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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**CENTRAL EXCISE APPEAL NO.115 OF 2014
WITH
CENTRAL EXCISE APPEAL NO.120 OF 2014
WITH
CENTRAL EXCISE APPEAL NO.121 OF 2014**

CEAT Limited ..Appellant

-Versus-

The Commissioner of Central
Excise & Customs, Nashik ..Respondent

.....

Mr. V. Sridharan, Senior Counsel, a/w Mr. Jas Sanghavi for the Appellant.
Mr. Pradeep S. Jetly for the Respondent.

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**CORAM: S.C. DHARMADHIKARI
AND
N. W. SAMBRE, JJ.**

DATE :- 6th FEBRAURY, 2015.

PC.:

These Appeals by the Assessee challenge the order passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench, Mumbai, dated 24th January, 2014.

2] Since perusal of this order reveals that there are substantial questions of law, we proceed to admit these Appeals on the following substantial questions of law:-

“(i) Whether in the facts and circumstances of the case, the Appellate Tribunal is correct in holding that interest is payable on differential duty arising on finalization of provisional assessment under Rule 7 of Central Excise Rules, 2002?

(ii) Whether the Appellate Tribunal is correct in not following two binding precedents of this Court reported at Ispat Industries – 2010 (259) ELT 662 (Bom.) & Tata Motors – Order dated 1.2.2012 in Central Excise Appeal No.54 of 2011?”

3] Since extensive arguments of both sides have been heard, by consent of parties, we proceed to dispose of these Appeals finally.

4] The facts necessary to appreciate the arguments of the learned Senior Counsel, appearing for the Assessee and the Advocate of the Revenue are that the Appellants engaged themselves, inter alia, in manufacture of tyres, tubes and flaps falling under Chapter Heading 40 to the First Schedule of the Central Excise Tariff Act, 1985. The period relevant for our purpose is April 2010 to March 2011. The Appellant cleared the manufactured goods, to their depot/C & F Agent etc. for subsequent sale in the replacement market and secondly, the original equipment manufacturers or other buyers from the factory gate.

5] They cleared the aforesaid manufactured goods on payment of

central excise duty as per the value determined in terms of section 4(1)(a) and section 4(1)(b) of the Central Excise Act. Thus, the Assessee paid the duty on the transaction value/normal transaction value as the case may be. The Assessee has set out the details, the mode of computation and the tax amount and stated that in cases of clearance of their goods to depot/distribution centres/C & F Agencies for sale in the replacement market, the normal transaction value, namely, the price actually to be realized was not known. This was because the Assessee claimed certain deductions and permissible in terms of this statute. Since these deductions could not be quantified they were determined ad hoc. In the light of the above, it was not possible for the Assessee to do the self assessment at the time of clearance. Therefore, the Appellants cleared the manufactured goods on provisional assessment basis under Rule 7 of the Central Excise Rules, then, prevailing.

6] The Appellants pointed out to the Revenue as to how at the end of each financial year, they obtained a cost accountant certificate and in relation to the quantification of discount but we are not concerned with this in any further details. Suffice it to note that the Appellants forwarded the requisite documents and records to the jurisdictional Assistant Commissioner/Deputy Commissioner of Central Excise and also the Range

Superintendent of Central Excise for finalization of the provisional assessment for the particular financial year. While furnishing the aforesaid details to the concerned authorities, pertinently, the Appellants also paid the differential duty without waiting for normal order of Deputy/Assistant Commissioner finalizing the provisional assessment. Thus, during the relevant period the Appellants-Assessee had paid the differential duty amount before passing of order for finalization of assessment. The details thereof are provided at para 17 page 6 of the paper book. The final assessment order came to be passed on 4th January, 2012 and finalizing the provisional assessment for the financial year 2010-2011.

7] It is in these circumstances that a notice to show cause-cum-demand came to be issued on 14th September, 2012 seeking to recover from the Assessee the interest of Rs.5,11,090/- under Rule 7(4) of the Central Excise Rules read with section 11AB of the Act on the amount of differential duty paid on the finalization of provisional assessment by the Appellants during the relevant period.

8] The Assessee replied to this notice by their letter dated 9th November, 2012 and raised the following contentions;-

- (i) Interest liability under Rule 7(4) of the Rules arises only after passing of final assessment order. Therefore, interest can be charged only for the period subsequent to the finalization of the assessment;
- (ii) The amount of differential duty on which demand of interest is proposed was paid well before the date of finalization of the assessment order;
- (iii) As per the provisions of section 11AB of the Act read with section 11A(3(ii)(b) of the Act, the relevant date for levying the interest is the date of final assessment. Further, the provisions of section 11AB of the Act shall come into play when the provisional assessment is finalized. Reliance was placed on the decision of the Appellate Tribunal in the case of CCE V/s. Dhariwal Tobacco Products – 2005 (180) ELT 451 (T).
- (iv) Interest is liable to be paid from the month following the month in which assessments were finalized. In the instant case, they have paid the differential duty before the finalization of the assessments. Therefore, no interest is liable to be paid. Reliance was placed on decision of the Appellate Tribunal in case of MSEB Pole Factor V/s. CCE – 2005 (187) ELT 209(T).

