**(2014) 09 BOM CK 0198**

**In the Bombay High Court**

**Case No :** Writ Petition Nos. 1915 and 3901 of 2013

Premier Ltd. APPELLANT

Vs

Union of India RESPONDENT

**Date of Decision :** 29-09-2014

**Acts Referred:**

Central Excises and Salt Act, 1944 — Section 11, 11A, 11A(2), 11AA, 32(2)(bb)
Constitution of India, 1950 — Article 14, 19(1)(g), 226
Income Tax Act, 1961 — Section 243

**Citation :** (2014) 309 ELT 3 : (2014) 48 GST 507 : (2015) 30 GSTR 581

**Hon'ble Judges :** S.C. Dharmadhikari, J;A.K. Menon, J

**Bench :** Division Bench

**Advocate :** V. Sridharan, Senior Advocate, Prakash Shah and Jas Sanghavi i/b. PDS Legal and Jitendra Motwani i/b. Naresh S. Thacker, Advocate for the Appellant; Pradeep S. Jetly and J.B. Mishra, Advocate for the Respondent

## Judgement

A.K. Menon, J.—Rule. Respondents waive service. By consent Rule made returnable forthwith.

2. In Writ Petition No. 1915 of 2013 the Petitioners challenge the recovery of sum of Rs. 49.28 crores and quashing impugned certificate dated 16th December, 2012 and impugned notice of demand dated 29th October, 2012 as being ultra vires of Central Excise Act, 1944 and violative of Article 14, 19(1)(g) of the Constitution of India on the ground that no interest is chargeable under the provisions of the Act and the demand for interest and seeks refund of amounts collected in excess by the Respondents. The Petitioners also impugn notification No. 68/63-CE dated 4th May, 1963 to the extent it makes section 142(1)(c)(ii) of the Central Excise Act, 1944 applicable to the Petitioners, as illegal, without jurisdiction and ultra vires of the Central Excise Act, 1944. The Petitioners also seek refund of sum of Rs. 49.28 crores, a sum of Rs. 2,72,73,685/- other amounts recovered by the Respondents.

3. In Writ Petition No. 3901 of 2013 the Petitioners question validity of letter

dated 5.9.2012 issued by the Assistant Commissioner of Central Excise, Kurla Division, Mumbai-I and the letter demanding a sum of Rs. 311,16,49,260/- along with interest thereon.

4. At the request of Mr. Sridharan, learned Senior Counsel appearing on behalf of the Petitioners in second petition and that the issue involved is common in both the Petitions, we took up Writ Petition No. 3901 of 2013 for hearing first. At this stage it is appropriate to mention that the controversy in these two Petitions involves the challenge to levy of interest on the amounts of Rs. 49.28 crores due to the Respondents from the Petitioners in the first petition, namely, M/s. Premier Ltd. and Rs. 311,16,49,260/- crores from the second Petitioners-New Holland Fiat (India) Pvt. Ltd.

5. The facts in brief leading up to the present challenge are as follows:

The Petitioners were manufacturers of motor cars, namely, "Fiat Uno" (petrol or diesel) and "Fiat Siena" (petrol or diesel) cars and the goods were excisable under Heading 8703.90 of the First Schedule of the Central Excise Tariff Act, 1985. Initially the business was managed by the Petitioners in companion petition which then surrendered excise registration thereto in M/s. Fiat (India) Pvt. Ltd. and carried on business with fresh registration.

The liability of New Holland Fiat India Ltd. (Fiat) to pay the sum of Rs. 311,16,49,260/-("the duty") towards principal sum is not in dispute since this amount was directed to be paid by the order and judgment of the Hon''ble Supreme Court dated 29th August, 2012 pursuant to finalisation of provisional assessment in the case of Fiat in terms of Rule 9B of Central Excise Rule, 1944 as then applicable. The amount of duty was payable in respect of motor vehicles cleared during the period April 1998 to June 2001.

6. In the course of assessment, the Assistant Commissioner vide his order dated 3rd January, 1997 inter alia directed that the provisional assessment may be calculated at the price which would include cost of production plus selling expenses which also include transportation and landing charges with profit margin, on the ground that the cars were not ordinarily sold in wholesale trade as the cost of production is much more than production price but were sold at loss in order to penetrate the market. The Assistant Commissioner therefore directed the Respondents to secure the amount of differential duty. This was done by executing a bond and bank guarantee(s).

