CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH

EXCISE APPEAL NO. 55568 OF 2014

(Arising out of Order–in-Original No. 6-11/Commissioner/2014-15 dated 14.07.2014 passed by Commissioner, Central Excise & Service Tax, Large Taxpayer Unit, New Delhi)

Commissioner, Central Excise and Service Tax, ...Appellant
Large Taxpayer Unit,
3, NBCC Plaza, Pushp Vihar,
Saket, New Delhi - 110017

VERSUS

M/s Gas Authority of India, GAIL Bhawan, ...Respondent
16, Bhikaji Cama Place,
New Delhi

APPEARANCE:

Shri O.P. Bisht & Rakesh Agarwal, Authorized Representatives for the Appellant
Shri Lakshmikumaran, Advocate for the Respondent

CORAM: **HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT**
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: July 16, 2021
Date of Decision: August 2, 2021

FINAL ORDER No. 51691/2021

JUSTICE DILIP GUPTA:

The order dated 14.07.2014 passed by the Commissioner, Central Excise and Service Tax, LTU Delhi[1], dropping the demand of Rs. 3,03,36,274/- proposed in the six show cause notices issued to the respondent, has been assailed in this appeal filed by the Commissioner.

2. The issue involved in this appeal relates to demand of National Calamity Contingent Duty[2] on 'heavier hydrocarbons' that is alleged by the Department to have been manufactured by M/s. Gas Authority of

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1 the Commissioner
2 NCCD

India[3] as an intermediate product in the manufacture of Mixed Fuel Oil/ Naphtha. The 'heavier hydrocarbons' have been described as Natural Gasoline Liquid[4] by the Department and as 'gas condensate' by the respondent.

3. The respondent, it has been stated, manufactures products falling under Chapter 27 of the First Schedule to the Central Excise Tariff Act, 1985[5], including Liquified Petroleum Gas[6] and Naphtha from natural gas at its plants situated at Gandhar, Vaghodia, Lakwa, Vijaipur & Pata and the process of manufacture has been described by the respondent in the following manner:

> "Firstly, the natural gas is dried and filtered to remove impurities such as moisture and dust. Thereafter, dried and filtered natural gas is cooled in the course of which, the components of natural gas namely, ethane, propane, butane, pentane and higher hydrocarbons are liquefied, along with some traces of methane. This liquefied portion is subjected to further fractioning where the lighter hydrocarbons mainly C_1 (methane), C_2 (ethane) and C_3 (propane) are removed and the heavier fractions containing C_{3+} hydrocarbons are sent to the next column viz. LPG column. In the LPG column, mixture of propane and butane is separated from the top **and the remaining heavier factions composed of C_5 and C_{6+} hydrocarbons are fed into the NGL fractioning column.** From the top of this column, C_5 (pentane) is separated and the bottom product which contains liquid hydrocarbons having carbon atoms ranging from C_6 and C_{6+} and some amounts of C_5 are stored in the tanks. **This product stored in the tanks and cleared by the Respondent on payment of duty, is Naphtha."**
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> **(emphasis supplied)**

4. Investigations were initiated by the Department and periodical show cause notices were issued to the units of the respondent. The details of the six show cause notices are as follows:

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3 **the respondent**
4 **NGL**
5 **the Tariff Act**
6 **LPG**

S. No.	Show Cause Notice issued by Commissioner	Plant	Date of issue	Period of demand	Amount of demand in Rupees
1.	Vadodara	Gandhar	05.09.2011	Aug.06 to June, 11	10538151
2.	Vadodara	Vaghodia	14.09.2011	Sept. 06 to May, 11	2436270
3.	Vadodara	Vaghodia	15.05.2012	June 11 to March, 12	423545
4.	Vadodara	Gandhar	06.08.2012	July 11 to March, 12	1824134
5.	LTU, Delhi	All Units	01.05.2013	April 12 to March, 13	8464889
6.	LTU, Delhi	All Units	06.05.2014	April 13 to March, 14	6649285
	Total				3,03,36,274

5. The aforesaid six show cause notices proposed a demand of NCCD to the extent of Rs. 3,03,36,274/- on the mixture of heavier hydrocarbons. This product has been marked in bold and underlined in paragraph 3 of this order. This mixture is alleged by the Department to be NGL falling under Chapter Heading No. 2709 of the Tariff Act. The respondent, however, claims that it is gas condensate and not NGL, though the mixture does fall under Chapter Heading 2709. According to the respondent, this gas condensate is produced as an intermediate product at the time of extraction of LPG and is captively consumed in the manufacture of Mixed Fuel Oil/Naphtha. The show cause notices also proposed imposition of penalty and recovery of interest on the ground that the respondent had contravened various provisions of law.

