

Demand, Adjudication and Offences

Question 1

What is the difference between short levy and short payment?

Answer

Short levy: Short levy arises when the charge itself is done at a lower rate. It may arise out of wrong classification.

Short payment : Short payment arises out of a short levy or short payment of a correct levy. It is a case of less payment of excise duty than what is due.

Question 2

What are the provisions for recovery of duties not levied or not paid or short-levied or short paid or erroneously refunded?

Answer

Section 11A of Central Excise Act, 1944 deals with the provisions for recovery of duties not levied or not paid or short-levied or short paid or erroneously refunded. The aforesaid Section has been substituted with effect from 08.04.2011. The provisions of substituted section are given in the following table for the purpose of ease of understanding and better retention:

Relevant Heading	Description	Relevant Section of Central Excise Act
Issue of Show Cause Notice within one year from the Relevant Date	Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, for any reason, other than the reason of fraud or 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, the Central Excise Officer shall, within one year from the relevant date , serve notice on the person chargeable with the duty which has not been so levied or paid or which has been so 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:	11A(1)(a)

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Payment of duty with interest before the issue of Show Cause Notice	The person chargeable with duty may, before service of above-mentioned Show Cause Notice pay either on the basis of- (i) his own ascertainment of such duty; or (ii) the duty ascertained by the Central Excise Officer, the amount of duty along with interest payable thereon under section 11AA.	11A(1)(b)
Submission of information regarding payment of duty & consequent no issue of SCN	The person who has paid the duty under clause (b) of sub-section (1), shall inform the Central Excise Officer of such payment in writing, who, on receipt of such information, shall not serve any notice under clause (a) of that sub-section in respect of the duty so paid or any penalty leviable under the provisions of this Act or the rules made thereunder.	11A(2)
Issue of Show Cause Notice for recovery of short-payment of duty	Where the Central Excise Officer is of the opinion that the amount paid under clause (b) of sub-section (1) falls short of the amount actually payable, then, he shall proceed to issue the notice as provided for in clause (a) of that sub-section in respect of such amount which falls short of the amount actually payable in the manner specified under that subsection and the period of one year shall be computed from the date of receipt of information under sub-section (2).	11A(3)
Issue of Show Cause Notice within five years from the Relevant Date	Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, by the reason of- (a) fraud; or (b) collusion; or (c) any wilful mis-statement; or (d) suppression of facts; or (e) contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by any person chargeable with the duty, the Central Excise Officer shall, within five years from the relevant date , serve notice on such person requiring him to show cause why he should not pay the amount specified in the notice along with interest payable thereon under section 11AA and a penalty equivalent to the duty specified in the notice.	11A(4)

When reduced penalty equivalent of 50% of duty is payable	Where, during the course of any audit, investigation or verification , it is found that any duty has not been levied or paid or has been short-levied or short-paid or erroneously refunded due to fraud, collusion, any willful mis-statement or suppression of facts etc. but the details relating to the transactions are available in the specified records , then in such cases, the Central Excise Officer shall within a period of five years from the relevant date , serve a notice on the person chargeable with the duty requiring him to show cause why he should not pay the amount specified in the notice along with interest under section 11 AA and penalty equivalent to fifty per cent , of such duty.	11A(5)
Facility of Compounding of Penalty	Any person chargeable with duty (for an extended period) may, before service of show cause notice on him, pay the duty in full or in part , as may be accepted by him along with the interest payable thereon under section 11 AA and penalty equal to one per cent, of such duty per month to be calculated from the month following the month in which such duty was payable, but not exceeding a maximum of twenty-five per cent , of the duty, and inform the Central Excise Officer of such payment in writing.	11A(6)
No issue of Show Cause Notice where duty, interest and penalty are fully paid	The Central Excise Officer, on receipt of information under sub-section (6), shall not serve any notice in respect of the amount so paid and all proceedings in respect of the said duty shall be deemed to be concluded where it is found by the Central Excise Officer that the amount of duty, interest and reduced penalty as provided under sub-section (6) has been fully paid;	11A(7)
Issue of Show Cause Notice in case of short-payment of duty or interest or penalty	The Central Excise Officer, on receipt of information under sub-section (6), shall proceed for recovery of such amount, if found to be short-paid , in the manner specified under sub-section (1) and the period of one year shall be computed from the date of receipt of such information.	11A(7)