7. After completion of investigation, the Commissioner of Central Excise caused special audit to be conducted to ascertain the price declared by the Petitioners. In the meantime the Superintendent of the Central Excise had issued 11 show cause notices for the period from June 1996 to February 2000 making demands of differential duty on the assessable value, calculated on the basis of manufacturing cost plus manufacturing profit minus Modvat availed per car. Replies were filed by the Petitioners who questioned the method of valuation. The replies were considered and the adjudicating authority vide order dated 31st

 

January, 2002 concluded that the assessee''s main consideration was to penetrate the market therefore the price at which they were selling the cars in the market could not be considered to be the normal price as per section 4 of the Act since the cost of production was much higher than the price at which the cars are sold to the general public. He adopted an average price of Rs. 4,53,739/- for different models of cars.

8. Being aggrieved by the order passed by Respondent No. 5, the Petitioners filed an appeal before the Commissioner of Central Excise (Appeals). Vide order dated 11th September, 2009 the Commissioner of Central Excise (Appeals) rejected the appeal of the Petitioners and confirmed the order dated 31st January, 2002. Being aggrieved by the order in appeal dated 11th September, 2009 passed by the Commissioner of Central Excise (Appeals) the Petitioners filed an appeal before the Customs, Excise and Service Tax Appellate Tribunal ("Tribunal") which vide final order dated 21st November, 2003 allowed the appeal and set aside the order dated 11th September, 2002 and Order-in-original dated 31st January, 2002. Respondent No. 2, namely, the Commissioner of Central Excise, Mumbai-II then filed Civil Appeal No. 1648 and 1649 of 2004 in the Supreme Court which by its judgment dated 29th August, 2012 allowed the appeal and set aside the order passed by the Tribunal dated 21st November, 2003. Thus, the order directing the Petitioners to pay an amount determined by the Commissioner of Central Excise (Appeals) became final.

9. The Supreme Court held that since the assessing authority could not do the valuation with the help of the other rules, he had resorted to best judgment method and while doing so has taken the assistance of a Cost Accountant, who was asked to conduct a special audit. The order of the Hon''ble Supreme Court directing the Petitioners to pay duty does not specify liability to pay interest at any particular rate.

10. On 30th August, 2012 the Petitioners were presented with a demand to pay a sum of Rs. 382,66,99,590/-. Subsequently, this amount was revised to Rs. 311,16,49,260/- along with interest at the appropriate rate. The Petitioners responded to this demand vide letter dated 17th September, 2012 wherein they contended that they had filed the application with directions in respect of the judgment of the Supreme Court and requested that the demand be kept in abeyance.

11. The Petitioners denied liability to pay interest on the following grounds:

(i) There is no demand to pay interest in its order dated 31st January, 2002 which was restored by the Hon''ble Supreme Court.

(ii) No appeal was filed by the department against this portion of the order of the adjudicating authority and therefore the order had become final and no interest was payable.

(iii) The adjudicating authority has finalised the provisional assessment for which bonds as contemplated under Rule 9B of the Central Excise Rules, 1944 were executed and duty paid on finalisation of the provisional assessment is not payable under section 11A of the Act and therefore no interest could be charged.

(iv) The Central Board of Excise and Customs vide circular dated 21st June, 2001 had declared that no interest would be charged in cases where the provisional assessment prior to 1st July, 2001 have been finalised after 1st July, 2001.

12. In other words, the Petitioners contend that circular of 21st June, 2001 clarifies that the interest is chargeable under Rule 7 only when the provisional assessment is finalised after 1st July, 2001. In the present case, the Petitioners contend that for the period April 1998 to June 2001 being prior to 1st July, 2001, no interest is payable.

13. In the meantime an application filed by the Petitioners for modification of the order of the Hon''ble Supreme Court was dismissed as withdrawn and the office of the Superintendent of Central Excise once again demanded the amount due to department along with accrued interest vide letter dated 19th October, 2012. The Petitioners responded with a letter of 23rd October, 2012. This time around, the Petitioners submitted that they had filed review petition before the Supreme Court seeking review of the order dated 29th August, 2012 and therefore requested that the demand be kept in abeyance.