9] The Assessee placed reliance upon the decisions of the Tribunal and the order passed by this Court in the case of Tata Motors V/s.

Commissioner of Central Excise reported in 2011 (269) ELT 415 (T) and in the case of Ispat Industries V/s. Commissioner of Central Excise reported in 2007 (209) E.L.T. 280.

10] The grievance of the Appellant was that none of these contentions and issues were considered by the Additional Commissioner of Central Excise and he confirmed the demand by his order dated 27th December, 2012 termed as Order in Original.

11] An Appeal was preferred to the Commissioner (Appeals) Central Excise and Customs, Nasik. That Commissioner (Appeals) dismissed the Appeal of the Assessee on 29th May, 2013. Aggrieved by the aforesaid orders, the Appellant approached the Customs, Excise and Service Tax Appellate Tribunal (CESTAT), by the impugned order and that Appeal also has been dismissed.

12] Mr. Sridharan, learned Senior Counsel, appearing in support of this Appeal would submit that the Tribunal proceeded on a total misreading of the Rules. On a plain reading of Rule 7(4) of the Central Excise Rules, 2002, the liability to pay interest would arise only if an amount payable is determined consequent to the final assessment. Thus, the first part of the

Rule has to be attracted and if that is attracted and is applicable, then, alone there is an obligation to pay interest. In other words, the liability to pay interest does not arise unless the finalization of the assessment results in any additional or differential liability. Once that assessment is determined, then, on that the interest is leviable and in terms of the later part of the Rule. If this is how the Rule is read and must be read, then, in the present case the Appellant has no liability to pay the interest. The Appellant has paid even the differential duty prior to the finalization of the assessment. Therefore, it is not as if the liability arises on finalization of the assessment. In these circumstances, the Revenue cannot recover interest and which is not provided by law.

13] Mr. Sridharan would rely upon the compilation of orders interpreting this Rule and rendered by the Tribunal in the case of Ispat Industries Ltd. V/s. Commissioner of Central Excise reported in 2007 (209) E.L.T. 280, Tata Motors Ltd. V/s. Commissioner of Central Excise reported in 2008(226) E.L.T. 563. He would submit that the view taken in decision of Ispat Industries by the Tribunal has been approved by this Court inasmuch as the Revenue's Appeal came to be dismissed. If the Revenue's Appeal was dismissed in that case and as well in the case of Ispat Industries, then, the Tribunal seriously erred in law in maintaining

the order passed by the Commissioner and the Appellate Authority. In other words, the Assessee's Appeal should have been allowed rather than dismissed by the Tribunal.

14] In support of a further submission and on law that a liability to pay interest arises only if there is a specific provision in a taxing statute, Mr. Sridharan would rely on the Constitution Bench of the Hon'ble Supreme Court in the case of J. K. Synthetics Ltd. V/s. Commercial Taxes Officer reported in (1994) 4 SCC 276 wherein it is held that when a statute levies a tax it does so by inserting a charging section by which a liability is created or fixed and then proceeds to provide the machinery to make the liability effective. It, therefore, provides the machinery for the assessment of the liability already fixed by the charging section, and then provides the mode for the recovery and collection of tax, including penal provisions meant to deal with defaulters. Provision is also made for charging interest on delayed payments. Mr. Sridharan, therefore, submits that the view taken by this Court as also the Tribunal in the case of M/s. Ispat Industries (supra), Tata Motors (supra) accords with this principle. Following them, we must allow this Appeal.

15] On the other hand, Mr. Jetly would submit that this Appeal does not

raises any substantial questions of law. The Tribunal's view is fair, just and proper. The Tribunal has applied the principle that if there is a liability to pay interest and which relates back to the the date of determination, then, any process or method by which such tax, which is due and legitimately recoverable, is paid belatedly, the interest on the same must be charged. The interest is, therefore, payable in the present case and merely because the Assessee has preempted the recovery by making the payment of differential duty before finalization of the assessment does not mean the liability to pay interest ceases. It still very much subsists and that is how Rule 7(4) must be read. It is futile to urge that two interpretations are required to be placed and, namely, on the first and second part of Rule 7(4). He would support the Tribunal's order in its entirety and by relying upon the judgment of the Hon'ble Supreme Court in the case of Commissioner of Central Excise, Pune V/s. SKF India Ltd. reported in 2009 (239) E.L.T. 385. He would also rely upon another judgment of the Hon'ble Supreme Court and which has been rendered in the case of Commissioner of Central Excise V/s. International Auto Ltd. reported in 2010 (250) E.L.T. 3.

