

(2016) 08 AHC CK 0274
In the Allahabad High Court
Case No : Writ Tax No. 718 of 2005

Rajesh Paper Mills

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 03-08-2016

Acts Referred:

Central Excise Rules, 2002 — Rule 8(3)
Central Excises and Salt Act, 1944 — Section 11AB

Citation : (2017) 3 ADJ 76

Hon'ble Judges : Sudhir Agarwal and Kaushal Jayendra Thaker, JJ.

Bench : Division Bench

Advocate : B.C. Rai, Advocate, for the Petitioner; K.C. Sinha, R.C. Shukla and Radha Mohan Pandey, S.S.C., A.S.G.I, for the Respondent

Final Decision : Allowed

Judgement

1. Heard Sri Gopal Verma and Sri B.C. Rai, learned counsel for petitioner and Sri Ashok Mehta, Additional Solicitor General of India assisted by Sri Praveen Kumar for respondents.

2. Petitioner has challenged validity of Rule 8(3) of Central Excise Rules, 2002 (hereinafter referred to as "Rules, 2002") being ultra vires of Article 14 of Constitution of India and Section 11AB of Central Excise Act, 1944 (hereinafter referred to as "Act, 1944") and also on the ground that same is beyond Rule making power under Section 3 of Act, 1944. It has also prayed for a writ of certiorari quashing order dated 6.4.2005 (Annexure No.2 to the writ petition), whereby a demand of total sum of Rs. 9,48,010/- has been raised by respondent-2 being interest on delayed payment of excise duty, by petitioner.

3. The facts in brief giving rise to present dispute are in a very narrow compass and stated as under.

4. Petitioner is a company registered under Companies Act, 1956 (hereinafter referred to as "Act, 1956") and has its registered office at Barapech Sikohabad,

District Ferozabad. It is engaged in manufacture and sale of paper which is an excisable article, hence, petitioner is registered with Excise Department under the provisions of Act, 1944. Petitioner paid excise duty for the period October, 2002 to February, 2005. However, respondent-2 vide letter dated 9.12.2004 informed petitioner that during scrutiny of monthly returns submitted by petitioner since February, 2005 there appears to be certain discrepancies showing that excise duty was deposited beyond due date during February, 2004 to November, 2004. Consequently, petitioner was directed to produce duty paying documents for the months of March, 2004 to November, 2004, or if, amount was not deposited within due date, to pay interest at the rate of Rs. 1,000/- per day. Petitioner produced relevant documents before respondent - 2 but it issued order dated 6th April, 2005, impugned in this writ petition, demanding interest on duty paid by petitioner for the period October, 2002 to February, 2005 stating that duty was paid after due date and for period of delay petitioner was liable to pay interest under Rule 8(3) of Rules, 2002.

5. It is contended by counsel for petitioner that interest has been calculated as per Rule 8(3) of Rules, 2002 which provides interest to be computed at the rate of 2% per month or Rs. 1,000/- per day whichever is higher. Charging of interest at the rate of Rs. 1,000/- per day is wholly illegal, inasmuch as it raises the rate of interest beyond maximum rate permissible under Section 11AB of Act, 1944. Therefore, same is beyond delegated legislative authority i.e. rule framing authority and is ultra vires of Section 11AB.

6. It is further submitted that before Finance Act, 1995 there was no provision authorizing respondents to charge interest on delayed payment. Section 11AA was inserted by Finance Act, 1995 w.e.f. 26.5.1995 and Section 11AB was inserted by Finance Act, 1996 w.e.f. 28.9.1996. Both these provisions provide that on delayed payment of duty, interest shall be chargeable at a rate not below 10% and not exceeding 36% but such rate shall be fixed by Central Government by Notification in official gazette. It is said that Central Government vide Notification No. 66/2000- CE(NT), dated 12.9.2003, fixed rate of interest at 13% per annum in exercise of power under Section 11AB. Rule 8(3) of Rules, 2002 however provides for a different rate of interest i.e. 2% per month or Rs. 1,000/- per day, whichever is higher, therefore, it is inconsistent with Section 11AB read with Notification dated 12.9.2003, hence ultra vires and liable to be struck down. It is also said that Rule 8 (3) is in conflict with Section 11AA and 11AB and hence, it is ultra vires.

