

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH**

REGIONAL BENCH - COURT NO. I

Excise Appeal No. 2819 of 2011

[Arising out of Order-in-Appeal No. 129-130-CE-APPL-CHD-II dated 26.08.2011 passed by the Commissioner (Appeals), Chandigarh-II]

M/s Pepsico India Holdings Pvt Ltd

.....Appellant

Frito Lays Division,
Village Channo, P.O. Bhawanigarh,
District Sangrur, Punjab

VERSUS

**Commissioner of Central Excise & Service
Tax, Chandigarh-I**

.....Respondent

Central Revenue Building,
Sector 17-C, Chandigarh 160017

WITH

(i) Excise Appeal No. 2792 of 2011 (Max Builders Sangrur Patiala Road Village Channo PO. Bhawanigarh, Sangrur, Punjab vs. CCE & ST, Chandigarh-I)

[Arising out of Order-in-Appeal No. 129-130-CE-APPL-CHD-II dated 26.08.2011 passed by the Commissioner (Appeals), Chandigarh-II]

(ii) Excise Appeal No. 71 of 2016 (Pepsico India Holdings Pvt Ltd vs. CCE & ST, Chandigarh-II)

[Arising out of Order-in-Appeal No. JAL-EXCUS-000-APP-208 to 212-15-16 dated 28.10.2015 passed by the Commissioner (Appeals), Chandigarh-II]

(iii) Excise Appeal No. 75 of 2016 (Max Builders vs. CCE & ST, Chandigarh-II)

[Arising out of Order-in-Appeal No. JAL-EXCUS-000-APP-218 to 219-15-16 dated 29.10.2015 passed by the Commissioner (Appeals), Chandigarh-II]

(iv) Excise Appeal No. 76 of 2016 (Pepsico India Holdings Pvt Ltd vs. CCE & ST, Chandigarh-II)

[Arising out of Order-in-Appeal No. JAL-EXCUS-000-APP-218 to 219-15-16 dated 29.10.2015 passed by the Commissioner (Appeals), Chandigarh-II]

(v) Excise Appeal No. 60306 of 2020 (Pepsico India Holdings Pvt Ltd vs. CCE & ST, Ludhiana)

[Arising out of Order-in-Appeal No. LUD-EXCUS-001-APP-145-2020 dated 08.05.2020 passed by the Commissioner (Appeals), Ludhiana]

APPEARANCE:

Present for the Appellants: Sh. B.L. Narasimhan, Advocate

Ms. Krati Singh, Advocate

Sh. Aman Singh, Advocate

Present for the Respondent: Sh. Siddharth Jaiswal (Jt. Commr.), AR

Sh. Harish Kapoor (Supdt.), AR

Sh. Raman Mittal (Insp.), AR

CORAM:

HON'BLE Mr. S. S. GARG, MEMBER (JUDICIAL)

HON'BLE Mr. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 60055-60060/2024

DATE OF HEARING: 06.02.2024

DATE OF DECISION: 12.02.2024

PER : S. S. GARG

Four appeals filed by M/s Pepsico India Holdings Pvt Ltd 'Appellant No.1' and two appeals filed by M/s Max Builders 'Appellant No.2' are directed against different impugned Order-in-Appeal passed by the Id. Commissioner (Appeals), whereby the Id. Commissioner has confirmed the duty demand under Section 11A and also imposed penalty on the Appellant No.1 under Rule 25 of the Central Excise Rules, 2002. Further, the Id. Commissioner has also imposed penalty on the Appellant No.2 under Rule 26 of of the Central Excise Rules, 2002. Since the issue involved in all six appeals is identical, therefore, all six appeals are taken up together for discussion and disposal. The details of all the six appeals are given herein below in a table form:

Appellant No. 1 : M/s Pepsico Holdings Pvt Ltd				
Sl. No.	Appeal No.	Period	O-I-A No. & Date	Amount
1	E/2819/2011	04/2007 to 11/2008	129-130/CE/Appl/Chd-II/2011 dt. 26.08.2011	Duty Rs.1,07,134/- u/s 11A, Penalty Rs.1,07,134/- u/r 25
2	E/71/2016	01/2009 to 12/2013	JAL-EXCUS-000-APP-208 to 212-15-16 dt. 28.10.2015	Duty Rs.7,41,330/- u/s 11A, Penalty Rs.7,41,330/- u/r 25
3	E/76/2016	01/2014 to 06/2014	JAL-EXCUS-000-APP-218 to 219-15-16 dt. 29.10.2015	Duty Rs.3,14,232/- u/s 11A, Penalty Rs.3,14,232/- u/r 25
4	E/60306/2020	07/2014 to 05/2016	LUD-EXCUS-001-APP-145-2020 dt. 08.05.2020	Duty Rs.20,28,146/- u/s 11A, Penalty Rs.20,28,146/- u/r 25
Appellant No. 2 : M/s Max Builders				
Sl. No.	Appeal No.	Period	O-I-A No. & Date	Amount
1	E/2792/2011	04/2007 to 11/2008	129-130/CE/Appl/Chd-II/2011 dt. 26.08.2011	Penalty of Rs.25,000/- u/r 26
3	E/75/2016	01/2014 to 06/2014	JAL-EXCUS-000-APP-218 to 219-15-16 dt. 29.10.2015	Penalty of Rs.50,000/- u/r 26

