IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

EASTERN ZONAL BENCH: KOLKATA

Excise Appeal No.71447/2013

(Arising out of Order-in-Original No. CCE/Shillong No-02/2013 dated 13.09.2013 passed by the Commissioner of Central Excise, Shillong)

M/s. Numaligarh Refinery Ltd.

Applicant (s)/Appellant (s)

Vs.

Commr. of Central Excise, Shillong

Respondent (s)

Appearance:

Shri Arvind Baheti, C.A. for the Appellant (s)

Shri S. S. Chattopadhyay, Supdt.(AR) for the Respondent (s)

CORAM:

SHRI P.K. CHOUDHARY, HON'BLE JUDICIAL MEMBER
SHRI V. PADMANABHAN, HON'BLE TECHNICAL MEMBER

Date of Hearing/Decision :- 01.03.2019

ORDER NO: FO/75272/2019

PER SHRI V. PADMANABHAN

The present appeal is directed against Order-in-Original No. CCE/Shillong No.02/2013 dated-13.09.2013 passed by the Commissioner of Central Excise, Shillong. The appellant is a public sector undertaking engaged in refining and marketing of petroleum products falling under Chapter 27 of the schedule to the Central Excise Tariff Act, 1985. The refinery is situated at Golaghat, Assam. The present dispute has arisen for the period June, 2009 to January, 2013. The appellant transported petroleum products viz. Motor spirit (MS), High Speed Diesel (HSD) as well as Superior Kerosene Oil (SKO) by means of the pipeline to Silliguri, West Bengal. For transport of these petroleum products over the distance of 660 kms., the appellant made use of pipeline of M/s. Oil India Ltd. To avoid inter mixing of the petroleum products while transporting through pipeline, the appellant used SKO to act as a product plug between MS and HSD. During this process , some inter mixing happens between MS, HSD and SKO. The resultant product received at the other end of the pipeline is a mixture of MS or HSD with SKO. Such product is sold, depending upon the quality of the product as MS or HSD.

2. After the withdrawal of the warehousing facility, for petroleum products vide Notification No. 17/2004-CE (NT) dated-4/9/2004, the appellant was required to pay the Central Excise Duty at the time of clearance of such products from the refinery. Since the sale of petroleum products took place from the depot situated at the other end of the pipeline, the appellant adopted such depot prices for payment of duty at the refinery as per the provisions of Section 4 (1) (b) of the Central Excise Act, read with Rule 7 of the Central Excise Valuation Rules.

3. The dispute arose with the Department, since the quantity of SKO cleared from the refinery was not fully accounted for at the other end of the pipeline. A part of the SKO was lost in the inter-mixing with MS/HSD. This resulted in reduced quantum of SKO at the other end of the pipeline and consequent increase in the quantum of MS/HSD, which was ultimately

sold through the depots. For the quantum of SKO, not accounted for at the other end of the pipeline, the appellant paid differential duty as applicable to the industrial SKO, without the benefit of exemption available for SKO (PDS). The Department's contention was that the appellant was required to pay duty on the quantum of SKO not accounted at the higher of the rates applicable to SKO or MS/HSD. For such stand of the Department, the CBEC Circular No. 636/27/2002-CX dated 22/4/2002 issued in F. No. 261/27/5/2002-CX-8 was cited.

4. The Show Cause Notice dated 28th of March, 2013, issued to the appellant, was finalised by the adjudicating authority by issue of the impugned order in which he confirmed the demand for Central Excise duty as proposed in the show cause notice on the basis of the CBEC Circular dated 22/4/2002. Aggrieved by the said decision, the present appeal has been filed.

5. The appellant is represented by Shri Arvind Baheti, Ld. C.A and Revenue is represented by Shri S.S. Chattopadhyay , Ld. D.R.

6. Ld. C.A. submitted that the demand made in the show cause notice is not sustainable for the following reasons:

After the withdrawal of the warehousing facility in September, 2004, the refineries were required to discharge Central Excise duty on the petroleum products at the time of their clearance from the refinery by payment of duty at prices prevalent contemporaneously at the depots. The appellant has discharged such duty on the above basis. In respect of the SKO, lost in the process of inter-mixing, he submitted that the duty is liable to be paid only as SKO- the form in which it was cleared from the refinery. He referred to the Rules 4 and 5 of the Central Excise Rules, 2002 to support his argument that the duty is required to be paid at the rate and value prevalent at the time of removal. He further submitted that since SKO

(PDS) has got inter-mixed during the transportation by pipeline, the appellant fairly adopted the value of SKO (Industrial) for the quantity lost and paid the Central Excise Duty without availing the exemption for SKO (PDS). He submitted that the reliance placed by the adjudicating authority on the CBEC circular dated 22/04/2002 is misplaced since the circular was issued prior to withdrawal of warehousing provisions on 6/9/2004. He also relied on the recent decision of the Ahmedabad Bench of the Tribunal in the case of IOCL Vs. Commr. of Central Excise, Vadodara by final order No. A/11838-11841/2018 dated 31/08/2018 in which the identical dispute was decided by the Bench. The Tribunal held that the circular dated 22/04/2002 was not applicable and duty is not payable as per the circular. Finally, the appeal of IOCL was allowed by the Tribunal.

