

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI**

REGIONAL BENCH - COURT NO. I

Excise Appeal No. 85784 of 2014

(Arising out of Order-in-Original No. Belapur/113-114/BEL-I/R-II/Commr./KA/2013-14 dated 29.11.2013 passed by the Commissioner of Central Excise, Belapur, Navi Mumbai)

**M/sHindustan Petroleum Corporation Ltd. Appellant
Vashi Terminal**

D-99, TTC Industrial Area,
MIDC, Turbhe, Navi Mumbai

Versus

Commissioner of Central Excise, Belapur.... Respondent

CGO Complex, 1st Floor, CBD Belapur,
Navi Mumbai - 400614

Appearance:

Shri M.H. Patil, Advocate for the Appellant

Shri R.K. Dwivedi, ADC, Auth Representative for the Respondent

CORAM:

**HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)**

FINAL ORDER NO. A/85696 / 2020

Date of Hearing: 06.02.2020

Date of Decision: 31.08.2020

Per: Dr. D.M. Misra

This is an appeal filed against Order-in-Original No. Belapur/113-114/BEL-I/R-II/Commr./KA/2013-14 dated 29.11.2013 passed by the Commissioner of Central Excise, Belapur, Navi Mumbai.

2. Briefly stated the facts of the case are that the appellant was registered with Central Excise Department for clearance of petroleum product namely, Motor Spirit, High Speed Diesel and SKO falling under Chapter 27 of Central Excise Tariff Act, 1985. They receive these goods through pipeline from Mumbai Refineries at their Vashi depots and clear the same to customers. They cleared Ethanol Blended Petrol (EBP) (Gasohol) consisting of by volume 95% Motor Spirit commonly known as petrol and 5% ethanol. The EBP was cleared at concessional rate of duty as per Notification No. 28/2002 dated 13.5.2002 amended by Notification No. 16/2003 dated 1.3.2003 read with Notification No. 14/2003 and Notification No. 15/2003, further amended by Notification No. 12/2004 dated 4.2.2004. Alleging that the appellant had not complied with the condition of said notifications inasmuch as the EBP did not satisfy the Bureau of Indian Standard's (BIS) specification 2796:2000, two SCNs were issued to them for the period April,2003 to June, 2004 demanding total duty of Rs.13,37,17,740/-. Also demand notice was issued for recovery of the said amount under Section 11D of Central Excise Act, 1944 alleging that though the duty was collected from the customers but not deposited with the Govt.. On adjudication, the demands have been confirmed with interest and penalty. Aggrieved by the said order, the appellant filed an appeal before this Tribunal. The Tribunal by its order dated 07.5.2013 remanded the matter to the adjudicating authority for *de novo* adjudication after taking into consideration the test reports submitted by the appellant to establish the product cleared by them conforms the (BIS) specification 2796:2000. In

the remand proceeding, the adjudicating authority confirmed the demand with interest and imposed penalty of Rs.1.00 crore on the appellant. Hence, the present appeal.

3. Learned Advocate Shri M.H. Patil for the appellant has submitted that the appellants have Refinery at various places including Mumbai and a Terminal at Vashi, Navi Mumbai. The Vashi Terminal during the relevant period received petroleum products manufactured in their Mumbai Refinery, under Bond till withdrawal of warehousing facility w.e.f.06.9.2004. A common product marketed by the appellant is Motor Spirit (MS), commonly known as Petrol, also known as Gasoline. With a view to promote eco-friendly fuel and to provide commercial value addition to the agricultural sector, the Central Govt. by Notification No.644 dated 12.9.2002 directed all Oil Marketing Companies to market Petrol blended with 5% Ethanol. The Ethanol Blended Petrol is also known as "Gasohol". It was also made mandatory to sell only EBP/Gasohol in the State of Maharashtra. Consequent to the direction of the marketing of EBP, notifications issued by the Central Government allowing full and partial exemption from various duty leviable on EBP; the conditions of the issued notification are that the Motor Spirit and Ethanol used for blending must be duty paid, the blending should be in the ratio of 95% Motor Spirit and 5% Ethanol and the resultant should conform to BIS 2796:2000 specification.

