

2012 (277) E.L.T. 96 (Tri. - Del.)

IN THE CESTAT, PRINCIPAL BENCH, NEW DELHI

[COURT NO. I]

Justice R.M.S. Khandeparkar, President and Shri Rakesh Kumar, Member (T)

COMMISSIONER OF CENTRAL EXCISE, JALANDHAR

Versus

A.G. FLATS LTD.

Final Order Nos. 648-661/2011-EX(PB), dated 25-7-2011 in Appeal Nos. E/555, 1858, 2168, 2169-2170, 2171-2172, 2173-2174/2008 and 1121, 2611-2614/2010 and Cross Objection Nos. E/CO/390/2008 and E/CO/7-8/2009

Waste - Soap stock/fatty acid, waxes and gums, emerged in the course of manufacture of exempted goods viz. refined vegetable oil and vanaspati - Products not shown to be of no value or negligible value, hence, not eligible for exemption as waste under Notification No. 89/95-C.E. - *The records indicate that the price of fatty acids, soap stock, waxes and gums is around Rs. 23,000/- per M.T., Rs. 11,000/- to Rs. 13,500/- per M.T., Rs. 10,000/- per M.T. and Rs. 1700 to Rs. 1800 per M. T. respectively. [para 6]*

Words and Phrases - Waste - By-product emerged in manufacture of some other product, cannot be treated as 'waste' just because it was an unintended product - By-product would be 'waste' only if it is of no value or negligible value, something which manufacturer would want to get rid of. - *Oxford Advanced Learner's Dictionary defines the term 'by-product' as a substance produced during the process of making or destroying something else. Thus, if in the course of manufacture of product A, a product B also emerges in addition to the intended product A, even though there was no intention to manufacture the product B, the product B would be called a 'by-product. The 'waste' is a 'by-product' which is of no value or very low value. [para 6]*

Wax, gum and soap stock, emerged in manufacture of refined vegetable oil and vanaspati, classifiable under Heading 15.22 of Central Excise Tariff and not under Heading 15.16 ibid as claimed by assessee. [para 5]

Fatty acids, emerged in manufacture of refined vegetable oil and vanaspati, classifiable under Heading 38.23 of Central Excise Tariff. - *Goods are specifically excluded from purview of Chapter 15 by virtue of Chapter Note 1(e) of Chapter 15 and same are specifically covered by Heading 3823 of Chapter 38. [para 5]*

Manufacture - By-product emerged during process of manufacture of main product - *When a particular process is a process of manufacture by virtue of some Chapter Note, not only main product, but all the by-products obtained by that process would be manufactured product - Section 2(f) of Central Excise Act, 1944. [para 4]*

Appeals disposed off

CASES CITED

A-One Granite v. State of U.P. — 2001 AIR SC 848 — *Referred*..... [Para 6]
Collector v. Tata Iron and Steel Co. Ltd. — 2004 (165) [E.L.T.](#) 386 (S.C.) — *Referred*..... [Para 2.1]
Commissioner v. Bharat Starch Industries — 2005 (183) [E.L.T.](#) 375 (Tribunal) — *Referred* [Para 2.1]
Commissioner v. Priyanka Refineries Ltd. — 2010 (249) [E.L.T.](#) 70 (Tribunal) — **Differed** [Paras 2.1, 2.2, 6]
Commissioner v. Priyanka Refineries Ltd. — 2011 (274) E.L.T. A16 (S.C.) — *Referred*.... [Para 2.1]
Commissioner v. Sethi Oil Industries — Appeal No. E/869/2009-Ex) — *Referred*..... [Para 2.1]
Goodyear India Ltd. v. State of Haryana — 1990 AIR SC 781 — *Referred*..... [Para 6]
Khandelwal Metal & Engineering Works v. Union of India — 1985 (20) [E.L.T.](#) 222 (S.C.) — *Referred* [Para 6]
Markfed Vanaspati and Allied Industries v. Commissioner — 2000 (116) [E.L.T.](#) 204 (Tribunal) — *Referred* [Para 6]
Rudra Bilas Kisan Sahakari Chini Mills Ltd. v. Commissioner — 2000 (121) [E.L.T.](#) 119 (Tribunal) — *Referred* [Para 2.1]
Shyam Oil Cake Ltd. v. Collector — 2004 (174) [E.L.T.](#) 145 (S.C.) — *Referred*..... [Paras 2.1, 3.4]
Somaia Organic (India) v. Collector — 2007 (214) [E.L.T.](#) 176 (All.) — *Referred*..... [Para 2.2]

REPRESENTED BY : S/Shri B.K. Singh, Jt. CDR and Sunil Kumar, DR, for the Department.
S/Shri S. Malhotra, Kamaljeet Singh, N.K. Garg, G.S. Sandhe, for the Assessee.

