CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

Customs Appeal No. 1341 of 2006

(Arising out of Order-in-Appeal No. GOA.CUS/BBP/29/2006 dated 29.09.2006 passed by the Commissioner of Central Excise &Customs (Appeals), Goa)

M/s Hindustan Petroleum Corpn. Ltd. .... Appellant
TalegaonChakan Road, Vill – Mahalunge Ingale,
Chakan, Pune - 410501

Versus

Commissioner of Central Excise, Pune-I .... Respondent
ICE House, 41/A, Sasoon Road,
Opp. Wadia College, Pune - 411001

Appearance:

Shri M.H. Patil, Advocate for the Appellant

Shri Ramesh Kumar, AC, Auth. Representative for the Respondent

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO. A/85651/2020

Date of Hearing: 17.12.2019
Date of Decision: 12.06.2020

Per: Dr. D.M. Misra

This is an appeal filed against the Order-in-Appeal No. GOA.CUS/BBP/29/2006 dated 29.09.2006 passed by the Commissioner of Central Excise & Customs (Appeals), Goa.

2. Briefly stated the facts of the case are that the appellants are importer of Liquefied Petroleum Gas (LPG). During the period September, 2004 to April, 2005, the appellant had imported

commercial butane (Liquefied Petroleum Gas) and cleared the same on payment of appropriate customs duty total amounting to Rs.11,60,61,990/-. The Notification No. 37/05-Cus dated 2.5.2005 was issued exempting Liquefied Petroleum Gases for supply to household domestic consumers at subsidized prices from whole of customs duty. Consequently, the appellant had filed a refund claim on 18.4.2005 seeking refund of Rs.11,60,61,990/- paid during the aforesaid period. Since the refund claim was not maintainable, the appellant was issued with a letter on 11.10.2005 directing them to file written reply and clarification on the issue. In the written submissions dated 21.10.2005, the appellant submitted that the basic customs duty on the Liquefied Petroleum Gas under the Customs Tariff Heading 2711.19 was reduced to Nil vide Notification No. 11/05-Cus dated 1.3.2005. Since the oil companies are not importing Liquefied Petroleum Gas per se and instead such imports are only in the form of commercial butane (Customs Tariff Heading 2711.13) or propane (Customs Tariff Heading 2711.12), they made representation to the Ministry of Petroleum and as a consequence Notification No. 35/05-Cus dated 2.5.2005 was issued. Therefore, they claimed that the duty paid on import of commercial butane during the said period amounting to Rs.11,60,61,990/- is refundable to them. On adjudication, the said refund claim was rejected observing that Notification No. 37/05-Cus dated 2.5.2005 cannot be assumed to have retrospective effect and as a result various representations made. Aggrieved by the said rejection of the refund claim, the appellant filed an appeal before the learned Commissioner

(Appeals), who in turn, rejected the appeal. Hence, the present appeal.

3. Learned Advocate Shri M.H. Patil for the appellant has submitted that during the relevant period i.e. Sept, 04 to April, 2005, the appellant had imported commercial butane (Liquefied Petroleum Gas) falling under Chapter Tariff heading 2711.1300. The appellant cleared the said commercial butane (Liquefied Petroleum Gas) on payment of normal customs duty of 10% instead of concessional rate of duty applicable to them under Notification No. 82/04-Cus dated 18.8.2004 and 11/05-Cus dated 1.3.2005. It is his contention that since the concessional rate exemption was available to the said commercial butane (Liquefied Petroleum Gas), the appellant filed refund claim of Rs.11,60,61,990/-. He has submitted that heading 2711 covers petroleum gases and other gaseous hydrocarbons. The said heading has been divided by two parts. The first part covers Liquefied Petroleum Gas and the second part petroleum gas in gaseous stream. First part i.e. LPG has been divided in five parts – Natural Gas, Propane, Butanes, Ethylene, propylene, butylenes and butadiene and residual nature, which is not covered in any of the precedent entry. Therefore, it is clear from the above entries, the same are covers Liquefied Petroleum Gas only in different states and kind. Therefore, the disputed item i.e. commercial butane (CHS 2711.1300) is also covers Liquefied Petroleum Gas. He has submitted that heading 2711 used the expression ‘petroleum gases’ and not ‘petroleum gas’; therefore, the said heading covers various petroleum gases. Referring to

