CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH

Excise Appeal No. 1233 of 2012

(Arising out of Order-in-Appeal No. BC/56/Bel/2012-13 dated 24.05.2012 passed by the Commissioner of Central Excise (Appeals), Belapur, Mumbai-III)

M/s. LSR Speciality Oils Pvt. Ltd. **Appellant**
Plot No. G-13/5 to 13/7/1, MIDC Indl. Area,
Taloja, Taluka: Panvel, Dist. Raigad

Vs.

Commissioner of CGST & CE, Belapur **Respondent**
1st floor, CGO Complex,
CBD Belapur, Navi Mumbai 400 614.

Appearance:

Shri I.C. Thakur, Advocate, for the Appellant
Shri Sanjay Hasija, Superintendent, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE MR. AJAY SHARMA, MEMBER (JUDICIAL)

Date of Hearing: 28.06.2022
Date of Decision: 12.07.2022

FINAL ORDER NO. A/85621/2022

PER: SANJIV SRIVASTAVA

This appeal is directed against Order-in-Appeal No. BC/56/Bel/2012-13 dated 24.05.2012 of the Commissioner of Central Excise (Appeals), Belapur, Mumbai-III. Vide the impugned order, Commissioner (Appeals) upheld Order-in-Original No. Belapur/Taloja/R-II/41/BSN/11-12 dated 31.01.2012 of the Additional Commissioner of Central Excise, Belapur, holding as follows:-

"ORDER

15.1 In view of above findings, I pass the following order:-

(i) I confirm the demand of Central Excise duty of Rs.25,82,5271- (Rupees Twenty five lakhs Eighty Two thousand

Five hundred Twenty Seven only) (B.E.D. Rs.25.59.133/- + Ed. Cess R$ 23,394/-) paid short during the period April 2006 to October 2010 under Section 11A of Central Excise Act 1944.

(ii) I appropriate the amount of Rs. Rs.25,82,527/- already paid by the assessee against the demand above confirmed against short payment.

(iii) I order recovery of interest due, at an appropriate rate, on the Central Excise duty recoverable as mentioned in para (i) above, under the provisions Section 11AB of Central Excise Act, 1944.

(iv) I impose a penalty of Rs. 25,82,527/- on M/s. LSR Speciality Oils Pvt. Ltd, under the provisions of Section 11AC of the Central Excise Act, 1944."

2.1 Appellants are manufacturer of excisable goods, namely lubricating oils and chemical additives and had cleared the same on payment of duty and availed the benefit of cenvat credit as provided by Cenvat Credit Rules, 2004.

2.3 During the course of scrutiny of records of the appellants, it was observed that the appellants had cleared certain inputs as such declaring lesser assessable value resulting in short payment of duty than the cenvat credit availed on the said inputs. As per Rule 3(5) of Cenvat Credit Rules, 2004 for the removal of inputs on which cenvat credit has been taken, the appellants were required to pay an amount equal to the credit availed in respect of such inputs and such removal was to be made under cover of an invoice referred to in Rule 9. On being pointed out by the Audit, appellants reversed the amount short paid by them for the period 2006-07.

2.4 It was observed that subsequent to making such reversal on 11.12.2008. Appellants continued with the same practice for the years 2007-08, 2008-09 and 2009-10. Appellants stated vide their letter dated 29.09.2010 that during the period 2007-08, 2008-09, 2009-10 and 2010-11 (upto September 2010) they had not cleared inputs as such wherein the amount paid on clearance of inputs as such was less than the credit availed. After further verification and being pointed out by the Range Superintendent, the appellants reversed the cenvat credit subsequently in respect of these clearances made during the above referred period.

