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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE

Office of the Principal Commissioner RA and
Ex-Officio Additional Secretary to the Government of India
8th Floor, World Trade Centre, Cuffe Parade,
Mumbai- 400 005

F.No.195/456/2016-RA /2159 **Date of Issue:** 12.04.2023

ORDER NO. 230/2023-CX(WZ)/ASRA/MUMBAI DATED 12.04.2023 OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Applicant : M/s Pepsico India Holdings Pvt Ltd.
L.U. Gadkari Marg,
Anik Village, Mahul, Mumbai 400 074

Respondent : Commissioner of Central Excise, Mumbai-II

Subject : Revision Application filed, under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. CD/234/M-II/2016 dated 22.03.2016 passed by the Commissioner of Central Excise (Appeals), Mumbai Zone-II.

ORDER

The Revision Application is filed by M/s. Pepsico India Holdings Pvt Ltd, L.U. Gadkari Marg, Anik Village, Mahul, Mumbai 400 074 (hereinafter referred to as "the Applicant") against from the Order-in-Appeal No. CD/234/M-II/2016 dated 22.03.2016 passed by the Commissioner of Central Excise (Appeals), Mumbai Zone-II.

2. The issue in brief is that the Applicant is engaged in the manufacture and clearance of 'synthetic mix preparation' and 'aerated waters' falling under Chapter 21 and 22 of the Central Excise Tariff Act, 1985. The Applicant, was availing cenvat credit on glass bottles/pet bottles/inputs for BIB's. The scrap of glass bottles/pet bottles/BIB arising during the manufacturing process has been cleared by the Applicant without assessing the central excise duty payable on such scrap before removal from the factory premises and without payment of central excise duty. As the Applicant had cleared the scrap of finished goods i,e breakages of glass bottles/pet bottles/BIB without payment of duty and preparation of invoices, show cause notice demanding duty amounting to Rs. 2,56,831/- for the period December 2013 to May 2014 was issued to the Applicant. Pursuant to following the process of law, the Original Adjudicating Authority vide Order-in-Original No. 31/DPS/ADJ/Pepsico/Ch-I/2015-16 dated 30.06.2016, confirmed the demand and ordered recovery of interest at appropriate rates and also imposed penalty of equal amount on the Applicant.

3. Aggrieved by the said Order-in-Original, the Applicant filed an appeal before the Commissioner of Central Excise (Appeals), Mumbai-II. The Appellate Authority, vide Order-in-Appeal No. CD/234/M-II/2016 dated 22.03.2016 upheld the impugned Order-in-Original.

4. Being aggrieved with the impugned Order-in-Appeal, the Applicant has filed this Revision Application under Section 35 EE of the Central Excise Act, 1944 before the Central Government on the following grounds:

4.1. That the impugned Order-in-Appeal being a non-speaking order has been passed in gross violation of principles of equity, fair play and natural justice and is liable to be set aside;

4.2. That the finding of the Commissioner (Appeals) in the impugned Order-in-Appeal that the remission application has been rejected by the adjudicating authority is factually incorrect as in the impugned Order-in-Appeal, the demand of duty on the bottled beverages lost due to breakages has been upheld on the ground that the remission applications filed by the Applicants have been rejected by the adjudicating authority, whereas the adjudicating authority has not passed any speaking order for rejection of remission applications filed under Rule 21 of Central Excise Rules, 2002 till date;

4.3. That bottled beverages lost due to breakages during the course of movements from the manufacturing area to bonded store rooms or during storage cannot be treated as removal from the plant/ bonded store room and therefore, bottled beverages lost due to breakages are covered under Rule 21 of Central Excise Rules, 2002.

4.4. That the AA has misinterpreted the provision of Rule 21 of Central Excise Rules, 2002 as Rule 21 does not provide that the remission application has to be filed before the removal of goods which have been lost or destroyed;

4.5. That the findings of the AA that the Applicants are required to reverse cenvat credit on the bottles under Rule 3(5B) was beyond the scope of Show Cause Notice as the Show Cause Notice did not propose to demand reversal of credit under Rule 3(5B). The Applicant has relied upon the following case laws is support of their contention

(i) CC vs. Toyo Engineering India Ltd [2006(201) E.L.T. 513(SC)]

(ii) CCE vs. Ballarpur Industries [2007(215) E.L.T. 489(SC)

4.6. That the finding in the impugned order has no relation with the present dispute as Rule 3(5B) of Cenvat Credit Rules, 2004 is applicable for inputs and capital goods only and does not deal with the finished goods. In the present case, the dispute pertains to demand of duty on bottled beverages (i.e. finished goods) lost due to breakages not the recovery of credit taken on the bottles and that the credit on inputs used in the manufacture of beverages lost due to breakage of bottles has already been reversed;

