CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
38,MG Marg Civil Lines,Old Red Building,Allahabad-211001
Regional Branch, Allahabad

Dated: 14/09/2016

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/70808-70809/2016-EX[DB] dated 09/06/2016

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 35-C(1) of the Central Excise and Salt Act, 1944.

Asstt. Registrar

Application	Appeal	Name and Address of Appellant
1	E/2040/2007	**NESTLE INDIA LIMITED** M-5A, CONNAUGHT CIRCUS, NEW DELHI
2	E/2041/2007	**PAAM EATABLES LTD.** VILLAGE GULISTANPUR NOIDA, DADRI ROAD, P.O. SURAJPUR, GAUTAM BUDH NAGAR

Name and Address of Respondent

3 -C.C.E. NOIDA
C-56/42, Sector-62, Noida-201307

Other Appellants and Respondents as per Annexure

Copy To

4 Advocate(s) / Consultant(s): SH V.L.KUMARAN,ADV
5, JANGPURA EXTENSION
LINK ROAD, NEW DELHI

5 Bar Association, CESTAT, Allahabad

6 Director Publications, Customs, Excise. I.P. Estate, Delhi
7 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3
8 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17
9 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005
10 Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Satellite Road, Ahmedabad-15
11 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)
12 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070
13 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad - 38
14 The ICFAI society, 52, Nagarjuna Hill,Punjagutta Hyderabad.-500082
15 M/S Knowledge Processing Pvt. ltd.(taxmanagementindia.com),FF-19,1st Floor,Cross River Mall,CBD Ground,Near Karkardooma Court,Delhi-110032
16 C.D.R. 17 Office Copy 18 Guard File

Asstt. Registrar

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH : ALLAHABAD
COURT No. I

APPEAL No.E/2040 & 2041/07-EX(DB)

(Arising out of Order-in-Appeal No. 37-38/CE/APPL/NOIDA/07 dated 30/03/2007 passed by Commissioner of Central Excise & Customs (Appeals), Noida)

For approval and signature:

Hon'ble Mr. Anil Choudhary, Member (Judicial)
and
Hon'ble Mr. Anil G. Shakkarwar, Member (Technical)

1.	Whether Press Reporter may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	No
2.	Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	Yes
3.	Whether their Lordships wish to see the fair copy of the order?	Seen
4.	Whether order is to be circulated to the Department Authorities?	Yes

M/s Nestle India Ltd
M/s Paam Eatables Ltd. **Appellants**

Vs.

Commissioner of Central Excise, Noida **Respondent**

Appearance:

Shri Atul Gupta, Advocate for Appellants
Shri V.R. Reddy, Assistant Commissioner (AR), for Respondent

CORAM:

Hon'ble Mr. Anil Choudhary, Member (Judicial)
Hon'ble Mr. Anil G. Shakkarwar, Member (Technical)

Date of Hearing : 09/06/2016
Date of Decision : 09/06/2016

FINAL ORDER NO.70808-70809/2016

Per: Anil Choudhary

The present appeals are filed by appellants M/s Nestle India Ltd & M/s Paam Eatables Ltd (PEL) against the common Order-in-Appeal No. 37-38/CE/APPL/NOIDA/07 dated 30/03/2007 passed by Commissioner of Central Excise & Customs (Appeals), Noida.

2. The issue in this appeal is whether the appellant Paam Eatables Ltd (PEL for short) a manufacturer of Maggi 2 minute Noodles etc on job work basis, and cleared on payment of duty, whether are liable to reverse input credit under Rule 57CC of Central Excise Rules, 1944 read with rule 6 (1) of the CENVAT Credit Rules, 2004, for removal of broken noodles (waste product) exempt under Notification No. 3/2005-CE.

