

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD**

REGIONAL BENCH - COURT NO.I

Excise Appeal No.50412 of 2015

(Arising out of Order-in-Original No.35/Commissioner/Hapur/2014-15 dated 28.10.2014 passed by Commissioner of Central Excise, Customs & Service Tax, Hapur)

M/s Action Construction Equipment Ltd.,Appellant

(Unit No.III, Plot Nos.5, 6, 7 & 8, UPSIDC Industrial Area,
Bazpur, Distt.-Udhamsingh Nagar, Uttarakhand)

VERSUS

**Commissioner of Central Excise, Customs &
Service Tax, Hapur**

....Respondent

(Opposite Shaheed Smarak, Delhi Road, Meerut)

APPEARANCE:

Shri Anurag Mishra, Advocate & Ms. Pragya Pandey, Advocate for the Appellant

Shri Manish Raj, Authorized Representative for the Respondent

**CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)**

FINAL ORDER NO.- 70592/2024 Dated- 24.09.2024

INTERIM ORDER NO.- 2/2024

DATE OF HEARING : 26 February, 2024

DATE OF DECISION : 25 June, 2024

P. K. CHOUDHARY:

The present Appeal has been filed by the Appellant against Order-in-Original No.35/Commissioner/Hapur/2014-15 dated 28.10.2014 wherein the Ld. Commissioner has confirmed a demand of Rs.8,29,60,000/- for the period from May, 2008 to Nov, 2011 under the provisions of Section 11D (2) along with interest under Section 11DD of the Central Excise Act, 1944.

2. The Appellant is a manufacturing unit of M/s Action Construction Equipment Ltd., a public limited company, engaged in the manufacture and sale of Mobile Cranes, Hydraulic Cranes, Forklifts, Tower Cranes, etc. The manufacturing units of the Appellant-Company are located at Jajru/Dhudholla, Palwal, Haryana, Bazpur, Uttrakhand and Kashipur, Uttrakhand. The

Appellant Company also has several branches/regional offices and dealers across the country to facilitate marketing of the final products of the Appellant Company. Present issue involved is only related to the Bazpur unit which is situated in Uttarakhand which is availing the benefit of Exemption Notification No.50/2003-CE dated 10.06.2003. The product manufactured at Bazpur unit is exempted from whole of Excise Duty and the Appellant is not paying any duty in respect of the clearances made from the said unit.

3. Under the apprehension that the Appellant unit were collecting the amount of Central Excise Duty from their customers but not depositing the same in Government accounts, search operations were conducted by DGCEI, Delhi Zonal Unit and Kanpur Regional Unit on various manufacturing units and different office premises including marketing offices of the Appellant. From the said premises the officers collected various documents including purchase orders, forwarding memo, contract review sheet of finished goods manufactured at different units of the Appellant and cleared to different buyers. The officers also recorded various statements of key persons of manufacturing units as well as of marketing officers.

4. On the basis of the purchase orders placed by the customers, internal documents like order forwarding memo, contract review sheet, it appeared to the revenue that the Appellant has collected amount of Excise Duty in respect of the clearances which were made from its Bazpur unit which is availing the Area Based Exemption under Notification No.50/2003 and not depositing it to the Government exchequer. Show Cause Notice¹ dated 03.09.2013 was issued to the Appellant on the ground that the purchase order, forwarding memo, contract review sheet shows element of Excise Duty and therefore, same is collected by the Appellant from their customers by representing them in their documents and hence, same should have been demanded and recovered from the Appellant for the period from May, 2008 to Nov, 2011 under

¹ SCN

Section 11D(2) of the Central Excise Act, 1944 read with Section 11A of the Central Excise Act, 1944 along with interest under Section 11DD of the Central Excise Act, 1944.

5. The Ld. Commissioner concluded that as per annexure to the SCN on the basis of which the demand has been raised, element of Excise Duty has been shown in purchase order. In other cases, the element of Excise Duty has been shown either in order forwarding memo or in contract review sheet and therefore, it was concluded by the Ld. Commissioner that the Appellant has represented the element of Excise Duty in their documents and hence, they have collected the Excise Duty but not paid to the Government Exchequer.

6. Ld. Counsel Shri Anurag Mishra along with Ms. Pragya Pandey appeared on behalf of the Appellant submitted a detailed written submission. They argued that the Appellant's manufacturing unit is exempted from payment of whole of Excise Duty under Notification No.50/2003 and the goods manufactured and cleared from the said unit does not show any amount of Excise Duty in their invoices. They submitted that according to Section 11D (1A) of Central Excise Act, 1944, demand of duty can only be made when the Appellant has collected the amount of duty on exempted goods by representing them as dutiable goods by showing the element of Excise Duty in their documents as prescribed under the provisions of Section 12A of Central Excise Act, 1944 read with Rule 11 of Central Excise Rules.

7. The Ld. Counsel also submitted that the instant demand has been raised under Section 11D(1A). Section 11D(1A) contemplates two situations where an amount in excess of duty may be collected –

- a. Collection of any amount in excess of the duty assessed or determined and paid on any excisable goods;
- b. Collection of any amount as representing duty of excise on any excisable goods which are wholly exempt or are chargeable to nil rate of duty.

