

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

REGIONAL BENCH - COURT NO.2

Excise Miscellaneous Application No.75417 of 2017 (COD)

(On behalf of Appellant)

And

Excise Appeal No.75881 of 2017

(Arising out of Order-in-Original No.48/COMM/CE/SLG/16-17 dated 06.02.2017 passed by Commissioner of Customs, Central Excise & Service Tax, Siliguri.)

M/s. Sikkim Organics

(Khasra No.392 & 393, Manpur, Sumbuk Block, South Sikkim.)

...Appellant

VERSUS

Commissioner of Central Excise & Service Tax, Siliguri

.....Respondent

(C.R. Building, Hakimpura, Haren Mukherjee Road, Siliguri-734001, West Bengal.)

WITH

Excise Appeal No.76500 of 2019

And

Excise Cross Objection No.76700 of 2019

(Arising out of Order-in-Original No.09/COMM/CE/SLG/2017 dated 30.11.2018 passed by Commissioner, Siliguri Central Excise CGST Commissionerate, Siliguri.)

M/s. Sikkim Organics

(393, Manpur, Sumbuk Block, South Sikkim, Sikkim.)

...Appellant

VERSUS

Commissioner of CGST & CX, Siliguri Commissionerate

.....Respondent

(C.R. Building, Hakimpura, Haren Mukherjee Road, Siliguri-734001, West Bengal.)

APPEARANCE

Shri Ananda Sen & Shri I.Banerjee, both Advocates for the Appellant (s)
Shri S.Mukhopadhyay, Authorized Representative for the Respondent (s)

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

**MISCELLANEOUS ORDER NO. 75195/2022
FINAL ORDER NO. 75385-75386/2022**

DATE OF HEARING : 30 March 2022
DATE OF DECISION : 12 July 2022

P.K. CHOUDHARY :

1. Since common issue is involved in these appeals and therefore, both the Appeals are taken up together for disposal.
2. The Appellant filed Appeal No. E/75881/2017 with application for condonation of delay of filing appeal against Order-in-Original No. 48/Comm./CE/SLG/2016-17 dated 06.02.2017 passed by the Commissioner of Customs, Central Excise and Service Tax, Siliguri Commissionerate, Siliguri. By Order No. M.A./75297/FO76679/2017 dated 21.08.2017, the Tribunal dismissed the appeal and COD Application on the ground that the Appellant had not made pre-deposit as required under Section 35F of the erstwhile Central Excise Act, 1944. The Appellant filed Writ petition under Article 226 of the Constitution of India before the Hon'ble High Court of Sikkim at Gangtok against the Order of the Tribunal, which was also dismissed. The Appellant filed appeal before the Hon'ble Supreme Court against the Order of the Hon'ble High Court. By Order dated 01.06.2021 in Special Leave to Appeal (C) No.(s) 551-553/2021, the Hon'ble Supreme Court restored the Appeal before the Tribunal and directed that the same shall be decided on its own merit. It appears from the said Order that the Appellant deposited an amount of Rs. 2.54 Crores. Hence, this appeal is taken up for hearing as per the direction of Hon'ble Supreme Court.

3. The Appellant also filed Appeal No. E/76500/2019 with application for condonation of delay of filing appeal, against Order-in-Original No. 09/Comm./CE/SLG/18-19 dated 30.11.2018 passed by the Commissioner of CGST & CX, Siliguri Commissionerate. It appears that the Appellant filed a Writ Petition against the impugned adjudication order before the Hon'ble High Court of Sikkim. By Order dated 09.05.2019 in W.P. (C) No. 15/2019, the Hon'ble High Court dismissed the Writ Petition with the observation that the mandate of the statute of pre-deposit is to be complied with in the first instance thereafter the petitioner is free to invoke the jurisdiction of the Court, if so advised. The Appellant complied with the pre-deposit under Section 35F of the Act, 1944 and filed this appeal. We find that on the similar issue the Hon'ble Supreme Court directed the Tribunal to hear the appeal on merits for the earlier period. So, the delay of filing of present appeal for the subsequent period should be condoned. Hence both the appeals are taken up for hearing.

