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

S.No.	Appeal No.	Appellant	Respondent	Arising out of Impugned Orders passed by Commr. (A), CE & ST, LTU Chennai & Commr. CE & ST, LTU Chennai
1.	E/271/2009	EID Parry (India) Ltd.	CCE & ST, LTU Chennai	OIA No.01/2009 dt. 20.01.2009
2.	E/289/2009	EID Parry (India) Ltd.	CCE& ST LTU Chennai	OIA No.04/2009 dt. 16.02.2009
3.	E/241/2010	EID Parry (India) Ltd.	CCE& ST LTU Chennai	OIA No.08/2010 dt. 09.02.2010
4.	E/250/2010	CCE & ST, LTU Chennai	EID Parry (India) Ltd.	OIA No.08/2010 dt. 09.02.2010
5.	E/395/2010	EID Parry (India) Ltd.	CCE & ST, LTU Chennai	OIO No. LTUC/100/2010-C dt. 30.03.2010
6.	E/442/2010	CCE & ST, LTU Chennai	EID Parry India Ltd.	OIO No.LTUC/ 100/2010-C dt. 30.03.2010
7.	E/40323/2013	EID Parry (India) Ltd.	CCE & ST, LTU Chennai	OIA No.64/2012 dt. 30.10.2012

Appearance:

Shri S. Muthuvenkatraman, Advocate
For the Assessee

Shri B. Balamurugan, AC (AR)
For the Revenue

CORAM :

Hon'ble Ms. Sulekha Beevi C.S. Member (Judicial)
Hon'ble Shri B. Ravichandran, Member (Technical)

Date of hearing: 13.09.2017
Date of Pronouncement : 15.09.2017

FINAL ORDER No. 42067- 42073/2017

Customs, Excise & Service Tax Appellate Tribunal

Per B. Ravichandran

These seven appeals are with reference to correct classification of the product called "ABDA" manufactured and cleared by the appellant-assessee [M/s.EID Parry (India) Ltd.] and the dutiability of the said product when cleared from EOU to DTA. The connected dispute of applicability of limitation and liability to penalty is also subject matter of dispute. Five appeals are by the appellant-assessee and two appeals are by the Revenue.

2. The brief facts of the case are that the appellant-assessee are engaged in the manufacture of 'Plant Vitalizer' with a brand name "ABDA". They have claimed the classification of the said product under Central Excise Tariff Heading 3101.00.99 as "Animal or Vegetable Fertilizers". The Revenue objected to the said classification and initiated proceedings to reclassify the product under Chapter 38 as 'Miscellaneous Chemical Products' and more specifically as "Plant Growth Regulators" under CETH 38089340. The consequence of such reclassification is the liability of the appellant-assessee for a differential duty as the product as a fertilizer is eligible for full exemption.

3. Appeal Nos. E/271/2009, E/289/2009 and E/241/2010 were against orders passed by Commissioner (Appeals), LTU, Chennai on

the classification of ABDA. Revenue also filed Appeal No.E/250/2010 against the same impugned OIA dt. 09.02.2010 of Commissioner (Appeals), LTU (challenged by assessee in Appeal E/241/2010) on the ground that the Revenue is correct in reclassifying the product as done by the original authority under 38089990.

4. Appeal No.E/395/2010 is against original order dated 30.3.2010 passed by Commissioner, LTU. This appeal dealt with classification of ABDA as well as concession available to the appellant-assessee when cleared to DTA in terms of Notification No.23/2003 dt. 31.1.2003.

5. Revenue also filed Appeal No.E/442/2010 against this order of the Commissioner regarding liability of Education Cess on the goods cleared by the appellant-assessee as 100% EOU to DTA.

6. Appeal No.E/40323/2013 is by the appellant-assessee with reference to their duty liability for DTA clearance and also liability to Education Cess.

