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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066

EXCISE APPEAL BRANCH

Appeal No. E/3462/2006-3464/2006 - EX[DB] & E/2305/2007 Date 23/10/2009

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S CHEMICOS(A UNIT OF CHEMICOS UNIVERSAL P LTD)
4TH KM,VILL-RUKANPUR,SHAMLI ROAD,MUZAFFAR NAGAR(UP)

M/S CHEMICOS(A UNIT OF CHEMICOS UNIVERSAL P LTD) Appellant

Vs

C.C.E.MEERUT Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 795-798/ **2009 EX[DB]** dated 22-10-09 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent
   C.C.E.MEERUT
   MANGAL PANDEY NAGAR,MEERUT.
2. Adv. / Consult
   MR.K.K ANAND
   A-5,BASEMENT,LAJPAT NAGAR-III NEW DELHI-24
3. S.D.R
4. ~~J.C.D.R.~~
5. Bar association, CESTAT, New Delhi
6. Director Publications, Customs, Excise. I.P. Estate, New Delhi
7. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3
8. Commercial Laws of India Pvt Ltd. Post Bag No. 1033, No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9. Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10. M/s Manupatra Information Solutions Pvt Ltd. Excise & Customs Cases B-37, Sector - 1, Noida - 201301, Gautam Budh Nagar, (UP)
11. M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
12. Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
13. Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
14. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-15
15. LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
16. Office Copy
17. Guard file

Assistant Registrar
(Excise Appeal Branch)

18. SH AVADHESH GOPAL AGARWAL
    30,GAJAWALI,RURKI ROAD,MUZAFFARNAGAR(UP)
19. M/S MASCOT CHEMICALS
    C-6,INDUSTRIAL AREA,KAIRANA ROAD,SHAMLI,MUZAFFARNAGAR(UP)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. II

DATE OF HEARING : 01/9/09.

Excise Appeal No. 3462 of 2006

[Arising out of the Order-in-Original No. 43-45/Commr./Meerut-I/2006 dated 27/07/2006 and 14/8/06 passed by The Commissioner of Central Excise, Meerut.]

M/s Chemicos (a unit of Chemicos Universal Pvt. Ltd.) — Appellant

Versus

CCE, Meerut — Respondent

Excise Appeal No. 3463 of 2006

M/s Mascot Chemicals — Appellant

Versus

CCE, Meerut — Respondent

Excise Appeal No. 3464 of 2006

Shri Avadesh Gopal Agarwal — Appellant

Versus

CCE, Meerut — Respondent

Excise Appeal No. 2305 of 2007

[Arising out of the Order-in-Original No. 30/Commr./Meerut-I/2007 dated 31/05/2007 (dispatch on 02/7/07) passed by The Commissioner of Central Excise, Meerut.]

M/s Chemicos (a unit of Chemicos Universal Pvt. Ltd.) — Appellant

Versus

CCE, Meerut — Respondent

Appearance

Shri K.K. Anand, Advocate – for the appellant.

Shri S.K. Panda, Authorized Representative (Jt. CDR) – for the Respondent.

CORAM : **Hon'ble Shri D.N. Panda, Judicial Member**
Hon'ble Shri Rakesh Kumar, Technical Member

FINAL Order No. 795-798/08-EX Dated : ____________

ORDER

Per. D.N. Panda :-

Appeal nos. E/3462-3464/06 arises out of order of adjudication dated 27/07/2006 and E/2305/07 arises out of order-in-original dated 31/05/07. In the first batch of three appeals as well as in appeal case No. E/2305 of 2007 arose in terms of adjudication order dated 31/5/07, there is a common issue involved as to classification of the goods of the appellant. The appellant makes sale of the goods under the trade name Chemisol 68 and Chemisol 35. Claim of the appellant is that its goods fall under the Classification No. 2711.99 while Revenue claims that the goods shall fall under the Class 2710.19.

For convenience of reading, we reproduce both the class of goods as appearing in the tariff entry under Chapter 27.

