CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH

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REGIONAL BENCH – COURT NO. 1

Excise Appeal No. 61290 Of 2019

[Arising out of OIA No. 81-82/CE/CGST-APPEAL-GURUGRAM/SG/2019 dated 30.07.2019 passed by the Commissioner (Appeals) of Goods and Service Tax, Gurugram]

CMI Limited **: Appellant (s)**
Plot No 71 & 82 Sector 6
FARIDABAD, HARYANA, 121006

Vs

CCE & ST- Faridabad-I **: Respondent (s)**
BLOCK D,NEW CGO COMPLEX, NH-IV, NIT
FARIDABAD, HARYANA, 121001

With
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BLOCK D,NEW CGO COMPLEX, NH-IV, NIT
FARIDABAD, HARYANA, 121001

APPEARANCE:
Ms. Krati Somani, Ms. Priyanka Singla, Advocates for the Appellant
Shri Tarun Kumar, Authorised Representative for the Respondent

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

ORDER No. A/60799-60800 / 2021

Date of Hearing:06/04/2021

Date of Decision:06/04/2021
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Per : Mr. Ashok Jindal

The appellant are in appeals against the impugned orders wherein the amount of rebate claims had been adjusted against the payment of goods and service tax for the period September 2017 as it is alleged that the same was paid later on, therefore, the amount of rebate claim was adjusted against the interest on delayed payment of goods and service tax by the appellant.

2. The brief facts of the case are that initially the appellant applied two rebate claims before the adjudicating authority which were initially denied but on appeal before the Ld. Commissioner (Appeals), the rebate claims were sanctioned. Against those orders, revenue preferred appeals before the revisionary authority, who dismiss the appeals filed by the Revenue. Therefore, the amount was recoverable from the department by the appellant. Instead of giving the said amount to the appellant, the revenue adjusted the same and a letter was issued to the appellant to pay interest for the period September 2017 for GST paid lately by the appellant. The appellant replied thereof saying that the interest is not payable by the appellant. Therefore, the said amount was adjusted against the interest. Therefore, the appellant is before me.

3. The Ld. Counsel for the appellant submits that the amount has been adjusted by invoking the provision of Section 11A of the Central Excise Act, 1944 readwith Section 79 of the CGST Act, 2017. It is her submission that to invoke the provision of Section 11A, a show cause notice is required which was not given to the appellant.

4. With regard to recovery by invoking the provision of Section 79 of CGST Act, 2017, it is his submission that the issue has been settled

by the Hon'ble Bombay High Court in the case of ***M/s New India Civil Erectors Pvt. Ltd. vs. UOI 2020 (10) TMI 59*** and the Jharkhand High Court in the case of ***Mahadeo Construction Co. Vs. UOI – 2020 (4) TMI 666*** wherein it has been held that if assessee dispute the amount of interest payable then the amount of interest is required to be adjudicated and without adjudication of the amount of interest, recovery cannot be made.

5. On the other hand, the Ld. AR for the Revenue submits that the appellant has not paid interest for the period September 2017 of the tax payable by them, therefore, two letters were issued to the appellant for payment thereof and the same was adjusted against the amount payable to the appellant by the revenue in terms of Section 79 of the CGST Act, 2017.

6. Heard the parties.

7. For recovery of the interest impugned the provision of Section 11A of the CEA, 1944 readwith Section 79 of CGST Act, 2017 has been invoked.

8. Section 11A of the CEA, 1944 is a machinery provision which provide how to recover the interest and for the said recovery, a show cause notice is required to be issued to the assessee which is missing in this case. Therefore, the provision of Section 11A of the CEA, 1944 are not applicable in the facts of the case.

9. With regard to invocation of Section 79 of CGST Act, 2017, the Hon'ble Bombay High Court in the case of ***M/s New India Civil Erectors Pvt. Ltd. (supra)*** has observed as under:-

> *"21. In other words, before proceeding to recover the amount by issuing garnishee notice under Section 87 (b) (i) the amount has to be first determined and quantified and thereafter not paid by the person required to make the payment as per law. Thus the garnishee notice has to be*

preceded by determination of the amount due and not paid. The amount payable has to first crystallize.

*22.1 Again in **ICICI Bank Limited vs. Union of India 2015 (28) STR 907,** a division bench of this court examined the question as to whether without there being any adjudication as provided under Chapter 5 of the Finance Act, 1994, coercive steps could be taken by the revenue for recovery of service tax or penalty or interest. After elaborately examining various provisions contained in Chapter 5 of the Finance Act, 1994 and after referring to several decisions of the Supreme Court, this Court concluded that "tax due' would mean an ascertained liability quantified in accordance with law. It was held that the amount which is payable by the person can be said to be payable only after there is determination as provided under Section 72 or Section 73 of the Finance Act, 1994."*

10. Further, the Hon'ble Jharkhand High Court also had an occasion to examine the issue in the case of ***Mahadeo Construction Co. (supra)*** wherein the Hon'ble High Court has observed as under:-

"21. It is not a true that liability of interest under Section 50 of the CGST Act is automatic, but the said amount of interest is required to be calculated and intimated to an assessee. If an assessee disputes the liability of interest i.e. either disputes its calculation or even the leviability of interest, then the only option left for the Assessing Officer is to initiate proceedings either under Section 73 or 74 of the Act for adjudication of the liability of interest.

22. The next issue for adjudication in the instant writ application is as to whether garnishee proceedings under Section 79 of the CGST Act can be initiated for recovery of interest without adjudicating the liability of interest, when the same is admittedly disputed by the assessee. Section 79 of the CGST Act empowers the authorities to initiate garnishee proceedings for recovery of tax where "any amount payable by a person to the Government under any of the provisions of the Act and Rules made thereunder is not paid."

11. Admittedly, in the case in hand, the appellant has disputed the interest liability and the same has not been adjudicated, in that

circumstances, the recovery of interest from the appellant is not in terms of law and the said recovery cannot be made as held by the Hon’ble High Court hereinabove. Therefore, I do not find any merit in the impugned orders, the same are set-aside.

12. In result, the appeals are allowed with consequential relief, if any.

(Dictated & pronounced in the Court)

(Ashok Jindal)
MEMBER (JUDICIAL)

G.Y.