A M/S. STEEL AUTHORITY OF INDIA LTD.

v.

COMMISSIONER OF CENTRAL EXCISE, RAIPUR

(Civil Appeal No. 2150 OF 2012)

B DECEMBER 07, 2015

[A.K. SIKRI AND R. F. NARIMAN, JJ.]

Central Excise Act, 1944 – s. 11AB – Interest on delayed C *payment of duty – Supplementary invoices raised by seller due to price increase by virtue of price variation clause in the sale contract – Differential duty paid by seller on value of such supplementary invoices – Payment of interest u/s. 11AB on the said differential duty – Held: As on the date when the* D *goods were cleared, there was no certainty that there would be price escalation – It is impossible to expect the assessee to pay the excise duty, at the time of clearance of the goods, on the basis of price escalation that took place at a later date in future – Thus, as on the date of clearance when excise* E *duty was paid, it could not be treated as 'short paid' on the said date – As a consequence when the principal amount, namely, the excise duty itself was not payable (on the differential) on the date of clearance of the goods, there cannot be any question of law to pay interest – However, Supreme* F *Court in earlier decisions-*SKF *and* International Auto *case held that interest would be payable on the duty paid on supplementary invoices – The said Bench did not consider the effect of the expression 'ought to have been paid' occurring in s. 11AB – Thus, the decision in* SKF *and* International Auto G *case needs re-consideration – Matter referred to the larger Bench.*

Referring the matter to the larger Bench, the Court

H **HELD: 1.1 The assessee had discharged the excise**

duty on the goods cleared by it on the basis of invoices raised indicating the value of these goods and as on the date of the clearance of these goods. The price declared in the said invoice was the transaction value of the goods in terms of Section 4 of the Central Excise Act, 1944 inasmuch as that was the price fixed between the parties at which the goods were to be supplied at the time and place of removal. The occasion for differential duty arose at a later date due to price variation clause in the contract for sale. The moment the assessee received the enhanced price due to price escalation, it paid differential duty on its own immediately on receipt of the said price. [Para 7] [946-F-H]

1.2 Interest under Section 11AB can be levied/ charged where any duty of excise has not been levied or paid or has been short levied or short paid. In such an event, interest is liable to be paid 'from the first date of the month succeeding the month in which the duty ought to have been paid'. Section 4(1)(a) of the Act provides that the value of the goods shall be the price 'actually paid or payable' for the goods. This means the price which has been 'paid' or 'agreed to be paid' by the buyer of the goods. For the purposes of Section 11AB, the expression 'ought to have been paid' would mean the time when the price is agreed upon by the seller and the buyer. In other words, the right of the seller to receive the revised price crystallises only when the buyer agrees to sanctions the same, and only at that time can liability to pay duty, if at all, on the revised price arise. Both parties are not aware of the final price at the time when the goods are removed. In the context of price revision subsequent to clearance, duty 'ought to be paid' only after the sanctioning of the revised priced by the buyer. The differential duty on account of price revision is paid in

A the month when the revised price is agreed between the seller (assessee) and the buyer and it ought to have been paid only at that time and not before. [Para 19] [958-C-H]

1.3 One has also to keep in mind the difference B between 'what should be the quantum of duty to be paid' and 'when such duty is payable'. In the cases price revision, the quantum of duty would be on the escalated price but the time for payment of differential duty is when the parties agree for the escalation in prices. On that C reckoning, it would follow that interest clock for differential duty will start ticking from the date differential duty is due, i.e., the date of agreement of escalated prices and not before. This concept was clarified with the latest amendment in 2015 to Section 11A with regard to the D 'relevant date' for payment of interest. [Para 20] [959-A-C]