4.7. That the Show Cause Notice issued in the present case is premature as the Remission Application has not been adjudicated by the Assistant Commissioner and the SCN could not be issued without proper adjudication of the Remission Application. The Applicant has relied upon the following case laws in support of the contention:

(i) RBNS Sugar Mills Ltd vs. CCE [2004 (166) ELT 327 (T)]

(ii) U.P. State Sugar Corporation Ltd. vs. CCE – [1999 (107) ELT 674 (T)]

(iii) Colt International Ltd. vs. CCE- [2006 (204) ELT 309 (T)]

(iv) DSM Sugar Asmoli vs CCE, Meerut [2010 (253) E.T.T. 796 (Tri. - Del.)]

4.8. That with respect to the aerated water industry, the breakages of bottled beverages in the plant/ factory bonded store room are not liable to excise duty since there is no clearance removal of such goods from the plant/ factory as finished goods;

4.9. That the CBEC vide Circular No. ID/3/70-CX/8 dated 08.09.1971 had specifically provided that in respect of breakage of bottled beverages, due to handling in the course of movement from the manufacturing place to bonded warehouse and at the time of clearance etc., the breakage upto 0.5% is allowed and the same can be written off in the accounts;

4.10. That Circular No. 930/20/2010-CX dated 09.07.2010 clarifies that if the final product (bottled beverage) is broken / destroyed, then remission can be claimed under Rule 21 of the Central Excise Rules, 2002;

4.11. That the applications for remission of excise duty were filed in view of the clarification in Circular dated 09.07.2010 on the bottled beverages lost due to breakages and that the Applicants has already reversed the cenvat credit pertaining to inputs used in the bottled beverages lost due to breakages and thus there was no question of payment of excise duty on the bottled beverages lost due to breakages since the remission applications have been periodically filed and cenvat credit is duly reversed;

4.12. That there was no dispute regarding breakages of finished goods and reversal of cenvat credit availed in respect of those goods and thus when the substantial condition has been fulfilled by the Applicant, the remission of duty cannot be denied on account of procedural lapse. The following case laws have been relied upon

(i) CCE vs. GDN Garments-[2010 (258) ELT 41(Guj.)]

(ii) Ramala Schkari Chinni Mills Ltd. vs. CCE-[2007 (213) ELT 361 (T)]

(iii) Triveni Engg. & Industries Ltd. vs. CCE- [2009 (236) ELT 517 (T])

(iv) DSM Sugar vs. Comm.-[2008 (228) ELT 301 (T)]

4.13. that if the demand of duty on the bottled beverages lost due to breakages is upheld then the Applicants would be entitled to avail cenvat credit of the duty paid on the inputs used in the manufacture of bottled beverages;

(i) Mahavir Plastics Vs. CCE, Mumbai-2010 (255) ELT 241 (T).

4.14. That if remission of duty on such beverages is denied and demand of duty is confirmed, the credit amount is to be allowed and adjusted. Therefore, the Applicants submit that they should be given credit of duty paid on the inputs which has been reversed by them, in case the demand of duty is confirmed. Therefore, if demand of duty is confirmed then the Applicants will be liable to pay Rs. 1,93,004/- (i.e.. Rs.2,56,831/- - Rs. 63,827/-).

4.15. That the department while calculating the duty demand has also included the differential duty on BIB which is baseless and there is no justification to this addition, as the dispute is only relatable to the plant breakages and not the breakages occurring at warehouse depot;

4.16. That the Applicant has not contravened any of the provisions of the Act or Rules and hence, penalty is not imposable on them. The following case laws have been relied by the Applicant in support of their contention:

(i) Amrit Foods Vs. CCE - 2005 (190) ELT 433 (SC)

(ii) Oswal Knit India Limited Vs. CCE [2006 (204) ELT 510 (Tri-Del)]

4.17. That in cases where the original demand is not sustainable, interest cannot be levied.

Under the circumstances, the Applicant submitted that the demand itself is not sustainable and hence the question of recovering interest does not arise.

5. Personal hearing in the matter was scheduled for 15.06.2022, 29.06.2022, 19.07.2022, 26.07.2022, 13.09.2022 or 27.09.2022. Shri Shantanu Kumar, Advocate appeared online for the hearing on 27.09.2022, on behalf of the Applicant. He submitted that similar matter is pending for decision before CESTAT for jurisdiction decision. He requested to wait for two weeks. No further communication has been received from the Applicant till date.