4. The relevant facts of the case, in brief, as per record are that the appellant is engaged in the manufacturing of "Sikko Sol" classified under tariff item No. 38140010 of the First Schedule to the Central Excise Tariff Act, 1985 (in short CETA 1985) and cleared the goods on payment of Central Excise duty. On 16.04.2015 and 27.04.2015, the Central Excise Officers of Anti evasion wing, Siliguri visited the appellant's factory and conducted a stock verification and found shortage and excess of raw materials and finished goods. The excess quantities of finished goods and raw materials were seized. The said Officers also drew the samples of finished goods Sikko Sol and Raw Materials on 17.04.2015. The partner, authorised Representative and other employees of the appellant firm were summoned and the statements were recorded in respect of shortage/excess of goods on different dates.

5. A Show Cause Notice dated 08.04.2016 was issued by the Commissioner of Central Excise & Service Tax, Siliguri, proposing demand of Central Excise duty along with interest and to impose penalty on the basis of Chemical Test Report dated 13.01.2016 classifying Sikko Sol under tariff item 27101213 of the Central Excise Tariff Act, 1985. It has also proposed to confiscate the seized goods and recovery of inadmissible Cenvat Credit. By the impugned Order in Original dated 06.02.2017, the Commissioner of Central Excise & Service Tax, Siliguri, confirmed the demand of Central Excise duty of Rs. 33.77,95,151.00 along with interest and imposed penalty on the clearance of Sikko Sol classifying under tariff item 27101213 of CETA, 1985. for the period from April 2011 to December 2015. It has also confiscated the seized goods and imposed redemption fine of Rs. 1,57,592.00 and directed recovery of re-credit of Rs. 42,088.00 and inadmissible Cenvat Credit of Rs. 44,100.00 and also imposed penalty thereon, against which the appellant filed Appeal filed Appeal No. E/75881/2017.

6. Thereafter, another Show Cause Notice dated 29.09.2017 was issued by the Commissioner, CGST, Central Excise, Siliguri proposing demand of Central Excise duty of Rs. 13,71,26,014.00 along with interest and to impose penalty on the clearance of "Sikko Sol" classifying under tariff item 27101213 of CETA, 1985 for the period from January 2016 to December 2016 on the basis of Chemical Test Report dated 13.01.2016.

7. By Order-in-Original dated 30.11.2018, the Commissioner of CGST & CX, Siliguri, confirmed the demand of Central Excise duty of Rs.39,96,769.00 along with interest and imposed penalty on clearance of Sikko Sol classifying under tariff item 27101213 of CETA, 1985 for the period from January 2016 to December 2016. By Corrigendum dated 04.03.2019 of the Order-in-Original dated

30.11.2018, the Commissioner dropped the erroneous demand of duty of Rs. 13,31,29,245.00 after re-calculation of demand in so far as the effective rate of duty was fixed @ 14% *Ad velorem* only as per Notification No. 12/12-CE dated 17.03.2012 as amended by Notification No. 24/2012-CE dated 08.05.2012. and there was no additional duty to be paid @ Rs. 15/Litre. The Appellant filed appeal being Excise Appeal No.75881/2017 against Order-in-Original dated 06.02.2017 and Excise Appeal No.76500/2019 against Order-in-Original dated 30.11.2018 to the extent of demand of duty along with interest and imposition of penalty.

8. The Learned Advocate appearing on behalf of the Appellant submitted that Sikko Sol, a brand name, is one type of Thinner mainly used by the paint industries. The main raw material Condensate is procured from Oil India Limited, a Public Sector Undertaking. As it is a regulated item, they submitted End User Certificate to Oil India Limited as well as District Magistrate as per Order dated 05.06.2000 issued by the Ministry of Petroleum and Natural Gas. It is further submitted that tariff item No. 38140010 specifically mentioned the goods "Solvent and Thinner" and therefore their product is clearly covered under the said tariff item as per Rule 3(a) of the First Schedule of Excise Tariff General Rules for the interpretation of this schedule (hereinafter referred to as Rules for the Interpretation of Tariff). The Learned Advocate further submitted that the Adjudicating authority had not looked into the Chemical Test Report in proper manner in so far as it is mentioned in the Test Report that Sikko Sol is Special Boiling Spirit. But, the Adjudicating authority erroneously observed that the Chemical Examiner opined that it is Special Boiling Point Spirit. Therefore, the finding of the Adjudicating authority is beyond the Chemical Examiner's opinion. It is further submitted that the Chemical Examiner has to analyse the product and he cannot classify and/or define the product in any manner.