1.4 The Bench in **SKF* case and ***International Auto* case which held that interest would be payable, did not E consider the effect of the expression 'ought to have been paid' occurring in Section 11AB of the Act. It is undeniable that under Section 4 of the Act, the excise duty is to be paid on the 'transaction value' and such a transaction value has to be seen at the time of clearance F of the goods. Indubitably, when the goods were cleared, the excise duty was paid taking into consideration the price that was actually charged and was reflected in the invoices raised for the said purpose. The Department cannot plead that as on that date, this was not the price G charged. No doubt, when the differential payment is made at a later date, further amount towards excise duty becomes payable as a result of said differential in price. Further, such an event took place at a subsequent date. As on the date when the goods were cleared, there was H no certainty that there would be price escalation and it

was beyond comprehension to ascertain the exactitude of such an escalation. It would be impossible to expect the assessee to pay the excise duty, at the time of clearance of the goods, on the basis of price escalation that took place at a later date in future. Therefore, as on the date of clearance when excise duty was paid, it could not be treated as 'short paid' on the said date. As a consequence when the principal amount, namely, the excise duty itself was not payable (i.e. on the differential) on the date of clearance of the goods, there cannot be any question of law to pay interest. No doubt, on receipt of differential price, when the buyer agreed to escalation in the price, further excise duty also become payable and on that reckoning one can say that the excise duty originally paid became 'short paid'. However, that would only attract payment on differential excise duty and not the interest thereon. [Para 21-22] [960-A-C]

1.5 The two judgments in *SKF India Ltd.* and *International Auto* are by the same Bench. *International Auto* follows *SKF India Ltd.* The primary factor by which the Bench was influenced was that there is a loss of revenue to the Government and, therefore, the Government should compensate for that. It proceeds on the basis that the price which was originally stated at the time of removal of the goods was 'understated' (*International Auto).* However, value of the goods for the purpose of duty is 'at the time of removal', which remains fundamental principle from the inception of the Central Excise Act originally enacted in 1944 and remains valid till date. It is, therefore, difficult to accept that the price was 'understated' on the date of removal of those goods. [Para 23] [960-D-F]

1.6 The observations of the Bench that the imposition of interest is to compensate the Department for loss of

A **revenue is contrary to the Constitution Bench judgment in the case of ******J.K. Synthetics Limited v. Commercial Taxes Officer* **that interest was compensatory in nature was specifically rejected. The Constitution Bench considered in detail the correctness of earlier three**
B **member Bench judgment in the case of** ***Associated Cement Company Limited v. Commercial Tax Officer, Kota and Others*** **wherein majority view was that interest claimed on unpaid tax dues could be charged as it was compensatory in character and not penal. [Para 25]**
C **[962-D-F]**

1.7 The decision in ***SKF*** **and** ***Auto International*** **require a re-look for the reasons given. The Registry is directed to place the matter before the Hon'ble Chief**
D **Justice of India for constituting a Larger Bench to go into the issue involved in the instant case. [Para 27] [962-A-B]**

E **CCE v. SKF India Ltd.* **(2009) 13 SCC 461:2009 (10) SCR 714;** ***CCE v. International Auto Limited* **(2010) 2 SCC 672: 2010 (1) SCR 211;** *CCE v. Rucha Engg. (P) Ltd.* **First Appeal No. 42 of 2007 decided on 03.04.2007;** *MRF Ltd.v. Commissioner of Central Excise, Madras* **(1997)**
F **5 SCC 104;** ****J.K. Synthetics Limited v. Commercial Taxes Officer* **(1994) 4 SCC 276;** *Associated Cement Company Limited v. Commercial Tax Officer, Kota and Others* **(1981) 4 SCC 578:1982 (1) SCR 563;** *Keshav Mills*
G *Company Limited v. Commissioner of Income Tax, Bombay* **(1965) 2 SCR 908 – referred to.**

CASE LAW REFERENCE

H **2009 (10) SCR 714 referred to. Para 11**

2010 (1) SCR 211	**referred to.**	**Para 11**	A
(1997) 5 SCC 104	**referred to.**	**Para 24**	
(1994) 4 SCC 276	**referred to.**	**Para 25**	B
1982 (1) SCR 563	**referred to.**	**Para 25**	
(1965) 2 SCR 908	**referred to.**	**Para 26**	

C

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2150 of 2012

From the Judgment and Order No. 615/2010-Ex dated 13.08.2010 of the Customs, Excise & Service Tax Appellate Tribunal, New Delhi in Appeal No. E/367/2008 D

WITH

C. A. No. 2562 OF 2012

C. A. Nos. 599, 600 & 1522-1523 OF 2013 E

V. Lakshmikumaran, M. P. Devanath, Hemant Bajaj, L. Charanaya, Aditya Bhattacharya, Anandh K., T. D. Satish for the Appellant.

