(2011) 03 KAR CK 0270

In the Karnataka High Court

Case No : CEA No. 16 of 2008

Commissioner of Central Excise APPELLANT

Vs

Presscom Products RESPONDENT

Date of Decision : 07-03-2011

Acts Referred:
Central Excise Act, 1944 — Section 11 A (2B), 11 AB

Citation : (2011) 185 ECR 458 : (2011) 268 ELT 344

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

Bench : Division Bench

Advocate : N.R. Bhaskar, for the Appellant; T. Rajeswara Sastry, for the Respondent

Final Decision : Allowed

Judgement

1. This appeal is by the revenue challenging the order passed by the Tribunal holding that the Assessee is not liable to pay interest on differential duty.

2. The Assessee - M/s Presscom Products is a manufacturer of excisable goods falling under Chapter sub-heading No. 8714.00 of the Schedule to the Central Excise Tariff Act, 1985. They preferred a refund claim of Rs. 27,802/-in respect, of interest amount paid by them under protest on the differential duty paid on the supplementary invoices raised during the months of July, September and November 2003 due to revision in price of their products after the dates of clearance. Therefore, a notice dated 14.9.2004 was issued to them calling upon them to show cause why the refund claim of Rs. 27.802/- being the interest paid on the delayed payment of differential duty through supplementary invoices should not be rejected on the ground that they had under valued the goods by not including the revised price of components though the fact of revision was known to them at the time of clearance of goods.

3. The adjudicating authority rejected the claim for refund of interest. It held Section 11AB specifically includes provisions for interest even in a situation of

Sub-section (2B) of Section 11A of the Central Excise Act. 1944 (for short hereinafter referred to as ''the Act''), where the Assessee voluntarily pays the duty short paid.

4. Aggrieved by the said order in original, the Assessee preferred an appeal before the Commissioner (Appeals). They contended that, what they had paid was a duty on differential value which was a transacted value revised by their customer due to increase in the cost of raw materials. The duty was determined and paid on the very day of revision of prices and there was no delay in payment of duty. They contended there is no liability to pay interest.

5. The Commissioner (Appeals) dismissed the appeal. Aggrieved by the said order, the Assessee preferred an appeal to the Tribunal. The Tribunal by the impugned order held that the Assessee was entitled for refund of the interest amount which had been paid by them before the issue of show cause notice and, therefore, it set aside the order passed by the lower authorities and held the revenue was not justified in charging the interest in the matter. Aggrieved by the same, the revenue is in appeal.

6. This appeal was admitted on 18.6.2008 to consider the following substantial question of law:

Whether it was correct and proper for the Tribunal to have set aside the confirmation of interest u/s 11AB of the Central Excise Act, 1944 in this case where the Assessee had raised supplementary invoices relating to earlier clearances which amounted to delayed payment of duty and squarely covered under the provisions of Section 11AB of Central Excise Act, 1944 merely because this was voluntarily paid?

7. Learned Counsel for the revenue assailing the impugned order contended that, in view of insertion of Sub-section (2B) by Act No. 14/2001 which came into effect from 11.5.2001 read with the amendment canned to the said Sub-section by Act 32/2003 which came into effect from 14.5.2003 and in particular explanation (2). differential duty paid after clearance indicates short payment/ short levied on the date of removal and hence interest becomes leviable. Therefore, he submits the order passed by the Tribunal is contrary to the aforesaid statutory provisions, as such it is liable to be set aside. In fact he relied on two judgments of the Apex Court.

8. Per contra, learned Counsel for the Assessee relied on a judgment of the Division Bench of this Court in the case of The Commissioner of Central Excise Vs. Bharat Heavy Electricals Ltd. Electronics Division, where it is held that, "the provisions envisaged u/s 11AB of the Act are not applicable to the facts of the present case as in the instant case there has been no determination of the duty nor there has been short payment of duty under Sub-section (2B) of Section 11A. Section 11AB is applicable and interest on delayed payment of duty arises only when any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded". Therefore he submits the

judgment of the Tribunal is in consonance with the aforesaid judgment and does not call for any interference.

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. However, by Act 14/2001 Sub-section (2B) was inserted which came into effect from 11.5.2011. It reads as under:

(2B) Where any duty of 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 willful 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 duly.

Explanation 2.: For the removal of doubts, it is hereby declared that: the interest u/s 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.

The words "on the basis of his own ascertainment of such duty or on the basis of duty ascertained by a Central Excise Officer" in Sub-Section 2B was inserted by Act 32/2003 which came into effect from 14.5.2003.

