

2012 (1) ECS (39) (Tri-Del)

**IN THE CUSTOMS EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
NEW DELHI**

PRINCIPAL BENCH NEW DELHI

M/s Hindustan Industries Ltd.

Versus

CCE, & ST (LTU)

Date of Hearing: 15.06.2012/13.07.2012

Date of Decision: 20.07.2012

1. Excise Appeal No. 325 & 326 of 2010

(Arising out of Orders-in-Original No, 4-5/Comm/09 dated 3.11.2009 passed by the
Commissioner of Custom & Central Excise, New Delhi)

M/s Hindustan Industries Ltd.
Appellant

Rep by Shri A.R. Madhav Rao, Advocate

V/s

CCE, & ST (LTU)
Respondant

Rep by Shri R.K. Verma, AR

2. Excise Appeal No. E/1755 of 2009

(Arising our of Order-in-Appeal No.95/CE/LDH/REV/2009 dated 9.4.09 passed by
the Commissioner of Customs & Central Excise, Chandigarh)

Commissioner of Central Excise, Ludhiana

Rep. by Shri R.K. Verma, AR

V/s

M/s HeroCycles Ltd

Respondant

Rep by none

3. Excise Appeal No. E/3730 & 3886 of 2006

(Arising out of order in Appeal No. 183/CE/CHD/06 dated 6.9.2006 of the Commissioner of Central Excise (Appeals). Chandigarh in Appeal No. E/3730 of 2006 & Order-in-Appeal No. 855/CE/CHD/2006 dated 15.9.2006 passed by the Commissioner of Central Excise (Appeals), Chandigarh in Appeal No. E/3886 Of 2006)

Commissioner of Central Excise, Chandigarh

Appellant

Rep. by Shri R.K Verma, AR

M/s Punjab Tractor Ltd.

4. Excise Stay Application No.E/Stay/371/2010 in Appeal No.368 of 2010

Excise Misc. Application Nos. 360 to 361/12 & E/Stay/372-373/10 in Appeals Nos. E/369 to 2010

Excise Misc. Application Nos.E/360 to 361/12 & E/Stay/372-373/10 in Appeal Nos. E/369 to 370/2010 (Misc. for additional grounds), Misc. Application Nos 358 to 359 of 2012 & E/Stay/374-375 in Appeals Nos E/371 to 372 of 2010 (Misc. for additional grounds

(Arising out common Order-in-Original No. 13-80/SSS/CE/09 dated 26,11,2009 passed by the Commissioner of Central Excise, Delhi-III.)

M/s, Jay Bharat Maruti Ltd.

. Appellant

Rep. by Shri A.R. Madhav Rao, Advocate

V/s

CCE, DELHI-III
Respondant

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Rep. by Shri R.K. Verma, AR

5. Excise Appeal No.E/2307 of 2011

(Arising out common Order-in-Original No. 13-80/SSS/CE/09 dated 26,11,2009 passed by the Commissioner of Central Excise, Delhi-III.)

M/s. Jay Bharat Maruti Ltd.

. Appellant

Rep. by Shri R. Santhanam Advocate

V/s

CCE, Delhi-III

. Respondant

Rep. by Shri N. Pathak, AR

6. Ex-Stay Applications No. E/376 to 377 of 2010 in
Excise Appeal Nos. 373 & 374 of 2010

(Arising out common Order-in-Original No. 13-80/SSS/CE/09 dated 26,11,2009 passed by the Commissioner of Central Excise, Delhi-III.)

M/s SKH Metal Ltd. Appellant

V/s

CCE, Delhi-III Respondant

Rep. by Shri R.K. Verma, AR

7. Excise Stay Application No.E/480 of 2010 in Excise Appeal No.
E/468 of 2010

M/s UCAL Fuel Systems Ltd., Appellant

Rep. by none

V/s

CCE, Delhi-III Respondant

Rep. by Shri R.K. Verma, AR

8. Ex Stay Application No. 481 of 2010 in Appeal No 469 of 2010
& Excise Appeal No. E/1478 of 2011

(Arising out common Order-in-Original No.13-80/SSS/CE/09 dated 26.11.2009 passed by the Commissioner of Central Excise, Delhi-iii in Appeal No. E/469 of 2010 and arising out of Order-in-Appeal No. 01 to 04/2011 dated 8.3.2011 in respect of Appeal No, E/1478 of 2011)

M/s Rasandik Engg. Indus, India Ltd.
Appellants

Rep. by Shri A.R. Madhav Rao, Advocate

V/s

9. Ex Misc. Application No. 362 of 2012 (Misc. for additional grounds) & E/Stay/482/10 In Excise Appeal No. 473 of 2010

(Arising out common Order-in-Original No. 13-80/SSS/CE/09 dated 26,11,2009 passed by the Commissioner of Central Excise, Delhi-III.)

