CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH

Service Tax Appeal No. 60114 of 2022-ST (SM)

(Arising out of Order-in-AppealNo.CHD-EXCUS-001-APP-98-2021-22 dated 06.01.2022 passed by the Commissioner of Central Excise (A), Chandigarh)

Kandhari Beverages Pvt. Ltd. **.....Appellant**
Plot no. 177F, Indl. Area, Phase I,
Chandigarh

VERSUS

The Commissioner of Central Excise& Service Tax, Chandigarh **.....Respondent**
Central Revenue Bldg.
Plot no. 19, Sector 17/C,
Chandigarh

APPEARANCE:

Shri Tarun Sharma, CA for the appellant
Shri Rajeev Gupta, AR & Shri Amandeep Kumar,(AR) for the respondent

CORAM:HON'BLE MR. AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER No: 60135 / 2022

DATE OF HEARING: 04.05.2022
DATE OF DECISION: 01.09.2022

Per: AJAY SHARMA

This appeal has been filed impugning the order dated 06.01.2022 by which the learned Commissioner (Appeals) partly allowed the Appeal filed by the Appellant and held that the Appellant is entitled for interest on pre-deposit amount, if there is any delay in sanctioning refund beyond three months from the date of filing of the refund application dated 22.7.2020, whereas the appellant filed the appeal before the Learned Commissioner against the rejection of their plea by the Adjudicating Authority that they are entitled for interest from the date of pre-deposit.

2. The issue involved herein is whether the interest on any amount pre-deposited prior to 6.8.2014 continues to be covered by provisions of un-amended Section 35FF of Central Excise Act, 1944 or will it be governed by amended Section 35FF ibid entitling interest from the date of pre-deposit?

3. The facts of the case in brief are as follows. The appellant is engaged in manufacture and supply of non-alcoholic beverages and fruit pulp based products under the franchise agreement with Coca Cola Company (USA). Service tax was demanded from the appellants by way of two show cause notices dated 9.9.2010 and 23.10.2011 respectively totaling Rs.3,74,67,511/- for the period 1.4.2005 to 26.2.2010 and also for Financial Year 2010-11, which was confirmed by the Adjudicating Authority. When the appellants filed appeal before this Tribunal alongwith stay application, while hearing the stay application they were directed to deposit 50% of the service tax amount with proportionate interest vide order dated 19.9.2013 of the Tribunal in Appeal No. ST/716/2012. Aggrieved, the appellant filed appeal before the Hon'ble High Court of Punjab & Haryana at Chandigarh being CEA No. 97 of 2013 (O&M) and the Hon'ble High Court vide order dated 22.4.2014 disposed of the appeal and directed the appellant to deposit a sum of Rs.50 lacs as a condition precedent for hearing of the appeal. Accordingly the appellant made the pre-deposit of Rs.50 lakhs on 25.6.2014. Ultimately, the Tribunal vide final order No. 60321/2020, dated 19.2.2020; reported in *2020(3)TMI 9130-Cestat Chandigarh* decided the Service Tax Appeal No. 716/2012 in favour of the Appellant.

4. According to the appellant, still the department did not refund the amount of pre-deposit, therefore vide letter dated

22.7.2020, the appellant requested the department to refund the said amount of pre-deposit of Rs.50 lacs alongwith applicable interest from the date of pre-deposit. The Adjudicating Authority vide Order-in-Original dated 28.10.2020 sanctioned the refund of Rs.50 lacs but no interest was granted as it was observed in the order that in terms of Section 35FF of the Central Excise Act, 1944 the department has to give refund within 3 months from the date on which order is received by the department but since the order is not received in Central GST Commissionerate, Chandigarh as per Review Branch letter dated 7.8.2020 and the appellant themselves filed for refund on 22.7.2020 i.e. after a lapse of 5 months, therefore no interest is admissible. Thereafter the appellant filed appeal before the Commissioner (Appeals) and the learned Commissioner vide impugned order dated 6.1.2022 partly allowed the appeal and held that the appellant is entitled for payment of interest from the date of filing of refund i.e. 22.7.2020, if there is any delay in sanctioning the refund beyond the prescribed period of 3 months in terms of section 11BB ibid as made applicable to Service Tax.

5. Learned Chartered Accountant for the Appellants submit that the amount of Rs.50 lacs, which was pre-deposited on 25.6.2014, was refunded to the appellant only in the month of November, 2020, therefore they are entitled for interest on the aforesaid amount from the date of pre-deposit till its refunded. In support of his submission learned chartered accountant placed reliance on the decision of the Hon'ble Supreme Court in the matter of *Sandvik Asia Ltd. vs. CIT; 2006(196)ELT 257(SC)*. He also relied upon the decision of the Tribunal in the matter of *Riba Textile Ltd. vs. Commr.CE&ST, Panchkula; 2020(2)TMI 602 – Cestat Chandigarh* in the interest on delayed refund was allowed by the Tribunal from the date of deposit till its realization. He also submits that denial of interest by resorting to the provisions of Section 11 B ibid is illegal. Per contra learned Authorised Representative appearing for the Revenue submits

