

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI
REGIONAL BENCH**

Excise Appeal No. 926 of 2012

(Arising out of Order-in-Appeal No. PII/RKS/106/2012 dated 16.04.2012 passed by Commissioner of Central Excise (Appeals), Pune-II)

M/s. Venugopal Foods Pvt. Ltd.

Appellant

Plot N. J-8, Additional MIDC, Satara 415 002.

Vs.

Commissioner of Central Excise , Pune-II

Respondent

ICE House, 41-A, Sassoon Road,
Opp. Wadia College, Pune 411 001.

Appearance:

Ms. Padmavati Patil, Advocate, for the Appellant

Shri Sanjay Hasija, Superintendent, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO. A/85102/2022

Date of Hearing: 10.02.2022

Date of Decision: 10.02.2022

PER: SANJIV SRIVASTAVA

This appeal is directed against Order-in-Appeal No. PII/RKS/106/2012 dated 16.04.2012 of the Commissioner of Central Excise (Appeals), Pune-II. The Commissioner (Appeals) upholding the order-in-original of the Assistant Commissioner, held as follows:

“ORDER

11. I uphold the impugned Order-in-Original No. Satara/144/Adj/2011, dated 30.12.2011, passed by the Assistant Commissioner, Central Excise, Satara Division. However, I allow the appellants to avail the Cenvat credit on inputs used in the manufacture of Sugar Syrup, subject to production of relevant duty paying documents and its verification by the jurisdictional Assistant Commissioner, as held in para 9 above. The appeal filed by the appellants is thus partially

allowed in above terms and the impugned Order-in-Original is modified to the above extent.”

1.2 The Assistant Commissioner vide his order referred to in above para held as follows:

“ORDER

15.1 I confirm the demand of Rs.4,10,892/- [Rupees Four Lakhs Ten Thousand Eight Hundred and Ninety Two only], (.e. Basic Excise Duty of Rs.3,96,923.87/-+ Ed. Cess of Rs.7,978.45/+S & H. E. Cess of Rs 3,989.22/-), as raised in the Show Cause Demand Notice issued under F.No. V(17)4-08/Ad/11-12/1799, dated 03.06.2011, on M/s. Venugopal Foods Pvt. Ltd., Plot No.J-8, Addl. MIDC, Satara-415004, under the provisions of Section 11A(2) of the Central Excise Act, 1944. I further order the assessee to pay the same immediately.

15.2 I confirm the interest liability at appropriate rate, on the confirmed duty liability of Rs. 4,10,892/-, calculated from the date the duty was actually due, till its payment, on M/s. Venugopal Foods Pvt. Ltd., Plot No.J-8, Addl. MIDC, Satara-415004, under the provisions of Section 11AB of the Central Excise Act, 1944. I further order the assessee to pay the same immediately.

15.3 I impose a penalty of Rs.5,000/- [Rupees Five Thousand only] under Rule 27 of the Central Excise Rules, 2002, on the assessee.

16. This order is issued without prejudice to any other action that may be taken initiated against the assessee and/or any other person(s) concerned, under the Central Excise Act, 1944 and/or under any other law/rules for the time being in force in the Republic of India.”

2.1 The appellants are manufacturer of biscuits which are exempt from payment of central excise duty vide Notification No. 3/2006-CE dated 01.03.2006, as amended by Notification No. 22/2007 dated 03.05.2007.

2.2 During the course of manufacture of the biscuits, sugar syrup is produced which is classifiable under sub-heading 17029090 and attracts duty @ 10% ad valorem with effect from 27.02.2010.

2.3 As the finished goods are exempt from payment of duty, Revenue was of the view that the appellants were required to discharge the duty as the benefit of exemption Notification No. 67/95-CE dated 16.03.1995 was not admissible to them.

2.4 Accordingly a show cause notice dated 03.06.2011 was issued to the appellants asking them to show cause as to why:

“(i) Central Excise duty amounting to Rs.4,10,892/- in respect of Sugar Syrup manufactured and used captively in the manufacture of Biscuits during the period July 2010 to October 2010, should not be demanded and recovered from them under the provisions of Section 11A(1) of the Central Excise Act, 1944.

(ii) Interest on the amount of duty not paid as mentioned above, should not be recovered from them, under the provisions of Section 11AB ibid.

(iii) Penalty should not be imposed on them under the provisions of Rule 27 of the Central Excise Rules, 2002.”

