

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

WEST ZONAL BENCH

**EXCISE APPEAL NO: 1052 OF 2011
WITH
APPLICATION (MSIC) NO: 459 OF 2012
(on behalf of appellant)**

[Arising out of Order-in-Original No: 5/CEX/2003 dated 27th February 2003
passed by the Commissioner of Central Excise and Customs, Nashik.]

H H Patel & Company

Prabhat Galli, Ghat Road, Chalisgaon,
Dist: Jalgaon

... Appellant

versus

Commissioner of Central Excise & Customs

Kendriya Rajaswa Bhavan, RG Gadkari Chowk
Old Agra Road, Nashik - 422002

...Respondent

APPEARANCE:

Shri R G Sheth, Advocate for the appellant

Ms Anuradha S Parab, Assistant Commissioner (AR) for the respondent

CORAM:

**HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)**

FINAL ORDER NO: A /86240/2022

DATE OF HEARING:	22/06/2022
DATE OF DECISION:	22/12/2022

PER: C J MATHEW

This dispute, arising from challenge of M/s HH Patel & Company to order-in-original no. 13/CEX/2011 dated 31st March 2011 of Commissioner of Central Excise & Customs, Nashik confirming recovery of ₹ 26,80,492 under section 11A of Central Excise Act, 1944 along with applicable interest, is before us for the second time though, on this occasion, limited only to the recovery ordered under section 11AB of Central Excise Act, 1944 on the plea that there is a clear finding of the adjudicating authority that demand for the extended period did not lie.

2. The appellant is in the business of manufacturing 'loose zarda', by deploying raw materials in specific proportions to obtain batches of 3165 kg, and had been clearing the same to their branches upon discharge of duties of central excise on cost for the period from April 1997 to December 2001 which the jurisdictional authority had held to have been incorrectly computed after exclusion of certain essential elements. The impugned order held that the value computed at ₹ 32 per kg for the period from 25th April 2001 to 29th October 2001, and at ₹ 36 per kg for the period thereafter till 31st December 2001, instead of ₹ 42.34 per kg in the revised CAS-4 prepared by the cost accountant of the appellant resulted in short-payment of duty which is not in dispute. The grievance of the appellant stems from the claim that the provision for charging interest under section 11AB of Central Excise Act, 1944 is triggered only when suppression, fraud or

misrepresentation has caused evasion of duty.

3. It is contended by Learned Counsel for appellant that 'revenue neutrality' by way of credit having immunized assesseees from demand, as held by the Hon'ble Supreme Court in *Commissioner of Central Excise, Pune v. Coca-Cola India Pvt Ltd* [2007 (213) ELT 490 (SC)] and in *Commissioner of Customs & Central Excise v. Textile Corporation Marathwada Ltd* [2008 (231) ELT 195 (SC)] and by the Tribunal in *PTC Industries Ltd v. Commissioner of Central Excise, Jaipur-I* [2003 (159) ELT 1046 (Tri-Del)] and in *Hindustan Zinc Ltd v. Commissioner of Central Excise, Jaipur-II* [2008 (232) ELT 687 (Tri-Del)], section 11AB of Central Excise Act, 1944 was also clearly not applicable. Reliance was placed on the decision of Hon'ble High Court of Karnataka in *Commissioner of Central Excise, Bangalore-III v. Bharat Heavy Electricals Ltd* [2010 (257) ELT 369 (Kar)] and of the Tribunal in *Commissioner of Central Excise, Vapi v. Subray Catal Chemical P Ltd* [2010 (261) ELT 1170 (Tri-Ahmd)] with special emphasis on the former for distinguishing the applicability of the decision of the Hon'ble Supreme Court in *Commissioner of Central Excise, Pune v. SKF India Ltd* [2009 (239) ELT 385 (SC)].

