

## 2010 (249) E.L.T. 70 (Tri. - Bang.)

IN THE CESTAT, SOUTH ZONAL BENCH, BANGALORE  
S/Shri T.K. Jayaraman, Member (T) and M.V. Ravindran, Member (J)

COMMISSIONER OF C. EX., HYDERABAD

Versus

PRIYANKA REFINERIES LTD.

Final Order Nos. 734-736/2009, dated 13-5-2009 in Appeal Nos. E/374, 385 and 294/2008

**Soap stock - Waste - Exemption - Soap stock arising during manufacture of refined edible oil and vanaspathi - Impugned final products exempted and soap stock contended as waste and exemption under Notification No. 89/95-C.E. claimed - Revenue treating soap stock as by-product and not waste for demand of duty - Appeal not filed against order on same issue for prior period and issue attained finality - Soap stock not classifiable under Heading 15.22 of Central Excise Tariff merely because it gets some price as waste - Respondent not engaged in business of manufacture of soap stock - Processes mentioned in Heading 15.22 ibid not undertaken but refining of edible oil alone made - Soap stock is waste - Impugned orders sustainable - Sections 5A and 11A of Central Excise Act, 1944. [paras 2, 7, 7.1, 7.2]**

**Appeals rejected**

### CASES CITED

Birla Corporation Ltd. v. Commissioner — 2005 (186) E.L.T. 266 (S.C.) — *Relied on*..... [Para 7.1]  
C.K. Gangadharan v. Commissioner of Income Tax — 2008 (228) E.L.T. 497 (S.C.) — **Distinguished** [Paras 5, 7.1]  
Commissioner v. Amar Bitumen and Allied Products Pvt. Ltd. — 2006 (202) E.L.T. 213 (S.C.) — *Relied on* [Para 7.1]  
Commissioner v. Bigen Industries Ltd. — 2006 (197) E.L.T. 305 (S.C.) — *Relied on*..... [Para 7.1]  
Commissioner v. Hindustan Steel Works Construction Ltd. — 2005 (179) E.L.T. 85 (Tribunal) — *Referred* [Para 2]  
Commissioner v. I.T.C. Ltd. — 2006 (204) E.L.T. 363 (S.C.) — *Relied on*..... [Para 7.1]  
Commissioner v. Novapan Industries Ltd. — 2007 (209) E.L.T. 161 (S.C.) — *Relied on*.. [Para 7.1]  
Commissioner v. Surcoat Paints Pvt. Ltd. — 2008 (232) E.L.T. 4 (S.C.) — *Relied on*..... [Para 7.1]  
Indian Oil Corporation Ltd. v. Collector — 2006 (202) E.L.T. 37 (S.C.) — *Relied on*..... [Para 7.1]  
Jayaswals Neco Ltd. v. Commissioner — 2006 (195) E.L.T. 142 (S.C.) = 2007 (8) S.T.R. 305 (S.C.) — *Relied on* [Para 7.1]  
Khandelwal Metal & Engg Works v. U.O.I. — 1985 (20) E.L.T. 222 (S.C.) — *Relied on*.. [Para 7.2]

REPRESENTED BY : Ms. Joy Kumari Chander, JCDR, for the Appellant.  
Ms. Kusum Ranganath, Advocate, for the Respondent.

**[Order per : M.V. Ravindran, Member (J)].** - All these three appeals are directed against OIA No. 01/2008 (H-IV) (D) C.E. dated 14-2-2008. Since the issue involved in all these appeals being the same, we dispose off the three appeals by common order.

2. The relevant facts that arise for consideration are :

“The respondents are manufacturers of edible vegetable refined oil and vanaspathi falling under sub-heading Nos. 1508/1510/1512/1516 etc., of the Central Excise Tariff, the respondents procure crude vegetable oil from various sources and convert/process the: same into refined vegetable edible oils and vanaspathi. During the course of processing of crude vegetable oils into refined vegetable oils, “soap stocks” emerge as a by-product apart from sludge etc., From the manufacturing process of the refining of vegetable oils, it is inevitable that “soap stocks” emerge as a by-product, which is normally used in the manufacture of soap. The respondent cleared the by-product/soap stocks by paying the duty @ 16% adv., under sub-heading No. 1507.00 of CETA 1985 upto February, 2005. With effect from 1-3-2005, refined vegetable edible oils and vanaspathi were exempt by Notification No. 4/2005-C.E., dated 1-3-2005. The respondents discontinued filing the monthly statutory returns in form, ER 1 with the department and did not furnish the information about the excisable goods manufactured and cleared from. 03/2005. Hence, under letter OC No. 696/2006 dated 21-11-2006 and summons dated 30-11-2006, the Superintendent of Central Excise, I/C Gaganpahad Range directed the respondents to provide details of clearances of soap stocks/residues emerged during the course of manufacture of vegetable refined oil and cleared during the period from December 2005 to May 2006. The required information (details of sales of sun-flower wastage muddy, rice bran wastage muddy, Rice bran wax, soya bean wastage muddy, CSC wastage muddy, palm soap muddy and vanaspathi wastage muddy) was furnished by the respondents with letter dated 1-12-2006. As these products were classifiable under Heading No. 15.22 with effect from 28-2-2005 and dutiable at the rate of 16% adv., The respondents, were directed to furnish the total sale value of these products during the period from 1-12-2005 to 31-5-2006, which was furnished as Rs. 1,27,12,347/- (cum-duty-value). A show cause notice dated 19-12-2006 was issued for demand of duty of Rs. 17,83,576/- and for imposition of penalty and interest, in reply the Respondents claimed that soap muddy & muddy rice bran is a waste product and claimed exemption from payment of duty in terms of FOI Notification No. 89/95-C.E. The ‘Adjudication authority’ relied on the decision of the