6. The relevant portions of the first show cause notice dated 05.09.2011 are reproduced below:

> "3.2 Whereas it appears that during the manufacturing process of LPG, first of all the Natural Gas is dried and filtered to remove impurities and then the said gas is pre cooled to -25° C, due to which some component of Natural Gas, namely, ethane, propane, butane and C5 plus are liquefied; that the same is further sent to LEF and LPG columns for further fraction; that in LEF column, lighter hydrocarbons, namely, methane, ethane and propane is removed from the top of column; that material

from the bottom of the LEF column is fed into LPG column where it is further fractioned; that is results into LPG from top of the column, **and from the bottom of the Column heavier hydrocarbons containing Pentane – Hexane etc. i.e. C5 plus, popularly known as NGL, being drawn which is a condensate, nothing but Petroleum in natural state and classifiable under C.H. 2709.00 of the Central Excise Tariff which applies to "Petroleum Oils and Oils obtained from bituminous materials, crude". The issue of classification of this condensate stands settled by the judgment of Hon'ble CESTAT in the case of Oil India LTD. V/s. CCE, Shillong, 2002 (148) ELT 802,** which was also upheld by the Hon'ble Supreme Court as reported in 2004 (170) ELT A 116/ (S.C.) and also another judgment of CESTAT in the case of M/s. GAIL, Waghodia, 2004 (170) ELT 75 (Tn. Del.).

3.3 It further appears that this also came to notice during investigation that said NGL is used in the manufacture of NAPHTHA from April2011, and before that it was used in the manufacture of Special Boiling Point Solvent (SBPS); that in the manufacturing of SBPS, the said NGL is heated upto 85° to 90° C in distillation column and during this process, the lighter hydrocarbons i.e. Pentane mixture are separated from the top of the column and heavier hydrocarbons i,e. C6 plus are drawn from the bottom of the column; that in the manufacture of Naphtha, NGL is heated to 75 to 85 °C in distillation column and lighter (Pentane mixture) is separated from the top of the column and Naphtha as bottom product is drawn and sent to storage tank.

4.1 Whereas it further appears that by distillation process, the said NGL i.e. heavier components traveled alongwith Natural Gas was separated and the same appear to have been used in the manufacture of SBPS/ Naphtha; that remains in liquid form at ambient temperature and pressure. **Since the product, NGL does not meet the specification of Motor Spirit, classifiable under CH 2710.1120 of the Central Excise Tariff Act, 1985, it is nothing but Crude Oil and hence rightly classifiable under CH 2709.00 of Central Excise Tariff Act.**

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7.2 **Whereas it appears that M/s. GAIL with an intent to evade the payment of NCCD on NGL (Crude Oil) have deliberately not classified the said product under 2709.00 of C.E.T. Act 1985 and they have also not declared to the Department that said product is used captively in the manufacture of**

> **Special Boiling Point Solvent/ Naphtha.** It further appears that they have shown Natural Gas (being exempted from Excise Duty) as input in the manufacture of SBPS / Naphtha, apparently to mislead the department that no NCCD is leviable on this product. **Thus it appears that they have suppressed the material facts from the department with an intent to evade the payment of NCCD on the product NGL which was used captively for the manufacture of SBPS/Naphtha.** M/s. GAIL were operating under Self Removal Procedure (viz. S.R.P.) and hence they are cast with responsibility in good faith, to assess the duty payable on excisable goods which they have failed to do.
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> 7.3 **In view of the above, it appears that, extended period of time limitation under Section 11A of the Central Excise Act, 1944, is applicable to the facts of the present case and penalty is imposable under Section 11 AC of the said Act.**
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> **(emphasis supplied)**

7. The subsequent five show cause notices are for different periods and contain the same allegations.

8. The respondent filed replies to the aforesaid show cause notices and denied all the allegations made therein. It was inter-alia, submitted that the respondent was not liable to pay NCCD as the same was exempt under Notification dated 14.05.2003; that the intermediate product, being a mixture of liquid hydrocarbons, was not an excisable product as the same was not marketable and, therefore, no NCCD was payable on the same; and the respondent also placed reliance on a Board Circular dated 09.01.2004 to contend that NCCD is payable on crude obtained from oil fields only.

9. The Commissioner dropped the demands proposed in the aforesaid six show cause notices by a common order dated 14.07.2014. The reasons stated by the Commissioner, in short, are as follows:

(i) NCCD was introduced on ‘petroleum oils and oils obtained from bituminous minerals, crude’ falling under Chapter

Heading No. 2709 of the Tariff Act in the Budget of 2003-04. Simultaneously, an exemption Notification dated 01.03.2003 was issued which provided exemption from payment of NCCD on crude oil obtained from certain specified oil fields. The said notification was substituted by Notification dated 14.05.2003 under which the exemption was provided to crude petroleum oils produced in specified fields under Production Sharing Contracts or in the exploration blocks offered under New Exploration Licensing Policy through competitive international bidding;

(ii) The position was clarified by CBEC by Circular dated 09.01.2004, wherein it was stated NCCD on crude petroleum oil should be charged only on the total quantity of crude petroleum oil produced and supplied from the oil field to the refineries. Thus, as per the said Circular, NCCD is to be levied only on such crude petroleum oil that is produced in and supplied from oil fields to the refineries;

(iii) The respondent is merely processing LPG from the natural gas and during the process, the mixture of liquid hydrogen i.e. condensate emerges which is captively consumed for the manufacture of dutiable goods, namely, Naphtha. Hence, no NCCD is recoverable on gas condensate which has been termed as NGL in the show cause notices;

(iv) The process of manufacture employed by the respondent at the plants is a continuous and integrated one, which breaks only at the stage of emergence of Pentane and Naphtha. There is no extraction of the mixture of liquid hydrocarbons emerging from the bottom of the LPG

column. Such mixture, upon its emergence, immediately passes to the next column for the extraction of Pentane and Naphtha. No gas condensate (alleged in the show cause notice as NGL) is being manufactured or cleared by the respondent. Since no new product emerges during the process of manufacture of Pentane and Naphtha from the LPG Column, no NCCD can be recovered from the gas condensate; and

(v) As NCCD is not recoverable on gas condensate, penalty cannot be imposed.

