CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Central Excise Appeal No. 935 of 2012

(Arising out of Order-in-Appeal No. JMJ/54 & 55/2011 dated 12.12.2011 passed by the Commissioner (Appeals), LTU, Bangalore.)

Toyota Kirloskar Auto Parts Private Limited,
Plot No.21, Bidadi Industrial Area,
Ramanagar Taluk,
Bangalore – 562 109.

Appellant(s)

VERSUS

The Commissioner of Central Excise (LTU),
JSS Towers, 100ft Ring Road,
Banashankari 3rd Stage,
Bangalore – 560 085.

Respondent(s)

With

Central Excise Appeal No. 936 of 2012

(Arising out of Order-in-Appeal No. JMJ/54 & 55/2011 dated 12.12.2011 passed by the Commissioner (Appeals), LTU, Bangalore.)

Toyota Kirloskar Auto Parts Private Limited,
Plot No.21, Bidadi Industrial Area,
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Appellant(s)

VERSUS

The Commissioner of Central Excise (LTU),
JSS Towers, 100ft Ring Road,
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Bangalore – 560 085.

Respondent(s)

APPEARANCE:

Mr. N. Anand, Advocate, for the Appellant

Mr. H. Jayathirtha, Superintendent (AR), for the Respondent

CORAM: HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MRS R BHAGYA DEVI, MEMBER (TECHNICAL)

Final Order No. 20646 - 20647 /2024

DATE OF HEARING: 22.02.2024
DATE OF DECISION: 19.08.2024

PER : DR. D.M. MISRA

These two appeals are filed against respective Orders-in-Appeal passed by Commissioner of Central Excise(Appeals); since involved common issues, are taken up together for hearing and disposal.

2. Briefly stated the facts of the case the appellant had requested for provisional assessment of the goods i.e. OE parts such as Front Axle, Rear Axle, Propeller Shaft, Stiffener etc. manufactured and cleared on payment of duty to their interconnected undertaking M/s. Toyota Kirloskar Motors Private Limited, Bidadi having business interest with each other, since the assessable value was determined as 110% of the cost of production and the overhead allocation to the goods manufactured by them could be finalized only after conclusion of the accounting year and the costing were to be carried out as the same was allowed by the Department. The period involved is 2008-09 & 2009-10. On receiving the relevant data, the appellant approached the Department for finalization of assessment. The Department raised objection for non-inclusion of the value of royalty paid by the appellant pursuant to an agreement with M/s. Toyota Motor Corporation, Japan, in computing the cost production under CAS-4 method, show-

cause notice was issued on 09.04.2010 for the FY 2008-09 proposing to add the amount of royalty of Rs.5,55,72,586/- paid and duty of Rs.77,80,162/- demanded with interest. Similarly for the year 2009-10, amount of royalty of Rs.6,59,23,976/- paid and duty of Rs.35,75,944/- demanded with interest. On finalization of the assessment, the adjudicating authority added the payments made towards royalty and finalized the assessment after appropriating the duty short-paid and directed payment of interest under Section 11AB of the Central Excise Act, 1944. The appellant challenged the orders before the learned Commissioner(Appeals), who in turn, rejected their appeals. Hence, the present appeals.

3. The learned advocate for the appellant has submitted that before this Tribunal, they would contest only levy of interest under Rule 7(4) of Central Excise Rules, 2002. It is submitted as follows:

- The Appellant is an LTU assessee engaged in manufacture of parts of motor vehicles such as Front Axle; Rear Axle; Propeller Shaft, Stiffener, etc. and these excisable goods are cleared on payment of appropriate central excise duties. Since the Appellant cleared their final product to M/s. Toyota Kirloskar Motor Private Limited, a "related person", the value of goods had to be determined in terms of section

4(1)(b) of the Act read with rule 8 of the CE Valuation Rules, 2000 (viz., 110% of cost of production) and as the value of goods could not be determined at the time of clearance of goods to related person, the Appellant requested for provisional assessment as per rule 7 of the Central Excise Rules, 2002.

- The Appellant’s request for provisional assessment was permitted in terms of Rule 7 of the CER, 2002. Subsequently, the Appellant furnished all the necessary details and documents for finalisation of the value of goods and they also voluntarily paid the differential duty payable on the finalized value as voluntarily computed by them. In respect of some of the goods, the Appellant had paid excess duty provisionally but they did not seek refund of the same.
- The *lis* in both the appeals relates to demand of interest under rule 7(4) of the CER, 2002 on finalisation of provisional assessment. It is submitted that the Department has ordered demand of differential duty payable u/r 7 of the CER, 2002 r/w Section 11A and also interest payable on the entire differential duty payable without adjusting the excess duty paid on other goods u/r 7(4) of the CER, 2002.

