

S U P R E M E C O U R T O F I N D I A

RECORD OF PROCEEDINGS

CIVIL APPEAL NOS. 7450-7451 OF 2000

M/S INDIAN OIL CORPORATION LTD.

Appellant(s)

VERSUS

COLLECTOR OF CENTRAL EXCISE, BARODA
)

Respondent(s)

(with application for stay and with office report)

WITH

CIVIL APPEAL NOS.9919-9929 OF 2003

(with application for stay and with office report)

Date: 02/08/2006 This Appeal was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE ASHOK BHAN

HON'BLE MR. JUSTICE MARKANDEY KATJU

For Appellant(s)

Mr. S.Ganesh, Sr. Adv.

in CA 7450-51/00 &

Mr. Mahesh Agarwal, Adv.

for respondent(s)

Mr. Rishi Agrawala, Adv.

in CA 9919-9929/2003

Mr. Vivek Yadao, Adv. for

Mr. E.C. Agrawala, Adv.

For Respondent(s)

Mr. Mohan Parasaran, ASG

in CA 7450-51/2000

Mr. Harish Chander, Sr. Adv.

and for appellant(s)

Mr. R.Sudhinder, Adv.

in CA 9919-29/2003

Mr. Asheesh Jain, Adv. for

Mr. B.K. Prasad, Adv.

UPON hearing counsel the Court made the following

O R D E R

Civil Appeal Nos.7450-51 of 2000 filed by the assessee are allowed and Civil Appeal Nos.9919-9929 of 2003 filed by the department are dismissed.

(Parveen Kr. Chawla)

(Suman Wadhwa)

Court Master

Court Master

[Signed Order is placed on the File]

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS.7450-51 OF 2000

M/s Indian Oil Corporation Ltd.

Appellant(s)

Versus

Collector of Central Excise, Baroda

Respondent(s)

WITH

CIVIL APPEAL NOS.9919-9929 OF 2003

O R D E R

This order shall dispose of two sets of appeals. Civil App

eal

Nos.7450-7451 of 2000 filed by the assessee-M/s Indian Oil Corporation Ltd. against the final order passed by Customs, Excise & Gold (Control) Appellate Tribunal, New Delhi (for short 'the Tribunal') in Appeal Nos. E/4768/91-C and E/6108/92-C whereby the Tribunal accepted the appeals filed by the respondent-Collector of Central Excise, Baroda and held that the assessee would not be entitled to avail of the benefit granted under serial No.34 of exemption notification No. 75/84-CE dated 1.3.1984 (as amended) issued by the Central Government. Period for which exemption is sought in these appeals falls between 1.8.1989 to 31.5.1991.

Civil Appeal Nos.9919-9929 of 2003 have been filed by the Commissioner of Central Excise, Vadodara against the final order passed by the Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi (for short 'the Tribunal') in Appeal Nos. E/254-57, 282-83, 320, 2091/98-C, E/2752/00C, E/274/00C & E/410/00C wherein and whereby the Tribunal has granted the benefit of Notification No. 67/95 which was operative between 16.3.1995 to 31.7.1996, Notification No. 8/96 operative for the period 1.8.1996 to 1.3.1997 and Notification No. 4/97 dated 1.3.1997 which is still in operation. It may be mentioned that Notification Nos. 67/95, 8/96 and 4/97 in substance extends the same benefit which has been extended to the assesseees under Notification No. 75/84. Period for which exemption is sought in these appeals falls between January, 1996 to September, 1999.

M/s Indian Oil Corporation, hereinafter referred to as 'the

assessee' is engaged in the refining of Crude petroleum which leads to the manufacture of various petroleum products. It produces Reduced Crude Oil (RCO) or Low Sulphur Heavy Stock (LSHS) which are captively consumed by the assessee in the thermal power plant located within the refinery area for generation of electricity which electricity in turn is largely used in the refinery for producing various petroleum products.

The assessee claimed exemption for RCO/LSHS which had been captively consumed based on exemption notifications issued from time to time.

Show cause notices were issued to the assessee for the period 1.8.1989 to 31.5.1991 calling upon to show cause why the duty demand be not raised on the LSHS and as to why their claim for exemption be not denied on the ground that clearance of LSHS to other associate agencies such as Gujarat Electricity Board, ONGC, State Bank of India, P&T Exchange and Post Office on Nil rate of duty under notification No. 75/84 is illegal and not admissible. According to the department condition No.4 of the notification is not fulfilled since fuel captively consumed was for production of electrical energy not for sale but for their own consumption or for supply to their non undertaking for which there is no execution of duty to such fuel use for generation of electricity.

Assessee on 24.4.1990 submitted its reply stating, inter alia, that LSHS used for generation of electricity in the Thermal Power Station situated within the refinery is eligible for exemption in terms of the

notification No. 75/84 since the electricity is supplied to the various agencies on no profit no loss basis.

The Tribunal in the impugned order in Civil Appeal Nos.7450-7451 of 2000 denied the benefit by observing that the Thermal Power Station of the assessee wherein LSHS was consumed for generation of electricity is not covered by the meaning of the word "refinery" as per the explanation. Therefore, serial No.34 of the notification under which the exemption was claimed as an alternate argument was not attracted and consequently it was not entitled to any exemption in terms of serial No.34 of Notification No. 75/84.