3.1 He has submitted that the blending of Ethanol with Motor Spirit is a simple process. 95% MS and 5% Ethanol stored

separately are pumped into tankers/trucks simultaneously and the blending process takes place in tanker/trucks, while in transit, without the use of any mechanical or electrical appliances or devices. He has submitted that in terms of Notification Nos.28/2002-CE dated 13.5.2002; EBP was exempt from all duties (i.e. Basic Excise Duty, Special Excise Duty, Additional Duty of Excise and Special Additional Duty of Excise). When MS was cleared for blending with Ethanol, concessional rate of Rs.5.70/- litre (as against normal duty of Rs.6/- litre) was payable under the said notification.

3.2 The appellants were undertaking the process of blending duty paid MS (95%) with duty paid Ethanol (5%) to make Ethanol Blended Petrol (EBP or Gasohol) at their Vashi Terminal. They were issued with the demand notices alleging that they did not produce any certificate or letter issued by BIS to the effect that EBP manufactured and marketed by HPCL conforms to BIS-2796:2000 specification. Further, it was alleged that they had not conducted all the tests in their Vashi Terminal; hence, the clearances of EBP do not qualify for exemption under Notification No. 28/2002-CE.

3.3 It is his contention that after the remand of the proceedings by the Tribunal, they have made various submissions in support of their contention that EBP supplied by their Vashi Terminal was conforming to BIS specification 2796:2000, including evidences like test reports dated 01.6.2004 and 05.6.2004 to show that they are eligible for

exemption under the relevant notifications. Also, they have submitted that since invoices reflect the composite cum-duty price, element of central excise duty was not shown separately, therefore, provisions of Section 11D are not applicable to their case. However, the learned Commissioner without considering their submissions advanced on behalf of the Appellant confirmed the demand.

3.4 He has submitted that the learned Commissioner has ignored their submission that generally the petroleum products are hazardous in nature; the same are manufactured and marketed under stringent quality control and safety specifications stipulated by the Ministry of Petroleum and other Departments. The EBP cleared from the Vashi Terminal comprises of 95% MS and 5% Ethanol is nothing but MS and the process of blending cannot be said to resulted into manufacture. He has submitted that before marketing any products, all Oil Marketing Companies, including HPCL, carry out necessary quality and safety tests and ensure that the same conforms to the required quality standards. Thus, EBP manufactured by HPCL was also tested to ascertain its quality standards and it was found in their case that EBP conforms to BIS specifications 2796:2000. Such tests were conducted on Gasohol/EBP, vide Test certificates dated 1.6.2004, 5.6.2004 and the same was proved to be in conformity with BIS specifications 2796:2000. He has submitted that since there was no complicated manufacturing process for blending of Ethanol with Motor Spirit, as it is a simple process of mixing at the time of loading into

tanker/truck, Vashi Terminal did not maintain all the testing facilities, however, the important parameters necessary to ascertain the quality has been available at Vashi Terminal. It is his contention that Vashi Terminal had conducted 9 out of 15 crucial tests, which were sufficient to conform and comply with the BIS specifications. He has pleaded that Revenue did not bring in any independent contrary evidence to substantiate the allegation that EBP cleared from Vashi Terminal did not conform the BIS specifications. He has submitted that HPCL is manufacturing and marketing EBP conforming to very same specifications throughout Maharashtra and such an objection was not raised in any other Commissionerate. It is his contention that when Department has not drawn the samples and got the disputed products tested separately, the test report of HPCL, a PSU ought to have been accepted, especially when it is a Government of India Enterprise and are subject to various quality control and safety audits as per their Industry Control Manual, over and above financial audit.

