

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

Excise Appeal No. 1167 of 2012

(Arising out of Order-in-Appeal No. BC/30/RGD/2012-13 dated 30.04.2012 passed by the Commissioner of Central Excise (Appeals), Mumbai-III)

M/s. PepsiCo (I) Holdings Pvt. Ltd.

Appellant

Plot No. 100/1-A Road, MIDC, Dhatav,
Roha, Dist. Raigad.

Vs.

Commissioner of CE & ST, Raigad

Respondent

Utpad Shulk Bhavan, Plot No.1,
Sector 17, Khandeshwar,
Navi Mumbai 410 206.

WITH

Excise Appeal No. 1289 of 2012

(Arising out of Order-in-Appeal No. US/330/M-II/2012 dated 11.05.2012 passed by the Commissioner of Central Excise (Appeals), Mumbai-II)

M/s. PepsiCo (I) Holdings Pvt. Ltd.

Appellant

LU Gadkari Marg, Mahul,
Chembur, Mumbai 400 074.

Vs.

Commissioner of CE, Mumbai-II

Respondent

9th Floor, Piramal Chambers,
Jijibhoy Lane, Lalbaug,
Parel, Mumbai 400 012.

Appearance:

Shri Rajesh Ostwal, Advocate, for the Appellant
Shri N.N. Prabhudesai and Shri Sanjay Hasija, Superintendents,
Authorised Representatives for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE MR. AJAY SHARMA, MEMBER (JUDICIAL)

Date of Hearing: 18.07.2022
Date of Decision: 27.09.2022

FINAL ORDER NO. A/85892-85893/2022

PER: SANJIV SRIVASTAVA

These appeals are directed against orders-in-appeal of Commissioner (Appeals), Mumbai-III & II as detailed in table below:

Appeal No	E/1167/2012	E/1289/2012
SCN No. & Date	(i) V. Adj. (SCN) 15-204/Rgd/09-Scrap/09-10/148 dated 7.1.2010 (ii) V(11A)/Adj./ABG/15-20/10-1Scrap/09-10/1309 dated 2.7.2010	(i) V.Adj.4-44/SCN-PepsiCo 10/6378 dated 5.5.2010 (ii) V. Adj.4-54/SCN-PepsiCo 1/3386/10 dated 6.8.2010
Period	FY 05-06, FY 07-08, FY 08-09 and FY 09-10 (from July 2009)	July 2005 to June 2009 and July 2009 to November 2009
OIO No. & Date	Raigad/ADC/110-111/10-11 dated 29.03.2011	(i) JSC/Adj./01/Ch-1/2011-12 dated 28.7.2011 (ii) US/330/M-II/2012-13 dated 28.7.2011
OIA No. & Date	BC/30/RGD/ 2012-13 dated 30.4.2012	US/330/M-11/2012 dated 11.5.2012
Amount Involved	Rs.32,32,540/- (29,26,011/- plus 3,06,529/-)	Rs.4,07,557/- (Rs.3,79,644/- plus Rs.27,913/-)
Penalty	Rs. 29,86,011/-	Rs.4,07,557/=

2.1. The appellants were engaged in the manufacture of "Aerated Waters" at Roha plant. The aerated water manufactured by them is bottled in glass bottles. In their store the goods manufactured by them as well as other units (received on payment of duty) are stored. During course of handling and storage some of the glass bottles break which are removed to scrap yard. Appellant reversed amount of Rs 5,47,217/- in September 2010 towards the CENVAT credit availed on such breakages.

2.2 The revenue issued show cause notices as indicated in table in para 1 proposing to recover excise duty in respect of

these breakages treating them as finished goods beverages, along with interest and penalty.

2.3 The above notices were adjudicated vide Order-in-Original referred in para 1 above. The impugned orders upheld the Order-in Original.

2.4 Aggrieved appellants have filed these appeals.

3.1 We have heard Shri Rajesh Ostwal, Advocate for the appellant and Shri N.N. Prabhudesai and Shri Sanjay Hasija, Superintendents, Authorised Representatives for the Revenue.

