

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.**

PRINCIPAL BENCH - COURT NO. II

Excise Appeal No. 51538 of 2022-SM

(Arising out of order-in-appeal No. 34/2021-22 dated 02.02.2022 passed by the Commissioner (Appeals-II) Goods and Service Tax, Delhi).

M/s AFT Tobacco Pvt. Ltd.,

Plot No. 51, Ground Floor

Rama Road, Industrial Area, New Delhi-110015.

Appellant

VERSUS

**Commissioner, Central Goods & Service
Tax and Central Excise**

Delhi West Commissionerate

EIL Annexe Building

Bhikaji Cama Place, New Delhi-110066.

Respondent

APPEARANCE:

Sh. Manish Pushkarna & Sh. Tarun Chawla, Advocates for the appellant

Sh. Ishwar Charan, Authorised Representative for the respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER No. 50035/2023

DATE OF HEARING: 21.12.2022

DATE OF DECISION: 16.01.2023

ANIL CHOUDHARY:

This appeal has been filed against Order-in-appeal confirming the demand of interest on late payment of National Calamity Contingent Duty (NCCD) for the period July, 2017 to July, 2019 in respect of Unit-I and August, 2017 to July, 2019 for Unit-II.

2. The brief facts of the case are that the appellant set up two units as follows:-

S. No.	Unit Address	Central Excise Registration No.	Range where registered	Registration month of units
1	Unit-1- Plot No. 51, Ground Floor, Rama Road Industrial Area, New Delhi-110015.	AAPCA7573EEM0 01	Range -97	July, 2017
2	Unit-1- Plot No. 13, Ground Floor, Rama Road Industrial Area, New Delhi-110015.	AAPCA7573EEM0 02	Range -99	August, 2017

3. NCCD is charged under Section 136 of the Finance Act, 2001 on specified goods (including tobacco products) manufactured in India. With effect from 01.07.2017 CGST Act, 2017 was implemented (GST regime) at the same time Central Excise Act, 1944 was repealed. However, by virtue of Section 174 of CGST Act, the Central Excise Act in respect of goods included in Entry 84 of Schedule-VII of Union List of the Constitution of India, had been saved. Section 136(1) of the Finance Act, 2001 provides for levy of NCCD by way of surcharge, duty of excise payable on the goods specified in the VII Schedule in the Union List of the Constitution of India. Thus, the appellant as a manufacturing unit, manufacturing tobacco products were liable to pay GST plus NCCD.

4. As per records, the appellant could not deposit NCCD on time due to problem faced by it, due to technical glitches on the Government portal. The portal was showing the remark "PV report pending" (physical verification report pending). Thus, the portal was not accepting or facilitating the payment of NCCD. The appellant had immediately brought this difficulty being faced to the Departmental Authorities including the screen shot of the portal. Further, the appellant was regularly filing monthly ER-I return and disclosing the amount of NCCD payable and had also mentioned in the return that

they are unable to deposit NCCD due to "PV report pending" remark till date. The appellant had no other way to deposit NCCD, as the law requires to deposit the duty of NCCD by way of electronic mode only. The appellant was in correspondence with the Department in regard to this issue being various correspondences dt. 02.07.2018, 01.04.2019, 14.08.2019, 16.09.2019 and 23.09.2010. It also kept mentioning the difficulty faced in every monthly return which has been filed regularly. Due to inaction and sloppiness on the part of the Revenue the issue remained pending for a long time and the appellant was prevented in depositing the amount of NCCD. Subsequently, when the issue was resolved in part, the appellant immediately deposited NCCD and gave intimation to the Revenue on 16.05.2019. The appellant also mentioned that as the delay in deposit is due to reasons wholly attributable to Department, they are not liable to pay interest.