14. Vide letter dated 25th October, 2012 the Petitioners once again requested that the demand be kept in abeyance but the letter did not contain any denial of interest liability. Vide letter dated 4th November, 2012 the Petitioners contended that a calculation error occurred while working out the duty demand in computing the assessable value. On 8th November, 2012 the Respondents issued notice of demand to defaulter for recovery of Rs. 311,16,49,260/- including demand for interest in accordance with section 11AB of the Central Excise Act, 1944. Vide letter dated 12th November, 2012 they requested for further time till the Hon''ble Supreme Court heard review petition and in the meanwhile as interim measure a sum of Rs. 10 crores was proposed to be paid till 16th November, 2012 and to further pay monthly instalment of Rs. 10 crores by 15th of every month under protest. The Petitioners once again denied the liability to pay interest.

15. Rs. 10 crores was paid on 15th November, 2012. In the meanwhile on 27th November, 2012 the review petitions were considered and were dismissed. The final demand was then made by the Superintendent of Central Excise on 29th November, 2012 for payment along with interest. Vide letter dated 5th December, 2012 the Petitioners requested the Commissioner of Central Excise to accept Rs. 311,16,49,260/- in instalments as per schedule.

16. The Superintendent of Central Excise vide letters dated 18th December, 2012 and 16th January, 2013 demanded payments forthwith. In the meanwhile the Commissioner of Central Excise also demanded payment of balance amount albeit with different amount. We may clarify that amount actually due was Rs.

 

311,16,49,260/- and this amount was correctly demanded by the Commissioner of Central Excise vide letter dated 16th January, 2013, while declining to grant instalments till 12th July, 2013 as requested. This letter of 16th January, 2013 assumes significance inasmuch as it suggested that the Petitioners to make revised plan for payments in instalments upto 31st March, 2013 provided that all instalments along with interest was paid before 31st March, 2013 failing which the department would resort to coercive action.

17. On 23rd January, 2013 the Petitioners submitted a revised schedule by which they proposed to make the entire payment of Rs. 311,16,49,260/- by 31st March, 2013. It will be useful to refer to revised instalment schedule which is reproduced below for case of reference:

While on the subject the Petitioner reiterated their contention qua interest liability. The said table sets out payments already made and amounts adjusted and appropriated including from refunds due to the Petitioners.

18. Vide letter dated 1st February, 2013 the Commissioner of Central Excise accepted the schedule of demand but insisted on demand of interest at the rate of 18% per annum in accordance with Notification No. 5/2011 Central Excise (NT) dated 1st March, 2011 read with CBEC circular No. 208/42/96-CX dated 2nd May, 1996 with effect from 29th August, 2012 being the date of the order of the Supreme Court. It is therefore seen that demand for interest is made only after the order of the Supreme Court, namely, when the order of adjudicating authority attained finality. It is useful to mention here that circular No. 208/42/96-CX clearly specifies that the board had decided that delayed payment as per circular No. 21/95, however, the demand made in the present case was restricted to 18% per annum. In the meanwhile the Petitioners filed curative petitions which came to be dismissed on 20th February, 2013.

19. It is the Petitioners'' case that the demand for interest is unsustainable under section 11A. According to the Petitioners the duty confirmed by the Supreme Court is neither an amount determined under section 11A nor an amount being paid voluntarily, since the demand for duty has been confirmed pursuant to the finalisation of the provisional assessment under Rule 9B of the erstwhile rule of Central Excise Rules, 1944.

20. It is the Petitioners'' case that the provision for charging interest and duty on finalisation of the provisional assessment came into effect on 1st July, 2001. The Petitioners contend that under Central Excise Rules, 2001 the proper officer may allow clearance of goods on payment of the duty on provisional basis. Sub-rule (4) of Rule 7 provides for interest on payments by the assessee. It is the Petitioners'' contention that prior to 1st July, 2001 there was no specific provision for recovery of duty arising out of finalisation of assessment.

21. The relevant portion of circular No. 354/66//2001/TRU dated 21st June, 2001 is set out below:

 

"(iii) In Rule 7 relating to provisional assessment, provision has also been made for charging of interest or for allowing refund, as the case may be. It may be clarified that these will apply to cases in which provisional assessment is resorted to on or after 1.7.2001 and not to past cases of provisional assessment even if the assessments are finalized on or after 1.7.2001."

