IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT NO.I

APPEAL NO.E/1751/2010 & E/805/2011

(Arising out of Order-in-Appeal No.PKS/166/BEL/2010 dated 08/07/2010 & PKS/510/BEL/2010 dated 21/01/2011 passed by the Commissioner of Central Excise (Appeals), Mumbai-III)

Colgate Palmolive (India) Ltd., : **Appellant**

VS

Commissioner of Central Excise : **Respondent**
Mumbai-III

Appearance

Shri Jitu Motwani, Advocate for Appellant
Shri Anil Choudhary, Asst. Comm. (AR) for respondent

CORAM:

Hon'ble Dr.Suvendu Kumar Pati, Member (Judicial)
Hon'ble Shri P Anjani Kumar, Member (Technical)

Date of hearing : 24/10/2018
Date of decision : 08/02/2019

ORDER NO. A/85266-85267/2019

Per : P Anjani Kumar

The appellant, M/s.Colgate Palmolive (India) Ltd., are engaged in the manufacture of toothpaste and removal of the same on payment of duty. However, they were using a small amount of base cream used in manufacture of toothpaste for R&D purpose and after a duration of time the same was removed in the form of waste after obtaining due permission from the Municipal authorities. Revenue seeks duty on the waste of base cream thus cleared by the appellants.

Deputy Commissioner, Central Excise, vide order dated 28/10/2010 confirmed a duty of Rs.61,196/- and imposed equal amount of penalty. The Commissioner (Appeals) vide order dated 21/01/2011 upheld the order of the lower authorities, hence this appeal.

2. The appellant contended that the waste of base cream was discarded into open container being was unfit for consumption. Therefore, it was not marketable. As the same did not satisfy the test of marketability, no excise duty is liable to be paid, as held by the Hon'ble Supreme Court in Delhi in the case of *Cloth & General Mills Co. Ltd. – 1997 (92) ELT 315 (SC).* He also relied upon the decision of the Tribunal in the case of *Waxpol Industries Ltd. – 2000 (126) ELT 1001*, wherein it was held that testing sample is a technical necessity for quality control and are not taken outside the factory and therefore, no duty can be demanded thereupon. He also relied upon the Hon'ble Supreme Court decision in the case of *Tata Iron & Steel Co. Ltd. – 2004 (165) ELT 386 (SC),* wherein the Hon'ble Apex Court held that merely selling does not mean that a commodity is a marketable commodity as even rubbish can be sold. He further submitted that the Commissioner (Appeals) has not considered their submissions on the applicability of Section 4A and admissibility of Cenvat Credit in the event the goods are held to be excisable for the reason that the appellants have raised the issue for the first time before the appellate authority.

3. Learned AR for the Revenue has reiterated the findings in the order-in-original and order-in-appeal.

4. Heard both sides and perused the records.

5. On going through the records of the case, it is seen that the appellants have informed the department vide letter dated 09/06/2005 that they will be using a small quantity of base cream of each batch and it will be dumped after testing and after duly accounting in their records. We find that learned Commissioner (Appeals) has taken a stand that the appellants have not contested his earlier order dated 08/07/2010 for a different period on the same set of facts; a s such, it is deemed that the appellants have accepted the contention of the department. We find that the logic of learned Commissioner (Appeals) fails to impress. It is a well known fact that there is no estoppel in taxation matters and the principle is equally applicable to the Revenue as well as the appellants. In the instant case, duty was sought to be demanded on the waste cleared by the appellants. It is not the case of the Revenue that the said waste is cleared for a consideration, therefore, no sale is involved. Base cream is not packed in tubes, as in the case of normal toothpaste tubes sold, it cannot be held that they are marketable as in respect of such products packing is am essential requirement to make it marketable. The waste cleared by the appellants does not even satisfy the test of saleability. Therefore, even when the goods are held to be excisable for the reason that they have been manufactured in the factory, they do not assume the character of being goods which can be marketable and saleable. Dumping of waste cannot be equated to clearance of excisable goods. Therefore, by following the ratio of the cases cited above, we find that there is a force in the contention of the appellants and stand of the

Revenue is not acceptable. Moreover, in view of the facts that the appellants have informed about their activity to the department well in 2005 itself and have been regularly filing RT-12/ER-1 returns, imposition of penalty under Section 11AC is not sustainable. However, as we hold that the case of the Revenue does not stand on merit discussions on applicability of penalty are of no consequence.

6. In view of the above, the appeal is allowed.

(Pronounced in Court on 0802/2019)

(Suvendu Kumar Pati)	***(P. Anjani Kumar)***
Member (Judicial)	***Member (Technical)***

PJ