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REGISTERED / AD

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK NO.2, R.K.PURAM, NEW DELHI-110066
EXCISE APPEAL BRANCH

Dated: **03/12/2012**

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. **A/1332-1340/2012-EX[DB]**, Stay Order No. **SO/1938-1946/2012** dated **29/11/2012**

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section **35-C(1) of the Central Excise and Salt Act, 1944.**

Asstt. Registrar(EXCISE Appeal Branch)

	Application	Appeal	Name and Address of Appellant
1	E/STAY/2202/2009 E/2127/2009		
	E/Stay/3326/2009	E/3243/2009	**KUCHCHAL CHEMICALS LTD.** E-22,UPSIDC, Industrial Area, Malwan,Distt. Fatehpur
	E/Stay/3327/2009	E/3244/2009	
	E/Stay/3328/2009	E/3245/2009	
	E/Stay/3329/2009	E/3246/2009	
	E/Stay/3330/2009	E/3247/2009	
	E/Stay/3331/2009	E/3248/2009	
	E/Stay/3332/2009	E/3249/2009	
	E/Stay/3333/2009	E/3250/2009	

	Name and Address of Respondent
2	**C.C.E. LUCKNOW** 7-A, Ashok Marg, Lucknow.

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Other Appellants and Respondents as per Annexure

Copy To
3Advocate(s) / Consultant(s):

SH. BIPIN GARAG, ADV.,
B-1/1289-A,VASANT KUNJ,
N. DELHI-70

4 Bar Association, CESTAT, Delhi

5 Director Publications, Customs, Excise. I.P. Estate, Delhi

6 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3

7 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

8 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

9 Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Satellite Road, Ahmedabad-15

10 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

11 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

12 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38

13 C.D.R.   14 Office Copy   15 Guard File

Asstt. Registrar(EXCISE Appeal Branch)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

West Block No.2, R.K.Puram, New Delhi

COURT-I

Date of hearing: 22.11.2012
Date of pronouncement: 29.11 2012

For Approval and Signature:

Hon'ble Mr. Justice Ajit Bharihoke, President
Hon'ble Mr. Rakesh Kumar, Technical Member

1	Whether Press Reporter may be allowed to see the Order for publication as per Rule 26 of the CESTAT (Procedure) Rules, 1982?	
2	Whether it should be released under Rule 26 of CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	
3	Whether their Lordships wish to see the fair copy of the Order?	
4	Whether Order is to be circulated to the Departmental authorities?	

Stay Application No.2202 of 2009 and Central Excise Appeal No.2127 of 2009

Kuchchal Chemicals Ltd. .. Appellant

Vs.

C.C.E., Lucknow .. Respondent

Arising out of the order in original No.05/Commissioner/LKO/CX/2009 dated 28.4.2009 passed by Commissioner, Central Excise, Lucknow

Present for the appellant : Shri Bipin Garg , Advocate
Present for the respondent :Shri R.K. Verma, A.R.

Stay Application No.3326 to 3333 of 2009 and Central Excise Appeal No.3243 to 3250 of 2009

Kuchchal Chemicals Ltd. .. Appellant

Vs.

C.C.E., Lucknow .. Respondent

Arising out of the order in original No.30-37/Commr./LKO/CX /2009 dated 31.8.2009 passed by Commissioner, Central Excise, Lucknow.

Present for the appellant : Shri Bipin Garg , Advocate

Present for the respondent :Shri R.K. Verma, A.R.
Stay order No 1938-1946/2012 - Ex(BR)
Final Order No. 1332-1340/2012- Ex(BR)

Per Justice Ajit Bharihoke (Oral):

The appellants are engaged in the manufacture of excisable goods. During the period in dispute, the appellant cleared the disputed goods claiming as "Organic Composite Solvent" under classification sub-heading No.38140010 of the First Schedule of Central Excise Tariff Act, 1985 on payment of excise duty at the rate of 16% ad valorem. The Department was of the view that appellant have misclassified the disputed goods which were actually classifiable as "Motor Spirit" under Chapter sub-heading 2710 1113 of the Central Excise Tariff Act, 1985 on which they were expected to pay excise duty at ad valorem rate of 32% besides instead of 16% ad valorem.

