CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH – COURT NO. 2

Excise Appeal No. 1306 of 2010

[Arising out of Order-in-Appeal No. 69/2010 dated 04/02/2010 passed by the Commissioner of Central Excise (Appeals), Mangalore]

M/s. HABIB AGRO INDUSTRIES ....**Appellant**
C/o Benchmark Signature House, 3,
Dr.Nelson Mandela Road, Bannimantap
Mysuru, Karnataka-570015

VERSUS

C.C.,C.E.& S.T-MYSORE ....**Respondent**
S1-S2...VINAYA MARGA,
SIDDHARTHA NAGAR, MYSORE
KARNATAKA-570011

WITH

Excise Appeal No. 1307 of 2010

[Arising out of Order-in-Appeal No. 69/2010 dated 04/02/2010 passed by the Commissioner of Central Excise (Appeals), Mangalore]

M.K. Agrotech (P) Ltd., ...**Appellant**
389, Kaveri Layout, P.B. No.20
Srirangapatna-571438

VERSUS

C.C.,C.E.& S.T-MYSORE ....**Respondent**
S1-S2...VINAYA MARGA,
SIDDHARTHA NAGAR, MYSORE
KARNATAKA-570011

WITH

Excise Appeal No.20154 of 2018

[Arising out of Order-in-Appeal No.MYS-EXCUS-000-APP-153-154-155-2017-18 dated 14.12.2017 passed by the Commissioner of Central Excise (Appeals), Mysore]

M.K. Agrotech (P) Ltd. ....**Appellant**
389 M B Road, Kaveri Layout,
Srirangapatna,
Karnataka -571438

VERSUS

Commissioner of Central Tax, Mysuru ....**Respondent**
No.S1-S2...VINAYA MARGA,
SIDDHARTHA NAGAR, MYSORE
KARNATAKA-570011

WITH

Excise Appeal No.20521 of 2018

[Arising out of Order-in-Appeal No.MYS-EXCUS-000-APP-088-17-18 dated 10.10.2017 passed by the Commissioner of Central GST & Central Excise (Appeals), Mysore]

M/s. HABIB AGRO INDUSTRIES ....**Appellant**
C/o Benchmark Signature House, 3,
Dr.Nelson Mandela Road, Bannimantap
Mysuru, Karnataka-570015

VERSUS

Commissioner of Central Tax, Mysuru ....**Respondent**
S1-S2...VINAYA MARGA,
SIDDHARTHA NAGAR, MYSORE
KARNATAKA-570011

AND

Excise Appeal No.20952 of 2018

[Arising out of Order-in-Appeal No.MYS-EXCUS-000-APP-157-158-17-18 dated 14.12.2017 passed by the Commissioner of Central Tax (Appeals), Mysuru]

M/s. HABIB AGRO INDUSTRIES ....**Appellant**
C/o Benchmark Signature House, 3,
Dr.Nelson Mandela Road, Bannimantap,
Mysuru, Karnataka-570015

VERSUS

Commissioner of Central Tax, Mysuru ....**Respondent**
S1-S2...VINAYA MARGA,
SIDDHARTHA NAGAR, MYSORE
KARNATAKA-570011

APPEARANCE:

Mr. S. Loknath, Consultant for the Appellant

Mr. P. Sarvana Perumal, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. P.A. AUGUSTIAN, MEMBER (JUDICIAL)
HON'BLE MR. PULLELA NAGESWARA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO.20751-20755/2023

DATE OF HEARING: 24/03/2023
DATE OF DECISION: 21/07/2023

PER: P.A. AUGUSTIAN

The appellants M/s Habib Agro Industries and M/s M.K Agrotech (P) Ltd., are engaged in the manufacture of edible refined oil and also clearing goods viz. acid oil, fatty acids, gums and waxes. Alleging that the appellants have indulged in clandestine clearance of said products to avoid payment of Central Excise duty, proceedings were initiated and show cause notices was issued to the appellants. The Adjudication Authority in the case of M/s Habib Agro Industries vide Order-in-Original No.13/JC/CX/2009 dated 03.04.2009 confirmed the demand with interest and imposed equal penalty for the period 01.04.2006 to 30.10.2007 and also confirmed the demand with interest and imposed penalty for the period from 01.11.2007 to 30.11.2008.

2. Further in the case of M/s M. K. Agrotech the Adjudicating Authority vide Order-in-Original No.12/JC/CX/2009 dated 03.04.2009 confirmed the demand with interest and imposed equal penalty for the period 01.03.2006 to 31.10.2007 and also confirmed the demand with interest and imposed penalty for the period from 01.11.2007 to 31.10.2008. Further penalties were imposed on Shri V. Subhan Khan Managing Director of M/s M.K. Agrotech Pvt. Ltd.

3. The appellants, preferred appeals before the Commissioner (Appeals) and vide Order–in-Appeal No. 69/2010 dated 04.02.2010, Commissioner (Appeals) set aside the demand, interest and penalty imposed for the period prior to 01.05.2008 on the ground that acid oil, fatty acids, gums and waxes were eligible for exemption under Notification No.89/95-CE dated 18.05.1995 as the same were waste, which arose during the course of manufacture of refined edible oil. Further the penalty imposed on Shri V. Subhan Khan Managing Director of M.K. Agrotech was also set aside.