Indian Standard Specification – IS 4576:1999, he has submitted that commercial butane is also mentioned as one of the covers Liquefied Petroleum Gas. Also referring to the Book‘Modern petroleum Refining Processes’ by Shri Bhaskara Rao, Dept. of Chemical Engineering, IIT, the learned Advocate submitted that *inter alia* pre-dominantly butane as well as butane –propane mixtures, is considered as LPG. Further, referring to the judgment of this Tribunal in the case of *Commissioner of Customs Vs. Aegis Logistics – 2014 (308) ELT 135 (T),* the learned Advocate submitted that in para 9 to 15 of the said judgment, it is held that butane, propane, butane-propane mixture are kinds of the Liquefied Petroleum Gases only. The said judgment was followed by this Tribunal subsequently in the case of *Reliance Industries Ltd. Vs. Commissioner of Customs – 2018-TIOL-2706-CESTAT-Mum*, wherein also it is held that commercial propane classified under Tariff Item 2711.1200 would be eligible for concessional rate and Department’s claim that exemption was available only to the goods ‘Liquefied Petroleum Gases’, which is a mixture of hydrocarbon gases i.e. propane, propylene, butane, butylenes and isobutene was not accepted. Further, he has submitted that in the Order-in-Appeal, it has been mentioned that the imported product is a mixture of butane and propane (98% butane and 2% propane), therefore, the same be considered as classifiable under Tariff Item 2711.1900 and eligible for exemption under the aforesaid Notifications. Further, he has submitted that similar dispute was decided in their favour vide Order-in-Original dated 26.09.2006. It is his contention that commercial butane or commercial propane or mixtures of both are known internationally as Liquefied Petroleum Gas. He has further submitted that the entry 75E substituted w.e.f. 2.5.2005 would have retrospective effect and in support he has referred to the judgment of the Hon'ble Supreme Court in the case of –

(i) *Indian Tobacco Association – (2005) 7 SCC 396*

(ii) *Zile Singh – (2004) 8 SCC 1*

(iii) *Ramkanali Colliery of BCCL - (2001) 4 SCC 236.*

4. Learned AR for the Revenue has submitted that the present issue relates to admissibility of refund relating to the exemption Notification, which was not claimed at the time of import of goods. It is his contention that M/s HPCL imported butane and propane classifying the same under Customs Tariff Heading 2711.1200 and 2711.1300 respectively. The Bills of Entry were assessed and accordingly duties were paid by the appellant. No appeals have been filed by the appellant against the said assessed Bills of Entry. The exemption subsequently claimed by the appellant relates to goods namely, Liquefied Petroleum Gas covered under Customs Tariff heading 2711.1900 and not applicable to "propane and butane" per se. Referring to the judgment of constitutional Bench of the Hon'ble Supreme Court in the case of *Commissioner of Customs (Import), Mumbai Vs. Dilip Kumar & Co. – 2018 (361) ELT 577 (SC),* submitted that the exemption is to be strictly interpreted and in case of ambiguity, benefit of such ambiguity cannot be claimed by the assessee and it must be interpreted in favour of the Revenue.

5. Further, he has submitted that in view of the ratio laid down, in the judgment of Hon'ble Supreme Court in the case of *Priya Blue Industries Ltd. Vs. Commissioner of Central Excise – 2004 (1q72) ELT 145 (SC)* and *Commissioner of Customs Vs. BPL Telecom Ltd. – 2015 (325) ELT 467 (SC),* held that there can be no claim of refund of duty paid unless importer successfully challenges the assessment of the Bill of Entry under which duties were paid. The said principles has not been reaffirmed in the recent judgment of *ITC Ltd. Vs. Commissioner of Central Excise, Kolkata – 2019 (368) ELT 216 (SC).* Further, he has submitted that in the case of *CEAT Ltd. Vs. Commissioner of Customs – 2016 (335) ELT 693 (T),* this Tribunal has relied upon the decision of Hon'ble Supreme Court in Priya Blue's case and held that the Bills of Entry presented by the importer and signed by the assessing officer is itself an order of assessment. Unless such assessment is successfully challenged, there can be no refund of duty paid.

6. The learned AR for the Revenue further submitted that after insertion of sub-section (2A) and (4) in Section 25, cannot be given retrospective effect unless such a specific explanation is inserted in the notification. Referring to the Larger Bench's decision of CESTAT in *Arvind Products Ltd. – 2014 (310) ELT 515 (Tri-LB)*, the notification cannot be have retrospective effect unless it is specifically mentioned in the said notification. Further, referring to clause (b) and (c) of Section 159A of the Customs Act, 1962, he has submitted that amendment to a notification shall not affect the previous operation of the un-

amended notification or anything duly done or suffered thereunder and that such amendment shall not affect any obligation or liability incurred under the un-amended notification. Therefore, the notification No. 37/05-Cus cannot operate retrospectively. The liability incurred to pay duty on imported butane and propane before 2.5.2005 cannot be undone by giving such retrospective effect.