4. It is the contention of Learned Authorized Representative that liability to discharge interest being an essential condition for not

proceeding with demand under section 11A of Central Excise Act, 1944 stands decided by the Hon'ble Supreme Court in *re SKF India Ltd.*

5. On perusal of the decision of the Hon'ble of High Court of Karnataka in *re Bharat Heavy Electricals Ltd* holding that

'6. *Having heard the counsel on both sides and on perusal of the material on record, we find that the show cause notice issued on 19-10-2004 was not in respect of any demand made regarding non-payment of duty on account of there being a price variation, but the demand made was only with regard to delayed payment of duty and for payment of interest and penalty. To the said show cause notice, reply has been given by the assessee by contending that in the first place, when there was actual removal of the goods and the appropriate duty has been paid based on the price of the goods. In the second place, when there was a transaction when there was escalation in the cost of goods with regard to the said price variation also there had been a payment of duty and hence, there was no delay in payment of duty. Having regard to the contents of the show cause notice and the reply, we are of the view that in the first instance there has been no demand made for payment of duty. In fact, such a demand could not have been made considering the fact that the respondent-assessee had paid the duty on the difference in the price and therefore, the differential duty was paid for the relevant period. In the circumstances, the provisions envisaged under Section 11AB of the Act are not applicable to the facts of the present case as in the instant case there has been no determination of the duty nor there has been short payment of duty under sub-section (2B) of Section 11A. Section 11AB is applicable and interest*

on delayed payment of duty arises only when any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded. The aforesaid circumstances are not applicable in the instant case. Therefore, the issuance of the show cause notice dated 19-10-2004 by invoking the provision of Section 11AB in the instant case is improper and not in accordance with the said section.

7. *Learned counsel for the appellant has however relied upon the decision of the Apex Court in the case of Commissioner of Central Excise, Pune v. SKF India Ltd. [2009 (239) ELT 385 (SC)] to contend that the said provision is applicable on the facts of the present case also. We have perused the said decision and we find that we are unable to accept the contention of the learned counsel for the appellant that the said case applies to the facts of the present case. It is to be noted that in the said decision, the facts were that the assessee had demanded from its customers, the balance of the higher price by virtue of the retrospective revision of the price and therefore, on the date the goods were cleared, the differential duty had to be paid and the same had not been done which was held to be a short payment of duty as the differential duty was paid only later when the assessee issued supplementary invoices to the customers demanding the balance amounts. Under the said circumstances, the Apex Court held that it was a case of short payment of duty though it was not intentional and without any allegation of deceit. The facts of the present case are that after the goods were initially cleared and the appropriate duty had been paid subsequently, the price escalation was due to the increase in input labour and other costs which was determined by the All India Industrial Price Indices and by the Reserve Bank of India communicated by All India Electrical Manufacturers Association. In terms of the said direction, the supplementary*

invoices were issued to facilitate the recovery of the expenditure of cost escalation and the enhanced duty thereon was paid. Therefore, as on the date the goods were cleared initially, if such a price escalation had not taken place, then the assessee could not foresee, the subsequent escalation in price. However, in the instant case the assessee paid duty on the differential price also. Therefore, we cannot apply the said decision to the present case.'

and of that of the Hon'ble Supreme Court in *re SKF India Ltd* holding that

'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 interestIt 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.

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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.’

it is evident that the facts rest upon entirely different circumstances.

6. It is clear that the decision in *re SKF India Ltd* has firmly established the principle that arising from the liability for duties of central excise devolving on the assessee at the price existing at the time of clearance, notwithstanding subsequent receipt of differential, interest under section 11AB of Central Excise Act, 1944 would have to be discharged for termination of proceedings under section 11A of Central Excise Act, 1944. On the other hand, in *re Bharat Heavy*

Electricals Ltd, the principle established was that section 11AB of Central Excise Act, 1944 could not be invoked independently of section 11A of Central Excise Act, 1944 rendered superfluous owing to prompt discharge of tax liability on escalation of price.

7. In the impugned proceedings, with confirmation of duty liability under section 11A of Central Excise Act, 1944, the claim of factual matrix identical with that in *re Bharat Heavy Electricals Ltd* does not find favour. Therefore, the liability to pay interest on duties short-paid at the time of clearance of goods for captive consumption does not get erased. The interest liability had not been discharged at the time of payment of differential duty and, hence, the essential precondition for dropping of further proceedings had not been complied with. Inevitably, the confirmation of differential duty necessarily has interest liability appended to it.

8. We, therefore, find no reason to interfere with the order of the original authority. Accordingly, the appeal is dismissed.

(Order pronounced in the open court on 22/12/2022)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)