IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA

REGIONAL BENCH - COURT NO.2

Excise Appeal No.887 of 2011
(Arising out of Order-in-Appeal No.20/DIB/CE(A)/GHY/2011 dated 14.07.2011 passed by Commissioner(Appeals) of Customs & Central Excise, Guwahati.)

Commissioner of Central Excise, Dibrugarh
(Milan Nagar, Lane-F, P.O. Building-786003.)

...Appellant

VERSUS

M/s.GAIL (India) Limited

.....Respondent

(LPG Recovery Plant, Lakwa, Sivasagar, Assam.)

WITH

(i) Excise Appeal No.980 of 2011 (Commissioner of Central Excise, Dibrugarh Vs. M/s.GAIL (India) Limited); (ii) Excise Appeal No.981 of 2011 (Commissioner of Central Excise, Dibrugarh Vs. M/s.GAIL (India) Limited); (iii) Excise Appeal No.982 of 2011 (Commissioner of Central Excise, Dibrugarh Vs. M/s.GAIL (India) Limited); (iv) Excise Appeal No.983 of 2011 (Commissioner of Central Excise, Dibrugarh Vs. M/s.GAIL (India) Limited); (v) Excise Appeal No.984 of 2011 (Commissioner of Central Excise, Dibrugarh Vs. M/s.GAIL (India) Limited); (vi) Excise Appeal No.985 of 2011 (Commissioner of Central Excise, Dibrugarh Vs. M/s.GAIL (India) Limited); (vii) Excise Appeal No.986 of 2011 (Commissioner of Central Excise, Dibrugarh Vs. M/s.GAIL (India) Limited);

(i) (Arising out of Order-in-Appeal No.28/DIB/CE(A)/GHY/2011 dated 30.08.2011 passed by Commissioner(Appeals) of Customs & Central Excise, Guwahati.)

(ii) (Arising out of Order-in-Appeal No.26/DIB/CE(A)/GHY/2011 dated 30.08.2011 passed by Commissioner(Appeals) of Customs & Central Excise, Guwahati.)

(iii) (Arising out of Order-in-Appeal No.27/DIB/CE(A)/GHY/2011 dated 30.08.2011 passed by Commissioner(Appeals) of Customs & Central Excise, Guwahati.)

(iv) (Arising out of Order-in-Appeal No.25/DIB/CE(A)/GHY/2011 dated 30.08.2011 passed by Commissioner(Appeals) of Customs & Central Excise, Guwahati.)

(v) (Arising out of Order-in-Appeal No.23/DIB/CE(A)/GHY/2011 dated 30.08.2011 passed by Commissioner(Appeals) of Customs & Central Excise, Guwahati.)

(vi) (Arising out of Order-in-Appeal No.24/DIB/CE(A)/GHY/2011 dated 30.08.2011 passed by Commissioner(Appeals) of Customs & Central Excise, Guwahati.)

(vii) (Arising out of Order-in-Appeal No.29/DIB/CE(A)/GHY/2011 dated 30.08.2011 passed by Commissioner(Appeals) of Customs & Central Excise, Guwahati.)

APPEARANCE

Shri K.Choudhary, Authorized Representative for the Appellant (s)

Shri M.P.Bagaria, Chartered Accountant for the Respondent (s)

CORAM: HON'BLE SHRI P. K.CHOUDHARY, MEMBER(JUDICIAL)

HON'BLE SHRI P.ANJANI KUMAR, MEMBER(TECHNICAL)

FINAL ORDER NO. 75091-75098/2020

DATE OF HEARING : 15 January 2020
DATE OF DECISION : 17 January 2020

P.ANJANI KUMAR :

M/s. GAIL (India) Limited, the respondents, engaged in production of LPG and Solvex-GL have availed duty exemption under Notification No.33/99 dated 08.07.1999 as amended from March 2000 onwards for the goods produced. As per the Notification the appellants have been filing refund claim by the 7th of subsequent month. The original authority i.e. Assistant Commissioner, Jorhat Division issued a show cause notice dated 28.05.2001 proposing to reject the duty exemption claimed by the appellants on the LPG which came to be allowed by the Commissioner(Appeals). Revenue though contested the claim of the appellants in respect of LPG; they did not get COD Clearance in respect of LPG. The appellants claimed refund of Rs.25, 31, 02,878, in respect of Solvex-GL for the period October 2000 to November 2007. The Deputy Commissioner of Central Excise, Jorhat

