(2021) 12 CESTAT CK 0022

Customs, Excise And Service Tax Appellate Ahmedabad

Case No: Excise Appeal No. 10382, 10375, 10447 Of 2014

Nayara Energy Limited And Ors.		APPELLANT
	Vs	
Commissioner Of Central Excise And ST, Rajkot		RESPONDENT

Date of Decision: Dec. 2, 2021

Acts Referred:

- Central Excise Act, 1944 - Section 11A(2B), 11A(1)(b), 11A(2), 11A(2B), 11AC
- Central Excise Rules, 2002 - Rule 26

Hon'ble Judges: Ramesh Nair, J; Raju, Technical Member

Bench: Division Bench

Final Decision: Allowed

Judgement

1. The brief facts of the case are that the appellant owns a refinery and engaged in the manufacture of Motor Spirit (MS for short) and High Speed

Diesel (HSD for short). Appellant manufactured and supplied standard MS and HSD to various Oil Marketing Companies (OMCs for short) namely,

Indian Oil Corporation Limited (IOCL), Hindustan Petroleum Corporation Ltd (HPCL), Bharat Petroleum Corporation Limited (BPCL) and Shell

India. After clearance of MS and HSD, the OMCs add certain additives to these standardized MS and HSD at their depot after taking delivery from

the appellant. In the said MS and HSD, the OMCs are mixing the additives and sold under different brand names. As per Notification No. 4/2008-CE

dated 01.03.2008, two effective rates of Central Excise duty were prescribed on MS and HSD, one for MS and HSD which was â€žintended for sale

without any brand name‟ and the other for MS and HSD which was â€žintended for sale with a brand name‟. The appellant manufactured and

cleared MS and HSD being standard products without any brand name on payment of rate of duty applicable for such unbranded MS and HSD. Since

the OMCs sold the MS and HSD under brand name and the excise duty is payable at the rate applicable on branded goods, the department vide letter

dated 17.07.2008 directed the appellant to furnish information regarding the process of manufacture of branded MS and HSD, names of OMCs to

whom such products were sold and copies of sale-purchase agreements. The requisite information was provided by the appellant vide letter dated

28.07.2008. The appellant, after getting information from OMCs, the details of branded goods sold by them, deposited the differential duty and

informed the department vide letter dated 06.10.2008. However, the department issued a show cause notice dated 19.03.2013 inter-alia alleging that

the appellant was obligated to collect duty from the OMCs on the quantity cleared by the OMCs as branded fuel but purchased as per the indent as

intended for sale without brand name. It was also alleged that appellant continued to clear unbranded fuel to the OMCs being fully aware that OMCs

were converting unbranded fuel to branded fuel, solely with an intention to evade payment of duty and in contravention of the Central Excise Rules. In

view of above, show cause notice proposed to invoke the extended period of limitation under Section 11AC of Central Excise Act, 1944. The appellant

replied to show cause notice as under vide letter dated 19.08.2013 contending, inter-alia that ::-

(i) Duty had been correctly paid based on the indents provided by the OMC as per provisions of CEA, 1944.

(ii) It was under no obligation to collect differential duty on certain quantity of fuel sold under a brand name, which was converted by the

OMCs at their depots, on which it had no control whatsoever.

(iii) The matter should have been treated as closed under section 11A(2B) of the CEA, 1944 since it discharged the differential duty along-

with interest on receipt of the same from the OMCs.

(iv) No case of fraud, or collusion or willful misstatement could be alleged, the extension of period of limitation could not be invoked, and

the mandatory penalty could not be imposed.

2. The show cause notice was then adjudicated vide impugned order whereby the appellants eligibility for waiver of show cause notice under Section

11A(1)(b) read with Section 11A(2) of Central Excise Act, 1944 was rejected on the ground that part of interest amounting to Rs. 51,236/- was

outstanding at the time of issuance of show cause notice. Accordingly, the demand of excise duty along with interest and penalty under Section 11AC

was confirmed and penalties of Rs. 10 Lakh was also imposed on the appellants Shri RK Jain, DGM of the appellant and and Rs. One lakh on Shri

Nitin Angre, Manager M/s. Shell India Markets Pvt. Limited. Therefore the present appeals filed by the appellants.

