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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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\+ **CEAC 37/2015 & CM No.16153/2015**

HINDUSTAN PETROLEUM CORPORATION LTD ..... Petitioner

Through: Mr M. P. Devnath, Advocate.

versus

COMMISSIONER OF CENTRAL EXCISE, DELHI-III ..... Respondent

Through: Mr Satish Kumar, Senior Standing Counsel.

CORAM:
HON'BLE DR. JUSTICE S.MURALIDHAR
HON'BLE MR. JUSTICE VIBHU BAKHRU

<u>O R D E R</u>

% **25.08.2015**

S. MURALIDHAR, J

1. This appeal by the Hindustan Petroleum Corporation Ltd. (‘HPCL’) is directed against the order dated 14th July, 2015 passed by the Customs, Excise and Service Tax Appellate Tribunal (‘CESTAT’) in the stay application in Appeal No. ST/59270-CU [DB] of 2013 filed by HPCL before CESTAT seeking waiver of the pre-deposit and stay of further proceedings pursuant to the adjudication order dated 10th May, 2013 passed by the Commissioner of Central Excise (‘CCE’) confirming a

service tax demand of Rs.1,36,15,903/- apart from interest and penalties.

2. The basis of the demand of service tax on HPCL is an agreement dated 31st October, 2007 entered into between HPCL and Indraprastha Gas Ltd. ('IGL') for distribution of Compressed Natural Gas ('CNG') through the HPCL owned/leased retail outlet in accordance with the terms and conditions set out in the said agreement. The question that arose in the proceedings before the CCE was whether in terms of the said agreement it could be said that HPCL was providing Business Auxiliary Services ('BAS') to IGL with regard to the sale of CNG through the retail outlet of HPCL. The CCE answered the question *prima facie* in the affirmative and held that the activity of HPCL in marketing or sale of CNG belonging to IGL, would fall within the ambit of Section 65 (105) (zzb) read with Section 65 (19) of the Finance Act, 1994 and, therefore, exigible to service tax.

3. Before the CESTAT, in support of its plea that there should be complete waiver of pre-deposit, HPCL relied on the final judgment dated 4th June 2014 passed by the Mumbai Bench of the CESTAT in ***Bharat Petroleum Corporation Ltd. and Hindustan Petroleum Corporation Ltd. v. Commissioner of Service Tax, Mumbai 2014 TIOL-1114***

(CESTAT-Mumbai) (hereafter referred to as the '***BPCL v. CST***, ***Mumbai***' case). In the said final judgment in the '***BPCL v. CST***, ***Mumbai***' case, the Coordinate Bench of the CESTAT held that since HPCL and Bharat Petroleum Corporation Ltd. ('BPCL') were themselves buying the CNG from Mahanagar Gas Ltd. ('MGL'), the question of rendering services to MGL by way of marketing the CNG did not arise. *Inter alia,* it was held that 'the contention of the learned AR that private parties are paying Service Tax under the category of Business Auxiliary Service on the same activity, therefore, the Appellant are required to pay service tax is not acceptable as in the case of private parties, the invoices on the customers were raised by M/s MGL directly and private parties are receiving commission and there is no transactions of principal to principal basis.'

4. Before the CESTAT HPCL also placed reliance was also placed on an interim the order dated 9th February 2015 of the CESTAT, Principal Bench, New Delhi in ***Indian Oil Corporation Ltd v. Commissioner of Service Tax, Delhi***, ***Stay Order No. 50557/2015-ST(Br)*** (hereafter the '***IOCL v. CST, Delhi***' case) where in a similar agreement between Indian Oil Corporation Ltd.(IOCL) and IGL the Tribunal, relying on ***BPCL v.***

CST, Mumbai (*supra*) held that "*prima facie*, we are of the view that facts of the applicants case are similar to *Bharat Petroleum Corp. Ltd"* and ordered a complete waiver of pre-deposit.