M/s Lifelong India Ltd,
Appellants

Rep. by Shri A.R. Madhav Rao, Advocate

V/s

CCE, Delhi-III
Respondant

Rep. by Shri R.K. Verma, AR

10. Ex-Stay Nos, 537 to 539 of 2010 in Appeals Nos. E/528 to 530 of 2010

M/s Motherson Sumi Systems Ltd.
Appellant

Rep. by Shri A.R. Madhav Rao, Advocate

CCE, Delhi-III
Respondant

Rep. by Shri R.K. Verma, AR

11. Ex. Stay Application No.540 of 2010 in Excise Appeal No. E/531 of 2010

(Arising out common Order-in-Original No. 13-80/SSS/CE/09 dated 26,11,2009 passed by the Commissioner of Central Excise, Delhi-III.)

M/s Krishna Maruti Ltd.

..... Appellants

Rep. by Shri A.R. Madhav Rao, Advocate

V/s

CCE, Delhi-III
Respondant

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Rep. by Shri R.K. Verma, AR

CCE, Delhi-III
Respondant

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Rep. by Shri R.K. Verma,

AR

12. Ex-Stay Application No. 541 of 2010 in Appeal No. 532 of 2010
abd E/stay/542/2010 in Appeal No. 533 of 2010

(Arising out common Order-in-Original No. 13-80/SSS/CE/09 dated 26,11,2009 passed
by the Commissioner of Central Excise, Delhi-III.)

M/s Rico Auto Indus. Ltd.

..... Appellants

Rep. by Shri A.R. Madhav Rao, Advocate

V/s

CCE, Delhi-III
Respondant

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Rep. by Shri R.K. Verma,

AR

13. Excise Appeal No 456 of 2010

(Arising out common Order-in-Original No. 13-80/SSS/CE/09 dated 26,11,2009 passed
by the Commissioner of Central Excise, Delhi-III.)

M/s Neel Metal Products Ltd.,

..... Appellants

Rep. by Shri S.k. Pahwa, Advocate

V/s

CCE, Delhi-III
Respondant

.....

Rep. by Shri R.K. Verma,

AR

14. Excise Appeal No. E/1059 of 2010

(Arising out common Order-in-Original No. 115(DK)CE/JPr-i/2010 dated 2.3.2010 passed by the Commissioner of Central III Excise (Appeal), Jaipur)

M/s Dynamic Cables Pvt. Ltd., Appellants

Rep. by Shri Mayank Garg, Advocate

V/s

CCE, Jaipur Respondant

Rep. by Shri R.K. Verma,

AR

15. Excise Appeal No. E/1064 of 2010

(Arising out common Order-in-Original No. 116(DK)CE/JPR-I/2010 dated 2.3.2010 passed by the Commissioner of Central Excise (Appeals), Jaipur)

M/s Mangal Electronics Industries
Appellants

Rep. by Shri Mayank Garg, Advocate

V/s

CCE, Jaipur Respondant

Rep. by Shri R.K. Verma,

AR

16. Excise Appeal No. E/732/ of 2011

(Arising out common Order-in-Appeal No.191/BPL/2010 dated 15.12.2010 passed by the Commissioner of Central Excise (Appeal), Bhopal).

M/s KEC International Ltd., Appellants

Rep. by Shri A.R. Madhav Rao, Advocate

V/s

CCE, Bhopal Respondant

Rep. by Shri R.K. Verma,

AR

Misc Oredor No. 880-884/2012-EX (BN)

STAY ORDER NO. 124601261/2012 (BN)

Per Rakesh Kumar:

1. Since a common issue is involved in these appeals, the same are being disposed of by a common order. While the Appeal No. 2307 of 2011 filed by M/s Jay Bharat Maruti Ltd was heard on 13/07.2012, other appeals had been heard on 15.06.2012.
2. In all these cases the assesses had supplied excisable goods to their customers against contracts with Price Escalation Clause. At the time of clearance, the duty had been paid on the provisional price, though the same was subject to variation in terms of the Price Escalation Clause. In none of these cases, the assessee had opted for provisional assessment in terms of the provisions of Rule 7 of the Central Excise Rules, 2002 and the duty had been paid at the time of clearance on the provisional price. Subsequently, there was upward revision of price from back date and the assessee received the escalation amount from their customers against the supplementary invoices raised by them and at the time, the assessee paid the duty on the price differential. However, while paying duty, they did not pay interest on the same as per provisions of Section 11 AB. The department was of the view that since the price had been revised upward from the back date and on account of such upward revision of the price, the appellant had received the differential amount, while paying duty on such price differential, they should also have paid the interest on the duty under the provisions of Section 11 AB. Since the assessee in these cases had not paid interest under Section 11 AB on the duty paid under the Supplementary invoices, the department issued show cause notices for demand of the same.
3. The above show cause notices were adjudicated by the concerned adjudicating authority's from Assistant/Deputy Commissioner to Commissioner. Except for the case of M/s Hero Cycles (E/1755/2009) where the interest demand was dropped by the Original Adjudicating Authority, in all other cases the interest demands were confirmed against the assessee. In the case of M/s. Hero Cycles, the department filed review appeal before the Commissioner (Appeals) who upheld the Asstt. Commissioner's order and against the order of Commissioner (Appeals), the Appeal No.E/1755/2009 has been filed.
4. In two cases of M/s Punjab Tractors Ltd., where the original Adjudication Authority had confirmed the interest demands, the orders of the Original Adjudicating Authority, on appeals being filed, were set aside by the Commissioner (Appeals) and against the orders of the Commissioner (Appeals), the Revenue has filed Appeals nos, E/3730/2006 and E/3886/2006.
5. In other cases, the interest demands were confirmed by the original adjudicating authorities. In cases adjudicated by Commissioner, appeal have been filed against the Commissioner's orders before this Tribunal. In cases when adjudication was done by officer lower in rank than Commissioner, the appeal were just filed before Commissioner of Central Excise (Appeals) and the orders of the original adjudicating authority were upheld by CCE (Appeals). Appeal