[Order per : Rakesh Kumar, Member (T)]. - Since the issue involved in these appeals is common, the same were heard together. The period of dispute in these appeals is from 1-4-05 to September 2007. The respondent in the appeals at Sl. No. 1 to 6 above and the appellant in appeals at Sl. No. 7 & 8 above are manufacturers of refined vegetable oil and vanaspati from crude vegetable oils. During the period of dispute, in terms of Chapter Note No. 6 to Chapter 15, the refining of vegetable oils falling under Heading 1507 to 1515 amounted to manufacture. In course of refining of crude vegetable oils, fatty acids, soap stocks, gums and waxes are obtained as inevitable by-products. For refining of oil, the crude oil is treated with phosphoric acid and/or enzymes along with water maintaining the desired temperature conditions. By this process the gums present in the crude oil get precipitated and are removed by centrifugal process. The de-gemmed oil is bleached by using activated earth under vacuum conditions and this process improves the colour and quality of the oil. The oil, thereafter, is subjected to process of controlled cooling for the purpose of de-waxing and in this process the wax in form of crystals gets separated and is removed by filtration process. After removal of the gum and wax, the oil still contains free fatty acids which are removed by various chemical processes. One process for removal of free fatty acid is neutralisation of oil by pre-determined quantity of alkalis in course of which the free fatty acid get combined with the alkalis and are separated as soap stock. After removal of free fatty acids, the oil is subjected to deodorisation and after the process of deodorisation, the refined vegetable oil emerges. Thus, there are three main by-products all the refining of oil-soap stock/fatty acids, waxes and gums.

1.1 During the period of dispute, the refined oils and vanaspati i.e. hydrogenated refined oils, were fully exempt from duty by an exemption Notification. During the period of dispute, there was an exemption Notification No. 89/95-C.E., dated 18-5-95 which exempted from the whole of the duty of excise leviable thereon, the "waste, parings and scrap" arising in course of manufacture of exempted goods and falling within schedule to the Central Excise Tariff Act, 1985, subject to condition that this exemption would not apply to waste, parings and scrap cleared by the factory in which any other excisable goods, other than exempted goods are also manufactured. As per explanation to this notification, for the purpose of this notification, the expression "exempted goods" means excisable goods which are chargeable to nil rate of duty or are fully exempt from excise duty by any exemption notification not being a notification where the exemption from the whole of the duty of excise is granted based on the value or quantity of clearances made in a financial year. The point of dispute in this case is as to whether the fatty acids/soap stock, waxes and gums obtained in course of refining of the vegetable oils are eligible for duty exemption under the Notification No. 89/95-C.E.

2. Heard both the sides.

2.1 Shri S. Malhotra, Advocate, representing M/s. A.G. Fats Ltd., Shri K.J. Singh, Advocate, representing M/s. A.P. Solvex Ltd. and A.P. Organics (P) Ltd. and Shri N.K. Garg, advocate, representing M/s. Dhillon Oil & Fats P. Ltd. and M/s. Shree Jindal Proteins Ltd. made the following oral and written submissions.

