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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

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

EXCISE APPEAL BRANCH

Appeal No. E/2204/2010-2206/2010 & E/2186-2190/2010 - EX[DB] WITH E/STAY/2102-2104/2010 & E/STAY/2073-2077/2010-EX   Date **29/09/2011**

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

To :
M/S M. P. BISCUITS PVT. LTD.

B-18, INDUSTRIAL AREA, RAMNAGAR, VARANASI-
221110 (U.P.)

M/S M. P. BISCUITS PVT. LTD. Appellant

Vs

C.C.E ALLAHABAD **STAY ORDER NO. 956-963/2011-EX** Respondent

I am directed to transmit herewith a certified copy of **Final order No. 825-832/ 2011 EX|DB|** dated 26-9-11 passed by the Tribunal under **Section 35-C(1)of Central Excises Act, 1944**

Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent
C.C.E ALLAHABAD
38,M.G.MARG, CIVIL LINES,
ALLAHABAD

2. Adv. / Consult SH. P. K. MONGA, ADV.,
C/O APPELLANT

3. C.D.R
4. Bar association, CESTAT, New Delhi
5. Director Publications, Customs, Excise, I.P. Estate, New Delhi
6. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file

Assistant Registrar
(Excise Appeal Branch)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

West Block No.2, R.K.Puram, New Delhi

COURT-I

Date of hearing/decision:14.9.2011

Stay Application No.2102 – 2104 of 2010 and
Central Excise Appeal No.2204 – 2206 of2010

[Arising out of order in appeal No.161-163/CE/ALD/2010 dated 31.5.2010 passed by the Commissioner of Central Excise (Appeals), Allahabad.

M/s M.P. Biscuits Pvt. Ltd. .. Appellants

Vs.

C.C.E. , Allahabad ... Respondent

Stay Application No.2073 – 2077 of 2010 and
Central Excise Appeal No.2186 - 2190 of 2010

[Arising out of order in appeal No.115-119/CE/ALD/2010 dated 27.4.2010 passed by the Commissioner of Central Excise (Appeals), Allahabad.

M.P. Biscuits Pvt. Ltd. .. Appellants

Vs.

C.C.E. , Allahabad ... Respondent

Appearance:

Shri P.K. Monga, Advocate for the appellants
Shri K.P. Singh, D.R. for the Revenue

Coram: Hon'ble Ms. Jyoti Balasundaram, Vice President
Hon'ble Mr. Mathew John, Technical Member

STAY oral order No. 956-963/2011-EX
FINAL Oral Order No. ~~825-832/2011~~-EX

Per Ms. Jyoti Balasundaram:

For the reasons recorded below, we waive pre-deposit of duty of Rs.3,47,367/- together with penalty of equal amount and proceed to hear and decide these appeals themselves as the issue stands covered by earlier order of the Tribunal in the case of M/s Ambaji Foods (India) Pvt. Ltd. and others - Final Order No.673-675/10-Ex , dated 23.8.2010.

2. The appellants herein are manufacturers of biscuits. "Sugar Invert Syrup" is an intermediate product used in the manufacture of biscuits. Biscuits are exempt from payment of duty vide Notification No.3/2007 dated 1.3.2007 and the intermediate product 'sugar syrup' is chargeable to duty in terms of Notification No.67/95-CE dated 16.3.95 as it is not entitled to exemption, being an input used in the manufacture of exempted final product. The assessee's plea that the item in dispute which is prepared by adding sugar 800 grams with 200 ml. per kilo and meagre quantity of citric acid which is heated upto 118 degrees in a tank and cooled and then mixed with other ingredients of biscuits to have sugar dissolved fully is not marketable/not capable of being bought and sold in the market, has been rejected by the authorities and duty demand together with interest and penalty has been confirmed and imposed as a consequence. The finding that the disputed item is marketable is mainly based upon the opinion of the Chief Chemist, CRCL, New Delhi. He has opined thus –