these orders of the CCE (Appeals), the appeals have been filed by the Assessee before the Tribunal.

6. Heard both the sides
7. While nobody appeared for M/s UCAL fuel System Ltd. (Appeal No, e/468/2010), M/s Rasandik Engg. Industries india Ltd. (Appeal No. E/469/2010), M/s Hero Cycles Ltd.,(E/1755/2009), Shri A.R. madhav Rao Advocate, appeared for M/s Hinustan Insecticides Ltd., M/s Jay bharat Ltd. (Appeal No E/368to 372of 2010), M/s SKH METAL Ltd., M/s life long India Ltd, M/s Motherson Sumi Systems Ltd., M/s Krishan Maruti Ltd., and M/s RICO Auto Industries Ltd., Shri S.K. Pahwa advocate, appeared for M/s Neel Metal Products Ltd., Shri Mayank Garg Advocate, appeared for M/s Dynamic Cables Pvt Ltd. And M/s Mangal Electrical Industries Ltd., and Shri R. Santhanam, Advocate appeared for M/s Jay Bharat Maruti Ltd., (Appea No. E/2307 of 2011).
- 7.1 Shri A.R. Madhav Rao, Advocate pleaded that the price differential received on account of retrospective price escalation also includes the element of interest, that interest on receivable is deductible from the the assessable value , that the assesses in these cases have paid duty on the entire amount of price escalation which includes the element of interest, that when the assesses have paid duty on the element of interest, there is no justification for demanding interest for delay in payment of duty in terms of provisions of Section 11 AB, that this poing has not been considered by the Apex Court in the cases of CCE, Pune V/s SKF India Ltd, reported in 2009 (239) ELT 385 (SC) and CCE Vs. International Auto Ltd., reported in 2010 (250) ELT 3 (SC), that in any case even if the interest under Section 11 AB is held to be payable on the duty paid on the price differential received on account of price escalation, the recovery of the same would be subject to limitation period prescribed for recover of shorts levied, short paid of erroneously refunded under Section 11 A of the Central Excise Act, that in this regard, reliance is placed on the Apex Court's judgment in the case of TVS Whirlpool reported in 2010 (119) ELT A-77 (SC) wherein the Apex Court held that it is only reasonable that period of limitation that applies to a claim for principal amount should also apply to the claim for interest thereon also, that same view has been expressed by Hon'ble Delhi High Court in case of Quality Ice Cream and others vs. Union of India decided vide Judgment dared 18.1.2012 n Writ Petition No. C/114-115/06 and by Hon'ble Gujarat High Court in the case of CCE, Vadodara –II Vs. Gujarat Narmada co. Ltd. Reported in AIT/2012/36 (HC) , that tribunal in the case of EMCO Ltd. Vs. CCE reported in 2011 (242) ELT 136 following Apex Court's judgment in the case of Collector of customs VS. TVS Whirlpool Ltd. (surpa) has held that for recovery of interest, the limitation period prescribed for recovery of short levy, non levy or erroneously refunded duty as prescribed under section 11 a (1) would apply, that in these case since the Assesses had paid the duty on the price differential received on their own under limitation to the department, there is no question of suppression of any information and it is only the normal limitation period of one year from the relevant date which would be applicable and that in the view of this, even if it is held that in respect of the duty paid under the supplementary invoices on the price differential amount received, the interest under section 11 AB is also payable, its recovery would be subject to the normal limitation period of one year prescribed under section 11 A of the Central Excise Act, 1944.