K. Radhakrishnan, Arijit Prasad, A. Sharma, B. Krishna Prasad for the Respondent. F

The Judgment of the Court was delivered by

A.K. SIKRI, J. 1. In all these appeals, identical question of law is involved and for the sake of brevity, we are discussing the question of law by taking note of the facts from Civil Appeal No. 2150 of 2012. G

2. The appellant/assessee herein, which is a public sector undertaking of the Government of India, has been selling iron H

A and steel products, that are manufactured by it, to the Indian Railways. For this purpose, contract was signed between the said two parties and the goods were being sold to the Indian Railways at the price mutually agreed upon between them. On each removal of these goods for supply to the Railways, the B assessee had been paying the excise duty as per the price disclosed by the assessee in the invoices issued at the time of the removal of the goods. Goods in this manner were supplied during the period January, 2005 to July, 2006 which period is involved in the instant appeal. It so happened that C there was an upward revision in the price by the Railways in August, 2006 covering the period in question. On that basis, assessee was paid the price difference on the fixation of enhanced consideration for the goods supplied. The assessee paid the differential duty of Rs.142.78 crores voluntarily in D August, 2006. According to the Revenue/respondent, since the differential duty was paid in August, 2006 and not paid at the time of clearance of the goods, there was delay in paying the differential duty and, therefore, under Section 11AB of the E Central Excise Act, 1944 (hereinafter referred to as the 'Act'), the assessee was liable to pay interest on the differential duty amount paid by it. The contention of the Revenue has been upheld by the Authorities below including Custom Excise and Service Tax Appellate Tribunal (hereinafter referred to as the F 'Tribunal').

3. The question, thus, that arises for consideration in these appeals is as to whether interest is leviable under Section 11AB of the Act on the differential duty amount paid under G supplementary invoices due to price increase by virtue of price variation clause in the sale contract. Now, facts in some detail:

The assessee is engaged in the manufacture of iron and steel products falling under Chapter 72 and 73 of the schedule of the Central Excise Tariff Act, 1985. The final products H

manufactured includes rails. The final products manufactured by the assessee are cleared on payment of appropriate duty of excise leviable thereon. The final products are either directly sold at the factory gate or are transferred to various Branch Sales Offices from where they are sold to the customers. The sales either from the factory or from the BSOs are in terms of purchase orders received from the customers. The assessee sold the rails to the Indian Railways in terms of the Price Circular No. LP-06 of 2005 dated 24.02.2005 w.e.f. 01.07.2004.

In terms of the prices quoted in the purchase orders, the assessee discharged central excise duty at the time of removal of the rails to the Indian Railways. Such price was the "transaction value" of the goods in terms of Section 4 of the Act at the given time. In terms of the price variation clause and also in terms of the agreement with the Indian Railways, the price circular dated 24.02.2005 effective from 01.07.2004 was revised upwards with increase in the agreed upon price. A revised price circular No. LP-010/06 dated 20.07.2006 was issued revising the agreed upon price.

In terms of the revised price circular the assessee discharged differential duty of Rs.142,78,88,172/- on the rails cleared during the period from January, 2005 to July, 2006. The differential duty was paid in August, 2006 under intimation to the Departmental Authorities.

4. In the above background, on a scrutiny of ER-1 return filed by the assessee for the month of August, 2006, a show cause notice dated 01.06.2007 was issued to the assessee contending that in respect of the differential duty of Rs.142.78 crores paid in August, 2006, the assessee are required to pay an interest of Rs.15,51,81,231/- under Section 11AB of the Act. The notice alleged that since the price was not correctly determined at the time of removal of goods there was short payment of duty hence the assessee is liable to pay interest.

A The notice also alleges that since the price was not final the duty should be treated as paid on the provisional price and in terms of Rule 7(4) of the Central Excise Rules interest under Section 11AB is payable. The notice also relied on circular dated 28.07.2003 to allege that the assessee is required to B pay interest. The notice also proposed to impose penalty under Rule 25 for contravention of Rules 7 and 8 of the Rules.

5. The assessee filed detailed reply dated 17.10.2007 challenging the allegations contained in the show cause ntoice C and contending that no interest is payable on the differential duty paid on account of price variation.

