**Customs, Excise & Service Tax Appellate Tribunal**
**West Zonal Bench at Ahmedabad**

REGIONAL BENCH-COURT NO. 3

**Excise Appeal No. 11185 of 2018 - DB**

(Arising out of OIA-VAD-EXCUS-002-APP-669-2017-18 dated 30/11/2017 passed by Commissioner ( Appeals ) Commissioner of Central Excise, Customs and Service Tax-VADODARA-I)

**Sulphur Mills Ltd** ........**Appellant**
Plot No. 1928-1930, Gidc, Panoli, Taluka-ankleshwar,
BHARUCH,GUJARAT

*VERSUS*

**Commissioner of C.E. & S.T.-Vadodara-ii** ......**Respondent**
1ST FLOOR... ROOM NO.101,
NEW CENTRAL EXCISE BUILDING,
VADODARA,GUJARAT-390023

**APPEARANCE:**
Shri Vinay Kansara, Advocate, Appeared for the Appellant
Shri Sanjay Kumar, Superintendent (AR) Appeared for the Respondent

**CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR**
**HON'BLE MEMBER (TECHNICAL), MR. C L MAHAR**

**Final Order No.12063/2024**

DATE OF HEARING: 10.07.2024
DATE OF DECISION: 19.09.2024

**RAMESH NAIR**

The brief facts of the case are as under:-

During the audit of Central Excise records, it was noticed that the assessee had manufactured a product viz; Sulphur 90% WG with a brand name of "COSAVET FERTIS" which is said to be used as fertilizer; the assessee had classified the said product under sub heading 25030090 & 25030010 of Central Excise Tariff Act, 1985, the assessee had made the clearances of the product under NIL rate of duty.

1.1 It was also further noticed that to manufacture the said product, the assessee procures the Sulphur with 99% purity which is in the form of lumps or granules and which is classifiable as per invoice under Tariff Item No. 25030010. The said lumps or granules of Sulphur are pre-crushed to get a required size in granular form (i.e. less than 15 mm size) with the help of grinding mills particle size separator, discharge by and cyclone separator.

The crushed lumps or Sulphur is then mixed with the required quantity of inert material viz. wetting, dispersing agent, binders, stabilizers, fillers etc. (containing approximate 10-11 % content); the mixture is then mixed with water (40% to 50%) and is charged in high speed mixing tank to make slurry. The slurry is thereafter milled using ball mill to get required particle size. Thereafter the said mills slurry is fed to spray dryers for spray drying at required temperature to get the water dispersible granules of 2 to 4 microns; the product in granular form having particle size of 2-4 microns is then collected and sent for retained (1kg, 3kgs, 6kgs etc) packing; by adding inert materials, the percentage of Sulphur is brought down to 90%. It was also further noticed that the said product is sold & marketed as fertilizers in product form in different retail packing;

1.2 In view of the above observation, the audit party was of the views that the said final product is a commodity distinct from the Raw Sulphur; this final product appears having distinct name, matter, shape, use and marketable as distinct from the Raw Sulphur; the same is marketed under the brand name and is being manufactured by long run process.

1.3 In view of the above facts, the periodical demands were issued. In the present case, the SCN dated 02.09.2015 was issued proposing to demand Central Excise Duty Rs. 40,82,980/- for the period 2013-14 to 2014-15 (up to September 2014); to recover interest; and to impose penalty. The said Show Cause Notice was issued on the ground that the product manufactured & cleared is different from the input Raw Sulphur & the process amounts to manufacture & is chargeable to duty.

1.4 The adjudicating authority had dropped the demand vide Order-I-Original dated 22-08- 2016, however, the Central Excise department had filed an Appeal before the Commissioner (Appeals) against the said Order-In-Original. The department's appeal was allowed vide Order-In-Appeal dated 30.11.2017. Hence the present Appeal is filed.

