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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
EXCISE APPEAL BRANCH

Appeal No. E/5152/2004 - EX[DB] Date 26/05/2009

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S KOTHARI PRODUCTS LTD.
133/233-35, TRANSPORT NAGAR, KANPUR

M/S KOTHARI PRODUCTS LTD. Appellant
Vs
C.C.E. KANPUR Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 384/2009-EX **EX[DB]** dated 5-5-09 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(Excise Appeal Branch)

Copy to :
1. Respondent
   C.C.E. KANPUR
   117/7, SARVODYA NAGAR, KANPUR
2. Adv. / Consult SH. K.K. ANAND, ADV.,
   A-5, BASEMENT,
   LAJPAT NAGAR-III,
   N. DELHI-24
3. C.D.R
~~4 J.C.D.R.~~
5. Bar association, CESTAT, New Delhi
6. Director Publications, Customs, Excise, I.P. Estate, New Delhi
7. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3
8. Commercial Laws of India Pvt Ltd. Post Bag No. 1033, No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9. Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10. M/s Manupatra Information Solutions Pvt Ltd. Excise & Customs Cases B-37, Sector - 1, Noida - 201301, Gautam Budh Nagar, (UP)
11. M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
12. Taxindiaonline.com Pvt.Ltd. B-XI/8183,Vasant Kunj, New Delhi - 110070
13. Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
14. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-15
15. LAWCRUX Advisors Pvt Ltd. LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
16. Office Copy
17. Guard file
18. HON'BLE PRESIDENT.

Assistant Registrar
(Excise Appeal Branch)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

West Block No.2, R.K.Puram, New Delhi

COURT-I

Date of hearing/decision:5.5.2009

Central Excise Appeal No.5152 of 2004

Arising out of the order in appeal No.373/CE/APPL/KNP/04 dated 27.7.04 passed by the Commissioner (Appeals), Customs & Central Excise, Kanpur.

M/s Kothari Products Limited ...... Appellant

Vs.

C.C.E., Kanpur ...... Respondent

For approval and signature:

Hon'ble Mr. Justice R.M.S. Khandeparkar, President
Hon'ble Mr. M. Veeraiyan, Member (Technical)

1	Whether Press Reporter may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	Yes
2	Whether it should be released under Rule 27 of CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	Yes
3	Whether their Lordships wish to see the fair copy of the Order?	Seen
4	Whether Order is to be circulated to the Departmental authorities?	Yes

Appearance:

Shri K.K. Anand, Advocate for the appellants
Shri B.S. Suhag, Authorized Departmental Representative (DR) for the Revenue

Coram: Hon'ble Mr. Justice R.M.S. Khandeparkar, President
Hon'ble Mr. M. Veeraiyan, Member (Technical)

FINAL Oral Order No. 384/09-EX

Per Shri Justice R.M.S. Khandeparkar:

Heard.

2. Only point which arises for consideration in the matter is whether filing of reference application under Section 35G as it stood prior to 1.7.99 would extend

the period of three months specified under Section 11BB of the Central Excise Act, 1944 for the purpose of demand of interest on the refundable amount.

3. Few facts relevant for decision are that respondents herein demanded duty from the appellants, who were consignment agent and transporter, to the tune of Rs.6,38,84,821.76 under show cause notice which was confirmed after adjudication to the tune of Rs.2,64,90,086.20 under the order dated 6th August, 2001. The appeal against the same was dismissed by the Commissioner (Appeals) vide its order dated 24.9.96. When the matter was carried in appeal before this Tribunal vide its order dated 29.12.1998, the orders passed by the lower authorities were quashed and set aside. Meanwhile, the appellants had to deposit a sum of Rs.1,31,00,000/- in the course of the said proceedings in order to get stay of the execution of the order passed by the adjudicating authority. Consequent to the quashing of the said demand the Tribunal by its order dated 29.12.1998, the appellants claimed refund of the said amount of Rs.1,31,00,000/- by a refund application dated 23.2.2001. The Department vide order dated 11th April, 2000 allowed the application for refund of Rs.1,31,00,000/- but did not order payment of interest even though there was delay in refunding amount. Under letter dated 3rd July 2000 addressed to the Deputy Commissioner ,the appellants demanded the amount of interest to the tune of Rs.28,16,579/- for a period from 23.5.99 to 13.4.2000 on the said amount of Rs.1,31,00,000/-. The said letter was followed by the reminders dated 13.7.2000, 6.10.2000, 2.12.2000, 16.1.2001, 27.1.2001, 11.7.2001 and 10.8.2001. The Deputy Commissioner by his order dated 6th August, 2001 rejected the claim of interest by the appellants. The appellants preferred an appeal against the said order of 6th August, 2001 before the Commissioner (Appeals). However, under order dated 27.7.2004, the Commissioner (Appeals) upheld the order of the Deputy Commissioner and dismissed the appeal. Hence the present appeal.