9. Regarding the classification of the Sikko Sol under tariff item No.27101213 as confirmed by the adjudicating authority, the Learned Advocate submitted that the Adjudicating authority had totally ignored Note 4 of Sub heading Notes of Chapter 72, which says that for the purpose of sub heading 271012 "light oils and preparations" are those of which 90% or more by volume (including losses) distil at 210°C. He drew the attention of the Bench to the Test Report No.01 dated 13.01.2016, where it is mentioned 90% by volume is distilled at 106°C. Thus, the product Sikko Sol would not come within the purview of Note 4 of Sub-heading Notes, then, it cannot be covered under sub-classification under tariff item 27101213 of CETA, 1985. It is further submitted that the Adjudicating authority strongly relied on the Supplementary Note (a) of Chapter 27 of CETA where it is mentioned that Special Boiling Point Spirits. (tariff Items 27101211, 27101212 and 27101213) means "Light Oils" as defined in Sub heading Note 4. It is submitted that Sub Heading Note 4 would not apply as per Test Report and therefore Supplementary Notes (a) would also not apply. He further submitted that the words "the difference of not less than 60°C between the temperatures at which 5% and 90% by volume (including losses) distill" in Supplementary Note (a) of Chapter 27 would be linked with Sub heading Note 4 which says 90% or more by volume distilled at 210°C and which is the basis for ascertaining difference of not more than 60°C between the temperatures 5% and 90% by volume distil. It is submitted that in the present case Test Report indicates 5% by volume is distilled at 54°C. The Learned Advocate also drew the attention of the Bench to the Rules of Interpretation of Tariff in detail. It is submitted that Sikko Sol is not light oil and preparation and the department had not adduced any evidence thereof. On the other hand, the Appellant produced the evidence in so far as End User Certificate and other documents would show that it is a Thinner/Solvent and accepted by the District Magistrate, Oil India Limited and in the market.

10. The Learned Advocate also submitted that the demand is barred by limitation and no penal provision can be invoked. It is a case of interpretation of classification of the goods. The Learned Advocate submitted Written Submission, Additional Written Submission along with list of dates, case laws, where it has dealt with shortage/excess of goods.

11. The following Case Laws are relied upon by the Ld Advocate:-

- i) 2006 (197) E.L.T. 324 (S.C.) H.P.L. Chemicals Ltd. -Vs- Commissioner of C. Ex., Chandigarh
- ii) 2016 (336) E.L.T. 42 (Cal.) Sanwar Agarwal -Vs- Commissioner of Customs (Port).
- iii) 2020 (372) E.L.T. 686 (Cal.) Commissioner of Customs (Port) -Vs- Sanwar Agarwal
- iv) 2020 (372) E.L.T. 465 (S.C.) Commissioner of Central Excise, Delhi-III - Vs- UNI Products India Ltd.
- v) 2001 (134) E.L.T. 285 (Tri.-Kolkata) Shalimar Paints Ltd. - Vs- Commissioner of Central Excise, Calcutta.
- vi) 2002 (145) E.L.T. A242 Commissioner -Vs- Shalimar Paints Ltd.
- vii) 1994 (70) E.L.T. 141 (Tribunal) UNITEC Industries -Vs- Collector of Central Excise, Belgaum
- viii) 2007 (207) E.L.T. 161 (S.C.) Commissioner of C. Ex. & Customs, Surat-II -Vs- Nirmala Dyechem
- ix) 2021 (375) E.L.T. 263 (Tri.-Hyd.) Biomax Life Science Ltd. - Vs- Commr. of Cus., C.Ex. & S.T., Hyderabad.
- x) 2015 (324) E.L.T. 594 (Tri.-Mumbai) Aarti Drugs Ltd. -Vs- Commissioner of Central Excise, Thane-II
- xi) (31) G.S.T.L. 487 (Tri.-Kolkata) Calcutta Industrial Supply Corpn. -VS Commissioner of S.T., Kolkata.
- xii) 2019 (31) G.S.T.L. J147 (S.C.) Commissioner -Vs- Calcutta Industrial Supply Corporation.

