CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

WEST ZONAL BENCH, MUMBAI

Excise Appeal No. 152 of 2011

(Arising out of Order-in-Appeal No. YDB/906/M-II/2010 dated 22.12.2010 passed by the Commissioner of Central Excise (Appeals)-II, Mumbai.)

M/s Hindustan Petroleum Corporation Ltd. ....Appellant
Refinery Division, B.D. Patil Marg,
Mahul, Mumbai – 400 074

VERSUS

Commissioner of Central Excise, Mumbai ....Respondent
9th Floor, Piramal Chambers,
Jijibhoy Lane, Lalbaug,
Parel, Mumbai – 400 012

APPERANCE:

Shri Chandra Nair, Advocate for the Appellant
Shri Sanjay Hasija, Supdt. Authorised Representative for the Respondent

CORAM:

HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO. A/85811/2019

Date of Hearing: 18.12.2018
Date of Decision: 02.05.2019

Appellant challenged the duty demand made and confirmed on differential quantity of production as shown in ER1 returns and annual accounts statement for the financial year 2004-05 on the ground of clandestine clearance in this appeal.

2. Brief facts of the appellant's case is that it is a Public Sector undertaking engaged in manufacture and marketing of various petroleum products including LPG. During the audit conducted by the respondent-department it was observed that there was mismatch between production figure of LPG shown in ER1 returns and financial report for the financial year 2004-05. Appellant was put to show-cause notice proposing duty demand of Rs. 23,82,576/- vide show-cause notice dated 31.03.2009 along with interest and equivalent penalty. The matter was adjudicated whereby said demand etc. were confirmed. Appeal preferred by the appellant before the Commissioner of Central Excise (Appeals)-II, Mumbai, yielded no fruitful result. Hence the appeal before this forum.

3. In the memo of appeal and during the course of hearing of appeal, learned Counsel for the appellant Shri Chandra Nair submitted that all-along starting from explanation given to audit party till hearing of appeal by the Commissioner (Appeals), it was explained by the appellant that such production figures shown in the annual report was in the higher side due to the fact that quantum of LPG reprocessing for quality outcome was not taken into consideration besides the fact that some amount of LPG was captively consumed for extraction of propane used as fuel in order to run boilers and taking those into account net difference would come to a negligible quantity of -0.225 TMT which could be due to evaporation/wastage etc. Placing reliance on the case laws reported in *2001 (130) ELT 228 (T), 2011 (270) ELT 168 (Pat), 2016 (342)*

ELT A-226 (SC), he submitted that difference in the figures of production shown in ER1 returns and financial report cannot be a ground to alleged suppression of production and clandestine removal, unless evidence is brought on record to prove beyond doubt that actual clandestine removal of goods had taken place and in so doing, evidence like purchase of raw materials, use of extra electricity, sale of final products, transportation of clandestinely removed goods, realization of sales proceeds, mode of flow back of funds etc. are to be established. He further place his reliance on these three case laws to support his contention namely *Continental Cement Company – 2014 (309) ELT 411 (All), Triveni Engg. & Industries – 2016 334 ELT 595 (All) & Auto Gollon Industries – 2018 (360) ELT 29 (All)*. He further argued that the entire case is based on assumption and presumption and it is a settled principle of law that suspicion howsoever grave cannot take the place of proof. He relied upon the case laws reported in *1978 ELT J-172 (SC), 2005 (188) ELT 470 (SC), 2009 (245) ELT 695 (T), 2017 (358) ELT 389 (T)* and earnestly urged to set aside the order passed by the Commissioner (Appeals) as appellant being a Public Sector Undertaking had no deliberate intention to evade duty.

4. Learned AR for the respondent-department Shri Sanjay Hasija, Superintendent, in response to such submissions, supported the reasoning and rationality of the order passed by the Commissioner (Appeals) and referring judgments reported in 2013 (287) ELT 102 (Tri.-Mumbai) & 2015 (37) STR 754 (Tri.-Ahmd.). He argued that

only inputs use in relation to manufacture of final product is to be taken into consideration and if short levy is detected during audit, suppression is presumed to have been established for which extended period is invokable and therefore the order passed by the Commissioner (Appeals) needs no interference by the Tribunal.

5. Heard from both sides at length and perused the case records. Admittedly appellant is a Public Sector Company engaged in the manufacture of LPG and it claims that the difference of production shown in two different statements was due to non-taking of captive use of LPG into account as well as segregating reprocessing of certain quantity of LPG which were not up to the standard maintained for such production. Respondent-department was appraised of those facts but it had not taken the same into consideration. Appellant had filed reconciliation statement duly certified by Chartered Accountant during hearing of the appeal to establish that there was substance in the statement of the appellant concerning captive consumption and reprocessing of LPG and the same is taken on record, though without a formal order.

6. Show-cause notice does not reveal offering of any such explanation by the appellant but as reveals from Order-in-Original given at para 20, production figures given in ER1 return was taken whereas in the removal column, three type of figures are shown including removal of reprocessed quantity and there is a reference in the same paragraph that quantity reprocessed is accounted

separately in ER1 return. The adjudicating authority further observed that such subtraction of quantity for reprocessing from manufactured quantity was only to tally the same with two financial records. At para 24 of Order-in-Original, it has been referred by the adjudicating authority that 5.080 TMT of LPG was stated by the appellant to have been captively consumed but he disbelieved the same due to non-maintenance of proper records for which he hold a finding that clandestine removal had taken place and the same is not required to be proved (by any other means). This being the factual aspect and the basis of Order-in-Original which finds its approval in the Order-in-Appeal, I find no reason to concurred with such finding when judicial decisions as referred above and the mode of proving clandestine removal as contend in para 3 above are contrary to such findings and law requires that clandestine removal is to be proved beyond all reasonable doubts. Hence the orders.

ORDER

7. The appeal is allowed and the order passed by the Commissioner of Central Excise (Appeals)-II, Mumba vide Order-in-Appeal No. YDB/906/M-II/2010 dated 22.12.2010 is hereby set aside.

(Order pronounced in the open court on 02.05.2019)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

Prasad