- 7.2 Shri Mayank Garg, Advocate, representing M/s. Dynamic Cables Pvt Ltd. And M/s. Mangal Electrical Industries Ltd. Also raised the same points as those raised by Shri A.R. Madhav Rao, Advocate.
- 7.3 However, Shri S.k. Pahwa, Advocate, Id. Counsel representing M/s. Neel Metal Products (Appeal No. E/456/2010) and shri R. Santhanam, Advocate representing M/s. jay Bharat Maruti Ltd. In Appeal No. E/2307 of 2011 pleaded that while they concede the main issue of merit, in view of the Apex Court's Judgment in SKF India Ltd. (supra), they contest the interest demands only on limitation and according to them, the demands for interest are subjected to limitation period prescribed under section 11 A (1), and in the circumstances of these cases, only normal limitation period would apply. In support of this plea both of them relied upon the various judgments cited by Shri A.R. Madhav Rao, Advocate.
8. Shri R.K Verma, Id. Departmental Representative pleaded that the issue involved in this case stands settled by the Apex Court in its Judgments in the cases of CCE Vs. SKF India Ltd. Reported in 2009 (239) ELT 385 and CCE VS. International Auto reported in 2010 (250) ELT 3 (SC), that these judgments of the Apex Court are binding on this Tribunal, that the appellants' plea that the price differential amount on account of upward price revision from back date also included the elements of interest and that the duty had also been paid on the interest, had neither been raised before the adjudicating authorities nor before the first the appellate authority and hence the same cannot be raised at this stage, that in any case, this point raised by the appellant has absolutely no relation to the point of dispute, in this case, as to whether interest under section 11 AB would be payable on the differential duty paid on the price escalation amount, received on account of upward price revision from the back date and that so far as the question of limitation is concerned, the Tribunal in the case of SKH Auto Components Vs. CCE, Delhi-IV reported in 2011 (274) ELT 273 (Tribunal-Delhi) has held that since in the statute no limitation period has been prescribed for recovery of interest, the court or the Tribunal can not read into statute book something which is not there and cannot invent a limitation period for recovery of interest in absence of any limitation period having been prescribed under the statute. He also cited the judgments of the Hon'ble Bombay High Court in the case of CC, Aurangabad Vs. Padmashri V.V. Patil S.S.K. Ltd reported in 2007 (215) ELT 23 (Bombay), wherein it was held that interest is a civil liability of the assessee, who has retained the amount of public exchequer and which ought to have gone in the pocket of the Government much earlier and that the interest on the duty evaded is payable and the same is compulsory. Even if no notice has been issued. He pleaded that whenever any duty demanded has been upheld against the assessee, the interest liability is automatic and there is no question of issuing issue show cause notice for recovery of interest and hence there is no limitation period for recovery of interest.
9. We have carefully considered the submissions from both the sides and perused the records.
10. In all these cases, the assesseees had supplied the goods manufactured by them to their customers against contracts with price variations/price escalation clause. While initially, the duty had been paid on the provisional price, subsequently, when the price was revised by the assesseees upwards with retrospective effect,

they issued supplementary invoices for prices differential and under those invoices, they also paid excise duty on the price differential. Treating the payments of duty by the Assessee on their own on the price differential received, as payment of short paid duty under section 11A (2B), the Apex court in the case of CCE vs. SKF Ltd. (supra) and International Auto Ltd. (supra) has held that the interest on this duty under section 11 AB would be chargeable. In this regard, para-7 and 8 of the judgment in the case of CCE vs. International Auto Ltd. (supra) are reproduced below:-

7. We find no merit in the submission advanced on behalf of the assessee. The controversy arising in this appeal is squarely covered by the judgment of the Court in the case of Commissioner of Central Excise, Pune. SKF India Limited, reported in 2009 (239) E.L.T. 385. We quote herein below relevant observation made in the case of SKF India Limited [supra], which reads as follows:

“9. Section 11A puts the cases of non –levy or short levy, non –payments or short payments 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 or 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 willful misstatement or suppression of facts, or contravention of any of the provisions of the Act or of Rules made there under with intent to evade payment of duty”; that is to say, it is intentional deliberate and/or by deceitful means. Naturally, the cases falling in the two groups lead to different consequences and are dealt with differently. Section 11A, however allow the assesses 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. dealt with under sub-section (1A) of section 11A and the cases where the non-payment of 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 make 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 started in Explanation 2 to sub-section (2B) is reiterated in section 11AB that states where any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded, the person who has paid the duty under sub-section (2B) of section 11A, shall in addition to the duty, be liable to pay 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 willful misstatement 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 & 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 452 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 Rucha 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 become known to them from their customers. The differential duty was due at that time i.e. when the revised rates applicable 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 provision of Section 11A(2) and 11A(2B) were not applicable as the situation occurred in the instant case was quite different section 11A (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 cleared, on short payment of duty. The differential duty was paid only later when the assessee issued supplementary invoices to its customers demanding the balance amount. 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.

8. Section 11a of the Act deals with recovery of duty not levied or not paid or short-levied or short-paid. The said Section, which stood inserted by Act 25 of 1978, underwent a sea-change when Parliament inserted major

