

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

REGIONAL BENCH - COURT NO.2

Excise Appeal No.76748 of 2019

(Arising out of Order-in-Appeal No.07/HWH/CE/2019-20 dated 02.04.2019 passed by Commissioner of CGST & Central Excise, Appeals-II, Commissionerate, Kolkata.)

M/s. Bengal Beverages Private Limited

(Durgapur Expressway, P.O. Dankuni Coal Complex, Hooghly-712310.)

...Appellant

VERSUS

Commissioner of CGST & CX, Howrah Commissionerate

.....Respondent

(M.S. Building, Custom House, 15/1, Strand Road, Kolkata-700001.)

WITH

Excise Appeal No.76859 of 2019

(Arising out of Order-in-Appeal No.07/HWH/CE/2019-20 dated 02.04.2019 passed by Commissioner of CGST & Central Excise, Appeals-II, Commissionerate, Kolkata.)

Commissioner of CGST & CX, Howrah Commissionerate

.....Appellant

(M.S. Building, Custom House, 15/1, Strand Road, Kolkata-700001.)

VERSUS

M/s. Bengal Beverages Private Limited

...Respondent

(Durgapur Expressway, P.O. Dankuni Coal Complex, Hooghly-712310.)

APPEARANCE

Shri Ankit Kanodia, Advocate for the Appellant/Assessee

Shri J. Chattopadhyay, Authorized Representative for the Respondent/Revenue

CORAM: HON'BLE SHRI P. K.CHOUHARY, MEMBER(JUDICIAL)

HON'BLE SHRI P.V.SUBBA RAO, MEMBER(TECHNICAL)

FINAL ORDER NO. 75118-75119/2022

DATE OF HEARING : 29 October 2021
DATE OF DECISION : 24 February 2022

P.K.CHOUDHARY :

The current proceedings are result of the Order-in-Appeal No.07/HWH/CE/2019-20 dated 02/04/2019 passed by the learned Commissioner of CGST & CX (Appeals-II), Kolkata by which the refund application of the Appellant was partly allowed to the extent of Rs.2,97,57,505/- while the balance amount of Rs.1,69,13,316/- has been rejected for the grounds contained in the impugned order. Thus, the Appellant is in appeal for the amount rejected while the Revenue is in appeal against the amount sanctioned as refund by the First Appellate Authority.

2. 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') classifiable 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.

3. Proceedings were initiated against the Appellant by a Show-cause Notice dated 02nd January 2018 proposing denial of refund of Cenvat Credit of Sugar Cess aggregating Rs.4,66,70,821/- claimed by the Appellant vide their refund application dated 25/09/2017 and submitted on 03/10/2017 before the office of the learned Assistant Commissioner, CGST & CX, Dankuni Division, Howrah CGST & CX Commissionerate on the ground that Sugar Cess is not expressly stipulated as a levy on which credit can be taken under Rule 3 of the Cenvat Credit Rules, 2004. The refund claim was rejected by the Adjudicating Authority vide the impugned Order-in-Original dated 11th June 2018.

4. The Appellant filed an Appeal before the First Appellate Authority which by its order dated 02/04/2019 partly allowed the refund claim to the extent of Rs.2,97,57,505/- while the balance amount of Rs.1,69,13,316/- has been rejected on the ground that for the said amount covering the period August 2014 to June 2015, the Appellant has

been served with a Show Cause Notice No.32/Commr./2015 dated 21/08/2015 which is pending adjudication and hence the said amount being under dispute cannot be refunded to the Appellant. Hence the present appeals.

5. Shri Ankit Kanodia, learned Advocate appearing for the Appellant assessee has assailed the order of the First Appellate Authority to the extent of denial of refund claim for a part period on the ground that such amount is pending adjudication on the ground that when the subject matter of refund itself is not in dispute and that the lower authority has sanctioned the refund for the period post June 2015 hence the proceedings vide notice dated 21/08/2015 becomes infructuous as in the current proceedings also the same amount for the same period is in dispute and when the eligibility of the Cenvat credit has been defined to be in favour of the Appellant, then the refund for the prior period cannot be withheld. The Learned Advocate 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 in respect 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 Advocate also invited our attention to the following decisions passed by different Benches of the Tribunal allowing credit of Sugar Cess by relying upon the judgement of the Hon'ble Karnataka High Court.

