

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.**

PRINCIPAL BENCH - COURT NO. II

Excise Appeal No. 50479 of 2019 (SM)

(Arising out of order-in-appeal No. 1282(CRM)CE/JDR/2018 dated 19.11.2018 passed by the Commissioner (Appeals), Central Excise & Central Goods & Service Tax, Jodhpur).

M/s J. K. Cement Works

(Unit: J.K. Cement Ltd.,)
Kailash Nagar, Nimbahera
Distt – Chittorgarh (Rajasthan).

Appellant

VERSUS

**Commissioner, Central Excise, Central
Goods and Service Tax,**

142-B, Hiran Magri, Sector No. 11
Udaipur (Rajasthan).

Respondent

APPEARANCE:

Shri Bipin Garg, Advocate for the appellant

Shri Pradeep Gupta, Authorised Representative for the respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO.51052/2021

DATE OF HEARING: 15.02.2021

DATE OF DECISION: 02.03.2021

ANIL CHOUDHARY:

The appellant has filed the present appeal against the order-in-appeal dated 19.11.2018 passed by the Commissioner (Appeals), Central Excise & Central Goods & Service Tax, Jodhpur, denying interest on delayed refund i.e. from the date of deposit till the refund of the pre-deposit of principal amount. The details are as follows:-

Table

Amount (Rs.)	SCN date	O-I-O date	Tribunal F.O. date	H.C.
1,71,94,490/- On 31.03.06 (under protest)	29.03.06 reply filed contested.	30.11.06 Confirms	16.04.2007 confirms	25.01.2018 Allowed. Demand set aside.

2. Thereafter, the appellant preferred application for refund and also prayed for grant of interest. The Adjudicating Authority vide Order-in-Appeal dated 2nd July, 2018 was pleased to grant refund of the principal amount. However, as regards the interest claim, the order is non-speaking.

3. Being aggrieved, the appellant preferred appeal before the Commissioner (Appeals), who was pleased to reject the appeal denying the claim of interest observing as follows:-

“I find that in the present case in the Order-in-Appeal the issue of admissibility of credit on freight paid to GTA has attained finality only after the order of High Court dated 25.01.2018. The appellant in consequence to the said order has claimed refund vide letter dated 16.04.2018 and the same was sanctioned on 20.07.2018 i.e. within 3 months from the date of application”.

Thus, it was held that the refund has been granted within 3 months from the date of application and accordingly, the appellant is not entitled to interest on the same under Section 11 BB of the Act. Being aggrieved, the appellant is before this Tribunal.

4. Shri Bipin Garg, Ld. Counsel for the appellant urges that from the aforementioned facts, it is evident that the appellant had reversed the cenvat credit on 31.03.2006 under protest and had contested the

show cause notice. The matter was finally settled in favour of the appellant by order of the Hon'ble Rajasthan High Court dated 25.01.2018.

5. It is further urged that under Section 35F of the Central Excise Act, an assessee was required to deposit 100% of the tax in dispute as a condition for filing and /or entertainment of the appeal. Thus, the amount paid under protest on 31.03.2006 *ipso facto* became pre-deposit under Section 35F on filing of the appeal. It is further urged that in view of the provisions of Section 11B read with Section 11BB read with Section 35F and Section 35FF, the appellant is entitled to get interest from the date, on which the amount was deposited / credit reversed, till the date of grant of refund. As the appellant has been successful vide final order of the Hon'ble High Court dated 25.01.2018, the said amount was never payable. Further, under the amended and substituted Section 35 FF (w.e.f. 6.8.2018), the appellant /assessee is entitled to interest on such amount at notified rate from the date of payment of amount till the date of refund of such amount.

6. Learned Counsel for the appellant submits that the scheme of Central Excise Act and its Rules has always been that wherever any demand of duty has not been paid by any assessee at the appropriate rate and date, the same attracts charging of interest on such amount from such date. Such principle needs to be followed even in such cases where any amount has been retained and utilised by the Revenue till the date of reimbursement of such amount to the assessee. In such cases, the assessee needs to be compensated by

way of interest, towards the financial loss suffered by the assessee, due to action of the Revenue. To support his contention, he relied on the decision of the Hon'ble Apex Court in the case of **Sandvik Asia Limited -2006 (196) ELT 257 (SC)**.