Hon'ble CESTAT, Delhi bench in the case of *Commissioner of C.E., Raipur v. Hindustan Steel Works Construction Ltd.* [2005 (179) [E.L.T.](#) 85 (Tri.-Del.)], wherein it was laid down that the benefit of exemption to waste arising during the manufacture of exempted products is available as long as the assessee is not manufacturing any other excisable goods other than exempted goods. He concluded that the by-product viz., soap stock is specifically classifiable under 1522.00 20 of the CETH and leviable to duty at the rate applicable in the tariff as long as the assessee is not eligible for the benefit under Notification No. 89/95-C.E. Once the assessee claims the benefit under Notification No. 89/95-C.E. and he is found eligible the exemption granted in terms of Section 5A of the Central Excise Act, 1944 prevails and it has to be extended as, soap stock which is nothing but waste arising during the manufacture of exempted excisable goods viz., refined vegetable oil and is covered under the schedule to the Central Excise Tariff Act, 1985'. In the impugned order he extended the benefit of notification No. 89/95 C.E. dated 18-5-1995 and dropped all other proceedings."

The Commissioner of Central Excise, Hyderabad reviewed the OIO and directed an appeal be filed before Commissioner (Appeals). The said appeal was heard by the learned Commissioner (Appeals) which were rejected by giving the following findings :

"4.1 The issues involved, in the case is classification of soap stocks and benefit of Notification No. 89/95-C.E.

4.2 The department in case of the respondents, on the same issue, but pertaining to an earlier period extended the benefit of Notification No. 89/95-C.E. and the same was accepted by the department. The position thus having been settled, no grounds have been made as to say that there are compelling reasons which have altered the situation to take different view. The CBEC circular cited was in, the context of earlier tariff and would not have a bearing on the way current tariff classification is organized. In view of the Hon'ble Supreme Court orders, cited, I feel the matter cannot be reopened. Since the issue can be disposed off on this ground, I do not intend to go into other issues raised. I did not find any reason, as to why the same issue in respect of the same assessee-respondent for a later period was taken up for appeal resulting in this appeal."

3. Learned JCDR and learned DR appearing on behalf of the revenue in these matters would submit that the learned Commissioner (Appeal's) findings as regards the *res judicata* is not applicable in this case. They would reiterate the grounds of appeal which are as under :

"The OIO No. 15/2006 dated 7-6-2006 pertaining to the same issue in respect of the same assessee for the previous period i.e. 3/05 to 11/05 extending the benefit of Notification No. 89/95 C.E. was accepted by the department. However, while reviewing the OIO No. 11/2007 dated 11-6-2007 pertaining to the subsequent period i.e. 1-12-2005 to 31-5-2006, in respect of the same assessee, it was observed that the Soap Stocks and wax emerged in Oil Refining units are in the nature of By-products which are used in the soap manufacturing industry and candle making industry etc., and hence extending the benefit of Notification No. 89/95-C.E. is not correct.

2. As per the clarification given by the Board vide letter F. No. D35/2/75-TRU (Pt) dated 6-6-75 the benefit of exemption under Notification No. 89/95-C.E. cannot be extended to the above bye-products as they are having distinctive characteristics and commercial uses of their own and cannot be treated on par with Waste, scrap or parings.

3. Based on the above observations, an appeal was filed by the Department against O-I-O No. 11/2007 dated 11-6-2007. Now the Commissioner (Appeals) vide his OIA No. 19/2007 (H-IV) (D) C.E. dated 31-12-2007 rejected the Department's appeal on the grounds that the matter cannot be reopened as the earlier OIO was accepted by the department without going into the merits of the case i.e. extending the benefit of Notification No. 89/95-C.E. to the by-products viz. Soap, // Stocks and wax is not correct."

4. They would also submit that the soap stock which has arisen during the course of oil refining is a by-product and it fetches a good market value. It was also submitted that exemption under Notification No. 85/95 cannot be extended to the by-products as they are having definitive characteristic and commercial uses. It was urged that, the impugned order be set aside and their appeals be allowed.

5. Learned JCDR would rely upon the decision of the Supreme Court in the case of *C.K. Gangadharan v. Commr. of Income Tax, Cochin* as reported at 2008 (228) [E.L.T.](#) 497 (S.C.) and submitted that the ratio of the said case will be squarely applicable to this case also. It is also submitted that non-filing of appeals in the similar cases does not bar filing of appeal in any other case. She would exhort us to consider the meaning of the words 'waste' as given in the New Webster's Dictionary of English Language and submit that the soap stock which arises during the course of refining of vegetable oil is not a waste but a by-product.

