CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

EXCISE APPEAL NO: 89470 & 89471 OF 2013

[Arising out of Order-in-Appeal No: SK/227 & 228/M-II/2013-14 dated 27th August 2013 passed by the Commissioner of Central Excise (Appeals) – II, Mumbai.]

Mahanagar Gas Limited
MGL House, G 33 Bandra-Kurla Complex
Bandra (E), Mumbai - 400051 … ***Appellant***

versus

Commissioner of Central Excise
Mumbai – II
Utpad Shulk Bhavan, Plot No. C-24, Sector – E
Bandra-Kurla Complex, Bandra (E), Mumbai - 400051 ***…Respondent***

APPEARANCE:

Ms Manasi Patil, Advocate for the appellant

Shri Xavier R Mascarenhas,, Superintendent (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: __85260-85261/2024

DATE OF HEARING: 07/09/2023
DATE OF DECISION: 05/03/2024

PER: C J MATHEW

Two appeals of M/s Mahanagar Gas Ltd, against common order[1]

[1] [order-in-appeal no. SK/227 & 228/M-II/2013-14 dated 27th August 2013]

of Commissioner of Central Excise (Appeals-II), Mumbai upholding demand of ₹ 4,78,788 and ₹ 88,750 under section 11A of Central Excise Act, 1944 for the period from July 2008 to November 2011 and for the period from December 2011 to June 2013, along with applicable interest under section 11AB of Central Excise Act, 1944, and imposing of penalty of like amount under section 11AC of Central Excise Act, 1944 as well as rule 25 of Central Excise Rules, 2002, are disposed off in this proceedings.

2. The issue stems from trade discount of ₹ 0.60 per kg of 'compressed natural gas (CNG)' that was contracted for supply to stations of Thane Municipal Transport (TMT) which was found to be excluded from assessable value was sought to be included as additional consideration. The appellant had entered into bulk contract for filling vehicles of the contracting agency with fuel at stations operated by them and also at depots of the transport agency. It was alleged that the 'trade discount' was, in reality, payment for space occupied by dispensers and other equipment and provision of trained staff.

3. According to Learned Counsel for appellant, there was no consideration received from the buyer of 'compressed natural gas (CNG)' while it was the amount foregone by them that is treated as recompense by the central excise authorities. It was also submitted that the issue stands squarely covered by the decision of the Tribunal in

Mahanagar Gas Ltd v. Commissioner of Central Excise, Mumbai-V [2017 (348) ELT 175 (Tri-Mumbai)]. Learned Authorized Representative reiterated the contents of the impugned order and that the decision in *Bharat Petroleum Corporation Ltd v. Commissioner of Central Excise, Nashik [2009 (242) ELT 358 (Tri-Mumbai)]* is on like lines.

4. The lower authorities seem to have been led to their respective conclusions from the presumption that

> *'9. In terms of the above provision transaction value means, the price paid or payable for the goods including the amount that the buyer is liable to pay to, or on behalf of the assessee, by reason of or in connection with the sale of the goods. In the instant case, it is the TMT which is paying all the taxes for maintaining the premises where CNG filling station is set up; it is the TMT which is paying the salaries to the trained staff deployed for filling CNG into the TMT vehicles; it is the TMT which is incurring expenditure for providing water and other facilities: TMT is incurring all this expenditure in connection with buying CNG from MGL. The cost of these facilities is nothing but additional consideration to MGL in the guise of facilities. Hence, the cost of these facilities has to be added in the price being charged by MGL. …….'*

5. We find that the contractual arrangement includes facilitation of the appellant by their customer and that it is the appellant who has foregone consideration to the extent of 'trade discount' which the lower authorities have convinced themselves to be costs of such facilitation.

In thus loading this cost to the assessable value, the original authority has failed to determine the value thereof by reference to Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 which is essential for validity in law.

6. Moreover, the issue was considered by the Tribunal in their own case on sale effected to 'oil marketing companies (OMC)' and it was held that

> *'5.2 We find that entire period covered in all the appeals is post July, 2000, governed by amended Section 4. The new Section 4 essentially seeks to accept different transaction value, which may be charged by the assessee to different customers, for assessment purposes, so long as those are based purely on commercial consideration, where buyer and the seller are not related and price is the sole consideration for sale at the time and place of delivery. Thus, it enables valuation of goods for excise purpose on the value charged as per normal commercial practices, rather than looking for a notionally determined value which existed prior to amendment of Section 4 in 2000. The Adjudicating Authority has confirmed the demand on the differential value between MGL's sales price from their own outlets and/or the outlets of PPs and the sales price of MGL to OMCs, treating the difference as the charges for the services rendered by OMCs to MGL and the Department also claims that sale is not taking place between the appellants and OMCs. We have perused the copies of Central Excise invoices issued by MGL to OMCs on daily basis for dispensing CNG from 6.00 am to 6.00 am showing the quantity supplied, assessable value, duty paid/payable, etc. We also find that there are joint tickets prepared outlet-cum-party-*

