IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
EAST REGIONAL BENCH : KOLKATA

Ex.Appeal No.297,298/08

(Arising out of Orders-in-Appeal Nos.12/DB/CE(A)/GHY/08 dt.25.02.2008 & 11/DB/CE(A)/GHY/08 dt.25.02.2008 both passed by Commissioner (Appeals) of Customs, Central Excise, Guwahati)

CCEx., Dibrugarh

Applicant (s)/Appellant (s)

Vs.

M/s Nezone Biscuits Pvt. Ltd.
M/s Nebisco Industries Pvt. Ltd.

Respondent (s)

Appearance:

Shri S. Mukhopadhyay, Supdt. (AR) for the Revenue (s)
Shri Ravi Raghavan, Adv. & Shri H.Shukla, C.A. for the Respondent (s)

CORAM:

HON'BLE SHRI P. K. CHOUDHARY, JUDICIAL MEMBER
HON'BLE SHRI BIJAY KUMAR, TECHNICAL MEMBER

Date of Hearing : 12.06.2018
Date of Pronouncement : 24.09.2018

Final Order No.FO/76664-76665/2018

Per Shri Bijay Kumar :

The issue in these appeals are identical and accordingly, the same are disposed off by this common order.

2. The present appeals have been filed by the Revenue against the impugned order on the ground that for the recovery made under Section 153 of the Finance Act, 2003, payment through Cenvat Credit account is not correct and the respondents are, therefore, not entitled for making payment of demanded amount through Cenvat Credit Account.

3. The issue involved in this case is that the appellant has availed exemption under Notification No.33/99-CE dated 08.07.1999. Consequent upon the retrospective amendment of the said Notification brought about vide Section 153 of the Finance Act, 2003, an amount of Rs.21,95,078/- was demanded vide Order No.03/Demand/32-33/99/ACT/03-04 dated 05.06.2003 from the respondents being the excess refund granted to them during the period from May, 2000 to 22.12.2002 by the Appellate Revenue. The Respondent paid the amount by way of debit in their Cenvat Credit account on 09.06.2003 in pursuance of Demand Notices. Department entertained the view that in pursuance of retrospective amendment through Notification Nos.32/99 & 33/99 both dated 08.07.1999 must not be adjusted from Cenvat Credit Account. However, the lower adjudicating authority held that the appellant was correct in making the payment through Cenvat Credit Account. This Adjudication Order was issued as per Remand Order of CESTAT vide its Final order No.S-495-509/A-1117-1131/Kol/2007 dated 31.05.2007. The relevant portion of the remand direction as contained in the CESTAT's Final order No.S-495-509/A-1117-1131/Kol/2007 dated 31.05.2007, is reproduced below :

"4. We have heard the ld.JDR who supports the impugned order on the basis of retrospective amendment as well as the cited decision of the Hon'ble Guwahati High Court. We are of the view that in the absence of Stay on the said decision of the Hon'ble High Court of Guwahati or contrary decision from any higher judicial forum, the law laid down by the said decision has to be followed. However, the

amended law effectively requires that the credit availed and lying unutilized only is required to be demanded from the appellants. In this case, the Original Authority has passed the orders without issue of any show cause notice and without hearing the appellants. Hence the appellant had no chance to present the factual details before the Original Authority to arrive at the proper calculation. Hence it was necessary for the lower Appellate Authority to ensure that the calculations are properly made in terms of the retrospectively amended law as upheld by the Hon'ble Guwahati High Cout before confirming the demands. Since the Lower Appellate Authority has passed a blanket order without looking into the factual details of each, we have no option but to set aside the impugned order and remand the matter to the Original Authority for fresh decision. He shall afford a reasonable opportunity of hearing to the appellants in regard to the calculation of the demanded amounts before passing a fresh order. All the 15 appeals are allowed by of remand. The Stay Petitions filed by the appellants also stand disposed off."

4. The Department filed appeal before the Commissioner (Appeals). Again, the order of the lower Appellate Authority, which was lying pending before him, the impugned order was passed . In the impugned order, the order of the lower Adjudicating Authority permitted the reversal of refund granted earlier through Cenvat Credit Account was upheld. It is against these orders, the Revenue is in appeals before us.

