HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HON'BLE Ms. JUSTICE J.UMA DEVI

<u>Writ Petition No.31500 of 2016</u>

<u>Order</u>: (per V.Ramasubramanian, J.)

This writ petition arises out of a demand made by the Superintendent of Central Excise, for payment of interest on customs duty and central excise duty that became payable by the writ petitioner, but which was paid over a long duration of time.

2.We have heard Mr.P.Kasi Nageswara Rao, learned counsel for the petitioner and Mr. B.Narayana Reddy, learned Assistant Solicitor General of India for the respondents.

3. The petitioner herein was registered with the Central Excise Department as a 100% export oriented unit and was permitted to manufacture and export frozen shrimp. Their unit was set up at Ankalapatur Village and the premises were bonded under Bond No.8/93-Customs.

4. It appears that during the verification of the records by the Range Officer, it was found out that the petitioner had diverted into the local market, the products valued at Rs.1,98,72,750/- during the period from 10-12-1993 to 30-01-1994. Since the petitioner had imported capital goods, consumables and raw materials by availing the benefit of exemption under Notification No.13/81-Customs and also since the petitioner procured certain indigenous goods by availing the exemption under Notification No.57/94-CE, dated 01-3-1994,

a show cause notice was issued on 08-5-1995. The show cause notice was confirmed by an Order-in-Original dated 15-12-1999. The amounts determined as payable under the Order-in-Original were as follows:

Customs duty confirmed u/S.72 of Customs Act, 1962	:	Rs.12,52,395/-
Confirmed Central Excise duty u/S.11A of CE Act, 1944	:	1,71,872/-
Penalty imposed u/S.112 of Customs Act, 1962	:	2,00,000/-
Penalty imposed u/S.111(o) of Customs Act, 1962	:	1,00,000/-
Penalty imposed u/R.173Q of CE Rules	:	20,000/-

5. As against the Order-in-Original, the petitioner filed an appeal before CESTAT. The Tribunal dismissed the appeal by a final order dated 02-7-2004. The petitioner filed a further appeal on the file of this Court in C.E.A.No.17 of 2004, but the same was dismissed on 19-11-2014.

6. Thus in essence, the demand made in the show cause notice was confirmed by all forums. Therefore, the petitioner was left with no alternative except to pay the amounts. It appears that the petitioner paid the entire amount as demanded under the Order-in-Original, during the period from 18-10-2000 to 19-6-2015. To be precise, the customs duty confirmed under Section 72 of the Customs Act, 1962 was paid over a period of 7 years from 18-10-2000 to 11-10-2007. The excise duty confirmed under Section 11A of the Central Excise Act, 1944 along with the penalty imposed under Rule 173Q of the Central Excise Rules was paid on 17-6-2015. The penalty imposed under Section 111(o) and the penalty imposed under Section 112 of the Customs Act, 1962 were paid on 17-6-2015 and 19-6-2015.

7. Thereafter, the Superintendent of Central Excise issued 2 communications, one dated 24-6-2015 and another dated 05-8-2016. Under the 1st communication, the Superintendent requested the petitioner to pay interest. But no amount was indicated in the said letter. However, in the 2nd communication, the Excise Superintendent gave out a calculation and demanded a sum of Rs.34,72,074/- towards interest. The tabular column provided in the communication dated 05-8-2016 would reveal the manner in which the interest liability has been worked out. Hence, it is extracted as follows:

O/O No. & Date	Duty confirmed And that are paid	Penalties imposed and that are paid	Interest payable
O/O No.14/99-Cus. dt.15.12.1999 of CCE, Guntur	Customs duty Rs.12,52,395/- is paid ---------------------- CE duty Rs.1,71,872/- is paid	Rs.2,00,000/- under Customs Act + Rs.20,000/- under CE Rules + redemption fine of Rs.1,00,000/- were paid.	Rs.28,75,782/- (payable since 10.12.1993 to 11.10.2007) ---------------------- Rs.5,96,292/- (payable since 31.01.1994 to 17.06.2015)
Total	Rs.14,24,267/-	Rs.3,20,000/-	Rs.34,72,074/-

8. Aggrieved by the said demand, the petitioner has come up with the above writ petition mainly contending that since the liability to pay interest was imposed for the first time under Sections 11AA and 11AB of the Central Excise Act, 1944 with effect from 26-05-1995 and 28-9-1996, the said statutory prescription will not apply to show cause notices issued before the amendment was passed.