6. The Commissioner of Central Excise, Raipur passed order dated 31.10.2007 confirming the amount of interest D proposed in the show cause notice and also imposing penalty of Rs.2,00,000/-. Against the order dated 31.10.2007 passed by the Commissioner of Central Excise, Raipur, assessee filed an appeal before the Tribunal. The Tribunal has passed the impugned order dated 13.08.2010 and dismissed the appeal. E This order is challenged by way of instant appeal.

7. It becomes manifest from the aforesaid facts that the assessee had discharged the excise duty on the goods cleared by it on the basis of invoices raised indicating the value F of these goods and as on the date of the clearance of these goods. It cannot be disputed that the price declared in the said invoice was the transaction value of the goods in terms of Section 4 of the Act inasmuch as that was the price fixed between the parties at which the goods were to be supplied at G the time and place of removal. The occasion for differential duty arose at a later date due to price variation clause in the contract for sale. The moment the assessee received the enhanced price due to price escalation, it paid differential duty on its own immediately on receipt of the said price.

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8. It is in this backdrop it is to be examined as to whether the difference in price, as per the decision taken by the Railways on a later date i.e. much after the date on which the goods were cleared, can be treated as price as on the date when the goods were actually removed and, therefore, it is to construed that the duty initially paid was 'short paid' to bring this event within the fold of Section 11AB of the Act. As per the assessee, provisions of Section 11AB of the Act would not be attracted at all inasmuch as, by no stretch of imagination, it can be treated that on the date of removal of the goods when the duty was paid as per the price fixed at that time, it is now to be treated as 'short paid' only because of the occurrence of an event at a later date which could not be visualised or taken into consideration at the time of removal of these goods.

9. For proper understanding of the matter, we may reproduce provisions of Section 11AB of the Act at this stage, which reads as under:

> "(1) Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person who is liable to pay the duty as determined under sub-section (2), or has paid the duty under sub-section (2B), of Section 11A, shall, in addition to the duty, be liable to pay interest at such rate not below eighteen percent and not exceeding thirty-six percent per annum, as is for the time being fixed by the Central Government, by notification in the Official Gazette, from the first date of the month succeeding the month in which the duty ought to have been paid under this Act, or from the date of such erroneous refund, as the case may be, but for the provisions contained in sub-section (2), or sub-section (2B), of Section 11A till the date of payment of such duty:
>
> Provided that in such cases where the duty becomes

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

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

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

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

F 10. A bare reading of the aforesaid provision reflects that in order to attract the same, following requirements need to be fulfilled:

(a) Non-levy or non-payment of duty.

G (b) Short levy or short payment of duty.

(c) erroneous refund.

(d) duty determined under Section 11A(2).

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(e) Section 11A(2) requiring Notice issued under Section 11A.

(f) duty payment under Section 11A(2B).

(g) interest is payable on such reduced or increased duty determined to be payable by Commissioner (Appeals) or Appellate Tribunal etc.

11. Before proceeding further, we would like to point out that we are not treading on a virgin territory, inasmuch as the provisions of Section 11AB of the Act have already been interpreted by this Court in two judgments under almost similar circumstances. These are:

(a) ***CCE*** v. ***SKF India Ltd.***[1]

(b) ***CCE*** v. ***International Auto Limited.***[2]

12. In *SKF India Ltd.* case, the assessee was engaged in the manufacture and sale of ball bearings and textile machine parts. It sold goods manufactured by it on certain prices on payment of excise duty leviable on the price on which the goods were sold. Later on, there was a revision of prices with retrospective effect. Following the revision the assessee raised supplementary invoices on its buyers and also paid the differential duty on the goods sold earlier. The Revenue took the view that the assessee was liable to pay interest on differential duty. This factual position would reflect that it was almost same that prevails in the present appeals. Though, the demand made in Order-in-Original was set aside by the Commissioner (Appeals) and the order of the Commissioner (Appeals) was upheld by the CESTAT holding that no interest was chargeable where there was time gap between the payment of differential duty and issuance of supplementary

