

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH COURT NO.IV

Service Tax Appeal No. 51793 of 2021 [SM]

[Arising out of Order-in-Appeal No. Comm. (A)CGST/2020/38 dated 31.03.2021 passed by the Commissioner, Appeal-II, Central Tax, Delhi]

M/s. Elegant Developers

B-4, K.H. No.1152/1154, Asola Farms,
Mehrauli, New Delhi

...Appellant

VERSUS

**The Commissioner, Central Excise &
CGST, Delhi-South**

2nd floor, EIL Annexe Building,
Bhikaji Cama Place, New Delhi-110066

...Respondent

APPEARANCE:

Mr. Ayush Agarwal, Advocate for the Appellant

Ms. Tamanna Alam, Authorised Representative for the Respondent

CORAM: HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)

DATE OF HEARING: 07/01/2022
DATE OF DECISION: 16/03/2022

FINAL ORDER NO.50255/2022

RACHNA GUPTA

The appellants, M/s Elegant Developers, are engaged in Real Estate Agent Services and are registered under Service Tax. Show cause notice bearing No.83 dated 22.04.2010 was issued to the appellants by DGCEI, New Delhi proposing a demand along with interest and the penalty. The said proposal was confirmed by original Adjudicating Authority vide Order No.132 dated 30th September, 2013. However, this Tribunal vide Final Order

No.53602-53605/2019 dated 25th June, 2019 has set aside the aforesaid Order-in-Original. Pursuant thereto that the appellant filed a refund claim for amount of pre-deposit of Rs.22,05,981/- vide their letter dated 9th December, 2019. The said amount along with interest of Rs.5,53,006/- was sanctioned in favour of the appellant vide Order-in-Original No.59 dated 11th February, 2020. The Department had gone in an appeal against the said order and Commissioner (Appeals) vide Order-in-Appeal No.38 dated 16th March, 2021 has allowed the Department's appeal setting aside the Order-in-Original to the extent of sanctioning the amount of Rs.5,53,006/- as interest. Being aggrieved thereof, the appeal is before this Tribunal.

2. I have heard Mr. Ayush Agarwal, learned Advocate for the appellant and Ms. Tamanna Alam, learned Authorised Representative for the Department.

3. It is submitted on behalf of the appellant that Commissioner (Appeals) has rejected the entitlement of appellant qua the interest on the sanctioned refund relying upon the un-amended Section 35FF of Central Excise Act, 1944. It is submitted that the amendment in Section 35FF of Central Excise Act is only clarifactory in nature hence it was to be given a retrospective effect. The reliance of Commissioner (Appeals), still, on erstwhile Section 35FF is therefore mentioned to be absolutely wrong. Learned counsel, further, has submitted that the issue involved herein is no more *res integra* and decision of this Tribunal in the case of **M/s Glossy Colour and Paints Vs Commissioner of Central Tax, Delhi [2021 (7) TMI 841 CESTAT, Delhi]** is relied upon. Learned counsel has also referred to the decision of

Hon'ble Apex Court in the case of **Sandvik Asia Ltd. Vs Commissioner of Income Tax-1, Pune [2006 (196) ELT 257 (SC)]**. Reliance has also been placed upon the decision of this Tribunal in the case of **M/s J.K. Cement Works Vs Commissioner, Central Excise, Udaipur [2021 (3) TMI 123-CESTAT NEW DELHI]**. Learned Counsel finally submitted that pre-deposit made by the appellant is not the payment of duty hence it was an amount being unauthorizedly held by the Department from the date of its payment. Moreso, Section 11B cannot be made applicable to the amounts of pre-deposit. Praying for appellant to be entitled for interest at the rate of 12% on the amount of pre-deposit, learned Counsel has prayed for Order-in-Appeal to be set aside and the present appeal to be allowed.

4. While rebutting these submissions, learned DR has laid emphasis upon the proviso to amended Section 35FF of Central Excise Act according to which the amended provision is not applicable upon the amounts deposited under section 35F pursuant to aforesaid amendment. It is submitted that the findings in Paragraph 6.8 of the Order are reasonable explanation and the justification. Impressing upon no infirmity in the Order under challenge that the appeal in hand is prayed to be dismissed.

