

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.07.2018

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR.JUSTICE SUBRAMONIUM PRASAD

C.M.A.No.2977 of 2017

The Commissioner of Central Excise & Service Tax,
Large Taxpayer Unit,
1775, Jawaharlal Nehru Inner Ring Road,
Anna Nagar Western Extension,
Chennai - 600 101. ... Appellant

Vs.

1.M/s.Chennai Petroleum Corporation Ltd,
Manali, Chennai 600 068.
2.Customs, Excise & Service Tax Appellate Tribunal,
South Zonal Bench, Shastri Bhavan Annexe,
I Floor, 26, Haddows Road,
Chennai - 600 006. ... Respondents

Prayer: Civil Miscellaneous Appeal is filed under Section 35 of Central Excise Act, 1944, against the Final Order No.40085 of 2016, dated 18.01.2016 and received on 05.02.2016, on the file of the CESTAT, South Zonal Bench, Chennai.

For Appellant : Mr.A.P.Srinivas

For R1 : Mr.R.Parthasarathy
for Mr.Lakshmi Kumaran & Sridharan

For R2 : Tribunal

JUDGMENT

(Judgment of this Court was made by S.MANIKUMAR, J.)

Instant Civil Miscellaneous Appeal is filed against the Final Order No.40085 of 2016, dated 18.01.2016, passed by CESTAT, South Zonal Bench, Chennai, on the following substantial questions of law:-

"1. Whether Hon'ble CESTAT order is legal and proper in the light of the fact that the order is non-speaking on the grounds of appeal filed by the department?

2. Whether Hon'ble CESTAT is correct remanding the case for fresh adjudication on a new ground i.e. excisability & dutiability of RFO, which was not a ground for appeal, without calling for views from the Department, as per Rule 10 of CESTAT (Procedure) Rules, 1982?

3. Whether Hon'ble CESTAT is correct in remanding the case for fresh adjudication to decide on the exciability and dutiability of RFO used in generation of Electricity, when the issue has reached a finality with the decision of Apex Court in the same party's case for the previous period vide decision reported in [2007(211)ELT 93(SC)]."

2. Short facts leading to the appeal are that, M/s.Chennai Petroleum Corporation, Chennai, are engaged in the manufacture of 'Petroleum Products', falling under Chapter 27 of the Central Excise Tariff act, 1985 and they are availing Cenvat Credit of duty paid on the inputs/capital goods received by them, for the manufacture of the final products. M/s.Chennai Petroleum Corporation Ltd, Chennai, 1st respondent herein, generates power, captively out of Low Sulphur Heavy Stock (LSHS), otherwise known as, Residual Fuel Oil (RFO) and also out of Naptha. RFO was used as fuel in the Steam Turbine Generator (TG2) and Naptha was used as fuel in Gas Turbine Generator (GTG). These are intermediate products, manufactured during refining crude and used in generation of electricity. Electricity so generated is used for further manufacturing of goods, which are dutiable and hence, the taxpayer is availing exemption, under Notification No.67/95.

3. On verification, it was noticed that the excess electricity so generated was sold to Tamil Nadu Electricity Board (In short "TNEB"). As the quantum of electricity sold to TNEB was not used in manufacturing of further goods which are dutiable, it appeared that duty had to be paid on RFO and Naptha used in generation of electricity sold to TNEB. The 1st respondent generates electricity from two separate plants using the two inputs and the electricity is transferred to a common grid from where it is captively consumed as well as sold to TNEB.

4. Vide Show Cause Notice in O.C.No.46/2000, dated 02.02.2001, a sum of Rs.1,79,47,649/-, has been demanded, being the duty payable, for the period from January 2000 to June 2000

on 11179.35 MTS of LSHS(RFO) cleared and used for generation of power sold to TNEB, as they are not eligible for exemption, under Notification No.67/95, dated 16.03.1995. It was also alleged that the 1st respondent is not eligible for benefit under Notification Nos.5/99, dated 28.02.1999 and 6/2000 dated 01.03.2000, due to non-fulfillment of the conditions, for availing such benefit. Notification Nos.5/99 and 6/2000, provides exemption of duty on residue of petroleum oils including LSHS(RFO) falling under Chapter 2713.3 of CETA, 1985, provided the said residue is intended for use, as fuel for generation of electrical energy by Electricity Undertakings, owned by Central or State Government or State Electricity Board or any Local Authority, a person licensed under Part II of Indian Electricity Act, 1910, to supply electrical energy or a person who has obtained sanction, under Section 28 of the Electricity Act, to engage in the business of supplying electrical energy except those who produce the same, not for sale but for own consumption or supply to their own undertaking. In the instant case, TNEB had confirmed that the 1st respondent was neither a licensee under Part II of the Electricity Act nor had obtained sanction under Section 28 of the said Act.

5. Vide Show Cause Notice in O.C.No.360/2001, dated 31.07.2001, another demand was raised, on the same grounds, for a sum of Rs.1,70,51,002/-, being the duty payable for the period from July 2000 to December 2000 on 10403.19 MTS of LSHS (RFO) cleared and used for generation of power sold to TNEB.