That even though section 32(2)(bb) of the Central Excise Act, 1944 granted powers to the Central Government to make rules to provide for charging interest on the duty amount, it becomes payable on finalisation of the provisional assessment.

22. According to Mr. Sridharan, learned senior counsel appearing on behalf of the Petitioners, the rules providing for charging interest in such a situation was considered and concluded by this Court in DGP Hinoday Industries Ltd. V/s. CCE (Central Excise Appeal No. 73 of 2004) wherein it is held that the provision for interest liability under section 11AA was inserted in the 1944 Act with effect from 26th May, 1995 and applies to person who has failed to pay the duty determined under section 11A(2) and 11AA and that it would not apply where the demand liability was determined other than by provisions 11A(2) of the Act. He further submits that interest can be levied only when there is a specific and substantive charging provision. In the absence of which the demand for interest would be illegal.

23. In the instant case the relevant sections of the Central Excise Act, 1944 referred to by Mr. Sridharan may be looked into. Section 11A deals with recovery of duties not paid or short levied or short payment. Section 11A reads thus:

"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 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 duty, by such person or his agent, the provisions of this subsection shall have effect, [as if, for the words [one year], the words "five years" were substituted."

 

Section 11AA deals with interest on delayed payment, which is reproduced for reference:

"SECTION 11AA. Interest on delayed payment of duty.--

(1) Subject to the provisions contained in section 11AB, where a person chargeable with duty determined under sub-section (2) of section 11A, fails to pay such duty within three months from the date of such determination, he shall pay, in addition to the duty, 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, on such duty from the date immediately after the expiry of the said period of three months till the date of payment of such duty.

Provided that where a person chargeable with duty determined under sub-section (2) of section 11A before the date on which the Finance Bill, 1995 receives the assent of the President, fails to pay such duty within three months from such date, then, such person shall be liable to pay interest under this section from the date immediately after three months from such date, till the date of payment of such duty."

24. Mr. Sridharan submitted that in cases where provisional assessment of duty is made there is no obligation to pay interest and the Rule did not provide for any such payment of interest. In this connection it is relevant to consider the provisions of section 37 which empowers Central Government to make rules. Section 37(2) lists out various circumstances where such rule making power may be exercised. It is the Petitioners'' submission that there is no rule making power in respect of situation faced by the Petitioners in the present case. Mr. Sridharan alluded to the facts that the Respondents relied upon circular 354/66/2001-TRU dated 21st June, 2001 which notifies new rules of Central Excise. The new rules were to come into force from 1st July, 2001. This entire rule provided for the relief relating to provisional assessment, provision has also been made for charging of interest or for allowing refund, as the case may be. It was clarified that these rules will apply to cases in which provisional assessment is resorted to on or after 1st July, 2001 and not to past cases of provisional assessment even if the assessments are finalised on or after 1st July, 2001. The Petitioners have relied upon this to submit that there cannot be interest liability foisted upon them in the present case.

25. Mr. Sridharan further submitted that the Respondents on the contrary have relied upon circular No. 208/42/96-CX dated 2nd May, 1996 which states that with the introduction of section 11AA in the Central Excise Act and with issuance of Notification No. 21/95-CE (N.T.) dated 29th May, 1995, a doubt had arisen about the rate of interest to be charged on delayed payments of the Central Excise dues. It is notified that the board has decided that the rate of interest on delayed payments of central excise dues would be 20% as notified in Notification No. 21/95-CE (N.T.) dated 29th May, 1995, even in cases where instalment

 

facilities is allowed. In the old cases also where instalment facility was granted in accordance with instructions the rate of interest would be the statutory rate of 20% per annum.

26. He then relied upon the observations of the Supreme Court in J.K. Synthetics Limited and Birla Cement Works and another Vs. Commercial Taxes Officer, State of Rajasthan and another, . It would be useful to reproduce the relevant paragraphs which the Petitioners rely upon:

