IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CENTRAL EXCISE APPEAL NO. 6 OF 2022

The Commissioner of CGST & Central Excise, Belapur Commissionerate … Appellant

Versus

Hindustan Petroleum Corporation Ltd. …Respondent

Mr. Jitendra B. Mishra a/w. Mr. Dhananjay B. Deshmukh for the appellant.

Ms. Padmavati Patil a/w. Mr. Kiran Chavan i/b. Cenex Services for the respondent.

CORAM: G. S. KULKARNI &
JITENDRA JAIN, JJ.

RESERVED ON: 11 July, 2023

PRONOUNCED ON: 18 July, 2023

JUDGMENT (Per G.S. Kulkarni, J.)

1. This Appeal under section 35G of Central Excise Act, 1944 (for short "C.E. Act") challenges an order dated 31 August, 2020 passed by the Central Excise & Service Tax Appellate Tribunal, Mumbai (for short "CESTAT") whereby the respondent's appeal against the Order-in-Original dated 29 November, 2013 passed by the Commissioner of Central Excise, Belapur, Navi Mumbai has been allowed. The appellant-revenue has proposed following questions of law for determination of this Court:

> "(a) Whether the CESTAT was right in setting aside demand of duty under Section 11 D of the Central Excise Act, 1944 merely because duty attributable to Ethanol is not shown and recovered separately in the invoice and it's composite cum duty price?

b) Whether the CESTAT has considered all the findings of the adjudicating authority, who has confirmed the demand of duty under Section 11 D of the Central Excise Act, 1944?"

2. Briefly the facts are: The respondent was registered with Central Excise Department for clearance of petroleum products, namely, Motor Spirit, High Speed Diesel and SKO falling under Chapter 27 of Central Excise Tariff Act, 1985. The respondent received these goods through pipeline from Mumbai Refineries at their Vashi depots and cleared the same to customers. The respondent cleared Ethanol Blended Petrol (EBP) (Gasohol) consisting of by volume 95% Motor Spirit commonly known as petrol and 5% ethanol. The EBP was cleared at concessional rate of duty as per Notification No. 28/2002 dated 13 May, 2002 amended by Notification No. 16/2003 dated 1 March, 2003 read with Notification No. 14/2003 and Notification No. 15/2003, further amended by Notification No. 12/2004 dated 4 February, 2004.

3. The Central Excise Department alleged that the respondent had not complied with the condition of said notifications inasmuch as the EBP did not satisfy the Bureau of Indian Standard's (BIS) specification 2796:2000, hence, two show cause notices were issued to the respondent for the period April, 2003 to June, 2004 demanding total duty of Rs.13,37,17,740/-. Also a demand notice was issued for recovery of the said amount under Section 11D of C.E.

Act alleging that though the duty was collected from the customers but the same was not deposited with the Government.

4. The show cause notices were adjudicated, the demands as made against the respondent were confirmed with interest and penalty. Being aggrieved by the said order, the respondent filed an appeal before CESTAT. The CESTAT by its order dated 7 May, 2013 remanded the matter to the adjudicating authority for de novo adjudication after taking into consideration the test reports submitted by the respondent to establish the product cleared by the respondent conformed to the (BIS) specification 2796:2000. On remand, the adjudicating authority passed Order-in-Original dated 29 November, 2013 as impugned before CESTAT thereby confirming the demand with interest and imposed penalty of Rs.1.00 crore on the respondent. Being aggrieved by such order, the respondent approached the CESTAT assailing the Order-in-Original.

5. Before the CESTAT, the respondent contended that during the relevant period, the respondent had received 'duty paid Motor Spirit' from their Refinery and also received 'duty paid Ethanol' at their Vashi Terminal. That the Motor Spirit and Ethanol were stored separately in different storage tanks at their Vashi terminal. It was contended that for clearance of EBP, the respondent pumped Motor Spirit as well as Ethanol simultaneoulsy in the ratio of 95% and 5% respectively by volume from the storage tanks, to the road

tankers/trucks, which is mixed online. The respondent also contended that the tests carried out on the samples of EBP at their Vashi Terminal even though limited to 9 out of 15 tests, indicated that the EBP confirmed to the BIS 2796:2000 specification and submitted the sample Test Reports conducted at Vashi Terminal to the Department. The respondent also contended that partial/full exemption from various types of duties on the clearance of EBP was conferred under various exemption Notifications issued from time to time.

6. It appears that the primary contention as urged by the revenue before the CESTAT was to the effect that the respondent to be eligible for exemption under the said notifications was required to show that EBP conforms the BIS 2796:2000 standards. The revenue alleged that the respondent had failed to establish that the EBP cleared by them from their Vashi Terminal conformed to the BIS specifications. The revenue contending that since the Vashi Terminal did not have the facility to conduct all the 15 tests required for BIS 2796:2000 specification, a demand notice be issued to the respondent.

