IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH, CHENNAI

Appeal No. C/40815 & 40816/2016

(Arising out of Order-in-Appeal C. Cus. II No.57 & 58/2016 dated 27.1.2016 passed by the Commissioner of Customs (Appeals – II), Chennai)

M/s. GMMCO Limited Appellant

Vs.

Commissioner of Customs, Chennai – IV Respondent

Appearance

Shri Hari Radhakrishnan, Advocate for the Appellant
Shri A. Cletus, Addl. Commissioner (AR) for the Respondent

CORAM

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of Hearing : 21.05.2018
Date of Pronouncement: 31.05.2018

Final Order Nos. **41670-41671 / 2018**

Per Bench

1. Brief facts are that the appellant M/s. GMMCO Ltd. is engaged in the business of sales and services of heavy earthmoving equipments, power transmission equipments, generator sets which are necessary for industrial and infrastructure projects.As the appellant was importing these spare parts from their related supplier, the transactions of the

appellant were referred to the Special Valuation Branch, Chennai vide circular No. 53/1986 dated 8.4.1986. Pending finalization of the investigation by the SVB, all the bills of entry of the appellant were provisionally assessed after collecting 20% Extra Duty Deposit (EDD). On completion of investigation, the Assistant Commissioner of Customs (SVB) passed an order on 4.9.1991, loading the value declared by the appellant as 8.3%.

1.1 Against the said order dated 4.9.1991, the appellant preferred an appeal before the Collector (Appeals), who vide order dated 6.1.1992 upheld the loading of 8.3% but restricted the same upto the period prior to introduction of the Customs Valuation Rules, 1988 and held that for the subsequent period, the transaction value has to be accepted.

1.2 Aggrieved by the order dated 6.1.1992 of the Collector (Appeals) both the appellant as well as the department filed appeals before the Tribunal. The Tribunal vide its final order dated 5.1.1994 rejected the appeal field by the appellant and allowed the appeal filed by the department.

1.3 Further appeal was preferred by the appellant before the Hon'ble Supreme court. The Hon'ble Supreme Court remanded the matter back to the Tribunal for fresh consideration in the light of additional evidences produced by the appellant before the Tribunal. Pursuant to such remand, the Tribunal vide its

Final Order dated 25.8.2000 allowed the appeal filed by the appellant and directed the department to finalize the assessment based on the transaction value.

1.4 The department filed civil appeal against the said order dated 25.8.2000 before the Hon'ble Supreme Court and vide order dated 11.4.2001, the Civil Appeal Nos. 2772 & 2773 of 2001 were dismissed.

1.5 The appellants then filed a refund claim on 11.12.2001 for an amount of Rs.1,14,44,338/- in respect of 238 bills of entry relating to years 1994 to 1998. The refund claim was rejected by the Deputy Commissioner of Customs (Refunds), vide orders dated 8.2.2002 on the ground that the refund claim is time-barred.

1.6 Aggrieved by the said orders of the said Deputy Commissioner dated 8.2.2002 on the ground that time bar is not applicable for provisional assessment and assessments having not been finalized in spite of Circular dated 16.7.2001, an appeal was filed before the Commissioner of Customs (Appeals) who vide Order-in-Appeal dated 11.11.2002, allowed the appeal and directed the Deputy Commissioner of Customs (Refunds) to process the refund claims of the appellant, after looking into the aspect of unjust enrichment. Since the assessments were not finalized and according to appellants, unjust enrichment has to be looked into only after finalization of assessment, they preferred an appeal to the Tribunal against the Order-in-Appeal dated 11.11.2002.

1.7 The Tribunal vide Final Order dated 21.9.2004 directed the original authority to finalize the provisional assessment and gave liberty to the appellant to file a refund claim thereafter, in terms of the limitation prescribed under Section 27 of the Customs Act, 1962.

