

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad**

REGIONAL BENCH- COURT NO.3

Excise Appeal No.181 of 2010

(Arising out of OIA-KRS/463/VAPI/2009 dated 31/12/2009 passed by Commissioner of Central Excise, Customs and Service Tax-VAPI)

India Gelatine & Chemicals Ltd

Plot No. 1/A, Gidc, Vapi, Gujarat

.....Appellant

VERSUS

C.C.E. & S.T.-Vapi

4th Floor...Adharsh Dham Building, Opp. Town Police Station,
Vapi-Daman Road, Vapi Gujarat- 396191

.....Respondent

APPEARANCE:

Shri Paresh M Dave, Advocate for the Appellant

Shri R.P Parekh, Superintendent (Authorized Representative) for the Respondent

**CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
 HON'BLE MEMBER (TECHNICAL), MR. RAJU**

Final Order No. A/ 10365 /2022

DATE OF HEARING: 10.01.2022

DATE OF DECISION: 13.04.2022

RAJU

This appeal has been filed by M/s Indian Gelatin Chemicals against denial of interest on the refund claim sanctioned to the appellant.

2. Learned Counsel for the appellant pointed out that the appellant had a classification dispute with the revenue. The claim was that the product di-calcium phosphate of animal feed grade merits classification under heading 2302 of the Central Excise Tariff Act and is therefore chargeable nil rate of duty whereas revenue claim that the said goods are classifiable under Heading No 2835 and was chargeable to central excise duty. The appellant paid Central excise duty under protest from 19.10.1996 onwards. On 07.07.1997 the appellant approached Hon'ble High court of Gujarat. The Hon'ble High court of Gujarat directed the appellant to clear the goods on provisional assessment under Rule 9 B of the Central Excise Rules on payment of 50% of duty and furnish bank guarantee for the differential amount of duty. The Commissioner (Appeals) vide order dated 06.01.1998 decided

the appellant's appeal and held that the goods are rightly classifiable under heading 2302 and therefore, the appellant stopped paying duty. On 29.07.1998 the appellant filed a refund claim of Rs 1, 76, 04,008/- for the duty paid under protest during 19.10.1996 to 21.01.1998. After some litigation on 05.03.2008 the Deputy Commissioner, Vapi ultimately allowed the refund of Rs. 83,41,421/- by way of cash refund and an amount of Rs 73,64,370/- by way of credit in the Cenvat register a total of Rs 1,57,05,791/-. On 01.05.2008 the appellant filed a claim for interest on delayed refund, as the refund claim was filed on 15.07.1998 whereas the same came to be sanctioned on 05.03.2008. On 19.06.2008 a SCN was issued to the appellant proposing rejection of claim of interest on the ground that the amount was refunded pursuant to finalization of provisional assessment in terms of Rule 9 B of the rules and that Section 11BB of the act is not applicable to the refunds under rule 9B. The claim for interest was rejected by the Deputy Commissioner on 26.03.2009. The appellant filed an appeal before the Commissioner (Appeals) dated 31.12.2009. This said appeal was rejected by the Commissioner (Appeals) on the ground that the refund claim was allowed under Rule 9B of the erstwhile rule and not under section 11 B of the act and therefore there was no case for interest on the delayed refund since Rule 9 B of the erstwhile rule contained no such provisions for interest. Aggrieved by said order the appellant is before the Tribunal.

2.1 Learned Counsel relied on the decision of Hon'ble High Court of Allahabad in the case U.P Twiga Fiber Glass Limited- 2008 (229) ELT 205(All.). The SLP filed against the said decision of the Hon'ble High Court of Allahabad was dismissed by the Hon'ble Apex Court as reported in 2009 (243) ELT A27 (SC). Learned Counsel also relied on the decision of the Tribunal in the case of Jay Engineering Works - 2017 (328) ELT 345 (Tri.

Hyd). Learned Counsel also relied on the decision of Hon'ble Apex Court in the case of Ranbaxy Laboratories Ltd- 2011 (273) ELT 3 (SC). Learned Counsel also relied on the decision of Hon'ble High Court of Gujarat in the case of Purnima Advertising Agency PvtLtd - 2016 (42) STR 785 (Guj.) and in case of Reliance Industries Ltd- 2010(259) ELT 356 (Guj.).

3. Learned AR argued that the refund in the instant case has been sanctioned under Rule 9B and therefore the provisions of Section 11BB are not applicable to the instant case. He relied on the decision of Excel Rubber Ltd – 2011 (268) ELT 419 (Tri. LB). He also relied on the decision of Hon'ble High Court of Gujarat in the case of Contemporary Packaging Technologies P Ltd -2014 (299) ELT 439 (Guj.). He also relied on the decision of Tribunal in case of Pleasant Foods P Ltd- 2008 (231) ELT 576 (Tri.-Chennai) and in case of Karnataka Pressure Vessels P Ltd – 2017 (347) ELT 159 (Tri.-Bang).

