**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL**
**SOUTH ZONAL BENCH, CHENNAI**

**E/00534 – 00535/2009**

[arising out of Order-in-Original No.05/2009 (Commr.), dated 27.05.2009 passed by the Commissioner of Central Excise, Salem]

M/s. SPAC TAPIOCA PRODUCTS (INDIA) LTD. APPELLANT/S
S. BALAMURUGAN

Versus

COMMISSIONER OF CUSTOMS & CENTRAL EXCISE, RESPONDENT
SALEM

Appearance:

For the Appellant Shri S. Muthuvenkataraman, Adv.
For the Respondent Shri K.P. Muralidharan, AC (AR)

**CORAM:**

**Hon'be Smt. Archana Wadhwa, Member (Judicial)**
**Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)**

Date of hearing **01-11-2017**
Date of Pronouncement 07-12-2017

FINAL ORDER NO. 43419-43420/2017

**Per Archana Wadhwa:**

Both the appeals are being disposed of together as they arise out of the same order passed by Commissioner, vide which demand of Rs.1,19,80,748/- stands confirmed against M/s. Spac Tapioca Products (India) Pvt. Ltd., along with confirmation of Interest and imposition of penalties. In addition, penalty of Rs.15,00,000/- has been imposed on Shri S. Balamurugan, Manager [General] in terms of the provisions of Rule 26 of Central Excise Rules, 2002.

As per facts on record, the appellant is engaged in the manufacture of Tapioca Starches, 'Native' as well as 'Modified'. The

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Native Tapioca Starches, is classifiable under Chapter Heading 11.08 and during the relevant period was fully exempted from payment of duty of excise vide Notification No.06/2002-CE, dated 01.03.2002 and Notification No.03/2006-CE, dated 01.03.2006. Apart from the Native Tapioca Spirit, the appellant was also manufacturing Modified Starch, which was classifiable under Chapter Heading 3505 and was liable to pay Central Excise duty under the said Chapter. However, inasmuch as, the clearances of the Modified Tapioca Spirit were below the exemption limit of clearances as provided in terms of small-scale exemption notifications, the same were also being cleared by appellant without payment of duty by availing such exemptions.

The appellant's factory was visited by the Central Excise Preventive officers on 25.04.2007, who conducted various checks and verifications. As per the Revenue, certain records maintained by the said appellant, which were incriminating in nature, were seized under Mahazar, dated 25.04.2007. Revenue also conducted simultaneous searches in the premises of the appellant's two buyers M/s. Seshasayee Paper & Board Ltd., and M/s. SKR Packaging, a manufacture of corrugated boxes. During the course of the visit of the officers in the appellant's factory statement of their Manager (General) SHri S. Balamurugan was recorded wherein he deposed that the appellant is engaged in the manufacture of various grades of Native Starch as also Modified Starch under various commercial names; that they are equipped with Plant and Machinery for the manufacture of Native as also Modified Starch; that they purchased various raw materials such as, Borax, Caustic Soda Flakes, Sulphur, Sulphuric Acid, Ammonia Solution, Silica Gel Blue, Hypo Chloride, Sodium

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Monocholoro Acetate, Hydrochloric Acid, Sodium-Meta-Bi-Sulphate, Phosphorus Oxychloride etc; that Modified Starch is dutiable but as they were availing the SSI exemption and the value of the said goods was within the exemption limit, no duty was being paid by them.

As there was a stock of Modified Starch lying ready, the officers also seized the same. The documents seized by the officers were scrutinized and based upon the same, a view was entertained that the appellant was clearing Tapioca Modified Starch by wrongly describing the same as Native Starch by availing the exemption in terms of Notification No.6/2002-CE and Notification No.3/2006-CE. As such, it was opined that if the said Native Starch cleared by the appellant was actually modified Starch, they would cross the exemption limit in terms of the small-scale notification, thus making them liable to differential duty. The matter was further investigated by the Revenue and statements of various purchasers and end users were recorded. It was found that Tapioca Starch is used in the manufacture of various items like food items, explosives, machinery manufacturer, soap and detergent manufacturers, paper manufacturer, corrugated box manufacturer, fireworks, shampoo and textile processors etc. Whereas, some of the buyers categorically deposed that they were receiving the Modified Starch, the others clarified that they are receiving either the Native Starch or the type of starch that does not make difference in its use in the items manufactured by them.