7. Sri B.C. Rai urged that interest has always been compensatory in nature and fixation of rate of interest under Rule 8(3) elevates said Rule to the status of a penal and confiscatory provision, rendering the same arbitrary, unreasonable and irrational. Rate of interest fixed under Rule 8(3) is inequitable, unfair, unreasonable and confiscatory, inasmuch as rate of interest on deposits in bank was currently between 4% to 6% while rate of interest on borrowings from bank is between 7.5% to 12% but under Rule 8(3), rate of interest provided is 2% per

month which comes to more than 24% per annum or Rs. 1,000/- per day, whichever is higher, which is extremely excessive and hence in-violation of Article 14 of Constitution of India, since, it loses its nature of being compensatory.

8. Sri B.C. Rai urged that Section 37 of Act, 1944 confers power upon Central Government to frame Rules to give effect to the provisions of Act, 1944 but Rule 8(3) is beyond Rule making power. It is said, when Central Government itself has issued a Notification fixing a lower rate of interest, authorities cannot take recourse to Rule 8(3) and demand a higher rate of interest. It is also pointed out that Rule 8(3) has further been amended by Second Amendment of 2005. Now the amendment made by Notification dated 31.3.2005, Rule 8(3) provides that rate of interest would be such, as specified by Central Government vide Notification under Section 11AB of Act, 1944 and that being so, it must be taken that intention of legislature in Rule 8(3) was same for earlier period also.

9. It is lastly contended that in respect to some period for which interest has been demanded, amount of duty was paid by petitioner well within due date by way of submitting a bank cheque which was encashed by Bank when deposited by respondents for collection, but respondent-2 has charged interest by treating date of payment of duty on the date when respondents got the amount encashed from Bank and not on the date of deposit of cheque which was deposited / submitted in time. In this regard our attention is drawn to Rules 8(1) of Rule 2002 and it is urged that, duty if deposited by cheque, is realized and encashed by Bank, when presented by Department, payment of duty shall be deemed to be on the date on which cheque was submitted by assessee.

10. Sri Ashok Mehta, Additional Solicitor General appearing for respondents contended that Rule 8 is part of subordinate legislation and Central Government in exercise of power under Section 37 of Act, 1944 and in order to give effect to the provisions of the Act has made the said Rule. Section 11AA and 11AB provide limit of minimum and maximum rate of interest, being 10% and 36% respectively. Rule 8(3) specifies rate of interest as 2% per month and Rs. 1,000/- per day which apparently is not beyond maximum rate permitted under Section 11AB, hence it cannot be said that Rule 8(3) is invalid. It is further submitted that Section 11AB itself provides rate of interest upto 36% and validity of principal legislation is not under challenge, subordinate legislation providing rate of interest, within the limits prescribed under Section 11AB, cannot be said to be arbitrary, unreasonable and confiscatory. Lastly, it is contended that Notification dated 13.5.2002 is only a non statutory executive order and when exercising Rule framing power, a Rule has been framed, that will prevail over executive order, and therefore, petitioner is liable to pay interest as per Rule 8(3). With respect to the deemed date of deposit of duty, with reference to Rule 8(1), he fairly stated, when cheque is presented in Bank and amount of cheque is realized and credited to the account of Department, the date of presentation of cheque in designated bank shall be deemed to be date of payment and delay, if

any, occurred in transferring amount by Bank to Department's account would not attract liability of interest. If respondent-2 has raised demand contrary to Rule 8(1), same shall be rectified if petitioner approaches respondent-2 and point out such a demand of interest in individual case(s).

11. We have heard counsel for parties at length and perused record.

12. Sections 11AA and Section 11AB which provide for interest on delayed payment of duty, read as follows :

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

Explanation 1. - Where the duty determined to be payable is reduced by the Commissioner (Appeals), Appellate Tribunal 6[, National Tax Tribunal] or, as the case may be, the Court, the date of such determination shall be the date on which an amount of duty is first determined to be payable.

