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REGISTERED / AD

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
38,MG Marg Civil Lines,Old Red Building,Allahabad-211001
Regional Branch, Allahabad

Dated: 07/03/2018

To

Appellant as per address in table below
Respondent as per address in table below

Final Order No. A/70510/2018-EX[DB] dated 09/01/2018

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 35-C(1) of the **Central Excise and Salt Act, 1944.**

Asstt. Registrar

Application	Appeal	Name and Address of Appellant
1	E/188/2009	CCE & ST, ALLAHABAD 38,M.G.Marg,Civil Lines, Allahabad
		Name and Address of Respondent
2		JHOOLA FEFINERY, NAUPUR, DISTT. JAUNPUR, (U.P.),,

Copy To
3 Advocate(s) / Consultant(s):

ANUJ AGARWAL, Advocate
A-103, DEFENCE COLONY,
NEW DELHI,
DELHI
110024

4 Bar Association, CESTAT, Allahabad

5 Director Publications, Customs, Excise. I.P. Estate, Delhi

6 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, Opp ICICI Bank of Defence Colony New Delhi-3

7 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

8 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

9 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

10 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

11 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38

12 The ICFAI society, 52, Nagarjuna Hill,Punjagutta Hyderabad.-500082

13 M/S Knowledge Processing Pvt. ltd.(taxmanagementindia.com),FF-19,1st Floor,Cross River Mall,CBD Ground,Near Karkardooma Court,Delhi-110032

14 C.D.R. 15 Office Copy 16 Second Folder Copy 17 Guard File

Asstt. Registrar

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH : ALLAHABAD

Date of Hearing/Order: 9.1.2018

Appeal No. E/188/2009-DB

(Arising out of Order-in-Appeal No. 88 to 90-CE/ALLD/2008 dated 4.11.2008 passed by the Commissioner (Appeals), Central Excise, Allahabad)

CCE, Allahabad — Appellant

Vs.

M/s Jhoola Refinery — Respondent

Appearance

Shri Mohd. Altaf, A.R. - for the appellant

Shri Anuj Agarwal, Advocate - for the respondent

CORAM: Hon'ble Mrs. Archana Wadhwa, Member (Judicial)
Hon"ble Mr. Anil G. Shakkarwar, Member (Technical)

Final Order No.-70510/2018

Per Ms. Archana Wadhwa:

Being aggrieved with the order passed by the Commissioner (Appeals), Revenue has filed the present appeal. We have heard Shri Mohd. Altaf appearing for the Revenue and Shri Anuj Agarwal, ld. Advocate appearing for the respondent.

2. As per facts on record the respondent is engaged in the manufacture of oil. Revenue by entertaining a view that the oil being cleared by the appellant is a refined vegetable oil,

manufactured by them under the brand name 'super distilled' ROO/SDVO/DVO, initiated enquiry against them and recorded the statements of various persons who stated that they adopt the process of neutralisation, bleaching and deodorization, Revenue entertained a view that the respondent's final product is refined vegetable oil inasmuch as all the processes laid down under the Prevention of Food Adulteration Act, 1954 stands adopted by them. Further, enquiries were also made from the dealers/persons dealing in edible and non-edible oil.

3. On the above basis of the result of the investigations made by the Revenue, proceedings were initiated against them by way of a Show Cause Notice dated 15.11.2006, raising a demand of duty of Rs.18,27,998.00 along with proposal to confirm the interest and imposed penalties. The said show cause notice culminated into an order passed by the original adjudicating authority confirming the demands and imposing penalties on the respondent as also on the other co-noticees.

4. The said order was appealed against by the assessee before Commissioner (Appeals) on various grounds. The assessee categorically took a stand that since August, 1997, they had started production of distilled oil after installing a specialised plant and technology imported from Japan. In support, they relied upon a

registration certificate issued by the Trade Tax Authorities of Uttar Pradesh. They contended that they manufacture distilled oil out of imported vegetable oil which cannot be converted into refined edible oil. The imported oil is tested at the point of clearance from the Custom authorities and in one of the instances of such imported inedible mixture of vegetable oil, the sample taken was got tested by the Dy. Commissioner, Nhava Sheva in October, 2005 in Mumbai Municipal Council Lab, which has reported that the oil mixture cannot be converted into edible oil. In support of the above, attention was drawn to a letter dated 8.12.2005 of the Assistant Commissioner of Customs, Nhava Sheva addressed to the Assistant Commissioner of Customs, Group – I, Nhava Sheva, Mumbai. They contended that the product imported by them contained fatty acid 12.5% which cannot be converted into refined vegetable oil, which is required to contain only 0.25% of fatty acid. They never purchased rise bran oil which is essential raw material for the manufacture of edible vegetable oil. The Director of the company Shri Mahesh Kumar Jhunjhunwala, in his statement recorded by the officers had clearly deposed that they were not manufacturing refined vegetable oil. No sample has been drawn by the Revenue to ascertain whether the oil manufactured by them was edible grade or not. The fatty acid present in the imported mixture of oils can only be removed at a temperature of 200 degree centigrade and they are not equipped to maintain such high degree temperature in their factory so as to convert the imported oil into an edible oil.