2. Nine show cause notices for different periods raising demand of differential excise duty were issued to the appellants. Notices also proposed to charge interest and imposes penalty on the appellant. Show cause notices adjudicated vide separate orders in original whereby the demand raised by the respective show cause notices was confirmed along with interest and equal amount of penalty was also imposed under Section 11AC of the Central Excise Act, 1944 read with Rule 25 of Central Excise Rules, 2002.

3. Feeling aggrieved of the impugned orders, the appellants preferred separate appeals which are taken up together for disposal because common question of law and facts is involved.

4. The issue involved in these appeals is regarding classification of the disputed goods. According to the appellants, the goods in question is "Organic Composite Solvent" classifiable under Chapter sub-heading No. 3814 00 10 whereas according to the Department, the goods in question are classifiable as "Motor Spirit" under chapter sub-heading 27101113 of the Central Excise Tariff Act, 1985.

5. In order to resolve this controversy it is necessary to know about manufacturing process of the disputed goods. As per the record, the main raw materials used by the assessee for manufacturing the product in question are Naphtha, Special Boiling Point Spirit and Pentane and the disputed goods are obtained by mixing of those products in required proportion and subjecting them to as fractional distillation.

6. Ld. Counsel for the appellants has submitted that the impugned orders classifying the disputed goods as "Motor Spirit" has been passed on assumption and presumption ignoring the report of the Chemical Examiner, Central Revenue Control Laboratory (CRCL), New Delhi and the definition of 'motor spirit' in chapter Note 27 of CETA, 1985 which provides that any substance having following specification shall fall under category of 'motor spirit':

1. It should be composed of hydrocarbon oil
2. Its flash point should be below 25 ^{0} C
3. It should be, either by itself or in admixture with any other substance, suitable for use as fuel in spark ignition engines.

7. Ld. counsel pleaded that admittedly, the samples of disputed goods were sent to CRCL, New Delhi for chemical analysis and the CRCL vide his reports in respective cases confirmed that the disputed goods are essentially composed of mineral hydrocarbon having flash point - less than 25^{0} C. However, as regards the third condition of the definition of motor spirit, the chemical examiner showed inability to confirm whether or not the sample by itself or in admixture with any substance could be used as fuel in the spark ignition engines. The Chemical Examiner reported that this could not be done because of lack of facility in the laboratory. Despite that the adjudicating authority instead of sending fresh sample to laboratory having the facility to verify whether or not the sample of disputed goods by itself or in

admixture with any other substance was suitable for use as fuel in spark ignition engines, proceeded to adjudicate the matter and classified the disputed goods as motor spirit classifiable under chapter heading 27101113 without any technical basis which approach is not tenable. Ld. counsel for the appellant further pleaded that impugned orders have been passed in total violation of the judgments of the Tribunal in the matter of Jagdamba Petroleum P. Ld. vs. C.C.E., Noida – 2004 (163) ELT 8 (Tri-Del.) and Silverchem Industries Pvt. Ltd. vs. C.C.E., Mumbai – 2003 (155) ELT 204 (Tri-Mumbai). As such, it is not sustainable.

8. Shri R.K. Verma, ld. A.R. for Revenue on the contrary has argued in support of the impugned orders and submitted that the Commissioner (Adjudication) has rightly classified the disputed goods cleared by the appellants as "Motor Spirit" classifiable under chapter sub-heading 27101113 and as such, the assessee was liable to pay differential excise duty. Ld. A.R. pleaded, undisputedly main component of the disputed product is Naphtha, which can be used as fuel in spark ignition engine, as such the product obtained by fractional distillation of Naphtha along with special boiling point spirit and pentane basically is pure form of Naphtha as such, the Commissioner was right in concluding that final product obtained from fractional distillation of the above referred component could be used as fuel in spark ignition engine and as such, it was classifiable as motor spirit under chapter sub-heading 27101113. Thus, ld. A.R. has pressed for dismissal of the appeals.