The first situation is applicable where the excisable goods in question have suffered some amount of duty and an amount in excess of the duty liable to be paid on such goods are collected, and the second situation is where the excisable goods in question are not subject to any duty (either on account of exemption or the goods being chargeable to nil duty) and an amount has been collected representing the same as duty of excise. The first situation is undoubtedly not applicable to the instant case, since the goods in question were fully exempt from duty under Notification No.50/2003-CE dated 10.06.2023. The second situation contemplates the existence of the following conditions –

- A. An amount should be collected as duty of excise; and
- B. The amount must be represented to the customers as being duty of excise.

8. The Ld. Counsel submitted that the said provision is not applicable in the present case as the Appellant has not collected any excise duty from its customers. Further, no amount has been represented to form duty of excise, in any manner. The Ld. Counsel further submitted that it is wholly incorrect to allege that the Appellant has collected excise duty from its customers. The Impugned Order as well as the SCN itself concede that the invoices of the Appellant (direct sale as well as transfer to depots/ regional offices) reflect only a lump sum amount and did not show any element of excise duty. Thus, there was no collection of any excise duty.

9. The Ld. Counsel further submitted that despite a clear finding that the invoices issued by the Appellant did not show any duty of excise separately, the Ld. Commissioner held that since the price of the goods reflected in the invoices are same as those in the purchase orders or other internal documents, the Appellant collected the duty amount from the customers. The Ld. Commissioner failed to correctly appreciate the factual and legal positions in the instant case. The Appellant in the standardized purchase orders or other confidential internal documents showed bifurcated price, though, as time and again reiterated by various

employees in their statements recorded, a lump-sum price is negotiated with the customers. Thus, when duty of excise was never represented to the customers, and the invoices under which goods were sold and price thereof collected having never shown any amount as excise, it is completely untenable to allege that the Appellant "collected" excise duty from its customers.

10. The Ld. Counsel drew our attention to Section 11D(1A) of the Act which clearly state that the amount so collected from the customers should represent as Duty of Excise. It is an undisputed fact that the invoices which are being raised by the Appellant does not reflect any amount of excise duty, therefore, the allegation of collection of duty is entirely baseless and contrary to the provisions of the Act. The internal documents like purchase order, Order forwarding memo and contract review sheet are not statutory documents as provided under the provisions of Section 12A of the Act read with Rule 11 of Central Excise Rules, 2002. The Ld. Counsel relied upon the following decisions : -

1. M/s Bharat Petroleum Corp. Ltd. Vs. CCE, Nagpur reported as 2003(158) E.L.T. 833 (Tri.).
2. Poddar Industrial Corporation Vs. CCE, Patna reported as 2003 (158) E.L.T. (Tri.)
3. Pitambar Coated Paper Ltd. Vs. CCE, Jaipur-I reported at 2003 (152) E.L.T. 392(Tri.)
4. HPCL Vs. CC, Kandla reported at 2007(219) E.L.T. 408 (Tri.).

11. He further submitted that the Ld. Commissioner has heavily relied upon the fact that the pricing pattern of both exempted unit and dutiable unit are uniform and therefore, it is quite evident that though the Appellant has not shown separate element of Excise Duty but they have charged the same price which is sufficient to establish that the Appellant has charged the element of Excise Duty from the customer. The Ld. Counsel submitted that the said contention of the Ld. Commissioner is not acceptable as the provisions of Section 11D cannot be invoked only because of the reason that the price charged from

the customer remains same. If this contention of the Ld. Commissioner is accepted then the whole purpose of granting exemption to the rural areas will be defeated. He heavily relied upon the judgement of the Hon'ble Bombay High Court in case of M/s Supermax Personal Care Pvt. Ltd. Vs. Union of India reported at 2021 (377) E.L.T. 399 (Bom.). The Ld. Counsel also drawn our attention to the C.A. Certificate showing that the Appellant has not charged any element of Excise Duty from their customers for the clearance made from their Bazpur unit and accordingly, no Excise Duty has been charged in the invoices. Similarly, he has drawn our attention towards the affidavit filed by their major buyers showing that they have not paid any Excise Duty to the Appellant Company.

12. He also drawn our attention to the chart annexed to the SCN on the basis of which the calculation of Excise Duty has been made out by the Department. The said chart is absolutely confusing as in most of the cases the element of Excise Duty has not been shown in any of the internal documents and we are unable to understand how the element of Excise Duty has been shown for the calculation of Excise Duty when there are no documents available with the Department to show that the element of Excise Duty is being represented even in these internal documents.

13. The Ld. Counsel further submitted that the present demand has been issued for the period May, 2008 to Nov, 2011 by invoking the provisions of Section 11D(2) read with Section 11A of the Act along with interest under Section 11DD of the Act. He submitted that in the instant case, the SCN has been issued on 30.09.2013 without alleging the allegation of fraud, collusion, suppression, willful mis-statement or contravention of law with intend to evade payment of duty. He submitted that the entire demand is barred by limitation and in support of his contention, he relied upon the judgement of the Hon'ble Madras High Court in case of M/s Gem Cables & Conductors Ltd. Vs. Collector of Customs, Hyderabad reported at 1994 (72) E.L.T. 848 (Mad.). His contention is further supported by the

judgement of the Hon'ble Tribunal in case of M/s Siddeshwar SSK Ltd. Vs. CCE, Aurangabad reported at 1997 (92) E.L.T. 616 and CESTAT Chennai in the case of Tamil Nadu Absestors (Pipes) V. CCE, Trichy reported at 2009 (238) E.L.T. 473 (Tri-Chennai). Therefore, he submitted that the entire demand is also barred by limitation.