2.5 The appellants were asked to pay the interest of the amounts short paid by them. However, they refused to deposit the interest due stating that they had availed the credit correctly and hence they were not required to pay any interest. Therefore a show cause notice was issued to the appellants asking them to show cause as to why:-

"a) an amount of Rs.25,82,5271- (Rupees Twenty five lakhs Eighty Two thousand Five hundred Twenty Seven only) (B.E.D. R$ 25,59,133/- + Ed. Cess Rs.23.394/-) paid short / availed excess cenvat credit wrongly on the clearances of inputs as such during the period April 2006 to October 2010 should not be demanded and recovered from them, under Rule 14 of Cenvat Credit Rules 2004 read with Section 11A of Central Excise Act 1944.

b) The amount of Rs. Rs.25,82,527/- paid by the assessee should not be appropriated and adjusted against the short payment / wrong availment of cenvat duty.

c) interest at the appropriate rate should not be demanded and recovered from them under the provisions of Rule 14 of Cenvat Credit Rules, 2004 read with Section 11AB of Central Excise Act 1944.

d) penalty equal to the duty / cenvat credit demanded should not be imposed upon them under Rule 15(2) of the Cenvat Credit Rules 2004 read with Section 11AC of Central Excise Act, 1944."

2.6 This show cause notice was adjudicated by the Additional Commissioner as per the order-in-original referred in para 1 above. The Commissioner (Appeals) dismissed the appeal filed by the appellants in this regard. Hence the present appeal.

3.1 We have heard Shri I.C. Thakur, Advocate for the appellants and Shri Sanjay Hasija, Superintendent (Authorised Representative) for the Revenue.

3.2 Arguing for the appellants, learned counsel submits as follows:-

- *During the year 2006-07 to 2009-10, the Appellant had received Cenvatable inputs and correctly availed Cenvat Credit thereon. These inputs are also cleared as such in terms of Rule 3(5) of the Cenvat Credit Rules, 2004.*
- *When Cenvatable inputs are cleared as such, an amount equivalent to the Cenvat credit availed needs to be reversed at the time of removal under the cover of excise/tax invoice issued.*
- *The appellant, while raising the sales order or delivery order for the removal of such Inputs as such, had by mistake or through an error calculated lower assessable/selling price or selling rate which resulted in selling the inputs at lower value and thereby reversal of Cenvat Credit at lower value. The initial Invoices raised at the rate of Rs.22.50 per Kg as against the actual price and assessable value of said inputs ranging from Rs.42.76 to Rs.50.66 per Kg and hence Cenvat Credit was short debited /reversed.*
- *When the above was noticed and pointed out, the same was fully reversed in December, 2008 and October, 2010, much before the date of issue of SCN as SCN was issued on 13th December, 2010, after limitation period. Hence entire demand is barred by limitation.*
- *there is no suppression or intention to evade the payment of duty. Moreover the cenvat credit was availed correctly at the time of receipt of inputs in the factory of the Appellants and thus there is no wrongful availment of Cenvat Credit. The short reversal of Cenvat Credit was un-intentional as it is caused due to an error in arriving the assessable or selling price. As a result of this ignorance, the appellant could not able recover the actual cost / value of such Inputs from the buyer/customers timely. The*

differential cost/value and the amount of differential cenvat credit was recovered much later through supplementary invoices from buyers/customers and never utilized but reversed when noticed and pointed out.

- *In the absence of any suppression with Intend to evade the payment of duty, no penalty can be imposed. Further when the Cenvat Credit was correctly availed at the time of receipt and never utilized, but reversed entirely, It will amounts non-availment of Cenvat Credit in terms of Supreme Court ruling in Chandrapur Magnet case and hence No Interest is payable/leviable."*
- Reliance is placed on the following decisions:
  - L.G. Electronics Pvt. Ltd. [2016 (341) ELT A223 (SC)]
  - Chandrapur Magnet Wires (P) Ltd. [1996 (81) ELT 3 (SC)]
  - Ind-Swift Laboratories Ltd. [2011 (265) ELT 3 (SC)]
  - Bill Forge Pvt. Ltd. [2012 (26) STR 204 (Kar.)]
  - SRF Ltd. [2012 (280) ELT 554 (Tri.-Chennai)]
  - Rajasthan Spinning & Weaving Mills [2009 (238) ELT 3 (SC)]
  - Pepsi Foods Ltd. [2010 (260) ELT 481 (SC)]
  - Grasim Bhiwani Textile Ltd. [2018 (362) ELT 424 (P&H).

