

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 12.06.2015

CORAM

THE HONOURABLE MR. JUSTICE R.SUDHAKAR
AND
THE HONOURABLE MS. JUSTICE K.B.K.VASUKI

C.M.A. NO. 266 OF 2010

The Commissioner of Central Excise
No.1, Foulk's Compound
Anaimeadu, Salem 636 001.

... Appellant

- Vs -

1. M/s.Jayashree Cables &
Conductors Pvt. Ltd.
Gonur Post, Mettur Dam 634 404.

2. The Customs, Excise & Service
Tax Appellate Tribunal
South Zonal Bench, Chennai.

... Respondents

Appeal filed under Section 35-G of the Central Excise Act against the order dated 3.7.2009 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai, made in Final Order No.824/09 against the Order dated 15.01.2009 made in A.No.14 of 2009 CE(SLM) on the file of Commissioner of Customs and Central Excise(Appeals), Salem - 363 001 against the Order dated 24.03.2008 made in Order Sl.No.19 of 2008 (AC - Salem II) on the file of Assistant Commissioner of Central Excise, Salem II Division.

For Appellant : Mr. Vikram Ramakrishnan, ACGSC

For Respondent : Mr. N.Viswanathan for R-1

JUDGMENT
(DELIVERED BY R.SUDHAKAR, J.)

Aggrieved by the order passed by the Tribunal in allowing the appeal filed by the assessee, the Revenue/appellant is before this Court by filing the present appeal. This Court, vide order dated 8.2.2010, while admitting the appeal, framed the following substantial question of law for consideration :-

"Whether the Tribunal is correct in disregarding the rulings of the Supreme Court delivered in a similar case in the case of CCE, Pune - Vs - M/s.SKF India Ltd., reported in 2009 (239) ELT 385 (SC)?"

2. The respondent is engaged in the manufacture of conductors, cables and transformers falling under Chapter 76 and 85 of the Central Excise Tariff Act, 1985. The first respondent entered into a contract with TNEB in which contract there is a clause for price variation formula for the supplies made. The first respondent cleared the conductors and paid the duty on the provisional value certified in the purchase orders placed by TNEB under the said contract. However, supplementary invoices were raised by the first respondent and differential duty for a sum of Rs.26,63,848/= was paid. However, appropriate interest was not paid by the assessee, though it is liable to pay the same as per Section 11AB of the Central Excise Act. Therefore, a show cause notice was issued on the first respondent by the appellant demanding interest for belated payment of differential duty and also invoking the penalty clause. After due adjudication, the adjudicating authority held that supplementary invoices have been raised and on the basis of the same, payments were made, wherein obligation to pay duty arose and, accordingly, the adjudicating authority passed the order demanding interest of Rs.1,20,662/= under Section 11AB of the Central Excise Act for belated payment of duty and imposed an equal amount of penalty under Rule 25 of the Central Excise Rules, 2002 read with Section 11AC of the Central Excise Act. The relevant portion of the order is extracted hereinbelow for better clarity :-

"13. In the case of Spicer India Ltd. reported in 2007 (210) ELT 312 (Commr. Appl.), the Appellate Commissioner has held that

"Interest - Delay in payment of duty - Valuation arrived at on CAS 4 prepared on basis of previous years financial accounts - Valuation found on higher side when balance sheet for current year finalized, hence, duty paid thereon - Enhanced price becomes correct assessable value ab initio i.e., from date of clearance of goods - Assessee's contention that there was no delay, not correct - Section 11AB of Central Excise Act, 1944.

Interest - Delay in payment - Mens rea - Duty paid prior to issuance of show cause notice - Even if duty is paid prior to issue of show cause notice, interest under Section 11AB of Central Excise Act is recoverable, if case pertains to period from and after 11-5-2001 irrespective of whether it is a case of mens rea or not."

14. Also in the case of Inducto Casts - Vs - Commissioner of Central Excise & Customs, Vadodara-I, reported in 2007 (217) ELT 455 (Tri. - Ahmd.), the Hon'ble CESTAT held that

"Interest - Valuation (Central Excise) - Price escalation clause - Rate revised subsequent to removal of goods - Differential duty paid but interest not paid - Value at time of clearance provisional - amount received consequent to price escalation includible in transaction value - Even if provisional assessment is not sought, interest payable - Section 4 of Central Excise Act, 1944 - Rule 7 of Central Excise Rules, 2002.

Valuation (Central Excise - Transaction value - Purchase order with price escalation clause - Transaction value to include amount received after price revision for goods already cleared - Assessee having option of provisional assessment in impugned cases - Interest payable even if assessment not provisional - Section 4 of Central Excise Act, 1944 - Rules 6 and 7 of Central Excise Rules, 2002."

