

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

REGIONAL BENCH - COURT NO. I

Excise Appeal No.1079 of 2010

(Arising out of Order-in-Original No.15/SR(15)/Commr/RGD/09-10 dated 15/03/2010 passed by the Commissioner of Central Excise & Service Tax, Raigad)

Parle International Ltd. (YoFrooti Unit) Appellant
Village Vanivali, Taluka- Khalapur, District- Raigad

Versus

Commissioner of Central Excise Raigad.... Respondent
4th Floor, Utpad Shulk Bhavan, Plot No.1, Sector 17,
Khandeshwar, New Panvel-410 206.

WITH

Excise Appeal No.1323 of 2010

(Arising out of Order-in-Original No.15/SR(15)/Commr/RGD/09-10 dated 15/03/2010 passed by the Commissioner of Central Excise & Service Tax, Raigad)

Parle International Ltd. (YoFrooti Unit) Appellant
Village Vanivali, Taluka- Khalapur, District- Raigad

Versus

Commissioner of Central Excise Raigad Respondent
4th Floor, Utpad Shulk Bhavan, Plot No.1, Sector 17,
Khandeshwar, New Panvel-410 206.

AND

Excise Appeal No.1324 of 2010

(Arising out of Order-in-Original No.15/SR(15)/Commr/RGD/09-10 dated 15/03/2010 passed by the Commissioner of Central Excise & Service Tax, Raigad)

Parle International Ltd. (YoFrooti Unit) Appellant
Village Vanivali, Taluka- Khalapur, District- Raigad

Versus

Commissioner of Central Excise Raigad Respondent
4th Floor, Utpad Shulk Bhavan, Plot No.1, Sector 17,
Khandeshwar, New Panvel-410 206.

Appearance:

Shri Bharat Raichandani, Advocate for the Appellant

Shri Sanjay Hasija, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. A/85130-85132/2022

Date of Hearing: 08.09.2021

Date of Decision: 22.02.2022

Per: P. Anjani Kumar

The present appeals No E/1079/2010 by Parle International Ltd (YoFrooti Unit); No E/1323/2010 by M/s Parle Bottling Ltd in Appeal and No E/1324/2010 by Parle International Limited have been filed against Order-in-Original No. 15/SR (15) COMMR/RGD/09-10 dated 15.03.2009 passed by the Commissioner of Commissioner of Central Excise & Service Tax, Raigad.

2.The appellants, during the period of dispute, though situated within the same continuous, undivided and common premises at Patalganga, were three separately registered units engaged in the manufacture of excisable final products; YoFrooti Division in nonalcoholic beverage based fruit drinks of "YoFrooti" brand; Parle Bottling Limited in "Mango Frooti" in 200ml pack and Parle International Limited in "Jolly jelly"; appellants claim that the goods manufactured in one plant were used in another plant for manufacture of excisable goods. The appellant cleared final product on payment of central excise duty, as applicable.

2.1. Department carried on an investigation against the appellants; it was observed that there were shortage/excess of raw material as well as final goods in all three units; alleged shortage was found lying within one or the other premises of another unit; a show cause notice dated 11.08.1998 seeking explanation on shortage/excess of raw materials and finished goods and demanding Cenvat credit of Rs. 22,61,776 availed on "TBA machine" (packing machine); Commissioner of Central Excise, vide order-in-original dated 28.02.2002, dropped the entire proceedings. On an appeal filed by the department, CESTAT, vide order dated 20.11.2008, remanded matter back to the adjudicating authority on the ground that the order was a non-speaking one. The impugned Order-in- Original, dated 15.03.2009, was passed in remand proceedings. Hence, the present set of appeals.

