2012 (2) ECS ( 39) (Tri-Ban)

CUSTOMS, EXCISE & SERVICE TAX APPELATE TRIBUNAL
SOUTH ZONAL BENCH AT BANGLORE
BENCH – DIVISION BENCH
COURT- 1

**CC & CE, Visakhapatnam**
**Vs.**
**M/s Cairn Energy India Pvt. Ltd**

Date of Hearing : 03.07.2012
Date of Decision: 03.07.2012

Appeal No. E/669/2009

(Arising out of Order-in-Appeal No. 34 to 36/2006 (V-II) CE dt. 23/01/2006 passed by CCE & C (Appeals), Visakhapatnam)

CC & CE, Visakhapatnam ……Appellant(s)
Vs.
M/s Cairn Energy India Pvt. Ltd. ……Respondent(s)

Appearance
Mr. Ravi Chander, Superintendent (AR) for the appellant.
Mr. C. Saravanan, Advocate for the respondent

**CORAM:**
**Hon'ble Mr. P.G. Chacko, Member (Judicial)**
**Hon'ble Mr. M. Veeraiyan, Member (Technical)**

**FINAL ORDER NOS. 526 – 528/2012**

**"The respondent's liability to pay the cess on the quantity received in HPCL's refinery is beyond question as it is abundantly clear from the provisions of Section 15 of the Oil Industry (Development) Act, 1974. …… The levy is on the quantity received in refinery. This legal position was settled by this Tribunal long ago in ONGC's case (2001 (129) ELT 115 (Tri. Del.)) and reiterated in a line of cases viz. ONGC Ltd. Vs. CCE, Dibrugarh [2007 (214) ELT 123 (Tri. Kolkata)], CCE, Vadodara Vs ONGC Ltd. [2010 (259) ELT 123 (Tri. Ahmd.)], etc. Therefore, the view taken by the original authorities on the substantive issue has also to be upheld." [Para 5]**

**Order per: P.G. Chacko**

1. These appeals filed by the Department are directed against a common order passed by the learned Commissioner (Appeals) in three appeals filed by the respondent (assessee) against three adverse Order-in-Original which were passed in adjudication of three show-cause notices. The three show-cause notices dt. 30/06/2003, 06/10/2003 and 18/05/2004 had demanded differential amounts of cess leviable under Section 15 of the Oil Industry (Development) Act, 1974 on crude oil cleared by the respondent in tanker vessels to the Visakha Refinery of M/s Hindustan Petroleum Corporation Ltd. (HPCL) during the periods June 2002 to August 2002, September 2002 to March 2003 and April 2003 to August 2003 respectively. The show-cause notices had also demanded interest on cess @ 24% p.a. under the relevant provisions of the Central Excise Rules and had also proposed penalties on the respondent under Rule 26 of the Central Excise Rules. The demands and other proposals were contested by the respondent. In adjudication of the dispute, the original authorities held that the respondent was liable to pay cess on that quantity of the crude oil which was acknowledged by HPCL in the relevant Intake certificates and not on the Bill of Lading quantity. In this connection, the Tribunal's decision in the case of ONGC Ltd. Vs. CCE, Mumbai [2001 (129) ELT 115 (Tri. Del.)] was relied on. Reliance was also placed on Board's Circular No.7/88/-CX.8 dt. 06/04/1988. Accordingly, the original authorities confirmed demands of differentia amounts of cess (with interest) against the assessee and imposed penalties on them. The Orders-in-Original were taken in appeals by the assessee and the learned Commissioner (Appeals) disposed of those appeals remanding the matters to the lower authorities after observing that there was no consistency in the Department's stand.

2. In the present appeals of the Department, the appellant relies on the Tribunal's decision rendered in ONGC case as also on the Board's Circular dt. 06/04/1988 and contends that. In terms of Section 15 (2) of the Oil Industry (Development)Act, 1974, the respondent is liable to pay cess on the excess quantities of crude oil received in HPCL's refinery as reflected in the Refinery's Intake certificates.

3. Heard both sides. The learned Superintendent (AR), apart from reiterating the grounds of these appeals. Relied also on 2 other decisions of this Tribunal vide ONGC Ltd. Vs. CCE, Dibrugarh [2007 (214) ELT 100 (Tri. Kolkata)] and CCE, Vadodara Vs. ONGC Ltd. [2010 (259) ELT 470 (Tri. Ahme\d)]. Apart from this, the learned Superintendent (AR) also submitted that the learned Commissioner (Appeals) did not have the power of remand and for this reason also his order was liable to be set aside. In this connection, reference was made to the Hon'ble Supreme Court's judgment in MIL India Ltd. Vs. CCE, Noida [2007 (210) ELT 188 (SC)].

4. The Learned counsel for the respondent, at the outset, submitted that, while excess quantity of crude oil as per Intake certificates vis-à-vis Bill of Lading was considered by the Department for recovery of differential cess, no case of shortage of crude oil quantity as per intake certificates vis-à-vis Bill of Lading

quantity was taken into account. The counsel pointed out that there were a few cases where the quantity of crude oil shown in the Intake certificates was lower than the quantity loaded in the tanker vessel (Bill of Lading quantity). According to the counsel, the respondent was eligible for refund of differential cess in respect of such shortages and the differential amounts of cess admissible as refund should be adjusted against the differential amounts of cess demanded by the original authorities in the event of the quantity of crude oil actually received by the refinery being adopted as the basis for demands of cess under Section 15 of the Oil Industry (Development) Act, 1974. In this connection, the learned counsel referred to two decisions of this Bench in their own cases viz. Final Order No.1472/2006 dt. 12/09/2006 in appeal No. E/93/2006 (Cairn Energy India Pvt. Ltd. Vs. CCE & C, Visakhapatnam-II) reported in 2007 (207) ELT 237 (Tri. Bang.) and Final Order Nos. 1631 to 1638/2006 dt. 28/09/2006 in Central Excise appeals Nos. 526 to 533/2006. The learned counsel also pointed out that a plea for set-off of the excess quantity of crude oil against shortage had been made by the assessee before the lower appellate authority also.

