IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA

REGIONAL BENCH - COURT NO.2

Excise Appeal No.75328 of 2019

(Arising out of Order-in-Original No.30/COMMR/C.Ex.Kol-V/KOL/2018-19 dated 3 December 2018 passed by Commissioner of CGST & Central Excise, Kolkata South.)

M/s. Diamond Beverages Pvt.Ltd.

(P-41, Taratala Road, Kolkata-700088.)

...Appellant

VERSUS

Commissioner of CGST & Central Excise, Kolkata South

.....Respondent

(GST Bhawan, Third Floor,
180, Shantipally, Rajdanga Main Road,
Kolkata-700107.)

APPEARANCE

Mr.Arvind Baheti, (C.A.) & Mr.S.Banerjee (Advocate) for the Appellant (s)
Mr.S.S.Chattopadhyay, Authorized Representative for the Respondent (s)

CORAM: HON'BLE SHRI P.K.CHOUDHARY, MEMBER(JUDICIAL)
HON'BLE SHRI BIJAY KUMAR, MEMBER(TECHNICAL)

FINAL ORDER NO. 76356/2019

DATE OF HEARING : 7 August 2019
DATE OF DECISION : 7 August 2019

P.K.CHOUDHARY :

This Appeal has been filed by the Appellant against the Order-in-Original No. 30/COMMR/C.EX/Kol-V/KOL/2018-19 dated 3 December 2018 passed by the Commissioner, CGST & CX, Kolkata South Commissionerate.

2.1 Briefly stated the facts of the case are that the Appellant is engaged in the manufacture and clearance of Aerated water and Fruit based drinks (in short 'final products') falling under Chapter- 22 of the Central Excise Tariff Act, 1985 on payment of applicable excise duty. The Appellant operates under the Cenvat Credit Scheme and Sugar is one of the principal ingredients in the manufacture of their dutiable final product.

2.2 Proceedings were initiated against the Appellant by a Show-cause Notice dated 29 June 2018 proposing denial of Cenvat Credit of Sugar Cess aggregating Rs. 2,32,11,708/- claimed by the Appellant in the ER-1 return for the month of June 2017 on two grounds. Firstly, Sugar Cess is not expressly stipulated as a levy on which credit can be taken under Rule 3 of the Cenvat Credit Rules, 2004. Secondly, it was alleged that such credit has been taken on the strength of invoices which were issued more than one year prior to the date of taking the credit in violation of the proviso to Rule 4 of the Cenvat Credit Rules. The demand proposed in the Notice was confirmed by the Adjudicating Authority vide the impugned Order-in-Original on both the grounds.

2.3 The authorized representative for the Appellant has assailed the Order-in-Original on both the counts. The Learned A/R refers to the decision of the Hon'ble Karnataka High Court rendered in the case of Shree Renuka Sugar [2014 (302) ELT 33] upholding the views of the Tribunal [2007 (218) ELT 388] wherein Cenvat Credit of Sugar Cess has been specifically allowed and Civil Appeal filed by the revenue against the said Order of the Hon'ble Karnataka High Court has also been dismissed by the Hon'ble Supreme Court [2016 (335) ELT A 77 (SC)]. The Learned AR has also invited our attention to the following decisions passed by different Benches of the Tribunal allowing credit of Sugar Cess by relying upon the decision of the Hon'ble Karnataka High Court.

- *Hindustan Coca-Cola Beverages Pvt. Ltd. Vs. CCE, Jaipur – MANU/CE/0313/2018 Para 8, 9;*
- *Hindustan Coca-Cola Beverages Pvt. Ltd. Vs. Commissioner of Central Tax-Guntur-GST – 2019-VIL-236-CESTAT-HYDERABAD-CE Para 7*

Secondly, on the issue of invoices being time barred, the Learned AR submits that the credit was originally taken within the period of limitation but reversed thereafter on being objected by the revenue under protest while reserving the right to take recredit if such reversal was found unwarranted in law. Therefore, this was a case of recredit, and no time limit could be applied to such recredit in view of Circular No. 990/14/2014-CX-8 dated 19 November 2014. Reliance in this regard was also placed upon the following decisions:

- *Commissioner of Ex., Kolkata – II Vs. Rahee Industries Ltd. – 2011 (263) ELT 225 (Cal.) Para 6;*
- *Suman Controls Pvt. Ltd. Vs. Commissioner of Central Excise, Service Tax and Customs, Bangalore-II Para 4*

The Learned AR vehemently argued that the decision relied upon by the Adjudicating Authority are distinguishable on facts as those were dealing with the issue of levy of Education Cess on various products specific Cesses imposed under different enactments but not with the eligibility of Cenvat Credit on Sugar Cess.

3. The Learned DR justifies the impugned order.

4. Heard both sides and perused the case records. We find that the substantial question of law considered by the Hon'ble Karnataka High Court in Renuka Sugar case is set out at para 6 thereof.

> "*Whether the assessee is entitled for Cenvat credit, on the Sugar Cess under Section 3(4) of the Sugar Cess Act, 1982 as the same is not one of the duties allowed for Cenvat credit under Rule 3(1) of the Cenvat Credit Rules, 2004.*"

Therefore, the decision of the Hon'ble Karnataka High Court in the Renuka Sugar case (supra) is directly dealing with the issue involved in the present proceedings and the same has also attained finality in view of the dismissal by the Hon'ble Supreme Court of the departments appeal against the same albeit for non-compliance.

The Hon'ble Karnataka High Court after taking into consideration the provisions of Section 3(4) of the Sugar Cess Act, which incorporates by reference the provision of the Central Excise Act and the Rules framed thereunder as also the effect of the legislation by reference as explained by the Hon'ble Supreme Court in Bamagore Jute Factory Co. Vs. Inspector of Central Excise – 1992 (57) ELT 3, answered the substantial question of law in favour of the assessee and against the revenue. On the other hand, none of the decisions relied upon by the Adjudicating Authority are dealing with the issue of eligibility of Cenvat Credit of Sugar Cess levied under the Sugar Cess Act. Therefore, the decisions relied upon by the Learned Adjudicating Authority has no application to the issue involved herein as a judgement is only an authority for what it decides and not what can be inferred therefrom.

5. We also find from the case records that the credit pertaining to the period September 2009 to August 2014 was taken for the first time in August 2014 itself under due intimation to the revenue authorities whereas the time limit for the purposes of taking credit was introduced for the first time only with effect from 1 September 2004. We also find that the Sugar Cess credit from September 2014 onwards was taken by the Appellant on a month to month basis prior to its reversal in February 2016 on being objected by the revenue while reserving the right to recredit. Therefore, it was a case of recredit and we agree with the Appellant's that no time limit could be imputed for

taking recredit of the amount so reversed under protest. Moreover, the views expressed by the original authority as regards non-applicability of Circular dated 19 November 2014 is erroneous and unsustainable as the circular speaks about recredit in general and the situations which have been mentioned therein are only illustrative in nature.

6. As a result, the appeal succeeds and the impugned Order-in-Original is set aside with consequential relief, if any.

(Operative part of the order was pronounced in the open Court.)

SD/
(P.K.CHOUDHARY)
MEMBER (JUDICIAL)

SD/

(BIJAY KUMAR)
MEMBER (TECHNICAL)

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