1.8 The department preferred an appeal against such order before the Hon'ble High Court of Madras. The Hon'ble High Court vide order dated 6.11.2008 in CMA Nos. 3607 and 3608 of 2005 dismissed the appeal filed by the department holding that the doctrine of unjust enrichment will not be applicable to provisional assessments even after finalization. Against the High Court order dated 6.11.2008, the Sea Commissionerates filed a restoration petition before the Hon'ble High Court with a prayer to set aside the High Court order dated 6.11.2008 and to restore their appeals. The Hon'ble High Court refused to review its earlier order and dismissed the restoration petition filed by the Sea Commissionerate.

1.9 As the assessments were still not finalized, a request was made by the appellant to the Commissioner of Customs vide letter dated 18.12.2008 seeking refund of the amounts together with interest at applicable rates.

1.10 The department then filed SLP to the Hon'ble Supreme Court against the said order of the Hon'ble High Court dismissing the application for restoration. The Hon'ble Supreme Court vide order dated 4.2.2013 in SLP Nos. 3105 and 3106 dismissed the petition filed by the department.

1.11 Ultimately, the provisional assessments were finalized on 10.10.2015 nearly after 15 years after receiving a contempt notice from the Hon'ble High Court of Madras moved in the matter by the appellant vide contempt petition dated 5.6.2014. The refund for the principal amount was then sanctioned without any interest vide Order-in-Original No. 41918/2015 dated 12.10.2015. The appellant made claim for interest on 18.11.2015 on delayed sanction of the refunds. Further, the Order-in-Original No. 41918/2015 dated 12.10.2015 in respect of 238 Bills of Entry for the claim amount of Rs.1,14,44,338/- had sanctioned only Rs.98,73,350/- and rejected the claim for a sum of Rs.15,70,988/- on the ground that the Group has not finally assessed 27 Bills of entry. Appellants preferred appeal against such Order in Original before the Commissioner (Appeals).

1.12 The Commissioner of Customs (Appeals) vide his Order-in-Appeal No. C. Cus. II No. 57 dated 27.1.2016 which is impugned herein sanctioned the balance refund of Rs.15,70,998/- but rejected the request for payment of interest on the delayed refund. The present appeal is against the rejection of interest on delayed payment of refund.

2. On behalf of the appellant, ld. counsel Shri Hari Radhakrishnan submitted that the Commissioner (Appeals) has erred in taking a view that there is no delay in refund as the department has sanctioned the refund within three months from the date of finalization of assessment. The authority below had not taken into account the inordinate delay in finalizing the provisional assessment which has caused undue hardship and huge financial loss to the appellant.

2.1 The authorities below ought to have taken into account the mandate of the Tribunal in its final order dated 21.9.2004 directing the original authority to finalize the provisional assessment after giving liberty to the appellant to file refund claim thereafter in terms of the limitation prescribed under section 27 of the Customs Act,1962. It is clear from the facts of the case that the delay is wholly attributable to the department and that the appellant has been deprived of the legitimate amount only due to the delay caused on the side of the department in finalizing the assessment. The department had preferred petitions for restoration to High Court and appeal to the Hon'ble Supreme Court only to delay the matter. The provision contained in section 18(4) to pay interest if not refunded within three months 'from the date of assessment of duty finally' has to be read as 'the date on which the department ought to have finalized the provisional assessment', when there is inordinate delay on the part of the department to finalise the assessment.

2.2 Even though no particular time limit is prescribed in the statute for finalizing the assessment, the Board vide its Circular No. 382/15/98-CX dated 19.3.1998 has given instructions that all provisional assessment must be finalized within a period of six months from the date of assessment of the order of the provisional assessment. In case it is not finalized within such six months, extension of another six months can be granted by the Commissioner. The department has flouted the Board circular. Even after the mandate of the Tribunal to finalize the assessment within four months, the department has not done so. The time limit as per this circular was also not complied. There has been, thus, deliberate and uncalled delay on the part of the department by taking more than 15 years to finalize the assessment. It is also submitted by him that the department had finalized the assessment only when the appellant had approached the Hon'ble High Court by filing a contempt petition. This proves that the department was deliberately delaying the matter of fianlising the assessment.