7. He further submits that although the decision of the Hon'ble Apex Court is in the context of Income Tax Act, but the provisions for granting the interest are identical to the provisions of Central Excise, and in terms of Article 141 of the Constitution of India, the judgement given by the Hon'ble Supreme Court is the law of land and is binding on all lower Courts or Authorities. Therefore, in the light of the decision of the Hon'ble Supreme Court in the case of **Sandvik Asia Limited** (supra), the appellant is entitled to claim compensation by way of interest from the date of deposit of the amount, till its realisation.

8. He also relied on the decision of Hon'ble Allahabad High Court in the case of **Hello Mineral Water (P) Limited vs. Union of India - 2004 (174) ELT 422 (All.)** and **Hindustan Coca-Cola Beverages Pvt. Ltd. vs. Union of India -2015 (324) ELT 299 (Guj.)**. He also relied on the decision of Hon'ble Madras High Court in the case of **M/s Areva T&D India Limited vs. CC, Chennai -2013 (290) ELT 496 (Mad.)**. Therefore, he prayed that the interest for the intervening period be granted to the appellant.

9. Ld. Authorised Representative, Shri Pradeep Gupta for the respondent, opposes the prayer for grant of interest and submits that reliance placed on the ruling of Apex Court in the case of **Sandvik**

Asia Limited (supra) is misplaced as in that case there was delay for a period ranging from twelve to seventeen years, whereas in the present cases, the refund have been granted within a period of three months from the date of application, pursuant to Final order of the High Court. Hence, no interest is payable. Further, in the case of **Sandvik Asia Limited** (supra), relates to refund of advance tax paid by the assessee, and refund arose pursuant to passing of the assessment order. In the facts of this case, the refund arisen pursuant to passing of the final order by High Court. It is further urged that in view of the specific provision, grant of interest under Section 35FF of the Act is applicable, as it existed prior to 06.08.2014 under which refund on pre-deposit is allowable on delay in granting refund beyond three months from the date of communication of the order, and thus no refund is allowable in the facts and circumstances of this case. Reliance is placed by the learned AR on ruling of the Apex Court in the case of **CCE, Hyderabad vs. ITC Ltd., -2005 (179) ELT 15 (SC)**.

10. Reliance is also placed on two Single Member Bench's rulings of Chandigarh Bench of this Tribunal as follows:-

- (i) **Saluja Motors (P) Ltd. – Tribunal –CHD- SM**
Final Order No.60414/2020 dated 3.12.2020.
- (ii) **Modern Dairies – Tribunal – CHD – SM dated 3.12.2020.**

11. Opposing the reliance placed by the Id. Authorised Representative on the aforementioned rulings, the Id. Counsel for the appellant submits that ruling of the Hon'ble Supreme Court in the case of **Sandvik Asia Ltd. (supra)** will prevail being subsequent to the

ruling of the Apex Court in the case of **CCE, Hyderabad Vs. ITC Ltd. – 2005 (179) ELT 15 (SC)**. He further places reliance on the ruling of this Bench in **M/s. Hitesh Industries and Ors. Vs. Commissioner of CGST**, being Final Order No.51631-51633 /2020 dated 07.12.2021, wherein under similar facts and circumstances, this Tribunal following the ruling of the Apex Court in the case of **Sandvik Asia Ltd. (supra)** as well as the Single Member Bench's ruling of this Tribunal in the case of **Fujikawa Power & another Vs. CCE & ST, Chandigarh – 2019 (11) ELT TMI 1197**, has been pleased to hold that the interest is payable to the assessee.

12. Having considered the rival contentions, I find that admittedly, the amount under dispute was reversed on 31.03.2006 under protest and the same became pre-deposit within the meaning of Section 35 F *ipso facto*, by operation of law. Further, I find that in the preceding order of this Bench as held in the case of **Hitesh Industries Ltd. (supra)** relying on the ruling of the Apex Court in **Sandvik Asia Ltd. (supra)**, that interest is payable to the assessee. The finding in the case of **Hitesh Industries (supra)** is reproduced here for ready reference:-

"11. The contention of the Ld.AR is that in terms of Section 35FF of the Central Excise Act, 1944, the interest on delayed refund is to be paid after 3 months from the date of communication of the order. When specific statute has been made, therefore, the decision in the case of Sandvik Asia Limited (supra) is not applicable to the facts of this case on the ground that the said decision has been delivered by the Hon'ble Apex Court in the context of Income Tax Act whereas we are dealing with Central Excise Act provisions. I find that whether the provisions of Income Tax Act and the provisions of Central Excise Act are pari materia or not. The same has been examined by this Tribunal

in the case of Donar Foods reported in 2017 (346) ELT 612(Tri.-Chan.) wherein this Tribunal observed as under:-

