

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

REGIONAL BENCH-COURT NO. 3

**Excise Appeal No. 11162 of 2018 - DB**

(Arising out of OIO-KCH-EXCUS-000-COM-57-58-59-17-18 dated 31/01/2018 passed by Commissioner of Central Excise, Customs and Service Tax-RAJKOT)

**Sanghi Industries Limited**

Sanghipuram, Village Motiber, Taluka Abdasa,  
Kutch, Gujarat

**.....Appellant**

*VERSUS*

**Commissioner of C.E.-Kutch (gandhidham)**

Central Excise & Service Tax Commissionerate,  
Central Excise Bhavan Plot No. 82,  
Sector 8, Gandhidham(Kutch)  
Gandhidham(Kutch), Gujarat

**.....Respondent**

**APPEARANCE:**

Shri Ishan Bhatt, Advocate for the Appellant

Shri Anoop Kumar Mudvel, Superintendent (AR) for the Respondent

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

**Final Order No. 12802/2024**

DATE OF HEARING: 29.07.2024  
DATE OF DECISION: 25.11.2024

**RAMESH NAIR**

The issue involved in the present case is that :-

- 1) whether the appellant is liable to pay duty on DM water used by their Clinker unit, grinding unit and power plant of the appellant.
- 2) Whether the DM water manufactured in the Desaliation plant is classifiable under chapter heading 2851/2853 or 2201 of Central Excise Tariff.
- 3) Whether the appellant is liable to pay the Excise duty on the DM water cleared for supply to GWSSB or otherwise.

1.1 The brief facts of the case are that M/s Sanghi Industries Limited (hereinafter referred to as "the Appellants") have their factory located at

Sanghipuram, District Kutch. The entire manufacturing unit of the Appellants consists of a clinker unit, a grinding unit, a power plant, a water desalination plant and a captive jetty. The clinker unit and grinding unit had separate Central Excise registrations. However, from May 2016, the clinker unit and grinding unit have been granted common Central Excise registration as one single factory.

1.2 Limestone, which is the primary raw material for manufacture of cement is extracted from the mines located adjacent to the clinker unit. Clinker is manufactured in the clinker unit from the limestone procured from the mines and the clinker is transferred to the grinding unit for manufacture of cement. The grinding unit is located at a distance of approximately 9 km from the clinker unit and is connected to the clinker unit by a road which is built on land that is under the ownership of the Appellants. Cement is manufactured in the cement grinding unit using the clinker received from the clinker plant. Thereafter, cement is cleared for home consumption as well as exported from the captive jetty which is located at a distance of 0.5 km from the grinding unit. Between the grinding unit and the clinker unit, at a distance of approximately 8 km from the clinker unit and 1 km from the grinding unit, the Appellants have set up a captive power plant for supply of uninterrupted power to the factory. The manufacture of clinker and cement is being carried out using power generated from this captive power plant. The power generated is transmitted to the various units within the factory using the company's own transmission lines installed within the factory and owned by the Appellants. The power generated is not transmitted through the state grid.

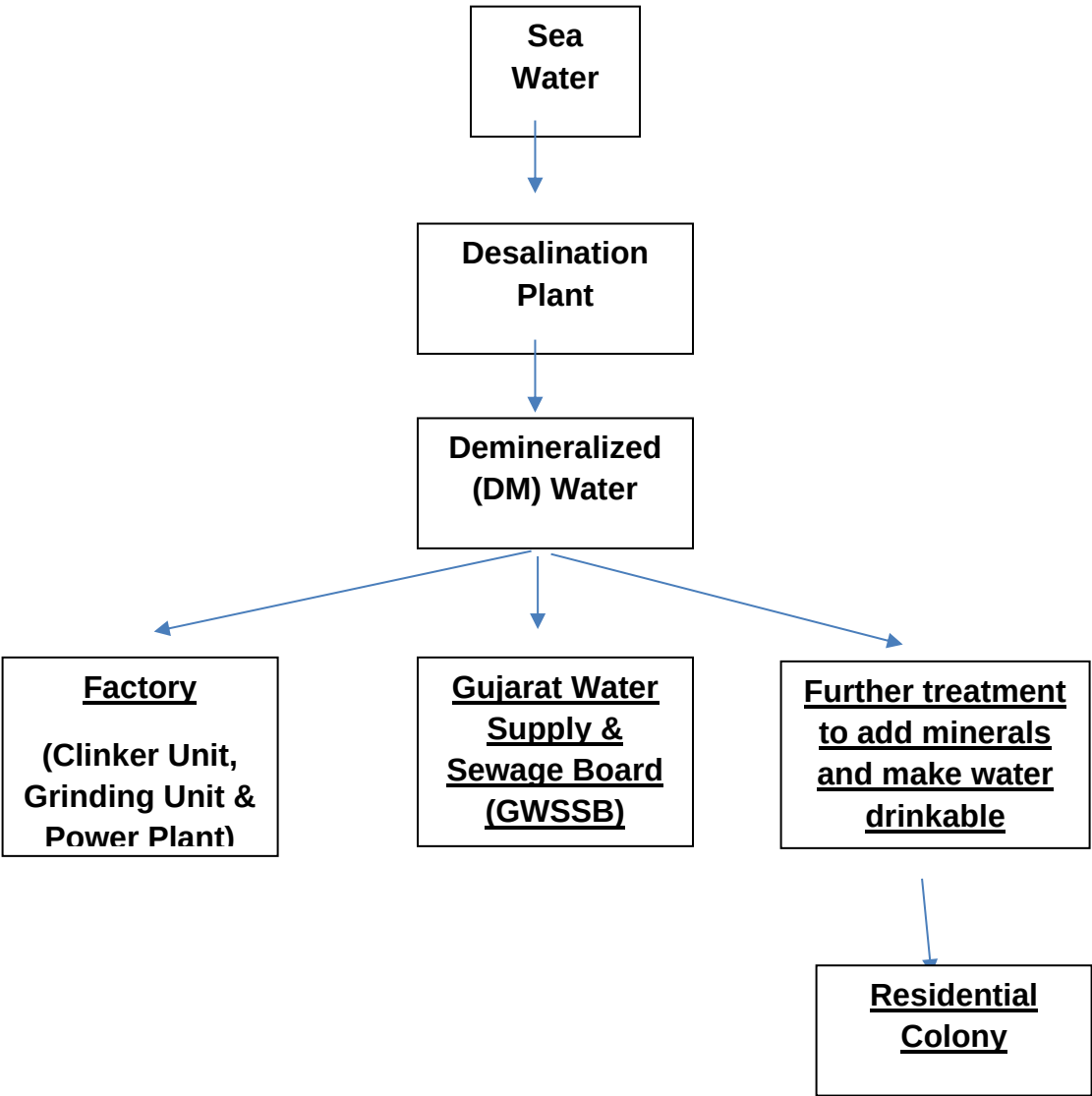
1.3 The Appellants have also set up a desalination plant adjacent to the said power plant where sea water is demineralized for use in the manufacture

