

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI**

REGIONAL BENCH – COURT NO. III

EXCISE APPEAL No.362 of 2012

(Arising out of Order-in-Original No.LTUC/98/2012-C dated 21.03.2012 passed by Commissioner of Central Excise & Service Tax, Large Taxpayer Unit, Chennai)

M/s. Chennai Petroleum Corporation Ltd.

Cauvery Basin Refinery,
Panangudi,
Nagapattinam.

... Appellant

Versus

Commissioner of GST & Central Excise,

Chennai Outer Commissionerate,
Newry Towers, No.2054, I Block, II Avenue,
12th Main Road, Anna Nagar,
Chennai – 600 040.

... Respondent

APPEARANCE:

Mr. Raghavan Ramabadran, Advocate
For the Appellant

Ms. K. Komathi, ADC (A.R)
For the Respondent

CORAM:

HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)

HON'BLE MR. M. AJIT KUMAR, MEMBER (TECHNICAL)

**DATE OF HEARING : 11.04.2023
DATE OF DECISION : 17.04.2023**

FINAL ORDER NO.40274/2023

Order : [Per Ms. Sulekha Beevi C.S.]

Brief facts of the case are that the appellant is a Public Sector Undertaking and is engaged in the manufacture of petroleum products such as Naphtha, High Speed Oil and LPG falling under Chapter 27 of the

First Schedule to the Central Excise Tariff Act (CETA), 1985. Based on intelligence that appellants were not discharging the appropriate duty on the quantity of petroleum products cleared through pipelines from their refinery, the officers of DGCEI visited their refinery and collected details. It was noted that the appellant was clearing their final products through pipeline to the terminal located at Muttom which is 1.2 kms away from their refinery and is owned by M/s. Indian Oil Corporation Ltd. (IOCL). IOCL which is a holding company of the appellant had leased out 11 tanks in their terminal at Muttam to the appellant. The finished products were transferred to the terminal at Muttam. It was noticed by DGCEI that appellant had not paid excise duty based on the quantity removed from their refinery, but they had accounted, prepared invoice and paid excise duty based on the quantity of petroleum products received into the leased tanks at Muttam terminal which is located outside the refinery. Thus, there was short payment of duty on the quantity cleared from their refinery when compared to that was received in the tanks at Muttam. Further, though the appellant had obtained permission for storage of the non-duty paid goods at Muttam terminal, the said permission was granted only till 2008. The appellant but continued to avail the facility without written permission from the Department. It appeared to the department that such permission even if allowed cannot form part of the R.G.1 stage (to consider the production quantity) and can only be treated as warehouse to store non-duty paid goods.

2. Secondly, the appellant had put underground pipeline from storage tanks located in their terminal at Muttam to Chidambaranar Oil Jetty on shore, located at Nagore for clearing the white petroleum oils, viz. Naptha, Superior Kerosene and High Speed Diesel through ship. It was noticed that appellant had not paid duty on the stock of Naptha of 1048 Kilo Litres @ NAT, which was lying in the pipeline after being cleared from the refinery.

3. On being pointed out these lapses, the appellant paid an amount of Rs.76,40,875/- on 04.09.2008 towards duty on pipeline quantity of Naptha. Further, they also paid Rs.36,98,213/- on 16.03.2011 towards the differential duty on the basis of actual production quantity recorded at the time of dispatch from appellant's refinery by netting the short / excess quantity despatched from refinery on a monthly basis. They also paid an amount of Rs.16,13,275/- towards interest on the above duty paid by them belatedly.

4. Show cause notice dated 30.03.2011 was issued for demanding the short duty along with interest for the disputed period from 01.04.2006 to 31.01.2011. After due process of law, the original authority confirmed the demand of Rs.2,33,00,356/- as proposed in the show cause notice along with interest and imposed equal penalty under Section 11AC of the Central Excise Act, 1944. The amount already paid by the appellant was appropriated towards liability. Aggrieved by such order, the appellants are now before the Tribunal.

5. Learned Counsel Shri Raghavan Ramabadran appeared and argued for the appellant. It is submitted that the appellant is a Refinery engaged in refining crude petroleum into petroleum products such as, High Speed Diesel (HSD) Oil, Liquid Petroleum Gas (LPG), Naptha, Superior Kerosene Oil and LSHS. IOCL is the holding company of the appellant. All products manufactured at the Cauvery Basin Refinery by the appellant are sold only to IOCL. The Cauvery Basin Refinery of the appellant was started in the year 1993.

