

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CEAC No. 16 of 2009**

% Decision Delivered On: 13th September, 2010.

PEARL DRINKS LTD. . . . Appellant

through : Mr. P.C. Jain, Advocate

VERSUS

COMMISSIONER OF CENTRAL EXCISE . . . Respondent

through: Mr. R.K. Tiwari with Mr. Ashwani
Bharadwaj, Advocates

CORAM :-

HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MS. JUSTICE REVA KHETRAPAL

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J. (ORAL)

1. The facts leading to the filing of the present appeal may be recapitulated in brief. These are as under:

The appellants are the manufacturer of aerated water of different brands of PEPSI and beverage syrup. The appellant's final product requires sugar as one of its important input. While aerated water etc. was liable to Cenvat Duty (Basic Excise Duty, i.e. BED) under Section 3 of the Central Excise Act, 1944, it was not liable to duty under Additional Duty of Excise (Goods of

Special Importance) Act, 1959. On the other hand, sugar was liable to separate duties under both the Acts mentioned above.

2. The appellants were purchasing sugar from two First Stage Dealers, viz., (1) Rajputana Store Pvt. Ltd., Delhi and (2) Bajaji Sugar Co. Delhi who were issuing invoices to the appellants showing the element of BED paid on sugar sold to the appellants and were not showing any element of AED (Additional Excise Duty) as no AED was leviable on final products for the purpose of taking Cenvat credit. No credit of AED could be taken and utilized by the appellants prior to 01.03.2000 because credit of AED paid on an input could be utilized towards payment of AED only leviable on a final product. Therefore, prior to 01.03.2003, invoices issued by first stage dealer did not show the element of AED paid on sugar sold by them to the appellants. There was no statutory liability on first stage dealers to show elements of various duties paid on goods sold by them. It is appropriate to mention here that the records of first stage dealers are subject to check by Central Excise Officers and a periodical return is also submitted by first stage dealers to Central Excise Range Office. This is the factual scenario in which the invoices issued by first stage dealers during the relevant period 01.04.2000 to 09.10.2000 to the appellant are to be understood. With effect from 01.03.2003, an amendment was made in Cenvat Credit Rules, 2002 that credit of AED paid on input can be utilized towards payment of BED and special excise duty as well leviable on a final product. Further, by a Circular dated 06.03.2003, it was

also clarified that any credit of AED accruing prior to 01.03.2003 to a manufacturer could also be utilized towards payment of BED and SED as well on final product. Above Circular dated 06.03.2003 was given a statutory backing by Clause 78 of Finance (No.2) Bill, 2004 (enacted as Section 88 under Finance (No.2) Act, 2004).

3. The appellants claimed Cenvat credit of AED (GSI) to the tune of ₹9,20,944 paid on sugar accruing during the period 01.04.2000 to 09.10.2000. However on 05.07.2005, a show cause notice was issued to the appellants proposing to withdraw the said credit. The appellants filed reply to the said show cause notice and also gave its written submission. Order-in-Original dated 20.10.2005 was passed by the Joint Commissioner confirming the demand of duty of ₹9,20,944 and penalty of equal amount was also imposed. The appellants preferred appeal thereagainst before the CIT(A), which was dismissed. Further appeal was preferred before the Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred to as 'the Tribunal') and met the same fate. It is in these circumstances, the instant appeal is filed, which is admitted on the following question of law:

“Whether in the facts and circumstances of this case, Cenvat credit of AED(GSI) paid on sugar during the period 01.04.2000 to 09.10.2000 is admissible to the appellant in view of Section 88 of Finance Act (No.2), 2004 irrespective of the fact that payment of such duty was not shown in invoices issued by the dealers to the appellants, as required under Rule 9, Cenvat Credit Rules, 2004?”

