

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 5190-5191/ 2008

Commissioner of Central Excise, Pune

.....Appellant

Versus

M/s SKF India Ltd.

.....Respondent

J U D G M E N T

AFTAB ALAM,J.

1. Just a few weeks ago in Union of India Vs. M/s Rajasthan Spinning & Weaving Mills (Appeal arising from SLP (C) No.15927 of 2007) we had the occasion to examine the nature and scope of the penalty provision in the Central Excise Act as contained in section 11AC, one of the four sections, forming a quartet, concerning recovery of unpaid duty, interest on deferred

payment/realisation of duty and penalty for non-payment of duty. In this case we are called upon to consider the conditions that would attract the levy of interest on excise duty not levied or short levied, not paid or short paid or erroneously refunded as provided under sections 11A, 11AA and 11AB of the Act. It may thus be seen as the sequel to the earlier decision in M/s. Rajasthan Spinning & Weaving Mills.

2. The facts of the case are fairly simple and admitted by both sides. The respondent-assessee is engaged in the manufacture and sale of ball-bearings and textile machine parts. It sold goods manufactured by it on certain prices on payment of excise duty leviable on the price on which the goods were sold. Later on, there was a revision of prices with retrospective effect. Following the revision the assessee demanded from its customers the balance of the higher prices and issued to them supplementary invoices. At the same time it also paid the differential duty on the goods sold earlier. The Revenue took the view that the assessee was liable to pay interest on differential duty. The assessee was given a notice dated April 4, 2006 demanding Rs.95,590/- as interest on delayed payment of duty under section 11AB of the Central Excise Act and further asking it to show cause why penalty may also not be imposed on it under section 37(3) of the Act. The assessee gave its reply stating that the payment of differential duty was made

by it at the time of issuing supplementary invoices to the customers and, therefore, there was no question of charging interest much less any penalty. However, the Assistant Commissioner Central Excise, Pune II Division, confirmed the demand of interest by his order dated June 5, 2006 and further imposed a penalty of Rs.5, 000/- against the assessee. The assessee took the matter in appeal before the Commissioner (Appeals) Central Excise, Pune I, who by his order dated August 30, 2006 allowed the appeal and set-aside the order of the Assistant Commissioner. The Revenue then brought the matter before the Customs, Excise and Service Tax Appellate Tribunal but its appeal was dismissed by order dated January 3, 2008. The Tribunal, following certain decisions of the Bombay High Court held that no interest was chargeable where there was no time-gap between the payment of the differential duty and issuance of supplementary invoices to the customers on the basis of upward revision of prices in respect of the goods sold earlier.

3. Aggrieved by the order of the Tribunal, the Revenue has come to this Court in appeal.

4. In Rajasthan Spinning & Weaving Mills we noted that the three issues of recovery, interest and penalty arising from non-levy or short levy of duty, non-payment or short payment of duty or erroneous refund of duty are dealt with under sections 11A (recovery of duties), 11AA and 11AB (interest on

delayed payment of duty) and 11AC (penalty for short levy or non levy of duty) of the Act. Section 11A is a long section which has become longer by the insertion of sub-sections by later amendments. In its present form section 11A reads as under.

“11A. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded.”-(1) When any duty of excise has not been levied or paid or has been short-levied or short-paid or [erroneously refunded, whether or not such non-levy or non-payment, short-levy or short payment or erroneous refund, as the case may be, was on the basis of any approval, acceptance or assessment relating to the rate of duty on or valuation of excisable goods under any other provisions of this Act or the rules made thereunder], a Central Excise Officer may, within [one year] from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice;

Provided that where any duty of excise has not been levied or paid or has been short-levied or short-paid or 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 duty, by such person or his agent, the provisions of this sub-section shall have effect, [as if] for the words [“one year”], the words “five years” were substituted:

Explanation. - Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of [one year] or five years, as the case may be.

[(1A) When any duty of excise has not been levied or paid or has been short-levied or short paid or erroneously refunded, by reason of fraud, collusion or any wilful misstatement or suppression of facts, or contravention of any of the provisions of this Act or the rules made thereunder with intent to evade payment of duty, by such person or his agent, to whom a notice is served under the proviso to sub-section (1) by the Central Excise Officer, may pay duty in full or in part as may be accepted by him, and the interest payable thereon under Section 11AB and penalty equal to twenty-five per cent of the duty specified in the notice or the duty so accepted by such person within thirty days of the receipt of the notice.]

(2) The [Central Excise Officer] shall, after considering the representation, if any, made by the person on whom notice is served under sub-section (1), determine the amount of duty of excise due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined.