"27. We have seen both decisions referred before us. The decision in the case of M/s. Cynamid India Ltd. (SC) is with regard to the Income Tax Act and as per Section 2(29BA) of the Income-tax Act, 1961 the term "manufacture" with its grammatical variation means a change in non-living physical object or article –

(a) resulting in transformation of object or article or things into a new and distinct object or article or having a distinct name, character and use; or

(b) bringing into existence of a new distinct object or article or thing with different chemical composition or integral structure.

28. On going through the above definition of the manufacture, the test laid down by the Apex Court in the case of Delhi Cloth and General Mills Co. Ltd. (supra) support the definition that a new and different article must emerge having a distinct name, character and use. Therefore, the definition of manufacture as Section 2(f) of the Central Excise Act, 1944 is pari materia to definition of manufacture in Income-tax Act as per Section 2(29BA) of the Income-tax Act, 1961."

13. The Hon'ble Apex Court has held in **Dunar Foods** that conversion of paddy into rice is not a distinct operation and the rice and husk remain in their natural form as a result of dehusking and are covered by the term "agricultural product".

"31. Therefore, we hold that the test of manufacture has been failed as the goods are not manufactured goods as per Section 2(f) of Central Excise Act, accordingly, the question of excisability does not arise. Therefore, the Issue No. 1 is answered in favour of the appellants."

14. Therefore, I find no force in the arguments advanced by the Ld.AR that the decision of Income Tax Act is not applicable to the Central Excise Act whereas the provisions of both Acts are *pari materia*. Therefore, the argument advanced by the Ld.AR is turned down and not acceptable.

15. I have gone through the case laws relied upon by the Ld.AR. In the case of ITC Ltd.(supra), the decision of Hon'ble Apex Court has been delivered on 02.12.2004 whereas the decision in the case of **Sandvik Asia** Limited (supra) delivered on 27.1.2006. Therefore, the latest decision of the Hon'ble Apex Court is having persuasive value. In all the other cases, (referred to by Ld. AR) have not considered the decision in the case of **Sandvik Asia** Limited (supra).

16. I have gone through the decision in the case of Sandvik Asia Limited (supra), wherein the section 243 dealt with situation of interest on delayed refund.

17. For better appreciation, section 243 of the Income Tax Act, 1961 reproduced as under:-

"243. Interest on delayed refunds- (1) if the Income tax officer does not grant refund-

(a) In any case where the total income of the assessee does not consist solely of income from interest on securities or dividend, within three months from the end of the month in which the total income is determined under this Act, and

(b) In any other case, within three months from the end of the month in which the claim for refund is made under this Chapter,

the Central Government shall pay the assessee simple interest at (twelve) per cent per annum on the amount directed to be refunded from the date immediately following the expiry of the period of three months aforesaid to the date of the order granting the refund.

Explanation: If the delay in granting the refund within the period of three months aforesaid is attributable to the assessee, whether wholly or in part, the period of the delay attributable to him shall be excluded from the period for which interest is payable."

18. Section 35FF of the Central Excise Act, 1944 deals with the situation in hand, the same is extracted below:-

"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."

19. On-going through the provisions of both Income Tax Act, 1961 and Central Excise Act, 1944, the interest on delayed refund is payable after expiry of 3 months from the date of granting refund or from the date of communication of order of the appellate authority, which are *pari-materia*. Therefore, the decision of Hon'ble Apex Court in the case of **Sandvik Asia Ltd.** (supra) is law of land, in terms of Article 141 of the Constitution of India which is to be followed by me, wherein the Hon'ble Apex has observed as under:-

