IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, EASTERN ZONAL BENCH: KOLKATA

Ex.Appeal No.263/08

(Arising out of Order-in-Appeal No.03-04/Kol.VII/08 dated 15.02.2008 passed by the Commissioner of Central Excise (Appeals), Kolkata)

M/s H.P.C.L.

Applicant (s)/Appellant (s)

Vs.

CCEx, Kolkata VII

Respondent (s)

Appearance:

Shri Sachin Dangaich, Sr.Manager (Tax), for the Appellant (s)
Shri A. Roy, Supdt. (AR) for the Revenue

CORAM:

HON'BLE SHRI V. PADMANABHAN, MEMBER (TECHNICAL)
HON'BLE SHRI S. K. PATI, MEMBER (JUDICIAL)

Date of Hearing : 04.10.2018
Date of Decision : 04.10.2018

ORDER NO…FO/A/76725/2018

Per Shri V.Padmanabhan :

The present appeal is filed against the Order-in-Appeal No.03-04/Kol.VII/08 dated 15.02.2008.

2. The appellant is engaged in the manufacture of lubricating oil. For this purpose, they received Lube Base Oil (LBO) from Indian Oil Refinery, Haldia as well as HPCL Refinery, Mumbai. Such LBO was received without payment of duty at the bonded warehouse of HPCL, Budge Budge Terminal (Appellant) for the purpose of manufacturing lubricating oil. The appellant discharged Central Excise duty at the transfer price fixed for transfer of such LBO from the Refinery to the

appellant. The period of dispute is from October, 1996 to March, 2000. Revenue authorities were of the view that the appellant was required to pay duty on LBO at the time of drawing the same for manufacture by including the amount of freight for transfer of the LBO from the Refinery to the appellant's storage tank. Accordingly, show-cause notice dated 27.02.2001 was issued to the appellant. The original adjudicating authority decided the issue by upholding the demand, but restricted the same within the normal time limit. When the order of the original authority was challenged before the Commissioner (Appeals) by the Revenue, the impugned order was passed in which he upheld the demand for the amount raised in the show-cause notice. The present appeal challenges the impugned order.

3. Shri Sachin Dangaich, the ld.Sr.Manager (Tax) is present on behalf of the appellant and Shri A.Roy, ld.D.R. is present on behalf of the Revenue.

4. The ld.Representative of the appellant, submitted as follows :

(i) Transfer Price for LBO from the Refinery was fixed by Oil Coordinating Committee (OCC), a wing of Ministry of Petroleum and Natural Gas, after dismantling of the administered price mechanism in 1998. Such prices have been adopted for transfer of LBO from the Refinery and duty stands paid adopting such prices ;

(ii) He submitted that the transfer price from the Refinery to Bonded Warehouse is inclusive of freight element from the Refinery to the assessee's factory. To support his contention, he refers to a Draft Comment on transfer price, approved by the Additional Secretary in reply to Audit Para raised by CAG to the effect that the Transfer Price from the Refinery to Bonded Warehouse is inclusive of freight element.

(iii) He also relies on the Hon'ble Supreme Court's decision dt. 17.05.2007, wherein the Hon'ble Apex Court dismissed the Civil Appeal No.D8638 of 2007 filed by Commissioner of Central Excise, Mangalore against CESTAT Order reported in 2007 (207) ELT 605 (Tri.Bang.) in the case of Hindustan Petroleum Corporation Ltd. Vs. Commissioner ;

(iv) He also submitted that even if the freight element is included, the differential Excise duty, which would become payable, would be available as modvat credit to the appellant at the time of clearing the final product i.e. lubricating oil.

(v) Finally, he submits that the impugned order may kindly be set aside and the appeal filed by the appellant be allowed with consequential benefit.

5. The ld.D.R. for Revenue, submitted that the impugned order merits to be upheld. He submits that LBO has been transported from the Refinery of the appellant and hence, the duty is required to be paid at the storage tank by including freight element.

6. Heard both sides and perused the records.

7. The appellant has procured LBO from the Refinery situated at Haldia as well as at Mumbai. LBO was cleared from Refinery without payment of duty and have been warehoused in the tank of the appellant. Central Excise duty has been paid by the appellant on LBO drawn for manufacture of Lube. The dispute is in respect of the valuation to be adopted for payment of such duty. The duty has been

paid by the appellant at the Refinery Transfer Price, which has been fixed by the Ministry of Petroleum and Natural Gas, for use in such transfer from one refinery to another. The Revenue's view is that the duty is required to be paid on such transfer price after addition of the freight element upto the storage tank of the appellant. Against such a view, the appellant's main contention is that refinery transfer price is inclusive of the equalized freight element from the refinery to the assessee's factory. To support this contention, the ld.Representative of the appellant, only a copy of the Note vide F.No.232/244/93.CX issued by Department of Revenue, Ministry of Finance approved by the Additional Secretary, in response to Audit Para raised by CAG on identical grounds, has been produced as documentary evidence. But it is noted that the period covered in CAG objection, is earlier in the present dispute when the Administered Price Mechanism was in place. For the period of dispute, there is nothing on record to support the claim that the freight element is already included in such transfer price.

8. LBO is moved from warehouse to the storage tank of the appellant without payment of duty. Duty is to be paid at the time of its removal from the storage tank. Since transportation charges for bringing the goods to the storage tank, is an element of value accrued prior to such removal, it is required to be included. Such view has been taken by both the authorities below and we find no reason to interfere with the same..

9. The original authority has also allowed the benefit of time bar, which has been reversed by the Commissioner (Appeals). The practice

of transporting non-duty paid LBO from the refinery to the storage tank of the appellant has been used for several years and the same is very much within the knowledge of the Department. It cannot be said that non-inclusion of freight element for payment of duty is on account of any malafide intention on the part of the appellants. Hence, we find no justification to extend the demand of duty beyond the normal time limit.

10. In the result, the impugned order is modified and the order passed by the original authority is restored.

11. Appeal is partly allowed.

(Dictated and pronounced in the open court.)

Sd/	Sd/
(S.K.Pati)	**(V.Padmanabhan)**
Member (Judicial)	**Member (Technical)**

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