3. Learned Counsel for the appellants submits that on physical verification of the stock of the finished excisable goods as well as the raw material vis-à-vis the book record, the Central Excise officers found shortage in respective units; however the inputs/finished goods were found lying within the same premises albeit in another unit; all the alleged shortage of raw materials and finished goods was found within the same common premises of one factory; approved ground plan shows that all three units have one common entry/exit gate; this fact is not in dispute and therefore, there cannot be a case of clandestine removal. Learned Counsel demonstrates the shortage/excess of different items in different units by way of a table and submits that there is only one "factory" and therefore, no clearance and removal of the excisable finished products without payment of duty, from one unit to another; there are three manufacturing units which are manufacturing different excisable goods and have been separately registered with the Central Excise department; same are located within the same contiguous and line are common boundary premises; finished goods allegedly found short have been cleared on payment of central excise duty at the time of clearance from the "sole" factory gate; there is no division/or fence between the aforesaid three units; after 1/4/1998, the appellants are having one common central excise registration for all the three units; the mere fact that the said three units were holding different central excise registrations would not make material difference; however, this aspect of the matter has been conveniently overlooked by the Commissioner; he relies on the ratio of cases of Dhampur Sugar Mills Limited Vs CCE 2001 (129) ELT 73 (SC) and J.K. Synthetics Vs CCE 1991 (52) ELT 116 (T).

3.1. Assailing the reliance placed by the Learned Authorized Representative on the decision of the Hon'ble Supreme Court in the case of Rollatainers Limited 2004 (170) ELT 257 (SC), he submits that the facts of the cited case and the instant case are totally different and distinguishable; the issue before the apex court, in that case, was of clubbing of clearances of two factories to deny benefit of SSI exemption.

4. Learned Counsel for the appellants submits, on the issue of denial of credit of Capital goods on "TBA 19" packing machine for manufacture of "Aqua Bailley" imported by Yofrooti unit, that that machine was received on 25.03.1997 and was installed on 31.03.1997; they also filed intimation about receipt of the aforesaid machine vide letter dated 19.03.1997; the said machine was intended to be used for manufacture of packaged

drinking water falling under Central Excise Tariff Heading 2201.19; "YoFrooti" was produced from the said machine with effect from 02.04.1997; however, credit of the CVD paid on the aforesaid machine was availed by the appellants in September, 1997 only totaling to Rs.23,91,519; declaration was filed by the appellants on 14.03.1997 in terms of Rule 57D(1) of the erstwhile Central Excise Rules.

4.1. Learned Counsel for the appellants further submits that the appellants undertook trial production of "Aqua Bailey"; however, the trial Production was not a fruitful exercise; documentary evidence in this regard, duly supported by affidavits of Shri. Bandekar Praful P., Director and another of Shri Seshadri Krishnan, General Manager (Taxation) in support of the above submission are on record; the "Bailey" mineral water manufactured during the course of trial run was also cleared by the appellant payment of Central Excise duty; the said trial production has also been reported in the audited balance sheet; Commissioner has not examined the documents placed on record and has overlooked the factual position.

4.2. Learned Counsel further submits that though "YoFrooti" was exempt from payment of Central Excise duty at the time of receipt of the aforesaid machine, it became dutiable from 14.05.1997; credit was availed in September 1997, after "Yo Frooti" became dutiable; there is no time limit prescribed under the Rules at the relevant time for taking credit; Commissioner relies on *Surya Roshni Ltd* 2003 (155) ELT 481 which has been upheld by the Supreme Court; conclusion that the case of *Surya Roshni* supra has been upheld by the Supreme Court is incorrect; Hon'ble Supreme Court held that the appeal is not maintainable; pursuant to the same, an appeal was filed before the Hon'ble Madhya Pradesh High Court 2013 (298) ELT A24 (MP) and the said appeal is pending disposal; in any event, the said decision of *Surya Roshni* supra would not have any application in the facts of the present case; in the above case, the assessee received capital goods and used the same in the production of non-dutiable products; final products subsequently become dutiable; in the present case, machinery purchased by the appellant for manufacture of exempted and dutiable products namely Aqua bailey and yofrooti; the same is reflected in the declaration under Rule 57T (1) and (2) filed by the appellant ; the said decision would not have any application to the facts of the present case. Learned counsel relies upon *Brindavan Beverages Private Limited V/s CCE* 2014 (310) ELT 398; *Gujarat Propack* 2009 (234) ELT 409 (Guj); *Kaleesuwari refinery Private Limited V/s*

CESTAT 2016 (340) ELT 632 (Mad) and CCE V/s S.T. Cottex Exports Private Limited 2011 (268) ELT 318 (P&H).

