

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, KOLKATA**

REGIONAL BENCH – COURT NO.2

Excise Appeal No. 76586 of 2017

(Arising out of Order-in-Appeal No. 22/KOL-V/2017 dated 28.02.2017 passed by
Commissioner of Central Excise (Appeal-I), Kolkata)

M/s. Switz Foods Pvt. Ltd.

(P-36 & 41, Kasba Industrial Estate, Phase-I, Kolkata-700107)

Appellant

VERSUS

Commr. of Central Excise, Kolkata-V

(3rd Floor, 180, Shantipally, Rajdanga Main Road,
GST Bhawan, Kolkata-700107)

Respondent

APPEARANCE :

Shri Aditya Dutta, Advocate for the Appellant

Shri S. Dey, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. R. MURALIDHAR, MEMBER (JUDICIAL)

HON'BLE MR. RAJEEV TANDON, MEMBER (TECHNICAL)

FINAL ORDER No.77034/2025

Date of Hearing : 16th July 2025

Date of Pronouncement : 25.07.2025

PER R. MURALIDHAR

The appellants are manufacturers of cakes, cookies etc under their brand name 'Fresh Bake / Bake Shop'. They were also undertaking jobwork for the 'Momginis' brand goods like cakes pastries etc. The appellants were paying the Excise Duty on Mongini branded goods when they were cleared from their factory. For the goods manufactured under their own brand, they were claiming SSI exemption under Notification No.8/2003 CE dated 1.3.2003 as amended from time to time. During the investigation taken up by the Revenue, it was found that they were availing Cenvat Credit and paying Excise Duty for their 'Fresh Bake' goods, but in respect of 'Bake Shop', they were not paying Excise Duty claiming the turnover to be less than the limit specified for SSI units. A Show Cause Notice was issued on 09.02.2011 for the period 2006-07 to 2010-11 by invoking the extended period provisions. After due process, the Adjudicating authority confirmed the demand along with interest and also imposed penalty under Section 11AC. Being aggrieved, the appellants filed their appeal before the Commissioner (Appeals), who

dismissed their appeal. Being aggrieved, now the appellant has filed their appeal before the Tribunal.

2. The Ld Advocate appearing on behalf of the appellant makes the following submissions :

2.1 The present appeal encompasses two issues:-

(a) Non-entitlement of SSI exemption under Notn No. 8/2003-CE dated 01.03.2003 since the total clearance value of all excisable goods own brand + monginis brand taken together had exceeded Rs.400 lakhs.

(b) Payment of CE duty and availment of CENVAT credit on manufactured products 'Fresh Bake' (own brand) and simultaneous availment for SSI exemption in respect of other part of own manufactured goods bearing brand name 'Bake Shop' is incorrect.

2.2 As per para 4 of Notn. No. 8/2003-CE dated 01.03.2003 stated that *the exemption contained in this notification shall not apply to specified goods bearing a brand name or trade name, whether registered or not, of another person.*

2.3 Thus, any excisable goods, whether dutiable or exempted containing/bearing the brand name or trade name of another person (in this case 'monginis') would go straight away out of the purview of the said Notification

2.4 The appellant has paid excise duty on the 'monginis' branded products from the very beginning, since the same are ineligible for the grant of this SSI exemption. In sum, the entire value of excisable goods dutiable or exempted which are excluded by virtue of Para 4 of the notification mentioned above shall not be taken into consideration for the purpose of computing the clearance value of Rs. 400 lakhs.

2.5 The said position is supported by the judgment of the Hon'ble Supreme Court in the case of *CC, Chennai v Nebulae Health Care Ltd. [2015 (325) ELT 431(SC)]*.

2.6 On issue (b) above, at the outset they would like to clarify that they have not taken any CENVAT credit for own brand products i.e. for Fresh Bake, Bake Shop & Jolojog (kind of sweets and by itself not dutiable). This factual position was clarified by Shri Mohan Krishna Maitra, General Manager of the appellant company in his statement (reply to question 20) under summon on 11.11.2010. This factual position has not been nullified by the Department bringing any material evidence.