of cement and clinker within the factory. Some quantity of the demineralized water ("DM water", for short) is cleared to the Gujarat Water Supply and Sewage Board ("GWSSB", for short) in tanks or through pipes for supply in nearby villages where there is no water supply available from other sources. Some quantity of DM water is further treated by adding minerals to make it drinkable. Drinkable water is cleared to the residential colony of the Appellants. The operation of all the four plants i.e. cement unit, clinker unit, power plant and desalination plant is interdependent and neither can function without the others. All the plants are located on land belonging to and in the exclusive possession of the Appellants. The land on which the connecting road has been laid also belongs to and is in the exclusive possession of the Appellants.

1.4 Sea water is natural water containing calcium and magnesium. The presence of calcium and magnesium in the water is a cause of hardness, which produces scaling in the machinery. The process of removing such minerals is also referred to as softening of the water. There are various methods for demineralization of water including distillation process, deionization process, electro-dialysis, heat-exchange etc. Distillation process is a very expensive process of demineralization. The Appellants are using an economical process of demineralization which produces water of more or less same purity of distilled water but not equivalent to distilled water. Process used by the Appellants is a type of flash distillation process. By this process, mineral contaminants are removed from sea water. Demineralized water ("DM water", for short) is thereafter used within the factory in the manufacture of cement and clinker. Some quantity of the DM water is cleared for supply to GWSSB in tanks or through pipes for supply in nearby villages where there is no water supply available from other sources. Some quantity of DM water is further treated by adding minerals to make it

drinkable water. Drinkable water is cleared to the residential colony of the Appellants.

1.5 The Appellants are not in the business of packaged drinking water and entire drinking water supply is only for the residential colony of the Appellants. The following is a pictorial representation of the above steps:



1.6 Upon scrutiny of the trial balance sheet of the Appellants for the year 2002-03, 2003-04 and April 2004 to September 2004, it was observed by the Department that the Appellants have received certain amounts towards sale of water to GWSSB and the same was shown as 'other income' in their trial balance sheet for the relevant period. After recording of statements of relevant personnel, the Appellants were issued a show cause notice no. V.

Bhuj/AR-II/Commr./18/2007 dated 06.03.2007, proposing to demand Central Excise duty of Rs.79,72,049/- on the value of DM water and mineral water cleared from the desalination plant during April 2002 to November 2004, along with interest and penalty.

1.7 The show cause notice alleged that the Appellants have set up a factory (desalination plant), for manufacture of mineral water and DM water, without availing separate Central Excise registration. It was alleged that the said factory was located away from the clinker unit and grinding unit and is an independent factory on its own. It was alleged that during the manufacture of mineral water from sea water, a new excisable commodity emerged out as intermediate goods which is DM water i.e. distilled or conductivity water and water of similar purity of CETSH 28.51 and attracting duty at 16% adv. It was alleged that DM water was also used as intermediate goods in the manufacture of exempted mineral water. Although the tariff rate for distilled water of CETSH 28.51 "*used within the factory of production*" was NIL, the show cause notice contended that the distilled water was not used by the Appellants but consumed by the Appellants within the factory of production. Thus, the provisions of Notification No. 67/95-CE dated 16.03.1995 are not applicable in respect of DM water consumed in the manufacture of exempted mineral water and the Appellants were required to pay duty at 16% on the DM water consumed in the manufacture of mineral water. Similarly, since the DM water cleared to GWSSB, clinker unit and grinding unit, cannot be said to have been "*used within the factory of production*", the same was also liable to duty at 16%.

1.8 The Appellants were also issued another show cause notice no. V.Bhuj/AR-II/Commr./19/2007 dated 06.03.2007, proposing to demand Central Excise duty of Rs.1,00,42,223/- for the period December 2004 to

18.11.2006, along with interest and penalty, on identical grounds as the show cause notice no. V. Bhuj/AR-II/Commr./18/2007 dated 06.03.2007.

1.9 The Ld. Commissioner of Central Excise, Rajkot vide Order-in-Original No. 17-18/COMMR/2008 dated 30.01.2008 adjudicated both the show cause notices dated 06.03.2007. The Ld. Commissioner of Central Excise in the Order-in-Original dated 30.01.2008, confirmed the demand of duty of Rs.45,73,427/- and dropped the remaining demand of Rs.1,34,40,845/-. The Ld. Commissioner also refrained from imposing any penalty on the Appellants. On merits, the Ld. Commissioner set aside the demand prior to March 2005 on the ground that the relevant tariff entry during this period, exempted DM water used within the factory of production. On limitation, the Ld. Commissioner set aside the demand beyond the normal period of limitation after observing that once a show cause notice is issued invoking extended period of limitation, another show cause notice cannot be issued invoking extended period of limitation. Thus, the demand for the period prior to March 2006 was set aside on limitation as well.

1.10 However, the demand of duty from March 2006 to November 2006, was confirmed against the Appellants after observing that DM water is a distinct product classifiable under CETSH 28.51 and liable to duty @ 16% from 01.03.2005 onwards. Similarly, mineral water, which was earlier exempted, is also liable to duty @ 16% from 01.03.2005 onwards. Thus, the DM water and mineral water cleared by the Appellants to clinker unit, grinding unit, GWSSB and residential colony, are all liable to excise duty at 16% from 01.03.2005 onwards.