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Exclusion of Stay Period	Where the service of notice is stayed by an order of a court or tribunal, the period of such stay shall be excluded in computing the period of one year referred to in clause (a) of sub-section (1) or five years referred to in sub-section (4) or sub-section (5), as the case may be.	11A(8)
Determination of duty payable for one year if charges of fraud etc. are not established	Where any appellate authority or tribunal or court concludes that the notice issued under sub-section (4) is not sustainable for the reason that the charges of fraud or 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 has not been established against the person to whom the notice was issued, the Central Excise Officer shall determine the duty of excise payable by such person for the period of one year , deeming as if the notice were issued under clause (a) of sub-section (1).	11A(9)
Determination of excise duty due after opportunity of being heard	The Central Excise Officer shall, after allowing the concerned person an opportunity of being heard , and after considering the representation , if any, made by such person, determine the amount of duty of excise due from such person not being in excess of the amount specified in the notice.	11A(10)
Time-limit for determining amount of excise duty due	The Central Excise Officer shall determine the amount of duty of excise under subsection (10)- (a) within six months from the date of notice , where it is possible to do so, in respect of cases falling under sub-section (1); (b) within one year from the date of notice , where it is possible to do so, in respect of cases falling under sub-section (4) or sub-section (5).	11A(11)
Effect of modification of amount of excise duty	Where the appellate authority or tribunal or court modifies the amount of duty of excise determined by the Central Excise Officer under sub-section (10), then the amount of penalties and interest under this section shall stand modified accordingly, taking into account the amount of duty of excise so modified.	11A(12)

Time-limit for depositing modified (increased) excise duty	Where the amount as modified by the appellate authority or tribunal or court is more than the amount determined under sub-section (10) by the Central Excise Officer, the time within which the interest or penalty is payable under this Act shall be counted from the date of the order of the appellate authority or tribunal or court in respect of such increased amount.	11A(13)
Compulsory payment of interest	Where an order determining the duty of excise is passed by the Central Excise Officer under this section, the person liable to pay the said duty of excise shall pay the amount so determined along with the interest due on such amount whether or not the amount of interest is specified separately.	11A(14)
Application of provisions for recovery of interest	The provisions of sub-sections (1) to (14) shall apply, mutatis mutandis, to the recovery of interest where interest payable has not been paid or part paid or erroneously refunded.	11A(15)
Meaning of term Refund	"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;	Explanation 1(a) to Section 11A
Meaning of term "Relevant Date"	(b) "relevant date" means,- (i) 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, and no periodical return as required by the provisions of this Act has been filed, the last date on which such return is required to be filed under this Act and the rules made thereunder; (ii) 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 and the return has been filed on due date, the date on which such return has been filed; (iii) in any other case, the date on which duty of excise is required to be paid under this Act or the rules made thereunder; (iv) in a case where duty of excise is provisionally assessed under this Act or the rules made thereunder, the date of adjustment of duty after the final assessment thereof;	Explanation 1(b) to Section 11A

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	(v) in the case of excisable goods on which duty of excise has been erroneously refunded, the date of such refund;	
Meaning of term "specified records"	"specified records" means records including computerised records maintained by the person chargeable with the duty in accordance with any law for the time being in force.	Explanation 1(c) to Section 11A

Question 3

M/s Om Processors, a job worker, was engaged in the processing of manmade fabrics received from the principal supplier. The job worker (assessee) had undertaken to discharge all the duty liabilities under the Central Excise Act, 1944. The assessee received manmade fabrics on declaration from the principal supplier that the said fabrics had polyester content below 70%. It processed the same and cleared the processed fabrics claiming the benefit of concessional rate of duty available to manmade fabrics containing polyester below 70%. On the basis of chemical examination by the Department, it was found that the fabrics contained polyester in excess of 70% and thus would attract higher rate of duty. A show cause notice was issued invoking the extended period of limitation under section 11A of the Central Excise Act, 1944 demanding differential duty and penalties on the ground of mis-declaration on the part of the assessee. Briefly discuss, with reference to decided case law, whether the stand taken by the Department is correct in law.