14. The Ld. Authorized Representative appeared on behalf of the Revenue and submitted that the internal documents like purchase orders, order forwarding memo and contract review sheet clearly shows that they have collected the amount of duty from their customers although the said amount of duty has not been shown in their invoices. He submitted that during the recording of their statements the key persons of the Appellant Company has categorically submitted that they have collected the amount of duty where they have paid the amount of duty. He further submitted that the uniform pattern of pricing of all the manufacturing units clearly establish that the Appellant Company has collected the amount of duty by making adjustment in their prices. He also submitted that the Ld. Commissioner has rightly upheld that even though the element of duty has not been shown in the invoices but collection of duty is established from the internal documents. He further submitted that the Ld. Commissioner has rightly held that the internal documents like purchase order, order forwarding memo and contract review sheet are prepared in the routine course of business and therefore, they are essential part of their accounting system and hence, sufficient to establish that the element of excise duty is being collected from the customers. He also submitted that the provisions of Section 11D do not provide any bar of limitation and the entire demand has been made under provisions of Section 11D. Therefore, the demand is not barred by limitation. The Ld. Commissioner has rightly confirmed the demand along with interest. He heavily supported the contentions of the Order of the Ld. Commissioner.

15. Heard the rival contentions of both sides and perused the appeal records.

16. In the present case, the only issue involved is that whether the Appellant who is availing the benefit of Exemption Notification No.50/2003-CE dated 10.06.2003 has collected the amount of Duty from their customers by representing the same as Excise Duty and contravened the provisions of Section 11D(1A) of the Central Excise Act, 1944. Whether the demand of Excise Duty against the Appellant under the provisions of Section 11D(2) of the Central Excise Act, 1944 read with Section 11A of the Central Excise Act, 1944 is sustainable in the eyes of law.

17. We have seen the impugned SCN dated 30.09.2013 which was issued by invoking the provisions of Section 11D(2) of the Central Excise Act, 1944 read with Section 11A of the Central Excise Act, 1944. In the impugned SCN the demand of duty has been raised for the period May, 2009 to Nov, 2011 along with interest under Section 11D of the Central Excise Act, 1944. The entire SCN proceedings have been initiated by the search proceedings jointly conducted by DGCEI, Delhi Zonal Unit & Kanpur Regional Unit. It is also an undisputed fact that the Appellant in their invoices has nowhere mentioned the amount of Excise Duty in respect of the goods cleared from their Bazpur unit against which the present SCN has been issued. It is also not disputed by the Department that the provisions of Section 11D(1A) can only be invoked when the amount of duty has been collected by representing them as Excise Duty in the statutory documents as provided under Section 12A of the Central Excise Act, 1944 read with Rule 11 of the Central Excise Rules, 2002. The entire demand in the present case has been raised on the basis of purchase orders, order forwarding memo and contract review sheets which are not the statutory documents as provided under Section 12A of the Central Excise Act, 1944 read with Rule 11 of the Central Excise Rules, 2002. We have also seen the Annexure A to the SCN on the basis of which the entire demand of duty has been calculated and demanded from the Appellant. We have carefully seen the said Annexure and came to the conclusion that the demand is not uniformly based either on the purchase order, order forwarding memo or only on the

basis of contract review sheet. The revenue as per the convenience selected the cases where element of Excise Duty has been shown in purchase order, order forwarding memo and contract review sheet.

18. As per our opinion, all these documents are internal documents which have been prepared by the Appellant for the convenience of the business and none of these documents can be said to be as statutory documents showing representation of Excise Duty. We have also gone through with the judgements cited by the Ld. Counsel in his defence in case of M/s Bharat Petroleum Corp. Ltd. Vs. CCE, Nagpur reported at 2003 (158) E.L.T. 833 (Tri.); Poddar Industrial Corporation Vs. CCE, Patna reported at 2003 (158) E.L.T. (Tri.); Pitambar Coated Paper Ltd. Vs. CCE, Jaipur-I reported at 2003 (152) E.L.T. 392 (Tri.) and HPCL Vs. CC, Kondla reported at 2007 (219) E.L.T. 408 (Tri.) and is of the firm opinion that for invoking the provisions of Section 11D(1A) it is essential that the element of Excise Duty must have been shown in the invoices. In the present case, there is no dispute that the element of Excise Duty has not been shown by the Appellant in their invoices. Therefore, purchase order, order forwarding memo and contract review sheet are only the internal documents and no demand of duty can be raised on the basis of the said documents.