- (1) It is a statutory obligation of the manufacturers of refined vegetable oil and vanaspati to remove free fatty acids, gums and waxes, as these substances are toxic substances. Thus, the gum, waxes and fatty acids obtained in course of refining of vegetable oil are nothing but waste and, hence, the same are covered by the exemption Notification No. 89/95-C.E. Same view has been taken by the Tribunal with regard to soap stock obtained in course of refining of edible vegetable oil in the case of *CCE, Hyderabad v. Priyanka Refineries Ltd.* reported in 2010 (249) E.L.T. 70 (Tri.-Bang.), wherein the Tribunal held that soap stock obtained in course of refining of vegetable oil is a waste eligible for benefit of exemption under Notification No. 89/95-C.E. The SLP filed by the Government against this decision of the Tribunal has been dismissed by Hon'ble Supreme Court [2011 (274) E.L.T. A16 (S.C.)].
- (2) The mere fact that fatty acids/soap stocks, wax and gums are marketable and fetch some price, cannot be a ground for denying the benefit of duty exemption in respect of them under Notification No. 89/95-C.E. by treating them something other than waste.
- (3) The dispute in this case is as to whether the goods, in question, would fall within the scope of the term 'waste' as appearing in the notification. In absence of any specific definition of the term 'waste' in the said notification or anywhere else in the Central Excise Act or the Rules made thereunder, reliance must be placed on the meaning of the term in various dictionaries or judicial pronouncements according to which the by-products of a manufacturing process are categorically included in the scope of the terms 'waste'. Since, the assessee in these cases manufacture refined vegetable oil or vanaspati and the fatty acid/ soap stock, gums and wax emerge as inevitable by-product in course of removal of various undesirable impurities and ingredients in the crude oil, these items must be treated as a waste.
- (4) Tribunal in the case of *Rudra Bilas Kisan Sahakari Chini Mill Ltd. v. CCE, Meerut* reported in 2000 (121) E.L.T. 119 (Tribunal) has held that bagasse arising in course of manufacture of sugar is a waste or residue, as no one puts up a unit to produce waste or residue as a final product. Tribunal in the case of *CCE, Panchkula v. Bharat Starch Industries* reported in 2005 (183) E.L.T. 375 (Tri.-Del.) has held that corn gluten meal, a by-product generated during manufacture of starch manufactured from maize is a waste or residue. Hon'ble Supreme Court in the case of *CCE, Patna v. Tata Iron & Steel Co. Ltd.* reported in 2004 (165) E.L.T. 386 (S.C.) has held that zinc dross, flux skimming and zinc scallings are waste products and not excisable goods although these were arising in course of galvanisation of steel sheets as by-product. The ratio of these judgments is squarely applicable to the facts of this case.
- (5) Hon'ble Supreme Court in the case of *Shyam Oil Cake Ltd. v. CCE, Jaipur* reported in 2004 (174) E.L.T. 145 (S.C.) has specifically held that refining of vegetable oil does not amount to manufacture. Subsequently a new Chapter Note was added to Chapter 15 vide Finance Act, 2005 to provide that the process of refining of vegetable oil of heading 1507 to 1515 amounts to manufacture. But this deeming provision would not be applicable to the other products - gums, waxes and fatty acids obtained in course of refining of oil and, hence, these products, in any case, are not excisable.

- (6) The soap stock/fatty acids, waxes and gums are fractions of vegetable oils and hence classifiable under heading 1516 and since all the goods falling under heading 1516 are fully exempt from duty under Notification No. 3/06-C.E. and its successor notification, no duty is chargeable on these items.
- (7) Based on dismissal by Hon'ble Supreme Court of SLP filed by the department against the judgment of this Tribunal in the case of *CCE, Hyderabad v. Priyanka Refineries Ltd.* (supra), the Commissioner, Central Excise, Lucknow in the case of *CCE, Lucknow v. Sethi Oil Industries* (Appeal No. E/869/09-EX) filed an application before the Tribunal for withdrawal of the appeal and the same was allowed by the Tribunal. When the department has accepted the Tribunal's judgment in the case of *CCE, Hyderabad v. Priyanka Refineries Ltd.* (supra) and as mentioned above, the Government's SLP to Supreme Court against this judgment has been dismissed, a different view cannot be taken by the department in this group of cases.