that as the pre-deposit was made on 25.6.2014 under erstwhile Section 35F ibid as per the directions of the Hon'ble High Court therefore any interest liability on the said amount has to the dealt with in accordance with the relevant statutory provisions of that period. According to learned Authorised Representative the decision of this Tribunal in the matter of *Riba Textile (supra)* is not applicable on the facts of this case as in that matter the deposit was made prior to 10.5.2008 i.e. prior to the insertion of section 35FF whereas in the instant matter the pre-deposit was made during the period when unamended section 35FF was in force. He further submits that the very same Bench of the Tribunal, which had passed order in *Riba Textile*, subsequently passed two orders in favour of Revenue on identical issue in the matter of *Saluja Motors Pvt. Ltd. vs. Commr. CE&ST, Chandigarh-I; Final Order No. 60414/2020, dated 3.12.2020* and also in the matter of *Modern Diaries Ltd. vs. CGST, Panchkula; Final Order No. 60413/2020, dated 3.12.2020*, in which it has been decided that the assessee therein is entitled to claim interest on refund of the amount of pre-deposit in terms of Section 35F ibid after three months from the date of communication of the order of the appellate authority till its realization. In both the aforesaid decisions, the pre-deposit was made in the month of May, 2013 i.e. during the period when the unamended section 35F was in operation. He also submits that the decision of the Hon'ble Supreme Court in the matter of *Sandvik Asia (supra)* is also not applicable on the facts of the present case. Accordingly learned Authorised Representative prayed for dismissal of appeal filed by the appellant.

6. I have heard learned Chartered Accountant for the appellant and learned Authorised Representative for the appellants and perused the case records including the written submissions and case laws filed by the respective sides. Section 35FF ibid deals with the issue of interest on delayed refunds. The said section was inserted in the Central Excise Act, 1944 on

10.5.2008 and remained as it is till 6.8.2014 and thereafter it was amended. Both the pre and post amended Section 35FF ibid are reproduced as under:-

10.5.2008 to 6.8.2014

Interest on delayed refund of amount deposited under the proviso to Section 35F.

"Section 35FF.

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."

Post- 6.8.2014, S. 35FF as substituted/amended :

"Interest delayed refund of amount deposited under Section 35F.

Section 35FF. Where an amount deposited by the appellant under section 35F is required to be refunded consequent upon the order of the appellate authority, there *shall be paid to the appellant interest* at such rate, not below five per cent and not exceeding thirty-six per cent per annum as is for the time being fixed by the Central Government, by notification in the Official Gazette,

> *on such amount from the date of payment of the amount* till the date of refund of such amount:
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> *Provided* that the amount deposited under section 35F, prior to the commencement of the Finance (No.2) Act, 2014, shall continue to be governed by the provisions of Section 35FF as it stood before the commencement of the said Act."

A perusal of the aforesaid provisions would make it clear that earlier i.e. upto 6.8.2014, the interest was liable to be paid only in the case of delay beyond three months in granting the refund from the date of communication of order passed by the Commissioner (Appeals) or the Tribunal, whereas post 6.8.2014, this has been changed and an interest has been made payable at a rate not below 5% and not exceeding 36% p.a. as is for the time being fixed by the Central Government by notification in the official gazette on such amount from the date of payment of amount till the date of refund of such amount. Proviso has also been added to it that any amount deposited under this section prior to the amendment, shall continue to be covered by the provisions of S.35FF as it stood before the amendment.

7. Admittedly, in the instant matter the amount was pre-deposited by the appellant on 25.6.2014 under Section 35F as per the direction of the Hon'ble High Court and during that period un-amended section 35FF*[which dealt with interest on delayed refund of amount deposited u/s.35F]* mandates the payment of interest only if there was a delay of refund beyond three months from the date of the order of the Tribunal. Interest from the date of payment of the amount till the date of refund of such amount has been made applicable only for post-6.8.2014 deposits when section 35FF was amended. Legislature was very careful while making the amendment and a proviso has been added to amended Section 35FF which specifically provides that

the amount deposited under section 35F, prior to the commencement of the Finance Act, 2014, shall continue to be governed by the provisions of Section 35FF as it stood before the commencement of the said Act. Meaning thereby that any amount deposited prior to 6.8.2014 shall be governed by erstwhile Sec.35FF.