Answer

According to Section 11A (4) of Central Excise Act, 1944 extended period of limitation can be invoked only where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, by the reason of-

- (a) fraud; or
- (b) collusion; or
- (c) any wilful mis-statement; or
- (d) suppression of facts; or
- (e) contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty.

Similar view was expressed by the Apex Court in case of **Padmini Products v. CCE (1989) 43 ELT 195 (SC)**, wherein it was held that failure to pay duty might not necessarily be due to fraud or collusion or willful misstatement or suppression of facts or contravention of any of the provisions of the Act. If facts of the case revealed that the appellant had acted bona fide, such act would not attract the penal provisions under section 11A of the Act. If the facts were otherwise, then the penalty would be levied.

In the given case, there was no requirement for the assessee (processor) to verify the

correctness of the declaration filed by the principal (suppliers). Further, there was no allegation that the assessee was a party to such mis-declaration by the principal supplier. Therefore, extended period of limitation could not be invoked against the assessee. Thus, the action taken by the Department is not valid in law.

Question 4

Which reasons shall not be considered as special and adequate for awarding sentence of imprisonment for a term of less than six months as per section 9(3) of the Central Excise Act, 1944?

Answer

As per **section 9(3) of the Central Excise Act, 1944**, for the purposes of section 9(1) or 9(2), the following shall not be considered as special and adequate reasons for awarding a sentence of imprisonment for a term of less than six months, namely:

- (i) the fact that the accused has been convicted for the first time for an offence under this Act;
- (ii) the fact that in any proceeding under this Act, other than a prosecution, the accused has been ordered to pay a penalty or the goods in relation to such proceedings have been ordered to be confiscated or any other action has been taken against him for the same act which constitutes the offence;
- (iii) the fact that the accused was not the principal offender and was acting merely as a carrier of goods or otherwise was a secondary party in the commission of the offence;
- (iv) the age of the accused (too young or too old)

Question 5

With reference to the Central Excise Act, 1944 and the rules made thereunder, write a brief note on the circumstances when personal penalty could be imposed on a director of a company or a partner of a firm or an employee or a transporter.

Answer

As per **rule 26(1)** any person who acquires possession of, or is in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reasons to believe are liable to confiscation under the Act or these rules, shall be liable to a penalty not exceeding the duty on such goods or ₹2,000 whichever is greater. **Section 9(1)(bbb) of the Central Excise Act also contemplates punishment** for such dealings by any person. Thus a director, partner, employee or transporter or trader will be personally liable to penalty if he is personally involved in clandestine removal etc.

Further, penalty can be imposed on such persons if they issue any duty invoice without delivery of the goods or abet in making such invoice [**Rule 26(2)(i)**].

Penalty is also imposable on such persons if they issue any other document or abet in making

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such document on the basis of which, user of such document takes any ineligible benefit such as CENVAT credit or refund [Rule 26(2)(ii)].

Question 6

Will omission on the part of the assessee to provide correct information constitute "suppression of facts" for purpose of the proviso to section 11A of the Central Excise Act, 1944. Write a brief note with reasons.

Answer

Omission on the part of the assessee to provide correct information does not constitute suppression of facts as the expression "suppression of facts" used in the proviso to section 11A of Central Excise Act is accompanied by very strong words as "fraud" and "collusion" and, therefore, has to be construed strictly. Suppression means failure to disclose full information **with intent to evade payment of duty**. When the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression.

Supreme Court in the case of **Continental Foundation Joint Venture v. CCEx. (2007) 216 ELT 177 (SC)** elaborated that mere omission to give correct information is not suppression of facts unless it was deliberate to evade the payment of duty.

Question 7

What is the period of provisional attachment of property during the pendency of any proceeding under section 11A or section 11D of the Central Excise Act, 1944?