The technical aspect of the product was also studied by the Revenue and it was found that –

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> "property of starch needs to be enhanced at-least by dextronisation either by heat or by both heat and acid to avoid retrogradation while using in the end use applications. Investigation brought out that SPAC maintain drier temperature at 130 degree to 195 degree C in the process of manufacture. It therefore appeared that when tapioca starch is manufactured or treated with this level of heat, the initial resultant product that would emerge is undoubtedly Pyrodextrin only, which is Starch in a modified form which is dutiable under Ch.Heading No. 3505 of the Central Excise Tariff.
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> It was also noticed from their process flow chart that SO2 (Sulphur di-Oxide) was mixed in the process at the extraction stage and their website reveals at page No.1 that they are adding Sulphur di-oxide solution at both the stages of extraction and refining in equal quantity as compared to quantity of Starch Milk. Such usage of chemicals appeared to confirm the modification done to the native starch.
>
> It was further observed by the Revenue that one of the important parameters that determines the nature of the starch as native or modified was its viscosity. Enquiries made with the producers of Native Starch indicated that the viscosity of native starch would be around 44 to 50 seconds only in Redwood No.1 method. Similarly, information gathered from the scientific community also confirmed that Native Starch, manufactured by any type of advanced technology will have a Viscosity parameter of around 44 to 50 seconds only."

The appellant was maintaining two lists of finished products, one showing the various types of starch as Native Starch and second showing the goods as Modified Starch. The Revenue, on scrutiny of their records found that dispatch bill records register maintained by them show the batch nos. of the goods as relatable to Modified Starch, whereas, the invoices issued mention the goods as Native Starch.

In view of the above background, a further statement of Shri S. Balamurugan, Manager (General) was recorded on 07.02.2008, wherein, he was asked the rationality for gradation of their product and differentiation between various grades given to the Native Starch. The said deponent submitted that he was ignorant of all the above factors inasmuch as, he was not responsible for maintenance of records, production of the goods etc. On being shown certain records, the said deponent stressed that wherever they have shown sale of

Tapioca Native Starch, the same is Native Starch only and not Modified Starch. As regards the discrepancies in the dispatch record and sale invoices, he clarified that sometimes batch numbers. are written in the dispatch bills and sometime product particulars are mentioned. He further clarified that all the clearances shown in the dispatch records were Native Starch only.

From the result of the above investigations conducted by the Revenue, a view was entertained that the appellant was clearing Modified Starch in the guise of Native Starch. Accordingly, three different show-cause notices issued were to them proposing demand of duty and imposition of penalties along with the proposal to confiscate the seized goods. During the course of adjudication, the appellant sought the cross-examination of various witnesses as also the deponent of the statements and the copies of the test results of the samples drawn by the Revenue at the time of investigations. They also insisted that though the Revenue has recorded the statements of various persons but the statements which are in favour of the assesse do not stand supplied to them. They demanded the copies of all these statements.

The appellant was provided cross-examination of various persons including the cross-examination of their own Manager. However, the appellant was not satisfied with the cross-examination and submitted that inasmuch as, the Native Tapioca Starch and Modified Starch are used in different kinds of industries, the Revenue has not produced the buyers of corrugated boxes, detergent and soap industries and paper industries, which use the Native Starch, for cross-examination. Request for supplying the test reports was also reiterated. It is seen that some of the buyers were further called for cross-examination during the course of further adjudications, but the test reports of the samples which were drawn by the Revenue itself during the course of investigations, were not provided to the assessee.