3.3 Arguing for the Revenue, learned Authorised Representative while reiterating the findings recorded in the impugned order submits that

- The appellants made the payment after having been pointed out by the revenue during the course of audit. Once the short payment of amount is there, the liability to pay interest as per the section 11AB will trigger in.
- This is clearly a case of short payment of the amounts at the time of removal of the inputs against which CENVAT Credit has been taken as such, in contravention of the provisions of Rule 3 (5) of the CENVAT Credit Rules, 2004.
- It is not the case of a single instance but appellant continuously defaulted over the entire period. They

continued with the practice of making short payment even after being pointed out by audit. Therefore they deliberately short paid contravening the provisions of Rule 3 (5) of the CENVAT Credit Rules, 2004. Accordingly the invocation of extended period and penalty imposed on the appellant cannot be faulted with.

- the issue involved in the present case is squarely covered by the decision of the Tribunal in the case of LSR Speciality Oil P. Ltd. [2015 (324) ELT 582 (Tri.-Mumbai). He therefore prays for dismissal of the appeal.

4.1 We have considered the impugned order along with the submissions made in the appeal and during the course of argument.

4.2 In the present case undisputedly the appellants have availed the cenvat credit as was admissible to them on the inputs received by them. However, at the time of clearance of the said inputs as such, they have short paid the amounts required to be paid by them in terms of Rule 3(5) of the Cenvat Credit Rules, 2004. Rule 3(5) of the Cenvat Credit Rules provides as under:-

"When inputs or capital goods, on which CENVAT credit has been taken, are removed as such from the factory, or premises of the provider of output service, the manufacturer of the final products or provider of output service, as the case may be, shall pay an amount equal to the credit availed in respect of such inputs or capital goods and such removal shall be made under the cover of an invoice referred to in rule 9 :

Provided that such payment shall not be required to be made where any inputs [or capital goods] are removed outside the premises of the provider of output service for providing the output service :

Provided further that such payment shall not be required to be made where any inputs are removed outside the factory for providing free warranty for final products."

4.3 Appellants do not deny such short payment and have on being pointed out paid the differential amounts as stated above. The dispute is only in respect of the interest that was required to be paid in respect of the clearances of inputs as such made by the appellants.

4.4 Appellants claim that they have correctly availed the cenvat credit and throughout had balance available in their cenvat account to cover the clearances made. So no interest is demandable from them. In his support, learned counsel has produced a chart prepared on the basis of their ER-1s showing that enough balance was available in their cenvat account during the entire period. No doubt the appellants claim that credit balance was available with them but that does not absolve them of the responsibility to pay the correct amounts as per Rule 3(5) of the Cenvat Credit Rules. It is not the case of wrongly taking the credit. It is the case of short payment while clearing the inputs as such. It is the claim of the appellants that the decision of the Hon'ble Supreme Court in the case of Ind-Swift Laboratories Ltd. [2011 (265) ELT 3 (SC)] will not have application in their case as they have not taken the credit wrongly.

4.5 We find that it is the case wherein the appellants have short paid the amounts at the time of clearance of the goods. The case of short payment of the amounts at the time of clearance of goods is akin to the case of short payment of duty on the goods of own manufacture when cleared by the appellants. Such cases need to be handled accordingly. It has been held by the Hon'ble Apex Court that in the case of short payment of duty at the time of clearance of the goods, the liability to pay interest on the same shall be absolute and there can be no denial of the same. Reference is made to the decision of the Hon'ble Apex Court in the case of International Auto Ltd. [2010 (250) ELT 3 (SC)] and Steel Authority of India Ltd. [2019 (366) ELT 769 (SC)].

4.6 In the case of International Auto Ltd., Hon'ble Supreme Court has held as follows:-

"7. We find no merit in the submissions advanced on behalf of the assessee. The controversy arising in this civil appeal is squarely covered by the judgement of this Court in the case of Commissioner of Central Excise, Pune v. SKF India Limited, reported in 2009 (239) E.L.T. 385. We quote hereinbelow relevant observations made in the case of SKF India Limited [supra], which reads as 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 misstatement 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 falling 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."