Answer

Provisional attachment of property can be done for a **period of 6 months** [Section 11DDA (2)].

This period can be extended with written permission of Chief Commissioner of Central Excise. However, total period of extension cannot be more than two years [First proviso to section 11DDA(2)].

However, if the assessee has made an application to the Settlement Commission, that period will be excluded for the purpose of calculating the time limit of two years [Second proviso to section 11DDA(2)].

Question 8

Write a note on "interest under section 11AA of Central Excise Act, 1944.

Answer

Section 11AA deals with interest on delayed payment of duty. With effect from 08.04.2011 provisions of erstwhile Section 11AA and Section 11AB have been merged into a revised section 11AA. The provisions of substituted/revised section 11AA have been given in the following table under suitable headings:

Relevant Heading	Description	Relevant Section
When interest is payable	Notwithstanding anything contained in any judgment, decree, order or direction of the Appellate Tribunal or any court or in any other provision of this Act or the rules made thereunder, the person, who is liable to pay duty, shall, in addition to the duty, be liable to pay interest at the rate specified in sub-section (2), whether such payment is made voluntarily or after determination of the amount of duty under section 11A. As far as period of interest is concerned, it is worth mentioning that interest is to be paid for the period beginning with the first date of the month succeeding the month in which the duty ought to have been paid or from the date of erroneous refund and ending with actual date of payment .	11AA(1)
Rate of Interest	The rate of interest shall vary between 10% p.a. and 36% p.a.as may be fixed by Central Government from time to time. The Central Government has fixed interest @ 18% p.a. for the financial year 2011-12.	11AA(2)
When no interest is required to be paid	No interest shall be payable where- (a) the duty becomes payable consequent to the issue of an order, instruction or direction by the Board under section 37B; and (b) such amount of duty is voluntarily paid in full, within forty-five days from the date of issue of such order, instruction or direction, without reserving any right to appeal against the said payment at any subsequent stage of such payment.	11AA(3)

Question 9

Naman Ltd. is registered under Central Excise Act, 1944. It has paid the following amounts under Central Excise Act, 1944:

Central Excise Duty	₹ 16,00,000
Amount of Interest	₹ 1,00,000

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In addition, it is liable under the following Acts for the amounts indicated against each Act:

<i>The Recovery of Debts Due to Banks and Financial Institutions Act, 1993</i>	<i>₹ 3,00,000</i>
<i>The Securitization and Reconstruction of Financial Assets and the Enforcement of Security Interest Act, 2002</i>	<i>₹ 2,00,000</i>
<i>Factories Act, 1948</i>	<i>₹ 3,00,000</i>
<i>Customs Act, 1962</i>	<i>₹ 6,00,000</i>

The company has a property worth ₹ 20 lakhs. What legal remedy is available to Central Excise Department for recovery of its above-mentioned dues of ₹ 17 lakhs.

Answer

According to provisions of **Section 11E** of Central Excise Act, 1944 Notwithstanding anything to the contrary contained in any Central Act or State Act, **any amount of duty, penalty, interest, or any other sum** payable by an assessee or any other person under this Act or the rules made thereunder shall be the **first charge on the property** of the assessee or the concerned. However, aforementioned first charge shall be subject to the amounts payable under the following Acts:

1. Companies Act, 1956 [Section 529A].
2. The Recovery of Debts Due to Banks and the Financial Institutions Act, 1993.
3. The Securitisation Reconstruction of Financial Assets and the Enforcement of Security Interest Act, 2002.

In view of above-mentioned provisions of Section 11E of Central Excise Act, 1944, the Department can create first charge on the property of defaulting assessee Naman Ltd. However, aforementioned first charge shall be subject to amounts payable under the following Acts:

<i>The Recovery of Debts Due to Banks and Financial Institutions Act, 1993</i>	<i>₹ 3,00,000</i>
<i>The Securitization and Reconstruction of Financial Assets and the Enforcement of Security Interest Act, 2002</i>	<i>₹ 2,00,000</i>

Thus, the Department will be able to create first charge of ₹ 15 lakh [₹ 20 lakh less ₹ 5 lakh payable under above Acts] only by virtue of Section 11E of Central Excise Act, 1944.

