IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
EASTERN ZONAL BENCH: KOLKATA

Ex.Appeal No.59/09

(Arising out of Order-in-Original No.25/MP/AYKUT/2008 dated 30.10.2008 passed by the Commissioner of Central Excise & Service Tax, Patna)

M/s I. O. C. L.

Applicant (s)/Appellant (s)

Vs.

CCEx. & S.Tax, Patna

Respondent (s)

Appearance:

Shri Chandan Kumar, DGM (Finance) for the Appellants(s)
Shri S. Mukhopadhyay, Supdt. (AR) for the Revenue

CORAM:

HON'BLE SHRI P.K.CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE SHRI V. PADMANABHAN, MEMBER (TECHNICAL)

Date of Hearing : 28.11.2018
Date of Decision : 28.11.2018

ORDER NO. FO/A/77002/2018

Per Bench :

The present appeal is filed against the Order-in-Original No.25/MP/AYKUT/2008 dated 30.10.2008.

2. The appellant has a refinery in Barauni from where petroleum products are cleared to not only Indian Oil Depots/Terminals, but also to other Oil Marketing Companies viz. M/s BPCL, M/s HPCL & M/s IBP. The period of dispute is from 01.11.2006 to 15.03.2007. The Oil Marketing Companies (OMCs) entered into an arrangement for reciprocal supply of petroleum products between them. In terms of

this arrangement, the petroleum products were cleared from M/s I.O.C.L. to other OMCs., on Import Parity Price as agreed between M/s IOCL and OMCs. The Department noticed that there was a disparity in the price at which such clearances were made to other OMCs and the price at which the same petroleum products were sold to independent buyers through IOCL's Depots/Dealers. In respect of latter clearances, the appellant discharged the Central Excise duty at the price at Depot on the date of clearance from the Refinery. However, since the price at which clearances were made to other OMCs, were found to be lesser, the Department was of the view that the appellant was required to discharge the Central Excise duty on the petroleum products at the price at which the same products were sold to independent buyers through IOC Depot/Dealer. On these lines, show-cause notice dated 30.11.2007 was issued to the appellant. After due process of adjudication, the impugned order was passed directing the appellant to discharge the differential Central Excise duty along with interest and penalty equal to the differential duty. This order is under challenge in the present proceedings.

3. The appellant is represented by Shri Chandan Kumar, ld.DGM (Finance) and Revenue is represented by Shri S. Mukhopadhyay, ld.D.R.

4. On behalf of the appellant, the following main arguments are advanced :

(i) The value of petroleum products for clearance to other OMCs at Import Parity Price has been the subject matter of several disputes. He pointed out that the Bombay Bench of the Tribunal in the case of Bharat Petroleum Corporation Ltd. Vs. Commr. of Central Excise, Nasik reported in 2009 (242) ELT 358 (Tri.-Mumbai) has taken a view that the price as per the agreement between the OMCs and IOCL, cannot be considered as transaction value under Section 4 of Central Excise Act, 1944 and decided the case in favour of the Revenue. An appeal filed by M/s BPCL against the above order of the Tribunal is before the Hon'ble Supreme Court and the same is still pending as on date.

(ii) The ld.Counsel further submitted that the Bombay Bench of the Tribunal in the appellant's own case on identical issue as reported in 2014 (308) ELT 502 (Tri.-Mumbai) has distinguished the earlier decision of the Tribunal in the case of M/s Bharat Petroleum Corporation Ltd.(supra) and has held that Import Parity Price agreed between one OMC and another based on MoU (Memorandum of Understanding) reached between them, can be considered as transaction value for assessment purpose under Section 4 of the Central Excise Act, 1944.

(iii) Finally, he submitted that in view of the decision of the Bombay Bench of the Tribunal in IOCL case, the present issue may be decided in their favour.

5. The ld.D.R. for the Revenue justified the impugned order. He submitted that the appeal by M/s BPCL against the earlier decision, is still pending before the Hon'ble Supreme Court. There are several other cases tagged with the above appeal and in that connection, Board has issued a Circular No.913/03/2010-CX dated 03.02.2010 to direct the field formations to keep the show-cause notices issued on

this subject in call book pending a final verdict from the Supreme Court. He submitted that the present matter may be kept pending till the outcome of the decision of the Hon'ble Supreme Court.

6. Heard both sides and perused the records.

7. As discussed above, the dispute in the present case, is regarding valuation of the petroleum products cleared by the appellant to other OMCs. by adopting Import Parity Price as the assessable value for payment of Central Excise duty. During the period under dispute, the appellant has paid Central Excise duty on such Import Parity Price, but Revenue is of the view that they are required to pay Excise duty on the price at which they are selling petroleum product to independent buyers through the appellant's own Depot/Dealer. Accordingly, the differential duty stands demanded..

8. Ìn the decision of the Tribunal in the case of M/s BPCL (supra), the Tribunal had taken a view that the price as per MoU with other OMCs, cannot be considered as transaction value under Section 4 of the Central Excise Act, 1944. Accordingly, the issue was decided in favour of the Revenue. But we note that this decision has been distinguished by the Tribunal in the later decision in the appellant's own case. In this decision, the Tribunal has held that Import Parity Price agreed between one OMC and another based on MoU reached between them, can be considered as transaction value for assessment purpose in terms of Section 4 of the Central Excise Act, 1944. The observations of the Tribunal in the above case are reproduced below :

"***4.1*** *In particular, we have noted that in Para 19 of the BPCL case order relied upon by the Revenue, it has been held that IPP based price cannot be considered as transaction value as it was an artificially fixed notional value. In such an arrangement, price was definitely not the sole consideration for sale. It is based on this reasoning, it was held in the BPCL case that sale price to OMC cannot be accepted as sole consideration for sale. However, we find that the reasoning adopted is flawed as Import Parity Price is not an artificially fixed price. It is an actual price at the time and place of import which is also place for the sales effected by the Refinery or OMC to another OMC. To say that such a price is an artificially fixed notional value is completely contrary to facts. Import price cannot be influenced by the marketing companies situated in India. Therefore, there is a major flaw in the reasoning adopted in the order relied upon by the Revenue. On the contrary, in the orders relied upon by the learned Counsel, it has been clearly held that import price agreed between one OMC and another based on the MOU reached between them can be considered as a transaction value and such a finding was also be upheld by the Hon'ble Apex Court in the case of HPCL (supra). This order prevails over all other decisions.*

5. *In view of the above, we do not find any merit in the appeal filed by the Revenue. Accordingly, we dismiss the same as devoid of merits."*

9. In view of the above discussions, the impugned order is set aside and the appeal is allowed.

(Dictated and pronounced in the open court)

Sd/
(P.K.Choudhary)
Member (Judicial)

Sd/
(V.Padmanabhan)
Member (Technical)

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