IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, CHENNAI

Excise Appeal No.40897 of 2015

(Arising out of Order-in-Appeal No. 11/2015 SLM-CEX dated 19.3.2015 passed by the Commissioner of Central Excise (Appeals - I), Salem)

M/s. Ponni Sugars (Erode) Ltd. **Appellant**
Odappali, Cauvery RS PO
Namakkal – 638 007.

Vs.

Commissioner of GST & Central Excise **Respondent**
No. 1, Foulks Compound, Anai Road
Salem – 636 001.

APPEARANCE:

Shri M.N. Bharathi, Advocate for the Appellant
Shri M. Ambe, DC (AR) for the Respondent

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Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)

Final Order No. **40353 / 2022**

Date of Hearing : 04.11.2022
Date of Decision: 04.11.2022

Brief facts are that the appellant is engaged in manufacture of sugar and are registered with the Central Excise Department. They filed refund claim on 19.9.2014 seeking for refund of Rs.21,58,584/-. The claim was filed for refund of the payment made by them under Rule 6 of CENVAT Credit Rules, 2004 on clearance of the waste products namely bagasse and press mud which emerged during the course of manufacture of sugar. According to appellant on being intimated by the department that they are not eligible to avail credit on common inputs and input services in regard to bagasse and press mud, they reversed the credit as under Rule 6(3A) of CENVAT Credit Rules, 2004. Later,

the Hon'ble Supreme Court in the case of Union of India Vs. DSCL Sugar Ltd. reported in 2015 (322) ELT 769 (SC) held that bagasse and press mud are non-excisable products and that no duty is payable on these items. Consequently, they sought for refund of the credit that has already been reversed. After due process of law, the refund sanctioning authority rejected the refund as time-barred under the provisions of sec. 11B of the Central Excise Act, 1944 as the credit has been reversed between 1.5.2010 and 1.5.2013 whereas the refund claim has been filed only on 19.9.2014 which is beyond one year. Aggrieved by such order, the appellant filed appeal before Commissioner (Appeals) who vide order impugned herein upheld the same. Hence this appeal.

2. On behalf of the appellant, learned counsel Shri M.N. Bharathi appeared and argued the matter. He submitted that the refund claim pertains to the period 1.4.2010 to 1.5.2013. The appellant had not been maintaining separate accounts for the common inputs and input services used in the manufacture of sugar. The department was of the view that bagasse and press mud which emerged during the process of manufacture of sugar are exempted products and therefore the appellant has to maintain separate accounts of common inputs and input services. As an abundant caution, the appellant reversed proportionate credit every month and also adjusted the balance credit at the end of the financial year. While doing so, they also intimated the department informing the reversal of credit. The learned counsel

referred to sample intimation dated 3.5.2010 enclosed with the appeal memorandum. He stated that in such intimation, the appellant had informed the department that the reversal is made by them only by abundant caution and they reserve their rights to go in appeal in case of need. The department did not consider this letter as a mark of protest. It is argued by the learned counsel that such intimation makes that the credit has been reversed under protest. Therefore, the limitation envisaged under sec. 11B of the Central Excise Act, 1944 will not apply.

3. The department has calculated the period of one year from the date of reversal of the credit up to the date of filing the refund claim and held that the refund claim is time-barred. When the credit has been reversed under protest, there is no limitation applicable to the refund claim. It is also pointed out by the learned counsel that the department had issued a Show Cause Notice demanding the amount of wrongly availed credit in regard to common inputs and input services used for exempted goods in the nature of bagasse and press mud. The said Show Cause Notice is dated 21.10.2015. The issuance of Show Cause Notice itself would prove that the reversal of credit was disputed by the appellant. The said Show Cause Notice was adjudicated by the original authority and vide Order in Original dated 29.3.2017, the demand in respect of common inputs and input services alleged to be wrongly availed in regard to bagasse and press mud was dropped by the original authority. It is thus established that the

appellant is eligible for refund of the credit that has been reversed by them during the period 1.4.2010 and 1.5.2013.

4. The learned counsel submitted that since the amount has been reversed by them by abundant caution and which is now held to be not payable, the limitation prescribed under sec. 11B of the Central Excise Act would not be applicable. The amount has to be considered as deposit.

5. The learned counsel relied upon the decision in the case of Triveni Engineering and Industries Ltd. reported in 2018 (363) ELT 331 (Tri. All.) and CCE Vs. Nasik SSK Ltd. reported in 2017 (358) ELT 664 (Tri. Mum.) and argued that very same issue was considered by the Tribunal in the above cases. It was held that limitation would not be applicable. He prayed that the appeal may be allowed.