7. However, the fact remains that after drawing samples of EBP, the respondent had got the sample tested at their Refinery, which was equipped with the facility to test all the parameters and produced two test reports indicating that the sample conforms the BIS 2796:2000 specification.

8. It appears that on remand of the proceedings to the adjudicating authority by the said order passed by CESTAT, the learned Commissioner of Central Excise although considered the test report certificates, however, he did not accept the same on the ground that since it was conducted in 2004 and the demand was for the period April, 2003 to June, 2004, it was not a correct attempt on the part of the respondent to show that the goods conforms BIS 2796:2000 specification, which according to it, was an afterthought on the part of the respondent as also lacking evidentiary value. Such order was assailed by the respondent in an appeal before the CESTAT.

9. In the Appeal, the CESTAT considered rival contentions and more particularly as to whether the Commissioner of Central Excise was correct in rejecting the test reports. Having examined the records, the Tribunal observed that the respondent while clearing the EBP from their Vashi Terminal invariably conducted tests on the EBP samples to ascertain its quality and the specification of its products before clearance. The Tribunal taking into consideration the previous orders passed in respondent's own case and in other similar decisions held that the Commissioner of Central Excise was not correct in confirming the demand under Section 11D of the C.E. Act.

10. Mr. Mishra, learned counsel for the revenue has limited submissions. His contention is that the CESTAT ought not to have set aside the duty as

demanded under section 11D of the C.E. Act, as the duty attributable to Ethanol was not shown and recovered separately in the invoice. It is submitted that the Commissioner in passing the Order-in-Original dated 29 November, 2013 was correct while confirming the demand raised under section 11D of the C.E. Act in holding that the respondent collected amounts towards Central Excise duty and failed to deposit the same with the Government. It is his submission that this was the case which clearly fell within the ambit of Section 11D of the C.E. Act inasmuch as the finding of the Commissioner in confirming the duty demand was required to be accepted that the respondent had collected amounts in excess of the duty paid on the excisable goods and had not deposited the same with the Central Government.

11. On the other hand, Ms. Patil, learned counsel for the respondent has supported the impugned order. Referring to the decision in ***Bharat Petroleum Corporation Ltd. vs. Commissioner of Central Excise, Raipur***[1] and ***Bharat Petroleum Corporation Ltd. vs. Commissioner of Central Excise, Allahabad***[2] and in the respondent own case in ***Hindustan Petroleum Corporation Ltd. vs. Commissioner of Central Excise, Aurangabad***[3]***,*** Ms. Patil would submit that the contention as urged on behalf of the revenue are untenable and the order passed by the Tribunal would not require any interference.

---

1 2002 (144) E.L.T. 672 (Tri. - Del.)

2 2017 (351) E.L.T. 313 (Tri. - All.)

3 2003 (162) E.L.T. 391 (Tri. - Mumbai)

12. We have heard learned counsel for the parties. We have also perused the record and the impugned order. At the outset, we may note that the controversy in the present proceeding pertains to the duty demand under section 11D of the C.E. Act, which provides for "Duties of excise collected from the buyer to be deposited with the Central Government". It would be appropriate to note the said provision, which reads thus:

> "*Section 11D - Duties of excise collected from the buyer to be deposited with the Central Government -*
>
> *(1) Notwithstanding anything to the contrary contained in any order or direction of the Appellate Tribunal or any Court or in any other provision of this Act or the rules made thereunder, every person who is liable to pay duty under this Act or the rules made thereunder, and has collected any amount in excess of the duty assessed or determined and paid on any excisable goods under this Act or the rules made thereunder from the buyer of such goods in any manner as representing duty of excise, shall forthwith pay the amount so collected to the credit of the Central Government.*
>
> *(1A) Every person, who has collected any amount in excess of the duty assessed or determined and paid on any excisable goods or has collected any amount as representing duty of excise on any excisable goods which are wholly exempt or are chargeable to nil rate of duty from any person in any manner, shall forthwith pay the amount so collected to the credit of the Central Government.*
>
> *(2) Where any amount is required to be paid to the credit of the Central Government under sub-section (1) or sub-section (1-A), as the case may be, and which has not been so paid, the Central Excise Officer may serve, on the person liable to pay such amount, a notice requiring him to show cause why the said amount, as specified in the notice, should not be paid by him to the credit of the Central Government.*
>
> *(3) The Central Excise Officer shall, after considering the representation, if any, made by the person on whom the notice is served under sub-section (2), determine the amount due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined.*

> *(4) The amount paid to the credit of the Central Government under sub-section (1) or sub-section (1A) or sub-section (3), as the case may be, shall be adjusted against the duty of excise payable by the person on finalisation of assessment or any other proceeding for determination of the duty of excise relating to the excisable goods referred to in sub-section (1) and sub-section (1A).*
>
> *(5) Where any surplus is left after the adjustment under sub-section (4), the amount of such surplus shall either be credited to the Fund or, as the case may be, refunded to the person who has borne the incidence of such amount, in accordance with the provisions of Section 11B and such person may make an application under that section in such cases within six months from the date of the public notice to be issued by the Assistant Commissioner of Central Excise for the refund of such surplus amount.*