1.11. Aggrieved by the Order-in-Original dated 30.01.2008 to the extent that the demand of Rs.45,73,427/- was confirmed by the Ld. Commissioner, the Appellants filed an appeal before this Tribunal vide Appeal No. E/526/2008. Similarly, aggrieved by the order to the extent that the demand of Rs.1,34,40,845/- was dropped, the Department filed an appeal before this Hon'ble Tribunal vide Appeal No. E/626/2008.

1.12. The Hon'ble Tribunal while disposing the Appeal No. E/526/2008 of the Appellants vide Final Order No. A/1297/WZB/AHD/08 dated 26.06.2008 (Annexure-7 of appeal) observed as follows:

(i) That the plea of the Appellants regarding classification under heading 2201.1010 was accepted by the Commissioner in the impugned order and duty was confirmed accordingly. However, it is the Appellants' contention that in terms of Sr. No. 13 of Notification No. 03/2005, all goods falling under the said heading and not bearing any brand name attract NIL rate of duty.

(ii) That the claim of benefit of the said Notification was not made before the adjudicating authority since they were agitating on the main issue of manufacture.

In view of the above, this Hon'ble Tribunal remanded the matter for adjudging the duty liability of the Appellants in terms of the Notification No. 03/2005-CE.

1.12 The Appeal No. E/626/2008 filed by the Department against Order-in-Original dated 30.01.2008 was decided by this Hon'ble Tribunal vide Final Order No. A/10991/2017 dated 19.05.2017 (Annexure-8 of appeal), wherein the Tribunal disposed of the Department's appeal by way of remand to adjudicating authority for *de novo* decision.

1.13 During the pendency of the above proceedings, the Appellants were issued show cause notice no. VGND/AR.1Bhuj/ADC/138/2011 dated 25.07.2011, proposing to demand Central Excise duty of Rs.12,28,504/- on identical grounds as the show cause notices dated 06.03.2007 for the period July 2010 to June 2011. The Appellants were also issued show cause notice dated 31.07.2012 proposing to demand Central Excise duty of Rs.2,10,043/- on identical grounds as the earlier show cause notices dated 06.03.2007 and 25.07.2011 for the period July 2011 to December 2011.

1.14 During the period between remand of Appeal No. E/526/2008 filed by the Appellants and Appeal No. E/626/2008, the show cause notice dated 31.07.2012 demanding duty for the period July 2011 to December 2011 was adjudicated by the Ld. Deputy Commissioner vide Order-in-Original No. 13/Dy.Commr./17 dated 31.03.2017 (Anneure-11 of appeal). The Ld. Deputy Commissioner vide Order-in-Original dated 31.03.2017, has dropped the demand of duty, interest and penalty on the ground that the DM water is classifiable under CETSH 2201.1010 and was chargeable to NIL rate of duty during the relevant period in view of Notification No. 03/2005-CE dated 24.05.2005. The Appellants submit that to the best of their knowledge, the above Order-in-Original dated 31.03.2017 has not been challenged by the Central Excise department and stands accepted.

1.15 The Ld. Commissioner initiated *de novo* adjudication proceedings in the 2 show cause notices dated 06.03.2007 and also proceeded with adjudication of 1 show cause notice dated 25.07.2011 involving demand on identical grounds for the subsequent period. The Ld. Commissioner has adjudicated all the 3 show cause notices demanding duty on identical grounds, vide the Order-in-Original No. KCH-EXCUS-000-COM-57-58-59-17-18 dated 31.01.2018 (hereinafter referred to as "the impugned order"). The Ld.

Commissioner vide the impugned order has confirmed a demand of Central Excise duty of Rs.1,35,81,807/- along with interest and dropped a demand of Rs.56,60,969/- proposed in the 2 show cause notices dated 06.03.2007 and show cause notice dated 25.07.2011. The Ld. Commissioner has also imposed penalty of Rs.1,35,81,807/- in the impugned order.

1.16 The Ld. Commissioner in the impugned order has confirmed the demands as follows:

- (i) Demand of duty on mineral water without brand name, supplied to residential colony, is set aside for the period up to 28.02.2005 since mineral water is correctly classified under CETSH 2201.11 and the same was chargeable to NIL rate of Central Excise duty till 28.02.2005.
- (ii) Desalination plant is an independent factory. DM water used in the desalination plant for manufacture of mineral water is exempt from duty till 28.02.2005. Thus, demand of duty to such extent is set aside. However, duty demand is confirmed on DM water cleared to clinker unit, grinding unit and GWSSB during the period from April 2002 to 28.02.2005, as the same cannot be said to be used within the factory.
- (iii) From 01.03.2005 onwards, duty is payable and confirmed @ 16% on both mineral water and DM water, irrespective of whether DM water is used within the factory or not.
- (iv) The contention of the Appellants that the demand in SCN No. 19/2007 dated 06.03.2007 is time barred is not maintainable. Both the SCN were issued on the same day and it cannot be considered that one of them is a subsequently issued SCN. The demand in the SCNs was split purely for the purpose of accounting convenience only and extended period of limitation is liable to be invoked.

(v) The contention of the Appellants that the DM water is not distilled water under CETSH 28.51/ 28.53, is not maintainable. The activity carried out by the Appellants involves purification of water by removal of its mineral contents by heating and then condensing. Distillation also involves purifying water through boiling of water and then condensing. Hence, it is a fact that in both the cases, water is purified by heating and then condensing.

(vi) That the Appellants have wilfully suppressed the fact of manufacture of DM water and mineral water from the department and have failed to obtain registration of the same with an intention to evade payment of duty and the said fact came to light only when their records were audited by the Audit Officers. Therefore, the extended period of limitation has been correctly invoked in the present case.

1.17 Aggrieved by the above impugned order, the Appellants have filed the present appeal.

2. Shri Ishan Bhatt, Learned Counsel appearing on behalf of the appellant made the following submission: -

A. At the outset, the Appellants submit that the impugned order is bad in law as well as on facts to the extent that it is against the Appellants. The impugned order is liable to be set aside on this ground alone.