The Commissioner vide his impugned order, dropped a part of the demand proposed to be confirmed in the notice and confirmed the duty to the extent of Rs.1,19,80,748/- [Rupees One Crore Nineteen Lakhs Eighty Thousands and Seven Hundred and Forty Eighty only] along with confirmation of interest and imposed penalty of identical amount under section 11AC of the Central Excise Act. In addition, penalty of Rs.15,00,000/- under Rule 26 of Central Excise Rules, 2002 was also imposed. The seized goods were also confiscated with the option to the appellant to redeem the same on payment of redemption fine. The said order of the Commissioner stands impugned before the Tribunal. Penalty of Rs.15,00,000/- was imposed upon the second appellant Shri S. Shri S. Balamurugan, Manager (General)

After hearing Shri S. Muthuvenkataraman, learned advocate appearing for the appellant as also learned departmental representative Shri K.P. Muralidharan, AC (AR) appearing for the Revenue, we find the fact that the appellant was engaged in the manufacture of both the types of starches i.e., Native as well as Modified Starch, is not in dispute. The Revenue's case is that during the period 2003-04 to 2006-07, the appellant have cleared Modified Starch, under the guise of Native Starch. The said allegation of the Revenue is primarily based upon the statement of the buyers of the appellant, which according to the Revenue, establishes beyond doubt

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that what was cleared by the appellant during the long period from 2003 to 2007 was Modified Starch.

The process of conversion of Native Starch to Modified Starch stands recorded in the impugned order and is being reproduced below for the sake of ready reference:-

➢ **Manufacturing Process:**

a) **Tapioca Starch**

Fresh tapioca tubers received in the factory is passed through the dry peeler to remove the soil and mud along with the outermost skin of the tubers. The cleaned tubers are fed into a washer to wash the tubers. The washed tubers are then fed into a chopper to get them chopped into small billets. The chopped billets are rasped with high tensile steel rasper blades into fine slurry by using fresh water. The slurry gets pumped into extractors where the starch milk is separated from the pulp. At this stage Sulphur di-oxide solution is mixed for better extraction purpose. The starch milk is then passed through separators where it gets refined and concentrated. The concentrated starch milk is pumped into de-hydrators. The starch is separated from the starch milk and wet starch with residual moisture of about 30% is extracted out of the debydrators. The wet starch is passed through disintegrators and gets powdered. The powdered wet starch is fed into flash dryers at 160° C by using hot air to dry the wet starch. The dried starches coming out of the flash dryer with about 12-13% residual moisture is fed into sifters and packed in the packing section. The notice also enclosed a detailed literature on the same.

b) **Modified Starch:**

The Native starch manufactured in the above mentioned process is subjected to heat for several hours (depending upon the required parameters of the product manufactured) in the reactor vessel in the presence of acids or alkali. This process results in de-polymerization which leads to reduction of viscosity. This process is called dry process modification.

For the manufacture of Modified Starch in wet process, the slurry with 40% solids is introduced into a well agitated tank. After the necessary adjustments of pH factor and temperature, the reagents are added, sometimes over a period of several hours and the reaction is allowed to proceed. A sample is analyzed to ensure that the correct properties have been attained after which the reaction is terminated, if necessary, by pH change or other means. The reacted starch is washed and concentrated_ in hydro cyclones or other systems after which it is dewatered and dried in the normal way. Some reactors require pH control using alkali.

**3 Tests to classify native starch and modified starch:**

**a) pH factor:**

Modified starch with the addition of acidic chemical could have lesser pH value. than even the native starch and therefore the lower pH level will not indicate whether they are native or modified. Even in Native starches, which are kept in prolonged storage in wet condition would lead to fermentation which would reduce the pH value. This is not a determining factor as addition of Acidic chemicals would reduce the pH level and addition alkali chemicals would increase the pH level.

b) **Viscosity :**

Viscosity is one of the factors but not the deciding factor in determining whether the product is native starch or modified. The minimum level of viscosity prescribed by ISI for native starch is 50 seconds in Redwood No.1 Viscometer (relevant portion: of the specification prescribed by the ISI is enclosed). It would increase depending upon the quality of raw material used and process conditions. By process conditions, they mean that prolonged storage of wet starch or in slurry form leading to fermentation of the starch which, in turn, would bring down the viscosity of the starch. Whereas in a continuous process as in the case of the notice, the total process from tuber to tapioca starch powder takes only 28 minutes. The viscosity level would be much higher in their product. Even in modified starch, certain modifications would increase the viscosity of modified starch and in certain modification it would bring down the same. For example, esterified, cross-linked modified starches would have higher viscosity. On the other hand etherified and acid modification would reduce the viscosity. Therefore, this also is not the determining factor.