3.5 The Learned Advocate has further submitted that provisions of Section 11D are not applicable to the present case as HPCL have not recovered any excess amount representing as duty, since the invoices issued from Vashi Terminal indicated a composite price, which is the sale price of petrol and did not show element of duty separately. It is his contention that duty was paid considering 95% of Motor Spirit (by volume) contained in EBP, while invoices for clearance of EBP were prepared showing a composite price, without showing duty element

separately. It is his contention that this is a principle of law settled by the Tribunal in a series of cases. In support, he has referred to the judgment in the following cases :-

- (i) *Bharat Petroleum Corporation Ltd. Vs. CCE, Raipur – 2002 (144) ELT 672 (Tri-Del)*
- (ii) *Bharat Petroleum Corporation Ltd. Vs. CCE, Nagpur – 2003 (158) ELT 833 (Tri-Mum)*
- (iii) *Hindustan Petroleum Corporation Ltd. Vs. CCE, Aurangabad – 2003 (162) ELT 391 (Tri-Mum)*

4. Learned AR for the Revenue reiterates the findings of the learned Commissioner. He has submitted that since the appellant has cleared EBP without producing certificate from BIS indicating that it conforms the BIS Standard 2796:2000 as required under the Notification No. 28/2002-CE dated 13.5.2002; benefit of the said notification cannot be allowed. They were required to pay standard rate of duty. Further, he has submitted that the appellant had paid less duty @ Rs.0.40 per liter on the clearance of the EBP during the relevant period; however, they have recovered the short paid duty from their customers. Hence, the amount collected but not deposited with the Govt. has been rightly confirmed by the Commissioner for recovery under Section 11D of the Central Excise Act, 1944.

5. Heard both sides and perused the records.

6. The issues involved for determination are:-

- (i) Whether the appellants are entitled to exemption under Notification No. 28/2002-CE as amended as other notification for clearance of EBP from their Vashi Terminal.

(ii) Whether the appellants are required to deposit duty under Section 11D of the Central Excise Act, 1944.

7. The undisputed facts are that the appellants during the relevant period received duty paid Motor Spirit from their Refinery and also received duty paid Ethanol at their Vashi Terminal. The MS and Ethanol are stored separately in different storage tanks at their Vashi Terminal. For clearance of EBP(Ethanol Blended Petrol) they pumped MS as well as Ethanol simultaneously in the ratio of 95% and 5% respectively by volume from the storage tanks to the road tankers/trucks, which is mixed on line. The Appellant claimed partial/full exemption from various types of duties on the clearance of EBP taking shelter of various exemption Notifications issued from time to time. The relevant Notifications are reproduced as below:

Notification No. 6/2002-CE dated 1.3.2002 reads as under: -

Exemption and effective Rates of basic excise duty for specified goods of Chapters 9 to 96

In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944 (1 of 1944), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts excisable goods of the description specified in column (3) of the Table below or specified in column (3) of the said Table read with the concerned List appended hereto, as the case may be, and falling within the Chapter, heading No. or sub-heading No. of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) (hereinafter referred to as the Central Excise Tariff Act), specified in the corresponding entry in column (2) of the said Table, -

- (a) from so much of the duty of excise specified thereon under the First Schedule (hereinafter referred to as the First Schedule) to the Central Excise Tariff Act, as is in excess of the amount calculated at the rate specified in the corresponding entry in column (4) of the said Table; and
- (b) from so much of the Special duty of excise leviable thereon under the Second Schedule (hereinafter referred to as the Second Schedule) to the Central Excise Tariff Act, as is in excess of the amount calculated at the rate specified in the corresponding entry in column (5) of the said Table,

subject to the relevant conditions specified in the Annexure to this notification, and referred to in the corresponding entry in column (6) of the said Table :

Provided that nothing contained in this notification shall apply to goods falling under sub-heading No. 3605.10 against S. Nos. 65, 66, 67 and 68 of the said Table on or after the 1st day of April, 2002 :

Provided further that nothing contained in this notification shall apply to the goods specified against S. Nos. 193, 195, 199 and 200 of the said Table on or after the 1st day of March, 2005.