3. The brief facts of the case are that the appellant Paam Eatables Ltd is a manufacturer of noodles and also manufactures noodles for Nestle India Ltd on job work basis in respect of Maggi 2 Minute Noodles, cleared on payment of appropriate duty. The appellant-PEL has taken CENVAT credit of the duty paid on the inputs used in or in relation to the manufacture of such noodles. They were paying Excise Duty on the removable of Noodles packed in unit packings/containers, effected to Nestle. During the inspection by the Range officers in December, 2005 it was noticed that certain quantities of broken Noodles which

was rejected by quality controller, in the factory of PEL, has no record of its production and clearance in Rule-I. On enquiry, it was informed that the item of production broken Noodles fall under sub heading No. 19024090 of CET and are exempted from excise duty under Notification No. 3/2005-CE (entry number 6). It appeared to revenue that no separate account was maintained by job worker PEL in respect of inputs going into manufacturer of dutiable goods and the inputs going into generation waste (broken noodles)/exempted goods. As such, PEL was therefore, directed to pay 8%/10% of the price of exempted goods under Rules 57CC of erstwhile CER, 1944/ Rule 6 (3b) of CENVAT Credit Rules 2002/2004. Accordingly S.C. notice was issued for demand of Rs.1,39,568/- for broken noodles cleared during the period 2001-02 to 2005-06 with proposal to impose penalty. Further, Nestle India Ltd was also issued show cause notice as to why not penalty to be imposed, as they appears to have colluded with PEL. The appellant contested the show cause notice stating that they cleared actually waste, scrap and by-product, are rejected Noodles, which are waste product to the manufacturer PEL and as such under the provisions of rule 57CC of the CER, 1944 they are not required to reverse the CENVAT credit. SCN was adjudicated vide O-I-O dated 29.09.06 confirming the said demand of Rs.1,39,568/- on PEL and further penalty was imposed on them under Rule 173Q of CER, 1944 read with Rule 25 of CCR, 2002 under section 11AC, along with interest.

AU

4. Further, penalty of equal amount was imposed on other appellant-Nestle India Ltd under Rule 209A read with Rule 26 of CER, 1944. Being aggrieved the appellant preferred appeal before the Commissioner (Appeals) who passed the impugned order and rejected the appeals. Observing that waste product is exempted goods and accordingly Rule 57 CC of CER, 1944/Rule 6 of CCR, 2002/2004 will be applicable.

5. Being aggrieved appellant is before this Tribunal. The Learned Counsel Mr. Atul Gupta for the appellant has demonstrated before us a few sample bills of clearing the waste product under question, where it is mentioned in the description "floor sweeping for Cattle feed". We further contended that both floor sweeping as well as broken Noodles are rejects and waste, and as such no demand could be made as provided in the provisions of Rule 57D of CER, 1944. He, further relies on the ruling of Hon'ble Bombay High Court in the case of Rallis India Ltd Vs Union of India 2009 (233) E.L.T.301(Bom.). This appeal was against the larger bench order of this Tribunal reported at 2007(208) E.L.T.25 (Del-LB). The issue before the larger Bench was "whether 8% of the amount as per earstwhile Rule 57CC of CER 1944 (now Rule 6 of CCR, 2002) is required to be discharged, before removal of product, as such products are exempted from whole of duty, therein in light of conflicting views. It was held as follows:-

"13. The appellants reference to the provisions of Rule 57D in support of their contention that modvat credit is not to be denied if a part of the same is contained in the by-product, is indicative of the legislative intent that reversal of 8% amount of the value of the by-product in terms of provisions of Rule 57CC will not apply. We find that the expression "by-product" occurring in Rule 57D has to be examined and interpreted in the context of the said rule, which uses the other expression "waste" or "refuse" etc. It is in that scenario that the rule provides for non-reversal of modvat credit, even if waste, refuse or by product has emerged during the course of manufacture. The effect of the said rule would be that if waste product, which may not be excisable, e.g. floor sweepings during the course of manufacture of biscuits, then the quantum of credit originally taken is not to be varied. Similarly, if iron and steel scrap arises during manufacture of iron products, the modvat is not to be varied, but iron and scrap being excisable product, has to discharge duty burden. If the same is exempted, provisions of Rule 57CC will apply. As such, it has to be concluded that Rule 57D refers to waste, scrap and by-product, which are not excisable at all. The said provision can't be pressed into service in support of the plea that even if the by-product is excisable, but exempted, amount of 8% is not required to be paid. The appellant is not being directed to reverse the credit amount equivalent to the inputs contained in the said exempted final products. Further, taking an hypothetical example of electrolysis of water, which an assessee may undertake to obtain Oxygen, can he take the plea that hydrogen which also emerges during such electrolysis was an unintended product and even if the same is being sold as exempted product, the same should be treated as by-product and Rule 57CC would not apply? The answer to above question is a clear 'No'.