2. Shri Vinay Kansara, Learned Counsel appearing on behalf of the appellant at the outset submits that the issue involved in the present case had already been decided by the Hon’ble CESTAT in case of show cause notices for the earlier period involvingthe same facts, out of three periodical show cause notices on the identical issue, in case of two show cause notices dated 12.06.2008 and 11.06.2008, this Tribunal vide Order No.A/1240-1243/2012 dated 06.08.2012 allowed the appeals of the appellant for subsequent period also this Tribunal decides the matter in favour of the

appellant vide order No. A/11229/2022 dated 18.10.2022 and order No. A/11059/2024 dated 15.05.2024. Therefore in the present case,havingthe same facts demand is not sustainable.

3. Shri Sanjay Kumar, Learned Superintendent (AR) appearing on behalf of the Revenue, reiterates the findings of the impugned order.

4. On careful consideration of the submissions made by both the sides and perusal of the record, we find that on the same product having same process department had issued various show cause notices and in all the show cause notices except the present one issue has been settled by this Tribunal vide following three orders dated 06.08.2012, 18.10.2022 and 15.05.2024. One of the latest orders, dated 15.05.2024 is reproduced below:-

> *"4. We have carefully considered the submission made by both the sides and perused the records. We find that the present appeal as well as the appeal No. E/12023/2016 were filed by the Revenue against the common order-in- original No. BHR-EXCUS-000-COM-42-43-2016-17dated 29.07.2017 and one of the appeal No. E/12023/2016 was disposed of vide order dated 18.10.2022, the said order is reproduced below:-*
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> > *"The present appeal has been filed by Revenue against the Order-In Original No. BHR-EXCUS-000-COM-42 & 43 -2016-17 dated 29-07-2016 passed by the Commissioner of Customs & Central Excise, Bharuch.*
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> > *2. The brief facts of the case are that the during the course of audit , it was observed by the Audit team that respondent had manufactured a product namely Sulphur – 90% WG with the brand name of "CosavetFertis", which is said to be used as fertilizer. The respondent has classified the said products under Sub-heading 24030090 of 1st schedule to Central Excise Tariff Act, 1985 for the period up to 27.12.2013 andthereafter under Sub-heading 25030010 of Central Excise Tariff Act, 1985. The respondent had made clearances of the said products under NIL rate of duty, in both the situations. As per the revenue the product Sulphur-90WG manufactured and cleared by the respondent is different from the input raw Sulphur. This products appeared to be identifiable goods as different, known as such in the market. On culmination of such an investigation, show cause notice was issued to the respondent herewith directing to show cause as to why the process of the resultant product Sulphur-90% WG with the brand name of "CosavetFertis" from sulphur may not be held amounting to manufacture under section 2(f) of Central Excise Act, 1944. The adjudicating authority, after considering the submissions made before him and also after granting*

*personal hearing to the respondent, dropped the proceedings initiated by said show cause notice. Aggrieved by such an order, Revenue is in appeal before us.*

*3. Shri. Prabhat K Rameshwaram Learned Additional (Authorised Representative) reiterates the grounds of appeal. It is his submission that the product viz. Sulphur-90WG ("Ferris-WG") manufactured and cleared by the assessee, which emerge from a series of processes is a distinct commodity (fertilizer) having distinct name and use and is different from the input raw sulpher. The said product is marketed under the brand name and is being manufactured by a long drawn process. As per the definition "manufacture" takes place when a new commercial commodity with a distinct name, character or use emerges from a process or series of processes. It is not necessary that chemical change during process has to be take place in the resultant final product.*

*3.1 He further submits that demands are based on the sole issue that the process undertaken by the assessee is amounting to manufacture under Section 2(f) of Central Excise Act, 1944 and assessee is liable to discharge appropriate tax liability on the resultant product. Ld. Commissioner remained silent on the issue of "amounting tomanufacture" and decided the case solely on the basis of Hon"ble CESTAT Order No. A/1240-1243/2012-WZB/AHD dtd. 06.08.2012.*