Explanation. - For the purposes of this notification, the rates specified in columns (4) and (5) of the said Table are ad valorem rates, unless otherwise specified :-

Table

S. No.	Chapter or heading No. or sub-heading No.	Description of goods	Rate under the First Sch- edule	Rate under the Second Sch- ed-ule	Co- ndi- tion No.
(1)	(2)	(3)	(4)	(5)	(6)
"32D	27.10	5% ethanol blended petrol that is a blend, - a) consisting, by volume, of 95% Motor spirit, (commonly known as petrol), on which the appropriate duties of excise have been paid and, of 5% ethanol on which the appropriate duties of excise have been paid, and b) conforming to Bureau of Indian Standards specification 2796.	Nil	Nil	-";

Notification No.. 28/2002-CE dated 13.5.2002 reads as under: -

Motor spirit (Petrol), High speed diesel oil — Effective rate of special additional duty —

In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944 (1 of 1944), read with sub-section (3) of section 147 of the Finance Act, 2002 (20 of 2002), and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 19/2002-Central Excise, dated the 1st March, 2002 [G.S.R. 140 (E), dated the 1st March, 2002], the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts goods falling within the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) and specified in column (2) of the Table hereto annexed, from so much of the special additional excise duty leviable thereon under sub-section (1) of section 147 of the said Finance Act, as is in excess of the amount indicated in the corresponding entry in column (3) of the said Table, namely :-

Table

S. No.	Description of goods	Rate
(1)	(2)	(3)
1.	Motor spirit, commonly known as petrol	Rupees six per litre
2.	High speed diesel oil	Nil

Notification No. 14/2003-C.E., dated 1-3-2003 reads as under: -

Petrol — Motor spirit intended for use in ethanol blended petrol — Exemption

In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944 (1 of 1944), the Central Government hereby exempts **Motor spirit (commonly known as petrol) (hereinafter referred to as said goods), falling under heading 27.10** of the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) (hereinafter referred to as said Schedules), manufactured in and cleared from an oil refinery or cleared from a registered warehouse, intended for use in ethanol blended petrol, that is, a blend,

- (a) consisting, by volume, of 95% Motor spirit, (commonly known as petrol) and of 5% ethanol; and
- (b) conforming to Bureau of Indian Standards specification 2796

from so much of the duty of excise leviable thereon under the said Schedules, as is in excess of the duty that would have been leviable on such goods under the said Schedules, if sold by the manufacturer for delivery at the time of removal of such goods or at any other time nearest to the removal of such goods, where the manufacturer and the buyer are not related and the price is the sole consideration.

2. This notification shall remain in force up to and inclusive of the 29th day of February, 2004.

Notification No. 15/2003-CE dated 1.3.2003 reads as under: -

Exemption to 5% ethanol doped petrol from additional duty of excise levied under Section 111 of the Finance (No. 2) Act, 1998 -

In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944 (1 of 1944), read with sub-section (3) of section 111 of the Finance (No. 2) Act, 1998 (21 of 1998) the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts **5% ethanol blended petrol** that is a blend ,-

- (a) consisting, by volume, of 95% Motor spirit, (commonly known as petrol), on which the appropriate duties of excise have been paid and, of 5% ethanol on which the appropriate duties of excise have been paid; and

- (b) conforming to Bureau of Indian Standards specification 2796,

from the **whole of the additional duty of excise leviable thereon.**

Explanation. - For the purposes of this exemption “appropriate duties of excise” shall mean the duties of excise leviable under the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), the additional duty of excise leviable under the Finance (No. 2) Act, 1998 (21 of 1998), and the special additional excise duty leviable under section 147 of the Finance Act, 2002 (20 of 2002), read with any relevant exemption notification for the time being in force.

2. This notification shall remain in force up to and inclusive of the 29th day of February, 2004

8. The Revenue’s main contention is that to be eligible for exemption under aforesaid Notifications, *inter alia*, it is required to show that EBP conforms the BIS 2796:2000 standards. It is their allegation that the Appellant failed to establish that the EBP cleared by them from their Vashi Terminal conforms the BIS specification.

