TELEGRAM : CEGCANAL
Website : www.cestat.gov.in

REGISTERED / AD
Email : delhi@cestat.gov.in

# CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

## PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066

## EXCISE APPEAL BRANCH

Appeal No. E/991 /2005 - EX[DB] WITH E/M/165/07-EX Date 07/05/2010

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
C.C.E. GHAZIABAD
C.G. O. COMPLEX-II, KAMLA NEHRU NAGAR,
GHAZIABAD 201302
C.C.E. GHAZIABAD Appellant

Vs

DELTA FOODS PVT LTD MISC ORDER NO.304/2010-EX Respondent

I am directed to transmit herewith a certified copy of **Final order No. 260/ 2010 EX[DB]** dated 03-5-10 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(Excise Appeal Branch)

**Copy to :**
1. Respondent
   DELTA FOODS PVT LTD
   B-10,B.S.ROAD INDL.AREA GHAZIABAD
2. Adv. / Consult
   MR.R. KRISHNAN
   297-E, POCKET-II, PHASE-I, MAYUR VIHAR DELHI-110091.

3 C.D.R
~~4 J.C.D.R.~~
5 Bar association, CESTAT, New Delhi
6 Director Publications, Customs, Excise. I.P. Estate, New Delhi
7 M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3
8 Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9 M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
10 Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
11 Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-15
12 LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
13 Office Copy
14 Guard file
15. HON'BLE PRESIDENT.

16. Tax India Online.Com (P) Ltd.
Unit No.1, 2nd Floor, Vasant Aracade, Nelson Mandela Road,
Vasant Kunj, New Delhi-70

Assistant Registrar
(Excise Appeal Branch)

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL**
**West Block No. 2, R.K. Puram, New Delhi – 110 066.**
**Principal Bench, New Delhi**

**COURT NO. I**

**Excise Appeal No. 991 of 2005 with Misc. Application No. 165 of 2007**

[Arising out of the Order-in-Appeal No. 08-CE/GZB/2005 dated 17/01/2005 passed by The Commissioner (Appeals), Central Excise, Ghaziabad.]

For Approval and signature :

**Hon'ble Justice R.M.S. Khandeparkar, President**
**Hon'ble Shri Rakesh Kumar, Member (Technical)**

1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? :
2. Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? :
3. Whether their Lordships wish to see the fair copy of the order? :
4. Whether order is to be circulated to the Department Authorities? :

CCE, Ghaziabad — Appellant

Versus

M/s Delta Foods (P) Ltd. — Respondent

**<u>Appearance</u>**

Shri P.K. Singh, Authorized Representative (SDR) – for the appellant.

Shri R. Krishnan, Advocate – for the Respondent.

CORAM : **Hon'ble Justice R.M.S. Khandeparkar, President**
**Hon'ble Shri Rakesh Kumar, Member (Technical)**

**DATE OF HEARING : 04/02/2010.**
**DATE OF DECISION : 3/5/2010**

Misc. order No 304/10-EX
&
Final Order No. 260/10-EX Dated : 3.5.10

**Per. Rakesh Kumar :-**

The respondents are engaged in the manufacture of Biscuits, chargeable to Central Excise Duty under sub-heading 1905.11 of the Central Excise Tariff. They manufacture biscuits on job work basis for M/s Britannia Industries Ltd. (hereinafter referred to as M/s BIL) out of the raw material supplied by them. The biscuits are cleared on payment of duty. The respondent also avail Cenvat credit of duty on the cenvatable inputs. In course of manufacture of biscuits, waste in form of floor sweeping consisting of flour, dirty dough, etc. is generated which is returned to M/s BIL without payment of duty. The Department was of the view that since the waste generated is an exempt product, in accordance with the provisions of Rule 6 (3) readwith Rule 6 (2) of the Cenvat Credit Rules, 2001/2002/Rule 57 AD (2) of Central Excise Rules, 1944, the respondent would be liable to pay an amount equal to 8% of the clearance value of such waste, as the respondent had not maintained separate account and inventory of cenvatable inputs used in the manufacture of dutiable finished products and those used in the manufacture of exempted finished product. It is on this basis that a show cause notice was issued for demanding an amount of Rs. 81,000/- in respect of clearance of floor sweepings during the period from 1999-2000 to 2002-03. The Assistant Commissioner vide order-in-original No. 92/2004-05 dated 28/09/2004 confirmed the demand alongwith interest and beside this, imposed penalty of Rs. 10,000/- on the respondent under Rule 13 of the Cenvat Credit Rules, 2002. On appeal to Commissioner (Appeals), the Assistant Commissioner's order was set aside vide the impugned order-in-appeal No. 08-CE/GZB/05 dated 17/1/05 on the ground that the waste in form of floor sweeping generated in course of manufacture of biscuits is a non-excisable product and, hence, would not be covered by the definition of "exempted goods" and as such, the provisions of Rule 6 (2) & 6 (3) would not be applicable. It is against this order of the Commissioner (Appeals) that the present appeal has been filed by the Revenue.