changes in that section vide Act 14 of 2001 [with effect from 11th May, 2001] and Act 32 of 2003 [with effect from 14th May, 2003]. It needs to be mentioned that simultaneously Act 14 of 2001 also made changes to Section 11AB of the Act. In the case of S.K.F. India Limited [supra], it has been inter alia, held, as can be seen from the above-quoted paragraphs, that sub-section 2(B) of Section 11A provides that the assessee in default may make payment of the unpaid duty on the basis of his own ascertainment or as ascertained by Central Excise Officer and, in that event such assessee in default would not be served with the Demand Notice under Section 11A(1) of the Act. However, Explanation (2) to the sub-section makes it clear that such payment would not be exempt from interest chargeable under Section 11AB of the Act. What is stated in Explanation (2) to sub-section 2(B) is reiterated in Section 11AB of the Act, which deals with interest on delayed payment of duty. From the Scheme of Section 11A(2B) and Section 11AB of the Act, it becomes clear that interest is levied for loss of revenue on any count. In the present case, one fact remains undisputed, namely, accrual of price differential. What does differential price signify? It signifies that value, which is the function of the price, on the date of removal/clearance of the goods was not correct. That, it was understated. Therefore, the price indicated by the supplementary invoice is directly relatable to the value of the goods on the date of clearance, hence, enhanced duty. This enhanced duty is on the corrected value of the goods on the date of removal. 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. In our view with the entire change in the Scheme of recovery of duty under the Act particularly after insertion of Act 14 of 2001 and Act 32 of 2003, the judgement of this Court in the case of M.R.F. Limited [supra] would not apply. That judgement was on interpretation of Section 11B of the Act, which concern claim for refund of duty by the assessee. That judgment was in the context of the price list approved on 14th May, 1983. In that case assessee had made a claim for refund of excise duty on the differential between the price on the date of removal and the reduced price on the date of removal and the reduced price at which tyres were sold. The price was approved by the Government. In that case, the assessee submitted that its price list was approved, by the Government on 14th May, 1983, level and on that account, price differential arose on the basis of which the assessee claimed refund of excise duty which stood rejected by this Court on the ground that once the assessee had cleared the goods on classification, the assessee become liable to payment of duty on the date of removal and subsequent reduction in the price for whatever reason cannot be made a matter of concern to the Department insofar as the liability to pay excise duty was concerned. In the present case, we are concerned with the imposition of interest which, as stated above, is charged to compensate the Department for loss of revenue. Be that as it may, as stated above, the Scheme of Section 11A of the Act has since undergone substantial change and, in the circumstances, in our view, the judgment of this Court in the case of M.R.F Limited [supra] has no application to the facts of this case. In

our view, the judgment of this Court in the case of SKF India Limited [supra] is squarely applicable to the facts of this case.

- 10.1 In our view, the judgment of the Apex Court in the case of CCE Vs. International Auto Ltd. (supra) and CCE Vs. SKF (supra) are squarely applicable to the facts of this case.
11. It is contended on behalf of the assessee that price differential on account of price revision from retrospective effect included the element of interest on the amount receivable, which interest as per law is deductible from the assessable value. Ld. Counsels for the assessee submitted that despite the aforesaid legal position, the assessee have paid excise duty on full amount of price differential which included the element of interest. As such, if at all, the assessee are held to be liable to pay the interest on the excise duty on price differential for the purpose of calculation of excise duty, the interest component included in the price differential has to be excluded.
 - 11.1 We are not convinced with the aforesaid submission. Firstly, for the reason that this plea was not raised by the assessee during the adjudication proceeding or the proceedings before the Commissioner (Appeals). This plea has been taken for the first time before the Tribunal and that too at the stage of final argument, which is our view, cannot be considered, as it relates to the question of fact. Otherwise also, the appellants/assessee have not placed on record documentary evidence regarding the fixation of the price escalation. That evidence alone, could have given a clue whether while fixing the final price of the goods cleared by the assessee, interest component on the differential of provisional price and final price was taken into account since the appellant have withheld the best evidence. In this regard, we are inclined to draw adverse presumption that the interest component on differential between the provisional and final price was not taken into consideration while fixing the final price on the basis of various factors like increase in cost of raw materials, labour charges, etc. We are supported in taking this view by the judgment of the Larger Bench of the Tribunal in the case of CCE Vs. Supreme Petroleum reported in 2009 (240) ELT 38 (Tribunal-LB), wherein it was held that since the transaction value depends on the contract between the seller and the buyer and the Revenue is not privy to the contract of the sale, in these circumstances, if the seller (assessee) claims certain deductions from the transaction value on account of certain expenses incurred which are not includible in the transaction value, the burden of proving that those expenses were incurred is on the assessee. In this case, if the assessee claim that the price differential on account of retrospective price escalation received by them also included the element of interest, which is deductible from the assessable value, the burden of proof would be on the assessee for which they have to produce cogent evidence. Just a claim that the price differential received by the assessee also included element of interest is without merit.
 - 11.2 Thus, we do not find any merit in this plea of assessee.
12. Since as discussed above, the issue involved in this case is squarely covered in favour of Revenue by the judgement of the Apex court in the case of SKF India Ltd. (supra) and CCE Vs. International Auto Ltd, we hold that the interest under Section 11 AB is payable on the duty paid under Section 11 A(2B) under supplementary invoice on the price differential on account of retrospective price

escalation received by the assessee and if the same has not been paid, the same would be recoverable from the assessee.