Question 10

Write a detailed note on cases in which appeal, application, revision or reference is not to be filed by Central Excise Officer

Answer

Section 35 R [deemed to have been inserted with effect from 20.10.2010] deals with the cases in which appeal etc. is to be filed by Central Excise Officer. The aforementioned section has been discussed under following broad headings:

Fixation of monetary limits for regulating the filing of appeal etc.: According to provisions of Section 35R(1) of Central Excise Act, 1944 Central Board of Excise and Customs may, from time to time, issue orders or instructions or directions fixing such monetary limits, as it may deem fit, for the purposes of regulating the filing of appeal, application, revision or reference by the Central Excise Officer under the provisions of this Chapter.

Central Excise Officer may file appeal etc. in any other case: Section 35R (2) provides that where, in pursuance of the orders or instructions or directions, issue under sub-section (1) the Central Excise Officer has not filed an appeal, application, revision or reference against any decision or order passed under the provisions of this Act, it shall not preclude such Central Excise Officer from **filing appeal, application, revision or reference in any other case** involving the same or similar issues or questions of law.

No contention of consent by Central Excise Officer:—According to Section 35R(3) notwithstanding the fact that no appeal, application, revision or reference has been filed by the Central Excise Officer pursuant to the orders or instructions or directions issued by CBEC under sub-section (1), no person, being a party in appeal, application, revision or reference shall contend that the Central Excise Officer has acquiesce in the decision on the disputed issue by not filing appeal, application, revision or reference.

Regard to the circumstances in which appeal etc. is not filed: Section 35R (4) provides that the Appellate Tribunal or court hearing such appeal, application, revision or reference shall have regard to the circumstances under which appeal, application, revision or reference was not filed by the Central Excise Officer in pursuance of the orders or instructions or directions issued by CBEC under section 35R (1).

Question 11

State briefly the provisions of the Central Excise Act, 1944 relating to arrest of a person.

Answer

Any Central Excise Officer not below the rank of Inspector may arrest any person whom he has reason to believe to be liable to punishment under the provisions of the Central Excise Act or rules made thereunder. Such arrest can be made only with the **prior approval of the Commissioner** of Central Excise [Section 13 of Central Excise Act].

As per **section 19** of the Act, every person arrested under the Act shall be forwarded without delay to the nearest Central Excise Officer empowered to send persons so arrested to a Magistrate, or if there is no such Central Excise Officer within a reasonable distance, to the officer-in-charge of the nearest police station. The arrest should be made as per the provisions of the Code of Criminal Procedure [Section 18 of the Central Excise Act].

Question 12

M/s Evasions Unlimited, manufacturing excisable goods, paid the differential duty, suo motu, to the Department as the prices of the said goods were revised with retrospective effect. The Revenue took the view that the assessee was liable to pay interest on differential duty under

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section 11AA of the Central Excise Act, 1944 and penalty thereof. The assessee replied that there was no question of charging interest and penalty as the payment of differential duty was made by it at the time of issuing supplementary invoices to the customers.

Discuss, whether the view taken by the Revenue is justifiable.

Answer

As per section 11AC of Central Excise Act 1944, where the non-payment or short payment etc. of duty is by the reason of fraud, collusion, any wilful mis-statement, 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, the person who is liable to pay duty would also be liable to pay a penalty. However as per the facts of the given case, the short payment is not intentional and hence, penalty cannot be levied in above case.

Further as per section 11AA, interest on delayed payment of duty is compulsorily levied whether such payment is made voluntarily or after determination by Central Excise Officer.

Hence M/S Evasion Unlimited is liable to pay interest, but not the penalty.

Question 13

Explain the validity of the following statement with reference to the Central Excise Laws, as amended:

Records seized by Department during investigation but not relied upon in the show cause notice should be returned within 30 days of issue of show cause notice.