5. However, the Department issued letter dated 18-19.09.2019 requiring the appellant to deposit interest for delayed deposit of NCCD. As the appellant disputed liability to interest, the Department issued show cause notice for the amount of interest and proposing penalty, alleging fraud, suppression etc. for delay deposit. The appellant contested the show cause notice by filing reply and written submissions. The show cause notice was adjudicated on contest. The Adjudicating Authority observed that there is no element of deliberate non payment or fraud etc. on the part of the appellant and hence there is no reason available to Revenue to invoke the provisions of Section 11A(4) for issue of show cause notice, invoking the extended period. It was also observed that the show cause notice

was issued after suo moto deposit of NCCD by the appellant. Further observed that appellant has written several letters to the Revenue and has also given qualified remark in the ER-1 return that they are unable to deposit NCCD due to glitches with the portal. Evidently the appellant has made payment of NCCD as soon as Revenue facilitated deposit on the portal. Thus, it is evident that the appellant always wanted to deposit NCCD in Government account on or before the due date, but unable to make the deposit due to technical reasons of the portal and thus the delay is wholly attributable to the Department. Thus, there is no breach of provisions of Rule 6 of Central Excise Rules, 2017. Thus, it is not a case of delayed payment rather non acceptance of payment by the Revenue due to reasons beyond the control of the appellant –assessee. Accordingly, the proposed demand of interest was dropped.

6. Being aggrieved, the Revenue preferred appeal before the Commissioner (Appeals) who vide the impugned order-in-appeal was pleased to allow the appeal confirming the demand of interest amounting to Rs. 42,51,975/-, observing that levy of interest under Section 11AA is mandatory as the Section has used the word – shall, in addition to duty, be liable to pay interest at the rate specified, in Sub-section (2), where such payment is made on or after determination of the amount of duty under Section 11AA. Further, observed that there is no clause in the section for allowing condonation or relief from the levy of interest under any circumstances.

7. Being aggrieved, the appellant is before this Tribunal.

8. Learned Counsel for the appellant inter-alia urges that the findings in the order-in-original is not challenged by Revenue before the Commissioner (Appeals), where it has been held that the show cause notice itself issued under Section 11A(4) is bad. There being no condition precedent available for the same. Further, evidently the delay occurred in deposit of tax due to inaction or sloppiness on the part of the Revenue in removing the glitch in its portal. Admittedly, appellant was always trying to make the deposit but due to the glitch on the portal. Admittedly, appellant has kept the Revenue informed regularly since the beginning and had also mentioned the difficulty being faced in each and every monthly return. Revenue never bothered to remove the difficulty till last week of August, 2019, nor even responded to various representations given by the appellant. Further, admittedly the appellant had no other way to deposit the amount of NCCD as the law mandates only through online portal. Thus, Revenue could not take advantage of its wrong doing by levy of interest. The appellant is being practically penalised for no fault of theirs. Further reliance is placed by the appellant on the following rulings:-

- i) Ramchandra Keshav Adke (dead) by Lrs. and Others v. Govind Joti Chavare and Others – (1975) 1 SCC 559
- ii) Raza Buland Sugar Co. Ltd., vs. Municipal Board, Rampur, AIR 1965 SC 895 and State of Mysore v. V. K. Kangan AIR 1975 SC 2190.
- iii) PML Industries Ltd., v. Commissioner of Central Excise -2013 (290) ELT 3 (P&H)
- iv) Banwarilal Agarwalla v. State of Bihar –AIR 1961 SC 849
- v) Mohan Singh v. IAAI (1997) 9 SCC 132
- vi) Southern Motors v. State of Karnataka -2017 (358) ELT 3 (SC)
- vii) Overseas Enterprises v. Union of India -2016 (336) ELT 234 (Pat.)

Accordingly, learned Counsel for the appellant prays for allowing the appeal.

9. Learned Authorised Representative appearing for the Revenue relies on the impugned order.

10. Having considered the rival contentions, I hold that interest is payable for default in depositing the tax by the due date voluntarily or after determination of the amount of duty under Section 11A. Here both the conditions are not available to Revenue as admittedly neither there is any determination of duty liability of NCCD under Section 11A, nor there is voluntary default in deposit of the amount of NCCD. In absence of condition precedent in Section 11AA of the Act, I hold that no interest can be demanded from the appellant –assessee. I further take judicial notice that the appellant was prevented from deposit of dues, due to glitch on the portal, which is wholly attributable to inaction on the part of Revenue. Thus, Revenue cannot take advantage of its wrong doing, by levy of interest.

11. In view of my aforementioned observations and findings, I set aside the impugned order and allow the appeal. The appellant is entitled to consequential benefits, in accordance with law.

(Order pronounced on 16.01.2023).

(Anil Choudhary)
Member (Judicial)