7. He submitted that the said decision is applicable to the present facts of the case and the differential duty demanded by the adjudicating authority will be liable to be set aside.

8. The Ld. Authorised representative supported the impugned order. He raised the following arguments :

> *The SKO which has got inter mixed with MS/HSD has been received at the other end of the pipeline into the tanks wherein MS/HSD are stored. In view of this fact, a portion of the SKO lost in inter-mixing, has been sold at the price as applicable to MS/HSD from the depot. In view of this fact, in terms of Section 4 (1)(b) of the Act read with Rule 7 of the Central Excise Valuation Rules, the appellant should have discharged duty on the prices at which MS/HSD has been cleared from the depot. He also submitted that this issue view has been clearly clarified by the Board in the Circular No. 796/29/2004-CX dated*

4/9/2004 issued at the time of withdrawal of the warehousing facility for removal of petroleum products.

*He also submitted that the case law cited by the Ld. C.A. is distinguishable in the facts of the present case in as much as the decision of the adjudicating authority is not solely based on the circular dated 22/04/2*002.

9. We have heard both sides and examined the record of the case.

10. The dispute in the present case is arising in respect of SKO (PDS) which after its clearance from the refinery, got inter mixed with MS/HSD during the process of transportation through the pipeline. Such SKO (PDS) has been used as a buffer between transportation of MS and HSD. The portion of SKO which has got inter mixed has been accounted as MS or HSD at the other end of the pipeline, depending upon its character. In the result, the portion of SKO which got inter-mixed is no longer available as SKO. This resulted in increase in the quantum of MS/HSD accounted at the other end. While there is no dispute regarding the payment of duty in the increased quantity of MS/HSD, the Department was of the view that the quantum of SKO not accounted as such at the other end, is liable to be charged to duty on the prices at which the same has been sold as MS or as HSD.

11. The appellant's contention on the other hand is that goods are required to be charged to duty at the time of clearance from the refinery, in the form in which it is cleared. Hence, it has been argued that even though a portion of inter mixed SKO and ultimately cleared as MS/HSD, such goods have been cleared from the factory as SKO and as such will be liable to duty only as SKO and not as MS/HSD. Of course, SKO not cleared for PDS will not be entitled to the benefit of exemption.

12. The related question is whether the process of mixing SKO with MS/HSD is a process of 'manufacture', resulting in SKO getting transformed into MS/HSD. In this regard, we note that this question has not been raised before the lower authority and we find no discussion of this either in the show cause notice or in the impugned order.

13. We have carefully considered the decision of the Ahmedabad Bench of the Tribunal in the case of IOCL (Supra). We find that the Tribunal has decided a case involving the very same dispute which is before us. Further, the dispute relates to the period after the withdrawal of the warehousing facility. As such, we consider it as precedent for the present dispute. The observations of the Tribunal in that case are reproduced below:

> *"4. We have carefully considered the submissions made by both the sides and perused the record. We find that the fact is not in dispute that while clearing the goods, the appellant have cleared from the factory quantities of MS, HSD and SKO separately. Since all the three goods are supplied through a pipeline, the SKO get mixed with either MS or HSD. As per the provisions of Section 4, the excise duty is payable on the transaction value at the time of removal of the goods from the factory. In the present case, the goods cleared from the factory is MS/HSD and SKO. Accordingly, the duty on these products is payable as per price of the respective product prevailing at the time of removal of the goods. As regards MS and HSD, the duty was paid on the transaction value. As regards SKO, since the same was not sold, the duty was paid on the prevailing price of SKO on the basis of sale price prevailing for SKO naturally which is higher than the price of SKO sold under Public Distribution System, therefore, the correct price was adopted by the appellant while clearing the interface quantity of SKO. The sole reliance of the Adjudicating Authority is on the Board Circular dated 22.02.2002, which is reproduced below:-*
>
> ***"Petroleum products movement through pipeline — Rate of duty on intermixed quantity — Clarifications***
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> ***Circular No. 636/27/2002-CX., Dated 22-4-2002***

F. No. 261/27/5/2002-CX-8
Government of India
Ministry of Finance (Department of Revenue)
Central Board of Excise & Customs, New Delhi

Subject : Movement of petroleum products through pipeline — Determination of duty on interface quantity.

