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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
EXCISE APPEAL BRANCH

Date 03/12/2010

Appeal No. E/1359/2005 - EX[DB]

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S INDIAN OIL CO. LTD.
BULK DEPOT OPPOSITE
RAILWAY LOCOSHED, JAMMU
M/S INDIAN OIL CO. LTD.

Appellant

Vs

Respondent

C.C.E JAMMU KASHMIR

I am directed to transmit herewith a certified copy of **Final order No.** 814 2010 **EX[DB]** dated 02.11.2010 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent
   C.C.E JAMMU KASHMIR
2. Adv. / Consult
   MR.L.P ASTHANA
   R-163, SECOND FLOOR, GREATER KAILASH-1,
   NEW DELHI - 110 048.

3 S.D.R
~~4 J.C.D.R.~~
5 Bar association, CESTAT, New Delhi
6 Director Publications, Customs, Excise. I.P. Estate, New Delhi
7 M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3
8 Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9 M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
10 Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
11 Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-15
12 LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
13 TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
14 Office Copy
15 Guard file
16. Hon;ble president.

Assistant Registrar
(Excise Appeal Branch)

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI, PRINCIPAL BENCH NEW DELHI

Date of Hearing:2.11.2010

Date of decision: 2.11.2010

Excise Appeal No.E/1359 of 2005

[Arising out of Order-in-Original No.01/CE/Commr/05 dated 31.01.2005 passed by the Commissioner of Central Excise, Jammu & Kashmir].

For approval and signature:

Hon'ble Justice Shri R.M.S. Khandeparkar, President
Hon'ble Shri Rakesh Kumar, Member (Technical)

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1. Whether Press Reporters may be allowed to see CESTAT (Procedure) Rules, 1982.

2. Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?

3. Whether Their Lordships wish to see the fair copy of the Order?

4. Whether Order is to be circulated to the Departmental authorities?

M/s. Indian Oil Corporation Ltd. Appellant

Vs.

CCE, Jammu & Kashmir Respondent

Appearance: Rep. by Shri L.P. Asthana, Advocate on behalf of the appellants.
Rep. by Shri R.K. Verma, JDR on behalf of the respondent/Department.

CORAM: **Hon'ble Justice Shri R.M.S. Khandeparkar, President**
Hon'ble Shri Rakesh Kumar, Member (Judicial)

FINAL Order No. 814/10-EX/Dated

Per Rakesh Kumar

The facts giving rise to this appeal are, in brief, as under:-

1) On 23.3.99, the Central Excise Staff of Jammu visited the premises of bonded warehouse of IOC at Jammu. On scrutiny of the details provided by the appellants vis-à-vis records maintained by them it was found that the appellants had cleared the duty paid stock of 7072.720 KLTs of High Speed Diesel Oil (HSD) lying with them prior to the presentation of Budget 1999-2000 on 28.02.99 by charging enhanced rate of basic excise duty @ 16% and additional duty of excise @ Rs.1000/- PKL imposed vide Clause 133 read with 2nd Schedule to the Finance Bill w.e.f. 27.2.99 (midnight). However, stock of HSD sold had suffered duty at the time of clearance from the refinery @ 15% Adv. and thus, the excess excise duty recovered by the appellants from the customers was Rs.74,69,601/-. The excess amount realised by the appellants from the customers in respect of sale of pre-budget stock of HSD was deposited by them with the central excise department on 1.4.99 in compliance of the provisions of Section 11 D of the Central Excise Act, 1944. However, on 1.4.99, a show cause notice was issued to the appellants for –(a) recovery of an amount of Rs.74,69,601/- under the provisions of Rule 9(2) of the Central Excise Rules read with Section 11 A and Section 11 D of the Central Excise Act along with interest on this amount under Section 11

AB ibid, and (b) imposition of penalty on the appellants under Rule 173Q (1) of the Central Excise Act, 1944 read with Section 11 AC of the Central Excise Act, 1944. The show cause notice was adjudicated by the Commissioner vide Order-in-Original dated 31.01.2005 by which –

(a) the Commissioner confirmed the demand of Rs.56,66,649/- against the appellants under Section 11 D of the Central Excise Act, 1944 and the amount already paid was ordered to be appropriated against the demand ;

(b) interest on this amount at the applicable rate was demanded, and (c) penalty of Rs.56,66,649/- was imposed on the appellants under Section 11 AC of the Central Excise Act. The present appeal has been filed against the Commissioner's order imposing penalty on them under Section 11 AC.

2. Heard both sides.

3. Shri L.P. Asthana, ld. Advocate, the learned Counsel for the appellant submitted that the stock of HSD had been cleared from Panipat Refinery of the appellant on 27.1.99 on payment of duty, that after clearance from the refinery, the stock of HSD had been transported to Jammu Depot from where it was sold after the presentation of budget for 1999-2000. On 27.2.99, in the budget 1999-2000 presented on 27.2.99, the rate of duty on HSD had been increased, that pre-budget stock of HSD was sold at higher price which included the central excise duty at the post-budget rate, that since the appellant while selling the pre-budget stock of HSD during the period after 27.2.99 had realised more

amount of central excise duty than the amount which has been paid as central excise duty , the excess amount charged by them from the customers was paid to the Department on 1.4.99, that the appellants have fully complied with the provisions of Section 11 D of the Central Excise Act, according to which any amount collected by an assessee from the customers as central excise duty is required to be paid to the Government, that Section 11 AC is attracted for imposition of penalty in case of non-levy, short levy or erroneous refund of duty due to fraud, mis-statement, wilful suppression of facts or contravention of provisions of Central Excise Act or of the rules made thereunder with intent to evade payment of duty, that this section has no application to this case, that imposition of penalty on the appellant under Section 11 AC was not called for at all and that in view of this the Commissioner's order imposing penalty of Rs.56,66,649/- on the Appellant is incorrect.

4. Shri R.K. Verma, ld. Departmental Representative defended the impugned order reiterating the Commissioner (Appeals)'s findings in the impugned order.

5. We have carefully considered the submissions from the sides and perused the records. The pre-budget stock of HSC cleared on payment of duty had been sold by the appellants after presentation of budget for the year 1999-2000 on 27.2.99 and since in the budget presented on 27.2.99, the rate of duty on the HSC had been increased, the pre-budget stock was sold in March, 1999 at a higher rate including the

enhanced rate of excise duty. However, since the appellants had charged from the customers the amounts towards excise duty higher than that paid by them, the excess amount collected as excise duty was paid to the Government in accordance with the provisions of Section 11 D of the Central Excise Act. This is not a case of non-levy, short-levy on non-levy short or erroneous refund of duty on account of any fraud, mis-statement, wilful suppression of facts, etc. on the part of the appellants. On being asked from the Departmental Representative, he fairly stated that there is no such allegation against the appellants. Since in this case, the appellants had complied with the provisions of Section 11 D and there is no allegation of evasion of duty against them by taking recourse to fraud, wilful misstatement, etc. penalty under Section 11 AC is not invokable and hence, the penalty under Section 11 AC imposed on the appellants was not called for. The Commissioner's order imposing penalty on the appellant under Section 11 AC is, therefore, set aside and the impugned order stand modified accordingly. The appeal is allowed

[Operative part of the order pronounced in the open court].

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member (Technical)

Ckp.