5. Learned Counsel submits also that the entire demand is time barred; there was no suppression of facts with intent to evade payment of duty; the appellant is registered with the department, paying central excise duty and are filing periodical ER-1 returns; appellants have filed declarations as well; the issue involved herein is one of interpretation and is purely legal in nature; moreover, there being no positive act on part of the appellants to suppress any fact from the department and there being no evidence for such allegation, the proposal to invoke extended period is not correct; he relies upon Continental Foundation Vs. CCE 2007 (216) ELT 177 (SC) and CCE Vs Chemphar Drugs 1989 (40) ELT 276 (SC) and submits that the demand being time barred no penalty can be imposed on the appellant.

6. Learned authorised representative appearing for the department reiterates the findings of the impugned order and submitted a written reply stating, inter alia, that

- On the appellants' argument that though all the three units are registered separately, their main exit is one and goods found in other units cannot be treated as removal and no duty can be demanded, he relies upon Hon'ble Supreme Court in the case of Rollatainers Ltd (supra);
- all the three units are independent and separately registered; therefore, all three units cannot be treated as one unit; they should have entered the particulars in the statutory records and invoice should have been issued even for movement from one unit to the other, which they fail to do so;
- the appellants contravened the provisions of Rule 47 of CER, 1944; during Panchnama dated 12.02.98, it was found that there was no stock of Yo Fruity in the Bonded Store Room whereas stock of YoFrooti was found in the Premises of Agro Division (39006) and Joly Jelly Division (12105); therefore, question of shortage of space does not arise; they never took such permission to store goods outside the bonded store room; they did not maintain proper records of removal of the said goods from bonded store room;
- the appellants have violated Rule 52A read with Rule 173G of erstwhile Central Excise Rules, 1944 which specified that no

excisable goods shall be delivered from a factory or warehouse except under an invoice signed by owner of the factory, or his authorised agent; the appellants neither issued any invoice at the time of such removal from bonded warehouse nor paid any duty;

- appellants claim that the said finished goods were cleared on payment of duty; goods were seized on 12.02.98; invoice shows that the goods were removed on payment of duty on 19.05.99 after lapse of 15 months; but goods were having expiry period of six months; they could should have filed remission application; they cleared goods on payment of duty, just to escape from the penal provisions.

- Date chart of events of availing credit, shows that the appellants mis-declared that they intend to use the said machinery for dutiable Bailey Aqua Water after lapse of 11 months from the date of purchase;, no trial of packing of Bailey Aqua Water was carried out till the date of investigation; after investigation started, they took first trial on 07.04.1998 just to eyewash department but did not carry out any production of the same; it shows from beginning they imported the said machinery for use of exempted product i.e. 'YoFrooti'.

- He relies on the decision of Larger Bench in the case of Spenta International Ltd. Vs. CCE Thane [reported in 2007 (216) ELT 133 (Tri-LB) relying upon decision of Hon'ble Supreme Court in the case of Commissioner Vs. Surya Roshni Ltd. [reported in 2003 (158) ELT A273]]; it was held that eligibility of credit is to be determined with reference to the dutiability of the final product on the date of receipt of capital goods;

- as on the date of receipt the said capital goods, the final product i.e., YoFrooti, was exempted; therefore, the Cenvat credit is not admissible to them; as they had filed wrong declaration to mislead the department, extended period is rightly invokable.

7. Learned Counsel submitted additional submissions, dated 13.09.2021, as undertaken during the hearing. He submits, regarding the credit of duty availed on "TBA machine" a List of events and dates involved in the matter; he submits, inter alia, that

- Perusal of ground plans approved by the Health Inspector as well as Central Excise department reveal that it is one contiguous premises having one common factory gate; there is no division

between the units, no fencing and thus, there is only one factory; the facts were also mentioned during investigation.

