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

Excise Appeal No.41660 of 2013

(Arising out of Order in Original No. 16/2013 (C) dated 22.4.2013 passed by the Commissioner of Central Excise, Puducherry)

M/s. Pepsico India Holdings Ltd. **Appellant**
Mamandur
Maduranthakam Taluk

Vs.

Commissioner of GST & Central Excise **Respondent**
No. 1, Goubert Avenue
Puducherry – 605 001.

APPEARANCE:

Shri Raghavan Ramabhadran, Advocate for the Appellant
Shri M. Ambe, DC (AR) for the Respondent

CORAM

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri M. Ajit Kumar, Member (Technical)

Final Order No. 40527/2023

Date of Hearing : 26.06.2023
Date of Decision: 28.06.2023

Per M. Ajit Kumar,

This is an appeal filed by M/s. Pepsico India Holding Pvt. Ltd. against Order in Original No. 16/2013 (C) dated 22.4.2013 passed by the Commissioner of Central Excise, Puducherry.

2. Brief facts of the case are that during the course of verification of records of the appellant, it was noticed that they have cleared 'fruit pulp or fruit juice based drinks' on payment of effective rate of duty of 1% by availing exemption under Notification No. 1/2011-CE dated 1.3.2011 vide sl. No. 24. As per the said Notification, the effective rate of duty of 1% is applicable only when no CENVAT credit on inputs or input services are availed. Whereas the appellant has availed CENVAT credit on the inputs i.e. sugar and input services viz manpower supply

agency services and other common services. Inasmuch as the appellant had availed credit on the inputs and input services, it appeared that the benefit of effective rate of duty of 1% was not available to them and they should have paid duty at the effective rate of 5% as per Sl. No. 11 of Notification No. 2/2011-CE dated 1.3.2011 under Chapter Sub Heading 2202 9020. Based on the above facts, two Show Cause Notices dated 23.3.2012 for the period from March 2011 to January 2012 and Show Cause Notice dated 20.2.2013 for the period from February 2012 to March 12 was issued proposing to deny the concessional rate availed by the appellant. After following the due process of law, the learned Commissioner has confirmed the demand of Rs.1,01,62,250/- (Rs 89,59,982/- + 12,02,268/-) along with interest. He also imposed penalty. Aggrieved by the said order, the appellant is before us in appeal.

3. No cross-objections have been filed by the Revenue.

4. We have heard Shri Raghavan Ramabhadran, learned counsel for the appellant and Shri M. Ambe, learned AR for the Revenue.

5. The learned counsel Shri Raghavan Ramabhadran has stated that after the issue of Notification No. 1/2011-CE dated 1.3.2011, they had opted to pay central excise duty on 'fruit pulp or fruit juice based drinks' at 1%. Since they had simultaneously availed CENVAT credit, they had themselves reversed the same to the tune of Rs.42,00,866/- for the period March 2011 to March 2012. Since the above reversal of the credit for the period March 2011 to October 2011 was carried out belatedly, interest @ 18% to the tune of Rs.3,23,674/- was also remitted by them on 21.11.2013. They had hence complied with the notification conditions on their own and were hence eligible for the

concessional rate of duty of 1%. From April 2012 onwards they have stopped availing the concessional rate under Notification No. 1/2011-CE. He has referred to para 10.2 of the impugned order and stated that the learned Commissioner had noted that they had reversed the amount of Rs.42,00,866/-, however, he found that the said reversal does not make them eligible for availment of exemption since they have not reversed the credit in respect of few CENVAT credit inputs such as ‘’plastic crates’ and ‘Brite wash HD plus’ and that the appellant further continued to avail credit on common inputs till March 2012. He stated that the ‘verification report’ of the Range Officer dated 15.4.2013 mentioned at para 10.2 of the impugned order had not been supplied to them. They have however obtained it subsequently and the copy of the same was also produced during the hearing. In the report at para 2, it is seen that the Range Officer has acknowledged the reversal of credit of Rs.42,00,866/-, but states that on perusal of the CENVAT credit statements, submitted to the department, it was observed by him that the unit is still availing CENVAT credit during the months from November 2012 to March 2013. The learned counsel stated that the verification report was in their favour inasmuch as the CENVAT credit shown to have been taken by them was only for the period beyond that covered in the Show Cause Notices when they were discharging duty at the higher rate. He has referred to the Tribunal judgment in the case of Jai Beverage Pvt. Ltd. Vs. CCE, Jammu and Kashmir reported in 2019 (369) ELT 768 (Tri. Chan.) and stated that in an identical matter, the tribunal had found them eligible for availing the exemption notification as they had reversed the CENVAT credit attributable to the exempted goods. He further drew our attention to

the judgment of the Hon'ble Supreme Court in the case of Chandrapur Magnets Pvt. Ltd. Vs. Commissioner of Central Excise reported in 1996 (81) ELT 3 (SC) and stated that exemption is permissible when the MODVAT credit taken on the final product has been reversed. He further stated that since there was no *mens rea* and the matter had all along been informed to the department and themselves have reversed the credit, no penalty could have been imposed. He referred to the following judgments:-

