

(2011) 03 KAR CK 0266

In the Karnataka High Court

Case No : CEA No. 8 of 2007 C/w CEA No. 9 of 2007

Commissioner of Central Excise

APPELLANT

Vs

J.K. Industries Limited

RESPONDENT

Date of Decision : 01-03-2011

Acts Referred:

Central Excise Act, 1944 — Section 11 AA, 11 BB, 35 C (2)
Central Excise Rules, 2002 — Rule 7 (4), 8

Citation : (2011) 185 ECR 450 : (2011) 268 ELT 168

Hon'ble Judges : Ravi Malimath, J;N. Kumar, J

Bench : Division Bench

Advocate : N.R. Bhaskar, CGSC, for the Appellant; Lakshmi Narayana, for Kiran S. Javali, for the Respondent

Final Decision : Allowed

Judgement

N. Kumar, J.—These two appeals are by the revenue challenging the order of the Tribunal which set aside the order of the Appellate Authority relating to appropriation of interest of Rs. 24,415/- in one case and in another case on differential duty of Rs. 48,72,582/-.

2. M/s. J.K. Industries Limited-the Respondent has two plants - Vikrant Tyres - Plant I at Mysore and Truck Radial Plant-II at Hebbal Industrial Area, Metagalli, Mysore. They requested for provisional assessment in respect of clearances effected to their depots for effecting further sales from 1.7.2000 onwards. Based on the request of the Respondents, provisional assessment orders were passed by the department in respect of the financial year 2002-03 in respect of both the plants. At the time of ordering the provisional assessment, various abatements that are covered under the provisional assessment, the mode of computation of value was not enumerated. Therefore particulars were called for from the Respondents. Accordingly, the Respondents informed that they are claiming abatement under various heads. Consequent to the order of provisional assessments, the Respondents were required to furnish the requisite bond and

security in time. They did not comply with the same. Therefore, they were issued a show cause notice proposing to re-determine the transaction value and to recover the consequential differential duty. Thereafter, the final assessment orders were passed on 4.3.2005 and 7.3.2005. In the said order it was held that interest involved is required to be paid by the Respondent-Assessee in accordance with Rule 7(3) of the Central Excise Rules, 2002 and accordingly a sum of Rs. 24,415/- was claimed as interest in respect of plant-I. In respect of plant-II it was held interest is payable by the Assessee in terms of Rule 7(4) of the Central Excise Rules, 2002 read with Section 11AA and 11BB of Central Excise Act, 1944 on the short paid duty of Rs. 48,72,582/-.

3. The Assessee aggrieved by the said order preferred an appeal before the Commissioner of Appeals. He upheld the order of the assessing authority. Aggrieved by the same, the Assessee preferred an appeal to the Tribunal.

4. The Tribunal by the impugned order, following the judgment in 2005 (187) ELT 209 held that the interest provision would be applicable after the expiry of the period of one month from the date when the amount is determined, i.e., when the final order of assessment is passed and, therefore, they allowed the appeal and upheld the Assessee's contention. In passing the said order, the Tribunal did not consider the claim of the Assessee regarding abatement, which had been negated. Therefore, an application was filed for rectification of the said order. The said application was rejected in view of the judgment of this Court that the application was not disposed off within six months from the date of the order of the Tribunal in terms of Section 35C(2) of the Central Excise Act. Now the matter stands remitted to the Tribunal for consideration of the rectification application afresh and it is pending consideration.

5. This Court admitted these two appeals to consider the following substantial question of law:

(1) Whether the tribunal was right in interpreting and holding that the interest would be applicable after expiry of the period of one month from the date when the amount is determined in terms of the provisions of Rule 7(4) of Central Excise Rules, 2002?

(2) Whether the tribunal was right in holding that the interest is payable from the first day of the month succeeding the month for which such amount is determined as per Rule 7(4) of Central Excise Rules, 2002?

6. The learned Counsel appearing for the Revenue assailing the impugned order contended that as is clear from Rule 7(4), the liability to pay interest consequent to the order for final assessment under Sub-rule (3) is to be calculated from the first day of the month succeeding the month for which amount is determined till the date of payment thereof and not from the first day of the month succeeding the month in which the final order of assessment is passed as wrongly held by the Tribunal.

7. Per contra, the learned Counsel appearing for the Assessee pointed out that Section 11A(3)(ii) defines "relevant date". For the purpose of Section 11A where it provides that "relevant date" means in the 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. Relying on the aforesaid provision, it is contended that the interest is payable after the date of the order of final assessment.

