(2014) 09 MAD CK 0061

In the Madras High Court

Case No : C.M.A. Nos. 2659-2663 of 2014 and M.P. No. 1 of 2014

Alstom T&D India Ltd. APPELLANT

Vs

CESTAT RESPONDENT

Date of Decision : 11-09-2014

Acts Referred:
Central Excises and Salt Act, 1944 — Section 11A, 11A(1), 11A(1A), 11A(2B), 11AA
Finance Act, 2011 — Section 64

Citation : (2015) 316 ELT 362 : (2015) 35 GSTR 233

Hon'ble Judges : R. Sudhakar, J;G.M. Akbar Ali, J

Bench : Division Bench

Advocate : Joseph Prabakaran, Advocates for the Appellant; Ravi Ananthapadmanabhan, Standing Counsel, Advocates for the Respondent

Judgement

R. Sudhakar, J.—These appeals are filed challenging the Final Order Nos. 40086-40090 of 2014, dated 6-1-2014 passed by the Customs, Excise and Service Tax Appellate Tribunal (for brevity, "the Tribunal").

1.1 The brief facts of the case are as under : The assessee is a manufacturer of electrical equipment falling under Chapter Heading 85 of the Schedule to Central Excise Tariff Act, 1985. The assessee was manufacturing and supplying goods to various customers. According to the assessee, the clearance to the customer was based on transaction value and is supported by purchase order from the customer. Whenever there was escalation in direct input or direct cost, such impacts were taken up with the customers. Thereafter, the customer issues an order of amendment giving effect to the price increase retrospectively. The assessee would thereafter raise supplementary invoice and that would pay differential duty on such price revision. This resulted in time gap between the date of actual clearance and the date of supplementary invoice on which duty was paid. According to the assessee, the differential duty was paid soon after the order of amendment was received from the customer.

1.2 The Department, after receipt of the differential duty based on supplementary invoices, issued five show cause notices demanding an amount of Rs. 28,99,243/- towards interest under Section 11AB of the Central Excise Act, 1944 (for brevity, "the Act") for the period from January, 2009 to November, 2009.

1.3 In response to the said notices, detailed replies were submitted by the assessee stating that only on account of supplementary invoice, duty was paid and, therefore, the question of demanding interest under Section 11AB of the Act does not arise. The assessee placed reliance on a decision of the Karnataka High Court in The Commissioner of Central Excise Vs. Bharat Heavy Electricals Ltd. Electronics Division, and tried to distinguish the decision of the Supreme Court in Commissioner of Central Excise, Pune Vs. SKF India Ltd., .

1.4 However, the Original Authority, followed the decision of the Supreme Court in SKF India Ltd. case, referred supra, and held that interest is payable on the differential duty paid through supplementary invoices under Section 11AB of the Act. The Original Authority did not accept the plea of the assessee based on the decision of the Karnataka High Court in Bharat Heavy Electricals Ltd. case, referred supra, and followed another decision of the Karnataka High Court in Commissioner of Central Excise Vs. Presscom Products, . However, laying much emphasis on the decision of the Supreme Court in SKF India Ltd. case, referred supra, the Original Authority confirmed the demand of interest as proposed under the show cause notices and also imposed penalty.

1.5 Challenging the said order, the assessee filed appeals before the Tribunal. The Tribunal, following the decision of the Supreme Court in SKF India Ltd. case, referred supra, upheld the demand of interest and set aside the penalty imposed.

1.6 Aggrieved by the order passed by the Tribunal, the assessee has filed these appeals raising the following substantial questions of law:

"(1) Whether in the facts and circumstances of the case, the appellant is liable to pay interest under Section 11AB of the Act, on raising of supplementary invoice?

(2) Whether in the facts and circumstances of the case, the first respondent is correct in ignoring the decision of the Karnataka High Court in BHEL, especially when the departmental appeal against the said decision has been dismissed by the Supreme Court?"

2.1 The main plank of the argument of Mr. Joseph Prabakar, learned counsel for the appellant, is that payment of interest under Section 11AB of the Act would apply only when there is a demand by the department on account of short payment and inasmuch as the assessee has paid duty when the liability occurred, no interest would become payable for receipt of additional consideration later.

2.2 He further contended that consequent to introduction of Section 11AA of the Act by Section 64 of the Finance Act, 2011 with effect from 8-4-2011, interest on delayed payment of duty is payable where such payment is made voluntarily or after determination of duty under Section 11A of the Act and inasmuch the provision of Section 11AA of the Act did not read in the same manner as that of Section 11AB of the Act, as it stood during the relevant assessment years, in a case where the assessee had voluntarily made payment, the question of interest on delayed payment of duty does not arise. To buttress the said plea, reliance was placed on the decision of the Karnataka High Court in Bharat Heavy Electricals Ltd. case, referred supra.

3. Mr. Ravi Ananthapadmanabhan, learned Standing Counsel appearing for the second respondent in all these appeals reiterated the stand taken by the department before the authorities below and prayed for dismissal of these appeals in the light of the law laid down by the Supreme Court in SKF India Ltd. case, referred supra.

4. We have heard the learned counsel on either side and perused the orders by the Tribunal and the authorities below.

5. Before adverting to the merits of the case, it would be relevant to refer to Sections 11A(1), 11A(2B) and 11AB of the Act, which read as under:

"Section 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.

....

(2B) Where any duty or 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.

Section 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 the duty as determined under the sub-section (2), or has paid the duty under sub-section (2B). 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 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 be payable is reduced by the 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 the 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 supplied)

6.1 Apropos of the first plank of argument made by the learned counsel for the appellant that unless there is a demand, there is no question of payment of interest, we find that such an argument would have no legs to stand, as the Supreme Court in SKF India Ltd. case, referred supra, has clearly set out that Section 11A of the Act puts the cases of non-levy or short levy, non-payment or short payment or erroneous refund of duty in two categories, that is to say (i) when 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; and (ii) when 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.