3.2 Arguing for the appellants learned counsel submits that-

- The breakages amount reflected in Trial Balance of respective FY also includes breakages of duty paid so includes breakages of duty paid finished goods received from other units of the appellants. In this regard, Chartered Accountant certificates showing bifurcation of value of breakages of finished goods manufactured at the appellant's plant at Roha and duty paid brought from other locations and were meant for trading only. Demand in respect of breakages pertaining to duty paid goods of other units is not maintainable.
- Demand in respect of breakages on finished goods pertaining to the appellants Rona plant is not maintainable appellants have already reversed cenvat credit involved in such breakages.
- D.1 In view of the inherent difficulties face by the aerated water industry, CBEC vide Circular dated 8.9.1971 specifically provided that in respect of breakage of bottles of aerated water, the breakage upto 0.50% is allowed and the same can be written off in the accounts. The clarification provided under the aforesaid Circular dated 8.9.1971 was re-confirmed by the CBEC vide another Circular dated 17.9.1975. This is permitted after careful consideration of the practical aspect that loss to such an extent is routine and normal during handling and movement therefore, ordinarily, the production of aerated water would stand reduced by tolerance limit prescribed.

- The above circulars were in force during the period under consideration. Since the breakages in the Appellants case is well within the prescribed limit of 0.5%, the same is to be written off in terms of the above Circulars and no duty is payable on the same.
- Departmental instructions are binding on Revenue and the department cannot be allowed to take a stand contrary to the aforesaid Circular. Ratan Melting & Wire Industries [2008 (231) ELT 22 (SC)].
- As per the Revenue, unless appellants claim remission on breakages, they are not entitle to benefit of exemption on the tolerance limit in view of the CBEC Circular No. 93 0/20/2010 CX dated 9.7.2010.
- Circular dated 9.7.2010 does not provide that this will have retrospective operation and will be applicable to the breakages for prior period to its issuance. It is also settled legal position that a circular which is beneficial in nature applies retrospectively but a circular which is oppressive has to be applied prospectively. Kindly refer:
 - Suchitra Components Ltd. Vs CCE – 2007 (208) ELT 321 (SC)
 - Bezel Pharma Pvt. Ltd. Vs CCE – 2008 (221) ELT 512 (T – LB) Affirmed by Hon'ble Supreme Court in CCE Vs. Bezel Pharma Pvt. Ltd. - 2010 (255) ELT A14 (SC)
 - Bajaj Auto Ltd. Vs Collector of CE - 1996 88 ELT 355 (T)
 - Alkem Laboratories Ltd. Vs. CCE – 2006 (203) ELT 102 (T)
- Since the breakages were within the permissible limits, the same were allowed to be written off and no remission application was to be filed for the same by the appellants. It automatically follows that there is no statutory requirement of filing remission application as per Circulars. Therefore, the benefit of the circulars can be extended to the petitioners without following the procedure for remission under Rule 21 of CER, 2002.
- Issue is no longer res-integra and has been decided in the favour of appellant in their own cases