6. Earlier, under the Warehousing procedures of the Central Excise Rules, 1944 and later under Rule 20 of the Central Excise Rules, 2002, petroleum products were allowed to be removed without payment of duty for warehousing and distribution therefrom. Excise duty was paid only when the products were cleared from the warehouse. This facility was in force till 05.09.2004. Accordingly, the appellant cleared the petroleum products to the storage and marketing terminals of IOCL located adjacent to the Refinery, without payment of duty. There were dedicated pipelines for HSD, LSHS etc. for carrying the petroleum products from the refinery to the storage terminals. Excise duty was paid by IOCL, as and when they removed the petroleum products from the terminal. The warehousing facility for the petroleum products was withdrawn by the Government w.e.f. 06.09.2004 vide Notification No.17/2004-CE (N.T) dated 04.09.2004. Therefore, the appellant was required to clear the goods on payment of excise duty from the refinery itself.

7. The appellant was not having storage facility inside the refinery. Therefore, the appellant took the storage tanks of IOCL on lease for

storage of their petroleum products. By this arrangement, the petroleum products could be taken through pipelines for storage at the leased tanks at Muttam. The appellant had applied and obtained permission from the Commissioner of Central Excise, Trichy under Rule 4 (4) of the Central Excise Rules, 2002 to store the non-duty paid petroleum products namely HSD, Naptha & LSHS in the leased tanks at Muttam. The department had granted permission upto 31.03.2005 and later was extended upto 31.03.2007 vide letter dated 14.03.2007 and further extended to 31.03.2008 vide letter dated 30.07.2007.

8. Though no further extension of permission was given by the department, the appellant continued the facility of storage of non-duty paid goods at IOCL terminal, Muttam for the periods 2008-09, 2009-10, 2010-11. The appellant had informed the department vide letters dated 17.02.2009, 21.02.2009 and 26.06.2009 that they are continuing the facility of storage for the years upto 2009-10 also. The Department had not objected to the storage facility which was continued by the appellant.

9. Meanwhile, the Commissioner vide letter 04.03.2005 proposed to withdraw the facility. A letter dated 09.03.2005 was issued proposing to withdraw the permission. The appellant filed a detailed reply dated 21.03.2005 justifying the need for continuation of the facility. There was no further response from the Department. The appellant had continued to store at the IOCL terminal. Thus, the storage facility at IOCL terminal without payment of duty continued. Later, the appellant had filed application dated 31.03.2011 and included these storage terminals also as part of the refinery in their registration certificate itself.

10. The first allegation for demand of duty is that the appellant has not paid duty on the actual quantity of petroleum products cleared from their refinery. It is submitted by the Ld. Counsel that the appellant has paid duty on the basis of the quantity that has been received in their storage tanks at the terminal at Muttam. Due to volatile nature of the petroleum products, there was difference in quantities of the products that was despatched from the refinery and that was received at the tanks at Muttam. The difference in the quantity is due to volatile nature of the products and also due to variation that may occur due to dip method for measurement of the quantity. The quantity that is received at the terminal at Muttam will at times be low than the quantity that is despatched from the refinery. When there is some quantity remaining in the pipeline, at times the quantity received at the terminal at Muttam may show excess than that was despatched from the refinery. The quantity that is removed from the refinery and that accounted as receipt in leased tanks is one and the same and variation is only on account of temperature, variation due to reading measurements which does not give rise to a situation of demanding differential duty. Moreover, there is no allegation that the appellant has clandestinely removed any quantity without payment of duty. The department while quantifying the duty has calculated the duty only for quantities which were found in excess dispatched and those which were found as excess received were ignored, which is not correct. If the entire quantity sent from refinery and received at tanks for a year is taken as a sample data, it can be seen that appellant had, in fact, paid more duty on receipt quantity than that payable on

dispatch quantity. There is no physical loss or shortage warranting payment of duty. Any loss is due to transit loss or human error in measurement, which is permissible if within limits prescribed.