12. The Learned Authorised Representative on behalf of the Revenue reiterated the findings of the adjudicating authority. He submitted that the Ld. Advocate on behalf of the Appellant only drew the attention of the Bench on Light Oil and Preparation. It is submitted that sub-heading No. 271012 would also cover Motor

Spirit. It is mentioned in Supplementary Note (a), Motor Spirit Flash Point below 25°C, which would be in conformity with the Test Report. It is contended that "Sikko Sol" may be treated as Motor Spirit covered under tariff item 27101213. The Learned Authorised Representative drew the attention of the Bench to the relevant portion of Rules of Interpretation of Tariff. It is further contended that there is no mention in End User Certificate that "Sikko Sol" is Solvent or Thinner. The case laws as referred by the Learned Advocate would not apply in the facts and circumstances of the case. The Learned Authorised Representatives had read the relevant portion of the impugned Order in respect of time bar issue. It is further submitted that there is a shortage/excess of goods as found during the stock verification, would establish clandestine removal of goods.

13. After hearing both the sides through video conferencing and on perusal of records, we find that the Appellant is manufacturing "Sikko Sol", which is their brand name, out of raw materials Condensate and Benzene. In both the appeals, the finished goods "Sikko Sol" was classified under tariff item. 38140010 as thinner and cleared by the Appellant on payment of Central Excise duty as applicable. On 17.04.2015 the Central Excise Officers drew the sample of finished goods and raw materials. By letter dated 21.01.2016 the Assistant Commissioner (HAEU) of Siliguri Commissionerate forwarded the Chemical Test Reports dated 13.01.2016 to the Appellant. The Show Cause Notices were issued proposing demand of duty along with interest by classifying Sikko Sol under tariff item 27101213 as Special boiling spirit, on the basis of Test Report No. 01A and 01B dated 13.01.2016.

14. The relevant portions of Rules of Interpretation of Tariff as referred by parties are reproduced below :-

The First Schedule - Excise Tariff

(See Section 2)

GENERAL RULES FOR THE INTERPRETATION OF THIS SCHEDULE

Classification of goods in this Schedule shall be governed by the following principles:

1. The titles of Sections, Chapters and Sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions.

2. (a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished,

(b) Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances.

3. When by application of rule 2(b) or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows:

(a) the heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

(b) mixtures, composite goods consisting of different materials or made up of different components,

(c) when goods cannot be classified by reference to (a) or (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

GENERAL EXPLANATORY NOTES

1. Where in column (2) of this Schedule, the description of an article or group of articles under a heading is preceded by "-", the said article or group of articles shall be taken to be a sub-classification of the article or group of articles covered by the said heading. Where, however, the description of an article or group of articles is preceded by "--", the said article or group of articles shall be taken to be a sub-classification of the immediately preceding description of the article or group of articles which has "-". Where the description of an article or group of articles is preceded by "---" or "----", the said article or group of articles shall be taken to be a sub-classification of the immediately preceding description of the article or group of articles which has "-" or "--".

2. *****

ADDITIONAL NOTES

In this schedule, -

1.(a) "heading" in respect of goods, means a description in list of tariff provisions accompanied by a four-digit number and includes all sub-headings of tariff items the first four digits of which correspond to that number;

(b) "sub heading", in respect of goods, means a description in the list of tariff provisions accompanied by a six-digit number

and includes all tariff items the first six digit of which correspondent to that number;

(c) "tariff item" means a description of goods in the list of tariff provisions accompanying either eight-digit number and the rate of the duty of excise or eight-digit number with blank in the column of the rate of duty;

(2) the list of tariff provisions is divided into Sections, Chapters and Sub-Chapters;

(3) in column (3), the standard unit of quantity is specified for each tariff item to facilitate the collection, comparison and analysis of trade statistics.

15. Note 1 of "General Explanatory Notes" of Rules for the Interpretation of this Tariff, may be divided into three parts:-

- (a) Where in column (2) of the Schedule, the description of an article or group of articles under a heading is preceded by " – ", the said article or group of articles shall be taken to be a sub-classification of the article or group of articles covered by the said heading;
- (b) Where, however, the description of an article or group of articles is preceded by " -- ", the said article or group of articles shall be taken to be a sub-classification of the immediately preceding description of the article or group of articles which has " – "
- (c) Where the description of an article or group of articles is preceded by " --- " or " ---- ", the said article or group of articles shall be taken to be a sub-classification of the immediately preceding description of the article or group of articles which has " – " " or " -- "

16. "Additional Notes" of Rules for Interpretation of Tariff defined the words "heading", "sub-heading" and "tariff item" of Tariff. Precisely, a description in the list of tariff is accompanied by a 4-digit number "heading", 6 – digit number "sub heading" and 8- digit number "tariff item"