19. The other contention raised by the Revenue that the price was uniformly charged both in respect of exempted unit as well as dutiable unit is sufficient to establish that the element of Excise Duty has been charged is unsustainable as it will defeat the purpose of Exemption Notification. The Hon'ble High Court in the similar situation in case of M/s Supermax Personal Care Pvt. Ltd. Vs. Union of India reported at 2021 (377) E.L.T. 399 (Bom.) has held as under:—

"Though on this point itself a clear conclusion can be reached that the impugned show cause-cum-demand notice dated 26.05.2020 is without jurisdiction, we may also add that in the order-in-original dated 20.11.2019 the adjudicating authority had recorded a clear finding that the

only presumption for the demand was that because the maximum retail price of the goods manufactured at Una, Himachal Pradesh and those manufactured elsewhere by the petitioner, which included excise duty, were the same, therefore the maximum retail price of the goods manufactured at Una, Himachal Pradesh included central excise duty which were collected from the ultimate consumers but not deposited in the Government treasury. Negating the fallacy of this presumption the adjudicating authority held that other than such a presumption, there was no evidence at all to establish that any amount was collected by the petitioner as representing duty of excise. In such a case, provisions of Section 11D of the Central Excise Act would not be applicable.”

20. Therefore, in view of the judgement we are of the considered view that the demand of duty is not sustainable under the provisions of Section 11D. The present demand has been raised by invoking the provisions of Section 11D read with Section 11A without invoking the charges of fraud, collusion, suppression, willful mis-statement or contravention of law with intend to evade payment of duty. Therefore, demand is also barred by limitation in view of the judgements cited by the Ld. Counsel.

21. In view of the above findings, we set aside the impugned order with consequential relief to the Appellant.

(Order pronounced in open court on.....)

Sd/-
(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

(Separate Order)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

LKS

SANJIV SRIVASTAVA:

I have gone through the order prepared by Learned Member (Judicial). However, I have not able to accept the findings recorded.

2. Facts have been stated in the order prepared by Learned Member (Judicial) hence, I am not producing the same again.

3. The issue involved in the present case is in respect of demand made in terms of Section 11D and 11DD of the Central Excise Act and not under the provisions of Section 11A which is in relation to short/nonpayment of Central Excise duty. The texts of Section 11D and 11DD are reproduced bellow:-

"SECTION [11D. Duties of excise collected from the buyer to be deposited with the Central Government.

*— (1) Notwithstanding anything to the contrary contained in any order or direction of the Appellate Tribunal or any Court or in any other provision of this Act or the rules made thereunder, **[every person who is liable to pay duty under this Act]** or the rules made thereunder, and has collected any amount in excess of the duty assessed or determined and paid on any excisable goods under this Act or the rules made thereunder from the buyer of such goods] in any manner as representing duty of excise, shall forthwith pay the amount so collected to the credit of the Central Government.*

[(1A) Every person, who has collected any amount in excess of the duty assessed or determined and paid on any excisable goods or has collected any amount as representing duty of excise on any excisable goods which are wholly exempt or are chargeable to nil rate of duty from any person in any manner, shall forthwith pay the amount so collected to the credit of the Central Government.]

[(2) Where any amount is required to be paid to the credit of the Central Government under [sub-section (1) or sub-section (1A), as the case may be,] and which has not been so paid, the Central Excise Officer may serve, on the

person liable to pay such amount, a notice requiring him to show cause why the said amount, as specified in the notice, should not be paid by him to the credit of the Central Government.

(3) The Central Excise Officer shall, after considering the representation, if any, made by the person on whom the notice is served under sub-section (2), determine the amount due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined.

(4) The amount paid to the credit of the Central Government under [sub-section (1) or sub-section (1A) or sub-section (3), as the case may be,] shall be adjusted against the duty of excise payable by the person on finalisation of assessment or any other proceeding for determination of the duty of excise relating to the excisable goods referred to in [sub-section (1) and sub-section (1A)].

(5) Where any surplus is left after the adjustment under sub-section (4), the amount of such surplus shall either be credited to the Fund or, as the case may be, refunded to the person who has borne the incidence of such amount, in accordance with the provisions of section 11B and such person may make an application under that section in such cases within six months from the date of the public notice to be issued by the Assistant Commissioner of Central Excise for the refund of such surplus amount.]

[SECTION 11DD. Interest on the amounts collected in excess of the duty. — (1) Where an amount has been collected in excess of the duty assessed or determined and paid on any excisable goods under this Act or the rules made thereunder from the [buyer of such goods or from any person or where a person has collected any amount as representing duty of excise on any excisable goods which are wholly exempt or are chargeable to nil rate of duty, the person] who is liable to pay such amount as determined

under sub-section (3) of section 11D, shall, in addition to the amount, 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 day of the month succeeding the month in which the amount ought to have been paid under this Act, but for the provisions contained in sub-section (3) of section 11D, till the date of payment of such amount :

Provided *that in such cases where the amount becomes payable consequent to issue of an order, instruction or direction by the Board under section 37B, and such amount 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 amount, including the amount already paid.*

(2) The provisions of sub-section (1) shall not apply to cases where the amount had become payable or ought to have been paid before the day on which the Finance Bill, 2003 receives the assent of the President.

