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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

Date **23/01/2012**

Appeal No. E/1906/2011-1907/2011 - EX[DB]

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

To :
M/S HOMEMADE BAKERS (INDIA) LTD.
54 K.M. STONE, DELHI-KARNAL ROAD, VILLAGE-LARSAULI, DISTT. SONEPAT (HARYANA)

M/S HOMEMADE BAKERS (INDIA) LTD. Appellant

Vs

C.C.E. ROHTAK Respondent

I am directed to transmit herewith a certified copy of **Final order No. A/44-45/ 2012 EX[DB]** dated 20-1-12 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. ROHTAK
SCO NO.6 SECTOR 1, ROHTAK.

2. Adv. / Consult
MR.V. LAXMIKUMARAN
B-6/10, SAFDARJUNG ENCLAVE, NEW DELHI-110029

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-3
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
14. SHRI PUNEET MANCHANDA, DIRECTOR OF M/S HOMEMADE BAKERS (INDIA) LTD., 54 K.M. STONE, DELHI-KARNAL ROAD, VILLAGE-LARSAULI, DISTT. SONEPAT (HARYANA)

Assistant Registrar
(Excise Appeal Branch)

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI PRINCIPAL BENCH, COURT NO. III

Excise Appeal No. 1906-1907 of 2011

[Arising out of Order-in-Appeal No. 156-157/BK/RTK/2011 dated 27.4.2011 passed by the Commissioner of Central Excise(Appeals), Delhi III]

For approval and signature:

Hon'ble Ms. Archana Wadhwa, Member (Judicial)
Hon'ble Mr. Rakesh Kumar, Member (Technical)

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1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? : No
2. Whether it should 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 Departmental authorities? : Yes

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M/s. Homemade Bakers (India) Ltd. — Appellants
Shri Puneet Manchanda

Vs.

Commissioner of Central Excise — Respondent
Rohtak

Appearance:

Shri A.R. M. Rao and Shri R.K. Hasija, Advocate for the Appellants
Shri Sumit Kumar, SDR for the Respondent

CORAM:
Hon'ble Ms. Archana Wadhwa, Member (Judicial)
Hon'ble Mr. Rakesh Kumar, Member (Technical)

Date of Hearing : 03.1.2012
Date of Pronouncement : 20.1.2012

FINAL **ORAL ORDER NO.** A/44-45/2012-EX(BR)

Per Archana Wadhwa (for the Bench):

After dispensing with the condition of pre-deposit of duty and penalty, we proceed to decide the appeal itself inasmuch as the issue stands covered by the precedent decision of the Tribunal.

2. After hearing both sides, we find that the appellants are engaged in the manufacture of edible biscuit which became exempt from payment of duty with effect from 3.5.07. During the course of manufacture of biscuits, the sugar syrup and glucose flavour comes into existence at intermediate stage. The present demand relates to said sugar syrup and flavour which according to the Revenue are classifiable under heading 1702.90 and 3302 respectively. Accordingly, the demand stands confirmed against the appellants.

3. The appellants contention is that sugar syrup and flavour in question is not marketable and hence can not be held to be excisable. By drawing our attention to the process of manufacture, which includes mixing of sugar and water and heating at 105^{0}C and subsequent addition of Citric acid to accelerate the inversion process, Learned advocate submits that

syrup so obtained is used in the manufacture of biscuits immediately inasmuch as the sugar in liquid form prepared by the appellants has a shelf life of only 24 hours and per se not capable of being brought to the market. Accordingly, it stands contended before us that the syrup being manufactured by them does not satisfy the test of marketability. It stands claimed that the same would become marketable only when further processes and special packaging is given. By referring to the various decisions, it stands contended before us that inasmuch as the sugar syrup manufactured by the appellants fails the test of marketability, the same cannot be held to be excisable. For the above proposition, he has also relied upon the Tribunal's decision in the case of CCE Mumbai IV vs. Raptakos Brett and Co. Ltd. as reported in [2006 (194) ELT 101 (Tri-Mum)]. They have contended that the onus to show that sugar syrup, manufactured by the appellants, as an intermediate product, to be used captively in the manufacture of the above biscuits, is upon the Revenue, who has failed to discharge the same.

4. On the other hand, the Revenue's contention is that invert sugar syrup is admittedly marketable and in support they have referred to various products being available in the market as invert sugar syrup. Once the sugar syrup has been held to be marketable, the Revenue's contention is that the same is excisable.

5. Learned DR appearing for the Revenue has drawn our attention to the fact that during the relevant period sugar syrup was classifiable under Central Excise Tariff heading 1702 9090. He has drawn our attention to the Supreme Court decision in the case of Nicholas Piramal India Ltd. vs. CCE, Mumbai as reported in [2010 (260) ELT 338 (SC)] as also in the case of Supreme Court judgement in the case of Indian Cable Co. Ltd. vs. CCE, Calcutta as reported in [1994 (74) ELT 22 (SC)]. The ratio of the above decision is that the finding as regards the marketability of the goods is a pre-requisite or "sine qua non" for levy of duty. The marketability means saleable or suitable for sale. As such, he submits that as long as goods are capable of being marketed, the fact that the same are not being actually marketed, cannot be adopted for holding in favour of the assessee. Similarly, he submits that as observed by the Hon'ble Supreme Court in the case of Nicholas Piramal India Ltd. short shelf life cannot be equated to no shelf life. Short shelf life would not ipso facto mean that product cannot be marketed. Learned DR also draws our attention to the CBEC Circular No. 780/13/2004-CX dated 12.3.2004 and the explanation added to section 2(d) of Central Excise Act vide amendment dated 10.5.2008. He also draws our attention to the HSN Explanatory notes and various catalogue, invoices, showing sale of sugar syrup. As such, he submits that the marketability of the products stands established by the Revenue and as such, the impugned orders be upheld.

