REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2150 OF 2012

M/S. STEEL AUTHORITY OF INDIA LTD. ..APPELLANT(S)

VERSUS

COMMISSIONER OF CENTRAL EXCISE, RAIPUR ..RESPONDENT(S)

WITH

CIVIL APPEAL NO.2562/2012

CIVIL APPEAL NO.600/2013

CIVIL APPEAL NO.1522-23/2013

CIVIL APPEAL NO.599/2013

JUDGMENT

K.M. JOSEPH, J.

1. A Bench of two judges doubted the correctness of the judgment rendered by a Bench of two learned judges of this Court in CCE v. SKF India Ltd. 2009 (13) SCC 461 (hereinafter referred to as

Signature Not Verified
Digitally signed by DEEPAK GUGLANI
Date: 2019.05.08 16:13:50 IST
Reason:

the "SKF Case") as also the another judgment rendered by the same Bench in CCE v. International Auto Ltd. 2010 (2) SCC 672 and on the said basis to resolve the controversy the matter stood posted before us.

2. Very briefly put, the question which we are called upon to consider and resolve is as to whether interest is payable on the differential excise duty with retrospective effect that become payable on the basis of escalation clause under Section 11AB of the Central Excise Act, 1944 (hereinafter referred to as "the Act").

3. In this batch of appeals, we will treat C.A. No.2150/2012 as the leading case. We will refer to the said case as the SAIL Case. In the said case originally, the appellant company which is manufacturer of various products including rail

sold the same to the Indian Railways. The products were cleared on sale from 1st January, 2005 to July 2006. The goods were cleared on the payment of excise duty on the payment of price which was fixed based on their circular dated 24.04.2005. Subsequently, the prices were enhanced by way of price circular dated 20.07.2006. The revision came into effect with retrospective effect. It is based on the same that SAIL deposited Rs.142 crores by way of excise duty. This was done in August 2006. Thereupon, the officers of the department indulged in correspondence with SAIL seeking details regarding the clearances which were effected. On the basis of material made available, SAIL was called upon to remit interest under Section 11AB of the Act. SAIL filed its objections. It is after considering the objections, the authority found that SAIL was liable to pay interest on a sum of

Rs.142 crores calculated based on the date of removal of the goods during the period from January, 2005 to July,2006. Various objections raised by the appellants were dealt with and they were found merit less. An appeal was carried before the Tribunal. The Tribunal relied upon the judgment of this Court in SKF India Ltd. Case (supra) and accordingly dismissed the appeal. Thereafter when the matter came up before this Court, a Bench of two learned judges after elaborately hearing the matter doubted the correctness of the decision in SKF case and also International Auto and hence the cases were referred to us in the decision reported in 2015 (16) SCC 107. We heard learned counsel for the parties.

4. In *SKF case* also the assessee on the basis of revision of prices with retrospective effect paid the differential duty on being called upon to pay the said amount. Thereafter the Revenue called

upon the assesee to pay interest under Section 11AB of the Act. A Bench of two learned judges after considering Sections 11A and 11AB disapproved the judgment of the Bombay High Court in CCE v. Rucha Engineering P.Ltd. holding *inter alia* as follows:

> **"11. Section 11-A puts the cases of non-levy or short-levy, non-payment or short-payment or erroneous refund of duty in two categories. One in which the non-payment or short-payment, etc. of duty is for a reason other than deceit; the default is due to oversight or some mistake and it is not intentional. The second in which the non-payment or short-payment, etc. of duty is "by reason of fraud, collusion or any wilful misstatement or suppression of facts, or contravention of any of the provisions of the Act or of Rules made thereunder with intent to evade payment of duty"; that is to say, it is intentional, deliberate and/or by deceitful means. Naturally, the cases falling in the two groups lead to different consequences and are dealt with differently.**
>
> **12. Section 11-A, however allow the assessees-in-default in both kinds of cases to make amends, subject of course to certain terms and conditions. The cases where the non-payment or short-payment, etc. of duty is by reason of fraud, collusion, etc. are dealt with under sub-section (1-A) of Section 11-A**

and the cases where the non-payment or short-payment of duty is not intentional under sub-section (2-B).

13. Sub-section (2-B) of Section 11-A provides that the assessee-in-default may, before the notice issued under sub-section (1) is served on him, make payment of the unpaid duty on the basis of his own ascertainment or as ascertained by a Central Excise Officer and inform the Central Excise Officer in writing about the payment made by him and in that event he would not be given the demand notice under sub-section (1). But Explanation 2 to the sub-section makes it expressly clear that such payment would not be exempt from interest chargeable under Section 11-AB, 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.

17. We are unable to subscribe to the view taken by the High Court in *Rucha Engg.* [First Appeal No. 42 of 2007 decided on 3-4-2007] 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 amounts. Seen thus, it was clearly a case of short-payment of duty

though indeed completely unintended and without any element of deceit, etc. The payment of differential duty thus clearly came under sub-section (2-B) of Section 11-A and attracted levy of interest under Section 11-AB of the Act."

5. The same Bench in *International Auto case* came to reiterate the same view in the latter decision. The Bench also proceeded to distinguish the decision in *MRF Ltd. v. Collector of Central Excise, Madras* 1997 (5) SCC 104. This is what the court has laid down in regard to *MRF case* in paragraph 9.

"9. 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 judgment of this Court in *MRF Ltd.* [(1997) 5 SCC 104 : (1997) 92 ELT 309] would not apply. That judgment was on interpretation of Section 11-B of the Act, which concerns claim for refund of duty by the assessee. That judgment was in the context of the price list approved on 14-5-1983. In that case, the 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

> **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 14-5-1983, but subsequent thereto, on account of consumer resistance, the Government of India directed the assessee to roll back the prices to pre-14-5-1983 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 became liable to payment of duty on the date of removal and subsequent reduction in the prices for whatever reason cannot be made a matter of concern to the Department insofar as the liability to pay excise duty was concerned."**

6. A Bench of two learned judges who have referred the cases felt that the MRF decision would continue to prevail, the value at the time of removal of the goods alone would govern the Situation which is a fundamental principle which continues to hold good till now. The additional duty to be paid in future cannot be treated as attracting the concept of "short payment". Though the differential duty may

be payable but the interest is not payable. The interest clock would start ticking from the date the differential duty is due, that is, the day on which the parties agree upon the escalated price and not before. The expression "ought to have been paid" found in Section 11AB was not considered by this Court in SKF case, it was pointed out. The Court felt that SKF Case runs contrary to the Constitution Bench decision in *JK Synthetics* and interest cannot be demanded by way of damages or compensation.

7. In our view, the following questions will fall to be decided by us:

1) Whether the decision in *SKF case* and also in *International Auto* lay down the correct law having regard to the decision of this Court in MRF case which was in fact rendered by a Bench of three Judges.

2) The effect of the judgment in *JK Synthetics v. State of Rajathan* as also the other judgments cited before us in regard to demand for interest under fiscal statutes.

3) Whether the determination of duty under Section 11A(2) is necessary to sustain the demand for interest under Section 11AB of the Act.

4) The impact of Rule 7 of the Central Excise rules which contemplates provisional assessment.

5) Whether payment of differential duty can be treated as a case of payment of duty under the head "short paid".

6) The effect of decisions under the Income Tax Act relating to accrual of income and the impact of accrual of income under the Income

Tax Act on the liability under Section 11AB of the Act having regard to the statutory scheme under the Act and the Rules.

8. Before we proceed to deal with the matter in greater detail, we must at once notice the following finding in the reference order passed by this Court in *Steel Authority of India vs. CCE* (supra):

> **"21. In the first instance, he pointed out that in these appeals, there can be two distinct types of transactions:**
>
> **(a) where the price of the goods is "fixed" at the time and place of removal, and as a result of subsequent negotiations (often protracted) the price is retrospectively revised by the buyer;**
>
> **(b) where the price at the time and place of removal is "not fixed" (price subject to escalation clause), and the final price is agreed between the seller and buyer subsequently.**
>
> **According to him in the cases falling in the first category, even the differential duty is not payable. However, all these appeals fall in the second category and, therefore, we are not indulging in any discussion pertaining to the first**

category. We may also point out that in all these appeals, the period in dispute (i.e. the period in which supplementary invoices on account of price revision were raised) is post the introduction of the "transaction value" definition in Section 4 of the 1944 Act but before 2010.

22. It is a common case of the parties and even the learned counsel for the assessee admits that in non-fixed price scenario, differential duty is liable to be paid on subsequent revision of price which the assessee had already paid the differential duty at or about the time when revised price was agreed upon by the seller and the buyer. The question, however, is as to whether interest thereon is payable from the date of clearance of goods when duty was paid on the basis of invoice, till the date when differential duty was paid."

Therefore, we proceed further in this matter on the basis that the price at the time of removal is not fixed. That is, the price is subject to revision under the escalation clause. There is also admittedly no dispute raised either before the Bench which referred the matter or before us by the learned counsel for the appellant that differential duty is

indeed payable on the subsequently revised price which is to operate with retrospective effect.

9. At this juncture we think it apposite to refer to the facts in MRF case (MRF Limited v. Collector of Central Excise, Madras). MRF Case was decided on 12.3.1997 and it is reported in 1997 (5) SCC 104. The appeal was filed in this Court against the order passed by the Tribunal dated 24.9.1986. By the impugned order the assessee's claim for refund of excess duty paid on differential price on the date of removal and the reduced price was rejected. The case set up by the assessee was that the price list was approved on 14.5.1983. Subsequently, there was resistance by the consumers. The Ministry of Commerce, Government of India, thereupon directed the manufacturer-assessee pursuant to a decision taken in a meeting of Manufacturers to bring down the prices to the pre

14.5.1983 level. On the basis of the same a difference in the prices arose. This led to a claim for refund. The Tribunal was of the view that the prices at the time of removal alone mattered. The subsequent reduction in the prices for whatever reason was totally irrelevant. Thereafter, the court proceeded to hold as follows:

> **"2. We have heard the learned counsel for the assessee. Once the assessee has cleared the goods on the classification and price indicated by him at the time of the removal of the goods from the factory gate, the assessee becomes liable to payment of duty on that date and time and subsequent reduction in prices for whatever reason cannot be a matter of concern to the Central Excise Department insofar as the liability to payment of excise duty was concerned. This is the view which was taken by the Tribunal in the case of *Indo Hacks Ltd.* V. *CCE (*1986) 25 ELT 69 (Trib)and it seems to us that the Tribunal's view that the duty is chargeable at the rate and price when the commodity is cleared at the factory gate and not on the price reduced at a subsequent date is unexceptionable. Besides as rightly observed by the Tribunal the subsequent fluctuation in the prices of the commodity can have no relevance whatsoever so far as the**

liability to pay excise duty is concerned. That being so, even if we assume that the roll back in the price of tyres manufactured by the appellant Company was occasioned on account of the directive issued by the Central Government, that by itself, without anything more, would not entitle the appellant to claim a refund on the price differential unless it is shown that there was some agreement in this behalf with the Government and the latter had agreed to refund the excise duty to the extent of the reduced price. That being so, we see no merit in this appeal brought by the assessee and dismiss the same with no order as to costs."

