



भारत सरकार, नई दिल्ली, भारत

GOVERNMENT OF INDIA, NEW DELHI, INDIA

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क्र. सं.	दिनांक	पृष्ठ सं.	पृष्ठ सं.
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BIJY-FXCCLIS-000-A 9P-158-113-167-2018-19

दिनांक	02.07.2018	पृष्ठ सं.	04.07.2018
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 Issued by: Shri Kumar Sanjosh, Commissioner, Balesar

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ORDER IN APPEAL:

The present five appeals have been filed by M/s. Sainath Industrial Fuels Pvt. Ltd., Survey No. 447-2, Seranagar, Mangal-Shaymgar Road, Near Nagdhanba, Bhanagar, Bhanagar (herein after referred to as "Appellant") against Orders-in-Original as detailed in the Table below (hereinafter referred to as 'the impugned orders') passed by the Assistant Commissioner of Central Excise Division, Jhagadia (hereinafter referred to as 'the lower adjudicating authority'):-

Sr. No.	Appeal No.	Order-in-Original No. & Date	Period	Dut. Inv. assessed
1	92/163/29B/2017	65 Excise/Demand/2016-17 dated 21.01.2017	April, 2014	3,59,502
2	92/162/29B/2017	65 Excise/Demand/2016-17 dated 21.01.2017	May, 2014	3,59,303
3	92/161/29B/2017	65 Excise/Demand/2016-17 dated 21.01.2017	June, 2014	2,10,575
4	92/164/29B/2017	65 Excise/Demand/2016-17 dated 21.01.2017	July 2014 to March 2015	28,11,754
5	92/165/29B/2017	65 Excise/Demand/2016-17 dated 21.01.2017	April-October 2015	7,02,625

2. The brief facts of the case are that appellant, engaged in manufacture and clearance of excisable goods viz. S.L. Benzene, S.L. Toluene, S.L. Hydromixture etc. falling under chapter 27071000, 27072000 & 27075000 of Central Excise Tariff Act, 1985 (hereinafter referred to as "CETA, 1985"), was holding Central Excise Registration No. AALES1205964001. The scrutiny of monthly ER-1 returns for the period mentioned in Table reveals that Appellant had cleared goods classified as S.L. Benzene & S.L. Hydromixture under CTSII 29022000 & 29023000 respectively attracting Central Excise duty @12% ad-valorem up to March, 2014. The appellant cleared these goods under Chapter 27071000 & 27075000, which attract Central Excise duty @14% ad-val. The Department alleged that appellant misclassifies S.L. Benzene & S.L. Hydromixture under CTSII 29022000 & 29023000 respectively as the said products were correctly classifiable under CTSII 27071000 & 27075000 respectively and Central Excise duty was chargeable @14% ad-val. whereas they cleared the same @12% of Central Excise duty and thereby short paid Central Excise duty thereon for the periods as mentioned in the above table.

3.1 Show Cause Notices were issued to Appellant by Assistant Commissioner, Central Excise Division, Bhanagar processing demand of Central Excise duty under Section 11A of the Act alongwith interest under Section 11A& of the Act.

The Show Cause Notices also proposed to impose penalty under Section 114C of the Act read with Rule 25(1) of the Central Excise Rules, 2002 (hereinafter referred to as 'the Rules'). The said Show Cause Notices issued for the period from April, 2014 to October, 2015 were adjudicated by the lower adjudicating authority on 31.03.2017. Vide the impugned orders wherein the lower adjudicating authority sustained the demands under Section 114A of the Act alongwith interest under Section 114A of the Act and also imposed penalty 250% of Central Excise duty payable under Section 114C(1)(b) of the Act read with Rule 25(1) of the Rules.