- the three units had composite plant and machinery required for the manufacture of agro based beverages; Raw sugar syrup, the basic ingredient for the preparation of Agro based beverages was seen to be exclusively being prepared by and in the premise of M/s PIL (Jolly Jelly Division) from where it was being transferred through pipe line to their own unit's M/s PBL (Agro Division) for blending and pasteurization; pasteurized ready beverage in bulk form is thereafter transferred again through pipe line to M/s PIL (YoFrooti Division); bulk beverage in ready form is being packed by M/s PBL (Agro Division) as Mango Frooti in 200 ml pack and by M/s PIL (YoFrooti Division) as YoFrooti in 250 ml. in tetra pack; no documents whatsoever are prepared for the transfer of raw sugar syrup from M/s PIL (Jolly Jelly Division) to M/s PBL(Agro Division) and thereafter of ready beverage in bulk form from M/s PBL (Agro Division) to M/s PIL (YoFrooti Division); these facts were confirmed by Shri P. K. Verma, work manager of all the three notices, in his statement dated 12.02.1998 and by Shri Y R. Shirke, the overall personnel and administrative manager. admittedly the shortage in one unit was found in other unit; there is no case of clandestine removal;
- the said goods are removed from factory gate at payment of duty; duty paid is not appropriated by Ld. Commissioner in impugned order.
- Submission of the Learned Authorized representative, on Rule 47 of erstwhile Central Excise Rules, 1944 stating that the goods would not have been removed to store room or any other place of storage without payment of duty, is wholly beyond the proceeding and raised for the first time; show cause notice did not invoke any contravention of Rule 47 and there is no such finding in impugned order; show cause notice was dropped by the erstwhile commissioner; there is no such ground in appeal filed by the department before this Tribunal in ground of appeal; Hon'ble Supreme Court held in the case of CCE vs. Ballarpur Industries Limited - 2007 (215) ELT 489 (SC) that it is well settled that the show cause notice is the foundation in the matter of levy and recovery of duty, penalty and interest; if there is no invocation of

Rule 7 of the Valuation Rules 1975 in the show cause notice, it would not be open to the Commissioner to invoke the said Rule".

- reliance placed by authorised representative on Spenta International Ltd 2007 (216) E.L.T. 133 (Tri. LB) is incorrect as the larger bench relies on Surya Roshini Ltd (supra) and the said decision is not upheld by Supreme Court; as already submitted the facts are different.
- Similarly, reliance placed by authorised representative on Naini Papers and Aneri Construction which followed the larger bench decision of Spenta are not applicable for same reason; he reiterates his reliance on the case of Brindavan Beverages and submits that Tribunal distinguished the judgment in the case of Surya Roshni.

8. Heard both sides and perused the records of the case. Brief issues that require our consideration in the case are as to whether

- (i). Duty can be demanded on the alleged shortages found by officers on 12.02.1998 in the various premises of the factory
- (ii). Credit of capital goods is available to the appellants on the TBA machine purchased and installed by them.

9. Coming to the first issue, we find that the department alleges that there were excesses and shortages in different products in the company on the day of verification. It is the contention of the appellants that the products found short in one unit are found in excess in other unit. They seek to explain the shortage of 1620 trays Mango Frooti 200ml pack found in Agro unit by stating that the same amount of excess was found in Jolly Jelly unit and that these facts can be seen from Annexures C and E to Show Cause Notice. They explain the other shortages also in a similar manner on the basis of Annexures to the Show Cause Notice. They further submit that the entire factory is one unit and has got only one out gate. Whenever goods are cleared outside the factory, due duty is paid. They in fact cleared the final products on payment of duty; their submissions were not taken in to account and credit of the same was not given.