10. We may at once notice a feature which stands out. In the *MRF case* at the time when the goods were removed, the prices were fixed and there was absolutely no occasion for the assessee or the department to even contemplate a price revision either upwards or downwards. The price was not provisional. Therefore, we would think that out of the two situations which are noted in paragraph 21 of the Reference Order, the first situation would be comparable to the facts of the decision obtaining

in MRF case. In case where the price is fixed there would be no occasion for the assessee to seek refund but here in the case before us, admittedly the case does not fall under the first category even according to the appellants. It could be said that the price was subject to variation based on the operation of the price escalation clause. Now the time is ripe for us to consider the statutory framework under the Act and the Rules made under the Act. Section 2(h) of the Act defines sale and purchase as follows:

> **2(h) "sale" and "purchase", with their grammatical variations and cognate expressions, mean any transfer of the possession of goods by one person to another in the ordinary course of trade or business for cash or deferred payment or other valuable consideration."**

11. Interestingly, unlike under the definition of Sale of Goods Act, 1930, "sale" under the Act takes place on transfer of possession. However we

need not say anything further as it is not necessary for the cases at hand. Section 3 is the charging section. With effect from 1.7.2000 under the Finance Act of 2000, Section 4 of the Act which is crucial for our case reads as follows:

> **"4. Valuation of excisable goods for purpose of charging of duty of excise –**
>
> **(1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to their value, then, on each removal of the goods, such value shall –**
>
> > **(a) In a case where the goods are sold by the assessee, for delivery at the time and place of the removal, the assessee and the buyer of the goods are not related and the price is the sole consideration for the sale, be the tansaction value;**
> >
> > **(b) In any other case, including the case where the goods are not sold, be the value determined in such manner as may be prescribed**
>
> **(2) The provisions of this section shall not apply in respect of any excisable goods for which a tariff value has been fixed under sub-section (2) of section 3.**
>
> **(3) For the purpose of this section,-**

(a) "assessee" means the person who is liable to pay the duty of excise under this Act and includes his agent;

(b) xxx xxx xxx

(c) xxx xxx xxx

(d) "transaction value" means the price actually paid or payable for the goods, when sold, and includes in addition to the amount charged as price, any amount that the buyer is liable to pay to, or on behalf of, the assessee, by reason of, or in connection with the sale, whether payable at the time of the sale or at any other time, including, but not limited to, any amount charged for, or to make provision for, advertising or publicity, marketing and selling organization expenses, storage, outward handling, servicing, warranty, commission or any other matter; but does not include the amount of duty of excise, sales tax and other taxes, if any, actually paid or actually payable on such goods."

12. Section 11A was inserted in the year 1980 and it underwent changes. Section 11A of the Act as it stood at the relevant time read as follows:

"11A. <u>Recovery of duties not levied or not paid or short-levied or shot-paid or erroneously refunded</u> – (1) When any duty of excise has not been levied or paid or

has been short-levied or short-paid or [erroneously refunded, whether or not such non-levy or non-payment, short-levy or short payment or erroneous refund, as the case may be, was on the basis of any approval acceptance or assessment relating to the rate of duty on or valuation of excisable goods under any other provisions of this Act or the rules made thereunder], a Central Excise Officer may, within [one year] from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

Provided that where any duty of excise has not been levied or paid or has been short-levied or shot-paid or erroneously refunded by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty by such person or his agent, the provisions of this sub-section shall have effect [as if, {*]] for the words [one year], the words "five years" were substituted.**

[Provided further that where the amount of duty which has not been levied or paid or has been short-levied or short-paid or erroneously refunded is one crore rupees or less a notice under this sub-section

shall be served by the Commissioner of Central Excise or with his prior approval by any officer subordinate to him:

Provided also that where the amount of duty which has not been levied or paid or has been short-levied or short-paid or erroneously refunded is more than one crore rupees, no notice under this sub-section shall be served without the prior approval of the Chief Commissioner of Central Excise.]

(2) The [Central Excise Officer] shall, after considering the representation, if any, made by the person on whom notice is served under sub-section (1), determine the amount of duty of excise due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined.

(3) For the purposes of this section,-

(i) "refund" includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(ii) "relevant date" means,-

[(a) in the case of excisable goods on which duty of excise has not been levied or paid or has been short-levied or short-paid -

(A) where under the rules made under this Act a periodical return, showing

particulars of the duty paid on the excisable goods removed during the period to which the said return relates, is to be filed by a manufacturer or a producer or a licensee of a warehouse, as the case may be, the date on which such return is so filed;

(B) where no periodical return as aforesaid is filed, the last date on which such return is to be filed under the said rules;

(C) in any other case, the date on which the duty is to be paid under this Act or the rules made thereunder;]"

13. Section 11AB is undoubtedly the most crucial Section as far as this case is concerned. Section 11AB read as follows:

"11AB. <u>Interest on delayed payment of duty</u>,– (1) Where any duty of excise has not been levied or paid or has been short-levied or shot-paid or erroneously refunded by reason of fraud, collusion or any wilful mis-statement 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 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 and 2 are not extracted.

14. It is also now relevant to notice certain rules under the Central Excise Rules, 2002. Rules 4,5,6,7 and 8 read as under:

"RULE 4. Duty payable on removal.-
(1) Every person who produces or manufactures any excisable goods, or who stores such goods in a warehouse, shall pay the duty leviable on such goods in the

manner provided in rule 8 or under any other law, and no excisable goods, on which any duty is payable, shall be removed without payment of duty from any place, where they are produced or manufactured, or from a warehouse, unless otherwise provided :

Proviso and Explanation omitted.

(1A) XXX XXX XXX

(2) Notwithstanding anything contained in sub-rule (1), where molasses are produced in a khandsari sugar factory, the person who procures such molasses, whether directly from such factory or otherwise, for use in the manufacture of any commodity, whether or not excisable, shall pay the duty leviable on such molasses, in the same manner as if such molasses have been produced by the procurer.

(3) Omitted

(4) XXX XXX XXX

RULE 5. Date of determination of duty and tariff valuation. —
(1) The rate of duty or tariff value applicable to any excisable goods, other than khandsari molasses, shall be the rate or value in force on the date when such goods are removed from a factory or a warehouse, as the case may be.

(2) The rate of duty in the case of khandsari molasses, shall be the rate in force on the date of receipt of such

molasses in the factory of the procurer of such molasses.

***Explanation*. - If any excisable goods are used within the factory, the date of removal of such goods' shall mean the date on which the goods are issued for such use.**

(3) omitted.

RULE 6. Assessment of duty.- The assessee shall himself assess the duty payable on any excisable goods:

Provided that in case of cigarettes, the Superintendent or Inspector of Central Excise shall assess the duty payable before removal by the assessee. Provisional assessment.

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

(2) The payment of duty on provisional basis may be allowed, if the assessee executes a bond in the form prescribed by

notification by the Board with such surety or security in such amount as the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, deem fit, binding the assessee for payment of difference between the amount of duty as may be finally assessed and the amount of duty provisionally assessed.

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

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

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

which such amount is determined, till the date of payment thereof.

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

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

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

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

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

RULE 8. Manner of payment .-
(1) The duty on the goods removed from the factory or the warehouse during a month shall be paid by the 5th day of the following month:

Provided that in case of goods removed during the month of March, the duty shall be paid by the 31st day of March :

Provided further that where an assessee is availing of the exemption under a notification based on the value of clearances in a financial year, the duty on goods cleared during a calender month shall be paid by the 15th day of the following month except in case of goods removed during the month of March for which the duty shall be paid by the 31st day of March.

Explanation – Not extracted

(1A) * *** *****

(2) The duty of excise shall be deemed to have been paid for the purposes of these rules on the excisable goods removed in the manner provided under sub-rule (1) and the credit of such duty allowed, as provided by or under any rule.

(3) If the assessee fails to pay the amount of duty by the due date, he shall be liable to pay the outstanding amount along with an interest at the rate of two per cent per month or rupees one thousand per day, whichever is higher, for the period starting with the first day after due date till the date of actual payment of the outstanding amount:

Provided that the total amount of interest payable in terms of this sub-rule shall not exceed the amount of duty which has not been paid by the due date:

Provided further that till such time the amount of duty outstanding and the interest payable thereon are not paid, it

shall be deemed that the goods in que3stion in respect of which the duty and interest are outstanding, have been charged without payment of duty, and where such duty and interest are not paid within a period of one month from the due date, the consequences and the penalties as provided in these rules shall follow.

Illustrations – Not extracted

(4) The provisions of Section 11 of the Act shall be applicable for recovery of the duty as assessed under rule 6 and the interest under sub-rule (3) in the same manner as they are applicable for recovery of any duty or other sums payable to the Central Government."

15. Excise duty is a duty on manufacture or production of goods. It is, however, collected at the point of removal of goods. When the duty of excise is chargeable with reference to the value of goods, Section 4 provides that on each removal of the goods, the value will be determined either under clause(a) or clause(b). We are in these cases governed by clause(a). Section (4) yields the following elements: -

(i) when the goods are sold;

(ii) for delivery;

(iii) at the time and place of removal;

(iv) the assessee (appellants in these cases are the assesses) and the buyer not being related;

(v) price is the sole consideration for the sale, then the transaction value will be the value for the determination of excise duty.

The price may be what is actually paid or what is payable for the goods when sold.

Apart from what is shown as the price the transaction value would include:

(i) Any amount the buyer is <u>liable to pay to the assessee</u> by reason of or in connection with the sale whether at the time of the sale or any other time.

(ii) Any amount payable on behalf of the assessee by reason of or in connection with the sale whether at the time of sale or any other time.

(iii) The aforesaid amounts encompass certain amounts which are specifically enumerated namely, advertising, publicity, marketing and selling, organizational expenses, storage, outward handling serving, warranty, commission or any other matter.

16. Thus, the intent is to determine the value by not only including the actual price paid or payable but all amounts which are separately enumerated and found mention as hereinbefore.

17. Now it is time to look at the effect of the rules relevant for the purpose of this case. Rule 4 falls under the heading 'duty payable on removal'.

It is contemplated that duty is to be paid on the goods in the manner provided under Rule 8 or under any law. No excisable good on which duty is payable can be removed without payment of excise duty unless otherwise provided. This would take us to Rule 8 as there is no case that any other law is applicable. Rule 8 under the heading 'manner of payment' declares that duty on the goods removed from the factory etc. during a month shall be paid by the 5th day of the following month. Removal however in the month of March will entail liability to pay by 31st day of March. Sub-rule 3 of Rule 8 provides for liability with the assessee who fails to pay the amount by the due date. Sub rule 4 refers to liability to pay interest. It is amply clear that the expression 'due date' would be 5th day of the month following the month during which the goods are removed except with regard to the goods removed

during the month of March in which case the due date would be 31st day of March.