2.2 Shri B.K. Singh, the learned Jt. CDR and Shri Sunil Kumar, the learned Departmental Representative opposing the contention of the respondents in the appeals at Sl. No. 1 to 6 and of the appellants in the appeals at Sl. No. 7 & 8, pleaded that what the Notification No. 85/95-C.E. exempts is waste, parings and scrap manufactured in a factory which manufactures some final product which is either chargeable to nil rate of duty or is fully exempt from duty by an exemption notification issued under Section 5A of Central Excise Act, 1944, other than the exemption notification granting full duty exemption based on value or quantity of clearances for a financial year, that there is difference between the term 'waste' and 'by-product', that by-product is a product which arises as an inevitable product in course of the manufacture of a final product, which the manufacturer intends to manufacture, and it is only the by-product which is of no value which can be treated as waste, that a by-product which is of some value, cannot be treated as waste, that in this case fatty acids/soap stock, waxes and gums cannot be treated as waste, as each of them has some value and is a raw material for some industry, that soap stock/fatty acids are the raw material for the manufacturers of soap and it is only the manufacturers of soap who purchase this item, that judgment of the Tribunal in the case of *CCE, Hyderabad v. Priyanka Refineries Ltd.* (supra) is not the correct judgment as it assumes that soap stock arising in course of refining of vegetable oil is waste without giving any reasons for arriving at this conclusion, that dismissal by Hon'ble Supreme Court of Government's SLP against the Tribunal's order in the case of *CCE, Hyderabad v. Priyanka Refineries Ltd.* (surpa) is not a binding precedent, as the same is summary dismissal of appeal without assignment any reasons, that during the period prior to 1-3-06. Notification No. 115/75-C.E. was there which exempted the excisable goods manufactured in the factories belonging to certain industrial sectors mentioned therein, one of the industrial section mentioned being oil industry and during that period the respondent in appeals at Sl. No. 1 to 6 and the appellants in appeals at Sl. No. 7 & 8 were availing of the exemption Notification No. 115/75-C.E. in respect of fatty acids/soap stock, gums and waxes and were not claiming that these goods are waste, that it is only as soon as the Notification No. 115/75-C.E. was withdrawn w.e.f. 1-3-06, the assesseees in this group of cases have started claiming the fatty acids/soap stock, gums and waxes as waste eligible for duty exemption under Notification No. 89/95-C.E., that fatty acids obtained in course of refining of vegetable oils are specifically covered by heading 382300 of the Central Excise Tariff, that Hon'ble Allahabad High Court in the case of *Somaiya Organic (India) v. CCE, Allahabad* reported in 2007 (214) E.L.T. 176 (All.) has held that by-product is a product which is obtained midway in the process of manufacture of main product, that looking to the price at which the soap stock/fatty acids, waxes and gums are sold by the assesseees, the same cannot be called waste and that in view of this, the respondent in appeals at Sl. No. 1 to 6 and the appellant in the appeals at Sl. No. 7 & 8 are not eligible for the benefit of Notification No. 89/95-C.E.

2.3 Shri S. Malhotra, Advocate, representing M/s. A.G. Fats Ltd. in rejoinder emphasised that the soap stock/fatty acids, waxes and gums arising in course of refining of vegetable oils are not excisable products, pleaded that just because the same fetched some price, the same cannot be treated as excisable and also emphasised since the period of dispute in this case is prior to 1-3-08 i.e. prior to the amendment of Section 2(d) of Central Excise Act, 1944, the amended definition of excisable goods as given in Section 2(d) of Central Excise Act, 1944 which came into force w.e.f. 10-5-08 cannot be applied retrospectively.

3. We have carefully considered the submissions from both the sides and perused the records.

3.1 The point of dispute in this case is as to whether soap stock/fatty acids, waxes and gums obtained in course of refining of vegetable oil can be treated as waste and, hence, eligible for full duty exemption under Notification No. 89/95-C.E. There is no dispute about the fact that each of these items arising as by-product in course of manufacture of refined oil and vanaspati are sold to various buyers and, hence, are marketable.

3.2 Notification No. 89/95-C.E., dated 18-5-95, which was in force during the period of dispute is reproduced below :-

"Waste, Parings and scrap arising during manufacture of exempted goods - Exempted

In exercise of the powers conferred by sub-section (1) of Section 5A of the Central Excise and Salt Act, 1944 (1 of 1944), the Central Government, being satisfied that it is necessary in the public interest to do so, hereby exempts waste, parings and scrap arising in the course of manufacture of exempted goods and falling within the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), from the whole of the duty of excise leviable thereon which is specified in the said Schedule :

Provided that nothing contained in this notification shall apply to waste, parings and scrap cleared from a factory in which any other excisable goods other than exempted goods are also manufactured.