4. We may point out, at the outset, that there is no dispute that the additional excise duty on sugar has been paid. The only dispute is that AED paid on sugar has not been passed on by the first stage dealers to the appellants because the duty paying documents, i.e., the invoices issued by the first stage dealers, did not show the element of AED. The Tribunal in its impugned order dated 09.06.2009 has remarked about the same, in the following manner:

“5. I find that in terms of the Board’s Circular dated 6.3.2003, the Additional Excise Duty (GSI) accrued prior to 1.3.2003 can be used for payment of Cenvat Credit. The appellants failed to produce proper duty paying documents in respect of payment of AED (GSI). The Representative contended that the dealer’s invoices indicated the value of the goods higher than that in the primary invoices of the manufacturer. It is his contention that the manufacturer’s invoice could establish the payment of AED (GSI). I am unable to accept the contention of the Id. Representative of the appellant. I find that credit would be eligible on the basis of duty paying documents as prescribed in the Rule 9 of the Rules. The documents in this case are the dealer’s invoice. Admittedly, there is no mention of the payment of GSI in the dealer’s invoice and, therefore, the Commissioner (Appeals) rightly disallowed the credit. However, I agree with the submission of the Id. Representative that in the instant case, there is no suppression of fact with intent to evade payment of duty and, therefore, imposition of penalty under Section 11AC is not warranted. In view of the above discussion, demand of duty and interest are upheld. Penalty is set aside. The appeal is disposed of in the above terms.”

5. Submission of the learned counsel for the appellant is that Rule 9 of the Cenvat Credit Rules, 2004 on which the reliance was placed by the Tribunal, is not applicable in the instant case inasmuch as these Rules obviously came to be passed in the year 2004 whereas the period involved in the present case is 01.04.2000 to 09.10.2000. As there was no such requirement at the relevant period, the invoices issued by the first stage dealers naturally would not incorporate the element of AED (GSI). It is, thus,

argued that the case of the appellants should have been decided by the Tribunal keeping in view the legal provisions, which were applicable at that time.

6. Learned counsel for the appellant has drawn our attention to Cenvat Credit Rules, 2002. The appellants have filed the copies of the invoices which were produced before the AO and an attempt is made by the learned counsel to show that additional excise duty (GSI) was duly paid, which is reflected in the said invoices. He has also made an attempt to demonstrate that this burden was passed on to the assessee/appellants as well. Referring to one such invoice dated 28.04.2000 issued by Daurala Sugar Works, Daurala, the learned counsel has pointed out that the amount reflected in the value of the invoice is ₹1,57,025.00. He has also relied upon the judgment of the Tribunal in the case of ***Britannia Industries Ltd. Vs. Commissioner of Central Excise, Delhi-I*** [2010 (251) E.L.T. 385].
7. As pointed out above, it is not in dispute that AED (GSI) on sugar has been paid. This was recorded by the Tribunal as well in the impugned order. The only question was as to whether the first dealer had passed on this burden to the appellant or not. As noted above, the appellants had produced sufficient evidence to demonstrate that such a burden had been passed on to the appellants. However, none of the Authorities below went into this aspect at all. The case of the appellants for Cenvat credit was rejected only on the ground that the procedure contained in the

Rules was not complied with. When we find that there is no such Rules in existence at the relevant time, the claim of the appellants should not have been rejected on the basis of aforesaid Rules. The orders of the Tribunal in the case of ***Britannia Industries Ltd. (supra)***, in such circumstances, would clearly be applicable. From the invoices produced by the appellants, the AO should have determined as to whether the burden of AED was passed on the appellants or not. That exercise has not been done by the AO. Even as per Sub-Rule (2) of Rule 9, the Cenvat Credit is not to be denied on the ground that any of the documents mentioned in sub-rule (1) does not contain all the particulars required to be contained therein under these rules, if such document contains details of payment of duty or service tax, description of the goods or taxable service, assessable value, name and address of the factory or warehouse or provider of input service. The Joint Commissioner of Central Excise or the Assistant Commissioner, as the case may be, can satisfy itself that the duty of excise or service tax due on the input or input service has been paid and such input or input service has actually been used or is to be used in the manufacturing of final products or in providing output services.

8. Thus, the aforesaid question is answered in favour of the appellants, as a result, the impugned order of the Tribunal is set aside. The matter is remanded back to the Joint Commissioner, who shall scrutinize the documents furnished by the appellants and satisfy himself and record the satisfaction, if any, in term of

Sub-Rule(2) of Rule 9 of the Cenvat Credit Rules, 2004 and if the requirements laid down therein are satisfied, the AED (GSI) shall be allowed to the appellants.

9. The present appeal is dismissed accordingly.

(A.K. SIKRI)
JUDGE

(REVA KHETRAPAL)
JUDGE

SEPTEMBER 13, 2010.
pmc