*3.2 He also submits that it is settled position that even if the resultant goods belong to the same entry the fact that they are different identifiable goods known as such in the market, the event of manufacture occurs is dutiable. Further, there is no estoppels in taxation matter. He placed reliance on the case of Laminated Packings (P) Ltd. – 1990(49) ELT 326 (SC). Thus the disputed product is chargeable to Central Excise Duty and Ld. Commissioner has clearly erred in the present order by not confirming the demands of Central Excise Duty amounting to Rs. 10,11,17,667/- and Rs. 8,58,26,239/- alongwith consequential interest and penalties on the assessee.*

*4. Shri. Paresh M Dave, learned Counsel appearing on behalf of respondent submits that all the facts and applicable legal provisions remain the same as regards the case ultimately decided by the Hon"ble Tribunal on 06.08.12 and the period cover under show cause notices subsequently issued on 24.08.2015 and 05.10.2015. When detailed discussion about "manufacture" was recorded in OIO No. 01/Dem/2010 dated 21.03.2010 while confirming demand of Central Excise Duty and when this order has been set aside by this Hon"ble tribunal, the action of the Ld. Commissioner in dropping the* *show cause notice proceedings is perfectly legal and valid, since there is no change at all in the situation.*

*4.1 He also submits that revenue cannot be now permitted to reagitate the issue or to take a different stand in the present case. It is well settled position that when the question arising for consideration on facts almost identical to previous case, the revenue cannot be allowed to take different view. Further the department having accepted the principles laid down in the earlier case, cannot be permitted to take a contrary stands in subsequent cases. He placed reliance on the following judgments.*

*(i) Birla Corporation Ltd. Vs. CCE- 2005 (186) ELT 266(SC)*

*(ii) CCE Vs. Jain Vanguard Polybuttene Ltd. – 2010 (256) ELT 523 (Bom)*

*(iii) CCE Vs. AurobindoPharma Ltd. -2010(259)ELT 673 (AP)*

*4.2 He further argues that major demands as raised in show cause notice dated 07.10.2015 for the period 2013-14 to 2014-15 (upto September 2014) is time barred as issued beyond normal period as prescribed.*

*5. Heard both the sides and perused the records. We find that whether the disputed goods liable to duty or not already decided by the Tribunal cited supra in the own case of the respondent. The nature and composition of the materials (including Sulphur 99%) procured and used by the Respondent are the same, the process undertaken and the chemicals added to Sulphur 99% are the same; the nature as well as composition and use of the products obtained by the Respondent i.eCasvetFertis- WG are the same, the structures of Chapter 25,38 and 31 of tariff are also the same, and most importantly there is no change in definition of „manufacture" and „excisable goods" under the Central Excise Act, nor it is there any new pronouncement of a Judicial or quasi-judicial forum affecting the concepts of manufacture or that of excisable goods or classification.In the instant case the same question arises for consideration and the facts are almost identical to previous case which has already been decided by the Tribunal, therefore in the present matter Ld. Commissioner by following the judicial discipline correctly dropped the demand of central excise duty.*

*5.1 Further it is also claimed by the respondent and Ld. Commissioner in his order that Tribunal order dated 06.08.2012 has been accepted by the department and the said decision of the Tribunal had become final and conclusive. If that being the position, we wonder as to how the Revenue is justified in contesting the very same issue in this appeal inrespect of same* *assessee/ respondent. If an issue is decided in favour of any party and had attained finality and accepted by the parties, the affected party in that case is certainly precluded from questioning its correctness in an another case. At this juncture, the decision of the Apex Court reported in 2006 (202) E.L.T. 213 (S.C.) (Commissioner of Central Excise, Navi Mumbai v. Amar Bitumen & Allied Products Pvt. Ltd.) is relevant to be quoted. Paragraphs 4 to 7 are usefully extracted hereunder :-*