10. Learned authorised representative, for the department submits that the ground plans of the different units are earmarked separately and each of the units has a demarcated Bonded Store Room; any removal from the BSR without payment of duty or without following proper procedure constitutes a contravention of Rule 47 of Central Excise Rules 1944. Learned counsel for the appellants submits that this ground was not taken in the Show Cause Notice or the OIO and hence, the revenue is not free to

take the ground at this juncture. He further submits that there is only one "factory" and therefore, no clearance and removal of the excisable finished products without payment of duty, from one unit to another; there are three manufacturing units which are manufacturing different excisable goods and have been separately registered with the Central Excise department; however, the same are located within the same contiguous and line are common boundary premises; the finished goods allegedly found short have been cleared on payment of central excise duty at the time of clearance from the "sole" factory gate; this is the fact which is not in dispute and there is no contrary finding as well; there is only one factory gate to the boundary wall within which all the three units are situated; there is no division/or fence between the aforesaid three units; management and officers of the appellant are common and they supervise all the three units; raw materials manufactured in one unit are used as input in another unit; all the three units are interconnected with pipelines which carry liquid inputs/raw materials from one unit to another. Learned counsel submits further that after 1/4/1998, the appellants are having one common central excise registration for all the three units; if the central excise department itself agrees and accepts that the said units are entitled for a common registration after 1998, the same would be the position even prior to 1998; the fact of appellants holding different central excise registrations would not make material difference.

11. We find, in view of the above, that there is force in the arguments of the appellants. The fact that the three units have common facilities is not disputed by the revenue and the ground plans have been accordingly in the knowledge of the department. No material has been submitted to prove that department objected to the ground plan. We are of the considered opinion that department cannot demand duty as the goods found short in one unit were found in excess in the other. We find that the counsel for appellants relies upon *Dhampur Sugar Mills Limited V/s CCE 2001 (129) ELT 73 (SC)*. He submits that in that case as well, the assessee had three units for manufacture of different excisable goods; goods manufactured in one plant were used in another plant for manufacture of another excisable goods; department disallowed the benefit of Notification No.67/95-CE on the ground that all the three units have different and separate registration; assessee contended that benefit cannot be denied to them just because all the three plants are located in the same premises having common boundary, exemption; Hon'ble Tribunal held that number of registrations would not decide the number of

factories unless and until they are situated in different premises; on appeal by the Revenue, Hon'ble Supreme Court, observed in the said case that

We do not find merit in this civil appeal filed by the Department. Apart from the reasons given in the impugned judgment by the Tribunal, we find that in the present case show cause notice given by the Department itself proceeds on the basis that the factory of the assessee Consisted of different units (plants); that it was one single factory consisting of separate units; that sugar and molasses came under one of the units, paper and paper board came in the other unit and that chemical came in the third unit. In the circumstances, the assessee-respondent was entitled to the benefit of exemption notification. It is not even was in the show cause notice that there are three factories as submitted on behalf of the Department.

In the circumstances, we find no merit in this civil appeal. The same is, accordingly, dismissed with no order as to costs."

12. In view of the above discussion and case law relied upon by the appellants; we find that department has not made a case against the appellants for demand of duty on goods found in short/excess. Moreover, it is neither alleged by the revenue that appellants have removed the goods clandestinely nor any proof of the same is placed on record. Therefore, duty cannot be demanded on the simple fact that shortages are found in different units. The appellants contention that the shortage found in one unit is found in the other unit cannot be brushed aside. It is evident from the annexures to show cause notices. Hence, duty cannot be demanded on such excesses and shortages.

13. Coming to the second issue of admissibility of credit on the TBA machine, we find that the appellants contend that "TBA 19" packing machine for manufacture of "Aqua Bailey" was imported by Yofrooti unit; the machine was received on 25.03.1997 and was installed on 31.03.1997; they also filed intimation about receipt of the aforesaid machine vide letter dated 19.03.1997; the said machine was intended to be used for manufacture of packaged drinking water falling under Central Excise Tariff Heading 2201.19; "YoFrooti" was produced from the said machine with effect from 02.04.1997; however, credit of the CVD paid on the aforesaid machine was availed by the appellants in September, 1997 only totaling to Rs.23,91,519; declaration was filed by the appellants on 14.03.1997 in terms of Rule 57D(1) of the erstwhile Central Excise Rules. Learned counsel submits that the appellants undertook trial production of "Aqua Bailey"; however, the trial Production was not a fruitful; documentary evidence in this regard, in the form of affidavits of Shri BandekarPraful P., Director and another of Shri Seshadri Krishnan, General Manager (Taxation), has been submitted; the "Bailey" mineral