5. However, the issue was agitated by some assesses before the Hon'ble High Court of Guwahati and the Hon'ble High Court of Guwahati vide its Order dated 21.09.2006 in the case of M/s Eminent Health Care and Cosmetics Pvt. Ltd. and Others Vs. UOI upheld the demand raised by the Department and directed the petitioner to make payments the respective amounts specified in the respective orders. Following the judgement of the Hon'ble High Court, the cases before the Commissioner (Appeals), were rejected vide Order-in-Appeal No.52/CE(A)/GHY/06 dt.13.11.2006 in which the respondent was also a party. The respondent along with the other parties preferred appeal before CESTAT, who vide its Order No.S-495-509/A-1117-1131/Kol/2007 dated 31.05.2007 set aside the impugned orders and remanded the matter to the original authority for a fresh decision. The original authority held that deposit of the amount demanded in the Cenvat Credit account was legally correct and there was no dispute over the amount involved.

6. The ld.Advocate on behalf of the respondent submitted that Section 153 of the Finance Act, 2003 does not in any way impart the present proceedings since the Cenvat Credit reversed by it for the payment of excess refund was not towards manufacture of any goods not covered under the Notification No.33/1999-CE dated 08.07.1999. It is also submitted that there is no finding as to the fact that the Respondent was manufacturing goods not covered under the Notification. In absence of the same, it cannot be said that the Cenvat Credit was utilized by respondent for manufacture of goods not

covered the notification. Thus the Department appeal is void of any merits. In support of their contention, they relied on the Board's Circular No.683/74/2002-CX dated 24.12.2002 and DOF No.334/1/2003-TRU dated 28.02.2003 wherein it has been clarified that the bringing the amendment was to curb utilization of credit towards payment of duty not covered under notification which resulted in excess refund to the assessee. He further submitted that since all the goods covered under the notification is being manufactured by it, the excess refund could be refunded by way of utilization of credit. He further submitted that the entire exercise is revenue neutral inasmuch as the credit utilized for payment of excess refund has been compensated by payment of duty in cash since credit amount has been reduced. Thus, the Respondent submitted that there has no loss to the revenue by utilization of credit for payment of excess refund. Therefore, the intention under which the amendment by Section 153 of the Finance Act, 2003 was brought has not been violated in any way. Without prejudice to the above, he submitted that even assuming without admitting that the case of the Department is correct, the Respondent is entitled to avail the Cenvat Credit utilized for payment of excess refund. It is further submitted that even this arrangement will result into revenue neutrality. In view of the above, the submission of the Respondent is that the appeal of the Department is liable to be dismissed.

7. On the other hand, the ld.DR for the Revenue, has stated that the impugned order of the Commissioner (Appeals) is not correct

under the fact that the appellants have claimed the refund amount through PLA/cash and the refund is required to be made through cash/PLA and through Cenvat Credit Account as done by the appellants.

8. We have considered the rival submissions and perused the case records.

9. At the outset, we have seen that the issue regarding reversal of cenvat credit after retrospective amendment during the Finance Act, 2003 has been the subject matter of batch of Writ Petition before the Hon'ble High Court of Guwahati. The Hon'ble High Court upheld the retrospective amendment and also held that the petitioners were required to pay back the refund granted to them in excess. Therefore, the excess amount of refund availed by the appellants are required to be recovered by the Department. At this juncture, we have also considered the submissions made by the respondents wherein in a categorical direction, the respondent has stated that the respondents in these cases are not manufacturing any other than one on which, refund has been demanded in pursuance to the Notifications granting such refund. Immediately after the retrospective amendment in the year, 2003, under Section 153 of the Finance Act, 2003, the assessee reversed the credit through Cenvat Credit Account. In this case, only one product was manufactured by the appellant and even if, the refund was to be granted through PLA account, the same would have been available by way of cenvat credit to the respondents making situation revenue neutral. We find that this argument of the

ld.Counsel appears to be valid and needs to be considered by us. We also considered the letter No. D.O.F.No.334/1/2003-TRU dated 28.02.2003 issued to the Commissioner after the announcement of the Annual Budget in the year 2003. The issue about the retrospective amendment has been discussed at length in the aforesaid letter. The relevant portion is appearing at Sl.No.16 of the said letter, which is extracted below :

