

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH**

REGIONAL BENCH – COURT NO. I [e-hearing]

Excise Appeal No. 61085 of 2019

[Arising out of OIA No. APPL./PKL/CE/57/2018 dated 22.07.2019 passed by the Commissioner (Appeals) of Central Goods and Service Tax, Panchkula]

M/s Modern Dairies Ltd.

136 K.M. G.T. Road, Karnal, Haryana, 132001

: Appellant (s)

Vs

Commissioner of CE & ST- Panchkula

SCO No. 407-408, Sector – 8 Panchkula, Haryana

: Respondent (s)

APPEARANCE:

Ms. Krati Somani & Ms. Priyanka, Advocate for the Appellant

Mr. Rajeev Gupta & Mr. H. S. Brar, ARs for the Respondent

CORAM : HON'BLE MR. ASHOK JINDAL, MEMBER (JUDICIAL)

FINAL ORDER NO. 60413/2020

Date of Hearing: 30.09.2020

Date of Decision: 03.12.2020

PER ASHOK JINDAL:

The appellant is in appeal against the impugned order for rejecting their refund claim.

2. The facts of the case are that an audit was conducted for the period 2007-2008 and 2008-2009 during the period 20.04.2009 to 24.04.2009. On 24.04.2009, the appellant reversed the cenvat credit of Rs. 17,67,816/- which was inadvertently entered in RG23C, part-II. Thereafter, on 16.09.2010 a show cause notice was issued to the appellant to demand cenvat credit of Rs. 78,30,427/- on account of wrong availment of cenvat of inputs used to manufacture dairy

machinery and to appropriate amount of Rs. 17,67,816/- already reversed. On 15.12.2010, the adjudication order was passed and the demands were confirmed and penalties were also imposed. The appellant filed appeal on 20.03.2012 before this Tribunal, this Tribunal vide order dated 12.02.2012 asked the appellant to make a pre deposit amount of Rs. 15,00,000/- in terms of Section 35F of the Central Excise Act, 1944. The appellant deposited the said amount of Rs. 15,00,000/- on 15.05.2013. The appeal was finally disposed on 05.07.2018 by setting aside the impugned order. Thereafter, the appellant filed refund claim of Rs. 15,00,000/- deposited by them on 12.09.2018. On 19.02.2019, the adjudicating authority held that the refund was admissible to the appellant but was appropriated the amount against Rs. 17,67,816/- as penalty and Rs. 4,56,484/- as interest confirmed vide order dated 15.12.2011 by holding that these demands were not set aside by the Final Order dated 05.07.2018. Thereafter, on 08.03.2019, the appellant filed a application for Rectification of mistake before this Tribunal and on 01.04.2019 the application for Rectification of mistake was allowed. The appellant also filed appeal before the Ld. Commissioner (Appeals) on 18.04.2019. On 21.05.2019, this Tribunal passed the Final order again by setting aside the demand of interest and penalty specifically. On 12.06.2019, the matter before Commissioner (Appeals) was listed for hearing and it was stated by the appellant before the Ld. Commissioner (Appeals) that the demand of interest and penalty against which the refund has been adjusted and have been set aside by this Tribunal but they have not received the detailed order. On 24.07.2019 a certified copy of the order passed by the Tribunal was filed with the office of the

Commissioner (Appeals). In the meantime, the Ld. Commissioner (Appeals) has passed the impugned order on 22.07.2019 and the same was sent to the appellant on 30.06.2019 and received by the appellant on 02.08.2019. On 08.08.2019, the appellant filed an application for rectification/modification of the order passed by the Ld. Commissioner (Appeals), but on 22.08.2019, the appellant received a communication from the office of the Ld. Commissioner (Appeals) that the order has already been passed before the submission of the copy of the order of this Tribunal. Thereafter, on 29.10.2019, this appeal has been filed.