4. We have considered rival submission. We find that refund has been sanctioned on finalization of provisional assessment. The order granting refund sanctions refund under section 11B of the Central Excise Act, 1944 read with Rule 9B of Central Excise Rules, 1944. The appellant claims that since while sanctioning the refund Section 11B has been invoked, therefore in terms of Section 11 BB the appellant is entitled to interest for the delay in sanction of refund claim from the date of filing of refund claim. In support of their claim, the appellant has relied on the decision of Hon'ble Apex Court in the case of Ranbaxy Laboratories Ltd (Supra). In para 9 of the said order following has been observed:

"9. *It is manifest from the afore-extracted provisions that Section 11BB of the Act comes into play only after an order for refund has been made under Section 11B of the Act. Section 11BB of the Act lays down that in case any duty paid is found refundable and if the duty is not refunded within a period of three months from the date of receipt of the application to be submitted under sub-section (1) of Section 11B of the Act, then the applicant shall be paid interest at such rate, as may be fixed by the Central Government, on expiry of a period of three months*

from the date of receipt of the application. The Explanation appearing below Proviso to Section 11BB introduces a deeming fiction that where the order for refund of duty is not made by the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise but by an Appellate Authority or the Court, then for the purpose of this Section the order made by such higher Appellate Authority or by the Court shall be deemed to be an order made under sub-section (2) of Section 11B of the Act. It is clear that the Explanation has nothing to do with the postponement of the date from which interest becomes payable under Section 11BB of the Act. Manifestly, interest under Section 11BB of the Act becomes payable, if on an expiry of a period of three months from the date of receipt of the application for refund, the amount claimed is still not refunded. Thus, the only interpretation of Section 11BB that can be arrived at is that interest under the said Section becomes payable on the expiry of a period of three months from the date of receipt of the application under sub-section (1) of Section 11B of the Act and that the said Explanation does not have any bearing or connection with the date from which interest under Section 11BB of the Act becomes payable."

It is seen that the facts of the said case are significantly different. In the said case the dispute was if the three months for calculation of interest are to be counted from the date of application for refund or from the three months after the date of final order on the strength of which the refund becomes due.

4.1 The appellant have also relied on decision of Hon'ble High Court of Allahabad in the case of Purnima Advertising Agency Pvt Ltd (Supra). In the said case also the Hon'ble High Court observes as follows:-

"8. From the facts noted hereinabove, it is evident that the Commissioner (Appeals) as well as the Tribunal have held that the petitioner was entitled to refund of Rs. 28,94,776/- under Section 11BB of the Central Excise Act. Section 11BB of Central Excise Act provides that if any duty ordered to be refunded under sub-section (2) of Section 11B to any applicant is not refunded within three months from the date of receipt of application under sub-section (1) of that section, there shall be paid to that applicant interest at such rate, not below five per cent., and not exceeding thirty per cent., per annum as is for the time being fixed by the Central Government, by notification in the Official Gazette on such duty from the date immediately after the expiry of three months from the date of receipt of such application till the date of refund of such duty. Thus, on a plain reading of the provisions of Section 11BB of the Central Excise Act, it is evident that the same provides for payment of interest from the date immediately after the

expiry of three months from the date of receipt of the refund application till the date of refund of such duty. In the facts of the present case, it is an admitted position that the refund claim was made on 24-1-2005 and the amount was refunded on 12-11-2010. The interest on refund of Rs. 28,94,776/-, however, in terms of the order of the Commissioner (Appeals) and the Tribunal, was paid for the period from 24-4-2005 to 2-6-2008 and the interest from 3-6-2008 till the date of actual payment i.e. 10-3-2010 was not paid on the ground that such amount had been transferred to the Consumer Welfare Fund pursuant to the order passed by the Commissioner (Appeals).