5. The Commissioner (Appeals) appreciated the above arguments of the assessee and observed as under:

> "8. According to the definition given at Sl. No. A-17-15 of the Prevention of Food Adulteration Rules, 1955, "Refined Vegetable Oil" means any vegetable oil which is obtained by expression of solvent extraction of vegetable oil bearing minerals, deacidified with alkali and / or physical refining and / or by miscella refining using permitted food grade solvent followed by bleaching with absorbent earth and / or carbon deodorized with stream. No other chemical agent shall be used. The name if the vegetable oil from which the refined oil has been manufactured shall be clearly specified on the label of the container. In addition to the under-mentioned standards to which refined vegetable oils shall conform to the standards prescribed in these rules for the specified edible oils shall also except for acid value which shall be not more than 0.5 percent. Moisture shall not exceed 0.10 percent by weight."
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> 9. From the above definition of the 'Refined Vegetable Oils', it is abundantly clear that apart from other specified standards, the acid value shall not be more than 0.55 by weight. However, while going through the finding of the adjudicating authority, I not find mentioned of specified acid value of 0.5% by weight, even though he has observed that the 'Refined Edible Oils' should meet the specified standards of the Prevention of Food Adulteration Act, 1954, as required one of the conditions of Notification No. 6/2002-CE dated 01.03.2002, as amended by Notification No. 6/2003-CE dated 01.03.2003 and 37/2003-CE dated 31.04.2003. I also do not find that any sample of the said product of the appellants' factory were drawn to ascertain the specified standards required under the Prevention of Food Adulteration Act, 1954 and rules made thereunder."
>
> 10. On the other hand there is lab reports accepted by the Assistant Commissioner, Customs CIU, JNCH, Nhava Shera, Mumbai as reported in his letter dated 8.12.2005,

that the oil mixture cannot be converted into edible. The adjudicating authority although considered above letter of the Assistant Commissioner, Customs CIU, JNCH, Nhava Sheva, yet he did not attribute any evidentiary value by only observing that the same was 'not relevant for the period of dispute, i.e., 30.04.2003 to 28.02.2005." But the adjudicating authority has not discussed any reason in support of his above observation. Therefore, I proceed to consider the above lab test as reliable evidence, which supports the claim of the appellant that the oil mixture imported by them could not be used in the manufacture of edible grade oil.

11. In his finding the adjudicating authority has also discussed Notification No. 17/2001-CUS dated 01.03.2001, Board's Circular Nos. 40/2001-CUS dated 13.07.2001 and 29/97-CUS dated 31.07.1997. On going the impugned show cause notice, I observe that neither these Notification and Circular pertain with Palm oil / Crude Palm oil, whereas in the present case the appellants have not claimed to have imported mixed vegetable oil, which has not been rebutted by the adjudicating authority by relying on any admissible evidence, especially by test reports. In fact the Department neither obtained the samples of the product manufactured by the Appellant nor their factory was inspected by the Department to see whether they have plant and machinery to manufacture Refined Vegetable Oil.

12. It is already mentioned above that the appellants have submitted that in the specialized plant installed by them, there is no required facility of heating 200 degree centigrade and above for the manufacture of edible grade oil. In support of the above submission the appellants have placed reliance on the export opinion of Sri S.K. Ahuja, Chartered Engineer. In his report dated 19.11.2005, Sri Ahuja has stated that he visited the plant of M/s Jhoola Refinery, situated at Village Naupur P.O. Thanagaddi Jaunpur on 13.10.2005 and studies manufacturing process. According to him, "For distillation of oil it is necessary to process the oil by degumming, Bleaching, dewaxing process. But is necessary to maintain the temperature above 200 degree centigrade for separation of Fatty from oil but there are no equipments installed to have the temperature of 200 degree centigrade as such the fatty cannot be removed from oil.

