IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT NO.I

Appeal No.	Arising out of	Appellant	Respondent
E/1245/2010	OIO No.07 to 14/CEX/Commr /2010, dt.24.03.2010, passed by CCE Aurangabad	M/s Badve Engineering Ltd	CCE Aurangabad
E/1246/2010	-"-	M/s Creative Tools & Press Components P. Ltd	CCE Aurangabad
E/1247/2010	-"-	M/s Badve Engineering Ltd	CCE Aurangabad
E/1248/2010	-"-	M/s Badve Engineering Ltd	CCE Aurangabad
E/3/2010	OIO No.29/CEX/2009, dt.15.09.09, passed by CCE Pune	M/s Badve Auto Comps Pvt. Ltd	CCE Pune

Appearance:
For Assessee: None
For Revenue: Shri Anil Chaudhary, D.C. & Shri Ajay Kumar, A.C.-ARs.

CORAM:
HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MR. C.J. MATHEW, MEMBER (TECHNICAL)

Date of Hearing: 18.10.2018
Date of Decision:27.03.2019

Order No.A/85599-85603/2019

Per: Dr. D.M. Misra

None present for the Appellants. Heard the learned A.R. for the Revenue.

2. All these appeals are filed against the respective Order-in-Originals passed by the Commissioners of Central Excise of Aurangabad/Pune. Since the issue involved in the all these appeals are common, therefore, these are taken up together for disposal.

3. The facts common in all these appeals are that the Appellants are engaged in the manufacture of motor vehicle parts, falling under Chapter 87 of CETA 1985. They sale/supply these motor vehicle parts to various OE manufacturers at the price declared at the time of clearance of goods on payment of duty. Later, on revision of the prices, they have issued supplementary invoices and also discharged appropriate differential duty on the same. Since they have not discharged appropriate interest on the

differential duty paid, computing it from the date of initial clearance, Show Cause Notices were issued to the Appellants on the basis of the information submitted by them for recovery of interest on the differential duty paid. On adjudication, the interest amount has been confirmed along with duty already paid before issuance of show cause notice. Aggrieved by the said order, the Appellants are in appeal.

4. The matter has been listed from time to time, but since no one appeared nor any request for adjournment was forwarded, the appeals are taken up for disposal. In their written submissions, the Appellants have requested to keep the matter in abeyance as the issue has been referred to the Larger Bench of the Supreme Court by a Division Bench in Steel Authority of India Ltd Vs CCE Raipur – 2015 (226) ELT 450 (SC) expressing doubt over the judgment of co-ordinate Bench in the case of C.C.E. Pune Vs. SKF India Ltd – 2009 (229) ELT 385 (SC). They have further submitted that this Tribunal, taking note of the said reference to Larger Bench by the Hon'ble Supreme Court, in the past has remanded the matter to the Adjudicating Authority vide Order No.A/88290/17/SMB dt.28.06.2017 and No.A/88951/17/SMB dt.21.07.2017 to decide the cases on the basis of out come of the reference before the Hon'ble Supreme Court.

5. The learned A.R. for the Revenue has submitted that the Appellants had not resorted to the provisional assessment under Rule 7 of the Central Excise Rules, 2002. They have paid appropriate duty at the time of clearance of motor vehicle parts to various O.E. manufacturers on the basis of the price determined by them and agreed by the customers. On subsequent change in the cost of the production, they revised the price and issued supplementary invoices either by increasing the prices or by way of decreasing the prices. On the differential duty paid when the price

has been increased, they issued supplementary invoices and their customers availed credit on the said supplementary invoices. However, the Appellants failed to discharge appropriate interest on the differential duty paid subsequent to the clearance of the goods by raising supplementary invoices. He submits that on revision of prices, the interest is payable for the normal as held by Hon'ble Delhi High Court in the case of Hindustan Insecticides Ltd Vs C.C.E. LTU – 2013 (297) ELT 332 (Del). It is his contention that all the notices in the present case have been issued within normal period of limitation and therefore, interest on the differential duty paid subsequently in terms of Section 11A(2B) of Central Excise Act, 1944 read with Explanation 2, interest is attracted.

6. We have carefully considered the submissions advanced by the learned A.R. for the Revenue and perused the records. Undisputedly, the Appellants, during the period in question, has paid the differential duty which arose due to enhancement of prices of motor vehicle parts cleared earlier and issued supplementary invoices of such differential duty. The customers availed credit on such supplementary invoices. The Revenue has demanded interest under sub-section (2B) of Section 11A of Central Excise Act, 1944.

7. The learned Commissioner relying on the principle of law laid down by Hon’ble Supreme Court in the case of C.C.E. Pune Vs SKF India Ltd – 2009 (229) ELT 385 (SC), observed that the Appellants are required to discharge interest for the delayed period. In SKF India Ltd’ case, the Hon’ble Supreme Court was confronted more or less a similar situation wherein the Respondent-Assessee in that case was engaged in the manufacture of sale of ball bearings and textile machinery parts. Initially, the goods manufactured were sold at certain price on payment of Excise duty and later there was upward revision of price with retrospective effect. Revenue was of the view that the Respondent-Assessee was required to

pay interest from the date of clearance of the goods on the revised vale. Their Lordships, after considering the relevant provisions viz.Section 11(2), 11AA and 11AB observed has follows:-

