IN THE HIGH COURT OF BOMBAY AT GOA

EXCISE APPEAL NO.1 OF 2018

The Commissioner of Central Excise,
Panaji. … Appellant
Versus
Indian Oil Corporation Ltd. & Ors. … Respondents

Ms. Asha A. Desai, Standing Counsel for the Appellant.

Mr. Rajiv Srivastava, Advocate for the Respondents.

Coram : M. S. Sonak &
Prithviraj K. Chavan, JJ.

Date : 9th January, 2019

P.C.:

Heard Ms. Desai, learned Standing Counsel for the Appellant and Mr. R. Srivastava, learned counsel for the Respondents.

2. This appeal is admitted on the following substantial questions of law.

> "*(a) Whether on the facts and circumstances of the case the CESTAT was right in holding that Section 11D of the Central Excise Act, 1944 is not applicable in this case, when it has not controverted the finding of fact by the adjudicating authority that the process undertaken by the assessee amounts to manufacture and whereby, the assessee becomes a person liable to pay duty, in terms of Section 11D of the Central Excise Act, 1944 read with Rule 4 of the Central Excise Rules,2002 and as such the finding of the CESTAT is perverse ?*
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> *(b) Whether in the facts and circumstances of the case, the CESTAT was right in holding that Section 11D of the Central Excise Act, 1944, is not applicable in this case when the evidence on record clearly establishes that the assessee, being a manufacturer of EBP and liable to pay Central Excise Duty, have collected Central Excise duty on the additional quantity of EBP blended and sold, without depositing the same to the Government Exchequer and as such the finding of the CESTAT is perverse ?*

3. With the consent and at the request of the learned counsel for the parties, the appeal is taken up for final disposal, since, we find in the present appeal that the CESTAT has not at all considered the rival contentions or in any case, the consideration, if any, is not reflected in the impugned order dated 17th July, 2017.

4. The impugned order dated 17th July, 2017 reads thus :

"The primary question in this appeal is whether the buyer of the motor spirit from the applicant, selling at a higher price of the same with pre-mixture thereof will attract Section 11D of the Central Excise Act, 1944 on the ground that the price charged by the buyer is higher than the price at which the goods were cleared to the buyer by the appellant.

2. Learned AR explains that there was a depression to the assessable value for which appropriate duty is chargeable. It is the defence of the appellant that in any event duty is recoverable taking recourse to law under Section 11A of the Central Excise Act, 1944 is sine qua non. Section 11D of the Act is not applicable to the present case since it has not at all recovered any duty element from buyer.

3. Heard both sides and perused the records.

4. Section 11D being penal in character, the proceedings under that section has to undergo the tests of law. Penalty is impossible if duty is collected over and above the duty liable to pay and such excess amount is not deposited in treasury. That not being the present case, the demand levied under Section 11D is to be set aside.

5. Appeal is accordingly allowed."

5. Ms. Desai, learned counsel for the Appellant submits that in terms of Section 11D of the Central Excise Act, 1944 once it is established that the assessee has collected an 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, then, such assessee shall forthwith pay the amount so collected to the credit of the Central Government.

6. She submits that in the present case, Shri P. Subbaraj, representative of the assessee had made a clear statement that the assessee has recovered the Central Excise duty from the customers but the same was not paid to the credit of the Central Government, since, there was no advise to that effect from the head office. She submits that this statement of Shri Subbaraj has been ignored by the CESTAT. She further submits that the fact that Section 11D of the said Act commences with a non obstante clause has also not been considered by the CESTAT.

7. Mr. Srivastava submits that in the present case the assessee is not at all a manufacturer and, therefore, there is no liability of payment of any excise duty. He points out that Section 11D of the said Act applies only to a person who is liable to pay the duty under the said Act or Rules made thereunder and not otherwise. Without prejudice, Mr. Srivastava submits that in the disputed period, it is quite clear that the assessee had never collected any excise duty in

excess of the excise duty payable or determined and, therefore, the provisions of Section 11D were not at all attracted to the case of the assessee. Mr. Srivastava submits that Section 11D is a penal provision and, therefore, has to be strictly construed. He further submitted that the statement of Shri Subbaraj has to be considered in its entirety and so considered and construed, it cannot be said that there was any excess duty collected by the assessee during the disputed period. He points out that all that was collected was a composite price.

8. From the perusal of the impugned order made by the CESTAT, it is clear that the CESTAT has proceeded on the basis that the assessee in the present case had not collected any duty over and above the duty liable to be paid. On this basis, CESTAT concluded that the provisions of Section 11D of the said Act, which, even otherwise, are penal in nature, were not attracted.

9. The CESTAT, has however failed to even advert to, much less consider the statement of Shri Subbaraj as reflected in the order in original dated 31st August, 2007. In para 5.1.1., it is recorded that Shri Subbaraj, the representative of the assessee, on being asked stated that the assessee had recovered the Central Excise duty from their

customers on the additional quantity generated because of blending of ethanol which was sold by the assessee at the same rates as that of the motor spirit (MS). It is further recorded that Shri Subbaraj stated that since there was no advise from the head office, the central excise duty so collected from their customers was not paid to the credit of the Central Government.

10. No doubt, as contended by Mr. Srivastava, Shri Subbaraj's statement has to be read in its entirety including the portions reflected in paras 5.1.2., 5.1.3., 5.1.4 as well as other material on record. He submits that it is impermissible to read certain stray statements in isolation. Mr. Srivastava also submitted that there is other evidence on record which makes the position of the assessee quite clear.

11. In the present case, all that we observe is that there is no consideration of whatsoever of the statement made by Shri Subbaraj whether in isolation or in the entirety. Non consideration of relevant material on record is a ground for interference. This is not a case of reappreciation or revaluation of material on record but this is a case where the material which both the parties regard as material, has not been adverted to, much less considered by the CESTAT. From the

impugned order, it is apparent that there is no consideration of even the assessee's contention that the assessee was not at all liable for payment of any excise duty since the assessee is not at all involved in any manufacturing. Mr. Srivastava is right that the other evidence adduced even by the assessee is not considered in the impugned order. Since several aspects have also not been considered by the CESTAT or in any case the impugned order does not reflect that such aspects have been considered, we are constrained to set aside the impugned order and remand the matter for disposal afresh.

12. Accordingly, we set aside the impugned order dated 17th July, 2017 and remit the appeal No. E/1450/2007 to the CESTAT for disposal afresh in accordance with law and on its own merits. We clarify that our observations in this order are only *prima facie* and all contentions of parties are expressly left open for adjudication by the CESTAT.

13. The CESTAT, is requested to endeavour to dispose of this appeal expeditiously.

14. The appeal is allowed in the aforesaid terms. There shall be no order as to costs.

Prithviraj K. Chavan, J. ***M. S. Sonak, J.***

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