
(2010) 03 P&H CK 0357
In the Punjab And Haryana At Chandigarh

C.C.E.	Vs	APPELLANT
Creative Dyeing and Printing Mills Pvt. Ltd.		RESPONDENT

Date of Decision : 03-03-2010

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A, 11A(1), 11A(2), 11A(2A), 11A(2B)

Citation : (2010) 254 ELT 625

Hon'ble Judges : Mehinder Singh Sullar, J; Ashutosh Mohunta, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Ashutosh Mohunta, J.—The Revenue has filed this appeal u/s 35G of the Central Excise Act, 1944 (for short "the Act") challenging the order (Annexure P-3) dated 1-8-2005, passed by the Customs, Excise & Service Tax Appellate Tribunal, New Delhi, vide which it was held that interest u/s 11AB of the Central Excise Act, 1944 cannot be demanded or charged from the assessee who has paid the duty before issuing of the show cause notice.

2. Briefly the facts of the case are that the respondent M/s. Creative Dying & Printing Mills Pvt. Ltd. is engaged in the processing of cotton and Man-made fabrics. Between March, 2001 and April, 2001, the respondent paid duty of excise on the processed fabrics on ad valorem basis. However, from May, 2001 they opted to work under the Compounded Levy Scheme under Notification No. 16/2001-C.E. (N.T.), dated 30-4-2001, which, for availment of the scheme, prescribed the condition that value of plant and machinery installed in the factory of an independent processor should not exceed Rs. 3 crores. The respondent in an application affirmed that the value of their plant and machinery was below Rs. 3 crores and they started paying duty of excise under the Compounded Levy Scheme from May, 2001. In September, 2001 the respondent again reverted to the ad valorem scheme, for the reason that value of their plant and machinery had exceeded Rs. 3 crores because of the purchase of a Merceriser valued at Rs. 34.45 lacs.

3. A physical verification was conducted by the Department, of the machinery installed in the respondent's factory and it was found by the Department that even as on 1-3-2001, the value of plant and machinery in the respondent's factory had exceeded Rs. 3 crores; that they had mis-declared the value of plant and machinery with a view to avail of compounded levy scheme and that a sum of Rs. 31,87,209/- as differential duty of excise was lost to the Government as a result of their mis-declaration. The respondent, however, paid the differential duty of their own even before the Department proceeded to realize it from them by issuance of a show cause notice.

4. Despite the fact that the entire duty stood paid by the respondent of their own, the Department called upon the respondent to show cause as to why they should not pay interest on differential duty u/s 11AB of the Act.

5. The respondent replied to the show cause notice and averred that as they have paid the differential duty even before the issuance of the show cause notice, hence, they are not liable to pay any interest. However, the adjudicating authority confirmed the demand against the respondent. An appeal was filed by the assessee which was dismissed by the Commissioner (Appeals). The aforementioned orders were challenged by the respondent before the Tribunal which allowed their appeal and held that interest is not chargeable when duty was paid before the issuance of a show cause notice by the Department. Reliance was placed on the decision of the Tribunal's Larger Bench in the case of 2004 (96) ECC 180 and Warner Lambert India Ltd. v. CCE, Bangalore 2004 (174) E.L.T. 386.

It is this order which has been impugned in the present appeal. The following questions of law arise in the present appeal:

(a) Whether in view of the changes brought about in Section 11A(2A), 11A(2B) & 11A(2C) and Section 11AB of the Central Excise Act, 1944 w.e. 11-5-2001, it is correct not to charge interest on the duty short paid or not paid, short levied or not levied or erroneously refunded, notwithstanding the fact that the amount involved was determined and paid voluntarily by the person concerned, even before issue of a show cause notice by the department.

(b) Whether the case laws decided in respect of situations where the duty short paid or short levied, not paid or not levied or erroneously refunded on account of genuine mistakes, prior to 11-5-2001, was determined and voluntarily paid by the person concerned even before issue of a show cause notice by the department, can be made applicable to similar situations obtaining after 11-5-2001, in view of the changed provisions in 11A(2A), 11A(2B) & 11A(2C) and Section 11AB of the Central Excise Act, 1944

6. Mr. Gurpreet Singh, counsel for the appellant has submitted that interest is payable on all cases of duty, short paid or not paid, short levied or not levied or erroneously refunded by a reason of fraud, collusion or willful suppression of fact. Learned Counsel has submitted that even if there is a genuine error, then also

interest would be payable on such amount from the first day of the month succeeding the month in which the duty ought to have been paid.

7. Counsel for the appellant has placed reliance on Commissioner of Central Excise, Pune Vs. SKF India Ltd., .

8. Learned Counsel has further argued that in the present case, the valuation of plant and machinery of the respondent had exceeded Rs. 3 crores which was well within their knowledge and hence they were not entitled to the availment of compounded levy scheme and it was only after physical verification was conducted by the Department that they paid the differential duty of excise. Learned Counsel further submits that a wrong declaration has been given by the respondent before the Central Excise Authorities.

9. The arguments raised by the counsel for the appellant have been vehemently controverted by the counsel for the respondent, who has submitted that as differential duty of excise was paid by the respondent even prior to the issuance of the show cause notice, therefore, no interest is leviable. Reliance was placed on the judgments of the Tribunal in Machino Montell's case (supra) and Warner Lambert's case (supra). Learned Counsel has also placed reliance on Commissioner of Central Excise, Aurangabad v. Kucha Engineering 2008 (223) E.L.T. 161 (Bom.), wherein the Bombay High Court has held as under:

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.

10. Counsel for the respondent has also argued that Sub-section 2B of Section 11A provides that assessee in default may, before the notice is issued under Sub-section 1, make payment of the unpaid duty on the basis of his own ascertainment or as ascertained by the Central Excise Officer and therefore, the Tribunal was right in holding that the assessee is not liable to pay any interest.

11. The question whether the assessee is liable to pay interest in case of default or in case where differential duty has been paid even prior to the issuance of notice by the Central Excise Officers and the effect of sub-section (2B) of Section 11A of the Act, came up for consideration before the Apex Court in SKF India Ltd. (supra), wherein it has been held as under:

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 u/s 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.

12. In the aforementioned judgment, the judgment of M/s. Rucha Engineering (supra) was also considered by the Apex Court and it has been held as under:

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 u/s 11AB of the Act.

13. In the present case the differential duty involved is for the period when the said changed position of law prevails. The respondent fully knew that value of their plant and machinery was well above Rs. 3 crores and hence they were not entitled to pay the duty of excise under the compounded levy scheme from May, 2001. The respondent had mis-declared the value of plant and machinery and was liable to pay the differential duty of excise alongwith interest.

14. In view of the above, it is held that the Revenue was entitled to charge interest on the duty, short paid or not paid, short levied or not levied, notwithstanding the fact that the amount involved was paid voluntarily by the assessee even before the issuance of show cause notice. Accordingly, both questions No. 1 and 2 are answered in favour of the Revenue and against the assessee.

15. The appeal filed by the Revenue is allowed and the order (Annexure P-3) dated 1-8-2005, passed by the Tribunal is set aside and the orders passed by the adjudicating authority and the Commissioner (Appeals) is restored. Resultantly, the respondent is liable to pay interest u/s 11AB of the Central Excise Act, 1944.