11. Ld. Counsel submitted that during the relevant period, the quantification of duty on the petroleum products sold to oil companies was under confusion and a debatable issue due to difference in quantity at the time of transit. Due to recurring nature of the matter, certain guidelines were issued by the Ministry of Finance, Department of Revenue on 14.02.2014. Based on the Report No.17 of 2013 of the Comptroller and Auditor General (C & AG), the department has issued instructions that the net quantity after adjusting the gain and loss on the quantity cleared from the Refinery to the quantity received at the terminals of the Oil Manufacturing Companies (OMCs) has to be considered for calculating the duty liability. It is argued by the Ld. Counsel that though the period involved in the present case is prior to 31.01.2011 and the clarification issued as per C & AG Report No.17 of 2013 is dated 14.02.2014 the said clarification has to be applied for quantification of liability of excise duty for the period of dispute. To support his argument, the decision of co-ordinate Bench of the Tribunal in the case of *Bharat Petroleum Corporation Ltd. Vs CC Cochin* - 2018 (364) ELT 571 (Tri.-Bang.) was relied. It is submitted by the Ld. Counsel that entire figures are available in the annexure to the show cause notice and the department would be able to quantify the duty as per the guidelines issued by the Ministry on the basis of C & AG's Report. The Ld. Counsel submitted that there is no conscious short payment of duty on the side of appellant.

12. The second issue is with regard to duty demand on the pipeline quantity of Naphtha. It is submitted by the counsel that certain quantity of Naphtha has to be retained in the pipeline for its effective transportation through the pipeline upto the ports. The appellant had not paid duty on the pipeline quantity of Naphtha. The retainment/maintenance of the product viz. Naphtha in the pipeline for effective transportation cannot be construed as clearances of finished product. The department ought not to have demanded duty. It is submitted by the appellant that they have discharged this duty liability much before issuance of show cause notice when the DGCEI had pointed out that they are liable to pay duty on the pipeline quantity of Naphtha.

13. The Ld. Counsel has put forward arguments on the ground of limitation also. It is submitted by him that appellant is a Public Sector Undertaking and cannot be saddled with penalty alleging that there is intention to evade payment of duty. The department has not adduced evidence of any positive act of suppression of facts on the part of the appellant. All the figures that form the basis for the quantification of duty has been taken by the department from the documents that have been submitted by the appellant. The appellant has fully cooperated by paying part of the duty and interest when pointed out by the officers during investigation. Further, payment of duty for petroleum products when there is difference in quantity after transit to the terminals, was always a debatable issue and there were many litigations pending before various forums. The Department had to issue circular based on the Audit report of the Comptroller and Auditor General which also would establish that

confusion prevailed at that time as to the manner in which the quantity of the products that are cleared from the refinery has to be calculated for the purpose of discharging Central Excise duty. The issue being interpretational in nature, the invocation of extended period is incorrect. So also, the appellants had not paid duty on pipeline quantity of naphtha on the bonafide belief that when the quantity is retained in the pipeline, it cannot be said to be cleared from the refinery. Thus, there is no suppression of facts to invoke extended period. Ld. Counsel submitted that for the same reasons, the penalty imposed is without any basis. He prayed that penalties imposed may be set aside. To support his argument on limitation and penalty, the Ld. Counsel relied upon the decision in the case of *U.P. State Sugar & Cane Dev. Corpn. Ltd. Vs CCE Allahabad- 2009 (242) ELT 260 (Tri.-Del.)* and *Mangalore Refinery & Petrochemicals Ltd. Vs CCE & ST Mangalore - 2015 (40) STR 1093 (Tri.- Bang.)*. The decision of the jurisdictional High Court in the case of *Assistant Commr. of GST & CE Vs Shri Ram Value Services Pvt. Ltd. - 2009 (8) TMI 1174 -MADRAS HIGH COURT* was relied to argue that extended period of limitation could not be invoked when there are conflicting views on the issue. He prayed that the appeal may be allowed.