6. Vide Order-in-Original No.46/2001, dated 31.12.2001, both the demands totaling to Rs.3,49,98,651/-, were confirmed by the Adjudicating Authority, with the following findings:

"(a) Regarding marketability of LSHS (RFO):- The term LSHS or RFO are interchangeable terms to refer to vacuum residue left behind after refining crude petroleum. The fact that it is vacuum residue does not make it non-marketable nor does its high viscosity stop it from being used as fuel. It may be mixed with other oils to reduce its viscosity and does not require major manufacturing operation which does not result in emergence of new product or change in properties of the product. Hence, it cannot escape levy on the plea that it is not marketable.

(b) Eligibility for exemption under Notification 5/99- they are neither licensee nor have obtained sanction order under the Electricity Act and hence, not eligible for exemption.

(c) Benefit under Notification 67/95- the benefit under this notification is available only for captive consumption for production of final products which are dutiable. In the instant case, the electricity generated from use of LSHS(RHO) is sold to TNEB and not consumed within the factory for production of final products on which duty is payable and hence benefit is not available.

(d) Calculation of duty - the contention that requirement of fuel at 0.28 MTs for generation of 1MW of electricity remains the same while requirement of fuel for other processes fluctuates is not acceptable. The liability worked out after taking percentage of electricity exported to TNEB out of total electricity produced and applying it total fuel consumed, is correct."

7. Aggrieved by the same, M/s.Chennai Petroleum Corporation Ltd, Chennai, first respondent herein, has filed Appeal Nos.108 and 109/2004 (M-I) and Revenue has filed Appeal No.2/2005 (M-I) (D), before the Commissioner (Appeals) and the same were rejected.

8. Being aggrieved by the same, Revenue has filed Appeal No. E/459/2005/DB, before CESTAT, Chennai, and the same was disposed.

9. Aggrieved by the order of CESTAT, Chennai, Revenue has filed the instant Civil Miscellaneous Appeal, on the following grounds:-

"(i) The appeal filed by Department was against the quantification of demand by the adjudicating authority i.e. the department contended in the appeal that instead of determining the quantum of fuel consumed in the Steam Turbine Generator (TG2) plant on a notional basis by adopting the production capacity vis-a-vis naphtha based Turbine's (GT) production capacity, the more accurate methodology would be to take into account the actual production. It was contended by the Department that it would be appropriate if the total quantity of electricity transferred to TNEB is apportioned into two parts in the ratio of total electricity generated using RFO & Naphtha and then the quantity of RFO & Naphtha used for generating electricity sold to TNEB and duty demanded accordingly.

(ii) However, the Tribunal has overlooked this ground of appeal and passed remand orders to consider the excisability and dutiability of RFO, afresh, which was not a ground of contention at all. In other words, Hon'ble Tribunal has not addressed our ground of appeal in the final order. As the Tribunal has not considered the plea of the Department and remanded the order for considering the issue of excisability which has attained finality, therefore, the Tribunal's order is not legal and proper and deserves to be set aside. Moreover, the grounds and plea of the Department had not been considered by the Tribunal and hence, it is not a speaking order on this aspect of appeal, thus violating the principles of natural justice.

(iii) CESTAT has observed that the adjudicating authority did not consider the crucial test of excisability by using the twin test prescribed by the Apex Court in the case of Board of Trustees Vs. CCE, AP [2007(216)ELT 513 (SC)]. In this regard, it is seen that the Adjudicating Authority while confirming the demand has discussed the marketability of LSHS (RFO) with the finding that LSHS/RFO are interchangeable terms to refer to vaccum residue that is left after refining the crude. Further, he had also detailed that the vaccum residue just because of its high viscosity does not make it as non-marketable since it can be mixed with other oils with minimal manufacturing operation to reduce the viscosity and further uses or sold commercially.

(iv) Further, the dutiability of RFO used in production of steam which is in turn used in production of electricity which is partly supplied to TNEB is already a settled issue with the decision of Hon'ble Supreme Court in the taxpayer's own case [2007(211)ELT 93(SC)]. This decision of the Apex Court has been abided by the taxpayer and they are paying the duty on RFO used in electricity supplied to TNE. Hon'ble Supreme Court held that RFO used for generation of electricity sold outside is dutiable. Hence, the directions of CESTAT to study the excisability of RFO and whether RFO is dutiable is no Res-integra as the issue has already reached finality with the decision of the Apex Court.

(v) Further, as per Rule 10 of CESTAT (Procedure) Rules, 1982,

"The Tribunal in deciding the appeal shall

not be confined to the grounds set forth in the memorandum of appeal or those taken by leave by the Tribunal under these rules: provided that the Tribunal shall not rest its decision on any other grounds unless the party who may be affected thereby has had a sufficient opportunity of being heard on that ground".

