

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.09.2019

CORAM:

THE HONOURABLE DR.JUSTICE ANITA SUMANTH

W.P.No.12158 of 2012

and

M.P.No.1 of 2012

M/s.Chennai Petroleum Corporation Ltd.,
Represented by S.Ramakrishnan,
Deputy General Manager - Finance
Manali, Chennai - 600 008.

... Petitioner

Vs.

1.Union of India,
Represented by its Joint Secretary,
Finance Department,
14, HUDCO Vishala Building, B-wing, 6th Floor,
Bhikaji Cama Place, New Delhi-110 066.

2.The Assistant Commissioner of Central Excise,
'D' Division, Chennai I Commissionerate,
R-40, A-1, 100 Feet Road,
Mogappair East,
Chennai - 600 039.

3.The Commissioner of Central Excise (Appeals),
Large Tax Payers Unit,
1775, Jawaharlal Nahru
Inner Ring Road, Anna Nagar,
Western Extension,
Chennai 600 101.

4.Commissioner of Central Excise,
Chennai I Commissionerate,
Nungambakkam High Road,
Chennai-34.

... Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India, to issue a writ of Certiorarified Mandamus, calling for the records relating to the order passed by the 1st Respondent vide order 1721/2011-CX dated 29.12.2011 (issued on 04.01.2012) quash the same and consequently direct

the 2nd Respondent to allow the rebate claim of the Petitioner, to the extent of the furnace oil exported.

For Petitioner : Mr.Raghavan Ramabadran
for Mr.Lakshmi Kumaran

For Respondent : Mr.A.P.Srinivas
Central Government Standing Counsel

O R D E R

The petitioner is the Chennai Petroleum Corporation Limited (CPCL). It effects supplies of furnace oil and petroleum products to the Indian Oil Corporation Limited (IOCL) both for domestic consumption and export. The petitioner remits duty in respect of those supplies effected for domestic consumption and in regard to the supplies made for export, forwards all relevant documents along with the goods supplied. This is the modus operandi consistently followed both by CPCL and IOCL over the years.

2. According to the petitioner, there are two storage containers in IOCL bearing Nos.006 and 007, the former receiving supplies for domestic consumption and the latter receiving supplies exclusively for export, demarcated as a bonded warehouse in respect of which a bonded stock register is maintained.

3. The petitioner had effected supplies under three invoices bearing Nos. PINV/001753/05-06 dated 31.08.2005, PINV/001829/05-06 dated 28.08.2005 and PINV/1921/05-06 dated 14.09.2005, comprising of a total quantity of 8255.486 K.L. of furnace oil. Under a misapprehension that the three supply were intended for domestic consumption, the petitioner had proceeded to remit excise duty. The supply effected was however received in storage Tank No.7, meant for export. IOCL proceeded to export a portion of the quantity supplied amounting to 5477.815 K.L. under two export forms. Upon realising that a portion of the supplies had been exported, the petitioner sought refund of the excise duty in relation to 5477.815 K.L. amounting to Rs.1,13,09,483/-, in terms of Rule 18 of the Central Excise Rules, 2002 (in short Rules).

4. Initially the claim for refund was preferred both by the exporter i.e. IOCL as well as the petitioner. The claim filed by the IOCL was rejected on 03.11.2006 by the Assistant Commissioner of Central Excise as against which IOCL filed an

appeal before the first appellate authority. Parallely it also appears to have filed a letter dated 03.09.2007 stating that it would withdraw the appeal filed by it upon condition that the refund claim would be settled in favour of CPCL. Notwithstanding this letter, perhaps for the reason that the claim was not settled in favour of CPCL by the Department, the statutory appeal filed by it was also pursued. The appellate authority, by order dated 28.12.2007, disposed the appeal of IOCL remanding the matter to the file of the assessing authority. In remand an order-in-original dated 23.12.2008 came to be passed rejecting the claim as against which, no further proceedings have been taken by IOCL.

5. In the meanwhile, a show cause notice was issued by the 2nd respondent to the petitioner on 23.05.2007 to which a reply was filed on 20.08.2007. This was followed by a communication from the petitioner dated 03.09.2007 submitting various documents as called for by the officer and a personal hearing thereafter in which the petitioner was heard. This culminated in an order-in-original passed by the 2nd respondent on 29.11.2007 rejecting the refund claim, solely on the ground that multiple claims had been filed in respect of the same duty both by IOCL as well as by CPCL. An appeal was filed challenging the aforesaid order before the Commissioner (Appeals), who, after a consideration of the matter, records a finding of fact to the effect that supplies to the extent of 5477.815 K.L. constitute 'deemed export'. He states as follows:

'As regard the rejection of the impugned claim on the ground that exports made under Rule 19 are not eligible for any rebate, it is noticed that there is no dispute on the fact that the impugned goods have been received on payment of duty from CP and that they have been actually exported. The appellant has exported the impugned goods along with certain other non-duty paid goods under bond under Rule 19. Normally, export-under claim of rebate is covered by Rule 18. However, the fact that the impugned goods have suffered duty has not been denied by the department.'