- Pepsico India Holdings Pvt. Ltd. Vs. CCE – 2006 (201) ELT 69 (T)
 - Pepsico India Holdings Pvt. Ltd. Vs. CCE – 2009 (245) ELT 167 (T). Affirmed by Hon'ble High Court at 2013 (287) ELT A129 (Cal.)
 - Pepsico India Holdings Pvt. Ltd. Vs. CCE – 2010 (261) ELT 567 (T)
 - Pepsico India Holdings Pvt. Ltd. Vs. CCE – 2013 (289) ELT 162 (T)
 - Final Order No. 50355/2014 dated 29.1.2014 passed by the Hon'ble CESTAT, New Delhi in the case of Pepsico India Holdings Pvt. Ltd.
 - Final Order No. FO/A/76439/2016 dated 21.12.2016 passed by the Hon'ble CESTAT, Kolkata in the case of Pepsico India Holdings Pvt. Ltd.
 - Final Order No. FO/78666/2017 dated 22.12.2017 passed by the Hon'ble CESTAT, Kolkata in the case of Pepsico India Holdings Pvt. Ltd.
 - Hindustan Coca Cola Beverages (P) Ltd. Vs. CCE – 2009 (243) ELT 270 (T)
 - Hindustan Coca Cola Beverages Pvt. Ltd. Vs. CCE – 2010 (253) ELT 642 (T)
 - Hindustan Coca Cola Vs. CCE – 2007 (220) ELT 908 (T)
 - Kandhari Beverages (P) Ltd. – 2008 (224) ELT 265 (T)
 - Bharat Coca-Cola Bottling N.E. P. Ltd. Vs. CCE – 2007 (216) ELT 548 (T)
- Suggestion by Ld. AR that the present appeal is not maintainable before the Hon'ble CESTAT in view of Section 35B(a) of the Central Excise Act, 1944, is incorrect and erroneous.

3.3 Arguing for the revenue learned authorized representatives while reiterating the findings recorded in the impugned orders submitted that tribunal does not have jurisdiction to consider these appeals.

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

4.2 In the impugned orders Commissioner (Appeals) has observed as follows for rejecting the appeal filed by the appellant:-

"6. The issue for decision is whether the duty is to be paid on excisable goods broken during production and also storage in BSR and in the facts and circumstances of the case whether the extended period is invokable or otherwise?"

7. The appellants are engaged in the manufacture of various brands of "aerated waters" falling under chapter 22 of Central Excise Tariff Act, 1985. The goods are filled in glass bottles/ PET bottles and metal cans. Since the bottles/cans are filled under high pressure, the same are prone to breakage during storing, handling and loading in the store room. Considering the nature of the manufacturing activities and nature of production process, the CBEC has issued instructions regarding condonation of such breakages, which are discussed as under:

- i. CBEC circular No. ID/3/70/cx-08 dated 8.9.71*
- ii. CBEC circular No. 261/ID/1/75-CX-8 dated 17.9.75*
- iii. CBEC circular No. 930/20/2010-cx dated 9.7.2010*

8. From the above circular, it is evident that vide circulars dated 8.9.71 & 17.9.75 the breakage to the extent of 0.5% of total production was allowed to be written off in the accounts. However vide circular dated 9.7.2010, the Board has clarified that the earlier instructions were issued in the context of breakage of glass bottles, when the CENVAT/MODVAT scheme was not available. After the introduction of CENVAT scheme, remission under Rule 21 of Central Excise Rules, 2002 can be claimed on the goods lost/ damaged before the clearance, subject to reversal of credit on inputs. It is therefore evident that the instructions issued on 8.9.71 & 17.9.75 are not on the subject issue as period involved therein is from 2005-06 onwards.

9. The appellant have referred and relied upon the Tribunal decision in their own case on the issue.

9.1 It is seen that in the order No. A-866-867/KOL/2008 dated 4.9.2008, the Tribunal has held that the benefit of doubt goes to the appellants. Duty involved is meagre. Also they were

periodically informing about the breakage every month and it was open to the Excise authorities to make a visit for inspection of the same. The orders of the lower authority are set aside and appeals are allowed.

9.2 In another case as reported in 2010 (261) ELT-567, Delhi bench of Tribunal has held that the demands issued for duty on broken goods were confirmed by the lower authority and Commissioner(Appeals) as the appellants had not filed applications of remission of duty. They had mentioned the quantity of broken bottles in their monthly returns from time to time. The officers have also visited and examined the issue and the loss is less than the limit prescribed by the Board. The orders are set aside and the appeal is allowed.