water manufactured during the course of trial run was also cleared by the appellant payment of Central Excise duty; invoices were also placed on record along with payment of particulars of duty payment; fact of trial production was reported in the audited balance sheets. He submits that the Commissioner has overlooked the factual position; ignored the documents placed on record and commissioner has rejected the affidavits on the only ground that the same have been filed belatedly; it is not the affidavits but the documents which were to be examined by the Commissioner.

14. On the contrary, the respondents submit that the appellants availed cenvat credit of capital goods used exclusively in the exempted goods; authorised representative submits that a declaration, under Rule 57(T)(i), was filed on 14.03.1997, declaring the intent to use the machine for manufacturing Bailey Acqua Water; declaration for intent to use the machine for both Bailey Acqua Water and YoFrooti was filed on 19.03.1997; Machine started for packing YoFrooti from 02.04.1997; YoFrooti Became dutiable on 14.05.1997 and Cenvat Credit was Taken 02.09.1997. He submits that the appellants misdeclared that they intend to use the said machinery for dutiable Bailey Aqua Water; trial packing of Bailey Acqua Water was carried out on 07.04.1998 after investigation started; from beginning they imported the said machinery for use of exempted product i.e. YoFrooti; he relies on Spenta International Ltd 2007 (216) ELT 133 (Tri-LB) which in turn relied upon Hon'ble Supreme Court in the case of Surya Roshni Ltd 2003 (158) ELT A273 wherein it was held eligibility of credit to be determined with reference to the dutiability of the final product on the date of receipt of capital goods. Learned counsel for the appellants however submits that Apex Court held in the case of Surya Roshni Ltd that the appeal is not maintainable; pursuant to the same, an appeal was filed before the Hon'ble Madhya Pradesh High Court 2013 (298) ELT A24 (MP) and the said appeal is pending disposal; in any event, the said decision of *Surya Roshni* supra would not have any application in the facts of the present case; in the above case, the assessee received capital goods and used the same in the production of non-dutiable products; final products subsequently become dutiable; in the present case, machinery purchased by the appellant for manufacture of exempted and dutiable products namely Aqua bailey and yofrooti; the same is reflected in the declaration under Rule 57T (1) and (2) filed by the appellant.

15. Learned Counsel for the appellant submits that "YoFrooti" was exempt from payment of Central Excise duty at the time of receipt of the aforesaid machine; however, with effect from 14.05.1997 "YoFrooti" became dutiable; appellants have availed credit of duty paid on the aforesaid machine after "Yo Frooti" became dutiable i.e. in September 1997; it is well settled that there is no time limit prescribed under the rules at the relevant time for taking credit; machine was used for manufacture of "Aqua Bailey" (dutiable product at the time of receipt of the machine) and in the manufacture of Yofrooti when the same became dutiable; credit cannot be denied. He relies on *Brindavan Beverages Private Limited V/s CCE 2014 (310) ELT 398*; *Gujarat Propack 2009 (234) ELT 409 (Guj)*; *Kaleesuwari refinery Private Limited V/s CESTAT 2016 (340) ELT 632 (Mad)* and *CCE V/s S.T. Cottex Exports Private Limited 2011 (268) ELT 318 (P&H)*.

