Hindustan Petroleum Corporation Ltd vs Commissioner Of Central Excise, Mumbai on 1 October, 2014

IN THE CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI

Appeal No.
ST/670/11
- Mum

(Arising out Order-in-Original No. 356/16/VI/2011/ COMMR/KS/ST dated 14.09.2011 passed b

For approval and signature:
Hon ble Mr. Ashok Jindal, Member (Judicial)
Hon ble Mr. P.S. Pruthi, Member (Technical)

1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? No

2. Whether it should be released under Rule 27 of the in any authoritative report or not? Yes

3. Whether Their Lordships wish to see the fair copy of the Order? Yes

4. Whether Order is to be circulated to the Departmental authorities? Yes

Hindustan Petroleum Corporation Ltd.
Appellant

Vs.

Commissioner of Central Excise, Mumbai
Respondent

Appearance:

Shri M.H. Patil, Advocate for the appellant Shri B. Kumar Iyer, Supdt. (AR) for the respondent CORAM:

Hon ble Mr. Ashok Jindal, Member (Judicial) Hon ble Mr. P.S. Pruthi, Member (Technical) Date of hearing : 05/09/2014 Date of decision : 01/10/2014 O R D E R No: ..

Per: P.S. Pruthi:

The appellant is in appeal before us against the order of Commissioner confirming and appropriating amount of `3,75,03,657/-, ordering appropriate interest and imposed equal penalty under Section 78 of Chapter V of the Finance Act, 1994.

2. The facts are that Hindustan Petroleum Corporation Ltd. (HPCL) refined crude oil and market petroleum products such as petrol, diesel and LPG. The LPG is marketed through HPCL dealers/distributors. Various manufacturers engaged in the manufacture of goods namely rubber hoses (Trade mark Suraksha), Green label brand LPG stoves, pressure cookers, Clipper brand kitchen lighters etc. entered into marketing agreements with HPCL to market their own goods through HPCL distributors on payment of overriding commission to HPCL. The agreements provided for co-branding of hose pipes (by manufacturers and HPCL) as well as printing logo of both parties on the said goods as well as on the packing material. The manufacturers are to adhere to technical and quality specifications specified in the said agreements. In their statement, personnel of HPCL stated that HPCL promoted the Suraksha concept but not brand per se, the manufacturers of stoves and hose pipes needed BIS approval and the premises of the manufacturers would be inspected to ensure that required standards are met before HPCL entered into agreements with the manufacturers. Revenue s view was that HPCL are undertaking promotional activities on behalf of the manufacturers of the said goods and earned over-riding commission on rates specified in the agreements with the manufacturers. In the case of GM Pens International who manufacture kitchen lighters, the agreement specifically mentioned that GM Pens are paying overriding commission to HPCL inclusive of service tax as applicable. Revenue viewed the activity as promotion or marketing of goods produced by the manufacturer as an activity of HPCL covered under Business Auxiliary Service . Show-cause notice was issued. As per the worksheets submitted by HPCL themselves, they deposited service tax (including additional cess and higher additional cess) of `3,75,03,657/- for the period July 2003 to March 2008 for violation of Rules 4, 6 and 7 of the Service Tax Rules, 1994. HPCL was show caused on 29.04.2009 demanding duty of `3,75,03,657/-, why the said amount paid by them on 11.04.2008 should not be appropriated, interest be demanded under Section 75 of the Act ibid and penalty should not be imposed under Section 76, 77 and 78 of the Act.

3. Heard both sides.

4. The ld. counsel stated that LPG is covered by Essential Commodity Act, 1955 and Rule 3 of Petroleum Products Order, 1972 required the refining company to regulate the supply and distribution of LPG. They were discharging this statutory function up to 31.03.2003 and thereafter on basis of agreement entered into at the instance of the Government. Further statutory prohibitions are imposed on them under LPG (Regulation of supply and Distribution) Order, 2001. These prohibited activities are, inter alia, forced sale of products/hot plates to the consumer. He also

referred to Static and Mobile Pressure Vessel Rules, 1981 under Indian Explosives Act, 1984, which lay down the minimum standards for manufacture of goods such as hoses. In short, the contention is that by selling the goods they are only discharging statutory obligations of ensuring safety incidental to which hot plates, rubber, hoses have to be of proper qualify meeting BIS requirements. His other argument is that HPCL recommended the LPG consumers to buy the said goods and therefore their activity is not of promotion or marketing of goods produced by the client as covered under Business Auxiliary Service .