3. Being aggrieved by the impugned orders, the appellant preferred present appeals, inter-alia on the following grounds:

3.1 Appellant submitted that S.I. Benzolite, S.I. Toluene & S.I. Lykrom Nucleol lower purity was classified under Item 1, ISH 29022000 & 29023000 respectively and the same was not classifiable under CETSI 2707000 & 2732000 of CETN, 1984, that they submit reply to Show Cause Notice, which has been ignored by the lower adjudicating authority; that they rely on their reply to Show Cause Notice submitted to the adjudicating authority vide paragraph 3, 4, 5, 6.1 & 6.2; that the lower adjudicating authority misinterpreted the case law of Oswal Petrochemicals Ltd reported as 2000 (226) F.T.R. 277 & 284; that they had a valid reason of the purity of the products manufactured by them was 99.87% and hence same was falling under Tariff item 29022000 as per explanatory notes of the ISH and clarified by CBEC vide Circular F. No. 83/20186-CX.1 dated 21.09.2016, that they had no intention to pay their duty liability at lower rates; that the department had not produced any evidence showing that purity of the finished goods of the appellant was less than 95%.

3.2 The appellant further contended that the penalty imposed under Section 114C of the Act is illegal in as much as intention being a necessary condition to be proved which is absent in the present case; that no evidence was adduced in the Show Cause Notice to establish that the alleged acts or omissions had been committed by them deliberately or contumaciously or in flagrant violation of provisions of law or with intent to evade payment of duty and hence no penalty is imposable upon them; that no penalty is imposable for an incorrect classification claimer in the classification declared/that as held in the case of Similifine Beecham Consumer Health Care Ltd reported as 2004 (147)



ELT 721 (11); that an attempt to change classification in order to obtain the benefit was not itself punishable under the Act or the Rules as held in Indabreun Ltd reported as 2008 (16) ELT 549 (Til-2011).

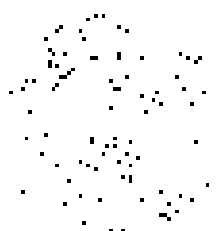
3.4 The Appellant received copy of the impugned orders on 25.04.2017 and filed appeal on 21.07.2017 i.e. beyond period of 60 days but within further 30 days a written application for condonation of delay as their consultant was busy with adjudication proceedings before various authorities due to delay of adjudication; that the consultant being a chartered accountant was busy with the reply work of notices issued by the Income Tax department due to demonetization of currency and statutory audit work of nationalized banks and they were also busy with the migration and consulting work of GST and hence they could not prepare appeals within 60 days time, which was not intentional on their part; that if the delay is not condoned, they will suffer irreparable loss/damage and they rely on judgment in case of Dist. Corpn and others reported as 1987 (28) ELT 195 (SC), Ghay Singh and Others reported as 1987 (32) ELT 256 (SC), *Yashraj & Yashrajtabei Baburao Patil* reported as 2001 (122) ELT 15 (SC), *S. D. Steel (P) Ltd* reported as 2003 (256) ELT 281 (Til-4016-12); that they had a good prima facie case and delay within of 30 days may be condoned.

4. Personal hearing in the matter was attended by Shri A. N. Yashdanya, Chartered Accountant, who reiterated the grounds of appeal and submitted that it is classification dispute of their products; stated that purity of the products is 95% or more (but did not submit any Test Report); and claimed that products are classifiable under Tariff Item 29022000 and 29023000 respectively as per test report of M/s. Microvet Research & Analytical Lab., Yashdanya; that since it is classification issue, no penalty is imposable on them.

FINDINGS:

5. I have carefully gone through the facts of the case, the impugned order and written as well as oral submissions made by the Appellant. The issue to be decided is whether:

- (i) S.L. Inocin & S.L. Hydramixture manufactured by Appellant are classifiable under Tariff Items 29022000 & 29023000 respectively or 27071000 & 27075000?
- (ii) Appellant is liable to pay differential Central Excise duty as mentioned in the Table of para 2 of this order alongwith interest or not?



(ii) Penalty is correctly imposed in the impugned orders or otherwise.

5.1 I find that the Appellant filed appeals beyond period of 60 days stating that their consultant was busy with work related to adjudicating proceedings before various authorities due to office of adjudicator, that the consultant being chartered accountant was busy with the regular work or notices issued by the Income Tax department due to demonetization of currency and statutory audit work of nationalized banks; that they were also busy with the managerial and consulting work of Co. and hence they could not prepare Appeal Memorandum within 60 days time. Since the appeals have been filed within further time of 30 days as prescribed under the act, I therefore do not allow appeals in the interest of justice and ordered to recall the appeals on merit.

