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SPEED POST

F.No. 195/585/11-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING
6th FLOOR, BHIKAJI CAMA PLACE,
NEW DELHI-110 066

Date of Issue....5/6/13

Order No. 517 /13-cx dated 4-6-2013 of the Government of India, passed by Shri D. P. Singh, Joint Secretary to the Government of India, under section 35 EE of the Central Excise Act, 1944.

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| Subject | : | Revision Application filed, under section 35 EE of the Central Excise, 1944 against the Order-in-Appeal No.09/2011 (G)-CE Try-II dated 11.05.2011 passed by Commissioner of Central Excise,(Appeals), Chennai. |
| Applicant | : | M/s. Pearl Beverages Ltd., Guntur. |
| Respondent | : | Commissioner of Central Excise, Chennai. |

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## ORDER

This revision application is filed by the M/s. Pearl Beverages Ltd., Guntur against the Orders-in-Appeal No. 09/2011 (G)-CE Try-II dated 11.05.2011 passed by Commissioner of Central Excise (Appeal), Chennai with respect to Order-in-Original passed by the Deputy Commissioner, Central Excise, Chennai.

2. Brief facts of the case are that the applicants are the manufacturers of aerated waters. The applicants were issued Show Cause Notice on the ground that during course of audit, the audit party observed that the applicant has not paid proportionate cenvat credit on breakages of Glass bottles after RG-I stage at stores and the applicant was showing breakages of glass bottles in RG-I register and ER-I returns. subsequently, the original authority passed impugned Order-in-Original confirming demand of duty with interest and also imposed penalty of amount equal to duty i.e. of Rs. 37,600/-.

3. Being aggrieved by the said order-in-original, applicant filed appeal before Commissioner (Appeals), who vide impugned order-in-appeal upheld the order of confirmation of demand of duty but reduced the quantum penalty from Rs.37,650/- to Rs.33,232/-.

4. Being aggrieved by the impugned Order-in-Appeal, the applicant has filed this revision application under section 35 EE of Central Excise Act, 1944 before Central Government on the following grounds:

4.1 The breakage of glass bottles/pet bottles of aerated waters were being shown in RG-I Register and ER-I monthly returns. Because prior to this audit, the parties of Central Excise Department and Accountant General had conducted audit of the unit at different period of times from May, 2004 to Sep, 2009. However, none of the audit parties pointed out earlier to pay Central Excise duty on breakage of glass bottles/pet bottles when all the relevant records for the period were made available and shown to them.

4.2 Commissioner (Appeals) has failed to appreciate submission without giving any reason for not accepting the same that when the accounts of the unit had been audited by the said audit parties, there is no suppression as held in the following orders:

i) 2010 (249) ELT-38 (Tri-Del)-CCE Meerut-I Vs. Fabrico India Ltd.
ii) 2009 (242) ELT-45 (Tri.-Mumabi)- Hindustan Coca Cola Beverages P. Ltd Vs. CCE-Thane-I.

4.3 There is breakage of glass/pet bottles during manufacturing/handling/storage of aerated water is very well within the knowledge of the department. This is long established practice, demand should not have be issued beyond one year.

4.4 The department has not established form the facts that the applicant made any wilful suppression, mis-statements from or any collusion with intent to evade duty, extended period is not applicable in this case. Since there is no such ingredients with intent to evade duty, the equal penalty under section 11AC of Central Excise Act, 1944 and Rule 15 (1) and (2) of cenvat credit Rules, 2004 is not imposable as well established by the law. This has been pronounced by the Hon'ble Supreme Court in the case of M/s. Rainbow Industries Vs. CCE-1994 (74) ELT-3 (SC). Same view has been followed in Tamil Nadu Housing Board Vs. CCE-1995 (74) ELT-9(SC). In this case it was held that the powers to extend period form one year to 5 years are exceptional powers and have to be construed strictly. It was held that both fraud, collusion etc. and intention to evade duty must concern.

4.5 In a similar type of case, the Government of India, in a revision application filed by M/s. Hindustan Coca Cola Beverages P. Ltd., A.P, has allowed the applicant's appeal vide order No. 197-199/09-Cx dt. 27-07-2009, issued under F.No. 195/52-53-54/07/RA-Cx.