Provided that if such person has paid the duty in full together with, interest and penalty under sub-section (1A), the proceedings in respect of such person and other persons to whom notice are served under sub-section (1) shall, without prejudice to the provisions of section 9, 9A and 9AA, be deemed to be conclusive as to the matters stated therein:

Provided further that, if such person has paid duty in part, interest and penalty under sub-section (1A), the Central Excise Officers, shall determine the amount of duty or interest not being in excess of the amount partly due from such person.]

[(2A) Where any notice has been served on a person under sub-section (1), the Central Excise Officer,-

- (a) in case any duty of excise has not been levied or paid or has been short-levied or short-paid or 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 the rules made thereunder with intent to evade payment of duty, where it is possible to do so, shall determine the amount of such duty, within a period of one year; and
- (b) in any other case, where it is possible to do so, shall determine the amount of duty of excise which has not been levied or paid or has been short-levied or short-paid or erroneously refunded, within a period of six months, from the date of service of the notice on the person under sub-section (1)

(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 “one year” referred to in sub-section (1) shall be counted from the date of receipt of such information of payment.

Explanation 1. - 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 duty.

Explanation 2.- For 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.

(2C) The provisions of sub-section (2B) shall not apply to any case where the duty had become payable or ought to have been paid before the date on which the Finance Bill, 2001 receives the assent of the President.]

(3) For the purposes of this section-

(i) “refund” includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(ii) “relevant date” means,-

[(a) in the case of excisable goods on which duty of excise has not been levied or paid or has been short-levied or short-paid.

(A) where under the rules made under this Act a periodical return, showing particulars of the duty paid on the excisable goods removed during the period to which the said return relates, is to be filed by a manufacturer or a producer or a licensee of a warehouse, as the case may be, the date on which such return is so filed;

(B) where no periodical return as aforesaid is filed, the last date on which such return is to be filed under the said rules;

(C) in any other case, the date on which the duty is to be paid under this Act or the rules made thereunder;]

- (b) in a case where duty of excise is provisionally assessed under this Act or the rules made thereunder, the date of adjustment of duty after the final assessment thereof;
- (c) in the case of excisable goods on which duty of excise has been erroneously refunded, the date of such refund.]”

(emphasis added)

5. Of the two sections dealing with interest section 11AA relates to the period from expiry of three months **from the date of determination** of the differential duty under sub-section (2) of section 11A till the date of payment and section 11AB is in regard to the period **from the first date of the month succeeding the month in which the duty ought to have been paid** till the date of payment of the duty.

6. In this case we are concerned with section 11AB which reads as under.

11AB. Interest on delayed payment of duty.- [(1) Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person who is liable to pay duty as determined under sub-section (2), **or has paid the duty under sub-section 2(B), of section 11A, shall, in addition to the duty, be liable to pay interest** at such rate not below [ten per cent] and not exceeding thirty-six per cent. Per annum, as is for the time being fixed by the Central Government, by notification in the Official Gazette, from the first date of the month succeeding the month in which the duty ought to have been paid under this Act, or from the date of such erroneous refund, as the case may be, but for the provisions contained in sub-section (2), or sub-section (2B), of section 11A till the date of payment of such duty:

Provided that in such cases where the duty becomes payable consequent to issue of an order, instruction or direction by the Board under section 37B, and such amount of duty payable is voluntarily paid in full, without reserving any right to appeal against such payment at any subsequent stage, within forty-five days from the date of issue of such order, instruction or direction as the case may be, no interest shall be payable and in other cases the interest shall be payable on the whole of the amount, including the amount already paid.]

[(2) The provisions of sub-section (1) shall not apply to cases where the duty had become payable or ought to have been paid before the date on which the Finance Bill, 2001 receives the assent of the President.]

Explanation 1. – Where the duty determined to be payable is reduced by the Commissioner (Appeals), the Appellate Tribunal “National Tax Tribunal” or, as the case may be, the court, the interest shall be payable on such reduced amount of duty.

Explanation 2.- Where the duty determined to be payable is increased or further increased by the Commissioner (Appeals), the Appellate Tribunal “National Tax Tribunal” or, as the case may be, the court, the interest shall be payable on such increased or further increased amount of duty.]

(emphasis added)

7. If the object of the law is to state clearly and unambiguously the obligations of the person whom the law addresses and to spell out plainly and without any confusion the consequences of failure to discharge the obligations cast by the law then the four sections of the Act fall miles short of the desired objective. Even as originally cast the provisions were far from

very happily framed and worded. Subjected to amendments from time to time those provisions have now become so complicated that in order to discern their meaning it becomes necessary to read them back and forth several times. We see no reason why the two periods for which interest is leviable may not be put together and dealt with in one consolidated provision instead of being split up in sections 11AA and 11AB. Also, there is much scope to reorganise all the different subsections of section 11A and to present the scheme of that section in a more coherent and readable form.