2.5 The show cause notice was adjudicated by the Assistant Commissioner as per para 1.2 above and the appeal filed by the appellants before the Commissioner (Appeals) was dismissed as per the impugned order.

3.1 We have heard Ms. Padmavati Patil, Advocate, for the appellants and Shri Sanjay Hasija, Superintendent, Authorised Representative, for the Revenue.

3.2 Arguing for the appellants, learned counsel submits that the issue involved in the matter has been settled by this Tribunal in their own case in their favour vide order No. A/88160/2018 dated 20.12.2018 and A/85151-85152/2019 dated 22.01.2019. Hence, as the issue is no longer res integra, the appeal should be allowed.

3.3 Learned AR reiterates the findings in the impugned order and submits that –

- Admittedly the sugar syrup manufactured by the appellants using 80% sugar and 20% water and additive like citric acid is added to it as preservative.
- Board has issued circular dated 03.07.1996 clarifying that according to IS: 4935-1968 synthetic syrups may be prepared with or without addition of citric acid to sugar syrups and flavouring essences. The total soluble solid content in synthetic syrup shall be not less than 65% by weight. The only additives that shall be used in synthetic syrups are citric acid and permitted colours.
- Since the total soluble solid content in the present case is more than 65% (80%), the sugar syrups prepared by the appellants are rightly leviable to excise duty.
- On the issue of marketability, he submits referring to the opinion dated 09.07.2009 given by Pankaj Traders, dated 11.07.2009 of Ashok Agencies, dated 11.07.2009 of Shashikant Brothers, dated 18.07.2009 of Labhesh Agencies and others. He submits that all the dealers who are dealing in sugar syrup state that sugar syrup has shelf life albeit live short stating that sugar syrup is not bought and sold in the market.
- It is now settled law that test of marketability is capability of bought and sold in the market and not the actual fact of the goods being bought and sold in the market, referring to the decision of the Hon'ble Supreme Court in the case of Nicholas Piramal India Ltd. [2010 (260) ELT 338 (SC)].
- In the case of Maharashtra Agro Industries Development Corporation Ltd. [2017 (2) TMI 244-CESTAT MUMBAI], it has also been held in favour of Revenue.
- Since the above were not considered by the Tribunal earlier, the matter needs to be reconsidered and decided in accordance with these decisions.

4.1 We have considered the impugned order along with the submissions made in the appeal and during the course of argument.

4.2 The Tribunal in the case of the appellant decided the issue stating as follows:-

“4. Learned Authorised Representative cited the findings of the lower authorities that ‘sugar syrup’ is a marketable commodity and that the addition of ‘citric acid’ ensures adequate shelf-life to warrant the finding. Relying upon the decision of the Tribunal in The Maharashtra Agro Industries Development Corp Ltd v. Commissioner of Central Excise, Nagpur [2017-TIOL-257-CESTAT-MUM] which followed various other judgements of the Tribunal such as PepsiCo India Holdings Ltd v. Commissioner of Central Excise, Chennai [2009 (245) ELT 707 (Tri-Chennai)], upheld by the Hon’ble High Court of Madras, and Commissioner of Central Excise, Hyderabad v. Spectra Bottling Co Ltd [2006 (198) ELT 417 (Tri-Bang)] to arrive at the conclusion that concentration of sugar in the syrup of more than 65% and the presence of citric acid would render the goods marketable and, hence, liable to duty of central excise.

5. There can be no doubt that, unless otherwise established, the deemed marketability of ‘sugar syrup’ is beyond question. It is also admitted that the appellant had been discharging duty liability on ‘sugar syrup’ as ‘intermediate goods’ till July 2008 and had discontinued payment of duty on advice from their client, M/s Parle Products Pvt Ltd. For the sweetening of ‘biscuits’, the addition of ‘sugar syrup’ is a necessity and is, invariably, produced within the factory by dissolving ‘table sugar’ in water using heat. This process, known as hydrolysis, converts ‘table sugar’ into ‘invert sugar’ and transforms the ‘sucrose’ in the former into ‘fructose’ and ‘glucose’ of equal proportion. Though this hydrolysis can be achieved by application of heat, the addition of ‘citric acid’ speeds up the process of conversion. ‘Invert sugar’ has shelf-life, is marketable and is an excisable good. The contention of the appellant that ‘sugar syrup’ produced by them does not meet these requirements, owing to less than adequate ‘fructose’ content, is backed by a test report which is not controverted by the lower authorities.

