
(2023) 03 CESTAT CK 0024

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Excise Cross Application No. 86131, 86132 Of 2022, In Excise Appeal No. 87394, 87395 Of 2016

M/S Hindustan Petroleum Corporation Ltd

APPELLANT

Vs

Commissioner Of Central Excise, Mumbai-II

RESPONDENT

Date of Decision : 16-03-2023

Acts Referred:

Central Excise Act, 1944 — Section 5(3), 5A, 5A(5)
Customs Act, 1962 — Section 14, 25, 25(4)

Citation : (2023) 03 CESTAT CK 0024

Hon'ble Judges : Sanjiv Srivastava, Member (T); Dr. Suwendu Kumar Pati, Member, (J)

Bench : Division Bench

Advocate : Manasi Patil, Bhilegaonkar Deepak

Final Decision : Allowed

Judgement

Dr. Suwendu Kumar Pati, Member (J)

1. Denial of refund of differential duty paid post clearance of goods upon amended notification brought out enhancing rate of duty of Excise and its confirmation by the Commissioner (Appeals) vide his above referred orders is assailed in this appeal.

2. Facts of the case, in brief, is that Appellant Company is a public sector undertaking engaged in refining of Crude Petroleum products and marketing the finished products like Motor Spirit and High Speed Diesel from its Mahul refinery, Mumbai. Certain clearances were made on 12.11.2014 and 02.12.2014 during the course of the day but rates of duties were enhanced on those two dates vide Notification Nos. 22/2014-CE and 24/2014-CE respectively from its previous rate of duty applicable since 17.03.2012 as per Notification No. 12/2012-CE. Appellant's claim is that such notifications enhancing duties came to the knowledge of the Oil Industry very late in the evening and much after the clearance but to avoid any future complicity, differential Excise duty basing on

calculation at the higher rate as per the amended notifications were paid with a protest note. Subsequently Appellant filed two refund applications seeking refund of differential duty of Rs.2,96,83,632/- paid in response to Notification No. 22/2014-CE and Rs.1,08,08,167/- paid in response to the other Notification No. 24/2014-CE claiming the same as not payable by it. Both claims were rejected through adjudication orders after service of required show-cause notices against which Appellant preferred appeal before the Commissioner (Appeals), who through a common Order-in-Appeal, confirmed such order of rejection of refund, which is assailed before this Forum.

3. During the course of hearing of the appeals, Learned Counsel for the Appellant Ms. Manasi Patil submitted that the primary ground of rejection of their appeals, as could be noticed from the Order-in-Appeal, was that he had taken the date issue of the said Notification as the effective date for its application in terms of sub-Section (5) of Section 5A of the Central Excise Act, 1944 despite the fact that it has been clearly held by the Hon'ble Supreme Court in the case of UOI Vs. Param Industries reported in 2015 (321) ELT 192 (S.C.) that both publication of the Notification as well as offer for sale by the concerned Board are to be fulfilled so as to make a Notification enforceable and recently Hon'ble Andhra Pradesh High Court in the case of Ruchi Soya Industries Ltd. reported in 2020 (374) ELT 898 (A.P.), while interpreting Section 25 of the Customs Act, which is *peri materia* to Section 5A of the Central Excise Act, had clearly held that Notification amending the existing provision has to be made available to the public at large, subsequent to the date of its publication but finally concluded, with reference to the decision of the Hon'ble Supreme Court made in the case of Union of India Vs. Ganesh Das Bhojraj reported in 2000 (116) ELT 431 (S.C.), that publication of the Notification in the Official Gazette can only make the Notification effective and applicable. Further she contended that they had obtained information through RTI application and in its reply dated 23.09.2019, it was clearly mentioned that Notifications were printed in the Gazette of India only on 13.11.2014 and 03.12.2014 which are on the next date of the clearance of goods on payment of duty at the then prevailing rate, for which the order passed by the Commissioner (Appeals) is unsustainable in law and fact. Additionally, she referred to the full Bench judgment of Hon'ble Supreme Court passed in the case of Union of India Vs. M/s. G.S. Chatha Rice Mills reported in 2020 (374) ELT 289 (S.C.) and made an alternate submission that such Notifications being in the nature of delegated legislation, provision of General Clauses of Act could not be applicable, though the same point was neither argued nor agitated in the proceedings concluded in the Forums below.