7. The Ld. Counsel representing the appellant-assessee submitted on the following points :

(a) The department drew sample and sent it to Regional Centre of Organic Farming, Bangalore which is coming under Ministry of Agriculture, Government of India. The Regional Director in his test report dt. 2.1.2007 categorically stated that the product is organic manure and the sample passed as per Fertilizer Control Order, 2006. The Revenue has refused to accept the finding of the Regional Director and proceeded to classify the product as "Plant Growth Regulator" under Chapter 38. He submitted that ABDA is a plant fertilizer which improves the productivity and yield when applied. Thus, it is not regulating plant growth. Regulator should have a function of increasing or inhibiting specified activities of the plant. The ABDA is more in the nature of fertilizer of vegetable origin as can be seen from the constituents.

(b) The Revenue adopted different classification in different proceedings. The show cause notice, original authority and first appellate authority indicated different classifications for the product. HSN Explanatory Notes and Chapter Notes which are not relevant were quoted.

(c) The contention of the department that all plant growth media and promoters should necessarily be classified only under Chapter 38 is incorrect. The product ABDA satisfied the various descriptions in Chapter 31. Reliance was placed on the decision of the Tribunal in *Northern Minerals Ltd. Vs CCE New Delhi* – 2001 (131) ELT 355 (Tri.-Del.) which was followed in 2002 (142) ELT 426 (Tri.-Del.) which was upheld by the Apex Court in 2003 (153) ELT A 301 (SC).

(d) Regarding exemption available to the appellant-assessee under Notification No.23/2003-CE, it is contended that paraffin wax is used by the appellant-assessee as a consumable and not as a raw material and hence the exemption is rightly available to them.

(e) Regarding the liability to additional Education Cess when cleared to DTA, reliance was placed on the decision of the Tribunal in *Kumar Arch Tech. Pvt. Ltd. Vs CCE Jaipur* - 2013 (290) ELT 372 (Tri.-LB) and *Godrej Industries Ltd. Vs CCE & ST Surat* – 2016 (338) ELT 435 (Tri.-Ahmd.).

(f) The extended period demand is not tenable in the present case. The dispute is the classification of the product. The appellant informed the department on 1.8.2005 itself giving details of the composition of the product and their intent to clear it under Chapter 31 without payment of duty. Accordingly, there is no tenable reason to invoke suppression etc. for a demand of extended period and also to impose penalties on the appellant-assessee.

8. The Ld. A.R opposed the appeals by the appellant-assessee. He submitted that the test report of the Regional Director, Regional Centre of Organic Farming, Bangalore only indicated the constituents of the sample. He is not competent to classify the product. Further, the presence of Nitrogen, Phosphorous, Potassium in the sample is only to a small percentage. The claim of the appellant-assessee in

Customs, Excise & Service Tax Appellate Tribunal product literature has been considered by the original authority and a decision is taken. It is clear that ABDA ensures uniform crop maturity, healthy vegetative growth resulting in plentiful harvest. The product per se is not fertilizer. Even the appellant is not marketing the same as fertilizer. They are marketing the same as "Plant Vitalizer". He supported the findings of the lower authorities.

9. On the appeals filed by Revenue, he submitted that the original authority relied on a decision of the Tribunal in *Sarla Performance Fibres Ltd. Vs CCE Vapi* – 2010-TIOL-408-CESTAT-AHMEDABAD = 2010 (253) ELT 203 (Tri.-Ahmd.). The department has not accepted the said order and as such the present appeal is filed.