10. This appeal has been filed by the Department basically on the following grounds:

(i) The CBEC Circular dated 09.01.2004, being very specific in nature, could not have been relied upon by the Commissioner;

(ii) The exemption granted under Notification dated 16.03.1995 is not applicable to the respondent as the same is available only to the goods specified in the Schedules to the Tariff Act and not to NCCD covered under the Seventh Schedule to the Finance Act, 2001; and

(iii) The adjudicating authority erred in dropping the demand on the ground that a new product did not emerge during the process of manufacture of Naphtha. The adjudicating authority failed to appreciate that NCCD is imposable as it is classifiable under the Chapter Heading 2709 of the Tariff Act.

11. Shri O.P. Bisht and Shri Rakesh Agarwal, learned Authorised Representatives of the Department appearing for the Appellant made the following submissions:-

(i) The appellant had earlier filed Excise Appeal No. 55666/2014 regarding classification of the product manufactured by the respondent to assail the order dated 23.07.2014 passed by the Commissioner dropping the demands by holding that the product cleared by the respondent was Naphtha falling under Heading 2710 12 19 or 2710 12 90 of the Tariff Act and entitled to exemption under Notifications dated 01.03.2006 and 01.07.2009. This Excise Appeal was decided by the Tribunal by order dated 30.11.2018[7] holding that the classification of the product is NGL and not Naphtha. The respondent filed on appeal against this order of the Tribunal before the Supreme Court and by an order dated 14.02.2019, the Supreme Court stayed the operative part of the order of the Tribunal. Thus, when the classification of NGL has been decided by the Tribunal under Tariff Item 2710 12 20 of the Tariff Act, the issue of NCCD on NGL should be decided in the light of the aforsaid decision of the Tribunal;

(ii) The plea of the respondent that the intermediate product (gas condensate) should be classified under Heading 2709 of the Tariff Act, therefore, cannot be accepted; and

(iii) The classification of NGL cannot be reopened in these proceedings.

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7. **Commissioner of C. Ex. & ST. LTU, Delhi vs. Gas Authority of India** reported in **2019 (366) ELT 941 (Tri-Delhi).**

12. Shri Lakshmikumaran, learned Counsel appearing for the respondent made the following submissions:-

(i) The case made out by the Department in the show cause notices is that the intermediate product is classifiable under Chapter Heading 2709 of the Tariff Act as NGL. The respondent does not dispute the classification of the intermediate product by the Department under Chapter Heading No. 2709. However, NCCD is not leviable on the intermediate product as it is not marketable and hence not an excisable product. In support of the this proposition, reliance has been placed on the following decisions:

a) **Collector of Central Excise** vs. **Ambalal Sarabhai Enterprises**[8]**;**

b) **Moti Laminates Pvt. Ltd.** vs. **Collector of Central Ex., Ahmedabad**[9]**;**

c) **Commissioner of C. Ex., Chandigarh-II** vs. **Jagatjit Industries Ltd**[10]**; and**

d) **Cadila Laboratories Pvt. Ltd.** vs. **Commr. of Central Excise, Vadodara**[11]**;**

(ii) The factum of such unviability of storage and transportation of NGL has duly been recorded by the Tribunal in the case of the respondent, namely **Gas Authority of India Ltd.** vs. **Commr. of C. Ex., Indore & Vadodara**[12]. The said decision has been upheld by the Supreme Court in **Commissioner of Central Excise, Indore** vs. **Gas Authority of India Ltd**[13]**;**

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8. **1989 (43) E.L.T. 214 (S.C.)**
9. **1995 (76) E.L.T. 241 (S.C.)**
10. **2002 (141) E.L.T. 306 (S.C.)**
11. **2003 (152) E.L.T. 262 (S.C.)**
12. **2004 (170) E.L.T. 75 (Tri.-Del.)**
13. **2015 (319) E.L.T. 5 (S.C.)**

(iii) Neither the show cause notices nor the appeal filed by the Department disclose any evidence of sale of mixture of hydrocarbons (alleged to be NGL) in the market so as to establish its marketability. It is a well settled proposition of law that the burden to prove marketability of a product is on the department. In this connection, reliance has been placed on the following decisions of the Supreme Court:

a) **Gujarat Narmada Valley Fert. Co. Ltd.** vs. **Collector of Ex. & Cus.**[14];

b) **Collector of Central Excise, Patna** vs. **Tata Iron & Steel Co. Ltd**[15]; and

c) **Union of India** vs. **Ahmedabad Electricity Co. Ltd**[16]**;**

(iv) In any case, the manufacturing process employed by the respondent is a continuous process which does not allow for extraction of the intermediate product i.e. mixture of liquid hydrocarbons at the intermediate stage. The manufacturing process is completely mechanized and automatic and at no stage controlled by the respondent;

(v) The Circular dated 09.01.2004 clarifies the above submission that NCCD on Crude Petroleum Oil should be charged only on the total quantity of Crude Petroleum Oil produced and supplied from the oil field to the refineries. In the instant case, the mixture of hydrocarbons, termed as NGL by the department, is neither produced in the oil field nor supplied to the refineries by the respondent and so no NCCD is recoverable from the respondent;

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14. 2005 (184) E.L.T. 128 (S.C.)
15. 2004 (165) E.L.T. 386 (S.C.)
16. 2003 (158) E.L.T. 3 (S.C.)