5. Personal hearing was scheduled in this case on 14-12-2012. Applicant vide letters dated 6.12.12 requested for adjournment of hearing and further prayed to fix hearing after 10.1.13. Accordingly second hearing was fixed on 22.2.13. But applicant again vide letter dated 15.2.13 made a request for adjournment of hearing. Since no reason is given while seeking adjournment of hearing, Government do not find any justification for fixing another hearing. As such case is taken up for decision on the basis of available case records. Nobody attended hearing on behalf of department also.

6. Government has carefully gone through the relevant case records and perused the impugned Order-in-Original and Order-in-Appeal.

7. In this case applicant company did not reverse proportionate cenvat credit on breakages of glass bottles and therefore the original authority confirmed the demand of duty and also imposed penalty of amount equal to duty demanded. Commissioner (Appeals) modified the impugned order-in-original to the extent that he upheld confirmation of demand of duty, however, reduced the quantum of penalty to Rs.33,232/- from Rs.37,650/-. Now, the applicant has filed this revision application on grounds mentioned in para (4) above.

8. The applicant has contended that they have duly shown the breakage of glass bottles/pet bottles of aerated water in their RG-I register and ER-I monthly returns; that various audit parties of Central Excise department conducted audit at different period from May 2004 to September 2009, but no audit party point out reversal of cenvat credit involved in such breakage bottles and hence, the extended period of five years cannot be involved, as there is no allegation of fraud, collusion, suppression of facts or misdeclaration.

8.1 Government observes that the original authority has confirmed the demand of duty by invoking extended period in terms of provision of Section 11A (1) of Central Excise Act 1944. The said Section 11A (1) reads as under:

*"11A(1) Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, for any reason, other than the reason of fraud or collusion or any wilful misstatement or suppression of facts or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty,—*

*(a) the Central Excise Officer shall, within one year from the relevant date, serve notice on the person chargeable with the duty which has not been so levied or paid or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice;*

*(b) the person chargeable with duty may, before service of notice under clause (a), pay on the basis of,—*

*(i) his own ascertainment of such duty; or*

*(ii) duty ascertained by the Central Excise Officer, the amount of duty along with interest payable thereon under section 11AA."*

8.2 From perusal of above provision, it is clear that the extended period can be invoked only for reason of collusion, fraud, mis-statement or suppression of fact with an intention to evade duty. In this case the applicant has undisputedly declared/mentioned breakage of bottles in their RG-I register and ER-I monthly returns. They further stated that many audit parties of Central Excise department conducted audit from 2004 to 2009 of their record and nobody pointed out any evasion by way of non-reversal of cenvat credit as alleged by the department in this case. Under such circumstances, Government finds that when the breakage of bottle by applicant has been declared in their excise record and their verification by such records by various excise audit teams is undisputed, there can be no reason to allege collusion, fraud, mis-declaration or suppression of fact by the applicant. Hence, given the fact and circumstances of this specific case, extended period of five years in terms of Section 11A(1) cannot be invoked. As such, any action of recovery of duty beyond one year and imposition of penalty by invoking extended period

suffers from legal infirmity and hence, cannot survive. Department had issued two show cause notices dated 24.11.09 and 5.3.10 for recovery of cenvat credit availed during the period November 04 to March 09 and April 09 to January 2010. As such demand raised within one year of relevant date is liable to be confirmed. In order to re-quantify the demand and penalty case is required to be remanded back to original authority.

8.3 Regarding the issue of reversal of cenvat credit involved on breakages of glass bottles original authority has observed as under:

"On a thorough examination of the issue and the contentions put forth by the assessee, I observe that the argument of the assessee is that Cenvat Credit is available even on inputs or raw material that were damaged or broken though they have not served the purpose for which they were meant is not correct in law. The intention of assessee that just bringing the inputs into the factory they are eligible to avail Cenvat Credit is a wrong notion and the input should be properly utilized in the dutiable goods that were manufactured end cleared. The assessee has taken credit on the entire goods i.e., bottles/pet bottles but reluctant to reverse the credit on the broken or damaged bottles which are not served the purpose ultimately. The tolerance limit of 0.5 % as claimed by the assessee or in other words the benefit of duty exemption in respect of glass/pet bottles as per Board's instructions vide F.No. 1D/3/70-CX.8, as amended vide letter F.No. 261/1D/1/75-CX.9, dated 17-09-1975 were further clarified in CBEC's Circular No. *930/20/2010-CX*, dated 09-07-2010 as follows:

