

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

CENTRAL EXCISE APPEAL NO. 115 OF 2016

Commissioner of Central Excise	}	
Mumbai – II	}	Appellant
versus		
M/s. Hindustan Petroleum	}	
Corporation Ltd.	}	Respondent

Mr. M. Dwivedi for the appellant.

Mr. M. H. Patil with Ms. Manasi Patil for
the respondent.

**CORAM :- S. C. DHARMADHIKARI &
SMT. BHARATI H. DANGRE, JJ.**

DATE :- FEBRUARY 8, 2018

P.C. :-

1. This appeal of the Revenue challenges the order passed by the Central Excise and Service Tax Appellate Tribunal dated 15th April, 2013.

2. The following two questions are proposed by the Revenue as substantial questions of law:-

“(a) Whether benefit of Notification No. 6/2002-CE as amended [Sr. No. 30] or Notification No. 6/2006-CE [Sr. No. 91] read with Notification No. 21/2002-Cus dated 1st March, 2002 [Sr. No. 76] which was available to “naphtha” used in the manufacture of “fertilizer”, is available to the respondent for that quantity of “naphtha” which was manufactured and cleared by it to M/s. Rashtriya Chemicals and Fertilizers Ltd (RCF). availing the benefits under the said notifications, but admittedly, not used by RCF in the manufacture of “fertilizers”?

(b) Whether the CESTAT was correct in holding that Central Excise Duty can be demanded from a person other than manufacturer of the excisable goods in a situation where the goods are locally procured under Notification No. 6/2002-CE or 6/2006-CE, the liability to pay the duty would be that of the user manufacturer who in the present case is RCF?”

3. The factual matrix in which these questions are proposed is that the Central Government issued a notification dated 1st March, 2002, copy of which is at Exhibit 'A' to the memo of this appeal, exempting goods of Chapter Heading No. 27.10, including naphtha for the manufacture of fertilizers, when imported into India, provided that the importer follows the procedure set out in the Customs (Import of Goods at Concessional Rate of Duty for Manufacturing of the Excisable Goods) Rules, 1996.

4. Then, there is another notification which is referred in para 3.2 of the memo of this appeal, whereunder, full exemption as well as partial exemption to various excisable goods of the description specified to the table appended therein came to be granted. This notification was amended by a notification dated 10th September, 2004 inserting serial number 301 to the table appended to Notification No. 6/2002, which provides for full exemption to goods falling under any Chapter of the tariff supplied against international competitive bidding subject to fulfillment of condition no. 64. Copies of both these notifications are annexed as Exhibit 'B'.

5. Then, what is referred to is Notification No. 6/2002 and replacement thereof by notification dated 1st March, 2006 continuing the exemption as mentioned above.

6. A copy of the last notification in the series is annexed as Exhibit-'C' to the petition.

7. Before us is an assessee, namely, M/s. Hindustan Petroleum Corporation Limited (HPCL) engaged in the manufacture of petroleum products. These products fall under Chapter 27 of the Central Excise Tariff Act, 1985. The assessee before us supplied naphtha to M/s. RCF against international competitive bidding at nil rate of duty and claimed the benefit of the above notifications.

8. The Revenue proposed to deny that on the ground that the naphtha was not utilised for manufacture of fertilizers by the RCF. This conclusion was reached by the Revenue after it visited the site/factory of RCF. Based on all this, a show cause notice was issued, rather two in number dated 7th December, 2006 and 1st October, 2007 demanding central excise duty to the tune of Rs.7,51,62,074/- and Rs.9,99,07,326/- from the respondent assessee.

9. These show cause notices were adjudicated and the orders-in-original were passed on various dates and particularly in the

month of October, 2010 and February, 2011. In fact there were four orders-in-original, which confirmed demand for distinct period under the show cause notices totaling four in number.

10. Aggrieved thereby, the tribunal was approached by the respondent-assessee. In fact, the Revenue sought to appeal against the order of the tribunal impugned before us by approaching the Supreme Court of India. However, that appeal was withdrawn with liberty to file the present appeal.

