

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI**

REGIONAL BENCH – COURT NO. III

Excise Appeal No. 40607-40609 of 2013

(Arising out of Order-in-Original No. MAD-CEX-000-COM-006 to 008-12 dated 14.12.2012 passed by Commissioner of Central Excise, Central Revenue Buildings, Bibikulam, Madurai – 625 002)

M/s. Patwari Bakers Pvt. Ltd.,

Plot No. B-2, SIDCO Industrial Estate,
Kappalur,
Madurai- 625 008.

...Appellant

Versus

Commissioner of Central Excise,

Madurai Commissionerate,
Central Revenue Buildings,
No. 4, Lal Bahadur Shastri Road,
Bibikulam,
Madurai- 625 002.

...Respondent

APPEARANCE:

For the Appellant : Mr. Jatin Mahajan, Advocate

For the Respondent : Shri R. Rajaraman, Assistant Commissioner (A.R)

CORAM:

HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)

HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

DATE OF HEARING : 06.07.2023

DATE OF DECISION : 11.07.2023

FINAL ORDER Nos.40548-40550/2023

Order : Per Ms. Sulekha Beevi C.S.

Brief facts are that the appellant is engaged in the manufacture of Biscuits on job work basis to M/s. Parle Products Pvt. Ltd. During the course of manufacture, the appellant is also manufacturing

Sugar Syrup (falling under Chapter sub-heading 1702 9090) as an intermediate product. The said sugar syrup is captively consumed in the manufacture of final products i.e Biscuits. For the manufacture of the intermediate product viz Sugar syrup, inputs such as Sugar, Water and Citric acid are used. The appellant was not paying duty on the Sugar Syrup as the said item was being captively consumed. It appeared to the department that the sugar being marketable and having shelf-life due to adding of citric acid is excisable and that appellant is liable to pay duty on such intermediate products. A show cause notice was issued for the period 01.04.2007 to 11.09.2007 proposing to demand the duty along with interest and for imposing penalties. After due process of law, the original authority confirmed the demand along with interest and imposed penalties. Aggrieved the appellant is now before the Tribunal.

2. The Ld. Counsel Shri Jatin Mahajan appeared and argued for the appellant. It is submitted by the learned Counsel that for manufacture of biscuits they prepare sugar syrup inside the factory by adding sugar with water and small amount of citric acid which is heated to make a mixture. The said sugar syrup is used in semi hot condition for manufacture of biscuits. The appellants did not pay duty on Sugar Syrup by availing exemption under Notification No. 67/95-CE dated 16.03.1995 with effect from 01.03.2007 though biscuits cleared in packaged form mentioning per kg retail sale price not exceeding Rs.100/- was exempt under Sl. No. 18A in terms of Notification No. 03/2006-CE. As the Sugar Syrup manufactured by the appellant was not marketable in the form in which it is prepared, the appellants did not pay duty on the Sugar Syrup and intimated the same to the jurisdictional Commissionerate.

3. The Learned counsel submitted that the issue is no more *res Integra* and has been held in various decisions. Sugar syrup being not marketable is not exigible to excise duty. The decision of the Tribunal in the case of *Rishi Bakers Pvt. Ltd. Vs. Commissioner of Commissioner of Central Excise and Service Tax, Kanpur [2015 (328) ELT 634 (Tri.- Del.)]* and the decision in the case of *Parley Biscuits Pvt. Ltd. vs Commissioner*

of Central Excise and Service Tax vide Final Order No. 58020-58023/2017 dated 20.11.2017 and other decisions were relied.

4. The learned AR Shri R. Rajaramam supported the findings in the impugned order

5. Heard both sides.

6. The issue to be decided is whether the Sugar Syrup prepared inside the factory is subject to levy of excise duty as an intermediate product. The appellant has argued that it is not a marketable product. The department has not furnished any evidence to show that sugar syrup manufactured by appellant is a marketable product. The issue has been settled by the Tribunal in the case of Rishi Baker Pvt. (*supra*) the relevant paragraph which is reproduced as follows: -

"7. The dispute in the present case is as to whether sugar syrup made by the appellant for captive use in the manufacture of exempted biscuits is chargeable to Central Excise duty under sub-heading 1702 90 90 of the Central Excise Tariff. The Department's contention is that since the sugar syrup is used in the manufacture of the exempted biscuits, the benefit of Notification No. 67/95-C.E. would not be available. In this regard, the contention of the appellant is that in terms of the proviso to Notification No. 67/95-C.E., the full duty exemption to intermediate products being used for captive consumption is available if a manufacturer discharges the obligation under Rule 6 of the Cenvat Credit Rules. We do not accept this plea, as in terms of proviso to Notification No. 67/95-C.E., the full duty exemption to intermediate product is available under this to exempted final product, a dutiable final product also by using common Cenvat credit availed inputs and in respect of exempted final product, he has discharged the obligation prescribed under Rule 6 of the Cenvat Credit Rules. In this case, it is now known as to whether the appellant throughout during the period of dispute, were manufacturing only exempted final product or along with the exempted final product were also manufacturing dutiable final product. The proviso to notification is applicable only in a situation where by using common Cenvat credit availed inputs, a manufacturer manufactures dutiable as well as exempted final product> and in respect of the exempted final product, the obligation under Rule 6 of the Cenvat Credit Rules has been discharged. ShriPatil in this regard has cited the judgment of the Tribunal in the case of Sakthi Sugars Ltd. V. CCE, Salem reported in 2008 (230) ELT 676 (Tri.-Chennai). We have gone through this

judgment. In our view ratio of this judgment is not applicable to the facts of this case."

