

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

REGIONAL BENCH - COURT NO.2

Excise Appeal No.75938 of 2022

(Arising out of Order-in-Appeal No.69/Kol-South/22 dated 20.10.2022 passed by Commissioner, CGST & CX, Appeals-I, Kolkata.)

M/s. Diamond Beverages Private Limited

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

...Appellant

VERSUS

Commissioner of CGST & CX, Kolkata South Commissionerate

.....Respondent

(GST Bhavan, 180, Shantipally, Rajdanga Main Road, Kolkata-700107.)

APPEARANCE

Shri Ankit Kanodia, Advocate for the Appellant (s)

Shri K.Chowdhury, Authorized Representative for the Revenue

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

FINAL ORDER NO. 75824/2023

DATE OF HEARING : 21 June 2023

DATE OF DECISION : 26 June 2023

Per : P.K. CHOUDHARY :

The current proceeding has arisen out of the Order-In-Appeal No. 69/Kol-South/22 dated 20/10/2022 passed by The Commissioner Of CGST & CX (Appeals-I), Kolkata by which it was held by the Ld. Appellate authority that Appellant is not entitled to refund of Cenvat credit of Sugar cess even when the Tribunal vide Final Order No. 76353/2019 dated 07.08.2019 has already held that the Appellant was eligible to claim Cenvat credit of the same on the ground that the said order of the Tribunal has been appealed by the department before the Hon'ble High Court and the matter is pending and thus the refund cannot be sanctioned in such cases. It was also held by the Ld. Appellate authority that judgment of the COMMISSIONER OF C. EX.,

CUS. & S.T., BELGAUM Versus SHREE RENUKA SUGARS LTD. 2014 (302) E.L.T. 33 (Kar.) has not attained finality has the same has been admitted by way of SLP before the Hon'ble Supreme Court of India and the same is also pending.

2. The brief facts of the case are as below:

2.1 The appellant being Authorised bottlers of Coco Cola purchases sugar from the market on which Sugar cess is charged by the suppliers and the Appellant has claimed the Cenvat credit of the said sugar cess in it's ER 1 return for the month of June 2017 i.e. until the onset of the Goods and Services tax indirect tax regime in India. The appellant had filed a refund application under section 11B of the central Excise Act, 1944 read with section 142(9)(b) of the Central Goods and Services Tax Act, 2017 for refund of Cenvat credit of Sugar cess as availed by the Appellant in its revised ER 1 return for the month of June 2017 vide its application dated 17.03.2018 and submitted on 21.03.2018 before the office of the Ld. Assistant Commissioner, CGST & CX, Taratalla II Division, Kolkata South CGST & CX Commissionerate. The said refund application was scrutinized by the department and a Show Cause Notice (SCN) C. No. V(18)27/Refund/Diamond/Tara-II/Kol-South/2018/759 dated 01.05.2018 was issued wherein the Appellant was asked to show cause as to why the said refund claim should not be rejected as sugar cess is not a duty of excise and hence refund of the same cannot be accepted. The appellant replied to the said SCN and submitted that the issue has been settled by Hon'ble High Court of Karnataka and there is no stay of operation of such order. The refund however came to be rejected vide Order-in-Original No. R-25/Tara-II/Kol South/CGST & CX/2017-18 dated 04.03.2019 on the only ground that the matter is pending and has not attained finality. The appellant preferred an appeal before the first appellate authority with regard to the OIO dated 04.03.2019 and the Ld. First Appellate Authority rejected the claim of the appellant and upheld the OIO dated 04.03.2019 albeit on new grounds which was never an allegation in

the SCN issued by the department for rejection of the refund claim. Thus the present appeal by the appellant.

3. Heard both sides and perused the appeal records.

4. At the outset, we note that the Ld. DR had raised the issue that this Tribunal is not competent to hear the present appeal having regard to the judgment of the Tribunal in ST/40010/2020 vide Interim Order No. 40019/2021 dated 22.10.2021. We have carefully gone through the contents of the said judgment and submissions of both the appellant as well as of the revenue on the same. We find that the present issue before us doesn't deal with applicability of section 142(3) of the CGST Act, 2017 as was the case before the Tribunal in the above mentioned case. Thus, we are satisfied that the present appeal can very well be heard and disposed by this Tribunal and thus we proceed to pass the order on merits.

5. We find that the only issue to be decided in the present proceedings is whether the Id. Appellate authority was correct in rejecting the refund application of the appellant by holding that the earlier order of this Tribunal vide Final Order No. 76353/2019 dated 07.08.2019 has been appealed against by the department and hence the same has not attained finality.

6. We find that the appellant has produced records before us to show that the appeal filed by the revenue against the Tribunal's order dated 07.08.2019 is pending before the Hon'ble High Court at Calcutta in CEXA 9/2020 and there has been no orders passed by the Hon'ble High Court granting stay of operation of the said order of the Tribunal. The revenue department has not been able to produce any document to show that the order has been stayed by any higher authority. Under this factual background, we are of the considered view that both the lower authorities were not correct in rejecting the refund claim of the appellant on the ground of pendency of proceedings when no stay has been given by any higher court in the earlier order regarding eligibility of Cenvat credit. In this regard we

rely upon the CBIC Circular CBIC Circular No. 572/9/2001-CX dated 22.02.2001 wherein the subject matter related to Central Excise & Customs - Disposal of refund/rebate claims where application is pending at appellate level - Instructions – Regarding. The CBIC had clarified as below:

"(1) Cases where it is considered advisable to contest an adverse High Court's Judgement, inter alia, involving substantial refund or release of any seized/confiscated goods by filing Special Leave Petition (SLP) including Stay Application, in the Hon'ble Supreme Court.