6. The learned AR Shri M. Ambe supported the findings in the impugned order. He submitted that the refund claim was rejected as time-barred in terms of sec. 11B of the Central Excise Act. The Hon'ble Supreme Court in the case of CCE Vs. Doaba Cooperative Sugar Mills reported in 2002-TIOL-426-SC-CX has held that in making claims for refund the assessee is bound within four corners of the statute and the period of limitation prescribed in the Central Excise Act and the Rules framed thereunder must be adhered to. Hence the refund claim filed by the appellant comes under the purview of sec. 11B of the Central Excise Act and is hit by the limitation prescribed under such section. He submitted that

in Triveni Engineering and Industries Ltd. (supra), the Tribunal held that bagasse and press mud not are dutiable item and not manufactured item, the credit reversed under protest by the appellant therein is not hit by the limitation. In the present case, there is no evidence that the credit has been reversed under protest and therefore the limitation envisaged under sec. 11B would apply. The appellant has reversed the credit during the period from 1.4.2010 to 1.5.2013 and the refund claim has been filed only on 19.9.2014. This is beyond one year from the relevant date and therefore barred by limitation. He prayed that the appeal may be dismissed.

7. Heard both sides.

8. The issue is whether refund claim filed by the appellant dated 19.9.2014 is hit by limitation as envisaged under sec. 11B of the Central Excise Act.

9. On perusal of records, it is seen that the appellant has reversed the credit for the period 1.4.2010 to 1.5.2013 and refund claim has also been filed for this period. The department has calculated the period of one year from the date of reversal and taken the view that the refund claim is barred by limitation. It is to be noted that the appellant had reversed the credit and intimated the department by issuing letters on various dates. In the letter dated 3.5.2010, it is noted by the appellant as under:-

> *"Please note that the above reversal is being done without prejudice to our right to go for appeal in case of need".*

The letter is seen received by the department and the endorsement made by the Superintendent is as under:-

> *"Procedure prescribed under sub-rule (3A) of Rule 6 of the CENVAT Credit Rules, 2004 is to be followed in advance. Whereas in this case your unit seems to have followed the procedure as a measure of ratification, which does not appear to be in order. Receipt of this letter is acknowledged with the above observation".*

10. It can be seen from the above intimation that the appellant has noted that they dispute the payment or reversal of credit. It is not necessary that the exact words 'payment made under protest' has to be written by the assessee. Protest means disagreement. If a note is given along with the reversal of credit that they are paying the amount only by abundant caution and intend to proceed with litigation would necessarily mean that they are reversing the credit under protest. Further, in the present case a protest cannot be made on the invoice or bill of entry as is usually done. It is a case of making payment by reversal of credit in their CENVAT account. The only method by which the appellant could intimate or inform their protest is by issuing a letter to the department that they are paying the amount are disputing the payment made. The intimation given by assessee would show that they have made the payment under protest. It is also seen that, later a Show Cause Notice has been issued to the appellant demanding 5% / 6% payment in regard to the common input and input services used in the manufacture of bagasse and press mud alleging that these are byproducts. The demand raised in the

Show Cause Notice was higher than the amount reversed by the appellant; but included the amount reversed. The said demand was dropped by the department vide Order in Original dated 29.3.2017. In para 4 of the said Order in Original, the contention raised by the appellant that they have already paid some amount and the same has to be adjusted to the demand is noted by the adjudicating authority. The demand in the Show Cause Notice was over and above the credit that has already been reversed by the appellant. The original authority followed the decision of the Hon'ble Supreme Court in the case of DSCL Sugar Ltd. (supra) and held that these items namely bagasse and press mud being non-excisable products, the demand cannot sustain.

11. On such circumstances, the demand having been dropped by the department, the consequence would be that the appellant would be eligible for refund of the credit that has already been reversed. It clearly shows that the issue was under litigation which is indication of protest / disagreement. The factual matrix would be that the issue was in dispute and the appellant was disputing the amount alleged to be payable by them. The letters issued by the appellant every month intimating the reversal as well as reserving their right for litigation would show that the credit has been reversed under protest.

12. The learned counsel has relied upon the decision in the case of Triveni Engineering and Industries Ltd. (supra). The relevant paragraphs is as under:-

"3. In order to avoid, further litigation and to also avoid the liability of interest by way of abundant caution, the appellant started reversing Cenvat credit under Rule 6(3) of CCR, 2004 upon clearance of Bagasse/Press Mud since April, 2010. This reversal was being made by them under protest, which is evident as they were contesting the issue before the appellate authority and also filed periodical refunds to this effect of the deposit/reversal of duty under protest.