6. After carefully considering the submissions made by both the sides, we note that invert sugar syrup is equimolar mixture of glucose and fructose in aqueous form. The biotechnological process employed for its manufacture employs immobilized enzymes for sucrose hydrolysis. The tariff entry under which the Revenue has classified the product reads as under:-

1702.90: Other, including invert sugar and other sugar and sugar syrup blends containing in the dry state 50% by weight of fructose.

We find that the lower authorities had observed that some of the invert sugar syrup manufacturers are selling the same in the market. He has also gone to the chemical dictionary meaning of invert sugar which has the following properties:-

A
* More sweeter than sugar
* Ready to use
* Extremely stable
* Highly purified
* No crystallization
* No fermentation

B
* Has lowest ash content
* Is of constant colour and aroma
* Is self preservative
* Is non carcinogenic and low on calories

* Is free from chemical additives
* Is highly soluble than sugar.

Accordingly, he has observed that this makes very clear that invert sugar is stable compound and also a marketable product. Also the CBEC vide its circular No. 226/60/C E/96-CX dated 3.7.96 and 780/13/2004-Cx. dated 12.3.2004 both issued from F.No. 14/2/2002/CX-I has clarified that if the sugar syrup is marketable as such without any reference to percentage of sugar concentration, then the same is excisable, whether taken for captive consumption or removed as such. The Board's Circulars have been issued at the strength of CRCL clarification C.No. 21-DX/0/95 on the subject of classification of sugar syrup product at the intermediate stage in the manufacture of aerated water and ayurvedic medicine. It has been clarified by the CRCL that the sugar syrup may have shelf life with /without addition of any preservative.

7. The appellants contention is that though sugar syrup are being sold by other manufacturers in the market but the type of sugar syrup manufactured by them has a very short shelf life and cannot be marketed at all. By drawing our attention to the certificate given by Shriram Institute for Industrial Research, it stands contended before us that fructose contained in the sugar syrup being manufactured by the appellant is to the extent of 31%. As such they do not satisfy the

criteria of 50% fructose weight in the sugar syrup, as specified in tariff heading 1702.90.

8. We note there is no dispute about the fact that it is the marketability of the 'product' which is required to be examined and not the actual sale of the product. However, it is also equally true that the product being manufactured by a particular assessee is required to be examined vis -a- vis its marketability, depending upon the various factors like the stability of the product and constituents of the product and the shelf life of the product. It is not the name of the product which is important, but the actual constituents of the product which would be decisive factor for deciding the above issue. We, further note that there is no test report of the sugar syrup being manufactured by the appellant, conducted by the Revenue. It is the sugar syrup, which is being manufactured by the appellant which has to be examined in relation to its marketability. If the sugar syrup being manufactured by the appellant does not have a shelf life and does not satisfy the criteria as prescribed in tariff heading 1702.90, the same would not be classifiable under the said heading.

9. The Tribunal in the case of M/s. Ambaji Foods (India) Pvt. Ltd. vs. CCE Kanpur vide its Final Order No. 673-675/10-Ex. dated 23.8.2010 has remanded all the matters to the lower authorities with the following observations:-

"11. Apparently the Adjudicating Authority has instead of deciding the marketability of the product had merely dealt with the issue of possibility of marketability of the final product, and relying upon the decision of the Hon'ble Supreme Court in Gujarat Narmada Valley Fert. Co. Ltd. case had arrived at the finding about the marketability of the final product. The decision of the Apex Court in Gujarat Narmada case is on the point that the issue of marketability of the materials need not be decided on the basis of the actual sale of product but it must be capable of being sold in the market or known in the market as the goods. In other words, though actual sale need not be established, the capability of the product being sold in the market or known in the market as goods must be established. It nowhere discloses any analysis of the materials on record to arrive at any finding regarding capability of the product being sold in the market or the same as being known to the market as the goods. Before relying upon any decision, it is necessary for the Adjudicating Authority to analyse the materials in relation to the facts of the case and to ascertain whether the reported decision of the higher authority is applicable to such the facts of the case in hand.

12. Plain reading of the orders passed by both the lower authorities apparently, therefore, discloses failure on the part of the authorities to consider the issue of marketability in the manner it was required to be decided as rightly pointed out by the learned advocate for the appellants. The authorities will have to analyse the materials on record and thereafter ascertain whether the same reveal the marketability of the product or not and accordingly decide about the duty liability. Since the authorities below have failed to carry out this exercise before confirming the demand, the orders passed by the lower authority *are required to be set aside and the matters need to be remanded to the Adjudicating Authority to decide the same afresh and bearing in mind the law laid down by the Apex Court and various other decisions relied upon on behalf of the appellants and quoted hereinabove. In the result, therefore, the appeals succeed and impugned orders are set aside and the matters are remanded, as stated above."*

10. In view of our foregoing observations and in the light of law declared in the case of Ambaji Foods (India) Pvt. Ltd., we set aside the impugned order and remand the mater to the lower authorities for examining the marketability aspect of the appellants product and to decide about the duty liability accordingly.

11. The stay petition as also appeal gets disposed of in the above manner.

(Pronounced in the open court on 20/1/12

(Archana Wadhwa)
Member(Judicial)

(Rakesh Kumar)
Member(Technical)

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