CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

WEST ZONAL BENCH

Excise Appeal No. 1925 of 2012

(Arising out of Order-in-Appeal No. PIII/RP/252/2012 dated 12.11.2012 passed by the Commissioner of Central Excise (Appeals), Pune III)

M/s. Vithal Corporation Ltd. **…..Appellant**
Post-Mhaisgaon, Tal-Madha,
Dist-Solapur-412 280.

Vs.

Commissioner of Customs Excise & Service Tax-Pune-II **…..Respondent**
ICE House, 41-A, Sasoon Road, Opp. Wadia College,
Pune-411 001.

APPEARANCE:

Ms Manasi Patil and Viraj, Advocate for the appellant
Shri P. K. Acharya, Superintendent (AR) for the respondent

CORAM: Hon'ble Mr Ajay Sharma, Member (Judicial)
Hon'ble Mr Anil G. Shakkarwar, Member (Technical)

FINAL ORDER NO: A/85864/2023

DATE OF HEARING: 23-01-2023
DATE OF DECISION : 11-05-2023

Per: Ajay Sharma

This appeal has been filed challenging the order dated 12.11.2012 passed by the Commissioner (Appeals), Central Excise, Pune III by which the Learned Commissioner although upheld the demand but reduced the same from Rs. 12,37,443/- to 11,79,703/- under Rule 14 of Cenvat Credit Rules, 2004 r/w. Section 11A(1) of Central

Excise Act, 1944 alongwith interest and penalty on the reduced demand.

2. The issue involved herein is whether, in view of amendment of Section 2(d) of Central Excise Act, 1944 w.e.f. 10.5.2008 the appellant is liable to pay u/r. 6(3) of Cenvat Credit Rules, 2004 an amount equal to 5% of the sale value of exempted product i.e. bagasse, generated during the manufacturing of sugar/molasses as they failed to maintain separate accounts for dutiable and exempted goods as required under Rule 6(2) ibid?

3. The facts are as follows. The appellants are engaged in manufacture and clearance of sugar and molasses and are paying duty on all these final products. They were availing Cenvat credit of excise duty paid on inputs and capital goods and also on service tax paid on input services used in the manufacture of aforesaid final product. During the process of manufacturing sugar & molasses, by-products bagasse, etc. were generated which, as per the appellants, are nothing but waste/residue byproduct/ refuse which were also being sold by the appellants. A show cause notice dated 4.5.2011 was issued to the appellants stating that they are availing the Cenvat credit on inputs, capital goods and input services under the Cenvat Credit Rules and utilizing the same for clearing the final product but neither they are maintaining separate records of inputs and input services used for manufacture of duty paid goods (sugar and molasses) and for exempted goods generated i.e. bagasse as required u/r. 6(2) ibid nor they are paying an amount of 5% of value of exempted goods (bagasse) sold by

them during the period 1.3.2010 to 30.9.2010 as required u/r. 6(3) ibid and accordingly a demand was raised for an amount equal to 5% of the value of bagasse sold i.e. Rs.12,37,443/- alongwith interest and penalty. The said show cause notice was culminated into Adjudication Order dated 20.6.2012 by which the Adjudicating Authority confirmed the demand alongwith interest and equal penalty. On Appeal filed by the Appellant, the learned Commissioner (Appeals) vide impugned order dated 12.11.2012 although upheld the demand but reduced the same from Rs. 12,37,443/- to 11,79,703/- under Rule 14 of Cenvat Credit Rules, 2004 r/w. Section 11A(1) of Central Excise Act, 1944 alongwith interest and penalty on the reduced demand.

4. The period in issue is from 1.3.2010 to 30.9.2010. According to learned counsel for the appellant the bagasse is nothing but waste which was produced during the manufacturing of sugar and no manufacturing activity has been done by the for the production of bagasse and therefore they are not liable to pay any duty on it. Per contra learned Authorized Representative submits that by amending Section 2(d) ibid an explanation was inserted in the said section w.e.f. year 2008 and a deeming provision has been created therefore once it is established that an article, a substance or material is capable of being bought and sold, it becomes ‘goods’ and once any such ‘goods’ find entry in the First Schedule and the Second Schedule of the Central Excise Tariff Act, 1985, they become *‘excisable goods’*. He reiterated the findings recorded in the impugned order and prayed for dismissal of appeal filed by the appellant.

5. We have heard learned counsel for the appellant and learned Authorized Representative on behalf of Revenue and perused the case records including the written submissions alongwith case laws submitted by learned counsel. It is nowhere disputed by the department that bagasse were not emerged as a waste/residue of sugarcane. In the light of the facts involved herein, we are of the considered view that the issue involved in the instant Appeal is not more *res integra* in view of the law laid down by the Hon'ble Supreme Court in the matter of *Union of India vs. DSCL Sugar Ltd.; 2015(322) ELT 769 (SC)* in which the Hon'ble Supreme Court has considered both the periods i.e. the periods before and after the insertion of explanation in Section 2(d) ibid, which has been heavily relied upon by the authorities below in fastening the duty liability on the appellant herein. The Hon'ble Supreme Court has held that bagasse being an agricultural waste or residue, there could be no manufacturing activity. The relevant paragraphs of the said decision are reproduced hereunder:-

> **"xxx xxx xxx**
>
> **4.**It is not in dispute that Bagasse is otherwise classified under Chapter sub-heading No. 2303 20 00 of the First Schedule to the Central Excise Tariff Act, 1985 and attracts nil rate of duty.
>
> **5.**However, show cause notices were issued to the respondents herein stating that Bagasse would be subject to duty under the Central Excise Act, 1944, as "other products". These show cause notices were issued to the respondents in terms of the provision contained in Rule 6(3) of the Cenvat Credit Rules, 2004 demanding various amounts. The said show cause notices were challenged by the respondents filing writ petitions in the High Court of Allahabad. The High Court has allowed these writ petitions holding that Bagasse being a waste and not a manufactured product, no duty is payable thereupon. For arriving at this conclusion, the High Court also have relied upon the judgment of this Court in *Balrampur Chini Mills Ltd.* in C.A. No.

2791 of 2005 decided on 21-7-2010 [2015 (320) E.L.T. A258 (S.C.)].

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."

6. On the basis of the amendment to Section 2(d), the department has taken out one circular No. 904/24/2009-CX, dated 28.10.2009 in line with the amendment in Section 2(d) ibid, which was also relied upon by the authorities below in confirming the demand. But after the judgment of the Hon'ble Supreme Court in the matter of *DSCL Sugar Ltd. (surpa)* another circular No. 1027/15/2016-CX, dated 25.4.2016 has been issued by the department stating that since the period covered in the aforesaid decision of the Hon'ble Supreme Court applies to both period i.e. before and after the insertion of explanation in section 2(d) ibid therefore the circular dated 28.10.2009 becomes *non est* and are *rescinded.*

7. Since the law laid down by the Hon'ble Supreme Court constitutes declaration of the law within the meaning of Article 141 of the Constitution of India which would be binding on all Court and Tribunals, therefore following the aforesaid decision of the Hon'ble Supreme Court, the issue involved herin decided in favour of the

Appellant and as a result the appeal filed by the appellant is allowed with consequential relief, if any, as per law.

(Order pronounced in Open Court on 11.05.2023)

(Anil G. Shakkarwar)
Member (Technical)

(Ajay Sharma)
Member (Judicial)

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