4. In response to such submissions learned Authorised Representative for the Respondent-Department argued in support the reasoning and rationality of the order passed by the Commissioner (Appeals) and took us through the order passed by the Commissioner (Appeals) with reference to the date of Notification available on the copies of Gazette itself to justify that those were published and issued on the same date namely on 12.11.2014 and 02.12.2014 for which the

same would be enforceable from the whole of the day. He further pointed out that the Notifications were uploaded in the CBEC website for information of all on the very same day and the said fact has been confirmed by the Appellant during hearing of their appeal before the Commissioner (Appeals). Further, with reference to the observation made by the Hon'ble Supreme Court in para 60 in M/s. G.S. Chatha Rice Mills case cited (supra), he added that there was clear observation that the decision of Param Industries appears to be contrary to the principle elucidated by the Hon'ble Supreme Court in various decisions rendered previously that if subordinate legislation does not prescribe the mode of publication, it would take effect only when it is published through the customarily recognised official channels namely the Official Gazette. He, therefore, concluded with reference to the decision of Ruchi Soya Industry of the Hon'ble Calcutta High Court reported in 2016 (336) ELT 463 (Cal.) that date of issue of publication being effective date, actual publication in Official Gazette and offer for sale of Gazette copy would not come to the rescue of the Appellant to succeed in its appeal.

5. We have heard arguments at length and gone through the case record including written notes/submissions and relied upon judgments. As could be noticed from the refund application itself, Appellant had admitted therein that it had knowledge about such enhancement on the same day, though it came late in the evening subsequent to the clearance of goods made during the course of day upon rising of invoice with old rate of duties prevailing at the time of clearance. As could be further noticed from the order of the Adjudicating Authority and Commissioner (Appeals), there was no pleading made before them that the Notifications came on the next day of its issue and Appellant itself also came to know about the same through the RTI application reply received in 2019. Even this fact of publication of both the Notifications on the next day of its issue was not within the knowledge of the Appellant nor it had taken the same as additional ground of appeal though we have accepted the same as additional piece of evidence and taken the same on record as those are issued by the office of the Director of Publication which is a public authority for which RTI reply can be put in the category of public documents. Therefore, the submissions of learned Authorised Representative that the Notifications were issued and uploaded in the website of CBEC is acceptable for the reason that Appellant also admitted to have knowledge about such amended Notification that reached the Oil Industries in the late evening but going by sub-Section (5) of Section 5A, Issued for publication and completion of publication in the Gazette of India are pre-conditions before the same is offered for sale. Therefore, uploading in the website of the CBEC cannot alone attach enforceability to those Notifications. Relevant portion of Section 5A(5) is reproduced below:-

"Every notification issued under sub-section (1) or sub-Section 2(A) shall,-

(a) Unless otherwise provided, come into force on the date of its issue by the Central Government for publication in the Official Gazette;

(b) also be published and offered for sale on the date of its issue by the Directorate of Publicity and Public Relations, Customs and Central Excise, New Delhi, under the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963)."

Moreover, change of law through judicial process has taken place only recently in 2020 in the Ruchi Soya Industry case which had overruled the earlier decision of 2016 passed by the Hon'ble High Court of Calcutta, cited supra and also struck down Section 25(4) of the Customs Act by holding that the same was arbitrary and contrary to other provisions of Customs Act and the full Bench judgment of the Hon'ble Supreme Court passed in the case of M/s. G.S. Chatha Rice Mills case cited supra that came in 2020 made it categorically clear that Notifications issued under delegated authority would not have retrospective effect, would not attract Section 5(3) or the other provisions of General Clauses Act meant for Central Act or Regulations and would not also reopen the assessment. Therefore, we are of the considered view that by the time order was passed by the Commissioner (Appeals), except on issue of unjust enrichment which Appellant's claimed to have crossed the bar in its refund application itself by annexing sample copies of the invoices with realisation of tax at the old rate, no illegality or irregularity could be noticeable therein but having regard to the fact that law on the issue has evolved and refined itself through judicial decisions and has

become law of the land after the full Bench of the Hon'ble Supreme Court dealt the same exhaustively taking into account all judicial precedent vis-a-vis the provisions of Excise Act and Section 5A being *peri materia* to Section 14 and Section 25(4) of the Customs Act, we thought it expedient, just and proper to modify the order passed by the Commissioner (Appeals), so as to extend the benefits to the Appellant. Hence the order.

ORDER

6. Both the appeals are allowed and the order passed by the Commissioner of Central Excise (Appeals), Mumbai-II vide Order-in-Appeal No. PK/18 & 19/M-II/2016 dated 08.09.2016 observing that the Notification would be effective from the date of its issue is modified to the extent that the said Notifications would be effective from the date and time of its publication in its Official Gazette which were published on 13.11.2014 and 03.12.2014 respectively. The Appellant is, therefore, entitled to the benefit of refund with all consequential relief. COs are disposed of.