CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH
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REGIONAL BENCH – COURT NO. 1

Excise Appeal No.44 Of 2011

[Arising out of OIO No.26CE/Commissioner/J&K/2010 dated 14.09.2010 passed by the Commissioner of Customs and Central Excise, Jammu & Kashmir]

The Commissioner of Central Excise, Jammu : Appellant (s)
OB-32, RAIL Head Complex, Jammu-180012

Vs

M/s FIL Industries Private Limited : Respondent (s)
(formerly known as Kohinoor Industrial
Agro Products), SIDCO, Industrial Complex,
Rangreth, Srinagar (J&K)

APPEARANCE:
Shri Nikhil Kumar Singh, Authorised Representative for the Appellant
Shri R.K. Hasija and Shri ShivangPuri, Advocate for the Respondent

CORAM :
HON'BLE Mr. S. S. GARG, MEMBER (JUDICIAL)
HON'BLE Mr. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER No.60404/2023

Date of Hearing: 30.08.2023

Date of Decision:18.09.2023

Per: P.ANJANI KUMAR

M/s FIL Industries Pvt Ltd. earlier known as (M/s Kohinoor Industrial Agro Products), are an EOU engaged in manufacture and export of Apple Concentrate; they have imported three chemicals viz. Captan Tech, Dodine Tech and Carbendazim Tech in March and June 2000; they have applied for permission to the Department to clear these inputs for processing by a job worker; however, the permission was denied by the Department. Meanwhile the appellants have claimed to have utilized some of the inputs in the processing of apples; the Department issued a show-cause notice alleging that the
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said goods are not usable for post-harvest activity and as such, the appellant's claim is incorrect and the said goods have been removed clandestinely without payment of duty. A show cause notice was issued and was confirmed vide OIO dated 30.06.2005; on an appeal filed by M/s Kohinoor Industrial Agro Products, CESTAT has remanded the case vide Order dated 29.04.2009 to the Adjudicating Authority with a direction to decide the matter afresh after providing the copies of relied upon documents and according reasonable opportunity of hearing to the noticee. Commissioner vide the impugned order has dropped the proceedings. Therefore, the Department is in appeal against the impugned order dated 14.09.2010.

2. Learned Authorized Representative for the Department reiterates the grounds of appeal.

3. Shri R.K. Hasija, learned Counsel for the respondents, submits that even though the permission to remove chemicals outside the factory was denied; the chemicals were used within the factory after dilution for post-harvest treatments of the apples as per the technical opinion dated 24.04.2002 issued by Sher-E-Kashmir, University of Agricultural Sciences & Technology, Jammu; the contention of the Department that the opinion given implies that only "minimal quantities" can be used and that the opinion of Jammu Centre of the University cannot be relied upon as apples are not grown there.

4. Learned Counsel submits that Department relies upon Letter, dated 19.07.2002 by Sher-E-Kashmir University of Agricultural Sciences & Technology, Kashmir, giving the opinion that the said chemicals cannot be used beyond the pre-harvest stage; however, Department has lost the sight of the confirmation in the very same certificate that the said university "has not taken up studies on the post-harvest application of these fungicides; it is not open for the Department to use part of the report to confirm the demand. He submits that the opinion given/ literature available as follows has been conveniently ignored by the Department:

- Letter date 18.02.2002 of M/s Chimac Agriphar SA confirming usage of dodine for both pre-& post-harvest disease control in apple.
- Certificate dated 06.02.2002 issued by M/s China National Chemical construction Jiangsu Company manufacturers of carbendazim confirming its usage for pre& post-harvest treatment for apple.
- Certificate dated 17.02.2002 issued by M/s Makhtesinm Chemical Works Ltd. Israel manufacturers of Captan conforming its usage for the treatment of disease on apple for both pre and post-harvest.
- Literature from suppliers of chemicals showing that the three chemicals can be used in pre and post-harvest disease control of apple.

5. Learned Counsel submits that it is not for the Department to imply that precautionary use should be minimal; conclusion cannot be

based on the process of creation of formulations; the concentration and quantity involved in the process of drenching cannot be ascertained by comparing it to a composition of a formulation. He relies on Saraswati Industrial Syndicate Ltd.- CIT [1999] 103 Taxman 395/237 ITR 1 and CIT Vs Bharti Cellular Ltd.- [2010] 193 Taxman 97/ [2011] 330 ITR 239 (SC).

