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**(2009) 03 SHI CK 0054**  
**In the High Court Of Himachal Pradesh**

Commissioner of C. Ex.

APPELLANT

Vs

Eicher Demm

RESPONDENT

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**Date of Decision :** 16-03-2009

**Acts Referred:**

Central Excises and Salt Act, 1944 — Section 11A

**Citation :** (2010) 252 ELT 519

**Hon'ble Judges :** V.K. Ahuja, J;Deepak Gupta, J

**Bench :** Division Bench

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## Judgement

Deepak Gupta, J.—This Excise Reference has been admitted on the following questions of law:

1. Whether CEGAT has erred in entertaining new/additional ground in defence which was not raised earlier at the time of passing of adjudication order?
2. Whether admittance by the respondent to evasion of duty and paying the same only on being pointed out by the department does not amount of suppression of material facts and whether the CEGAT has erred in not discussing the same?
2. As far as the first question is concerned, we are of the considered view that this question has to be answered against the Revenue since the questions raised before the CEGAT were not questions of fact but pure questions of law.
3. Briefly stated the facts of the case are that the petitioner was manufacturing tractor parts. These parts used to be sent to another unit of the petitioner at Faridabad where the tractors were manufactured. These parts were being valued by the assessee at rates at which they were to be used as components of the main tractor. Admittedly, some of the spare parts were not used for the manufacturing of the tractor but were disposed of directly by the unit of Faridabad. The Excise Department was of the view that the parts which were sold by the unit at Faridabad should be valued at the rate at which they were sold by the dealers and not at the rate assessed when the parts were being sent from

one unit to another. The assessee on being notified of this immediately deposited the difference in tax.

4. The Commissioner Excise thereafter levied interest and penalty on the assessee. The assessee challenged the imposition of penalty and tax and the ground raised before the CEGAT was that the sine-qua-non for the imposition of penalty and interest was the passing of an order in terms of Section 11A of the Central Excise Act, 1944. The CEGAT upheld this view and quashed the imposition of penalty and interest 2002 (140) ELT 227

5. On perusal of Section 11-AA, which relates to payment of interest on delayed payment of duty, it is obvious that this section would become applicable only after a determination of duty under Sub-section (2) of Section 11-A has been made. Similarly, in case of imposition of penalty, Section 11-AC comes into play only when duty is determined under Sub-section 2 of Section 11. However, as far as Section 11-AB is concerned, it relates to non-payment or short payment of duty or erroneous refund of duty after determination of Sub-section 2 of Section 11-A. But this section also deals with payment of duty under Sub-section (2-B) of Section 11-A which relates to voluntary payment of duty before service of notice u/s 11A(1). Admittedly, in the present case no notice was issued u/s 11-A till the time when the amount was deposited by the assessee. This notice was issued after three years.

6. Section 11-AB reads as follows:

Interest on delayed payment of duty. 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 11-A, shall, in addition to the duty, be liable to pay interest at such rate not below (ten percent) and not exceeding thirty-six percent 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 subsection (2), or Sub-section (2-B), of Section 11-A 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 u/s 37-B, 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.

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 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 or, as the case may be, the Court, the interest shall be payable on such increased or further increased amount of duty.

7. In our considered opinion it is the first proviso which applies in the present case. The order, instruction or direction by the board can be issued in any manner. In the present case, the assessee deposited the amount after the respondent informed him that his method of paying excise was not correct. The assessee did not reserve any right to appeal. It is not the case of the Department that the assessee did not deposit this amount within 45 days. The proviso makes it clear that if the assessee deposits the amount of duty within 45 days of being informed about the short deposit no interest shall be payable.

8. In view of this proviso, we are of the considered view that no penalty or interest could be levied on the assessee, firstly, because there is no order passed u/s 11-A and secondly, there is nothing on record to show that the assessee did not deposit the amount within 45 days of being informed of his liability. In fact, it is not the case of the Department that the assessee did not deposit the amount within 45 days.

9. In view of the above discussion, the Excise Reference is answered against the Department.