9. We have considered the rival submissions and perused the record. The Department is seeking to demand differential excise duty from the appellant by classifying the disputed product as motor spirit classifiable under chapter sub-heading 27101113, therefore, the onus of proving that the product in question falls within the definition of

'motor spirit' classifiable under aforesaid sub-heading is squarely on the Department.

10. The definition of 'motor spirit' is given under supplementary note of Chapter 27 of the CETA, 1985. As per aforesaid definition in order to be classified as motor spirit under chapter 27 of CETA, 1985, the product must fulfill the following three conditions, namely, (i) it should be composed of hydrocarbon oil, (ii) its flash point should be below 25^0 C and (iii) it should be either by itself or in admixture with any other substance, suitable for use in spark ignition engine. Admittedly, the sample of the disputed product was sent to CRCL for chemical analysis. Perusal of the report submitted by the Chemical Examiner would show that the Chemical Examiner has given finding in respect of sample being composed of hydrocarbon oil and its flash point is below 25^0 C. The Chemical Examiner however declined to comment or certify whether or not the sample by itself or in admixture with any other substance was suitable for as fuel in spark ignition engine on the plea that it was not possible by the laboratory to determine octane number and give finding regarding suitability to be used as fuel in spark ignition engine Thus it is clear that the chemical analysis report does not establish that the disputed goods fulfill the requirement of definition of 'motor spirit' in the chapter heading 27. Despite that the adjudicating authority instead of sending the fresh sample to the laboratory having the requisite facility to verify whether or not the disputed goods either by itself or in admixture with any other substance was suitable for use as fuel in spark ignition engine proceeded to introduce his own theory to categorise the disputed goods as motor spirit. This approach by the adjudicating authority in our view is not tenable particularly when the Chemical Examiner who is an expert could not give any opinion regarding suitability of disputed product as fuel for Spark Ignition Engine. Thus we are unable to sustain the impugned finding of

adjudicating authority which are in the nature of his opinion without any scientific verification of samples. and as such we are unable to agree with the findings written by the adjudicating authority.

11. We may note that in the matter of Jagdamba Petroleum (P) Ltd. vs. C.C.E. - 2004 (163) ELT 88 (Tri-Delhi), similar issue came up before the coordinate Bench of this Tribunal in the said case also the final product in dispute was manufactured using Nephtha as main raw material and the chemical examiner's reports disclosed that the product was composed of hydrocarbon and its flash point was below 25^0 C, However, the chemical examiner regarding suitability of the product as fuel for fuel spark ignition engine observed thus:

> "........................However, at present, it is not possible for this lab to say whether each of the products under reference by itself or in admixture with any other substance is suitable for use as fuel in spark ignition engine or otherwise."

The Tribunal taking note of the fact that Chemical Examiner has not given opinion regarding suitability of the product under reference by itself or in admixture with any other substance as fuel spark ignition engine set aside the order of the Commissioner classifying the product under Chapter 27 sub-heading 2710.13.

12. The Department challenged the order of the Tribunal in the Apex Court and the Supreme Court dismissed the appeal filed against the order of the Tribunal observing thus:

> "In view of the fact that admittedly the report of the Chemical Examiner is inconclusive, the Revenue has not been able to discharge its onus of proof that the classification of the excisable article by the assessee was wrong". (reference be made to Commissioner, Central Excise, Noida vs. Jagdamda Petroleum P. Ltd. - 2004 (163) ELT 88 (Tri-Delhi).

13. In view of discussions above, we are unable to sustain the impugned orders confirming the demand of differential duty demand which is not supported by the report of the Chemical Examiner.

14. The appeals are, therefore, allowed and the impugned orders are set aside.

(Pronounced in open Court on २९. 11. 2012)

s

(Justice Ajit Bharihoke)
President

(Rakesh Kumar)
Technical Member

scd/