15. Applying the ratio of the above decisions that interest is payable on the amount received consequent to price escalation/variation, I am inclined to hold that the allegation made in the show cause notice that the demand of interest on the differential duty paid consequent on the upward revision of price due price variation clause, is maintainable in law and the same is liable to be recovered from the assessee under Section 11AB of the Central Excise Act, 1944."

3. In respect of the plea of time bar, the said plea was rejected by the adjudicating authority by recording the following reason :-

"16. With reference to the assessee's contention that the demand of interest is time barred since issued beyond a reasonable period of one year, I observe that no time limit has been specified in the Act/Rule to demand interest. The Hon' Tribunal also, in the case of Gujarat State Fertilizers & Chemicals Ltd. - Vs - CCE, Vadodara, had held that no time limit prescribed for demand of interest. Therefore, the assessee's contention fails before law since the demand of interest beyond the period of one year is sustainable."

4. Aggrieved against the said adjudication order, the respondent filed appeal before the Commissioner (Appeals). The Commissioner (Appeals), vide order dated 15.01.2009, confirmed the order of the adjudicating authority.

5. Against the said order, the first respondent/assessee preferred appeal to the Tribunal. The Tribunal, on considering the facts of the case, relying on the decision in the case of CCE, Vadodara - Vs - Chloritech Industries (2009 (235) ELT 17 (Guj.)), allowed the appeal filed by the assessee, against which the appellant/Department has preferred the present appeal.

6. Learned counsel appearing for the appellant/Revenue pleaded that the decision in Chloritech Industries case (supra - 2009 (235) ELT 17) came to be challenged by the Department in appeal before the Supreme Court and the matter was remanded and on remand, the Gujarat High Court, in CCE, Vadodara - Vs - Chloritech Industries (2014 (306) ELT 447 (Guj.)), following the decision of the Supreme Court in Commissioner of Central Excise, Pune - Vs - SKF India Ltd. (2009 (239) ELT 385), allowed the appeal filed by the Revenue. In the light of the above position of law, it is submitted by the learned standing counsel for the Department that the issue in relation to interest having been settled by the Supreme Court in SKF India case (supra), the order of the Tribunal is liable to be interfered with.

7. Per contra, learned counsel appearing for the first respondent/assessee, at the outset, contended that the decision of the Supreme Court, relied on by the appellant for getting the appeal admitted was passed after the order was passed by the Tribunal. The order of the Tribunal having been passed before the judgment of the Supreme Court, the order of the Tribunal cannot be found fault with. Further, the learned counsel for the first respondent/assessee raised a preliminary objection as to the maintainability of the case of the appellant contending that the appellant ought not to have filed the appeal in view of the National litigation policy of the Government issued by the Ministry of Finance, Department of Revenue, Central Board of Excise & Customs. vide Instructions dated 20.10.2010 in F.No.390/Misc./163/2010-JC, wherein the following instruction has been issued :-

"5. The Board has decided that appeals in the Tribunal shall not be filed where the duty involved or the total revenue including fine and penalty is Rs.1 Lakh and below. Similarly, in the case of High Courts, appeals should not be filed in cases where the duty involved or total revenue including fine or penalty is Rs.2 Lakhs and below. While deciding the thresholds mentioned above the duty involved shall be

the decisive element. For example, in a case involving duty of Rs.1 Lakh with mandatory penalty of Rs.1 Lakh besides any other penalty imposed under the relevant provisions of Law, no appeal shall henceforth be filed in the Tribunal as the duty involved is within the monetary limit of Rs.1 Lakh. Similarly, if the duty involved in a case is Rs.2 Lakhs with equal mandatory penalty and any other penalty imposed under the Law in force at the relevant time, no appeal shall be filed before the High Court."

8. It is further contended by the learned counsel for the respondent that in view of the above instruction, for preferring an appeal, monetary limit, insofar as duty component is concerned, is fixed and only if the monetary limit exceeds Rs.2 Lakhs, appeal can be filed. It is the further contention of the learned counsel for the assessee that the case on hand is not a case falling under Section 11A, as is evident from the show cause notice and, therefore, no interest could be demanded invoking the decision of the Supreme Court in SKF India case (supra).

9. Heard the learned standing counsel appearing for the appellant/Revenue and the learned counsel appearing for the respondent/assessee and perused the materials available on record and also the judgments relied on by the learned counsel appearing for the parties.

10. Even before embarking upon deciding the contentions raised by the learned counsel on either side, on merits, it is to be observed that the question of law has been wrongly framed, as rightly pointed out by the learned counsel appearing for the assessee. The decision of the Supreme Court in SKF India case (supra) came to be passed subsequent to the decision of the Tribunal and, therefore, the question of law raised that the Tribunal has not considered the decision in SKF India case (supra) is incorrect.