5. In the appeal, the appellants, stated Section 73(1), which says that demand notice has to be issued by a Central Excise officer who is competent to determine the duty liability under Section 73(2), is violated because the show-cause notice has been issued by DGCEI but made answerable to Commissioner, Service tax, Mumbai. It was also disputed that the classification issue was not brought into question before proposing to demand service tax. The appellants stated that the demand is time barred as there is no fraud, collusion, etc. with intent to evade payment of service tax, that as service tax was paid before issuance of show-cause notice, no penalty is imposable under Section 78. Penalty is not warranted in view of Section 80 and in absence of mensrea. They relied on the various judgments to support their above pleas. They also stated that interest under Section 75 is not sustainable because the amount of tax was paid before issuance of show-cause notice and relied on Gaurav Mercantile Ltd. 2005 (70) RLT 699 (Bom) and Rashtriya Ispat Nigam 2003 (161) ELT 285 which was upheld by the Supreme Court in 2004 (163) ELT A-53 (SC). In the end it was stated by the ld. counsel that they are only disputing the imposition of penalty.

6. Ld. AR relied on the findings of the Commissioner. In support of his contention that HPCL have provided Business Auxiliary Service, he took us through various clauses in the Marketing agreement of HPCL with M/s. Sidhartha Rubber Pvt. Ltd. (for LPG hoses), with M/s. Super LPG Appliances (for green label stoves), with M/s. TTK Prestige Ltd. (for pressure cookers, and mixer grinders) and with M/s. GM Pens International P. Ltd. (for kitchen lighters).

7. We have carefully considered the submissions made by both sides.

8. The only point to be decided on merits is whether HPCL have provided Business Auxiliary Service (BAS) to the manufacturer of hoses, LPG stoves, pressure cookers, kitchen lighters. Under Section 105 (zzb) of the Finance Act, 1994, taxable service means any service provided or to be provided to a client by any person in relation to Business Auxiliary Service. Under Section 65 (19), Business Auxiliary Service means any service in relation

(i) Promotion or marketing or sale of goods produced or provided by or belonging to the client.

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Thus it is to be examined whether HPCL had rendered service to the manufacturer of these goods which amounts to promotion or marketing of goods/products of the manufacturers.

9. To understand the nature of activities undertaken by HPCL, we may straightaway refer to the agreements with the manufacturers. We may only see the relevant clauses of the agreements, as

reproduced below:

9.1. Marketing agreement with M/s. Sidhartha Rubber Pvt. Ltd.:-

AND WHEREAS both HPCL & Manufacturer agree that it is in their own mutual interest to enter into an agreement for co-branding of SURAKSHA LPG HOSE through LPG distributors of HPCL . .2 . HPCL shall endeavour for promoting SURAKSHA LPG Hose for domestic LPG 3.1. HPCL will through their Distribution network, highlight the safety features of SURAKSHA LPG Hose and endorse and support the product by promoting the same through Television, Radio, Bill Boards, Newspapers, Magazines, Petrol Pumps, safety clinics and Road shows. 3.6. Manufacturer will prepare an annual service campaigns/ sales promotion plan in coordination with HPCL marketing headquarters 3.7. 3.8. HPCL will make available hoardings at their distributors 6.2. As recognition of availing the HPCL s distribution network and providing support by HPCL, Manufacturer will pay overriding commission to HPCL for rubber hoses 6.3. Manufacturer will pay overriding commission to HPCL @ Rs.15 per piece for both 1.2 and 1.5 Mtr. of every SURAKSHA LPG HOSE sold by the party to HPCL LPG Distributors. 7.4. Co-branding details on hose will be given to manufacturer by HPCL, . Co-branding marks will be carried out on hose as per requirement of HPCL . 9.2. Agreement with M/s. Super LPG Appliances WHEREAS Party have approached HPCL for marketing of this Green Label Series through HPCL, LPG distributor network. 2.2. The party and HPCL have agreed that HPCL shall permit its distributor network, at its discretion to effect sales of PADMASHREE Brand Green label stoves 2.3. 2.4. HP Gas Logo (screen printed) to be provided on each of the stoves supplied by the party to HPCL distributors. 2.7. As this agreement is for co-branding of equipments marketed by the party.

3.1. The logo of both the parties would appear on such products, packages and all publicity materials. The lay out of such printing on the products, packages and publicity materials would be decided by both the parties to mutual satisfaction. 7.1. Party will pay overriding commission to HPCL @ 12% for every PADMASHREE Brand Green Label co-branded stoves sold by the party to HPCL LPG distributors on 9.3. Agreement with M/s. TTK Prestige Ltd.

WHEREAS TTKPL have approached HPCL for marketing of their cookware, Pressure cooker & Mixer Grinder product line through HPCL LPG distributor network. 2.6. As this agreement is for marketing of products manufactured by /or for the TTKPL 2.7. 3.0 Advertising . HPCL may provide necessary space for display of signage in the said LPG Distributorships for visibility. . 7.0 TTKPL will pay overriding commission to HPCL @ 5% of Distributor Billing Price for every Prestige product sold by the TTKPL to HPCL LPG distributors on realisation. 9.4. Agreement with M/s. GM Pens International P. Ltd.