4. Learned Advocate for the appellants drawing our attention to Section 11BB of the Central Excise Act, 1944 submitted that the said provisions of law

clearly require the department to refund the amount refundable to the assessee within three months from the date of receipt of the application in that regard. In the case in hand, in spite of such application having been filed pursuant to the final order passed by the Tribunal, the department failed to refund the amount within the said period and therefore, the appellants applied to the department to pay interest for the delayed period. In spite of repeated reminders, the department did not respond and it was only in August, 2001 that the department rejected the claim for interest and even the appeal filed by the appellants before the Commissioner (Appeals) could not yield fruitful result.

5. Learned Advocate placing reliance in the decision of the Rajashan High Court in J.K. Cement Works vs. Assistant Commissioner of Central Excise & Customs reported in [2004 (170) ELT 4 (Raj.) and of the Allahabad High Court in Hamdard (Wakf) Laboratories vs. Union of India reported in [2005 (188) ELT 476 (All.)] submitted that both the High Courts have clearly interpreted the Section 11BB to be mandatory in nature and therefore, the authorities should have ordered for payment of interest on the refundable amount to the appellants.

6. Learned DR on the other hand submitted that since the department had preferred a reference application against the earlier order passed by the Tribunal quashing the demand of duty against the appellant, and the amount having been paid to the appellants within three months from the date of disposal of the such reference application, the appellants cannot be held to be entitled for interest under Section 11BB.

7 It is not in dispute that the appellants had deposited with the department a sum of Rs.1,31,00,000/-during the pendency of the proceeding arising from the demand of duty from the appellants. It is also undisputed fact that the demand of duty was quashed and set aside by the order of the Tribunal on 29.12.1998. Undisputedly, the appellants thereafter, preferred an application dated 23.2.1999 claiming refund of the said amount of Rs.1,31,00,000/-. Undoubtedly, the amount of Rs.1,31,00,000/- belonged to the appellants and the

department had no right to retain the same. However, it was not refunded to the appellants till 11.4.2000. At the same time, it is also not in dispute that the department had preferred a reference application against the order dated 29.12.1998 which came to be disposed of on 19.1.2000. Equally, it is true that it is not in dispute that the amount of Rs.1,31,00,000/- was refundable to the appellants consequent to the order passed by the Tribunal on 29th December 1998 as there was no demand for duty pending against the appellants, subsequent to the said order of the Tribunal.

8. The question, therefore, arises is as to whether filing of the reference application against the order dated 29.12.1998 would automatically result in stay of refund claim in relation to the amount which was deposited by the appellants for obtaining stay of the order dated 24.9.1996. Section 11BB of the Central Excise Act, 1944, clearly provides that if any duty ordered to be refunded under sub-section (2) of section 11B to any applicant is not refunded within three months from the date of receipt of application under sub-section (1) of that section, there shall be paid to that applicant, the interest at such rate, not below 10% and not exceeding thirty per cent per annum as is for the time being fixed by the Board from the date immediately after the expiry of three months from the date of receipt of such application till the date of refund of such duty.

9. Plain reading of Section 11BB, therefore, discloses that on refund of duty under sub-section (2) of Section 11B to any applicant, the department has to pay interest for the delayed period. The refund of the amount demanded after the disposal of an application under Section 11B should be made within three months from such demand, otherwise, the department has to pay interest for the delayed period.