The SCN proceeds on the basis that the viscosity of native starch would be around 44 to 50 seconds only in Redwood No.1 Method. This information is gathered from the producers of native starch whereas in majority of cases, the viscosity of Tapioca `A' grade starch supplied by the noticee was 58 to 61 seconds and therefore concluded that the same could only be modified starch. This conclusion is erroneous as even ISI prescribes minimum of 50 seconds for native starch. The SCN also refers to information gathered from scientific community revealed that viscosity parameter for native starch was only 44-50 seconds and that even this level of viscosity was achievable only in case of fine quality native starch powder. The department ahs not disclosed the source or the information gathered from the scientific community to come to such a conclusion. As stated earlier the minimum level of viscosity prescribed by ISI for a native starch is 50. It would increase depending upon the quality of raw material used and process conditions. By process conditions, prolonged storage of wet starch or in slurry form leads to fermentation of the starch which, in turn, would bring down the viscosity of the starch. Whereas in a continuous process as in the case of the noticee, the total process from tuber to tapioca starch powder takes only 28 minutes the viscosity level would be much higher.

c) **Test of Iodine:**

When tested with Iodine, the native starch turns blue whereas the modified starch turns violet. This test would determine whether the product in question is native or modified starch.

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The HSN(Page 90 of Vol.1) specifies that native starches when tested with iodine would turn dark blue.

**d) Degree of Substitution:**
By chemical analysis, in case of native starch, there is no degree of substitution since there is no chemical molecule present whereas in the case of modified starch, presence of chemical molecule like carboxyl group, nitrogen, carbonyl, acetyl, etc., can be found.

**e) NMR (Nuclear Magnetic Resonance) Spectro Photo Meter:**

By pressing this equipment into service, the molecular structure of the starch to find out the degree of substitution. In case Native starch the equipment would reveal the chain length of Amylase and amylopectin molecules. In case of modified starch, the chain length would be broken and substitution of chemicals to be ascertained, it would differ depending upon the modification done.

As is seen from above, the Native Starch and Modified Starch are two different products and conversion of one into another requires certain additional procedures to be adopted by the manufacturer. There is nothing on record, by way of documentary evidences that such processes were actually undertaken by the appellant during the period in question so as to convert the Native Starch to Modified Starch.

The appellant have explained all the technical aspects and have contended that in the case of Modified Starch, dried starch had to be subjected to heating for several hours in a reactor vessel and the resultant product is "Pyrodextrin". The authorities have failed to appreciate the said fundamental distinction between the Native and Modified Starches. Similarly, the conclusion in respect of use of Sulphur di-oxide solution is erroneous, inasmuch as, the same is for usage and proper extraction of milk from the tuber and the ISI Standard allowed 100 PPM of Sulphur di-oxide in Native Starch. Similarly the Revenue's reference to viscosity of Native Spirit being

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around 44-55 seconds only is not appropriate, ~~inasmuch as, this Information.~~

It is seen that the buyers, who statements were recorded, wherever appeared for cross-examination, clarified that their statements are entirely based on their understanding of what Native Spirit and Modified Starch is. They have also stated that they never carry out the test to find out whether the starch supplied to them were Native or modified. We also note that no of the buyers, whose statements were recorded were not produced for cross-examination and in fact, the statements of the buyers, which have in clear terms, stated that they were receiving the Native Starch have neither been relied upon in the show-cause notice nor called for cross-examination.

We note that the reference to PH factors, feasible test of iodine etc., are not linked with any opinion of the expert and is based upon conjunctures and surmises. In any case, the goods already stands sold by the assessee and it is not possible for the Revenue to conclude that what was cleared was not Native but Modified Starch, based upon the various chemical specifications of the products.