9.3 Hence the said case laws are not relevant to the instant case.

10. In view of the introduction of CENVAT scheme and new Central Excise Rules, 2002, the appellant ought to have filed application of remission of duty which they have failed to do so. The Tribunal in their own case reported in 2009/245) ELT-167-Kol has allowed the benefits to the appellants on the ground that they have filed applications for remission. In other manufacturing plants/units were aware of the procedure for remission of duty on broken goods. Ignorance of law procedure by their Roha unit cannot be taken as a valid excuse to escape duty liability:

11. As regards the invocation of extended period, the appellant have pleaded that the breakages have been periodically reported by them in their monthly RT-12/ER-1 returns. They have also submitted copies of RT-12 returns for the month of June 1995 and ER1 return for the month of April 2009. In both the returns specific remarks about quantity of breakage is mentioned. Here I observe that the disputed period in the instant case is Financial Years 2005-06, 2007-08, 2008-09 and July 2009 to March, 2010. The RT 12 returns and ER 1 returns submitted by the appellants do not relate to the period discussed in the appeal. Hence, the evidence produced by the appellant are of no avail."

4.3 The only issue for our consideration in these appeals is:

"Whether the duty is demandable on the bottles of beverages which have broken?"

4.4 The issue of jurisdiction that has been raised by the learned authorized representative has been raised by the authorized representative at the very late stage. The appellants have appeals were filed in the year 2012. The Appeals came up for hearing before the CESTAT at the time of stay hearing in 2012. The Revenue did not raise the issue of jurisdiction at the time of stay hearing. The CESTAT exercised the jurisdiction and granted stay in this matter. This ground being preliminary ground should have been raised at the earliest available opportunity. Having not raised this ground for almost ten years, authorized representative now will be hit by delay and laches and should be rejected on this count itself. However we find that this ground is not even sustainable on merits. The relevant provision of Section 35 B of the Central Excise Act, 1944 is reproduced below:

"Provided that no appeal shall lie to the Appellate Tribunal and the Appellate Tribunal shall not have jurisdiction to decide any appeal in respect of any order referred to in Clause (b) if such order relates to, -

(a) a case of loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory, or from one warehouse to another, or during the course of processing of the goods in a warehouse or in storage, whether in a factory or in a warehouse;

in case of Supercoats Industries - 2005 (183) ELT 255 (T-LB) referred to by the authorized representative tribunal larger bench has observed as follows:

"5. A plain reading of this Section (35B) indicates that all losses including the kind of loss mentioned in Rule 49 are covered under this Section, if the impugned order is passed by a Commissioner (Appeals) in respect of any loss that an assessee has claimed to have occurred, the Tribunal has no jurisdiction to hear an appeal arising out of it.

6. When a similar matter came up before the High Court of Judicature at Madras in a writ petition India Pistons Ltd. v. ACCE

- 1987 (27) E.L.T. 651 (Mad.), the Hon'ble High Court did not find fault with the Tribunal's decision that it lacked jurisdiction to deal with appeals arising out of an order passed by Commissioner (Appeals) pertaining to loss of goods. We are aware that the Hon'ble High Court has not given any ruling on whether or not such a view of the Tribunal is correct or not. But did not find fault with it either. In the case of *Lakshmiji Sugar Mills Co. Ltd. v. CCE* [1991 (56) E.L.T. 629], the Tribunal held that it had no jurisdiction to hear appeals of this nature. The Tribunal relied upon the decision of the Madras High Court cited *supra*. The position would be however different if the appeal arises out of an order passed by Commissioner of Central Excise (Appeals). Against such order, appeal does lie with the Appellate Tribunal.

7. We observe that the Tribunal in the case of *Shiva Essential Oils & Chemicals v. CCE, Noida* cited *supra*, has not considered the decision in *Lakshmiji Sugar Mills Co. Ltd.*'s case nor was it cited before them. Loss, whether it occurs due to unavoidable accident or otherwise, is a loss. So long as such loss occurs in storage, it is a loss referred to in Section 35B proviso. The artificial distinction between one type of loss and another sought to be made in *Shiva Essential Oils & Chemicals*'s case does not appear to be correct in view of the unambiguous language of Section 35B. We are of the opinion that the Tribunal has no jurisdiction to hear appeals arising out of the orders of Commissioner (Appeals) where the appeals relate to loss of goods either in transit or in storage as stated in proviso (a) to Section 35B of the Central Excise Act."