10. In the case in hand as already noticed above, the appellant had filed application on 23.2.1999 for refund of the amount of Rs.1,31,00,000/- which amount was deposited by the appellants in order to obtain stay of the order

dated 24.9.96 regarding demand of duty and penalty. Consequent to setting aside the said order dated 24.9.96 by the Tribunal on 29.12.1998, the department had no claim whatsoever in relation to or over the said amount of Rs.1,31,00,000/- deposited with the department and which belonged to the appellants.

11. Rajasthan High Court in J.K. Cement Works case after referring to the decision of the Apex Court in Union of India vs. E. Merck (India) reported in 1998 (97) ELT 218 (SC) while considering Section 11B and 11BB held thus ;-

> *"21. The perusal of Section 11B goes to show that it prescribed a period within which the amount of refund can be claimed by the applicant. It also prescribes three months from the date of application as the period within which such refund is to be paid. Consequence of not paying refund within three months of making such application under Section 11B is that the Revenue becomes liable to pay interest on amount of refund with effect from the expiry of three months from the date of application until date of actual payment. The liability to pay interest is not tagged with decision to pay interest but in case it is ultimately found to be payable liability is with effect from expiry of three months of the date of receipt of application required to be made under Section 11B(1). The rate of interest is to be prescribed by the Board and the interest is payable with effect from the date commencing from the expiry of three months from the date of receipt of such application till the refund of such duty."*

12. Similarly, the Allahabad High Court in Hamdard (Wakf) Laboratories vs. UOI referring Section 11BB of the said Act held thus :-

> *"6. From a bare reading of the provisions of Section 11BB of the Act, we find that the legislature by the aforesaid provision has cast a duty upon the adjudicating authority to decide the claim for refund immediately within three months failing which the liability for interest start running after excluding the period of three months from the date of the application. Admittedly, in the present case, it is not in dispute that the claim for refund was made on 25th August, 1999 whereas the order for refund has been passed on 16th November, 2000. Under the provision of Section 11BB of the Act, interest start running after three months from the date of the application irrespective of the fact as to whether the order for refund has been made subsequent to the period of three months. As in the present case, the order for refund has been made on 16th November, 2000 i.e. much after the expiry of period of three months from the date of making the application, therefore, the respondents are liable to pay interest at the specified rate therein. Liability for payment of interest is statutory and, therefore, it was the bounden duty of the Assistant Commissioner of Central Excise, Division-I, Ghaziabad to also pay interest from 26th November, 1999 to 16th November, 2000 at the rate specified under Section 11BB of the Act."*

13. Simiarly, the Bombay High Court in C.C.E., Pune III vs. Ballarpur Industries Ltd. while interpreting Section 11B and 11BB of the said Act held thus :-

> " *Perusal of the above provision shows that Section 11BB of the Act comes into operation only after an order for refund has been made under Section 11B of the Act. It lays down that in case any duty paid is found refundable then if the duty is not refunded within a period of three months from the date of receipt of the application to be submitted under Section 11B of the Act, then interest on the amount is liable to be paid on expiry of period of three months from the date of receipt of the application. The Explanation appearing below Section 11BB of the Act shows that it introduces deeming fiction that where the order for refund of duty paid is made not by the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise but is made by the Commissioner (Appeals), Appellate Tribunal or by the Court, then for the purpose of this section the order made by the Commissioner (Appeals), Appellate Tribunal or by the Court shall be deemed to be an order made under sub-section (2) of Section 11B of the Act. Thus, the purpose of introducing explanation was to introduce deeming fiction that for the purpose of sub-section (2) of Section 11B if the order is made not by the Assistant Commissioner or Deputy Commissioner, but by the higher authorities, the order made by the higher authorities shall be deemed to be an order made by the Assistant Commissioner or Deputy Commissioner for the purpose of sub-section (2) of Section 11B of the Act. The explanation has nothing to do with the postponement of the date from which interest becomes payable under Section 11BB of the Act. Interest under Section 11BB of the Act becomes payable on expiry of period of three months from the date of the receipt of the application for refund if the amount is not refunded within three months from the date of receipt of the application. The learned Counsel appearing for respondent also relied in support of his submission on the judgments of various High Courts. However, in our opinion, the position of law is absolutely clear that the interest is payable under Section 11BB of the Act on expiry of period of three months from the date of receipt of the application and that Explanation appearing below Section 11BB of the Act does not have any effect or connection with the date from which interest under Section 11BB of the Act becomes payable. The only purpose served by the explanation, as observed above, is to introduce a deeming fiction which is relevant for the purpose of sub-section (2) of Section 11B of the Act."*