5.2 Appellant submitted that S.I. Benzene, S.I. Hydro mixture of lower purity were excluded from Tariff items 29027000 & 29024000 respectively and the same were classifiable under Tariff items 27071000 & 27072000; that they had submitted a copy of test report dated 19.03.2015 along with reply to Show Cause Notice, which has been ignored by the lower adjudicating authority; that they rely on the submissions made in detail vide their reply to Show Cause Notice submitted to the adjudicating authority vide paragraph 2, 4, 5, 6.1 & 6.2 and reiterated the same for the purpose of the present appeal; that the lower adjudicating authority misinterpreted the notation of Usual Petrol products (tr reported at 2009 (128) ELT 1232 (Tribunal); that the purity percentage of S.I. Benzene manufactured by appellant was 99.6% as per Test Report MPAL/CHEN/19425/15 dated 19.03.2015 and hence same was falling under Tariff item 29027000 as per explanatory notes of the HS4 and CUG Circular No. 60/2015-CE3 dated 22.09.2016; that they had no intention to pay their duty liability at lower rates; that the department had not produced any evidence to show that purity of S.I. Benzene & S.I. Hydro mixture manufactured by the appellant was less than 95%.

5.3 I find that note 1 of Chapter 27 of the CETA, 1985 is as under.

2707 For the purposes of tariff items 2707 10 00, 2707 20 00, 2707 30 00 and 2707 40 00, the terms "benzol (benzene)", "toluol (toluene)", "xylole (xylene)" and "naphthalene" apply to products which contain more than 50% by weight of benzene, toluene, xylene or naphthalene, respectively."

2707 OILS AND OTHER PRODUCTS OF THE DISTILLATION OF HIGH TEMPERATURE COAL TAR SIMILAR PRODUCTS IN WHICH THE WEIGHT OF THE AROMATIC

CONSTITUENTS EXCEPT THAT OF THE NON AROMATIC CONSTITUENTS

<u>2707 10 00</u> Benzol (benzene)	kg.	14%
<u>2707 20 00</u> Toluol (toluene)	kg.	14%
<u>2707 90 00</u> Other aromatic hydrocarbon mixtures of which 55% or more by volume (including losses) distill at 250° C by the ASTM D 86 method	kg.	14%

The Chapter heading 2902 stands as under

2902 CYCLIC HYDROCARBONS - Cyclohexes, cyclohexenes and cyclohexenones:

<u>2902 20 00</u> Benzene	kg.	12%
<u>2902 30 00</u> Toluene	kg.	12%

6.1 I find that Note 3 of Chapter 27 specifically mentions the criteria classify Benzene & Toluene under Chapter 27, which contain more than 50% by weight of Benzene & Toluene under tariff item 2707 00 00 and 2707 20 00 respectively. Heading 2707 refers to Gas and other products obtained from distillation of high temperature, coal tar or similar products in which the weight of the aromatic constituents exceed that of the non aromatic constituents are classifiable under heading 2707 including other aromatic hydrocarbon mixtures of which 55% or more by volume (including losses) distill at 250°C by ASTM 86 method whereas heading 2902 refers to cyclic hydrocarbons - cyclohexes, cyclohexenes and cyclohexenones. The submission made/ records submitted by the Appellant do not state (even does not indicate) as to what are the constituents of these products by volume or weight, whether the products in question are cyclic hydrocarbons or otherwise and what is purity of the products in question i.e. Benzene and S.I. Hydro mixture.