"45. The facts and the law referred to in paragraph (supra) would clearly go to show that the appellant was undisputably entitled to interest under Sections 214 and 244 of the Act as held by the various High Courts and also of this Court. In the instant case, the appellant's money had been unjustifiably withheld by the Department for 17 years without any rhyme or reason. The interest was paid only at the instance and the intervention of this Court in Civil Appeal No. 1887 of 1992 dated 30.04.1997. Interest on delayed payment of refund was not paid to the appellant on 27.03.1981 and 30.04.1986 due to the erroneous view that had been taken by the officials of the respondents. Interest on refund was granted to the appellant after a substantial lapse of time and hence it should be entitled to compensation for this period of delay. The High Court has failed to appreciate that while charging interest from the assesses, the Department first adjusts the amount paid towards interest so that the principle amount of tax payable remain

outstanding and they are entitled to charge interest till the entire outstanding is paid. But when it comes to granting of interest on refund of taxes, the refunds are first adjusted towards the taxes and then the balance towards interest. Hence as per the stand that the Department takes they are liable to pay interest only upto the date of refund of tax while they take the benefit of assesses funds by delaying the payment of interest on refunds without incurring any further liability to pay interest. This stand taken by the respondents is discriminatory in nature and thereby causing great prejudice to the lakhs and lakhs of assesses. Very large number of assesses are adversely affected inasmuch as the Income Tax Department can now simply refuse to pay to the assesses amounts of interest lawfully and admittedly due to them as has happened in the instant case. It is a case of the appellant as set out above in the instant case for the assessment year 1978-79, it has been deprived of an amount of Rs.40 lakhs for no fault of its own and exclusively because of the admittedly unlawful actions of the Income Tax Department for periods ranging up to 17 years without any compensation whatsoever from the Department. Such actions and consequences, in our opinion, seriously affected the administration of justice and the rule of law.

COMPENSATION:

46. The word 'Compensation' has been defined in *P. Ramanatha Aiyar's Advanced Law Lexicon 3rd Edition 2005* page 918 as follows:

"An act which a Court orders to be done, or money which a Court orders to be paid, by a person whose acts or omissions have caused loss or injury to another in order that thereby the person damnified may receive equal value for his loss, or be made whole in respect of his injury; the consideration or price of a privilege purchased; something given or obtained as an equivalent; the rendering of an equivalent in value or amount; an equivalent given for property taken or for an injury done to another; the giving back an equivalent in either money which is but the measure of value, or in actual value otherwise conferred; a recompense in value; a recompense given for a thing received recompense for the whole injury suffered; remuneration or satisfaction for injury or damage of every description; remuneration for loss of time, necessary expenditures, and for permanent disability if such be the result; remuneration for the injury directly and proximately caused by a breach of contract or duty; remuneration or wages given to an employee or officer."

47. There cannot be any doubt that the award of interest on the refunded amount is as per the statute provisions of law as it then stood and on the peculiar facts and circumstances of each

case. When a specific provision has been made under the statute, such provision has to govern the field. Therefore, the Court has to take all relevant factors into consideration while awarding the rate of interest on the compensation.

48. This is the fit and proper case in which action should be initiated against all the officers concerned who were all in charge of this case at the appropriate and relevant point of time and because of whose inaction the appellant was made to suffer both financially and mentally, even though the amount was liable to be refunded in the year 1986 and even prior to. A copy of this judgment will be forwarded to the Hon'ble Minister for Finance for his perusal and further appropriate action against the erring officials on whose lethargic and adamant attitude the Department has to suffer financially.

49. By allowing this appeal, the Income-tax Department would have to pay a huge sum of money by way of compensation at the rate specified in the Act, varying from 12% to 15% which would be on the high side. Though, we hold that the Department is solely responsible for the delayed payment, we feel that the interest of justice would be amply met if we order payment of simple interest @ 9% p.a. from the date it became payable till the date it is actually paid. Even though the appellant is entitled to interest prior to 31.03.1986, learned counsel for the appellant fairly restricted his claim towards interest from 31.03.1986 to 27.03.1998 on which date a sum of Rs.40,84,906/- was refunded.

50. The assessment years in question in the four appeals are the assessment years 1977-78, 1978-79, 1981-82 and 1982-83. Already the matter was pending for more than two decades. We, therefore, direct the respondents herein to pay the interest on Rs.40,84,906 (rounded to Rs.40,84,900) simple interest @ 9% p.a. from 31.03.1986 to 27.03.1998 within one month from today failing which the Department shall pay the penal interest @ 15% p.a. for the above said period."

20. As the Hon'ble Apex Court has answered the issue holding that the assessee is entitled to claim interest from the date of payment of initial amount till the date of its refund. Therefore, I hold that the appellants are entitled to claim the interest on delayed refund from the date of deposit till its realization.

