
(2021) 11 CESTAT CK 0064

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Excise Appeal No. 10246 Of 2021

Gujarat State Fertilizers Chemicals Ltd

APPELLANT

Vs

C.C.E. And S.T.-Vadodara-II

RESPONDENT

Date of Decision : 17-11-2021

Acts Referred:

Central Excises and Salt Act, 1944 — Section 3
Central Excise Act, 1944 — Section 11AC

Citation : (2021) 11 CESTAT CK 0064

Hon'ble Judges : Ramesh Nair, J;Raju, Technical Member

Bench : Division Bench

Advocate : Willingdon Christian, D. Kanjani

Final Decision : Allowed

Judgement

1. This appeal has been filed by M/s Gujarat State Fertilizers Chemicals Ltd. against demand of Central Excise duty, interest and imposition of penalty.
2. Learned Counsel for the appellant pointed out that the issue involved is identical to the issue decided in the appellant's own case vide order no.A/10703/2020 dated 28/02/2021. He also submitted that in response to RTI query, Revenue has informed him that the said order of Tribunal dated 28/2/2021 has been accepted by the Revenue. In support of the same, he submitted a letter from CPRO, Vadodara F.No. IV/16-08/RTI/APP/2021-22 Date 12.08.2021.
3. Learned Authorised Representative for the appellant agrees that issue involved is identical.
4. We have examined the facts of this case. The facts are identical to the facts involved in the Appeal no. E/10576/2019 which was decided by the Final Order no. A/10703/2020 dated 28.02.2020. In the said order, following was observed:
5. We have considered the rival submissions. We find that the appellant are

seeking benefit of Notification No. 12/2012-CE dated 17 March 2012. Notification 12.2012-CE grants exemption to goods falling under Chapter heading 25030010 from payment of Central Excise duty subject to condition, entry 55 which reads as under:-

Sl. No.

Table Sl. No. Chapter of heading or sub-heading or tariff item of the First Schedule

Description of excisable goods

Rate

Condition

1

2

3

4

5

55

25030010

All goods for manufacture of fertilizers

Nil

2

The appellant have placed on record a flow diagram detailing the manner the Sulphur is used:-

6. The first issue relates to use of Sulphur used for manufacture of Sulphuric Acid/ Oleum which in turn used for manufacture of Molten Urea. Revenue's objection is that the some quantity of Molten Urea is used as input for the manufacture of Malamine and therefore, the appellants are not entitled to benefit of notification. It is noticed that Molten Urea which comes into existence is itself a chemical fertilizer, as held by Hon'ble Apex Court in the appellant's own case reported at 1997 (91) ELT 3 (SC). The Hon'ble Apex Court observed as under:-

"10. Then next we turn to exemption Notification No. 40 of 1985, dated 17-3-1985. As per the said notification, as amended from time to time, it had been laid down that the Central Government was pleased to exempt goods of the description mentioned in column (2) of the Table and falling under Chapters 25, 27, 28, 29 and 31 or 32, as the case may be, of the Schedule to the Tariff Act, from the whole of the duty of excise leviable thereon under Section 3 of the

Central Excises and Salt Act, 1944, subject to the conditions, if any, laid down in the corresponding entry in column (3) thereof. Column (2) of the Table referred to the description of goods and at Sl. No. 3 is mentioned ammonia. Thus ammonia which was manufactured by the appellant out of raw naphtha came under the sweep of the said exemption notification. The condition for earning exemption from excise duty on ammonia as laid down in column (3), which is relevant for our present purpose, is Condition No. (ii) which provides that ammonia should be used in the manufacture of fertilisers. It is not in dispute that ammonia was captively consumed by the appellant in manufacturing molten urea. Therefore, the moot question is whether ammonia could be said to have been utilised for manufacturing any fertiliser. It is no doubt true that molten urea in its turn became an input for producing the final product, namely, melamine which admittedly was not a fertiliser. But as required by the express language of the notification we have to find out whether molten urea which was manufactured out of ammonia was a fertiliser or not. It is now well settled by a catena of decisions of this Court that for deciding whether an exemption notification gets attracted on the facts of a given case, the express language of the exemption notification has to be given its due effect. In this connection, we may refer to a decision of this Court to which our attention was invited by Shri Dave, learned Senior Counsel for the appellant. In *M/s. Hemraj Gordhandas v. H.H. Dave, Assistant Collector of Central Excise & Customs, Surat and Ors.* [1978 (2) E.L.T. (J 350)], a Constitution Bench of this Court speaking through Ramaswami, J. has made the following pertinent observations in paragraph 5 of the Report :

"....It is well established that in a taxing statute there is no room for any intendment but regard must be had to the clear meaning of the words. The entire matter is governed wholly by the language of the notification. If the taxpayer is within the plain terms of the exemption it cannot be denied its benefit by calling in aid any supposed intention of the exempting authority. If such intention can be gathered from the construction of the words of the notification or by necessary implication therefrom, the matter is different but that is not the case here..."