> ***" According to technical literature syrups are concentrated solution of sugars such as sucrose in water or other aqueous liquids. When purified water is used in making solution of sucrose the preparation is known as syrup or simple syrup. In manufacturing syrups the sucrose must be selected carefully and a purified water free foreign substance and clean vessels and containers must be used. Dilute solution of sucrose are prone to growth of molds, yeast and other micro-organisms. In concentration of 65% by weight or more the solution will retard the growth of micro-organisms. Thus it may have shelf life without addition of any preservative".***

The authorities below have held that the percentage of sugar in solution is relevant only in such cases when no preservatives is added whereas in the present case, citric acid is used as preservative and as such the 'sugar invert syrup' has shelf life and is marketable.

3. The learned DR has relied upon the invoices for 'sugar invert syrup' issued by Rahul Sugar Products, who is selling bakery grade sugar invert syrup and

also relies upon the product literature of Rahul Sugar Product and Sun Agro Foods on sugar invert syrup to support his contention that the sugar invert syrup is marketable. However, we find that not only has such material not been relied upon in the impugned orders but further there is no literature on sugar syrup prepared by the assessees herein.

4. Moreover, we find that the Chief Chemist's opinion is not sufficient to hold that sugar syrup in question satisfies the test of marketability. The item in dispute has not been tested. There has been no analysis of material on record to arrive at a finding regarding capability of the product being sold in the market or being known in the market as goods. In the above background, the decision of the Tribunal in M/s Ambaji Foods (India) Pvt. Ltd. and others on the issue of marketability and consequent excisability of sugar syrup captively consumed in the manufacture of biscuits remanding the case for ascertaining the marketability of the product after analysis of material on record, becomes relevant. In that case, the Bench has held as under:-

> ***"6. Perusal of the impugned order discloses that the said authority while dealing with the issue regarding the marketability raised by the appellants in case of Ambaji Foods (India) P. Ltd. are concerned, has held thus :-***
>
> ***"15. The next is the issue of marketability. In this regard, I observe that all the points submitted in the defence reply submitted with the adjudicating authority have been incorporated in the Order-in-Original, which means that the order has been passed after considering the entire submissions. The contention of the appellant that the adjudicating authority has not recorded any finding on the issue of marketability of sugar syrup has got no relevancy. I find that the question of marketability arises only when, the same has to be marketed as such. The Sugar Syrup in this case is an intermediate product being used for manufacturing the biscuits, which are the exempted finished goods. In the instant case the issue relates to denial of benefit notification no. 67/95-CE, which clearly stipulates that duty on excisable intermediate product has to be discharged in case the finished goods are exempted. The notification does not stipulate any condition of saleability or marketability for allowing or denying the benefit of the said notification. The concept of individual marketability cannot be applied in case of such products because such intermediate products loose their identity when they are used in final products, which are marketed ultimately. Therefore, the marketability of such intermediate products has to be considered in conjunction with the final products. Since, the biscuits are***

sold, the saleability/marketability of the sugar syrup is established and the same can be deemed to be a marketable/saleability commodity."

