

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
EASTERN ZONAL BENCH, KOLKATA**

Cus.Appeal No.50/07

**Arising out of Order-in-Appeal No.Kol./Cus./CKP/218/2006, Dated:
24.11.2006**

Passed by Commr.(Appeals) of Customs, Kolkata

Date of Hearing: 10.12.2018

Date of Decision: 18.12.2018

M/s HPCL

Vs

**COMMISSIONER OF CUSTOMS
KOLKATA**

Appellant Rep by: Shri Avra Majumdar, Adv.

Respondent Rep by: Shri K Choudhary, Supdt. AR

CORAM: P K Choudhary, Member (J)

V Padmanabhan, Member (T)

Cus - The assessee is engaged in business of refining of crude oil and marketing various petroleum products thereof - For supply of LPG to domestic customers, they received products from their own refineries - In addition, they also imported certain goods - The dispute is regarding the claim of assessee for benefit of Customs Notifications specifying effective rate of duty for import of LPG - The goods imported by them through Haldia Port were classified under 2711200 as Propane (LPG) and under 2711300 for Butane (LPG) - The goods were cleared on payment of duty and subsequently, refund claims were filed in respect of 15 Bills of Entry filed for goods imported - In refund claims, assessee claimed the benefit of concessional rate of duty/"nil" rate of duty - The lower authorities have rejected the refund claims by taking a view that concessional rate of duty will be applicable only to LPG classifiable under 2711900 - Since the Notification during the period of dispute did not specify other two sub-headings, the refund claims were rejected - W.e.f. 02.05.2005, there is no dispute since all the three subheadings have found place in the Notification - Therefore, the question before this Bench is whether concessional rate of duty can be extended for Propane and Butane by considering them as LPG, even when sub-headings were not listed in the Notification - The Notfn 21/02-Cus, during the period of dispute, has extended the benefit of concessional rate of duty to LPG to specify the sub-heading as 2711900 - A plain and simple reading of entries would lead to conclusion that concessional rate will be applicable to only those LPG falling under sub-heading 2711900 - The goods imported have been described as Propane/Butane (LPG) and the respective sub-headings have been declared in Bills of Entry - The decision of Tribunal in case of *AEGIS LOGESTICS*

LTD. - 2014-TIOL-2994-CESTAT-MUM gives a clear guideline that both Propane & Butane can be considered as form of LPG - But since the Notification has specified only LPG falling under 27111900 for the concessional rate, it leads to conclusion that Propane and Butane imported by assessee will not be entitled to the concessional rate, even if, they are considered as forms of LPG - By strict interpretation of Notfn, assessee cannot be considered as satisfying the parameters of exemption clause in the Notfn - Consequently, the benefit of ambiguity of wordings cannot be extended to assessee - The assessee has argued that the amendment to Notfn carried out through amending Notfn 37/2005-Cus, should be considered as retrospective - The wording of Notfn gives no clue or indication to the effect that substitution of entry is to be retrospectively - The amending Notfn is dated 02.05.2005 and hence the benefit will be applicable only from that date - The assessee will be entitled to the benefit only prospectively w.e.f. 02.05.2005: CESTAT

Appeal rejected

Case laws cited:

AEGIS LOGESTICS Ltd - 2014-TIOL-2994-CESTAT-MUM... Para 4

CC, Mangalore Vs. ELF Gas India Ltd. reported in 2006 (206) ELT 1059 (Tri.-Bangalore)... Para 4

Natural Health Products (P) Ltd. Vs. Collector of Central Excise, Hyderabad - 2003-TIOL-19-SC-CX... Para 4

Collector of Customs, Bangalore and Another Vs. Maestro Motors Ltd. & Another - 2004-TIOL-98-SC-CUS... Para 4

Commr. of Customs (Import), Mumbai Vs. Dilip Kumar & Company - 2018-TIOL-302-SC-CUS-CB... Para 5

LM Wind Power Blades (India) Pvt. Ltd. Vs. Commr. of Customs, Tuticorin reported in 2015 (327) ELT 641 (Tri.- Chennai)... Para 5

FINAL ORDER NO. A/77116/2018

Per: Bench:

The present appeal is filed against the Order-in-Appeal No.Kol./Cus./CKP/218/2006 dated 24.11.2006.