> "9. Section 11A puts the cases of non-levy or short levy, non-payment or short payment or erroneous refund of duty in two categories. One in which the non-payment or short payment etc. of duty is for a reason other than deceit; the default is due to oversight or some mistake and it is not intentional. The second in which the non-payment or short payment etc. of duty is "by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of the Act or of Rules made thereunder with intent to evade payment of duty"; that is to say, it is intentional, deliberate and/or by deceitful means. Naturally, the cases failing in the two groups lead to different consequences and are dealt with differently. Section 11A, however allow the assessees in default in both kinds of cases to make amends, subject of course to certain terms and conditions. The cases where the non-payment or short payment etc. of duty is by reason of fraud collusion etc. are dealt with under sub-section (1A) of Section 11A and the cases where the non-payment or short-payment of duty is not intentional under sub-section (2B).
>
> 10. Sub-section (2B) of Section 11A provides that the assessee in default may, before the notice issued under sub-section (1) is served on him, make payment of the unpaid duty on the basis of his own ascertainment or as ascertained by a Central Excise Officer and inform the Central Excise Officer in writing about the payment made by him and in that event he would not be given the demand notice under sub-section (1). But Explanation 2 to the sub-section makes it expressly clear that such payment would not be exempt from interest chargeable under Section 11AB, that is, for the period from the first date of the month succeeding the month in which the duty ought to have been paid till the date of payment, of the duty. What is stated in Explanation 2 to sub-section (2B) is reiterated in Section 11AB that states where any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded, the person who has paid the duty under sub-section (2B) of Section 11A, shall, in addition to the duty, be liable to pay interest ....It is thus to be seen that unlike penalty that, is attracted to the category of cases in which the non-payment or short payment etc. of duty is "by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of the Act or of Rules made thereunder with intent to evade payment of duty", under the scheme of the four Sections (11A, 11AA, 11AB & 11AC) interest is leviable on delayed or deferred payment of duty for whatever reasons.
>
> 11. The payment of differential duty by the assessee at the time of issuance of supplementary invoices to the customers demanding the balance of the revised prices clearly falls under the provision of sub-section (2B) of Section 11A of the Act.
>
> 12. The Bombay High Court, Aurangabad Bench, in its decision in *The Commissioner of Central Excise, Aurangabad* v. *M/s. Rucha Engineering Pvt. Ltd.,* (First Appeal No. 42 of 2007) that was relied upon by the Tribunal for dismissing the Revenue's appeal took the view that there would be no application of Section 11A (2B) or Section 11AB where differential duty was paid by the assessee as soon as it came to learn about the upward revision of prices of goods sold earlier. In *M/s. Rucha Engineering* the High Court observed as follows:
>
> > "It is evident that the Section (11AB) comes into play if the duty paid/levied is short. Both, the Commissioner (Appeals) and the

> CESTAT have observed that the Assessee paid the duty on its own accord immediately when the revised rates became known to them from their customers. The differential duty was due at that time i.e. when the revised rates applicable with retrospective effect were learnt by the Assessee, which was much after the clearance of the goods and therefore, question of payment of interest does not arise as the duty was paid as soon as it was learnt that it was payable. Finding that provisions of Section 11A (2) and 11A (2B) were not applicable as the situation occurred in the instant, case was quite different, Section 11AB (1) was not at all applicable, and therefore, the Assessee was not required to pay interest."

> 13. It further held that a case of this nature would not fall in the category where duty of excise was not paid or short-paid.
>
> 14. We are unable to subscribe to the view taken by the High Court. It is to be noted that: the assessee was able to demand from its customers the balance of the higher prices by virtue of retrospective revision of the prices. It, therefore, follows that at the time of sale the goods carried a higher value and those were cleared on short payment of duty. The differential duty was paid only later when the assessee issued supplementary invoices to its customers demanding the balance amounts. Seen thus it was clearly a case of short payment of duty though indeed completely unintended and without any element of deceit etc. The payment of differential duty thus clearly came under sub-section (2B) of Section 11A and attracted levy of interest under Section 11AB of the Act.
>
> 15. For the reasons discussed above we set aside the judgments and orders passed by the Tribunal and the Commissioner (Appeals). We restore the order passed by the Assistant Commissioner in so far as charge of interest is concerned. On the facts of this case there is no question of imposition of any penalty. Hence, that part of the order of the Assistant Commissioner is set aside."

8. The Appellants in their written submissions argued that the ratio laid down by Hon'ble Supreme Court in SKF India Ltd case has been doubted by subsequent Division Bench of Hon'ble Supreme Court in the case of Steel Authority of India Ltd Vs CCE Raipur – 2015 (226) ELT 450 (SC). Consequently, their Lordships referred the matter to the Larger Bench observing as follows:-

> "27. We have kept in mind the aforesaid consideration and feel that decision in SKF and International Auto requires 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 a seminal importance having far reaching ramifications."

9. It has been brought to the notice of the Bench that in similar circumstances this Tribunal has remanded the matter to the adjudicating authority to decide the issue on the basis of the outcome of the reference pending before the Larger Bench of Hon'ble Supreme Court. In such

scenario, at this stage, it is prudent to remand the matter to the Adjudicating Authority to decide the issue of liability of interest on the differential duty paid subsequent to the revision of prices, on the basis of the outcome of the pending reference before the Larger Bench of Hon'ble Supreme Court.

10. Appeals are allowed by way of remand to the Adjudicating Authority.

(Order pronounced in Court on27.03.2019)

(C.J. Mathew)
Member (Technical)

(Dr. D.M. Misra)
Member (Judicial)

cbb