The goods falling under Class 2710 has been recognised by Customs Tariff Act, 1975 through Classification criteria in the following manner :-

Heading No.	Sub-heading No.	Description of goods	Rate of duty
"27.10		**Petroleum oils and oils Obtained from bituminous Minerals, other than crude; Preparations not elsewhere Specified or included, containing by weight 70% or more of petroleum oils or of**	

		oils obtained from bituminous minerals, these oils being the basic constituents of the preparations	
	-	*Motor spirit, that is to say, any Hydrocarbon oil (excluding crude Mineral oil) which has its flash Point below 25ºC, and which either By itself or in admixture with Any other substance, is suitable For use as fuel in spark ignition engines*:	
	2710.11--	Special boiling point spirits (other than Benzene-Tuluol) with nominal boiling point range 55-155ºC	16%
	2710.19-- -	Other Other :	16%

Similarly the goods recognised under the Class 2711.19 is described in the following manners :-

Heading No.	Sub-heading No.	Description of goods	Rate of duty
"**27.11**		**Petroleum gases and other gaseous hydrocarbons**	
	2711.19 -- -	Other In gaseous state :	16%

This heading covers **crude** gaseous hydrocarbons obtained as natural gases or from petroleum, or produced chemically. **Methane** and **propane** are, however, included even when pure.

These hydrocarbons are gaseous at a temperature of 15ºC and under a pressure of 1,013 millibars, (101.3 kPa). They may be presented under pressure as liquids in metal containers and are often treated, as a safety measure, by the addition of small quantities of highly odoriferous substances to indicate leaks.

The criteria laid down in aforesaid classification brings the goods to proper classification as per guideline note appearing under HSN classification as reproduced above. Revenue drew the sample of goods of the Appellant and sent the same for testing. Both the sides agreed that reports of the concerned laboratory appears in the public record at page 68 to 77 of the appeal folder.

2. Learned Counsel Shri Anand appearing on behalf of all the Appellants points out that at page 77 of the appeal folder, the testing laboratory could not come to a conclusion for which following remarks appear :-

> "It is not possible by this laboratory to say whether the product under reference either by itself or in admixture with any substance is suitable for use as fuel in spark ignition engine."

While perusing page 77 of the appeal folder containing laboratory report dated 12/12/03 it is noticed that the sample that was drawn and sent to laboratory was in the form of colourless clear free flowing liquid. It is a mixture mainly of mineral hydrocarbon together with organic solvents. The percentage mineral hydrocarbon is more than 70% by weight. It does not show any visible suspended matter and extraneous matter and having the following characteristics :-

Flash point	-	below 25°C
Relative density at 17°C	-	0.6670
Boiling range	-	35 - 120°C

From the above laboratory report dated 12/12/03, it appears that there was no further effort made by Revenue to send sample

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to any other laboratory for an objective analysis although inability of the testing laboratory was expressed by the report.

3. When the matter stood thus, a show cause notice dated 24/4/06 was issued for the period April 2004 to January 2006 against Chemicos. Similarly other two show cause notices dated 24/3/05 and 27/4/05 were issued for the period March 2004 and April 2004 to March 2005 respectively against Mascot Chemicals and Chemicos disputing the classification. While clubbing of clearance was proposed in show cause notice dated 24/3/05 alongwith classification dispute, Authority alleged that goods in question is classifiable under sub-heading 2710.11.

4. According to Appellants, Pentane was received by them from the U.P. Petrochemical Complex of GAIL. The declaration annexed to the invoices issued by GAIL exhibits that Pentane was cleared from the plant at Pata has the following specifications:

Density at 15°C	:	0.65 gm/cc(Max Distillation Range)
IBP	:	35°C (Max)
Dry out	:	65°C (Max)
Flash Point	:	<25°C

The Pentane received as above from GAIL was subjected to the process of distillation to obtain the product called Chemisol-35 and Chemisol-68, which the party have claimed to be Iso-Pentane and N-Pentane respectively. As per the manufacturing process explained by the Appellants vide their letter dated 12.6.2002, addressed to the jurisdictional Range Superintendent, the final boiling point of Chemisol-35 is 35° and it contains C_3 C_4 and C_5 compounds. Similarly, the boiling point range of Chemisol-68 is 35°C to 75°C and it contains C_4, C_5, C_6 & C_7 compounds. The boiling point range declared by the party also indicates that

Pentane is the predominant compound in Chemisol 35 while Hexane is the predominant compound in Chemisol 68. Besides, in the statements dated 21.03.2002 and 16.01.2002, Shri Avdesh Gopal Agarwal, Director of M/s Chemicos, a unit of Chemicos Universal (P) Ltd. (Proprietor of M/s Chemicos upto 31.05.05) stated that : Chemisol-35 and Chemisol-68 were manufactured by distillation of Pentane by taking cuts at 36°C and 68°C, respectively and that these were in Liquid form at normal temperature and no Cryogenic Tanks were used to store them in liquid form.