2. Briefly stated facts of the present case are that the Appellant No.1 is engaged in the manufacturing of Potato Chips, Kurkure and Namkeens etc. On gathering the intelligence that the Appellant No.1 is evading central excise duty in respect of 'potato starch' classifiable under Tariff Item No. 11083100 of the Tariff by manufacturing and clearing the same clandestinely under the garb of scrap-veg-refuse without payment of appropriate duty and without reflecting the same in their monthly ER-1 returns, the unit was visited by the Central Excise Officers and after the detailed investigation, show cause notices were issued and after following the due process, the Adjudicating Authority confirmed the demand and also imposed penalties. Aggrieved by the said order, the Appellants filed appeals before the Commissioner (Appeals), who rejected the appeals filed by the Appellants. Hence, the present appeals.

3.1 The learned Counsel for the Appellants submits that the impugned orders are not sustainable in law and are liable to be set aside as the same have been passed without properly appreciating the facts and the law and binding judicial precedents.

3.2 He further submits that the impugned goods is not manufactured product in terms of provisions of Central Excise Act. He also submits that the product 'scrap-veg-refuse' came into existence pursuant to process of recycling of waste water, which was not undertaken for manufacturing of 'scrap-veg-refuse'. Such process was undertaken only to reuse the reusable water content in the waste water.

3.3 He further submits that during the process of manufacturing potato chips, the potatoes are washed in water after slicing to clean the potato and its slices from dirt, waste and to retain the texture. In the said process, potato vegetative parts including peels, refuse alongwith dirt are washed off and this waste gets mixed with water in the drum washer.

3.4 He further submits that earlier, such left-over dirty waste water was drained out by the Appellant No.1. But now, with a view to prevent wastage of water, the Appellant No.1 decided to recycle the waste water and accordingly, installed a 'Centrifuge Unit' in their factory. During the recycling of water, the 'Centrifuge Unit' segregates reusable water from the vegetative parts and dirt. The recycled water is reused for early stage mud washing of potatoes. Further, the process of recycling of water also reduced the load on the effluent treatment plant. The waste, arising during the process of recycling, contains vegetable residue which was being cleared by the Appellant No.1 as 'scrap-veg-refuse' during the relevant period.

3.5 He further submits that the Appellant No.1 is not engaged in the manufacturing of starch. In support of his contention, he places reliance on the following decisions wherein it has been held that to levy excise duty, the excisable goods needs to satisfy twin test of manufacture and marketability:-

(a) Hindalco Industries Ltd vs UOI - 2015 (315) ELT 10 (Bom.) affirmed by SC as 2019 (367) ELT A246 (SC)

(b) Balrampur Chini Mills Ltd vs. UOI - 2014 (300) ELT 372 (All.) affirmed by SC as 2015 (322) ELT 769 (SC)

(c) DSCL Sugar vs. UOI – 2017 (355) ELT 61 (All.)

(d) NK Proteins Ltd vs. CCE & ST, Ahmedabad-III – 2023-TIOL-338-CESTAT-AHM

3.6 The learned Counsel for the Appellants also submits that the vegetable refuse is in the form of wet paste/slurry and therefore, it is not capable of being marketed as starch. The vegetable refuse being in the form of wet paste/slurry is not a saleable commodity as it is prone to fermentation. Further, the condition in which it leaves the factory of the Appellant No.1 as a wet paste, makes it a non-marketable commodity and therefore, it fails the twin test of manufacture and marketability. In support of his contention, he places reliance on the following decisions:-

(a) Hindustan Zinc Ltd vs Commissioner – 2005 (181) ELT 170 (SC)

(b) UOI vs Delhi Cloth & General Mills Co. Ltd - 1997 (92) ELT 315 (SC)

(c) Shri Varalakshmi Co. vs CCE, Salem – 2009 (235) ELT 155 (Tri.) affirmed by SC as 2013 (296) ELT A52 (SC)

(d) Venkatachalapathy Rice & Sago Factory & Others vs CCE, Coimbatore – 2013-TIOL-113-CESTAT-MAD

3.7 He further submits that the Appellant No.1 has correctly classified the 'scrap-veg-refuse' under Chapter Heading 23080000 as a vegetable waste. He also submits that explanatory notes to Chapter 23.08 states that **the said Chapter covers vegetable materials, vegetable products, vegetable waste, residues and by-products used in animal feeding and generated from the**

industrial processing of vegetable material in order to extract some of their constituents.

3.8 He further submits that from the description of the goods mentioned in Chapter 23.08, it is cleared that the impugned goods qualifies all the criteria mentioned in the said Chapter Heading and therefore, is liable to nil rate of duty.