17. The issue involved in the present appeals is as to whether Sikko Sol would be classified under tariff item 27101213 of Central Excise Tariff Act, 1985 as held by the Adjudicating authority. Both the sides referred Chapter Notes of Chapter 27 of CETA, 1985 as reproduced below :-

CHAPTER 27

Mineral Fuels, Mineral Oils and Products of their distillation;
Bituminous Substances, Mineral Waxes

Notes : Chapter does not cover :

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*****          *****          *****          *****
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Sub-heading Notes :

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4. For the purposes of sub-heading 2710 12, "light oils and preparations" are those of which 90% or more by volume(including losses) distil at 210°C (ASTM D 86 method).

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5. *****          *****          *****          *****
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Supplementary Note:

In this Chapter, the following expressions have the meanings hereby assigned to them:

(a) "motor spirit" means any hydrocarbon oil (excluding crude mineral oil) which has its flash point below 25°C and which

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either by itself or in admixture with any other substance, is suitable for use as fuel in spark ignition engines. "Special boiling point spirits (tariff items 2710 12 11, 2710 12 12 and 2710 12 13)" means light oils, as defined in Sub-heading Note 4, not containing any anti-knock preparations, and with a difference of not more than 60°C between the temperatures at which 5% and 90% by volume (including losses) distil;

(b) ***** ***** *****
 ***** *****

Tariff Item	Description of goods
*****	*****

27090000 Petroleum oils and oils obtained from bituminous minerals, crude

2710 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; waste oil :

- Petroleum oils and oils obtained from bituminous minerals (other than crude) and 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, other than those containing bio-diesel and other than waste oil :

2710 12 -- Light oils and preparations :

--- Motor spirit

2710 12 11 ---- Special boiling point spirits (other than benzene, toluol) with nominal boiling point range 55-115°C

2710 12 12 ---- Special boiling point spirits (other than benzene, benzol, toluene and toluol) with nominal boiling point range 63-70°C

2710 12 13 ---- Other Special boiling point spirits (other than benzene, benzol, toluene and toluol)

2710 12 19 ---- Other

2710 12 20 --- Natural gasoline liquid (NGL)

271012 90 --- Other.

18. "Light oils and preparations" is preceded by "--"accompanied by a six-digit number sub heading 271012. The description of an article "Other Special boiling point spirit" is preceded by "----", accompanied by eight – digit number tariff item 27101213. As per third part of Note 1 of General Explanatory Notes, tariff item 27101213 shall be taken to be a sub-classification of sub-heading 271012.

19. While classifying Sikko Sol under Tariff item 27101213 the findings of the Adjudicating authority in Order-in-Original dated 06.02.2017 are as under :-

"In the Chemical report, the Chemical Engineer has opined that the two samples marked O1A and 01B of Sikko Sol, being the finished product, is a Special Boiling Point Spirit. On close perusal of the report I see that the difference between the temperatures at which 5% and 90% by volume distils is less than 60°C, the actual difference being 54°C for both the samples. As per Supplementary Note (a) to Chapter 27 of the Central Excise Tariff 'Special boiling point spirits (tariff items 2710 1211, 2710 1212 and 2710 1213) means light oils, as defined in Sub-heading Note 4, and with difference of not more than 60°C between the temperatures at which 5% and 90% by

volume (including losses) distill. As the report of the Chemical Examiner is in conformity with the Sub-heading no 2710 1213, I conclude that the classification of the impugned finished goods as proposed in the Show-cause Notice to be proper and correct. Accordingly, the finished product of the Noticee is to be classified under the Sub-heading no. 2710 1213 attracting an effective rate of duty of 14% with effect from 17.03.2012 and 16% +Rs.15/- per litre prior to 17.03.2012. I note that this mis-classification has resulted in a short payment of duty as calculated in Annexure- C to the Show-cause Notice."

20. For the purpose of proper appreciation of the case, the chemical analysis of the Chemical Test Report No. 01A is reproduced below :-

1.	Flash Point is below 25°C
2.	Density at 15°C = 0.7210 gm/ml
3.	Distillation Range from 42°C to 116°C
4.	5% volume distilled at 52°C
5.	90% volume distilled at 106°C
	It is Special Boiling Spirit

Test Report No. 01B is similar to Test Report 01A as mentioned above, except 5% volume distilled at 54°C and 90% volume distilled at 108°C.

