CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD

Division Bench
Court – I

Excise Appeal No. 2780 of 2011

(Arising out of OIA No. 19/2011 (G) CE dt.22.07.2011 passed by Commissioner of Customs, Central Excise & Service Tax (Appeals), Guntur)

Bhagyanagar Gas Ltd
2nd Floor, Parishram Bhavan, APIDC Building, Basheerbagh, Hyderabad – 500 004 **......Appellant**

VERSUS

Commissioner of Customs, Central Excise & Service Tax, Guntur
CR Building, Kannavarithota, Guntur, Andhra Pradesh – 522 004 **......Respondent**

Appearance
Shri Karthik Raman, Advocate for the Appellant.
Shri V.R. Pavan Kumar, AR for the Respondent.

Coram:
HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. A.K. JYOTISHI, MEMBER (TECHNICAL)

FINAL ORDER No. A/30404/2023

Date of Hearing: 05.07.2023
Date of Decision: 29.11.2023

[Order per: ANIL CHOUDHARY]

The issue involved in this Appeal is valuation for the levy of Central Excise duty.

2. The Appellant is a PSU and is a Joint Venture between (i) Hindustan Petroleum Company Ltd (HPCL), (ii) GAIL (India) Ltd (GAIL), (iii) Kakinada Seaports Pvt Ltd (KSPL) and (iv) the Government of Andhra Pradesh. The Appellant manufactures Compressed Natural Gas (CNG). The Appellant was registered with the department and have discharged Central Excise duty for the period August 2005 to December 2009.

3. Owing to its sensitive nature, CNG and its transactions are regulated and administered in a precise manner. The CNG manufactured by the Appellant is dispatched from its factory, in some cases via 'under-ground pipelines' and in some cases via 'automobile trucks'. In the instant case, the Appellant has cleared CNG from its factory located at RS No.70, Gollapudi Road, Vidyadharapuram, Near YV Rao Estates, Vijayawada, and has dispatched to its customer i.e., HPCL via 'automobile trucks'.

4. The trucks containing the CNG are moved to the retail stations operated by HPCL and over there, the CNG is moved from the trucks into the cascade tanks located at HPCL outlets. Thereafter, HPCL continues to store the CNG in its station and further effects sale of the CNG to the end-customers, i.e., the public.

5. In the back-drop, the Appellant has entered into an agreement dt.13.09.2005 with HPCL, which has been renewed from time to time for such sale of CNG to it. As per Clauses 2, 8 & 14, of the Agreement, the Appellant and HPCL have agreed that there is no relationship of agency between them, and that they are only working on a principal to principal basis; that the transfer of CNG from the Appellant to HPCL, constitutes sale of goods, for which the Appellant raises sale invoices duly charging State VAT from HPCL, and thereafter, discharges the VAT liability to the State Government; Once HPCL has procured the CNG, it effects further sale to the end-customers.

6. While the Appellant charges, for instance Rs.28.63/- to HPCL for the sale of CNG (including the excise duty and VAT applicable); the price at which the HPCL may sell to the end-customer is also fixed in the agreement, owing to the sensitive nature of CNG. Accordingly, in this illustration, HPCL sells the CNG to the end-customers at Rs.30/- including VAT of Rs.3.8/-, leaving a profit-margin of Rs.1.20/- for HPCL.

7. It is a matter of record that this profit margin of Rs.1.20/- per Kg that is made by HPCL is retained by HPCL alone and it is never passed on to Appellant. There is no allegation or finding in the assessment order or in the Appellate Order that the Appellant has, in fact, actually received the profit-margin mark up of HPCL.

8. The basis of levy of additional excise duty or differential duty by the Authorities below is that there is no real sale between the Appellant and HPCL, and that the Appellant and HPCL are working on an agency basis and that the final sale price charged by the HPCL to its end-customers, must be treated as the 'transaction value' for the purposes of Sec 4(1)(a) of the Central Excise Act for the purpose of levy, instead of the value adopted by the Appellant, at the time of its clearance to HPCL. The Department has also held that the 'place of removal' should be treated as the 'retail outlet of HPCL' and not the Appellant's factory. The sale invoices raised by the Appellant in favour of the HPCL are disregarded, as not reflecting the real value.

9. Learned Counsel for the Appellant contends that Clause 14 of the Agreement clearly lays down and establishes that there is no relationship of agency between the Appellant and HPCL and that they are only operating on a principal to principal basis; that Clause 2 of the Agreement proves that there is an actual and real sale between the Appellant and HPCL of the CNG, at a defined price; that Clause 8 proves that the Appellant has discharged its VAT liability, which is only applicable, if there is sale.

10. He further contends that the usage of the word 'commission' in the Agreement, cannot be twisted and held against the Appellant, since the true nature of the mark-up retained by HPCL is not a commission, but HPCL's own profit-margin. Even otherwise, the Agreement must be read as a whole and not in isolation to suit one party or the other. A comprehensive study of the Agreement would show that there was no intention of agency.

11. The Appellate Authority has observed that there is no sale of CNG between the Appellant and HPCL when it is cleared at the factory gate, since the Appellant has installed equipment at HPCL's retail stations and they are also maintaining them in proper conditions and paying electricity charges as applicable. It was held that the relation between the parties is not on principal to principal basis, and what is paid to HPCL, is indeed commission. It was also held that the place of removal as per Sec 4 is the retail outlet. The Appellate Authority sustained the invocation of the extended period of limitation on the ground that the facts would not have come to light, but for verification of the records of the Appellant by the department and that there is a mis-declaration of facts with an intent to evade the payment of Central Excise duty and that the Appellant did not inform the Department about the activities such as installation of equipment and its maintenance at HPCL stations. In the same manner, levy of penalty @ 100% of the tax, is also confirmed.

