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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jun-03-2002

Reported in : (2002)(84)ECC21

Judge : K Usha, N T C.N.B.

Appellant : Oil India Ltd.

Respondent : Cce

Judgement :
The above appeals at the instance of the assessee Mis. Oil India Ltd. are directed against orders dated 29.11.91, 9.5.94 and 15.1.92 passed by Collector of Customs & Central Excise, Shillong, Collector of Central Excise (Appeals), Calcutta and Collector of Customs & Central Excise. Shillong respectively. While in Appeal No. E/2238/92-C and E/474/95-C the issue arising for consideration is classification of condensate in Appeal No. E/2629/92-C the dispute relates to classification of Lean Gas. We will, therefore, consider Appeal Nos.

E/2238/92 and E/474/95-C together and Appeals No. E/2629/92-C separately.

2. M/s. Oil India Ltd. Dullajan, a Public Sector Undertaking set up an LPG plant for recovery of LPG from natural gas. The LPG plant is treated as part of mine under Clause 2(j) of Section 26 of the Mines Act, 1952. Natural gas associated with crude oil, is separated from crude oil at the oil collecting stations for supply to LPG recovery plant. The natural gas as obtained from oil well broadly consists of

following hydrocarbon: Methane C1 86.80% Ethane C2 06.50% Propane C3 03.30% Butane C4 01.58% Pentane C5 00.31%Hexane & others C6+ 00.15%Other Gases & Moisture 01.36% During the process of separation, lighter fractions of crude oil (C5 and C6 +) present in vapour form set condensed and termed as condensate. This condensate which is in liquid form was used, upto July 1988 for the following purposes: (a) Injected back to the reservoir for dewaxing of the well to enhance recovery.

Since LPG plant of the appellant is treated as a mine, the appellant was claiming exemption from excise duty in respect of condensate under Notification No. 179/86-CE, as mended from time to time. While so (sic) show cause notice dated 5.3.90 was issued proposing to levy excise duty on the condensate under the erstwhile Tariff Item 6 (1) prior to 1.3.96 and under sub-heading 27.10.19 of the Central Excise Tariff from 1.3.96. Show cause notice invoked the proviso to Section 11A of the Central Excise Act alleging that the appellants suppressed the production of condensate in their plant. The Collector by his order dated 29.11.91 upheld the above classification and demand, which order is under challenge in Appeal No. 1.E/2238/92-C.3. The appellant has challenged the impugned order, where duty was not quantified put a penalty of Rs. 50,000 was imposed, on the ground of wrong classification as also on the ground of limitation. After hearing the learned counsel for the appellant and the learned senior counsel for the Revenue, we are of the view that this Appeal E/2238/92-C can be disposed of on the ground of limitation. As mentioned earlier, the allegation in the show cause notice is that the assessee had suppressed the fact of production of condensate in their plant. We find no basis for this allegation. There is also no merit in the finding in the impugned order that the appellant had mis-declared the items from 1982 onwards. The letter dated 9.7.1982 addressed by the Superintendent of Central Excise to the appellant would show that the department was informed about the emergence of condensate as a by-product during extraction of LPG and its being pumped back into crude oil. The appellant was required to maintain full accounting of condensate showing production, disposal, closing stock at the end of each day and to produce before the department as and when required. The product was classified under Tariff Item No. 68 vide Trade Notice No. (Tech) 128/81 dated 27.11.81 of the Additional Collector, Cen-1, CEX, Shillong. On 23.8.1983

Superintendent of Central Excise addressed another letter requesting for details of condensate production. This was followed by another letter dated 30.11.83 directing the appellant to obtain licence for condensate, to execute B-2 bond and payment be made from August 1982 onwards on the quantity cleared from storage tanks.

4.Thereafter, the appellant makes a representation on 9.12.83 to the Central Board of Excise & Customs seeking clarification regarding the dutiability of the condensate. This was followed by reminders in 1983 and 1984. On 11.3.86 the Board wrote a letter to the Department of Petroleum stating that the matter has been examined in consultation with the Collector and it is now reported by the jurisdictional Collector that he has already issued instructions to the field authorities for withdrawal of demands as oil condensate is eligible for exemption as mined product. In the light of this position there was no need for exemption to oil condensate. The department was, therefore, fully aware of the emergence of condensate in the appellant's LPG plant. On facts as above, which are not in dispute, the only conclusion that could be arrived at is that, there had not been any suppression of facts on the part of appellant, nor wilful mis-declaration in order to attract the larger period of limitation under the proviso to Section 11 -A of the Central Excise Act. Therefore, the demand under the show cause notice dated 5.3.90 is not sustainable in law and is barred by limitation. The impugned order dated 29.11.91 which upheld the demand under the above show cause notice for the period 1.4.82 to 29.2.88 and which imposed penalty of Rs. 50,000 is only to be set aside and we do so.