8. Section 11A of the Act deals with recovery of duty not levied or not paid or short-levied or short-paid. The said section, which stood inserted by Act 25 of 1978, underwent a sea-change when Parliament inserted major changes in that section vide Act 14 of 2001 [with effect from 11th May, 2001] and Act 32 of 2003 [with effect from 14th May, 2003]. It needs to be mentioned that simultaneously Act 14 of 2001 also made changes to Section 11AB of the Act. In the case of S.K.F. India Limited [supra], it has been, inter alia, held, as can be seen from the above-quoted paragraphs, that sub-section 2(B) of Section 11A provides that the assessee in default may make payment of the unpaid duty on the basis of his own ascertainment or as ascertained by a Central Excise Officer and, in that event, such assessee in default would not be served with the Demand Notice under Section 11A(1) of the Act. However, Explanation (2) to the sub-

section makes it clear that such payment would not be exempt from interest chargeable under Section 11AB of the Act. What is stated in Explanation (2) to sub-section 2(B) is reiterated in Section 11AB of the Act, which deals with interest on delayed payment of duty. From the Scheme of Section 11A(2B) and Section 11AB of the Act, it becomes clear that interest is levied for loss of revenue on any count. In the present case, one fact remains undisputed, namely, accrual of price differential. What does differential price signify? It signifies that value, which is the function of the price, on the date of removal/clearance of the goods was not correct. That, it was understated. Therefore, the price indicated by the supplementary invoice is directly relatable to the value of the goods on the date of clearance, hence, enhanced duty. This enhanced duty is on the corrected value of the goods on the date of removal. When the differential duty is paid after the date of clearance, it indicates short-payment/short-levy on the date of removal, hence, interest which is for loss of revenue, becomes leviable under Section 11AB of the Act. In our view, with the entire change in the Scheme of recovery of duty under the Act, particularly after insertion of Act 14 of 2001 and Act 32 of 2003, the judgement of this Court in the case of M.R.F. Limited [supra] would not apply. That judgement was on interpretation of Section 11B of the Act, which concerns claim for refund of duty by the assessee. That judgement was in the context of the price list approved on 14th May, 1983. In that case, assessee had made a claim for refund of excise duty on the differential between the price on the date of removal and the reduced price at which tyres were sold. The price was approved by the Government. In that case, the assessee submitted that its price list was approved, by the Government on 14th May, 1983, but subsequent thereto, on account of consumer resistance, the Government of India directed the assessee to roll back the prices to pre-14th May, 1983 level and on that account, price differential arose on the basis of which the assessee claimed refund of excise duty which stood rejected by this Court on the ground that once the assessee had cleared the goods on classification, the assessee became liable to payment of duty on the date of removal and subsequent reduction in the prices for whatever reason cannot *be made a matter of concern to the Department insofar as the liability to pay excise duty was concerned. In the present case, we are concerned with the imposition of interest which, as stated above, is charged to compensate the Department for loss of revenue. Be that as it may, as stated above, the Scheme of Section 11A of the Act has since undergone substantial change and, in the circumstances, in our view, the judgment of this Court in the case of M.R.F. Limited [supra] has no application to the facts of this case. In our view, the judgment of this Court in the case of SKF India Limited [supra] is squarely applicable to the facts of this case."*

4.7 In the case of Steel Authority of India Ltd., on reference a three judges bench of Hon'ble Supreme Court held as follows:-

"61. While it may be true that interest cannot be demanded by way of damages or compensation and it is also further true that unless there is a substantive provision providing for payment of interest in a fiscal statute, interest cannot be demanded, we would think in the context of the Act and the Rules in question, under Section 11AB, particularly, when there is no dispute relating to liability to pay the differential duty and we notice that absence of dispute is a fair acknowledgement of the fact that the facts of the present cases are unlike the situation in MRF decision where the price was fixed at the time of removal, interest is payable as provided in Section 11AB and from the point of time indicated therein. But in these cases, the price was variable under the escalation clause which was very much within the knowledge of the assessee and the demand for interest is sustainable.