5. The appellant pleaded before the learned Adjudicating Authority for its defence to classify the goods under the category 2711.19 claiming that the raw material is procured from GAIL and that raw material is Pentane. Such material falls in the Class of 2711. The goods in question is a gas in liquid form and transported by tank. Getting the raw material from GAIL, the appellant processed the same using technology and finished product with Hydro Carbon composition is obtained. The raw material is subjected to process of distillation and Chemisol 35 and Chemisol 68 are trade name of finished goods which were manufactured. The finished goods so obtained were being used in solvent industries as thinner. The finished goods were liquefied gas and rightly be classifiable under sub-heading 2711.19.

6. Learned counsel Shri Anand appearing on behalf of all the Appellants submits that when laboratory report was inconclusive as apparent from page 77 of the appeal folder, this appellant shall be squarely covered by the judgment of the Tribunal in the case of **Jagdamba Petroleum P. Ltd. vs. CCE, Noida** reported in **2004 (163) E.L.T. 88 (Tri. - Del.)** and its goods are classifiable under sub-heading 2711.19. According to him decision of the Tribunal in the case

of Jagdamba Petroleum P. Ltd. (supra) on appeal by revenue to Apex Court was dismissed by an order in Civil Appeal No. 3980 of 2004. Shri Anand, learned Counsel also relies on the decision of the Tribunal in the case of **Gas Authority of India Ltd. vs. CCE, Indore & Vadodara** reported in **2004 (170) E.L.T. 75 (Tri. - Del.)**. He also relies on the judgment of the Tribunal in the case of **CCE, Belapur vs. Sun Coats & Chemicals (I) Ltd.** reported in **2008 (231) E.L.T. 531 (Tri. - Mumbai)** and **Silverchem Industries Pvt. Ltd. vs. CCE, Mumbai** reported in **2003 (155) E.L.T. 204 (Tri. - Mumbai)** to support his contentions for classification of the impugned goods under sub-heading 2711.19.

7. Shri Anand reiterates that in all the four appeals, classification is the common issue involved and that needs to be answered in favour of Assessee. Additional issue of clubbing involved in show cause notice dated 24/3/05 is without any substance brought to record by Revenue. Learned counsel further submits that there shall not be clubbing of clearance at all because one is the proprietary concern which is M/s Chemicos and in M/s Mascot Chemicals proprietor of M/s Chemicos having held 60% interest alongwith his wife Mrs. Niti Agarwal holding 40% therein, ipso facto does not establish that both the concerns are one and the same. There is no element of oneness brought out by adjudication order. Both concerns being distinct in different ways and there is no oneness for different features there shall not be clubbing of clearances.

8. Shri Anand, learned counsel also submits that the show cause notice dated 24/3/05 which is subject matter of the order-in-original dated 27/7/06 and covered by first batch of three appeals i.e. Excise Appeal No. 3462/2006 to 3464/2006 is time barred. Therefore no demand can be raised in respect of that show cause notice which had

made allegation of clubbing as well as classification. Once it is held to be time barred, the question of classification cannot be decided even by adjudication.

9. Learned Jt. CDR appearing on behalf of revenue brings out that the goods of the appellant according to its own pleadings and averment cannot be conceived to be liquefied gas. The moment it is liquid it comes under the sub-heading 2710.19. For Classification under sub-heading 2710.19 a perfect guideline by HSN classification is available. Once the goods are not liquefied gas but liquid in nature that has to fall under the sub-heading 2710.19 without further dispute.

10. Learned Jt. CDR further submits that even if the laboratory report is inconclusive, there is a categorical observation in the report in page 77 showing that the goods in question were liquid only. When it is found to be liquid only that comes out of the Class of 27.11. Only question arose is as to whether the goods submitting to Class 2710 for classification has to find a suitable platform of class for its classification. Even if the report is inconclusive, it cannot be said that the goods is not liquid and once the goods is held to be liquid petroleum oil, it is to be classified whether it is a motor spirit or any other goods depending on its nature and character as well as HSN guideline. Laboratory report may be inconclusive only to a limited extent. But characteristics of goods has been brought out by the report. Further testing was advised to know about suitability for use of the goods. User not being criteria, the classification which is more scientific for the purpose of sub-heading 2710, following HSN norm, is to be answered by the nature of the goods in question which is liquid.