> WHEREAS HPCL and GMPIPL had entered into the agreement dated 15.11.2006 for marketing of CLIPPER range of products (Kitchen Lighters and Refill Gas Cans) through LPG distributors of HPCL on terms and conditions mentioned therein.
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> 4. GMPIPL will pay overriding commission to HPCL @ 10.11 (inclusive of service tax as applicable) for every CLIPPER brand Kitchen lighter and Rs.4.49 (inclusive of service tax as applicable) for every refill gas can sold by GMPIPL to HPCL LPG distributors on realisation.

10. From the various agreements entered into by HPCL with manufacturers of hoses, LPG stove, etc. and the clause relating to marketing, business promotion, availing HPCL s distribution network, providing supports by HPCL etc., the only inescapable conclusion that may be drawn is that HPCL are very obviously and very visibly providing the service of promotion and marketing of the goods of the manufacturers. In fact, the words used explicitly in the agreement are endorsement, promotion, display of hoarding, promotion through TV, radio etc. All these clearly point to obvious promotional activities for enhancing the customer base in respect of the said goods. It is clear that the appellant not only promoted the sale of goods of the manufacturers by making available their marketing/distributor network but also add their brand value to the products which attract customers to buy the said goods. Even packing covers for the said goods such as Suraksha, LPG hose, (covers as depicted after para 11 of Adjudication order.) bear the words promoted by HPCL, Ballard Estate, Mumbai. In our view the above is sufficient evidence to establish that HPCL are providing BAS to the various manufacturers.

11. The appellants have put up a weak defence by saying that they are merely endorsing the safety requirements under various regulations cited above. Undoubtedly the safety regulations which are statutory requirements have to be complied with and the oil companies indeed would have to recommend adherence to such safety regulations. But this does not detract from the fact that the promotion and marketing of goods is being definitely undertaken. Rather, had the purpose of advertisements been only to draw attention to safety requirements, HPCL would not have withdrawn from the responsibility for accidents in case of sub-standard goods. In fact the agreements clearly state that the quality of products will be the sole responsibility of the manufacturers and HPCL will be indemnified of losses on account of latent and patent manufacturing defects. HPCL have secured themselves and recused from any responsibility by requiring the manufacturers to submit indemnity bond favouring HPCL.

12. The agreements are for co-branding of the goods, sale through HPCL distributor network. The agreement with SUPER LPG states Super LPG approached HPCL for marketing their goods. The agreements clearly provide for specific overriding commission on per piece basis on or on ad valorem basis and such commission is payable over and above the commission payable to HPCL distributors. The commission is for the service rendered by HPCL towards marketing/promotion of goods manufactured by the manufacturers mentioned above. The service tax amount has been correctly demanded and the appropriation of the said amount already deposited is correct in law.

13. The plea taken by the appellant regarding the competence of the same Central Excise officer to adjudicate the notice is, in our view, without substance. The Sections 73(1) and 73(2) only speak of Central Excise officer. There is no doubt that the reference to Central Excise officer means any Central Excise officer who is competent to adjudicate the case and not any particular Central Excise officer. Strangely, the appellants have also raised an issue to the effect that the show-cause notice does not propose to classify the service before quantifying the demand. This appears to be a total false contention because the show-cause notice, in para 19 as well as in other paras clearly states that HPCL are providing services which are appropriately classifiable under the category of Business Auxiliary Service. The plea has been made without any application of mind.

14. On the issue of penalty, the appellants contend that they acted under bonafide belief and paid service tax liability on their own before issue of show-cause notice. Therefore, penalty need not be imposed, relying on the following judgments.

1) CCE vs. Master Kleen 2012 (25) STR 439 (Kar.)

2) CCE vs. Adecco Flexione Workforce Solutions Ltd. 2012 (26) STR 3 (Kar.)

3) CST vs. Vee Aar Secure 2011 (22) STR 517 (Kar.) 14.1. We have gone through these judgements. We find in these judgments, the appellants in those cases failed to pay service tax on bonafide belief and therefore, it was held by the Karnataka Hon'ble High Court that as per Section 73(3), once service tax and interest is paid, the authorities shall not serve any notice under Section 73(1). Therefore, it was held that authorities did not have the authority to initiate proceedings for recovery of penalty under Section 76 and the original authority rightly waived the penalty under Section 80 of the Finance Act, 1994 after recording proper reasons. We find these cases are distinguishable from the facts of the present case. In the present case, firstly interest has not been paid. Secondly, section 73(3) proviso clearly provides that the sub-section (3) will not apply in cases of wilful misstatement or suppression of facts with intention to evade payment.

