

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON : 07.08.2018

JUDGMENT PRONOUNCED ON : 07.12.2018

CORAM:

THE HON'BLE MR. JUSTICE S.MANIKUMAR
and
THE HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

C.M.A.No.3535 of 2017

Indian Oil Corporation Ltd.,
Represented by its Senior Terminal Manager,
Korukkupet Terminal,
Korukkupet, Chennai. Appellant

Vs.

The Commissioner of Central Excise Chennai-I,
26/1, Mahathma Gandhi Road,
Chennai - 600 034. Respondent

PRAYER: Civil Miscellaneous Appeal has been filed under
Section 35G of the Central Excise Act, against the Final Order
No.40991 of 2017, dated 14.06.2017, on the file of the
Customs, Excise and Service Tax Appellate Tribunal, Chennai.

For Appellant : Ms.Cynduja Krishnan
for M/s.S.Muthuvenkataraman

For Respondent : Mr.A.P.Srinivas
Standing Counsel for CE

सत्यमेव जयते

J U D G M E N T

SUBRAMONIUM PRASAD, J.

Instant Civil Miscellaneous Appeal is directed
against the order passed by the Customs, Excise & Service Tax
Appellate Tribunal in Final Order No.40991 of 2017 dated
14.06.2017 (Appeal No.E/668/2005-DB).

Brief Facts:

2. The appellant/Indian Oil Corporation Ltd.,
Korukkupet Terminal, Kathiwakkam High Road, Korukkupet,
Chennai, is holder of Central Excise Registration

No.AAACI1681GXM150, for the receipt, storage and clearance of petroleum products falling under Chapter Heading No.27 of the Central Excise Tariff Act, 1975.

3. Appellant, operating under the warehousing provisions, stock, transfer petroleum products like High Speed Diesel Oil (HSD) and Motor Spirit (MS), to their Depots at Renigunta, Neyveli and Pondicherry. The actual sale, to the customers takes place from these depots only by adopting the assessable value, prevailing from time to time, with reference to the rate circular received from their Head Office.

4. Appellant was served with a show cause notice dated 19.02.2004, stating that the duty structure of Motor Spirit and High Speed Diesel Oil had been revised on 01.03.2001 and 12.01.2002 respectively, as under:-

PRODUCT : MS

Duty Structures		Duty Structures	
Prior to	After	Prior to	After
1.3.2001	1.3.2001	12.1.2002	12.1.2002
BED 16%	16%	16%	16%
SED ---	16%	16%	74%
AED Rs.1000/kl	1000/kl	1000/kl	1000/kl

PRODUCT : HSD

Duty Structures		Duty Structures	
Prior to	After	Prior to	After
1.3.2001	1.3.2001	12.1.2002	12.1.2002
BED 12%	16%	16%	20%
SED ---			
AED Rs.1000/kl	1000/kl	1000/kl	1000/kl

5. Show cause notice stated that, as per the stock statement furnished by the appellant, there was no stock at Pondicherry depot on the above 2 dates of revision. The excess amount payable towards excise duty, consequent to the above duty revision, on the stock at the depots at Renigunta and Neyveli worked out to Rs.21,84,271.57 P. Show cause notice further stated that as per the provisions contained in Section 11 D of the Central Excise Act, 1944, "every person, who is liable to pay duty under the Central Excise Act, 1944, or the rules made thereunder, and collected any amount, in excess of the duty, assessed or determined and paid on any excisable goods, under the Central Excise Act, 1944, or the rules made thereunder, from the buyer of such goods, in any manner, representing duty of excise, shall forthwith pay the amount, so collected to the credit of the Central Government.

6. On the above, respondent was of the view that the appellant was therefore, required to show cause, as to why the differential duty of Rs.21,84,271.57 P (as detailed in the annexure to the show cause notice), should not be demanded, under Section 11 D of the Central Excise Act, 1944, for the clearance of the Petroleum Products, made for two dates of price revision i.e. 01.03.2001 and 12.01.2002. Thus the appellant was asked to show cause, as to why penalty, should not be levied under the provisions of Rule 27 of the Central Excise Rules, 2002.

7. Appellant has given a reply stating that they had paid the duties of Excise, based on the valuation provisions of Central Excise Act and pricing, prevailing on the date, and the time of removal of the goods from the terminal since the Oil Marketing companies had no control over pricing changes and that the appellant had no say in the matter. Appellant has further stated that Renigunta and Neyveli Depots, are independent Depots, and not functioning under the administrative control or direction of the appellant.

8. Appellant has further contended that no differential duty of excise can be demanded, on the stocks hold by the depots, without substantiating that a) the said stocks were received by the depot only from Korukkupet Terminal b) they were sold without any loss in storage, c) the duty of excise was collected on such sale through invoice specifying the duty amount so collected in the invoice d) such collection was received by and accounted against Korukkupet Terminal (appellant herein). Appellant has therefore, stated that in the absence of the above mentioned factors, no differential duty can be claimed against the appellant.