6. The incidence of payment of duty as well as the factum of export has thus been recorded by the appellate authority and these factual findings have attained finality, no appeal having been filed by the respondents in this regard. The petitioner, on the other hand, challenged the appellate order in revision resulting in the present impugned order. The rejection has been confirmed on several grounds: one, that there was no specific

reasoning as to why duty paid material was received in the bonded tanks, thus confirming, as a fact, such factum of receipt, secondly, the absence of permission from the Central Excise Commissioner for storage of duty paid materials in the bonded tanks, and thirdly, a discrepancy is pointed out in respect of the quantities supplied in the documentation of IOCL and CPCL. Since the supplies of duty-paid material in the bonded tank is itself stated to be inadvertent, the question of permission does not arise.

7.The relevant findings in the order-in-original rejecting the refund claim are extracted below:

'The export warehouse registration for their Tank no.T007 has been obtained for storage of their petroleum products without payment of duty under Bond as per Notification no.46/2001 CE (NT) for exports from thereon. The duty paid furnace oil has been received under the invoice no.PINV/001829/05 dt. 28.08.2005 for 31252119 KL and under invoice no. PINV/001753/05 dt. 31.08.2005 for 3826.6796 KL. The storage of non-duty paid furnace oil and the duty paid furnace oil which was subsequently diverted for exports have been stored in the same tank and the exports were made from there. Hence, the segregation of non-duty paid and duty paid goods cannot be made unless otherwise specially sorted out thereby entails in great difficulty in correlating the category. Further the relevant Bill of Lading displays a huge quantity of 28345.386 Kl @ 15 Deg. C / 27292.513 MT whereas the Shipping Bill covers 25000 MT whilst the ARE1 no.100 / dt. 03.11.2005 covers 12103.453 MT and ARE 1 no.10 / 2005 dt. 02.11.2005 covers 15189.060 MT. The case law referred by the assessee is not applicable to the present case since the categorical correlation of the duty paid goods cleared for export from the non-duty paid stock subsequently after a pause of two months cannot be made and further the exports have been made under Bond under Rule 19 of Central Excise Rules. In view of the above, I pass the following Order:-'

8.The sum total of the exports as per the two ARE-I forms is 27292.513 MT (12103.453 MT plus 15189.060 MT). This quantum is reflected in the bill of lading, that is as fairly confirmed by both learned counsel, the authoritative document to establish the volume/quantitative details of the commodity (oil) carried on board.

9.The bill of lading itself contain two figures, 28345.386 K.L., (oil at 15 degree celsius) and 27292.513 metric tones (oil at normal temperature). Thus, and in fact, the quantity of oil as per the two ARE-I Forms corresponds to the quantity set out in the bill of lading. Admittedly the shipping bills mention only 25000 metric tones and this remains a mystery. However, in the light of the identity between the quantity as set out in the bill of lading, and the ARE-1 Forms, to an extent of 27292.513 metric tones, I am of the view that the supplies of 5477.815 KL by the petitioner would stand included in the same.

10.A one to one correlation is impossible in the nature of goods involved, being fungible goods. However, a reasonable presumption can be drawn in this regard, in the light of the facts and circumstances as I have noticed above. Moreover, the stock statements filed as part of the document compilation of the petitioner and in respect of which no dispute is raised by the revenue indicate that a total quantity of 6197.631 K.L. has been supplied by the petitioner to IOCL of which, the quantity exported is stated to be 5477.816 K.L. Thus the petitioner is entitled to rebate in respect of the duty paid by it relating to 5477.816 K.L.

11.A Division Bench of this Court in the case of Ford India Private Limited vs. Assistant Commissioner of Central Excise, Chennai (272 E.L.T. 353) and Zandu Chemicals Limited vs. Union of India, Bombay High Court (315 E.L.T. 520) have held that neither non-production nor discrepancy in ARE-1 Forms would be fatal to a refund claim and such inadequacies are liable to be condoned if other materials were available to establish the factum of export. The conclusion is to the effect that the conditions imposed in relation to ARE-1 Forms are directory/procedural only. In the present case, quite apart from the fact that IOCL has filed the ARE-1 Forms the findings of fact by the appellate commission are to the effect that the duty element has been paid and the goods in question has been exported. The petitioner is thus entitled to the rebate sought.

12.This writ petition is allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-VI)

//True Copy//

Sub Assistant Registrar

vs

To

1.The Joint Secretary,
Union of India,
Finance Department,
14, HUDCO Vishala Building, B-wing, 6th Floor,
Bhikaji Cama Place, New Delhi-110 066.

2.The Assistant Commissioner of Central Excise,
'D' Division, Chennai I Commissionerate,
R-40, A-1, 100 Feet Road,
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Inner Ring Road, Anna Nagar,
Western Extension,
Chennai 600 101.

4.The Commissioner of Central Excise,
Chennai I Commissionerate,
Nungambakkam High Road,
Chennai-34.

+1cc to Mr.A.P.Srinivas, Advocate SR.82736

+1cc to Mr.Lakshmi Kumaran, Advocate SR.82857

W.P.No.12158 of 2012
and
M.P.No.1 of 2012

PP(CO)
CB(28/01/2020)

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