5. The impugned order in this appeal is dated 9.5.94 passed by the Collector (Appeals), Central Excise, Calcutta upholding the adjudication order dated 25.5.93 sustaining a demand for the period 1.3.88 to 31.7.89 under show cause notice dated 6.3.89. The above would show that a portion of the demand is not barred by limitation.

Therefore, we would go into the contentions raised by both sides on merits of the demand. It is the case of the appellants that in view of the Central Board of Excise Customs Tariff Advice 83/14/80-CX dated 17.11.81, clarifying that the condensate

is classifiable as crude mineral oil, even under the new Tariff System it cannot be classified other than as a crude. Tariff Entry 2709.00 would take in crude whereas 2710 is in respect of petroleum oils and oils obtained from bituminous materials other than crude. Therefore, according to the appellant, the classification under sub-heading 2710.19 in the impugned order is unsustainable in law. It is also contended that apart from the fact that test report shows flash point of condensate to be less than 25^oC, there is no other evidence adduced by the department to show that condensate is capable of being used as fuel in spark ignition engines.

For this reason also, the appellant submits that the classification upheld in the impugned order cannot be accepted.

6. On the other hand, the learned senior counsel appearing on behalf of the Revenue submitted that under Heading 27.10 after referring to Motor Spirit there is a clause excluding crude mineral oil from it. If crude oil is excluded from the Heading 27.10 as contended by the appellant there is no need for a further exclusion from Motor Spirit. Therefore, according to the Revenue the classification under 2710.00 is justified in the light of the test result that flash point of condensate is below 25^oC.7. Before we go into a discussion on the above conflicting contentions.

We will first refer to the relevant portion of the Board's TA No.125/81 dated 17.11.81 which reads as follows: 4. The Ministry of Petroleum, Chemicals & Fertilizers. (Department of Petroleum) who were consulted, have examined the matter in detail in consultation with the Oil & Natural Gas Commission and Oil India Ltd. who are the producers of crude oil in the country. Based on their opinion, that Ministry have advised that Condensate is a petroleum in natural state and is crude oil.

5. Having regard to the advice tendered by the Ministry of Petroleum based on the opinion of the trade understanding Board is of the views that Condensate is classifiable as crude mineral oil under item 68 CET Relevant portion of Item Nos. 6 and 68 of the old Tariff read as follows:

No.	Tariff

Description

(i) any mineral oil (excluding crude mineral oil) which has its flash point below twenty-five degrees of Centigrade thermometer, and, which either by itself or in admixture with any other substance, is suitable for use as fuel for internal combustion engines. 68.

All other goods, not elsewhere specified but excluding--

Notification No. 179/85-CE dated 1.8.95 granting exemption to goods produced in mines reads as follows: Exemption to goods produced in mines--In exercise of the powers conferred by Sub-rule (1) of Rule 8 of the Central Excise Rules, 1944, the Central Government hereby exempts goods, falling under Item No. 68 of the First Schedule to the Central Excises and Salt Act, 1944 (1 of 1944) and manufactured in a mine, from the whole of the duty of excise leviable thereon under Section 3 of the said. Act.

Explanation--In this notification the expression 'mine' has the meaning assigned to it in Clause (j) of the Mines Act, 1952 (35 of 1952).

The relevant entries under Headings 2709 and 2710 under Chapter 27 of the Central Excise Tariff Act reads as follows:

No.Sub-heading Description of goods No.

27.09 2709.00 Petroleum oils and oils obtained from bituminous materials crude. 27.10 Petroleum oils and oils obtained from bituminous materials 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 Motor spirit that is to say any hydrocarbon oil (excluding crude mineral oil) which has its flash point below 25^oC and which either by itself or in admixture with any other substance, is suitable for use as fuel in 2710.11 Special boiling point spirits (other than Benzene, Benzol, Toluene 2710.12 Special boiling point spirits (other than Benzene Toluene and 2710.13 Other special boiling point spirits (other than Benzene,

Benzol,

In view of the Board's clarification dated 17.11.81 the Revenue cannot take up a contention that condensate will not come under Item 68 of the old Tariff The above clarification further makes it clear that condensate is a petroleum in natural state and is crude oil. It is to be classified as crude mineral oil. If that be so, it would directly come under sub-heading 2709.00 which takes in petroleum oils and oils obtained from bituminous materials and crude. When we examine the Heading 2710 we find that the main heading makes a specific exclusion of crude. If that the so, there is no merit in the contention that because of an exclusion clause provided under Motor Spirit, condensate has to undergo a test of flash point and use as a fuel in spark ignition engine for being excluded from the Heading 2710. Since the main heading itself excludes crude, it cannot be taken that subsequent exclusion will bring it back under Heading 2710. There is also merit in the contention of the appellant that reference to admixture with any other substance is to be taken as substance other than mineral oil. The description under the heading 'Motor Spirit' tallies with the description under Item 6 in the old Tariff.