11. The only contention raised before us on behalf of the Revenue by Mr. Dwivedi is that the impugned order of the tribunal is illegal and perverse. It is stated that the tribunal failed to appreciate that the exemption under the notification was conditional. The contention is that the respondent must satisfy the Revenue that the naphtha supplied may be by international competitive bidding process but has gone into the manufacture of fertilizers. This is because there were several cases detected, by which, the stocks/supplies of naphtha were diverted and by such clandestine diversion, there was substantial revenue loss. The exemption from duty was available when naphtha was used in the manufacture of fertilizer.

12. The second argument is that the tribunal concluded that the actual user condition has to be fulfilled by the buyer/user RCF and that the assessee before us, namely, HPCL cannot be expected to ensure the use of the goods by the RCF. Even this finding is termed as perverse.

13. Mr. Patil would support the conclusion of the tribunal and would submit that given the language of the notification, the assessee before us is not expected to ensure fulfillment of the condition and it is imposed on the end user. Mr. Patil would submit that wherever the Revenue desired and intended that an actual or end user condition should be included or inserted in the exemption notification, it has so expressed it in the notification itself. Absent such a stipulation in the present notification, by an indirect or oblique method, the Revenue cannot allege the violation of the notification by the assessee. He would, therefore, submit that the tribunal's view is imminently possible in the given facts and in the backdrop of the language of the notification. Such a view of the tribunal, therefore, cannot be termed as perverse or vitiated by any error of law apparent on the face of the record.

14. Upon a perusal of the entire paper book, including the impugned order, we agree with Mr. Patil. The tribunal has, in the background of the allegations in the show cause notice,

considered the issue at hand by appraising and appreciating the rival contentions. We find that the tribunal has correctly noted the controversy and arising out of the subject notifications. It is common ground that the naphtha was supplied by the respondent-assessee by resort to the international competitive bidding process. The naphtha brought for this supply was claimed to be exempted by the assessee. The tribunal noted that naphtha is exempt from payment of excise duty if supplied against international competitive bidding and used in the manufacture of fertilizers. The notification has been reproduced in the tribunal's order and particularly its relevant para. The tribunal found that all goods supplied against competitive bidding are exempt from payment of excise duty provided the said goods are exempt from duties of customs leviable under the First Schedule to the Customs Tariff Act, 1975 and the additional duty leviable under section 3 of the Customs Tariff Act, 1975. It also found that goods falling under heading 27.10 or 2714.90 are exempt from payment of customs duty and additional duty for the manufacture of fertilizers. However, the said customs duty exemption is not unconditional. The customs duty exemption is available if the importer follows Condition No. 5 in the Customs Notification No. 21/2002 which mandates that the importer follows the procedure set out in the Customs (Import of Goods at Concessional Rate of

Duty for Manufacture of Excisable Goods) Rules, 1996. The tribunal also carefully perused these rules and came to the conclusion that the notifications read together would reveal that in the present case, the naphtha supplied against competitive bidding was not entirely consumed for the manufacture of fertilizers by the RCF. In the present case, for such failure, the manufacturer, where the goods were intended to be used is required to pay differential duty. If the user and manufacturer are one and the same, there is no difficulty. The tribunal gave an illustration, as can be found completely consistent with the case at hand. If the importer of the goods is 'A' but the goods are to be used in the factory of 'B', then, in such situation also, though the goods may be imported by 'A' but the liability to pay the differential duty in the event of failure to use the goods is on 'B'. The question is not of local procurement and the tribunal found, therefore, that M/s. HPCL, at the time of clearance, has satisfied both the pre-conditions, namely, the goods were supplied against international competitive bidding and for the manufacture of fertilizers. The actual use of the goods is post clearance condition and which is required to be fulfilled by the buyer/user, which is the RCF. Hence, the assessee cannot be expected to ensure the precise use of the goods by M/s. RCF.

15. We do not think, therefore, that the conclusion reached in paras 14 and 15, in the backdrop of the factual allegation and the surrounding circumstances, to be perverse or vitiated by any error of law apparent on the face of the record. It is a possible conclusion. Once this is a possible conclusion and consistent with the factual materials placed on record, then, merely because another view can be taken is no ground to interfere with the impugned order.

16. We do not think that the impugned order raises any substantial question of law. The appeal is devoid of merits and it is dismissed. There would be no order as to costs.

(SMT. BHARATI H. DANGRE, J.)

(S.C.DHARMADHIKARI, J.)