- It is the Appellant's contention that upon finalisation of provisional assessment order it is the cumulative effect which had to be considered while demanding interest u/r 7(4) of the CER, 2002. In other words, the demand of interest u/r 7(4) can only be on the net difference i.e., after adjusting the excess provisional duty paid, if any, by the Appellant as per the finalisation order itself. Hence, it is the case of the Appellant that in the case of appeal in E/935/2012, the demand of interest on the differential duty demanded of Rs.50,48,450/- is excessive and on the contrary the interest was payable only on net difference viz., Rs.30,49,570/-. In the case of second appeal in E/936/2012, there was excess duty paid (net difference) upon finalisation and hence no interest is demandable.
- The revenue has not accepted the above contention/plea of the Appellant and has confirmed the demand of interest only on differential duty ordered ignoring the excess provisional duty paid in respect of some of the goods. Hence, the present appeals.

1. The Appellant submits that the issue involved in both the appeals are no longer *res integra* inasmuch in the Appellant's own case for the earlier period (viz., 2007-08), the Honorable Karnataka High Court as reported as *Toyota*

Kirloskar Auto Parts Pvt Ltd v. CCE, LTU, Bangalore, [2012 (276) ELT 332 (Kar.)] has held in favour of the Appellant and held that interest u/r 7(4) of the CER, 2002 is payable only when differential duty is payable after adjusting the excess payment made in respect of other goods. If there is no short-fall after such adjustment, no interest is payable u/r 7(4). The impugned orders are therefore not tenable.The Appellant further submits that the impugned order(s) is also opposed to the following decisions, -

(a) ***Hindustan Zinc Ltd v. CCE***, [2016 (336) ELT 328 (Tri-Del.).]
(b) ***Sangam Spinners v. CCE***, [2016 (344) ELT 623 (Tri-Del.).]
(c) ***Mercedes Benz (I) Pvt Ltd v. CCE***, [2017 (347) ELT 646 (Tri-Mum.).]
(d) ***Jonas Woodhead & Sons (I) Ltd v. CCE***, [2015 (329) ELT 577 (Tri-Che.).]

4. *Per contra*, the learned AR for the Revenue has submitted that it is an admitted fact that the appellant had cleared the goods to their interconnected units resorting to provisional assessment for the FY 2008-09 and 2009-10. Also, the appellant had calculated the assessable value based on CAS-4 method and submitted the same before the adjudicating authority for finalization of assessment. At the time of submission of the said details, it was informed that they had paid differential duty short-paid by them and raised supplementary invoices and passed on same duty to their buyers. The said short-paid duty was discharged before finalization of the

provisional assessment. Also, they undertook not to claim any excess duty paid which was refundable by the Department for the said Financial Years. Pursuant to the said declaration and undertaking furnished by the appellant, the assessment was finalized by the adjudicating authority. As the appellant had undertaken not to claim any refund, the adjudicating authority confirmed the demand of duty short-paid and the duty already paid appropriated which has been upheld by the Commissioner(Appeals). Since they were not eligible for refund, the same was not discussed in the orders. Since the appellant paid the differential duty but failed to discharge interest on the delayed payment of duty, the interest was demanded in terms of Section 11AB of Central Excise Act, 1944 read with Rule 7(4) of the Central Excise Rules, 2002. In support, the learned AR for the Revenue referred to the judgment of the Hon'ble Supreme Court in the case of ***Steel Authority of India Ltd. Vs. CCE, Raipur*** [2019(366) ELT 769 (SC)]. He has also referred to the judgment of Hon'ble Allahabad High Court in the case of ***Bharat Heavy Electricals Ltd. Vs. CC&CE, Kanpur*** [2015(323) ELT 417 (All.)].

4.1 Distinguishing the judgment of the Hon'ble Karnataka High Court in the Appellant's case, the learned AR for the Revenue has submitted that the decision of the Hon'ble Karnataka High Court is not applicable as in the said judgment, the Hon'ble high Court has discussed the manner of netting to be done while finalization of the provisional assessment. In the said judgment,

it is observed that the authority should have deducted the shortfall in the excess payment made; if there is no shortfall in payment of duty, payment of interest does not arise. The said order directs the authorities to take action of netting of duty excess paid and duty short-paid by the appellant on the goods considered for provisional assessment. The said decision is applicable where either the duty is due to the Department or duty is to be refunded to the assesse (excess paid) but in this case, there is no such duty that is due to the Appellant either by way of refund after finalization of provisional assessment in view of the fact that that differential duty was paid prior to finalization and they had undertaken that they will not be seeking / claiming the excess duty paid by them. Also, the duty so paid was taken by their other Unit as credit and utilized. That is the reason why the authorities have appropriated the differential duty paid by them and had demanded the interest on delayed payment of duty. Since the differential duty has already been paid, netting the said amount again from the duty due for refund, if any, could amount to double payment of differential duty i.e. once paid prior to finalization and against in the order as a result of netting, which would be against the statutory provisions. He has further submitted that the issue is no more *res integra* and covered by the judgment of the Hon'ble Supreme Court in the case of ***Bharat Heavy Electrical Limited Vs. CC&CE, Kanpur*** [2022(383) ELT 161 (SC)].