5. After hearing the rival contentions and pursuing the records, I observe and hold as follows:

The amount for which the refund claim was filed by the appellant on 9th December, 2019 was the amount of pre-deposit as was made by the appellant on 6th October, 2015 pursuant to the directions of High Court Order in C.M.No.11263/2015 dated 15.09.2015. This was the amount to be

paid as pre-deposit at the time of filing the appeal before this Tribunal against the Order-in-Original No.132 dated 30th September 2013. Hence impugned was an amount as was deposited in terms of Section 35F of Central Excise Act, 1944, the provision which demands deposit of certain percentage of duty demanded or penalty imposed before filing the appeal. This amount of deposit prior to filing of appeal either before Commissioner (Appeals) (7.5%) or before this Tribunal (additional 2.5%) has to be refunded consequent upon the order of respective Appellate Authority in terms of Section 35FF of Central Excise Act. The impugned refund claim was filed after this Tribunal disposed off the appellant's appeal against the Order-in-Original dated 30th September, 2013. Section 35FF, further, entitles appellant for the interest along with the refund of the amount of pre-deposit. This Section, however, has undergone an amendment vide Finance Act of 2014. The controversy herein is as to whether Section 35FF pre-amendment will be applicable to the present case or Section 35FF post-amendment.

6. The pre and post amendment provisions are recorded as below:

Section 35FF as it stood prior Finance Act 2014:

"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 Amendment Section 35FF reads as:

Section 35FF. Interest on delayed refund of amount deposited under Section 35F - 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 percent 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.

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

7. The perusal makes it clear that prior 2014, the assessee used to be entitled for interest upon the amount of refund of amount of pre-deposit if and only if, the refund was not used to sanction within a period of three months. However, post Finance Act, 2014, the amendment Section 35F makes assessee always entitled for interest at the rate of not less than fifty per cent and not more than thirty six per cent per annum on the amount deposited by the assessee/appellant under Section 35F. The proviso to amended Section 35FF makes it clear that the un-amended provision shall continue to apply to the amounts deposited under Section 35F prior to the commencement of Finance Act, 2014.

8. In the present case, the appellant filed an appeal before this Tribunal against Order-in-Original dated 30th September, 2013 apparently the amount as required under Section 35F to be deposited while filing such appeal was deposited by the appellant vide Challan No.61692 dated 06.10.2015. This particular perusal makes it abundantly clear that the

amount of pre-deposit under Section 35F of Central Excise Act, 1944 was made after the amendment introduced vide Finance Act, 2014. Hence, the case of the appellant goes out of the scope of proviso to the amended provision and it shall be amended Section 35FF and not the erstwhile Section 35FF which shall be applicable to the deposit in question. Accordingly, I am of the view that original Adjudicating Authority had rightly sanctioned the refund along with the interest. The Commissioner (Appeals) is rather held to have committed error while relying upon the erstwhile Section 35FF of Central Excise Act, 1944.

9. Coming to the plea of the appellant about the rate of interest, it is observed that original Adjudicating Authority has awarded interest at the rate of five per cent. The said rate is the lowest rate in the amended Section 35FF. The amount in question is not an amount of duty but was an amount paid by way of deposit under Section 35F for availing the remedy of an appeal. The appeal has been allowed. Such an amount is bound to be refunded along with the appropriate consequential relief as that of interest. I draw my support from the decision of Hon'ble High Court, Mumbai in the case of **Suvidhe Limited Vs Union of India [1996 (82) ELT 177]**. Hon'ble Apex Court also in the case of **Pratibha Processors Vs Union of India [1996 (88) ELT 12 (SC)]** has held that interest is essentially compensatory in character. The appellant is held to be reasonably compensated for the interest that too from the date of its payment. Further, I observe that the original Adjudicating Authority has given no reason for applying the lowest rate of interest given in amended Section 35FF. Keeping in view the above adjudication, I am of the opinion that the reasonable rate

of interest in the given facts and circumstances is the rate at twelve per cent. Hence, the request of the appellant is accepted with respect to rate of interest also. Consequent to the above discussion, the order under challenge/Order-in-Appeal is hereby set aside holding appellant to be entitled for sanction of refund of pre-deposit amount along with interest at the rate of twelve per cent thereof. The appeal accordingly stands allowed.

[Order pronounced in the open Court on 16/03/2022]

(RACHNA GUPTA)
MEMBER (JUDICIAL)

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