16] Mr. Jetly submits that now the larger Bench decision of the Tribunal is available in the case of Cadbury India Ltd. V/s. Commissioner of

Customs and Central Excise, Pune-I reported in 2008(232)E.L.T. 224 and which completely covers the controversy. The larger Bench follows the Hon'ble Supreme Court's judgments in the cases referred above and equally, distinguishes those rendered by it earlier and confirmed by this Court. Mr. Jetly also placed reliance upon a judgment of the Division Bench of Karnataka High Court in the case of Commissioner of Central Excise, Mysore-I V/s. J. K. Industries Limited reported in 2011 (268) E.L.T. 168. He, therefore, submits that the Appeal be dismissed.

17] For a proper appreciation of the rival contentions, we would reproduce Rule 7. Rule 7 of the Central Excise Rules, 2002 and applicable at the relevant time read as under:-

“RULE 7. Provisional Assessment. – (1) Where the assessee is unable to determine the value of excisable goods or determine the rate of duty applicable thereto, he may request the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, in writing giving reasons for payment of duty on provisional basis and the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, may order allowing payment of duty on provisional basis at such rate or on such value as may be specified by him.

(2) The payment of duty on provisional basis may be allowed, if the assessee executes a bond in the form prescribed by notification by the Board with such surety or security in such amount as the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, deem fit, binding the assessee for payment of difference between the amount of duty as may be finally assessed and the amount

of duty provisionally assessed.

(3) The Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, shall pass order for final assessment, as soon as may be, after the relevant information, as may be required for finalizing the assessment, is available, but within a period not exceeding six months from the date of the communication of the order issued under sub-rule(1) :

Provided that the period specified in this sub-rule may, on sufficient cause being shown and the reasons to be recorded in writing, be extended by the Commissioner of Central Excise for a further period not exceeding six months and by the Chief Commissioner of Central Excise for such further period as he may deem fit.

(4) The assessee shall be liable to pay interest on any amount payable to Central Government, consequent to order for final assessment under sub-rule (3), at the rate specified by the Central Government by notification issued under section 11AA or section 11AB of the Act from the first day of the month succeeding the month for which such amount is determined, till the date of payment thereof.

(5) Where the assessee is entitled to a refund consequent to order for final assessment under sub-rule(3) subject to sub-rule(6), there shall be paid an interest on such refund at the rate specified by the Central Government by notification issued under section 11BB of the Act from the first day of the month succeeding the month for which such refund is determined, till the date of refund.

(6) Any amount of refund determined under sub-rule (3) shall be credited to the Fund :

Provided that the amount of refund, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to

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(a) the duty of excise paid by the manufacturer, if he had not passed on the incidence of such duty to any other person; or

(b) the duty of excise borne by the buyer, if he had not passed on the incidence of such duty to any other person.”

18] That Rule is Entitled “Provisional Assessment”. A bare perusal of

sub-rule (1) would indicate as to how in case the Assessee is unable to determine the value of excisable goods or determine the rate of duty applicable thereto, he may request the Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, in writing giving reasons for payment of duty on provisional basis. The provisional duty has, then, to be determined by either of these Commissioners and by passing an order. The crucial words, “may order allowing payment of duty on provisional basis at such rate or on such value as may be specified by him” would indicate further as to how even a provisional assessment has to be made by order of these authorities. This has to fix the rate or value. Thereafter sub-rule(2) postulates payment of duty on provisional basis but on the Assessee executing a bond in the form prescribed by notification by the Board with such surety or security in such amount as these Commissioners may deem fit. This would bind the Assessee to payment of difference of the amount of duty as may be finally assessed and the amount of duty provisionally assessed. Then, comes sub-rule (3) where a period is prescribed for finalizing the assessment. Then, comes sub-rule (4) by which a liability to pay interest on any amount payable to Central Government, consequent to order for final assessment under sub rule (3), at the rate specified by the Central Government by notification issued under the relevant statutory provision. The interest is payable from

the date specified in the later part of sub-rule(4). What the Tribunal found in this case is that the Assessee had before finalizing of the assessment remitted or paid the differential duty. Thus, the assessment provisionally made resulted in payment of that sum and specified in the provisional assessment order. Further, the Assessee volunteered on its own to determine the liability of duty and the amount in that behalf came to be paid. That was before the finalization of the assessment. There resulted nothing consequent to finalizing of assessment. The amount as received earlier, namely, on provisional assessment and the later voluntary exercise of the Assessee was the sum payable and recoverable. It is in these circumstances that the Tribunal proceeded on the footing that Rule 8 will be of the assistance in construing Rule 7 (4). That part of the discussion in the Tribunal's order is at para 7 page 37 to 39 of the paper book. Then, the Tribunal placed upon its larger Bench decision in the case of Cadbury India Ltd. (supra) and following it so also that of the High Court of Karnataka dismissed the Assessee's Appeal. The relevant finding of the Tribunal at para 13 is that the Assessee has paid the duty before formal finalization order issued by the Deputy/Assistant Commissioner will not make any difference to the legal position.

