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

DATE OF HEARING : 27/09/2017.
DATE OF DECISION : 27/09/2017.

Excise Appeal No. 52653 of 2015

[Arising out of the Order-in-Original No. RPR/EXCUS/000/COM/ 016/EX/2015 dated 31/03/2015 passed by The Commissioner of Central Excise, Raipur.]

M/s Ganesh Bakers Pvt. Ltd. Appellant

Versus

CCE & ST, Raipur Respondent

Appearance

Shri Jatin Mahajan, Advocate – for the appellant.

Shri M.R. Sharma, Authorized Representative (DR) – for the Respondent.

CORAM : **Hon'ble Shri Justice Dr. Satish Chandra, President**
Hon'ble Shri B. Ravichandran, Member (Technical)

Final Order No. 56814/2017 Dated : 27/09/2017

Per. Justice (Dr.) Satish Chandra :-

The present appeal is filed by the appellant against order-in-Original No. RPR/EXCUS/000/COM/016/EX/2015 dated 31/03/2015.

2. The brief facts of the case are that during the period of dispute from June 2008 to September 2011, the appellant was engaged in the manufacture of biscuits and used sugar syrup

which was prepared within their factory. The appellant has claimed the exemption of the excise duty under Notification No. 67/1995-CE dated 16/03/1995 which was denied by the Department. Being aggrieved present appeal is being filed by the assessee.

3. Heard Shri Jatin Mahajan, learned Counsel for the appellant and Shri M.R. Sharma, learned AR for the Revenue and perused the appeal record.

4. After hearing both the sides, it appears that the identical matter had come up before this Tribunal in the case of **Lucky Biscuit Company vs. CCE, Patna** vide final order No. 76068-76071 of 2017 dated 14/06/2017, wherein it was observed that:-

> "5. We find that the issue in the present case is whether sugar syrup made by the appellant for captive use in the manufacture of exempted biscuit is chargeable to central excise duty under sub-heading 17029090. We find that both the lower authorities have concluded that the sugar content is more than 80% on empirical basis without any chemical test having been done. In the absence of chemical test to ascertain the precise fructose content of the goods, any conclusion that the goods are classifiable under sub-heading 17029090 is not sustainable. We also find that the CBEC Circular dated 7.11.1994 relied upon by the lower authorities has been issued in respect of sugar syrup produced in the manufacture of aerated water and ayurvedic medicines. Hence, the same cannot be applied to the sugar syrup being produced for the biscuits without establishing that the two products are identical. We also

find that issue in this appeal is squarely covered by the judgment of the Tribunal in the case of Rishi Bakers Pvt. Ltd. (supra), wherein the Tribunal has held as under:

> 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 the 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 manufacturer 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.

Dhampur Speciality Sugars Ltd. is being sold to M/s. Britannia Industries, M/s. J.B. Mangaram 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. Dhampur Speciality 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 + 66.5º) and the same is a mixture of glucose (with specific rotation of +52.7º) and fructose (with specific rotation of - 92º), with net specific rotation of - 19.7º. The process of hydrolysis of cane sugar (which is dextrorotatory i.e. with rotation of + 66.5º) is also called inversion, as the mixture of glucose and fructose formed by this process is levorotatory with sp. Rotation of - 19.7º 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), Nicholaas Piramal India Ltd. v. CCE, Mumbai (supra) and Medley Pharmaceuticals Ltd. v. CCE & Cus, Daman (supra) cited by the learned DR are not applicable to the facts of this case.

10. In view of the above discussion, we hold that neither there is any evidence to prove that the goods,

in question, are classifiable under 1702 90 90 nor there is any evidence to prove that the goods, in question, in form in which they come into existence in the appellant's factories, are marketable. We, therefore, hold that the impugned order is not sustainable. The same is set aside. The appeals are allowed with consequential relief.

6. The above ratio of judgment is directly applicable to the facts of the present case. The above decision of the Tribunal has been followed in the case of Bhagwati Foods Pvt Ltd & Orthers vs. CCE & ST, Kanpur in Final Order No.A/70409-70417/2016-EX[DB] dated 30.06.2016 in Appeal Nos. E/51610-51618/2015-EX[DB]".

5. By following our order (supra), we find no reason to sustain the impugned order. The same is hereby set aside.

6. In the result, the appeal filed by the appellant is allowed.

(Order dictated and pronounced in the open court.)

(Justice Dr. Satish Chandra)
President

(B. Ravichandran)
Member (Technical)

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