4. Further Commissioner (Appeals) held that Acid oil, gum, wax and fatty acids, which emerges as waste residue or /and refuse product, which arise during the course of manufacture and are capable of being sold for a consideration. He noted that w.e.f. 10.05.2008 vide Section 78 of the Finance Act, 2008 an explanation was added to the definition of excisable goods which reads as follows:-

> *Excisable goods, means, goods specified in the first schedule and second schedule of Central Excise Tariff Act, 1985 as the subject to the duty of excise and includes salt;*
>
> *Explanation:- for the purpose of this clause goods includes any article, material or substance which is capable of being bought and sold for consideration and such goods shall be deemed to be marketable.*

5. Commissioner (Appeals) held that in view of the amendment to the definition of excisable goods the appellants are not eligible for the benefit of Notification No.89/95-CE w.e.f. 01.05.2008. These will be excisable goods and chargeable to payment of excise duty and remanded the matter to the adjudicating authority to determine the duty and penalty for the period from 01.05.2008.

6. The Department accepted the findings of the Commissioner (Appeals) prior to 10.05.2008. Consequent to the finding as regards the period after 10.05.2023, large number of show cause notices were issued for the period after 10.05.2008 and they were adjudicated. The appeals having Excise Appeal No.20154 of 2018, Excise Appeal No.20521 of 2018 and Excise Appeal No.20952 of 2018 are also filed by the appellants, aggrieved by the Order of Commissioner (Appeals) confirming demand with interest and imposition of penalty for the period after 10.05.2008.

7. Heard both sides and perused the records.

8. The Learned Counsel for the appellant submitted that the findings of Appellate Authority are contradictory and unsustainable. Once the Appellate Authority accepted that the goods cleared till 10.05.2008 are non-excisable, since they are waste, the very same goods cannot be treated as excisable goods for the period after 10.05.2008. He further submitted that the issue was considered by the Larger Bench of Tribunal in the case of *Ricela Health Foods Ltd. 2018 (2) TMI 1395-CESTAT NEW DELHI,* where it was held as under:

9. We have heard both the sides and perused the appeal record to examine the reference made by the Division Bench. Since the appellants submitted on the excisability itself the first point for decision is the excisability of the products, in question. The appellants strongly contended that even before examining the admissibility of exemption under Notification 89/1995-CE, the point to be decided is the excisability of the product, in question. It is the case of the appellant that if it can be established that these goods are not manufactured goods then the question of levy itself will not arise. It is contended that the product, in question, are unwanted/inevitable waste. The value realized by the appellants on such unintended waste by sale, itself is not a criteria to decide the excisability. The Hon'ble Supreme Court in CCE vs Indian Aluminium Company- 2006 (203) E.LT. 3 (S.C.) held zinc dross and flux skimming are not exigible to central excise duty. Relying on the earlier decisions in Union of India vs. Indian Aluminium Company Ltd. - 1995 (77) ELT 268 (S.C.) and CCE, Patna vs. Tata Iron & Steel Company Ltd. - 2004 (165) ELT. 386 (S.C.), the Apex court held that the dross and skimming arising during the course of manufacture of metal cannot be subjected to excise levy only because it may have some saleable value, observing that the term "manufacture implies a change; every change, however, is not a manufacture" Every change of an article may be the result of treatment, labour and manipulation. The manufacture would imply something more. There must be a transformation; a new and different article must emerge having a descriptive name, character or use (Delhi Cloth and General Mills Company Ltd. - AIR 63 SC 791). The Apex court categorically held that dross do not answers the description of "waste and scrap”.

10. In view of the ratio adopted by the Apex court while arriving at the above decisions, the point for consideration in the present dispute is the gums, waxes and fatty acid that emerge as a by-product can be considered as a products arising out of a manufacturing process. The appellants are engaged in converting crude rice bran oil into refined rice bran oil. In effect the processes undertaken by them are towards this intended final product. For producing refined rice bran oil, the gums and waxes available in the crude rice bran oil are to be removed by deguming and de-waxing. Thereafter by a process of deacidification/ de-odourisation, by distillation the refined oil is obtained. In this final process fatty acid distillate (fatty acid with odour) is obtained as a waste. As can be seen the gums, waxes and fatty acid distillate are emerging due to removal/refining process of crude rice bran oil. As already noted the process is to obtain refined rice bran oil by removing these unwanted products along with spent earth, which when present makes the oil as crude refined oil.

9. After considering the above facts, the Larger Bench held that "Hence, we are of the considered view that the removal of unwanted materials resulting in products like gums, waxes and fatty acid with odour cannot be called as a process of manufacture of these gums, waxes and fatty acid with odour. The process of manufacture is for refined rice bran oil. As such, we note that these incidental products are nothing but waste arising during course of refining of rice bran oil and applying the ratio of Apex court judgment, as discussed above, these cannot be considered as manufactured excisable goods. Noting that the

reference is to decide whether these are to be treated as waste for the purpose of exemption Notification 89/95-CE. We note though the excisability of the product itself is seriously in dispute as per the opinion expressed by us, as above, these cannot be considered as anything other than waste and as such will be covered by the exemption Notification No. 89/95-CE.