5. Heard both sides and perused the records.

6. The short question involved in the present appeals for determination is: whether the appellants are required to discharge interest on finalization of the provisional assessment under Rule 7(4) of the Central Excise Rules, 2002. The undisputed facts in both the appeals are that the appellant had resorted to provisional assessment under Rule 7 of the Central Excise Rules, 2002 for the FY 2008-09 and 2009-10 as certain elements of expenditure could not be determined to arrive at the cost of the products applying CAS4 method at the time clearance of their good to their related concern. For the respective Financial Years 2008-09 & 2009-10, they have filed CAS4 certificates certified by a Cost Accountant declaring the cost of production and requested for finalization of the assessment. The Department proposed to add the value of the royalty charges paid to the overseas company for technical know-how which on assessment added and the duty liability was calculated on the reassessed value. The appellant before finalization of assessment paid the differential duty and wrote to the department that they would not be seeking refund of duty excess paid during certain period.

7. In the present appeals, they have only contested the levy of interest on the duty calculated to be short-paid and appropriated against their payment. It is the contention of the

appellant that they have resorted to provisional assessment on various parts during the said Financial Years and in certain cases, they have paid excess duty and in certain cases, they have paid less duty resulting into short-payment. It is their argument that the duty excess paid adjusted against the duty short-paid then there won't be any payment required to be made by them; hence there is no issue of interest leviable from them on the duty short-paid and appropriated by the Department. In support, they have referred to the judgment of the Hon'ble High Court of Karnataka in their own case. The Revenue on the other hand vehemently argued that on finalization of assessment, the duty short-paid automatically attracts interest from the succeeding month of the clearance of the goods assessed provisionally as per Rule 7(4) of the Central Excise Rules, 2002. In support, they have referred to the judgment of the Hon'ble Supreme Court in the case of ***Steel Authority of India Ltd.*** (supra) which has later been followed in Bharat Heavy Electricals Ltd.'s case.

8. Sub-rule 4 of Rule 7 of Central Excise Rules, 2002 reads as follows:-

> *Rule 7(4): The assessee shall be liable to pay interest on any mount 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 first day of the month succeeding the month for which such amount is determined, till the date of payment thereof.*

9. This rule has been interpreted and the liability to discharge interest on finalization of provisional assessment considered by the Hon'ble Supreme Court in Steel Authority of India Ltd.'s case and observed as follows:-

> ***35.*** *We are of the view that the scheme of the Central Excise Act and the Rules are a separate code. Section 11A is a provision for recovery. If there is a non-levy, non-payment, short-levy or short-payment, the same becomes recoverable under Section 11A. If there is any of the four contingencies referred to in Section 11A, then Section 11AB is attracted. The working of the parent Act is intricately intertwined with the rules, the scope of which we have already referred to. Therefore, if the value which is declared by way of self-assessment, by way of Rule 6 and on which the duty is paid is not the full value then under the scheme of Section 11A read with Section 11AB and the Rules, the assessee incurs liability for interest when in a case where there is full value found and it dates back to the date of removal.*
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> ***36.*** *We have noticed that in this case admittedly that at the time goods were removed the price was not fixed. The assessee was fully conscious of the fact that it was subject to variation. Assessee must be imputed with knowledge that the value it was declaring was amenable to upward revision. The circumstances were indeed clearly both apposite and appropriate for the assessee to invoke the provisions of Rule 7 and seek an order for provisional assessment. In fact, take the example of manufacturer A and manufacturer B. Both remove goods under contracts which contain escalation clauses. Manufacturer A invokes Rule 7. It seeks permission for removal of goods on provisional assessment. Though an order of final assessment has to be passed within a period of time it is capable of being extended without any time-limit. Manufacturer-A on the basis of upward revision of the price with retrospective effect and acknowledging the value to be the value as provisionally assessed and as enhanced by the escalation arrived at under the escalation clause pays the duty when the escalation comes into effect on the difference in the value under Rule 7. Apart from payment of the differential excise duty manufacturer A becomes also liable to pay interest from the date when the escalation would come into play on the arrival at the higher price having retrospective operation. Manufacturer B in identical facts clears the goods on the basis of self-assessment even*

though he is fully aware that the value of the goods which is paid is not fixed and is amenable to upward revision. He deliberately chooses not to go in for provisional assessment. Thereafter, he pleads that though he was aware that the value is not fixed and the prices on removal was tentative and was amenable to change since he has paid duty on the tentative value he is not liable to pay interest on the value of the goods on the differential duty which he is admittedly liable to pay. Is it contemplated?