In *Steel Authority of India Ltd. v. Collector of Central Excise* [1996 (88) E.L.T. 314 (S.C.)], one of us S.P. Bharucha, J. speaking for a Bench of two learned Judges, while dealing with an exemption notification in connection with raw naphtha laid down in paragraph 5 of the Report that due emphasis had to be given to the clear language of the condition mentioned in the exemption notification. Same view was reiterated in the case of *Prince Khadi Woollen Handloom Prod. Coop. Indl. Society v. Collector of Central Excise* [1996 (88) E.L.T. 637 (S.C.)]."

"13. That takes us to the consideration of the main submission canvassed by Shri Bhat, learned Additional Solicitor General, that the CEGAT had taken the view that ammonia which was utilised by way of captive consumption by the appellant

for manufacture of molten urea was subjected to a continuous process of manufacturing which had resulted in the end product melamine which was admittedly not a fertiliser. That may be so. However, the question remains whether ammonia could be said to have been used in the manufacture of molten urea which was a chemical fertiliser. We have to recall that molten urea itself is an excisable commodity even though it might have been exempted from payment of excise duty by a notification issued by the Central Government. But for the said exemption notification molten urea would have been required to bear the full duty. As seen earlier, it has been classified as a chemical fertiliser under Heading 31.02 by the authorities themselves. For levying excise duty on such a commodity, namely, molten urea, if the department takes the view that it is to be subjected to excise duty as a chemical fertiliser on its clearance even for captive consumption, it is difficult to appreciate the contrary stand of the very same authority that it would cease to be a fertiliser for the purpose of exemption Notification No. 40 of 1985, even though ammonia results in the manufacture of the same excisable item, namely, molten urea. Such a stand cannot be permitted to be adopted by the department, as it would amount to blowing hot and cold at the same time. If molten urea is treated to be an excisable item under Heading 31.02 as a chemical fertiliser, it has to be treated on the same lines while construing the sweep of exemption Notification No. 40 of 1985 which expressly refers to Chapter 31 amongst others. In short, molten urea must be treated to be a fertiliser for the purpose of its exigibility to duty under Heading 31.02 of the Tariff Act and simultaneously also for the purpose of exemption Notification No. 40 of 1985. It is also easy to visualise that if molten urea would have been sold by the appellant in outside market instead of being captively consumed further for the manufacture of melamine, it would have borne full duty subject to exemption notification, if any, under Tariff Item 31.02. Only because it was captively consumed in the onward process of manufacture which had resulted into melamine, it could not be said that the final product for the purpose of Excise Act had not emerged in the shape of molten urea by the captive consumption of ammonia."

Revenue has sought to distinguish this decision by stating that Sulphuric Acid used in Cooling Towers does not qualify as use in the manufacture of Urea. We find that claim of the appellant that Sulphuric Acid is directly used in the manufacture of Urea has not been contested by Revenue in the impugned order. We find that distinction made is not logical as Sulphuric Acid is also directly used in the manufacture of Urea as claimed by the appellant. In this circumstance, we find no merit in the Revenue's case in so far as the use of Sulphur in manufacture of Urea is concerned. Exemption in respect of Sulphur used in manufacture of Urea is allowed.

7. The second issue relates to use of Sulphur in the manufacture of Sulphuric Acid/Oleum which in turn used in Caprolactam Plant. Caprolactam is manufactured along with Ammonium Sulphate, which is undisputedly a chemical fertilizer, and therefore, the appellant would be entitled to avail benefit of

Notification No. 12/2012-CE in respect of use of Sulphur which in turn used in the manufacture of Ammonium Sulphate. The issue is also covered by the decision of Single Member Bench of Hon'ble Delhi High Court in their own case reported at 2009 (241) ELT 190 (Del.) and approved by Division Bench of Hon'ble Delhi High Court reported at 2010 (252) ELT 339 (Del.). The Division Bench of Hon'ble Delhi High Court observed as follows:-

"7. Admittedly, the Respondent uses Oleum in the manufacture of Ammonium Sulphate and Caprolactum but according to the Appellant Ammonium Sulphate is only a by-product and as such Oleum is not used in the manufacture of fertilizers. There is no dispute that Ammonium Sulphate is nothing but a chemical fertilizer. The learned Single Judge rightly held that the exemption notifications, on a plain reading, make no mention of a by-product or a primary product. All that is to be seen is whether the use of fuming sulphuric acid results in the manufacture of a fertilizer. In this case, the answer must be in the affirmative since the use of Oleum results in the manufacture of Ammonium Sulphate which is nothing but a chemical fertilizer.