14. Ld. A.R Ms. K. Komathi appeared and argued for the department. Ld. A.R adverted to the table at para 3.2 of the SCN. It is submitted that this table would show that quantity that was despatched from the refinery was not accounted in the RG.1 register and in the ER1 returns. The appellant has mentioned lesser quantity that was received in terminal at Muttam in the RG.1 register which is less than the quantity that was

despatched from the refinery. Further, the documents collected from the appellant would show that tanks taken on lease at Muttam terminal are not part of their approved registered premises. They have amended the registration so as to include the Muttam terminal only in 2011. The appellants have thus short paid duty on the quantity of petroleum products that have been cleared from the refinery. The demand raised is legal and proper. The appellants have admittedly not paid duty on the pipeline quantity of Naphtha. Only on being pointed out by DGCEI, they have paid the duty liability on 04.09.2008 before issuance of SCN. Countering the arguments put forward by the Ld. Counsel with regard to limitation, it is submitted by the Ld. AR that as the appellants have not accounted the correct quantity in their RG.1 Register, it is suppression of facts. Invocation of extended period is therefore correct and proper. She prayed that the appeal may be dismissed.

15. Heard both sides.

16. The sum and substance of the allegation is that there is difference in the quantity of petroleum products that has been despatched from the refinery and the quantity received at the terminal at Muttam. It is an undisputable fact that there may be loss in quantity during the transportation of the petroleum products from the refinery to the terminals. Such variation in the quantity may occur due to variation in temperature, the dip method of measuring etc. Some times, there may be some excess quantity of petroleum product which is still in the pipeline and will result in showing excess quantity received at the terminal at Muttom. For these reasons, there has been confusion in the field as to

the calculation of duty on the petroleum products which are cleared from the refinery and transported to the terminals of the Oil Marketing Companies. To obtain uniformity, the Department has issued a clarification dated 14.02.2014 on the basis of the Comptroller and Auditor General Report No.17 of 2013 in which it has been clarified as under :

“The Department of Revenue, Ministry of Finance, Government of India in the ‘Action Taken Note’ on the above mentioned audit para has taken a view that ‘the net quantity after adjusting the gain and loss on the quantity cleared from the Refinery to the quantity received at the terminals of the Oil Marketing Companies (OMCs) has to be considered for calculating the duty liability. Since the duty on the clearances during the entire month are to be paid by the 5th / 6th of the following month, the net quantity received at the end of the OMCs based on the Joint Certification (JC) can be calculated and the duty on the excess quantity can be paid’. The C & AG has accepted the view of the Ministry and requested the department that the SCNs transferred to call book may be taken out and adjudicated.

In view of the decision, as accepted by the C&AG, taken by the Ministry, you are directed to adhere to the decision hence forth in respect of the clearances to Oil Marketing Companies. The duty may be paid by the 5th/6th of the succeeding month on the net quantity based on the Joint Certification and the payment particulars may be intimated to this office along with detailed worksheet”.

17. The Hon’ble High Court of Kerala in Central Excise Appeal No.14 of 2016 dated 16.07.2018, in a similar matter, held as under :

“3. On the basis of an audit report by the Comptroller and Auditor General, the Ministry has taken a decision to permit monthly netting, which permission was granted only after the impugned orders in the above appeals by the Customs, Excise & Service Tax Appellate Tribunal [CESTAT]; which confirmed the orders of the first appellate authority. We were also apprised of the fact that the subsequent appeals were remanded by the CESTAT itself to the original authority resting on the decision taken by the concerned Ministry. A copy of the order was handed over to us across the Bar, which contained the gist of the clarification, which is as below:

“The Department of Revenue, Ministry of Finance, Government of India in the ‘Action Taken Note’ on the above mentioned audit para has taken a view that *‘the net quantity after adjusting the gain and loss on the quantity cleared from the Refinery to the quantity received at the terminals of the Oil Marketing Companies (OMCs) has to be considered for calculating the duty liability. Since the duty on the clearances during the entire month are to be paid by the 5th / 6th of the following month, the net quantity received at the end of the OMCs based on the Joint Certification (JC) can be calculated and the duty on the excess quantity can be paid’*. The C & AG has accepted the view of the Ministry and requested the department that the SCNs transferred to call book may be taken out and adjudicated.

In view of the decision, as accepted by the C&AG, taken by the Ministry, you are directed to adhere to the decision hence forth in respect of the clearances to Oil Marketing Companies. The duty may be paid by the 5th/6th of the succeeding month on the net quantity based on the Joint Certification and the payment particulars may be intimated to this office along with detailed worksheet”.

In such circumstances, we deem it fit that the questions raised herein be left open and the matter remanded back to the original authority for re-working the issue as per the permission granted in the clarification issued by the Ministry.

Accordingly, the appeals are disposed of, leaving it open to the appellant to produce materials before the original authority to carry out the reconciliation of the net loss/net gain . Parties are left to suffer their respective costs.”