7. Heard both sides and perused the records.

8. The short issue involved for determination in the present appeal is whether the appellants are entitled to refund the customs duty of Rs.11,60,61,990/- paid during September, 2004 to April, 2005. The undisputed facts are that the appellants had imported commercial butane (Liquefied Petroleum Gases) classifying it under Chapter heading 2711.1300 of Customs Tariff Act, 1975 on payment of applicable Basic Customs Duty (BCD) of 10%. Two amended notifications of the basic notification No. 21/02-Cus dated 1.3.2002 were in force during the period namely, Notification No. 82/04-Cus dated 18.8.2004 and 11/05-Cus dated 1.3.2005. The said notifications are reproduced below:-

> **"Kerosene, Motor spirit, High Speed Diesel and Liquefied Petroleum Gases — Effective rate of duty — Amendment to Notification No. 21/2002-Cus.**
>
> In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, being satisfied that it is necessary in the public interest so to do, makes the following further amendments in the notification of the Government of India, in the Ministry of Finance (Department of Revenue), No. 21/2002-Customs, dated the 1st March, 2002, namely :-
>
> In the said notification, in the Table, -

(i) against S. No. 73, for the entry in column (4), the entry " 5% " shall be substituted;

(ii) after S. No. 75A and the entries relating thereto, the following S. Nos. and entries shall be inserted, namely :-

(1)	(2)	(3)	(4)	(5)	(6)
"75B.	2710 11	Motor Spirit	15%	-	-
75C.	2710 19 30	High Speed Diesel (HSD)	15%	-	-
75D.	2711 19 00	Liquefied Petroleum Gases (LPG)	5%	-	-".

[Notification No. 82/2004-Cus., dated 18-8-2004]

(ix)afterS.No. 75D, and the entries relating thereto, the following shall be inserted, namely :-

((1)	(2)	(3)	(4)	(5)	(6)
"75E.	2711 19 00	Liquefied Petroleum Gases (LPG) imported for supply to household domestic consumer			

[Notification No. 11/2005-Cus., dated 1-3-2005]

9. Under Notification No. 82/04-Cus dated 18.8.2004, Liquefied Petroleum Gases (LPG) falling under Chapter sub-heading 2711 1900 attracted concessional duty @ 5%, whereas the amending notification No. 11/05-Cus prescribed exemption to Liquefied Petroleum Gases for supply to household domestic customs falling under the same chapter heading 2711.1900. It is the contention of the appellant that after the issuance of first amending notification No. 82/04-Cus dated 18.8.2004, they have represented to the Government that oil marketing company did not import Liquefied Petroleum Gases as such, but commercial butane or propane of mixture of commercial butane and propane. It is their argument that taking into note the objections of the oil marketing company alternatively the Notification No. 37/05-Cus dated 2.5.2005 was issued whereby the exemption extended to Liquefied Petroleum Gases was streamlined. For ease of reference, the said notification is reproduced below: -

"Liquefied Propane and Butane and their mixture imported for supply through PDS and Monofilament long line system for tuna fishing — Effective rate of duty — Amendment to Notification No. 21/2002-Cus.

In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby makes the following further amendments in the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 21/2002-Customs, dated the 1st March, 2002 which was published in the Gazette of India, Extraordinary vide number G.S.R.118 (E), dated the 1st March, 2002, namely :-

In the said notification, -

(A) in the Table, -

(i) for S. No. 75E and the entries relating thereto, the following shall be substituted, namely : -

(1)	(2)	(3)	(4)	(5)	(6)
"75E.	2711 12 00, 2711 13 00, 2711 19 00	Liquefied Propane and Butane mixture, Liquefied Propane, Liquefied Butane and Liquefied Petroleum Gases (LPG) imported for supply to household domestic consumers at subsidized prices under the public distribution system (PDS) Kerosene and Domestic LPG Subsidy Scheme, 2002, as notified by the Ministry of Petroleum and Natural Gas vide notification No. P-20029/18/ 2001-PP. dated 28th January, 2003	Nil	-	-";

10. It is the argument that under the Notification No. 37/05-Cus dated 2.5.2005, commercial liquefied butane and liquefied propane mixture had been mentioned in the said notification along with Liquefied Petroleum Gases. Thus, it is their contention that the same notification was issued consequent to their representation, hence the duty paid during the September, 2004 to 02.05.2005 without availing exemption is refundable to them. Further, it is the contention that even though in the respective Bills of Entry, it is mentioned as commercial butane (LPG), but in

fact the import said Liquefied Petroleum Gas was in mixture of butane (98%) and propane (2%), hence satisfied the criteria of Liquefied Petroleum Gases. In explaining the mentioning of Liquefied Petroleum Gases, the appellant had referred to the Bureau of Indian Standards and also the literature on the subject.

