

SUPREME COURT OF INDIA

Commissioner of Central Excise

Vs.

Gurdaspur Distillery

C.A.No.4270 of 2002

(Ashok Bhan and Dalveer Bhandari,JJ.)

05.03.2008

ORDER

1. The present appeal has been filed under Section 35L(b) of the Central Excise Act, 1944 ('the Act') against the Final Order No.63/2002-C dated 15th March 2002 in Appeal No.E/2659/2001-C passed by the Customs, Excise & Gold (Control) Appellate Tribunal, New Delhi [for short 'the Tribunal'].

2. The issue involved in the present appeal is whether Methane gas classifiable under Chapter Heading 2711.29 specified in the Schedule to the Central Excise Tariff Act, 1985 is liable to excise duty when consumed captively and not marketed. Briefly stated, the facts of the case are that the respondent-assessee was engaged in the manufacture of de-natured Ethyl Alcohol and during the manufacture of de-natured Ethyl Alcohol, a residue known as spent wash comes into existence and the same is reacted in a closed type digester and Methane gas is produced which, in turn, is used by the respondent as fuel in distillery. A show cause notice dated CIVIL APPEAL NO.4270 OF 2002 28th April 2000 was issued by the Revenue, the appellant herein, to show cause as to why excise duty of Rs.17,83,678/- be not imposed on the Methane gas produced by the respondent and used captively during the period from 01.04.1995 to 31.07.1997 by invoking extended period under the proviso to Section 11A(I) of the Act. Assessee, in response to the said notice, took a stand that Methane gas produced by it is not marketable and, therefore, no excise duty could be levied on the same. The Adjudicating Authority, vide order dated 03rd April 2001, confirmed the demand. A penalty of Rs.4,50,000/- (Four Lac Fifty Thousand) under Rule 173Q of Central Excise Rules, 1944 and Rs.17,83,678/- (Seventeen Lac Eighty Three Thousand Six Hundred Seventy Eight) under Section 11AC of the Act was also imposed. Assessee, being aggrieved, filed an appeal before the Commissioner (Appeals). The appellate authority accepted the appeal and came to the conclusion that the gas in question is not marketable. This finding was arrived at on the basis that the burden to prove that the gas in question is marketable was on the Department and the Department failed to discharge the same. However, no finding was recorded regarding invocation of CIVIL APPEAL NO.4270 OF 2002 extended period. Revenue, being dissatisfied, filed an appeal before the Tribunal which was dismissed by the impugned order. The Tribunal dismissed the appeal in view of the finding recorded by the

Commissioner (Appeals) that the goods in question are not marketable and the Revenue had failed to produce any evidence in respect of marketability of the goods in question. Hence, the Tribunal confirmed the order of the Commissioner (Appeals). The Tribunal also relied upon a judgment of this Court in the case of *Bhor Industries Ltd. v. Collector of Central Excise* reported in 1989(40) ELT 280 wherein it was held that marketability is an essential ingredient in order to attract excise duty on the excisable goods under the schedule to the Central Excise Tariff Act. In our opinion, an article does not become liable to excise duty merely because of its specification in the schedule to the Central Excise Tariff Act unless it is salable and known to the market. Counsel for the Revenue has very fairly stated that the Revenue had not led any evidence to show that the goods in question were marketable. The finding recorded by the Commissioner (Appeals) that the Methane gas produced by the respondent was not marketable CIVIL APPEAL NO.4270 OF 2002 and as confirmed by the Tribunal is a finding of fact which does not call for any interference. Since the Revenue had not been able to lead any evidence to show that the goods in question are marketable, in the absence of the same, it cannot be held that Methane gas was marketable and consequently the excise duty was exigible.

3. The appeal is, therefore, dismissed. No costs.