1. In such cases most speedy action should be taken by concerned Commissioner to submit, considered comments, grounds for appeal and all relevant papers to Board for taking Law Ministry's advice and if agreed filing SLP & Stay Petition against the order of the High Court. (Where appropriate considering the stakes and urgency of the matter conversant officer dealing with the case be also deputed to help expedite the aforesaid action) 2. In terms of the present practice in the Supreme Court Registry, the SLPs/Stay Applications filed in the Supreme Court are listed for hearing in their own turn according to the dates of their filing. However, in case of urgency, there is a procedure of mentioning before the bench headed by the Chief Justice of India for ad interim stay till the stay application is heard and disposed of by the Supreme Court. For this purpose, the Central Agency Section is requested to file an application with the Registrar of the Supreme Court giving reasons justifying out of turn hearing of the stay application. In case the Registrar is satisfied about the urgency, the application is included in the "list of cases for urgent mentioning" and it is then possible to mention the case on the following day before the bench headed by the Chief Justice of India. In view of the aforesaid procedure, it may not be possible to move the Supreme Court for out of turn hearing

of stay applications in every case in a routine way. We will have to justify the urgency and serious implications if the adverse order is not stayed. It may also not be always possible to get our applications listed according to our wish. The Commissioners should, therefore, while ensuring submission of proposals for SLP/Stay on top priority basis also take steps simultaneously so that non-implementation of the High Court's Order without obtaining stay from the Supreme Court does not create complications. In such cases, therefore the following action is advised :-

- 1. Where a High Court has stipulated any time limit for implementation of its order, the Customs House/Central Excise Commissionerate apart from taking steps for filing SLP/Stay Petition before the deadline, as mentioned in para (a) above, should simultaneously file an application before the High Court intimating steps taken for filing SLP/Stay Petition before the Apex Court, and request be made for extension of time limit for implementation of the order till the department's Stay Application is heard or disposed of by the Hon'ble Supreme Court. If the High Court rejects the application, a copy of the application filed and the order of the High Court should be immediately faxed to the Board, so that even this could be produced to Supreme Court Registry, while seeking out of turn/urgent hearing for stay.*
- 2. Where no time limit is stipulated by the High Court for implementing its order, but the petitioner files a contempt petition/notice in the High Court, the same should be immediately faxed to the Board, for similar action as mentioned in (i) above for pressing for urgent hearing of our stay. It would be possible for the Board's office to file SLP/Stay Petition with relevant documents showing justification for urgency petition before the Registrar of the Supreme Court (for inclusion of department's application for out of turn hearing in the 'list of cases for urgent of monitoring'), and to get interim stay in time , from the*

Supreme Court when we have a good case, only if Commissioners and the Legal Cells keep very strict personal watch for taking time bound & speedy action suggested above. No unilateral decision should be taken by the Commissioners to release the goods/order refund in a case where it is decided in consultation with our Counsels in the field, and Law Ministry, to file SLP/Stay Application before the Apex Court against the order of the High Court and till this is pending decision before the Apex Court. The decision in such cases where there is any urgency & stay of Apex Court is not forthcoming, should be taken only in consultation with the Board."

The above Circular stood amended by issuance of circular No. 695/11/2003-CX dated 24.02.2003 wherein it was stated as-

"2. Board has examined the matter. It is observed that the above guidelines requiring consultation with Board in such cases dilute the legal position that the order of High Court/Tribunal should be implemented unless a stay has been obtained from the higher judicial forum on the implementation of the order. Further, consultation with Board in such cases may cause into delay in finalisation of the refund claims. Accordingly, Board has decided to permit jurisdictional Commissioners to take decision in such cases on merits at their level to grant refund or release goods without seeking permission/clearance from the Board. However, in the matters concerning Supreme Court, the jurisdictional Commissioners should continue to pursue with the Board for early disposal of stay application. 3. Board's Circular bearing No.572/9/2001-CX dated 22.02.2001 stands modified to the above extent."

Thus, having regard to the Board Circulars as above, we are of the view that the Appellants are entitled to the refund of sugar

cess and that there is no basis to deny the said refund at the present moment by the department.

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 However the binding adjudication proceedings" wherein it was stated that – "2. 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.

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. Kamalaksi 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.

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."

8. We further note that the Ld. Commissioner (Appeals) had also passed orders on various other grounds which was never alleged while issuance of the show cause notice and thus the appellate order

to that extent goes beyond the allegations raised in the SCN and cannot be sustained on this ground also.

As a result, the appeal of the Appellant is allowed with consequential benefits as per law.

(Order pronounced in the open court on 26 June 2023.)

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

Sd/
(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

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