

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL
BANGALORE**

REGIONAL BENCH - COURT NO. 1

Central Excise Appeal No. 2746 of 2011

(Arising out of Order-in-Appeal No. 195/2011 – CE dated 08.07.2011
passed by the Commissioner of Central Excise (Appeals-I),
Bangalore.)

M/s. Bhuruka Gases Limited

Whitefield Road,
Mahadevapura,
Bangalore.

Appellant(s)

VERSUS

**The Commissioner of Central
Excise, Bangalore –I
Commissionerate,**

C.R.Building,
Queens Road,
Bangalore.

Respondent(s)

APPEARANCE:

Mr. B. Venugopal, Advocate, for the Appellant

Mr. K. Vishwanatha, Superintendent (AR), for the Respondent

**CORAM: HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MRS R BHAGYA DEVI, MEMBER
(TECHNICAL)**

Final Order No. 20907 /2024

DATE OF HEARING: 29.05.2024

DATE OF DECISION: 27.09.2024

PER : DR. D.M. MISRA

This is an appeal filed against Order-in-Appeal No. 195/2011 – CE dated 08.07.2011 passed by the Commissioner of Central Excise (Appeals-I), Bangalore.

2. Briefly stated the facts of the case are that the appellant are engaged in the manufacture of excisable goods viz. industrial gases, medical grade Oxygen etc. falling under Chapter 28 of the Central Excise Tariff Act, 1985(CETA, 1985 for short). On the basis of intelligence, investigation was initiated against the

appellant as they were clearing 'synthetic air' as 'zero air' without payment of duty by misclassifying the same under Chapter Sub-heading 28510030 of CETA, 1985. Consequently, the officers visited their premises on 26.10.2007 and retrieved the records from the premises. On completion of investigation, a show-cause notice was issued to them on 02.01.2008 demanding duty of Rs.5,90,310/- for the period December 2002 to June 2007 on the quantity of Zero Air cleared from their factory without payment of duty along with interest and penalty. On adjudication, the demand was confirmed with interest and penalty. Aggrieved by the said order, they filed appeal before the learned Commissioner(Appeals) who in turn rejected their appeal. Hence, the present appeal.

3. At the outset, the learned advocate for the appellant has submitted that their main products are Nitrogen, Oxygen including medical Oxygen and Argon. They also manufacture small quantities of synthetic air and zero air. He has explained the process of manufacture of Synthetic Air and Zero air, as under:-

ZERO AIR

Atmospheric air is compressed by air compressor by passing through dust filter. The compressed air is then chilled by refrigeration unit up to 7 to 9% centigrade. The chilled air is passed through moisture separator to remove liquid water. the compressed air is then passed through molecular sieve battery for removal of vapor moisture carbon di-oxide, carbon monoxide and light hydro carbons. Air thus obtained is free from dust, moisture, carbon di- oxide, carbon monoxide and light hydrocarbons etc. This pure air is filed into cylinder using a

compressor and this is called 'zero air'. Since zero air is filled before it is subjected to the process of air separation it contains Argon almost equal to the quantity present in the natural air.

SYNTHETIC AIR

The remaining air after 'Zero air' is obtained is subjected to air separation into Nitrogen / Oxygen / Argon and stored in tankers. As per the ratio required by the customers, Nitrogen and Oxygen are mixed and cleared as Synthetic air, by classifying the said product as a mixture of gases under 2804. Thus, Synthetic air is mixture of Nitrogen and Oxygen. Since Synthetic air is manufactured by process of mixing the Nitrogen and Oxygen, it contains negligible traces of Argon.

3.1 Further, he has submitted that the distinction between Zero air and Synthetic air depends on the process of manufacture and since Zero air is obtained from the natural air by way of compression and removal of Carbon di-Oxide, moisture, dust into pure air; the same was classified by the appellant as compressed gas following the decision of the Tribunal in the case of **Indian oxygen Limited Vs. CCE, Bolpur** [2000(118) ELT 120 (Tri. Kolkata)] which has been later upheld by the Hon'ble Supreme Court. Further, he has submitted that the difference between these two products is that Zero air contains Argon as is available in natural air whereas Synthetic air contains traces of Argon. He has submitted that there is no misstatement or suppression of facts as the appellant has correctly classified the impugned product Zero air based on the decision of the Hon'ble Tribunal in the case of **Indian oxygen Limited** (supra). Also, the appellant entertained a *bona fide* belief that the impugned product technically and

commercially is liable to be classified under the said Chapter heading 2851 / 2853 of CETA, 1985. Also, they have been declaring Zero air in ER1 returns which the Department could have verified at any point of time; therefore, invocation of extended period for confirmation of demand against the appellant is not correct. In support, he has referred to the following judgments:-