13. On the plain reading of the above provision, it is clear that sub-section (1) of Section 11D ordains that notwithstanding anything to the contrary contained in any order or direction of the Appellate Tribunal or any Court or in any other provision of this Act or the rules made thereunder, every person who is liable to pay duty under C.E. Act or the rules made thereunder, has collected any amount in excess of the duty, assessed or determined and paid on any excisable goods under C.E. Act or the rules made thereunder from the buyer of such goods, in any manner as representing duty of excise, shall forthwith pay the amount so collected to the credit of the Central Government.

14. The question is whether any of the ingredients of the provision are attracted in the present case.

15. It is clear that in the present case, the blending was undertaken in the licensed premises and the blended goods were cleared from the licensed premises. The product was subjected to strict control and orders issued by

Central and State Government from time to time under the Motor Spirit and High Speed Diesel (Regulation of Supply & Distribution and Prevention of Malpractices) Order, 1998 where under the quality and specification of the Motor Spirit was to strictly monitored and complied. Also at the Vashi Terminal where the duty paid Motor Spirit and Ethanol were received and where after blending the same, EBP was generated, the respondent had carried out the tests and 9 out of 15 tests which indicted that it conformed to the BIS 2796:2000 specification and the Control Order, 1998. Only after such procedure as to verification of the compliance under Control Order 1998, the respondent had cleared/sold the said goods to their customers similar to what other Refineries/terminals did.

16. Further, on such EBP test reports being disputed by the department as carried out at Vashi Terminal, the appellant subjected the samples tested at their Refinery and produced test certificates dated 1 June, 2004 and 5 June, 2004, which conformed to the BIS specifications 2796:2000. It is for such reason the Tribunal observed that subsequent tests conducted by the department cannot be considered as an afterthought but they were carried out when the department did not accept the routine tests conducted on the product at Vashi Terminal. In our opinion, the Tribunal has also rightly observed that it could not lost sight of the fact that the respondent was a Public Sector Undertaking and on many occasions, in absence of facilities at

Government Laboratories, the tests conducted in well equipped laboratories are accepted by the department for classification purposes under the Tariff Act. For such reason, the test reports on EBP at Vashi Terminal could not be brushed aside unless contrary test result was produced by the revenue is the observation of the Tribunal.

17. As rightly contended by the respondent, such goods were also sold from other Terminals of the respondent in Maharashtra and no objection was raised by the Department nor any notice was issued to other terminals proposing denial of benefit of exemption on the ground that the EBP did not conform to the said BIS specification. Such contention was not contested by the revenue. Thus, clearly the benefit of exemption notification could not be denied to the respondent as rightly observed by the Tribunal.

18. On such conspectus, insofar as the applicability of Section 11D of the C.E. Act to the facts of the present case are concerned, as noted above, admittedly the Vashi terminal of the respondent received duty paid Motor spirit from its Refinery and also duty paid ethanol, which was blended in the ratio of 95:5 at the time of clearance from the Vashi unit to the customers in tankers. The price per kilolitre of EBP was similar to the price charged by the respondent for unblended motor spirit to the customers. In the invoice the duty paid on motor spirit (EBP) was not shown separately attributable to Motor spirit and Ethanol, but the sale price of EBP was a composite inclusive

of duty. Thus, the price charged was inclusive of duty, and the duty attributable to Ethanol was not shown and recovered separately in the invoice, the same could not be recoverable under Section 11D of C.E. Act. It may also be observed that only where any amount is collected representing as excise duty, the same is required to be credited to the Government. This is a case in which the revenue could not show that the respondent after blending ethanol with duty paid motor spirit collected amounts separately, mentioning the duty on ethanol in the invoices, but the same was not credited to the Government. In such situation, Section 11D of C.E Act was certainly not attracted as the crucial requirement to attract Section 11D was certainly not being fulfilled for the revenue to invoke Section 11D of the C.E. Act.

19. This apart, the Tribunal has rightly observed that the present case was covered in the respondent's own case in **Hindustan Petroleum Corporation** *(supra)*. We also find that long time back the Tribunal in the case of **Bharat Petroleum Corporation** *(supra)* had taken a similar view, which was approved by the Supreme Court in rejecting the appeal in ***Commissioner vs. Bharat Petroleum Corporation Ltd.***[4]

20. In the aforesaid circumstances, we find no merit in the appeal. It is accordingly rejected. No costs.

(JITENDRA JAIN, J.) (G. S. KULKARNI , J.)

---

4 2003 (156) E.L.T. A326 (S.C.)