21. It is noted that tariff item 27101213 is the sub classification of sub heading no. 271012 of CETA. Sub heading Note 4 of Chapter 27 provides that for the purpose of Sub Heading 271012 "Light Oil and Preparation" are those of which 90% or more by volume (including losses) distilled at 210°C (ASTMD 86 Method). On perusal of the Serial no. 5 of Test Report, it is seen that Sikko Sol 90% by volume

is distilled at 106°C. So, the condition of the Sub heading Note 4 of Chapter 27 would not satisfy Sikko Sol as per Test Report. When sub-heading 271012 would not satisfy Sikko Sol then, sub classification under tariff item 27101213 cannot be sustained.

22. The Adjudicating authority observed that the Chemical Examiner has opined that the two samples of Sikko Sol being the finished products is a Special Boiling Point Spirit. On perusal of the Test Report, we find that the Chemical Examiner opined that it is Special Boiling Spirit. The word "point" is not mentioned in the Chemical Examiner Report. So, the finding of the Adjudicating authority at this regard is not correct and beyond the scope of Chemical Examiner Report. In any event, it is required to examine the Chemical analysis of the Test Report. It is well settled that the Chemical Examiner has only to give composition of the goods and not to comment on the classification of goods in any manner.

23. The Adjudicating authority while classifying Sikko Sol, a Special Boiling Point Spirit under tariff item 27101213, proceeded on the basis of Supplementary Note (a) of Chapter 27. It says that "Special Boiling Point Spirits (tariff item 27101211, 27101212 and 27101213)" means: -

- (a) light oils, as defined in sub-heading Note 4,
- (b) not containing any anti knock preparations, and
- (c) with a difference of not more than 60 °c between the temperatures at which 5% and 90% by volume (including losses) distil;

24. Special boiling point sprits under tariff item 27101213 in Supplementary Note (a) is started with "light oils, as defined in Sub-heading Note 4". We have already observed that Sikko Sol would not satisfy the condition of Sub-heading Note 4, which provides that Light Oils and preparations are those of which 90% or more by volume (including losses) distil at 210°C (ASTM D86 method). In this case, as per chemical test report Sikko Sol 90% by volume is distilled at

106°C. So, it is not "light oils" as defined in Sub-heading Note 4. The next part is "not containing any anti-knock preparations". The chemical test report is silent about the test of "anti knock preparations".

25. The Adjudicating authority proceeded on the basis of third part of the definition of "Special boiling point spirits" as mentioned in Supplementary Note (a). The finding of the Adjudicating authority is that the difference between the temperatures at which 5% and 90% by volume distils is less than 60°C, as mentioned in Supplementary Note (a) and in the instant case the actual difference being 54°C for both the samples and therefore Sikko Sol is Special boiling point spirits. In our considered view, the Supplementary Note (a) should be read as a whole. The expression "a difference of not more than 60°C between the temperatures at which 5% and 90% by volume (including losses) distil" in Supplementary Note (a), if read with the prefix words "Special boiling point spirits (tariff items – 27101211, 27101212 and 27101213) means light oils, as defined in Sub heading Note 4", would make it clear that difference of not more than 60°C between the temperature at which 5% and 90% by volume distil would be ascertained taking into consideration of 90% or more by volume distilled at 210°C as defined in Sub heading Note 4. The finding of the Adjudicating authority is merely on the basis that the difference between 5% and 90% by volume is not more than 60% and totally ignored Sub-heading Note 4. We find from the Test Report that Sikko Sol 90% by volume is distilled at 106°C, which is much below than 90% by volume distilled at 210°C as mentioned in Sub heading Note 4. Similarly, as per test report Sikko Sol 5% by volume is distilled at 52°C. The Adjudicating authority while reading Supplementary Note (a) had totally overlooked Sub heading Note 4 and erroneously classified Sikko Sol under Tariff item 27101213 as Special Boiling Point Spirit. Hence, there is no force in the finding of the Adjudicating authority.