wise showing the sale period starting at 0600 hrs. on preceding day and ending at 0600 hrs. on the succeeding day and also show the quantity of CNG dispensed with opening reading, closing reading, total reading and total quantity supplied. Such joint-tickets are also signed by both parties, i.e. appellants and OMCs. Thereafter, the appellants are raising tax invoices upon OMCs on monthly basis with specific business days within which payment has to be made by OMCs and for any delay in payment, interest is also payable by OMCs. The appellants have paid VAT/sales tax on their sale of CNG to OMCs, as evidenced from the invoices. Further, sales invoices of OMCs for resale of CNG to ultimate buyers, VAT/sales tax is paid by them on their sales price. In nutshell, the appellants are paying VAT on its sales price to OMCs and OMCs are also paying VAT on their sales price to their customers. This clearly evidences that the AR's arguments that sale is not taking place between appellants and OMCs and also it is a paper transaction is incorrect and not supported by any evidence on record. It is noteworthy that this Tribunal in the case of BPCL/HPCL (supra), wherein the service tax demanded on the very same amount received by OMCs from MGL, claiming such amount as commission paid for rendering of services under Business Auxiliary Service for marketing of CNG manufactured by the appellants, has been set aside holding that the OMCs themselves are buying the goods from MGL and MGL is charging VAT/sales tax while selling the CNG to BPCL/HPCL and BPCL/HPCL are also paying VAT/sales tax on the entire value, including the so-called commission and, hence, the transaction between them is sale/purchase transaction and VAT/sales tax has been paid at both ends the same cannot be considered as service contracts.

5.3 We find that the appellants' contention that OMCs, being bulk buyers, have been given higher discount also needs to be *accepted in the absence of any allegation/substantiation of mutuality of interest between appellants and OMCs, as both are independent entities. We also find that there is a distinct difference in the transactions of the appellants with PPs, wherein MGL supply CNG through the outlets owned and operated by PPs and CNG is directly supplied by PPs to the ultimate consumers/vehicles users from their outlets for and on behalf of MGL, under the invoices/bills/cash memos of MGL and the price charged in those bills/invoices/cash memos are the retail sales price or maximum recommended price determined by MGL, from time to time. In a true sense, the customers/vehicle users at the outlets of PPs are buying CNG from MGL, through the PPs. The privity of contract is between MGL and those buyers and those sales are directly recorded in the Books of Account of MGL and not in the Books of PPs, as there is no sale and purchase of CNG by PPs and PPs act only as an agent of MGL on commission basis. The entire sales proceeds are remitted by PPs to MGL on daily basis. The contracts between MGL and PPs are that of "principal" and "agent" as the PPs are merely service providers and not buyers of CNG from MGL. Their obligation under the contracts is merely to provide assistance for supply/sale of CNG to the vehicles by MGL. For acting as an agent of MGL, PPs get specified service charges on "per kg" basis of the CNG sold by them on behalf of MGL. Since the PPs are acting as agents of MGL for supply of CNG, PPs consider their activity as Business Auxiliary Service and pay service tax on the commission received from MGL. We find that sale of CNG by the appellants to OMCs is on principal-to-principal basis, which is clear from various terms/covenants of the agreements between MGL and OMCs, i.e. retail sales price is the price at which CNG is to be sold to vehicles by the OMC as communicated by MGL to OMCs, from time-to-time; OMC shall sell CNG at the outlets situated at the site; Retail Price of*

CNG shall be fixed by MGL and the OMCs shall sell the CNG only at the retail price communicated by MGL to OMCs, from time-to-time; OMCs shall pay to MGL the retail price as reduced by profit margin/commission/discount; MGL shall, before 5th of every month, send to OMCs an invoice for the quantity of CNG sold by OMCs during the preceding month. Such invoices shall be based on the meter reading on CNG dispensers jointly taken by MGL and OMCs; OMCs shall pay to MGL the invoice value for CNG sold as stated in the invoice within ten days from the date of invoices; it is specifically stated in the agreements between OMCs and MGL that during the term of the agreements OMCs shall not hold out to be as agents of MGL and it is clearly understood that this agreement is on principal-to-principal basis and MGL shall not be liable for any of the acts of omission/commission of OMCs. We also find from record that when CNG is supplied by MGL through PPs, there is no sale between MGL and PPs, as the sale takes place between MGL and the ultimate customers/vehicle users and the PPs act as agents of MGL; that the PPs were/are issuing cash memos/invoices/bills of MGL, when they supply CNG to customers/vehicle owners; that the PPs are acting as agents of MGL, for which they get specified service charges and the PPs are paying service tax on such amount; that, in contrast, as far as OMCs are concerned, sale of CNG takes place between MGL and OMCs at OMCs outlets and OMCs issue their cash memos/bills/invoices to their customers/vehicle owners and MGL do not have any role to play in such transactions; that commission paid to PPs was Rs. 1.20/kg, Rs. 1.74/kg, Rs. 1.90/kg and Rs. 2.45/kg during different periods, whereas discount given to OMCs was Rs. 1.20/kg, Rs. 1.40/kg, Rs. 2.42/kg, Rs. 2.62/kg and Rs. 2.74/kg during different periods. From the above discussions, we are of the view that the appellants' case is squarely covered under new Section 4(1)(a) of CEA which essentially permit different

> *transaction values, unlike normal sales price existed prior to 1-7-2000, which has also been explained by C.B.E. & C., vide its Circular No. 354/81/2000-TRU, dated 30-6-2000 in Para 5.'*

7. The reliance placed by Learned Authorized Representative on the decision in re *re Bharat Petroleum Corporation Ltd* does not advance the case of Revenue inasmuch as the two transactions therein were held to be akin to barter. Here, it is alleged that money value of the facilities, treated as equivalent to 'trade discount', be added back to the transaction value. These fall under different provisions of the Rules *supra* and the lower authorities have not amplified the lack, and remedy, which was sought to be invoked.

8. Considering the above, we find that the impugned order lacks validity and must be set aside. Appeals are, thus, allowed.

(Order pronounced in the open court on 05/03/2024)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*