Division issued show cause notice dated 18.12.2007 proposing rejection of the claim on the ground that Solvex GL did not appear to be covered under Sl.No.13(1) not being gas and also did not appear to cover under any other entries of the schedule to the said show cause notices covering different periods i.e. December 2007 to September 2008, October 2008, November 2008, December 2008, January 2009, February 2009, March 2009 and April 2009 were issued and refund orders R-45/2008-09, R-58/2008-09, R-61/2008-09, R-62/2008-09, R-70/2008-09, R-76/2008-09, R-80/2008-09, R/91/2008-09, R-3/2009-10 were issued sanctioning the refunds. Department preferred appeals before Commissioner (Appeals), who has rejected the appeals filed by the department. Now Revenue has filed the below cited appeals in respect of the orders passed by Commissioner(Appeals), as detailed below:-

Refund Order				Date of Review	Appeal No
Period	**No.**	**Amount**	**Order date / Date of Communication**		
Oct 2000-Nov 2007	R/45/2008-09	24,87,38,684	19.06.2008 26.09.2008	08.09.2009	**E/887/2011**
Oct-08	R/61/2008-09	27,50,418	19.12.2008 21.05.2009	11.08.2009	**E/980/2011**
Nov-08	R/62/2008-09	16,90,447	09.01.2009 21.05.2009	11.08.2009	**E/981/2011**
Dec-08	R/70/2008-09	16,22,146	12.01.2009 21.05.2009	11.08.2009	**E/982/2011**
Jan-09	R/76/2008-09	11,72,210	06.04.2009 07.08.2009	31.10.2009	**E/983/2011**
Feb-09	R/80/2008-09	13,45,865	06.04.2009 01.07.2009	07.09.2009	**E/984/2011**
Mar-09	R/91/2008-09	12,97,329	07.05.2009 02.08.2009	05.11.2009	**E/985/2011**
Apr-09	R/3/2009-10	13,16,048	16.06.2009 21.08.2009	05.11.2009	**E/986/2011**

2. Learned Authorized Representative for the department submits that Solvex-GL is a liquid and not gas, as such it is not covered under Sl.No.13(i); it is also not covered under any other entry of the schedule to the Notification No.33/99 dated 08.07.1999; under Sub-Sl.No.13(i) ‘gas exploration and production’ has been specified under sub-Sl. No. (ii) to (xii). Different other products, which are manufactured out of Petroleum gas as basic starting raw material has been specified; Sub-

Sl.No.13(i) refers to gases only i.e. items which are gaseous at a standard/normal temperature and pressure; therefore Solvex GL, which is not gaseous is not covered under the exemption Notification. Commissioner (Appeals) has rejected the original first appeal i.e. R-45/2008-09 on the grounds that the order was passed on 19.06.2008 and communicated on 26.09.2008 and Review Order is dated 08.09.2009 which is beyond the time limit allowed for review. The learned Authorized Representative submits that Commissioner (Appeals) has not considered the fact that Commissioner has not received the Order-in-Original issued on 20.09.2008; photocopy was obtained only on 19.06.2009 and was taken up for review. He further submits that Commissioner has categorically observed that all the entries in the Central Receipt Register during the period from 26.09.2008 to 18.06.2009 have been checked and no entries relating to receipt of said Order-in-Original dated 20.09.2008 was found. Learned Authorized Representative further submits that the Notification particularly giving an exemption should be interpreted strictly; in case of ambiguity the benefit should be given to Revenue and not to the party. He relies upon the following cases:-

(*a) Commissioner of Customs, Vijayawada Vs. Kimmi Steels Pvt. Ltd. [2019 (368) E.L.T. 92 (Tri.-Hyd.)]
Affirmed by Supreme Court as reported in 2019 (368) ELT A 40(SC)*

(b) Commissioner of Cus. (Import), Mumbai Vs. Dilip Kumar & Company [2018 (361) E.L.T. 577 (S.C.)]