13. As such it is confirmed that M/s Jhoola Refineries Ltd., Sarnath Varanasi cannot manufacture the refined

oil." This technical opinion has been discussed by the adjudicating authority but has held the same "irrelevant and also not based on facts." He has further stated, "Sri S.K. Ahuja vide his letter dated 26.02.2008 had requested to ignore and not to take cognizance of his aforesaid report". However, in the impugned order it is no where mentioned that Sri Ahuja has ever retracted or disowned his opinion / statement dated 19.11.2005. Besides, I also do not find any inspection reports of the Departmental Officers to the effect that the appellant had manufacturing facility for separation of fatty acid from imported mixed vegetable oil to reduce the same at 0.25% level by weight, to make the same edible oil as per standards laid down under afore-discussed provision of the Prevention of Food Adulteration Act, 1954 and Rules made thereunder. In such circumstance, I have no option but to place reliance on the technical report dated 19.11.2005 of Sri Ahuja. Now it is well settled legal proposition that burden to prove that a particular product falls within a particular chapter of the tarrif lies upon the Revenue and not upon the assessee for excisablity, as has been held by the Hon'ble High Court Allahabad in the case of Shahnaz Ayurvedics v/s. CCE, Noida [2004 (173) ELT – 337 (All)]. Similar, view has been held by the CESTAT in the case of Indian Plastics and Laminated Ltd. v/s. CCE, Ghaziabad [2004 (169) ELT – 51 (Trib. Del.)]. In the case of O.K. Play (India) Ltd. v/s. CCE, Delhi – III Gurgaon [2005 (180) ELT – 300 (SC)] the hon'ble Supreme Court has held that functional utility, predominant usage etc. have also got to be taken into accounts. The aforesaid aids and assistance more important then names used in trade or common parlance. In this case the investing officers instead of enquiring from end users of the said products have relied upon statements of traders and dealers. This proposition of law has further laid down by the Hon'ble Supreme Court in the case of M/s Dabur (India) Ltd. v/s. CCE, Jamshedpur [2005 (182) ELT – 290 (SC)]. In this case the Hon'ble Apex Court has also held, "classifying a product the scientific an technical meaning is not to be resorted to." In view of the above legal position the findings of the adjudicating authority based on dictionary meaning and textbook of Organic Chemistry do not hold goods.

14. In the case of Jay Engineering Works Ltd. v/s. CCE, Kolkata – V [2008 (223) ELT – 181 (Tribunal)], it has been held, "Proper identification of the very goods itself is sine qua non to classify the impugned goods in the proper parentage without the same being thrown to orphanage. The Department would do well to witness entire process

by inspection. This would be enable proper finding for appropriate classification in accordance with law." But in this case no inspection process of manufacture to identify the product of appellant has been done. In the case of CCE, Mumbai-III v/s. Reliance Silicones Ltd. [2004 (174) ELT – 3 (SC)], the Hon'ble Supreme Court while holding the CEGAT order has held, "mere statements obtained from some dealers in the market cannot prevail over these test reports." In fact one of the dealer during his cross examination has admitted that he was purchasing distilled oil from the Appellant. In the case of Forbes Gokak Ltd. vs. CCE, Belgaum [2005 (192) ELT – 1000 (Trib.)], the Hon'ble CESTAT, while relying upon the ratio of law laid down by the Hon'ble Supreme Court in the Reliance Silicones Ltd., supra, has held, "wherein the Apex Court has held that when test results are available, they are best evidence as against market enquires." The CESTAT in the above case has also relied upon the decision in the case of Polyglass Acrylic Manufacturing Co. Ltd. v/s. CCE [2003 (153) ELT – 276 (SC)] which lays down that reports obtained by department itself has greater force and it should not be ignored. The distilled oil is manufactured by the appellant from imported oil and this fact is not disputed by the department. The test report of Imported Oil clearly suggested that Edible Oil cannot be manufactured out of those imported oil. Even report of Sri Ahuja Technical Expert also clearly state that the appellant cannot manufacture Refined Vegetable Oil with the available plant and machinery.

15. From above discussed factual and settled legal position, I arrive at the conclusion that the Department has failed to discharge its burden of proof. The laboratory test report, especially when relied upon by the Assistant Commissioner, Customs CIU, JHCH, Nhava Sheva cannot be brushed aside. Similarly, technical survey / inspection report of Sri S.K. Ahuja, Chartered Engineer cannot be discarded. Therefore, I am of considered view that findings of the adjudicating authority that the product of appellant No. 1 was Refined Edible Vegetable Oil, has no legal merit. Therefore, question of excisability of the said product under Notification No. 6/2002-CE dated 01.03.2002, as amended by Notification No. 6/2003-CE dated 01.03.2003 and 37/2003-CE dated 30.04.2003 does not arise, as alleged and held in the impugned order. In view of such situation the allegation of not taking registration, clandestine manufacture and clearance of foods in contravention of provisions of Rule 4, 8, 9, 10 and 12 of the Central Excise Rules, 2002 and Section 6 of the

Central Excise Act 1944 do not substantiated. The demand of duty and imposition of penalties on appellants do not stand as held by the Hon'ble Supreme Court in the case of CCE v/s. HMM [1995 (76) ELT – 497 (SC)]."

6. On going through the above findings of Commissioner (Appeals), we note that the same are detailed findings and the appellate authority's reliance on the laboratory test report conducted by Revenue itself at the time of import of the goods is appropriate. As far the said report, the imported oil can never be converted into edible oil and the said report defaces the Revenue's entire stand. The Revenue in their memo of appeal has not advanced any arguments to rebutt the above findings of Commissioner (Appeals). We find no infirmity in the impugned order and as such Revenue's appeal is accordingly rejected.

(Pronounced in Court)

Sd/-
Anil.G. Shakkarwar
Member(Technical)

Sd/-
(Archana Wadhawa)
Member (Judicial)

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