Explanation - For the purpose of this notification, the expression "exempted goods" means excisable goods which are chargeable to "Nil" rate of duty or, are exempted from the whole of the duty of excise leviable thereon by any other notification (not being a notification where exemption from the whole of duty of excise is granted based upon the value or quantity of clearance made in a financial year) issued under sub-rule (1) of rule 8 of the Central Excise Rules, 1944 or sub-section (1) of section 5A of the said Act."

3.3 From the reading of the above notification, it is clear that the following conditions must be satisfied for exemption under this notification :-

- (i) the goods must be waste, parings and scrap;
- (ii) the goods must be falling within the schedule to the Central Excise Tariff Act;

- (iii) the waste, parings and scrap must have arise in course of manufacture of excisable goods which are exempted goods i.e. goods chargeable to nil rate of duty or the same are fully exempt from duty under an exemption notification other than exempt notification granting full duty exemption based on value or quantity of the goods cleared in a financial year;
- (iv) other than the exempted final product no other dutiable excisable goods are manufactured and cleared.

3.4 In this case there is no dispute that the factories of the assesseees in this group of cases were manufacturing refined vegetable oil and vanaspati which were fully exempt from duty under Notification No. 89/95-C.E., dated 18-5-95 and these units were not manufacturing any other dutiable final product. The point of dispute is as to whether the soap stock/fatty acids, waxes and gums can be said to be the waste. Besides this, the appellants also plead that the items, in question, are fractions of the vegetable oils and, hence, classifiable under Heading 1516 and since all the goods falling under Heading 1516 are fully exempt from duty under Notification No. 3/06-C.E., dated 1-3-06 and its successor notifications, no duty is chargeable in respect of soap stock/acid oil, gums and residue. It is also the contention of the appellant that Chapter Note 6 to Chapter 15 introduced by Finance Act, 2005 providing that the refining of crude edible vegetable oil amounts to manufacture is a deeming provision by which the process of refining of crude oil was made manufacture which otherwise was held by Hon'ble Supreme Court in the case of *Shyam Oil Cake Ltd. v. CCE, Jaipur* (supra) as not amounting to manufacture and on the basis of this Chapter Note, the by-products obtained in course of refining of oil cannot be treated as excisable goods, as a legal fiction cannot be extended beyond the purpose for which the same had been created and hence, the soap stock/fatty acids, waxes and gums are not excisable.

4. During the period of dispute, by virtue of Chapter Note 6 to Chapter 15 the process of refining of crude vegetable oil was to be treated as process of manufacture. The soap stock/fatty acids, waxes and gums are the by-products which are obtained in the course of manufacture of refined vegetable oil. Each of these by-products has a name, characteristic and uses distinct from the raw material - crude vegetable oil and, hence, the same satisfy the criteria for. treating the process as manufacture. The argument of the respondents in appeals at Sl. No. 1 to 6 and of the Appellant in appeals at Sl. No. 7 & 8, that by virtue of Chapter Note 6 to Chapter 15, only the refined oil is to be treated as manufactured product and not the by-products obtained in course of refining is difficult to accept. When a particular process is a process of manufacture under Section 2(f) by virtue of some Chapter Note, not only the main product but all the by-products obtained by that process would have to be treated as manufactured product and if the same are covered by some entry in the Central Excise Tariff and are marketable the same would be chargeable to Central Excise Duty. The waxes and gums obtained in course of refining is covered by heading 1522. As regards soap stock, the same would also be covered by Heading 1522, as, as per HSN Explanatory Notes of heading 1522, this heading among other things, covers soap stocks which are the by-product of oil refining, produced by neutralisation of free fatty acids with a base (sodium hydroxide) and consist of mixture of crude soap, natural oils or fats. As regards, fatty acids obtained in course of refining, the same by virtue of Chapter Note 1(e) to Chapter 15 are excluded from the purview of Chapter 15 and the same are specifically covered by Heading 3823. Therefore, each of the three by-products, soap stock/fatty acids, waxes and gums are the manufactured products covered by Central Excise Tariff and since it is not under dispute that the same are marketable, the same have to be treated as excisable product chargeable to Central Excise Duty.