19] Now, therefore, we will have to determine as to whether the larger

Bench decision of the Tribunal dealt with any such controversy and similar to one noted by us in this case.

20] A careful perusal of the larger Bench decision in Cadbury India Ltd. (supra) would reveal that M/s. Cadbury India Ltd. manufacture cocoa and chocolate products. The interim products manufactured and captively consumed by them were provisionally assessed for certain periods. The Assessments were finalized by the Assistant Commissioner by four orders. All these details can be obtained from para 2 of the Tribunal's larger Bench decision. Prior to final assessment, the Assessee paid the entire differential duty on their own accord. No further duty was payable on final assessment. However, the Assistant Commissioner, while finalizing the assessment, directed the Range Superintendent to charge interest as applicable and the same was to be charged from the first day of the month succeeding the month for which such amount was determined. The Appellants, namely, Cadbury India Ltd. challenged these orders and were unsuccessful. Then, they approached the Tribunal. There were several Single Member Bench orders of the Tribunal and one decision of the Division Bench of the Tribunal holding that interest, if any, is payable from the first day of the month succeeding the month in which the Assessment is finalized, that is how the two issues or questions in para 7 of the larger

Bench order have been framed. The Tribunal, then, referred to the rival contentions, the Rule and all the decisions brought to its notice. It referred to several situations and in paras 28, 29, and 30 on which heavy reliance is placed by Mr. Jetly, the Tribunal held as under:-

“28. The learned counsel of the appellants has laid great emphasis on the Rule 7(4) of the Central Excise Rules, 2002 which states that an assessee shall be liable to pay interest on any amount payable to the Central Government, consequent to an order for final assessment under sub-rule(3), which means that question of paying interest would arise only if on final assessment when Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise comes to a conclusion that amount is due and payable by the assessee towards duty. If no dues are payable by the assessee upon finalization, inasmuch as the entire amount has been paid before the finalization, then the provisions of Rule 7(4) will not come into picture. In support of this argument, he referred to the provisions of section 18(3) of the Customs Act, 1962, which deal with the identical situation and say that the importer/exporter shall be liable to pay interest on any amount payable to the Central Government, consequent to an order for final assessment under sub-section 2, at the rate fixed by the Central Government under section 28AB from the first day of the month in which duty is provisionally assessed till the date of payment thereof. It was pleaded that under the Customs Act, the intention of the Government to charge interest from the first day of the month in which the duty is provisionally assessed has been made clear, which is not so in the case of Rule 7(4) of Central Excise Rules, 2002. We are not impressed by this plea of the appellants. They have, while disputing the liability to pay interest from the month for which the assessment was made provisional, have referred to Rule 7(4), which says that an assessee shall be liable to pay interest, consequent to an order for final assessment and, therefore, once the entire amount has been paid before final assessment, the question of payment of interest, consequent to

order of final assessment does not arise. However, the learned counsel has failed to notice that similar wording appear in section 18(3) of the Customs Act, 1962, which also say that importer/exporter shall be liable to pay interest on any amount payable to the Central makes it clear that even under the Customs Act, the legal liability to pay interest arises consequent to finalization of assessment and not before that. Thus, the provisions of Customs Act in no way, support the plea of the learned counsel of the appellants. The only difference in the Customs Act and the Central Excise Act is that, while under Customs Act, the liability to pay interest arises from the month, in which assessment was made provisional, whereas under the Central Excise Act, the liability to pay interest arises from the first day of the month succeeding the month for which the assessment was finalized. This is in the view of the fact that under the Central Excise Act, the duty liability can be discharged by the 5th of the month following the month in which the goods were cleared, whereas under the Customs Act it has to be discharged before the clearance of the goods.

29. We further note that in the scheme of the Central Excise, the Returns are filed on monthly/quarterly basis and the assessments are made on monthly or quarterly basis. Therefore, the provisional assessment has to be finalized for every month separately and it is for this reason that Rule 7(4) refers to the month for which the assessment is finalized. As assessment is to be finalized for each and every month separately, the words used in Rule 7(4) are for the month as the differential duty is to be paid for every month.

30. In view of this, we are of the view that interest is required to be paid even when the differential amount is paid before the finalization of assessment.”

21] Thus, the Tribunal concluded that interest is required to be paid even when the differential duty is remitted before the finalization of the

assessment. The Tribunal has, in arriving at this conclusion relied upon the judgments delivered and from time to time in case of interest.