(vi) If the demand cannot be quantified, then provisions of levy fail; consequently, there can be no demand. The quantity of intermediate product produced by the respondent could not be quantified and so the Department calculated the demand on the total quantity of Pentane and Naphtha cleared by the respondent upon payment of duty. In support of this contention, reliance has been placed on the judgment of Supreme Court in **Commissioner, Income Tax, Bangalore** vs. **B.C. Srinivasa Setty**[17]**;**

(vii) The department had previously issued multiple show cause notices to respondent alleging that final product manufactured was wrongly classified as 'Naphtha' and was correctly classifiable as 'NGL' falling under Tariff Item No. 2710 12 20 of the Tariff Act. However, the present show cause notices have been issued by the Department claiming classification of 'NGL' under Chapter Heading 2709 of the Tariff Act;

(viii) The extended period of limitation could not have been invoked, nor penalty could be imposed. This is for the reason that the respondent was and still is under a bona fide belief that NCCD was not payable by it. Further, the dispute involves interpretation of Tariff Items of the Tariff Act and there can also be no possible motive for the respondent to evade taxes, as it is a public-sector undertaking;

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17. (1981) 2 SCC 460

(ix) Once the Department invoked proviso to section 11A(1) of the Central Excise Act, 1944[18] and the same is found to be non-applicable, then the demand cannot be confirmed even for normal period of limitation in view of the 'doctrine of election'. In support of the this connection, reliance has been placed on the following judgments:

a) **Collector of C. Ex., Jaipur** vs. **Alcobex Metals**[19]**;**

b) **Infinity Infotech Parks Ltd.** vs. **Union of India**[20]**;** and

c) **M/s Turret Industrial Security Pvt. Ltd.** vs. **CCE & ST, Jamshedpur**[21]**;**

(x) Section 136 of the Finance Act, 2001 does not borrow the provisions of sections 11AB/11AA of the Excise Act for recovery of interest. Thus, there is no charge for interest and therefore, no interest is recoverable from the respondent in the absence of machinery provisions for assessment and collection of interest; and

(xi) The contention of the Department that this appeal should be decided on the basis of the classification decided by the Tribunal on 30.11.2011 in **Gas Authority of India** is misconceived.

13. The submissions advanced by the learned counsel for the appellant and the learned Authorized Representatives of the Department have been considered.

14. It will be necessary to examine the product of which the classification has been sought and then determine whether NCCD is leviable on it.

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18. the Excise Act
19. 2003 (153) E.L.T. 241 (S.C.)
20. 2014 (36) S.T.R. 37 (Cal.)
21. 2019 (10) TMI 1109-Cestat Kol.

15. The show cause notices, portions of which have been reproduced in paragraph 6 of this order, describe the product as “heavier hydrocarbons containing pentane/hexane popularly known as NGL.” This has been stated to be a condensate classifiable under Heading 2709 of the Tariff Act. The respondent has also described the process undertaken by it and the same has been reproduced in paragraph 3 of this order. There is no apparent difference in the description of the process undertaken by the respondent.

16. It is seen that natural gas is first dried and filtered to remove impurities. It is then cooled as a result of which certain components of natural gas like ethane, propane, butane, pentane and higher hydrocarbons are liquefied with some traces of methane. This liquefied portion is subjected to further fractioning where the lighter hydrocarbons like methane, ethane and propane are removed and the heavier fractions containing C_{3+} hydrocarbons are sent to the LPG column. In this LPG column, mixture of propane and butane is separated from the top and the remaining heavier factions comprising C_5 and C_{6+} hydrocarbons are fed into the NGL fractioning column. From the top of this column, C_5 (pentane) is separated and the bottom product which contains liquid hydrocarbons having carbon atoms ranging from C_6 and C_{6+} and some amount of C_5 are stored in the tanks. This product that is stored in the tanks and cleared by the respondent on payment of duty, is Naphtha.

17. It is, therefore, clear that the product of which the classification is sought is ‘heavier hydrocarbons’ described as ‘gas condensate’ by the respondent and ‘NGL’ by the Department.

18. At this stage, it would be useful to reproduce the relevant portions of the Tariff Items under consideration and they are as follows:-

CHAPTER 27

Tariff Item	Description of goods	Unit	Rate of duty
(1)	(2)	(3)	(4)
2709 00 00	**Petroleum oils and oils obtained from bituminous minerals, crude**	**Kg.**	**Nil**
2710	**Petroleum oils and oils obtained from bituminous minerals, 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; waste oils**		

19. Learned counsel for the respondent does not dispute the classification of the product under Heading 2709, but what he contends is that despite this classification, NCCD cannot be levied on the product since it is not marketable and hence not excisable. According to the learned counsel for the respondent, the product which is gas condensate consists of heavier hydrocarbons namely C4+ which are very volatile in nature and cannot be transported or sold in the market and neither in the show cause notices or in the appeal filed by the Department any evidence has been produced by the Department to substantiate that the product is marketable.

20. This submission advanced by learned counsel for the respondent deserves acceptance for the reason that there is indeed no evidence led by the Department to substantiate that the product is marketable. It also transpires that the mixture of heavier hydrocarbons emerging during the manufacturing process of LPG, mainly consists of C4+ hydrocarbons which are very volatile in nature and cannot be transported, bought or sold in the market. The product is, therefore,

not marketable. It would, therefore, not be an excisable product. Consequently, it is not leviable to Central Excise duty.