In fact, we find that the Commissioner himself has accepted the fact that there were different types of buyers in the market who required the Native Starch as also the Modified Starch. He has categorized the statements of the buyers into four different categories and has extended the benefit to the appellant by observing as under:-

> "19.01. The evidence in the form of market identity consists of statements recorded from various representative buyers some of whom have been relied upon and "some not relied. The buyers consisted of both end-users and traders Upon examination of these statements, I notice that all the statements can be broadly ategorized into three viz., (a) statements which have identified some grades as modified starch without

any contradiction (b) statements some of which categorized the grades as modified starch and some stating hat they do not know whether the grades are modified starch or native starch; (c)

statements in which some buyers identify the grades as native starch and some as modified starch and (d) statements which identified certain grades as native starch. It is felt that it would be fair to conclude that grades identified in the manner as described at (a) & (b) above by the buyers as modified starch would have to be treated as modified starch. It has to be concluded with reference to grades at (c) and (4that the market identity could not be established conclusively as modified starch. Similarly those grades whose market identity could not be established with reference either to the internal records or the statements are required to be omitted from demand. And those grades which are referred to as modified starch in their internal references in the buyers statements have to be treated so. The Annexure appended to this order would exhibit the consolidated market responses to each of the grades - both how they appear in private records and how the buyers understood it, from which the identity of the product could be established for the purpose of demand of duty.

20. While analyzing the market identity, it is interesting to note that in the result arrived at by adopting the twin criteria of how the product is perceived by the manufacturer as described in their internal records and how the product is perceived by the market as mentioned in the statements, one finds remarkable congruence. Of the twenty grades mentioned in Table-I, in 9 cases (SI.Nos. 12 to 20 of Annexure I to this order) both the internal records and statements from the market established that the goods are modified starch; of 7 cases (SI.Nos.1 to 7), in three case (SI.Nos. 1 to 3), the grades can be. concluded as native starch as they were absent from both the records as well as statements and in 4 cases (SI.Nos. 4 to 7) the statements refer to th/ as native starch and no , reference was available in the register. Therefore, they have to be treated as native starch. 1 In 4 cases only (SI.Nos.8 to 11) out of 20 there is certain incongruence between both these evidences. In other words, congruence between both sets of evidences is a matter of rule'/' rather than exception. Of the 4 ,variations between the perception of market and internal records on analysis, it is found that in two cases they are not contradictory. In the case of "A" grade (SI.No.8 of the Annexure I), there is no mention in the internal records, except in three cases and there is confusion/contradiction in market perception with some calling it modified starch and some native starch. But in the case of these three despatches which were described as modified starch in internal records, the corresponding statements also confirmed them as modified starch. Therefore, in these cases, the goods have to be held as 'white dextrin' and 'PPC & CG' which are modified starches and not 'A' Grade )(as mentioned in the corresponding invoices. Therefore, the demand with regard to 'A' grade has to be ignored except for these three cases.A.-In the second case of Swan grade (SI.No.11) while the market statements refer to it as modified starch, the despatch register makes no mention. However, the evidence of market can be relied upon in the absence of any contradiction in judging this grade as modified starch. Thus, in 18 of the 20 Grades both the statements and record tally or there is no contradiction between them. However, in the case of ALN and D Grades (SI.No.9 & 10) (unlike the other two cases) there is

direct contradiction between the statements from the market (of M/s.Aditya Starch Products and Aditya Specialities in the case of ALN and M/s.Dixons Enterprises in the case of D Grade) and the entries in the despatch register which described them as modified starch."

As is seen from above, the adjudicating authority is primarily going by the statement of the buyers, in the absence of any other evidence to reflect that the appellant was actually manufacturing and clearing the Modified Starch. The fact that the adjudicating authority has extended the benefit to the assessee on the finding that they were clearing Native Starch in some cases lead to the inevitable conclusion that the appellant was manufacturing Native Starch also, which was being sold by them to his various customers, who needed the said Native Starch. In such a scenario, based upon the statement of some of the buyers, no conclusions can be made as to the clearances of the Modified Starch in the guise of Native Starch.

