IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

REGIONAL BENCH – COURT NO.2

Excise Appeal No.238 of 2010 &
Excise Appeal No.76038 of 2014

(Arising out of Order-in-Original No.15/Commissioner/CE/Haldia/Adjn./2014 dated 05.05.2014 passed by Commr. of Central Excise, Haldia Commissionerate)

M/s Krishna Technochem Pvt. Ltd.
Vill. + P.O.-Kandua, Sulati, P.S.Sankrail, Ranihati, Howrah-711302

Appellant

VERSUS

Commr. of Central Exicse, Haldia
25,Princep Street, 3rd Floor, Kolkata 7700072

Respondent

WITH

Excise Appeal No.239 of 2010

(Arising out of Order-in-Original No.01/Commissioner/CE/Haldia/Adjn./2010 dated 07.01.2010 passed by Commr. of Central Excise, Haldia Commissionerate)

Shri Bindhyachal Singh,
Accountant/Manage of M/s Krishna Technochem Pvt. Ltd.
Vill. + P.O.-Kandua, Sulati, P.S.Sankrail, Ranihati, Howrah-711302

Appellant

VERSUS

Commr. of Central Exicse, Haldia
25,Princep Street, 3rd Floor, Kolkata 7700072

Respondent

APPERANCE :

Shri Rajesh Chhibbar, Advocate and Shri D.K.Datta, Consultant for the Appellants
Shri S.S.Chattopadhyay, Authorized Representative for the Appellant

CORAM:

HON'BLE MR. P.K.CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR.C. J. MATHEWS, MEMBER (TECHNICAL)

FINAL ORDER NO.77087-77089/2019

DATE OF HEARING : 25.09.2019
DATE OF DECISION : 25.09.2019

PER P.K.CHOUDHARY :

The instant appeals have been preferred by the assessee, M/s. Krishna Technochem Pvt Ltd, against demand of Central Excise duty, interest and penalty confirmed by the Ld. Commissioner of Central Excise, Kolkata, for the period from 11.04.2005 to 09.02.2008 and 01.04.2008 to 28.02.2013. A personal penalty has also been imposed on Sri Bindhyachal Singh, Accountant of the appellant company, who has also preferred appeal before us. Since the issues involved in all the appeals are common, the same are disposed of by this common order.

2. The appellant is inter-alia engaged in the manufacture of solvent oil, also referred as organic composite solvent oil ('OCS') on which central excise duty has been paid by classifying them under tariff sub heading 3814 00 10. In the first Show Cause Notice (SCN) dated 31.03.2009, the classification was proposed to be made under tariff sub heading 2710 11 19 as 'others' appearing under the main heading 271011 as "light oil and preparation". However, the duty demand has been confirmed for the differential duty amount in the impugned order under sub heading 2710 11 90 together with interest and penalty on the appellant company and personal penalty on the Accountant as mentioned above. In the SCN date 20.03.2013 issued for the subsequent period, the differential duty demand has been confirmed in the adjudication order by classifying the goods under tariff sub heading 2710 11 19 as was proposed in the said SCN.

3. Sri Rajesh Chhibbar, Advocate, and Sri D. K. Datta, Consultant, appeared for the appellant and Sri S S Chattpadhyay, Ld. A/R appeared for the Revenue.

4. The Ld. Advocate for the appellant submitted that there is no dispute with regard to the nature or description of goods as Organic Composite Solvent Oil (OCS). He further submitted that the Department has heavily relied on the finding made by the Chemical Examiner in the testing report wherein it has been stated that the sample is in the form of clear colourless liquid containing mixture of hydrocarbons having

distillation range from 35 degree to 58 degree celsius and flash point below 25 degree Celsius. It is the submission of the Ld. Advocate that the classification adopted by the Ld. Commissioner is not supported by the definition as given against Note no. 4 to Chapter 27 of the Tariff which states that "Light Oil and Preparations" are those of which 90% or more by volume (incl. losses) distill at 210 degree Celsius, whereas the Chemical Examiner in his report stated that the range of distillation of product is 35 degree to 58 degree Celsius which is much below 210 degree Celsius. Hence the classification under chapter 271011 is automatically ruled out.

The Ld Advocate also submitted that classification has been settled by the Tribunal in the case of Kuchchal Chemicals Ltd. vs, CCE, Lucknow 2013 (288) ELT 585 and further the issue is finally settled by the Hon'ble Apex Court in Commissioner, Central Excise, Noida vs. Jagdamba Petroleum Pvt. Ltd 2007 (212) ELT A112 (S.C.). He also disputed the case on time bar and imposition of penalty in absence of fraud or suppression and also submitted that personal penalty could not be imposed on the second appellant under Rule 26 of the Central Excise Rules in absence of necessary evidences.

5. The Ld. Departmental Representative appearing for the Revenue reiterated the findings made by the Ld. Commissioner, supported the impugned order and prayed for upholding the demand.

6. Heard both sides and perused the appeal records in detail.

7. On perusal of the decisions relied by the Ld. Advocate for the appellant, we find that the issue stands squarely decided in their favour in the case of Kuchchal Chemicals Ltd (Supra), wherein the Tribunal has held that Organic Composite Solvent cannot be classified under chapter 27. The relevant extracts of the decision is reproduced below:

> *"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 2710 11 13 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°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°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 2710 11 13 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. v. C.C.E., Noida - 2004 (163) E.L.T. 8 (Tri.-Del.) and Silverchem Industries Pvt. Ltd. v. C.C.E., Mumbai - 2003 (155) E.L.T. 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 2710 11 13 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 2710 11 13. 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 2710 11 13, 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 fulfil the following three conditions, namely, (i) it should *be composed of hydrocarbon oil, (ii) its flash point should be below 25°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°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 fulfil 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. v. C.C.E. - 2004 (163) E.L.T. 88 (Tri.-Del.), similar issue came up before the coordinate Bench of this Tribunal in the said case also the final product in dispute was manufactured using Naphtha 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°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 v. Jagdamda Petroleum P. Ltd. - 2004 (163) E.L.T. 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."

8. Further, in the instant case, sole reliance has been placed by the Ld. Commissioner on the Chemical Examiner's report. As rightly pointed out by the Ld. Advocate that, in the testing report it has been stated that the sample drawn from the appellant's premises is liquid containing mixture of hydrocarbons having distillation range from 35 degree to 58 degree Celsius and flash point below 25 degree Celsius. The classification adopted by the Ld. Commissioner is not in consonance with the Note no. 4 to Chapter 27 of the Tariff which states that "Light Oil and Preparations" are those of which 90% or more by volume (incl. losses) distilled at 210 degree Celsius, whereas the Chemical Examiner

has stated that the range of distillation of product is 35 degree to 58 degree Celsius which is much below 210 degree Celsius. Hence the classification under chapter 271011 cannot be adopted. Similar observations have been made by the Tribunal in the aforesaid decision.

9. In view of the aforesaid, the classification adopted by the Ld. Commissioner cannot be approved and hence, the entire duty demand, interest and penalty are set aside and the appeals are allowed with consequential relief. The personal penalty imposed on Sri Bindhyachal Singh, Accountant, is also set aside.

(Operative part of order was pronounced in the Open Court)

Sd/
(P. K. Choudhary)
Member (Judicial)

Sd/
(C.J.Mathews)
Member (Technical)

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