8. Under the circumstances, both the ingredients of the exemption Notifications have been met by the Respondent, namely, that it is using fuming sulphuric acid which is included in the expression sulphuric acid falling in T.I. 14G of the First Schedule to the Act and that this fuming sulphuric acid is intended for use in the manufacture and is in fact used in the manufacture of fertilizer that is Ammonium Sulphate."

The impugned order seeks to distinguish this decision on the ground that Ammonium Sulphate produced by the appellant in this stream is only a by-product and Caprolactam is main product. It has been argued that appellant produce 5 ton of Ammonium Sulphate to produce just 1ton of Caprolactam therefore, it cannot be treated as by-product. We find that sulphur used for production of Ammonium Sulphate alongwith Caprolactam is exempted as held by Hon'ble Delhi High Court in the appellant's case reported at 2009 (241) ELT 190 (Del.). Relevant Para 30 of the decision is reproduced below:-

30. The crucial terms here are sulphuric acid "intended for use in the manufacture of fertilizers". There are no restrictive terms cutting down the width of the phrase "intended for use". Applying the canon of construction mentioned earlier, i.e. that such exemption notifications are to be considered in their own terms, the Court holds that the express terms here do not make a distinction between "primary" and "secondary" product or "main product" and "by-product". As far back as in Hansraj's case, it was ruled that :

"It is well-established that in a taxing statute there is no room for any intendment but regard must be had to the clear meaning of the words. The entire matter is governed wholly by the language of the notification. If the taxpayer is within the plain terms of the exemption it cannot be denied its benefit by calling

(emphasis supplied)

In this case the notification does not prohibit the use of diverse technologies that may enable a manufacture to produce two kinds of goods, simultaneously, in the same process. It is not denied that for each ton of Caprolactum produced 5.1 tonnes of ammonium sulphate is produced. If indeed this is deemed a by-product it appears to be a case of the proverbial tail wagging the dog. The Court cannot be unmindful, here of the object of the notification which was to make fertilizers less expensive, and more widely accessible. The innovative use of a relatively less known technology to achieve production of ammonium sulphate concededly a fertilizer, cannot be denied the benefit of the exemption notification, which contains no support for the distinction between "main product" and "by-product" relied upon by the revenue. Consequently, this question too has to be answered against the revenue.

In these circumstances, we find merit in the arguments of the appellant. However, we find that a small quantity of Hydroxylamine Sulphate (HX/HAS) sold by the appellant and they have admitted their liability in respect of duty free Hydroxylamine Sulphate sold by them in the open market on payment of duty and their argument is only Revenue neutrality. We find, in so far as demand of duty on Sulphur used in the quantity of Hydroxylamine Sulphate sold by them in the open market needs to be confirmed. Accordingly, demand in so far as Sulphur used in the manufacture of Sulphuric Acid/Oleum used for manufacture of Ammonium Sulphate and Caprolactam, is set-aside.

8. 3rd issue relates to use of Sulphuric Acid in maintaining PH balance in cooling towers. In this context, the appellant relied on various decisions of Hon'ble Apex Court and Tribunal as referred to in Para 3.3 above. In the case of Indo Gulf Fertilizers & Chemicals vs. CCE - 1999 (112) ELT 448 (Tri.) (supra), the issue has been examined and following has been observed:-

"4. We find that the issue is covered by the earlier decision of the Tribunal in appellants' own case in appeal No. E/1357/95-C and the Tribunal vide Final Order No. 435/99-C, dated 19-5-1999 allowed the benefit of Notification 81/75-C.E. in respect of sulphuric acid used in the cooling tower in appellants' unit. The Tribunal held as under :

"The contention of the appellants is that the sulphuric acid is used in the cooling tower for the control of acid alkaline ratio (pH value) of the water which was later on used in the ammonia plant. The contention of the appellants is that since this sulphuric acid was used in or in relation to the manufacture of fertilisers, therefore, they are eligible for the benefit of the notification. The Notification No. 81/75-C.E., dated 22-3-1975 exempts from excise duty the sulphuric acid intended for use in the manufacture of fertilisers. We find the issue is covered by the decision of the Tribunal in the case of Fertiliser Corporation of India Limited v. C.C.E., Patna reported in [1997 (23) RLT 594 (CEGAT)]. In this case, the Tribunal, while following the earlier decisions in the cases of Fertilizer Corporation

of India Limited v. C.C.E., Patna reported in [1987 (30) E.L.T. 507] and C.C.E., Patna v. Hindustan Fertiliser Corporation reported in [1996 (85) E.L.T. 187] held that sulphuric acid used in the fertiliser plant is eligible for the benefit of Notification No. 81/75-C.E."

We find merit in the decision and therefore, relying on the said decision, we allow the appeal in so far as use of Sulphuric Acid in the Cooling Towers is concerned.