[1](2009) 13 SCC 461

[2](2010) 2 SCC 672

A invoices to the customers on the basis of upward revision of prices in respect of the goods sold earlier. The said view of the Tribunal was reversed by this Court holding that interest was payable under Section 11AB of the Act. After reproducing the provisions of Section 11AB, the Court in the first instance
B pointed out that the aforesaid provision was not happily worded and made following remarks in this behalf:

> "9. If the object of the law is to state clearly and unambiguously the obligations of the person whom the
C law addresses and to spell out plainly and without any confusion the consequences of failure to discharge the obligations cast by the law then the four sections of the Act fall miles short of the desired objective. Even as originally cast the provisions were far from very happily
D framed and worded. Subjected to amendments from time to time those provisions have now become so complicated that in order to discern their meaning it becomes necessary to read them back and forth several times.
E
> 10. We see no reason why the two periods for which interest is leviable may not be put together and dealt with in one consolidated provision instead of being split up in Sections 11-AA and 11-AB. Also, there is much scope
F to reorganise all the different sub-sections of Section 11-A and to present the scheme of that section in a more coherent and readable form. Be that as it may. In the case in hand we have to deal with the law as it stands now."
G

13. Thereafter, the Court contrasted the provisions of Section 11A with Section 11AB and some other provisions. It also took note of the judgment of High Court of Bombay in ***CCE*** v. ***Rucha Engg. (P) Ltd.***[3] wherein the Bombay High Court
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[3]First Appeal No. 42 of 2007 decided on 03.04.2007

had held that Section 11AB of the Act is not applicable in such a situation. The Court, however, rejected the aforesaid view of the Bombay High Court. We would like to reproduce the relevant discussion touching the aforesaid aspect, as contained in the judgment:

> "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.
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> 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).
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> 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

A 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
B of the month succeeding the month in which the duty ought to have been paid till the date of payment of the duty.

14. What is stated in Explanation 2 to sub-section (2-B)
C is reiterated in Section 11-AB that states where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person who has paid the duty under sub-section (2-B) of Section 11-A, shall, in addition to the duty, be liable to pay
D interest.... It is thus to be seen that unlike penalty that is attracted to the category of cases in which the non-payment or short-payment, etc. of duty is "by reason of fraud, collusion or any wilful misstatement or suppression of facts, or contravention of any of the provisions of the
E Act or of Rules made thereunder with intent to evade payment of duty", under the scheme of the four Sections (11-A, 11-AA, 11-AB and 11-AC) interest is leviable on delayed or deferred payment of duty for whatever reasons. The payment of differential duty by the assessee
F at the time of issuance of supplementary invoices to the customers demanding the balance of the revised prices clearly falls under the provision of sub-section (2-B) of Section 11-A of the Act.

G 15. The Bombay High Court, Aurangabad Bench, in its decision in *CCE* v. *Rucha Engg. (P) Ltd.*, (First Appeal No. 42 of 2007 decided on 3-4-2007) that was relied upon by the Tribunal for dismissing the Revenue's appeal took the view that there would be no application of Section
H 11-A(2-B) or Section 11-AB where differential duty was

paid by the assessee as soon as it came to learn about the upward revision of prices of goods sold earlier. A

16. In *Rucha Engg.* the High Court observed as follows:

"It is evident that Section 11-AB comes into play if the duty paid/levied is short. Both, the Commissioner (Appeals) and CESTAT have observed that the assessee paid the duty on its own accord immediately when the revised rates became known to them from their customers. The differential duty was due at that time i.e. when the revised rates applicable with retrospective effect were learnt by the assessee, which was much after the clearance of the goods and, therefore, question of payment of interest does not arise as the duty was paid as soon as it was learnt that it was payable. Finding that provisions of Section 11-A(2) and 11-A(2-B) were not applicable as the situation occurred in the instant case was quite different, Section 11-AB(1) was not at all applicable, and therefore, the assessee was not required to pay interest." B C D E

It further held that a case of this nature would not fall in the category where duty of excise was not paid or short-paid.

17. We are unable to subscribe to the view taken by the High Court in *Rucha Engg.* 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 F G H

A 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."