6.2 In SKF India Ltd. case, referred supra, the Supreme Court has clearly held that Section 11A of the Act provides that assessee can make amends subject to certain terms and conditions. It makes it clear that Section 11A(1A) dealt with cases where the non-payment or short payment etc. of duty is by reason of fraud collusion etc. and Section 11A(2B) of the Act dealt with cases where the nonpayment or short payment of duty is not intentional.

6.3 The Supreme Court in SKF India Ltd. case, referred supra, further held that payment of differential duty by the assessee at the time of issuance of supplementary invoice to the customer demanding the balance of the revised prices clearly falls under the provisions of Section 11A(2B) of the Act. At this juncture, it is relevant to refer to paragraphs (9) to (11) of the decision of the Supreme Court in SKF India Ltd. case, referred supra, wherein it is held as under:

"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 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"

(emphasis supplied)

6.4 We notice that by interpreting Explanation (2) to sub-section 2B of Section 11A of the Act, the Supreme Court in SKF India Ltd. case, referred supra, has clearly held that such payment of differential duty at the time of issuance of supplementary invoices would not be exempt from interest chargeable under Section 11AB of the Act.

6.5 The Supreme Court reiterated the said position of law in Commissioner of Central Excise Vs. International Auto Limited, and held as follows:

"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 list 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 Commissioner of Central Excise, Pune Vs. SKF India Ltd., , 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 judgment of this Court in the case of MRF Ltd. Vs. Collector of Central Excise, Madras, would not apply. That judgment was on interpretation of Section 11B of the Act, which concerns claim for refund of duty by the assessee. That judgment 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 judgment 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 judgment of this Court in the case of SKF India Limited [supra] is squarely applicable to the facts of this case."

(emphasis supplied)

6.6 The decision of the Karnataka High Court in Bharat Heavy Electricals Ltd. case, referred supra, holding that interest is not payable on supplementary invoices on the ground that there was no demand, is not justified in view of the emphatic finding rendered by the Supreme Court in SKF India Ltd. case, referred supra, in paragraph (11), which, with the risk of repetition, is reproduced hereunder for better clarity:

"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."

6.7 In the facts of the present case, we are not inclined to take a different view merely on the ground that the Special Leave to Appeal filed by the Revenue against the decision of the Division Bench of the Karnataka High Court in Bharat Heavy Electricals Ltd. case, referred supra, was dismissed by the Supreme Court by order dated 3-12-2010 made in Special Leave to Appeal (Civil) C.C. 17917 of 2010.

6.8 We find that another Division Bench of the Karnataka High Court in Commissioner of Central Excise Vs. Presscom Products, has held that the decision in Bharat Heavy Electricals Ltd. case, referred supra, is per incuriam. The relevant portion of the said decision reads as under:

"13. The said judgment rendered by this Court is contrary to the law declared by the Apex Court in the aforesaid two judgments. Further, the said judgment does not take into consideration the explanation to sub-section (2B) of Section 11A and accordingly, it is a judgment "per incuriam". Therefore, the law laid down by this Court in the aforesaid judgment is not a good law."

6.9 We find, on facts, that in the present case the assessee has cleared goods and paid duty thereon and raised supplementary invoices, but however failed to pay interest payable under Section 11AB of the Act. In view of the decision of the Supreme Court in SKF India Ltd. case, referred supra, the first plea raised by the learned counsel for the appellant fails and in that regard, we find no infirmity in the order passed by the Tribunal.

7.1 The second plank of the argument raised by the learned counsel for the appellant is that consequent to introduction of Section 11AA by the Act with effect from 8-4-2011, interest on delayed payment of duty is payable where such payment is made voluntarily or after determination of duty under Section 11A of the Act and inasmuch the provision of Section 11AA of the Act did not read in the same manner as that of Section 11AB of the Act, as it stood during the relevant assessment years, in a case where the assessee had voluntarily made payment, the question of interest on delayed payment of duty does not arise.

7.2 Section 11AA of the Act, as amended by Section 64 of the Finance Act, 2011 (8 of 2011), does not in any way advance the case of the appellant, as we find that the liability to pay interest on delayed payment of duty is clearly envisaged in Section 11A(2B) read with Explanation 2 to the said provision. Such interest was leviable even during the period in question. In fact, the Supreme Court in SKF India Ltd. case, referred supra, observed that there is some ambiguity in the said provisions, which was a cause for amendment brought to Section 11AA of the Act. The relevant portion of the observation made by the Supreme Court is as under:

"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 sub-sections of Section 11A and to present the scheme of that section in a more coherent and readable form."

Therefore, the plea of the appellant that their voluntary payment of duty would not attract interest is unacceptable.

7.3 In any event, the decision of the Supreme Court in SKF India Ltd. case, referred supra, clearly answers the point in issue against the assessee. Accordingly, the second plank of argument of the learned counsel for the appellant also does not merit consideration.

8. We have earlier in the case of S.L. Lumax Ltd. v. The Commissioner of Central Excise Judgment dated 28-8-2014 made in C.M.A. No. 1436 of 2014) followed the decision of the Supreme Court in SKF India Ltd. case, referred supra, and dismissed a similar plea raised by the assessee.

9. That apart, in assessee''s own case in relation to a different period, we have dismissed the appeals filed by the assessee on the very same plea vide judgment dated 10-9-2014 made in C.M.A. No. 1355 of 2014 and batch cases. For the foregoing reasons, we answer the substantial questions of law raised in these appeals against the assessee and dismiss these appeals. No costs. Consequently,

connected miscellaneous petitions are closed.