3. Shri Vipin Jain, learned Counsel along with Shri Abhishek Kapadia and Mrs. Dimple Gohil, Advocate appeared on behalf of the appellants. He

submits that as per Notification, the term â€œintended for sale without brand nameâ€ means at the time of clearance of goods, the goods intended

were sold without brand, the rate of duty shall be applicable accordingly. In the present case, the OMCs have not informed the appellant at the time of

clearance of MS and HSD the intention of goods being sold without the brand name. Therefore, the appellant has correctly paid excise duty

considering the MS and HSD as unbranded, in terms of purchase order issued by the OMCs. In this regard, he placed reliance on the following

judgments:-

(a) Inter Continental (India) â€" 2008 (226) ELT 16 (SC)

(b) Inter Continental (India) â€" 2003 (154) ELT 37 (Guj.)

(c) Clough Engineering Limited - 2006 (198) ELT 457 (Tri. Mum)

(d) National Organic Chemical Indus. Limited â€" 2000 (126) ELT 1072 (Tri.)

(e) B.G. Exploration & Production (I) Limited â€" 2014 (301) ELT 81 (Tri. Mum.)

4. He further submits that demand is barred by limitation as appellant has not suppressed or misstated any facts so as to attract extended period of

limitation. He submits that there is no reason for the appellant to evade excise duty for the reason that actual duty paid by the appellant is reimbursable

by the OMCs. Therefore, there is no malafide on the part of the appellant. He further submits that period involved is March 2008 to January 2010.

Accordingly, the present case is governed by the provisions of Section 11A as it stood before the amendment made through Finance Act, 2011. As

per un-amended sub-section (2B) of Section 11A it suggests that only requirement is payment of duty before issuance of show cause notice and

payment of interest was not the condition precedent for non issuance of show cause notice. This being the legal position, respondent ought to have

extended the benefit of Section 11A (2B) as undisputedly, the entire differential duty with substantial portion of the interest stood deposited much prior

issuance of show cause notice.

5. As regards the penalty under Section 11AC imposed by the Adjudicating Authority, he submits that no justification whatsoever has been provided

by the respondent, to impose penalty under Section 11AC of Central Excise Act, 1944. Section 11AC, on the first instance requires evasion of duty

and on the second, requires suppression of facts, willful mis-statement etc. on the part of the appellant for imposition of penalty. Both of which are

absent in the facts of the present case. The appellant was neither aware of the OMCs inclination to sell the purchased unbranded products, upon

dosing, as branded nor was privy or party to such an act.

6. As regards the appellant Shri R.K. Jain, DGM, he submits that on the appellant penalty was imposed under Rule 26 of Central Excise Rules, 2002.

None of the ingredients precedent for invoking Rule 26 is applicable to the facts of the present case. The applicant had no knowledge or role

whatsoever in the sale of fuel intended for as unbranded being sold as branded fuel, especially when dosing of additives was done only subsequent to

the clearance of goods at the OMC‟s depot. Without prejudice to the above, he further submits that the respondent has not come to the conclusion

that MS and HSD in which demand for differential duty is made, is liable to confiscation. In absence thereof, no penalty under Rule26 is sustainable.

With the above submissions, he prays that impugned order be quashed and set-aside as totally illegal and unsustainable and the appellant be refunded

the differential duty along with interest thereon.

7. On the other hand Shri Ghanshyam Soni, learned Joint Commissioner (AR) appearing on behalf of the Revenue reiterates the findings of the

impugned order.

8. We have carefully considered the submissions made by both the sides. We find that appellant have vehemently argued that since the differential

duty has been paid before issuance of show cause notice along with interest, the case is required to be closed in terms of Section 11A(2B) of Central

Excise Act, 1944 prevalent at the relevant time. On perusal of the impugned order, we find that Adjudicating Authority, as regards the submission of

the appellant for waiver of show cause notice in terms of Section 11A(1(b) read with Section 11A(2) of Central Excise Act, 1944, following finding

was given:-

â€œ27.4 As regards waiver of show cause notice under Section 11A(1)(b) read with Section 11A(2) of the Central Excise Act, 1944, it is

pertinent to reproduce the relevant provisions of Section 11A, of the Central Excise Act, 1944.

