IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI
PRINCIPAL BENCH, COURT NO. IV

Appeal No. E/798/2010-CU [SM]

[Arising out of Orders in Appeal No. IND-I/005/2010 dated 09.01.2010, passed by the Commissioner, Central Excise & ST, Indore.]

For approval and signature:

Hon'ble Mr. V. Padmanabhan, Member (Technical)

M/s. Khaitan Agro **....Appellant**

Vs.

CCE & ST, Indore **....Respondent**

Appearance:

Shri Sunil Khandelwal, Chartered Accountant for the Appellants
Shri R.K. Mishra, DR for the Respondent

CORAM:

Hon'ble Mr. V. Padmanabhan, Member (Technical)

Date of Hearing: 03.01.2017

FINAL ORDER NO. 50019/2017-EX [SM]

Per V. Padmanabhan

The present appeal is filed against Order-in-Appeal dated 13.01.2010 passed by Commissioner (Appeals), Indore.

2. The appellant is engaged in the manufacture of Refined Soya bean Oil. During the process of making Refined Soya bean Oil, certain other products which emerged are Soya Gums, Soya sludge, Fatty Acid, Deodorized Distillate etc. The present dispute is with

respect to the product prescribed as 'Soya Gum'. The appellant was originally classifying the product 'Soya Gum' under chapter heading 15220090, but subsequently changed the classification to 13019019 from the month of May 2007. The classification was again changed in the month of June 2007 to 15079090. It is the case of the Revenue that at the time of changing classification to chapter 13, the appellant also changed the description of the product to read as 'Soya Oil Sludge'. Thereby, camouflaging the fact that what was being manufactured and cleared was nothing but Soya Gum. The Revenue was of the view that product is rightly classifiable under heading 1522 as was being originally done by the appellant. On being pointed out, the appellant paid the differential Central Excise duty to the extent of Rs. 17,78,541/- along with the applicable interest amount of Rs. 1,49,098/- and the same was intimated to the Revenue authorities on 08.09.2008. However, the Show Cause Notice dated 15.10.208 was issued and the order in original dated 13.06.2009 was passed in which duty and interest paid by the assessee was confirmed along with penalty equal to the amount of duty under section 11AC of the Central Excise Act, 1944. When the issue was challenged before Commissioner (Appeals), the Order-in-Original was upheld. In the present appeal, the payment of duty as well as interest is not being challenged. However, the appellant has agitated against the levy of penalty under section 11AC.

3. With the above background, heard Shri Sunil Khandelwal, ld. Consultant for the appellant and Shri R.K. Mishra, ld. AR for the Revenue.

4. Ld. Consultant submitted that the penalty imposed by the authorities below may be waived inasmuch as they have paid the duty as well as interest before issue of Show Cause Notice. Accordingly, he submitted that, in terms of section 11A (2) (B), no penalty will be imposable.

5. Ld. AR, on the other hand supports the order of the authorities below. He argued that differential duty has arisen as a result of mis-statement by the appellant. He submitted that the product Soya Gum has not only been misclassified but even wrongly described as Soya Oil Sludge, with a view to camouflage the real product. Accordingly, he submitted that penalty under section 11AC will be imposable.

6. The dispute is with respect to the classification of the product Soya Gum. The appellant has accepted the classification under heading 1522, as proposed by the Revenue and have also paid the differential duty along with applicable interest. They are agitating against imposition of penalty under section 11AC. From the records, I find that the product Soya Gum was being manufactured and cleared classifying the same under chapter heading 1522. However, during the period May 2007, the assessee has changed the classification to chapter 1301 along with change in description of the item to Soya Oil Sludge. As a result of the investigation undertaken by Revenue, it is established that the product cleared has remained the same but described differently. Ultimately, the classification of the product under heading 1522 has been accepted by the assessee and differential duty paid. Under the circumstances, I am of the view that

the benefit of section 11A (2) (B) cannot be extended in view of the explanation-1 which reads as follows:-

> *Explanation 1 – Nothing contained in this sub-section shall apply in a case where the duty was not levied or was not paid or was short-levied or was short paid or was erroneously refunded by reason of fraud collusion or any willful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty.*

7. The first proviso to section 11AC provides that:-

> ***(2B)*** *Where any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded , the person, chargeable with the duty, may pay the amount of duty on the basis of his own ascertainment of such duty or on the basis of duty ascertained by a Central Excise Officer before service of notice on him under sub section (1) in respect of the duty, and inform the Central Excise Officer of such payment in writing, who on receipt of such information shall not serve any notice under sub-section (1) in respect of the duty so paid:*
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> ***Provided*** *that the Central Excise Officer may determine the amount of short payment of duty if any which in his opinion has not been paid by such person and, then, the Central Excise Central Excise Officer shall proceed to recover such amount in the manner specified in this section, and the period of "one year" referred to in sub-section (1) shall be counted from the date of receipt of such information of payment.*

The appellant will be entitled to the benefit of payment of penalty of 25% of the differential duty as the differential duty as well as interest stands paid by them before issue of Show Cause Notice.

8. The appeal is disposed of in the above terms.

[Dictated and pronounced in the open Court]

(V. Padmanabhan)
Member (Technical)

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