14. The issue in the instant case is not relatable to reversal of the credit originally taken by the appellant on the ground of emergence of any by-product. The issue before us is a straight and simple interpretation of Rule 57CC, which as already held does not make any distinction between exempt final product or exempt by product. As along as the excisable product cleared from the assessees factory enjoys exemption or attracts nil rate of duty, provisions of Rule 57CC will come into play. The straight answer to the above question lies in the literal interpretation of the language employed in the said Rule without straining to find out the legislative intent, especially when the language used is unambiguous. As already observed, the provisions of Rule 57CC or Rule 6 envisage common use of inputs in two final products i.e. one dutiable and other exempted, for the applicability of the same. As such, we are of the view that as long as two final products emerging out of use of common inputs are excisable and one of them is exempted, the provisions of Rule 57CC will apply. The exempted final product may be intended manufacture or unintended by-product. As such, we agree with the view expressed in *Binani Zinc Ltd.* [2005 (187) E.L.T. 390 (Tri.)]. Reference is answered in above terms. File is sent back to the regular bench for disposal of appeal."

The Hon'ble High Court taking notice of the provisions observed that the Larger Bench of this Tribunal has held that Rule 57D referred waste, scrap and by product, which is not excisable at all. Larger bench has referred to instances of floor sweeping arising during manufacture and hydrogen arising as a by-product in the manufacture oxygen by the process of electrolysis of water. Further, held that finding of Tribunal-LB are not acceptable, what Rule 57 D provides is that modvated/common inputs is used in the manufacture of dutiable product and waste, scrap and by-product arising in that process then even if the madvated inputs are contained in waste or by-products and even if not liable to Excise duty, the manufacturer would not be denied full credit of duty paid on inputs used in the manufacture of dutiable final products. Further observed that Rule 57 CC applies only if the madvated inputs are used in the manufacture of both dutiable final product and exempted final product, and the manufacturer has not maintained separate accounts, so as to ascertain the quantity of inputs used in the manufacture of exempted final products. Accordingly allowing the appeal Rallis India Ltd it was held that on clearance of waste, scrap and by-product arising on the manufacture will be covered by Rule 57 D and no amount of Central Excise is to be reversed. It was further pointed out by Ld. Counsel that ruling in the case of Rallies India Ltd have been affirmed by Hon'ble Supreme Court in the case of Hindustan Zinc Ltd Vs Union of India 2014 (303) E.L.T. 321 (S.C.).

6. Learned A.R. for revenue relies upon the impugned order.

7. Having considered the rival submissions, we are of the view that the appellant is not required to reverse CENVAT credit on clearance of waste (floor sweeping and rejected Noodles). We further observe that in the ruling of the Hon'ble Supreme Court in the case of DSCL Sugar and others, it is held that the provisions of Rule 6 (3) of CCR, 2004, will not be attracted in the case of clearance of waste and by-product arising on the manufacturer of taxable final product. Under the facts & circumstances we also hold that the extended period of

Ar

limitation is not attracted in this case. Accordingly, we allow the appeals with consequential benefits. The impugned orders are set aside.

(Dictated in Court)

-Sd/-
(ANIL G. SHAKKARWAR)
MEMBER (TECHNICAL)

-Sd/-
(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

akp

प्रमाणित प्रति / Certified True Copy
14.10
सहायक पंजीकार / Asstt. Registrar
सीमाशुल्क, उत्पादशुल्क एवं सेवा कर
अपील अधिकरण / (C.E.S.T.A.T.)
38, एम. जी. मार्ग, इलाहाबाद-211001
38, M. G. MARG, ALLAHABAD-211001