11. However, before proceeding to venture into the merits of the issue, it would be relevant to decide the preliminary objection raised by the learned counsel for the respondent/assessee. The preliminary objection of the learned counsel for the respondent/assessee is that the monetary limit is well below Rs.2 Lakhs and, therefore, the department ought not to have filed the appeal in view of the National Litigation Policy. To consider the above submission raised by the learned counsel for the respondent, it is necessary to advert to the National Litigation Policy of the Government, wherein monetary limit for filing appeal before the

various forums has been fixed. For better appreciation, at the risk of repetition, the relevant portion of the National Litigation Policy is quoted hereinbelow :-

"5. The Board has decided that appeals in the Tribunal shall not be filed where the duty involved or the total revenue including fine and penalty is Rs.1 Lakh and below. Similarly, in the case of High Courts, appeals should not be filed in cases where the duty involved or total revenue including fine or penalty is Rs.2 Lakhs and below. While deciding the thresholds mentioned above the duty involved shall be the decisive element. For example, in a case involving duty of Rs.1 Lakh with mandatory penalty of Rs.1 Lakh besides any other penalty imposed under the relevant provisions of Law, no appeal shall henceforth be filed in the Tribunal as the duty involved is within the monetary limit of Rs.1 Lakh. Similarly, if the duty involved in a case is Rs.2 Lakhs with equal mandatory penalty and any other penalty imposed under the Law in force at the relevant time, no appeal shall be filed before the High Court." (Emphasis supplied)

12. A reading of the above provision makes it clear that where the duty component involved is less than Rs.2 lakhs, excluding mandatory penalty and any other penalty imposed under the law in force at the relevant time, no appeal shall be filed before the High Court. In the present case, it is admitted by either side that the differential duty component is more than Rs.26 Lakhs, which has been paid by the respondent/assessee, though belatedly, on which interest is sought to be levied by the appellant/Revenue. In the present appeal, the imposition is only interest on delayed payment of duty component. Therefore, by no stretch of imagination, the argument of the learned counsel for the respondent/assessee could be accepted, as there is no duty involved in this case and it pertains only to interest on delayed payment of differential duty. Therefore, even at the threshold, the said objection is negated.

13. Insofar as the other contentions are concerned, it is admitted by the parties that the decision in Chloritech Industries case (supra - 2009 (235) ELT 17), which has been relied on by the Tribunal to hold in favour of the assessee, has been subsequently reversed by the Gujarat High Court in Chloritech Industries case (supra - 2014 (306) ELT 447) and the appeal was allowed in favour of the Revenue. In the above background, the core issue that falls for consideration in the present appeal is "whether on the delayed payment of differential duty, the respondent/assessee is liable to

pay interest as provided under sub-rule (3) of Rule 8 at the rate as provided in the Notification issued under Section 11AB of the Act."

14. The Tribunal has held in favour of the assessee relying upon the decision in Chloritech Industries case (supra - 2009 (235) ELT 17), wherein the core issue is as under :-

"Whether in the facts and circumstances of the case, the Tribunal erred in holding that no interest as prescribed under the provisions of Section 11AB of the Act can be recovered when the differential duty is paid on price variation?"

15. The case of Chloritech Industries is apparently a case of payment of differential duty in terms of Section 11A (2B) and in that scenario, following the ratio laid down by the Supreme Court in SKF India case (supra), the Gujarat High Court, on remand, allowed the appeal filed by the Revenue. For better clarity, the relevant portion of the order is quoted hereunder :-

"8. As already noted, the decision in the case of SKF India Limited (supra) was followed in subsequent decision in the case of CCE v. International Auto Limited (supra). The Apex Court observing that the differential price signified that value, which is the function of the price, on the date of removal/clearance of the goods was not correct. It was further observed that 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. Here again, the decision of the Bombay High Court in the case of Rucha Engineering Pvt. Limited (supra) was not approved.

9. Section 11AB of the Central Excise Act, 1944 reads as under :-

"11AB. Interest on delayed payment of duty. -

(1) 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 is liable to pay duty as determined under sub-section (2), or has paid the duty under sub-section (2B), of Section 11A shall, in addition to the duty, be liable to pay interest at such rate not below [ten per cent] and not exceeding thirty-six per cent. per annum, as is for the time being fixed by the Central Government, by notification in the Official Gazette, from the first date of the month

succeeding the month in which the duty ought to have been paid under this Act, from the date of such erroneous refund, as the case may be, but for the provisions contained in sub-section (2), or sub-section (2B), of Section 11A till the date of payment of such duty :

Provided that in such cases where the duty become payable consequent to issue of an order, instruction, or direction by the Board under Section 37B, and such amount of duty payable is voluntarily paid in full without reserving any right to appeal against such payment at any subsequent stage, within forty-five days from the date of issue of such order, instruction or direction as the case may be, no interest shall be payable and in other cases the interest shall be payable on the whole of the amount, including the amount already paid.

