CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
HYDERABAD

REGIONAL BENCH

Excise Appeal No. 209 of 2009

(Arising out of Order-in-Original No. 38/2007-08(RS) dated 02.05.2008 passed by the Commissioner of Central Excise & Customs (Appeals), Visakhapatnam)

Hindustan Petroleum Corporation Limited **Appellant**
Visakh Refinery

Versus

Commissioner of Central Excise, **Respondent**
Central Excise Building, Visakhapatnam

Appearance:

Shri Narendra Dave, Advocate for the Appellant

Shri V.R. Pavan Kumar, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P. V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: 29.07.2022
Date of Decision: 01.09.2022

Final Order No. 30079/2022

P.V. Subba Rao:

M/s Hindustan Petroleum Corporation Limited, Vishakapatnam [1] is a Government of India Undertaking which refines crude petroleum and manufactures various finished petroleum products such as HSD, motor spirit, naptha, superior kerosene oil, furnace oil, bitumen, jute batching oil (JBO) and LSHS. It is aggrieved by the order in original dated 2.5.2008 passed by the Commissioner of Central Excise, Vishatapatnam as

1 appellant

amended by corrigendum dated 4.8.2008 whereby an amount of Rs. 1,06,58,056/- has been demanded from the appellant as duty under the proviso to sub-section (1) of Section 11A of the Central Excise Act, 1944 along with interest under Section 11AB.

2. Usually, when goods are manufactured duty becomes payable when they are cleared from the factory. However, Rule 20 of the Central Excise Rules, 2002 provides for the Central Government to extend the facility of removing the goods from the factory of production to a warehouse, or from one warehouse to another warehouse without payment of duty. It further provides that in case of warehousing the responsibility for payment of duty on the goods that are removed from the factory lies on the consignee. Further, if the goods which are dispatched for warehousing are not received in the warehouse, the responsibility for payment of duty shall be on the consignor. The appellant has several Local Marketing Installations [2] which are registered as warehouses under the aforesaid provisions and the appellant is entitled to remove the finished products to these LMIs. If goods which are manufactured are lost due to natural causes or accidents, the duty thereon can be remitted by the Commissioner as per Rule 21 of the Central Excise Rules. Such losses are common in petroleum products as they are volatile by nature. As per the instructions of the Central Board of Excise & Customs dated 1.06.1956, 2.3.1959 and 15.12.1989 losses of petroleum products in storage, pipeline deliveries and transit losses etc. are permissible up to some limits. A cumulative loss/gain statement consisting of

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2 LMI

storage losses, gains and LMI transit losses and gain for each month for all the petroleum products at 15 Degree Centigrade has to be submitted by the assesses on a monthly basis.

3. Up to September, 2003 the monthly excise ER-I returns filed by the appellant were reflecting the opening and closing balance thereafter it had not provided details of the losses. The Range Officer had written a letter dated 3.5.2005 calling for these details but the appellant failed to provide the data. Consequently, a show cause notice covering the period April 2004 to March 2006 was issued based on the information available in the quadruplicate copies of the AR3As (the re-warehousing certificates) received from the consignees. Repeated letters were written to the appellant but it had not provided the required data.

4. Thereafter, the show cause notice was taken up for adjudication. During hearing, the appellant submitted that it had switched over to a new ERP system which resulted in teething troubles and consequential delays in submitting statements of loss of the products during transit. Nevertheless, it submitted the details of the losses to the Commissioner during hearing which were considered by the Commissioner to some extent and duty has been remitted by the Commissioner under Rule 21 of the Central Excise Rules. The Commissioner has not remitted duty on some portion of the losses which resulted in confirmation of demand in the impugned order.

5. Learned Counsel for the appellant Shri Narendra Dave submitted that CBEC Circular dated 1.6.1956 and 2.3.1959 have set condonable limits for the following products:

Products	**Condonable limit**
1. Motor spirit	0.5%
2. Kerosene	0.5%
3. Refined diesel oil	0.5%
4. Furnace oil	0.25%
5. LSHS	0.05%

6. However, for certain other products such as Naptha, Sulphur, ATF and JBO no specified limits have been prescribed by the Board. However, by Circular dated 19.10.1981 Board has clarified as follows:

> "An assessee has to properly account for any storage or processing loss to the satisfaction of proper officer before duty thereon is remitted, because every storage loss or efficiency found in stock cannot always be attributed to natural or permissible causes, like evaporation or pilferage losses.
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> What should be the percentage of storage and processing losses depends on the facts and circumstances of each individual case. However, in relation to goods where evaporation or pilferage can take place, CBE & C has prescribed 1% as a standard permissible loss (para 4 CBEC Bulletin for the period January to March 1965, Vol. XI, page No. 55)
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> For the condonation of losses upto the limit of 1% the authorities need not enter into detailed scrutiny to verify the bonafide of the reported loss. However, when a claim for the condonation of loss above 1% is made the officers concerned have to very closely scrutinize the case and satisfy themselves that the claim is genuine, technical advise may also be sought.
>
> When the remission of duty on storage or other losses claimed by the assessee does not appear genuine, the Department has to issue a Show Cause Notice before rejecting the claim."