The problem of accountal of petroleum products resulting from intermingling of different products pumped through pipelines has been engaging the attention of the Board for quite some time. In a recent case, one of the oil companies has represented against the differential duty demanded by the Department on account of shortage of Superior Kerosene Oil (SKO) imported under concessional rate of duty. It has been contented that the movement of petroleum products through pipelines is carried out by product to product method of pumping and in such an event, co-mingling of one product with another is inevitable. The case of the oil company is that shortage of SKO imported under concessional rate of duty is accounted for in terms of the interface quantity i.e. the gain in Motor Spirit (MS)/High Speed Diesel (HSD) and the duty paid by them on this interface quantity is more than the duty foregone on SKO on account of concessional rate of duty. Therefore, as per the assessee, the question of additional duty liability does not arise.

The Board has examined the issue from the twin objectives 2. of safeguarding revenue as well as avoiding unnecessary litigation. The existing instructions vide Board's letter F. No. 21/13/66-CX. III, dated 20-3-67 and F. No. 11A/9/70-CX.9, dated 27-3-1973 accept the off-setting of gain observed in one product against loss observed in another product. Though in the scheme of accountal of one product for the other, the duty payable on the interface SKO (co-mingled products) taken as MS or HSD is presently more than the duty liability on the shortage of imported SKO, however, the situation can be reverse also. Furthermore, it is a fact that the SKO imported under concessional duty is not fully utilised for the intended purpose and in such case, the concessional duty cannot be extended. The Board is therefore, of the view that in the event of inter mixing of the products, the higher of the two duties i.e. duty payable on SKO not used for intended purpose and duty payable on surge/gain in MS or HSD shall be payable for the intermixed/interface quantity. In other words, the duty of inter mixed part of SKO and MS/HSD as the case may be, may be quantified and higher of the two values may be accepted. The existing instructions on the subject stand modified to the above extent. **"**

On careful reading of the above Circular, we find that the Circular suggests that even on clearance of SKO, the price of HSD/MS should be applied. However, this proposal of the Board Circular does not flow from any statutory provision. As discussed above, the appellant have correctly applied the price of respective goods cleared from the factory at the time of removal. Therefore, we do not find any support of any statutory provisions in the Board Circular. The Hon'ble Supreme Court time and again held that the board Circular cannot vitiate the law or the Board Circular cannot be issued contrary to the statutory provisions. We refer some of the judgments on this issue:-

2008 (229) ELT 641 (SC) – Sindur Micro Circuits Limited vs. CCE Belgaum
2009 (235) ELT 385 (SC) – Atul Commodities Pvt. Limited vs. CC, Cochin
2003 (156) ELT 819 (Bom) – Narendra Udeshi vs. UOI

2015 (326) ELT 26 (SC) – DGFT vs. Kanak Exports

4. In view of the above judgments, it is clear that the Board can only clarify the existing law but cannot create law by itself. Therefore, the above Board Circular dated 22.04.2002 having without support of any Act or Rule, is not binding on the assessee.

5. As regards the issue that after removal of goods, intermixing of SKO with MS/HSD amounts to manufacture, we find that there is no charge in the show cause notice that the activity of supplying HSD/MS with interface SKO amounts to manufacture. Therefore, on this point, the adjudication order travelled beyond the scope of show cause notice which is not permissible in the law. The adjudicating authority has relied upon clause (iii) of Section 2(f) for holding that activity amounts to manufacture, which reads as under:-

***“** 2(f) "**manufactur**e" includes any process,-*

i. incidental or ancillary to the completion of a manufactured product; ii. which is specified in relation to any goods in the Section or Chapter notes of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as amounting to manufacture; or

*iii. which, in relation to the goods specified in Third Schedule involves packing or re-packing of such goods in a unit container or labeling or re-labeling of containers including the declaration or alteration of retail sale price on it **or adoption of any other treatment on the goods to render the product marketable to the consumer**;**”***

From the reading of the above clause, it is clear that the activity specified in the said clause (iii) will amount to manufacture only in respect of the goods specified under Third schedule. It is undisputed that the products of the appellant are not specified under third schedule, therefore, whatever activity mentioned in clause (iii) shall not apply to the goods which are not specified in Third schedule. For this reason, intermixing of SKO with HSD/MS does not amount to manufacture.

6. As per our above discussion, the differential duty demand raised on interface quantity of SKO is clearly not sustainable. Hence, the impugned orders are set-aside and the appeals are allowed. "

Thus the Tribunal as above held that the differential duty demand raised on inter-mixed quantity of SKO is not sustainable.

14. We also wish to refer to the decision of the Larger Bench of the Tribunal in the case of Jyoti Sales Corpn. Vs. Commissioner of Central Excise, Panchkula reported in 2016 (341) ELT 328 (Tribunal-LB). In this decision it was held that an item is required to be assessed in the form the same is cleared from the manufacturer's factory and not on the basis of its future use, after clearance , unless it is the requirement of entry.

15. By following the above decisions, we set aside the impugned order and allow the appeal.

(Dictated and pronounced in the open court.)

P.K. CHOUDHARY	V. PADMANABHAN
(JUDICIAL MEMBER)	(TECHNICAL MEMBER)

k.b/-