(2) The provision of sub-section (1) shall not apply to cases where the duty had become payable or ought to have been paid before the date on which the Finance Bill, 2001 receives the assent of the President.

Explanation 1. - Where the duty determined to be payable is reduced by the Commissioner (Appeals), the Appellate Tribunal "National Tax Tribunal" or, as the case may be, the Court, the interest shall be payable on such reduced amount of duty.

Explanation 2. - Where the duty determined to be payable is increased or further increased by the Commissioner (Appeals), the Appellate Tribunal "National Tax Tribunal" or, as the case may be, the Court, the interest shall be payable on such increased or further increased amount of duty."

10. To our mind, facts on material aspects are similar in the present case. It is of course true that a part of the price received by the assessee for the goods sold was based on fluctuating price regime and fluctuated on the basis of factors over which the assessee had no control. Whereas, in SKF case, assessee received higher price for goods already cleared and sold on account of retrospective price increase. However, to our mind, this distinction is not material. What is important is that the assessee received differential price of the goods after its

clearance. At the time of clearance, assessee had paid excise duty only on the price it had received till then. For the difference, it had to pay interest under Section 11AB, as held by the Apex Court in the case of SKF India Limited (supra). We are unable to agree with the learned counsel for the assessee that there is a revenue neutral case. The Apex Court, in a subsequent decision in the case of CCE v. International Auto Limited (supra) has further elaborated that on interest loss to the Revenue, Section 11AB would be applicable in similar cases."

16. In the present case, the show cause notice is issued in terms of Section 8 (1) of the Central Excise Rules and sub-rule (3) of Rule 8 makes it an obligation on the assessee to pay interest on account of delayed payment of duty in terms of the notification issued under Section 11AB of the Central Excise Act. For better clarity, Rule 8 (3) of the Central Excise Rules is quoted hereinbelow :-

"If the assessee fails to pay the amount of duty by due date, he shall be liable to pay the outstanding amount along with interest at the rate specified by the Central Government vide notification issued under Section 11AB of the Act on the outstanding amount, for the period starting with the first day after due date till the date of actual payment of the outstanding amount."

17. The plea of the learned counsel for the assessee/respondent that the present case is not one falling under Section 11A and, therefore, no interest could be demanded is an argument, which, we find, is far fetched and untenable because the entire proceedings, in the instant case, is on the basis of the delayed payment of differential duty in terms of Section Rule 8 (1) of the Central Excise Rules, for which interest is leviable under sub-rule (3) of Rule 8 at the rate notified under Section 11AB of the Act. The show cause notice was issued under Rule 8 (1) of the Central Excise Rules, 2002 for failure to pay the duty in terms of Rule 8 (1) and, therefore, liability to pay interest specified under Section 11AB of the Act was mulcted on the assessee in terms of sub-rule (3) of Rule 8. Sub-Rule (3) of Rule 8 provides for quantum of interest, viz., interest as notified in terms of Section 11AB of the Act. However, the Tribunal, without going into the factual aspect of the show cause notice, laid emphasis on Chloritech Industries case (supra - 2009 (235) ELT 17) to allow the appeal in favour of the assessee. The Tribunal has not adverted to the merits of the matter and also the relevant provisions of law for levying interest, viz., Rule 8 (3), but decided the issue in the light of the decision in Chloritech

Industries case (2009 (235) ELT 17), which has been subsequently reversed in Chloritech Industries case (supra - 2014 (306) ELT 447).

18. The Tribunal has not addressed the issue on merits in relation to the claim of the assessee and merely proceeded on the basis of the decision in Chloritech Industries case (supra - 2009 (235) ELT 17), which does not apply to the facts of the present case, we are inclined to remand the matter back to the Tribunal for re-consideration of the issue in the light of the legal position as above.

19. Accordingly, this appeal is allowed by way of remand to the Tribunal. In the circumstances of the case, there shall be no order as to costs.

Sd/-

Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

GLN

To

1. The Commissioner of Central Excise
No.1, Foulk's Compound
Anaimeedu, Salem 636 001.
2. Customs, Excise & Service
Tax Appellate Tribunal
South Zonal Bench
Shastri Bhavan Annexe
1st Floor, No.26, Haddows Road
Chennai 600 006.
3. The Commissioner of Customs and
Central Excise(Appeals),
Salem - 636 001.
4. The Assistant Commissioner
of Central Excise,
Salem II Division, Salem - 636 004.

C.M.A. NO. 266 OF 2010

VD(CO)
CA(29/09/2015)