(Signature)

6.2 It is on record that the appellants themselves were classifying the products in question under Chapter 27 till March, 2014 and from April, 2014, they started classifying the same products under Chapter 29 without any chemical test reports submitted to the department only to pay Central Excise duty @12% instead of @14%. I find that the act of the appellant is highly irresponsible and without any justification to abruptly change classification of the products under Chapter 29 after classifying these products under Chapter 27 previously. The appellant failed to substantiate the reason for this change of classification and simply refers to some test report from a laboratory in Vadodra but failed to produce the said test report before the lower adjudicating authority and also before me for verification. It is undisputed fact that classification of a product is

to be claimed by the assessee on the basis of justified facts and if Department is not in agreement, the appellant is duty bound to produce that basis/fact material to justify his claims.

6.4 While filing reply to the Show Cause Notice, the appellant argued that upto March, 2013, they had been clearing their products classifying them under Chapter 29 and only during financial year 2013-14, they had cleared these products under Chapter 27 due to lack of knowledge and alleged harassment by the then Range Superintendent, but could not produce any letter/document to support the allegation of Harassment. It was the appellant who classified their products under Chapter heading 2707 for the financial year 2013-14 and then changed classification under Chapter heading 2902 w.e.f. April, 2014 onwards without producing any test report or literature or any other valid documents. This is an act in breach of trust reposed by the government/department in the assessee and the appellant has miserably failed in maintaining that faith and rule of law.

6.5 Appellant failed to produce any documentary evidences in support of their claim to classify their products under Chapter heading 2902 either before the adjudicating authority or during Appral proceedings. A notable Tribunal in case of Mrs. Tara Iron & Steel Co. Ltd. reported as 1983 ; 13 E.L.T. 1113 (CEGAT) has held that "goods classified as forged products under a specific tariff item for a number of years cannot be classified suddenly under another tariff item without any cogent reasons which are absolutely essential to explain such change over. A mere change in classification without assigning any reasons therefor is unjustified, unsustainable in law and, therefore, liable to be crushed." This injunction was upheld by Hon'ble Supreme Court reported as 1987 (34) E.L.T. 415 (S.C.). Therefore, I have no option but to hold that the subject products in question are classifiable under Chapter heading 2707 and not under Chapter heading 2902 as claimed by the appellant in absence of proper justification and/or change in law.

6.6 In the Supreme Court in case of Comr. Petroschemicals Ltd reported as 2007 (129) E.L.T. 384 (S.C.) dismissing the writ Appeal filed by Mrs. Comr. Petroschemicals Ltd on merits against Tribunal Order reported as 2000 ; 26 E.L.T. 239 (Tribunal). The Appellate Tribunal in its order, following the ratio of Supreme Court decision in the case of 'Nocoracil Products Ltd. reported in 1995 (27) E.L.T. 23 (S.C.) had held that the product benzene and toluene are

classifiable under sub-heading 2707.10 and 2707.20 of Central Excise Tariff as
 173697

*3.1 Classification of Benzene and Toluene

The distinguishing criterion for classification of Benzene and Toluene is the purity of the product, as seen from the 18th Explanatory Notes to Chapter 27 and Chapter 29. Under the HS Explanatory Notes, which are required to be followed when Tariff Entry is preferred thereon, as held by the Apex Court in the case of Collector of Central Excise, Shillong v. Woodcraft Products Ltd reported in 1991 (77 F.L.T. 23 (S.C.)), a separate chemical defined compound is defined as "single chemical compound of known substance which does not contain other substances deliberately added during or after its manufacture (including purification)". The Notes further state with specific reference to Benzene carbons, and in particular to Benzene and Toluene that, in order to fall under Chapter Heading 29.02, Benzene should distil 78 to 98% by volume within a 20 C range which includes 90.10 C and that Benzene of lower purity is excluded (heading 27.07), and that Toluene must distil 78 to 98% by volume within a 20 C range which includes 110.50 C and that Toluene of lower purity is excluded (heading 27.07). The Bench in its letter No. 80/2006 C.E. I, dated 22-9-1980 had clarified that the distinguishing criteria for classification of Benzene and Toluene and Xylene, mentioned under Chapter 27 or under Chapter 29, would be the test laid down in 18th Explanatory Notes and that the HSN test could be adopted for determining the classification of these materials for the purpose of levy of Central Excise duty. The Bombay Collectorate had also issued Trade Notice No. 29/80 on the basis of this letter. In view of the above, we hold that the distinguishing criterion laid down in 18th Explanatory Notes is the criterion that purity will be a criterion for the purpose of determining classification of petro-chemical product under Chapter 29.