"16. Provisions are also made for charging interest on delayed payments etc. Ordinarily the charging section which fixes the liability is strictly construed but that rule of strict construction is not extended to the machinery provisions which are construed like any other statute. The machinery provisions must, no doubt, be so constructed as would effectuate the object and purpose of the statute and not defeat the same. But it must be realised that provision by which the authority is empowered to levy and collect interest, even if construed as forming part of the machinery provisions, is substantive law for the simple reason that in the absence of contract or usage interest can be levied under law and it cannot be recovered by way of damages for wrongful detention of the amount. Our attention was however drawn by Mr. Sen to two cases. Even in those cases, CIT Vs. M. Chandrashekar and Central Provinces Manganese Ore Co. Ltd. V/s. CIT, all that the Court pointed out was that provisions for charging interest was, it seems introduced in order to compensate for the loss occasioned to the Revenue due to delay. But then interest was charged on the strength of a statutory provision, may be its objective was to compensate the Revenue for delay in payment of tax. But regardless of the reason which impelled the Legislature to provide for charging interest, the Court must give the meaning to is as is conveyed by the language used and for the purpose to be achieved. Therefore, any provision made in a statute for charging or levying interest on delayed payment of tax must be construed as a substantive law and not adjectival law. So construed and applying the normal rule of interpretation of statutes, we find, as pointed out by us earlier and by Bhagwati J. in the Associated Cement Co. case, that if the Revenue''s contention is accepted it leads to conflicts and creates certain anomalies which could never been intended by the Legislature."

27. Mr. Sridharan placed reliance upon the decision of the Supreme Court in India Carbon Ltd. etc. Vs. State of Assam, in which the Hon''ble Court was considering the question of delay in payment of central sales tax in the absence of any specific provisions for levy of interest. The Court had held that there was no specific provision for payment of interest on central sales tax under the Central Sales Tax Act.

28. Mr. Sridharan, then, relied upon the decision of M/s. VVS Sugars Vs. Govt. of Andhra Pradesh and Others, and submitted that interest being substantive provision, can be levied only where the Act makes a substantive provision in that behalf and not otherwise. He also relied upon the Hon''ble Supreme Court''s decision in the case of Modi Industries Limited, Modinagar and Others Vs.

 

Commissioner of Income Tax, Delhi and Another, wherein the Supreme Court held that there is no right to get interest on refundable advances which finding arose out of a contention that it will be inequitable if the assessee does not get interest on advance tax paid pursuant to an earlier order. The Court held that there is no right to get interest except as provided by the statute. Interest on excess amount of advance tax paid under section 214 is not paid from the date of payment of the tax nor from the date of refund but only paid upto the date of the regular assessment. No interest is paid on excess amount of tax collected by deduction at source.

29. The Petitioners also relied upon the decision in the case of Union of India and Others Vs. M/s. Orient Enterprises and Another, and an earlier decision followed in the case of Suganmal Vs. State of Madhya Pradesh and Others, which held that no right accrued entitling the assessee to get interest on delayed refund unless the statute provides for it. It is submitted that since the insertion of section 27-A in the Act by Act 22 of 1995 there was no right entitling payment of interest on delayed refund under the Act. Relying upon the provisions, it is submitted that the claim for interest was in the name of compensation for wrongful retention. The Petitioner then relied upon the judgment of Panchanathan Chettiar Vs. Commissioner of Income Tax, Madras, , wherein the question before the Supreme Court was whether the assessee was entitled to claim interest on refund which became due on the strength of the decision of the Court. There is no provision for payment of interest unless it comes within the scope of section 243 of the I.T. Act, 1963 and, therefore, the Court declined to grant interest. We do not find that the above decisions are of any assistance in the present case for reasons set out hereafter.

30. Mr. Jetly, learned counsel for the Respondents submitted that the Petitioner are bound to pay interest. He relied upon the Notification No. 5/2011 -Central Excise (N.T.) dated 1st March, 2011, which reads as under:-

"G.S.R. (E)-In exercise of the powers conferred by section 11AA of the Central Excise Act, 1944 (1 of 1944) and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 18/2002-Central Excise (N.T.), dated the 13th May, 2002 (GSR (E), dated the 13th May, 2002), except as respects things done or omitted to be done before such supersession, the Central Government hereby fixes the rate of interest at eighteen percent per annum for the purposes of the said section.

This notification shall come into force from the 1st day of April, 2011."