22] Mr. Jetly has relied upon several Supreme Court decisions for interpreting Rule 7(4). With his assistance, we would refer to the judgment in case of Commissioner of Central Excise, Pune V/s. SKF India Ltd. (supra). There the Assessee was engaged in the manufacture and sale of ball-bearings and textile machine parts. It sold goods manufactured by it on certain prices on payment of excise duty leviable on price on which the goods were sold. Later on, there was a revision of prices with retrospective effect. Following the revision the Assessee demanded from its customers the balance of the higher prices and issued to them supplementary invoices. At that time it also paid the differential duty on the goods sold earlier. The Revenue took the view that the Assessee was liable to pay interest on differential duty. The Assessee was given notice demanding interest on delayed payment of duty under section 11AB of the Central Excise Act and further asking it to show cause why penalty should not be imposed. The Assessee replied and urge that payment of differential duty was made by it at the time of issuing supplementary invoices to the customers and there was no question of charging interest and at least any penalty. The Assistant Commissioner

confirmed the demand of interest and imposed penalty as well. The matter was carried in Appeal, the Commissioner allowed the Assesee's Appeal and set aside the order of the Assistant Commissioner. The matter was carried to the Customs, Excise and Service Tax Appellate Tribunal by the Revenue but its Appeal was dismissed. Thereafter the Tribunal's order was challenged in the Hon'ble Supreme Court. It is in this backdrop that in para 4 of the judgment, the Hon'ble Supreme Court referred to section 11 A which enables recovery of duties not levied or not paid or short levied or short paid or erroneously refunded and interest on delayed payment of duty under section 11AB.

23] That postulates if any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded, the person who is liable to pay duty as determined under sub section (2) of section 11AB or has paid the duty under section 2(B) of section 11A shall in addition to the duty be liable to pay interest at such rate not below at that time, namely, 10% and not exceeding 36%. Incidentally, sub section (2B) of section 11A deals with the cases where any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded, the person, chargeable with the duty, may pay the amount of duty (on the basis of his own ascertainment of such duty or on the basis of

duty ascertained by a Central Excise Officer) before service of notice on him under sub section(1) in respect of the duty, and inform the Central Excise Officer of such payment in writing, who, on receipt of such information shall not serve any notice under sub-section (1) in respect of the duty so paid. The proviso thereto and the explanations would clarify as to how the Central Excise Officer may determine the amount of short payment of duty, if any, which in his opinion has not been paid by such person and, thereafter, he may proceed to recover it. The explanations take care of fraud, collusion or any willful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or for the rules made thereunder with intent to evade payment of duty. Explanation 2 declares that the interest under section 11AB shall be payable on the amount paid by the person under this sub-section and also on the amount of short payment of duty, if any, as may be determined by the Central Excise Officer, but for this sub-section. Sub-section(1) of section 11A enables the Central Excise Officer to serve a notice within one year from the relevant date on the person chargeable with the duty which has not been levied or paid or which has been short levied or short paid or to whom the refund has been erroneously made, requiring him to show cause why he should not pay the amount specified in the notice.

24] When such was the legal position and emerging from the reading of the Act itself that the Hon'ble Supreme Court in the case of SKF India Ltd. (supra) concluded that if the object of the law is to state clearly and unambiguously the obligations of the person whom the law addresses and to spell out plainly and without any confusion the consequences of failure to discharge the obligations cast by the law, then, the four sections of the Act fall miles short of the desired objective. The Hon'ble Supreme Court had to analyze these sections and that is how from paras 9 to 14 it proceeded to do so. These paras are very crucial and read as under:-

“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 failing in the two groups lead to different consequences and are dealt with differently. Section 11A, however allow the assessee 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 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 Rules made thereunder with intent to evade payment of duty", under the scheme of the four Sections (11A, 11AA, 11AB and 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. Sucha 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 application 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 clear 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.”

25] It is in these circumstances that the Hon'ble Supreme Court reversed the view taken by this Court.

26] In the case of Commissioner of Central Excise V/s. International Auto Ltd. (supra) similar situation of price difference arising on the date of removal and the enhanced price at which the goods were ultimately sold, the Department issued a show cause notice proposing to levy interest on the differential duty, paid by the Assessee, under section 11AB of the Central Excise Act, 1944. Following the view taken in SKF Ltd. (supra) the Appeal of the Revenue also came to be allowed in International Auto Ltd.

27] The High Court of Karnataka at Bangalore dealt with the situation where J. K. Industries Limited had two plants. They requested for provisional assessment in respect of clearances effected to their depots for effecting further sales from 1st July, 2000 onwards. Based on the request of the respondents, provisional assessment orders were passed by the Department in respect of the financial year 2002-03 in respect of both the plants. At the time of ordering the provisional assessment, various abatements that are covered under the provisional assessment, the mode of computation of value were not enumerated. Hence, certain particulars were called for from the Assessee. The Assessee furnished these particulars. Consequent to the order of provisional assessment, the Respondents were required to furnish the requisite bond and security in time. They did not comply with the same. Therefore, the show cause notice proposing to re-determine the transaction value and to recover the consequential differential duty was issued. Thereafter the final assessment orders were passed on 4th March, 2005 and 7th March, 2005. In the said orders, it was held that interest involved is required to be paid by the Respondent-Assessee in accordance with Rule 7(3) of the Central Excise Rules, 2002. That is how the sum was claimed towards interest. Interest was also claimed in terms of Rule 7(4) read with section 11AA and 11BB of the Central Excise Act.

