IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH, CHENNAI

E/00093/2010

[arising out of Order-in-Original No.LTUC/344/2009-C, dated 24.11.2009 passed by the Commissioner of Commissioner of Central Excise & Service Tax (LTU), Chennai]

M/s. CHENNAI PETROLEUM CORPORATION LTD. APPELLANT

Versus

COMMISSIONER OF CENTRAL EXCISE, LTU, CHENNAI RESPONDENT

Appearance:

For the Appellant Shri Raghavan Ramabhadran, Adv.
For the Respondent Shri K. Veerabhadra Reddy, JC (AR)

CORAM:

Hon'be Smt. Sulekha Beevi C.S, Member (Judicial)
Hon'ble Shri B. Ravichandran, Member (Technical)

Date of hearing/decision **13-11-2017**

FINAL ORDER NO. 42915 /2017

Per B. Ravichandran:

The appeal is against order dated 24.11.2009 of Central Excise, LTU, Chennai. The appellants are engaged in the manufacture and sale of petroleum products. They have depots for storage of petroleum products in various places. They cleared petroleum products without payment of duty to these depots for onward sale or

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further clearances to another depot, from where final sale is effected. The dispute in the present appeal relates to the duty liability on the freight element incurred on inter-depot transfer of petroleum products for payment of duty. The Revenue after conducting certain inquiry of the records of the appellants held a view that the appellants were not discharging Central Excise duty on the correct value in terms of Rule 7 of Valuation Rules. Where there is no sale of product ex-factory and the goods were actually sold from the depot the appellants discharged duty on such depot value. There were instances, where the goods were actually not sold from a depot but were cleared to another depot for sale from there. In other words, it is the value of freight involved from first depot to the second depot from where the goods were actually sold, for addition in the Central Excise value, is point of dispute. The original authority confirmed the differential duty involved for 5-year period from Sept.'04 and imposed penalty of equivalent amount under section 11AC of the Central Excise Act, 1944.

2. The learned counsel for the appellants did not contest the case on merits, in view of the decision of the Tribunal in *M/s. Brakes India Ltd. Vs Commissioner of Central Excise, Chennai* reported in *2005 (184) E.L.T.179 (Tri.-Chennai)* and in the case of M/s. Sundaram Clayton Ltd. Vs Commissioner of Central Excise, Chennai reported in *2010 (256) E.L.T.144 (Tri.-Chennai)*. It is submitted that the appellants discharged, the full liability on such freight element. In fact, they have paid interest on delayed payment of duty. On receipt of the impugned order they have discharged 25% of the penalty imposed under section 11AC.

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3. In the present appeal, the submission of the appellants is mainly focused on the penalty. The learned counsel submitted that since the appellants discharged the differential duty much before the issue of notice, it is a fit case for closure without proceedings, in terms of section 11A(2B) of the Act. He submitted that the payment of differential duty, for the extended period by itself cannot be construed as a bar for closure of case under the said provision. He submitted that the Tribunal is required to make a distinction between the voluntary payment and tax evasion for longer period and the existence of required elements like suppression, fraud etc., for penal proceedings. In other words, the appellant's admission of duty liability itself should not be construed as existence of elements for imposition of penalty under section 11AC.

4. The learned Authorised Representative contested the appeal on the ground that the closure of the case, which is pleaded by the appellants, is not admissible. The demand is for extended period. The payment for such differential duty before issue of notice does not preclude the adjudicating authority in proceedings against the appellants in case the elements for imposition of penalty are available and are invoked. The original authority, after examining the facts as alleged in the notice concluded that it is a fit case for imposition of penalty. Against such legal course of action it cannot be pleaded that different circumstances exist for extended period of demand and for imposition of penalty. He submitted that such interpretation will be against provisions of section 11A.

5. We have heard both sides and perused the appeal records.

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6. The admitted facts of the case are that the appellants are not contesting on the merits of the demand in view of the settled decisions by the Tribunal involving same set of facts. However, the only contest is against imposition of penalty. We have closely examined the impugned order as well as provisions of section 11A read with section 11AC as applicable to the facts of the present case. The point raised by the appellants is that when they have voluntarily discharged the differential Central Excise duty before the issue of notice, the matter should have been closed. The question of suppression or willful misstatement is not relevant in the present case, as such, elements are not established categorically in the impugned order. The appellants are pleading that they are continuing the same practice of payment of Central Excise duty all along and the withdrawal of warehousing provisions for petroleum products has brought in this valuation dispute, as the place of removal is considered as place of sale from depot. They have continued the practice as per the earlier system when they were paying tax in the warehouse located in various places as the warehouses were discharging duty on petroleum products before the withdrawal of such facility in 2004. The demand, in the present case, pertains to the period after withdrawal of such facility. The plea of the appellants is that they have continued the old practice and as such, there is no malafide on their part. We note that withdrawal of warehousing facility has brought new responsibility to the appellants as the place of removal for the excisable goods are to be determined at the time of clearance of goods from the factory. When the goods were not sold from the depot to which they were cleared by the appellants, it would necessarily follow that till the actual

place of clearance, the element freight has right has to be added. There is no dispute on this issue in view of the settled position of law as per Tribunal's decision cited above. The impugned order records that the appellants have not intimated the facts that part of the goods are not sold from the depots to which they were cleared from factory. To counter this, the appellants pleaded that prior to withdrawal of warehousing provision, the Revenue is aware that these depots are paying duty, following the legal provision of place of removal and the same practice is now carried over by the appellants for clearances from the factory. We find that with the withdrawal of warehousing facility, the onus is on the appellants to discharge duty correctly and the plea that they have followed the earlier practice, hence there is no suppression cannot be admitted on the face value. More important legal question is whether the fact that the appellants are pleading absence of malafide only for penalty will have effect on the demand for extended period. We note that the parameters for sustaining the demand for extended period under proviso to section 11A as well as for imposition of penalty under section 11AC are identical. The only reason pleaded for the waiver of penalty is such the tax is paid immediately on intimation from Revenue. We note that even in such a situation it is open for the Revenue to examine the existence or otherwise of the elements for imposition of penalty. In the present case, the same has been done. Since the criteria for both, extended period of demand as well as imposition of penalty are one and the same and same demand has been confirmed for extended period, we find a different interpretation cannot be invoked for waiver of penalty. In fact, there is no provision to waive penalty imposable under section

11AC in Central Excise Act, 1944. We also note that the appellants paid 25% of penalty imposed under section 11AC within 30 days of receipt of the impugned order. As such, the remaining penalty stands waived in terms of the legal provisions itself. Accordingly, we find no justification to interfere with the impugned order. Appeal is dismissed.

(Dictated and pronounced in open court)

(B. RAVICHANDRAN) 14.11.17
MEMBER (TECHNICAL)

Sulekha Beevi
(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)

ksr
13-11-2017

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सहायक पंजीकार / Asst. Registrar
सीमाशुल्क उत्पादशुल्क एवं सेवा कर अपील अधिकरण / (CESTAT)
चेन्नै / CHENNAI

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