6. The lower authorities have discounted the relevance of ‘fructose’ content by a semantic analysis of the description in

heading no. 170290 of First Schedule to Central Excise Tariff Act, 1985 without any attempt to comprehend the role of 'sugar syrup' in the manufacture of biscuits and the process by, and purpose for, which 'sugar syrup' is produced. Consequently, the property of stability that is acquired by 'invert sugar' in contradistinction with 'sugar syrup' – which is a generic description of sugar dissolved in water – has not been taken into consideration while rendering the findings. The finding of 'sugar syrup' having shelf-life and, thereby, becoming excisable is not founded on a proper appreciation of the impugned product.

7. The relatively less stable 'sugar syrup' utilised in the manufacture of 'biscuits' has been recognised and acknowledged in the decisions of the Tribunal in re Rishi Bakers and in re MB Bakers Ltd. The decision in re The Maharashtra Agro Industries Development Corp Ltd does not stand on the same footing as the 'sugar syrup' used in the manufacture of 'juices and concentrates' are for purposes which are not comparable with the addition of adding 'sugar syrup' to 'biscuits' which is an entirely different food product.

8. In view of the decisions of the Tribunal dealing with an identical situation pertaining to another contract manufacturer of 'biscuits', and in the absence of any test report to contradict the 'fructose' content in the 'sugar syrup' produced by the appellant, we do not find sufficient reasons to consider the impugned goods to be excisable within the meaning of section 2(d) of Central Excise Act, 1944."

This decision was followed in the subsequent decision in the appellants' own case.

4.3 The circular referred to by learned AR has been considered by the Tribunal in the case of Lucky Biscuit Company [2017-TIOL-3841-CESTAT-KOL] and it has been held in para 5 of the said decision as follows:-

"5. We find that the issue in the present case is whether sugar syrup made by the appellant for captive use in the manufacture of exempted biscuit is chargeable to central excise duty under sub-heading 17029090. We find that both the lower authorities have concluded that the sugar

content is more than 80% on empirical basis without any chemical test having been done. In the absence of chemical test to ascertain the precise fructose content of the goods, any conclusion that the goods are classifiable under sub-heading 17029090 is not sustainable. We also find that the CBEC Circular dated 7.11.1994 relied upon by the lower authorities has been issued in respect of sugar syrup produced in the manufacture of aerated water and ayurvedic medicines. Hence, the same cannot be applied to the sugar syrup being produced for the biscuits without establishing that the two products are identical. We also find that issue in this appeal is squarely covered by the judgment of the Tribunal in the case of *Rishi Bakers Pvt. Ltd. (supra)*, wherein the Tribunal has held as under:

"8. Next comes the question of classification. The Department has classified the product, in question, under sub-heading 1702 90 90. Sub-heading 1702 90 90 comes under the 6 digit sub-heading 1702 90 which covers "other sugars including invert sugar and sugar syrup blends containing in the dry stage 50% by weight of fructose". The goods, in question, are sought to be classified under 1702 90 90 as "sugar syrup blends containing in dry stage, 50% by weight of fructose". In our view for classification as "sugar syrup blend" in this sub-heading the product must contain 50% by weight of fructose sugar in dry state. In these cases, the appellant's plea from the very beginning has been that the fructose sugar content is less than 50% and in this regard they have produced the test report of Shriram Institute of Industrial Research. It is seen that the Commissioner (Appeals) has not given any finding on this plea. Not only this, there is no evidence to show that before seeking classification of the goods, in question, under sub-heading 1702 90 90, the samples drawn from the goods had been got tested by the CRCL to confirm as to whether the fructose content of the goods, in question, in dry stage is 50% by weight. Just because the appellant during period till June 2008 were paying duty on the goods by classifying the same under sub-heading 1702 90 90, it cannot be presumed that they had accepted that the goods, in question, conform to the description of sugar syrup blends of sub-heading 1702 90 for which the sugar syrup in dry stage must contain 50% by weight of fructose. The Apex Court in the case of *Metlex (I) Pvt. Ltd. v. CCE, New Delhi* reported in 2004 (165) E.L.T. 129 (S.C.) = [2004-TIOL-77-SC-CX](#) has held that filing of classification list mistakenly does not mean that party has to pay duty, if in law, he is not bound to pay duty. Same view has been taken by the Apex Court in its judgment in the case of *Bonanzo Engg. & Chemical P. Ltd. v. CCE* reported in 2012 (277) E.L.T. 145 (S.C.) = [2012-TIOL-25-SC-CX](#). In view of this, we hold that the classification of the goods under sub-heading 1702 90 90 is not sustainable, as absolutely no evidence has been produced by the Department to show that the fructose content of the goods, in question, in dry state was 50%.

