

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

E/590/2009

(Arising out of Order-in-Original No. 9/2004 dated 5.10.2004
passed by the Commissioner of Central Excise, Pondicherry)

M/s. ST-CMS Electric Company Pvt. Ltd. Appellant

Vs.

Commissioner of Central Excise, Puducherry Respondent

Appearance

Ms. Sweta Giridhar, Advocate for the Appellant
Shri B. Balamurugan, AC (AR) for the Respondent

CORAM

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of Hearing / Decision: **30.08.2017**

Final Order No. 41909/2017

Per Bench

The appellants are a power generating company generating electricity by lignite based power plant. They are registered with the Central Excise Department and were obtaining Low Sulphur Heavy Stock (LSHS) falling under Heading 27.13 of CETA without payment of duty availing the exemption contained in Sl. No. 29 of Notification No. 6/2002-CE dated 1.3.2002. Exemption to LSHS is available when it is

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used as fuel for generation of electricity by the electricity undertakings owned or controlled by the Central Government or any State Governments or local authority or State Electricity Board or a person licensed under Part - II of the Indian Electrical Act, 1910 and engaged in the business of supply of electrical energy. The department was of the view that the appellant being a private limited company are not controlled or owned by the TNEB ^{& and} is not eligible for the benefit of exemption. Secondly, that as lignite is primary fuel for generation of electricity and LSHS was not used as a fuel for generation of electricity, they are not eligible for the exemption. Show cause notice was issued proposing to deny the benefit and for demanding duty, interest and for imposing penalty. After adjudication, the original authority confirmed duty of Rs.47,02,274/- along with interest and imposed penalty of Rs.15 lakhs and also denied the benefit exemption. Hence this appeal.

2. On behalf of the appellant, Id. Counsel Ms. Sweta adverted to Sl.No. 29 of the said Notification No. 6/2002. She submitted that the word used in Column II of the Notification is that 'intended for use as fuels for the generation of electrical energy'. In the appellant's power plant, coal is the main input used for generation of electricity. However, LSHS is used for lighting up the coal and is therefore a secondary fuel. It is used for starting up / ignition of furnace and this is the essential fuel

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for generation of electricity. Although coal is used for continuous generation of electricity, LSHS is also intended for use as fuel for the generation of electricity since it is used for ignition of the furnace. It is also submitted by her that the said issue was considered by the Tribunal in their own case for an earlier period reported in 2008-TIOL-2581-CESTAT-MAD, which relied upon the decision in the case of Neyveli Lignite Corporation Vs. CCE, Puducherry – 2007 (209) ELT 310 and observed that LSHS would be eligible for exemption when used as a secondary fuel. She also submitted that the Notification was amended later whereby an Explanation was added. The appellant would thus fall within the Explanation which states that 'generating company' means a generating company as defined under section 2(4A) of the Electricity (Supply) Act, 1948 and which has been granted consent/permission in writing under section 44 of the Electricity (Supply) Act, 1948. She referred to the very same judgment in the appellant's own case and submitted that the Tribunal in the said decision had also observed that for post-amendment, the appellant would be eligible for the benefit of the Notification.

3. Ld. AR Shri B. Balamurugan reiterated the findings in the impugned order. He submitted that the fuel so obtained availing exemption should be used as fuel for generation of electricity. The LSHS is used by appellant for unloading from



LSHS to fuel storage tanks, testing and start up. That such use cannot be termed as used for generation for electricity.

4. Heard both sides.
5. In the appellant's own case, for the earlier period, the Tribunal denied the benefit of exemption on the ground that they do not fall within the category of persons stated in the notification. However, in post-amendment Notification 3/2006, an explanation was added whereby the appellants are covered by the notification. In the said case, the Tribunal had also an occasion to consider whether the appellant would be eligible for the exemption benefit when it is used as a secondary fuel for generation of electricity. In paragraphs 10 and 11 of the said decision, the Tribunal has observed as follows:-

"10. Another issue which arises in this case is whether the benefit of the Notification was admissible to secondary fuels like LSHS. This issue is already covered in favour of the appellants by our decision in Neyveli Lignite Corporation Ltd. Vs. Commissioner of Central Excise, Pondicherry - 2007 (209) E.L.T. 310 (Tri. - Chennai) = 2006-TIOL-1733-CESTAT-MAD. As in the instant case, LSHS was used as secondary fuel in the thermal power station of M/s.NLC. The question arose as to whether the Corporation could claim exemption under SI.No.19 in the Table annexed to the Notification No.5/98-CE. It was argued by the Revenue that the benefit was available only to primary fuels and not to secondary fuels. Negating this argument, this Bench held as under:-

It should be held that the LSHS used as secondary fuel in the start-up of boilers in the Thermal Power Station of M/s. NCL was intended for use as fuel for the generation of electricity. If this be so, the LSHS used as secondary fuel for 'flame stabilization' i.e. for sustaining the process of combustion of lignite (primary fuel) must a fortiori be held to be intended for use as fuel for generation of electricity. Both start-up operation and flame stabilization are integral to the generation of electricity. In other words, the LSHS used as secondary fuel in start-up of boilers and in flame stabilization was eligible for procurement without payment of duty during the period of dispute by virtue of exemption provided in the relevant



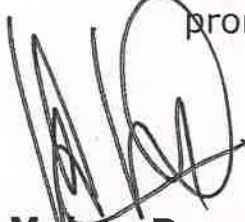
Notifications. Accordingly, the first issue is held in favour of the assessee."

11. For the reasons already recorded, it is held that the benefit of exemption under SI. No.29 in the Table annexed to Notification No.6/2002 dated 1.3.2002 was not admissible to M/s.ST-CMS who were not eligible for the benefit during the period of dispute. M/s.ST-CMS were not an electricity undertaking owned or controlled by TNEB, nor a person who had obtained licence under Section 3 or sanction under Section 28 of the 1910 Act for supply of electrical energy to TNEB. Hence they were not eligible for the benefit during the said period. Compliance with procedural conditions did not render them eligible, nor can they claim eligibility for the period of dispute on the strength of anything contained in the 1948 Act. However, with the dropping of the proposal of revocation of registration and cancellation of Annexure - I Certificate, they have been in a position to claim the benefit of the Notification from 1.3.2003 as a "generating company".

6. The Tribunal has followed the judgment in the case of Neyveli Lignite Corporation (supra), in which the said issue has been discussed in detail. In the present case, without such LSHS, the appellant cannot commission or start up the ignition of the furnace. That therefore it is an essential fuel for generation of electricity for the appellant. Therefore, denial of benefit of notification is unjustified.

7. In the result, we set aside the impugned order and allow the appeal with consequential relief, if any.

(Operative portion of the order was pronounced in open court)



(Madhu Mohan Damodhar)
Member (Technical)



(Sulekha Beevi C.S.)
Member (Judicial)

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सहायक पंजीकार / Asst. Registrar
सीमाशुल्क उत्पादशुल्क एवं सेवा कर
अपील अधिकारी / (CESTAT)
चेन्नई / CHENNAI