10. Therefore, the legislature has not kept anyone in doubt. Section 11AB of the Act provides for interest on delayed payment of duty. It provides that, 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 [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 (2B), of Section 11A till the date of payment of such duty. Therefore, Section 11AB provides for interest on delayed payment of duty. Explanation (2) makes it clear this provision regarding interest on delayed payment of duty equally applies to the payment of duty under Sub-Section 2B of Section 11A. Therefore, whatever may be the reason for the delay in payment of duty and even in a case where duty is paid even before the issue of a show cause notice claiming duty under Sub-section (1) of Section 11A once the duty is not paid on the due date, the liability to pay interest on such delayed payment of duty becomes effective automatically. In the scheme of the Act, no provision is made or no circumstances is carved out for excluding the payment of interest on delayed payment of duty. In fact, this question arose for consideration before the Apex Court in the case of Commissioner of Central Excise, Pune Vs. SKF India Ltd., Dealing with these provisions, the Supreme Court 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 willful 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 (IA) 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). Bui 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, 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 willful misstatement 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.

11. Following the aforesaid judgment, the Apex Court in the case of Commissioner of Central Excise Vs. International Auto Limited, has held as under:

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 11th 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 u/s 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 u/s 11AB of the Act. What is stated in Exploitation (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 u/s 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 M.R.F. Limited (supra) would not apply.

12. However, this Court in the case of Bharat Heavy Electricals case (referred to supra) held as under:

6. Having heard the counsel on both sides and on perusal of the material on record, we find that the show cause notice issued on 19-10-2004 was not in respect of any demand made regarding non-payment of duty on account of there being a price variation, but the demand made was only with regard to delayed payment of duty and for payment of interest and penalty. To the said show cause notice, reply has been given by the Assessee by contending that in the first place, when there was actual removal of the goods and the appropriate duty has been paid based on the price of the goods. In the second place, when there was a transaction when there was escalation in the cost, of goods with regard to the said price variation also there had been a payment of duty and hence, there was no delay in payment of duty. Having regard to the contents of the show cause notice and the reply, we are of the view that in the first instance there has been no demand made for payment of duty. In fact, such a demand could not have been made considering the fact that the Respondent Assessee had paid the duty on the difference in the price and therefore, the differential duty was paid for the relevant period. In the circumstances, the provisions envisaged u/s 1LAB of the Act are not applicable to the facts of the present case as in the instant case there has been no determination of the duty nor there has been short payment of duty under Sub-section (2D) of Section 11A. Section 11AB is applicable and interest on delayed payment of duty arises only when any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded. The aforesaid circumstances are not applicable in the instant case. Therefore, the issuance of the show cause notice dated 19-10-2004 by invoking the provision of Section 11AB in the instant case is improper and not in accordance with the said Section.

7. Learned Counsel for the Appellant has however relied upon the decision of the Apex Court in the case of Commissioner of Central Excise, Pune Vs. SKF India Ltd., to contend that the said provision is applicable on the facts of the present case also. We have perused the said decision and we find that we are unable to accept the contention of the learned Counsel for the Appellant that the said case applies to the facts of the present case. It is to be noted that in the said decision, the facts were that the Assessee had demanded from its customers, the balance of the higher price by virtue of the retrospective revision of the price and therefore, on the date the goods were cleared, the differential duty had to be paid and the same had not been done which was held to be a short payment of duty as the differential duty was paid only later when the Assessee issued supplementary invoices to the customers demanding the balance amounts. Under the said circumstances, the Apex Court held that it was a case of short payment of duty though it was not intentional and without any allegation of deceit. The facts of the present case are that after the goods were initially cleared and the appropriate duty had been paid subsequently, the price escalation was due to the increase in input labour and other costs which was determined by the All India Industrial Price Indices and by the Reserve Bank of India communicated, by all India Electrical Manufacturers Association. In terms

of the said direction, the supplementary invoices were issued to facilitate the recovery of the expenditure of cost escalation and the enhanced duty thereon was paid. Therefore, as on the date the goods were cleared initially, if such a price escalation had not taken place, then the Assessee could not foresee, the subsequent escalation in price. However, in the instant case the Assessee paid duty on the differential price also. Therefore, we cannot apply the said decision to the present case.

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.