9. Original authority i.e. the Assistant Commissioner of Customs, Excise & Service Tax Appellate Tribunal, Chennai, after going through the records of the case and after giving personal hearing to the parties, passed an order directing the appellant to pay a sum of Rs.12,71,643/- under Section 11 D of the Central Excise Act. The authority did not impose any penalty. Original authority has found that the appellant has not denied or disputed, in the show cause notice, collection of excise duty, at the revised rate of Central Excise duty, at the time of sale of stock of petroleum products lying as on the date of revision of excise duty rate.

10. The original authority, on scrutinizing the invoices raised, after the date of revision of rate of duty, viz., 01.03.2001 and 12.01.2002, has found that the invoices, mentioned the rates, which were chargeable after revision, and therefore, the original authority held that the difference between the amount collected by the depot invoice, and the value declared for the purpose of duty, at the time of

clearance from the warehouse, has to be treated, as excess excise duty.

11. The assessing authority also rejected the claim of the appellant that depots are independent, and not coming under the control of the appellant, and therefore, the sum amount, so collected, has not been received and accounted with the appellant.

12. The original authority, thus held that the petroleum products were removed from the appellant terminal on stock transfer basis to various depots for sale. Original authority, held that sale of products, takes place only at depots.

13. Original authority, thus concluded that the appellant, a consignor of the goods on stock transfer basis, are responsible, for adoption of the correct procedure including Section 12A of Central Excise Act, 1944, even at depots, as the depots are selling the same goods received, on stock transfer basis. In any event, the original authority, held that M/s.IOC is the only one person, and IOC depots and IOC, Korukkupet Terminal (appellant herein) are functioning under the overall control of the same management of M/s.IOC Limited.

14. On facts, the original authority has found that the excess amount has been collected, in the name of excise duty/duty, at the time of sale of goods cleared, on stock transfer basis from the appellant, and therefore, the appellant, is liable to pay duty, under the Central Excise Law and responsible for the correct adoption of the provisions of Law ,including Section 12A of the Act, till the stock transferred goods, were sold out. The original authority has accepted the calculation, as per the worksheet, filed by the appellant, along with their reply notice, and the calculation of the differential duty, would come to Rs.12,71,643/-, for High Speed Diesel and Motor Spirit.

15. Appellant and the Department have preferred appeals, against the assessment order. The appellant herein has challenged invocation of Section 11 D of the Central Excise Act. On the other hand, the Department challenged the reduction of amount by the authority. Appeal filed by the appellant was numbered, as Appeal No.55 of 2005, and the appeal filed by the Department, was numbered as Appeal No.16 of 2005.

16. The appellate authority viz., the Commissioner of Central Excise (Appeals), Chennai, by its order dated 10.05.2005, rejected the appeal, filed by the appellant, and the allowed in part the appeal, filed by the Department, accepting the grounds put forth by the Department, resulting in total demand of Rs.15,20,749 (additional demand of

Rs.2,49,106/-).

17. Aggrieved by the two orders, the appellant has preferred an appeal before the Commissioner of Central Excise (Appeals), Chennai. The Tribunal by its order dated 14.06.2017 in Final Order No.40991/2017, dismissed the appeal filed by the appellant. Instant Civil Miscellaneous Appeal has been filed, on the following substantial questions of law:-

1. Whether the order of the Tribunal is arbitrary, illegal and without jurisdiction inasmuch as it proceeds on a complete misconception of law and facts, thus liable to be set aside?
2. Whether the order of the Tribunal is right in confirming the order of the lower authorities when the very issuance of show cause notice is without jurisdiction?
3. Whether the order of the Tribunal is legally valid when the provisions of Section 11D cannot be made applicable to the instant case?
4. Whether the order of Tribunal is correct in stating that subsequent price revisions in depots affects the duty liability of appellant, when Rule 7 of Central Excise Valuation Rules 2000 requires payment of duty based on price prevalent at the time of clearance from the warehouse?
5. Whether the order of the Tribunal suffers from judicial impropriety/indiscipline inasmuch as it chooses not to follow the binding decision of this Hon'ble High Court in the case of CCEx. Coimbatore Vs. Hindustan Petroleum Corpn. Ltd reported in 2015 (322) ELT 618 which is binding on Tribunal?
6. Whether the order of the Tribunal is right in confirming the order of the lower appellate authority confirming the demand of interest under Section 11DD of the Central Excise Act, 1944, when the proposal to demand interest on the differential duty is not invoked in the show cause notice?
7. Whether the order of the Tribunal is right in confirming the order of the lower appellate authority confirming the demand of interest under Section 11DD of the Central Excise Act 1944, when Section itself was introduced only from 14.05.2003?

Contentions:

18. Ms.Cynduja Krishnan, learned counsel appearing for the appellant, reiterated the submissions made by the appellant, in the forums below. Learned counsel for the

appellant submitted that Renigunta and Neyveli Depots, are independent Depots, not functioning under the appellant's administrative control or direction of the appellant Corporation, and they are lying outside the jurisdiction of Chennai. Learned counsel for the appellant also submitted that notice ought to have been issued to the respective officers, wherein the goods were lying, and not terminal, because the goods were cleared from the appellant's terminal, by paying appropriate duty, as per the provisions of the Valuation Rules.