18. The scheme of the rules further is that assessment is to be done by the assessee itself by way of self-assessment and the duty paid by the due date (see Rule 6). What is to happen when the asssessee is confronted with a situation when it is unable to determine the value of the goods or find the rate of duty. Rule 7 provides the solution. The assessee can thereunder apply giving reasons and seeking permission to make a provisional assessment. The officer may, grant such permission. Thereupon, duty is payable on a provisional basis. The value or the rate would be indicated by the officer in the order permitting such provisional assessment. This is however made subject to the assessee executing a bond binding the assessee to pay the difference between the duty as

payable under the final assessment and the provisional assessment. The final assessment is to be made within six months from the date of communication of the order permitting provisional assessment under Rule 7(1). The period can be extended by the Commissioner for six months and by the chief Commissioner for which there is no time limit.

Sub-rule (4) of Rule 7 is very crucial. It provides as follows:-

1) **The assessee shall be liable to pay interest**
2) **On any amount payable based on a final assessment under Rule 7(3)**
3) **At the rate fixed under Section 11A or Section 11B of the Act**
4) **From the first date of the month succeeding the month for which the amount is determined till the date of payment thereof.**

Rule 7(5) contemplates interest on refund based on the final assessment.

19. Now it is important that we delve upon the case of SAIL before the Commissioner, its stand in the appeal and finally before this Court. As already noticed SAIL sold and cleared rails to Indian Railways based on the price circular dated 24/04/2005. The transaction in question related to the period 01/01/2005 to July, 2006. Later, based upon a revised price circular dated 20/07/2006, the prices were revised and it took effect from 01/01/2005. The excise duty undoubtedly in a sum of Rs. 142.78 crores came to be paid by SAIL in August 2006. However, upon receipt of notice under Section 11AB of the Act calling upon it to pay more than Rs. 15 crores as interest under Section 11AB. SAIL raised various objections. It, in fact, contended that this is not a case of short payment

of duty as the price at the time of actual removal of goods formed the basis for which duty was duly paid. It was not liable to pay the differential duty. Rebutting the case of the department, it was contended that it was not liable to resort to provisional assessment under Rule 7. The Commissioner however, took the view that the price which were shown originally by SAIL was itself provisional. It was a case where the assessee should have invoked Rule 7 and proceeded to make the provisional assessment. In appeal before the Tribunal, the assessee-SAIL continued with its contention that it actually was not liable to pay the differential duty. The Tribunal as already noticed following the judgment of this Court in *SKF case* (supra) which came to be delivered by that time dismissed the appeal of the assessee. Before the Bench which referred the matters to this Bench

however, the appellants have made it clear that they are indeed liable to pay the differential duty. We have noticed that stand which has been expressly recorded by this Court in paragraphs 21-22 of the reference order.

20. Much reliance has been placed by the appellants on the decision of this Court in J K Synthetics. The first decision is the decision of this Court in Associated Cement. The said decision was rendered by a Bench of three learned judges. There was a cleavage of opinion. Justice E.S. Venkataramiah, as His Lordship then was wrote the majority judgment. Justice P.N. Bhagwati as His Lordship then was dissented. The case arose under the Rajasthan Sales Tax Act. The two relevant provisions to be noticed under the statute considered by the said Bench are Sections 7 and Section 11B of the Act. They read as follows:

"7. Submission of returns.-(1) Every registered dealer and such other dealer, as may be required to do so by the assessing authority by notice served in the prescribed manner, shall furnish prescribed returns, for the prescribed periods, in the prescribed forms, in the prescribed manner and within the prescribed time to the assessing authority:

Provided that the assessing authority may extend the date for the submission of such returns by any dealer or class of dealers by a period not exceeding fifteen days in the aggregate.

(2) Every such return shall be accompanied by a Treasury receipt or receipt of any bank authorised to receive money on behalf of the State Government, showing the deposit of the full amount of tax due on the basis of return in the State Government Treasury or bank concerned.
(2A) Notwithstanding anything contained in sub-section (2), the State Government may by notification in the official Gazette require any dealer or class of dealers specified therein, to pay tax at intervals shorter than those prescribed under sub-section (1). In such cases, the proportionate tax on the basis of the last return shall be deposited at the intervals specified in the said notification in advance of the return. The difference, if any, of the tax payable according to the return and the advance tax paid shall be deposited with the return and the return shall be accompanied by the treasury receipt, or receipts, of any Bank authorised to

receive money on behalf of the State Government, for the full amount of tax due shown in the return

(3) If any dealer discovers any omission, error, or wrong statement in any returns furnished by him under sub-section (1), he may furnish a revised return in the prescribed manner before the time prescribed for the submission of the next return but not later.

(4) Every deposit of tax made under sub-section (2) shall be deemed to be provisional subject to necessary adjustments in pursuance of the final assessment of tax made for any year under section 10."

"11-B. Interest on failure to pay tax, fee or penalty – (a) If the amount of any tax payable under sub-sections (2) and (2-A) of Section 7 is not paid within the period allowed, or

(b) If the amount specified in any notice of demand, whether for tax, fee or penalty, is not paid within the period specified in such notice, or in the absence of such specification, within 30 days from the date of service of such notice, the dealer shall be liable to pay simple interest on such amount at one per cent per month from the day commencing after the end of the said period for a period of three months and at one and a half per cent per month thereafter during the time he continues to make default in the payments;

Provided that, where, as a result, of any order under this Act, the amount, on which interest was payable under this section, has been reduced, the interest shall be reduced accordingly and the excess interest paid, if any, shall be refunded;

Provided further that no interest shall be payable under this section on such amount and for such period in respect of which interest is paid under the provisions of Sections 11 and 14."

21. In Associated Cement Ltd., the majority was dealing with the case falling under Section 11B(a). After analyzing the various provisions the majority took the view that not only the assessee should have paid the tax on the basis of the return but the return must be a return which it ought to have filed in law and on facts. Justice Bhagwati who dissented however, took exception to this reasoning and found that such an interpretation would raise conflicts between the provisions contained in clause (a) and clause(b) of Rule 11B. Justice Bhagwati in his

dissent pointed out the anomaly behind the reasoning of the majority. In particular, we may point out that it was noticed by the learned Judge that if the reasoning of the majority is accepted, different rates of interest would apply at different stages. Furthermore, it was reasoned that an assessee cannot do beyond paying the tax according to the return. He cannot possibly divine what the assessing officer will finally assess him to. In fact, in the later judgment in JK Synthetics, the Constitution Bench subscribed to the view expressed in the dissenting judgment in *ACC Ltd. case* which it accepted as laying down the correct position in law and overruled the majority in Associated Cement Co. case. In the JK Synthetics judgment also the case arose under the Rajasthan Sales Tax Act though it arose under Section 7(2)(A). The case in Associated Cement case fell under under Section 7(2) of the Act. What

is relevant for our purpose are two aspects. One is we must bear in mind the actual provisions of the Rajasthan tax law which fell for consideration that we have already set forth. We must advert to the law which has been laid down in JK Synthetics. Following is the discussion:

> **"16. It is well-known that when a statute levies a tax it does so by inserting a charging section by which a liability is created or fixed and then proceeds to provide the machinery to make the liability effective. It, therefore, provides the machinery for the assessment of the liability already fixed by the charging section, and then provides the mode for the recovery and collection of tax, including penal provisions meant to deal with defaulters. Provision is also made for charging interest on delayed payments, etc. Ordinarily the charging section which fixes the liability is strictly construed but that rule of strict construction is not extended to the machinery provisions which are construed like any other statute. The machinery provisions must, no doubt, be so construed as would effectuate the object and purpose of the statute and not defeat the same. (See *Whitney* v. *IRC* [1926 AC 37 : 42 TLR 58] , *CIT* v. *Mahaliram Ramjidas* [(1940) 8 ITR 442 : AIR 1940 PC 124 : 67 IA 239], *India United Mills***

Ltd. **v.** ***Commissioner of Excess Profits Tax, Bombay*** **[(1955) 1 SCR 810 : AIR 1955 SC 79 : (1955) 27 ITR 20] and** ***Gursahai Saigal*** **v.** ***CIT, Punjab*** **[(1963) 3 SCR 893 : AIR 1963 SC 1062 : (1963) 48 ITR 1]). But it must also be realised that provision by which the authority is empowered to levy and collect interest, even if construed as forming part of the machinery provisions, is substantive law for the simple reason that in the absence of contract or usage interest can be levied under law and it cannot be recovered by way of damages for wrongful detention of the amount. (See** ***Bengal Nagpur Railway Co. Ltd.*** **v.** ***Ruttanji Ramji*** **[AIR 1938 PC 67 : 65 IA 66 : 67 CLJ 153] and** ***Union of India*** **v.** ***A.L. Rallia Ram*** **[(1964) 3 SCR 164, 185-90 : AIR 1963 SC 1685]). Our attention was, however, drawn by Mr Sen to two cases. Even in those cases,** ***CIT*** **v.** ***M. Chandra Sekhar*** **[(1985) 1 SCC 283 : 1985 SCC (Tax) 85 : (1985) 151 ITR 433] and** ***Central Provinces Manganese Ore Co. Ltd.*** **v.** ***CIT*** **[(1986) 3 SCC 461 : 1986 SCC (Tax) 601 : (1986) 160 ITR 961] , all that the Court pointed out was that provision for charging interest was, it seems, introduced in order to compensate for the loss occasioned to the Revenue due to delay. But then interest was charged on the strength of a statutory provision, may be its objective was to compensate the Revenue for delay in payment of tax. But regardless of the reason which impelled the Legislature to provide for charging interest, the Court must give that meaning to it as is conveyed by the language used and the purpose to be achieved. Therefore, any provision made in a statute for charging or levying**

interest on delayed payment of tax must be construed as a substantive law and not adjectival law. So construed and applying the normal rule of interpretation of statutes, we find, as pointed out by us earlier and by Bhagwati, J. in the *Associated Cement Co. case* [(1981) 4 SCC 578 : 1982 SCC (Tax) 3 : (1981) 48 STC 466] , that if the Revenue's contention is accepted it leads to conflicts and creates certain anomalies which could never have been intended by the Legislature.