21. It needs to be remembered that the Tribunal in **Gas Authority of India,** which is a case pertaining to the respondent, did not accept the contention advanced on behalf of the Department that the product namely NGL, was marketable. The Tribunal also held that the product would be classifiable under Heading 2709 of the Tariff Act. The relevant portion of the decision of the Tribunal is reproduced:

> 1. In these two appeals, filed by M/s. Gas Authority of India Ltd., against the Orders-in-Original, **the common issue involved is whether Natural Gas Liquid (NGL) is marketable and whether it is classifiable under Heading 27.10 of the Schedule to the Central Excise Tariff Act or under Heading No. 27.09/27.11 of the Tariff.**
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> 2. Sh. V. Lakshmikumaran, learned Advocate, mentioned that **the appellants manufacture Liquefied Petroleum Gas (LPG) from natural gas;** that natural gas is the mixture of various hydrocarbons and broadly consists of C1, C2, C3, C4 (Propane & Butane); **that in the process of extraction of LPG, a mixture of C5 and C6 called as NGL emerges inevitably; that NGL is highly unstable in the atmospheric temperature and pressure and as such is not marketable; that it had never been marketed; that the moment NGL in the liquid state enters Lean Gas Header, in the Lean Gas Pipeline it mixes with the lean gas, gets vaporised and becomes part of the Lean Gas in the gaseous state and what ultimately leaves the factory premises is lean gas;** that no evidence has been mentioned in the show cause notice regarding the marketability of NGL except relying upon a sale invoice raised by the appellant on I.O.C in 1983; that this was a trial order and since proportion of C5 was very high to that of C6 and others, NGL never reached the destination and IOC had never paid for the invoice since NGL was not delivered (it merely vanished in thin air); that this proves that the impugned product is a non-marketable product. He, further, mentioned that their NGL is not comparable with the NGL of M/s. ONGC as the starting material of the appellants is vastly different from the starting material used by ONGC; that their starting material is relatively light and almost free from heavier hydrocarbons; that in view of presence of Pentane (C5) to the extent of 70%, impugned NGL is not stable.
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> 3.1 The learned Counsel submitted that before classifying a product under a particular Tariff Heading, it is to be ensured that the product is satisfying the conditions prescribed under Heading 27.10 because NGL is neither Petroleum Oil and oil obtained from bituminous minerals or 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; that NGL is not a species of motor spirit, which either by itself or in admixture with any other substance is suitable for use as fuel in spark ignition engines; that NGL also does not satisfy the conditions of Note 2 to Chapter 27 of the Tariff as it is neither petroleum oil or oil obtained from bituminous minerals; that it is also not a mixed unsaturated hydrocarbon.

4. Countering the arguments, Sh. M. Chandersekharan, learned Senior Advocate, submitted that the impugned product is marketable as M/s. O.N.G.C. is regularly selling NGL.

5.1. We have considered the submissions of both the sides. **The issue regarding classification of impugned product has been decided by the Appellate Tribunal in the case of Oil India Ltd.,** [2002 (148) E.L.T. 802 (T) = 2002 (51) R.L.T. 1030 (CEGAT)]. The Tribunal has relied upon Board's Tariff Advice No. 121, dated 17-11-1981 which reads as under:

> "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, the Ministry have advised the Condensate is a petroleum in natural state and is crude oil.
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> 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."

5.2. **The Tribunal, in view of the said Tariff Advice, came to the conclusion that Condensate is a petroleum in a natural state and is crude oil and it is to be classified as crude mineral oil falling under sub-heading 2709.00 of the Tariff which applies to "Petroleum oils and oils obtained from bituminous materials, crude." The Tribunal also observed that Heading 27.10 specifically excludes crude from its purview.** The Tribunal has then held as under :

> "If that be 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 27.10. Since the main heading itself excludes crude, it cannot be taken that a subsequent exclusion will bring it back under Heading 27.10."

6. **We, thus, following the decision in Oil India case, hold that the impugned product is not classifiable under Heading 27.10 and as such the demand of duty confirmed on this count is not sustainable.** Without going into other issues raised by the learned Advocate for the appellants, we allow both the appeals on the aspect of classification itself.

(emphasis supplied)

22. It is seen from the aforesaid decision of the Tribunal that the issue that had arisen for consideration was whether NGL was classifiable under Heading 2710 or under Heading 2709. The Tribunal relied upon the earlier decision of the Tribunal in **Oil India Ltd** as also the Tariff Advice and concluded that gas condensate would be classifiable under Heading 2709.

23. This order of the Tribunal was not interfered with by the Supreme Court and the appeal was dismissed. The decision is reported in **Commissioner of Central Excise, Indore** vs. **Gas Authority of India Ltd**[22] and it is reproduced below:

> 1. After hearing the arguments at length made by counsel on either side, **we are of the firm opinion that the Tribunal has rightly come to the conclusion that the issue involved is covered by its earlier judgment rendered in the case of Oil India Ltd. - 2002 (51) R.L.T. 1030 (CEGAT) = 2002 (148) E.L.T. (802) (Trib.).** We may only note that the appeal against the said judgment was dismissed by this Court on merits, al beit in limine.
>
> 2. We, thus, are of the opinion that the order of the CESTAT does not call for any interference. These appeals are accordingly dismissed.
>
> **(emphasis supplied)**

24. In **Oil India Ltd.** vs. **Commissioner of Central Excise, Shillong**[23]**,** which has been referred to in the aforesaid decision of the Supreme Court and the decision of the Tribunal, the Tribunal found as a fact that condensate has to be classified as crude mineral oil and if that be so, it would be classifiable under Heading 2709 which refers to petroleum oils and oils, obtained from bituminous materials, crude.