**The impugned order is a non-speaking order. The Ld. Commissioner in the impugned order has failed to take into cognizance the directions of the Hon'ble Tribunal in its remand order dated 26.06.2008 and also the submissions made in the reply to the show cause notices dated 06.03.2007.**

B.1 The Appellants submit that at the time of first adjudication proceedings, the Ld. Commissioner in the Order-in-Original dated 30.01.2008 accepted the submissions of the Appellants to the extent that mineral water obtained by further treatment of DM water is classifiable under Chapter Sub-

Heading 2201.11 as mineral water not bearing any brand name. Since the rate of duty on goods of Chapter Sub-Heading 2201.11 was NIL in the tariff itself up to 28.02.2005, demand of duty on mineral water was dropped to such extent. However, demand of duty on mineral water supplied to residential colony was confirmed for the period after 01.03.2005 on the ground that after the introduction of 8 digit tariff, mineral water became chargeable to duty at the rate of 16% under Chapter Sub-Heading 2201.1010.

B.2 The Ld. Commissioner in the previous Order-in-Original dated 31.01.2008 failed to take note of the fact that from 01.03.2005 onwards, mineral water not bearing any brand name was granted exemption from duty by Sr. No. 13 of Notification No. 03/2005-CE dated 24.02.2005 and thus the duty demand confirmed on mineral water for the period after 01.03.2005 was also liable to be dropped.

B.3 In view of the above contention, the Hon'ble Tribunal vide its final order dated 26.06.2008 (Annexure-7 of appeal), remanded the appeal with specific directions to decide the merits of the case after considering the exemption granted vide Sr. No. 13 of Notification No. 03/2005-CE dated 24.02.2005.

B.4 However, the Ld. Commissioner in the impugned order has again failed to take note of exemption under Sr. No. 13 of Notification No. 03/2005-CE dated 24.02.2005 and confirmed demand of duty on mineral water supplied to the residential colony without bearing any brand name for the period after 01.03.2005, even after accepting the classification of the mineral water under Chapter 2201 and even after dropping demand on mineral water for the period prior to 01.03.2005.

B.5 The Appellants submit that once the Ld. Commissioner in the impugned order has held at Para 16.28 that subsequent to 28.02.2005, the mineral waters are correctly classified under CETSH 2201.1010, the demand on mineral water supplied to residential colony even after 28.02.2005 is liable to be dropped in view of the exemption granted vide Sr. No. 13 of Notification No. 03/2005-CE dated 24.02.2005.

B.6 The Appellants submit that in spite of such specific directions of the Hon'ble Tribunal, the impugned order demands duty at 16% on mineral water classified under Chapter Sub-Heading 2201.1010 and admittedly cleared without any brand name to the residential colony of the Appellants.

B.7 The Appellants submit that the Ld. Commissioner in the impugned order has only considered the submissions made in the additional

submissions filed by the Appellants on 07.11.2017 and not the submissions made in their original replies to the show cause notices dated 06.03.2007. The same is liable to be set aside for being in violation of principles of natural justice. On these grounds, the duty demand on mineral water supplied to residentially colony for the period from 01.03.2005 onwards is liable to be set aside.

**The process of converting sea water to DM water does not amount to "manufacture". Therefore, demand of excise duty is the present case is not sustainable.**

C.1 The Appellants submit that mere purification of water itself is not a manufacturing process as water remains water.

C.2 The Appellants submit that in the present case, the process of demineralization of sea water is a process for removal of impurities from the sea water and it is thus a process which removes foreign matter from goods complete in themselves and/or processes which clean goods that are complete in themselves.

C.3 The Appellants submit that in the present case, no new commodity comes into existence by the process undertaken. Water remains water. Mere change is not manufacture i.e. mere conversion of sea water into water of higher purity itself will not amount to manufacture.

C.4 It is also well settled that burden to prove that there is manufacture as well as the classification of the product is on the department. - Reliance is placed on **Hindustan Poles Corporation v. CCE- 2006 (196) ELT 400 (S.C).**

C.5 In view of the above, the impugned order is liable to be set aside to the extent that it confirms demand of duty on DM water on the ground that the activity of purifying sea water to obtain DM water does not amount to manufacture.

**Assuming without admitting that DM Water is a manufactured product, the said product is not classifiable under Chapter Heading 28.51/28.53 of the Central Excise Tariff Act as contended by the Ld. Commissioner.**

D.1 The Ld. Commissioner in the impugned order has held that DM water is nothing but distilled water or water of similar purity since all the minerals have been removed from the sea water and the same is classifiable under Chapter Heading 28.51.

D.2 The Ld. Commissioner in the impugned order has held that for the period up to 28.02.2005, the DM water when used within the factory of production, is classifiable under Chapter Sub-Heading 2851.11 and is chargeable to NIL rate of duty. The Ld. Commissioner also observes that since the desalination plant is an independent factory and DM water is supplied to clinker unit, grinding unit, power plant and GWSSB, the said DM water cannot be said to have been used within the factory of production and is chargeable to duty at the rate of 16% under Chapter Sub-Heading 2851.19. The Ld. Commissioner in the impugned order further observes that after introduction of 8 digit tariff, the DM water is classifiable under Chapter Sub-Heading 2851.0010 up to 2007-08 and subsequently under Chapter Sub-Heading 2853.0010.

D.3 The Appellants submit that although sea water in the present case is purified by process similar to distillation, the end result is not 'distilled water'. Distilled water is one where all the impurities are removed through distillation process. The process of distillation involves boiling of water and then condensing the steam into a clean container to obtain pure water without any impurities or minerals. In the present case, sea water is heated at 100 degree Celsius but it is not boiled because the pressure under which such heating is done is above 1 ATM (atmospheric pressure). Water normally boils at 100 degree centigrade under standard atmospheric pressure of 1 ATM, which is not done in the present case. Therefore, the end product is not distilled water. The show cause notice or the impugned order have failed to lay down any evidence which even remotely suggests that the product is distilled water. The department has failed to conduct any test to come to the conclusion that the water is distilled water and has confirmed the present demand on the assumption that the water is distilled water or water of equal purity.

D.4 The Appellants submit that the contention that the product in question is not distilled water has been accepted by the Ld. Deputy Commissioner in his **Order-in-Original No.13/Dy.Comm/17 dated 31.03.2017** in the Appellants' own case for a subsequent period. To the best of the knowledge of the Appellants, no appeal has been preferred by the Department against the Order-in-Original dated 31.03.2017.