17. Let us look at the question from a slightly different angle. Section 7(1) enjoins on every dealer that he shall furnish prescribed returns for the prescribed period within the prescribed time to the assessing authority. By the proviso the time can be extended by not more than 15 days. The requirement of Section 7(1) is undoubtedly a statutory requirement. The prescribed return must be accompanied by a receipt evidencing the deposit of full amount of 'tax due' in the State Government on the basis of the return. That is the requirement of Section 7(2). Section 7(2-A), no doubt, permits payment of tax at shorter intervals but the ultimate requirement is deposit of the full amount of 'tax due' shown in the return. When Section 11-B(*a*) uses the expression "tax payable under sub-sections (2) and (2-A) of Section 7", that must be understood in the context of the aforesaid expressions employed in the two sub-sections. Therefore, the expression 'tax payable' under the said two sub-sections is the full amount of tax due and 'tax due' is that amount which

becomes due ex hypothesi on the turnover and taxable turnover "shown in or based on the return". The word 'payable' is a descriptive word, which ordinarily means "that which must be paid or is due, or may be paid" but its correct meaning can only be determined if the context in which it is used is kept in view. The word has been frequently understood to mean that which may, can or should be paid and is held equivalent to 'due'. Therefore, the conjoint reading of Sections 7(1), (2) and (2-A) and 11-B of the Act leaves no room for doubt that the expression 'tax payable' in Section 11-B can only mean the full amount of tax which becomes due under sub-sections (2) and (2-A) of the Act when assessed on the basis of the information regarding turnover and taxable turnover furnished or shown in the return. Therefore, so long as the assessee pays the tax which according to him is due on the basis of information supplied in the return filed by him, there would be no default on his part to meet his statutory obligation under Section 7 of the Act and, therefore, it would be difficult to hold that the 'tax payable' by him 'is not paid' to visit him with the liability to pay interest under clause (*a*) of Section 11-B. It would be a different matter if the return is not approved by the authority but that is not the case here. It is difficult on the plain language of the section to hold that the law envisages the assessee to predicate the final assessment and expect him to pay the tax on that basis to avoid the liability to pay interest. That would be asking him to do the near impossible."

22. In short, therefore, the principle may be taken to be established that while levy of interest is a part of the adjective law, yet to levy interest there must be substantive provision. Demand for interest can be made only if the legislature has specifically intended collection of interest. We must look at the statutory provisions.

23. In *Purolator India Limited Vs. Commissioner of Central Excise* 2015 (10) SCC 715, a Bench of two learned Judges was called upon to decide the question as to whether cash discount and trade discount are to be deducted for arriving at the transaction value. The Bench went on to consider section 4 of the Act prior to its amendment in 1973, after the amendment in 1973 and also still further after the amendment in the year 2000. After elaborate consideration of the matter, the Bench

speaking through Justice Rohinton Fali Nariman held as follows:

> **"14. It can be seen that the common thread running through Section 4, whether it is prior to 1973, after the amendment in 1973, or after the amendment of 2000, is that excisable goods have to have a determination of "price" only "at the time of removal". This basic feature of Section 4 has never changed even after two amendments. The "place of removal" has been amended from time to time so that it could be expanded from a factory or any other premises of manufacture or production, to warehouses or depots wherein the excisable goods have been permitted to be deposited either with payment of duty, or from which such excisable goods are to be sold after clearance from a factory. In fact, Section 4(2) pre-2000 made it clear that where the price of excisable goods for delivery at the place of removal is not known, and the value thereof is determined with reference to the price for delivery at a place other than the place of removal, the cost of transportation from the place of removal to the place of delivery is to be excluded from such price. This is because the value of excisable goods under the section is to be determined only at the time and place of removal. Even after the amendment of Section 4 in 2000, the same scheme continues. Only, Section 4(2) is in terms replaced by Rule 5 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000.**

*** * * * ***

18. It can be seen that Section 4 as amended introduces the concept of "transaction value" so that on each removal of excisable goods, the "transaction value" of such goods becomes determinable. Whereas previously, the value of such excisable goods was the price at which such goods were ordinarily sold in the course of wholesale trade, post-amendment each transaction is looked at by itself. However, "transaction value" as defined in sub-section (3)(*d*) of Section 4 has to be read along with the expression "for delivery at the time and place of removal". It is clear, therefore, that what is paramount is that the value of the excisable goods even on the basis of "transaction value" has only to be at the time of removal, that is, the time of clearance of the goods from the appellant's factory or depot as the case may be. The expression "actually paid or payable for the goods, when sold" only means that whatever is agreed to as the price for the goods forms the basis of value, whether such price has been paid, has been paid in part, or has not been paid at all. The basis of "transaction value" is therefore the agreed contractual price. Further, the expression "when sold" is not meant to indicate the time at which such goods are sold, but is meant to indicate that goods are the subject-matter of an agreement of sale. Once this becomes clear, what the learned counsel for the assessee has argued must

necessarily be accepted inasmuch as cash discount is something which is "known" at or prior to the clearance of the goods, being contained in the agreement of sale between the assessee and its buyers, and must therefore be deducted from the sale price in order to arrive at the value of excisable goods "at the time of removal".

24. No doubt, there are decisions of the High Court which followed in *MRF Ltd.* [see 2007 (207) ELT 31, Punjab and Haryana] to the effect that a subsequent reduction in prices would not entitle the assessee to lay a claim for refund. In 2010(257) ELT 369, Karnataka, the Division Bench of Karnataka High Court distinguished the judgment of this Court in SKF India Ltd.(supra) by noting that in the said case after the goods were initially cleared and appropriate duty had been paid, subsequently the price escalation was due to the increase in input labour and other costs which was determined by the All India Industrial Prices Indices and by the Reserve Bank of India nominated by All India

Electrical Manufacturer Association. In terms of the said direction, the court noted that supplementary invoices were issued. It was noted that the assessee had also paid differential price. It is undoubtedly the case of the appellant that the SLP carried against the said judgment has been dismissed. We notice that this Court has given no reasons while dismissing the SLP.

25. In India Carbon Ltd. & Ors. vs. State of Assam 1997 (6) SCC 479 there was delay in payment of central sale tax. The appellants were called upon to pay interest of 24% per annum by the sale tax authorities of the state of Assam under the Assam Sales Tax Act. Following the judgment of the Constitution Bench in J.K. Synthetics v. CCE (supra) among other judgments, the court *inter alia* went on to hold that there is no substantive provision in the Central Act requiring payment of interest under

the Central Sales Tax Act. Though Section 9(2) was pressed into service by the Revenue and the said provision did refer to the power to recover interest under the State Act noticing the absence of any power to recover interest under the Central Act in respect of tax due under the Central Act, the Court took the view that interest could not be demanded from the appellant.

CASE LAW UNDER THE INCOME TAX ACT.

26. Appellants have sought to derive support from certain judgments rendered by this Court under the Income Tax Act. In *E.D. Sassoon & Co. Ltd. v. CIT* AIR 1954 SC 470, the appellant company which was the managing agent of certain companies agreed to transfer their agencies to two companies. Amounts were received on formal deeds of conveyance and transfer being executed in the year 1944. The entire amount of the managing agency commission

received by the transferees were assessed by the officers as income of the transferees for the year 1945-1946. In appeal the contention of the transferees was accepted, in that it was found that commission received by them should be apportioned on the proportionate basis and they were to be assessed on the commission earned during the period they had worked as managing agents of the respective companies. Proceedings were commenced against the appellant who were transferors' of the commission agency in regard to the amounts of the commission earned prior to the date of the respective transfers. The case of the transferor *inter alia* was that no part of the commission for the broken period of 1943 was earned by them. The contract of employment was an entire indivisible contract. The Court had to consider the connotation of the word "earned" which was used in Section 4 of the Income

Tax Act which fell for consideration. The majority judgment *inter alia* held as follows:

> **"35. If therefore on the construction of the Managing Agency Agreements we cannot come to the conclusion that the Sassoons had created any debt in their favour or had acquired a right to receive the payments from the Companies as at the date of the transfers of the Managing Agencies in favour of the transferees no income can be said to have accrued to them. They had no doubt rendered services as Managing Agents of the Companies for the broken periods. But unless and until they completed their performance viz. the completion of the definite period of service of a year which was a condition precedent to their being entitled to receive the remuneration or commission stipulated thereunder no debt payable by the Companies was created in their favour and they had no right to receive any payment from the Companies. No remuneration or commission could therefore be said to have accrued to them at the dates of the respective transfers.**
>
> **40. It is no doubt true that the accrual of income does not much later depend upon its ascertainment or the accounts cast by assessee. The accounts may be made up at a much later date. That depends upon the convenience of the assessee and also upon the exigencies of the situation. The amount of the income, profits or gains may thus be ascertained later on the accounts being made up. But when the accounts are thus made up the income, profits or gains**

ascertained as the result of the account are referred back to the chargeable accounting period during which they have accrued or arisen and the assessee is liable to tax in respect of the same during that chargeable accounting period. "The computation of the profits whenever it may take place cannot possibly be allowed to suspend their accrual …". "The quantification of the commission is not a condition precedent to its accrual". (Per Ghulam Hassan, J. in *CIT* v. *K.R.M.T.T. Thiagaraja Chetty* and *Co.* [24 ITR 525 at p. 534] See also *Isaac Holden and Sons, Ltd.* v. *Commissioners of Inland Revenue*[12 TC 768], and *Commissioners of Inland Revenue* v. *Newcastle Breweries Ltd.*[12 TC 927] What has however got to be determined is whether the income, profits or gains accrued to the assessee and in order that the same may accrue to him it is necessary that he must have acquired a right to receive the same or that a right to the income, profits or gains has become vested in him though its valuation may be postponed or though its materialisation may depend on the contingency that the making up of the accounts would show income, profits or gains. The argument that the income, profits or gains are embedded in the sale proceeds as and when received by the Company also does not help the transferees, because the Managing Agents have no share or interest in the sale proceeds received as such. They are not co-sharers with the Company and no part of the sale proceeds belongs to them. Nor is there any ground for saying that the Company are the trustees for the business

or any of the assets for the Managing Agents. The Managing Agents cannot therefore be said to have acquired a right to receive any commission unless and until the accounts are made up at the end of the year, the net profits ascertained and the amount of commission due by the Company to the Managing Agents thus determined. (See *Commissioners of Inland Revenue* v. *Lebus*) [(1946) 1 AER 476 (Z3)".

55. The whole difficulty has arisen because the High Court could not reconcile itself to the situation that the transferees had not worked for the whole calendar year and yet they would be held entitled to the whole income of the year of account; whereas the transferors had worked for the broken periods and yet they would be held disentitled to any share in the income for the year. If the work done by the transferors as well as the transferees during the respective periods of the year were taken to be the criterion the result would certainly be anomalous. But the true test under Section 4(1)(*a*) of the Income Tax Act is not whether the transferors and the transferees had worked for any particular periods of the year but whether any income had accrued to the transferors and the transferees within the chargeable accounting period. It is not the work done or the services rendered by the person but the income received or the income which has accrued to the person within the chargeable accounting period that is the subject-matter of taxation. That is the proper method of approach while considering the taxability or otherwise

of income and no considerations of the work done for broken periods or contribution made towards the ultimate income derived from the source of income nor any equitable considerations can make any difference to the position which rests entirely on a strict interpretation of the provisions of Section 4(1)(*a*) of the Income Tax Act."