12. Assailing the Impugned Order, learned Counsel urges that the issue is no longer res integra and the same is covered in favour of the Appellant by the ruling of the Coordinate Bench in the case of Mahanagar Gas Ltd vs CCE [2017 (348) ELT 175]. In the case of Mahanagar Gas Ltd (supra) also, under similar facts and circumstances, they were selling CNG both through their own outlets as well as the outlets of dealers. Since the dealers were selling CNG for and on behalf of Mahanagar Gas Ltd, certain service charges/commission was paid to the dealers. Similarly, Mahanagar Gas Ltd was also selling CNG to Oil Marketing Companies (OMC) who were purchasing and reselling CNG and Mahanagar Gas

Ltd allowed certain discount/commission to them from the Retail Sale Price (RSP), as per Agreement. For the sale of CNG to OMC, Mahanagar Gas Ltd raised sales invoices for the value mutually agreed upon. In consequence thereof, the trade profit/commission/discount given to OMC was excluded from the RSP by way of backward calculation. In other words, Excise duty was being paid by Mahanagar Gas Ltd on the sale price to OMC, which was the transaction value. Similar objection was raised by the Revenue for demanding differential duty with respect to sales made to OMC alleging that all parameters like ownership of equipment, manner of production, product RSP, etc., remained in the control of Mahanagar Gas Ltd till the point of sale to the retail customers. This Tribunal held that Mahanagar Gas Ltd have charged the mutually agreed price, which was the transaction value with respect to sale to OMC in the normal course of their business, and no additional consideration, whatsoever, flows from the OMC to Mahanagar Gas Ltd. Further, by virtue of its technical necessity, supply of CNG could have been done in the manner in which it has been done by Mahanagar Gas Ltd, as natural gas by the process of compression amounts to manufacture, for the purpose of marketing as CNG for use as fuel, which had been done at the time of dispensing. It was further held that the transaction value squarely falls under the provisions of Sec 4(1)(a) of the Act. The Tribunal also held that Assessee can have different transaction value with respect to different transactions with different parties. The said ruling was challenged by the Revenue before the Apex Court in Civil Appeal Diary No. 21486/2017. The said Appeal stood dismissed by Order dt.02.02.2018.

13. Learned Counsel also relies on the ruling of Coordinate Bench in the case of Adani Gas Ltd vs CC, Ahmedabad being Final Order No.A/10685/2019 dt.16.04.2019. Under similar facts and circumstances, CNG was being sold by Adani Gas Ltd to OMC on payment of duty and VAT and discharged duty on the sale price to retail customers/outlets. The OMC in turn sold the CNG to retail customers on payment of VAT on their sale price. Since the sale price has to be kept uniform or regular at all sale outlets, Adani Gas Ltd granted trade margin/commission to the OMC to cover their expenses and profit margin. The Coordinate Bench at Ahmedabad had relied on the ruling of Mahanagar Gas Ltd (supra) and have been pleased to set aside the demand and allow the Appeal under similar facts and circumstances. Accordingly, learned Counsel prays for allowing their Appeal with consequential benefits.

14. Opposing the Appeal, learned AR for Revenue relies on the Impugned Order. He further refers to the facts that Appellant sells CNG to HPCL and

thereafter, HPCL sells the same to retail customers at the administered price. HPCL agreed with the Appellant to set up CNG dispensing facility in their retail outlets. Such RSP is fixed by the Appellant at which HPCL is to sell to the retail customers. Thus, it is Appellant which is selling CNG to the retail customers through HPCL, as the sale price is being determined by the Appellant and not HPCL. It is further urged that CNG price is neither governed by 'Administered Price Mechanism' as prevalent to petroleum products before 01.04.2002 nor CNG is governed by Legal Metrology Act, for fixation of RSP. Further HPCL is not free to sell at any price it chooses and they are entitled to fixed commission as agreed between the parties. Even the electricity charges incurred for installing equipment and accessories thereto required for filling of CNG in vehicles is borne by the Appellant. If the Appellant is selling CNG to HPCL, then why the cost for electricity incurred for retail selling of CNG to ultimate customer are borne or reimbursed by the Appellant. Accordingly, he prays for dismissing the Appeal and upholding the Impugned Order.

15. Having considered the rival contentions, we find that the issue herein is no longer res integra and the same is squarely covered in favour of the Appellant by the ruling of the Coordinate Bench in the case of Mahanagar Gas Ltd (supra). This judgment has been further upheld by the Apex Court. We further hold that the Court below has erred in drawing adverse inferences as the word 'commission' has been used instead of the word 'profit-margin'. Further, no adverse inferences can be drawn as the RSP is fixed by the Appellant, which is a PSU and CNG being a sensitive product touching the life of common man, in various aspects. In view of our findings and observations, we allow the Appeal and set aside the Impugned Order. Appellant shall be entitled to consequential benefits, in accordance with law.

(Pronounced in the Open Court on 29.11.2023)

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

(A.K. JYOTISHI)
MEMBER (TECHNICAL)

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