(c) Little Star Foods Pvt.Ltd. Vs. Commr. of Central Tax, Hyderabad [2019 (368) E.L.T. 730 (Tri.-Hyd.)]

3. Learned Counsel for the Respondents submits that in respect of the first Order i.e. R-55/2008-09, the Review Order was not issued within the time limit. Review was taken up after a period of one year therefore the Review Order is bad in law. He also submits that the merits of the case are also in their favour as observed by the learned Commissioner (Appeals). He also points out to the fact that no review order was filed in respect of R-58/2008-09. Therefore it is to be implied that the department has initially accepted the contentions of the appellant.

4. Heard both sides and perused the records of the case. We find that there are altogether eight appeals in the instant case. There are two issues which require consideration by this Bench – (1) whether in respect of Excise Appeal No.887 of 2011 the Review Order dated 08.09.2009 is beyond the period statutorily allowed for review. (2) Whether in the facts and circumstances of the case, the appellants are eligible for the exemption under the said Notification No.33/99 dated 08.07.1999. Coming to the first issue we find that the Commissioner while passing the Review Order No.20/COMMR./DBR/2009 dated 08.09.2009, mentions that the refund Order R-45/2008-09 dated 19.06.2008 communicated on 26.09.2008 appears to have not been received in his office as the same was sent in ordinary post and due to postal irregularity; all the entries in the Central Receipt Register during the period 26.09.2008 and 18.06.2009 have been checked; no entries relating to receipt of the said Order-in-Original issued on 20.09.2008 could be found; a photocopy of the Order-in-Original duly certified by the issuing authority has been received in the Commissionerate on 19.06.2009; accordingly they have reviewed the same. On going through the Order-in-Appeal, we find that the learned Commissioner (Appeals) has discussed the issue in detail and has given reasoning elaborately.

5. We find that the learned Commissioner (Appeals) has raised some valid questions as to whether enquiry, if any, was conducted with the postal authorities and if so, what was the result thereof and as to whether steps were taken to rectify and setting right the mistake that attempted to have been occurred in sending by ordinary post and that whether the options available under 37C (1)(b) & (c) were followed. We find from the records of the case that no such enquiry appears to have been undertaken. Under the circumstances we find that the respondents cannot be made a scapegoat and the lawful due benefit passed on to the respondents should not be attempted to be curtailed by way of a review order. At this juncture, learned counsel for the respondents also raised the issue that this refund is more than Five Crores and must have reached Commissioner for pre-audit purposes. The learned Authorized Representative for the department replies stating that the proceedings of pre-audit do not travel up to the Commissioner and normally end at the level of Deputy Commissioner only and on this basis the Commissioner's action cannot be faulted. We find that though the Commissioner may claim that the issue was not brought to his notice by way of proposing a review, it is very difficult to comprehend as to how such a huge refund involving amount of Rs.25.00 Crores was not brought to the notice of the Commissioner formally or informally. Therefore we do not find merits in the contentions of the appellants that the review could not be completed within the time limit prescribed as the order was not received and that the same could be taken up only after the receipt of duly attested photocopy of the Order-in-Original. In view of the above we hold that the review is undertaken much after the stipulated time limit prescribed therein.

6. Coming to the issue on merits, we find that as observed by the learned Commissioner the matter is essentially technical in nature and reference to the manufacturing process is necessary for a proper appreciation of the issue. We find from records that M/s GAIL submitted that LGP as well as Solvex GL are two inter-mediate gaseous products of processed natural gas stored under pressure as liquid; natural gas is compressed to a high pressure and after compression it is expanded to achieve a very low temperature and in the process the natural gas gets liquefied; the liquefied gas is then brought to the destination column wherein both the products i.e. LPG and Solvex GL are separated; whereas LPG being lighter is collected from the top of the column and Solvex GL is recovered from the bottom; natural gas normally comprises of C-1, C-2, C-3, C-4, C-5, C-6 + and includes small portion of N_2, CO_2 etc.; whereas LPG comprises of C-3 & C-4, 'Solvex GL' comprises of mainly C-5 and C-6; therefore both LLPT as well as Solvex

GL are the two intermediate gaseous products of processed natural gas being recovered and stored under pressure as liquid.