5. We have given careful consideration to the submissions. The respondent's liability to pay the cess on the quantity received in HPCL's refinery is beyond question as it is abundantly clear from the provisions of Section 15 of the Oil Industry (Development) Act, 1974. Section 15 of the Act, shorn of inapplicable clauses, reads as follows:-

Section 15: (1) There shall be levied and collected, as a cess for the purposes of this Act, on every item specified in column 2 of the schedule, which is produced in India (including the continental shelf thereof) and –

(a) Removed to a refinery or factory; or
(b) … … …

(2) Every duty of excise leviable under sub-section (1) on any item shall be payable by the person by whom such item is produced an in the case of crude oil, the duty of excise shall be collected on the quantity received in a refinery.

(3) The duties of excise under sub-section (1) on the items specified in the Schedule shall be in addition to any cess or duty leviable on those items under any other law for the time being in force.

(4) The provisions of the Central Excises and Salt Act, 1944 and the rules made thereunder, including those relating to refunds and exemptions from duties shall, as far as may be, apply in relation to the levy and collection of duties of excise leviable under this section and for this purpose the provisions of that Act shall have

> effect as if that Act provided for the levy of duties of excise on all items specified in the Schedule.

The levy is on the quantity recived in refinery. This legal position was settled by this Tribunal long ago in ONGC's case (2001 (129) ELT 115 (Tri. Del.)) and reiterated in a line of cases viz. ONGC Ltd. Vs. CCE, Dibrugarh [2007 (214) ELT 123 (Tri. Kolkata)], CCE, Vadodara Vs ONGC Ltd. [2010 (259) ELT 123 (Tri. Ahmd.)], etc. Therefore, the view taken by the original authorities on the substantive issue has also to be upheld. However, two questions survived for consideration. Firstly, was it open to the learned Commissioner (Appeals) to remand the case? Secondly, is the respondent's claim for adjustment liable to be considered?

6. To the first question, answer can be found in the Hon'ble Supreme Court's judgment in the case of MIL India Ltd. (supra). The relevant observations of the apex court read as under:

> "4… … … In fact, the power of remand by the Commissioner (A) has been taken away by amending Section 35 A with effect from 11-5-2001 under the Finance Bill, 2001. Under the Notes to clause 122 of the said Bill it is stated that clause 122 seeks to amend Section 35 A so as to withdraw the powers of the Commissioner (A) to remand matters back to the adjudicating authority for fresh consideration. Therefore, the Commissioner (A) continue to exercise the power of the adjudicating authority in the matters of assessment. … …"

The lower appellate authority did not have the power of remand and hence ought to have disposed of the assessee's appeals on merits after taking a conclusive view on the substantive issue. As rightly submitted by the learned Superintendent (AR), the impugned order is liable to be set aside on this very ground.

7. The learned counsel for the respondent has produced a copy of one of the memoranda of appeals filed with the lower appellate authority, and we have perused the same. One of the grounds raised by the assessee before the lower appellate authority reads thus:

> "8. It is respectfully submitted that the said differential Cess has been arrived at based on the higher-side receipt quantities than the delivered quantities. Conspicuously missing aspect in this is the lesser-side receipt quantities than the delivered quantities. If both these aspects are considered, together there would be a refund due to the Ravva Joint Venture to the tune of Rs.1.37 crores approx."

It is not in dispute that the law as it stood during the period of dispute required the respondent to file monthly returns. The annexures to the relevant show-cause notices (copies produced by counsel) indicate both positive and negative

differential quantities (i.e. excesses and shortages) of crude oil received in the refinery as per Intake certificates for a given calendar month. The excess quantities were considered for recovery of differential cess from the respondent and the shortages were ignored. If the assessee was liable to pay differential cess on the excess quantities of crude oil in terms of Section 15 (2) of the Oil Industry (Development) Act, 1974, they could claim refund of differential cess in respect of the shortages. Therefore, the assessee's claim for adjustment was liable to be considered by the proper officer of Central Excise at the time of finalization of provisional assessement of the relevant monthly return. Of course, as per a larger Bench decision of this Tribunal in the case of Excell Rubber Ltd. Vs. CCE, Hyderabad [2011 (268) ELT 419 (Tri. LB)] as clarified by us in the case of Excell Rubber Ltd. Vs CCE, Hyderabad [Final Order Nos.133 & 134/2012 dt29.02.2012 in appeal Nos. E/267 & 890/2006, any such adjustment between demand and refund of cess should be subject to the condition that the claim for refund is not hit by the bar of unjust enrichment. This answers the second question framed above. We find that the respondent did claim adjustment between demand and refund before the lower appellate authority but the claim was not considered. This is another reason for setting aside the impugned order.

8. In the aforesaid facts and circumstances, a remand of the case to the original authority is called for: Accordingly, we set aside the impugned order and allow these appeals by way of remand with a direction to the original authorities concerned to finalized the assessments of the assessee's monthly returns afresh in accordance with law as well as in terms of this order, of course, after giving the asessee a reasonable opportunity of being heard.

(Operative portion of this order pronounced in court on conclusion of the hearing.)