9. The appellants, on the other hand, claimed that the tests carried out on the samples of EBP at their Vashi Terminal even though limited to nine out of fifteen tests, but indicate that the EBP conforms to the BIS 2796:2000 specification. They submitted the sample Test Reports conducted at Vashi Terminal to the department.

10. Not accepting the contention of the appellant on the ground that since the Vashi Terminal did not have the facility to conduct all the 15 tests required for BIS 2796:2000 specification, the department issued demand notice to the appellant. Subsequently, after drawing samples of EBP the appellant got the sample tested at their Refinery, which is equipped with the facility to test all the parameters, and produced two test reports

indicating that the samples conforms the BIS 2796:2000 specification.

11. In the first round of litigation, this Tribunal remanded the matter to the adjudicating authority to analyze and consider the said two test reports to examine whether the appellants are eligible to the benefit of exemption notification. In the *de novo* proceeding, the learned Commissioner though considered the certificates but did not accept the same on the ground that since it was conducted in 2004 and the demand was for the period April, 2003 to June, 2004, it is an attempt on the part of the appellant to show that it conforms BIS 2786:2000 specification which is an afterthought and lacks evidentiary value.

12. We do not find merit in the reasoning advanced by the learned Commissioner in rejecting the test reports. The appellant while clearing the EBP from their Vashi Terminal invariably conducted tests on the EBP samples to ascertain its quality and the specification of the product before clearance. Needless to mention the said product is subjected to strict control and orders issued by Central and State Government from time to time viz. Motor Spirit and High Speed Diesel(Regulation of Supply & Distribution and Prevention of Malpractices) Order,1998, where under the quality and specification of the MS to be strictly complied.

13. We find that at the Vashi Terminal where the duty paid MS and Ethanol were received, and after blending the same, EBP

emerges, the Appellant carry out tests, albeit nine out of fifteen tests, which indicated that it conforms the BIS 2796:2000 specification and the control Order, 1998; and accordingly cleared/sold to their customers like other Refineries /terminals did. Later on being disputed by the department about the correctness of the test reports of EBP at Vashi Terminal as all the tests were not carried out on the samples, they subjected the samples tested at their Refinery and produced test certificates dated 1.6.2004 and 5.6.2004, which conform BIS specification 2796:2000. Therefore, in our view the subsequent tests conducted by the department cannot be considered as an afterthought but it was carried out when the department did not accept the routine tests conducted on the product at Vashi Terminal. Also, it cannot be ignored and lost sight of the fact that the Appellant is a Public Sector Undertaking and on many occasions, in absence of facilities at Govt. Laboratories the tests conducted in such well equipped laboratories are accepted by the department for classification purposes under the Tariff Act. Thus the test reports on EBP at Vashi Terminal cannot be brushed aside unless contrary test result is produced by the Revenue. The said test results further confirmed when got tested at their equipped to test all parameters.

14. We also took note of the argument of the Learned Advocate for the Appellant that even though MS blended with Ethanol sold from other Terminals in Maharashtra, no objection was raised by the Department nor any notice was issued to other terminals proposing denial of benefit of exemption on the ground

that the EBP did not conform to BIS specification 2796:2000. No contrary submission has been advanced by Revenue. Thus, it is evident that the Appellant had complied with condition of the Exemption Notifications i.e. the EBP at Vashi Terminal conformed the BIS specification 2796:2000, hence the benefit cannot be denied to them.

15. Before analyzing the issue on applicability of Section 11D to the facts of the present case, it is necessary to reproduce the said provision, as was in force during the disputed period, which reads as below:

"Section 11D. Duties of excise collected from the buyer to be deposited with the Central Government –

(1) Notwithstanding anything to the contrary contained in any order or direction of the Appellate Tribunal or any Court or in any other provisions of this Act or the rules made thereunder, every person who is liable to pay duty under this Act or the rules made thereunder, and has collected any amount in excess of the duty assessed or determined and paid on any excisable goods under this Act or the rules made thereunder from the buyer of such goods in any manner as representing duty of excise, shall forthwith pay the amount so collected to the credit of the Central Government."