9. Under Section 11BB of the Central Excise Act, there is an obligation upon the respondents to pay the interest at the prescribed rate immediately after the expiry of three months from the date of receipt of such application till the date of refund of such duty, which in the present case is from 24-4-2005 to 10-3-2010. The case of the respondent is that with effect from 3-6-2008, the amount had been transferred to the Consumer Welfare Fund and therefore, the liability of the Revenue to pay any interest was discharged. In the opinion of this court, such contention cannot be countenanced for the reason that the Section 11BB of the Central Excise Act provides for payment of interest after a period of three months from the date of application till the date of actual payment. The statute does not provide for curtailment of the period for which the interest has to be paid on account of any super winning circumstances, like transfer of the amount to the Consumer Welfare Fund. The learned counsel for the respondents is not in a position to point out any provision of law which shows that when the amount is transferred to the Consumer Welfare Fund, the period for which the assessee would be entitled to interest under Section 11BB of the Central Excise Act would stand curtailed. It is a settled legal position that insofar as the taxing provision is concerned, the same has to be construed strictly and one has to look merely at what is said in the relevant provisions; there is nothing to be read in; nothing to be implied and there is no room for any intendment. On a plain reading of Section 11BB of the Central Excise Act, it is evident that the object behind such provision is to provide for payment of interest to a party commencing from a period after three months from the date of application till the date of actual refund. The reason is not far to see, namely, that a party should not be prejudiced on account of any delay in deciding the application or on the ground that the party might have to challenge the order of refund before any other forum. As regards the transfer of the amount to the Consumer Welfare Fund, it is evident that the order passed by the Commissioner (Appeals) holding that there was unjust enrichment, was held to be erroneous and has been set aside, under the circumstances, no prejudice ought to be caused to the petitioner on account of any erroneous order passed by the respondents authority, without there being any default on part of the petitioner. On a plain reading of the statute, the petitioner is entitled to interest from the date specified in the statute. The Tribunal was, therefore, not justified in holding that from the date of transferring the sum to the Consumer Welfare Fund, the petitioner was not entitled to payment of interest on the refund amount. The petitioner would, therefore, be entitled to interest on the amount of Rs. 28,94,776/- from 24-4-2005 till the actual payment i.e. up to 10-3-2010.

10. Insofar as the prayer for interest on interest is concerned, the learned advocate for the petitioner fairly stated that in view of the decision of the Supreme Court in the case of *Commissioner of Income Tax, Gujarat v. Gujarat Fluoro Chemicals* (supra), such relief cannot be granted. He, however, has submitted that the petitioner should be compensated for the prejudice caused to it due to inordinate delay in payment after the lapse of statutory period. In the opinion of this Court, the petitioner was required to unnecessarily litigate in two rounds; in the first round, up-till the Tribunal and in the second round, up to this Court, for the purpose of availing of the statutory interest payable to it. Under the circumstances, while the Court is of the view that the petitioner is entitled to the grant of compensatory costs, which are quantified at Rs. 25,000/-."

In this case the interest on the refund was curtailed and interest was not sanctioned for the period after the order of Commissioner (Appeals) on account of which the refund became due. Thus we find that the facts of the case as well as issue in dispute are different.

4.2 The appellant have also relied on the decision of Hon'ble High Court of Gujarat in the case of *Reliance Industries Ltd* (Supra) wherein the Hon'ble High Court observed as follows:-

"10. Section 11-BB of the Act makes provision for payment of interest from the date immediately after expiry of three months from the date of receipt of the application under sub-section (1) of that section, till the date of refund of such duty at such rate as may be fixed by the Central Government by notification in the Official Gazette subject to the minimum and maximum limits specified thereunder, if any duty ordered to be refunded under sub-section (2) of Section 11-B to any applicant is not refunded within three months from the date of receipt of such application. Thus, section 11BB of the Act would be attracted in case where there is delay in refunding the amount of duty ordered to be refunded under sub-section (2) of section 11B of the Act. Refund under Rule 5 of the Rules also being a refund under sub-section (2) of Section 11B of the Act would therefore, squarely fall within the ambit of Section 11BB of the Act and interest would be payable under Section 11BB of the Act in case of delay in sanctioning refund under Rule 5 of the Rules.

11. There is a basic fallacy in the premise on which the contention of Revenue is based. Cenvat credit is nothing else but credit for duty paid by the supplier of inputs, which are dutiable goods manufactured by the supplier or dutiable services rendered by the service provider. In principle such goods/services when utilised for further manufacture or providing service which are dutiable already carry the duty paid component as a part of its price/value, and hence the duty payable on the ultimately manufactured goods/services rendered stands reduced to the extent of duty already paid on the inputs. Thus the duty paid on inputs by the supplier has already been actually received by the exchequer. Therefore, this contention is, to say the least, misconceived.