8. In the light of the aforesaid contentions, in order to answer the substantial question of law, it is necessary to look into the provisions in the Act and the Rules.

9. Section 11A of the Act provides for recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded. It provides that duty is payable as per the provisions of the Act or Rules made thereunder. The Act by itself will not stipulate the date on which the duty is payable.

10. Rule 8 of the Central Excise Rules 2002 provides for manner of payment. Sub-rule (1) of Rule 8 provides that duty on the goods removed from the factory or the warehouse during a month shall be paid by the 6th day of the following month if the duty is paid electronically through internet banking and by the 5th day of the following month in any other case. Therefore the said Rule provides for the date on which the duty is paid. If the duty is not paid on the appointed date, Section 11A provides for recovery of duty not levied or not paid or short levied or short paid or erroneously refunded.

11. Rule 6 provides for assessment of duty, where the Assessee shall himself assess the duty payable on any excisable goods and pay the same. However, where the Assessee is unable to determine the value of the excisable goods or determine the rate of duty applicable thereto. Rule 7 provides for provisional assessment. Under the said provision, the Assessee may request the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, in writing, giving reasons for payment of duty on provisional basis and the authority may order allowing payment of duty on provisional basis at such rate or on such value as may be specified by him. The payment of duty on provisional basis is allowed subject to Assessee executing a bond binding himself to pay the difference between the amount of duty as may be finally assessed and the amount of duty provisionally assessed. Thereafter, within a period not exceeding six months from the date of communication of the order of provisional assessment, the aforesaid authorities shall pass an order for final assessment. Then, under Sub-rule (4), the Assessee shall be liable to pay interest on any amount payable to Central Government, consequent to the order of final assessment under Sub-rule (3). at the rate specified by the Central Government by notification issued u/s 11AA or Section 11AB of the Act from the first day of the month succeeding the month for which such refund is determined, till the date of payment thereof.

12. Section 11AB provides for Interest on delayed payment of duty. It provides, 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 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 10% and not exceeding 36% per annum from the first day of the month succeeding the month in which the duty ought to have been paid under this Act.

13. The Tribunal has read those provisions as to mean that interest is liable to be paid within one month from the date of final assessment order, as the liability to pay duty is finally determined with the passing of the final assessment order. Therefore the liability to pay interest also arises only when the Assessee does not pay the duty as determined by the final assessment order. We find it difficult to accept the said interpretation placed by the Tribunal on this provision, namely, Rule 7(4).

14. In fact, Sub-section (3) of Section 11A defines the word, "relevant date" as under:

(3)(ii)(C)(b) "relevant date", means,

in the 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.

15. Therefore, the Parliament consciously has not stated that the relevant date on which the adjustment of duty is made is the date of final assessment thereof. In the final assessment, the rate of duty payable is finally determined. That was the duty which was payable by the Assessee under Rule 8 on the 6th date of the following month if the duty is paid subsequently through internet banking and on the 5th day of the following month in any other case. Therefore the adjustment of duty is to be made on that date. Not after the determination by the final assessment order. All that happens in the final assessment order is, the rate of duty payable is determined. The adjustment is to be made on the date it was actually liable to be paid. Therefore, if the duty paid under a provisional assessment is less than what is determined in the final assessment, it is a case of short payment of duty. Therefore interest is payable on that short payment of duty from the due date, the relevant date being the day on which the duty is to be adjusted. Therefore, the date of provisional assessment and the date of final assessment have no relevance in deciding the payment of interest. The date on which duty is payable is provided under the Rules. If the duty determined to be paid under the final assessment is not paid on the due date, if it is short paid, not only the Assessee has to pay the balance in duty, he is also liable to pay interest on such short payment of duty from the due date. The only advantage is, he will get the benefit of one month from the said due date as is clear from Rule 7(4). Therefore, the order passed by the Tribunal holding that interest is

payable from one month from the date of final assessment order is erroneous and is liable to be set aside.

16. It is submitted that this is a case where the Assessee has paid excess duty and if that duty is adjusted, there is no liability to pay duty at all, there is no short payment and therefore the question of payment of interest would not arise. That is the matter to be considered by the Assessing Authority and if the Assessee has paid excess duty or if the differential duty has been paid before the final assessment order, the Assessing Authority has to consider the liability of interest in the light of the aforesaid provision and pass appropriate orders and grant relief to the Assessee if he is entitled to in law.

17. In that view of the matter, the appeal is allowed. The impugned order is hereby set aside. The substantial question of law is answered in favour of the Revenue and against the Assessee.