D.5 The Appellants submit that distilled water is expensive to produce and is of a very high purity. Distilled water is mainly used in car batteries, manufacture of some chemicals, laboratory or chemical testing etc. Whereas, in the present case the Appellants do not require such high purity of water and the DM water is mainly used in the machinery within their factory to avoid scaling caused by hard salts in sea water. The fact that DM water is also

supplied to GWSSB for supply in nearby towns and villages also supports the contention of the Appellants that the same is not of a purity equivalent to distilled water.

D.6 The Appellants submit that distilled water or conductivity water or water of similar purity are not just void of minerals but also any kind of micro-organisms like virus, bacteria etc. However, that is not necessarily the case with DM water, which is free of minerals but not necessarily free of other impurities like micro-organisms.

D.7 In any case, the Department has failed to produce any technical or scientific evidence on record to suggest that the product is more appropriately covered under heading 28.51. It is now well settled that the burden to prove correct classification is on the department as held in **CCE v. Markfed Vanaspati & Allied Industries- 2003 (153) ELT 491 (S.C.)**. Thus, the demand on DM water confirmed for the period from 01.03.2005 is not sustainable.

**DM water is classifiable under Chapter Heading 22.01 of the Central Excise Tariff. No duty is payable on DM water classifiable under Chapter Heading 22.01 either before 01.03.2005 or after 01.03.2005.**

E.1 Chapter Heading 22.01 of the Central Excise Tariff covers waters including natural or artificial mineral waters and aerated waters, not containing added sugar or other sweetening matter not flavoured.

E.2 Sea water is a uniform solution of essentially constant composition containing 96.5% water and 3.5% ionized salts, associated compounds, elements and ionic complexes.

E.3 Sea water is a source of fresh water and by desalination, the mineral salts are removed from the sea water and thus, purified water in the form of DM water is obtained which is supplied without any brand name, in pipelines or tankers to the clinker unit, grinding unit, power plant and GWSSB. The said DM water cleared without any brand name is classifiable under Chapter Heading 2201.11 for the period up to 28.02.2005 and chargeable to NIL rate of duty.

E.4 Reliance is placed on the Explanatory Notes of HSN under Heading 28.53 (identical to 28.51 during period prior to 2006 under CETA), which reads as under:

*"(A) DISTILLED AND CONDUCTIVITY WATER AND WATER OF SIMILAR PURITY"*

*The heading covers only distilled water, re-distilled or electro-Osmatic water, Conductivity water and water of similar purity, including water treated with ion exchange media.*

*Natural Water, even if filtered, sterilized, purified or softened is excluded Heading 22.01. When put up a medicament in measured dose or in packing for retail sale, water falls under Heading 30.04"*

(Emphasis supplied)

E.5 Thus, as per Explanatory Notes in the HSN 'natural water' even if purified or softened is excluded from Chapter Heading 28.53 and will fall under Chapter Heading 22.01. Therefore, DM water would be rightly classifiable under Chapter Heading 22.01 and not under Chapter Heading 28.51 or 28.53, as classified by the Ld. Commissioner in the impugned order.

E.6 The Appellants submit that for the period prior to 01.03.2005, the DM water is classifiable under Chapter Sub-heading 2201.11 and liable to NIL rate of duty. W.e.f. 01.03.2005, the DM water is classifiable under Chapter Sub-heading 2201.9090 and is exempt from duty in view of Sr. No. 13 of Notification No. 03/2005-CE dated 24.02.2005.

E.7 In view of the above, the entire demand on DM water in the impugned order, both prior to and after 01.03.2005, is liable to be set aside.

**Without prejudice to the submission that DM water is classifiable under Chapter Heading 22.01, even if the classification under Chapter Heading 28.51/28.53 is accepted for the sake of argument, the DM water supplied to clinker unit and power plant is liable to NIL rate of duty as it is "used within the factory of production". Issue is decided by this Hon'ble Tribunal in favour of the Appellants in the Appellants' own case reported at (2014 (302) ELT 564 (Tri. Ahd.).**

F.1 The Appellants submit that even if the case of the Department that the DM water is classifiable under Chapter Heading 28.51, is accepted for the sake of argument, the demand confirmed in the impugned order to the extent of DM water supplied to clinker unit and power plant of the Appellants is liable to be set aside in any case.

F.2 The Appellants submit that, admittedly, the goods of Chapter Heading 28.51 when used within the factory of production were classified under Chapter Sub-heading 2851.11 and liable to NIL rate of duty up to 28.02.2005. In fact, on this ground the Ld. Commissioner in the impugned order has dropped the demand on the quantity of DM water used within the desalination plant to prepare mineral water.

F.3 W.e.f., 01.03.2005, with the introduction of 8 digit tariff, exemption was granted to goods of Chapter Heading 28.51 used within the factory of production vide Sr. No. 26 of Notification No. 03/2005-CE dated 24.02.2005. This exemption was also available during the period covered in the SCN dated 25.07.2011 to the identically worded Chapter Heading 28.53 during the relevant period. Relevant entries of Notification No. 03/2005-CE are reproduced below:

(a) From 01.03.2005 onwards

| Sr. No. | Chapter or heading or sub-heading or tariff item | Description of goods                                                                             | Rate of duty |
|---------|--------------------------------------------------|--------------------------------------------------------------------------------------------------|--------------|
| 26      | 2851 00 10                                       | Distilled or conductivity water or water of similar purity used within the factory of production | Nil          |

(b) After 27.02.2010 (i.e. During the period covered in SCN dated 25.07.2011)

| Sr. No. | Chapter or heading or sub-heading or tariff item | Description of goods                                                                             | Rate of duty |
|---------|--------------------------------------------------|--------------------------------------------------------------------------------------------------|--------------|
| 26      | 2853 00 10                                       | Distilled or conductivity water or water of similar purity used within the factory of production | Nil          |

F.4 Thus, during the entire period covered in the impugned order, distilled or conductivity water or water of similar purity, when used within the factory of production was liable to NIL rate of duty.

F.5 The Appellants submit that even if the case of the Department is accepted for the sake of argument and DM water is classified under Chapter Heading 28.51/28.53, no demand of duty is sustainable on the DM water supplied to the clinker unit and the power plant of the Appellants since the

same are all part of one factory and such DM water is used within the factory of production.

F.6 The Appellants submit that the issue whether desalination plant and power plant of the Appellants are part of the clinker unit of the Appellants has been answered in favour of the Appellants by this Hon'ble Tribunal in its judgment reported at **2014 (302) ELT 564 (Tri. Ahd.)**.