14. The aforesaid statutory provisions and the law declared by the Apex Court in the aforesaid two judgments make it clear that, interest is leviable on delayed or deferred payment of duty for whatever reasons. 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). Non-issue of a demand notice under Sub-section (1) is nothing to do with leviability of interest for delayed payment. Explanation 2 to the Sub-section (2B) makes it expressly clear that such payment would not be exempt from interest chargeable u/s 11AB. What is stated in Explanation 2 to Sub-section (2B) is reiterated in Section 11AB which 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, in addition to the duty, be liable to pay interest. Interest is levied for loss of revenue on any count. The 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 u/s 11AB of the Act. The said non-payment or short payment of duty may be not intentional. Whatever may be the reason even if the Assessee is not at fault on any count, as the duty payable in law is not paid on the value of the goods on the date of removal, the payment of interest is attracted to bridge the loss of revenue. When the legislature consciously inserted these provisions in Section 11AB, the legal effect flowing from such provisions is to be given effect to. Therefore, a harmonious reading of the aforesaid provision makes it clear that interest is leviable on the differential duty paid in pursuance of a subsequent invoice as the proper duty payable under the law had not been paid on the date of clearance.

15. At this stage, it is relevant to point out that this was not the position of law prior to 11.5.2001 when Sub-section (2B) of Section 11A came into fore. This is

clear from Sub-Section 2C of Section 11A which reads as under:

(2C) The provisions of Sub-section (2B) shall not apply to any case 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

16. Therefore, this provision is made only prospective. It has no retrospective operation. The intention of the legislature is made clear by express words by incorporating Sub-section (2C) by the very same amendment by which this interest on delayed payment of duty was made leviable.

17. Therefore, the order passed by the Tribunal holding that as the duty was paid even before the issue of show cause notice under Sub-section (1) of Section 11A and, therefore, no interest is leviable is contrary to the aforesaid statutory provision as well as the law declared by the Apex Court and, therefore, it cannot be sustained. Accordingly, it is hereby set aside. The substantial question of law framed in this appeal is answered in favour of the revenue and against the Assessee.

18. At this stage it was pointed out that the Central Board of Excise and Customs has issued a circular/instruction F. No. 390/Misc./163/2010-JC dated 20.10.2010 in respect of "Litigation - Monetary limits for departmental appeals before CESTAT and High Courts". This is one of the steps taken by the Central Board of Excise and Customs, New Delhi, in their attempt to reduce the Government litigation in pursuance of the National Litigation Policy formulated by the Government of India aiming to reduce Government litigation so that the Government ceases to be a compulsive litigant. The purpose underlying this Policy is to ensure that the valuable time of the Courts is spent in resolving pending cases and in bringing down the average pendency time in the Courts. To achieve this, the Government should become an efficient and responsible litigant. Therefore, for the reasons set out therein they have taken a conscious decision as set out in para 5 as under:

5. The Board has decided that appeals in the Tribunal shall not be filed where the duty involved or the total revenue including fine and penalty is Rs. 1 Lakh and below. Similarly in the case of High Courts appeals should not be filed in cases where the duty involved or total revenue including fine or penalty is Rs. 2 lakhs and below. While deciding the thresholds mentioned above, the duty involved shall be the decisive element. For example, in a case involving duty of Rs. 1 lakh with mandatory penalty of Rs. 1 lakh besides any other penalty imposed under the relevant provisions of Law, no appeal shall henceforth be filed, in the Tribunal as the duty involved is within the monetary limit of Rs. 1 lakh. Similarly, if the duty involved in a case is Rs. 2 lakhs with equal mandatory penalty and any other penalty imposed under the Law in force at the relevant time, no appeal shall be filed before the High Court.

However, the said circular makes some exceptions to the rule notwithstanding the subject matter of the appeal being less than Rs. 1 Lakh or Rs. 2 Lakh. Clause

9 of the circular makes it clear that the above instructions of the Board must be adhered to strictly for all appeals filed on or after 1.11.2010. Therefore, it was contended that though the subject matter of this proceeding is less than Rs. 2 lakhs and after issuing of instructions, the Department could not have filed appeal as this appeal was filed much earlier to the instructions, the instructions has no application to the facts of the case.

19. It is true that the instructions came into effect from 1.11.2010, whereas the present appeal is filed on 7.3.2008. The subject matter of this appeal is Rs. 27,802/- which is less than Rs. 2 Lakhs. Though the said circular is not applicable as the appeal had already been filed before the instructions came into force and the appeal involves a substantial question which we have answered in the above paras, the Assessee should not be denied the benefit of the said circular. If only this appeal had been filed after the instructions, the appeal could not have been filed, even if substantial question of law is involved as it is well settled in fiscal legislation, the principles of res judicata is not attracted. But, as the appeal was filed and we have already answered the substantial question, in the facts of this case, we are satisfied that the Assessee is entitled to the benefit of the policy underlining the instructions, as the amount involved in this appeal is hardly Rs. 27,802/-.

20. For the reasons aforesaid, the appeal is allowed. The impugned order passed by the Tribunal is hereby set aside. The substantial question of law is answered in favour of the revenue and against the Assessee. However, the payment of interest by virtue of the order which is now restored abates in view of the circular issued by the Government.