1 It is also seen that the appellants Manager (General) was put to cross-examination, wherein, he deposed as under:-

**"<u>Shri S.Balamurugan, Manager (Gen.), M/s.SPAC.</u>**

- He is looking after the production, clearance as per the requirement of Marketing and Accounts Department;
- Their raw material is Tapioca tuber. Peeling is done by primary and secondary dry peelings to remove the skins and washed by root washer to remove the soil and mug, rasped by using raspers. Fiber is extracted by centrifugal extractors in three stages coarse, fine and final stages. In this extent, they are adding sulphur-di-oxide, k "am water for better extraction. Starch milk comes out from final extractor is further washed and concentrated by separators and hydrocyclones. Concentrated milk is dewatered by dehydrating centrifuges. Output of centrifuges contain 30% moisture content. Wet starch is mixed with hot air at 160 degree centigrade wet starch is travelled with hot air in duct upto 100 feet and getting dried to 13% moisture maximum and cooled by hydrocyclones. Whole drying process is completed within 10 seconds. The material is sieved and packed.
- They are manufacturing tapioca Native starch and Modified Starch. They are categorizing native starch from 'A' grade to 'H' grade. It is categorized based on end users.

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- For textile industry, they are grading 'B'; packing industries, grade is 'C' and 'D'; fish processing industries, it is CFG 77, likewise. There is no difference in quality.
- Normal viscosity of native starch is around 60seconds. Show cause notice reference starch with 58% viscosity can never be a native starch is wrong. ISI itself prescribes minimum 50 seconds for tapioca starch. There is no limit for maximum level. Because, viscosity is based on quality of raw material. If the raw material is pre matured, viscosity is in lesser side. If it is matured tuber, it is in higher side and also depends on process conditions.
- Native starch is white coloured free flowing amorphous powder and consists of amylase and amylo pectin molecules and it turns blue colour with iodine solution. It forms hydrogels with water while heating.
- Modified starch is manufactured by treating native starch using chemical by heating or without heating. Some chemical groups are introduced during modification or depolymerisation takes place.
- For the basis for distinguishing native and modified starches, PH is one of the factor and it is not the deciding factor. Viscosity is one of the factor and it is also not the deciding matter.

Test of Iodine – native starch turns blue with iodine solution but modified starch turns purple with iodine solution.
Degree of substitution: for native starch, there is no degree of substitution, there is no chemical molecules present in native starch whereas, modified starch consists of chemical molecules like carboxyl groups, nitrogen, carboxyl etc.

- None of their clients has given statement to the effect that they have carried out these tests to determine that the products that they have received was native or modified.
- The department drew samples of all the varieties from their factory. The test reports of the samples drawn were not provided to them. They have asked for the same. SCN did not refer to any of the test report. They have asked for the test reports after receipt of the SCN and the same were not given.
- He is also aware that the department took samples from their customers. They or their clients have not been given test reports of those samples.
- With reference to question no 31 of statement dated 07.04.2008, he explained that for drying of wet starch, they use hot air around 160 degree centigrade. This is the process adopted by all starch manufacturing units irrespective of raw material viz., maize, wheat, corn etc. it is the temperature of hot air and the product is not exposed to direct heating. The purpose of this process is not for removing moisture content and he can demonstrate this in his factory. Exposure to hot air of such magnitude does not convert native starch to pyrodextrin.
- Starch is converted into pyrodextrin when they apply the direct heat to starch at the temperature of 170-200 degree centigrade for minimum 6 hours reaction by continuous agitation/mixing.
- They are adding sulphur-di-oxide, water in their extraction section for better extraction purpose, Addition of SO2 does not amount to modifying the starch. ISI standard allows 100ppm maximum level of sulphur-di-oxide presence in native starch. This is the common manufacturing process for all tapioca starch

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industries. In maize starch industry also, they are treating raw maize for 24 hours at 50 degree centigrade for extraction purpose. The modified starch dispatch record referred to in the SCN is not official record and it is maintained by lab chemist for client appraisal purpose. Client appraisal means that some of their customers visit the factory and look at their dispatches and for that purposes, they are maintaining. This record includes other clearances also.