3. The Ld. Counsel for the appellant submits that the refund claim has already been sanctioned by the order dated 19.02.2019 by the adjudicating authority and this Tribunal vide order dated 21.5.2019 has given the clear finding that no demand is sustainable against the appellant and the said order was communicated to the Ld. Commissioner (Appeals) but without taking cognizance of the same, the impugned order has been passed which is in gross violation of judicial discipline and submitted that the appellant is entitled for refund claim of the amount of Rs. 15,00,000/- alongwith interest from the date of deposit till its realization. The appellant relied on the decisions of ***M/s. Fujikawa Power and Another vs. CCE, Chandigarh-I - 2019 (11) TMI 1197-CESTAT Chandigarh, M/s. Marshall Foundry & Engg. Pvt. Ltd. vs. Commissioner of CGST-Faridabad - 2019 (11) TMI 1269*** and ***M/s Riba Textiles Ltd. vs. Commissioner of CE & ST- Panchkula - 2020 (2) TMI 602***. She also relied on the decision of the Hon'ble Madras High Court in the

case of ***Commissioner of Central Ex. Chennai-II vs. UCAL Fuel Systems Ltd. - 2011 (9) TMI 903***. Further, she also relied on the decision of this Tribunal in the case of ***Commissioner vs. Balaji Wire Pvt. Ltd. - 2018 (12) - TMI 1577-CESTAT Allahabad***.

In her argument, she submits that the Revenue has relied on the decision of ***CCGST Mumbai vs. M/s Juhu Beach Resort Ltd. - 2019-TIOL-3596-CESTAT-MUM*** without considering the decision of ***Sandvik Asia Limited vs. Commissioner of Income Tax- 2006 (196) ELT 257 (S.C.)***. Further, Revenue has relied on the decision of ***Commissioner of CE & ST- vs. M/s Som Flavour Masala Pvt. Ltd. - 2020 (6) TMI 60-CESTAT CHANDIGARH***. The said decision is not applicable to the facts of this case as in the said decision, the decision of Hon'ble Madras High Court in the case of ***UCAL Fuel Systems Ltd. (supra)*** has not been considered.

4. The Ld. AR opposed the contention of the Ld. Counsel for the appellant and submitted that as the appellant had failed to submit that the copy of the order of this Tribunal dated 21.05.2019 before the Ld. Commissioner (Appeals), therefore, the Ld. Commissioner (Appeals) could not take the cognizance of the order passed by this Tribunal. He also submitted that this Tribunal has not issued the order within one month of the hearing, therefore, the department had no occasion to deal the issue in hand. He further submitted that as this Tribunal has already dealt the issue vide order dated 21.05.2019 and the impugned order has been passed before submission of the said order before the Ld. Commissioner (Appeals), therefore, the order of this Tribunal will prevail and he conceded the merits of the case but submitted that the

matter be remanded back to the Commissioner (Appeals) to pass the order after considering the order of this Tribunal dt. 21.05.2019.

5. With regard to claim of interest, it is his submission that the appellant has sought interest from the lapse of three months from 05.07.2018 and the appeal has been finally disposed off vide order dated 21.05.2019, therefore, the refund in cash could not be dispersed to the appellant. In that circumstances, the matter be remanded back to the Ld. Commissioner (Appeals) to decide the matter afresh after considering the order of this Tribunal dated 21.05.2019. He further submitted that the interest is not payable from three months from 05.07.2018 as the said order has not the final order disposing the said appeal which was disposed off only on 21.05.2019. To support of this contention, he relied on the decision of the Hon'ble High Court of Bombay in the case of **CCE, Mumbai-III vs. CEAT LTD - 2013 (298) ELT 525 (Bom.)** wherein it has been held that while disposing of the appeal, the period upto the passing of the order on the Rectification of Mistake application by the Tribunal was excluding while deciding whether the delay in filing the appeal was condonable or not? Also, he relied on the decision of this Tribunal in the case of **Shri Lotus Exports vs. CCE, Trichy - 2011 (245) STR 444 (Tri. Chennai)** wherein it has been held that while deciding the limitation for filing appeal whether to be reckoned from the date of the order in original or from the date of order passed on rectification application against said impugned order, it was held that the time limit for filing appeal shall be computed from the date of the order on such rectification application. Therefore, in the present case, the date of

finality of Excise Appeal No. 652/2012 should be 21.05.2019 and not 05.07.2018.