> *"The instructions mentioned above (i.e., Boards circular referred above) were issued primarily In the context of use of glass bottles. At the relevant time, the scheme of Modvat/CENVAT credit was not available to the assessee and therefore, there was no issue of reversal of credit taken on bottles, which were subsequently broken/destroyed. After the introduction of MODVAT and subsequent placement of the same with CENVAT, any circular, instruction or provision inconsistent with the same has no relevance. As per the provisions of Rule 21 of Central Excise Rules, 2002, remission of duty before removal can be claimed on any goods lost or destroyed by natural causes or unavoidable accident claimed by manufacturer to be unfit for consumption or marketing. The said remission is granted subject to the condition of reversal of cenvat credit taken on inputs used in the final product, as per the Circular No.*

*800/33/2004-CX dated 01-10-2004 {2004* (172) *E.L.T. T23}. Rule* 3 *(5C) was also inserted in CENVAT Credit Rules 2004, w.e.f 07-09-2007, to specifically provide for the same. Further; as per Rule* 3 (5B) *of CENVAT Credit Rules, 2004, if the value of any input is written off, the cenvat availed on the same is required to be reversed. Therefore, if the final product (i.e. bottled beverage) is broken/destroyed then remission can be claimed and if the bottle (input) is written off by the assessee as destroyed, the same is required to be dealt with as per the provisions of Rule* 3 (5B) *of CENVAT Credit Rules, 2004."*

In view of the above Board's Circular which clarifies the situation it is clear that Cenvat credit on glass bottles that are damaged or broken is not admissible. Even remission of duty before removal on goods lost or destroyed by natural causes or unavoidable accident if claimed by the assessee they have to reverse the Cenvat credit taken on inputs used in the said goods as per the Circular No.800/33/2004-Cx dated 01-10-2004. In view of the above instructions of Government, the assessee is not entitled to avail the credit on broken or damaged glass bottles /pet bottles at whatever stage they lie in the factory. Hence I am not considering the case laws referred by the assessee in support of their claim. The order in appeal on the revision application of M/s. Hindustan Coca-Cola Beverages (P) Ltd., cited by the asssessee is also not considerable after the issue of Board's Circular No. 930/20/2010-CX dated 09-07-2010."

8.4 Government notes the CBEC circular dated 9.7.10 has clearly stipulated that cenvat credit availed on inputs is required to be reversed as per Circular No.800/33/04-Cx dated 1.10.94. Further rule 3 (5)(c) was also inserted in Cenvat Credit Rules 2004 w.e.f. 7.9.07 to specifically provide for such reversal of cenvat credit availed on input used in the final product. In GOI Revision Order No.197-199/09-Cx dated 27.7.09 cited by applicant, the above said CBEC circular was not considered and therefore the said order cannot be made applicable now. Further, in another GOI Revision Order No.881/12-Cx dated 8.8.2012 in the case of Hindustan Coca Cola Beverages Pvt. Ltd., Government after considering the above said CBEC circular dated 9.7.10 has held that cenvat credit availed in inputs is required to be reversed. As such, Government do not find any infirmity in the above said findings of the adjudicating authority which are upheld by appellate authority also.

9. In view of above discussions, Government remands the case back to original authority for re-quantifying the demand of cenvat credit involved on breakages of glass bottles which is recoverable within one year from the relevant date as discussed above and for imposing proportionate penalty by taking into account the above observations. A reasonable opportunity of hearing will be afforded to the party.

10. Revision application is disposed off in terms of above.

11. So, ordered.

(D.P. Singh)
Joint Secretary (Revision Application)

M/s. Pearl Beverages Ltd.,
302/325, Nadimpalem,
Guntur-522019.

Attested
4/6

(भागवत शर्मा/Bhagwat Sharma)
सहायक आयुक्त/Assistant Commissioner
C.B.E.C.-O.S.D. (Revision Application)
वित्त मंत्रालय (राजस्व विभाग)
Ministry of Finance (Deptt. of Rev.)
भारत सरकार/Govt. of India
नई दिल्ली/New Delhi

Order No. 517 /13-Cx dated 04.06.2013

Copy to:

1. The Commissioner of Central Excise, Commissionerate, Chennai-I, Mahatma Ghandhi Road, Nungambakkam, Chennai-600034.
2. The Commissioner of Central Excise (Appeals), C.R.Building, Kannavarithota, Guntur-522004.
3. The Deputy Commissioner of Central Excise, Guntur Division, Guntur.
4. PS to JS (RA)
5. Guard File.
6. Spare Copy

ATTESTED

(B.P.Sharma)
OSD (Revision Application)