In the order impugned in Civil Appeal Nos.9919-9929 of 2003 , the Tribunal relied upon a decision of the Southern Bench of the CEGAT in the case of Hindustan Petroleum Corporation Ltd. vs. CCE, Hyderabad reported in 2000 (124) ELT 323(T) in which the benefit in terms of entry 34 of notification No. 74/84 was extended to Hindustan Petroleum Corporation Ltd. The only difference being that in that case electricity was produced in the Thermal Power Plant located in the refinery for captive consumption with the use of Naptha whereas in the present case the electricity is produced with the use of LSHS.

Mr. Mohan Parasaran, the learned Additional Solicitor General has fairly conceded that against the order passed by the Tribunal in the case of Hindustan Petroleum Corporation Ltd.(supra), no appeal was preferred by the department and the said order has attained finality. Since

no appeal was preferred against the order passed by the Tribunal in Hindustan Petroleum Corporation Ltd.(supra) and the same has become final, the department is not entitled to raise the same point in other cases in view of the decisions of this Court in Union of India & Others vs. Kaumudini Narayan Dalal & Another reported in (2001) 10 SCC 231; Collector of Central Excise, Pune vs. Tata Engineering & Locomotives Co. Ltd. reported in 2003 (158) ELT 130 (SC); Birla Corporation Ltd. vs. Commissioner of Central Excise reported in 2005 (186) ELT 266 (SC); and Jayaswals Neco Ltd. vs. Commissioner of Central Excise, Nagpur reported in 2006 (195) ELT 142(SC) wherein it has been held that if no appeal is filed against an earlier order or the earlier appeal involving the identical issue was not pressed by the revenue, the revenue is not entitled to press the other appeals involving the same question. In Birla Corporation Ltd. (supra), this Court observed as follows:

"In the instant case the same question arises for consideration and the facts are almost identical. We cannot permit the Revenue to take a different stand in this case. The earlier appeal involving identical issue

was not pressed and was, therefore, dismissed. The respondent having taken a conscious decision to accept the principles laid down in Pepsico India Holdings Ltd. (2001 (130) ELT 193) cannot be permitted to take the opposite stand in this case. If we were to permit them to do so, the law will be in a state of confusion and will place the authorities as well as the assesseees in a quandary."

Birla Corporation Ltd. (supra) is being followed consistently.

Since the point involved in the present case is identical to the point involved in Hindustan Petroleum Corporation Ltd. (supra) and the

department having accepted the principle laid down in Hindustan Petroleum Corporation Ltd. (supra), the department cannot be permitted to take a different stand in the present appeals.

Apart from this, considering the appeal on merits as well, we find that the assessee would be entitled to the benefit in terms of entry 34 of exemption notification No.75/84. The same reads as under:

Sl.No.	Description of goods	Rate of duty	Intended use/ Condition
34	Low Sulphur Heavy Stock	Nil	Intended for use as fuel in a refinery. Explanation- "Refinery" means a refinery wherein refining of crude petroleum or shale or blending of non-duty paid petroleum products is carried on.

The Board had issued a circular which reads as under:

"Eligibility of concession under Notification No.74/63-CE, dated 18.5.63 & 353/77-CE dated 16.12.77.
In supersession of the Board's instructions contained in F.No.35 65-CX-3 dated 16.9.67 it has been decided that since generation of electrical energy (electricity as an intermediate product is incidental in the process and manufacture of petroleum products falling under T.I.Nos. 6 to 11 AA the exemption contained in the Notification No. 352/77-CE dt. 16.12.77 as amended by Notification No. 131/80-CE dt. 23.8.80 and 41/82-CE dt. 28.2.82 would be available to the quantity of intermediate product electricity. The exemption contained in this notification will however, not be available to that quantity of petroleum products which is used in the generation of electricity which, in turn, is not used in the process and manufacture of petroleum products."
[emphasis supplied]
[underline by us]

Low Sulphur Heavy Stock is used by the assessee as fuel in a

Thermal Power Plant located within the refinery area for generating

electricity which in turn is captively consumed for production of various petroleum products. Entry No. 34 of Notification No. 75/84 read with the clarificatory circular clearly spells out that the assessee would be entitled to the benefit of exemption on LSHS to the extent it is used in Thermal Power Plant located within the refinery area for generating electricity which in turn is used in the process of manufacture of petroleum products.

For the reasons stated above, these appeals are accepted; order under appeal is set aside and it is held that the assessee would be entitled to the benefit of exemption notification No. 75/84 in terms of entry 34 read with clarificatory circular which covers such captive consumption of the fuel for the purpose of petroleum products manufactured in the refinery. The exemption shall not be available in respect of RCO/LSHS used in the generation of electricity which in turn is not used in the process and manufacture of petroleum products within the refinery area.

Civil Appeal Nos.9919-9929 of 2003

Mr. Mohan Parasaran, the learned Additional Solicitor General fairly concedes that the subsequent notification Nos. 67/95, 8/96 and 4/97 have further enhanced the scope of the exemption and the assessee would be entitled to avail of the exemption in terms of the notification No. 67/95.

In view of the concession made by the learned Additional Solicitor General, these appeals fail and are accordingly dismissed.

.....J.

.....
(ASHOK BHAN)

New Delhi;
August 02, 2006.

.....J.
(MARKANDEY KATJU)