> **"16.Retrospective Amendments**
> **16.1**
> It may be recalled that notification No.61/2002-CE dated 23.12.2002 was
> issued to provide that:
> (i) the
> Cenvat credit of the duty paid on the inputs used in the manufacture of final products cleared after
> availing of the exemption under notification No.32/99-CE and 33/99-CE both dated 8.7.1999 [North East exemption
> notifications] shall be utilized only for payment of duty on the final products cleared after availing of the exemption
> under the said notifications; and
> (ii) the refund allowable under these notifications shall not exceed the amount of duty paid less the
> amount of the
> Cenvat credit availed of, in respect of the duty paid on the inputs used in or in relation to the
> manufacture of goods cleared under the corresponding exemption notification.
> **16.2**
> Similarly, notification No.42/2002-CE (NT) dated 23.12.2002 was iss
> ued to disallow diversion of the credit
> taken on inputs used for manufacture of products exempted under the said North East notifications for payment of
> central excise duty on other products. Such diversion simply implied payment of a greater amount of duty through
> account-current on the products exempted under the said notifications thereby resulting in unintended benefit. The
> following illustration shows how the scheme was being misused:
> Illustration:
> Suppose duty payable on the goods was Rs.100/- and the duty paid on inputs for the

manufacture of said goods is Rs.20/-. What the notification 32/99-CE and 33/99-CE envisage is that the
manufacturer will utilize the full credit in respect of inputs and pay only Rs.80/- in cash, which would be
subsequently refunded to him. However, there are cases where a manufacturer did not utilize the input credit
and paid the entire duty of Rs.100/- in cash. The credit of Rs.20/- was being kept by him in reserve to be
utilized on some other goods not covered under the exemption notifications. There were also situations when
the assessee was manufacturing two goods, one covered under the above notifications, and the other outside.
What they were doing was to utilize the entire input tax credit for payment of duty on the product not covered
under the exemption notification, and paying full duty on the exempted goods and getting back full refund.

16.3

The amendments made in December, 2002 sought to plug this loophole. These provisions are now being
given retrospective effect
w.e.f. 8.7.1999[clauses 142 to 145 of the Finance Bill]. Consequently, all assessments
from 8.7.1999 onwards in respect of these two notifications will have to be revised to ensure that the entire credit of
duty paid on the inputs used in the manufacture of the exempted final products is used only for payment of duty on
final products cleared under these notifications and refund is restricted to total duty paid less the total credit in
respect of the duty paid on inputs. Thus, in the above illustration, refund will be restricted to Rs.80/-, though the
duty paid in cash was Rs.100/-. Similarly, if any credit taken in respect of inputs used in the manufacture of goods
cleared under 32/99-CE and 33/99-CE, was used for payment of duty on other goods not entitled to the benefit under
these notifications, such credit is not admissible and amount equal to the credit so utilized has to be demanded from
the manufacturers. As the
assessee will have to make the payment within 30 days of the enactment of Finance Bill, it
is suggested that necessary action be taken to work out the amount to be recovered before this date. Similar
amendment has also been made prospectively in the notifications for
Kutch district of Gujarat and State of J&K. It
may be ensured that refund of duty is made only in accordance with the above provisions.

16.4

Clause 146 (1) of the Finance Bill amends notification No.32/99-CE and 33/99-CE retrospectively so as to

provide that the exemption under this notification will not be available to cigarettes and pan
masala containing
tobacco with effect from 8.7.1999 and in respect of all products of chapter 24
w.e.f. from 1.3.2001. Here also,
action has to be initiated to recover the amount within 30 days of the enactment of the Finance Bill.
16.5
Notification no.32/99-CE has also been amended retrospectively to provide that
w.e.f. 12.2.2002, benefit
under this notification will not be available to goods manufactured and cleared by (
i) Numaligarh Refineries Limited
(ii) Bonagaigaon Refineries and Petrochemicals Limited (iii) Indian Oil Corporation,
Guwahati and (iv) Assam Oil
Division, Indian Oil Corporation,
Digboi (clause 146(1) of the Finance Bill)"

10. In view of the aforesaid discussions after considering the submissions made before us, we are of the considered view that there is no infirmity in the order passed by the Commissioner (Appeals). Accordingly, the same is required to be upheld.

11. As a result, both the appeals filed by the Department are dismissed.

(Pronounced in the open Court on 24.09.2018)

Sd/	Sd/
(P. K. CHOWDHARY)	**(BIJAY KUMAR)**
MEMBER (JUDICIAL)	**MEMBER (TECHNICAL)**

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