- Some times their company engaged in trading also."

As is seen from the above, Manager (General) has also explained that the Native Starches being cleared by them were not converted into Modified Starches and none of their clients has also given any statement to the effect that the goods supplied to them were put to testing so as to determine as to whether the same was Native or Modified Starch. He again, in the said cross-examination asked for the test reports of the product.

It is also seen that some of the buyers of the appellant whose statements were recorded were also cross-examined, wherein it was clarified that they were captively using Native as also Modified Starch. Some of the buyers of the paper manufacturing industries or the corrugated boxes manufacturing industries deposed that both the types of starches can be used by them for manufacture of their final product and they do not conduct any test on the starch purchased by them. Some of them, in fact, deposed that they do not note a difference between Native or Modified Starch and use the starch sold by the assessee without testing the same.

As such, it becomes clear from the above material on record that there is no strict observance by the buyers for the use of either the Native Starch or the Modified Starch. It is also seen that no samples of starch purchased by the said buyers has been drawn by the Revenue and decided by them so as to establish that the starch

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purchased by the buyers were nothing but Modified Starch. In the absence of the same, oral statements made by the buyers that too, which have not withstood the test of cross-examination, cannot be made the sole basis for holding against the appellants. There is no effort by the Revenue to establish that during the period in question, the Native Starch was converted into Modified Starch by undertaking the conversion process. When the Commissioner himself has categorised the statements of the buyers into various categories and have extended the relief to the appellant, it has to be held that such statements cannot be made the sole basis for confirmation of demand.

The allegations proceeds to get support from the fact that the prices of the starch supplied by them to their buyers were very high, thus leading to the conclusion that the same would be only Modified Starch and not Native Starch. The appellants have explained that there are various factors which could influence the pricing. The price variation could be on the basis of special packing, low moisture and food grade micro-biological prescription. In the case of CFG 77 and MN 575, which are supplied to Food and Pharma Industries, the whole plant is sanitized and micro-biological parameters and observed and the product is prepared under various hygienic conditions. The same involve lot of labour, time and other factors, which could ultimately reflect in the pricing of those products. We are of the view that whatever may be the reason for the pricing of the goods, this fact by itself would not tilt the weight of the evidence in favour of the Revenue. Based upon the prices of the final product, it cannot be concluded, whether the same was Native Starch of Modified Starch.

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The allegations made by the Revenue are required to be substantiated by production of positive and tangible evidences.

Similarly, the observations of the Commissioner that they have given various types of grades to the Native Starches which according to the statement of their buyers do not differ much in quality, is indicative of the fact that the said Native Starches cleared to the buyers were not Native but Modified Starch. Though, the appellants have explained that various grades give to the Native Starch are for the purpose of testing the same for supplies to be made to various industries. Whereas, 'A' Grade was supplied to all the industries, Grade 'B' was meant for supplies to textile industries and Grade 'C', 'G' & 'H' is for corrugated box manufacturers. Similarly, they have explained the other grades. However, it is appreciated that the said grades given by the appellants to the various types of Native Starches produced by them is their business tactics and has no relevance to the fact that such grading would convert them into Modified Starches. The fact that what was cleared can be decided only by way of testing the same and not based upon the assumptions and presumptions. Similarly, concluding that the clearances were of Modified Starches based upon the details given in the dispatch register cannot be upheld. It already stands explained by Shri S. Balamurugan through his cross-examination that the said record is maintained for marketing purposes to show the prospective buyers about the sale of a particular variety of starch. As such, the register is for the purpose of seeking appraisal and cannot be adopted to conclude that clearances were of Modified Starches. It is to be kept in mind that it is not the Revenue's case, that they were clearing excess starch products than what was being reflected in their records. The allegation is that Modified Starches were cleared in the guise of Native Starch and as such the allegation cannot be substantiated by entries made in the dispatch register.