The assessee had come to this Tribunal on an earlier occasion challenging a similar order passed by Collector (Appeals) dated 29.3.90 covering the very same period. While disposing of the above appeal this Tribunal had observed as follows: We have also perused the query raised by the Superintendent in his letter dated 11.7.88 as to whether by itself or in admixture with any other substance, the product is suitable for use as fuel in spark ignition engine, and the reply of the appellants dated 12.7.88 to this query is that it is not suitable for use as fuel alone and by lending with commercial gasoline it may be used with SOLEX Carburetors. Therefore, there was no ground to conclude as the Assistant Collector has done in this order, that the product can be used asfuel in spark ignition engine by blending with commercial gasolene or other chemicals. There is no reference to other chemicals in their reply to the query. The orders of the Assistant Collector and Collector (Appeals) also do not indicate how the classification of the item under heading 27.09 as crude, is ruled out which is also a necessity before confirming classification under heading 2710.

The matter was considered again by the Assistant Collector and he took the same view under the order dated 29.3.90 which was confirmed in the order impugned. While passing the order dated 18.3.93 the adjudicating authority has not applied its mind to the directions contained in the order of this Tribunal dated 7.9.91 either in the matter of use of condensate as fuel or on the issue how condensate can be excluded from the Heading 2709 when it has to be treated as a crude. Therefore, the demand under the impugned order is unsustainable both on merits as also on the ground of bar of limitation for certain period. The order, therefore, stands set aside.

8. This appeal relates to dutiability and classification of lean gas generated in the LPG plant of the appellant. In the earlier portion of this order we have referred to the constituents of the natural gas as obtained from oil well. During the process of extraction of LPG (C3 & C4), C5 and C6 get converted into liquid form. This is recovered and added back to the crude. C3 and C4 are recovered in equal proportion in liquid state and the resultant product is termed as LPG. The natural gas after removal of easily liquefiable components is termed as lean gas if total GPM of the gas is less than 2.5. The natural gas containing largely Methane, Ethane and Propane is cleared from the mines using same pipeline, which is used for supply of wet natural gas to its customers. The lean gas also has calorific value within the range specified for natural gas and has the same end use as wet natural gas. Hence mix of lean gas and wet gas is also billed as gas and is sold at the price fixed by the Ministry of Petroleum for natural gas.

The facts, as stated above and as put forward by the assessee are not challenged by the Revenue.

9. Prior to the introduction of the Central Excise Tariff Act, 1985 natural gas classified under Tariff Item 68 of the erswhile Central Excise Tariff in accordance with Tariff advice No. 61/82 dated 13.10.82 issued by the Board. The natural gas produced in a mine was exempt from payment of duty under Notification No. 179/85-CE dated 1.8.85.

10. With effect from 1.3.86 natural gas and other gaseous hydrocarbon were classified under Heading 27.11. Notification No. 179/85 was amended to include

the new tariff headings of goods produced in mines and included under sub-heading 2711.21. The assessee took the stand that natural gas after extraction of LPG, remains natural gas and, therefore, lean gas is also to be classifiable under sub-heading 2711.21 and entitled to the exemption under Notification No. 179/85.

Show cause notice dated 27.5.91 was issued under proviso to Section 11A of the Central Excise Act proposing to charge duty on lean gas by classifying the same under sub-heading 2711.29 of the tariff namely, other than natural gas'. The adjudicating authority confirmed the demand under order dated 15.1.92 which is under challenge in this appeal.

11. After hearing both sides we find that the appellants has made out a case both on merits as well as on the question of limitation. The allegation in the show cause notice was that the assessee wilfully misstated and withheld facts in respect of clearance of lean gas.

Contention raised by the assessee that the demand is barred by limitation was rejected in the impugned order in the following manner: It is a fact that information on the production plan of LPG is submitted but it is also a fact that Department Officers are laymen and unless informed in writing the productions of certain non-visible items the officers cannot be expected to know non-visible' because the lean gas are pumped out in pipelines.

The learned senior counsel appearing on behalf of the Revenue made an earnest effort to sustain the finding on limitation. But after going through the communication dated 24.5.82 addressed by the assessee to the Superintendent of Customs and Central Excise, RBCI Range, Digboi, we find that the allegation of suppression against the assessee is totally unsustainable. In the above communication it has been specifically stated as follows: Natural gas from Naharkatiya field off-take point, earmarked for Namrup market (HFCL, ASEB, APL & AGC) along with other gas for OIL'S internal use, totalling 2.21 million standard cubid metres of gas per day will be passed through the LPG plant to recover LPG. In the plant approximately 0.1 million standard cubic metre of gas per day will be consumed and the balance approx. 2.11 million standard cubic metre/day of lean gas will be then supplied to the Namrup market and for internal use The effect of

the above communication cannot be got over by stating that the officers of the department are laymen. Since the assessee had brought to the knowledge of the department the required information in time, we are of the view that the larger period of limitation under the proviso to Section 11-A cannot be resorted to in this case. The entire demand is, therefore, barred by limitation. On merits also we are of the view that the appellant is fully justified in contending that since the lean gas is treated as natural gas it has to come under Heading 2711.21 and not under 2711.29. In the result the impugned order is set aside.

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