2.3 He relied upon the decision in the case of Sandvik Asia Ltd. Vs. Commissioner of Income Tax, Pune – 2006 (196) ELT

257 (SC) and argued that in the said case, the Hon'ble Apex Court had analyzed the issue whether assessee was entitled to claim interest for the delay in sanctioning the refund claim. The Apex Court held that tax can only be collected in accordance with law and in case of collection of excess tax or withholding any amount from the assessee without authority of law, the Revenue must compensate the assessee. Thus, the assessee in the said case was awarded interest, on the interest which was wrongfully withheld by the Department. The case of Areva T&D India Ltd. Vs. Commissioner of Customs, Chennai – 2013 (290) ELT 496 (Mad.) was relied upon by the ld. counsel to argue that the decision in Sandvik Asia Ltd. (supra) was relied upon by the jurisdictional High Court to grant interest in a case where there was delayed payment of refund. Similar view was taken in the case of LSE Securities Ltd. – 2015 (320) ELT 350 (P&H), wherein interest was awarded for the delay caused by the department in refunding the amount deposited by assessee during investigation process after holding that such deposit is a predeposit. He argued that the department has taken its own sweet time by sleeping over the applications for refund filed by the appellant and not finalizing the assessment. The appellant is put to bear the consequences by denying the legitimate interest on the delayed sanction of refund of excess duty deposit. He therefore prayed that applying the decision in the

case of Sandvik Asia Ltd. (supra), the appellant is entitled to be compensated consequent to the delay in finalization of the assessment.

3. The ld. AR Shri A. Cletus supported the findings in the impugned order. He adverted to sub-section (4) of Section 18 of the Customs Act, 1962 and submitted that the department is liable to pay interest only when the refund has not been granted within three months from the date of finalization of the assessment. In the present case, the assessment has been finalized on 10.10.2015 and the refund claims were sanctioned on 12.10.2015 taking the refund claims filed on 11.12.2001 as a claim in terms of Explanation (ii) to Section 27(1) of Customs Act, 1962. Part of the refund claim was allowed vide 9.10.2015 and 12.10.2015. The ld. AR submitted that the issue was under litigation from 1991 onwards and in 1994 the order passed by the Tribunal was in favour of the department. Only when the matter reached the Hon'ble Supreme Court and the same was remanded to the Tribunal for fresh consideration vide Final Order dated 25.8.2000, the Tribunal held the issue in favour of the assessee and directed the department to finalize the assessment. The department then filed Civil Appeal against such Final Order of Tribunal before the Apex Court and later petitions for restoration were preferred before the High Court also. That there was no stay granted by any of the higher

Courts. Since the matter was under litigation, the appellant cannot contend that the department has slept over the finalization of assessment and has thus delayed the refund. He relied upon the decision in the case of Commissioner of Income Tax, Gujarat Vs. Gujarat Fluoro Chemicals – 2013 (296) ELT 433 (SC). The decision of the Apex Court in the case Sandvik Asia Ltd. (supra) was considered by the Apex Court in this case and has clarified that in Sandvik Asia Ltd., the Court was considering the issue whether the assessee who is made to wait for refund of interest for decades be compensated for the delay after the lapse of statutory period to pay the interest. He submitted that the Court in Sandvik Asia Ltd. case was considering the delay caused in granting the statutory interest and therefore directed the Revenue to pay compensation for the same which was not in the nature of interest on interest. Whereas in the present case, as per sub-section (4) of Section 18, since the refund has been granted within three months of finalization of assessment, as per law, the appellant is not entitled to any interest. Therefore, there is no question of granting compensation for the same. The delay if any, in finalization of assessment was only because the matter was being litigated before various forums. He relied upon the decision in the case of Commissioner of Customs Vs. VBC Industries Ltd. – 2011 (270) ELT 314 (Mad.) and argued that in this case also the decision in the case of Sandvik Asia Ltd. (supra) was considered. The decision of the Tribunal in the case of Hindustan Photo Films Mgf. Co. Ltd. Vs. Commissioner of Central Excise, Salem vide Final Order No. 42039/2017 was relied by the ld. AR to contend that the Tribunal after taking note of the decision in the case of Sandvik Asia Ltd. (supra), as well as Gujarat Fluoro Chemicals (supra), has held that no amount can be paid to the appellant which is not provided in the statute.