7. As regards the case of M/s K.N. Bakers Pvt. Ltd. are concerned, the impugned order on the said issue reads as under:-

"14. The first submission of the appellant is that the order was passed without considering the certificates submitted to prove that the sugar syrup manufactured by them was not capable of being bought and sold. I have considered the said certificates and after going through the same, I observe that the appellant is unnecessarily litigating a settled issue by dragging the issue of marketability. In my opinion, the issue of classification on the basis of marketability comes into play only when the clear cut classification is not available. In this case, since beginning it is an admitted fact from both sides that the sugar syrup in question merit classification under CSH no. 17029090 therefore, raising the question of marketability is of no help to the appellant. I also observe that all the points submitted in the defence reply submitted with the adjudicating authority have been incorporated in the Order-in-Original, which means that the order has been passed after considering the entire submissions. The contention of the appellant that the adjudicating authority has not recorded any finding on the issue of marketability of sugar syrup has got no relevancy. I find that the question of marketability of the sugar syrup arises only when, the same has to be marketed as such. The sugar syrup in this case is an intermediate product being used for manufacturing the biscuits, which are the exempted finished goods. In the instant case the issue relates to denial of benefit notification no. 67/95-CE, which clearly stipulates that duty on excisable intermediate product has to be discharged in case the finished goods are exempted. The notification does not stipulate any condition of saleability or marketability for allowing or denying the benefit of the said notification. The concept of individual marketability cannot be applied in case of such products because, such intermediate products loose their identity when they are used in final products, which are marketed ultimately. Therefore, the marketability of such intermediate products has to be considered in conjunction with the final products. Since, the biscuits are sold, the saleability/marketability of the sugar syrup is established and the same can be deemed to be a marketable/saleable commodity."

8. Plain reading of the impugned orders discloses complete failure on the part of the Commissioner (Appeals) to consider the issue regarding the requirement of the marketability which is to be established by the department before a product can be qualified to be an excisable product warranting duty liability. The issue which was raised by the appellants was that the intermediate product in the nature of sugar syrup was not marketable and the same was required to be decided with reference to the said product only and not with reference to the final product, wherein the said product was used as one of the inputs. Merely because of the final product is marketable, it cannot be said that the intermediate product has *necessarily to be a marketable product. It would all depend upon the facts of each case.*

9. As far as the orders of the original authority are concerned, the said issue has been dealt with in Ambaji Foods (India) P. Ltd. case as under :-

" Now, I take the issue of marketability of the goods in question. The party in their Defence submissions stated that Sugar syrup made of own specification and proportions suitable to use in manufacture of biscuits, are not capable of being bought and sold in market and no other manufacturer would buy their Sugar syrup since contents of the Sugar syrup of each manufacturer is distinct for which different ingredients in different proportions are mixed and subjected to process/processes to manufacture sugar syrup. The party reiterated that under these circumstances, Sugar syrup even though covered in the Central Excise Tariff under CSH 1702.90, would not be subjected to duty for lack of marketability. They rely upon the Hon'ble Supreme Court case of M/s Moti Laminates – 1995 (76) E.L.T. 241 (SC) wherein the court has ruled in that excisable goods produced or manufactured and specified in Tariff Schedule, were excisable goods yet dutiable only if marketable.

In this context, I am of the view that the party had nothing with them to say in this regard, except the above. The party could not put forth any documentary or otherwise evidences before me to clarify their claims, that the goods are not marketable. In the regard I hold that there is a difference between actual sale and marketability of the product. The various courts have pronounced in their judgments that even if the goods are not sold in the open market, the goods may be capable of being sold in the market. The possibility of the marketability of the product in question cannot be ruled out since the product Sugar syrup has got considerable shelf life as it is party and parcel of biscuit and the product is, therefore saleable and accordingly, the goods are marketable even though the party is not selling the same and using the same captively. The Hon'ble Supreme Court in the case of Gujarat Narmada Valley Fertilizer Co. Ltd. vs. CCE as reported in 2005 (184) E.L.T. 128 (SC)."

10. As far as the case of M/s K.N. Bakers Pvt. Ltd. is concerned, the said issue has been dealt with as under :-

" The question of marketability of Sugar Syrup has also been examined. The party submitted that Sugar syrup made of own specification and proportions suitable to use in manufacture of biscuits, are not capable of being bought and sold in market and no other manufacturer would buy their Sugar syrup since taste of the Sugar syrup of each manufacturer is distinct for which different ingredients in different proportions are mixed & subjected to process/processes to manufacture sugar syrup and cited a catena of decisions. On going through the submission of the party in this regard it is seen that there is difference between actual sale and marketability of the product. Actual sale/marketing is not a factor to decide