B 14. Fact situation in *International Auto Limited* was also almost similar. In that case, the assessee, viz., International Auto Limited had supplied auto parts to its customers (manufacturers of motor vehicles) who determined the prices of auto parts having regard to the cost of raw material, C manufacturing cost, profit margin, etc. and placed orders with the assessee. Since price difference arose between the price on the date of removal and the enhanced price at which the goods stood ultimately sold, the Department issued show cause notice proposing to levy interest on the differential duty, D paid by the assessee, under Section 11-AB of the Act. The assessee took up the defence that prices indicated in the purchase order were final and not liable to change at the time of removal of the goods and, thus, it was not the case of 'short levy' on which interest could be charged. After extensively E quoting from the judgment of *SKF India Ltd.* and following the same, aforesaid contention of the assessee was repelled. In addition, the judgment also contained some further discussion on Section 11AB of the Act which needs to be taken note of. It F runs as under:

"6. Section 11-A of the Act deals with recovery of duty not levied or not paid or short-levied or short-paid. The said section, which stood inserted by Act 25 of 1978, underwent a sea change when Parliament inserted major G changes in that section vide Act 14 of 2001 (with effect from 11-5-2001) and Act 32 of 2003 (with effect from 14-5-2003). It needs to be mentioned that simultaneously Act 14 of 2001 also made changes to Section 11-AB of the Act. H

7. In *SKF India* Ltd., (2009) 13 SCC 461, it has been, inter alia, held, as can be seen from the abovequoted paragraphs, that sub-section (2-B) of Section 11-A provides that the assessee in default may make payment of the unpaid duty *on the basis of his own ascertainment* or as ascertained by a Central Excise Officer and, in that event, such assessee in default would not be served with the demand notice under Section 11-A(1) of the Act. However, Explanation 2 to the sub-section makes it clear that such payment would not be exempt from interest chargeable under Section 11-AB of the Act. What is stated in Explanation 2 to sub-section (2-B) is reiterated in Section 11-AB of the Act, which deals with interest on delayed payment of duty.

8. From the scheme of Section 11-A(2-B) and Section 11-AB of the Act, it becomes clear that interest is levied for loss of revenue on any count. In the present case, one fact remains undisputed, namely, accrual of price differential. What does differential price signify? It signifies that value, which is the function of the price, on the date of removal/clearance of the goods was not correct. That, it was understated. Therefore, the price indicated by the supplementary invoice is directly relatable to the value of the goods on the date of clearance, hence, enhanced duty. This enhanced duty is on the corrected value of the goods on the date of removal. When the differential duty is paid after the date of clearance, it indicates short-payment/short-levy on the date of removal, hence, interest which is for loss of revenue, becomes leviable under Section 11-AB of the Act.

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.* 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.

10. In the present case, we are concerned with the imposition of interest which, as stated above, is charged to compensate the Department for loss of revenue. Be that as it may, as stated above, the scheme of Section 11-A of the Act has since undergone substantial change and, in the circumstances, in our view, the judgment of this Court in *MRF Ltd.* has no application to the facts of this case. In our view, the judgment of this Court in *SKF India Ltd.* is squarely applicable to the facts of this case."

15. Mr. Lakshmikumaran, who appeared for the

assessees in these appeals, insisted on a different course of action. He adopted two pronged strategy. His first endeavour was to show that the judgments in the cases of *SKF* and *International Auto* were not applicable as the aforesaid cases were distinguishable. His alternate submission was that these judgments do not correctly interpret the provisions of Section 11AB of the Act and, therefore, matter required a fresh look by a Larger Bench.

16. It is difficult to accept the first submission. As already pointed out above, the factual scenario in which the aforesaid two cases were decided were similar, nay, almost identical. When this Court on the basis of same type of events interpreted the provisions of Section 11AB of the Act in a particular manner and held, in no certain terms, that interest was payable, it is difficult to countenance the argument of the assessee that these cases are distinguishable on facts. Therefore, we advert to the second plank of Mr. Lakshmikumaran's submissions which was argued with all vehemence, covering the entire length and breadth of the statutory provisions with relevant case laws.

17. 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 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'

A definition in Section of the Act, 1944 but before 2010.

18. 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 B 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, C till the date when differential duty was paid.