4. Heard both sides.

5. The main contention of the appellant is that there has been inordinate delay in finalizing the assessment and granting refund which resulted in withholding of legitimate amount causing monetary loss and hardships to the appellant which has to be compensated by way of paying interest on the sanctioned refund. It is argued by the ld. counsel that when there was a clear direction by the Tribunal vide its Final Order No.677 to 688/2000 dated 25.8.2000 directing the department to finalize the assessment within the time frame of four months, the department had to comply with the same. Taking the said date of four months as the time by which department ought to have finalized the assessment, the appellant has to be granted interest upon the sanctioned refund amount. For

better appreciation, the direction of the Tribunal in the said Final Order reads as under:-

> *"11. In view of what has been stated above, we dismiss the appeal filed by the Revenue and allow the appeal of the importer, namely GMMCO. We direct the authorities to finalize the assessment on the basis of the transaction value shown in the invoices as the value of the goods worth within the purview of Section 14 of the Customs Act. Since the matter is a long pending one, we direct the adjudicating authority to pass final order as expeditiously as possible, at any rate, within four months from the date of receipt of a copy of this order. M/s. GMMCO will be entitled to consequential relief".*

The department filed appeal before Supreme Court against this order which was dismissed. Later, the Deputy Commissioner (SVB) has issued Circular directing to finalize the assessment on the basis of order passed by Supreme Court and CEGAT which reads as under:-

> *"Since Supreme Court has dismissed appeal, we have to implement the CEGAT Order No. 677 – 688/2000 dated 25.8.2000".*
>
> *All pending case may be finalized based on the Hon'ble Supreme Court order and CEGAT".*

6. The appellant filed two refund claims on 11.12.2001 which were rejected on 8.2.2002/13.2.2002. The matter reached Tribunal and vide order dated 21.9.2004, the Tribunal directed to finalize the assessment. The relevant portion is reproduced as under:-

> *"14. In the result, it is ordered as follows:-*
>
> *(a) All the 238 Bills of Entry filed between March 1994 and February 1998 in respect of the goods imported by the appellants from Caterpillars through Chennai Seaport shall*

> *be finally assessed by the original authority in accordance with law and the principles of natural justice, whereupon it will be open to the appellants to file a claim for refund within the period of limitation prescribed under Section 27 of the Customs Act.*
>
> *(b) <u>As directed by the Commissioner (Appeals), the original authority shall finalize the provisional assessments in respect of the 438 Bills of Entry for the period 1987 – 88 to 1991 – 92 in accordance with law and the principles of natural justice, whereupon it will be open to the assessee to file refund claim within the period of limitation prescribed under Section 27 of the Act</u>."*
>
> *(Emphasis supplied)*

It may be correct that there was repeated direction from the Tribunal to finalize the assessment without loading 20% of invoiced value. The fact remained that the assessment was not finalized. It was only on 10.10.2015, as submitted by the ld. counsel, that the assessments got finalized. The refund was granted within three months of the assessment. Thus according to department, the refund having been granted within the time prescribed as under sub-section (4) of Section 18, there is no liability to pay interest. The ld. counsel for appellant has strenuously argued that since there is deliberate delay to finalize the assessment, the relevant date to reckon the date of finalization should not be taken as 10.10.2015 but the date on which the department 'ought to have' finalized the assessment i.e. within four months from the date of Tribunal order dated 25.8.2000.

7. Though this argument of the ld. counsel may appear to be attractive on the first blush, it is to be stated that it is

settled principle in law, that the Court cannot read anything into a statutory provision which is plain and unambiguous. The language used in the statute speaks of the legislative intent. The Court has to look into what has been said. In para 19 of Union of India Vs. Dharmendra Textiles Ltd. – 2003 (231) ELT 3 (SC), the Hon'ble Apex Court observed as follows:-