Explanation 1. - *Where the amount determined under sub-section (3) of section 11D is reduced by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, the interest payable thereon under sub-section (1) shall be on such reduced amount.*

Explanation 2. - *Where the amount determined under sub-section (3) of section 11D is increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, the interest payable thereon under sub-section (1) shall be on such increased amount.].”*

4. For holding in favour of the appellant, in para-18 Learned Member (Judicial) have relied upon various decisions which are

for the period prior to insertion of Sub-section (1A) in the Section 11D. Sub-section (1A) was inserted by the Finance Act, 2008 (18 of 2008), dated 10-05-2008.

5. None of the Courts or Tribunal adjudicating these cases was in position to consider the said Sub-section (1A) as it was not there.

6. The findings recorded to the effect that the excise duty must have been shown in the invoices cannot be held to be a valid finding as Sub-Section (1A) is with reference to 'every person' and not the person who is registered with the department as a manufacturer/dealer etc. Issuing invoices as provided under the Central Excise Act, the fact with regards to collection of amount reproducing duty of excise in such case needs to be ascertained from the documents which are available and which has been done in the present case. The persons referred in this clause would not be the person who would have issued any central excise invoice as prescribed. The only requirement in this Section is that amount should have been collected as representing duty of excise.

7. The provisions considered by the decisions referred in para no.18 are in respect of Sub-section (1) of Section 11D where the Section was applicable only in respect of the person liable to pay duty under the Act, implying that he was duty bound to issue invoices as prescribed giving all the details as per Section 12 (A) of the Act. For each of reference, provisions of Section 12 (A) are reproduced bellow:-

"SECTION 12A. Price of goods to indicate the amount of duty paid thereon. — Notwithstanding anything contained in this Act or any other law for the time being in force, every person who is liable to pay duty of excise on any goods shall, at the time of clearance of the goods, prominently indicate in all the documents relating to assessment, sales invoice, and other like documents, the amount of such duty which will form part of the price at which such goods are to be sold."

8. On perusal of these two Sections, it is clear that both the Sections using the same phrase 'every person who is liable to pay duty of excise', whereas Sub-Section (1A) of Section 11D do not use such a phrase but uses the phrase **"every person who has collected any amount liable to pay duty under this Act or the rules made thereunder, and has collected any amount in excess of the duty assessed or determined and paid on any excisable goods under this Act or the rules made thereunder from the buyer of such goods from any person in any manner"**. The difference between these two sections is obvious and in my view, the findings recorded are contrary to the said provisions which would render Sub-section (1A) otiose. The findings recorded in para-19 with regards to determination of value is totally irrelevant in view of the documentary evidence and reliance on the decision of M/s Supermax Personal Care Pvt. Ltd. or of Hon'ble Bombay High Court is totally irrelevant in view of the documentary evidences recovered and relied upon by which it is established that the appellant have collected these amounts representing excise duty from their customers.

In my view the demand made in the present case needs to be upheld.

**Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)**

In view of the above, taking note of the facts that Member (Judicial) has opined for setting aside the demand and Member (Technical) has held against upholding the impugned order, following questions have referred to Hon'ble President for referring the matter to Third Member for resolution in difference of opinion recorded:-

- i. Whether for invoking the provisions of Section 11D (1A) it is mandatory that the central excise duty so collected from the buyer should be represented in the invoice prescribed under the provisions of Section 12A?

- ii. Whether the private documents representing the element of duty maintained by the Assessee or by the buyer can be a basis to form an opinion that the element of duty has been charged and whether such duty can be recovered from the Assessee by invoking the provisions of Section 11D (1A)?
- iii. Whether the uniform price charged by a unit working under the Area Based Exemption Scheme and None Exempted Area can be a basis to form an opinion that the duty has been charged from the buyer by a unit working under the Exempted Area?
- iv. Whether for non-deposit of the said amount to the government exchequer, penalties under Section 11AC should be imposed?
(Order pronounced in open court on- 25 June, 2024)

Sd/-

**(P.K. CHOUDHARY)
MEMBER (JUDICIAL)**

Sd/-

**(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)**

PER : S.S. GARG

The difference on the following issues recorded in terms of two separate orders passed by two Members of the original Division Bench, has been placed before me to give my opinion as a Third Member:

(i) Whether for invoking the provisions of Section 11D(1A), it is mandatory that the central excise duty so collected from the buyer should be represented in the invoice prescribed under the provisions of Section 12A?

(ii) Whether the private documents representing the element of duty maintained by the Assessee or by the buyer can be a basis to form an opinion that the element of duty has been charged and whether such duty can be recovered from the Assessee by invoking the provisions of Section 11D(1A)?

(iii) Whether the uniform price charged by a unit working under the Area Based Exemption Scheme and Non-Exempted Area can be basis to form an opinion that the duty has been charged from the buyer by a unit working under the Exempted Area?

(iv) Whether for non-deposit of the said amount to the government exchequer, penalties under Section 11AC should be imposed?

Though the facts of the case have already been recorded by the Members of the original bench, therefore I will not repeat the facts of the case.

2. Heard both the parties; perused the material on record and also perused the respective opinions recorded by both the Id. Members.

3. The learned Counsel Sh. Anurag Mishra along with Ms. Pragya Pandey appears on behalf of the appellant and submits that the view taken by the Member (Judicial) is well reasoned and legally correct as per law and should be upheld in view of the various decisions relied upon by the appellant. He has further made submissions on each of the difference of opinion as recorded in the Interim Order passed by the Tribunal.