27. In *Commissioner of Income Tax, Madras v. A. Gajapathy Naidu, Madras* AIR 1964 SC 1653, a Bench of three learned Judges had to deal with the following factual scenario. The respondent had entered into a contract with the government for supplying bread. He was maintaining his accounts on mercantile basis. Amount due was credited to his account sometime later. The respondent represented to the Government complaining that he was supplying bread at a loss. Therefore, Government directed payment of compensation for the loss which was supplied in 1948-1949. He received a certain sum during the year 1950-1951. This

amount was included by the officer in the assessment year 1951-1952. One of the contentions of the appellant assessee was that he had received sum in respect of the contract which was executed in the year 1948-1949 and therefore it could not be included in the assessment year 1951-1952. This Court proceeded on the basis that amount received by way of compensation was taxable. It went on to consider the question whether the assessee had been assessed correctly in the year 1951-1952. This Court allowed the appeal and took the view that the respondent-assessee was correctly assessed in the year 1951-1952. It referred the case of *E.D. Sassoon & Co. Ltd. v. CIT* (supra) which we have already referred to. The Court held *inter alia* as follows:

> **"8. Under this definition accepted by this Court, an income accrues or arises when the assessee acquires a right to receive the same. It is common place that there are two**

principal methods of accounting for the income, profits and gains of a business-, one is the cash basis and the other, the mercantile basis. The latter system of accountancy "brings into credit what is due immediately it becomes legally due and before it is actually received; and it brings into debit expenditure the amount for which a legal liability has been incurred before it is actually disbursed." The book profits are taken for the purpose of assessment of tax, though the credit amount is not realized or the debit amount is not actually disbursed. If an income accrues within a particular year, it is liable to be-,assessed in the succeeding year. When does the right to receive an amount under a contract accrue or arise to the assessee i.e., come into existence? That depends upon the terms of a particular contract. No other relevant provision of the Act has been brought to our notice-for there is none- which provides an exception that though an assessee does not acquire a right to receive an income under a contract in a particular accounting year, by some fiction the amount received by him in a subsequent year in connection with the contract, though not arising out of a right accrued to him in the earlier year, could be related back to the earlier year and made taxable along with the income of that year. But that legal position is sought to be reached by a process of reasoning found favour with English courts. It is said that on the basis of proper commercial accounting practice, if a transaction takes place in a particular year, all that

has accrued in respect of it, irrespective of the year when it accrues, should belong to the year of transaction and for the purpose of reaching that result closed accounts could be reopened. Whether this principle is justified in the English law, it has no place under the Indian Income tax Act. When an Income-tax Officer proceeds to include a particular income in the assessment, he should ask himself inter alia, two questions, namely, (i) what is the system of accountancy adopted by the assessee? and (ii) if it is mercantile system of accountancy, subject to the deemed provisions, when has the right to receive that amount accrued? If he comes to the conclusion that such a right accrued or arose to the assessee in a particular accounting year, he shall include the said income in the assessment of the succeeding assessment year. No power is conferred on the Income-tax Officer under the Act, to relate back an income that accrued or arose in a subsequent year to another earlier year on the ground that the said income arose out of an earlier transaction. Nor is the question of reopening of accounts relevant in the matter of as certaining when a particular income accrued or arose. Section 34 of the Act empowers the Income-tax Officer to assess the income which escaped assessment or was under-assessed in the relevant assessment year. Subject to the provisions of the section and following the procedure prescribed thereunder, he can include the escaped income and re-assess the assessee on the basis of which the earlier assessment was

made. So too, under s. 35 of the Act the officers mentioned therein can rectify mistakes either of their own motion or when such mistakes are brought to their notice by a party to the proceedings. For that purpose the correct item may be taken into consideration in the matter of assessment. But strictly speaking even in those cases there is no reopening of the accounts of the assessee, but a re-assessment is made or the mistake is corrected on the basis of the actual income accrued or received by the assessee. We do not see any relevancy of the question of reopening of accounts in considering the question when an assessee acquired a right to receive an amount.

The Court also held *inter alia* as follows:

"9……We would prefer to base our conclusion on the ground that we cannot extend the meaning of the word "accrue" -or "arise" in s. 4(1)(b)(i) of the Act so as to take in amounts received by the assessee in a later year, though the receipt was not on the basis of the right accrued in the earlier year. Such amounts are in law received by the assessee only in the year when they are paid. We cannot apply the English decisions in the matter of construction of the provisions of the Indian Act, particularly when they have received an authoritative interpretation from this Court…".

28. In *Vikrant Tyres Ltd. v. First Income Tax Officer, Mysore* 2001(3) SCC 76 under an assessment order under the Income Tax Act, 1961 the appellant assessee paid the tax. On his appeal being allowed the tax was refunded. The High Court reversed the Appellate order. On fresh demands being made the assessee repaid the tax as assessed and demanded. The revenue demanded payment of interest under Section 220(2) of Income Tax Act, 1961 for the period commencing with the refund of the tax. This Court allowed the appeal filed by the assessee and took the view that no tax could be levied or imposed by an act of Parliament without the words "clearly disclosing such an intention". Finding there was no default in payment within the time by the assessee it was found that invocation of Section 220 was misplaced. This Court purported to follow the decision in *V.V.S. Sugars vs. Govt. of A.P. and*

Others **1999(4) SCC 192** ***(India Carbon vs. VBS Sugar)*****. The last judgment we would advert to under the Income Tax Act was rendered by one among us (Chief Justice Ranjan Gogoi) and the decision is** ***P.G. & W. Sawoo (P) Ltd. v. CIT & Ors.*** **2017(13) SCC 284. The facts of the said case in a nutshell was as follows:**

The assessee had let out its premises to the Government. The rent was enhanced with effect from 01.9.1987. The factum of enhancement was communicated to the assessee by letter dated 29.3.1994. The Income Tax Officer purported to reopen the assessment for the year 1989-1990. The Court relying upon the judgment in ***E.D. Sassoon & Co. Ltd. v. CIT*** **(Supra) inter alia held as follows:**

> **"7. Viewed from the aforesaid perspective, it is clear that no such right to receive the rent accrued to the assessee at any point of time during the assessment year in question, inasmuch as such enhancement though with**

> **retrospective effect, was made only in the year 1994. The contention of the Revenue that the enhancement was with retrospective effect, in our considered view, does not alter the situation as retrospectivity is with regard to the right to receive rent with effect from an anterior date. The right, however, came to be vested only in the year 1994."**

29. It was accordingly found that the notice to reopen the assessment for the assessment year 1989-1990 was without jurisdiction.

30. We are of the view that the appellants are not justified in seeking to derive support from the judgments rendered by this Court under the Income Tax Act. The impact of taxing of income under the Income Tax Act would not be apposite for considering the question which arises in these cases which is whether interest can be levied under Section 11AB of the Act in respect of the amounts which are short paid or short levied inter alia. Even it be that for the purpose of the Income Tax Act, it is only

when on the basis that party agreed to escalation in price on a date which is after the date of the removal of goods rendering it exigible to income tax on a later date, it would be irrelevant for the purpose of deciding the liability to pay interest in terms of the clear provisions of the Act.

31. Now we may advert to the judgment of this Court in *E.I.D. Parry (India) Ltd. v. CCT* 2005 (4) SCC 779. The appellant therein was a manufacturer of sugar. The minimum price of sugarcane which they purchased from farmers was payable immediately. Under Clause 5A of the Sugarcane (Control) Order 1966, additional price was payable which would be determined only at the end of the year. On the advice of the Government the manufacturer paid the additional price as advance at the time of purchase from the farmers and it was subsequently adjusted under Clause 5A. In proceedings under the Tamil

Nadu General Sales Tax Act 1959, the assessee showed the turnover on the basis of minimum price and paid tax thereon. It did not pay tax on the additional price which has been paid but it was included in the turnover. When the price was fixed under Clause 5A, the appellant filed revised return and paid tax. Interest was sought to be charged under Section 24(3) on the price fixed under Clause 5A from the date of purchase of sugarcane till the payment of tax. The appellants contended before this Court that the price determined under Clause 5A would be known only after it was determined. Only then the same would be includable in the returns. The advances given on advice from Government were merely ad hoc payments and did not constitute the price.

32. Under the Tamilnadu Sales Tax Act, the dealers were given an option to pay tax in advance

on the basis of monthly return. Under Section 13(1) which provided for advance payment of tax, the tax could be collected in advance in monthly or prescribed instalment. The assessing authority could provisionally determine the amount, payable in advance and intimate the dealer to pay the tax. Sub-section (2) of Section 13 provided that the dealer may at his option pay tax in advance on the basis of his actual turnover for each month or for such other period as prescribed. Tax under this provision was to be paid on the basis of return to be filed by him. It was also to become due without any notice of demand to the dealer *inter alia*. The Court proceeded to take the view that in the monthly returns, the advance which was received by the assessee should have been included as part of the turnover. When it came to the question relating to liability to interest, the Court referred to Section

24 of the Act. Section 24(3) provided for interest.

It read as follows:

> **"(3) On any amount remaining unpaid after the date specified for its payment as referred to in sub-section (1) or in the order permitting payment in instalments, the dealer or person shall pay, in addition to the amount due, interest at one-and-half per cent per month of such amount for the first three months of default and at two per cent per month of such amount for the subsequent period of default:**
>
> **Provided that if the amount remaining unpaid is less than one hundred rupees and the period of default is not more than a month, no interest shall be paid:**
>
> **Provided further that where a dealer or person has preferred an appeal or revision against any order of assessment or revision of assessment under this Act, the interest payable under this sub-section, in respect of the amount in dispute in the appeal or revision, shall be postponed till the disposal of the appeal or revision, as the case may be, and shall be calculated on the amount that becomes due in accordance with the final order passed on the appeal or revision as if such amount had been specified in the order of assessment or revision of assessment, as the case may be."**

33. Thereafter, the Court in E.I.D. Parry (India)Ltd. V. Asst. Commercial of Commercial Taxes, Chennai held as follows:

> **"….Under Section 24(1) if the tax has been assessed or has become payable under the Act, then the payment has to be made within the said time as may be specified in the notice of assessment and tax under Section 13(2) has to be paid without any notice of demand. However, as seen above, the tax under Section 13(2), in the absence of any determination by the assessing authority, is tax as per the returns. If default is made in payment of such tax then interest becomes payable under the Act. In the present case, it is an admitted position that tax as per the monthly return had been paid within time. It is also an admitted position that there was no assessment, even provisional, by the assessing authority prior to the final assessment made after the revised returns had been filed. Interest becomes payable under Section 24(3) on an amount remaining unpaid after the date specified for its payment under sub-section (1) of Section 24. As seen above, sub-section (1) of Section 24 deals with an assessed tax or tax which has become payable under the Act. In cases covered by Section 13(2) tax must be paid without any notice of demand. But as stated above, under Section 13(2) tax is to be paid "on the basis of such returns". Tax as per the returns has admittedly been paid. If the returns were incomplete or incorrect as now claimed the assessing authority had**

to determine the tax payable and issue a notice of demand. In the absence of any assessment, even provisional, and a notice of demand no interest would be payable under Section 24(3). …"