16. We find that the revenue relies on *Spenta International Ltd (supra)* which in turn relied upon Hon'ble Supreme Court in the case of *Surya Roshni Ltd (supra)*. We find that in a very later judgement Tribunal in the case of *Kaleesuwari refinery Private Limited V/s CESTAT 2016 (340) ELT 632 (Mad)*, has referred to the decision in *Spenta* and has clarified that the Apex Court has not upheld the Tribunal's decision and as such the same has not attained finality. We find that Tribunal held that

20. It appears that the decision of the Tribunal in *Surya Roshni*, was taken on appeal to the Supreme Court by the assessee. Though the Supreme Court dismissed the Special Leave Petition, the Supreme Court did not affirm the decision of the Tribunal on merits. The Supreme Court dismissed the appeal as not maintainable. As a consequence, *Surya Roshni* has again bounced back to the Madhya Pradesh High Court, which is now seized of the matter. We have seen the order passed by a Division Bench of the Madhya Pradesh High Court on 21-9-2012, which makes it clear that the very decision in *Surya Roshni* relied upon by the Tribunal has not attained finality. This is apart from the fact that even if it attains finality, it would have no application to the case on hand.

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27. The consequences of giving a different interpretation to the Rule is too obvious. Take for instance a case where the factory receives capital goods on a particular day, say for instance 1-10-2003. If the goods are dutiable goods on the date of receipt, namely 1-10-2003, the Department agrees that the factory will be entitled to Cenvat credit. Suppose an exemption notification is issued on the date following the date of receipt of capital goods, he will still be entitled to the benefit of Cenvat credit. Therefore, to interpret Rule 4(2)(a) in a manner that will benefit a person, who receives the capital goods on the date, on which, the goods to be manufactured were dutiable, despite the same goods becoming exempted goods on the next day, but to deprive the benefit to a person, who manufactures dutiable goods on the basis of the capital goods received in a particular financial year, would not be a proper interpretation to the Rules.

17. We find that in the instant case, it is not disputed that a declaration, under Rule 57(T)(i), was filed on 14.03.1997, declaring the intent to use the machine for manufacturing Bailey Acqua Water; declaration for intent to use the machine for both Bailey Acqua Water and YoFrooti was filed on 19.03.1997; Machine started for packing YoFrooti from 02.04.1997; YoFrooti Became dutiable on 14.05.1997 and Cenvat Credit was Taken 02.09.1997. The intention is clear about the usage of the machine and the declarations were not denied by the department. We find that the Tribunal has analysed the position of law and fact clearly in the case of Brindavan Beverages Private Limited (supra) and held that

7. In terms of the provisions of sub-Rule (4) of Rule 6 of the Cenvat Credit Rules, 2004 Cenvat credit shall not be admissible on capital goods which are used exclusively in the manufacture of exempted goods or in providing exempted services, other than the final products which are exempt from the whole of the duty of excise leviable thereon under any notification, where the exemption is granted based on the value or quantity or clearances made in a financial year. From a perusal of this sub-Rule, it is clear that capital goods Cenvat credit would be admissible when the capital goods are used either only for dutiable final product or for dutiable as well as exempted final product. The capital goods Cenvat credit is also admissible when a manufacturer is availing full duty exemption based on the value or quantity of the goods cleared in a financial year, in which case, while initially the manufacturer will be availing full duty exemption (for some months or for several financial years at a stretch) but subsequently at some point of time when he crosses the threshold limit for exemption, his final product becomes dutiable and in such a case, even during the period of full exemption, the manufacture can take capital goods Cenvat credit which he can utilize when this final product becomes dutiable. A question arises as to when capital goods are used for manufacture of dutiable as well as exempted final product, whether for availing capital goods credit, the dutiable as well as exempted final product have to be manufactured simultaneously. In our view this is not necessary, and Cenvat credit would be admissible even if the capital goods are used for manufacture of dutiable goods and exempted goods at different points of time. However, if at the time of receipt of the capital goods, the manufacturer was using the capital goods only for manufacture of fully exempted final product and had no plan or intention to use them for dutiable final products and later on, either the final product becomes dutiable or he changes his plans and starts using the capital goods for manufacture of dutiable final products, the judgment of the Tribunal in the case of CCE, Indore v. Surya Roshni Ltd. (supra) and Spenta International Ltd. v. CCE, Thane (supra) would become applicable. But, if at the time of receipt, the manufacturer had clear intention to use the capital goods for manufacture of dutiable as well as exempted final products, in such a situation just because at the time of receipt, he uses the capital goods for manufacture of exempted final product and subsequently he switches over to the manufacture of dutiable final product, the capital goods Cenvat credit cannot be denied. When at the time of receipt of capital goods, capable of use in manufacture of dutiable as well as exempted final products, there is evidence to show that the manufacturer had intention to