10. We have heard both sides and perused the appeal records.

11. As noted earlier in this order, the main issue for decision is the correct classification of ABDA manufactured by the appellant-assessee. The actual nature and constituent of the product is not in question. ABDA is manufactured using the following items :

Quartz Sand (97.97%)

Paraffin Wax (1.50%)

Neem Extract (0.12.%)

Algae (0.40%)

Aada Thoda Plant Extract (0.01%) and

pigments, solvents etc. for process

The chemical composition of the product was subjected to test by the department. The test report dt. 2.1.2007 of Regional Director of Regional Centre of Organic Farming, Bangalore makes it clear that the impugned product contains Nitrogen 0.7%, Phosphorous 0.4%, Potassium 0.6%. The report states that the product is organic manure and the sample is passed as per FCO, 2006. The Revenue did not accept this report. On careful perusal of the impugned orders, we are unable to find out detailed reason for rejection of the findings by an expert. The Revenue proceeded to classify the product under Chapter 38, more specifically as "Plant Growth Regulator" under Heading 38089340. The product literature available on the package was also reproduced in the impugned orders. A reference was made to HSN Explanatory Note which is applicable for classification under Heading 3824. We find no relevance of such note for the present dispute. Further, it was stated that the Fertilizer Control Order, 1985 talks about organic fertilizer as a substance made up of one or more unprocessed materials of a biological nature (plant / animal) and may include unprocessed mineral materials that have been altered through micro biological decomposition process. Thereafter, the impugned order proceeds to state that the product of the appellant-assessee is not manufactured through micro biological decomposition process. We note that such decomposition process is not mandated in respect of all kind of organic fertilizer. It states that substances made up of one or more unprocessed materials of biological nature. Thereafter an inclusive point is made for unprocessed mineral materials also. In any case, the admitted fact is that as per the chemical composition, impugned goods contain all the fertilizing elements namely, Nitrogen, Phosphorous and Potassium. No other active ingredient is shown (other than carbon). The quartz sand is apparently a volume filler.

12. Board in its clarification dt. 19.5.1998 examined the scope of plant growth regulators and fertilizers for classification. It was recorded that as per HSN Explanatory Note, plant growth regulators are applied to alter the life process of the plant so as to accelerate or retard growth, enhance yield, improve quality of facilitate harvesting etc. Plant hormones are one type of plant growth regulators. Synthetic organic chemicals are also used as plant growth regulators. The circular further clarified that fertilizers are materials added to soil and, sometimes to foliage to supply nutrients to sustain plants and promote their abundant and fruitful growth. It was further stated in the said circular that while notification under F.C.O is irrelevant for classification, it is necessary to consider whether or not product contains N, P, or K for classifying the product as micronutrients / plant growth regulators or fertilizers. In the present case, admittedly, ABDA

contains all the fertilizing elements (N, P & K). The impugned orders did not bring out any technical evidence to state that the impugned goods are more in the nature of regulators than general growth promoters. Admittedly, plant growth regulators has a role for controlled growth. It will include retardation also whereas if the product is containing fertilizing elements which aims to enhance growth and plentiful yield of the plant, the same cannot be called as a regulator. It will be more akin to a fertilizer. Appellant-assessee are manufacturing ABDA using plant products and sand with wax. The usage of the product is also clearly indicated as for plentiful harvest.

13. In *Northern Minerals Ltd.* (supra), the Tribunal, relying on the product literature which indicated the use as "plant growth promoter", held the product to be classified as 'Bio-fertilizer'. The Tribunal examined the scope of application of plant growth regulators and also fertilizers. The Tribunal held that plant growth promoter cannot be considered synonymous with plant growth regulator. A plant growth promoter will only promote growth and will not inhibit. On the other hand, a plant growth regulator can enhance, promote or otherwise alter physiological processes in plant. Relying various technical literature, the Tribunal made the distinction between plant growth regulator and the plant growth promoter. In the present case, ABDA is marketed as Plant Vitalizer and the usage indicated in the literature

clearly shows that they are not plant growth regulators. They will be more in the nature of plant growth promoter / fertilizer. As such, on careful consideration on the facts placed before us, we are of the considered opinion that product is rightly classifiable under Chapter Heading 31010099 as "Other Animal or Vegetable Fertilizer".