9. Even if it is assumed that the goods, in question, are covered by sub-heading 1702 90 90, for attracting Central Excise duty the goods must be proved to be marketable. The Tribunal had remanded this matter to Commissioner (Appeals) for examining the question of marketability of the goods, in question. In this regard it is settled law that the marketability of a product has to be established in the condition in which it emerges. In this regard the Apex Court in the case of *Bata India Ltd. v. CCE, New Delhi* (supra) has held that the test of marketability is whether product is marketable in condition in which it emerges. In this regard the marketability of the goods produced by a particular manufacturer cannot be presumed on the basis of the marketability of the similar goods in different condition being produced by another manufacturer, unless it shown that the two products are identical. In these cases, the Commissioner (Appeals) has held that the goods, in question, to be marketable only on the basis that the "invert sugar syrup" being manufactured by M/s. Dhampur Speciality Sugars Ltd. is being sold to M/s. Britannia Industries, M/s. J.B. Mangaram Food Industries and M/s. ITC Ltd. In our view this basis of holding that the goods, in question, are marketable is absolutely wrong, as it has been presumed that the sugar syrup being made by the appellants is identical to the "invert sugar syrup" being made by M/s. Dhampur Speciality Sugars Ltd. for which there is no basis. Chemically, invert sugar is obtained by Hydrolysis of cane sugar (sucrose, a disaccharide with specific rotation of + 66.50) and the same is a mixture of glucose (with specific rotation of +52.70) and fructose (with specific rotation of - 920), with net specific rotation of - 19.70. The process of hydrolysis of cane sugar (which is dextrorotatory i.e. with rotation of + 66.50) is also called inversion, as the mixture of glucose and fructose formed by this process is levorotatory with sp. Rotation of - 19.70 and for this reason the mixture of glucose and fructose formed by hydrolysis of cane sugar is called invert sugar. The invert sugar has longer shelf life. Whether a sugar syrup is ordinary cane sugar syrup or is invert sugar syrup has to be ascertained by chemical test which has not been done. It is, therefore, totally wrong to presume a given sugar syrup as invert sugar syrup without test. The judgments of the Apex Court in the cases of *Gujarat Narmada Valley Fert. Co. Ltd. v. CCE & Cus.* (supra), *Nicholaas Piramal India Ltd. v. CCE, Mumbai* (supra) and *Medley Pharmaceuticals Ltd. v. CCE & Cus, Daman* (supra) cited by the learned DR are not applicable to the facts of this case.

10. In view of the above discussion, we hold that neither there is any evidence to prove that the goods, in question, are classifiable under 1702 90 90 nor there is any evidence to prove that the goods, in question, in form in which they come into existence in the appellant's factories, are marketable. We, therefore, hold that the impugned order is not sustainable. The same is set aside. The appeals are allowed with consequential relief."

4.4 Even the same view has been taken by the Allahabad Bench of the Tribunal in the case of *Gokul Foods Pvt. Ltd.* [2018-

TIOL-169-CESTAT-ALL] and the Delhi Bench of the Tribunal in the case of MB Bakers Pvt. Ltd. [2017-TIOL-249-CESTAT-DEL] and Rishi Bakers Pvt. Ltd. [2015 (328) ELT 634 (Tri.-Del.)].

4.5 Learned Authorized Representative relied upon the decision of the Hon'ble Apex Court in the case Nicholas Piramal India Ltd, wherein following has been held:

“10. The taxable event for the levy of excise duty is the manufacture of goods. The term “manufacture” is of wide import and may include various activities and processes which may not be termed as ‘manufacture’ in the common parlance. But manufacture of goods alone is not enough. In order to attract the levy of excise duty, the goods should not only be manufactured, i.e., come into existence, but also should be articles or products that are known to the market and must be capable of being brought and sold. Some emphasis has to be laid on the use of the word capable as actual sale of the product or article is not essential and required. This has been settled in a number of authorities of this Court and no longer res integra. There cannot be any doubt that intermediate products, even if captively consumed and not actually sold, may be liable to levy of excise duty if they satisfy the test of both manufacture and marketability. The aforesaid legal principle has been laid down by this Court in the judgments in Hindustan Zinc Ltd. v. Commissioner of Central Excise, Jaipur, reported in 2005 (181) E.L.T. 170 (S.C.), Union of India v. Delhi Cloth & General Mills Co. Ltd., reported in 1997 (92) E.L.T. 315 (S.C.), Cadila Laboratories Pvt. Ltd. v. Commissioner, reported in 2003 (152) E.L.T. 262 (S.C.). In the decision in Hindustan Zinc Ltd. (supra), decided by three Judge Bench of this Court, it was also held, by this Court that marketability of a product is essentially a question of fact.