8. Be that as it may. In the case in hand we have to deal with the law as it stands now.

9. Section 11A puts the cases of non-levy or short levy, non-payment or short payment or erroneous refund of duty in two categories. One in which the non-payment or short payment etc. of duty is for a reason other than deceit; the default is due to oversight or some mistake and it is not intentional. The second in which the non-payment or short payment etc. of duty is “by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of the Act or of Rules made thereunder with intent to evade payment of duty”; that is to say, it is intentional, deliberate and/or by deceitful means. Naturally, the cases falling in the two groups lead to different consequences and are dealt

with differently. Section 11A, however allow the assessee in default in both kinds of cases to make amends, subject of course to certain terms and conditions. The cases where the non-payment or short payment etc. of duty is by reason of fraud collusion etc. are dealt with under sub-section (1A) of section 11A and the cases where the non-payment or short payment of duty is not intentional under sub-section (2B).

10. Sub-section (2B) of section 11A provides that the assessee in default may, before the notice issued under sub-section (1) is served on him, make payment of the unpaid duty on the basis of his own ascertainment or as ascertained by a Central Excise Officer and inform the Central Excise Officer in writing about the payment made by him and in that event he would not be given the demand notice under sub-section (1). But *Explanation 2* to the sub-section makes it expressly clear that such payment would not be exempt from interest chargeable under section 11AB, that is, for the period from the first date of the month succeeding the month in which the duty ought to have been paid till the date of payment of the duty. What is stated in Explanation 2 to sub-section (2B) is reiterated in section 11AB that states where any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded, the person who has paid the duty under sub-section (2B) of section 11A, shall, in addition to the

duty, be liable to pay interest.....It is thus to be seen that unlike penalty that is attracted to the category of cases in which the non-payment or short payment etc. of duty is “by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of the Act or of Rules made thereunder with intent to evade payment of duty”, under the scheme of the four sections (11A, 11AA, 11AB & 11AC) interest is leviable on delayed or deferred payment of duty for whatever reasons.

11. The payment of differential duty by the assessee at the time of issuance of supplementary invoices to the customers demanding the balance of the revised prices clearly falls under the provision of sub-section (2B) of section 11A of the Act.

12. The Bombay High Court, Aurangabad Bench, in its decision in *The Commissioner of Central Excise, Aurangabad vs. M/s Rucha Engineering Pvt. Ltd., (First Appeal No.42 of 2007)* that was relied upon by the Tribunal for dismissing the Revenue’s appeal took the view that there would be no application of section 11A (2B) or section 11AB where differential duty was paid by the assessee as soon as it came to learn about the upward revision of prices of goods sold earlier. In *M/s Rucha Engineering* the High Court observed as follows:

“It is evident that the section (11AB) comes into play if the duty paid/levied is short. Both, the Commissioner (Appeals) and the CESTAT have observed that the Assessee paid the duty on its own accord immediately when the revised rates became known to them from their customers. The differential duty was due at that time i.e. when the revised rates applicable with retrospective effect were learnt by the Assessee, which was much after the clearance of the goods and therefore, question of payment of interest does not arise as the duty was paid as soon as it was learnt that it was payable. Finding that provisions of section 11A (2) and 11A (2B) were not applicable as the situation occurred in the instant case was quite different, section 11AB (1) was not at all applicable, and therefore, the Assessee was not required to pay interest.”

13. It further held that a case of this nature would not fall in the category where duty of excise was not paid or short-paid.

14. We are unable to subscribe to the view taken by the High Court. It is to be noted that the assessee was able to demand from its customers the balance of the higher prices by virtue of retrospective revision of the prices. It, therefore, follows that at the time of sale the goods carried a higher value and those were cleared on short payment of duty. The differential duty was paid only later when the assessee issued supplementary invoices to its customers demanding the balance amounts. Seen thus it was clearly a case of short payment of duty though indeed completely unintended and without any element of deceit etc. The payment of differential duty thus clearly came

under sub-section (2B) of section 11A and attracted levy of interest under section 11AB of the Act.

15. For the reasons discussed above we set aside the judgments and orders passed by the Tribunal and the Commissioner (Appeals). We restore the order passed by the Assistant Commissioner in so far as charge of interest is concerned. On the facts of this case there is no question of imposition of any penalty. Hence, that part of the order of the Assistant Commissioner is set aside.

16. In the result the appeals are allowed but with no order as to costs.

.....J.
[S.H. KAPADIA]

.....J.
[AFTAB ALAM]

New Delhi,
July 6, 2009.