11. The Revenue's contention, on the other hand, is that the exemption Notification No. 37/05-Cus dated 2.5.2005 cannot be given retrospective effect as no such notification is provided in the amending notification. They have argued vehemently that the exemption notification has to be construed strictly and in support referred to the judgment of the Hon'ble Supreme Court in *Dilip Kumar's case (supra).* Also, they have submitted that the appellant vehemently discharged duty classifying the commercial duty under Customs Tariff sub-heading 2711.1300 and at no point of time the classification was contested. In the notification, the exemption was specifically allowed to Liquefied Petroleum Gases falling under Chapter sub-heading 2711.1900. Therefore, in absence of change of classification by filing necessary appeal against the assessment order, benefit of exemption notification cannot be extended to commercial butane (Liquefied Petroleum Gases).

12. We find force in the Revenue's contention inasmuch as principles governing interpretation notification as has been laid down by the Constitutional Bench of the Hon'ble Supreme Court in the case of *Dilip Kumar & Co. (supra).* Their Lordships

analyzing the principles laid down earlier held that exemption notification should be interpreted strictly; the burden to prove applicability would be on the assessee to show that his case comes within the parameter of exemption clause or exemption notification. The relevant para 52 is reproduced as under: -

> ***"52.*** *To sum up, we answer the reference holding as under -*
> *(1) Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.*
> *(2) When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the revenue.*
> *(3) The ratio in Sun Export case (supra) is not correct and all the decisions which took similar view as in Sun Export case (supra) stands overruled."*

13. In the present case, in both amending exemption notifications No. 82/04-Cus and 11/05-Cus, concessional rate of duty + Nil rate of duty as the case may be the prescribed to be applicable only to Liquefied Petroleum Gases falling under Chapter 2811.1900. There was no mention of Chapter heading 2711.1300 as declared by the appellant while importing commercial butane (Liquefied Petroleum Gas). Applying the principles of strict interpretation, the exemption notification cannot be made applicable to the clearances of commercial butane(Liquefied Petroleum Gas) during the said period. Besides, we also agree with the contention of the learned AR for the Revenue that in absence of successfully challenging the assessment order, correcting the classification of commercial butane to that of Liquefied Petroleum Gases by filing necessary appeal before higher forum, the methodology followed by filing the refund claim is contrary to the principles of law laid down by

the Hon'ble Supreme Court in *Priya Blue Industries' case (supra),* which has been recently upheld in the ITC case.

14. Learned Advocate for the appellant has heavily relied upon the judgment of this Tribunal in the case of Aegis Logistics Ltd. (supra), in support of his contention that exemption to Commercial Butane (LPG) is admissible under relevant Notifications are admissible. In our considered opinion, the said judgment is not applicable to the facts of the present case inasmuch as the issue before the Tribunal was whether concessional rate of 8% under Entry 27 of Notification No. 4/2006-CE dated 1.3.2006 is applicable to commercial propane imported by the assessee. The Tribunal examining the relevant tariff entries under Chapter 2711 and analyzing the scope of serial no. 27 of the said notification which specifies Tariff sub-headings 27111200, 27111300 and 27111900 the description of the goods as Liquefied Petroleum Gases held that the imported commercial propane also could also be called as LPG hence eligible to exemption being covered under the scope of the said sr. no 27 of the Notification No. 4/2006-CE dated 1.3.2006. In the present case, we are concerned with the period prior to 2.5.2005 where under the notifications did not contain all the three chapter sub-headings like Entry No. 75E of Notification 37/2005Cus. dated 02.5.2005, both notifications 82/2004 Cus and 11/2005 Cus. mentioned the Chapter sub-heading 27111900 only and the description of goods as Liquefied Petroleum Gas only. Besides, the principle of interpretation of an exemption notification is now well settled by the Hon'ble

Supreme Court in Dilip Kumar & Company's case (supra); it needs to be construed strictly. In these circumstances, we do not find relevance of the said judgment of the Tribunal in deciding the present dispute.

15. In the result, the impugned order rejecting the refund claim is sustained and the appeal being devoid of merit, accordingly rejected.

(Pronounced in open court on 12.06.2020)

(Dr. D.M. Misra)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

Sinha