6. Learned Counsel further submits that there is no shred of evidence that the chemicals were removed clandestinely; no evidence in the form of transportation/ sale of the said inputs is produced. Therefore, the Department cannot allege clandestine removal on the basis of certificates given by technical persons. He submits that a number of times officers have visited the premises and no discrepancy of stock of inputs has been found; the OIO is silent whether balance stock was verified on 04/05-09-2001. He also submits that the assertion of the Department that the chemicals have been used after the expiry shelf life is not based on any proof; moreover, it is not for the Department to decide that the chemicals can be used or not after expiry period.

7. Heard both sides and perused the records of the case. The case of the Department stands on two suppositions i.e. (i) as per the opinion of Sher-E-Kashmir, University of Agricultural Sciences & Technology, Srinagar, the chemicals cannot be used for post-harvest treatment of apples and (ii) the chemicals have been clandestinely cleared without payment of duty. We find that the opinion relied upon

by the Department is inconclusive inasmuch as the same certificate which asserts that the said chemicals cannot be used for post-harvest treatment of apples beyond the period of 25 days also mentions that the university has not undertaken any studies regarding the use of such chemicals in the post-harvest scenario. Therefore, the certificate cannot be said to be conclusive. Moreover, the Jammu Centre of the University has certified that the said chemicals can be used for treatments of apples; the Department counters the submissions of the appellants and the opinion of the Jammu Centre of the University merely by stating that as apples are not grown in Jammu, the certificate cannot be relied upon. We are of the considered opinion that a technical opinion cannot be negated by such a flimsy averment. Moreover, the certificates issued by other agencies and the Deputy Director of Horticulture, Government of Jammu & Kashmir speak of the possibility and feasibility of the use of the impugned chemicals in the post-harvest treatment of apples. As submitted by the learned Counsel for the respondents, we find that the expert evidence given cannot be brushed aside for non-technical reasons. If the Department did not want to rely upon the technical opinion, the same should have been done by countering technical opinion by expert opinion authoritatively countering the opinion given. This having not been attempted or done, the Department cannot brush aside the technical opinion as per the whims and fancies or even for Revenue considerations. We find that learned Commissioner has, categorically, observed that the Jammu unit of the university have given opinion at

the instance of the Department only and the Department cannot be selective in using the reports.

8. Another defence advanced by the respondents was that the learned Commissioner has confirmed the demand on the allegation that the goods imported duty free have been clandestinely cleared; however, no evidence to this effect has been produced; no stock taking was done. We find that there is merit in the argument of the respondents. On going through the records of the case and rival submissions, we find that no attempt has been made by the Department to ascertain the stock available and the stock consumed. Though, it has been alleged that the respondents have cleared the stock of inputs clandestinely, no investigation, whatsoever, appears to have taken place in this regard to ascertain the purchasers, the transportation and the receipt of such sale. It is seen that no stock taking has been done at any point of time. No Panchnama,on the date of visit on 04/05-09-2001, indicating stock taking appears to have been placed on record. Under the circumstances, allegation of clandestine removal bereft of any evidence cannot be upheld. We find that the learned Commissioner observed that no evidence was put on record to substantiate the said allegations; the show-cause notice is silent on important issues like from where the job work was done, to whom and how these chemicals were sent; onward movement and return of formulations and there is no evidence on the purported use of the formulations in any of the orchards. Therefore, we are of the

considered opinion that the Department has not made any case of clandestine removal against the appellants.

9. We find that learned Commissioner has gone through the issue raised in the show-cause notice and the submissions of the appellants and has given a considered and reasoned opinion on the basis of available evidence on record. The Department has not brought out any cogent reason, whatsoever so as to negate the findings of the learned Commissioner. Under the circumstances, we find that no case has been made out against the impugned order.

10. In view of the above discussion, we are of the considered opinion that the impugned order is sustainable and requires no interference. Accordingly, the Department's appeal is dismissed.

(Pronounced on 18/09/2023)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

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