use them for manufacture of dutiable as well as exempted final product, the eligibility of the capital goods for Cenvat credit cannot depend upon the order in which the same are used - whether first for the manufacture of exempted final products or for the manufacture of dutiable final product. We are supported in this view by the judgment of Hon'ble Gujarat High Court in case of CCE, Vadodara II v. Gujarat Propack reported in [2009 \(234\) E.L.T. 409 \(Guj.\)](#), wherein the Hon'ble High Court has held that when the capital goods installed in the year 2000 were used for manufacture of exempted goods on trial basis and subsequently were used for manufacture of dutiable goods when regular production was started, the Cenvat credit in respect of capital goods cannot be denied and the Tribunal's judgment in case of M/s. Surya Roshni Ltd. (supra) would not be applicable.

18. We find that in the instant case, the appellants have made clear their intention to use the machine for manufacture of dutiable as well as exempted goods. They have filed two declarations to this effect. The declarations were not contested by the department at the material time. The appellants claim that they had utilised the machine for manufacture of 'Aqua Bailey' though on trial basis and the same was not successful. The appellants cleared the scrap of such goods on payment of duty. Learned Commissioner rejects the claim of the appellants saying that the affidavits are filed in a belated manner. It is also to note that the appellants have availed credit only after the 'YoFrooti' became dutiable. We find that in terms of the provisions of sub-Rule (4) of Rule 6 of the Cenvat Credit Rules, 2004 Cenvat credit shall not be admissible on capital goods which are used exclusively in the manufacture of exempted goods or in providing exempted services, other than the final products which are exempt from the whole of the duty of excise leviable thereon under any notification, where the exemption is granted based on the value or quantity or clearances made in a financial year. A perusal of the provisions makes it clear that there is nothing in the provisions to indicate that the intent of use of machine is relevant at the point of receiving or installation of capital goods. The only pre condition is that the credit of capital goods should not be used exclusively in the manufacture of exempted products or in the provision of exempted services. It is not the case of the department that the appellant used the capital goods exclusively in the manufacture of exempted products or in provision of exempted services. The appellants have filed declarations under Rule 57(T) (i) and availed credit on 02.09.1997 after YoFrooti Became dutiable on 14.05.1997. We are in agreement with the learned Counsels argument that there is no time limit prescribed for taking credit. They have availed credit within 6 months of receipt of capital goods, for which there is no express bar.

Express Bar if any is in relation to the usage exclusively in the manufacture of exempted products or in provision of exempted services. As per our discussion above, that bar has not been violated. We are of the considered opinion that the provisions of Rules need to be understood as they are and it is not for the authorities or Tribunal to supplement the same with arguments however cogent. Therefore, in view of the provisions of Law and the case law discussed above and cited by the appellants, we find that the appellants have correctly availed Credit on the impugned Capital goods.

19. Learned Counsel for the appellants submits that the entire demand is time barred; the appellant is registered with the department, paying central excise duty and are filing periodical ER-1 returns and other declarations as well; the issue involved herein is one of interpretation and is purely legal in nature; moreover, there being no positive act on part of the appellants to suppress any fact from the department and there being no evidence for such allegation, the proposal to invoke extended period is not correct. On-going through the records of the case, we find that the submissions are convincing. For this reason we find that the Show Cause Notice dated 11.08.1998 issued to the appellants is time barred. We find therefore, that the appeal survives on limitation too.

20. In the Result, all the 3 appeals are allowed with consequential relief, if any, as per law.

(Pronounced in open court on 22.02.2022)

(S.K. Mohanty)
Member (Judicial)

(P. Anjani Kumar)
Member (Technical)