19. Starting from the basics, it is axiomatic that interest under Section 11AB can be levied/charged where any duty of excise has not been levied or paid or has been short levied or D short paid. In such an event, interest is liable to be paid 'from the first date of the month succeeding the month in which the duty ought to have been paid'. Section 4(1)(a) of the Act provides that the value of the goods shall be the price 'actually paid or payable' for the goods. This means the price which E has been 'paid' or 'agreed to be paid' by the buyer of the goods. We find force in the argument of the assessee that the expression 'ought to have been paid' in Section 11AB has to be understood in this light. Thus, for the purposes of Section 11AB, the expression 'ought to have been paid' would mean F the time when the price is agreed upon by the seller and the buyer. In other words, the right of the seller to receive the revised price crystallises only when the buyer agrees to sanctions the same, and only at that time can liability to pay duty, if at all, on the revised price arise. Both parties are not G aware of the final price at the time when the goods are removed. In the context of price revision subsequent to clearance, duty 'ought to be paid' only after the sanctioning of the revised priced by the buyer. The differential duty on account of price revision is paid in the month when the revised price is H

agreed between the seller (assessee) and the buyer and it ought to have been paid only at that time and not before.

20. One has also to keep in mind the difference between 'what should be the quantum of duty to be paid' and 'when such duty is payable'. In the cases price revision, the quantum of duty would be on the escalated price but the time for payment of differential duty is when the parties agree for the escalation in prices. On that reckoning, it would follow that interest clock for differential duty will start ticking from the date differential duty is due, i.e., the date of agreement of escalated prices and not before. This concept gets clarified with the latest amendment in 2015 to Section 11A with regard to the 'relevant date' for payment of interest.

21. We have already taken note of judgments in *SKF* and *International Auto* including the reasons which have been given in support of the view that interest would be payable. At the outset, we may mention that the Bench did not consider the effect of the expression 'ought to have been paid' occurring in Section 11AB of the Act. It is undeniable that under Section 4 of the Act, the excise duty is to be paid on the 'transaction value' and such a transaction value has to be seen at the time of clearance of the goods. Indubitably, when the goods were cleared, the excise duty was paid taking into consideration the price that was actually charged and was reflected in the invoices raised for the said purpose. The Department cannot plead that as on that date, this was not the price charged. No doubt, when the differential payment is made at a later date, further amount towards excise duty becomes payable as a result of said differential in price. Further, such an event took place at a subsequent date. As on the date when the goods were cleared, there was no certainty that there would be price escalation and it was beyond comprehension to ascertain the exactitude of such an escalation. It would be impossible to

A expect the assessee to pay the excise duty, at the time of clearance of the goods, on the basis of price escalation that took place at a later date in future. Therefore, as on the date of clearance when excise duty was paid, it could not be treated as 'short paid' on the said date. As a consequence when the
B principal amount, namely, the excise duty itself was not payable (i.e. on the differential) on the date of clearance of the goods, there cannot be any question of law to pay interest.

22. No doubt, on receipt of differential price, when the
C buyer agreed to escalation in the price, further excise duty also become payable and on that reckoning one can say that the excise duty originally paid became 'short paid'. However, that would only attract payment on differential excise duty and not the interest thereon.
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23. The two judgments in *SKF India Ltd.* and *International Auto* are by the same Bench. *International Auto* follows *SKF India Ltd.* The primary factor by which the Bench was influenced was that there is a loss of revenue to the Government and,
E therefore, the Government should compensate for that. It proceeds on the basis that the price which was originally stated at the time of removal of the goods was 'understated' (para 8 of *International Auto).* However, value of the goods for the purpose of duty is 'at the time of removal', as emphasised
F above which remains fundamental principle from the inception of the Central Excise Act originally enacted in 1944 and remains valid till date. It is, therefore, difficult to accept that the price was 'understated' on the date of removal of those goods.
G

24. We further find that the Bench distinguished earlier three member Bench judgment in the case of ***MRF Ltd.*** v. ***Commissioner of Central Excise, Madras***[4] on the purported ground that there was 'sea change' in Section 11A of the Act
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[4](1997) 5 SCC 104

(which was originally inserted by Act 25 of 1978) when Parliament inserted major changes in that Section vide Act 14 of 2001 w.e.f. 11.05.2001, Act 32 of 2003 w.e.f. 14.05.2003 and Act 14 of 2001 whereby Section 11AB of the Act was also amended. However, we are of the opinion that amendments made to Section 11A in 2001 and 2003 have nothing to do with the valuation of the goods based on 'the price at the time of removal'. *MRF* was a case where a particular price was charged by the said assessee from the buyer on the date of removal and excise duty paid thereupon. However, thereafter this price was reduced on the direction of the Government. On that basis, assessee laid its claim for refund of excise duty on differential between price on the date of removal and the reduced price at which the buyers were sold on the direction of the Government. This claim of the assessee was rejected and the order upheld by this Court as well with the following discussion:

> "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 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

A 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 B 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 C same with no order as to costs."