9. 4th issue relates to use of Sulphuric Acid in the manufacture of Phosphoric Acid (and Phospho Gypsum) which in turn used to produce Ammonium Phosphate. The benefit has been sought to be denied on the ground that by-product Phospho Gypsum is also manufactured and sold in the open market on payment of duty. It is not in dispute that Ammonium Sulphate is fertilizer. In this regard, the arguments in respect of Sulphuric Acid used in the manufacture of Urea would equally apply that Sulphuric Acid was in turn used for production of Ammonium Sulphate.

9.1 Another objection raised, is in respect of use of Sulphuric Acid and Phosphoric Acid consumed for production of Phospho-gypsum which is a by-product and sold in the market on payment of duty. The appellant have relied on the extracts of Year Book 2016 (Part-III) wherein following has been stated:-

"Phospho-gypsum is produced as a by-product during the manufacture of phosphoric acid by wet process.

Presently, most phosphoric acid plants dispose the phospho-gypsum generated, by way of stacking it within the plant premises. These stacks are subsequently sold off when demand arises for them. Phospho-gypsum generated from phosphoric acid plants contains three types of impurities such as residual acid, fluorine compounds and trace elements, including those that are radioactive that are considered to be potentially harmful."

The appellant have also relied on various decisions of Hon'ble Apex Court and High Courts as referred to in Para 3.4 above. In the case of National Organic Chemical Industries Limited reported at 2008 (232) ELT 193 (SC) (supra), the Hon'ble Apex Court observed as follows:-

"6. The respondent manufactures petro chemicals falling under chapters 27 and 29 from raw naptha. Raw Naptha is cracked in cracker containing number of burners and heated upto 800 degree centigrade. After the process of cracking, Ethylene and Propylene gases are produced in the factory. These gases are also captively consumed as a refrigerant for cooling since they have the property of reducing temperatures upto 100 degree c. and 30 degree c. respectively.

7.

8. It is the further case of the appellant that as per Exemption Notification No. 217/86-C.E., dated 2-4-1986, the inputs ethylene and propylene (falling under chapter 29) captively consumed in the manufacture of finished goods falling

under chapter 29 are exempted from excise duty. As per the said notification such exemption will not be available to ethylene and propylene used in the manufacture of goods falling under chapter 27, namely methane and ethane. In other words, excise duty will have to be paid by the respondent assessee for such of the quantity of ethylene and propylene (inputs) captively consumed and used in the manufacture of products falling under chapter 27 namely methane and ethane.

9 to 29

30. We have heard the learned counsel for the parties at length and perused the judgments cited at the Bar. The Tribunal's finding that the ethylene and propylene used as refrigerant has been used in or in relation to the manufacture of the same goods. The inevitable and automatic emergence of ethane and methane, therefore, by itself is no ground for denying the exemption contained in the notification. The Tribunal came to the categorical finding that the respondent could not have manufactured ethylene and propylene without manufacturing its by-products ethane and methane. The Tribunal held that in any technology the emergence of ethane and methane was inevitable and hence while it is no doubt correct to say that the ethylene and propylene have been used in or in relation to the manufacture of ethane and methane, the identical quantity of the same goods has simultaneously been used in the manufacture of ethylene and propylene. The emergence of ethane and methane, therefore, cannot be a ground to deny the benefit of exemption to the respondent.

31. In our considered view, no interference is called for in the well-reasoned judgment/order of the Tribunal. The appeal being devoid of any merit is accordingly dismissed. However, in view of the facts & circumstances of the case, the parties are directed to bear their own costs."

We find that ratio of aforesaid decision squarely apply to the instant case.

9.2 Thus, we find no merit in the Revenue's arguments that benefit of Notification No. 12/2012-CE dated 17 March 2012 can be denied on the ground that during manufacture of Phosphoric Acid which in turn used in the manufacture of fertilizer and Phospho-gypsum is manufactured. We find that appellant have admitted liability in respect of Sulphur which is used in the manufacture of Sulphuric Acid and sold in the open market on payment of duty. They have contended that it is Revenue neutral situation. However, we find that liability for Central Excise duty would arise nonetheless in respect of Sulphur used in the manufacture of Phosphoric Acid which was cleared on payment of duty.

10. In this background, we find no penalty can be imposed under Section 11AC, as there is no apparent malafide intention and the issue relates to interpretation. In view of above, we set-aside the demand except for the demand within limitation on the quantity of Sulphur used in the manufacture of Hydroxylamine Sulphate (HX/HAS) and Phosphoric Acid sold by them on payment of duty. In

these circumstances the benefit of limitation is also extended.

11. Appeal is partly allowed in the above terms.

5. We find that the issues involved are identical to the issues involved in the instant case. Relying on the aforesaid decision in appellant's own case, the appeal is allowed on same terms as aforesaid order.

(Pronounced in the open court on 17.11.2021)