62. As far as the scope of the second explanation of Section 11A(2)(b) is concerned, it contemplates payment voluntarily by the assessee. It is without any notice being issued under Section 11A. There is also reference to liability on the part of the assessee to pay interest under Section 11A(2)(b), not only on the amount which is paid within the meaning of Section 11A(2)(b) but on any short payment as may be determined by the excise officer. This only means that payment can by an *assessee of any of the four amounts with which we are more concerned namely, non-levy, non-payment, short-levy or short-payment. Since there is no notice under Section 11A and non-determination of the amount as such pursuant to which the amount is paid it may happen that there may be shortfall in the amount which is paid by the assessee in comparison to what the assessee is legally required to pay. The short payment which is therefore referred to in the second Explanation to Section 11A(2)(B) can only be the aforesaid short payment and it is not referring to the short payment of duty which was originally occasioned and which is the subject matter of Section 11A(2)(b) and Section 11AB.*

63. We are of the view that the reasoning of this Court in the order referring the cases to us (to this Bench) that for the purpose of Section 11AB, the expression "ought to have been paid" would mean the time when the price was agreed upon by the seller and the buyer does not square with our understanding of the clear words used in Section 11AB and as the rules proclaim otherwise and it provides for the duty to be paid for every removal of goods on or before the 6th day of the succeeding month. Interpreting the words in the manner contemplated by the Bench which referred the matter would result in doing violence to the provisions of the Act and the Rules which we have interpreted. We have already noted that when an assessee in similar circumstances resorts to provisional assessment upon a final determination of the value consequently, the duty and interest dates back to the month "for which" the duty is determined. Duty and interest is not paid with reference to the month in which final assessment is made. In fact, any other interpretation placed on Rule 8 would not only be opposed to the plain meaning of the words used but also defeat the clear object underlining the provisions. It may be true that the differential duty becomes crystallised only after the escalation is finalized under the escalation clause but it is not a case where escalation is to have only prospective operation. It is to have retrospective operation admittedly. This means the value of the goods which was only admittedly provisional at the time of clearing the goods is finally determined and it is on the said *differential value that admittedly that differential duty is paid. We would think that while the principle that the value of the goods at the time of removal is to reign supreme, in a case where the price is provisional and subject to variation and when it is varied retrospectively it will be the price even at the time of removal. The fact that it is known, later cannot detract from the fact, that the later discovered price would not be value at the time of removal. Most significantly, Section 11A and Section 11AB as it stood at the relevant time did not provide read with the rules any other point of time when the amount of duty could be said to be payable and so equally the interest. We would concur with the views expressed in SKF case (supra) and International Auto (supra). We find no merit in the appeals. The appeals will stand dismissed."*

4.8 We find that in the case of LSR Speciality Oil P. Ltd. (supra) in similar circumstances the Tribunal has held as follows:-

*"**6.** We also note that the revenue is not denying the credit taken by the appellant. All that revenue is asking the appellant is to pay the differential amount i.e. the difference between the Cenvat credit taken at the time of importation/receiving of inputs minus the duty paid at the time of clearance of such inputs. We do not find anything wrong in the same and we uphold the demand on merits. The appellant has submitted a catena of case laws to support that having collected excise duty, Cenvat credit cannot be denied. We observe that Revenue is not denying the Cenvat credit taken. We observe that appellant is working under the self assessment procedure. In the monthly return they have described goods under Chapter 38 and paid duty. It is only during physical verification and audit of the factory that the correct facts has come out. The catena of the case laws submitted by the appellant are not relevant in the present facts of the case as revenue has not proposed to deny the Cenvat credit but what revenue is demanding is the differential amount. Hence the case law quoted are not relevant to the facts of present case.*

7. *The next contention was the quantification of the duty was not correct. During the argument the Bench had queried from the counsel whether there is any other method to compute the duty. To this the reply of the counsel was that there is no such method but, rules did not specify the method adopted by Revenue. We have seen the show cause notice and the method of quantification. Since the appellant is not able to make one to one correlation with the goods cleared as such with the imported goods what revenue has done is that computed average duty liability for per unit each financial year and subtract duty paid per unit during the financial year. To us this is most reasonable method in the existing circumstances namely where one to one correlation is not available.*

8. *As far as the contention of the ld. counsel about the limitation is concerned, we have gone through ER1 filed, in the ER1 filed for the month of January, 2008, in Column No. 5, the appellant has indicated as under : -*

Credit taken on inputs on imported inputs (`)	*11522196*	*0*	*0*	*0*	*0*	*0*	*0*	*0*	*0*

Further, in column at page 3 of the return, the appellant has indicated as under : -