3.1 As regards the first issue whether for invoking the provisions of Section 11D(1A), it is mandatory that the central excise duty so collected from the buyer should be represented in the invoice prescribed under the provisions of Section 12A, the learned Counsel took me through the entire provisions of Section 11D and Section 12A of the Central Excise Act and submitted that it is a mandatory requirement that the central excise duty collected from the buyer must be reflected in the invoice as prescribed under Section 12A of the Act. He further submits that Section 11D(1A) addresses the collection of excess excise duty whereas Section 12A mandates that the duty must be accurately reflected in the invoice. He further submits that in the order to invoke the provisions of Section 11D(1A), it is essential that the duty or excess amount collected is properly represented in the invoice as required under Section 12A. Failure to correctly reflect such amounts in the

invoice may hinder the invocation of Section 11D(1A) as the excess collection needs to be traceable and accounted for through the invoice. He further submits that the documentary evidence relied upon by the Revenue indicates non-compliance of the requirement of Section 11D(1A) as there is no evidence that the excise duty was collected, nor there is any representation of excise duty on the invoice. In this regard, he relies on the following cases:

- *M/s The Indian Hume Pipe Co Ltd vs. CCE – Appeal No. E/34 to 37/2009 - Final Order Nos. 41985-41988/2017 dated 06.09.2017 (Tri. – Chennai)*
- *Everest Industries Ltd vs. CCE, Coimbatore – 2019 (369) ELT 1569 (Tri. - Chennai)*

3.2 As regards the second point of difference whether the private documents representing the element of duty maintained by the Assessee or by the buyer can be a basis to form an opinion that the element of duty has been charged and whether such duty can be recovered from the Assessee by invoking the provisions of Section 11D(1A), the learned Counsel submits that the private records maintained by Assessee which indicate the duty element, cannot serve as a valid basis for forming an opinion that the duty has been charged, nor can they be relied upon to recover such duty from the Assessee under the provisions of Section 11D(1A) of the Act. He further submits that the private records maintained by the Assessee, although they may reflect certain financial transactions or suggest the presence of a duty component, but they are not recognized under the law specifically under the Central Excise Act and Rules, for the purpose of representing the collection

of excise duty. For recovery of duty under Section 11D(1A), the law requires that the excise duty be represented on a statutory invoice in compliance with Section 12A. Statutory invoice serves that purpose of ensuring transparency and legal accountability in relation to duty collection. He further submits that the private records or documents are not a substitute for the invoice mandated by law (under Section 12A). Recovery under Section 11D(1A) is predicated on the duty being represented in a statutory invoice. If the duty is not shown on the invoice as required, private records cannot be used as a substitute for proving that excise duty was charged or collected.

3.3 As regards the third issue whether the uniform price charged by a unit working under the Area Based Exemption Scheme and Non-Exempted Area can be basis to form an opinion that the duty has been charged from the buyer by a unit working under the Exempted Area, the learned Counsel submits that the uniform price charged by a unit operating under an Area-Based Exemption Scheme and a unit located in a Non-Exempted Area cannot by itself serves as a valid basis for forming the opinion that excise duty has been charged from the buyer by the unit operating within the Exempted Area. He further submits that it is a common practice in various industries to charge a uniform price for goods, regardless of whether the unit is situated in an exempted area or a non-exempted area, due to factors such as market conditions, raw material costs, production efficiency or other considerations. In

this regard, he relies on the decision of Hon'ble Bombay High Court in the case of *M/s Supermax Personal Care Pvt Ltd vs. UOI – 2021 (377) ELT 399 (Bom.)* which has also been relied upon by the Id. Member (Judicial). He further submits that the mere fact that an exempted unit charges the same price as a non-exempted unit does not imply that excise duty has been included in the exempted unit's pricing.

3.4 As regards fourth issue relating to the imposition of penalties under Section 11AC, the learned Counsel submits that the penalties under Section 11AC of the Central Excise Act, 1944 cannot be imposed for the non-deposit of the amounts collected in excess of duty but not deposited with the government exchequer under Section 11D. He further submits that for non-deposit of excess amount collected under Section 11D, the law does not automatically treat it as a case of fraud or willful suppression of facts and therefore, Section 11AC cannot be invoked in such cases unless there is clear evidence to evade duty. Penalties under Section 11AC require conditions like fraud or suppression to be met, which are not necessarily present in cases under Section 11D where the issue is the non-deposit of excess collections. In this regard, he relies on the decision of Hon'ble Supreme Court in the case of *UOI vs. Rajasthan Spinning & Weaving Mills – 2009 (238) ELT 3 (SC)*.

4. On the other hand, Sh. Manish Raj, the learned Authorized Representative for the Revenue supported the view expressed by

Member (Technical) and has submitted that the view taken by the Member (Technical) is correct in law and should be upheld. He reiterated the findings recorded by the Member (Technical) and also the findings of the impugned order.

5. I have considered the submissions made by both the parties and perused the views expressed by both the Id. Members and also perused the various decisions relied upon by both the parties.