6. With regard to calculation of delay in disbursal of refund prior to 06.08.2014 section 35FF of the Central Excise Act deals the issue which prescribed that prior to the commencement of the Finance Act, 2014, the interest shall be payable after expiry of three months from the date of communication of the order of the appellate authority till the refund of such amount. As the amount of Rs. 15,00,000/- have been deposited by the appellant on 15.05.2013 in compliance to the provision of Section 35F of the Central Excise Act, 1944, therefore, the provision of Section 35FF as they existed on the date of pre deposit are applicable and in that case no interest is payable for the period from the date of deposit till expiry of three months from the date of communication of the final order of this Tribunal dated 21.05.2019. To support of this contention that he relied on the decisions in the cases of ***M/s IFP Products (P) Ltd. vs. UOI in Writ Tax Appeal No. 653 of 2017, CC & GST, MUMBAI VS. JUHU Beach Resort Ltd. - 2020 (371) ELT 622 (Tri.- Mumbai)*** and ***CCE & ST, Rohtak vs. Som Flavour Masala Pvt. Ltd. vide Final Order NO. 60385/2020 dated 02.03.2020.***

7. In response to the submission made by the Ld. AR, the Ld. Counsel for the appellant submitted that there has been inordinate delay in sanctioning the refund claim by the authorities, therefore, the appellant is entitled to claim interest on refund amount in terms of

provision of Section 35FF of Central Excise Act, 1944 from the date of deposit till actual refund.

8. After hearing both the sides, I find that the merits of the case have not been disputed either of the side which were decided in the favour of the appellant vide order dt. 05.07.2018.

9. The issue involved in the matter is whether the appellant is entitled to claim the interest on delayed refund or not? If yes, then from which date?

The Section 35FF of the Central Excise Act, 1944 was relevant to decide the issue in hand, which is extracted herein blow:

"SECTION 35FF – Interest on delayed refund of amount deposited under the proviso to Section 35F.

Where an amount deposited by the appellant in pursuance of an order passed by the Commissioner (Appeals) or the Appellate Tribunal (hereinafter referred to as the appellate authority), under the first proviso to Section 35F, is required to be refunded consequent upon the order of the appellate authority and such amount is not refunded within three months from the date of communication of such order to the adjudicating authority, unless the operation of the order of the appellate authority is stayed by a superior court or tribunal, there shall be paid to the appellant interest at the rate specified in Section 11BB after the expiry of three months from the date of communication of the order of the appellate authority, till the date of refund of such amount."

The said provision of Section 35FF was amended w.e.f. 06.08.2014 and the amended provisions are not applicable to facts of this case as per the said amendment.

10. As per the said provision, the assessee is entitled to claim the interest on delayed refund after the expiry of three months from the date of communication of the order of the appellate authority till the date of refund of such amount.

11. In the matter in hand, the appeal was finally disposed of on 05.07.2018 by setting aside the impugned order and the pre-deposit made as per the directions of this Tribunal on 15.05.2013, became refundable to the appellant. But the adjudicating authority held that the said amount is refundable to the appellant but appropriated the said amount against interest and penalty which was already set aside by the order dt. 05.07.2018 and started another round of litigation. The said act of the adjudicating authority shows the high handedness by not to refund the amount to the appellant. The same is in contravention of the speech given by the Hon'ble Finance Minister on 08.11.2019 where the Hon'ble Finance Minister has said that the Revenue Officers are the facilitators for the tax payer; whereas in this case, the act of the Revenue Officer does not seem to be a facilitator for the tax payer. Therefore, as held by this Tribunal, the appellant is entitled to claim the refund of Rs. 15 lacs. Furthermore, during the course of arguments, it came to the knowledge of the Bench that the appellant filed the appeal against the order of the adjudicating authority appropriating the amount of refund claim before the Commissioner (Appeals) and intimated to the Id. Commissioner (Appeals) vide letter dt. 12.06.2019 that this Tribunal has allowed the refund to the appellant on 21.05.2019. Instead of taking note of the said fact, the Id. Commissioner (Appeals) dismissed the appeal filed by

the appellant without taking note of the decision of this Tribunal on 22.07.2019, whereas the order of this Tribunal was uploaded on the website itself on 01.07.2019. The act of the Id. Commissioner (Appeals) cannot be appreciated.