16. As stated above, the Vashi terminal receives duty paid Motor spirit from their Refinery and also duty paid ethanol, which was blended in the ratio of 95:5 at the time of clearance from the Vashi unit to the customers in tankers. The price per KL of EBP was similar to the price charged by the appellant for unblended motor spirit to the customers.

17. It is not in dispute that in the invoice the duty paid on motor spirit (EBP) is not shown separately attributable to Motor spirit and Ethanol, but the sale price of EBP was a composite

cum duty price, which is inclusive of duty. Hence, proportionate duty applicable to ethanol in the total duty, when the price charged was inclusive of duty, and the duty attributable to Ethanol is not shown and recovered separately in the invoice, cannot be recoverable under Section 11D of CEA, 1944. This Tribunal in the case of *M/s National Organic Chemical Industries Ltd. (supra)* held that the provisions of Section 11D have to be read along with other provisions and it is observed that only where any amount is collected as representing as duty of excise then only it is to be credited to the Government. In the present case, the Revenue could not show that the appellant after blending ethanol with duty paid motor spirit collected separately, mentioning the duty on ethanol in the invoices, but not paid to the Government. Therefore, Section 11D of CEA, 1944 cannot be said to have been attracted. A similar view has been expressed by this Tribunal in a series of cases including in *HPCL's case (supra)*:-

“2. The matter was argued at length by Shri A.M. Setalwad, learned Counsel for the appellants and Shri M.K. Gupta, learned Jt. C.D.R. for the Revenue. After hearing rival submissions and perusal of case records, we find that the short point is whether Section 11D is applicable in the instant case. Section 11D requires that “every person who is liable to pay duty under this Act or the rules made thereunder, and has collected any amount in excess of the duty assessed or determined and paid on any excisable goods under this Act or the rules made thereunder from the buyer of such goods in any manner as representing duty of excise, shall forthwith pay the amount so collected to the credit of the Central Government.” The main ingredients of this Section are that a person should have collected an amount (in excess of the duty assessed) in any manner as representing duty of excise from the buyer of such goods. In the instant case, we find that only a composite price under the administered pricing mechanism has been charged from the buyers under relevant invoices. We do not find any amount has been charged representing the same as duty of excise. Therefore, one of the main ingredient to attract Section 11D is lacking in this case.”

18. The learned AR for the Revenue has vehemently argued that the issue is covered by the judgment of this Tribunal in the

appellant's own case reported as *IOCL Vs. Commissioner of Customs, Vadodara – 2011 (263) ELT 698 (Tri-Ahmd)*. Analyzing the facts and the question of law involved in the said case, we find that there is no similarity between the said case and the appeal before us. In the said case, the assessee received motor spirit through pipeline without payment of duty and also received duty paid ethanol. Both of these are blended together in the ratio of 95% to 5%. In spite of the exemption notification namely, 6//2003-CE, 15/2003-CD and 16/2003-CE all dated 1.3.2003, the appellant paid duty on the entire quantity of Ethanol Blended Petroleum (EBP). They discharged duty on the said Motor spirit (EBP) @ 5700 per KL and reflected in their ER-1 returns accordingly. However, in their sales invoice the duty element was shown separately as Rs.6000/- per KL and also collected the said amount from the buyers. In these circumstances, this Tribunal held that the excess amount of duty collected from the buyers is required to be deposited with the Government under Section 11D of Central Excise Act, 1944.

19. In the result, the impugned order is set aside and appeal is allowed with consequential relief, if any, as per law.

(Pronounced in court on 31.08.2020)

(Dr. D.M. Misra)
Member (Judicial)

(P. Anjani Kumar)
Member (Technical)