

Fertilizer Corporation of India Vs. Collector of Central Excise

Fertilizer Corporation of India Vs. Collector of Central Excise

SooperKanoon Citation : sooperkanoon.com/2118

Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Mar-27-1985

Reported in : (1985)(5)LC1898Tri(Delhi)

Appellant : Fertilizer Corporation of India

Respondent : Collector of Central Excise

Judgement :

1. In his Order No, 12/14H/79/Collector 2/79, dated 21-7-1979 the Collector of Central Excise and Customs, Bhubaneswar observed- However, their contention that the quantity of oxygen consumed in their gasification plant are also covered by the exemption Notification No. 145/71, dated 26-7-1971 as amended is doubtful. In Item 4 of the table annexed to this notification it is indicated that the Government exempted oxygen from the whole of the duty of excise leviable thereon if it is used in the manufacture of fertilizer falling under Item 14 HH of the First Schedule of the Central Excises and Salt Act. As per statistics furnished by them they started consuming oxygen in their gasification plant from the month of April 1978 but the production of fertilizer in the factory has not yet started even today (July 79). In other words the Talcher Fertilizer Plant has been consuming oxygen in their gasification plant for the last more than one year without producing any fertilizer. Since the condition of exemption of oxygen from duty under the above-mentioned notification is, "if used in the manufacture of fertilizer" it will not be correct to say that oxygen consumed by this factory in their gasification plant from April 1978 onwards was in the manufacture of fertilizer.

2. This dispute was in respect of 6,572,000NM³ oxygen manufactured by the Talcher factory of M/s. Fertilizer Corporation of India. The Collector decided that exemption under Notification No. 145/71-C.E. should not be given to the oxygen because no fertilizer came out even after a year of use. The matter went up in appeal to the Central Board of Excise and Customs which dismissed the appeal saying that there was a difference between the Notification No. 145/71-C.E. and Notification No. 187/61-C.E. which the appellants say should help their case. There was a clarification about Notification No. 187/61-C.E. that it was available to raw naphtha whether used as feed stock or process fuel so long as the intention was for the naphtha to be used in the manufacture of fertilizer. The Board said that there was a basic difference in the two notifications because 1961 notification used the term "intended for use in the manufacture of fertilizers", while the 1971 exemption used the words "if used in the manufacture of fertilizers". This, said the Board, could be interpreted only as referring to instant or direct or physical use.

3. The arguments before us were long and lively. The Fertilizer Corporation was represented by Shri C.M. Oberoi while the department was represented by Shri N.V.R. Iyer and S.N. Khanna. Mr. Oberoi argued that the oxygen that was produced was not excisable for the purpose of the Central Excises Act as it was not a commercial commodity and had not been bottled or compressed and could not have been taken to the market for sale : its purity was only around 96%. In view of the Supreme Court judgment in the DCM case-1977 E.L.T. J 199, the South Bihar Mill AIR 1968 S.C. 922, it can be confidently said that this oxygen was not known to the market as an oxygen. The oxygen went at least upto the synthesis gas stage. Unfortunately, no fertilizer emerged because the plant was still very new and it had not yet been stabilised. This is a problem that all new fertilizer plants have-the gestation and stabilisation period vary, but in all cases they are quite long. There is no known reason why fertilizer did not emerge from the process, but it is a fact that none did.

4. When they look at the Notification No. 187/61-C.E., they can draw comfort from the fact that the Government of India issued clarification which broaden the utility of that notification so as to cover even naphtha that could be said to be not within the terms of the notification. The learned Counsel suggested that the same should

be done in this case. After all, intention to use a raw material under concession of duty must be an honest intention, bona fide and unaccompanied by anything but desire to do what they set out to do.

They set out in good faith to use the oxygen to manufacture fertilizer- that intention is manifest in that the oxygen went as far as the synthesis gas stage, so necessary in the process. There is no allegation that there was a misuse of the oxygen or that the concession was abused or that there was any criminal diversion of the oxygen to illegal channels. The penalty of Rs. 5000 imposed by the Collector on grounds that they had produced the oxygen without declaration to the Central Excise, was set aside by the Board as unwarranted. They are left only with the problem of the duty concession under Notification No. 145/71-C.E.5. On behalf of the department the arguments were first made by Mr.

Khanna and later by Mr. Iyer. They argued that it is wrong to claim that because oxygen had a 96% purity it would not be classifiable as oxygen. There are different grade of oxygen, some purer than others.

