

SUPREME COURT OF INDIA

Commr.of Cen.Excise

Vs.

International Auto Ltd.

C.A.No.225 of 2010

(S.H. Kapadia and Aftab Alam JJ.)

08.01.2010

ORDER

1. Delay condoned.
2. Leave granted.
3. In this case, Department seeks to recover interest on differential duty, paid by the assessee, under Section 11AB of the Central Excise Act, 1944, which is disputed by the assessee.
4. During the relevant Assessment Years, assessee supplied auto parts to their customers [manufacturers of motor vehicles], such as Tata Motors, Mahindra and Mahindra and Piaggio Vehicles Private Limited - who determined the prices of auto parts having regard to the cost of raw material, manufacturing cost, profit margin, etc. and placed orders with the assessee. In case of Tata Motors, orders were placed through internet under a software system known as "SRM".
5. Since price difference arose between the price on the date of removal and the enhanced price at which the goods stood ultimately sold, the Department issued a show-cause notice proposing to levy interest on the differential duty, paid by the assessee, under Section 11AB of the Central Excise Act, 1944 ['Act', for short].

“The case of the assessee, before us, was that such interest was not leviable under Section 11AB of the Act, particularly in view of the fact that prices indicated in the purchase orders were final during the period of supply of goods. According to the assessee, in the present case, the Department has accepted the position that the prices in the purchase orders were final. Further, according to the assessee herein, there was no price variation clause in the purchase orders, therefore, there was no scope for increase in prices subsequently and that too, retrospectively. In short, according to the assessee, prices indicated in the purchase orders were final and not liable to change at the time of removal of goods. It was submitted that, in the circumstances, the present

case was not a case of short-levy or non-levy of the goods removed by the assessee calling for recovery under Section 11A of the Act, hence, this was not a case for charging of interest under Section 11AB of the Act. Learned counsel appearing on behalf of the assessee submitted that this case is squarely covered by the judgement of three learned Judges of this Court in the case of *M.R.F. Limited vs. Collector of Central Excise, Madras*¹.”

6. We find no merit in the submissions advanced on behalf of the assessee. The controversy arising in this civil appeal is squarely covered by the judgement of this Court in the case of Commissioner of *Central Excise, Pune vs. SKF India Limited*². We quote hereinbelow relevant observations made in the case of SKF India Limited [supra], which reads as follows:

"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 assessees 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 ...4/- - 4 - 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."

7. 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."

8. Section 11A of the Act deals with recovery of duty not levied or not paid or short-levied or short-paid. The said section, which stood inserted by Act 25 of 1978, underwent a sea-

change when Parliament inserted major changes in that section vide Act 14 of 2001 [with effect from 11st May, 2001] and Act 32 of 2003 [with effect from 14th May, 2003]. It needs to be mentioned that simultaneously Act 14 of 2001 also made changes to Section 11AB of the Act. In the case of S.K.F. India Limited [supra], it has been, inter alia, held, as can be seen from the above-quoted paragraphs, that sub-section 2(B) of Section 11A provides that the assessee in default may make payment of the unpaid duty on the basis of his own ascertainment or as ascertained by a Central Excise Officer and, in that event, such assessee in default would not be served with the Demand Notice under Section 11A(1) of the Act. However, Explanation (2) to the sub-section makes it clear that such payment would not be exempt from interest chargeable under Section 11AB of the Act. What is stated in Explanation (2) to sub-section 2(B) is reiterated in Section 11AB of the Act, which deals with interest on delayed payment of duty. From the Scheme of Section 11A(2B) and Section 11AB of the Act, it becomes clear that interest is levied for loss of revenue on any count. In the present case, one fact remains undisputed, namely, accrual of price differential. What does differential price signify? It signifies that value, which is the function of the price, on the date of removal/clearance of the goods was not correct. That, it was understated. Therefore, the price indicated by the supplementary invoice is directly relatable to the value of the goods on the date of clearance, hence, enhanced duty. This enhanced duty is on the corrected value of the goods on the date of removal. When the differential duty is paid after the date of clearance, it indicates short- payment/short-levy on the date of removal, hence, interest which is for loss of revenue, becomes leviable under Section 11AB of the Act. In our view, with the entire change in the Scheme of recovery of duty under the Act, particularly after insertion of Act 14 of 2001 and Act 32 of 2003, the judgement of this Court in the case of M.R.F.

9. Limited [supra] would not apply. That judgement was on interpretation of Section 11B of the Act, which concerns claim for refund of duty by the assessee. That judgement was in the context of the price list approved on 14th May, 1983. In that case, assessee had made a claim for refund of excise duty on the differential between the price on the date of removal and the reduced price at which tyres were sold. The price was approved by the Government. In that case, the assessee submitted that its price list was approved by the Government on 14th May, 1983, but subsequent thereto, on account of consumer resistance, the Government of India directed the assessee to roll back the prices to pre-14th May, 1983 level and on that account, price differential arose on the basis of which the assessee claimed refund of excise duty which stood rejected by this Court on the ground that once the assessee had cleared the goods on classification, the assessee became liable to payment of duty on the date of removal and subsequent reduction in the prices for whatever reason cannot be made a matter of concern to the Department insofar as the liability to pay excise duty was concerned. In the present case, we are concerned with the imposition of interest which, as stated above, is charged to compensate the Department for loss of revenue. Be that as it may, as stated above, the Scheme of Section 11A of the Act has since undergone substantial change and, in the circumstances, in our view, the judgement of this Court in the case of M.R.F. Limited [supra] has no application to the facts of this case. In our view, the judgement of this Court in the case of SKF India Limited [supra] is squarely applicable to the facts of this case.

Accordingly, civil appeal is allowed with no order as to costs.

¹[1997] 92 *E.L.T.*309

²[2009] 239 *E.L.T.*385