13. The next point of dispute is as to whether the recovery of interest would be subject to limitation period prescribed under section 11 A (1) of the Central Excise Act or not. According to the assessee, the recovery of interest is subject to the limitation period prescribed under Section 11 A and since there is no suppression of facts on part of the assessee, only normal limitation period of one year would be available. On the other hand, according to the Department, there is no limitation period for recovery of interest.
14. Section 11 A of the Central Excise Act, 1944 provides a mechanism for determining the correct duty liability of an assessee when it appears that there has been non-levy, short levy; short payment or erroneous refund of duty in case of some assessee and Section 11 A (1) provides for issue of a show cause notice to the assessee for this purpose and also the limitation period of one year of five year from the "relevant date", as the case may be, for issue of the notice. The duty becomes payable and becomes the "sum due to the Government" only when the show cause notice has been adjudicated and the duty liability has been determined under sub Section (2) of Section 11 A. The interest liability under Section 11 AB arises as soon as it has been determined that there is short payment/non-payment or erroneous refund of duty and if so, its quantum has been determined. If the duty payable as determined under Section 11 A(2), which is the "sum due to the Government" is not paid along with interest under Section 11 AB, the same can be recovered as per the provisions of Section 11 for which no further show cause notice is required to be issued.
14. Under Section 11 A (2B) in the case of non levy, short levy, short payment or erroneous refund of duty, where no fraud, willful mis-statement suppression of facts, etc. is involved, if an assessee either on discovering such non-payment, short payment or erroneous refund of duty himself on being pointed out by the Department, pays on his own the entire duty along with interest chargeable under Section 11 AB and intimates the payment to the Department, no show cause notice under Section 11 A (1) shall be issued to him. In such cases, the assessee himself has accepted his duty liability and if he discharges it on his own along with interest under Section 11 AB, no show cause would be required to be involved.
- 14.2 Under Rule 8 of the Central Excise Rules, 2002, an assessee is required to pay duty on the clearance of excisable goods made during a month as self-assessed by him under Rule 6 *ibid*, by 5th of the next month and if he fails to pay the duty by the due date, he shall be liable to pay interest on outstanding duty at the rate notified under Section 11 AB from the 1st day after the due date till the date of payment of duty. If the duty payable under Rule 8 is not paid along with interest the same can be recovered as per the provisions of Section 11 and no show cause notice is required to be issued under Section 11 A the recovery of the duty self assessed under Rule 6, which was not pay by the due date prescribe in Rule 8.
- 14.3 Under Section 11 AB (1), where any duty of excise has not been levied or has been short levied or short paid erroneously refunded, the person who is liable to pay the duty as determined under Section 11 A (2), or has paid the duty under Section 11 A (2B), shall in addition to the duty be liable to pay interest at a rate

fixed by Central Government by notification from the 1st Day of the month succeeding the month in which the duty ought to have been paid or from the day erroneous refund, as the case may be, till the date of payment of such duty. Thus ones the short payment, non-payment erroneous refund of duty has been determined by a proper officer under Section 11 A(2) or has been admitted by the assessee under Section 11A (2B), the interest liability under Section 11 AB is automatic.

- 14.4 The question arises as to whether a show cause notice for recovery of interest on duty is required to be issued within the limitation period prescribe in Section 11 A, when either –
- (a) Duty liability in respect of non paid, short paid erroneously refunded duty as determined under Section 11 A(2) by an order passed by a proper office has been discharged by the assessee, but the interest on duty under Section 11 AB has not been paid or
 - (b) Duty liability in respect of non paid, short paid erroneously refunded duty, not involving fraud suppression, etc., has been discharged by the assessee under Section 11 A (2B), on his own ascertainment or on being pointed out by the Department, but the interest on such duty under Section 11AB has not been paid; or
 - (c) Duty liability in respect of clearances made during a month, as self-assessed under Rule 6 was paid but after some delay from the due date and the interest for the period of delay has not been paid.
- 15 Hon'ble Supreme Court in case of Commissioner of Trade Tax, Lukhnow Vs. Kanhai Ram Thekedar reported in 2005 (185) ELT 3 (SC) has held that interest liability occurs automatically and separate written notice is not required for his recovery. Some view has been taken by the Apex Court in its judgments in the case of -
- (a) The Sales Tax Officer, Sector-I, Kanpur & Ors. Vs. M/s Dwarka Prasad Sheao Karan Dass reported in (1977) 1 SCC-22.
 - (b) Prahlad Rai & other Vs. Sales Tax Office, Meerut-1991 (Supp) (2) 612; and
 - (c) Haji Lal Mohd. Biri Works Vs State of U.P. 1974 3 SCC 137.

When interest for the period of delay in discharge of duty liability by an assessee, either self-assessed or assessed by the Department is automatic by operation of the law and for this reason, no show cause notice is required to be issued to the assessee and no adjudication process is required fo determing his interest liability, in our view, the limitation period prescribed under Section 11 A would not be applicable, as the same s for the issue of show cause notice for adjudication of the allegation of non-payment, short payment or erroneous refund of duty and determining the duty liability if the allegation is upheld and would not be applicable if no show cause notice is required to be issued. Interest for delay in discharge of duty liability either determined by the Department under-Section 11A (2) OR self-determined by the assessee under Section 11 (2B) or self assessed by the assessee for a particular month under-Rule 6 of the Central Excise Rules, 2002, is automatic and the same is a “sum due of the Government”, which if not paid,