6. I find that it is undisputed fact that the appellant's unit is exempted from payment of excise duty under the Notification No. 50/2003-CE dated 10.06.2003, but the department entertained a view that the appellant has collected the duty in respect of the goods which are wholly exempt or are chargeable to nil rate of duty. The entire demand has been confirmed on the basis of internal documents i.e. purchase orders, forwarding memo, contract review sheets of finished goods manufactured at different units of the appellant and cleared to different buyers.

7. Further, I find that for invocation of the provisions of Section 11D(1A) of the Central Excise Act, 1944, it is a mandatory requirement that the central excise duty for excess amount collected from the buyer is properly represented as duty of excise in the invoices, as required under Section 12A of the Act.

8. Further, I note that the prerequisite condition in the appellant's case is whether they have collected any amount from their customers representing the same in the statutory records as

excise duty; the answer is in the negative as the invoices which have been issued to the customers do not show the element of excise duty; no documentary evidence, which is collected from the appellant's factory proves that the element of excise duty is collected from the customers. In this regard, the findings recorded by the Tribunal in the case of *M/s The Indian Hume Pipe Co Ltd* (*cited supra*) are relevant and the findings in para 9 and 10 are reproduced herein below:

"9. *Regarding the demand under section 11D of the Act, we note that the said section stipulates that any person who has collected any amount in excess of duty assessed shall forthwith pay the amount so collected to the credit of the Central Government. Sub-section (1A) is added with effect from 10.5.2008 and the same is not applicable to the period in dispute in the present appeals. Sub-section (1) only talks about collecting any amount in excess of excise duty, representing as excise duty. Apparently, in the present case, the invoice raised by the appellant did not represent any excise duty. However, Revenue proceeded against them only on the inference that the contract being inclusive of duty payable it will necessarily lead to a conclusion that the excise duty element is inbuilt and the appellant did collect the same. Support was taken from the ledger entry as indicated above. We note that the appellant accepted the said ledger entry which was also recorded in the show cause notice that they have reversed such entry recorded on due advice from the auditors. We note that even otherwise to apply the provisions of section 11D(1), it is to be clearly established that the appellant did collect any amount, in excess of excise duty payable, as if representing excise duty to invoke such provision. In the present case, no such evidence is available to attract the provisions of Section 11D(1). We also refer to the decisions of the Tribunal in the case of Poddar Industrial Corporation Vs. Commissioner of Central Excise 2003 (158) ELT 473 (Tri. Kol.); Commissioner of Central Excise Vs. Tapi RCC 2005 (186) ELT 107 (Tri. Mumbai),*

Shreyans Industries Ltd. Vs. Commissioner of Central Excise 2005 (179) ELT 351 (Tri. Del.) and Ascent Laboratories Ltd. Vs. Commissioner of Central Excise, Mumbai 2008 (221) ELT 583. In various decisions, Tribunal held that if there is a composite contract for consideration which show excise duty is inclusive, a demand under section 11D cannot be raised.

10. *In the present case, there is no evidence that the sales document namely invoices etc. indicated any excise duty separately so that the buyer has paid any money representing excise duty to the appellant. In the absence of such situation, the provisions of Section 11D cannot be attracted and the impugned order is without merit."*

Further, in the case of *Everest Industries Ltd (cited supra)*, the Tribunal has considered the provisions of Section 11D and has given the findings in para 9, which are reproduced herein below:

"9. *We have considered the arguments from both sides and perused the records. Section 11D of the Central Excise Act required during the relevant period of every person who is liable to pay duty under this Act or Rules and has collected any amount in excess of the duty assessed or determined and paid on any excisable goods in any manner as representing duty of excise to forthwith pay such amount to the Central Government. Evidently, it did not cover the goods which are only wholly exempt from duty but on which manufacturer collects some amount as representing Central Excise duty. This lacuna was corrected by introduction of Section 11D (1A) in 2008. The Budget speech of the Hon'ble Finance Minister for the year referred to above clarifies that prior to 2008 this Section 11D did not cover those goods where the goods were wholly exempted or were chargeable to Nil rate of duty as in the present case. The amendment in 2008 has not been given retrospective effect. For this reason, the liability to Section 11D does not apply to the appellant's goods because undisputedly, the products were fully exempted from payment of duty. A plain reading of Section 11D also shows that what is required to be deposited in the Government exchequer is any amount collected as representing excise duty. In this case*

there is nothing on record that they have collected any amount as representing excise duty. They have collected a consolidated amount stating it as inclusive of excise duties. No specific amount was shown as representing excise duty. On this ground also, the demand does not sustain. We have carefully considered the arguments of Ld. D.R that they should have reduced the price and passed on the benefit of exemption notification to customers which they have not. It is true, from a plain perusal of the records that the appellant has resorted to profiteering by not passing on the benefit of the exemption notification to the customers. While they enjoyed the exemption notification, they have not reduced the prices to customers thereby enhancing their own profits. However, non-profiteering is not what is contemplated in Section 11D of the Central Excise Act. Therefore no demand can be raised or sustained on this ground. Unless any amount is specifically collected representing as excise duty, Section 11D cannot be invoked. Whenever duties are reduced or exempted, a shrewd businessman can pocket the windfall by not reducing his prices and such profiteering is not covered by Section 11D."