14. Regarding the issue of eligibility of the appellant for concessional rate when cleared to DTA, we note that the exemption was denied on various grounds. One of the grounds is the violation of condition No.3 (i) of Notification No.23/2003-CE dt. 31.3.2003. The said condition states that the goods are to be produced or manufactured wholly from raw materials produced or manufactured in India. The appellants admittedly used paraffin wax imported into India. They have claimed that they have used the said paraffin wax as a consumable and not as a raw material. We are not in agreement with the said assertion. It is clear from the submissions made by the appellant and also from the letter dt. 1.8.2005 submitted to the department, that paraffin wax is one of the raw materials in the manufacture of ABDA. We have perused the manufacturing process for production of ABDA. It is clear that paraffin wax is used as a raw material in the process and the claim of the appellant that it is only consumable is misplaced. The detailed processes indicate the usage of paraffin wax for coating of granules. Even in the technical literature

given by the appellant, it is clearly stated that paraffin wax is used for coating so that the plant extracts and the dye do not get removed from the base material. The paraffin wax loses its identity as soon as it is coated over the sand. It is apparently a raw material in the manufacture of ABDA. Simply because it loses its identity as a wax does not make it a consumable item. As such for non-fulfilment of the condition of using goods manufactured or produced in India, the appellant-assessee is not eligible for the concession under Notification No.23/2003-CE.

15. Regarding calculation of correct amount of cess payable on the goods cleared by the appellant-assessee to DTA, we note that the original authority in order dt. 30.03.2010 held that once the education cess is added to the customs duty to arrive at aggregate of customs duties, the question of charging education cess again does not arise. He relied on the decision of the Tribunal in *Sarla Performance Fibres Ltd.* (supra). We note that the Revenue in the appeal contended that they are filing an appeal against the said order and hence contested the findings of the original authority. We note that the said decision of the Tribunal has been affirmed by the Hon'ble Supreme Court in *Meghmani Dyes and Intermediates Ltd.* – 2014 (307) ELT A79 (SC). As such, we find, the appellant's additional liability on education cess as demanded is not sustainable.

16. The final point for decision is whether the demands wherever raised invoking extended period are barred by limitation or not. Admittedly, the appellant addressed a letter dt. 1.8.2005 to the jurisdictional Deputy Commissioner clearly stating the process of manufacture of ABDA along with constituents and their intention to clear the goods under NIL rate of duty under Heading 31010099 as 'fertilizer'. It is also intimated by them that they have been clearing the goods on payment of duty @ 16%, however with immediate effect they will be rectifying it. The said letter was sent to the jurisdictional Superintendent also. The impugned orders recorded that appellant-assessee did not include the details of clearance of this item in their ER-1 returns. Accordingly, demand for extended was held to be sustainable. We note that the intimation to the department on 1.8.2005 has not been followed up for any action by the jurisdictional officers. In fact, the sample was drawn and sought to be tested only in November 2006. The test report came on 2.1.2007 and thereafter a SCN dt. 7.2.2007 was issued. We find no justification for demand invoking extended period in the face of present facts. The intimation given by the appellant-assessee is categorical and specific. As such, no suppression of fact can be invoked against the appellant-assessee on this issue relating to classification of ABDA. Even otherwise, we note that the question involved is of technical interpretation and the

opinion of the Regional Director itself shows that the product is to be considered as organic manure. On this count also, we find no justification to invoke extended period to demand differential duty. We are in agreement with the submission of appellant on limitation.

17. In view of the above discussions and analysis, we hold that "ABDA" manufactured and cleared by the appellant-assessee is correctly classifiable under Heading 31010099. The claim for exemption under Notification No.23/2003-CE, wherever duty is payable is not sustainable in view of violation of condition No.3 (i) of the notification as discussed. Demand for differential duty, if any, will be applicable only for normal period. The appeals by the appellant-assessee as well as Revenue are disposed in the above terms.

(Pronounced in court on 15.09.2017)

15.9.17.
(B. Ravichandran)
Member (Technical)

(Sulekha Beevi C.S)
Member (Judicial)

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Excise & Service Tax Appellate Tribunal

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