2. Heard both the sides.

2.1 Shri P.K. Singh, the learned Departmental Representative assailed the impugned order reiterating the grounds of appeal in the Revenue's appeal. He pleaded that the goods being residue/waste from food industries are covered by heading 23.01 of the Central Excise Tariff where the rate of duty is nil and, therefore, the goods are excisable goods with nil rate of duty and hence, are covered by the definition of "exempted goods" as given in Rule 2 (d) of the Cenvat Credit Rules, 2002 and since the respondent have not maintained separate account and inventory of the Cenvatable inputs meant for dutiable and exempted finished products, the provisions of Rule 6 (3) of Cenvat Credit Rules, 2001/2002/Rule 57 AD (2) of Central Excise Rules, 1944 would be applicable.

2.2 Shri R. Krishnan, Advocate, the learned Counsel for the respondent pleaded that the waste generated is floor sweeping of flour, dirty dough, etc. that it is non-excisable, that Tribunal in the case of **CCE, Bhopal vs. J.B. Mangharam Food Ltd.** reported in **2000 (115) E.L.T. 683 (Tribunal)** has held that floor sweeping consisting of flour, maida, sugar, salt, dough and over-baked or under-baked biscuits arising in course of manufacture of biscuits being rubbish or scum collected to keep the floor clean, are not "residue from food industry" and are non-excisable, that this judgment of the Tribunal is squarely applicable to the facts of this case, that Hon'ble Supreme Court in the case of **Jayaswals Neco Ltd. vs. CCE, Nagpur** reported in **2006 (195) E.L.T. 142 (S.C.)** has held that the judicial discipline demands that the Bench of co-ordinate jurisdiction must not disregard decision of same strength on an identical question and if a Bench of co-ordinate jurisdiction does not agree with a Bench of same strength, then it should refer the matter to a Larger Bench, that since no appeal has filed by the Department against the Tribunal's judgment in the case of CCE, Bhopal vs. J.B. Mangharam Food Ltd. (supra), the judgment is final and that since the product, in question, is non-excisable, it is not covered by the definition of "exempted goods" and, hence, the provisions of Rule 6 (2) & 6 (3) of Cenvat Credit Rules, 2001/2002/Rule 57 AD (2) of Central Excise Rules, 1944 are not applicable and accordingly there is no infirmity in the order-in-appeal passed by the Commissioner (Appeals).

3. We have carefully considered the submissions from both the sides and perused the records. The respondent manufacture biscuits on job work basis for M/s BIL out of the raw material received from them. They take Cenvat credit of duty on the cenvatable inputs and the biscuits manufactured on job work basis are cleared to M/s BIL on payment of duty. In course of manufacture of biscuits, waste in form of flour sweeping, consisting of flour, dirty dough, etc. arises which is also collected and returned to M/s BIL. The point of dispute is as to whether in respect of the waste, the respondent are liable to pay an amount equal to 8% of the clearance value, as admittedly they are not maintaining separate account and inventory as per the provisions of sub-Rule (2) of Rule 6 of the Cenvat Credit Rules, 2001/ 2002/Rule 57AD (2) of Central Excise Rules, 1944.

4. Sub-Rule (2) of Rule 6 of the Cenvat Credit Rules, 2001/2002 and sub-Rule (2) of Rule 57AD of the Central Excise Rules, 1944 during the period of dispute provided that where a manufacturer avails of Cenvat credit in respect of inputs, except the inputs intended to be used as fuel, and manufactures finished products which are dutiable as well as exempted goods, then the manufacturer shall maintain separate accounts for receipt, consumption, and inventory of the inputs meant for use in the manufacture of dutiable final product and the quantity of inputs meant for use in the manufacture of exempted goods and take Cenvat credit only on that quantity of inputs which is intended for use in the manufacture of dutiable goods. Sub-Rule (3) of Rule 6

of Cenvat Credit Rules, 2001/2002 and sub-Rule (2) of Rule 57AD of Central Excise Rules, 1944 provides that a manufacturer opting not to maintain separate account shall pay at the time of clearance of the exempted goods, an amount as specified in the sub-rule, which in respect of the product, in question, would be 8% of the sales price. The term "exempted goods" is defined in Rule 2 (d) of Cenvat Credit Rules as the goods which are exempt from the whole of the duty of excisable thereon and the includes the goods which are chargeable to nil rate of duty. The term – "final product" is defined in Rule 2 (e) of the Cenvat Credit Rules as "excisable goods manufactured or produced from inputs, except matches.