Explanation 2. - Where the duty determined to be payable is increased or further increased by the Commissioner (Appeals), Appellate Tribunal, of National Tax Tribunal or, as the case may be, the Court, the date of such determination shall be, -

(a) for the amount of duty first determined to be payable, the date on which the duty is so determined;

(b) for the amount of increased duty, the date of order by which the increased amount of duty is first determined to be payable;

(c) for the amount of further increase of duty, the date of order on which the duty is so further increased. "

Section 11AB. Interest on delayed payment of duty. - (1) 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 subsection (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 subsection (2), or sub-section (2B), of section 11A 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 under section 37B, 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.

(2) 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, National Tax 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 5[, National Tax Tribunal] or, as the case may be, the Court, the interest shall be payable on such increased or further increased amount of duty.

(emphasis added)

13. Section 11AA and 11AB though look similar provisions but the actual difference is that Section 11AA takes within its ambit excise duty determined under Section 11A(2) while section 11AB has within its ambit liability of duty not complied with and covered by Section 11A(1). Irrespective of duty determined under sub-section (2) or paid under sub-section (2B) of Section 11A, rate of minimum interest as well as maximum, prescribed in both the provisions, is same i.e. 10% and 36% per annum. Both sections provide that actual rate of interest which shall be applicable, would be such, as fixed by Central Government by Notification in Official gazette.

14. It is admitted that so far as petitioner is concerned, it is covered by rate of interest prescribed under Section 11AB. Sri Ashok Mehta, counsel for respondent also did not dispute that in exercise of powers conferred by Section 11AB of Act, 1944 and in supersession of earlier Notification, Central Government issued a notification dated 12.9.2003 by publishing in Gazette, and fixed rate of interest at 13% per annum for the purpose of Section 11AB. Copy of aforesaid Notification dated 12.9.2003 is on record as Annexure - 6 to writ petition and

reads as under :-

"In exercise of the powers conferred by section 11AB 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.19/2002 - Central Excise (N.T.), dated the 13th May, 2002 [GSR 355(E), dated the 13th May, 2002], except as respect things done or omitted to be done before such supersession, the Central Government hereby fixes the rate of interest at thirteen percent per annum for the purpose of the said notification.

[Notification No.66/2003 - C.E.(N.T.), dated 12.9.2003]"

15. In our view, a bare reading of Section 11AB shows that rate of interest, if any, payable under Section 11AB would be such as prescribed in two Notification published in Gazette. For that purpose there is neither any justification nor occasion to refer any Rule including Rule 8. When statute require specifically that rate of interest shall be fixed by Central Government at such rate as notified in official gazette by way of Notification, such rate shall prevail. Aforesaid Notification dated 12th September, 2003 partakes nature of "statutory instrument" issued under Section 11AB, since that is the only way prescribed for fixing rate of interest in respect of cases covered by Section 11AB. Any general provision will not cover this situation. Hence, demand of interest at a rate, other than that prescribed in the Notification dated 12th September, 2003, by taking recourse of Rule 8(3) would be illegal and impermissible.

16. It is well settled, when law requires something to be done in a particular manner, things have to be done in that manner alone and not otherwise. This principle was recognised in *Nazir Ahmad v. King-Emperor* AIR 1936 PC 253 and, thereafter it has been reiterated and followed consistently by Apex Court in a catena of judgements, which we do not propose to refer all but would like to refer a few recent one.

17. In *Dhananjaya Reddy v. State of Karnataka* 2001 (4) SCC 9 in para 23 of the judgment the Court held :

"It is a settled principle of law that where a power is given to do a certain thing in a certain manner, the thing must be done in that way or not at all."

18. In *Commissioner of Income Tax, Mumbai v. Anjum M.H. Ghaswala* 2002 (1) SCC 633, it was held :

"It is a normal rule of construction that when a statute vests certain power in an authority to be exercised in a particular manner then the said authority has to exercise it only in the manner provided in the statute itself."

19. The judgments in *Anjum M.H. Ghaswala* (supra) and *Dhananjaya Reddy* (supra) laying down the aforesaid principle have been followed in *Captain Sube Singh & others v. Lt. Governor of Delhi & others* 2004 (6) SCC 440.

