

Demand, Adjudication and Offences

Question 1

Bring out the difference between short levy and short payment.

Answer

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

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

Central excise duty	₹ 16,00,000
Amount of interest	₹ 1,00,000

In addition, it is liable under the following statutes for the amounts indicated against them:

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

The company has a property with a realizable value of ₹ 20 lakh. What legal remedy, under section 11E of the Central Excise Act, 1944, is available to Central Excise Department for recovery of the aforementioned dues of ₹ 17 lakh?

Answer

Section 11E of Central Excise Act, 1944 creates a first charge on the property of a defaulter for recovery of the Central Excise dues subject to the provisions of the Companies Act, Recovery of Debt due to Bank and Financial Institution Act and Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act. This implies that after the dues, if any, owing under the provisions of these Acts, dues under the Central Excise Act shall have a first charge.

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In the light of the aforesaid provisions, in the given case, the Department can create first charge on the property of the assessee in default - Naman Ltd. subject to amounts payable under the following Acts:

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

Thus, the Department will be able to create first charge of ₹ 15 lakh (₹ 20 lakh - ₹ 5 lakh) for the recovery of central excise dues.

Question 3

State the three conditions laid down under section 11A of the Central Excise Act, 1944, upon fulfilment of which penalty 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 4

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, instruction or direction; and
- (c) Right to appeal against such payment at any subsequent stage is not reserved.

Question 5

M/s Evasions Unlimited, manufactured excisable goods, and cleared them after paying the excise duty on them. Subsequently, the prices of the said goods were revised with retrospective effect paid. Thus, he paid the differential duty, suo motu, to the Department.

The Revenue issued a show cause notice demanding interest under section 11AA and penalty under section 11AC. The assessee contended that there was no question of levy of interest and penalty as the payment of differential duty was made by it, suo moto, at the time of issuing supplementary invoices to the customers.

Discuss whether the view taken by the Revenue is justifiable.

Answer

Penalty under section 11AC is payable only 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. However as per the facts of the given case, the short payment is not intentional and hence, penalty cannot be levied in this case.

However, interest under section 11AA is payable by M/s Evasions Unlimited because as per section 11AA, in case of delayed payment of duty, interest under section 11AA is compulsorily leviable even if such duty is paid voluntarily or after the determination by Central Excise Officer and whether the non-payment or short payment etc. of duty is by the reason of fraud, collusion, etc. with intent to evade payment of duty or otherwise.

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

Question 6

An assessee cleared goods without payment of excise duty. Subsequently, he came to know from his sources that a show cause notice demanding duty on such clearances was likely to be issued on him. Consequently, he made the payment of excise duty along with interest before the issuance of such notice.

The Department issued the show cause notice to him subsequently as to why the assessee should not be subject to mandatory penalty equal to the excise duty sought to be evaded under section 11AC of the Central Excise Act, 1944. Briefly examine 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)*.

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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 erstwhile section 11A [now section 11A(4)] 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 show cause notice states that the escaped duty was the result of any conscious and deliberate wrong doing and in the order passed under the erstwhile section 11A(2) [now section 11A(10)], 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 7

The assessee was engaged in manufacture of various toilet preparations such as after-shave lotion, deo-spray, mouthwash, skin creams, shampoos, etc. The assessee 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 to render the same unfit for human consumption. The addition of DEP to ENA resulted in the manufacture of an intermediate product i.e. Di-ethyl Alcohol. The Department alleged that the said intermediate product was liable to central excise duty.

However, the assessee alleged that the notice issued was time-barred as per section 11A. The Department pleaded that non-disclosure as regards manufacture of Di-ethyl Alcohol amounted to suppression of material facts thereby attracting the extended period of limitation of 5 years under section 11A(4).

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 extended 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 assessee to declare the same could not be held to be suppression as Department, knowing the fact that the assessee 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.

Question 8

M/s Om Processors, a job worker, was engaged in the processing of inputs 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 the inputs on declaration from the principal supplier that the content of certain chemical in the said goods was below 70%. It processed the same and cleared the finished excisable goods claiming the benefit of concessional rate of duty available to such goods containing the said chemical content of less than 70%. On the basis of examination by the Department, it was found that the finished goods contained the said chemical 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 penalty thereof 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 the 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

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(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 9

Will omission on the part of the assessee to provide correct information constitute "suppression of facts" for purpose of section 11A(4) 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 11A(4) of the Central Excise Act, 1944 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. CCE* (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.

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. Can a manufacturer make suo moto payment of duty short paid? Discuss.
4. Explain briefly whether the penalty can be attracted on short levy of duty. When can the penalty be reduced?
5. Discuss the provisions regarding issue of duty demand notice under section 11A.

6. *A sum of ₹ 50,00,000 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.*
7. *ABC Ltd. has removed the goods manufactured by it by paying excise duty @ 12% ad valorem. However, in the invoice for sale of goods, ABC Ltd. shows an amount, which is 16% 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.*
8. *Who will be held liable in case of offences committed by a company, under section 9?*
9. *What is culpable mental state?*
10. *Write a short note on penalty under section 11AC.*