12. Now, the issue comes that from which date the appellant is entitled to claim the interest till its realisation. Admittedly, as per Section 35FF of the Act, the appellant was entitled to claim the interest on delayed refund after three months from the date of the order of this Tribunal. This Tribunal has finally disposed of the appeal of the appellant on 05.07.2018.

13. The Id. A.R. relied on the decision of Hon'ble Bombay High Court in case of **CEAT Ltd (supra)** to say that the date when the application for Rectification of Mistake has been decided, from the said date, limitation for refund claim is to be reconed. As discussed above, in this case, the issue has been settled by this Tribunal on 05.07.2018 finally by setting aside the impugned order, but the adjudicating authority after sanctioning the refund claim, has adjusting the said amount by wrong interpretation of order of this Tribunal which does not amount to a mistake apparent on record; therefore, the said decision is of no help to the appellant.

14. The Id. Counsel for the appellant has heavily relied upon the decision of this Tribunal in the case of **M/s Fujikawa Power & Another (supra)**. The facts of the said case are not applicable to the facts of the case in hand, as in the said case, the appellant did not

deposit the amount as per the directions of the appellate authority in terms of Section 35F of the Central Excise Act, 1944. In fact, the amount has been paid before filing the appeal before the Tribunal. Further the reliance on the case of **UCAL Fuel Systems Ltd (supra)** it also no help, as in the said case, the amount was deposited by the assessee during the course of investigation. Further the other case laws relied upon by the Id. Counsel for the appellant followed the decision in the case of **M/s Fujikawa Power & Another (supra)**; therefore, they are not relevant to the facts of the case in hand. In the case of **Balaji Wire Pvt Ltd (supra)**, relied upon by the Id. Counsel, the amount was paid by the assessee under protest. Moreover, in the case of **M/s CNH Industrial India Pvt Ltd (supra)** also, the amount was paid by the assessee under protest. Therefore, those decisions are of no help to the appellant. On the other hand, the Id. A.R. for the Revenue relied on the decision **Som Flavour Masala Pvt Ltd (supra)**. The facts of the said case are not relevant to the facts of the case in hand as in that case this Tribunal has held that refund claim is pre mature as no adjudication took place while deciding the claim of interest.

15. Further, I find that in the case of **IFP Products (P) Ltd (supra)**, the issue has been dealt in details by the Hon'ble Allahabad High Court, wherein the Hon'ble High Court has observed as under:

“The aforesaid provision of Section 35FF of the Act was amended by the Finance Act No. 25 of 2014 with effect from 06.08.2014 and it was provided that where any amount deposited by the party under Section 35F of the Act is required to be refunded consequent upon the order of the Appellate

Authority, it will carry an interest at the specified rate till the date of refund. It permits payment of interest at the specified rate for the entire period, the amount remains deposited with the authority. However, the aforesaid provision has been subjected to a proviso, which lays down that if any amount has been deposited prior to the enforcement of the Finance Act No. 25 of 2014 i.e. before 06.08.2014, it shall continue to be governed by the unamended provision of Section 35FF of the Act, which means that in cases of deposit made prior to 06.08.2014, interest would be payable only if the amount is not refunded within a period of three months from the date of communication of the appellate order.

Apart from the above provision, there is no other provision, which permits payment of interest on the amount of excise duty deposited in pursuance to the order of the Commissioner (Appeals) or the Tribunal by any party.

A composite reading of unamended Section 35FF and amended Section 35FF of the Act reveals that in respect of an amount deposited prior to the commencement of the Finance Act No. 25 of 2014, interest on the refunded amount is payable only if it is not refunded within three months of the communication of the order of the appellate authority entitling the refund and that too after the expiry of three months of the communication of the order.

In the present case, the amount was deposited on 24.04.2014 and 28.04.2014, the appeal entitling the refund was allowed on 03.08.2016 and the refund was actually made on 28.11.2016.