14.2. As discussed in preceding paras, we have noted that the agreements between HPCL and the manufacturers GM Pen clearly provided for over-riding commission on a value which will be inclusive of service tax. It will be very naove to accept the contention that the appellant were under bonafide belief that service tax is not payable especially when they are a massive organisation with enough expertise to handle their taxation matters. The agreement specifically indicates that the overriding commission is inclusive of service tax. In the light of this stark fact, the plea of bonafide belief cannot be accepted. There is suppression of facts which enabled evasion of duty.

15. The next plea taken by the appellant is that penalties under Section 76, 77 and 78 are not imposable in view of Section 80 because there was reasonable cause for failure to pay service tax. They have relied upon the following judgments ?

i) S.R. Enterprises 2008 (9) STR 123 (Bom) upheld by the Supreme Court in 2008 (12) STR J 133 (SC)

ii) Flyman Air Courier 2006 (3) STR 283 (T)

iii) Huchison Telecom 2006 (1) STR 80 (T).

15.1. We have gone through these judgments. It is held that when the penalties have been waived after exercise of discretion and in the absence of showing that the power has been exercised arbitrarily, it will not be open for Courts to interfere with the exercise of discretion. Here again it may be stated that these cases are distinguishable from the present case. As discussed above, the appellants actually suppressed the fact that they had entered into agreements with the manufacturers and more so that the agreements provided for inclusion of service tax. The appellants being a registered assessee for a long time well versed in service tax matters chose not to declare the existence of the agreements. They did not take the advice of the department. In fact they did not even make any query to the department as to whether the service tax would be leviable on the service of promotion of business for manufacturers. Their activity very transparently reflects the Business Auxiliary Service provided by them. Therefore, the appellant cannot now take shelter of bonafide belief or that the issue was not free from doubt.

15.2. On the other hand, the matter stands settled by the decision of the Supreme Court in Rajasthan Spinning & Weaving Mills 2009 (238) ELT 3 (SC). The question before the Hon'ble Apex Court was whether there was warrant for levy of penalty under Section 11AC since the assessee had deposited the excise duty even before the show-cause notice was issued. It was held that the application of 11AC (of Central Excise Act) would depend upon the existence or otherwise of the condition expressly stated in the Section. Once the section is applicable in a case the concerned authority would have no discretion in quantifying the amount and penalty must be imposed equal to the duty determined under sub-Section 2 of Section 11A. This is what Dharmendra Textile Processors 2008 (231) ELT 3 (SC) decides. The provisions of Service Tax Act, 1994 on penalty are paramateria to the provisions of Central Excise Act. In the present case under consideration it has been shown above that there was wilful suppression of facts. The act of non-disclosure of agreements and the glaring non-disclosure of fact that an agreement stipulated that commission includes service tax cannot find shelter under the plea of bonafide belief. The appellant could only have evaded duty intentionally by suppressing these facts. Hence the Section 78 leaves no discretion but to impose penalty equal to the duty confirmed.

16. The appellants have emphasised that government undertakings have no intention to evade duty. They have relied upon .

1) Markfed Refined Oil & Allied 2008 (229) ELT 557 (T) upheld by Punjab & Haryana High Court 2009 (243) ELT A91.

2) Indian Oil Corporation Ltd. 2013 (291) ELT 449 (T)

3) CESTAT Order no. A/1191/13/CSTB/C-I dated 28.05.2013 in Balmer Lawrie & Co. Ltd.

4) Hindustan Petroleum Corpn. Ltd. 2011-TIOL-1363-CESTAT-MUM 16.1. In all the cases relied upon, the appellants took the plea of bonafide belief. In the later judgments mentioned above, reliance has been place on the judgment of Hon'ble P&H High Court in the case of Markfed Refined Oil & Allied Inds (supra). The Hon'ble High Court passed the order stating that the Tribunal recorded a categorical finding that there is no material brought on record which may lead to an inference that there was any intention to evade duty. However, in the case of the appellant, we have brought on record the existence of agreements which reflected inclusion of service tax in the Commission and fact that the agreements were not brought to the notice of the department. It is clear that they were aware of requirement of payment of service tax under the agreements. But they chose not to pay the tax. For the sake of repetition, it may be mentioned that the appellants are very old assessees. They are a massive organisation with all expertise. Therefore, non-disclosure of agreements amounting to clear suppression of facts does not give them the benefit of doubt and makes them liable for penalty under Section 78. In similar circumstances, penalty would have been imposed on private companies, there appears to be no reason why the appellant should escape penalty on similar ground.

17. In view of the above, we uphold the order of the Commissioner and reject the appeal of the appellants.

(Pronounced in Court on) (Ashok Jindal) (P.S. Pruthi) Member (Judicial) Member (Technical) //SR