Oxygen used in medical application or in laboratory would naturally have greater purity than other kinds used in industries and less sensitive work. The Supreme Court judgment about marketability of a product must be understood as applicable to industrial use also. If the oxygen finds industrial use, then it has marketability, even if its purity values are below the highest standard.

6. They also argued that oxygen must be used in the production of fertilizer. Intention is not enough, because unlike Notification No.187/61-C.E. the 1971 exemption was more stringent. It demands use and this means only actual use and no intention to use or even preparation to use will do. There must be hard concrete use and this use can be proved only by the emergence of fertilizer. Till then, we cannot interpret the conditions of the notification as having been met and to say that the factory had used the oxygen in the specified manner.

7. We will deal first with the exemption as that appears to be the only ground taken before the lower authorities. The arguments about marketability and impurity of oxygen presented now by Talcher factory were not before the Board or the

Collector. A new point of this kind should not be raised before us.

8. We have some difficulty in accepting the department's arguments about use. The notification says: if used in manufacture of fertilizers. The proceedings that went before do not say that the 6.5 million NM³ oxygen had been sold or had been diverted into steel production or any of the other myriad (sic) uses to which oxygen can be put. The Collector came to the decision only because no fertilizer came out in one year or so that the oxygen gas was consumed in the gasification plant. These are very significant circumstances. The Collector said the oxygen was consumed in the gasification plant. He did not say that the oxygen found its way into the market or was diverted to (sic) uses not specified by exemption Notification No. 145/71-C.E. The subject therefore is whether we can say, in spite of the fact that no urea came out, that the oxygen had been used in the manufacture of fertilizer. We think we can (sic).

9. At least up to the gasification we know the oxygen was used. There is no point in gasification using oxygen to reach this stage, if the aim was not (sic) production of fertilizer. We, of course, do not know why no fertilizer came (sic) or what could have happened along the way. The oxygen was used in the manufacture of fertilizer but unfortunately the fertilizer did not materialise. This phenomenon is common in new plants and this is not the first time we (sic) have had a problem of this kind reach us. It is useful to bear in mind that in this kind of production, processes can go awry and there are cases, even in older plants in active production when batches for no reason that anyone can discover are ruined. It can be said therefore, technically that the finished product was not produced. Whether one takes this view or that, depends on one's outlook and the way one sees things. We have hard facts here.

One of the facts is that the oxygen was taken into the pipeline system that was designed to produce fertilizer. We know that the oxygen did enter the system and reach the clearly advanced stage of the process in the synthesis gas : it is a pity that the final urea was not generated, We know, however, that the central excise did not find that the oxygen had been used in ways that would make the use wrongful or illegal.

There is no accusation of clandestine clearance or evasion of duty or attempt to deceive the central excise. Therefore, we must take all environmental circumstances together to arrive at our decision. We have seen that though no fertilizer was generated, the oxygen did go into the system. Therefore, we can say that it was used in the manufacture of fertilizer. This looks to us as the more reasonable way of looking at this than to say that it was not used in the manufacture of fertilizer, because one would have to ask what was it used for then. We can see no satisfactory answer to it. We think the notification has been satisfied and that we can safely say in this case that the oxygen had been used in the manufacture of fertilizer and so disagree with the Collector. We, therefore, set aside the Board's order and direct that the exemption under Notification No. 145/71-C.E. which was refused by the Collector should be given on the disputed quantity of 6,572,000 NM³ oxygen.

10. This being our decision we shall have to reject the other arguments by M/s. Fertilizer Corporation to the effect that the oxygen was not oxygen of the excisable variety and that its purity stood in the way of its being excisable. If M/s. Fertilizer Corporation wants the exemption we have given it; but only because it is oxygen. We can see no logic in extending the exemption on oxygen to a gas that is not oxygen. Indeed M/s. Fertilizer Corporation should not have tried to have it all their way. It is not right for them to deny the gas was excisable oxygen and they ask for an exemption meant for the excisable oxygen. Not, let us declare clearly, that we agree the oxygen was not excisable oxygen. The learned Counsels for the department were quite correct when they said an oxygen gas of less than the highest purity would still be oxygen under the central excise. If proof of this was needed, we have it in the factory's use of the gas. It was used as oxygen. No one can use a substance as oxygen if it was not oxygen.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com