CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
West Block No.2, R.K.Puram, New Delhi

COURT-II

Date of hearing: 09.06.2017
Date of decision: 22.06.2017

Appeal No. E/2583/2008-EX[SM]

[Arising out of the Order-in-Original No. 31-33/2008-CE/Commissioner dated 16/09/2008, passed by the Commissioner of Central ,Jaipur-I)

Kotsons Pvt. Ltd. … Appellant

Vs.

CCE, Jaipur -I … Respondent

Appearance:

Present Ms. Priyanka Goel, Advocate for the appellant
Present Shri. G.R. Singh, AR for the respondent

Coram: Hon'ble Mr.Ashok K. Arya, (Technical Member)

FINAL ORDER No. 54246/2017

Per Ashok K. Arya :

1. *M/S Kotsons Pvt. Ltd.* is in appeal against Order in Original No. 31-33/2008 dated 16/09/2008 whereunder liability of interest amounting to Rs. 23, 72,364/- has been confirmed against the appellant.
2. The brief facts are that:-

(i) Appellant is engaged in manufacturing electrical transformers falling under heading 850400 of Central Excise Tariff and availing Cenvat credit. Appellant is selling goods at their factory gate to unrelated buyers at the price determined in terms of section 4 of Central Excise Act, 1944. They paid the appropriate duty on transaction value of the goods shown in the relevant invoices at the time of clearance of goods from the factory gate.

(ii) On account of fluctuation in prices of raw material supplementary invoices were raised for differential amount and duty was paid on the differential amount.

(iii) Department issued 3 Show Cause Notices totally demanding interest of Rs. 23, 72,364/- under Section 11 AB of Central Excise Act, 1944 on the duty of central excise paid in respect of price variation bills raised in subsequent months.

3. Both sides represented by Ld. Counsels, Ms. Priyanka Goel for the appellant and Shri G.R. Singh for the Revenue have been heard.

4. The appellant's main plea is that the Department has issued Show Cause Notice which is barred by time except for the demand for January and February, 2007.
5. Learned DR for the Revenue has emphasized that as per provisions of Sections 11 A and 11 AB of Central Excise Act interest on the duty not paid or short paid is payable.
6. The facts of the case and submissions of both the sides have been carefully considered.
7. It is to be noted that Hon'ble Supreme Court in the cases of *CCE Pune SKF India Ltd* 2009 (239) ELT 385 (SC) and *CCE Vs International Auto Limited* 2010 (250) ELT 3 (SC) held that interest is chargable under Section 11 AB of the Central Excise Act, 1944 for the duty of Central Excise payable on account of price increases made through supplementary invoices.

   7.1 However, the Hon'ble Supreme Court in the case of *Steel Authority of India Limited V/s Commissioner of C.EX., Raipur* 2015 (326) ELT 450 (SC) has expressed difference of opinion with the Apex Court's decision in *SKF India Limited* (supra) and *international Auto Limited (supra).*

Hon'ble Supreme Court therein has observed as under:-

23. The two judgments in *SKF India Ltd.* and *International Auto* are by the same Bench. *International Auto* follows *SKF India Ltd.* The primary factor by which the Bench was influenced was that there is a loss of revenue to the Government and, therefore, the Government should compensate for that. It proceeds on the basis that the price which was originally stated at the time of removal of the goods was 'understated' (para 8 of *International Auto*). However, value of the goods for the purpose of duty is 'at the time of removal', as emphasised above which remains fundamental principle from the inception of the Central Excise Act originally enacted in 1944 and remains valid till date. It is, therefore, difficult to accept that the price was 'understated' on the date of removal of those goods.

24. We further find that the Bench distinguished earlier three member Bench judgment in the case of *MRF Ltd.* v. *Commissioner of Central Excise, Madras* - (1997) 5 SCC 104 = 1997 (92) E.L.T. 309 (S.C.) on the purported ground that there was 'sea change' in Section 11A of the Act (which was originally inserted by Act 25 of 1978) when Parliament inserted major changes in that Section vide Act 14 of 2001 w.e.f. 11-5-2001, Act 32 of 2003 w.e.f. 14-5-2003 and Act 14 of 2001 whereby Section 11AB of the Act was also amended. However, we are of the opinion that amendments made to Section 11A in 2001 and 2003 have nothing to do with the valuation of the goods based on 'the price at the time of removal'. MRF was a case where a particular price was charged by the said assessee from the buyer on the date of removal and Excise duty paid thereupon. However, thereafter this price was reduced on the direction of the Government. On that basis, assessee laid its claim for refund of excise duty on differential between price on the date of removal and the reduced price at which the buyers were sold on the direction of the Government. This claim of the assessee was rejected and the order upheld by this Court as well with the following discussion :