6. The Applicant, at the time of personal hearing has given written submissions to further their contention. In the written submissions the Applicant has reiterated the grounds mentioned in the Revision Application and submitted further arguments which as under:

6.1. That the present issue stands decided in favour in various courts in the country wherein it has been held that no duty is payable on the breakage occurring during the manufacturing process. The Applicant has relied upon the following case laws in support of their contention:

(i) Pepsico India Holdings Pvt Ltd vs. CCE, Mumbai [2017(11)TMI284-CESTAT Mumbai]

(ii) Pepsico India Holdings Pvt Ltd vs. CCE, Meerut-II [2016(343) E.L.T 645(Tri-Del)]

(iii) Pepsico India Holdings Pvt Ltd vs. CCE, Kolkata-VII [2013(289) E.L.T (Tri-Kolkata)]

(iv) Pepsico India Holdings Pvt Ltd vs. CCE, Meerut-II [2010(261) E.L.T 567(Tri-Del)]

(v) Pepsico India Holdings Pvt Ltd vs. CCE, Kolkata-III [2009(245) E.L.T 167(Tri-Kolkata)]

(vi) Commissioner vs. Pepsico India Holdings Pvt Ltd [2013(287) E.L.T A129(Cal)

(vii) Varun Beverages Ltd vs CC Customs, GST and CEx, Jaipur [2022(2) TMI 731-CESTAT, New Delhi

(viii) Varun Beverages Ltd vs CCE and ST, Jaipur [2018(4) TMI 823-CESTAT, New Delhi

(ix) Bharat Coca Cola Bottling Beverages Pvt Ltd vs CC & CE, Kanpur [2007(4) TMI 110-CESTAT, New Delhi]

(x) HindustanCoca Cola Beverages Pvt Ltd vs. UOI [2013(296) E.L.T. 150(All)]

(xi) CCEx. Vs Kandhari Beverages P Ltd [2007(12)TMI 79-CESTAT, New Delhi]

(xii) Charminar Bottling Co (P) Ltd vs,CCEX Hyderabad [2001(134)E.L.T (Tri-Del)]

(xiii) Poona Bottling Co Ltd vs. CCEX. Pune-II [2001(134) E.L.T 445(Tri-Mum)

(xiv) CCEX, New Delhi vs Dhillon Kool Drinks & Beverages Ltd [2001(130) E.L.T. 475(Tri-Del) {Affirmed by the Hon'ble Supreme Court in Commissioner vs. Dhillon Kool Drinks & Beverages Ltd [2002(144) E.L.T. A210 (SC)}

6.2. That the present case relates to the demand of excise duty on bottled beverages lost due to breakages and not the demand of duty of duty on the scrap of bottles but the AA has mechanically confirmed the demand and hence is a non-speaking order

6.3. That the finding that the remission applications have been rejected by the Adjudicating Authority is factually incorrect as no speaking order has been passed for rejection of the remission application and there is no mention of the same in the OIO.

7. Government has carefully gone through the relevant case records available in the case file, oral & written submissions and perused the impugned Order-in-Original and Order-in-Appeal.

7.1. Government observes that the instant case is pursuant to the issue of show cause notice by the department for the recovery of duty from the Applicant as the Applicant had not assessed the correct Central Excise duty, before the removal of scrap of finished goods breakages (including glass bottles/pet bottles, BIBs) containing finished goods, from the factory premises during the period from December 2013 to May 2014.

8.1 Government observes that Section 35B of the Central Excise Act, 1944 deals with the appeals to the Appellate Tribunal against orders issued under Section 35 and 35A of the Central Excise Act, 1944 and at this juncture finds it pertinent to examine the relevant proviso to Section 35B of the Central Excise Act, 1944 and the same is reproduced below:-

> *"[5][**Provided** that no appeal shall lie to the Appellate Tribunal and the Appellate Tribunal shall not have jurisdiction to decide any appeal in respect of any order referred to in clause (b) if such order relates to, -*
>
> *(a) a case of loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory, or from one warehouse to another, or during the course of processing of the goods in a warehouse or in storage, whether in a factory or in a warehouse;*
>
> *(b) .....*
>
> *(c) .....*
>
> *[(d) ....."*

8.2. Further the Government finds that Section 5 of Central Excise Act 1944 provides enabling provisions for remission of Central Excise duty on Excisable goods which are found deficient in quantity or destroyed due to natural / unavoidable causes by making rules in this behalf. In exercise of powers conferred under Section 5 of the Central Excise Act, 1944, the Government has framed Rule 21 of the Central Excise Rules, 2002. Rule 21

of the Central Excise Rules, 2002 provides as follows:-

> ***"Remission of duty. -***
>
> *Where it is shown to the satisfaction of the Commissioner that goods have been lost or destroyed by natural causes or by unavoidable accident or are claimed by the manufacturer as unfit for consumption or for marketing, at any time before removal, he may remit the duty payable on such goods, subject to such conditions as may be imposed by him by order in writing :*
>
> ....."