20. In *Competent Authority v. Barangore Jute Factory & others* 2005 (13) SCC

477, it was held :

"It is settled law that where a statute requires a particular act to be done in a particular manner, the act has to be done in that manner alone. Every word of the statute has to be given its due meaning."

21. In *State of Jharkhand & others v. Ambay Cements & another* 2005 (1) SCC 368 in para 26 of the judgment, the Court held:

"It is the cardinal rule of interpretation that where a statute provides that a particular thing should be done, it should be done in the manner prescribed and not in any other way."

22. In effect a similar question was considered by Division Bench of this Court [in which I was also a member with Hon"ble S.R. Alam, J., (as His Lordship then was)] in *Daya Shankar Singh v. State of U.P. and others*, 2008(2) ESC 1220 and this Court has observed:

"A modification, amendment etc., therefore, is permissible by exercising the power in the like manner and subject to like sanction and conditions in which the main provision was made initially. Since, Staff Regulations were framed admittedly with the previous sanction of the State Government and by publication in the official Gazette, same can be amended only following the same procedure and not otherwise. Therefore, the proposal/resolution passed by the Board of Directors, UPSWC by no stretch of imagination can be said to have the effect of either amending Regulation 12 of Staff Regulations or to bind UPSWC and its employees to be governed by such resolution/proposal which are inconsistent with the existing provisions contained in Staff Regulations."

23. We are also fortified in taking above view by referring to Section 21 of General Clauses Act, 1897, which reads as under :-

"21 Power to issue, to include power to add to, amend, vary or rescind notifications, orders, rules or bye - laws. - Where, by any Central Act or Regulations a power to issue notifications, orders, rules or bye-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions (if any), to add to, amend, vary or rescind any notifications, orders, rules or bye-laws so issued."

(emphasis added)

24. Power to prescribe rate of interest, is conferred by Section 11AB, to be fixed by Central Government by notification in official gazette and such a Notification was actually issued on 12th September, 2003. Same could have been altered or modified or changed in same manner and not by referring to a general rule.

25. In that view of the matter, we find that there is no necessity to look into validity of Rule 8(3) of Rule, 2002 but since, matter has been argued on this aspect also in the alternative, we proceed to examine whether rate of interest specified in Rule 8(3) if applied to a case covered by Section 11AB, it would be

inconsistent with Section 11AB so as to render it ultra vires.

26. Rate of interest under Rule 8(3) is 2% per month or Rs. 1,000/- per day whichever is higher. Rule 8(3) as applicable before 1.4.2005 read as under :-

" if the assessee fails to pay the amount of duty by the due date, he shall be liable to pay the outstanding amount along with an interest at the rate of two per cent per month or rupees one thousand per day, whichever is higher, for the period starting with the first day after due date till the date of actual payment of the outstanding amount ;

Provided that the total amount of interest payable in terms of this sub-rule shall not exceed the amount of duty which has not been paid by due date;

Provided further that till such time the amount of duty outstanding and the interest payable thereon are not paid, it shall be deemed that the goods in question in respect of which the duty and interest are outstanding, have been cleared without payment of duty, and where such duty and interest are not paid within a period of one month from the due date, the consequences and the penalties as provide din these rules shall follow."

(emphasis added)

27. It may also be noticed that Rule 8(1) and 8(3) of Rules, 2002 were substituted w.e.f. 1.4.2003 by amendment Notification dated 1.3.2003.

28. 2% per month will make rate of interest more than 24% per annum, but rate of Rs. 1000/- per day can go to the extent of even more than 100% per annum. For example if the amount of default is Rs. 1,00,000/- and there is delay of 365 days, then amount of interest would come to Rs. 3,65,000/- but by applying proviso to Rule 8(3), it would be confined to Rs. 1,00,000/- since it cannot exceed the amount of duty which has not been paid by due date. Still rate of interest would be 100%. This is obviously in the teeth of Section 11AB where rate of interest cannot be more than 36% per annum. Rate of interest at Rs. 1,000/- per day, therefore in several cases may result in exceeding 36% per annum. Such higher rate beyond 36% is not permitted by Section 11AB, hence to that extent Rule 8(3), ex-facie is ultra vires of Section 11AB of Act, 1944.