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22. 2015 (319) E.L.T. 5 (S.C.)
23. 2002 (148) ELT 802 (Tri-Delhi)

The relevant portion of the decision of the Tribunal is reproduced below:-

> 8. 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 be 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 a 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.

25. The Civil Appeal filed by the Department against the aforesaid decision of the Tribunal in **Oil India Ltd.** was dismissed by the Supreme Court on 3.6.2002 and the decision is reported as **Commissioner** vs. **Oil India Ltd**[24]**.**

26. It is, therefore, clear from the aforesaid decisions of the Tribunal in **Gas Authority of India** and **Oil India Ltd.** that the product gas condensate is classifiable under Heading 2709 and not Heading 2710. The show cause notices in the present appeal also classify the product gas condensate under Heading 2709 and the respondent does not dispute this classification.

27. It also needs to be remembered that burden is on the Department to prove, if excise duty is to be charged, that the product is marketable.

28. This is what was expressed by the Supreme Court **Ambalal Sarabhai Enterprises.** The Supreme Court emphasised that the burden is on the revenue to establish that the goods were marketed or

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24. 2004 (170) E.L.T. A116 (S.C.)

are marketable. The relevant portion of the judgement is reproduced below:

> **5. XXXXXXX But we are concerned with the question whether actual goods in question were marketed or, in other words, if not, whether these are marketable or not.** It is true that the goods with unstable character can be theoretically marketable if there was a market of such transient type of articles which are goods. But one has to take a practical approach. The assessee produced evidence in the form of affidavit. One Shri Khandor, who filed an affidavit in support of the case of the respondent, had stated in his affidavit that completely hydrolysed starch would start fermenting and decomposing and at higher concentration it would start crystallizing out within two or three days. This is evidence indicating propensity of its not being marketed. It is good evidence to come to this conclusion that it would be unlikely to be marketable as it was highly unstable. **There was evidence as noted by the Tribunal that it has not been marketed by anyone.** There is also an admission of the Superintendent of the appellant that no enquiry whatsoever was conducted by the Department as to whether starch hydrolysate was ever marketed by anybody. It was pointed out by the revenue that even according to the respondent, it stored starch hydrolysate in tanks before transporting it through pipes but according to the appellant, the storage of starch hydrolysate was only for a period of a few hours only as a step in the process of transfer thereof to sorbitol. **It, therefore, appears to us that there was substantial evidence that having regard to the nature of the goods that this was unlikely that the goods in question were marketable. This should be judged in the background of the evidence that the goods have not been marketed in a pragmatic manner.** All this again would have to be judged in the light of the fact that revenue has not adduced any evidence whatsoever though asked to do so. **It was pointed out that if the Department was to charge duty of excise on this starch hydrolysate as one form of glucose it would be the burden on the Department to establish that starch hydrolysate was not merely marketable but was being marketed as glucose in some form.** This would be so since what is liable for duty under Item 1-E is glucose in any form and, therefore, in order to demand duty under that Section, the Department must establish that the product on which duty was demanded was known in the market as glucose in one form or the other. **There is no such evidence as observed by the Tribunal. The Tribunal noted and, in our opinion, rightly that revenue cannot be said to have discharged its burden of establishing that by applying the process of hydrolysis to starch for production of starch hydrolysate the respondent manufactures any excisable goods in the sense of being goods known in the market and being marketed or marketable.**
>
> **7. In the premises, the revenue has failed to discharge its onus to prove that starch hydrolysate was dutiable.** In the premises, the Tribunal cannot be said to have committed any error.
>
> **(emphasis supplied)**

29. In **Moti Laminates,** the Supreme Court again observed:

> **9.** Although the duty of excise is on manufacture or production of the goods, but the entire concept of bringing out new commodity etc. is linked with marketability. **An article does not become goods in the common parlance unless by production or manufacture**

> **something new and different is brought out which can be bought and sold.**
>
> **(emphasis supplied)**

30. In **Gujarat Nermada Valley Fert,** the Supreme Court also observed:

> 4. The appellant is right in its contention that the decision of the CEGAT is based on conjectures, hypotheses and is illogical. After the decision of this Court in Bhor Industries Ltd. Bombay v. Collector of Central Excise, Bombay 1989 (1) SCC 602, **unless the product is capable of being marketed and is known to those who are in the market as having an identity as a distinct identifiable commodity that the article is subject to excise duty.** Simply because certain articles fall within the schedule does not make them marketable. Actual sale in the market is not necessary but the articles must be capable of being sold in the market or known in the market as goods.
>
> 7. **The onus was on the Revenue.** The only piece of evidence which has been produced by the Revenue was a test report which merely stated that the sample showed that the items were organic chemicals. **It does not in any way establish marketability.** Nor can marketability be established on the basis of mere stability. Something more would have to be shown to establish that DECA AND CMBE were known in the market as commercial products.
>
> **(emphasis supplied)**

31. In the present case, the Department has not placed any evidence to show that the product was marketed or is marketable. In fact, the contention of the respondent is that the condensate that emerges is captively consumed for the manufacture of Naphtha and the process of manufacture is a continuous and integrated one, which breaks only at the stage of emergence of Naphtha. The respondent also contends that no extraction of the condensate emerges from the bottom of LPG column, since this mixture, upon its emergence, passes to the next column immediately for extraction of Naphtha. The respondent further claims that gas condensate is not manufactured or cleared by the respondent and, therefore, no new product emerges during the manufacture of Naphtha from the LPG column. No evidence has been led by the Department to controvert this factual position stated by the respondent.