> *"19. It is then true that :*
>
> *"When the words of a law extend not to an inconvenience rarely happening, but due to those which often happen, it is good reason not to strain the words further than they reach, by saying it is casus omissus, and that the law intended quae frequentius accidunt."*
>
> *"But", on the other hand,*
>
> *"it is no reason, when the words of a law do enough extend to an inconvenience seldom happening, that they should not extend to it as well as if it happened more frequently, because it happens but seldom". (See Fenton v. Hampton (1858) 11 MOO PC 347)."*

8. Moreover, the department had filed a statutory appeal before the Hon'ble Supreme Court against the said Tribunal order dated 25.8.2000. The Hon'ble Supreme Court thereafter has dismissed the said appeal on 11.4.2001 after which the department has filed petitions before the High Court. Thus, till the date of finalization of assessment, the matter was under litigation. Whether such litigation was fruitful is not the concern of this Tribunal. On facts, it is brought out that the refund has been sanctioned within three months from the date of finalization of provisional assessment. Section 18(4) provides to pay interest only when the refund is delayed beyond three

months after finalization of assessment. The relevant provision contained in section 18(4) is reproduced as under:-

> *"18. **Provisional assessment of duty***
>
> *(4) Subject to sub-section (5), if any refundable amount referred to in clause (a) of sub-section (2) is not refunded under that sub-section within three months from the date of assessment of duty finally [or re-assessment of duty, as the case may be], there shall be paid an interest on such unrefunded amount at such rate fixed by the Central Government under section 27A till the date of refund of such amount."*

The said provision does not require to pay interest when refund has been sanctioned within a period of three months from the date of finalization. It may be correct that the Board vide its Circular dated 19.3.1998 has prescribed time limit of six months for finalization of assessment. The matter was under litigation before various forums. After filing the contempt petition by the appellant, the department has finalized the assessment on 10.10.2015.

9. An interdepartmental circular dated 16.7.2001 has been much stressed by the ld. counsel for appellant. The Deputy Commissioner of Customs (SVB) has issued circular dated 16.7.2001 directing to implement the final order of Tribunal dated 25.8.2000. However, the refund claims filed by the appellant on 11.12.2001 was rejected against which another round of litigation was set into motion which travelled upto the High Court. Thus for the entire period till the finalization of assessment, there were litigations pending before various

forums and after the finalization of assessment, refund has been sanctioned within a period of three months. When the statute does not provide to pay interest, the Tribunal which is a creature of the statute cannot grant any amount in the nature of compensation. The Tribunal in a similar issue in the case of Hindustan Photo Films Mgf. Co. Ltd. cited supra, considered the decisions of the Hon'ble Apex Court in Sandvik Asia Ltd. (supra) as well as Gujarat Fluoro Chemicals (supra) and held that Tribunal cannot grant compensation not provided in the statute. The relevant portion of the order passed by Tribunal is reproduced as under:-

> *"6. The question now in the present appeal is the eligibility of the appellant for payment of interest on delayed payment of interest on the refund sanctioned to them. The appellant claimed such payment on the ground of long delay even in disbursing the interest. Though the ld. consultant insisted that it can be considered as a compensation for the financial loss and not strictly as interest on interest, we note that the appellant did not quote any statutory provision under the Customs Act, 1962 to support their claim. Any claim of amount from the Government can be disbursed only based on a statutory provision. The Tribunal cannot pass an order for general compensation in the facts of the present case. We note that in Gujarat Fluoro Chemicals (supra), the Hon'ble Supreme Court, examining similar provisions under the Income Tax, held that the payment ordered in Sandvik case (supra) cannot be considered as interest on interest and it was ordered in special circumstances as a compensation for unduly long delay in sanctioning the refund / interest. It is clear that interest as indicated under the Customs Act, 1962 only can be paid to the appellant and no other amount which is not covered by the statutory provision can be paid and on this ground, the impugned order cannot be interfered with. Accordingly, the appeal is dismissed."*

10. Thus, following the above, we are of the considered opinion that the claim of the appellant for interest on delayed refund cannot sustain. The impugned order is upheld and the appeal filed by the appellant is dismissed.

(Pronounced in open court on 31.05.2018)

(**Madhu Mohan Damodhar**)
Member (Technical)

(**Sulekha Beevi C.S.**)
Member (Judicial)

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