Answer

Yes, the statement is valid as per **rule 24 A** of the Central Excise Rules, 2002 inserted w.e.f. 7.7.2009.

Question 14

Briefly discuss the residual penalty under Rule 27 of the Central Excise Rules, 2002.

Answer

Rule 27 of the Central Excise Rules, 2002 stipulates that where no other penalty is provided in the rules therein or in the Act, a breach of these rules shall be punishable with a **penalty which may extend to ₹ 5,000 and with confiscation of the goods** in respect of which the offence is committed.

Question 15

State the various circumstances where goods are liable for confiscation under the Central Excise Law. Can the assessee get back the confiscated goods and if so how?

Answer

Under **Rule 25** of the Central Excise Rules, 2002, the excisable goods shall be liable for confiscation if any producer, manufacturer, registered person of a warehouse or registered

dealer -

- (i) removes any excisable goods in contravention of Central Excise Rules/Notifications; or
- (ii) does not account for any excisable goods produced or manufactured or stored by him; or
- (iii) contravenes any of the provisions of Rules/Notification with an intent to evade payment of duty; or
- (iv) engages in the manufacture or production or storage of any excisable goods without registration of the factory.

Section 34 of the Central Excise Act provides that whenever confiscation is adjudged under the Central Excise Act or the rules made thereunder, the officer adjudging it, shall give the owner of the goods an option to pay in lieu of confiscation such fine as the officer thinks fit. Therefore, the assessee can get the confiscated **goods back by paying redemption fine as prescribed** in the order of the officer adjudging such confiscation.

Question 16

State the three conditions upon fulfilment of which penalty under Section 11A of the Central Excise Act, 1944 may be halved and the extended period of limitation of five years may be invoked.

Answer

Under section 11A of the Central Excise Act, 1944, extended period of limitation can be invoked and penalty be reduced to 50% on fulfilment of the following conditions:

- duty has not been levied or paid or has been short-levied or short-paid or erroneously refunded by the reason of fraud, collusion, any wilful mis-statement, suppression of facts, contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty.
- the said default has been found during the course of any audit, investigation or verification.
- details relating to the transactions are available in the specified records.

Question 17

State the three conditions upon fulfilment of which no interest would become payable under Section 11AA of the Central Excise Act, 1944.

Answer

Interest under section 11AA of the Central Excise Act, 1944 would not be payable on fulfillment of the following conditions:

- (a) Duty becomes payable consequent to issue of an order, instruction or direction by the Board under section 37B;
- (b) Full duty is paid voluntarily within 45 days from the date of issue of such order,

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instruction or direction; and

(c) Right to appeal against such payment at any subsequent stage is not reserved.

Question 18

An assessee had cleared goods without payment of excise duty. However, on coming to know from his sources that a show cause notice demanding duty on such clearances is likely to be issued but before actual issue of such notice the assessee made full payment of excise duty with interest. A show cause notice was issued subsequently as to why the assessee should not be subject to mandatory penalty equal to the excise duty sought to be evaded under section 11 AC of the Central Excise Act, 1944. Briefly examine, with a note, the conditions for levy of penalty under section 11AC and state whether there is any discretion to reduce such penalty.

Answer

The conditions and the circumstances that would attract the imposition of penalty under section 11AC of the Central Excise Act, 1944 have been laid down by the Apex Court in case of **UOI v. Rajasthan Spinning and Weaving Mills 2009 (238) ELT 3 (SC)**.

In the instant case, the Apex Court, overruling the decision of the Tribunal, held that mandatory penalty under section 11AC of the Central Excise Act, 1944 is not applicable to every case of non-payment or short-payment of duty.

In order to levy the penalty under section 11AC, conditions mentioned in the said section should exist. Supreme Court ruled that the Tribunal was not justified in striking down the levy of penalty against the assessee on the ground that the assessee had deposited the balance amount of excise duty (that was short paid at the first instance) before the show cause notice was issued.

The Apex Court elaborated that the payment of the differential duty, whether before/ after the show cause notice is issued, cannot alter the liability for penalty. The conditions for penalty to be imposed are clearly spelt out in section 11AC of the Act.