Details of Clearance								
Cetsh No.	*Description of Goods*	*Unit of Quantity*	*Opening Balance*	*Quantity Manu-factured*	*Quantity Cleared*	*Closing Balance*	*Assessable Value (`)*	*Type of Clearnace*
38112900	*-*	*KG*	*0*	*185185*	*201110*	*0*	*16521360*	

From the above columns, it is very clear that nobody can make out that the credit on inputs taken are falling under Chapter 39. Further, while clearing the goods no description is mentioned and the classification of the goods mentioned is 38. It is not possible from the above description for any human being that the inputs have been cleared as such and the classification of the input have been Changed. We do not see any reason for the *appellant to change the classification. To our mind, the classification has been changed only to ensure that they are in a position to take higher credit and pay lower duty. In our view, there is clear cut suppression of fact and wilful misstatement and in view of the fact and circumstances, extended period of limitation is correctly invoked. Ld. counsel has submitted that as per CBEC manual, ER1 return are required to be scrutinised. On query from the Bench whether any details have been asked during any scrutiny, and they have submitted the manufacturing process or informed in detail of the activity, the answer was negative. Nobody on the basis of ER1 return filed by the appellant can make out that the goods are being cleared as such. We therefore, reject the said contention."*

4.9 We also note that the appellants were made aware in 2008 about the default in short payment of amount. However, they continued with the practice and have showed a willful intention to not act as per the provisions of Rule 3(5) of the Cenvat Credit Rules. In such situation, invocation of extended period is justified and needs to be upheld.

4.10 In the case of Rajasthan Spinning & Weaving Mills [2009 (238) ELT 3 (SC)], Hon'ble Supreme Court has held as follows:-

"17. The main body of Section 11AC lays down the conditions and circumstances that would attract penalty and the various provisos enumerate the conditions, subject to which and the extent to which the penalty may be reduced.

18. One cannot fail to notice that both the proviso to sub-section 1 of Section 11A and Section 11AC use the same expressions : "....by reasons of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty,...". In other words the conditions that would extend the normal period of one year to five years would also attract the imposition of penalty. It, therefore, follows that if the notice under Section 11A(1) states that the escaped duty was the result of any conscious and deliberate wrong doing and *in the order passed under Section 11A(2) there is a legally tenable finding to that effect then the provision of Section 11AC would also get attracted. The converse of this, equally true, is that in the absence of such an allegation in the notice the period for which the escaped duty may be reclaimed would be confined to one year and in the absence of such a finding in the order passed under Section 11A(2) there would be no application of the penalty provision in Section 11AC of the Act. On behalf of the assessees it was also submitted that Sections 11A and 11AC not only operate in different fields but the two provisions are also separated by time. The penalty provision of Section 11AC would come into play only after an order is passed under Section 11A(2) with the finding that the escaped duty was the result of deception by the assessee by adopting a means as indicated in Section 11AC.*

19. From the aforesaid discussion it is clear that penalty under Section 11AC, as the word suggests, is punishment for an act of deliberate deception by the assessee with the intent to evade duty by adopting any of the means mentioned in the section.

20. At this stage, we need to examine the recent decision of this Court in Dharamendra Textile (supra). In almost every case relating to penalty, the decision is referred to on behalf of the Revenue as if it laid down that in every case of non-payment or short payment of duty the penalty clause would automatically get attracted and the authority had no discretion in the matter. One of us (Aftab Alam, J.) was a party to the decision in Dharamendra Textile and we see no reason to understand or read that decision in that manner. In Dharamendra Textile the court framed the issues before it, in paragraph 2 of the decision, as follows :

"2. A Division Bench of this Court has referred the controversy involved in these appeals to a larger Bench doubting the correctness of the view expressed in Dilip N. Shroff v. Joint Commissioner of Income Tax, Mumbai & Anr. [2007 (8) SCALE 304]. The question which arises for determination in all these appeals is whether Section 11AC of the Central Excise Act, 1944

