

THE GODS MUST BE CRAZY – PART I

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Prologue: *"Whenever there is degradation of dharma and growth of adharma, I embody myself for the protection of the good, for the destruction of the wicked, to establish Dharma and I take forth a body in age after age"*

Bhagavad Gita IV: 7-8

GOOD, BAD AND THE USURY

"Stipulated interest beyond the legal rate, being against the law, cannot be recovered; they call that a usurious way of lending; the lender is in no case entitled to more than five in the hundred."

- Manu Smriti 8:152

Though every other religion condemned USURY (lending of money at excessive interest rates, especially rates above legal limits), modern civilization embraced this commercial compulsion.

"Interest" under Central Excise has a very interesting history, though brief. The elder cousin Section 11AA of CEA, whereby, "interest" was chargeable only when the duty is not paid after three months from the date of confirmation of such duty demand, by an order.

Section 11 AB of the CEA was introduced with effect from 28.09.1996, whereby, "interest" was made payable in cases, where the duty of excise has not been levied or paid, or has been short-levied or short-paid or erroneously refunded, by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of the Act, or the rules made thereunder with an intention to evade payment of duty.

Over years, the provisions of Section 11 AB of CEA has undergone mighty changes, of which, the one made in 2001 was very significant. With effect from 11th May 2001, the "interest", which was hitherto chargeable only in certain heinous occasions *supra*, had been made applicable for all delayed payments, notwithstanding such delay is either due to *malafides* or based on *bonafides*!

Though on many occasions, duty was short paid due to genuine reasons like interpretational warfare, human error, contributory negligence etc, going by the spirit and essence, its **GOOD**.

Way back in 2003, on an insignificant summer noon while lazily glancing through ELT, I just got stuck with a departmental clarification based on some "intelligence"! It

stated with an illustration that "interest" under Section 11AB of the Central Excise Act, 1944 (CEA) shall be payable on the "supplementary invoices". That day, I never thought that this "intelligence" is worth a FBI *classified*!

In the said Board's letter **F.No.574/CE/5/Misc/2003 Dated 28.07.2003 [2003 (156) T29]**, it had been observed that "interest" under Section 11AB of CEA shall be charged even for the cases where there were upward price revision subsequent to removal of goods and the assessee had raised a supplementary invoice for the differential price and differential duty.

It is a common practice in many of the industries, as the clearances cannot wait till the negotiations are complete, goods would be cleared based on a mutually agreed price. At a later time, the negotiated price may turn out to be either lower or higher than the one, at which the goods were invoiced and duty was paid. In certain cases of continuous supply, the assessee would be negotiating hard for a price increase due to variety of reasons including increase in the BOM (Bill of materials), whereas, in certain cases the buyer would bargain based on competitors' lesser quotes. For this, the assessee, if there is a downward revision or an upward revision of price, would issue either a credit note or a supplementary invoice respectively.

The Board, vide the above mentioned letter, had clarified that "Interest" would be chargeable from the assessee from the date of original clearance of goods, as per the provisions of Section 11 AB (i.e from the first day of the month succeeding the month in which the duty ought to have been paid till the date of its payment), in respect of the upward price revision, for which supplementary invoices are issued. To justify this, an example had also been given equating the exchequer to that of a pawnbroker!

This low pressure formed in the Indian Ocean, got intensified and became a cyclone when the Board issued the circular of even number dated 18th December 2006 confirming the above stand and further requiring the field formations to issue show cause notices invoking penal clauses for demand of interest in such cases. Show cause notices flew like flying saucers across the nation. The issue went to the corridors of Tribunals. Tribunals stood divided. Larger Benches were constituted resulting no consensus. Finally a five member bench was constituted and heard the matter. Before the decision was pronounced, the Hon'ble Supreme Court in the case of **CCE, Pune vs SKF India Ltd {2009 (239) ELT 385}** laid down the law, whereby, it has been held as under:

"It is to be noted that the assessee was able to

*demand from its customers the balance of the higher prices by virtue of retrospective revision of the prices. **It, therefore, follows that at the time of sale the goods carried a higher value and those were cleared on short payment of duty.** The differential duty was paid only later when the assessee issued supplementary invoices to its customers demanding the balance amounts. Seen thus it was clearly a case of short payment of duty though indeed completely unintended and without any element of deceit etc. The payment of differential duty thus clearly came under sub-section (2B) of section 11A and attracted levy of interest under section 11AB of the Act."*

In effect, the Apex Court endorsed the departmental stand that "interest" is payable on the price revision effected through supplementary invoices and had thus hammered the last nail in the coffin.

With due respects to the wisdom, certain rudimentary questions loom large at my mind that, as observed by the Apex Court, whether the goods carried a higher value at the time of their original clearance? If so, whether anyone would mention a lesser value in his invoice and collect such reduced price at the first place? In other words, for the purpose of delaying payment of duty, which is 10%, whether any assessee would like to postpone his collection

of the total price, which is 100%? That too, when the CENVAT credit is available at the other end!

Now with the interest rates increased from 13 % to a whopping 18%, I really wonder whether it would be prudent to take any retrospective price revision at all, at the first place?

Before Parting...

While sky rocketing the rate of interest for the delayed payment of duties, the rate of interest for delayed refunds is still kept at an abysmal 6%. **UGLY!**