28] It is in this backdrop that the analysis of the legal provisions of the Rules came to be made from para 8 onwards on which heavy reliance has been placed by Mr. Jetly. Thus, upon finalization of the assessment, the liability to pay interest and in terms of Rule 7(4) was not in dispute but the time from which it became leviable and payable. The argument that determination was not made was negated and it was held that the liability to pay duty is finally determined with the passing of the final assessment order is the conclusion of the Tribunal. Therefore, interest is liable to be paid within one month from the date of final assessment order was the conclusion recorded. Therefore, the liability to pay duty is finally determined with the passing of the the final assessment order and also the obligation to pay arises only when the Assessee does not pay the duty as per that order. This conclusion was not upheld by the High Court of Karnataka and in the teeth of the language of Rule 7(4). The observations and findings in para 15 would denote that the High Court of Karnataka held that the date of provisional assessment and the date of final assessment have no relevance in deciding the payment of interest. The date on which duty is payable is provided under the Rules. If the duty determined to be paid under the final assessment is not paid on the due date, if it is short paid, not only the Assessee has to pay the balance duty, he is also liable to pay interest on such short payment of duty from the

due date. The only advantage is, he will get the benefit of one month from the said due date as is clear from Rule 7(4). The order passed by the Tribunal holding that interest is payable after one month from the date of final assessment order is erroneous. This is what the High Court held. In the aforementioned circumstances, when the larger Bench decision in Cadbury India Ltd. relied upon the aforesaid view of the High Court of Karnataka, it lost sight of the fact that the High Court of Karnataka was considering a somewhat different situation. There was nothing therein which would enable the larger Bench to hold that the interest which is contemplated by Rule 7(4) is payable in all cases and, therefore, even if the Assessee makes payment of the differential duty prior to finalization of assessment, interest would still be leviable, payable and recoverable in terms of Rule 7(4). For that the Tribunal took assistance of section 11AA and section 11BB.

29] We do not find this conclusion of the Tribunal to be correct. As has been rightly urged before us that when a statute levying and imposing tax makes specific provision for recovery of interest on delayed payment only, then, such interest and the liability to pay the same arises. In that regard, the Constitution Bench judgment in the case of J. K. Synthetics Limited V/s. Commercial Taxes Officer (supra) referred to the Rajasthan Sales Tax

Act, 1954. It referred to section 11-B at page 281 of the judgment and at page 282 in para 5 it reproduced sub-sections(2) and (2-A) of section 7. It, then, held that a three Bench decision of the Hon'ble Supreme Court in the case of *Associated Cement Co. Ltd. V/s. CTO reported in (1981) 4 SCC 578* does not lay down the correct law. In para 11, it reproduced the majority conclusions in the case of *Associated Cement Co. Ltd.* In para 13, the Hon'ble Supreme Court reproduced the minority view and in paras 16 and 17 it held thus:-

*“16. It is well-known that when a statute levies a tax it does so by inserting a charging section by which a liability is created or fixed and then proceeds to provide the machinery to make the liability effective. It, therefore, provides the machinery for the assessment of the liability already fixed by the charging section, and then provides the mode for the recovery and collection of tax, including penal provisions meant to deal with defaulters. Provision is also made for charging interest on delayed payments, etc. Ordinarily the charging section which fixes the liability is strictly construed but that rule of strict construction is not extended to the machinery provisions which are construed like any other statute. The machinery provisions must, no doubt, be so construed as would effectuate the object and purpose of the statute and not defeat the same. (See *Whitney V/s. IRC, CIT V/s. Mahaliram Ramjidas, India United Mills Ltd. V/s. Commissioner of Excess Profits Tax, Bombay and Gursahai Saigal V/s. CIT, Punjab*). But it must also be realised that provision by which the authority is empowered to levy and collect interest, even if construed as forming part of the machinery provisions, is substantive law for the simple reason that in the absence of contract or usage interest can be levied under law and it cannot be recovered by way of damages for wrongful detention of the amount. (See *Bengal Nagpur Railway Co. Ltd. V/s. Ruttanji Ramji and Union of India V/s.**

A. L. Rallia Ram). Our attention was, however, drawn by Mr Sen to two cases. Even in those cases, CIT V/s. M. Chandra Sekhar and Central Provinces Manganese Ore Co. Ltd. V/s. CIT, all that the Court pointed out was that provision for charging interest was, it seems, introduced in order to compensate for the loss occasioned to the Revenue due to delay. But then interest was charged on the strength of a statutory provision, may be its objective was to compensate the Revenue for delay in payment of tax. But regardless of the reason which impelled the Legislature to provide for charging interest, the Court must give that meaning to it as is conveyed by the language used and the purpose to be achieved. Therefore, any provision made in a statute for charging or levying interest on delayed payment of tax must be construed as a substantive law and not adjectival law. So construed and applying the normal rule of interpretation of statutes, we find, as pointed out by us earlier and by Bhagwati, J. in the Associated Cement Co. case, that if the Revenue's contention is accepted it leads to conflicts and creates certain anomalies which could never have been intended by the Legislature.