2.1 The brief facts of the case are that the appellant is engaged in the business of refining of crude oil and marketing various petroleum products thereof. For supply of Liquefied Petroleum Gas (in short for LPG) to domestic customers, the appellant received products from their own refineries. In addition, they also imported certain goods. The dispute in this case is regarding the claim of the appellant for the benefit of Customs Notifications specifying effective rate of duty for import of LPG. The goods imported by the appellant through Haldia Port were classified under

27111200 as Propane (LPG) and under 27111300 for Butane (LPG). The goods were cleared on payment of duty and subsequently, refund claims were filed on 19.08.2005 in respect of 15 Bills of Entry filed for goods imported during the period August, 2004 to April, 2005. In the refund claims, the appellant claimed the benefit of concessional rate of duty/"nil" rate of duty as follows :

(i) The benefit of 5% concessional rate of duty was claimed under Sl.No.75D in terms of Notification No.21/2002-Cus dated 01.03.2002 as amended by Notification No. 82/04-Cus dated 18.08.2004 (for the period 18.08.2004 till 28.02.2005) ;

(ii) The benefit of "nil" rate of duty was claimed under Sl.No.75E after amendment by Notification No.11/05-Cus dated 01.03.2005 (for the period 01.03.2005 till 01.05.2005).

2.2 The refund claims were rejected by the jurisdictional Assistant Commissioner and when appeal was filed before the Commissioner (Appeals), he upheld the rejection of refund claims. Hence the present appeal.

3. Heard Shri Avra Majumdar, Id. Advocate on behalf of the appellant. Revenue is represented by Shri K. Chowdhury, Id.D.R..

4. The arguments advanced on behalf of the appellant are summarized below :

(i) The Id. Advocate submitted that the dispute covers importation of goods viz. Propane as well as Butane. The imported goods were intended for supply to household domestic customers at subsidized prices under the Public Distribution System.

(ii) He submitted that the term "Liquefied Petroleum Gas" essential covers a mixture of propane as well as butane in various proportions along with other gases. The intention of the Government was to extend concessional rate of duty to LPG imported for supply to household domestic customers. The amending notification dated 18.05.2004 mentioned only sub-heading 27111900, which is a residuary entry. Realizing that LPG also includes propane and butane, which are classifiable under 27111200 and 27111300, the Government amended the Notification by substituting the entries in Sl.No.75E to include the above two sub-headings along with the earlier sub-heading 27111900.

(iii) In view of the fact that what was imported by the appellant was only LPG, he submitted that the appellant will be entitled to the benefit of concessional rate of Customs duty and as such, refund may be ordered to be paid.

(iv) To support the above arguments that LPG consists the mixture of propane and butane, he refers to the decision of the Bombay Bench of the Tribunal in the case of *AEGIS LOGESTICS Ltd. reported in 2014 (308) ELT*

135 (Tri.-Mumbai) = 2014-TIOL-2994-CESTAT-MUM. He submits that in the said decision, the Tribunal had occasion to consider an identical dispute with respect to the Central Excise Notification in connection with the payment of CVD on similar imported goods. The Tribunal has observed that the term "LPG" will include propane as well as butane and other mixtures and all of them will be entitled to the benefit of concessional rate of duty in terms of Central Excise Notification No.04/06-CE dated 01.03.2006 (Sl.No.27).

(v) He also relied on the decision of the Bangalore Bench of the Tribunal in the case of *CC, Mangalore Vs. ELF Gas India Ltd. reported in 2006 (206) ELT 1059 (Tri.-Bangalore)*, wherein it has also been held that propane and butane mixtures are to be considered as LPG.

(vi) He rebutted the view taken by the lower authorities that 10 out of 15 refund claims were time barred with the argument that at the time of import, the appellant had paid the Customs duty without the benefit of Notification under "protest".

(vii) He also relied on the following case laws :

(i) *Natural Health Products (P) Ltd. Vs. Collector of Central Excise, Hyderabad : (2004) 9 Supreme Court Cases 136 = 2003-TIOL-19-SC-CX ;*

(ii) *Collector of Customs, Bangalore and Another Vs. Maestro Motors Ltd. & Another : (2005) 9 Supreme Court Cases 412 = 2004-TIOL-98-SC-CUS .*

5. The Id.D.R. rebutted the arguments of the Id.Advocate for the appellant. He justified the impugned order rejecting the refund claims with the following main grounds :

(i) He submitted that the refund claims in respect of 10 Bills of Entry are hit by time bar since they are filed beyond the mandatory period of six months specified under Section 27 of the Customs Act, 1962. He specifically pointed out that there is nothing on record to support the claim of the appellant that Customs duty was paid under protest. As such, the refund claims filed on 19.08.2005 in respect of only following 5 Bills of Entry have been filed in time :