All the aforesaid dates are earlier to 06.08.2016, the date of enforcement of Finance Act No. 25 of 2014. Thus, in view of the proviso to the amended Section 35FF of the Act, the payment of interest to the petitioner would be governed by the unamended Section 35FF of the Act.

Accordingly, if at all the petitioner would be entitled to interest on the

amount refunded, it will be for the period the amount had remained with the respondents after three months from the date of communication of the appellate order.

Sri Mathur at this stage submits that the amount deposited by the petitioner was not under Section 35F rather it was deposited as a duty and the claim was made for refund under Sections 11B and 11BB of the Act.

The submission is devoid of any force, inasmuch as the petitioner had deposited the duty of excise on 24.04.2014 and 28.04.2014 pursuant to the order of the Tribunal, which would essentially be a deposit under Section 35F of the Act. The deposit under Section 35F of the Act also contemplates the deposit of excise duty and not any other amount.

Sri Mathur next argued that merely for the reason that there is no express provision for the payment of interest for the entire period, the petitioner cannot be denied interest on the amount that had remained with the Department for the entire period, it was with the Department.

In support of his submission, he has placed reliance upon the decision of the Division Bench of this Court dated 26.04.2017 passed in Central Excise Appeal No. 127 of 2015, R.H.L. Profiles Limited Vs. Commissioner, Customs, Excise and Services, Kanpur.

In the said case, the sole question, which came up for consideration, was whether the Tribunal was justified in rejecting the claim of interest on the amount refunded on the ground that there is no provision for paying interest on such amount.

The aforesaid question was answered in favour of the assessee and against the Department holding that where the amount was illegally detained by the Revenue and ultimately, refunded, the assessee is entitled to interest even though there may not be a specific provision to that effect. This was laid down following the decision of the Apex Court in the case of

Union of India through Director of Income Tax Vs. TATA Chemicals Limited (2014) 6 SCC 335, wherein it was held that when the collection is illegal, there is corresponding obligation on the Revenue to refund such amount with interest.

The aforesaid decisions would not be any help of the petitioner inasmuch as there was neither any illegal detention nor any unauthorized collection of any amount by the Revenue, rather the said amount was deposited by the petitioner pursuant to the interim direction of the Tribunal.

The law is well settled that the taxing statutes have to be construed strictly and when there is no specific provision for doing a particular thing, the same cannot be done either in equity or on compassionate basis.

All other decisions, which have been cited on behalf of the petitioner, only observes that when there is a delay on the part of the Revenue in refunding the amount, the Revenue is liable to pay interest by way of compensation.

In the case we are dealing, there is no undue delay on the part of the Revenue in refunding the amount. The amount has refunded more or less within the period of three months from the date of the order of the Tribunal entitling the refund.

The period of three months for refunding the amount has to be computed from the date of communication of the order of the Tribunal. The date of communication of the appellate order has not come on record.

The application for refund was moved by the petitioner on 05.09.2016 and therefore, in the absence of any date of communication of the order, the date of the application would be recognized as the date of communication of the appellate order.

In addition to the above, the application of the petitioner for refund was decided vide order dated 28.11.2016 and the petitioner was held entitled to the refund of the excise duty deposited pursuant to the interim orders of the

Tribunal. The petitioner was not held entitled to any interest.

The petitioner has not objected to the said order and has neither challenged it in appeal or has asked for its rectification.

The above order having become final and accepted by the petitioner by taking the refund without interest with no protest, no further relief in exercise of extra ordinary jurisdiction can be extended to the petitioner.

In view of the aforesaid facts and circumstances, we do not find any merit in this petition to direct for payment of any interest on the amount refunded in the absence of any specific provision providing for payment of interest for the entire period, the amount had remained in custody of the Revenue.

Accordingly, the writ petition is dismissed.”

16. In view of the above discussions and observations, I hold that the appellant is entitled to refund of pre-deposit of Rs.15,00,000/- along with interest on delayed refund from 19.02.2019 the day on which the refund claim was allowed till its realization.

In these terms, the appeal is disposed of.

(Order pronounced on 03.12.2020)

(ASHOK JINDAL)
MEMBER (JUDICIAL)