9. We have carefully considered the above submissions.

10. It appears that Section 11AA was inserted for the first time by Act 22/1995 with effect from 26-5-1995. It was amended

by Act 33/1996 with effect from 28-9-1996. Thereafter, it underwent several amendments, with which we are not now concerned. But it should be pointed out that by Act 8/2011, a new Section 11AA has been inserted.

11. There is no dispute about the fact that a liability to pay interest was statutorily imposed, for the first time only under Act 22/1995 with effect from 26-5-1995. Section 11AA was inserted on 26-5-1995 and Section 11AB was inserted on 28-9-1996. The show cause notice was issued on 08-5-1995, even before the liability to pay interest was statutorily imposed for the first time. Therefore, the question is as to whether the petitioner can be slapped with a demand for interest, when there was no liability to pay interest at least statutorily on the date on which the show cause notice was issued.

12. Realising the difficulty in sustaining the demand for interest on the basis of statutory provisions, the Department contends in the counter affidavit that there is a liability to pay interest even as per para-2 of the conditions of the Bond executed under Sections 59 and 62 of the Customs Act, 1962. The terms and conditions of the Bond prescribe interest at the rate of 18% per annum. The respondents also rely upon an agreement entered into by the petitioner with the Development Commissioner of the Export Processing Zone, to contend that there was a liability to pay interest at 18% per annum. Interestingly, the respondents admit in para-15 of the counter, albeit indirectly, that Section 11AB will have no application.

The relevant portion of para-15 of the counter affidavit filed by the Department reads as follows:

> "I further submit the petitioner alleged that the provisions of Section 11AB cannot be made applicable to the demands relatable to the period prior to 28.9.1996. But the petitioner did not inform the Hon'ble Court regarding the liability of interest under Section 11AA of the Central Excise Act, 1944 as it existed at the relevant time. It is submitted that petitioner is liable for payment of interest under Section 11AA which was inserted with effect from 16.5.1995 vide Finance Act, 1995."

13. But the above contention loses sight of the fact that the show cause notice was issued on 08-5-1995 and Section 11AA was inserted only on 16-5-1995. Therefore, the logic that would apply to Section 11AB would equally apply to Section 11AA.

14. Therefore, the respondents should either rely upon condition No.2 of the Bond and condition No.7 of the Agreement entered into with the Development Commissioner of the Export Processing Zone or rely upon Sections 11AA and 11AB. If the respondents rely upon condition No.2 of the Bond and condition No.7 of the Agreement, they are liable to charge interest only at 18% per annum. But if the respondents rely upon Sections 11AA and 11AB, they are entitled to charge interest at a rate not below 10% and not exceeding 36%, as provided in these statutory provisions before the Amendment Act 8/2011 came into effect.

15. A careful look at the 2nd impugned order dated 05-8-2016 passed by the Superintendent of Central Excise would show that the respondents have charged interest at different rates, ranging from 13% to 24%. In the calculation sheet annexed

to the impugned order dated 05-8-2016, the respondents have charged interest at 13% in some cases, 15% in some cases, 18% in some cases, 20% in some cases and 24% in some cases. Therefore, it is obvious that the impugned orders were passed not on the basis of condition No.2 of the Bond or condition No.7 of the Agreement. The impugned orders have been passed obviously on the basis of statutory prescription that came into effect only after the show cause notice was issued.