11. Learned Jt. CDR submits that so far as clubbing is concerned, there is an identical case which was subject matter of decision by Apex Court in the case of **CCE, New Delhi vs. Modi Alkalies & Chemicals Ltd.** reported in **2004 (171) E.L.T. 155 (S.C.)**. The appellant has to be governed by that decision when all the criteria of clubbing as that is appearing in that judgment is present in the case of the appellant. Crystal finding of the authority below does not take away case of appellant from clubbing.

12. So far as the limitation is concerned, argument of revenue is when the matter was under confusion by the assessee, there was only deferment in issuing the show cause notice by the Department. But there is nothing on record to claim limitation when fault of assessee has surfaced.

13. Heard both sides and perused the record.

14. We have gone through the entries under Class 2710 and 2711 of Tariff list and have reproduced the entries herein before. We have also gone through the HSN classification notes of both categories. The explanatory note of the heading 27.11 which is claimed by the appellant provides a guideline as to how the goods shall fall into that Class. That is also reproduced herein before. We have not failed to go through the guideline under the Class 27.10. There is also an objective criteria laid down by the Rules under that Class of goods. We have also reproduced criteria of classification under that class in the preceding paragraphs.

14. Reading of page 77 relied upon by the appellant and claimed to be inconclusive laboratory test report established that the goods in question was liquid. Nature of goods has been described by the report. Property and characteristics of the goods is also appearing in the

report. But we are compelled to halt without proceeding further with the report for the reason that the chemical examiner himself has expressed his inability to say whether the product under reference either by itself or in admixture with any substance is suitable for use as fuel in spark ignition engine. Conclusion of the learned Adjudicating Authority does not rule out the goods to be liquid. One of the criteria for entry No. 2710 as per HSN guideline is to bring the goods into category of motor spirit so that such goods should be suitable for use in spark ignition engine either by itself or admixture. This calls for a clear opinion by an ex-parte body. Therefore the materials on record needs a technical appraisal and testing since the appellant clarified in the course of hearing that there will not be further samples available for testing by an ex-parte body. We do not express any opinion at this stage since we are handicapped to opine when the chemical examiner has expressed inability to bring the goods into the category of motor spirit by his observation by an inconclusive test report. In view of the difficulties expressed as above and the show cause notice bringing out the goods to be motor spirit and the pleading of the appellant submitting that it shall fall under the Class 2711.19, it is not practically possible to decide the matter without any technical expert report.

15. To do justice to both the sides, it is necessary that the learned Adjudicating Authority shall refer the matter to an expert body like Petroleum Research Institute or any other body of the country to guide the authority for drawing a proper conclusion. We have also noticed from statement dated 21/3/02 and 16/1/02 of the appellant stating that Chemisol-35 and Chemisol-68 were manufactured by distillation of Pentane by taking cuts at 36°C and 68°C respectively and that these were in liquid form at normal temperature and no Cryogenic Tanks were used to store them in liquid form. There is also a significant

of heading 27.11

feature which needs scrutiny for the reason that Hydro Carbon are gaseous at a temperature of 15ºC and under a pressure of 1,013 Millibars (101.3 kPa). This aspect also cannot be ignored since this is one of the conditions prescribed by the HSN classification criteria under the heading 27.11. We have also seen from page 154 and 155 of the appeal folder that the goods sold was liquid in nature and sold as thinner. This needs thorough test by learned Adjudicating Authority to arrive at a rational decision.

16. In view of aforesaid observations and finding, it would be proper to send back the matter to the learned Adjudicating Authority who shall refer all the technical material available in his record for evaluation and conclusion by expert body and get the report of that body for testing the same on the touch stone of HSN guidelines under the Class 2710 and 2711 so as to decide the goods to go to appropriate tariff entry and liability of excise duty and other consequences of law if any be determined accordingly.

17. On the principal issue of classification, when we have decided to send the matter back, all other legal issues and pleadings are left open to both sides to plead and lead evidence on the issue of clubbing and limitation before the learned Adjudicating Authority. The authority taking into consideration of Revenue's citation in the case of CCE, New Delhi vs. Modi Alkalies & Chemicals Ltd. (supra) and citations of Assessee shall pass a reasoned and speaking order.

18. With the aforesaid observation and directions, all the four appeals are disposed off remanding the matter to the learned Adjudicating Authority, setting aside the impugned orders. In the remand proceeding, both sides are entitled for fair opportunity of

hearing and outcome thereof to result in a reasoned and speaking order.

(Dictated and pronounced in open court)

(D.N. Panda)
Judicial Member

(Rakesh Kumar)
Technical Member

PK