3.9 He further submits that the impugned goods is not classifiable as 'potato starch' under Chapter Heading 11081300 as the said product does not meet the criteria as provided in the HSN explanatory notes for the Chapter 1108. The HSN explanatory notes clearly states that the potato starch falling under Chapter 1108 shall be physically in white powdered form, however, in the present case, the 'scrap-veg-refuse' is physically in the form of a wet paste. He places reliance on the following decisions wherein it has been held that presence of certain elements in the residue or scrap does not take it out of the purview of a waste or residue and the onus lies on the Department to bring sufficient evidence to establish that the said product is not residue or waste:-

(a) Commissioner vs Bharat Starch Industries – 2005 (183) ELT 375 (Tri. Del.)

(b) Collector of C.E., Coimbatore vs Brooke Bond Ltd - 1996 (85) ELT 136 (CEGAT)

3.10 The learned Counsel for the Appellants further submits that the Appellant No.1 has produced on record the affidavit of their Associate Director of Research & Development clarifying the

difference between potato starch and scrap-veg-refuse on the basis of literature of International Institute of Starch, Denmark, which is also produced on record. He also submits that the test report produced by the Revenue is not the conclusive proof because it only states that the sample tested positive for starch but without going into the details of the composition of the sample and therefore, the said report cannot be relied upon. He also submits that the impugned goods is entitled for exemption from payment of excise duty under the Notification No. 89/1995-CE dt. 18.05.1995 and Notification No. 27/2011-CE dt. 24.03.2011 because their final product was fully exempted during the relevant period. In support of this submission, he places reliance on the following case-laws:

(a) CCE vs Priyanka Refineries Ltd – 2010 (249 ELT 70 (Tri. Bang)

(b) Ricela Health Foods Ltd vs CCE, Chandigarh – 2018 (361) ELT 1049 (Tri. LB) affirmed by SC as 2022 (382) ELT 436 (SC)

(c) CCE vs Indian Aluminum Co. Ltd – 2006 (203) ELT 3 (SC)

(d) Deepak Vegpro Pvt Ltd Vanaspati Division vs CCE, Patna – 2022-TIOL-749-CESTAT-KOL

3.11 The learned Counsel for the Appellants also contested the invocation of extended period of limitation and the imposition of penalty.

4. On the other hand, the learned DR reiterated the findings of the impugned orders.

5. Heard both sides and perused the records.

6. After considering the submissions of both the parties, we find that the only issue involved in all these appeals is whether the impugned goods 'scrap-veg-refuse' is classifiable under Chapter Heading 23080000 as vegetable waste as claimed by the Appellant or potato starch classifiable under Chapter Heading 1108 as claimed by the Department.

7. Further, we find that the HSN explanatory notes clearly provide that the potato starch falling under Chapter Heading 1108 shall be physically in white powdered form, however, in the present case, the 'scrap-veg-refuse' is physically in the form of a wet paste. It is seen that the only reason for upholding demand against the Appellant No.1 is on the basis that the said 'scrap-veg-refuse' has starch contents in it. Here, we note that just because the product has some starch contents does not qualify it as potato starch classifiable under Chapter Heading 1108. It has been held by the Tribunal in the cases cited supra that mere presence of certain elements of starch in the residue or scrap does not take it out of the purview of a waste or residue and the Department has to bring sufficient evidence to establish that the said product is not residue or waste. We may also note that the process of manufacturing starch from a potato is entirely different from the process involved in this case. The Appellant No.1 effectively does not take any process to extract the potato starch from the potatoes except for extraction of water for reuse. The Appellant No.1 has also placed the literature explaining the process of potato starch extraction explained by the International Institute of

Starch, Denmark and also filed an affidavit of their Associate Director of Research & Development Division clarifying the difference between 'potato starch' and 'scrap-veg-refuse'.

8. Besides this, we also find that the impugned goods is not a manufactured product as per Section 3(1) of the Central Excise Act, 1944, which mandates that excisable goods must come into existence as a result of manufacturing process so as to attract the levy of excise duty; whereas in the present case, 'scrap-veg-refuse' came into existence pursuant to process of recycling of waste water, undertaken only to reuse the reusable water content in the waste water.

9. Further, we find that test report of Central Revenue Control Laboratory produced by the Revenue, is not conclusive as it only states that the sample tested positive for starch without going into the details of the composition of the sample and has not given any conclusive proof.

10. Further, we find also find that the impugned goods are also exempted from payment of excise duty under the Notification No. 89/1995-CE dt. 18.05.1995 and Notification No. 27/2011-CE dt. 24.03.2011 as applicable during the relevant period and as per the said notifications, waste pairing and scrap arising during the manufacture of exempted goods were exempt from the payment of excise duty. It is seen that the Appellant No.1's case is squarely covered by the decisions relied upon by the Appellant cited supra in this regard.

11. In view of the discussion above, we are of the considered opinion that the impugned orders are not sustainable in law and therefore, we set aside the same.

12. Once, the demand itself is set aside, the question of interest and penalties on the Appellant No.1 and Appellant No.2 does not arise. Hence, all six appeals are allowed on above terms.

(Order pronounced in the court on 12.02.2024)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

RA_Saifi