6. Learned counsel on the other hand would submit that the issue of charging of duty and denying the benefit of exemption Notification No. 89/95 does not arise as in their own case, the lower authorities have accepted the Orders passed in respect of the very same issue for the earlier period. She would submit that the learned Commissioner (Appeal's) Order is correct and does not require any interference. On the merits of the case, she would submit that the main activity of the appellant is of refining the vegetable oils and not manufacturing of soap stock. Hence, the soap stock according to the appellant is nothing but a waste.

7. We have considered the submission made at length by both sides and perused the records.

Two points that arise for our consideration in these cases are :

- (1) Whether the principles of *res judicata* will apply in these cases?
- (2) Whether the soap stock which has arisen during the course of manufacturing of vegetable oil can be considered as a by-product or a waste to get the benefit of Notification No. 89/95?

7.1 As regards the first issue the reliance was placed by the learned JCDR on the decision of the Hon'ble Supreme Court in the case *C.K. Gangadharan v. Commr. of Income Tax, Cochin* (supra). The Hon'ble Supreme Court held that "merely because in some cases, the revenue has not preferred an appeal that does not operate as a bar for the revenue to prefer an appeal in another case, where there is just cause for doing so. Or it is in public interest to do so or for a pronouncement by the

higher Court when divergent views are expressed by the Tribunals or the High Courts.”

It may be seen from the above reproduced, answer given by the Apex court that the issue before the Hon'ble Court was regarding the appeal being filed in some cases and an appeal being not filed in another case and also when there are divergent views expressed by the Tribunal or High Court. In the case before us we find that in respect of both the respondents, an identical issue was raised and lower authorities have held in favour of the respondents. These earlier Orders were reviewed by high authorities in Commissionerate and a conscious decision was taken not to file an appeal against the said Order by the Higher Authorities, who reviewed the orders. On this background, we find that, the decision of the Hon'ble Apex Court in the case of *CCE v. Surcoat Paints Ltd.*, 2008 (232) [E.L.T.](#) 4 (S.C.) is directly on the point. We also find that the Hon'ble Supreme Court in the following cases has clearly held that if an identical issue is decided in case of an assessee, revenue cannot be permitted to take opposite stand in other cases.

- (1) *Birla Corporation Ltd. v. CCE* - 2005 (186) [E.L.T.](#) 266 (S.C.)
- (2) *Jayaswals Neco Ltd. v. CCE* - 2006 (195) [E.L.T.](#) 142 (S.C.) = 2007 (8) [S.T.R.](#) 30 (S.C.)
- (3) *CCE v. Bigen Industries* - 2006 (197) [E.L.T.](#) 305 (S.C.)
- (4) *CCE v. Amar Bitumen & Allied Industries* - 2006 (202) [E.L.T.](#) 213 (S.C.)
- (5) *Indian Oil Corporation Ltd.* - 2006 (202) [E.L.T.](#) 37 (S.C.)
- (6) *CCE v. ITC Ltd.* - 2006 (204) [E.L.T.](#) 363 (S.C.)
- (7) *CCE v. Novopan Industries Ltd.* - 2007 (209) [E.L.T.](#) 161 (S.C.)

We find that in the case before us, in the respondent's own case, the lower authorities have consciously taken a decision not to file an appeal before appellate forum. If that be so, the decisions of the Apex Court as has been cited above will apply. We find that the ratio as laid down by the Apex Court in *C.K. Gangadharan's* case (supra) could have been made applicable, but for the facts of these cases before us, which are totally different, as indicated herein above.

**7.2** On merits we find that the soap stock is a product which arises/emerges during the manufacture of refined vegetable oil. The respondent had always contended before the lower authorities that the soap stock which emerges is not at all a by-product but a waste product. It is the contention of the revenue that the soap stock which emerges during the course of manufacture of vegetable oil has a distinctive name, character and use and is specified under Central Excise Tariff 1522 00 20. There is no dispute to the finding that the soap stock arises during the refining of edible oil. Just because waste, gets some price it cannot be automatically classified under Central Excise Tariff Heading No. 15.22. We find that the decision of the Supreme Court in the case of *Khandelwal Metal & Engg. Works* [1985 (20) [E.L.T.](#) 222 (S.C.)] would cover the issue in favour of the respondent. We also find strong force in the contention of the learned counsel that the respondents are engaged in the refining of edible oil and are not in the business of manufacturing of a by-product called soap stock. The Revenue's efforts to argue the issue that the soap stock having been found mention in the Chapter 152200 seems to be misplaced as the heading clearly talks about resulting from treatment of fatty substances or animal or vegetable waxes. It is seen that in the case before us, the appellant is not doing this activity but is only refining the edible oil. In view of this, we find that the soap stock which arises/emerges during the refining of vegetable oil is a waste for the respondents, though the Revenue may call it as a by-product. Accordingly, on merits as well as on the law, the Revenue (Appeals) are devoid of merits and are liable to be rejected and we do so.

(Operative portion of the Order already pronounced in open Court on conclusion of the hearing)

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