31. Mr. Jetly relied upon the judgment of the Karnataka High Court in the case of Triton Valves Ltd. V/s. Assistant Commissioner of C.Ex., Mysore-II reported in 2002(149) E.L.T. 74 (Kar), which concerned a case where the Appellant was allowed to make payment of the tax demanded in instalments subject to payment of certain amount of interest. After payment, the Appellant filed an application for refund of interest amount collected with the plea that there was

 

no provision before coming into force of section 11AA of the Central Excise Act. The said application was rejected. Writ petition filed was dismissed. While dismissing the writ petition, the learned Single Judge held as under:-

"May be that the interest of 17.5% was charged on the basis of the Circular of the Board but the fact remains that it was on the application of the Petitioner that such an interest was charged. As such it has become a contract between the parties. The Petitioner has to make the payment for which he has agreed. If any dispute arises that could be examined only by the Civil Court and not by this Court. Learned Counsel for the Petitioner pointed out that the interest could have been charged only from the date of entering into contract and not from the date of the adjudication order. Neither the contract nor the order passed are before me and therefore this contention cannot be gone into. So far as the interest charged which is only a simple interest the same cannot be examined in a proceedings under Article 226 of the Constitution of India. "

32. The Division Bench agreed with the decision of the learned Single Judge and found that having been availed the benefit of making payment in instalments, the Appellant could not repudiate the remaining part of the order. The Appellant in that case had not challenged the conditional order of the authority permitting the payment of instalment subject to payment of interest. The aforesaid decision of the Karnataka High Court was carried in appeal before the Hon''ble Supreme Court which dismissed the Civil Appeal No. 4096 of 2000 filed by Triton Valves and held as follows:-

"We are of the view that the High Court was right in the view that it took in the order under challenge. The appellant took advantage of the order of the authority in respect of the instalments that were offered thereby and bought time and impugned it later insofar as interest was concerned. Under Article 226, in the circumstances, the appellant could get no relief."

33. Triton Valves proceeded to file a review petition in the Hon''ble Supreme Court which also came to be dismissed. There is considerable force in the submission of Mr. Jetly, inasmuch as, the Petitioner had taken advantage of availing the instalments to pay the sum of Rs. 311,16,49,260/-.

34. Mr. Jetly also relied upon the decision of the Rajasthan High Court in the matter of Hanumant Cement Pvt. Ltd. Vs. Union of India (UOI), wherein the Petition came to be filed to set aside an order dated 25th April, 2001 with a prayer seeking to prevent Union of India from auctioning assets of the Petitioner concerned and to permit the petitioner to pay the amount of duty in instalments within three years. The Respondent in that case directed the Petitioner to deposit Rs. 10 lacs on or before 27th April, 2001 and that the balance amount be paid in 11 monthly instalments including interest. The Court upheld the interest liability and permitted the Petitioner by granting 16 instalments to pay up the entire amount inclusive of interest.

35. Mr. Jetly then drew our attention to the fact that vide Notification No. 5/2011-

 

CE (N.T.) dated 1st March, 2011 in exercise of powers conferred under section 11AA of the Central Excise Act and in supersession of earlier notification dated 13th May, 2002 except as respects things done or omitted to be done before such supersession, the Central Government hereby fixes interest at the rate of 18% per annum for the purpose of section 11AA. This notification came into effect from 1st April, 2011. He therefore submitted that in all cases where the interest paid is not specified, the assessee would be liable to pay the aforesaid rate of 18% percent. Mr. Jetly also relied upon the communication dated 5th December, 2012 from the Ministry of Finance to the Chief Commissioner of Customs, Central Excise and Service Tax, Meerut Zone, wherein it was recorded that in all cases where facility was granted to pay amount of duty in instalments on the usual terms and conditions parties like the Petitioners would be liable to pay simple interest at 17.5% compounded at the end of each month chargeable from the date of confirmation of the demand. He therefore submits that the demand for interest in the present case is legitimate and sustainable.

36. Our attention was drawn to the fact that after judgment of the Hon''ble Supreme Court dated 29th August, 2012 the Petitioners were liable to discharge their liability forthwith but sought indulgence to pay the same in instalments. Vide order dated 29th August, 2012 the Hon''ble Supreme Court restored the order passed by the Adjudicating Authority thus crystalising the liability.