Apart from the above, we find that when the appellant requested for the test results of the samples to nail the truth, but the same was refused by the Revenue by referring to certain decisions of the apex court laying down that inasmuch as, the test reports were not the basis of the show-cause notice and were not relied upon documents, the non-supply of the same cannot be held to be any violation of the principles of natural justice. However, we note that the importance of the test reports in a given a case has to be adjudged based upon the facts and circumstance of a particular case. As we have already held that the material relied upon by the Revenue for confirming the demand against them is not sufficient to come to an adverse finding, the test report would form valid and legal documents so as to adjudge the dispute ~~to~~ in either way. It is not understood that when the samples were drawn by Revenue in the presence of the appellant and sent to the chemical examiner for testing, then why the results of the same were not provided to the assesse.

The answer to the above question probability lies in the fact that the said test reports were in favour of the assessee. It is seen that when the matter came up before the Tribunal on earlier occasions and a grievance to the effect of non-supply of test reports was made, the Tribunal directed the Revenue to supply the test reports to the appellant. The same stand produced before us now. On going through the same, we note that the test certificates of the tests conducted by the National Test House, Kolkata hold the goods in question as Native Starch. It is further seen that the samples were also got tested from Central Tuber Crops Research Institute, Trivandrum, Kerala and the same were held to be Native Starch, by referring to various specifications. Admittedly, the said authorities are the experts in the field and their opinion, unless demonstrated to be erroneous, cannot be legally brushed aside. In the absence of any other evidence, and in the light of the above test reports, which conclusively establishes the samples to be that of Native Starch, we find no reasons to uphold the impugned order of the Commissioner. The Tribunal in the case of *Reliance Cellulose products Ltd. Vs Collector of Central Excise, Hyderabad* reported in *1997 (93) E.L.T.646 (S.C.)* has observed that the opinion of the Chemical Examiner and Chief Chemist of the Government has to be given the status of an expert opinion. In terms of Rule 56 of the Central Excise Rules, the Central Excise officer is empowered to take samples for the purpose of testing and he has to communicate the result of such tests to the manufacturer. Further, in the case of Commissioner of *Central Excise, Customs & Service Tax, Belgaum Vs M/s. Murdheswar* reported in *2016 (37) E.L.T. 384 (Tri.-Bang.)*, the opinion of the Chemical Examiner examining was adopted for classification purposes.

In view of our foregoing discussions, we find that there is virtually no evidence worth upholding, produced by the Revenue so as to conclude that what was cleared by the appellants during the period in question was not Native Starch but was Modified Starch. On the other hand, as already observed, the test results of various samples drawn by the Revenue from the product available during their visit in the assessee's factory has established it beyond doubt that what was

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being cleared by the assessee was Native Starch and not Modified Starch. We further note that by holding the clearance of Native Starch as that of Modified Starch, Revenue has added the clearance of the same in the value of clearances of Modified Starch which consequently stand exceed the clearances value of small-scale exemption. Duty is accordingly confirmed.

As we have already held that the Native Starches cleared by the appellants were in fact Native and not Modified Starch, their clearance value cannot be added in the clearance value of Modified Starch, in which case, the clearance value of Modified Starch would remain within the exemption limit of small-scale exemption notification. Accordingly, we set aside the impugned order of confirming ~~of~~ demand of duty against the main appellants M/s. Spac Tapioca Products (India) Ltd., along with setting aside of penalties and the confiscation of the goods.

As ~~In relation to~~ the appeal of M/s. Spac Tapioca Products (India) Ltd., stands allowed by us, the penalty imposition on Shri S. Balakrishnan is also required to be set aside. We order accordingly. Accordingly, the same is set aside and appeal is allowed with consequential relief to the appellant.

In a nutshell, the impugned order is set aside and both the appeals ~~is~~ are allowed with consequential relief, if any, to the appellants.

(Pronounced in open court on 07-12-2017)

05/12/2017 28/11/17

(MADHU MOHAN DAMODHAR)
MEMBER (TECHNICAL)

(ARCHANA WADHWA)
MEMBER (JUDICIAL)

**ksr**
14-11-2017

Customs, Excise & Service Tax Appellate Tribunal

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