2.7 They have discharged central excise duty on their own branded product namely 'Fresh Bake' from 2008-09 when they started the production of 'Fresh Bake Brand'. But they did not pay central excise duty on another of their own branded product namely 'Bake Shop' due to a wrongful notion on their part.

2.8 Without prejudice to the above submissions, in any case, they were entitled to get SSI exemption benefit on the full value of clearances in respect of their own branded products upto a clearance value of Rs. 100 lakhs or 150 lakhs as the case may be in a particular financial year. As per Annexure 'B' to the SCN it can be seen that for the FYs 2005-06 to 2007-08 they did not have any clearance of 'Fresh Bake' branded products (their own brand on which they had discharged duty from the very beginning) and the clearance value of 'Bake Shop' was also within the threshold exemption limit (within Rs. 1 Crore for 2005-06 and 2006-07 and within Rs. 1.5 Crores for 2007-08) . Hence from 2005-06 to 2007-08 we are eligible for the SSI exemption (threshold exemption benefit).

2.9 Notwithstanding what has been stated above, the case had originated in course of scrutiny of records by departmental audit pertaining to the period from 2005-06 to 2009-10 (upto July). We had always duly filed our monthly ER-1 Returns in time and maintained all the statutory or otherwise records required under CE law which were always open to the Department and the Department has framed the charges in the SCN on the basis of the scrutiny of the said records only and no new factual evidence has been brought forth by the Department to sustain charges framed in the SCN which culminated into the purported demand of Rs. 35,91,558/-. The SCN was issued on 09.02.2011 covering the period 2006-07 to 2010-11 (upto July, 2010).

Thus, a major portion of the demand from 2006-07 to 2009-10 (upto December 2009) is barred by limitation of time since SCN has been issued after one year from the date of filing ER-1 returns.

3. At the time of Hearing, the Ld Counsel submitted the copies of Annexure A and Annexure B of the Show Cause Notice, which as per him would give the details of the turnover in respect of various products and the Excise Duty quantification arrived at by the Revenue.

4. Considering the time bar aspect and other submissions, he prays that the appeal may be decided accordingly.

5. The Ld A R reiterates the findings of the lower authorities and submits that since the appellant has paid the Excise Duty in respect of one product, he cannot claim SSI exemption in respect of the other product in respect of the same assessee. He submits that there is no such provision available in the statute. Hence, he justifies the confirmed demand.

6. It would be relevant to go through the concerned portion of the SSI exemption Notification No.8/2003 dated 1.3.2003 :

| S. No | Value of clearances | Rate of duty |
|-------|--|--------------|
| (1) | (2) | (3) |
| 1. | First clearances up to an aggregate value not exceeding one hundred lakh rupees made on or after the 1st day of April in any financial year. | Nil |

(vii) the aggregate value of clearances of all excisable goods for home consumption by a manufacturer from one or more factories, or from a factory by one or more manufacturers, does not exceed rupees three hundred lakhs in the preceding financial year.

3. For the purposes of determining the aggregate value of clearances for home consumption, the following clearances shall not be taken into account, namely : -

- (a) clearances bearing the brand name or trade name of another person, which are ineligible for the grant of this exemption in terms of paragraph 4;

After amendment with effect from 1.4.2007 [Notn No.8/2007 dt 1.3.2007]

2. In the said notification,-

- (i) in the Table, in column (2), for the words “one hundred lakh rupees”, the words “one hundred and fifty lakh rupees” shall be substituted;

7. From the above extracts, we note that the SSI limit was Rs.1 crore from 1.3.2003 to 31.3.2007, which was increased to Rs.1.50 crores from 1.4.2007. We will refer this as ‘inner limit’ for ease of reference. Similarly, the outer limit was initially at Rs.3 crores, which was increased to Rs.4 crores subsequently. The assessee opting for SSI, has to start to pay Excise Duty the moment he exceeds the inner limit. However, within the same financial year, if the outer limit is not exceeded, he can once again claim the SSI limit for the next financial year. But once the outer limit of Rs.3 or Rs.4 crores is exceeded, he would not get the SSI benefit in the subsequent financial year.