4. After being successful before this Tribunal, as referred to hereinabove. The appellant filed refund claim on 13-6-2013 for the period April, 2010 to August, 2012. Thereafter, a show cause notice dated 6-9-2013 was issued proposing to reject the claim on the ground of time-bar under Section 11B of the Central Excise Act. In reply to the SCN the appellant again reiterated that they had reversed the duty under protest and hence limitation of one year under Section 11B will not be applicable and further there is no prescribed limitation under Rule 6(3) of CCR, 2004. It is also urged that the CESTAT Order, as aforementioned was served to them on 11-7-2012 and from such date also the claim have been filed within the period of 12 months. However, the Assistant Commissioner rejected the refund application, observing that the protest by the appellant seized after final verdict of the Tribunal on the issue. Further, for the purpose of explanation (B) (ec) to the Section 11B(5) of the Act, for computation of one year from the relevant date under Section 11B(1) is provided that the limitation of one year from the date of judgment/discussion/order or direction of the appellate Tribunal/Court. Accordingly, he held that the refund application was hit by limitation. Being aggrieved, the appellant preferred appeal before Learned Commissioner (Appeals) who was pleased to uphold the findings of the Assistant Commissioner, rejecting the appeal.

5. Being aggrieved, the appellant-assessee preferred appeal before this Tribunal. The Learned Counsel urges that as it have been held by the Hon'ble Tribunal, as aforementioned in their own case and also subsequently by Hon'ble Supreme Court in the case of *Union of India* v. *DSCL Sugar Ltd.* - 2015 (322) E.L.T. 769 (S.C.) that Bagasse being only an agricultural waste and not being a result of any process, not covered in definition of manufacture under Section 2(f) of the Act and there being no Chapter note or Section note in the Central Excise Tariff declaration process in respect of Bagasse as amounting to manufacture. Thus, notwithstanding the amendment in 2008 in Section 2(d), creating a fiction of deemed marketability, Bagasse is not excisable, as it does not pass through the test of manufacture. Accordingly, whatever amount the appellant-assessee have paid by way of reversal is in the nature of revenue deposit and there is no limitation attracted for refund of such revenue deposit. The Learned Counsel also relies on the ruling of Hon'ble Allahabad High Court in the case of *CCE* v. *M/s. Kisan Sahakari Chini Mills Ltd.* reported at 2014 (302) E.L.T. 346 (All.) wherein also it has been held that Bagasse is not a manufacture item and hence not dutiable and does not attract Rule 6(3) of CCR, 2004. The Learned Counsel also states that under such facts and circumstances, the revenue should have *suo-motu* refunded the amount paid by them on clearance of Bagasse under the provisions of Rule 6(3) of CCR, 2004. Further, there is no question of any limitation being attracted. The Learned Counsel said that the courts below have erred in holding that limitation starts from the date of judgment in their appeal for earlier period, before the Tribunal being judgment dated 8-6-2012."

13. Similar issue was analyzed in the case of Nasik SSK Ltd. (supra), wherein the Tribunal observed as under:-

"4. I have carefully considered the submissions made by the learned AR and perused the records. I find that this is a case of refund of an amount

equal to 5%/6% paid/reversed by the respondents in terms of Rule 6(3) of Cenvat Credit Rules, 2004. There is no dispute that this amount does not represent excise duty. If this amount is not liable to be reversed, the same can be allowed as re-credit similarly in the manner as the Cenvat credit is allowed at the time of receipt of input/input service. Since the amount is not under the head of excise duty, the refund thereof does not fall under the term of Section 11B. Accordingly, limitation provided under Section 11B shall not be applicable in the present case where the respondent sought refund of an amount reversed in terms of Rule 6(3) of Cenvat Credit Rules. Therefore, the learned Commissioner in principal rightly held that the time limit is not applicable in the case of refund of amount paid in terms of Rule 6(3) of the Cenvat Credit Rules. However, an amount of Rs. 9,34,758/- plus interest of Rs. 3,25,000/- was confirmed as a demand in the adjudication process and the order-in-original was upheld by the Commissioner (Appeals) vide order-in-appeal dated 22-5-2015. The said order was not challenged by the respondent. Therefore, the demand of Rs. 9,34,758/- along with interest of Rs. 3,25,000/- attained finality. Even though the merit of the issue is in favour of the respondent but the said demand being not challenged, the amount was payable by the respondent. Accordingly, the amount of Rs. 9,34,758/- plus Rs. 3,25,000/- cannot be refunded to the respondent. For the remaining amount, the respondent is allowed to take re-credit in their Cenvat account. Accordingly, the impugned order stands modified to the above extent. The appeal is partly allowed in the above terms. Stay application is also disposed of."

14. From the discussions made above and following the decisions cited, I am of the view that the allegation that the refund claim is hit by time-bar cannot sustain and requires to be set aside which I hereby do.

15. The impugned order is set aside. The appeal is allowed with consequential relief, if any.

(Dictated and pronounced in open court)

(**SULEKHA BEEVI C.S.**)
Member (Judicial)

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