F.7 The Hon'ble Tribunal in the aforesaid judgment has allowed CENVAT credit availed on inputs used in the generation of electricity supplied to the desalination plant and the administrative building on the ground that they are situated within the clinker unit of the Appellants.

F.8 In view of the above judgment, it is no longer *res integra* that the clinker unit of the Appellants, the power plant of the Appellants and the desalination plant are all part of one factory and the DM water supplied by the desalination plant to the clinker unit and the power plant is used within the factory of production.

F.9 In view of the above, no duty is payable on the DM water supplied to the clinker unit and the power plant from the desalination plant since the same is used within the factory of production in view of Chapter Sub-Heading 2851.11 for the period up to 28.02.2005 and in view of Sr. No. 26 of Notification No. 03/2005-CE dated 24.02.2005 for the period from 01.03.2005 onwards. The impugned order demanding Central Excise duty on DM water supplied to the clinker unit and the power plant is liable to be set aside to such extent.

**Without prejudice to the above, the entire exercise is revenue neutral w.r.t the supply of DM water to the clinker unit, grinding unit and power plant.**

G. The Appellants submit that even if DM water is classified under Chapter Heading 28.51/28.53 and desalination plant is treated as a separate manufacturing premises, the Central Excise duty paid by the Appellants on clearance of DM water from the desalination plant to the clinker unit, grinding unit and power plant of the Appellants would be available as CENVAT credit to the recipient unit. Thus, the entire demand is revenue neutral to such extent.

**The extended period of limitation is not invokable.**

H.1 Out of the 3 show cause notices adjudicated by the Ld. Commissioner in the impugned order, the show cause notices dated 06.03.2007 invoke the

extended period of limitation to demand duty for the period April 2002 to November 2004 and December 2004 to 18.11.2006 where the demand for the period prior to March 2006 is proposed by invoking the extended period of limitation on the ground that the Appellants have knowingly failed to register the desalination plant as a separate manufacturing unit with the *mala fide* intention to evade payment of Central Excise duty.

H.2 The Appellants submit that none of the show cause notices dated 06.03.2007 allege any of the ingredients i.e. suppression, wilful misstatement, fraud or collusion with intent to evade payment of duty, for invoking extended period of limitation. The proviso to Section 11A(1) of the Central Excise Act, 1944 has not been invoked in the show cause notices dated 06.03.2007.

H.3 The Appellants submit that the Ld. Commissioner in the impugned order has erred in invoking the extended period of limitation.

H.4 Without prejudice to the above, the Appellants submit that it is not a case in which the Department has become aware of the impugned activity of the Appellants by intensive investigation or based on material which was not supplied by the Appellants. The show cause notices also make no such claim, rather they categorically narrate how the case arises from an audit of the sales ledger and trial balance maintained by the Appellants. Thus, admittedly, the entire information was available on record. Thus, it is clear that the Appellants have supplied all the information to the Department that was required to be statutorily declared and submitted.

H.5 The Department is well aware of all the activities performed by the Appellants and the existence of the desalination plant inasmuch as in prior disputes, CENVAT credit availed on inputs used in generation of electricity supplied to the desalination plant of the Appellants was sought to be denied by the Department. In such a situation, where the Department is well aware of the activities of the assessee, the finding that the Appellants have suppressed information or mis-declared the information is not at all tenable. The demand for the period prior to March 2006 is liable to be set aside on this ground. The same was also done by the Ld. Commissioner in the first round of litigation in the Order-in-Original dated 30.01.2008. However, the impugned order passed after remand has wrongly upheld the demand for extended period as well. The same is liable to be set aside.

I. Once the duty demand or the extended period of limitation are not invocable, the question of imposing penalty or charging interest does not arise.

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

4. We have carefully considered the submission made by both the sides and perused the records. We find that the first and foremost issue is that whether the manufacturer DM water is classifiable under 2851/2853 or 2201. Both the rival classifications are as under:-

| Heading No. | H.S. Code | ITC(HS) Code | Description                                                                                                                                                         | Unit | Rate of duty |
|-------------|-----------|--------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|--------------|
| 2201        | 2201 10   |              | <b>WATERS, INCLUDING NATURAL OR ARTIFICIAL MINERAL WATERS AND AERATED WATERS, NOT CONTAINING ADDED SUGAR OR OTHER SWEETENING MATTER NOR FLAVOURED; ICE AND SNOW</b> |      |              |
|             |           |              | <b>Mineral waters and aerated waters:</b>                                                                                                                           |      |              |
|             |           | 2201 10 10   | Mineral Water                                                                                                                                                       | 1    | 16%          |
|             | 2201 90   | 2201 20 10   | Aerated water                                                                                                                                                       | 1    | 16%          |
|             |           |              | <b>Other:</b>                                                                                                                                                       |      |              |
|             |           | 2201 10 90   | Ice and snow                                                                                                                                                        | 1    | Nil          |
|             |           | 2201 90 90   | Other                                                                                                                                                               | 1    | Nil          |

| Heading No. | Sub heading No. | Description                                                           | Rate of duty |
|-------------|-----------------|-----------------------------------------------------------------------|--------------|
| 28.51       |                 | <b>Other inorganic compounds (including distilled or conductivity</b> |              |

|  |         |                                                                                                                                                                       |            |
|--|---------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------|
|  |         | <b>water and water of similar purity); liquid air (whether or not rare gases have been removed); compressed air; amalgams, other than amalgams of precious metals</b> |            |
|  |         | <i>Distilled or conductivity water and water of similar purity:</i>                                                                                                   |            |
|  | 2851.11 | <i>Used within the factory of production</i>                                                                                                                          | <i>Nil</i> |
|  | 2851.19 | Other                                                                                                                                                                 | 16%        |
|  |         | Liquid air(whether or not any fraction has been removed):                                                                                                             |            |
|  | 2851.21 | <i>Used within the factory of production</i>                                                                                                                          | <i>Nil</i> |
|  | 2851.29 | Other                                                                                                                                                                 | 16%        |
|  | 2851.30 | Compressed air                                                                                                                                                        | Nil        |
|  | 2851.90 | other                                                                                                                                                                 | 16%        |

