;

(ii) which is specified in relation to any goods in the Section or Chapter notes of the Fourth Schedule 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; the word "manufacturer" 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 or manufacture on his own account.

20. Thus, the term 'manufacture' itself is very wide and includes anything incidental or ancillary to manufacture.

21. For a service to qualify as 'input service' under CENVAT Credit Rules, 2004 post 2011, the service in question need not be covered even by the very wide definition of manufacture under section 2(f) of the Central Excise Act. Any service which is used not only in manufacture but also 'in relation to' manufacture will also qualify as input service. The scope of input service is further enlarged with the expression whether directly or indirectly used in the definition of input service. Thus, there are:

(a) Actual manufacture;

(b) Processes incidental or ancillary to manufacture which are also manufacture;

(c) Activities directly in relation to manufacture (i.e., in relation to 'a' and 'b' above);

(d) Activities indirectly in relation to manufacture (i.e., in relation to 'a' and 'b' above);

22. All four of the above qualify as input service as per Rule 2(l) (ii) as applicable post 1.4.2011. Although setting up the factory is not manufacture in itself, it is an activity directly in relation to manufacture. Without setting up the factory, there cannot be any manufacture. Services used in setting up the factory are,

therefore, unambiguously covered as 'input services' under Rule 2 (l) (ii) of the CENVAT Credit Rules, 2004 as they stood during the relevant period (post 1.4.2011). The mere fact that it is again not mentioned in the inclusive part of the definition makes no difference. Once it is covered in the main part of the definition of input service, unless it is specifically excluded under the exclusion part of the definition, the appellant is entitled to CENVAT credit on the input services used. This Bench has already taken this view in Kellogs. Similar views have been taken by the other Benches in the other cases mentioned above."

15. We also find that in Kellogs India Pvt Ltd vs CCT, Tirupati [2020 (7) TMI 414 (Tri-Hyd)] also this Bench had taken the same view. In view of the above, we find that the Appellant is entitled to Cenvat credit on the inputs used in setting up the plant and machinery.

Central Excise duty on molasses manufactured and captively used to manufacture ethyl alcohol some of which was cleared as such and some after denaturing

16. The third point of dispute is regarding the non-payment of Central Excise duty on molasses captively consumed by the Appellant. It is the case of the Department that the Appellant had wrongly availed the benefit of Notification No. 67/1995-CE dt.16.03.1995 on the molasses, which it had captively consumed. Learned Counsel for the Appellant submits that in the impugned Order, the Commissioner had relied on the judgment of the Hon'ble Supreme Court in the case of Commissioner vs Sakthi Sugar Ltd[2016 (332) ELT A194 (SC)] and Tribunal Bangalore in the case Godavari Sugar Mills Ltd vs CCE, Belgaum [2007 (212) ELT 234 (Tri-Bang)] and Ugar Sugar Works Ltd vs CCE, Belgaum[2008 (232) ELT 81 (Tri-Bang)] in which it has been held that once the manufacturer discharges its obligations under Rule 6 of CCR, 2004, it is eligible for the exemption from duty on the goods captively used in the manufacture of further goods. The Commissioner followed this decision and in order to verify, if the Appellant had fulfilled its obligations under Rule 6 of CCR, called for a report from the Range Superintendent, who by his letter dt.28.10.2016 reported as follows:

a) In terms of Rule 6(3A)(b) of CCR, 2004, M/s NSL are required to determine and pay the Cenvat credit attributable to inputs and input services used in or in relation to manufacture of exempted goods/ provision of exempted services, provisionally on a montly basis. However, M/s NSL have not paid the amounts for the months of April and May, 2014;

b) There is a huge differene between the Cenvat credit amount reflected in the ER1 Returns and the credit amount adopted for arriving at the total amount payable in terms of 6(3A) for the FY 2014-15;

c) In terms of 6(3A)(c)(i) of CCR, 2004, M/s NSL are required to determine the amount of Cenvat credit attributable to inputs used in the manufacture of exempted goods on the basis of total quantity of inputs used in the said exempted goods, whereas in the instant case the computation was done based on the values but not on quantity basis as stipulated in the Rule;

d) While arriving at the amount payable in terms of Rule 6(3A)(c)(iii) of CCR, 2004, M/s NSL have excluded the input service credit availed in respect of input services used exclusively in Sugar plant. However, in terms of the said Rule, the total Cenvat credit taken on all the input services should have been adopted for ascertaining the amount payable in terms of Rule 6(3A)(c)(iii), but not the "Cenvat credit taken on common input services" as was done by the assessee. Further, the Board vide point B.19 of Minutes of Tariff Conference held on 28th and 29th October, 2015 as communicated in F.No. 96/85/2015-CX.1 dt.07.12.2015, clarified that the language of the Rule is very clear and that it should be implemented in terms of clear provisions of the Rule as it exists; and

e) Further, while working out the amount to be reversed on inputs used exclusively in Co-Gen Plant, M/s NSL have apportioned the credit among three plants, viz., Sugar plant, Ethanol plant and Co-gen plant, basing on the steam usage by the respective plants and reversed the amount attributable to Co-gen plant only. However, in the other two plants viz., Sugar plant and Ethanol plant, the assessee are manufacturing both dutiable and exempted goods and hence they are not entitled to avail total input credit attributable to steam usage in the respective units.