> "2. We have heard the learned counsel for the assessee. Once the assessee has cleared the goods on the classification and price indicated by him at the time of the removal of the goods from the factory gate, the assessee becomes liable to payment of duty on that date and time and subsequent reduction in Excise Department insofar as the liability to payment of excise duty was concerned. This is the view which was taken by the Tribunal in the case of *Indo Hacks Ltd.* v. *CCE* - 1986 (25) E.L.T. 69 (Trib.) and it seems to us that the Tribunal's view that the duty is chargeable at the rate and price when the commodity is cleared at the factory gate and not on the price reduced at a subsequent date is unexceptionable. Besides as rightly observed by the Tribunal the subsequent fluctuation in the prices of the commodity can have no relevance whatsoever so far as the liability to pay excise duty is concerned. That being so, even if we assume that the roll back in the price of tyres manufactured by the appellant Company was occasioned on account of the directive issued by the Central Government, that by itself, without anything more, would not entitle the appellant to claim a refund on the price

> differential unless it is shown that there was some agreement in this behalf with the Government and the latter had agreed to refund the excise duty to the extent of the reduced price. That being so, we see no merit in this appeal brought by the assessee and dismiss the same with no order as to costs.”

We, thus, are of the view that principle laid down in *MRF Ltd*. would continue to prevail.

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26. We are conscious of the sentiments expressed by seven Judges Bench of this Court in *Keshav Mills Company Limited* v. *Commissioner of Income Tax, Bombay* - (1965) 2 SCR 908 wherein the Court sounded caution and stated the restraint that has to be exercised while dealing with the question as to whether earlier decisions of this Court should be reconsidered and revised. The Court observed that merely because two views are possible should not be a reason to review the earlier judgment as it was necessary to maintain consistency and depict certainty in law. At the same time, Court made the following remarks :

“...That is not to say that if on a subsequent occasion, the Court is satisfied that its earlier decision was clearly erroneous, it should not hesitate to correct the error; but before a previous decision is pronounced to be plainly erroneous, the Court must be satisfied with a fair amount of unanimity amongst its members that a revision of the said view is fully justified. It is not possible or desirable, and in any case it would be inexpedient to lay down any principles which should govern the approach of the Court in dealing with the question of reviewing and revising its earlier decisions. It would always depend upon several relevant considerations-What is the nature of the infirmity or error on which a plea for a review and revision of the earlier view is based? On the earlier occasion, did some patent aspects of question remain unnoticed, or was the attention of the Court not drawn to any relevant and material statutory provision, or was any previous decision of this Court bearing on the point not noticed? Is the Court hearing such plea fairly unanimous that there is such an error in the earlier view? What would be the impact of the error on the general administration of law or on public good? Has the earlier decision been followed on subsequent occasions either by this Court or by the High Courts? And, would the reversal of the earlier decision lead to public inconvenience, hardship or mischief? These and other relevant considerations must be carefully drawn in mind whenever this Court is called upon to exercise its jurisdiction to review and revise its earlier decisions. These considerations becomes still more significant when the earlier decision happens to be a unanimous decision of a Bench of five learned Judges of this Court.”

27. We have kept in mind the aforesaid consideration and feel that decision in *SKF* and *International Auto* require a re-look for the reasons given by us above. We, thus, direct the Registry to place the matter before the Hon’ble Chief Justice of India for constituting a Larger Bench to go into the issue involved in this case which is of seminal importance having far reaching ramifications.

7.2 From the above discussion, it appears that there are two views on the issue and the matter is now pending with the Larger Bench of the Hon'ble Supreme Court. When it is so it is deemed fit to set aside the impugned order and remand the matter to the Original Adjudicating Authority to decide the same afresh, as and when the decision of the Larger Bench of the Hon'ble Supreme Court is made available on the subject and after giving the opportunity of personal hearing to both sides.

7.3 However, since the matter is pending with the Larger Bench of the Hon'ble Supreme Court the *status quo* has to be maintained in respect of recovery and refund, if any, from/to the assessee.

8. In the result, the appeal filed by the assessee appellant is allowed by way of remand accordingly.

[Order Pronounced in the open court on_22/06/2017_]

(Ashok K. Arya)

Member (Technical)

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