21. Further, the interest on the refund shall be payable @ 12% per annum as held by Hon'ble Kerala High Court in the case of **Sony Pictures Networks India Pvt.Ltd.-2017 (353) ELT 179 (Ker.)** wherein it has held as under:-

"14. Now, the sole question remains to be considered is what is the nature of interest that the petitioner is entitled to get. As discussed above in the judgment Commissioner of Central Excise v. ITC (supra), the Apex Court confined the interest to 12% and further held that any judgment/decision of any High Court taking contrary view, will be no longer good law. The said judgment is rendered, in my considered opinion under similar circumstances. So also in Kuil Fire Works Industries v. Collector of Central of Excise [1997 (95) E.L.T. 3 (S.C.), the pre-deposit made by the assessee was directed to be returned to him with 12% interest. I have also come across the judgment of the Calcutta High Court in Madura Coats Pvt. Ltd. v. Commissioner of C. Ex., Kolkata-IV [2012 (285) E.L.T. 188 (Cal.), wherein the peremptory directions of the Apex Court in the judgment of ITC Ltd. (supra) was considered and ordered 12% interest, and further held that when the High Court directed the respondents to pay interest to the appellant in terms of the circular dated 8-12-2004 on the pre-deposit of the delayed refund within two months, it has to be construed that, the Court meant the rate of interest which was awarded by the Supreme Court in the case of Commissioner of Central Excise v. ITC Ltd., which was the rate quantified by the Supreme Court in the absence of any statutory provisions in the Act in question. Even though various other judgments of various High Courts and the various Tribunals was brought to my notice awarding 15% interest, in view of the directions contained in the judgment of the Apex Court in Commissioner of Central Excise v. ITC Ltd. (supra) rate of interest is to be confined to 12%. I am also bound to follow the same. Therefore the interest that is liable to be paid by the respondents as per the directions of this Court in Ext. P12 judgment is fixed at 12% per annum.

15. Taking note of the compendious circumstances and reckoning the law, there will be a direction to the respondents to pay interest to the petitioner at 12% from the date of expiry of three months from 18-11-2002, to the amount of refund already made, within a month from the date of receipt of a copy of this judgment, after adjusting any interest paid."

22. Further, the same view was taken in the case Ghaziabad Ship Breakers Pvt.Ltd.-2010 (260) ELT 274 (Tri. Ahmd.), wherein this Tribunal observed as under:-

"5. I have considered the submissions made by both the sides. I notice that appellants deposited amount in September, October and in November 2004, as per the directions of the department. In September 2004, the Hon'ble Gujarat High Court had dismissed the SCA filed by the appellants against the order of the Tribunal rejecting the appeal for failure to make the pre-deposit. This SCA was dismissed in September 2004 and SLP was filed in the Hon'ble Supreme Court in October 2004. In July 2005, the Hon'ble Supreme Court ordered that if the amount directed to be deposited by the Tribunal is deposited, the appeals before the Tribunal has to be restored and decided on merits. In these circumstances, the amount deposited by the appellant is to be treated as pre-deposit since the matter had not attained finality during the relevant period. Therefore, refund is to be treated as refund of pre-deposit made when the appeal was pending. There is no dispute that the amounts deposited is duty but this is not the issue which has been taken into account while precedent decisions have allowed the interest at 12% on the refunds claimed in respect of pre deposit. I find that in the decisions cited by the learned advocate, interest at 12% has been allowed. Therefore, following the judicial discipline, I consider it appropriate that interest in this case also is to be allowed @ 12%. Accordingly, original adjudicating authority is directed to workout the differential interest amount and make the payment to the appellants."

23. As the provisions of section 243 Income Tax Act, 1961 and section 35FF of Central Excise Act, 1944, are *pari-materia*. Therefore, following the decision of Hon'ble Apex Court in the case of **Sandvik Asia Ltd.** (supra) and Sony Pictures Networks India Pvt. Ltd. (supra) I hold that the appellants are entitled to claim interest from the date of payment of initial amount till the date its refund @ 12% per annum."

23. Following the findings of my precedent order in the case of **Hitesh Industries and Ors. (supra)**, I allow this appeal and set aside the impugned order so far the interest claim has been

disallowed. The Adjudicating Authority is directed to grant interest from the date of deposit (31.03.2006) till the date of grant of refund @12% p.a. Such interest on refund should be granted within a period of 60 days from the date of receipt of, or service of a copy of this order.

(Pronounced on 02.03.2021).

(Anil Choudhary)
Member (Judicial)

Ckp.