| Heading No. | H.S. Code | ITC(HS) Code | Description                                                                                                                                                                                                                          | Unit       | Rate of duty |
|-------------|-----------|--------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------|--------------|
| <b>2853</b> |           |              | <b>Other inorganic compounds (including distilled or conductivity water and water of similar purity); liquid air (whether or not rare gases have been removed); compressed air: amalgams, other than amalgams of precious metals</b> |            |              |
|             | 2853 00   |              | <i>Other inorganic compounds (including distilled or conductivity water and water of similar purity); liquid air (whether or not rare gases have been removed); compressed air: amalgams, other than amalgams of precious metals</i> |            |              |
|             |           | 2853 00 10   | <i>Distilled or conductivity water and water of similar purity</i>                                                                                                                                                                   | <i>Kg.</i> | <i>10%</i>   |
|             |           | 2853 00 20   | Liquid air, whether or not any fraction of rare gases has been removed                                                                                                                                                               | Kg.        | 10%          |
|             |           |              | <i>Compressed Air</i>                                                                                                                                                                                                                | <i>Kg.</i> | <i>Nil</i>   |

|  |  |               |                                            |     |     |
|--|--|---------------|--------------------------------------------|-----|-----|
|  |  | 2853 00<br>30 |                                            |     |     |
|  |  | 2853 00<br>40 | Amalgams, other than of<br>precious metals | Kg. | 10% |
|  |  |               | <b>Other:</b>                              |     |     |
|  |  | 2853 00<br>91 | Cyanogen Chloride [(CN) C1]                | Kg. | 10% |
|  |  | 2853 00<br>99 | Other                                      | Kg. | 10% |

4.1 The case of the department is that the DM water manufactured by the appellant is classifiable under 2851. In this regard, we find that as per the tariff entry of 2851, it is clear that only Distilled or conductivity water and water of similar purity is covered under Chapter Heading 2851. The appellant have given the process chart of DM water. The description of process given by the appellant is as under: -

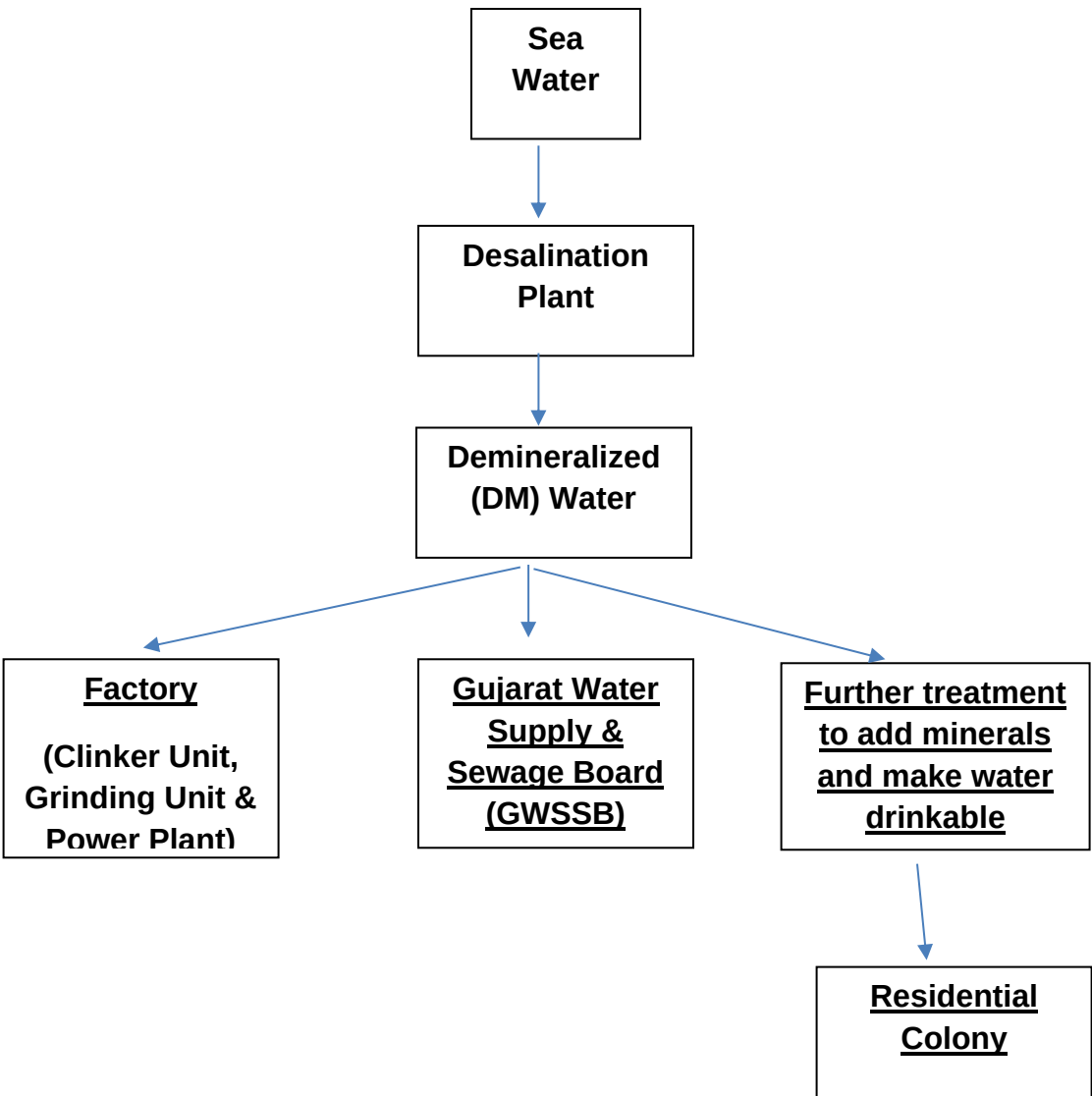
"4.1 Sea water is natural water containing calcium and magnesium. The presence of calcium and magnesium in the water is a cause of hardness, which produces scaling in the machinery. The process of removing such minerals is also referred to as softening of the water. There are various methods for demineralization of water including distillation process, deionization process, electro-dialysis, heat-exchange etc. Distillation process is a very expensive process of demineralization.