However, we find that the present case is not in respect of the loss of goods during storage or transportation but is case of the demand of the duty in respect of the breakages of glass bottles during storage and handling. Further the issue is with regards to applicability of the Circulars of 1971 and 1975 to determine whether the breakages was within the prescribed limit. Since the issue in our view is not covered by the above provision of the section 35 B of the Central Excise Act, 1944 the objection raised by the authorized representative cannot be sustained. We are supported in our view by the fact that the same issue has been

adjudicated by tribunal in the appellants own case and in case of similarly placed appeals on number of occasions in past in the decisions referred to by the appellant.

4.5 We find that that the issue is no longer res-integra. In the appellant own case in a long list of decisions referred by the counsel the issue has been decided in the favour of appellant. For sake of brevity we reproduce here the relevant para from the order No FO/78666/2017 dated 08.11.2017 of the Kolkata Bench:-

"7. The Learned Commissioner (Appeals) observed that the appellant should have filed the application for remission of duty under Rule 21 of the Central Excise Rules, 2002. It is further observed that such remission is allowable within the permissible limit as per Board Circular. It is pertinent to mention that one cannot go beyond the scope of the Act or Rules made there under. In my considered view, the Board Circular is binding on the Revenue Officer as held by the Hon'ble Supreme Court in various decisions. In any event, I find that this issue is covered by various Case Laws as under:

3. Commissioner of Central Excise Vs. Pepsico India Holdings Pvt. Ltd. Order dated 21.12.2016, passed by the Hon'ble CESTAT, Kolkata.

4. Pepsico India Holding Pvt. Ltd. Va. Commissioner of Central Excise, 2013 (289) ELT 162 (Tri.).

5. Pepsico India Holding Pvt. Ltd. Vs. Commissioner of Central Excise 2010 (261) ELT 567 (Tri.).

6. Pepsico India Holding Pvt. Ltd. Vs. Commissioner of Central Excise, 2009 (245) ELT 167 (Tri.).

7. Commissioner Vs, Pepsico India Holding Pvt. Ltd. 2013 (287) ELT A129 CAL.

8. Pepsico India Holding Pvt. Ltd. Vs. Commissioner of Central Excise, 2006 (201) ELT 69 (Tri.).

9. Hindustan Coca-Cola Beverages Pvt. Ltd. Vs. Commissioner of Central Excise, 2009 (243) ELT 270 (Tri.).

8. In view of the above discussion, the impugned Order is set aside and the appeal filed by the appellant is allowed."

4.6 The reliance placed by the Commissioner (Appeal) on the Circular dated 09.07.2010 to decide the issue against the appellant for the period prior to issuance of the said circulars is contrary to the fact that during the period of dispute there were two circulars of 1971 and 1975 which have been followed by the appellant. It is not even stated in the impugned order that these two circulars were not applicable to the appellant. It is also noted that the MODVAT credit scheme was introduced in the year 1986 and CENVAT credit scheme is refined form of the said scheme. These circulars continued to hold field throughout till 09.07.2010. Observations made by the Commissioner (Appeal) in para 8 of the impugned order cannot be sustained for this simple reason. However we also note that substantial compliance with the circular of 2010 has been made by the appellant by reversing the CENVAT Credit on the inputs used in respect of the finished goods contained in the breakages. Thus in our view taking the note of the reversal made in our view the impugned order cannot be sustained.

5.1 Appeals are allowed and the impugned orders set aside.

(Order pronounced in the open court on 27.09.2022)

(Sanjiv Srivastava)
Member (Technical)

(Ajay Sharma)
Member (Judicial)

tvu