3.2 The respondents were testing samples of their products, Benzene and Toluene in their Quality Control Laboratory. The said reports indicated that the percentage of Benzene and Toluene by weight separately was less than 98% w.g. In respect of clearance on 16-5-1993, the weight of Toluene was 87.15%, in respect of clearance on 12-6-1993, the weight of Toluene was 84.30%, in respect of clearance on 11-6-1996, weight of Benzene was 75.36% and in respect of clearance on 2-7-1993, weight of benzene was 85.60%. The Quality Control Laboratory reports mentioned in the above paragraphs annexures A and B to the show cause notice initially indicated that Benzene or Toluene contents were less than 98%. Further, the Product Bulletin (previous 10 to the show cause notice) of Benzene and Toluene indicates purity more than 98% which is in conformity with 98% specifications. Since the test results showed purity less than 98%, Benzene and Toluene were different categories from Benzene and Toluene of higher purity, and, therefore, Benzene and Toluene manufactured by the respondents is classifiable under CET sub-heading 2707.10 and 2707.20 respectively, as envisaged by the Bench in its earlier judgment Chapter Heading 29 as explained by the respondents.

(If copies supplied)

7. In view of above, the contention of the appellant that their product is Benzene had purity of 99.02% without submitting any Test Report and keeping department in dark can't be accepted, more so when they have been classifying the same product under Chapter heading 2707 and March, 2014 and failed to produce Test Reports of approved laboratory before adjudicating authority or

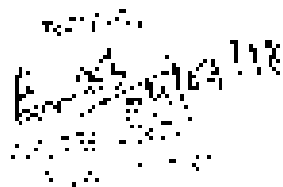
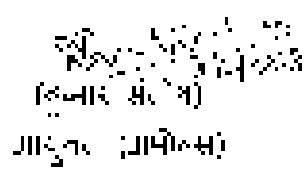
over this Appellate authority. Further, they have failed to produce any test reports in respect of Sulphur content. Accordingly, demand of duty of Rs. 40,33,757/- under Section 11A of the Act is required to be upheld. The payment of interest is mandatory consequence of the Central Excise duty liability. Since Central Excise duty is payable under Chapter heading 2707, the appellant is directed to pay interest also under Section 11A of the Act forthwith.

8. It is found that the appellant has behaved in a very irresponsible manner and suppressed the facts by not making test reports available with them to the department and hence, imposition of penalty of Rs. 26,76,885/- under Section 11A(1)(a) of the Act is justified, legal and proper.

9. In view of above, I uphold the impugned order and reject the appeal.

९. अपीलकर्ता द्वारा दिये गये नई आँकड़ों का निष्पक्ष तारीखी तरीके से लिया जाता है।

9.1 The appeal filed by the appellant stands disposed off in above terms.

By Order

M/s. Sainika Industries Fuels Pvt. Ltd., Survey No. 44/1-2, Saital Jal, Along Bhavnagar Road, Near Kachhaniba, Bhavnagar.	जसाई साई- ए इंडस्ट्रियल फ्यूल, प्लॉट नं. ४४/१-२, साईताल जल, भवनगर रोड के पास, काचखानिबा, भवनगर.
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Copy for information and necessary action to:

- 1) The Chief Commissioner, GST & Central Excise, Ahmedabad Zone Ahmedabad for his kind information.
- 2) The Commissioner, GST & Central Excise, Bhavnagar Commissionerate, Bhavnagar.
- 3) The Assistant Commissioner, GST & Central Excise Division, Bhavnagar.
- 4) The Superintendent, GST & Central Excise, Range: B, Bhavnagar.
- 5) Guard file.
- 6) F. No. V2/363/14R/2017 (7) F. No. V2/364/BVR/2017 (8) F. No. V2/365/BVR/2017 (9) V2/366/BVR/2017.