16. In *Archana Spinners Ltd. v. Deputy Commissioner of Central Excise*, decided by the Madras High Court in C.E.A.Nos.1630 to 1633 of 2015 on 12-02-2016, to which one of us (*VRS, J.*) was a party, one of the questions that arose for consideration was whether the Department was entitled to take advantage of the amendment brought forth to Section 11AB with effect from 11-5-2001 in relation to the show cause notices issued before that date. Paragraphs-17 to 22 of the said decision may be usefully extracted as follows:

> "17. Before 11.5.2001, the Scheme of Sections 11A, 11AA and 11AB was to the following effect :
> (i) Whenever any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the Central Excise Officer may, within six months from the relevant date, serve notice on the person chargeable with duty, requiring him to show cause as to why he should not pay the amount specified in the notice;
> (ii) After considering the representation, if any, made by the noticee, the Central Excise Officer may determine the amount of duty of excise due from such a person under Sub-Section (2) of Section 11A;
> (iii) If the duty, so determined under Section 11A(2) in the manner prescribed above, was not paid within three months

from the date of such determination, the person becomes liable to pay interest under Section 11AA, at a rate not below 10% and not exceeding 30%, from the date immediately after the expiry of the said period of three months till the date of payment of such duty; and

(iv) If the duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded by reason of fraud, collusion or any wilful misstatement or suppression of facts or contravention of any of the provisions of this Act or the Rules made thereunder, with intent to evade payment of duty, the person liable to pay duty as determined under Section 11A(2) should also pay interest at a rate not below 10% and not above 30% from the first date of the month succeeding the month, in which, the duty ought to have been paid under the Act.

18. Therefore, the provisions of Section 11A, 11AA and 11AB as they stood before 11.5.2001, made a clear distinction between two categories of cases namely

(a) cases where there has been no levy or no payment or short levy or short payment or erroneous refund in the normal course and

(b) cases where there has been no levy or no payment or short levy or short payment or erroneous refund due to fraud, collusion, wilful misstatement or suppression of facts.

19. These two categories of cases were treated differently by the statute in so far as the liability to pay interest is concerned. If the case fell under the first category where there is no allegation of fraud, collusion, etc., interest became payable only under Section 11AA and that too, only if no payment is made within three months of the determination under Section 11A(2). Therefore, the statute did not make the liability to pay interest as automatic after determination under Section 11A(2).

20. It is only in the second category of cases where there was a determination under Section 11A(2) of not only levy, but also a finding of fraud, collusion, etc. that the statute imposed a liability under Section 11AB. This is why the date of commencement of the liability to pay interest was the date of original liability and not the date of determination under Section 11AB. Unless we understand this scheme that was prevailing before 11.5.2001, the interpretation that is called for to the provision that exists post amendment with effect from

11.5.2001 or the provisions as they now stand after the amendment dated 8.4.2011, cannot be understood.

21. Now, let us take the amendments that were inserted with effect from 11.5.2001. The provisions of Section 11AA and 11AB as they stood before 11.5.2001 and after 11.5.2001 are provided in the tabular column as follows :

Sec.	Before 11.5.2001	After 11.5.2001
11AA	*Interest on delayed payment of duty:* *Subject to the provisions contained in Section 11AB, where a person chargeable with duty determined under Sub-Section (2) of Section 11A, fails to pay such duty within three months from the date of determination, he shall pay, in addition to the duty, interest at such rate not below ten per cent and not exceeding thirty six percent per annum, as is for the time being fixed by the Central Government, by notification in the Official Gazette, on such duty from the date immediately after the expiry of the said period of three months till the date of payment of such duty :* *Provided that where a person chargeable with duty determined under Sub-Section (2) of Section 11A before the date on which the Finance Bill, 1995 receives the assent of the President, fails to pay such duty within three months from such date, then, such person shall be liable to pay interest under this section from the date immediately after three months from such date, till the date of payment of such duty.* *Explanation 1. - Where the duty determined to be payable is reduced by the Commissioner (Appeals), Appellate Tribunal, National Tax Tribunal or, as the case may be, the court, the date of such determination shall be the date on which an amount of duty is first determined to be payable.* *Explanation 2. - Where the duty determined to be payable is increased or further increased by the Commissioner (Appeals), Appellate Tribunal, National Tax Tribunal or, as the case may be, the court, the date of such determination shall be, -* *(a) for the amount of duty first determined to be payable, the date on which the duty is so determined;* *(b) for the amount of increased duty, the date of order by which the increased amount of duty is first determined to be payable;* *(c) for the amount of further increase of duty, the date of order on which the duty is so further increased.*	*Interest on delayed payment of duty :* *(1) Notwithstanding anything contained in any judgment, decree, order or direction of the Appellate Tribunal or any court or in any other provision of this Act or the rules made thereunder, the person, who is liable to pay duty, shall, in addition to the duty, be liable to pay interest at the rate specified in Sub-Section (2), whether such payment is made voluntarily or after determination of the amount of duty under Section 11A.* *(2) Interest, at such rate not below ten per cent and not exceeding thirty-six per cent per annum, as the Central Government may, by notification in the Official Gazette, fix, shall be paid in terms of Section 11A after the due date by the person liable to pay duty and such interest shall be calculated from the date on which such duty becomes due up to the date of actual payment of the amount due.* *(3) Notwithstanding anything contained in Sub-Section (1), no interest shall be payable where -* *(a) the duty becomes payable consequent to the issue of an order, instruction or direction by the Board under Section 37B; and* *(b) such amount of duty is voluntarily paid in full, within forty-five days from the date of issue of such order, instruction or direction, without reserving any right to appeal against the said payment at any subsequent stage of such payment.*