Sl.No.	B/E No.	B/E Date
1.	230378	27.04.2005
2.	228450	11.04.2005
3.	226600	24.03.2005
4.	225622	16.03.2005
5.	222992	23.02.2005

(ii) The Id.D.R. for the Revenue, submitted that the benefit of exemption Notification is to be granted strictly in terms of wording of the Notification. He relied on the decision of the Hon'ble Supreme Court in the case of *Commr. of Customs (Import), Mumbai Vs. Dilip Kumar & Company*

reported in 2018 (361) ELT 577 (S.C.) = 2018-TIOL-302-SC-CUS-CB, in which the Hon'ble Apex Court has laid down the law that the exemption Notification should be interpreted strictly. The burden to prove its applicability would be on the assessee to show that his case comes within the parameter of the exemption clause or exemption Notification.

(iii) He referred to the Notification in dispute and submitted that during the period of dispute, the entries relevant in the Notification, specifies "Liquefied Petroleum Gases" falling under Tariff sub-heading 27111900. He specifically pointed out that during the period of dispute, the entries did not include Propane under subheading 27111200 and Butane under sub-heading 27111300. Hence, he argued that even if the imported goods are considered to be in the nature of LPG, these goods cannot be extended the benefit of concessional rate of Customs duty since the sub-heading of such imported goods (in terms of the appellant's own declaration in the Bills of Entry) are not finding place in the Notification.

(iv) He also referred to the decision of the Chennai Bench of the Tribunal in the case of *LM Wind Power Blades (India) Pvt. Ltd. Vs. Commr. of Customs, Tuticorin reported in 2015 (327) ELT 641 (Tri.- Chennai)* to support his argument that the exemption Notification in which the goods are specified in terms of description as well as subheading, will be allowable only when both the description as well as sub-headings are specified. In this case, he pointed out that the imported goods (LPG) did not find place in the Notification in terms of sub-headings. As such, he submitted that the benefit of the Notification cannot be extended.

(v) He also argued that the decision of the Tribunal in the case of AEGIS LOGESTICS Ltd. (supra) as well as the decision of the Bangalore Bench, dealt with different facts of the case. In the decision of AEGIS LOGESTICS Ltd. (supra), it was held that the benefit of Notification No.04/06 ibid, will be allowable to propane and butane, when the description did not specify propane/butane but liquefied Petroleum Gases. He pointed out that the sub-heading specified in the Notification included 27111200 (Propane) as well as 27111300 (Butane). But the description was given as Liquefied Petroleum Gases (LPG). The dispute in the present case is different and hence that the above decision is distinguishable.

(vi) Finally, he submitted that the appeal may be rejected.

6. Heard both sides and perused the appeal records.

7. The dispute is regarding the rejection of refund claims made by the appellant in respect of 15 Bills of Entry, the details of the 15 Bills of Entry are given below for ready reference :

Sl.No.	B/E No.	B/E Date	Date of Payment of duty
1.	212722	29.11.2004	02.12.2004
2.	214923	15.12.2004	17.12.2004

3.	214927	15.12.2004	17.12.2004
4.	218695	17.01.2005	19.01.2005
5.	218696	17.01.2005	19.01.2005
6.	219492	24.01.2005	27.01.2005
7.	222992	23.02.2005	24.02.2005
8.	225622	10.03.2005	19.03.2005
9.	226600	24.03.2005	26.03.2005
10.	206401	05.10.2004	11.10.2004
11.	207532	13.10.2004	14.10.2004
12.	208289	20.10.2004	25.10.2004
13.	208299	20.10.2004	26.10.2004
14.	228450	11.04.2005	16.04.2005
15.	230378	27.04.2005	29.04.2005

The refund claims in respect of these Bills of Entry were filed on 19.08.2005.

8. Before we discuss the merit of the refund claims, the issue of time bar may be considered at the outset. Section 27 of the Customs Act, 1962, specifies a period of six months from the date of payment of duty for filing refund claims. Reference to the above Table led to the conclusion that the refund claims filed on 19.08.2005, are time barred in respect of 10 Bills of Entry. Only in respect of balance 5 Bills of Entry, the refund claims can be entertained on merit. In this regard, it has been submitted on behalf of the appellant that even in respect of 10 Bills of Entry, the claims have been filed beyond six months, they cannot be considered as time barred since the duty involved in those Bills of Entry were paid under "protest". If the duty is paid under "protest", the time bar under Section 27 will not apply.