- i. ***Cosmic Dye Chemicals Vs. CCE, Bombay*** [1995(75) ELT 721 (SC)]
- ii. ***Tamilnadu Housing Board Vs. CCE, Madras*** [1994(74) ELT 171 (SC)]
- iii. ***Pushpam Pharmaceuticals Co. Vs CCE, Bombay*** [1995(78) ELT 401 (SC)]
- iv. ***Continental Foundation Jt. Venture Vs. CCE, Chandigarh-I*** [2007(216) ELT 171 (SC)]

4. *Per contra*, learned AR for the Revenue reiterated the findings of the learned Commissioner(Appeals). He has submitted that the customers of the appellant has categorically stated that the Zero air purchased by the customers from the appellant which cannot be equated with compressed gas, as compressed gas cannot be used for the purpose of lab test.

5. Heard both sides and perused the records.

6. The short issue involved in the present appeal for consideration is, whether the 'Zero Air' cleared by the appellant during the period December 2002 to June 2007 is classifiable under Chapter heading 2851 as compressed air attracting NIL rate of duty or classifiable under Chapter heading 2804 attracting 16% duty as confirmed in the impugned order.

7. Undisputedly the appellants are engaged in the manufacture of various gases like Oxygen, medical Oxygen, Nitrogen, Liquid Nitrogen, Hydrogen, Synthetic gas, Zero Air, Argon etc. The Department disputed the clearance of 'Zero Air' during the relevant period alleging that the appellant cleared the same to various customers misdeclaring its classification under Chapter heading 2851 whereas the same being Synthetic Air having a distinct use in laboratories for which compressed air cannot be used. The appellant's contention is that the difference between Synthetic Air and Compressed Air is in the process of manufacture, otherwise both the gases are derived from natural air and hence the Zero Air cleared by them is classifiable as Compressed Air under Chapter heading 2851. In support that the Zero Air cleared by them is not subjected to duty, they relied on the judgment of this Tribunal in the case **of Indian Oxygen Ltd.** (supra). The Revenue on the other hand in support of their allegation submitted that what was cleared by the appellant though described in the invoices as 'Zero Air' which the appellant claimed to be Compressed Air, but in fact was Synthetic Air. In support, they have referred to the classification adopted by M/s. Inox Air Products Ltd. and also the statements of the customers to whom Zero Air has been cleared by the appellant.

8. From the records, we find that the process of manufacture of Synthetic Air and Compressed Air are different; however, from the evidences collected by the Department viz. statement of Mr. M. Dhananjay, Manager of M/s. Somu Solvents (P) Ltd. who are

engaged in the manufacture of Glycol ether acetates and other solvents. It is stated that they purchased Zero Air from the appellant and categorically stated that the said Zero Air contains 78% of Nitrogen, 20.8% of Oxygen and 1.2% of Argon and they do not use the same as Compressed Air in or in relation testing their manufacture of their finished products, since Compressed Air cannot be used in Gas Chromatograph test; besides, composition of Compressed Air is not of required standard for Gas Chromatograph test. Further it is stated by him that there is no difference between Synthetic Air and Zero Air as both are one and the same. In his statement dated 07.11.2007, Mr. Devendra Kumar, Scientist of M/s. EID Parry (India) Limited, Bangalore has also categorically disclosed that they purchased Zero Air from the appellant and the same is used for Gas Chromatograph test by them, to which Compressed Air cannot be a substitute. Therefore, even though the process of manufacture of Zero Air and Compressed Air are different, the above statements which remained unchallenged and no cross-examination has been requested by the appellant nor the said statements were disputed before the authorities below; therefore, the gas cleared from the factory of the appellant was not Compressed Air but Zero Air / Synthetic Air which is classifiable under Chapter Heading 2804 of CETA, 1985.

9. The judgment referred to and relied upon by the appellant in the case of India Oxygen Ltd. (supra) is not applicable to the circumstances of the present case inasmuch as in the said case,

the customers were not examined by the Department nor any statement has been recorded indicating that the product manufactured by the appellant and cleared could not be used in the labs for Gas Chromatograph test like the present case. Hence, the ratio laid down in the above said case cannot be made applicable to the present case.

10. Further, we find that the clearance of Zero Air classifying the same under Chapter Heading 2851 as Compressed Air itself involved suppression of facts. Therefore, invocation of extended period, in our view, is justified. Besides that, from July 2007, accepting the classification as pointed out by the Revenue subsequent to visit of their factory, the appellant discharged duty for clearance of the said Zero Air classifying the same under Chapter Heading 2804.

9. In view of the above finding, we do not find merit in the appeal. consequently, the impugned order is upheld and the appeal is rejected.

(Order pronounced on 27.09.2024)

(D.M. MISRA)
MEMBER (JUDICIAL)

(R BHAGYA DEVI)
MEMBER (TECHNICAL)

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