> *4. The Tribunal relying upon an earlier decision of another Bench of the Tribunal in Commissioner of Central Excise, Calcutta-I v. Bitumen Products (India) - 1999 (107) E.L.T. 58 (T), held that „Bituminised Hessian based felt" is covered under Chapter Heading 59.09 as contended by the assessee and not under 68.07 as contended by the revenue.*
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> *5. Admittedly, no appeal was filed by the Revenue against the earlier decision of the Tribunal in Bitumen Products (India) (supra) and the same has become final.*
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> *6. This Court in a catena of cases has consistently taken the view that if an earlier order is not appealed against by the Revenue and the same has attained finality, then it is not open to the Revenue to accept judgment/order on the same question in the case of one assessee and question its correctness in the case of some other assessees. The Revenue cannot pick and choose. (See : Union of India and Others v. Kaumudini Narayan Dalal and Another - 2001 (10) SCC 231); Collector of Central Excise, Pune v. Tata Engineering & Locomotives Co. Ltd. - 2003 (158) E.L.T. 130 (S.C.); Birla Corporation Ltd. v. Commissioner of Central Excise - 2005 (186) E.L.T. 266 (S.C.); JayaswalsNeco Ltd. v. Commissioner of Central Excise, Nagpur - 2006 (195) E.L.T. 142 (S.C.) etc.,)"*
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> *7. It was held in Birla Corporation Ltd. (Supra) as under :*
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> *"In the instant case the same question arises for consideration and the facts are almost identical. We cannot permit the Revenue to take a different stand in this case. The earlier appeal involving identical issue was not pressed and was, therefore, dismissed. The respondent having taken a conscious decision to accept the principles laid down in Pepsico India Holdings Ltd. [2001 (130) E.L.T 193] cannot be permitted to take the opposite stand in this case. If we were to permit them to do so, the law will be in a state of confusion and will place the authorities as well as the assessees in a quandary."*

*5.2 Similarly, in another decision of the Apex Court reported in 2007 (13) SCC 807 = 2006 (195) E.L.T. 142 (S.C.) (JayaswalsNeco Limited v. Commissioner of Central Excise, Nagpur), it has been observed as follows :-*

*"7. This Court in Birla Corpn. Ltd. v. CCE [2005 (6) SCC 95] relying upon an earlier decision of this Court, held that the Department having accepted the principles laid down in the earlier case cannot be permitted to take a contra stand in the subsequent cases. In para 5 of the said judgment it was observed, thus : (SCC p. 97)*

*"5. In the instant case the same question arises for consideration and the facts are almost identical. We cannot permit the Revenue to take a different stand in this case. The earlier appeal involving identical issue was not pressed and was therefore, dismissed. The respondent having taken a conscious decision to accept the principles laid down in Pepsico India Holdings Ltd. [2001 (130) E.L.T. 193 (CEGAT)] cannot be permitted to take the opposite stand in this case. If we were to permit them to do so, the law will be in a state of confusion and will place the authorities as well as the assessees in a quandary."*

*8. Since the point involved in the present case is identical to the point decided in Hindustan Gas and Industries case [1996 (88)E.L.T. 413 (CEGAT)] and the Department having accepted the principle laid therein to the effect that the inserts did not require any precision machining or that any such machining was done by the appellant, cannot be permitted to take a stand different than the principles laid down in the earlier case."*

*6. Going by the above decisions of the Apex Court, we are of the view that, the impugned order is absolutely in order and we do not find any infirmity therein. The impugned order is upheld. Revenue's appeal is dismissed."*

*From the above order of this Tribunal, it can be seen that the fact and the impugned order is common for the present appeal as well as appeal No. E/12023/2016 which has already been disposed as above. Therefore, nothing more need to be added in the present order. Accordingly, following the order dated 18.10.2022, as reproduced above the demand in the present case also does not sustain.*

*5. Hence, the impugned order is upheld. Revenue's appeal is dismissed."*

5. In view of the above decision in the appellant's own case on the same issue and the facts involved, the impugned order in the present case is not

sustainable. Accordingly the impugned order is set aside. The appeal is allowed.

*(Pronounced in the open court on 19.09.2024)*

**(RAMESH NAIR)**
**MEMBER (JUDICIAL)**

**(C L MAHAR)**
**MEMBER (TECHNICAL)**

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