32. Such being the position, there is no hesitation in holding that NCCD would not be leviable on gas condensate, even though it is classifiable under Heading 2709, since it was not marketed and is also not marketable.

33. In view of the aforesaid discussion, it would not be necessary to examine the other two contentions raised by the respondent regarding the Notification dated 01.03.2003 or the Circular dated 09.01.2004, though learned counsel for the respondent had very fairly stated that the respondent was not pressing any submission regarding the applicability of the Notification dated 01.03.2003.

34. Learned Authorized Representatives appearing for the Department, however, stated that the classification of the product should be decided in the light of the decision on the Tribunal rendered in Excise Appeal No. 55666 of 2014 that was filed by the Department to assail the order dated 23.07.2014 passed by the Commissioner dropping the demands.

35. It needs to be noted that in the earlier Excise Appeal, the product had been described in the show cause notices and by the Tribunal as NGL falling under Tariff Item No. 2710 12 20, though it was contended by the respondent that it would fall under Heading 2710 12 19 or 2710 12 90. It also needs to be noted that the show cause notices involved in the present Appeal, classify the product under Heading 2709 but still the Department contends that it should be classified under Heading 2710 as a result of which the demand would not be confirmed. The only reason that comes to mind for raising such a contention is the anxiety of the Department to sustain the earlier decision of the Tribunal rendered on 30.11.2018 that

involved confirmation of demand of Rs. 830 crores, whereas the demand in the present appeal is only about Rs. 3 crores.

36. In any case, it appears necessary to examine the proceedings relating to the earlier show cause notices and the proceedings relating to the present show cause notices. Learned counsel for the respondent stated that there is no difference in the product involved in the earlier Excise Appeal and in the present Excise Appeal, except for the fact that the pentane was removed from the product involved in the earlier Excise Appeal, whereas pentane is removed subsequently from the product involved in the present Excise Appeal. The two Excise Appeals, therefore, need to be discussed.

Earlier Excise Appeal No. 55666 of 2014 filed by the Department

37. The respondent had classified the product under Tariff Item No. 2710 11 90 of Tariff Act and claimed the benefit of concessional rate of duty under a Notification dated 01.03.2006 upto 06.07.2009 and thereafter under Tariff Item No. 2710 12 90. For the subsequent period also the respondent claimed benefit of concessional rate of duty under a Notification dated 07.07.2009. In terms of the above Notifications, the product falling under Chapter Heading 2710 was exempt from duty of excise in excess of 14% / 16%.

38. The show cause notices proposed a demand of differential duty of excise on the product on the ground that the goods were NGL, classifiable under Tariff Item No. 2710 11 20 / 2710 12 20 and were not classifiable under Tariff Item No. 2710 11 90 / 2710 12 90, as claimed by the respondent. Consequently, the show cause notices proposed a demand of duty @ 16% / 14% + Rs. 15 per litre with imposition of penalty and recovery of interest.

39. In response to the show cause notices, the respondent denied all the allegations and contended that the product in question was classifiable under Tariff Item 2710 11 90. The respondent also pleaded alternatively that the product in question, being a condensate of natural gas, was classifiable under Chapter Heading 2709 and chargeable to 'NIL' rate of duty.

40. The Commissioner, by order dated 24.07.2014, dropped the entire demand of duty proposed in all the show cause notices primarily for the reason that the product fell under Heading 2710 and was entitled to exemption under the Notifications, irrespective of the fact whether it fell under Tariff Item 2710 12 19 or 2710 12 90.

41. The Department filed an appeal before the Tribunal on the ground that the product was NGL and not Naphtha. The Tribunal held that though the adjudicating authority correctly concluded that Naphtha and NGL were two different products, but it wrongly concluded that the product was Naphtha and not NGL. The Tribunal, classified the product under Tariff Item 2710 12 20.

Present Excise Appeal

42. In so far as the dispute in the present appeal is concerned, the show cause notices proposed a demand on the product described as ''heavier hydrocarbons''. This product is produced as an intermediate product at the time of extraction of LPG and is captively consumed in the manufacture of Naphtha/ Mixed Fuel Oil. The show cause notices, while describing the product as NGL, classified it under Heading No. 2709 of the Tariff Act. The respondent does not dispute the classification of the product under Heading No. 2709, but contends that since this product is not marketable, it is not an excisable product

and so no NCCD can be levied. This contention of the respondent was accepted by the Commissioner in the impugned order dated 14.07.2014. The Department has filed this appeal to contend that the product is NGL.

43. It, therefore, emerges that in the earlier Excise Appeal the dispute was whether the product was NGL as contended by the Department, but in any case the product was stated to be classifiable under Heading 2710 by the Department. The adjudicating authority found that the product was Naphtha but the Tribunal recorded a finding that the product was NGL. The order passed by the Tribunal has been assailed by the respondent before the Supreme Court and the order passed by the Tribunal has been stayed. Thus, the classification of the product that was under consideration in the earlier Excise Appeal has to be decided by the Supreme Court.