5. The contention of the appellant that each of these by-products have to be treated as fractions of vegetable oil covered under heading 1516 is not acceptable, as, as discussed above, while the waxes, gums and soap stocks obtained in course of refining are covered by Heading 1522, the fatty acids obtained in course of refining are specifically excluded from the purview of Chapter 15 by virtue of Chapter Note 1(e) to Chapter 15 and same are specifically covered by Heading 3823 of Chapter 38. Therefore, the plea that these products are classifiable under Heading 1516 and, hence, are fully exempt from duty under Notification No. 3/06-C.E. is not acceptable.

6. Coming to the main point of dispute as to whether the soap stock/fatty acids, waxes and gums obtained in course of refining of crude vegetable oil can be treated as waste, since this term has not been defined in the Notification or in the Central Excise Act, 1944 or the Rules made thereunder, the meaning of this term has to be understood from the dictionary and judicial pronouncements. However, a distinction has to be made between the term 'by-product' and the term 'waste.' Oxford Advanced Learner's Dictionary defines the term "by-product" as a substance produced during the process of making or destroying something else. Thus, if in course of manufacture of product A, a product B, also emerges in addition to the intended product A, even though there was no intention to manufacture the product B, the product B would be called a by-product. The waste is a by-product which is of no value or very low value. Larger Bench of the Tribunal in the case of *Markfed Vanaspati & Allied Indus v. CCE, Chandigarh* reported in 2000 (116) E.L.T. 204 (Tribunal) after observing that by-product means something of value produced in making the main product or a substance obtained in course of a specific process but not a primary object, has held that the spent earth arising in course of refining of oil, being of no value, is not a new product or a by-product. Though the Tribunal in the case of *CCE, Hyderabad v. Priyanka Refineries Ltd.* (supra) has held that soap stock arising in course of refining of oil is waste, no reasons have been given for arriving at this conclusion. In this order, the observations of the Tribunal that the decision of Hon'ble Supreme Court in the case of *Khandelwal Metal & Engineering Works v. Union of India* reported in 1985 (20) E.L.T. 222 (S.C.) would cover the issue in favour of the respondent are also not correct as the issue involved in the case of *Khandelwal Metal & Engineering Works* was as to whether the imported brass scrap in form of old and used articles of brass sold as scrap, would attract additional custom duty under Section 3 of the Indian Customs Tariff Act, while the issue involved in the case of *CCE, Hyderabad v. Priyanka Refineries Ltd.* (supra) was as to whether the soap stock arising in course of refining of crude vegetable oil could be treated as waste for the purpose of Notification No. 85/95-C.E., which is a totally different issue. Just because the appeal filed by the Government against this order of the Tribunal has been dismissed by Hon'ble Supreme Court, the dismissal being a summary dismissal without giving any reasons does not lay down any law as, as held by Hon'ble Supreme Court in a series of judgment in the cases of *Goodyear India Ltd. v. State of Haryana* reported in 1990 AIR SC 781

and *A-One Granite v. State of U.P.* reported in 2001 AIR SC 848 summary dismissal of an appeal or a SLP without giving any reasons i.e. a *sub silentio* decision, does not lay down any law or a binding precedent. When a product emerges as a by-product in course of manufacture of some other product, that by-product cannot be treated as waste just because it is an unintended product arising in course of manufacture of an intended final product. The by-product would be waste only if it is of no value or negligible value something which the manufacture would want to get rid of. No evidence has been produced by the Assessee that the products, in question, are of no value or negligible value, which have to be got rid of. On the contrary, the records indicate that the price of fatty acids, soap stock, waxes and gums is around Rs. 23,000/- per M.T., Rs. 11,000/- to Rs. 13,500/- per M.T., Rs. 10,000/- per M.T. and Rs. 1700 to Rs. 1800 per M.T. respectively. Since the products, in question, have not been shown to be of no value or negligible value which have only to be discarded, the same would not be eligible for exemption under Notification No. 89/95-C.E.

7. In view of the above discussion, so far as appeals at Sl. No. 1 to 6 are concerned, the impugned orders are not sustainable, the same are set aside and the Revenue's appeals are allowed and so far as the appeals at Sl. No. 7 & 8 are concerned, the impugned orders are upheld and the appeals are dismissed.

(Pronounced in open court on 25-7-2011)