26. The Learned Authorised Representative during the course of hearing submitted that Supplementary Note (a) is also indicating "Motor Spirit". It is contended that the Test Report indicated Flash Point below 25°C, which is in conformity with Supplementary Note (a). On perusal of the impugned Adjudication Order, it is seen that the Adjudicating authority held that Sikko Sol is "Special Boiling Point Spirit. We find that the submission of the Learned Authorised Representative is beyond the Show Cause Notice and the Adjudication Orders. In this context, the Learned Advocate of the appellant drew the attention of the Bench the words "suitable for use as fuel in Spark Ignition Engine" in Supplementary Note (a) in respect of "Motor Spirit". It is submitted by the appellant that there is no material available on record that Sikko Sol is suitable for use as fuel in Spark Ignition Engine. On the other hand, the End User Certificate as submitted by the appellant to various authorities, it is established that Sikko Sol is nothing but Solvent and/or Thinner. The expression "suitable for use" has been considered by the Tribunal in the case of Cellulose Products of India Ltd Vs. C.C.E 1996 (82) ELT 147, it has been held that actually, practically, and commercially the product is fit for use and not casual, incidental or possible use.

27. In a series of decisions by the Hon'ble Supreme Court, High Court and Tribunal, it is held that if the department intends to classify the goods under a particular heading or sub heading different as claimed by the assessee, the department has to adduce proper evidence and discharge burden of proof. The Hon'ble Supreme Court in the case of HPL Chemicals Ltd (Supra) observed as under :-

"29. This apart, classification of goods is a matter relating to chargeability and the burden of proof is squarely upon the Revenue. If the Department intends to classify the goods under a particular heading or sub-heading different from that claimed by the assessee, the Department has to adduce proper evidence and discharge the

burden of proof. In the present case the said burden has not been discharged at all by the Revenue."

28. It is well settled that while determining the classification of the goods, the broad description of the articles fits in with the expression used in the tariff is relevant. It is also required to examine the meaning of the product in the commercial parlance. The End Use of the goods would strengthen the conclusion that it is known in the market. In the instant case, the appellant purchased raw material "Condensate" (which is a regulated item) from Oil India Limited, a Public Sector Undertaking. In exercise of the Essential Commodities Act, 1955 (10 of 1955), the Ministry of Petroleum and Natural Gas issued Order dated 05.06.2000, which may be called "Solvent, Raffinat and Slop (Acquisition, Sale, Storage and Prevention of use in Automobile) Order 2000". Clause 3 of the said Order 2000 provides that any person whosoever is engaged in sale or trading of Solvent, Raffinat and Slop or their equipment and product either imported or indigenous shall file End Use Certificate from the consumer whom he sells and furnish customer wise sales to the District Magistrate or to the State Civil Supplies Authority on quarterly basis.

29. It is seen that the appellant filed the End User Certificate to Oil India Limited as well as the District Magistrate as per provision of Order dated 05.06.2000 of the Ministry of Petroleum & Natural Gas. Thus, it is evident that Sikko Sol is not used in Automobile. We do not find any evidence that Sikko Sol is used as Light Oil and/or motor spirit suitable for use in Spark Ignition Engine as mentioned in the Supplementary Note (a). So, there is no merit to classify Sikko Sol under tariff Item 27101213 of CETA 1985. The demand of duty along with interest and penalty by the impugned Orders classifying the product under Tariff No. 27101213 cannot be sustained.

30. It is observed that on perusal of the Show Cause Notice dated 08.04.2016 we find that only one page, paragraph nos. 2.19 and 2.20 out of 25 pages, have been dealt with classification of Sikko Sol

under tariff item 27101213. Similarly, the finding of the Adjudicating authority in Order-in-Original dated 06.02.2017 is only half page as mentioned above, out of 28 pages, and the remaining pages are narrating shortage /excess of raw materials and finished goods as detected on 16.04.2015 and 27.04.2015, where the excess goods were confiscated and redemption fine of Rs. 1,57,592.00 was imposed and ordered for recovery of Cenvat Credit of Rs. 86,188.00 on shortage of goods. It would show that an extensive investigation was conducted in so far as several statements were recorded including Chief Material Manager of M/s. Oil India Ltd in respect of shortage /excess of goods. But, no enquiry was done on the proposed change of classification of Sikko Sol, such as manufacturing process, marketability, chemical composition, Chapter note etc. The Hon'ble Supreme Court in the case of Commissioner of Central Excise, Delhi Vs. UNI Products Pvt Ltd.(Supra)observed that the "common parlance test", "marketability test", "popular meaning test" are all tools for interpretation to arrive at a decision on proper classification of a tariff entry. These tests, however, would be required to be applied if a particular tariff entry is capable of being classified in more than one heading. In the present case, it is submitted by the appellant that since 2010 they were clearing Sikko Sol classifying under tariff item 38140010 on payment of central excise duty. The department by show cause notice dated 08.04.2016 proposed to change the classification of goods without any enquiry except Chemical Test Report. .