Supreme Court clarified that both section 11AC as well as proviso to sub-section (1) of section 11A use the same expressions : ".....by reasons 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.....". Hence, it drew the inference that the penalty provision of section 11AC would come into play only if the notice under section 11A(1) states that the escaped duty was the result of any conscious and deliberate wrong doing and in the order passed under section 11A(2), there is a legally tenable finding to that effect.

Further, Central Board of Excise and Customs vide **Circular No. 889/09/2009 CX dated 21.05.2009** has clarified that when the conditions spelled out under section 11AC are fulfilled, there is no discretion to reduce the mandatory penalty which is equal to duty even though the duty is paid before the issuance of show cause notice.

Question 19

XS Ltd. was engaged in manufacture of various toilet preparations such as after-shave lotion, deo-spray, mouthwash, skin creams, shampoos, etc. XS Ltd. procured Extra Natural Alcohol (ENA) from the local market on payment of duty, to which Di-ethyl Phthalate (DEP) was added so as to denature it and render the same unfit for human consumption. As a result, an intermediate product i.e. Di-ethyl Alcohol was produced. The Department alleged that Di-ethyl Alcohol manufactured as a result of addition of DEP to ENA, was liable to central excise duty and issued a show cause notice under section 11A.

However, XS Ltd. alleged that the notice issued is time-barred as per section 11A. In reply, Department pleaded that non-disclosure as regards manufacture of Di-ethyl Alcohol amounts to suppression of material facts thereby attracting the larger period of limitation under section 11A.

You are required to examine, with the help of a decided case law, whether the Department's plea is valid in law.

Answer

No, the Department's plea is not justified in law. The issue, as to whether non-disclosure as regards manufacture of Di-ethyl Alcohol amounts to suppression of material facts thereby attracting the larger period of limitation under section 11A, was decided by the Gujarat High Court in case of the *CC Ex. & C v. Accrapac (India) Pvt. Ltd. 2010 (257) E.L.T. 84 (Guj.)*. In the instant case, The Tribunal noted that denaturing process in the cosmetic industry was a statutory requirement under the Medicinal & Toilet Preparations (M&TP) Act. Thus, addition of DEP to ENA to make the same unfit for human consumption was a statutory requirement. Hence, failure on the part of the respondent to declare the same could not be held to be suppression as Department, knowing the fact that the respondent was manufacturing cosmetics, must have the knowledge of the said requirement. Further, as similarly situated assesses were not paying duty on denatured ethyl alcohol, the respondent entertained a reasonable belief that it was not liable to pay excise duty on such product.

The High Court upheld the Tribunal's judgment and pronounced that non-disclosure of the said fact on part of the assessee would not amount to suppression so as to call for invocation of the extended period of limitation.

Exercise

1. What are the methods of recovery of sums due to Government from assessee?
2. Briefly describe the provisions relating to search and seizure?
3. What are the circumstances in which compounding authority may grant immunity from prosecution?

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4. *Can a manufacturer make suo moto payment of duty short paid? Discuss.*
5. *Explain briefly whether the penalty can be attracted on short levy of duty. When can the penalty be reduced?*
6. *Discuss the provisions regarding issue of duty demand notice under section 11A.*
7. *A sum of ₹ 50,00,000.00 is due from 'A' towards his excise duty liability. How does the Central Excise Act, 1944 provide for recovery of such money? Will it make any difference if 'A' transfers his whole business to 'B'? Discuss.*
8. *ABC Ltd. has removed the goods manufactured by it by paying excise duty @ 20% ad valorem. However, in the invoice for sale of goods, ABC Ltd. shows an amount, which is 25% of the value of the goods as excise duty and collects it from the buyer as part of the total sale price. Can the Department ask ABC Ltd. to pay the amount so collected by him to the credit of the Central Government? Discuss the related legal provisions in detail.*
9. *Who will be held liable in case of offences committed by Company under section 9?*
10. *What is culpable mental state?*
11. *Write a short note on penalty under section 11AC?*