10. Learned Counsel for the appellant also placed on record the following case laws:

- *Vinayak Agrotech Ltd., Vs. CCE, Jaipur-I, 2017 (11) TMI 598- CESTAT NEW DELHI.*
- *Arihant Solvex Pvt. Ltd., Vs. CGST, Jodhpur 1, 2019 (1) TMI 235- CESTAT NEW DELHI.*
- *CCE, Ludhiana Vs. Shree Jindal Proteins Ltd. and Sangrur Agro Ltd., 2018 (3) TMI 915-CESTAT CHANDIGARH.*
- *Adani Wilmar Ltd., Vs. CCE, Ahmedabad-III, 2023 (3) TMI 535- CESTAT AHMEDABAD.*
- *N.K. Agro Oils Pvt. Ltd., Vs. CCT, Bangalore, 2018 (11) TMI 965- CESTAT BANGALORE.*
- *Saraiwwalla AGRR Refineries Ltd., Vs. CCE, Guntur and Rangareddy- GST, 2018 (3) TMI 838- CESTAT HYDERABAD.*
- *CC & CE, Meerut-II Vs. B.L. Agro Oils Ltd. and others, 2018 (4) TMI 720- CESTAT ALLAHABAD.*
- *SSD Oil Mills Company Ltd. Vs. CCE, Chennai-IV, 2018 (7) TMI 671- CESTAT CHENNAI.*

- *Sri Devi Oil Pvt. Ltd., Vs CCE, Salem, 2018 (5) TMI-1117-CESTAT CHENNAI.*
- *Udyog Mandir Vs. CCE, Jaipur, 2018 (5) TMI 17116CESTAT NEW DELHI.*

11. Learned Counsel for the appellant also submitted that in the matter of *Vinayak Agrotech Ltd.* (supra) CESTAT, New Delhi considered the period of dispute from December 2007 to 2009 and in the matter of *Arihant Solvex Pvt. Ltd.* (supra), show cause notice was issued for the period from 01.04.2010 to 31.12.2013 and in all those cases, it was categorically held that the by-products emerging during the manufacture of refined oil are completely unintentionally by-products. Hence, they do not classify the definition of manufactured excisable goods. Since refined oil was exempted goods during the relevant period, these by-products are entitled to be treated as exempted by virtue of Notification No.89/ 95-CE dated 18.05.1995. Learned Counsel for the appellant further submitted that the appellants are eligible for the benefit of Notification No.8/2003 dated 01.03.2003 since the appellant has not crossed the permissible limit of Rs.3 crore in a financial year, if the aggregate value of clearance of all excisable goods is assessed by excluding the value of clearance of non-excisable goods.

12. On the other hand, learned AR submitted that in the present case, the investigation was conducted on the basis of credible intelligence that assessee was indulging in clandestine clearance of acid oil, fatty acids, gums and waxes manufactured by them to avoid payment of Central Excise duty. Acid oil was

not a by-product /waste arising during the manufacture of edible oil and that the same was an excisable product being intentionally manufactured and cleared by assessee.

13. We have considered the submissions made by both the parties and also considered the findings of Larger Bench wherein the Larger Bench in the matter of *Ricela Health Foods Ltd* (supra) through detailed chart explained the process of manufacturing of refined rice bran oil and generation of waste at each stage of manufacture. There is nothing on record to show that the manufacturing of acid oil is excluded from the said process of manufacturing of edible oil. The issue whether "acid oil" can be treated as a waste during the course of manufacture was considered in the cases of Arihant Solvex Pvt. Ltd., and Vinayak Agrotech Ltd., and it is categorically held that acid oil is a waste and not a by-product. Hence eligible for the benefit of Notification No.89/95-CE dated 18.05.1995. We find that the issue involved in the appeals has been settled by Larger Bench in the matter of *Ricela Health Foods Ltd* (supra) and the other benches of the Tribunal in similar cases. Further the Hon'ble Apex court has affirmed the above order on 18.10.2022 reported as 2022 (382) E.L.T. (S.C.).

14. In view of the above, we are of the view that the impugned orders confirming demand with interest and imposition of penalty in all the above appeals are not sustainable. Hence Appeal No. 1306 of 2010, Appeal No. 1307 of 2010, Appeal No. 20154 of 2018, Appeal No. 20521 of 2018 and Appeal No. 20952

of 2018 filed by appellants are allowed with consequential relief. However, we have not considered the submissions made by the learned Counsel for the appellants regarding consequential relief regarding their eligibility to avail the exemption as per Notification No.8/2002 dated 01.03.2002.

(Order pronounced in the open court on 21.07.2023)

(P.A. AUGUSTIAN)

MEMBER (JUDICIAL

(PULLELA NAGESWARA RAO)

MEMBER (TECHNICAL)

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