34. Section 24(1) incidentally provided for a notice of assessment save as it was otherwise provided in Section 13(2). The tax under Section 13(2) was to be paid without any notice of demand. The Court drew support from the decision in *JK Synthetics Ltd.* (supra). We may also notice the following discussion:

> **"..In this respect the principles laid down in *J.K. Synthetics Ltd. case* [(1994) 4 SCC 276] fully apply even though the provisions of the Tamil Nadu General Sales Tax Act and the Rajasthan Act may not be identical. The principle to be kept in mind is, that, when the levy of interest emanates as a statutory consequence and such liability is a direct consequence of non-payment of tax, be it under Section 215 of the Income Tax Act or under Sections 7(2)/7(2-A) read with Section 11-B(*a*) of the Rajasthan Sales Tax Act, 1954 (as discussed in the decision of this Court in *J.K. Synthetics Ltd. case* [(1994) 4 SCC 276]) or under Sections 13(2)/24(3) read with Rule 18(3) under the Tamil Nadu General Sales Tax**

Act, 1959, then such a levy is different from the levy of interest which is dependent on the discretion of the assessing officer. The default arising on non-payment of tax on an admitted liability in the case of self-assessment falls under Section 24(3) read with Rule 18(3) which attracts automatic levy of interest whereas the default in filing incomplete and incorrect return falls under Rule 18(4) which attracts best-judgment assessment in which the levy of interest is based on the adjudication by the assessing officer. Therefore, Rule 18(3) and Rule 18(4) operate in different spheres…"

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.

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?

37. It was by Act No.26 of 1978 that Sections 11A, 11B and 11C were inserted in the Act. Though it was inserted by Act 26 of 1978, it was brought into force only in 1980. The words "levy, not paid, short levy and erroneously refunded" were not

expressions which were however introduced for the first time through Section 11A. Rule 10 of the Central Excise Rules 1944 made under the Act as it read was as follows:

> **"10. *Recovery of duties not levied or not paid, or short-levied or not paid in full or erroneously refunded*.—(1) Where any duty has not been levied or paid or has been short-levied or erroneously refunded or any duty assessed has not been paid in full, the proper officer may, within six months from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid, or which has been short-levied, or to whom the refund has erroneously been made, or which has not been paid in full, requiring him to show cause why he should not pay the amount specified in the notice:**
>
> **Provided that—**
>
> **(*a*) where any duty has not been levied or paid or has been short-levied or has not been paid in full, by reason of fraud, collusion or any wilful misstatement or suppression of facts by such person or his agent, or**
>
> **(*b*) where any person or his agent, contravenes any of the provisions of these rules with intent to evade payment of duty and has not paid the duty in full, or**

(*c*) where any duty has been erroneously refunded by reason of collusion or any wilful misstatement or suppression of facts by such person or his agent, the provisions of this sub-section shall, in any of the cases referred to above, have effect as if for the words 'six months', the words 'five years' were substituted.

***Explanation*.—Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the period of six months, or five years, as the case may be.**

(2) The Assistant Collector of Central Excise shall, after considering the representation, if any, made by the person on whom notice is served under sub-rule (1), determine the amount of duty due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined.

(3) For the purposes of this rule,—

(*i*) 'refund' includes rebate referred to in Rules 12 and 12-A;

(*ii*) 'relevant date' means,—

(*a*) in the case of excisable goods on which duty of excise has not been levied or paid or on which duty has been short-levied or has not been paid in full, the date on which the duty was required to be paid under these rules;

(*b*) in the case of excisable goods on which the value or the rate of duty has been provisionally determined under

these rules, the date on which the duty is adjusted after final determination of the value or the rate of duty, as the case may be;

(*c*) in the case of excisable goods on which duty has been erroneously refunded, the date of such refund."

38. Thus, Rule 10 did provide for recovery of duties which were not levied or not paid or short levied or erroneously refunded. What is the position as far as the expression short paid to be found in Section 11A of the Act is concerned? Was there a counterpart in Rule 10? A perusal of Rule 10 would show that the expression 'short paid' as such was not used in Rule 10 as it is used in Section 11A. However, we notice that Rule 10 did contemplate recovery of duties which was assessed but have not been paid in full.

39. Before we proceed to pronounce on the scope of the expression 'short paid' in Section 11A, we deem it appropriate also to refer to Rules 173-B and

173-C of the Central Excise Rules, 1944. The relevant provisions thereof read as follows:

> **"173-B. *Assessee to file list of goods for approval of the proper officer*.—(1) Every assessee shall file with the proper officer for approval a list in such form as the Collector may direct, in quintuplicate, showing—**
>
> **(*a*) the full description of — (*i*) all excisable goods produced or manufactured by him, (*ii*) all other goods produced or manufactured by him and intended to be removed from his factory, and (*iii*) all the excisable goods already deposited or likely to be deposited from time to time without payment of duty in his warehouse;**
>
> **(*b*) the Chapter, Heading No. and Sub-Heading No., if any, of the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) under which each such goods fall;**
>
> **(*c*) the rate of duty leviable on each such goods; and**
>
> **(*d*) such other particulars as the Collector may direct.**
>
> **(2) The proper officer shall, after such inquiry as he deems fit, approve the list with such modifications as are considered necessary and return one copy of the approved list to the assessee who shall, unless otherwise directed by the proper officer, determine the duty payable on**

the goods intended to be removed in accordance with such list.

(2-A) All clearances shall, subject to the provisions of Rule 173-CC, be made only after the approval of the list by the proper officer. If the proper officer is of the opinion that on account of any inquiry to be made in the matter or for any other reason to be recorded in writing, there is likely to be delay in according the approval, he shall, either on a written request made by the assessee or on his own accord, allow such assessee to avail himself of the procedure prescribed under Rule 9-B for provisional assessment of the goods.

(3) Where the assessee disputes the rate of duty approved by the proper officer in respect of any goods, he may, after giving an intimation to that effect to such officer, pay duty under protest at the rate approved by such officer.

(4) If in the list approved by the proper officer under sub-rule (2), any alteration becomes necessary because of—

(*a*) the assessee commencing production, manufacture or warehousing of goods not mentioned in that list, or

(*b*) the assessee intending to remove from the factory any non-excisable goods not mentioned in that list, or

(*c*) a change in the rate or rates of duty in respect of the goods mentioned in that list or, by reason of any amendment to the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), a change in the Chapter, Heading No. and Sub-Heading No.

the assessee shall likewise file a fresh list or an amendment of the list already filed for the approval of such officer in the same manner as is provided in sub-rule (1).

(5) When the dispute about the rate of duty has been finalized or for any other reasons affecting rate or rates of duty, a modification of the rate or rates of duty is necessitated, the proper officer shall make such modification and inform the assessee accordingly.

(6) The Collector may exempt by a general order any class of assessees, who manufacture wholly goods which, for the time being, are exempt from paying duty, from filing the list under sub-rule (1):

Provided that as and when duty exemption is withdrawn or modified or no longer applicable, the assessee shall comply with the provisions of sub-rule (4) as if he had filed a list earlier and the list had been approved with 'nil' rate of duty.

173-C. *Assessee to file price list of goods assessable ad valorem*.—(1) Every assessee who produces, manufactures or warehouses goods which are chargeable with duty at a rate dependent on the value of the goods, shall file with the proper officer a price list, in such form and in such manner and at such intervals as the Collector may require, showing the price of each of such goods and the trade discount, if any, allowed in respect thereof to the buyers along with such other particulars as the Central Board of Excise and Customs or the Collector may specify.

(2) Prior approval by the proper officer of the price list filed by an assessee under sub- rule(1) shall be necessary only, where the assessee—

(*i*) sells goods to or through a related person as defined in Section 4 of the Act; or

(*ii*) uses such goods for manufacture or production of other goods in his factory; or

(*iii*) clears such goods for free distribution; or

(*iv*) clears such goods in any other manner which does not involve sale to a non-related person; or

(*v*) clears the goods of the same kind and quality from his factories located in the jurisdiction of different Collectors of Central Excise or Assistant Collectors of Central Excise; or

(*vi*) submits a fresh price list or an amendment of the price list already filed with the proper officer and which has the effect of lowering the existing value of the goods.

***** *** *****

(5) Subject to the provisions of Rule 173-CC, an assessee specified in sub-rule (2) shall not clear any goods from a factory, warehouse or other approved place of storage unless the price list has been approved by the proper officer. In case the proper officer is of the opinion that on account of any enquiry to be made in the matter or for any other reasons to be recorded in writing, there is likely to be delay in according approval, he shall either on a written request made by the assessee or of his own accord allow

such assessee to avail himself of the procedure prescribed under Rule 9-B for provisional assessment of the goods."

40. We have already noticed that the new Central Excise Rules have come into force known as Central Excise Rules 2002. Under Rule 173-B of the erstwhile Rules, the method of assessment and payment of tax was essentially by the assessee filing a classification list under Rule 173-B which *inter alia* was to contain the rate of duty leviable. The Rule further contemplated approval of the said list with any modification as may be considered necessary. The clearance was, subject to the provision of Rule 173-CC, to be made only after the approval by the competent officer. Equally under rule 173(C), the assessee, the manufacturer or producer or one who warehoused goods chargeable with duty on the value of goods was to file a price list. Prior approval was necessary only in certain

circumstances which included sale to or through related person as defined in Section 4 of the Act. Under Sub-rule 5 of Section 173-C again subject to the provisions of Rule 173CC, the assessee covered by Rule 173C(2) could not clear any goods from a factory, warehouse or other approved place of storage unless the price list was approved. Under the new dispensation namely, Excise Rule 2002, we have noticed that assessment was based on the value and the rate of tax as declared by the assessee.