We, thus, are of the view that principle laid down in *MRF* Ltd. would continue to prevail.

D 25. Mr. Lakshmikumaran argued, and we find force in this argument, that observations of the Bench in the aforesaid case that the imposition of interest is to compensate the Department for loss of revenue is contrary to the Constitution Bench judgment in the case of ***J.K. Synthetics Limited*** v. E ***Commercial Taxes Officer***[5] wherein the argument that interest was compensatory in nature was specifically rejected. The Constitution Bench considered in detail the correctness of earlier three member Bench judgment in the case of ***Associated Cement Company Limited*** v. ***Commercial Tax*** F ***Officer, Kota and Others***[6] wherein majority view was that interest claimed on unpaid tax dues could be charged as it was compensatory in character and not penal. Bhagwati, J. had, however, dissented giving various reasons, one of which was that tax which has yet to be ascertained through the G process of ascertainment could not be treated as tax payable from the date of submission of the return and, therefore, no

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[5] (1994) 4 SCC 276

H [6] (1981) 4 SCC 578

interest could be charged from the date of filing of the return upto the date of assessment. This view of Bhagwati, J. was accepted after detailed discussion with the following conclusion:

> "...Our attention was, however, drawn by Mr. Sen to two cases. Even in those cases, *CIT* v. *M. Chandra Sekhar*, (1985) 1 SCC 283 and *Central Provinces Manganese Ore Co. Ltd.* v. *CIT*, (1986) 3 SCC 461, 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, 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."

26. We are conscious of the sentiments expressed by seven Judges Bench of this Court in ***Keshav Mills Company Limited*** v. ***Commissioner of Income Tax, Bombay***[7] wherein the Court sounded caution and stated the restraint that has to be exercised while dealing with the question as to whether earlier decisions of this Court should be reconsidered and revised. The Court observed that merely because two views

[7](1965) 2 SCR 908

A are possible should not be a reason to review the earlier judgment as it was necessary to maintain consistency and depict certainty in law. At the same time, Court made the following remarks:

B "...That is not to say that if on a subsequent occasion, the Court is satisfied that its earlier decision was clearly erroneous, it should not hesitate to correct the error; but before a previous decision is pronounced to be plainly erroneous, the Court must be satisfied with a fair C amount of unanimity amongst its members that a revision of the said view is fully justified. It is not possible or desirable, and in any case it would be inexpedient to lay down any principles which should govern the approach of the Court in dealing with the question of D reviewing and revising its earlier decisions. It would always depend upon several relevant considerations- What is the nature of the infirmity or error on which a plea for a review and revision of the earlier view is based? On the earlier occasion, did some patent E aspects of question remain unnoticed, or was the attention of the Court not drawn to any relevant and material statutory provision, or was any previous decision of this Court bearing on the point not noticed? Is the Court hearing such plea fairly unanimous that there F is such an error in the earlier view? What would be the impact of the error on the general administration of law or on public good? Has the earlier decision been followed on subsequent occasions either by this Court G or by the High Courts? And, would the reversal of the earlier decision lead to public inconvenience, hardship or mischief? These and other relevant considerations must be carefully drawn in mind whenever this Court is called upon to exercise its jurisdiction to review and revise

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its earlier decisions. These considerations becomes still more significant when the earlier decision happens to be a unanimous decision of a Bench of five learned Judges of this Court." A

27. We have kept in mind the aforesaid consideration and feel that decision in *SKF* and *Auto International* require a re-look for the reasons given by us above. We, thus, direct the Registry to place the matter before the Hon'ble Chief Justice of India for constituting a Larger Bench to go into the issue involved in this case which is of seminal importance having far reaching ramifications. B

Nidhi Jain Matter referred to larger Bench.