19. It is also submitted that unless and until it is not established that the entire stock received by the depot at Renigunta and Neyveli, were only received from the appellant's terminal, and that there was no loss in storage and further, the duty of excise was collected, on such sale through invoice specifying the duty amount so collected in the invoice, the Department cannot raise a demand of duty under Section 11 D of the Central Excise Act, 1944.

20. Learned Standing Counsel appearing for the Department, on the other hand, would support the order impugned before us, and contended that no interference is called for from this Court.

Discussion and conclusion:-

21. Section 11 D of the Central Excise Act, 1944, reads as under:-

Duties of excise collected from the buyer to be deposited with the Central Government. -

(1) Notwithstanding anything to the contrary contained in any order or direction of the Appellate Tribunal or any Court or in any other provision of this Act or the rules made thereunder, every person who is liable to pay duty under this Act or the rules made thereunder, and has collected any amount in excess of the duty assessed or determined and paid on any excisable goods under this Act or the rules made thereunder from the buyer of such goods in any manner as representing duty of excise, shall forthwith pay the amount so collected to the credit of the Central Government.

(2) Where any amount is of the Central Government under sub-section required to be paid to the credit (1) and which has not been so paid, the Central Excise Officer may serve, on the person liable to pay such amount, a notice requiring him to show cause why the said amount, as specified in the notice, should not be paid by him to the credit of the Central Government.

(3) The Central Excise representation, if any, made by the person?Officer shall, after considering the on whom the notice is served under sub-section (2), determine the amount due from such person (not

being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined.

(4) The amount paid to the under sub-section (1) or sub-section (3) shall credit of the Central Government be adjusted against the duty of excise payable by the person on finalisation of assessment or any other proceeding for determination of the duty of excise relating to the excisable goods referred to in sub-section (1).

(5) Where any surplus is left sub-section (4), the amount of such surplus shall after the adjustment under either be credited to the Fund or, as the case may be, refunded to the person who has borne the incidence of such amount, in accordance with the provisions of section 11B and such person may make an application under that section in such cases within six months from the date of the public notice to be issued by the Assistant Commissioner of Central Excise for the refund of such surplus amount.

22. Section 11 D specifies that "every person who is liable to pay duty under this Act or the rules made thereunder, and has collected any amount in excess of the duty assessed or determined and paid on any excisable goods under this Act or the rules made thereunder from the buyer of such goods in any manner as representing duty of excise, shall forthwith pay the amount so collected to the credit of the Central Government".

23. Facts are that the appellant operating, under warehousing provisions, stock transfers petroleum products like High Speed Diesel Oil (HSD) and Motor Spirit (MS), to their Depots at Renigunta, Neyveli and Pondicherry. The actual sale to the customers, takes place from these depots only by adopting the assessable value, prevailing from time to time with reference to their rate circular received from their Head Office. Whenever, there is upward revision of rates, the amount is collected from the customers, by the Depots. The additional amount recovered, has to be considered, as extra excise duty, which is liable to be paid under Section 11 D of the Act.

24. The appellant cannot be permitted to pay duty, on the rates, prevailing on the date of stock transfer, ignoring the upward revision of rates, which is the price, at which the products to be sold, to the customer.

25. Arguments of the appellant that they have no control over the Depots, is no answer to avoid the demand, because, it is the duty of the appellant to maintain the records of the amounts received from the Depots, from the sale of High Speed Diesel and Motor Spirit.

26. Amount that are received from the Depots would include the excise duty, collected by the Depots, at the revised rate. The calculation are accounted, against the appellant. Therefore, the appellant alone is liable to pay the differential excise duty, recovered, in terms of Section 11 D of the Central Excise Act. The products of High Speed Diesel and Motor Spirit, are under the Administrative pricing Control mechanism of the Government of India. It is not disputed that the actual sale of petroleum products, received from the warehouse, on stock transfer basis to the customers, takes place from various depots.

27. It is not disputed that in the present case there is an upward revision of duty between the date of stock transfer and the date of sale. The difference between the amount, collected by the depot invoice and the value declared for duty purpose, at the time of clearance from the warehouse, has to be treated as an excess excise duty, which has to be paid to the Central Government, under Section 11 D of the Act.

28. Appellant, is the consignor of the goods, and the goods are removed from the terminal of the appellant to the depots only on stock transfer. They being the consignors, are responsible, for accounting to the authorities, for payment of excise duty. Admittedly, there is no sale between the terminal and depots. It is therefore, it is the responsibility of the consignor, to produce the sale record on stock transfer of goods, and pay the excess amount of excise duty collected due to upward revision of rates.

29. In view of the concurrent finding of the fact, arrived at by the forums below, appeal is devoid of merits, and the same is liable to be dismissed.

30. Accordingly, the present Civil Miscellaneous Appeal is dismissed. There shall be no order as to costs.

Sd/-

Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

asi/pkn
To

Customs, Excise & Service Tax Appellate Tribunal,
No.26, Shastri Bhavan, Annex Building,
Haddows Road, Chennai - 600 006.

+1cc to Mr.A.P.Srinivas , Advocate SR.No. 84723

C.M.A.No.3535 of 2017

ASK(02/01/2019)