41. In the context of Rule 173B and 173C, questions have arisen before this Court as to the effect of notice issued under Rule 10 of the Excise Rules, 1944 when the approved classification was sought to be reopened. The Assistant Collector sought to revise the net assessable value and recover the differential duty. A Bench of two

learned Judges held in *Rainbow Industries (P) Ltd. v. CCE* (1994)6 SCC 563, that once the price list was approved and acted upon this reclassification would be effective from the date of issue of the show cause notice. A Bench of three learned Judges in *Balarpur Industries Ltd. v. Assistant Collector of Customs and Central Excise & Ors.* (1995) Supplement 3 SCC 429, sought to confine the aforesaid judgment to the facts of the case. Finally, the matter was considered by a Constitution Bench in the case of *Collector of Central Excise, Baroda v. Cotspun Ltd.* reported in (1999) 7 SCC 633. This Court approved the view taken in Rainbow Industries (supra) and it disapproved of Balarpur Industries noticing that it did not advert to Rule 173-B. In the course of judgment, the Court *inter alia* held as follows:

> **"12. Rule 173-B deals with classification lists. It entitles the proper officer of Excise to make such enquiry thereon as he deems fit and**

requires him to approve the list only thereafter, and that with such modifications as are considered necessary. The assessee must determine the excise duty that is payable by him on the goods he intends to remove in accordance with the approved classification list. Sub-rule (5) provides for modification of an approved classification list.

13. Rule 10 is a provision for recovery of duties that have not been levied or paid in full or part. So far as is relevant for our purposes, it provides that where any duty has been short-levied, the Excise Officer may, within six months from the relevant date, serve notice on the assessee requiring him to show cause why he should not pay the amount that had been short-levied. Rule 10 does not deal with classification lists or relate to the reopening of approved classification lists. That is exclusively provided for by Rule 173-B.

14. The levy of excise duty on the basis of an approved classification list is the correct levy, at least until such time as to the correctness of the approval is questioned by the issuance to the assessee of a show-cause notice. It is only when the correctness of the approval is challenged that an approved classification list ceases to be such.

15. The levy of excise duty on the basis of an approved classification list is not a short levy. Differential duty cannot be

recovered on the ground that it is a short levy. Rule 10 has then no application."

(Emphasis supplied)

42. A Bench of two learned Judges i*n the case of M/s. Eastland Combines, Coimbatore v. Collector of Central Excise, Coimbatore* reported in AIR 2003 SC 843 after noticing the judgment in Ballarpur Industries, Rainbow and also noticing the change brought about by the Finance Act 10 of 2000 in Section 11A, proceeded to take the view that in view of the amendment, the basis for arriving at the conclusion that Rule 10 does not deal with classification list or relate to the reopening of classification list is altered and the conditions on which *Cotspun* (supra) judgment was rendered in (1999)7 SCC 633 was fundamentally altered. The view taken in *M/s. Eastland Combines, Coimbatore* (supra) came to be doubted by another Bench of two Judges.

Consequently, again it was referred to a Bench of three learned Judges and the reference came to be answered in the decision reported in *ITW Signod India Limited vs. Collector of Central Excise* reported in (2004) 3 SCC 48. Thereunder, the Court, after referring to the 1994 Rules, Section 11A which was introduced in the Act, the amendment which was brought about by Section 97 of the Finance Act, 2000, found that Section 11A, as amended by the Finance Act, 2000 brought about a completely different situation in the course of the judgment of the Court held *inter alia* as under:

> **"55. Section 11-A deals with a case when inter alia excise duty has been levied or has been short-levied or short-paid. The word "such" occurring after the words "whether or not" refers to non-levy, non-payment, short-levy or short payment or erroneous refund. It is, therefore, not correct to contend that the word "such" indicates only such short-levy which has been held to be non-existent in *Cotspun* [(1999) 7 SCC 633] having regard to Rule 173-B. Such short-levy or non-levy may be on the basis of any**

approval, acceptance or assessment relating to the rate of duty on or valuation of excisable goods. Thus, any approval made in terms of Rule 10 (*sic* 173-B), in the event, any mistake therein is detected, would also come within the purview of the expression "such short-levy or short payment". Such notice is to be served on the person chargeable with the duty which inter alia has been short-levied or short-paid."

57. The procedure laid down under Rule 173-B of the Rules has specifically been included in the Act. Furthermore, by reason of the amended Act a provision has been made for reopening the approved classification lists. It is a procedural provision, in terms whereof statutory authorities are required to determine as to whether the earlier classification was correctly done or not. The said authority upon giving an opportunity of hearing to the parties may come to the conclusion that decision on the approval granted need not be reopened and even if the same is reopened, the reasons therefor are to be stated. As the provision of Section 11-A is a recovery provision as regards non-levy or non-paid or short-levy or short-paid or erroneously refunded duties by reason of the said amendment, Parliament had merely provided that an approval on the basis of a classification list inter alia in case of a short-levy can be recovered if a finding is arrived at that the goods had undergone a short-levy. For the aforementioned purpose, Section 110 of the Finance Act, validating actions taken under Section 11-A can be taken into consideration

whereby and whereunder a legal fiction is created."

(Emphasis supplied)

43. Section 11A, thus, was held to be a recovery provision as regards non-levy, non-paid, short-levy, short-paid or erroneously refunded duty. Levy of excise duty under Rule 10 of the Excise Rules, 1944 on the basis of approved classification list or price list was found to be correct levy. It did not give rise to short-levy. Undoubtedly, the amended provisions of Section 11A empowered recovery of duty even in a case where the classification list has been approved earlier and it would operate from the date of removal and not from the date on which show cause was issued.

44. In the case of *N.B. Sanjana, Assistant Collector of Central Excise, Bombay & Ors. v. The Elphinstone Spinning and Weaving Mills Co. Ltd.*;

1978 E.L.T. (J 399), the contention of the assessee was that neither Rule 9 nor Rule 10A (1944 Rules) gave power to the Revenue to raise the demand notice involved in the said case. The demand had to be made if at all under Rule 10 and the demand having been made long after three months, contrary to what was prescribed in the said Rule, the notices were illegal and void. The court *inter alia* held as follows:-

> **"14. We are not inclined to accept the contention of Dr. Syed Mohammad that the expression 'levy' in Rule 10 means actual collection of some amount. The charging provision Section 3(i) specifically says "There shall be levied and collected in such a manner as may "be prescribed the duty of excise. It is to be noted that Sub-section (i) uses both the expressions "levied and collected" and that clearly shows that the expression "levy" has not been used, in the Act or the Rules as meaning actual collection. Dr. Syed Mohammad is, no doubt, well founded in his contention that if the appellants have power to issue notice either under Rule 10A or Rule 9(2), the fact that the notice**

refers specifically to a particular rule, which may not be applicable, will not make the notice invalid on that ground as has been held by this Court in J.K. Steel Ltd. v. Union of India (1969) 2 SCR 418 = (AIR 1970 SC 1173).

"If the exercise of a power can be traced to a legitimate source, the fact that the same was purported to have been exercised under a different power does not vitiate the exercise of the power in question. This is a well settled proposition of law. In this connection reference may usefully be made to the decisions of this Court in *B. Balakotaiah v. The Union of India*: [1958]SCR 1052 = (AIR 1958 SC 232); and *Afzal Ullah v. State of U.P.* [1964]4SCR 991 = (AIR 1964 SC 264).

The Court further proceeded to held as follows:-

"18. This now takes us to the question of proper interpretation to be placed on the expression "short-levied" and "paid" in Rule 10. Does the expression "short-levied" mean that some amount should have been levied as duty as contended by Dr. Syed Mohammad or will that expression cover even cases where the assessment is of 'nil duty', as contended by Mr. Daphtary. What is the meaning of the word "paid" in Rule 10 ? It is contended on behalf of the appellants that it means "actually paid", whereas, according to the respondents, it means "ought to have been paid". Taken literally, the word "paid" does mean

actually paid in cash. That means that a party or an assessee must have paid some amount of duty whatever may be the quantum. If this literal interpretation is placed on the expression "paid" in rule it is needless to state that it will support in a large measure the contention of Dr. Syed Mohammad that Rule 10 contemplates a short-levy in the sense that the amount which falls short of the correct amount has been assessed and actually paid. In our opinion, the expression "paid" should not be read in a vacuum and it will not be right to construe the said word literally, which means actually paid. That word will have to be understood and Interpreted in the context in which it appears in order to discover its appropriate meaning. If this is appreciated and the context is considered it is apparent that there is an ambiguity in the meaning of the word "paid". It must be remembered that Rule 10 deals with recovery of duties or charges short levied or erroneously refunded. The expression "paid" has been used to denote the starting point of limitation of three months for the issue of a written demand. The Act and the Rules provide in great detail the stage at which and the time when the excise duty is to be paid by a party. If the literal construction that the amount should have been actually paid is accepted, then in case like the present one on hand, when no duty has been levied, the Department will not be able to take any action under Rule 10. Rule 10-A cannot apply when a short-levy is made through error or misconstruction on the part of an officer, as such a case is specifically

provided by Rule 10. therefore, in our opinion, the proper interpretation to be placed on the expression "paid" is "ought to have been paid". Such an interpretation has been placed on the expression "paid" occurring in certain other enactments as in *Gursahai Saigal v. Commissioner of Income-tax, Punjab* [1963] 3 SCR 893 = (AIR 1963 SC 1062), and in *Allen v. Thorn Electrical Industries Ltd.* (1968) 1 QB 487. In (1963) 3 SCR 893 = (AIR 1963 SC 1062, the question arose as follows: In certain assessment proceedings under the Indian Income-tax Act, 1922, an assessee was charged with interest Under Sub-section (8) of Section 18A of that Act Under that Sub-section interest calculated in the manner laid down in Sub-section (6) of Section 18A was to be added to the tax assessed. Sub-section 3 of Section 18A dealt with cases of a person who has not been assessed before and he was required to make his own estimate of the tax payable by him and pay accordingly. Sub-section (3) of Section 18A was applicable to the assessee in that case. However, he neither submitted any estimate nor did he pay any advance tax. Under Sub-section (6) of Section 18A it was provided:

> **"Where in any year an assessee has paid tax Under Sub-section (2) or Sub-section (3) on the basis of his own estimate, and the tax so paid is less than eighty percent of the tax determined on the basis of regular assessment simple interest at the rate of six per cent per annum from the 1st day of January in the**

financial year in which the tax was paid up to the date of the said regular assessment shall be payable by the assessee upon the amount by which the tax so paid falls short of the said eighty percent."

"25. We may point out that if the contention of Dr. Syed Mohammad that in order to constitute short-levy, some amount should have been assessed as payable by way of duty so as to make Rule 10 applicable, is accented the result will be rather anomalous. For instance if due to collusion (which means collusion between a party and an officer of the Department) a sum of Rs. 2/-is managed to be assessed by way of duty when really more than thousand times that amount is payable and if the smaller amount of duty so assessed has been paid, the Department will have to take action within three months for payment of the proper amount of duty. On the other hand, if due to collusion again an order of nil assessment is passed, in which case no duty would have been paid, according to the appellants Rule 10A will apply. We do not see any reason to distinguish the above two cases one from the other. Both are cases of collusion and if an assessee in collusion manages to have a petty amount of duty assessed and paid he can effectively plead limitation of three months under Rule 10. Whereas in the same case of collusion where no duty has been levied there will be no period of limitation. In our opinion, that will not be a proper interpretation to be placed on Rule 10A by us. By the interpretation placed by us on Rule 10, the position will

be that an assessee who has been assessed to a smaller amount as well as an assessee who has been assessed to nil duty will all be put on a par and that is what is intended by Rule 10."