can be recovered directly by following the procedure prescribed in Section 11 for which there is no limitation period. There is a difference between the proceeding under Section 11 A for determining the duty liability in cases of the alleged non-payment or erroneous refund of duty, whether due to bonafide mistake of the assessee or otherwise and for which a show cause notice is required to be issued within the limitation period of one year or five years, as the case may be, and the recovery action under Section 11 which is for the recovery of the "sum to the Government", which is the duty liability already determined by the proper officer or self-ascertained or self-assessed and interest on such duty, if any, chargeable and for which neither any show cause notice is required nor the limitation period prescribed under section 11 A would be applicable. The question of limitation period for recovery action under Section 11 of the "sums due to the Government" would arise only if a limitation period has been prescribed in Section 11 for this purpose. But no such limitation period has been prescribed for recovery of "sum due to the Government" i.e. the arrears of revenue. The limitation period under Section 11 A (1) is only for making claim by the Revenue for recovery of duty alleged to be not paid, short paid or erroneously refunded, not for effecting recovery of an adjudicated claim which has been confirmed and has become a 'Sum due to the Government'. In our view, when short-payment, non payment or erroneous refund of some duty has been admitted by an assessee and he chooses, to pay such duty under-section 11A(2B) voluntarily, in accordance with the provision of Section 11AB, he would also be required to pay the interest on this duty and if he has not paid the interest alongwith the duty the interest can be recovered directly under Section 11 as sum due to the Government and for this purpose, neither any show cause notice under-Section 11 A is required to be issued nor the limitation period prescribed in Section 11 A would be applicable, as the limitation period under-Section 11 A is only for issue of show cause notice for determining the duty liability by an adjudication process, not for recovery under-Section 11 of duty demand already determined or self admitted or self-assessed and interest on such duty liability under-Section 11AB, which is by automatic operation of law.

16. In the case of TVS Whirpool (supra), the Assessee with clearing the goods from bonded warehouse after the expiry of warehousing period did not pay the interest on duty for the period of delay in clearing the warehoused goods which was chargeable in terms of provisions of Section 61 (3) of the Custom Act, 1962 and for this reason, the Department issued a notice to the Assessee for recovery of interest. The Tribunal held the notice to be time barred holding that for issue of notice for recovery of non-paid interest, the limitation period prescribed under-Section 28 of the Custom Act 1962 for recovery of non-levied, short-levied, short paid or erroneously refunded duty would apply. The Apex Court vide order dated 7.10.2009 upheld the Tribunal's order observing that-

"It is only reasonable that the period of limitation that applies to the principal amount should also apply to the claim for interest thereon. We find no merit in the appeals and they are dismissed with costs,"

However, in this order, the earlier judgement of the Apex Court in case of Commissioner of Trade Tax Lucknow Vs Kanhai Ram Thekedar (supra) was not considered, in paras 9, 10, 11, 12, 13, & 16 Of which the Apex Court held thus:-

“9. The High Court was of the view that even if the dealer was liable to pay interest on delayed payment of amount of tax, a notice in writing before passing the impugned order was necessary which is not shown to have been done in the present case. The impugned order dated 30.07.1990 nowhere states that any notice was sent to the dealer, therefore, such an order could not be sustained. Consequently, the Tribunal has committed an error in passing the impugned order dated 21.07.1998 remanding the matter to the assessing authority. Holding so, the High Court allowed the revision and quashed the order of the Tribunal.

10. In our opinion, the order passed by the High Court is absolutely illegal.

11. In the case of Commissioner of Sales Tax Vs Crucible Centre 1993 Suppl. (3) SCC 495, the Commissioner of Sales Tax was the appellant. The appeal was preferred against the judgment of the learned single judge of Allahabad High Court allowing the sales Tax revision filed by the assessee. After referring to section 8(1), this court held as under:-

“According to this section, a dealer shall have to deposit the tax admittedly payable either within the time prescribed or by August 31, 1975 whichever is later. If he fails to do so, simple interest at the rate of 2% per mens rea becomes payable. This levy of interest is by operation of law; it does not require a separate order as such by any authority. The explanation define the expression- “tax admittedly payable”. It mean the tax which is payable, inter alia, according to the return filed by the dealer.

In this case, the dealer filed a return for the assessment year 1975-76. The goods in which he was dealing fell within the category of unspecified goods. For unspecified goods, the rate of tax prior to December 1, 1973 was 3.5% with effect from the said date, however, the rate was revised to 7%. In the return filed by the respondent-assessee, he arrived at the tax admittedly payable on the turnover disclosed by him, by applying rate of 3.5%. The authorities held that inasmuch as he has not paid the tax admittedly payable within the meaning of section 8(1) inasmuch he has not calculated and paid the tax at the rate prescribed by law- he must be held to have failed to comply with the requirement of section 8(1). Accordingly, interest as prescribed by the said section was levied. The appellate authority as well as the tribunal affirmed the said levy. The matter was carried to the High Court by way of a revision. The learned Judge allowed the revision holding that “there has been no revision. The learned Judge allowed the revision holding that “there had been no finding by the Tribunal that the assessee acted mala fide in not depositing the tax at the rate of 7%. The demand of interest was not justified.

