IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CENTRAL EXCISE APPEAL NO. 38 OF 2006

The Commissioner of Central Excise, Mumbai – II	}	**Appellant**
versus		
M/s. Indian Oil Corporation Ltd.	}	**Respondent**

Ms. P. S. Cardozo with Ms. Ruju R. Thakkar for the appellant.

Mr. M. H. Patil with Ms. Aparna Hirandagi for the respondent.

CORAM :- S. C. DHARMADHIKARI &
B. P. COLABAWALLA, JJ.

DATED :- DECEMBER 5, 2016

P.C. :-

1. This appeal of the Revenue was admitted by this court on 4th April, 2006. It was placed for directions today to find out as to whether the issue raised and the questions on which the appeal has been admitted by terming them as substantial questions of law survive for determination.

2. Since both sides state that the same survive, we take up, with their consent, this appeal for final disposal and since it is of the year 2006.

3. The tribunal's order, impugned by the Revenue, reads as under:-

> "ORDER NO.A/1038/WZB/2005/CIII
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> Per : Mr. S. S. Sekhon, Member (Technical)
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> 1. The price of lubricating oil sold ex-depot, of the appellant, had additional surcharge of Rs.1.60 per litre and duty was paid. Stocks held as on 25.10.1996, were also charged to this duty by addition of this amount. Depot is duty paid depot.
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> 2. Since the duty recovered ex-depot of the appellant included duty on this surcharge of Rs.1.60 per litre, action under Section 11D was initiated with recovery under provision of Section 11A read with rule 9(2) by a Show Cause Notice dated 06.09.2001 and penalty provision under Section 11AC with interest under Section 11AB proposed.
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> 3. Following our decision in appellants own case vide Order No. A/589/WZB/05/C-1 dated 12.05.05 para 8 thereof, this recovery under provision of Section 11D cannot be upheld. In any case, resort to rule 9(2) read with section 11A is bad in law since the recovery under Section 11D is not a levy of duty under Section 3 of the Central Excise Act, 1944. On same reasons penalty under Section 11AC and interest under Section 11ABN cannot be upheld. We find force in the reliance on the decision in case of M/s. Bharat Petroleum Corporation Ltd. (2002 9146) ELT 646 by the Ld. Advocate to not to uphold the recovery ordered. Order impugned is set aside and appeal allowed.
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> (Pronounced in Court)"

4. What we find is that the tribunal has failed to grasp the issue raised before it. The issue was whether section 4 as amended would apply and hence the clearance at the depot was to be taken for the purpose of the liability to pay the Central Excise duty. The allegation is that the manufacturer/assessee was

clearing its goods through their depot at higher price than their ex-factory price. However, they were paying Central Excise duty on their ex-factory price upto 28th September, 1996. They started paying the Central Excise duty on their depot price from 25th October, 1996. However, they did not pay the differential duty on their stock as on 24th October, 1996 on which they had already paid Central Excise duty on ex-factory price. The assessee was called upon to pay differential duty on the stock lying in their depot as on 24th October, 1996. That is how a show cause notice was issued and the demand was raised. The adjudicating officer confirmed the same in the order-in-original dated 30th May, 2003. That was challenged before the Tribunal. The tribunal allowed the appeal of the assessee by the impugned order dated 30th June, 2005. The tribunal relied upon a case pertaining to the very assessee and found that it is identical.

5. The Revenue argued that this is not a proper approach for the tribunal did not set out the facts in details, the nature of demand and there is absolutely no discussion as to how the question of paying the differential duty does not arise in spite of the amended section 4. The tribunal also did not take into consideration the findings in the order of the Commissioner. The differential duty was paid on 25th May, 1998. That was to the

tune of Rs.38,33,724/-. Thus, the detailed findings of the Commissioner and as appearing from pages 46-47 of the paper book had not been considered at all. Similarly, whether the fact situation in the present case is identical to the assessee's own case referred in the tribunal's order has also not been considered in details.

6. As a result of the cryptic and virtually non-reasoned order of the tribunal, we find that it would not be proper on our part to go into all the details. Though more than 10 years have lapsed from the date of the tribunal's order, but considering that factual matters have to be resolved and by going into the relevant details, it would not be proper on our part to undertake that exercise.

7. As a result of the above discussion, the appeal succeeds. The impugned order is quashed and set aside. The appeal of the assessee before the tribunal is restored to its file for a fresh consideration on merits in accordance with law. However, while deciding the same, the tribunal shall not be influenced in any manner by its earlier order and observations. The appeal is allowed to this extent. There would be no order as to costs.

(B.P.COLABAWALLA, J.) **(S.C.DHARMADHIKARI, J.)**