11. Therefore, the question of marketability, being a question of fact, has to be determined in the facts of each case and cannot be strait-jacketed into pigeon holes. The orders passed by the Commissioner as also the Tribunal clearly demonstrate that the

product in question is commercially known and is capable of being marketed. The facts that the appellants have chosen not to sell the product in question does not mean that the same is not capable of being marketed. The matter can be looked from another angle. There is also no dispute that the said product in question is used in the manufacture of the animal feed supplement sold by the Appellant. Had the Appellant not used the product in question, they would have had to buy the same from the market to manufacture and sell the Animal Feed Supplement. This clearly shows that a marketable product emerges.

12. Furthermore, in dealing with a question of fact, this Court should be reluctant in interfering with concurrent findings of fact on the issue of marketability unless it is shown that the said finding is perverse or patently illegal.

13. One of the arguments placed by the Counsel for the Appellant is that the product in question does not have shelf-life and hence cannot be said to satisfy the test of marketability. The said argument is contradicted by the evidence adduced by the Appellant themselves. It has been brought on record by the Appellants themselves that the product has a shelf-life of 2 to 3 days. Short shelf-life cannot be equated with no shelf-life and would not ipso facto mean that it cannot be marketed. A shelf-life of 2 to 3 days is sufficiently long enough for a product to be commercially marketed. Shelf-life of a product would not be a relevant factor to test the marketability of a product unless it is shown that the product has absolutely no shelf-life or the shelf-life of the product is such that it is not capable of being brought or sold during that shelf-life. This Court in T.N. State Transport Corporation Limited (supra) has held that a shelf-life of 8 to 10 hours was enough to market the product in issue before the Court in that case."

In our view this case also does not advance the case for revenue, as in present case no evidence has been adduced by revenue that the sugar syrup in question is known in the market as such and can be marketed. Hon'ble Supreme Court has clearly laid down that marketability is question of fact and needs

to be examined in facts of each case and for that shelf life cannot be relevant criteria. Contrary to revenue not having adduced any evidence to establish the marketability of “sugar syrup”, arising in the course of manufacture of biscuits, appellants have produced a substantial number of certificates earlier referred by us while recording the submissions made during the course of argument from the persons dealing in similar goods who clearly stated that “sugar syrup” of this type is never bought and sold in the market. In view of the above, and in absence of evidence to establish the marketability of sugar syrup, we are not inclined to accept the argument advanced by the revenue on the basis of this decision of Hon’ble Apex Court. Same view was expressed by the Mumbai bench in case of Hindustan Breweries and Bottling Ltd. [2013 (294) ELT 279 (T-Mum)] observing as follows:

“6. There is nothing on record, which shows that the slurry yeast obtained in the intermediate stage is actually being marketed or is in a marketable form. The only argument adduced is that it has a shelf life of two days and, therefore, it can be marketed. The marketability of a product has to be established by the department by leading evidence to the fact that how the product is commercially known and how it is capable of being marketed. Shelf life of a product would not be a relevant factor to test the marketability of a product unless it is shown that the product has absolutely no shelf life or the shelf life of the product is such that it is not capable on being bought or sold during that shelf life as has been held by the Hon’ble Apex Court in the case of Nicholas Piramal India Ltd. v. CCE, Mumbai - 2010 (260) E.L.T. 338 (S.C.). Merely because a product has shelf life of two days, it does not mean that the product is a marketable commodity unless there is other corroborative evidence to show that the product is actually marketed or is capable of being marketed. In the instant case there is no such evidence adduced by the department to establish the marketability of the product in question.”

4.6 Since we find the issue is squarely covered by the above decisions, after consideration of the arguments as advanced in the impugned order and by the learned AR during the course of

argument, we do not find any reason to sustain the impugned order.

5.1 The impugned order is set aside and the appeal allowed.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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