8. I have also gone through the law laid down by the Hon'ble Supreme Court in the matter of *Sandvik Asia Ltd. (supra)* and find that in that matter the assessee's interest on refund amount had been *unjustifiably* withheld by the Income Tax Department for 17-18 years without any rhyme or reason and therefore the Hon'ble Supreme Court had taken the view that the appellant therein should be entitled for compensation for the unjustifiable withholding of interest on refund amount. In that matter the refund pertains to the assessment years 1977-78, 1978-79, 1981-82 and 1982-83 and the Hon'ble Supreme Court specifically observed that in view of express provisions of the Income Tax Act, an assessee is entitled to compensation by way of interest on the delay in the payment of amounts lawfully due to the appellant therein which were withheld wrongly and contrary to the law by the department for an inordinate long period upto 17 years. The aforesaid decision has later been clarified by the Hon'ble Three Judges' Bench of the Hon'ble Supreme Court in the matter of *CIT, Gujarat vs. Gujarat Fluoro Chemicals; 2017(51)STR 236 (SC)* relevant paragraphs of which are reproduced hereunder:-

> " *xxx xxx xxx*
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> *4. We would first throw light on the reasoning and the decision of this Court on the core issue in Sandvik case (supra). The only issue formulated by this Court for its consideration and decision was whether an assessee is entitled to be compensated by the Income Tax Department for the delay in paying interest on the refunded amount admittedly due to the assessee. This Court in the facts of the said case had noticed that there was delay of various*

periods, ranging from 12 to 17 years, in such payment by the Revenue. This Court had further referred to the several decisions which were brought to its notice and also referred to the relevant provisions of the Act which provide for refunds to be made by the Revenue when a superior forum directs refund of certain amounts to an assessee while disposing of an appeal, revision etc.

5. Since, there was an inordinate delay on the part of the Revenue in refunding the amount due to the assessee this Court had thought it fit that the assessee should be properly and adequately compensated and therefore in paragraph 51 of the judgment, the Court while compensating the assessee had directed the Revenue to pay a compensation by way of interest for two periods, namely; for the Assessment Years 1977-78, 1978-79, 1981-82, 1982-83 in a sum of Rs. 40,84,906/- and interest @ 9% from 31-3-1986 to 27-3-1998 and in default, to pay the penal interest @ 15% per annum for the aforesaid period.

6. In our considered view, the aforesaid judgment has been misquoted and misinterpreted by the assessees and also by the Revenue. They are of the view that in Sandvik case (supra) this Court had directed the Revenue to pay interest on the statutory interest in case of delay in the payment. In other words, the interpretation placed is that the Revenue is obliged to pay an interest on interest in the event of its failure to refund the interest payable within the statutory period.

7. As we have already noticed, in Sandvik case (supra) this Court was considering the issue whether an assessee who is made to wait for refund of interest for decades be compensated for the great prejudice caused to it due to the delay in its payment after the lapse of statutory period. In the facts of that case, this Court had come to the conclusion that there was an inordinate delay on the part of the Revenue in refunding certain amount which included the statutory interest and therefore, directed the Revenue to pay compensation for the same not an interest on interest.”

9. Admittedly in the instant matter the pre-deposit was made on 25.6.2014, which is prior to 6.8.2014 when section 35FF required an interest as specified in S.11BB to be paid for any amount of pre-deposit which has been refunded after a period of three months from the date of communication of order of

appellate authority till the date of refund of such amount. An identical issue came up for consideration before a co-ordinate Bench of the Tribunal in the matter of *Hindustan Agro Insecticides vs. CCT, Guntur; 2019(367)ELT 669 (Tri.-JHyd.)* wherein it has been held as under:-

> *"5. I have considered the arguments made in the appeal memorandum and the relevant legal provisions. The proviso to amend Section 35FF makes it clear that in respect of any amounts pre-deposited prior to 6-8-2014 will continue to be covered by the provisions of the unamended Section 35FF. The unamended provisions provided for payment of interest only if the pre-deposit was not refunded within three months from the date of communication of the order of the appellate authority. Therefore, no interest is payable to the appellant in this case. The impugned order is correct and calls for no interference. Accordingly, the appeal is rejected and the impugned order is upheld."*

10. In the light of the discussions made in the preceding paragraphs, I am of the considered opinion that in the instant matter the interest on refund has to be dealt with in accordance with the erstwhile section 35FF which clearly mandates the payment of interest only if there was a delay beyond three months. The statutory period prescribed therein is 3 months from the date of communication of the order of the Appellate Authority. While going through the case records I find that based on the Final Order dated 19.2.2020 of this Tribunal, the refund of Rs.50 lacs came to be sanctioned by the authority concerned vide Order-in-Original dated 28.10.2020 that too when the appellant sent letter dated 22.7.2020 to the department requesting refund of the amount of pre-deposit alongwith applicable interest from the date of pre-deposit. The department cannot take advantage of lethargy on their part. This is not proper to say that the order is not received in Central GST Commissionerate, Chandigarh. The statute uses the word '*communication of the order of appellate authority'* and that cannot be construed as '*receipt of the copy of the order'.* When any order is pronounced in Tribunal, Department is represented

through Departmental Representative/Authorised Representative and therefore communication of order to them deemed to have been communicated to the concerned authority which has to sanction refund. So in my view after the expiry of three months from the date of the final order dated 19.02.2020, the appellant is entitled for the interest on delayed refund till the date of refund of the aforesaid pre-deposit amount and to that extent only the impugned order is modified and the matter is remanded to the Adjudicating Authority for calculating the amount of interest on the above terms and to pay the same to the appellant within a period of *two months* from the date of this order.

10. The appeal filed by the appellant is accordingly partly allowed.

(Pronounced in open Court on 01.09.2022)

(Ajay Sharma)
Member (Judicial)

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