17. In view of the above discrepancies reported by the Range Superintendent, the Commissioner held that the Appellant had not discharged its obligatoins under Rule 6(3A) of CCR and held that the Appellant had not fulfilled the conditions laid down in Notification No. 67/1995-CE. Therefore, he denied the benefit of the exemption and demanded duty on molasses.

18. Learned Counsel for the Appellant submits that the Commissioner had agreed with its submissions, that once the provisions of Rule 6 of CCR are followed, it will be entitled to the benefit of exemption notification and there is no dispute about it. The only question is if it had fulfilled its obligations under Rule 6 of CCR or not. According to the Appellant, it had fulfilled the obligations, while according to the Revenue, it had not fulfilled the obligations. Learned Counsel for the Appellant submits that the report of the Range Superintendent was obtained by the Commissioner after the Personal Hearing in the matter, and a copy of it was never sent to the Appellant so that it could defend its position and show how it had fulfilled the obligations under Rule 6. No reliance could have been placed by the Commissioner on this report of the Range Superintendent, without even giving it a copy of the report.

19. Learned authorised representatives vehemently supports the impugned order.

20. We do find strong force in the submission of the learned Counsel that the adverse report of the Range Superintendent obtained after the Hearing was over, cannot be relied upon unless a copy is served upon the Appellant and it is given an opportunity to defend. The only matter of fact to be determined is if the appellant had fulfilled the requirements under Rule 6 of CCR or not. In view of

the above, we find that it is a fit case to be remanded to the Commissioner on this question, with a direction to provide or send a copy of the report of the Range Superintendent to the appellant and after giving the appellant sufficient opportunity to rebut the report and explain how it had fulfilled the obligation under Rule 6 of CCR, and pass a reasoned order after following principles of natural justice.

Demand of an amount equal to 6% of the value of exempted goods under Rule 6(3) of CCR

21. The last part of the demand is pertaining to 6% of the value of the exempted goods in terms of Rule 6(3)(ii) of CCR, 2004. The case of the Revenue is that since the Appellant had not fulfilled its obligations under Rule 6(1) or 6(2) of CCR, 2004, the Appellant is required to pay an amount of 6% of the value of exempted goods in terms of Rule 6(3)(ii) of CCR, 2004. Since this amount was not paid, it has been confirmed.

22. We find that it has been held by the jurisdictional High Court of this Bench, that no demand can be raised or confirmed under Rule 6(3) of CCR, 2004. In Tiara Advertising vs UOI [2019 (30) GSTL 474 (Telangana)], it has been held by the Hon'ble High Court that the obligations under Rule 6(1) or Rule 6(2) or Rule 6(3) are various options given to the assessee and it is not for the Department to choose an option for the Assessee. If the assessee does not follow any of the options and fulfill its obligations, demand can be raised to deny the entire amount of Cenvat credit, but the assessee cannot be forced to pay an amount equal to 6% under Rule 6(3)(i) of CCR, 2004. Therefore, the demand equal to 6% of the value of exempted goods sold, under Rule 6(3) of CCR, 2004, cannot be sustained and needs to be set aside and we do so.

22. To sum up – In view of the above, Appeal E/30287/2017 is partly allowed, setting aside the denail of Cenvat credit on the capital goods installed in the distillery plant and the input services used in their installation and the demand of an amount equal to 6% of the value of exempted goods under Rule 6(3)(i) of CCR, 2004. The demand pertaining to Central Excise duty on the quantity of molasses cleared and consumed captively availing exemption Notification No. 67/1995-CE dt.16.03.1995 is remanded to the Original Authority with a direction to provide a copy of Range Superintendent's report to the Appellant and decide the matter afresh after giving a reasonable opportunity of being heard to the appellant.

23. In Appeals E/30126/2018 and E/30369/2023, the matter pertaining to the exemption Notification No. 67/1995-CE on the molasses captively consumed is remanded to the Original Authority to provide a copy of the Range Superintendent's report to the Assessee and the demand of an amount equal to 6% of the value of exempted goods under Rule 6(3) of CCR, 2004 is set aside.

24. All the three Appeals are partly allowed and partly remanded as above.