12. *On the facts and in the circumstances of the present case, admittedly the refund has been ordered under Rule 5 of the Rules and there was a delay in sanctioning the refund, in the circumstances, the provisions of Section 11BB of the Act would clearly be attracted and as such the Tribunal was justified in holding that the provisions of clause (c) of the proviso to sub-section (2) of Section 11B and consequently Section 11BB of the Act are clearly applicable to the facts of the present case and as such the respondent is entitled to interest on delayed refund of Cenvat Credit as claimed by it."*

It is seen that the said decision relates to refund under Rule 5 of the Cenvat Credit Rules and therefore, the facts of the case are different. Section 11 B specifically excludes from the applicability of unjust enrichment to the cases of refund of cenvat credit of excisable goods by clause (c) of the third proviso to section 11 B. Thus, it implies that such cases are covered by section 11 B.

4.3 Learned Counsel also relied on the decision of Hon'ble High Court of Gujarat in the case of M/s Rawmin Mining and Industries Pvt Ltd .The said case also relates to refund under Notification No 41/2007-ST dated 06.10.2007 which is operated by allowing refund as an exemption in respect of goods exported. In para 11 following have been observed:-

"11. It is undisputed fact in view of the Notification No 41/2007-ST dated 06.10.2007, the petitioner became eligible to the refund of the duty, which has paid to the service provider in respect of service, availed for the exports of goods. It is undisputed fact that the petitioners promptly lodge refund claim on 13.06.2016, which was rejected by the Respondent No. 2. The Petitioner ultimately got the order of full refund vide order of Appellate Tribunal dated 25.05.2018, whereupon they claimed refund with interest by submitting letter dated 12.06.2018 to the respondent no 2. They have got the refund of the duty without interest on the specious ground that the refund was paid within three Months on 12.07.2018. We are unable to countenance the contention of learned advocate for the respondent that the refund was promptly within two months after receipt of formal letter and also after the decision of the appellate tribunal. We are of the considered opinion that the initial claim application dated 13.06.2016 for the refund of duty was prosecuted by the petitioners up to the Commissioner (Appeal) to get full refund of the duty. It is worthwhile to note that the Appellate Tribunal passed order on 25.05.2018 with all consequential relief. It is thus, very clear that the consequential relief would include payment of interest on delayed refund payment. Section 11BB of the Central Excise Act contemplates that if the refund is not paid within three months of the application, the assessee becomes entitled to the interest not below 5 % and not exceeding 30% p.a as is for the time being fixed by Central Government by Notification in the Official Gazette. We are of the

view that the order of The appellate tribunal relates to the initial/original application dated 13.06.2016 and therefore, the petitioners have become entitled to receive interest on the delayed payment of the duty."

It is seen that the aforesaid decision has been passed in a petition under article 226 of the Constitution of India. The facts of the case are also different.

4.4 Learned AR has relied on the following decisions:

- Contemporary Packaging Technologies P Ltd- 2014 (299) ELT 439 (Guj.)
- Excel Rubber Ltd – 2011 (268) ELT 419
- Pleasant Foods Pvt Ltd- 2008 (231) ELT 576 (tri.- Chennai)
- Karnataka Pressure Vessels P Ltd – 2017 (347) ELT 159 (Tri.Bang)

4.5 It is noticed that in the case of Contemporary Packaging Technologies P Ltd the jurisdictional Hon'ble High Court of Gujarat has observed as follows :-

"18. As can be noted from the record that, in the instant case, the petitioner-company has paid higher rate of duty on goods under protest for the period from July, 1993 to March, 1994 undisputedly provisionally.

The assessment came to be finalized by the Tribunal on 29-12-1996 in the proceedings where classification dispute was put at rest. Admittedly, no duty was paid for which the refund claim has been preferred by the petitioner after the final assessment was ordered under Rule 9B(5) of the Rules and the entire refund claim was for the period during which the assessment was admittedly provisional. Therefore, any excess duty paid at the time of provisional assessment needed to be refunded without even any claim being required to be made by petitioner-assessee, on finalization of assessment.

18.1 *The Tribunal in its order insisted that if a claim for refund of duty is to be accepted, it is required to be established by the petitioner that it has not passed the burden of duty to others. Reiteratively, it is emphasized that duty has been collected from ITC to whom the goods had been supplied and therefore, there was no sustainable claim for refund of duty. The Tribunal also refused to accept the contention of the appellant that since the duty was paid under protest and was received from ITC, that aspect does not fall under doctrine of unjust enrichment. It is needed to be noted for clarity at this juncture that Section 18 and Section 27(2) of the Customs Act are parimateria and similar to Section*

11B and Rule 9B of the Central Excise Act & Rules as subsequent rulings of this Court and of Delhi High Court are sought to be relied upon.