8. Para 3 (a) of the Notification specifically removes the exemption benefit when the clearance is that of any branded goods. This means that in respect of the branded goods of others, cleared by the SSI, would require payment of Excise Duty, even if the unit per se is exempted from payment of Excise Duty.

9. Coming to the point about the turnover of the branded goods also being considered as part the total turnover of the appellant, we have seen that as per Para 3 (a) of the Notn No.8/2003 CE dated 1.3.2007, the turnover in respect of other branded goods cleared is excluded from the SSI exemption and hence Excise Duty is required to be paid. When Para 2 (vii) and Para 3(a) are read together it get clarified that the turnover of Excise Duty paid goods in respect of the branded goods cannot be clubbed with the turnover of the unit to deny the SSI benefit. In the present case, it is not disputed that for Brand ‘Monginis’, the appellants have paid the Excise Duty. Similar issue had arisen before the Chennai Tribunal in the case of **NEBULAE HEALTH CARE LTD.** *Versus*

COMMISSIONER OF CUSTOMS, CHENNAI - 2007 (209) E.L.T. 125 (Tri. - Chennai), wherein the Tribunal has held as under :

7. The provisions in the relevant Notifications to compute aggregate value of clearances mandate that the clearances of goods bearing brand name or trade name of another person which are ineligible for the grant of exemption shall not be taken into account in determining the aggregate value of clearances. Therefore, value of clearances of goods bearing brand name of third parties without availing the benefit of Notification No. 8/2003 is not reckoned for computing clearance value of Rs. One hundred lakhs in any year for exemption benefit. From these clauses contained in the relevant Notifications, it is clear that goods bearing brand name of third parties were not eligible for exemption contained in Notification No. 8/2003. Identical provision existed in Notification No. 9/2003 where the option of availment of Modvat benefit and payment of a concessional rate of duty was prescribed. Goods bearing brand name of third parties are therefore excluded from the exemption in Notification No. 9/2003 as well. The assessee has not availed the benefit contained in either of the Notifications 8/99 and 9/99, 8/2000 and 9/2000 etc. in respect of goods bearing brand name of third parties.

10. This decision has been affirmed by the Hon'ble Supreme Court - **2015 (325) E.L.T. 431 (S.C.) [27-10-2015] - COMMISSIONER OF C. EX., CHENNAI Vs NEBULAE HEALTH CARE LTD.**

11. Therefore, we hold that the Revenue cannot add the turnover in respect of the Mongini Turnover of the appellant, so as to deny the SSI benefit.

12. We also observe that the exemption is in respect of the unit and is not in respect of any specific product within the unit. He has to take the option for the entire turnover of that unit. He cannot choose and select the goods on which he would pay the Excise Duty and claim SSI exemption in respect of some goods. Therefore, we reject the appellant's view in respect of part option of SSI exemption in respect of one of their products. Hence, we are with the Revenue on this issue.

13. The Excise Duty to be paid has to be quantified after considering the SSI provisions in this case. The Annexure A and Annexure B of the Show Cause Notice would help us to come to a conclusion.