14. It is also to be noted that the efforts on the part of the department to challenge the order passed by the Rajasthan High Court in J,K. Cement Works proved futile as the Special Leave to Appeal (Civil) No.21547 of 2004 was dismissed by the Apex Court by order dated 10.2.2004.

15. It is settled law that whenever a statutory provision prescribes certain period for performance of a statutory obligation or duty and simultaneously prescribes consequences for failure to perform such obligation or duty within prescribed period, then such a provision has to be construed as a mandatory one. Section 11BB specifically casts the duty upon the department to refund, within

the specified period, the money to the assesee over which the department has no claim. Once the amount is ascertained as the refundable to the assessee, it cannot be said that the department would have any lien or claim over such amount unless there is any other order or statutory provision under which such lien or charge could be disclosed. Undisputedly, in the case in hand the amount to the tune of Rs.1,31,00,000/- which was in possession of the department, belonged to the appellants and there was no lien or any charge over the said amount in favour of the department. Being so, it was the duty of the department to return the same within the prescribed period under Section 11B failing which the consequences contemplated under the statutory provisions are bound to follow.

16. The contention that there was reference application filed by the respondent against the order dated 29.12.1998 and the same was disposed of on 19.1.2000 and the order of refund was passed within three months therefrom and accordingly, the amount was refunded, cannot be of any help to the department inasmuch as that undisputedly, there is no provision under the said Act for automatic stay of any order passed in appeal, moment there is reference application preferred by the department. Mere filing of appeal or any proceeding cannot ipso facto result in stay of the order passed by the original or the lower authority. In order to obtain stay of the order passed by the original or lower authority which is sought to be challenged in such appeal or the proceedings, the aggrieved party has to obtain necessary order in that regard from the appellate or higher authority. The law as comprised under Section 35G nowhere provides for automatic stay of the proceedings before the authorities below and wherefrom the reference application is preferred.

17. Besides, there was no executable order passed by the Tribunal under order dated 29.12.1998. For the grant of stay of an order of the lower authority, there has to be an executable order passed by the lower authority demanding duty or interest or penalty. The amount of Rs.1,31,00,000/- was deposited by the appellant in order to avail the order of stay of the demand of duty during the

pendency of the appeal before the Tribunal. The order of the adjudicating authority and that of the Commissioner (Appeals) demanding duty were set aside by the Tribunal and it was against such order of the Tribunal that the reference application was filed. Being so, the order of the Tribunal setting aside the order demanding the duty cannot be said to be an executable order. In these circumstances, therefore, it cannot be said that the department was entitled to retain the said amount.

18. The authority below having totally ignored the mandate of Section 11BB, the order dated 6.8.2001 by the Additional Commissioner and the order dated 27th July 2004 by the Commissioner (Appeals) in the matter in hand as far as they relate to refusal of demand of interest cannot be sustained and are to be set aside and the department is to be held liable to pay interest to be calculated in terms of provisions comprised under Section 11BB bearing in mind the above referred decision of the High Court and the observations made herein above.

19. In these circumstances, we allow the appeal and direct the respondents to calculate interest according to the provisions of law based on the rate fixed by the Board for the relevant period under Section 11BB bearing in mind the rulings of the High Courts referred to above as well as the observations made herein above. The said calculation should be done by the respondent within a period of six weeks and the entire amount of interest should be paid to the appellants within four weeks thereafter.

20. The appeal accordingly, stands disposed of in above terms.

(Justice R.M.S. Khandeparkar)
President

(M. Veeraiyan)
Member (Technical)

scd/