(in short the "Act') inserted by Finance Act, 1996 with the intention of imposing mandatory penalty on persons who evaded payment of tax should be read to contain mens rea as an essential ingredient and whether there is a scope for levying penalty below the prescribed minimum. Before the Division Bench, stand of the revenue was that said section should be read as penalty for statutory offence and the authority imposing penalty has no discretion in the matter of imposition of penalty and the adjudicating authority in such cases was duty bound to impose penalty equal to the duties so determined. The assessee on the other hand referred to Section 271(1)(c) of the Income Tax Act, 1961 (in short the IT Act') taking the stand that Section 11AC of the Act is identically worded and in a given case it was open to the assessing officer not to impose any penalty. The Division Bench made reference to Rule 96ZQ and Rule 96ZO of the Central Excise Rules, 1944 (in short the "Rules') and a decision of this Court in Chairman, SEBI v. Shriram Mutual Fund & Anr. [2006 (5) SCC 361] and was of the view that the basic scheme for imposition of penalty under section 271(1)(c) of IT Act, Section 11AC of the Act and Rule 96ZQ(5) of the Rules is common. According to the Division Bench the correct position in law was laid down in Chairman, SEBI's case (supra) and not in Dilip Shroff's case (supra). Therefore, the matter was referred to a larger Bench."

After referring to a number of decisions on interpretation and construction of statutory provisions, in paragraphs 26 and 27 of the decision, the court observed and held as follows :

"26. In Union Budget of 1996-97, Section 11AC of the Act was introduced. It has made the position clear that there is no scope for any discretion. In para 136 of the Union Budget reference has been made to the provision stating that the levy of penalty is a mandatory penalty. In the Notes on Clauses also the similar indication has been given.

"27. Above being the position, the plea that the Rules 96ZQ and 96ZO have a concept of discretion inbuilt cannot be sustained. Dilip Shroff's case (supra) was not correctly decided

but Chairman, SEBI's case (supra) has analysed the legal position in the correct perspectives. The reference is answered.........".

21. From the above, we fail to see how the decision in Dharamendra Textile can be said to hold that Section 11AC would apply to every case of non-payment or short payment of duty regardless of the conditions expressly mentioned in the section for its application.

22. There is another very strong reason for holding that Dharamendra Textile could not have interpreted Section 11AC in the manner as suggested because in that case that was not even the stand of the revenue. In paragraph 5 of the decision the court noted the submission made on behalf of the revenue as follows :

"5. Mr. Chandrashekharan, Additional Solicitor General submitted that in Rules 96ZQ and 96ZO there is no reference to any mens rea as in section 11AC where mens rea is prescribed statutorily. This is clear from the extended period of limitation permissible under Section 11A of the Act. It is in essence submitted that the penalty is for statutory offence. It is pointed out that the proviso to Section 11A deals with the time for initiation of action. Section 11AC is only a mechanism for computation and the quantum of penalty. It is stated that the consequences of fraud etc. relate to the extended period of limitation and the onus is on the revenue to establish that the extended period of limitation is applicable. Once that hurdle is crossed by the revenue, the assessee is exposed to penalty and the quantum of penalty is fixed. It is pointed out that even if in some statues mens rea is specifically provided for, so is the limit or imposition of penalty, that is the maximum fixed or the quantum has to be between two limits fixed. In the cases at hand, there is no variable and, therefore, no discretion. It is pointed out that prior to insertion of Section 11AC, Rule 173Q was in vogue in which no mens rea was provided for. It only stated "which he knows or has reason to believe". The said clause referred to wilful action. According to learned counsel

what was inferentially provided in some respects in Rule 173Q, now stands explicitly provided in Section 11AC. Where the outer limit of penalty is fixed and the statute provides that it should not exceed a particular limit, that itself indicates scope for discretion but that is not the case here."

23. The decision in Dharamendra Textile must, therefore, be understood to mean that though the application of Section 11AC would depend upon the existence or otherwise of the conditions expressly stated in the section, once the section is applicable in a case the concerned authority would have no discretion in quantifying the amount and penalty must be imposed equal to the duty determined under sub-section (2) of Section 11A. That is what Dharamendra Textile decides."

5.1 In view of above, we do not find any merits in the submissions made by the appellants. The decision of Chandrapur Magnet Wires (P) Ltd. relied upon by the appellants is altogether in different context and has no applicability to the facts of the present case.

5.2 Accordingly appeal is dismissed.

(Order pronounced in the open court on 12.07.2022)

(Sanjiv Srivastava)
Member (Technical)

(Ajay Sharma)
Member (Judicial)

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