(i) Union of India Vs. Rajasthan Spinning and Weaving Mills Ltd. – 2009 (238) ELT 3 (SC)

(ii) CCE, Chandigarh Vs. Pepsi Foods Ltd. – 2010 (260) ELT 481 (SC)

(iii) Continental Foundation Joint Venture Vs. CCE – 2007 (216) ELT 177 (SC)

(iv) Amrit Foods Vs. Commissioner of Central Excise – 2005 (190) ELT 433 (SC)

6. Shri M. Ambe, learned AR has reiterated the points in the impugned order.

7. We have gone through the facts of the case and we find that this is a case in which the appellant had opted for benefit of exemption under Notification No. 1/2011-CE dated 1.3.2011 to discharge duty at 1%. We find that, in the year 2011, vide Union Budget, the earlier exemption granted to 'fruit pulp or fruit juice-based drinks' was withdrawn and the said goods were subject to duty at the following concessional rates exercisable at the option of the assessee.

(a) @1% vide Notification No. 01/2011-CE dated 1.3.2011 subject to condition that no CENVAT credit was taken on the inputs / input services used to manufacture the said goods.

(b) @5% vide Notification No. 02/2011-CE dated 1.3.2011 with no restriction as to availment of CENVAT credit on inputs or input services.

8. Although the appellant had opted to pay duty on fruit pulp or fruit juice based drinks at 1% under Notification No. 1/2011-CE, they had initially availed CENVAT credit. However, they have on their own reversed Rs.42,00,866/- being the proportionate CENVAT credit availed on the inputs and input services on dutiable aerated waters and beverages and exempted fruit pulp or fruit juice based drinks. This has been confirmed in the Range Officers verification report dated 15/04/2013. They have also discharged interest on the same. We find that as per the decision of the Hon'ble Supreme Court in **Chandrapur Magnets Pvt. Ltd. Vs. Commissioner of Central Excise** reported in 1996 (81) ELT 3 (SC), once the appellant has reversed the ineligible credit, the claim for exemption of duty on the disputed goods cannot be denied and they are hence eligible to discharge duty at 1% as per Notification 1/2011-CE. Para 9 of the said judgment is extracted below.

> "9. In view of the aforesaid clarification by the Department, we see no reason why the assessee cannot make a debit entry in the credit account before removal of the exempted final product. If this debit entry is permissible to be made, credit entry for the duties paid on the inputs utilised in manufacture of the final exempted product will stand deleted in the accounts of the assessee. In such a situation, it cannot be said that the assessee has taken credit for the duty paid on the inputs utilised in the manufacture of the final exempted product under Rule 57A. In other words, the claim for exemption of duty on the disputed goods cannot be denied on the plea that the assessee has taken credit of the duty paid on the inputs used in manufacture of these goods."

In an identical matter, the issue has been decided by the Hon'ble Tribunal at Chandigarh in **Jai Beverage Pvt. Ltd. Vs. CCE, Jammu and Kashmir** reported in 2019 (369) ELT 768 (Tri. Chan.). The relevant portion of the judgment is reproduced below:-

> "6. We find that in terms of Rule 6(3)(b) of Cenvat Credit Rules, 2004, the appellant was required to maintain separate account of inputs and input used for dutiable as well as exempted goods in the product, if, same is not maintained, then appellant is required to pay an amount equal to 5%/6% of the value of exempted goods. During

> the period involved in the show cause notice, there was the dispute going on whether the appellant is manufacturing dutiable as well as exempted goods, in that circumstances, the *mala fide* cannot be attributed against the appellant. In these circumstances, as the appellant has already reversed the Cenvat credit attributable to the exempted goods on inputs used in manufacturing of 'SLICE' during the intervening period. In that circumstances, the same is equal to compliance of the Rule 6(3) of the Cenvat Credit Rules, 2004 as they have not availed Cenvat credit on inputs used in manufacturing of exempted goods. Therefore, an amount equal to 5%/6% of the value of exempted goods can't be demanded and benefit of Notification No. 1/2011-C.E., dated 1-3-2011 cannot be denied to the appellant. He further take a note that the Ld. AR raised some disputes with regard to interest for intervening period. As the appellant has already reversed the Cenvat credit attributable to the inputs used in the manufacture of the exempted goods, therefore, the demand proposed in the show cause notice is not sustainable."

9. We concur with the opinion rendered in the above said judgment and accordingly find that the appellant was eligible for payment of effective rate of duty of 1% on the 'fruit pulp or fruit juice based drinks' cleared by them, during the impugned period, by availing exemption under Notification No. 1/2011-CE dated 1.3.2011

10. Since the matter has been decided on merits in favour of the appellant, the issue relating to interest and penalty does not survive. Having regard to the discussions as stated above, the impugned order is set aside and the appeal is allowed with consequential relief, if any, as per law.

(Pronounced in open court on 28.6.2023)

(**M. AJIT KUMAR**)
Member (Technical)

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

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