8.3. Government observes that under Rule 21, a remission of duty is contemplated where it is shown to the satisfaction of the Competent Authority that goods have been lost or destroyed by (i) natural causes; or (ii) unavoidable accident; or (iii) are claimed by the manufacturer as being unfit for consumption or for marketing. The remission is to be granted subject to such conditions as may be imposed by the Competent Authority.

9. A plain reading of Section 35B of the Central Excise Act, 1944 indicates that the power for Revision of Orders of the Commissioner (Appeals) by the Central Government, as provided for by Section 35EE of the Central Excise Act, 1944, is limited to those matters which relate to *a case of loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory, or from one warehouse to another, or during the course of processing of the goods in a warehouse or in storage, whether in a factory or in a warehouse;*

10.1. Further, the Appellate Authority in the Order-in-Appeal has at Para 5.3.1 has stated as under

> *"Rule 21 makes it explicitly clear that duty can be remitted only when application is made in respect of the goods lost or destroyed by natural causes or by unavoidable accident or are claimed by the manufacturer as unfit for consumption or for marketing, at any time before removal. The remission application filed by the appellants for the period March 2013 to November 2013 has already been rejected and the adjudicating authority had elaborately discussed the issue in the impugned order. The duty on the written off bottles is in any case required to be paid/reversed under Rule 3(5B) of Cenvat Credit Rules, 2004. Accordingly, I find no reason for*

interference in the order of the adjudicating authority and therefore, on merits, the demand is upheld. In the circumstances of the case, the imposition of the penalty is also upheld."

10.2. In the instant case, the Appellate Authority has observed that the that the remission applications for the period December 2013 to May 2014 have been rejected by the Adjudicating Authority, The Applicant, in the Revision Application has claimed the same to be factually incorrect stating that the Adjudicating Authority has not passed any speaking order for rejection of the remission application filed under Rule 21 of the Central Excise Rules, 2002, till date.

10.3. Besides, as averred by the Applicant, cursory reading of the Order-in-Original suggests that unlike as claimed by the Appellate Authority, in the impugned order, the issue of remission has not even been mentioned, let alone discussed in the impugned Order-in-Original.

11. In the instant case, being a demand of duty for non payment of duty on scrap of glass bottles generated during the manufacturing process, it is essential to ascertain whether the issue pertains to remission of duty claimed by the Applicant. Government notes that there is an absence of any documentary evidence to that effect and the findings of the Appellate Authority and averment of the Applicant, as regards the status of the remission applications are diametrically opposite to each other. Further, the findings of the lower authorities being unclear whether the issue pertains to demand pursuant to rejection of application for remission of duty or is an issue of clearance of scrap by the Applicant without payment of duty, it is essential that a verification of the facts needs to be done by the lower authorities to address the issue of maintainability of the Revision Application.

12. In view of the above discussions, Government sets aside the Order-in-Appeal No. CD/234/M-II/2016 dated 22.03.2016 passed by the Commissioner of Central Excise (Appeals), Mumbai Zone-II and remands the

case back to the Original Adjudicating Authority for verification on the lines as discussed above and for arriving at conclusions based on the same.

13. The Revision Application is disposed in terms of the above.

Shrawan 12/4/23

(SHRAWAN KUMAR)
Principal Commissioner & Ex-Officio
Additional Secretary to Government of India

ORDER No.230/2023-CX(WZ)/ASRA/Mumbai DATED 12.04.2023

To,

M/s Pepsico India Holdings Pvt Ltd.
L.U. Gadkari Marg,
Anik Village, Mahul, Mumbai 400 074

Copy to:

1. The Commissioner, CGST, Navi Mumbai Commissionerate, 16th Floor Satra Plaza, Sector 19D, Palm Beach Road, Vashi, Navi Mumbai 400 705.
2. The Commissioner of CGST, Raigad Appeals, 5th Floor, C.G.O Complex, CBD Belapur, Navi Mumbai 400 614.
3. M/s Lakshmikumaran & Sridharan, Attorneys, 2nd Floor, B & C Wing, Cnergy IT Park, Appa Saheb Maratha Marg, Prabhadevi, Mumbai 400 025.
4. Sr. P.S. to AS (RA), Mumbai.
5. Notice Board.
6. Spare Copy.