"8. Next comes the question of classification. The Department has classified the product, in question, under sub-heading 1702 90 90. Sub-heading 1702 90 90 comes under the 6 digit sub-heading 1702 90 which covers "other sugars including invert sugar and sugar syrup blends containing in the dry stage 50% by weight of fructose". The goods, in question, are sought to be classified under 1702 90 90 as "sugar syrup blends containing in dry stage, 50% by weight of fructose". In our view for classification as "sugar syrup blend" in this sub-heading the product must contain 50% by weight of fructose sugar in dry state. In these cases, the appellant's plea from the very beginning has been that the fructose sugar content is less than 50% and in this regard they have produced the test report of Shriram Institute of Industrial Research. It is seen that the Commissioner (Appeals) has not given any finding on this plea. Not only this, there is no evidence to show that before seeking classification of the goods, in question, under sub-heading 1702 90 90, the samples drawn from the goods had been got tested by the CRCL to confirm as to whether the fructose content of the goods, in question, in dry stage is 50% by weight. Just because the appellant during period till June 2008 were paying duty on the goods by classifying the same under sub-heading 1702 90 90, it cannot be presumed that they had accepted that the goods, in question, conform to be description of sugar syrup blends of sub-heading 1702 90 for which the sugar syrup in dry stage must contain 50% by weight of fructose. The Apex Court in the case of Metlex (I) Pvt. Ltd. v. CCE, New Delhi reported in 2004 (165) E.L.T. 129 (S.C.) has held that filing of classification list mistakenly does not mean that party has to pay duty, if in law, he is not bound to pay duty. Same view has been taken by the Apex Court in its judgment in the case of Bonanzo Engg. & Chemical P. Ltd. v. CCE reported in 2012 (277) E.L.T. 145 (S.C.). In view of this, we hold that the classification of the goods under sub-heading 1702 90 90 is not sustainable, as absolutely no evidence has been produced by the Department to show that the fructose content of the goods, in question, in dry state was 50%."

9. "Even if it is assumed that the goods, in question, are covered by sub-heading 1702 90 90, for attracting Central Excise duty the goods must be proved to be marketable. The Tribunal had remanded this matter to Commissioner (Appeals) for examining the question of marketability of the goods, in question. In this regard it is settled law that the marketability of a product has to be established in the condition in which it emerges. In this regard the Apex Court in the case of Bata India Ltd. v. CCE, New Delhi (supra) has held that the test of marketability is whether product is marketable in condition in which it emerges. In this regard the marketability of the goods produced by a particular manufacture cannot be presumed on the basis of the marketability of the similar goods in different condition being produced by another manufacturer, unless it shown that the two products are identical. In these cases, the

Commissioner (Appeals) has held that the goods, in question, to be marketable only on the basis that the "invert sugar syrup" being manufactured by M/s. DhampurSpeciality Sugar Ltd. is being sold to M/s. Britannia Industries, M/s. J.B. Managaram Food Industries and M/s. ITC Ltd. In our view this basis of holding that the goods, in question, are marketable is absolutely wrong, as it has been presumed that the sugar syrup being made by the appellants is identical to the "invert sugar syrup" being made by M/s. DhampurSpeciality Sugars Ltd. for which there is no basis. Chemically, invert sugar is obtained by Hydrolysis of cane sugar (sucrose, a disaccharide with specific rotation of + 66.5) and the same is a mixture of glucose (with specific rotation of rotation of +52.7) and fructose (with specific rotation of -92), with net specific rotation of -19.7. The process of hydrolysis of cane sugar (which is dextrorotatory i.e. with rotation of + 66.5) is also called inversion, as the mixture of glucose and fructose formed by this process is levorotatory with sp. Rotation of -19.7 and for this reason the mixture of glucose and fructose formed by hydrolysis of cane sugar is called invert sugar. The invert sugar has longer shelf life. Whether a sugar syrup is ordinary cane sugar syrup or is invert sugar syrup has to be ascertained by chemical test which has not been done. It is, therefore, totally wrong to presume a given sugar syrup as invert sugar syrup without test. The judgments of the Apex Court in the cases of Gujarat Narmada Valley Fert.Co. Ltd. v. CCE & Cus.(supra), NicholaasPiramal India Ltd. v. CCE & Cus, Daman (supra) cited by the learned DR are not applicable to the facts of this case."

(emphasis supplied)

7. The Tribunal in the case of M/s. *Modern Bakers (Madras) vide Final Order No. 41553-41558/2019* dated 18.11.2019 had an occasion to consider similar issue and observed as under -:

"6. The issue is whether the sugar syrup, which is an intermediate item and captively consumed can be subject to levy of duty. The said issue is decided by the Tribunal in the case of M/s. Badami Goods (supra) and M/s. Rishi Bakers Pvt. Ltd., Vs. Commissioner of Central Excise & Service Tax, Kanpur reported in 2018 (328) ELT 634 (Tri.-Delhi). On similar set of facts the contention of the department that sugar syrup is marketable and, therefore, subject to levy of duty was rejected by the Tribunal. The department does not have a case that they have conducted any test to prove the element of fructose contained in sugar syrup in these appeals. The decision in M/s. Rishi Bakers Pvt. Ltd. (supra) as well as M/s. Badami Foods (supra) would squarely apply to the facts of the present case. Following the said decisions, we are of the view that the demand cannot sustain. The impugned order is set aside. The appeals are allowed with consequential relief, if any."

(emphasis supplied)

8. After appreciating the facts, evidence and following the above decisions, we are of the view that the department has not put forward any evidence to establish that the Sugar Syrup is the marketable product. The demand therefore cannot sustain and requires to be set aside which we hereby do. The appeals are allowed with consequential relief, if any, as per law.

(Order dictated and pronounced in open court 11.07.2023)

(VASA SESHAGIRI RAO)
MEMBER (TECHNICAL)

(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)

RKP