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50. *We have also noticed what happens if there is provisional assessment. In the case of provisional assessment, the assessee entertains a doubt regarding the actual value or the rate of duty. He applies and he is permitted under the order to remove goods on a provisional assessment. The assessment is thereafter finalized. When the provisional assessment is finalized, the assessee becomes liable however to pay interest from the first date of the month succeeding the month for which the amount is determined. We have no doubt in our mind that under Rule 7(4), the expression "succeeding the month for which such amount" is determined refer to the month of removal of the goods. When the provisional assessment has such consequences, it would occasion an invidious discrimination to place an interpretation on Section 11AB by which those assesses who go in for provisional assessment under Rule 7 are called upon to pay interest upon finalization of the assessment with reference to the date of removal in a case where the value is fully determined as a result of escalation clause being worked resulting in an upward revision of prices and under Section 11AB payability arises with reference to the date of decision to grant escalation. In other words, the law will have to be interpreted in a manner that it is fair and equal to similarly situated group of assessees. Legislative intention, in this regard, also cannot be otherwise. Legislature has clearly in Section 11AB spelt out the time with reference to the Act and the Rules. Under Section 11AB in the case of short-levy or short payment inter alia, the expression "month in which the duty has become payable" under the Act and the rules must be understood as the month in which the duty is payable under the Rules made under the Act. Thus, if goods are removed in the month of January ordinarily payment must be made by the 6th of February. If the duty is not paid by the 6th of February, Section 11AB must be understood as mulcting the assessee with liability to pay interest from the first day of March in the example we have given. If*

the assessee went in for provisional assessment under Rule 7, it becomes liable from the 1st day of the month following the month for which the amount is determined.

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63. *We are of the view that the reasoning of this Court in the order referring the cases to us (to this Bench) that for the purpose of Section 11AB, the expression "ought to have been paid" would mean the time when the price was agreed upon by the seller and the buyer does not square with our understanding of the clear words used in Section 11AB and as the rules proclaim otherwise and it provides for the duty to be paid for every removal of goods on or before the 6th day of the succeeding month. Interpreting the words in the manner contemplated by the Bench which referred the matter would result in doing violence to the provisions of the Act and the Rules which we have interpreted. We have already noted that when an assessee in similar circumstances resorts to provisional assessment upon a final determination of the value consequently, the duty and interest dates back to the month "for which" the duty is determined. Duty and interest is not paid with reference to the month in which final assessment is made. In fact, any other interpretation placed on Rule 8 would not only be opposed to the plain meaning of the words used but also defeat the clear object underlining the provisions. It may be true that the differential duty becomes crystallised only after the escalation is finalized under the escalation clause but it is not a case where escalation is to have only prospective operation. It is to have retrospective operation admittedly. This means the value of the goods which was only admittedly provisional at the time of clearing the goods is finally determined and it is on the said differential value that admittedly that differential duty is paid. We would think that while the principle that the value of the goods at the time of removal is to reign supreme, in a case where the price is provisional and subject to variation and when it is varied retrospectively it will be the price even at the time of removal. The fact that it is known, later cannot detract from the fact, that the later discovered price would not be value at the time of removal. Most significantly, Section 11A and Section 11AB as it stood at the relevant time did not provide read with the rules any other point of time when the amount of*

> *duty could be said to be payable and so equally the interest. We would concur with the views expressed in SKF case (supra) and International Auto (supra). We find no merit in the appeals. The appeals will stand dismissed.*

10. The principle laid down in the said judgment is loud and clear that on finalization of provisional assessment, the interest is to be calculated of the duty short-paid from the succeeding month on which the said duty was payable. This principle has been subsequently endorsed by the Hon'ble Supreme Court in ***Bharat Heavy Electricals Ltd***.'s case. The judgment cited by the learned advocate for the appellant in the appellant's own case is in a different context and set of facts. In the present case the Appellant has voluntarily discharged the differential duty short paid and chose not to claim refund of the excess duty paid indue course of clearance to their other related interconnected undertaking, obviously for the reason that the said Unit has already availed credit on the excess amount paid. Therefore, to ascertain the interest payable on the differential short paid on finalization of the provisional assessment for the Financial years 2008-09 & 2009-10, in the light of the judgments of Hon'ble Supreme Court in ***Steel Authority of India Ltd.*** (supra), the matter needs to be remanded to the adjudicating authority for calculation of interest. Needless to mention a reasonable opportunity be allowed to the Appellant to present their case.

11. In the result, the impugned orders are modified and the appeals are disposed of by way of remand to the adjudicating authority.

(Order pronounced on 19.08.2024)

(D.M. MISRA)
MEMBER (JUDICIAL)

(R BHAGYA DEVI)
MEMBER (TECHNICAL)

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