4.2 The Appellants are using an economical process of demineralization which produces water of more or less same purity of distilled water but not equivalent to distilled water. Process used by the Appellants is a type of flash distillation process. By this process, mineral contaminants are removed from sea water. Demineralized water ("DM water", for short) is thereafter used within the factory in the manufacture of cement and clinker. Some quantity of the DM water is cleared for supply to GWSSB in tanks or through pipes for supply in nearby villages where there is no water supply available from other sources.

4.3 Some quantity of DM water is further treated by adding minerals to make it drinkable water. Drinkable water is cleared to the residential colony of the Appellants.

4.4 The Appellants are not in the business of packaged drinking water and entire drinking water supply is only for the residential colony of the Appellants.

4.5 The following is a pictorial representation of the above steps:



4.2 From the above representation and the process described by the appellant, it is clear that the appellant have not carried out the distillation process. Therefore, the DM water in question of the present case cannot be called as distilled water. The DM water is nothing but purified natural water as from the sea water, the impurity calcium and magnesium has been removed. In this regard, we referred to the HSN note which reads as under:

-

*"(A) DISTILLED AND CONDUCTIVITY WATER AND WATER OF SIMILAR PURITY"*

*The heading covers only distilled water, re-distilled or electro-Osmatic water, Conductivity water and water of similar purity, including water treated with ion exchange media.*

*Natural Water, even if filtered, sterilized, purified or softened is excluded Heading 22.01. When put up a medicament in measured dose or in packing for retail sale, water falls under Heading 30.04"*

*(Emphasis supplied)*

4.3 From the above HSN note, it has been clarified that heading 28 51/28 53 covers only distilled water. However, natural water even if filtered, sterilized, purified or softened is excluded and same is classified under heading 2201. Therefore, on the above fact, we are of the view that the DM water manufacture by the appellant is correctly classifiable under heading 2201 and not under heading 28 51/28 53. The water being admittedly not bearing a brand name falling under 2201.11 attracts nil rate of duty upto 28.02.2005, thereafter, the similar entry was provided under Sr. No. 13 of the Notification No. 3/2005-CE dated 24.02.2005 and thus the duty provided is 'Nil'. The said Notification is reproduced below:-

***Exempts various products***

***Notification No. 03/2005-CE***

***Dated 24/02/2005***

***G.S.R. (E) -*** *In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944 (1 of 1944), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts excisable goods of the description specified in column (3) of the Table below and falling within the chapter, heading, sub-heading or tariff item of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as amended by the Central Excise Tariff (Amendment) Act, 2004 (5 of 2005), (hereinafter referred to as the Central Excise Tariff Act), specified in the corresponding entry in column (2) of the said Table, from so much of the duty of excise specified thereon under the First Schedule to the Central Excise Tariff Act (hereinafter referred to as the First Schedule), as is in excess of the amount calculated at the rate specified in the corresponding entry in column (4) of the said Table.*

TABLE

| <b>S.<br/>No.</b> | <b>Chapter or heading or<br/>sub-heading or tariff<br/>item</b>          | <b>Description of goods</b>        | <b>Rate of<br/>duty</b> |
|-------------------|--------------------------------------------------------------------------|------------------------------------|-------------------------|
| <b>(1)</b>        | <b>(2)</b>                                                               | <b>(3)</b>                         | <b>(4)</b>              |
| 13.               | 2201 10 10,<br>2201 90 90,<br>2202 10 90,<br>2202 90 30 or<br>2202 90 90 | All goods not bearing a brand name | Nil                     |

From the above Notification, it is clear that the water falling under chapter 2201 not bearing the brand name is exempted from the whole of the duty. Therefore, the DM water in the present case is not liable to duty prior to 01.03.2005 and also post 01.03.2005.

4.4 In this regard we perused the Order-in-original dated 31.03.2017 issued by Deputy Commissioner of Central Excise for the period July 2011 to December 2011, wherein the demand was dropped on the ground that the DM water is classifiable under CETSH 22011010 or chargeable to nil rate of duty and the said order was accepted by the department, this also support the appellant’s case of classification of DM Water under 2201.

4.5 Without prejudice to the above, we find that even if department’s contention of classification under 28 51/28 53 is accepted, the DM water cleared by the appellant to their own Clinker unit, grinding unit and power plant shall be treated as captive consumption within the same factory. The adjudicating authority held that being a different unit, it cannot be said that the DM water manufactured by the appellant is used within the same factory.

In this regard we rely on the this Tribunal decision in the appellant's own case Sanghi Industries Ltd. V/s. CCE Rajkot 2014(302) ELT 564(Tri- Ahm.), wherein this Tribunal observed that for the purpose of the Cenvat credit input namely Furnace oil /Lubricants Used in Power Plant and DMW plant sustained away from Clinker Unit for generation of electricity and generated electricity brought back for manufacture of final product. The use of Electricity by DMW plant unit and administrative block which are situated within clinker Unit, to be considered as use in connection with the manufacture of final product. Hence, the proportionate credit of input sent to power plant corresponding to generation of electricity used in the DMW plant and administrative block was held eligible as Cenvat credit.

4.5 In view of the said observation, it is clear that the contention of the adjudicating authority that the DM water produced by the DM water plant of the appellant is not used within the factory is absolutely illegal and incorrect. Moreover, We observed that the DM water plant, clinker plant, grinding plant and power plant belongs to the appellant's company only and it is within one vicinity. Therefore, it cannot be said that the use of DM water produced by appellant's own DM water plant in the clinker plant and other plants is out of factory of the DM water plant. Therefore, since, the DM water produced by the appellant was used within the factory and the same is exempted under Notification No. 67/95-CE dated 16.03.1995. And with effect from 01.03.2015, the distilled water calling under 28510010 and 28530010 attracts nil rate of duty. Therefore, for the entire period, the captive consumption of DM water is not liable to Excise Duty.

4.6 As per our above discussion and findings, we are of the view that the DM water in the facts of the present case is correctly classified under 2201 and accordingly not liable to duty. The appellant have raised multiple grounds such as activity not being amount to manufacture, demand is hit by limitation, etc. since, we decide the matter, as per our above observation, we are not addressing other issues and the same are left open.

5. Accordingly, the impugned order is set aside. Appeal is allowed with consequential relief.

*(Pronounced in the open court on 25.11.2024)*

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

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

Raksha