Sec.	Before 11.5.2001	After 11.5.2001
	(2) The provisions of Sub-Section (1) shall not apply to cases where the duty becomes payable on and after the date on which the Finance Bill, 2001 receives the assent of the President.	
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 by reason of fraud, collusion or any wilful misstatement or suppression of facts or contravention of any of the provisions of this Act or the rules made thereunder with intent to evade payment of duty, the person liable to pay duty as determined under Sub-Section (2) of Section 11A shall, in addition to the duty be liable to pay interest at such rate not below eighteen 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 day of the month succeeding the month in which the duty ought to have been paid under this Act or the Rules made thereunder or from the date of such erroneous refund, as the case may be, but for the provisions contained in Sub-Section (2) of Section 11A, till the date of payment of such duty. (2) For the removal of the doubts, it is hereby declared that the provisions of Sub-Section (1) shall not apply to cases where the duty became payable before the date on which the Finance (No.2) Bill, 1996 receives the assent of the President. Explanation 1 - Where the duty determined to be payable is reduced by the Commissioner (Appeals), the Appellate 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 or, as the case may be, the court, the interest shall be payable on such increased or further increased amount of duty.	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 the 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, or 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 becomes 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 provisions 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.

22. A careful look at the tabulation above would show that the distinction between the two categories of cases that was maintained upto 11.5.2001 disappeared to

some extent by the amendment inserted from 11.5.2001." Though a small distinction was still retained, the liability to pay interest became common for both categories of cases and a distinction was retained only in respect of the minimum ratio of interest and the date of commencement of liability post 11.5.2001. In cases where the payment was made voluntarily after determination of the amount of duty under Section 11A, the amendment stipulated a minimum rate of interest at 10% per annum and a maximum rate of interest at 36% per annum. But, in other cases, the minimum rate of interest was maintained at 18% per annum. Except this, the distinction between the two categories of cases was diluted."

17. After an analysis of the statutory prescriptions as aforesaid, the Madras High Court came to the conclusion that the amendments cannot be pressed into effect in respect of show cause notices issued before the date of the amendment.

18. Therefore, the demand made by the respondents on the basis of the statutory prescription is contrary to law. It should also be point out incidentally that the unit of the petitioner has already been closed by virtue of an order passed by the Green Bench of the Supreme Court on 15-3-1997 in *Indian Council for Enviro Legal Action v. Union of India*. In other words, a unit that was established in November, 1994 had to be closed within 3 years in 1997. Fortunately for the Department, the petitioner has at least paid the amount as determined in the Order-in-Original, though belatedly and in instalments. In such circumstances, we are of the considered view that the demand for interest, is neither legal nor justified.

19. Hence, the writ petition is allowed and the impugned demand is set aside. The miscellaneous petitions, if any, pending in this writ petition shall stand closed. No costs.

V.RAMASUBRAMANIAN, J.

J.UMA DEVI, J.

02nd March, 2017.
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HON’BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HON’BLE Ms. JUSTICE J.UMA DEVI

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