31. Regarding confiscation of the seized goods and imposition of redemption fine of Rs. 1,57,592.00, the Learned Advocate of the appellant submitted that there is no involvement of Central Excise duty on raw materials. We find that the Central Excise Officer seized Sikko Sol and raw materials under the provision of Rule 24 of the Central Excise Rules, 2002. Rule 24 of the Central Excise Rules provides that if a Central Excise Officer has reason to believe that any

goods which are liable to excise duty but no duty has been paid thereon, or the goods were removed with the intention to evading Central Excise duty payable thereon, the Central Excise Officer may detain or seize such goods. In the present case, the goods were lying in the appellant's factory. There is no material available on record that the appellant had any intention to remove the goods without payment of duty. Hence, the confiscation of goods and imposition of redemption fine cannot be warranted.

32. The Adjudicating authority ordered recovery of re-credit amounting to Rs. 42,088.00 and inadmissible Cenvat Credit of Rs. 44,100.00. It is seen that the appellant explained during the investigation that the alleged shortage of goods is for miscommunication between the Plant Operator and Staff working in the Factory office resulting some inadvertent error in data reconciliation. The appellant also explained during the investigation that the shortage was occurred at the time of distillation and mixing of the goods. It appears that the Enquiry Officer had not examined the contention of the appellant and the Adjudicating authority brushed aside the contention of the appellant as the explanation is not at all convincing. In our considered view, such finding of the Adjudicating authority cannot be sustained.

33. The Learned Advocate submitted that the demand of duty is barred by limitation as the extended period of limitation cannot be invoked. The Adjudicating authority observed that it is a misclassification of the final product. The wrong classification of the product in the ER-1 return cannot be the ground for invocation of extended period of limitation. The Ld. Advocate relied on the decision of Biomax Life Science Ltd (supra) where the Tribunal held as under:-

"As far as the question of limitation is concerned, it is evident from the order of the adjudicating authority that the only ground on which the extended period of limitation has been invoked and upheld in this case is that the appellant has wrongly classified the products in their

ER-1 returns and paid less duty. We find that in terms of Section 11A of the Central Excise Act, extended period of limitation can be invoked only in cases of fraud, collusion, wilful misstatement, suppression of facts or violation of Act or Rules with an intention to evade payment of duty. Claiming wrong classification cannot be the ground for invoking extended period of limitation, therefore, the entire demand beyond normal period of limitation needs to be set aside and we do so."

34. In the present case, it has been alleged in the Show Cause Notice that the appellant through the process of misclassification and consequent short-payment of duty have violated the provision of Rule 6 the Central Excise Rules, 2002, as it had not assessed their duty liability properly. It has been stated in the said notice that the calculation for the demand has been made on the basis of ER-1 returns submitted by the appellant. The Adjudicating authority observed that the allegations regarding the contraventions of the provisions of the rules and notification have been thoroughly dealt with in the show cause notice. It has been observed that the contraventions of the rules and notifications were made with the intention to evade the payment of duty and the modus operandi unearthed by the departmental officers is more enough to invoke the extended period of limitation under Section 11A of the Central Excise Act, 1944. We are not convinced with the finding of the Adjudicating authority in so far as there is no material available on record to establish willful misclassification and/or misstatement as the ingredients to invoke extended period of limitation under Section 11A of the Central Excise Act, 1944. The decision of Biomax Life Science Ltd (Supra) on limitation is applicable in the instant case and therefore we hold that demand of duty for extended period of limitation cannot be invoked.

35. In the facts and circumstances of the instant case, it is our considered view that "Sikko Sol" cannot be classified under tariff item 27101213 of the CETA, 1985. Accordingly, the demand of duty with interest and imposition of penalty would be set aside on merit and on limitation. The confiscation of goods, imposition of redemption fine and recovery of credit are also set aside.

36. In view of the discussion, we set aside the impugned orders. Both the appeals are allowed with consequential reliefs, if any. The Miscellaneous Application (COD), filed by the Applicant/Appellant, for condonation of delay in filing Excise Appeal No.75881 of 2017, also gets disposed off.

(Order pronounced in the open court on 12 July 2022.)

Sd/

(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/

(RAJU)
MEMBER (TECHNICAL)