37. In our view there is no substance in the Petitioners'' contentions. The Petitioners have ventured to seek quashing of the impugned letter on the basis that the order in original of the adjudicating authority did not provide for payment of interest. The fact remains that the claim for interest has been made only upon the instalments being proposed and which were agreed upon subject to payment of interest. This is evident from the letter dated 5th December, 2012 Exhibit "W" and the reply dated 16th January, 2013 Exhibit "Z" wherein the Commissioner of Central Excise made it clear that the complete payment will have to be made along with interest before 13th December, 2013. Thereafter a revised payment schedule was then submitted on 23rd January, 2013. In this letter the Respondents contended that its position on interest had already been clarified in its letter dated 17th September, 2012 Exhibit " L" to the Petition wherein they enumerated reasons for denying the interest claim.

38. We have dealt with these reasons elsewhere in the judgment and we are of the view that these reasons did not justify waiver of interest. Mere omission to mention of interest of the adjudicating authority in its order dated 31st January, 2002 will not entitle the Petitioners to avoid liability to pay interest after the order of the Supreme Court. It is pertinent to mention here that the Respondents are not claiming interest for the period from April 1998 to June 2001 and in fact the Petitioners cannot expect largesse in the matter of revenue. Although no appeal was filed by the department against the order passed by the adjudicating authority dated 31st January, 2002 the claim for interest in the present case does not commence from 31st January, 2002. It is in fact the process of

 

negotiations when the Petitioners sought instalments commencing vide its letter dated 5th December, 2012 that interest levy was specified as a condition to instalment payment. The Petitioners'' contention that interest is not payable for the reasons set out in the letter dated 17th September, 2012 was not acceptable to the Respondents. This is evident from the fact that the Respondents vide their letter dated 18th December, 2012 reiterated the demand for interest. The demand for interest was again reiterated in the letter dated November, 2012 signed on 28th December, 2012 Exhibit "X" to the petition. The letter dated 16th January, 2012 Exhibit "Y", "Z" and "AA" which inter alia recorded that sum of Rs. 85 crores has been paid without any instalments being approved and that the balance is payable along with interest.

39. Vide its reply dated 23rd January, 2013 the Petitioners did not make offer to pay instalments upon waiver of interest by the Respondents but merely reiterated their submissions in the letter dated 17th September, 2012. The fact that the Respondents did not accept the condition or grant waiver is evident from the letter dated 1st February, 2013 wherein once again the balance principal sum was demanded along with interest at 18% per annum. It is relevant to mention here that the power to grant instalments was delegated to the Commissioner of Central Excise subject to payment of statutory rate of interest vide Notification No. 289/50/97/CX-9 dated 17th November, 1997 which specified that power to grant instalments were subject to payment of statutory rate of interest as provided for under section 11 of the Central Excise Act read with Notification 21/95 dated 25th May, 1995.

40. The Petitioners were no babes in the wood and while applying for instalments would have been aware about this provision and therefore sought instalments from the Commissionerate. We will assume they were unaware of this notification. Even if they were so unaware, the fact remains that interest was not demanded under Section 11A. As we have already seen circular No. 289/96/CX-9 which specifies that the interest on delayed payment have to be collected at the rate of 20% per annum from the date of new section 11A came into force and that such interest would be payable only on the actual amount in balance and not on the original amount payable.

41. In the instant case an application for seeking instalments was obviously made to the Commissioner of Central Excise apparently with full knowledge that the Commissioner is empowered to grant instalments upon such application being made, subject to payment of interest. The Commissioner in exercise of his discretion imposed the condition of the payment of interest. He repeatedly demanded interest. If the Petitioners were desirous of contesting the demand for interest they would have been well advised not to apply for instalments and pay up entire sum of Rs. 311,16,49,260/- forthwith upon passing of the order of the Hon''ble Supreme Court dated 29th August, 2012 but the Petitioners thought and acted otherwise and proceeded to demand instalments and sought waiver of interest. In view of the delegation of powers to grant instalments subject to

 

payment of interest, there was no power vested in the Commissioner to waive interest. If at all any such discretion was exercised the same would be without authority. The Petitioners have, however, proceeded to submit a revised schedule and did thereafter pay some amounts in accordance with revised schedule and thereafter paid the balance amount in an accelerated manner. The liability to pay interest was never waived and grant of instalments at all times remained subject to payment of interest on the entire amount of Rs. 311,16,49,260/- from the date of order of the Supreme Court dated 29th August, 2012 till the payment or realization. No doubt the Petitioners would be entitled for credit for the amounts paid but are still liable to pay interest in accordance with the Act. We note that the Respondents have thereafter continued to demand the interest pursuant to the circular dated 2nd May, 1996. The interest demanded was not under section 11AA. The department demanded interest in pursuance of the instalments facility granted in accordance with the Notification dated 2nd May, 1996 as stated above the grant of interest free instalments would not have been authorized at all and therefore there is no justification in the Petitioners seeking quashing of the impugned notice.