29. There is another aspect of matter. Legislature vide Section 11AB required that rate of interest must be on per annum basis and not in any other manner, while Rule 8(3) provides rate of interest on per month or per day basis which is also not consistent with Section 11AB. It is for this reason, it appears to us, Rule 8(3) of Rule 2002, as framed w.e.f 1.3.2003 was not found in conformity with Section 11AB and this is fortified from the fact that Central Government issued Notification in official gazette as contemplated in Section 11AB, specifically, to provide rate of interest at 13% per annum. If recourse is taken to Rule 8(3) for the purpose of levying interest as already said, it would be ultra vires of Section 11AB.

30. We are also informed that several High Courts have already declared Rule 8(3), ultra vires of Section 11AB and in this regard we may refer to Rajasthan High Court judgment in *Lucid Colloids Limited v. Union of India*, 2006(200) 377, Gujarat High Court in *K.C. & Sons Appliances Pvt. Ltd. v. Union of India*, 2014 (306) E.L.T. 249 and Madras High Court in *V.T. Dyers and Screen Printers v. Union of India*, 2015 (322) E.L.T. 705.

31. Probably realising this anomaly, and in order to bring Rule 8(3) in conformity with Section 11AB, Government also amended, by substitution Rule 8(3), vide Notification dated 31st March, 2005 and now it reads as under :

" If the assessee fails to pay the amount of duty by due date, he shall be liable to pay the outstanding amount along with interest at the rate specified by the Central Government vide notification under Section 11AB of the Act on the outstanding amount, for the period starting with the first day after due date till the date of actual payment of the outstanding amount. "

32. We find that amended Rule now brings into application, the Notification dated 12.9.2003 issued by Government by publishing in official gazette, prescribe rate of interest, consistent to Section 11AB.

33. With respect to another part, as to how delay in payment shall be computed, counsel for parties did not dispute that Rule 8(1) (Explanation-B) would be applicable and date of payment of duty shall be deemed to be the date on which cheque was received by Department provided cheque as and when presented to Bank by Department, got encashed. Rule 8(1) (Explanation-b) is very clear and explicit, reads as under :

" if the assessee deposits the duty by cheque, the date of presentation of the cheque in the bank designated by the Central Board of Excise and Customs for this purpose shall be deemed to be the date on which the duty has been paid subject to realization of that cheque."

34. Rule 8(1) (Explanation-b) makes it very clear that it is not the date on which duty is credited to the account of Department which shall be treated to be date of payment but it is the date on which cheque was received, shall be treated to be date of payment, provided cheque when presented in Bank, amount of cheque is realized. This Rule takes care of delay, if any, on the part of Department in not presenting cheque for encashment to Bank within reasonable time and for its own delay not to make Assessee, suffer. Rule Framing Authority recognizing the fact that one should not be allowed to take advantage of its own wrong, has made this aspect very clear but it appears that Respondent-Competent Authority, in the case in hand, has completely ignored or omitted to consider aforesaid provision. The provision being very clear, obviously we cannot appreciate such lapse particularly when a clear provision has been made by Rule Framing Authority and it is the responsibility of officers of Department that whenever they make assessment or raise demand of duty upon Assessee, they must observe and comply each and every provision of statute, strictly. In the present case

since date of receipt of cheque by Department was ignored, and the date on which amount was realized by respondent, after presenting cheque in Bank, has been taken to be the date of payment, same cannot be sustained in view of Rule 8(1)(Explanation-b).

35. In the result, writ petition succeeds and is allowed. Impugned demand is set aside. Respondents are directed to determine rate of interest, if any, payable by petitioner, in respect of alleged delayed payment of duty, for which it is liable to pay interest, in the light of discussion made above, and in accordance with Law under Section 11AB, by computing such interest as per Notification dated 12 September, 2003 so long as it is not substituted or amended by any other provision, and secondly; for determining, whether there is any delay or not, it shall look into the date of deposit of cheque by petitioner and apply Rule 8(1) (Explanation-b), strictly.

36. In the facts and circumstances of the case, we make cost easy.