7. We find that the Notification No.33/99 provides for exemption to goods specified in the schedule appended to the Notification and cleared from a unit located in the state of Assam or Tripura or Meghalaya or Mizoram or Nagaland or Arunachal Pradesh as the case may be. From so much of the duty of excise, leviable thereon under any of the said acts as is equivalent to the amount of duty paid by the manufacturer of goods from the account current maintained under Rule 9 read with Rule 173 G of the Central Excise Rules, 1944. Schedule to the Notification at Sl.No.13 is as follows:-

13. Gas based intermediate Products

(i) Gas based Intermediate Products
(ii) Gas Distribution and Bottling
(iii) Power Generation
(iv) Plastics
(v) Yarn Raw Materials
(vi) Fertilizers
(vii) Methanol
(viii) Formaldehyde and FR Resin Melamine and MF Resin
(ix) Methylamine or Hexamethylene Tetranine or Ammonium Bi-Carbonate
(x) Nitric Acid and Ammonium Nitrate
(xi) Carbon Black
(xii) Polymer Chips

On perusal of the schedule it is apparent that the exemption is available to the gas based intermediate products. Sub-Sl. No. 13(i) of the schedule relates to gas exploration and production. Whereas Sl.No.13 mentions about gas based inter-mediate products. Sub-Sl. No.(i) refers to gas exploration and production. It is evident that the schedule not only refers to certain products but also to certain processes. The only inference one can get is that the products generated in the processes mentioned are covered by the entry and are eligible for exemption. Going by the manufacturing process given by the respondents and not disputed by the Revenue, we find that Solvex GL is manufactured during the process of production of LPG gas which is subsequently bottled and sold. The plea taken by the department that the exemption is applicable only to gas based products appears to be farfetched; the word 'gas based intermediate products' has to be understood to mean the products or the intermediate products generated during the exploration and production of 'gas based products'. It is not the case of the department that the impugned products i.e. Solvex GL is not produced during the production /manufacture of LPG. Under such circumstances the exemption cannot be restricted to products which are formed in the gaseous stage alone for the reason that the exemption refers to gas based intermediate products and gas exploration and production. The correct interpretation of gas based products would go to include all the products which are produced in the processes of production of gas/LPG. The argument taken by the appellants appears to be farfetched for the reason that even LPG for which the exemption was extended by the department is also in the bottle and sold in the liquefied form. We find that the arguments of the learned Authorized Representative on the issue that while LPG is produced after liquefaction of gas and Solvex GL is produced or occurs in liquid form naturally not acceptable. We are of the considered opinion that the Notification does not give any such interpretation. It is clear that the entry 13 of the schedule refers to certain products which are not gaseous in nature. The main heading 'gas based intermediate products' has to include all the products intermediate or finally produced or occurring or manufactured in the process of exploration and production of gas. The distinction that the department is trying to bring in between liquids and gases is not acceptable. The products mentioned at Sub-Sl. Nos. of Sl.No.13 to the schedule to the Notification are not gases. If one takes the view that the exemption is only applicable to products occurring in gaseous state are alone eligible for exemption to the items like plastics, fertilizers. Ammonium Nitrate etc. would not have formed a place in the list of the products made to be eligible for the Notification. Therefore an appropriate reading of the Notification would give an understanding that the main activity referred to therein is gas exploration and products which emerge as finally or intermediately in the process are eligible for exemption. As the wordings of the Notification are very clear no two interpretations are available and as such the case law cited by the learned Authorized Representative are of no avail.

8. In view of the above, we find that the Notification squarely covers the impugned product and the benefit of the same is available to the respondents. In view of the above, the appeals filed by the department are liable to be rejected on merits. The issue relating to whether or not R/45 was reviewed within the time limit becomes inconsequential. We also find that appeals E/980/2011- E/986/2011 are also covered by National Litigation Policy and are liable for dismissal. In the result, all the appeals are rejected.

(Order pronounced in the open court on 17 January 2020.)

SD/
(P.K.CHOUDHARY)
MEMBER (JUDICIAL)

SD/
(P.ANJANI KUMAR)
MEMBER (TECHNICAL)

sm