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

6. Shri J.Chattopadhyay, learned Authorized Representative for the Respondent/Revenue justifies the impugned order and as regards the departmental appeal for the amount allowed as refund by the First Appellate Authority, the learned Authorized Representative relies on the judgment of the Hon'ble Apex Court in the case of Unicorn Industries v. UOI, 2019 (12) TMI 286, which has held in cases of refund/exemption of excise duty for the units located in the northeast region, the same does not apply to education cess as the notification governing the exemption does not specifically exempts the same.

7. The Learned Advocate for the Appellant/Assessee vehemently argued that the decision relied upon by the learned Authorized Representative for the Respondent/Revenue are distinguishable on facts as those pertained to the issue of exemption of Education Cess for north eastern units when excise duty was exempted but not with the eligibility of Cenvat Credit on Sugar Cess.

8. Heard both sides through video conferencing and perused the Appeal records.

9. 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, which is as follows:-

"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 Rule3(1) of the Cenvat Credit Rules, 2004."

Therefore, the judgement 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 of the Department's Appeal by the Hon'ble Supreme Court.

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, the decisions relied upon by the learned Authorized Representative for the Respondent/Revenue are dealing with the issue of eligibility of exemption of education cess when the excise duty levy is exempted which is totally a different subject matter in our view.

10. Also, in a similar matter, this Bench in the case of *Diamond Beverages Private Limited* vide Final Order No.76356/2019 dated 07/08/2019 has allowed the Cenvat credit of sugar cess.

11. We find from the case records that the First Appellate Authority has rejected the part claim of Cenvat credit on the ground that a demand for recovery of such amount for the period August 2014 to June 2015 is pending adjudication by the learned Commissioner. We find that the issue in the said demand notice also relates to eligibility of Cenvat credit on sugar cess and when the same has already been decided in favour of the Appellant assessee, then the earlier demand notices become infructuous and cannot be sustained in the eyes of law. Further for the same period on the same issue, two demand notices cannot be sustained and hence we are of the view that the order of the learned First Appellate Authority needs to be modified to the above extent. Also, Instruction F. No. 201/01/2014-CX.6, dated 26-6-2014 issued by the CBIC as regards "Instructions regarding need to follow Judicial discipline in adjudication proceedings" wherein it was stated that –

"2. However the binding precedent was not followed which led to litigation before the Hon'ble High Court to which Hon'ble High Court took a serious view. It may be noted that on the subject of consequential refund, where the department has gone in appeal, there already exists a Circular No. 695/11/2003-CX., dated 24-2-2003 [2003 (152) E.L.T. (T42)]. This circular of the Board is binding on all field officers. Had this circular been

followed in the case, unnecessary litigation as well as adverse observation of the Hon'ble High Court could have been avoided. This circular is once again brought to the notice of field officers with direction that it is followed scrupulously.

3. The judgment of Hon'ble High Court in M/s. Dupont case (supra) under reference may be perused by the field officers for complete understanding of the issues involved and directions of the Hon'ble High Court on need to follow judicial discipline. Judgment of the Hon'ble Supreme Court in case of Union of India v. Kamalakshi Finance Corporation Ltd. [1991 (55) E.L.T. 433 (S.C.) = 2002-TIOL-484-SC-CX-LB] may also be perused as this is an authoritative pronouncement on the issue and has also been cited by the Hon'ble High Court.

4. The contents of this instruction may be brought to the notice of all Adjudicating Authorities under your jurisdiction with direction to follow the same scrupulously."

13. Thus in the instant case, the refund claim of the Appellant needs to be allowed.

As a result, the appeal of the appellant is allowed with consequential benefits as per law and the departmental appeal is dismissed.

(Order pronounced in the open court on 24 February 2022.)

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

Sd/
(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