(vi) In this connection it is submitted that the appeal filed by the Department was only on the grounds of wrong formula for quantification of duty demanded by the original adjudicating authority, whereas, the Tribunal has decided on a new ground regarding excisability of RFO which was not a ground for Department's appeal. As per CESTAT Rules, the department should have been given an opportunity to present their views of the new ground but the opportunity was not given. No views were called for from the Department on the new issue of excisability and Tribunal has ordered remand for fresh adjudication."

10. Besides, the order of the Tribunal, does not advert to the grounds raised, before the Tribunal.

11. On the above substantial questions of law, we have heard the learned counsel for both the parties.

12. Mr.R.Parthasarathy, learned counsel for the first respondent, fairly conceded that, the substantial questions of law, be answered in favour of revenue the further submitted that the matter be remanded to the Tribunal, for fresh consideration, with liberty to dealer/first respondent, to putforth all tenable contentions.

13. In Nandhi Spinning Mills (P) Limited Vs. The Commissioner of Central Excise, Salem Commissionerate, reported in 2018 [8] G.S.T.L.103, at paragraphs Nos.2 to 5, this Court held as follows:-

"2. The tribunal is a final fact finding authority. Though the tribunal has considered the grounds of appeal, there is no discussion. Further, by relying on the decision of Punjab and Haryana High Court in the case of CCE Chandigarh Vs. Modern Alloys - 2010 (285) ELT 364 (P&H), tribunal dismissed the appeal, which cannot be approved in the light of the decision of the Hon'ble Supreme Court in Tata Engineering & Locomotive Co. Ltd., v. Collector of Central Excise, Pune reported in 2006 (203) ELT 360 (SC).

3. At this juncture, we deem it fit to consider few decisions, on this aspect.

(i) In HVPNL v. Mahavir reported in (2004) 10 SCC 86, while dealing with an order passed by the State Consumer Disputes Redressal Commission, the Hon'ble Apex Court held that the appellate forum is bound to refer to the pleadings of the case, submissions of the counsel, necessary points for consideration, discuss the evidence, and then to dispose of the matter by giving valid reasons.

(ii) In Tata Engineering & Locomotive Co. Ltd., v. Collector of Central Excise, Pune reported in 2006 (203) ELT 360 (SC), the Hon'ble Supreme Court, dealing with a case, whereby, a cryptic and non-speaking order, the Tribunal upheld the order passed by the Commissioner, by applying the ratio of the decision of a Larger Bench in TISCO Ltd., v. CCE, Madras [2000 (118) ELT 104 (T-LB)], without recording any findings of fact. On the facts and circumstances of the case, the Hon'ble Apex Court, while holding that it is not sufficient in a judgment, to give conclusions alone, but it is necessary to give reasons, in support of the conclusions arrived at, set aside the order of the Tribunal, holding that the findings recorded by the Tribunal therein, were cryptic and non-speaking, and remitted the matter to the Tribunal for taking a fresh decision, by a speaking order, in accordance with law, after affording due opportunity to both the parties.

(iii) In Commr. of Central Excise, Bangalore-II v. Fitwel Tools & Forgings (P) Ltd., reported in 2010 (256) ELT 212 (Kar.), a Hon'ble Division Bench of Karnataka High Court, at Paragraph 5, held as follows:

"After careful perusal of the order impugned, it is manifest on the face of the order that the Tribunal has committed a grave error in passing the order impugned without assigning any valid reasons and without any discussion. By merely following the order passed in similar matters, it has proceeded to pass the impugned order, allowing the appeal filed by the respondent. Hence, we are of the opinion that the impugned order is cryptic in nature and such a non-speaking order cannot be sustained."

4. In the light of the above discussion and decisions, the impugned order is set aside and the matter is remitted to CESTAT, Chennai. CESTAT, Chennai is directed to issue notice to both parties, provide

opportunity, consider the issues raised in the appeal and pass orders on the appeal on merits and in accordance with law. Tribunal is further directed to dispose of the appeal, as expeditiously as possible within a period of two months from the date of receipt of a copy of this order.

5. Civil Miscellaneous Appeal is allowed, as indicated above. No Costs. Consequently, the connected Civil Miscellaneous Petitions are closed."

14. Placing on record the submissions of the learned counsel for both the parties, and the decision stated supra, order impugned in Final Order No.40085 of 2016, dated 18.01.2016 on the file of the CESTAT, Chennai, is set aside. The matter be remitted back to CESTAT, Chennai. CESTAT, Chennai, is directed to issue notice to both parties and give opportunity to the parties to raise all contentious issues.

15. Having regard to initiation of proceedings in the year 2002 and the time consumed, Tribunal is directed to dispose of the appeal, as expeditiously as possible.

16. With the above directions, Civil Miscellaneous Appeal is allowed. No Costs.

Sd/-

Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

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To

Customs, Excise & Service Tax Appellate Tribunal,
South Nonal Bench, Shastri Bhavan Annexe,
I Floor, 26, Haddows Road,
Chennai - 600 006.

+1cc to Mr.A.P.Srinivas, Advocate Sr.45031

C.M.A.No.2977 of 2017

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srg 9/8/2018