The Tribunal in the case of *Bharat Petroleum Corporation Ltd. Vs CC Cochin* (supra) had considered a similar issue for the period prior to issuance of the clarification by the department. After taking note of the fact that the demand arises on account of difference in quantity between

the quantity that is shown as despatched from the refinery and the quantity that is received at the terminal, the Tribunal held that the direction given by the department as per the said instructions of the Board has to be applied. Relevant part of the said decision of the Tribunal is as under :

“3.2 The Learned Counsel further submitted that the benefit of monthly adjustments between the excess quantity received and the short quantity received at the end of the OMCs vis-a-vis the quantity removed at the refinery end may be permitted even for the periods under dispute, in line with the Department of Revenue circular as above. Learned Counsel further submitted that the appellant is in a position to give monthly detailed calculations for the period under consideration.

4. The Learned AR reiterated the impugned order as also the earlier decision of the Tribunal which is in favour of the Revenue.

5. After hearing both sides and perusal of records, we find that the basic issue is arising because of the difference in quantity between the quantity shown as cleared at the end of the refinery and the quantity received as evidenced by the dip reading at the end of the OMCs. Because of the nature of the goods i.e. petroleum products, such variations are inevitable. We note that the Department of Revenue was seized of the matter and have issued guidelines to minimize the difficulties faced by the field formations in such assessment. The guidelines have allowed monthly adjustments between the quantities of excess receipt with the quantities of short receipt before the payment of duty on monthly basis. Even though this clarification is dated 14-2-2014, which is after the date of impugned order, we are of the view that the benefit of such monthly adjustments may be extended even for the earlier periods. In view of the above, we set aside the impugned orders and remand the matter to the original authority for *de novo* decision by working out the demand after granting the adjustments as per the Ministry of Finance, Department of Revenue's circular. Appellant may be given an effective hearing to submit the relevant details which may be taken on record, as per law.”

18. In our considered opinion, the demand is raised only because of the difference in quantity when the petroleum products are despatched from the refinery and after it is received at the terminals at Muttam. There is no allegation of clandestine removal. It can be reasonably perceived that loss of the quantity is due to temperature variation, the variation caused in dip method of measurements etc. As

the goods are petroleum products, which are volatile in nature, some times there may be loss in quantity at the time of receipt at terminal. Likewise, there may be receipt of excess quantity reaching the terminal as some quantity may be retained in the pipeline. After considering these situations, based on the C&AG Report, the department has issued clarification that net quantity after adjusting the gain and loss has to be taken for demand of duty. Though this clarification is dated 14.02.2014, we are of the considered opinion that the said method has to be applied for the disputed period also being a clarification issued by the department. All the details with regard to the quantity despatched from the refinery as well as the quantity received at the terminal at Muttam are available in the annexure to the show cause notice. Therefore, we deem it fit to remand this issue to the original authority who is directed to re-quantify the duty liability in accordance with the clarification issued by the department.

19. The second issue is with regard to demand of duty on the pipeline quantity of Naphtha. According to the department, the quantity that is retained in the pipeline has to be construed a goods already cleared from the refinery and therefore the appellant is liable to duty. The Ld. Counsel for appellant has submitted that they maintain some quantity of Naphtha in the pipeline to facilitate transportation of Naphtha upto the port which cannot be considered as quantity cleared from the refinery. It is seen that the appellant has paid duty much

before issuance of the show cause notice and therefore the department ought not to have imposed penalty.

20. We find that both the above issues are interpretational in nature. With regard to the first issue, a clarification had to be issued by the department as to the method for demand of duty on petroleum products. In regard to the second issue, the appellant has paid the duty at the earliest. Taking note of these facts, we are able to conclude that penalties imposed on account of both the issues are unwarranted and requires to be set aside which we hereby do.

21. In the result, the matter is remanded to the original authority who is directed to re-quantify the duty demand on the basis of the clarification issued by the Department dated 14.02.2014. The penalty imposed are entirely set aside.

22. The appeal is partly allowed and partly remanded in above terms.

(Pronounced in open court on 17.04.2023)

Sd/-
(M. AJIT KUMAR)
MEMBER (TECHNICAL)

Sd/-
(SULEKHA BHEEVI C.S.)
MEMBER (JUDICIAL)

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