17. Let us look at the question from a slightly different angle. Section 7(1) enjoins on every dealer that he shall furnish prescribed returns for the prescribed period within the prescribed time to the assessing authority. By the proviso the time can be extended by not more than 15 days. The requirement of section 7(1) is undoubtedly a statutory requirement.”

30] In the case before this Court in Commissioner of Central Excise V/s. Ispat Industries Ltd. the facts were that differential duty was paid prior to the date of final assessment. The Division Bench in confirming the view of the Tribunal held as under:-

“2. This appeal has been admitted on the following question of law:
“Whether the CESTAT was right in holding that in terms of the provisions of Rule 7(4), respondent No. 1 could not be held liable to

pay the interest on the differential duty as the duty amount has been paid prior to the final assessment, especially when provisions of Rule 7(4) of Central Excise Rules, 2002 read with Section 11AB(2B) of Central Excise Act, 1944, explicitly stipulates that interest is payable on delayed payment of any amount, at the appropriate rates from the first day of the month succeeding the month for which such amount is determined till the date of payment thereof.

3. *Perusal of the order of the CESTAT [2007 (209) E. L. T. 280 (Tribunal) shows that in the present case, differential duty was paid prior to the date of final assessment. Interest under Rule 7(4) of the Central Excise Rules, 2002 is payable from the first date of the month succeeding the month for which such amount is determined by the final assessment till the date of payment. Since differential duty was paid even before the final assessment was made, the Tribunal has held that the respondent assessee is not liable to pay interest. In our opinion, no fault can be found with the order of the Tribunal. Accordingly, question raised by the revenue is answered in favour of the assessee and against the revenue. The appeal is disposed of. No order as to costs.”*

31] The Revenue carried a Appeal from the order passed in the case of Ispat Industries Ltd. to the Hon'ble Supreme Court but the Special Leave Petition was dismissed. In the case of Tata Motors, the Tribunal once again followed the view taken in Ispat Industries Ltd. and allowed the Assessee's Appeal.

32] In the case of Tata Motors, the provisional assessments were finalized but before finalizing the same, differential duty was paid and hence adjudicating authority only adjusted the amount of the duty already paid against the duty finalized. The Adjudicating Authority however, did

not make any order for the recovery of interest as provided under Rule 7(4) of the Central Excise Rules, 2002. The Revenue filed the Appeal against this order of the Adjudicating Authority to the Commissioner (Appeals). The Commissioner (Appeals) proceeded to pass an order in favour of the Revenue. That is how the Assessee approached the Tribunal and the Assessee's Appeal was allowed on the same reasoning as is to be found in the case of Ispat Industries Ltd. The Revenue approached this Court by filing Central Excise Appeal No.54 of 2011 against the view of the Tribunal in M/s. Tata Motors Ltd. and another but on 1st February, 2012 the Revenue's Appeal was dismissed.

33] We find from a reading of this judgment that the conclusion in the larger Bench decision of the Tribunal cannot be applied to cases which are expressly noted in M/s. Ispat Industries Ltd. and Tata Motors Ltd. Rule 7 and its sub-rules if read together would denote as to how the Revenue secures itself against any provisional assessment. If on a provisional assessment, certain amount of duty is paid, but it is not accurate and correct, then, the final assessment is contemplated on a finalization of the assessment. Upon finalizing, it is possible that the Revenue will determine the duty liability and to that of something more that has been recovered in the provisional assessment. When that exercise is finalized and

consequent thereon that the Assessee shall be liable to pay interest on any amount payable to the Central Government. Thus, the liability to pay interest arises on any amount payable to Central Government and consequent to order for final assessment under Rule 7 sub-rule (3). We are in agreement with the Assessee in the present case that the later part of sub-rule (4) is not attracted. The liability to pay interest on any amount payable to Central Government consequent to order for final assessment is not a situation to be found in the present case. It is not the argument of the Revenue that what was paid by the Assessee as differential duty and prior to finalizing of the assessment, is not correct, accurate or proper computation of the liability. Having found that the final assessment resulted in nothing due and payable to the Government, we do not find any justification then to recover interest. If the interest was to be recovered and was indeed payable on the date on which the Assessee made payment of differential duty and prior to finalization of the assessment, then, the Rule would have specifically said so. In the absence of any such stipulation in the Rules the dictum in the decision of the Hon'ble Supreme Court in J.K. Industries Ltd. would apply. If that principle can be applied, then, there was no liability to pay interest. If the liability to pay interest between the time or the period of provisional assessment and payment of differential duty until the final assessment

