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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CENTRAL EXCISE APPEAL NO.69 OF 2016

M/s.Indian Oil Corporation Ltd. ...Appellant
vs.
The Commissioner of Central
Excise, Mumbai-II Commissionerate ...Respondent

Mr.M.H.Patil i/b Ms Padmavati Patil for the appellant
Ms P.S.Cardoza for the respondent

CORAM : A.S.OKA, &
RIYAZ I. CHAGLA,JJ.
DATE : SEPTEMBER 18, 2017

P.C.:

1 Heard the learned counsel appearing for the appellant. By this appeal, the appellant has taken an exception to the order dated 12th May 2015 passed by the Customs, Excise and Service Tax Appellate Tribunal (for short `Appellate Tribunal'), Western Zonal Bench, Mumbai. With a view to appreciate the submissions canvassed across the bar, it will be necessary to make a brief reference to the facts of the case.

2 The dispute relates to the base oil which is being received by the appellant which in turn is being used in manufacturing of final product. The appellant has been availing of cenvat credit on such base oil. A show cause notice was issued on 5th January 2010 by which a demand of duty of Rs.1,64,40,644/- was made in respect of short

receipt of base oil during the period from December 2004 to March 2009. The extended period of limitation was also invoked. The appellant was informed that the interest and penalty will be imposed by exercising power under section 11(c) of Central Excise Act,1944. In the show cause notice, allegation in short is that the appellant had availed of cenvat credit on duty of full quantity of base oil as shown in the invoice/bill but the scrutiny of documents shows that in fact the appellant has received base oil of a shorter quantity.

3 In adjudication proceedings, the Commissioner dropped the demand for the extended period. However, he confirmed the demand for the period from December 2008 to March 2009. He confirmed the demand for the said period and interest. Penalty of Rs.8,37,482/- was imposed. Being aggrieved by the said order of the adjudication Authority, an appeal was preferred by the appellant before the Appellate Tribunal. The Appellate Tribunal disposed of the appeal by permitting the appellant to compute duty after taking benefit 0.1% permissible limit on account of various losses and to pay differential amount and interest. The Tribunal by the impugned order proceeded to set aside the imposition of penalty.

4 The learned counsel for the appellant contended that the appeal may be admitted on the following substantial questions of law set out on a separate sheet tendered by him. He relied upon the letter

dated 30th October 1985 addressed by the Central Board of Excise and Customs to all the Collectors of the Central Excise and in particular paragraph 3 thereof. He submitted that lubricating base oil or base oil which is the subject matter of this appeal is also a mineral oil. He relied upon Chapter 27 which deals with mineral fuel/mineral oil and urged that the lubricating base oil is also a mineral oil. He placed reliance on the various orders passed by the Custom Authorities by which loss of 1% is allowed. He submitted that the notification dated 30th April 1971 in respect of the lubricating base oil was in respect of the storage loss and not the transit loss.

5 We have considered the submissions. The submissions made on behalf of the appellant have been recorded in detail in paragraph 2 of the impugned Judgment and Order. On 21st August 2017 the contention of the learned counsel for the appellant before this Court was that the submissions have not been correctly recorded by the Appellate Tribunal. If that be so, the appellant had a remedy available. He tenders across the bar a letter dated 4th May 2015 addressed by the consultant of the appellant to the appellant recording the submissions made on behalf of the appellant before the Appellate Tribunal.

6 In the present case, the submissions made across the bar on behalf of the appellant have been recorded in detail in paragraph 2 of the impugned Judgment and Order which read thus:

> "2...Ld. Counsel submits that in view of this 1% transit loss may be allowed.... It was further submitted that though the Ld. Commissioner has held that Cenvat Credit availed and utilized on short receipt in excess of 0.1% is sustainable but has confirmed the demand without extending the benefit of 0.1%."

7 The law is very well settled. If the case of the appellant was that either the submissions have not been correctly recorded or that some of the submissions actually made before the Appellate Tribunal were not recorded and not dealt with, the remedy available for the appellant was before the Appellate Tribunal. Only on the basis of the letter addressed by the Cen-Ex Services, the Consultants appointed by the appellant, we cannot accept the contention that what is recorded in paragraph 2 of the Judgment is not correct. Paragraph 2 records the submissions which were made across the bar before the Appellate Tribunal and therefore, only on the basis of the said letter, we are unable to accept the contention that the submissions have not been correctly recorded by the Appellate Tribunal in the impugned Judgment.

8 In paragraph 5 of the Judgment, the Appellate Tribunal has relied upon a copy of the manual of departmental instructions on excisable manufactured products. In the said manual, different limits have

been prescribed for different goods and different methods for transfer etc. The Tribunal relied upon the statement produced by the appellant and noted that it provides that in case of lubricating base oil, permissible limit is 0.1%. The Tribunal held that the limit of 0.1% is in accordance with the directions of the Central Board of Excise and Customs on the subject. Reliance placed in this appeal on the letter dated 30th October 1985 addressed by the Central Board of Excise and Custom to all the Collectors of Central Excise.

9 Firstly, before the Appellate Tribunal, the appellant never relied upon the said letter. Secondly, the said letter specifically refers to the mineral oil. If the appellant wanted to rely upon the said letter, it was for the appellant to produce the said letter before the Appellate Tribunal and satisfy the Tribunal that the lubricating base oil is also a mineral oil. The question of fact whether the lubricating base oil is mineral oil or not cannot be adjudicated upon in this appeal for the first time.

10 As noted earlier, the Tribunal has relied upon the the material produced by the appellant itself. It appears from paragraph 2 of the Judgment that the appellant relied upon the decision of a Division Bench of this Court in the case of Hindustan Petroleum Corporation Limited vs. Union of India[1]. The Division Bench was dealing with Naphta and in

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1 [2012 (286) ELT 505 Bom

paragraph 9, the Division Bench observed that it is not in dispute that the transit loss in case of Naphta is permitted to the extent of 0.1% and therefore, this decision will not help the appellant. In the present case, 0.1% is considered by the Division Bench on the basis of the admitted position. In the present case, the Tribunal has followed the circular of the Board dated 30th April 1971. Therefore, the Tribunal has granted benefit of 0.1% under the impugned Judgment and order.

11 Five different orders relied upon by the appellant which are part of the compilation tendered by the learned counsel for the appellant are not precedents. The first order is dated 4th July 2008. By the said order, no law is laid down. Moreover, there is nothing in the said order to indicate that the Authority was dealing with the lubricating base oil. The second order is dated 28th March 2013 passed by the Commissioner of Central Excise. The said order relies upon the decision of the Division Bench of this Court in the case of Hindustan Petroleum Corporation Limited (supra). The Commissioner of Central Excise has not noticed that the Division Bench was dealing with the Naphta and not the lubricating base oil. Moreover, the said decision is based on admitted position. The same is the case with the order dated 28th March 2013 passed by the Commissioner of Central Excise. Therefore, none of the orders which are part of the said compilation will help the appellant. In almost all the orders, the decision of Division Bench of this Court in the

case of Hindustan Petroleum Corporation Limited (supra) has been relied upon. As noted earlier, paragraph 9 of the said Judgment makes it very clear that the the Division Bench proceeded on the admitted position that the transit loss of Naphta is permitted to be 1%.

12 In the present case, we find that no substantial question of law arises in this appeal and accordingly the appeal is dismissed.

(RIYAZ I. CHAGLA,J.) (A.S.OKA,J.)