18.2 *Going by the decisions of the Apex Court in the case of Mafatlal (supra) and the decision given in case of Hindalco Industries Ltd. (supra) and all other subsequent decisions on the issue, the refund claim of the petitioner-assessee would not be governed by the Section 11A or Section 11B of the Central Excise Act as the case may be."*

The aforesaid cases dealing with almost identical facts. The aforesaid case related to applicability of provision of unjust enrichment of section 11 B to the cases of refund arising out of finalization of provisional assessment. In such circumstances the Hon'ble High court has held that the provision of Section 11 B would not be applicable to the cases of finalization of provisional assessment. In the instant case the issue is if the provision relating to interest under section 11 B would be applicable to refund arising out of finalization of provisional assessment. Applying the ratio of the decision of Hon'ble High Court it is apparent that the provision of Section 11 B would not be applicable in such circumstances.

5. The facts of instant case are that while assessment was done provisionally on the direction of Hon'ble High Court, no order finalizing the provisional assessment has been passed. The appellant had filed the refund claim on 29.07.1998 after the Commissioner (Appeals) decided their appeal on 06.01.1998 and held that the goods are rightly classifiable under heading No. 2302 and charge to nil rate of duty. In Para 95 of the decision of the Hon'ble Apex Court in the case of Mafatlal Industries Ltd- 1997 (89) ELT 247(SC) following has been observed:

"95. *Rule 9B provides for provisional assessment in situations specified in Clauses (a), (b) and (c) of sub-rule (1). The goods provisionally assessed under sub-rule (1) may be cleared for home consumption or export in the same manner as the goods which are finally assessed. Sub-rule (5) provides that "when the duty leviable on the goods is assessed finally in accordance with the provisions of these Rules, the duty provisionally assessed shall be adjusted against the duty finally assessed, and if the duty provisionally assessed falls short of or is in excess of the duty finally assessed, the assessee shall pay the deficiency*

or be entitled to a refund, as the case may be". Any recoveries or refunds consequent upon the adjustment under sub-rule (5) of Rule 9B will not be governed by Section 11A or Section 11B, as the case may be. However, if the final orders passed under sub-rule (5) are appealed against - or questioned in a writ petition or suit, as the case may be, assuming that such a writ or suit is entertained and is allowed/decreed - then any refund claim arising as a consequence of the decision in such appeal or such other proceedings, as the case may be, would be governed by Section 11B. It is also made clear that if an independent refund claim is filed after the final decision under Rule 9B(5) re-agitating the issues already decided under Rule 9B - assuming that such a refund claim lies - and is allowed, it would obviously be governed by Section 11B. It follows logically that position would be the same in the converse situation."

From the above it is seen that in ordinary course of refund arising out of finalization of provisional assessment would be decided in terms of Rule 9B however if any refund arises on account of challenge to an order passed under Sub Rule (5) of Rule 9 B then such demand or refund would be governed by section 11 A or Section 11 B as the case may be. The same view has been taken by Hon'ble High Court of Gujarat in the case of Contemporary Packaging Technologies P Ltd in Para 18, 18.1 & 18.2 (Supra).

5.1 In the instant case there is no finalization of Provisional assessment and there is no challenge to any such assessment, in these circumstances the refund would not be governed by provisions of Rule 9 B.

5.2 The appellant has claimed that the lower authorities have examined the refund in terms of Section 11B in as much as they had examined that there was unjust enrichment as well as limitation. The Learned Commissioner (Appeals) in his order has rightly stated that the test for unjust enrichment was done in terms of the direction of the Tribunal in its order A/596/WZB/05/CI/EB dated 03.10.2005. It is also noticed that proceedings arising out of filing of refund claim culminated with presumed finalization of provisional assessment as concluded in the order of Deputy Commissioner dated 05.03.2008 while granting part of the refund claim. Thereafter on 01.05.2008 the appellant instead of challenging

the said order in original filed a fresh claim for refund of interest. Relying on the CBEC Circular No 670/61/2002-CX/1 dated 01.10.2002. Another SCN was issued wherein it was held that the refund arising on account of finalization of provisional assessment under Rule 9 B are not governed by the provisions of section 11B. It is seen that this view is in harmony with the observation of Hon'ble Apex Court in the case of Maftlal Industries (Supra). In this regard the observation of the jurisdictional High Court in the case of Contemporary Packaging Technologies P Ltd. (Supra) also becomes relevant wherein it is categorically observed that the provisions of Section 11B of the Central Excise Act would not govern the grant of refund claims arising on account of finalization of provisional assessment under rule 9B of Central Excise, 1944.

6. In view of the observation of the Hon'ble Apex court as well as jurisdictional High Court we do not find any merit in the appeal. The same is dismissed.

(Pronounced in the open court 13.04.2022)

RAMESH NAIR
MEMBER (JUDICIAL)

RAJU
MEMBER (TECHNICAL)

Geeta