has to be read in the Rule, that is not possible. The interest in this case is not payable merely on equitable considerations. Such being the position, we do not find that the Tribunal was justified in dismissing the Assessee's Appeal. The Tribunal was also not justified in placing reliance upon its larger Bench decision. The larger Bench decision took assistance of the substantive provisions and particularly section 11A and section 11AB of the Act. We have already noted as to how section 11A(1) operates. The notice under the same can be issued provided there is a satisfaction reached in terms of that provision. That notice need not be issued in the cases which are dealt with by sub-section (2B) as held in SKF India Ltd. (supra). Therefore, that sub-section together with the proviso and explanation making specific provision for recovery of interest and enabling the Revenue to recover it, that the Hon'ble Supreme Court reached a conclusion that on price revision the Assessee was liable to pay interest on the differential duty. That was because he not only recovered the revised price but passed on the burden of the differential duty paid on the customer. It was not his later act but his prior act of raising supplementary invoices and, then, paying the differential duty which enabled the Revenue to recover interest and relying on the substantive provisions. That is how both the judgments should have been read. If the Tribunal's conclusion is upheld, the Revenue would face proceedings for

recovery of interest on the entitlement to refund in cases covered by Rule 7(5) of the Rules. If the differential duty paid and prior to finalization of Assessment exceeds the duty leviable in law, then, on final assessment the Assessee is entitled to refund. He may interest on the sum refunded from the date of payment. However, Rule (6) cannot be construed in that manner. Hence, the words “such amount is determined” appearing in Rule 7(4) and “such refund is determined” in Rule 7(5) are crucial. The determination is thus a relevant factor.

34] Before parting, we would reproduce the following conclusion in the impugned order of the Tribunal. The attention of the Tribunal was invited to the order passed by it in the case of Ispat Industries Ltd. and Tata Motors Ltd. and further the order of this Court upholding the same. Yet, the Tribunal observes as under:-

“We also note that the judgments of this Tribunal in the case of Ispat Industries Ltd. and Tata Motors Ltd. which were upheld by Hon'ble Bombay High Court are per incuriam as the details of various Rules as also the judgment of the Hon'ble Supreme Court, Hon'ble High Court of Karnataka and other judgments of this Tribunal were not brought to the notice of the Tribunal or the Hon'ble Bombay High Court. We also note some of these judgments are subsequent to the judgment in the case of Ispat Industries Ltd. and Tata Motors Ltd.”

35] It is unfortunate that the Tribunal ignores and brushes aside even

orders of this Court. Had the Tribunal noted the facts in Ispat Industries Ltd. and Tata Motors Ltd. it would have possibly concluded that those orders would bind it in this case. Possibly because it was inclined to follow its larger Bench decision, the facts in Cadbury were more or less identical, yet, it should not have held that this Court's orders are per incuriam. Per Incuriam is a Rule or a principle applicable only when a judgment brushes aside a statutory provision or a binding precedent. The co-ordinate bench cannot disregard or ignore a binding precedent unless it is found to be contrary to an express statutory provision or refuses to follow a binding decision of the Hon'ble Supreme Court of India or the jurisdictional High Court. In this regard, we would invite the attention of the Tribunal to the following paragraphs in the case of Assistant Collector of Central Excise, West Bengal V/s. Dunlop India Ltd. and Others reported in 1985(19) E.L.T. 22, para 9 and 10 reads as under:-

“9. We desire to add and as was said in Cassel and Co. Ltd. V/s. Broome – (1972) A.C. 1027, we hope it will never be necessary for us to say so again that 'in the hierarchical system of Courts' which exists in our country, 'it is necessary for each lower tier', including the High Court, to accept loyally the decisions of the higher tiers.' “It is inevitable in a hierarchical system of Courts that there are decisions of the Supreme appellate Tribunal which do not attract the unanimous approval of all members of the judiciary.... But the judicial system only works if someone is allowed to have the last word and that last word, once spoken, is loyally accepted.” The better wisdom of the Court below must yield to the higher wisdom of the Court above. That is the strength of the

hierarchical judicial system.

10. In Cassel V. Broome, commenting on the Court of Appeal's comment that Rookes V. Barnard – (1964) A.C. 1129 was rendered per incuriam, Lord Diplock observed,

“The Court of Appeal found themselves able to disregard the decision of this House in Rookes V. Barnard by applying to it the label per incuriam. That label is relevant only to the right of an appellate Court to decline to follow one of its own previous decisions, not to its right to disregard a decision of a higher appellate Court or to the right of a judge of the High Court to disregard a decision of the Court of Appeal.”

36] We would expect the Tribunal to be more careful and guarded hereafter. We say nothing more.

37] As a result of the aforesaid conclusions, the Appeals succeed. The questions of law are answered in favour of the Assessee and against the Revenue. There will be no orders as to costs.

(N. W. SAMBRE, J.)

(S.C. DHARMADHIKARI, J.)