9. The Id.D.R. has pointed out that there is nothing on record to support the claim of the appellant that the duty have been paid under "protest". None of the document such as Bills of Entry whose copies are attached with the Appeal Paper Books, indicates as "paid under protest". The appellant has also not submitted any other documentary evidence to support their claims. As such, we are of the view that the refund claims in respect of 10 Bills of Entry have been rightly rejected by the lower authorities as time barred. We find no reason to interfere with such finding.

10. Next we discuss the merit of the dispute. The dispute covers the period 18.08.2004 to till 01.05.2005. The relevant Notification No.21/2002-Cus dated 01.03.2002 has prescribed concessional rate of duty for Liquefied Petroleum Gases (LPG), the parent Notification as found underwent amendment vide Notification No.82/04-Cus dated 18.08.2004 prescribed 5% rate of duty for Liquefied Petroleum Gases (LPG) falling under sub-heading 27111900. It was further amended by Notification No.11/2005-Cus dated 01.03.2005 prescribing "nil" rate of duty, when the goods are

imported for supply to household domestic customers. Further amendment carried out vide Notification 37/05- Cus dated 02.05.2005 extended the "nil" rate of duty, but included the sub-heading 27111200 (Propane) and 27111300 (Butane). The description of the goods were also suitably amended. For ready reference, these changes are presented below in the form of a Table :

Exemption Notification	Sl. No.	Description of goods	Tariff Heading /subheading	Rate of duty	Remarks
21/2002-Cus dated 01.03.2002 amended by 82/2004-Cus dated 18.08.2004	75D	Liquefied Petroleum Gases (LPG)	27111900	5%	Insertion of entry in the Parent Notification
11/2005-Cus dated 01.03.2005	75E	Liquefied Petroleum Gases (LPG) imported for supply to household domestic consumer	27111900	NIL	Insertion of entry in the Parent Notification
37/2005-Cus dated 02.05.2005	75E	Liquefied Propane and Butane mixture, Liquefied Propane, Liquefied Butane, and Liquefied Petroleum Gases (LPG) imported for supply to household domestic consumers at subsidized prices under the Public Distribution System (PDS), Kerosene and Domestic LPG Subsidy Scheme, 2002, as notified by the Ministry of Petroleum and	27111200 27111300 27111900	NIL	Substitution of entry in the Parent Notification

		Natural Gas vide Notification No.P- 20029/18/2001- PP. dated 28th January, 2003.			
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11. During the period under dispute, the appellant has claimed that they have imported Liquefied Petroleum Gases (LPG) through the above Bills of Entry. The description in the Bills of Entry as well as different sub-heading indicated were 27111200-Propane (LPG), 27111300-Butane (LPG) and in certain other cases. The appellant has pressed for refund during the period 18.08.2004 to 01.03.2005 in respect of the goods imported with the claims that what has been imported is nothing but Liquefied Petroleum Gases (LPG), even that the description and sub-headings have been indicated as above. The lower authorities have rejected the refund claims by taking a view that concessional rate of duty will be applicable only to Liquefied Petroleum Gases (LPG) classifiable under 27111900. Since the Notification during the period of dispute did not specify other two sub-headings, the refund claims were rejected.

12. W.E.F.02.05.2005, there is no dispute since all the three subheadings have found place in the Notification. Therefore, the question before this Bench is whether concessional rate of duty can be extended for Propane and Butane by considering them as Liquefied Petroleum Gases (LPG), even when sub-headings were not listed in the Notification.

13. The appellant's case has been built up on the follower pillars :

(i) The term "Liquefied Petroleum Gases (LPG)" also include Propane and Butane. For such proposition, they have referred to the decision of the Tribunal in the case of AEGIS LOGESTICS Ltd. (supra) in which, the Tribunal has taken such a view in the context of Central Excise Notification No.4/2006-CE dated 01.03.2006.

(ii) In the decision of the Tribunal in the case of ELF Gas India Ltd. (supra), the Tribunal took similar conclusion by making reference to the BIS standard prescribed for Liquefied Petroleum Gases (LPG).

(iii) An amendment has been carried out in Notification No.21/2002 ibid by Notification No.37/05-Cus dated 02.05.2005 in which, "nil" rate of duty has been extended to Liquefied Petroleum Gases (LPG) falling under all three sub-headings. It has been submitted that such amendment was carried out by substitution of the entries in the Parent Notification. It is further submitted that such amendments were as a result of the representation made by the Oil Marketing Companies, who were importing Liquefied Petroleum Gases (LPG) for supply to domestic consumers. Since the intention of the Government was always to extend concessional rate for such imports, the amendment carried out by Notification dated 02.05.2005 is to be considered as applicable retrospectively right from 18.08.2004.