â€œ(1) Where any duty of excise has not been levied â€œor paid, or has been short-levied or short-paid or erroneously refunded; for any

reason, other than the reason of fraudâ€™ or collusion or any willful misstatement 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,â€

(a) â€¦â€¦â€¦â€¦.

(b) the person chargeable with duty may, before service of notice under clause (a), pay on the basis of,â€

(i) his own ascertainment of such duty; or

(ii) duty ascertained by the Central Excise Officer, the amount of duty along with interest payable thereon under section 1 1AA.

(2) The person who has paid the duty under clause (b) of sub-section (1), shall inform the Central Excise Officer of such payment in writing,

who, on receipt of such information, shall not serve any notice under clause (a) of that sub-section in respect of the duty so paid or any

penalty leviable under the provisions of this Act, or the rules made thereunder.â€

A plain reading of the above provisions make it abundantly clear that a person intending to seek waiver of show cause notice should

exercise option under Section 11A(2) by by intimating the Investigating officer after discharging his entire duty liability and interest. I find

that the impugned show cause notice was issued for the period March, 2003 to January,2010 on 19.03.2013, however, even after more

than three years, the Noticee No. 1 is yet to discharge their entire interest amount on the differential duty. Till date, they have discharged

interest of Rs. 1,19,12,967/- only out of total interest amounting to Rs. 1,19,64,203/- demanded in the SCN and hence an amount of Rs.

51,236/- is still outstanding against them. Accordingly, the Noticee No.1 was not eligible for waiver of SCN under Section 11A(1)(b) read

with Section 11A(2) of the Central Excise Act, 1944.â€

9. From the above findings, we observe that the Adjudicating Authority has quoted Section 11A(1)(2) of Central Excise Act, 1944 which is duly

amended as per the amendment made by Finance Act, 2011. However, in the present case, the period involved is March 2008 to January 2010

therefore, the un-amended provision shall be applicable which is reproduced as under:-

â€œSECTION 11A. Recovery of duties not levied or not paid or short levied or short paid or erroneously refunded.---

(1) -----

(1A) -----

(2) -----

(2A) -----

(2B) Where any duty of 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:

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 â€œone yearâ€ referred to in sub-Section (1) shall be counted from the date of receipt of such information of payment.

Explanation 1. â€" 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 wilful 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 duly.

Explanation 2. - Fur 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.

10. We are of the clear view that unamended sub-Section 11(2B) shall apply for waiver of show cause notice. Therefore, there is fundamental error

on the part of the Adjudicating Authority for considering wrong provision i.e. amended provision, which is effective by enactment of Finance Act,

2011. We also find that the appellant have paid entire differential excise duty along with interest. There is only minor difference in the interest amount

as per Revenue even that is also in dispute as regard the correct calculation thereof.

11. Therefore, we are of the view that the case needs to be reconsidered in the light of our above observations. All other issues are kept open. The

matter is remanded to the Adjudicating Authority for reconsideration and for passing de-novo order. The appeal of the Company is allowed by way of

remand to the Adjudicating Authority.

12. As regards the appellants Shri R.K. Jain and Shri Nitin Angre, we are of the view that as regards the goods being sold as branded by OMCs, the

appellant had no knowledge. Moreover, there is no proposal of confiscation of the goods therefore, considering the overall facts and circumstances of

the case, the penalties imposed under Rule 26 of Central Excise Rules, 2002 upon Shri R.K. Jain and Shri Nitin Angre are clearly not sustainable.

Hence, penalties are set-aside and the appeals of Shri R.K. Jain (E/10375/2014) and Shri Nitin Angre (E/10447/2014) are allowed.

(Pronounced in the open court on 02.12.2021)