4.1 According to the respondent, the goods are non-excisable goods and hence not covered by the definition of "exempted goods", while according to the Department, the goods are excisable goods classifiable under heading 23.01, chargeable to nil rate of duty and hence are covered by the definition of "exempted goods". However, on the question as to whether the floor sweeping arising in course of manufacture of biscuits are classifiable under heading 23.01 or are non-excisable, has been decided by the Tribunal in the case of CCE, Bhopal vs. J.B. Mangharam Food Ltd. (supra), wherein the Tribunal held that such floor sweeping being merely rubbish or scum to keep the floor clean, are not a residue from food industry and hence have to be treated as non-excisable. Since the product, in question, has been held by the Tribunal to be non-excisable, the same would not be covered by the definition of "exempted goods" and hence the provisions of sub-Rule (3) of Rule 6 of Cenvat Credit Rules, 2001/2002 and sub-Rule (2) of Rule 57AD of Central Excise Rules, 1944 would not be applicable.

5. There is one more reason why the provisions of Rule 6 (2) and 6 (3) of Cenvat Credit Rules, 2001/2002/Rule 57AD (2) of Central Excise Rules, 1944, are not applicable to this case and this will hold good even if the waste in this case is treated as "nil" rated excisable goods classifiable under heading 23.01 and covered by the definition of 'exempted goods'. Rule 57 AD (1) of Central Excise Rules, 1944/Rule 6 (1) of Cenvat Credit Rules, 2001/2002 provides that Cenvat Credit shall not be allowed on such quantity of inputs which are used in the manufacture of exempted goods, except in the circumstances mentioned in sub-Rule (2). Sub-Rule (2) of Rule 57AD of Central Excise Rules, 1944/sub-Rule (2) of Rule 6 of Cenvat Credit Rules, 2001/2002 provided that when a manufacture avails Cenvat credit in respect of any non-fuel inputs and manufactures dutiable as well as exempted final products, he shall maintain separate accounts for receipt, consumption and inventory of input for use in the manufacture of dutiable final product and the quantity of inputs meant for use in this manufacture of exempted goods and take Cenvat credit only on that quantity of input, which is intended for use in the manufacture of dutiable goods. As per the provisions of sub-Rule (2) of Rule 57AD of Central Excise Rules, 1944/sub-rule (3) of Rule 6 of Cenvat Credit Rules,

2001/2002, a manufacturer opting not to maintain separate accounts shall have to pay, at the time of clearance of exempted goods, an amount as specified in this sub-rule.

5.1 If a manufacturer is manufacturing product group A which is dutiable and product group B which is "exempted goods", he can comply with the provisions of sub-Rule (2) of Rule 57AD of Central Excise Rules, 1944/sub-Rule (2) of Rule 6 of Cenvat Credit Rules, 2001/2002 by maintaining separate accounts for receipt, consumption and inventory of inputs meant for use in the manufacture of dutiable final products and the quantity of inputs meant for use in the manufacture of exempted goods. But if he is manufacturing only the dutiable finished products, in the manufacture of which some waste emerges, which is fully exempt from duty or is a nil rated item, will it be possible for the manufacturer to comply with the provisions of Rule 57AD (2) of Central Excise Rules, 1944/Rule 6 (2) of Cenvat Credit Rules, 2001/2002? The answer to this question would obviously be ***NO***. In such a case all the manufacturer can do is to estimate the quantity of waste which would arise and not take Cenvat credit in respect of the same or reverse proportionate Cenvat credit on the cenvated inputs contained in the waste at the time of its removal, which would translate into compliance with the provisions of sub-Rule (1) of Rule 57AD of Central Excise Rules, 1944/sub-Rule (1) of Rule 6 of Cenvat Credit Rules, 2001/2002. Hon'ble Supreme Court, in case of **Cochin State Power and Light Corporation vs. State of Kerala** reported in **AIR 1965 – SC – 1688** has, in accordance with the maxim lex non cogit ad impossibilia held that compliance of duty which is impossible must be excused. Therefore, sub-Rule (2) of Rule 57AD of Central Excise Rules, 1944/Rule 6 (2) and 6 (3) of Central Credit Rules, 2001/2002 are not applicable to this case. We find that same view has been taken by this Tribunal in case of **Narmada Gelatines Limited vs. CCE, Bhopal** reported in **2009 (233) E.L.T. – 332 (Tri. – Del.),** wherein it was held that when there is an impracticability of maintenance of separate account of inputs meant for dutiable and exempted goods for the reason that entire cenvatable input is used in manufacture of dutiable goods whereby waste arises, the processing of which results in emergence of exempted goods, levy of an amount equal to 8% of the sales price of the exempted goods by invoking Rule 6 (3) (b) of Cenvat Credit Rules, 2002, is unwarranted. This judgment of the Tribunal has been followed by Hon'ble Bombay High Court in case of **Rallis India Ltd. vs. Union of India** reported in **2009 (233) E.L.T. 301 (Bom.)**.

6. In view of the above discussion, there is no infirmity in the impugned order. The Revenue's appeal is dismissed.

(Pronounced in open court on 3/5/2010

**(Justice R.M.S. Khandeparkar)**
**President**

**(Rakesh Kumar)**
**Member (Technical)**

PK