(Emphasis supplied)

45. In fact, it is to be noticed, that Section 11A which was inserted by Act 26 of 1978 is substantially the reproduction of Rule 10 of 1944 Rules. We notice, in fact, the following answers given by Shri Satish Aggarwal, the Minister of State in the Ministry of Finance, as regards, the reasons for Act 26 of 1978 by which Section 11A was inserted:-

"Shri Amrit Nahata made a frontal attack on clause 24 and asked, why are you going to increase the limit with regard to short levy from six months to five years? Previously, there was no limit. It was only in August 1977 that the rules were amended and provision made in the rules to fix a time limit in the case of fraud. Earlier, a case could be reopened even after 20 years in the case of fraud. In 1977 the rules prescribed a time limit of five years in the case of fraud. Otherwise, the period was unlimited. When we limited the period to five years, the Committee on Subordinate Legislation

> **recommended that instead of incorporating such an important provision in the rules it should find a place in the Act itself. That is why we have brought in this amendment to the Act. Otherwise, since those rules were laid on the Table of the House by implication they were approved by the House without any amendment. So, that is more or less the law now. We are only incorporating it in the Act, as recommended by the Committee on Subordinate Legislation."**

46. It is apparently thus that Section 11A came to be inserted.

47. Coming to Section 11AB, it came to be inserted by Act 33 of 1996. Thereafter, it was amended by Act 10 of 2000, Act 14 of 2001, Act 20 of 2002 and Act 49 of 2005. We have already extracted the relevant provisions of the said section. Section 11A must necessarily be read with Section 11AB. This is for the reason that interest under Section 11AB is premised upon the duty of excise not being levied or paid or short levied, short paid or erroneously refunded. Such duty is

either determined under sub-Section(2) of Section 11A or without such determination it being paid under Section 2B of Section 11A. In any of the circumstances, namely, non-levy, non-payment, short-levy and short-paid, any duty has been determined or paid as has been provided under Section 11A, necessarily the assessee becomes liable to pay interest from the first date of the month succeeding the month in which duty ought to have been paid.

48. The question which we are necessarily called upon to decide is when price is revised upward with retrospective effect and the excise duty on the same is paid immediately on a future date whether interest is payable under Section 11AB from the first day of the month succeeding the month in which the duty ought to have been paid under the Act. To keep the matter in focus, the exact question is which

is the month in which the duty ought to have been paid.

49. Under the Rules, goods become exigible to duty on removal. Assessment is to be done by assessee itself by way of self-assessment. In a case where duty is payable on the basis of the value, the assessee is to apply the rate of duty to the value and pay the duty on or before the sixth day of the month succeeding the month in which removal of the goods takes place. Undoubtedly, if the removal takes place in March, the payment is to be made by 31st of March.

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.

51. The expression "the month in which the duty ought to have been paid" under this Act, when it is read alongwith Rule 8, which declares that the duty on the goods removed from the factory or warehouse during a month is to be paid on the 6th day of the following month would mean that the Legislature has understood the expression "the month in which the duty ought to have been paid" under the Act in the same sense as it is declared in Rule 8.

52. In this regard it is also pertinent to notice the finding in the order of the original authority that perusal of the Circular dated 01/07/2004 makes it unambiguously clear that the price was understood

as provisional price. This belies quite clearly the case of the appellant that the price was final. Could the assessee in the light of the Circular even for a moment in the same breath contend that the assessee was unhesitatingly ready and able to determine the price and hence the value. We would think that it certainly presented a situation where the assessee should have resorted to Rule 7.

53. As we have already noted, SAIL has paid the differential duty of Rs.142.78 crores even without waiting for any notice under Section 11A(1). The assessee volunteered and made payment in October 2006. We find merit in the finding by the authority that this is a case where therefore the payment made by the assessee is to be treated as one falling under Section 11A(2)b). This meant also that there was no need for determination of the duty within the

meaning of Section 11A(2)(a) or issuance of notice under Section 11A.

54. It is important to notice that when we contrast Section 11A as it was introduced with effect from 15.11.1980 with Section 11A after amendment by Section 97 of the Finance Act, 2000, we find that in the later avtar of Section 11A, the following words have been inserted: -

> **"Whether or not such non-levy or non-payment, short-levy or short-payment or erroneous refund, as the case may be, was on the basis of any approval, acceptance or assessment relating to the rate of duty on or valuation of excisable goods under any other provisions of this Act or the rules made thereunder."**

No doubt, it had the effect of taking away the basis for the decision in the case of *Collector of Central Excise, Baroda v. Cotspun Ltd.* reported in (1999) 7 SCC 633, which took the view that a levy based on the approved classification list, is not short-levy. But its impact goes beyond the same.

Power under Section 11A to recover the duty which has not been levied or not been paid or short-levied or short-paid will be available *inter alia* irrespective of, whether the aforesaid contingency was or was not the result of any approval, acceptance or assessment either relating to the rate of duty or the valuation under the Act and the Rules. Thus, even when there has been an assessment or acceptance in relation to the rate of duty or valuation, it does not stand in the way of invoking power under Section 11A.

55. Rule 12 declares that every assessee is to file monthly returns. There is no provision in the rule which contemplates an assessment as such based on the return by the authorities. Assessment is self-assessment by the assessee under Rule (6). No doubt, in the case covered by Rule 7 there is a provisional assessment followed by a final

assessment. The main ingredients for self-assessment would appear to be (1) the rate of duty (2) valuation (3) quantity of removal.

56. Are cases of non-levy, non-payment, short-levy and short-payment mutually exclusive?. In other words, can it be said that in a case of non-payment, it would not be a case of non-levy? Do they overlap? If there is non-levy, will there by short levy at the same time. Finally, in a case of short levy, can there also be short payment?

57. What is levy? We have already noticed that in the decision of this Court in *N.B. Sanjana* (supra), this Court rejected the argument of the Revenue that levy in Rule 10 means collection of some amount. The Court went on to hold that levy has not been used in the Act or the rules as meaning actual collection.

58. In a case where goods are removed clandestinely, there would be no levy. Equally, there will be non-payment. Thus, a case of non-levy can overlap with non-payment. No doubt, there can be cases where despite full levy there can be no payment, may be by mistake or otherwise. Equally thus, if there is no non-levy, there can be partial payment. That would make it a case of short payment as the payment does not match the amount of duty levied as per the self-assessment carried out by the assessee. A short levy ordinarily would be a case where out of the ingredients of assessment, namely, (1) rate of duty, (2) valuation and (3) quantity removed, the components all or any are incorrectly applied. As an instance if the full rate of duty applicable is not applied though the valuation and the quantity is correctly arrived at, it may fall under short-levy. In one sense it could be said

that there is short-payment also, as if payment could be understood as the amount which ought to have been paid but it has not been paid, it may be a case of short payment. But it may be more appropriate to put it under short levy where the deficit in payment is essentially in terms of a short-levy.

59. We are here concerned in these cases with one of the ingredients of assessment, namely, valuation. There is no dispute regarding the quantity removed. There is no issue relating to rate of duty. The dispute is relating to the correct value. To appreciate it better, let us take an example of an assessee who deliberately undervalues the goods which he removed. This results in assessee arriving at an amount which would not be the correct amount. He pays this incorrectly assessed amount. Would it be a case of

short levy or short payment? If short- levy is to be understood as confined to cases where the assessment is not the full assessment, taking into account the parameters involved correctly, namely, rate of duty, valuation and quantity it could be classified as a case of short levy as one of the components of proper assessment namely, valuation has been incorrectly arrived at. The payment in such a case is made in terms of the incorrectly assessed figure. The payment matches the assessment. In fact, it is worthwhile to recall that under Rule 10 of 1944 Rules which we have adverted to., the expression "short-payment" is not used. Instead the words duty has not been paid in full, has been used. No doubt, in a case where in law though the amount which is paid is in harmony with the amount which is assessed, it is not the amount which ought to have been paid by the assessee.

The absence of full payment of duty or short payment has indeed also in one sense taken place. In a case where there is an escalation clause goods are cleared on a provisional price. Consequently, the value is provisional. There is a subsequent escalation with retrospective effect. It will affect the valuation which was employed in the self-assessment by the assessee which would necessarily be provisional. Enhancement of the value will date back to the dates of removal in view of the retrospective operation. Admittedly the liability for payment of differential duty has arisen. Upon the true value, in a case of retrospective escalation of price though later agreed being received and consequential differential duty being admittedly payable, it would result in Section 11A read with Section 11AB applying.

60. It is true that the statutory authority has found it to be a case of short payment. In the notice issued claiming interest it is stated there is short levy (see page 89 Vol.II SLP paper book). Proceeding on the basis that it is a case of short levy, Section 11A read with Section 11AB is attracted and the interest clock ticks from the date as we have found namely as provided in Rule 8 read with Section 11AB. If the concept of short payment is stretched to include all amounts which ought to have been paid, it may also be treated as a case of short payment though juridically it may be true that it may strictly fall under short levy.

61. While it may be true that interest cannot be demanded by way of damages or compensation and it is also further true that unless there is a substantive provision providing for payment of

interest in a fiscal statute, interest cannot be demanded, we would think in the context of the Act and the Rules in question, under Section 11AB, particularly, when there is no dispute relating to liability to pay the differential duty and we notice that absence of dispute is a fair acknowledgement of the fact that the facts of the present cases are unlike the situation in *MRF decision* where the price was fixed at the time of removal, interest is payable as provided in Section 11AB and from the point of time indicated therein. But in these cases, the price was variable under the escalation clause which was very much within the knowledge of the assessee and the demand for interest is sustainable.

62. As far as the scope of the second explanation of Section 11A(2)(b) is concerned, it contemplates payment voluntarily by the assessee. It is without

any notice being issued under Section 11A. There is also reference to liability on the part of the assessee to pay interest under Section 11A(2)(b), not only on the amount which is paid within the meaning of Section 11A(2)(b) but on any short payment as may be determined by the excise officer. This only means that payment can by an assessee of any of the four amounts with which we are more concerned namely, non-levy, non-payment, short-levy or short-payment. Since there is no notice under Section 11A and non-determination of the amount as such pursuant to which the amount is paid it may happen that there may be shortfall in the amount which is paid by the assessee in comparison to what the assessee is legally required to pay. The short payment which is therefore referred to in the second Explanation to Section 11A(2)(B) can only be the aforesaid short payment

and it is not referring to the short payment of duty which was originally occasioned and which is the subject matter of Section 11A(2)(b) and Section 11AB.

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 crystalised 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.

……CJI.
(Ranjan Gogoi)

……J.
(Uday Umesh Lalit)

……J.
(K.M. Joseph)

New Delhi;
May 08, 2019