O-279

CEXA/5/2020
IA No.GA/1/2020 (Old No.GA/917/2020)

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (CENTRAL EXCISE)
ORIGINAL SIDE

COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX, HALDIA COMMISSIONERATE.

-VERSUS-

M/S. INDIAN OIL CORPORATION LIMITED.

BEFORE :
THE HON'BLE JUSTICE SURYA PRAKASH KESARWANI
AND
THE HON'BLE JUSTICE AJAY KUMAR GUPTA
Date : 28th June, 2024.

Appearance:
Mr. C. G. Kamal, Adv.
… for the appellant.

Dr. Samir Chakraborty, Sr. Adv.
Mr. A. Biswas, Adv.
Mr. Bhaskar Sengupta, Adv.
...for the respondent.

1. Heard Sri C. G. Kamal, learned counsel for the appellant and Sri Chakiraborty, learned senior advocate assisted by Sri Biswas and Sri Sengupta, learned Advocates for the respondent/assessee.

2. Briefly stated facts of the present case are that a sum of Rs.4,13,18,733/- along with applicable interest on quantity of SKO cleared from Haldia Refinery to its own sister concern Guwahati Refinery was paid by respondent before the issuance of demand-cum-show cause notice. The adjudicating authority confirmed the demand of Rs.4,13,18,733/- and appropriated it from the

aforesaid amount deposited by the respondent/assessee. He imposed penalty equivalent to the amount of duty. Thus, the dispute in the show cause notice and the order-in-original remained only to the extent of imposition of penalty.

3. Aggrieved with the order-in-original, the assessee filed Excise Appeal No.71375 of 2013 (M/s. Indian Oil Corporation Ltd. vs. Commissioner of Central Excise, Haldia.) before the Customs, Excise & Service Tax Appellate Tribunal, Kolkata, Eastern Zonal Bench, Kolkata, which has been allowed by the final order No.A/76501/2019 dated 23.07.2019. While allowing the appeal, the Tribunal has recorded the following finding of fact:

> *"5. We have carefully considered the submissions made by both the sides and perused the appeal records.*
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> *6.* ***There is no dispute about the fact that the entire duty demand along with interest was paid by the appellant and this was done prior to the issuance of show cause notice and this fact had been intimated to the department. In view of this, in terms of the provisions of Section 11A(2B), no show cause notice is required to be issued and hence there was no question of imposing any penalty on the appellant.***
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> *7. The impugned order imposing penalty is, therefore, set aside. The appeal filed by the appellant is thus allowed with consequential benefits, if any."*

4. Learned counsel for the appellant submits that the Tribunal has committed an error to allow the appeal and set aside the order-in-original.

5. Learned counsel for the respondent/assessee submits that no show cause notice could have been issued in view of the specific provision of Section 11A(2B) of the Central Excise Act, 1944 as it existed at the relevant point of

time. Therefore, the Tribunal has lawfully allowed the appeal on the basis of the admitted facts. The findings recorded by the Tribunal are findings of fact. He submits that no substantial question of law is involved in the present appeal.

6. We have carefully considered the submissions of learned counsels for the parties and perused the records of the appeal.

7. In the order-in-original itself that the adjudicating authority has mentioned that the entire amount of duty of Rs.4,13,18,733/- and interest of Rs.68,24,912/- was deposited by the respondent/assessee vide challan No.00326 dated 06.05.2012. The remaining amount of interest of Rs.10,542/- was also paid by the assessee vide challan No.00115 dated 19.07.2013. The demand-cum-show cause notice was issued by the adjudicating authority on 14.08.2012 i.e. much subsequent to the deposit of the amount of duty along with interest. Section 11A(2B) as it existed at the relevant time, specifically provides as under:

> ***"11A. Recovery of duties not levied or not paid or short-levied or short-paid or errone9ously refunded.-***
>
> *** * *   * * *   * * ***
>
> *(2B) Where any duty or excise has not been levied or paid or has been short-levied or short paid or erroneously refunded, the person, chargeable with the duty,* ***may pay the amount of duty on the basis of his own ascertainment of such duty or on the basis of duty ascertained by a Central Excise Officer before service of notice on him under sub-section (1) in respect of the duty, and inform the Central Excise Officer of such payment in writing, who, on receipt of such information shall not serve any notice under sub-section (1) in respect of the duty so paid:***
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> *Provided that the Central Excise Officer may determine the amount of short payment of duty, if any, which in his opinion has not been paid by*

> *such person and then, the Central Excise Officer shall proceed to recover such amount in the manner specified in this section. and the period of "one year" referred to in sub-section (1) shall be counted from the date of receipt of such information of payment.*
>
> *Explanation 1- Nothing contained in this sub-section shall apply in a case where the duty was not levied or was not paid or was short-levied or was short-paid or was erroneously refunded by reason of fraud, collusion or any willful mis-statement or suppression of facts. or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty.*
>
> *Explanation 2 - For the removal of doubts, it is hereby declared that the interest under section 11AB shall be payable on the amount paid by the person under this sub-section and also on the amount of short-payment of duty, if any, as may be determined by the Central Excise Officer, but for this sub-section.*
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> *Explanation 3.- For the removal of doubts,* ***it is hereby declared that no penalty under any of the provisions of this Act or the rules made thereunder shall be imposed in respect of payment of duty under this sub-section and interest thereon."***

8. Thus, on facts there is no factual dispute that the entire amount of duty along with interest was deposited by the assessee much prior to the issuance of notice. It is also admitted fact that information about the aforesaid deposit of the amount of duty and interest was given by the assessee to the Central Excise Officer concerned. We find that provisions of sub-Section (2B) of Section 11A of the Central Excise Act, 1944 is fully attracted on facts of the present case which specifically provides the circumstance in which the Central Excise Officer shall not serve any notice under sub-Section (1) of Section 11A of the Act, 1944 in respect of the duties paid. Section 11A(2B) is fully attracted on facts of the present case.

9. Under the circumstances, we do not find any irregularity in the findings recorded by the Tribunal in paragraph 6 of the impugned order which has been reproduced above. No substantial question of law is involved in the present appeal.

10. In view of the aforesaid, the appeal (CEXA/5/2020) is dismissed at the admission stage. The connected application also stands disposed of.

(SURYA PRAKASH KESARWANI, J.)

(AJAY KUMAR GUPTA, J.)

As.