44. In the present case, as noticed above, the product described in the show cause notices is 'heavier hydrocarbons' which is an intermediate product in the production of Naphtha. The Department has classified it under Heading 2709, which classification has not been disputed by the respondent in this Excise Appeal filed by the Department.

45. It is, therefore, clear that a contrary stand has been taken by the Department in the show cause notices, which were the subject matter of the earlier Excise Appeal and the show cause notices which are the subject matter of the present Excise Appeal. The Department had previously issued multiple show cause notices to the respondent alleging that the product was classifiable as 'NGL' under Tariff Item No. 2710 12 20 of the Tariff Act. However, the present show cause notices

have been issued by the Department claiming classification of 'NGL' under Chapter Heading No. 2709 of the Tariff Act.

46. It is, therefore, not possible to accept the contention of the learned Authorized Representative appearing for the Deparmtment that the product should be classified as NGL under the same Heading as was classified in the order of the Tribunal passed in the earlier Excise Appeal. The show cause notices, in the present Excise Appeal, proceed on the footing that the heavier hydrocarbons (gas condensate) should be classified under Heading 2709 of the Tariff Act. The Department cannot, in this Excise Appeal, be permitted to take a stand that is contrary to the stand taken in the show cause notices.

47. The aforesaid discussion leads to the inevitable conclusion that the product 'heavier hydrocarbons' described as 'gas condensate' is classifiable under Heading 2709 but NCCD would not be leviable because the product is not marketable.

Extended Period of Limitation

48. It has been submitted by the learned counsel for the respondent that since the show cause notices do not disclose any evidence of positive act of suppression, fraud or mis-statement on the part of the respondent, the extended period of limitation could not have been invoked and in any case it cannot be urged that there was any suppression since the Department had full knowledge of the activities undertaken by the respondent during the period of dispute as regular returns were being filed by the respondent. Learned counsel also submitted that since contrary views were being taken by the Department, the Tribunal and the High Courts, the extended period of limitation cannot be invoked and in support of this contention placed reliance on the following decisions:

a) **GAIL (India) Ltd.** vs. **Commissioner of Central Excise, Kanpur**[25]**;**

b) **Blue Star Ltd.** vs. **Union of India**[26]**;**

c) **Mentha & Allied Products Ltd.** vs. **Commissioner of C. Ex., Meerut**[27]**;**

d) **Commr. of C. Ex.,Cus. & S.T., Guntur** vs. **Indian Oil Corporation Ltd**[28]**;** and

e) **Muskan Engineering Industries, Parveen, Authorized Signatory** vs. **CCE, Panchkula**[29]**.**

49. Learned counsel for the respondent also submitted that once the Department invoked proviso to section 11A(1) of the Central Excise Act and the same is found to be non-applicable, then the demand cannot be confirmed even for normal period of limitation in view of 'doctrine of election'. In support of this connection, reliance has been placed on the decisions rendered in **Alcobex Metals, Infinity Infotech Parks Ltd,** and **Turret Industrial Security.**

50. Though learned Authorised Representative appearing for the Department contended that the extended period of limitation was correctly invoked and that even if the extended period of limitation is held to be not invokable, then too the demand for the normal period of limitation would be sustainable, but it would not be necessary to examine the submission advanced by learned counsel for the respondent in this appeal.

51. This is for the reason that even from the reply filed by the respondent in response to the show cause notices it is seen that the contention that is now being raised in regard to the extended period of limitation was not raised by the respondent, though the show cause

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25. 2015 (323) E.L.T. 186 (Tri. – Del.)
26. 2015 (322) E.L.T. 820 (S.C.)
27. 2004 (167) E.L.T. 494 (S.C.)
28. 2020 (40) G.S.T.L. 345 (Tri. Hyd.)
29. 2018 (10) TMI 959 – CESTAT CHANDIGARH

notices had invoked the extended period of limitation. This is clear from the submissions of the respondent recorded by the Commissioner in the impugned order. It would, therefore, not be appropriate to examine the contentions now sought to be raised in this appeal, more particularly when the respondent has not filed any cross appeal for supporting the order of the Commissioner on this ground.

Penalty and Interest

52. Once it is held that the demand cannot be sustained, the imposition of penalty or recovery of interest cannot also be sustained.

Conclusion

53. Thus, for all the reasons stated above, the order passed by the Commissioner does not call for any interference in this appeal. The appeal is, accordingly, dismissed.

(Order pronounced on 02.08.2021)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P V SUBBA RAO)
MEMBER (TECHNICAL)

Shreya/JB

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH

EXCISE APPEAL NO. 55568 OF 2014

Commissioner, Central Excise and Service Tax,
New Delhi - 110017 ...Appellant

VERSUS

M/s Gas Authority of India, GAIL Bhawan,
New Delhi ...Respondent

APPEARANCE:

Shri O.P. Bisht & Rakesh Agarwal, Authorized Representatives for the Appellant
Shri Lakshmikumaran, Advocate for the Respondent

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

Date of Hearing: July 16, 2021
Date of Decision: August 2, 2021

ORDER

Order pronounced.

(JUSTICE DILIP GUPTA)
PRESIDENT

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

JB