5. In the impugned order, the CESTAT, Principal Bench at New Delhi (of the same Bench strength as the Coordinate Bench of the CESTAT in Mumbai which passed the judgment in ***BPCL v. CST, Mumbai*** (*supra*), did notice the said decision but observed that it did not "appear to have examined the terms of the agreement between the retail petroleum outlet, the appellant therein and MGL in sufficient detail and proceeded on an assumption that there was an anterior sale of CNG to the appellant therein'. Similarly, as regards the interim order in ***IOCL v. CST, Delhi*** (*supra*), the CESTAT observed that in the said order too there was no examination and analysis of the agreement between in the parties and in the absence of the same, "the conclusions recorded in the above judgement/order cannot *prima facie* be considered as laying down a ratio which operates as a precedent."

6. In the impugned order, the CESTAT then proceeded to analyse the individual clauses of the Agreement dated 31st October, 2007 between

HPCL and IGL and came to *prima facie*, conclusion that “there is no sale of natural gas or CNG to the appellant and sale of CNG the retail customers is by the IGL itself without an intermediary transfer of property in CNG in favour of the applicant”. The corresponding *prima facie,* conclusion, therefore, was that the activity of BPCL in marketing without IGL would be exigible to service tax. In para 12 of the impugned order, the CESTAT, Principal Bench noticed that there were “in respect of identical transactions covered by substantially similar agreements the final order in ***Bharat Petroleum Corporation Ltd.*** *(supra)* and the interim order in ***Indian Oil Corporation Ltd.*** *(supra)”*. The CESTAT held that on balancing the interests of the Revenue and HPCL, requiring the making of a pre-deposit of 50% of the assessed liability along with proportionate interest would be justified.

7. At the hearing of the present appeal on 21st August, 2015, the Court recorded the submission of Mr Devnath, learned counsel for the Appellant, that he would on the next date produce a copy of the agreement entered into between HPCL and MGL, which was the subject matter of the final order in ***BPCL v. CST, Mumbai***. He also undertook to inform the Court whether any appeal had been filed against the said

order.

8. The Court has today been shown the copy of the Agreement dated 7th December, 2009 entered into between MGL and HPCL together with the earlier renewal agreements containing the relevant clauses. The Court notices that the agreement which formed the subject matter of the final order of the CESTAT, Mumbai Bench in ***BPCL v. CST, Mumbai*** (*supra*) is identical to the agreement between HPCL and IGL which forms the subject matter of the present case. The Court is of the view that since a Coordinate Bench of the CESTAT while interpreting identical clauses of a similar agreement involving HPCL itself came to the conclusion that HPCL was not providing Business Auxiliary Services to MGL in carrying on the activity of providing CNG to consumers through its retail outlets, that final judgment itself constituted a *prima facie* case in favour of HPCL. If the Principal Bench of the CESTAT felt that the agreement between HPCL and IGL, identical to the agreement between HPCL and MGL, called for a different interpretation, and that therefore the decision of the Coordinate Bench of the same strength in ***BPCL v. CST, Mumbai*** required reconsideration, then the appropriate course for the Principal Bench, CESTAT to adopt would be to refer the matter to a larger Bench

of the CESTAT. In any event, at the stage of considering an application for stay, the CESTAT, Principal Bench ought to have proceeded on the basis that in light of the final judgment in ***BPCL v. CST, Mumbai*** (*supra*) being favour of HPCL, it had a *prima facie* case.

9. The Court has been shown a copy of the order dated 23rd February, 2015 passed by the Supreme Court in Civil Appeal No.2471-2473 of 2015 preferred by CST, Mumbai against the aforementioned final judgment in ***BPCL v. CST, Mumbai*** (*supra*) issuing notice but not granting stay. The issue is, therefore, pending consideration in the Supreme Court.

10. In that view of the matter, the Court is of the view that the CESTAT was not justified in declining to grant an unconditional stay in favour of the Appellant, without requiring the making of any pre-deposit.

11. For the aforementioned reasons, the impugned order dated 14th July 2015 of the CESTAT is hereby set aside. There shall, during the pendency of the appeal preferred by HPCL before the CESTAT, be an unconditional stay of the order dated 10th May, 2013 passed by the CCE, Delhi-III, which is under challenge in the said appeal.

12. The appeal is allowed in the above terms.

13. *Dasti* under the signature of the Court Master.

S.MURALIDHAR, J

VIBHU BAKHRU, J

AUGUST 25, 2015
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