12. In the case of Sales Tax Officer, Section-I, Kanpur & Anr. Vs. M/s. Dwarika Prasad Sheo Karan Dass (1977) 1 SCC-22, this court held that the assessee is liable to pay interest under section 8(1-A) of the UP Sales Tax Act, 1948 on unpaid amount of the tax and such liability arises automatically by operation of law. This court also held fresh notice of demand was not necessary when amount of tax or other dues reduced as a result of the appeal, revision or other proceeding.

13. This court had occasion to considered sub-section (1-A) of section 8 of the Act in the case of Haji Lal Mohd. Biri Works Vs. State of U.P., (1974) 3 SCC-137 and held that the liability to pay interest under section 8(1A) of the Act is automatic and arises by operation of law. It was further observed in that case that it is not necessary for the Sales Tax Officer to specify the amount of interest in recovery certificate.

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16. In the case of Prahald Rai & Orthers Vs. Sales Tax Office, Meerut & ors. 1991 Suppl. (2) SCC-612 this court had an occasion to consider the payment of interest on arrears of sales tax. In this case, the assessee contended that he had admittedly paid the entire arrears of sales tax voluntarily and therefore, they did not become defaulter and not liable to pay interest. Rejecting the said argument, this court held that accrual of interest is automatic and no separate notice of demand was required to be served on that respect.

16.1 When on an admitted excise duty liability, which is voluntarily discharged, interest chargeable by automatic operation of law was not paid, no show cause notice for recovery of interest would be required and, therefore, the limitation period under section 11 A, which is for issue of show cause notice for adjudication of allegation of non-levy, non payment, short payment or erroneous refund duty, would not be applicable for recovery of such interest,. The question of limitation under section 11 A of Central Excise Act, 1944 for recovery of interest on a confirmed duty demand or an admitted duty is liability, is linked with requirement of issuing show cause notice for the same. But in the case of TVS Whirlpool (supra) neither the question whether there was requirement to issue show cause notice for recovery of interest under section 61(3) of customs Act, 1962 on the customs duty paid on clearances of goods from bonded warehouse after the expiry of warehousing period, which was by automatic operation of law, was raised nor was considered and the interest demanded was considered as a chain yet to be adjudicated, not as sum to the Government recoverable under Section 142 of Customs Act,1962 (corresponding to section 11 of Central Excise Act, 1944).

17. In case of Kwality Ice Creams Company & other Vs. Union of India & others decided by Hon'ble Delhi High Court vide judgement reported in AIR -2012-38-HC, a duty demanded of Rs 1,2300,006/- had been upheld against M/S. Kwality Ice Creams-Co, by the Assistant Commissioner vide order-in-original dated 6.4.2000 by the way of demand for short paid duty. The order was silent about interest. On appeal, the CCE (Appeals) reduced the duty to Rs.75,16,661/- vide order-in-appeal dated 12.09.2001. The order of the Appellate Authority was also silent about interest. On 10.11.2004, the Department wrote a letter to the assessee demanding an amount of Rs 24,05,332/- as interest on duty under section 11 AB. Hon'ble High Court relying upon the Apex Court's order in case of TVS Whirlpool (supra) quashed the Department's direction dated 25.10.2001 for payment of interest as time barred in terms of limitation period, prescribed under section 11 A However, this order does not consider Apex Court's Judgement In case of CST, Lucknow VS. Kanhai Ram Thekedar (supra), wherein it was held that separate written notice for recovery of interest on sales

tax is not required if the interest demand was not included in the assessment order.

- 17.1 Similarly, Hon'ble Gujarat High Court In case of CCE, Vadodara-II Vs. Gujarat Narmada Fertilizer Co. Ltd. Reported in AIR – 2012 -36 –HC, while holding that recovery of interest on short paid duty, voluntarily, paid under section 11 A (2B) , is subjected to the limitation period prescribed under section 11 A, has not taken note of the above mentioned Judgments of the Apex Court.
18. In view of the above discussion, our findings on the question of limitation are as under.
 - 18.1 Interest on A duty liability confirmed under Section 11 A (2) or self ascertained and paid under Section 11 A (2B) is by automatic of Section 11 AB and for recovery of such interest, no show cause notice is required and hence the limitation period prescribed under Section 11 A is inapplicable.
 - 18.2 The interest under Section 11 AB on A duty demand confirmed under section 11 A(2) or self admitted/self ascertained duty under section 11 A(2B) or for delay in payment of duty self assessed under Rule 6 of Central Excise Rules, 2002 by the due date prescribed under Rule 8 ibid is "sum due to the Government", Which is recoverable under Section 11 of the Central Excise Act 1944, and for which there is no limitation period. The show cause notice issued in these cases, even if invoking Section 11 A, have to be treated as mere communication to the assesseees for recovery of interest under section 11.
19. In view of the finding in para-12 and 17 of this order, while the appeals filed by the Revenue are allowed, the appeals filed by the Assesseees are dismissed. All stay and Misc, application also stand disposed of.

[Order pronounced on 20.07.2012].