9. Further, I note that perusal of the provisions of Section 11D(1A), it is seen that the same applies to any person who has collected any amount as representing duty of excise or any excisable goods which are wholly exempt or chargeable to nil rate of duty from any person in any manner. In the present case, from the invoices raised by the appellant, it is seen that there is no mention of collection of any amount as representing excise duty.

10. Further, I find that the appellant has produced on record the certificate issued by the Chartered Accountant wherein the Chartered Accountant after examining the records of the appellant certified that the appellant did not collect any excise duty from the

customers on the goods cleared from their Bazpur unit, both for sales directly made from Bazpur plant or through Warehouse/depot. Excise duty amount reflected in audited financials of the company does not contain any amount for goods manufactured at Bazpur unit. The appellant has also produced certificates from some of their buyers certifying that the appellant did not charge any excise duty from them on clearance of goods from their Bazpur unit. In view of this, I am of the considered opinion that it is a mandatory requirement that duty collected should be represented in the invoice so as to attract the applicability of the provisions as provided in Section 11D(1A) of the Central Excise Act, 1944.

11. As regards whether the private documents representing the element of duty maintained by the Assessee or by the Buyer, can be a basis to form an opinion that the element of duty has been charged and the said duty can be recovered from the Assessee; I am of the considered opinion that the private documents which include purchase orders, forwarding memos, contract review sheets etc prepared either at the end of the customers or the sale office are the internal documents; these documents are private in nature and not the statutory documents and the confirmation of duty demand based on such documents is not tenable in law; only statutory documents can establish whether the excise duty properly represented in the invoice. Therefore, I am of the view that if the duty is not shown in invoice as required, the private

records cannot be used as a substitute for holding that the excise duty was charged or collected. Further, in para 17 of the Interim Order, the Id. Member (Judicial) has recorded as under:

"17. *The entire demand in the present case has been raised on the basis of purchase orders, order forwarding memo and contract review sheets which are not the statutory documents as provided under Section 12A of the Central Excise Act, 1944 read with Rule 11 of the Central Excise Rules, 2002. We have also seen the Annexure A to the SCN on the basis of which the entire demand of duty has been calculated and demanded from the Appellant. We have carefully seen the said Annexure and came to the conclusion that the demand is not uniformly based either on the purchase order, order forwarding memo or only on the basis of contract review sheet. The revenue as per the convenience selected the cases where element of Excise Duty has been shown in purchase order, order forwarding memo and contract review sheet."*

12. As regards the uniform pricing charged by the appellant from a unit which is situated in exempted area does not, by itself, indicate that the exempted unit is recovering the duty from the buyer. Without clear documentation (such as invoices showing the duty element), it would not be appropriate to invoke the provisions of Section 11D(1A) based solely on uniform pricing. The uniform pricing may simply reflect prevailing market conditions or other elements such as logistics, profit margins or operational expenses.

13. As regards the imposition of penalties under Section 11AC of the Act, I find that imposition of penalties under Section 11AC requires conditions like fraud or willful suppression of facts as essential conditions to be met which is not present in the instant

case. Further, it has been observed by the Member (Judicial) that the charge of fraud, collusion, suppression, willful mis-statement and contravention of law with intent to evade duty has not been raised in the show cause notice. Further, I find that the penalties under Section 11AC can only be invoked when the demand is confirmed under extended period of limitation; whereas in the present case, the facts of fraud, collusion or suppression etc has not been alleged in the show cause notice. The Hon'ble Apex Court in the case of *UOI vs. Rajasthan Spinning & Weaving Mills (cited supra)* dealt with the issue of whether penalty under Section 11AC was mandatory in case of fraud, collusion or suppression of facts etc to hold that penalties under Section 11AC are mandatory if the conditions (fraud, collusion or suppression etc) specified in the section are met. The Adjudicating Authority does not have discretion to reduce or waive the penalty if the offense falls within the ambit of Section 11AC; the penalty is automatic where the conditions under Section 11AC are met and there is no discretion to reduce the same; whereas, in the present case, the conditions (fraud, collusion or suppression etc) are not satisfied and therefore, penalties under Section 11AC are bad in law.

14. As regards the finding recorded by the Id. Member (Judicial) in para 20 holding that the demand is barred by limitation, I find that in the Interim Order of difference of opinion, the Id. Member (Technical) has not differed with this finding that the demand is

barred by limitation; rather both the Id. Members have agreed that the demand is barred by limitation.

15. In view of my discussion above, I am of the considered view that the opinion expressed by the Member (Judicial) is correct in law and hence, I also hold the same opinion. Further, the opinion expressed by the Member (Technical), in my view, is not correct in view of the facts and circumstances of this case. Accordingly, I go with the opinion expressed by the Member (Judicial).

16. Now the matter be placed before the Regular Division Bench for majority order.

Sd/-

(S. S. GARG)
MEMBER (JUDICIAL)

In view of the majority order, the demand as also the interest are set aside and appeal is allowed with consequential relief, as per law.

(Order pronounced in open court on **24th September, 2024**)

**Sd/-
(P. K. CHOUDHARY),
MEMBER (JUDICIAL)**

**Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)**

LKS