Annexure-A

Statement showing calculation of non-payment of Cenvat on account of manufacture in and removal of excisable goods cakes and cookies of own brand " Bake Shop and Fresh Bake" for the financial years 2006-07 to 2010-11 (upto July, 2010) by M/S Switz Foods Pvt Ltd

| Year | Value (Cum duty) | Assesable value | Rate of duty | Cenvat | Edu Cess | SHECess | Total |
|---------------------|------------------|-----------------|--------------|---------|----------|---------|---------|
| 2006-07 | 8875259 | 8205675 | 8% | 656454 | 13129 | 0 | 669583 |
| 2007-08 | 14100667 | 13027224 | 8% | 1042178 | 20844 | 10422 | 1073443 |
| 2008-09 | 11002194 | 10164630 | 8% | 813170 | 16263 | 8132 | 837566 |
| 2008-09 | 2965960 | 2848597 | 4% | 113944 | 2279 | 1139 | 117362 |
| 2009-10 | 14325863 | 13758995 | 4% | 550360 | 11007 | 5504 | 566871 |
| 2010-11 (upto July) | 8257161 | 7930427 | 4% | 317217 | 6344 | 3172 | 326734 |
| | | 55935548 | | 3493323 | 69866 | 28369 | 3591558 |

22/12/10
Inspector,
Central Excise
Range-2
Tollygunge Divn
Kolkata-V Commissionerate

22/12/10
T. K. ROY
Supdt. of Central Excise
Range-2, Tollygunge Divn.
Kol-V Commissionerate

ANNEXURE - 'B'

| Year | 'Monginis' brand cake, pastries & cookies, chocolates on which SSI exemption is ineligible | Goods of own brand on which SSI exemption not availed ('Fresh Bake') | Goods of own brand on which SSI exemption availed (Bake shop') | Other excisable goods whether of own brand or brand of others (Exempted/'Nil' rated) | Total 2+3+4 |
|---------|--|--|--|--|---------------|
| | 1 | 2 | 3 | 4 | 5 |
| 2005-06 | 10,14,23,080 | ----- | 73,36,784 | 12,48,40,829 | 1321.78 Lakhs |
| 2006-07 | 11,34,49,313 | ----- | 88,75,259 | 12,65,71,769 | 1354.47 Lakhs |
| 2007-08 | 13,30,90,343 | ----- | 1,41,00,667 | 15,74,04,916 | 1715.06 Lakhs |
| 2008-09 | 15,98,66,725 | 11,36,047 | 1,39,68,154 | 20,75,80,548 | 2226.85 Lakhs |
| 2009-10 | 20,55,52,622 | 3,20,152 | 1,43,25,863 | 20,70,60,418 | 2217.06 Lakhs |

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14. From Annexure B, we observe that the appellant has not manufactured their goods 'Fresh Bake' during the years 2005-06 and 2006-07. The turnover for these years, are less than the threshold limit of Rs.1 crores. Hence, on this score itself the demands for these years are not sustainable.

15. In respect of turnover of 2007-2008, the turnover being Rs.1.41 crores, the same is less than the increased SSI inner limit of Rs.1.50 crores. On this ground, the confirmed demand is not sustainable.

16. For the year 2008-09 the total turnover is Rs.1,51,04,201 as per the Table B, which is more than Rs.1.50 cr inner turnover limit. However, from Annexure A we find that cum-duty benefit has been given while quantifying the demand. If cum-duty benefit is considered the turnover would be Rs.1,48,95,042 [13758995 + 1136047]. Therefore, the demand is not sustainable as the turnover is less than Rs.1.50 cr. For the year 2009-10, the turnover is less than Rs.1.46 cr. Hence, the demand is not sustainable for this year.

17. To summarize our views, we find that the appellant is in error in partly paying the Excise Duty on one product and opting for SSI exemption in case of another product, which is not allowed. However, we find that their turnover during the entire period under dispute is less than the respective inner limit (Rs. 1 Cr/Rs. 1.50 Cr) specified for SSI exemption for the concerned year.

18. Accordingly, we set aside the impugned order and allow the appeal. The appellant would be eligible for consequential relief, if any, as per law.

(Pronounced in the open court on 25.07.2025)

Sd/-
(Rajeev Tandon)
Member (Technical)

Sd/-
(R. Muralidhar)
Member (Judicial)