42. In view of the fact that the interest was not demanded under section 11AA the fundamental challenge in the petition must be rejected. The gravamen of the Petitioners'' case is that by the virtue of circular No. 354/66/2001/TRU dated 21.6.2001 any amount due subject to provisional assessment resorted to on or after 1.7.2001 alone would attract interest liability under Central Excise Rules prospectively and not past cases even if provisional assessment were to be finalized after 1st July, 2001. Absent applicability of sections 11A and 11AA, the circular dated 21st June, 2001 is of no avail. The judgment referred in DGP Hinoday cited by Mr. Sridharan concerns interest liability under section 11AA so also the observations of the Hon''ble Supreme Court in JK Synthetics Ltd. dealt with a case based on substantive law provisions. The other cases relied upon by Mr. Sridharan also deal with cases some of which were under Central Sales Tax Act and the ratio of the judgments contained a common factor, viz. there is no right to get interest except the right provided by the statute.

43. In the facts of the present case it cannot be disputed that the Petitioner has retained money owing to the Respondents without authority of law and engaged the Respondents in a series of litigations. They then filed Civil Appeals before the Supreme Court which were disposed of on 16th October, 2012 with liberty to file Review Petition. The Review Petition was filed on 19th October, 2012. The review petition came to be dismissed on 27th November, 2012. The Petitioners did not stop there. They then filed a curative petition on or about 2nd January, 2013 which came to be dismissed on 20th February, 2013. Thus, at every opportunity the Petitioners sought to defeat the Revenue''s right to amount of duty and there is no reason for the Petitioners to be excused from paying interest.

44. In Aditya Mass Communications (P) Ltd. Vs. A.P.S.R.T.C., it was held that there is duty cast upon the Court that the party is adequately compensated when

 

funds are retained and a party is denied use of its money. As far as quantum of interest is concerned the Supreme Court observed that the Court may allow interest as in given case as governed by the facts of the case and not by any precedent law. Applying the ratio of the said decision in the instant case we find that the Petitioners have deprived the Revenue of the sums of Rs. 311,16,49,260/- and Rs. 49.28 crores and therefore the Petitioners is liable to pay interest as demanded. In the present case the rate of interest demanded will be payable in accordance with Notification No. No. 208/42/96-CX dated 2nd May, 1996. As regards date from which interest is payable, we direct that interest be paid from the date on which the interest was first demanded by the Respondents, namely 5th September 2012.

45. In the present case it is matter of record that the demand for interest in the present case does not emanate purely from the statute but from negotiated demand for instalments pursuant to the final order of the Hon''ble Supreme Court fixing liability to pay the principal amount. Had the Petitioners paid the entire sum as on the date of the order of the Supreme Court they may have been in position to contend in the facts of the present case that no interest is liable to be paid. However, we clarify that this observation is made specifically in the facts and circumstances of the present case and not to be considered as precedent of any kind.

46. In the circumstances we have no hesitation in holding that the liability to pay interest being reiterated in the acceptance of the proposal for instalments and the Petitioners having acted upon the same, the Petitioners are bound to pay interest at the rate of 18% per annum from the date of the order of the Supreme Court dated 29th August, 2012 till the date of realisation as demanded pursuant to Notification No. 5/2011 Central Excise (NT) dated 1st March, 2011 read with CBEC circular No. 208/42/96-CX dated 2nd May, 1996. While computing the interest the Respondents shall consider whether or not the payments were made towards principal sum and following the rules of appropriation of payments in this behalf by crediting the instalments to principal amounts and charging interest on the balance amount after each instalments was paid and appropriated and arriving at interest amount of the liability. In the circumstances the Petition fails.

47. In view of the order passed in Writ Petition No. 3901 of 2013, Writ Petition No. 1915 of 2013 also does not survive and the same is also dismissed. Rule stands discharged in both petitions. The Petitioners in both petitions shall pay costs to the Respondents quantified at Rs. 50,000/- with four weeks from the date of receipt of a copy of this judgment.

 