7. Learned Counsel submits that in view of the above clarification, CBEC has prescribed a limit of 1% without reference to

any specific products and the losses incurred by them in this case were below 1% and, therefore, duty on the same need to be remitted. He further submits that there is no allegation or evidence that any of the goods have been clandestinely removed from the factory or sold. The only ground on which the Commissioner has not remitted some losses is that she has considered the limits set in the CBEC's Circulars of 1956 and 1959 and allowed remission of duty on such products which were indicated in these Circulars and to that extent. He submits that in view of the subsequent Circular dated 19.10.1981 losses up to 1% should be condoned and the authorities need not enter into a detailed scrutiny to verify the bona fide of the reported loss. However, if the losses are above 1%, officers may scrutinize the claims closely. He further submits that Rule 21 of the Central Excise Rules, 2002 which provides for remission of duty does not lay down any limit. All that is required is for the Commissioner is to be satisfied that the losses were on account of natural causes or unavoidable accidents. It is possible that in some cases an accident may occur and the losses may be much higher than 1% and in such cases the officers may scrutinize to satisfy themselves about the genuineness of the claim of loss. In this case, since the total losses were below 1% as per the Board's Circular dated 19.10.1981, the losses must be condoned without even much scrutiny.

8. He further submits that with respect to motor spirit handled in the month of April 2004, the learned Commissioner has reckoned that the loss was 3.443% but the actual loss was only 0.3% because the quantity handled was wrongly recorded as 12,936.69

KL by the Commissioner instead of 1,27,936.699 KL. He submits that this resulted in a clerical error of demand of Rs. 45,62,684/- which needs to be set aside even on this ground. Lastly, he also submits that the demand is time barred after the period August 2005 and there is no evidence of fraud or collusion or willful mis-statement or suppression of facts. He prays that the impugned order may be set aside.

9. Per contra, Shri V.R. Pavan Kumar, learned Authorised Representative supports the impugned order. He submits that remission of duty by the Commissioner can only be considered if the appellant applies for remission but it has not applied for remission at all. This is not a case of remission being allowed or otherwise but it is a case of goods sent out for warehousing from the factory to the LMIs but were not received for as per the re-warehousing certificates issued by the officers at the destinations. In terms of sub-rule (4) of Rule 20, if the goods are not received in the warehouse the responsibility for payment of duty shall be upon the consignor who is the appellant in this case. However, to the extent losses were allowed and the demand was reduced by the Commissioner as per Board's Circulars of 1956 and 1959. There is no case for further remission and thereby reduction in the demand. He also points out that the Commissioner has not imposed any penalty and all that is confirmed is duty on the goods manufactured by the appellant and sent to its LMIs but which have not been received there.

10. We have considered the arguments on both sides and perused the records.

11. We agree with the learned Authorised Representative for the Revenue that this is not a decision on application for remission of duty by the appellant but is a case of demand of duty on the goods which were not received in the LMIs as required under Rule 20 of the Central Excise Rules. It is also evident that the appellant had not provided the required data despite being repeatedly asked by the Range officer. Having not provided the data despite repeated requests, the appellant cannot now take shelter on the ground that the demand is time barred. The information of the extent of losses is within the exclusive knowledge of the appellant and it is its responsibility to provide the data. Having delayed in providing the data, the appellant cannot profit from its own inaction and now argue that the demand is time barred. The appellant's contention is that it was switching over to a new system which caused teething troubles because which of it was unable to provide the data within time. Even if it be so, the fact remains that appellant has not provided the data and is now trying to profit from its own inaction to claim that the demand is time-barred. Therefore, we find the appellant had actually suppressed the information from the Department and now cannot benefit by claiming that the demand is time-barred.

12. As far as the demand on merits itself is concerned, while it is true this is not a case of application for remission of duty but it is a case of demand in its reply to the show cause notice, the appellant

has submitted as a defence that the goods in question were lost in transit. This submission was examined and considered by the Commissioner to some extent and the demand was confirmed to the remaining extent only. Therefore, the submission of the learned Authorised Representative that this is not a case of remission but it is a case of demand has no relevance in this case. When a demand is made, the noticee has a right to put up whatever the defence it wants to and which may be considered and accepted or rejected by the adjudicating authority. Now the only question which remains is if the extent to which the claim of remission on account of losses has been rejected by the Commissioner is correct or otherwise.

13. We do find that the CBEC Circulars of 1956 and 1959 did provide losses which were condonable only with respect to some goods. However, the Circular of 1981 clarifies that the condonation of losses up to the limit of 1% the authorities need not enter into a detailed scrutiny to verify the bonafide of the reported loss. It further clarifies that the claim of losses above 1% must be scrutinized to satisfy that they are genuine. In this case, we find from the revised annexure to the order in original dated 2.5.2008 (revised on 4.8.2008), the losses in almost in all the cases is below 1%. We also find that in respect of certain commodities such as Sulphur, Naptha, JBO, ATF etc, the Commissioner has reckoned condonable limit of 0%. This is probably because these products were not mentioned in Circulars of 1956 and 1959. However, since the 1981 Circular of the Board clarifies that losses of up to 1% can be allowed without detailed scrutiny and loss above 1% can be

condoned after scrutiny, we find no reason to not condone losses in these cases as claimed. There is no allegation, let alone evidence, that the losses were not genuine or that the products were suspected to have been diverted or pilfered. With respect to motor spirit, for the month of April 2004, learned Counsel submits that during the calculation error which resulted in an apparent loss of 3443% whereas it only 0.348%.

14. In view of the above, we find that the appellant is entitled to remission of the losses as claimed and consequently the demand of duty on the appellant cannot be sustained. The appeal is allowed and the impugned order is set aside with consequential relief, if any, to the appellant.

(Pronounced in open Court on 01.09.2022)

(Justice Dilip Gupta)
President

(P.V. Subba Rao)
Member (Technical)

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