14. We have carefully considered the above two case laws cited by the appellant. The dispute in the case of AEGIS LOGISTICS LTD. (supra) was with reference to Notification No.04/2006-CE dated 01.03.2006. Entry Sl.No.32E of the Notification extended concessional rate of duty of 8% to Liquefied Petroleum Gases (LPG) falling under sub-headings 27111200, 27111300, 27111900 and other certain cases. The importer imported commercial Propane and classified the same under 27111200. Even though sub-heading was specified in the Notification, the benefit was denied by the Customs by taking the view that the description covered Liquefied Petroleum Gases (LPG) and not Propane. The Tribunal held that Propane is a form of Liquefied Petroleum Gases (LPG) and extended such benefit of concessional rate.

15. In the present case, however, the dispute is different. The Notification No.21/02-Cus dt. 01.03.2002 (as amended), during the period of dispute, has extended the benefit of concessional rate of duty to Liquefied Petroleum Gases (LPG) to specify the sub-heading as 27111900. A plain and simple reading of the entries would lead to conclusion that concessional rate will be applicable to only those Liquefied Petroleum Gases (LPG) falling under sub-heading 27111900. The goods imported have been described as Propane/Butane (LPG) and the respective sub-headings have been declared in the Bills of Entry. The decision of the Tribunal in the case of AEGIS LOGISTICS LTD. (supra) gives a clear guideline that both Propane & Butane can be considered as form of Liquefied Petroleum Gases (LPG). But since the Notification has specified only Liquefied Petroleum Gases (LPG) falling under 27111900 for the concessional rate, it leads to the conclusion that Propane and Butane imported by the appellants will not be entitled to the concessional rate, even if, they are considered as forms of Liquefied Petroleum Gases (LPG).

16. In this connection, the case law relied upon by the Revenue in the case of LM wind Power Blades (India) Pvt. Ltd. (supra), appears relevant. In the said case, the Tribunal had occasion to consider the entitlement to concessional rate of duty for certain goods under Notification 21/02 ibid. The imported goods were conformed to the description given in the Notification, but were not covered under the classification specified in the Notification. The Tribunal held as follows:

"10. From the above exemption notification it is evident that the exemption is extended to the excisable goods of the description specified in table read with concerned list appended and falling within chapter, heading number or sub heading number of the First Schedule to the CETA, 1985 specified in the corresponding entry in Column No.2 of the said table. Therefore exemption available subject to fulfillment of the criteria given in the notification viz. (1) goods should be conforming to the description given in the Table of the notification (2) the goods must fall under the heading or sub heading of the first Schedule of the CETA. From the plain reading of the said exemption notification, we find that if the goods do not fall under

any heading or sub heading or under 8 digit tariff heading but only fall under the description, then they would not be covered by the notification....."

The above decision of the Tribunal further supports the conclusion that the appellant will not be entitled to the benefit of the Notification in dispute, even though the goods are covered by description, since the sub-headings of the imported goods do not find mention in the Notification.

17. The Revenue has also relied upon on the decision of the Constitutional Bench of the Hon'ble Supreme Court in the case of Dilip Kumar & Company (supra), the Apex Court laid down the following ratio with reference to extending the benefit of exemption Notification. Para 52 of the said judgement is reproduced below :

"52. To sum up, we answer the reference holding as under -

(1) Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.

(2) When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the revenue."

When the above ratio is applied to the facts of the present case, it leads to the conclusion that by strict interpretation of the Sl.No. of the Notification, the appellant cannot be considered as satisfying the parameters of the exemption clause in the Notification. Consequently, the benefit of ambiguity of the wordings cannot be extended to the appellant.

18. The appellant has argued that the amendment to the Notification carried out through amending Notification No.37/2005-Cus dated 02.05.2005, should be considered as retrospective. The wording of the Notification gives no clue or indication to the effect that substitution of the entry is to be retrospectively. The amending Notification is dated 02.05.2005 and hence the benefit will be applicable only from that date. The ratio of the Hon'ble Supreme Court in the case referred to above by the Id.DR for the Revenue, is equally applicable to this fact, leading is to the conclusion that the appellant will be entitled to the benefit only prospectively w.e.f. 02.05.2005.

19. In view of the above discussions, the following orders are passed :

(i) Rejection of refund claims in respect of 10 Bills of Entry discussed in detail at the preceding Paragraphs, is upheld ;

(ii) Refund claims in respect of balance 5 Bills of Entry have been rightly rejected in the impugned order '

20. In view of the above, the impugned order is sustained and the appeal filed by the appellant is rejected.

(Pronounced in the open court on 18.12.2018)