IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.

Date of Hearing/Decision: 26.9.2018

Appeal No ST/52141/2018- ST(SB)

[Arising out of Order in Appeal No. BHO-EXCUS-002-APP-47-18-19 dated 17/04/2018 passed by the Commissioner (Appeals-I)Customs Central Excise and Service Tax-Raipur(C.G.)]

SKS Ispat & Power Ltd. **Appellant**

Vs.

CCE & ST-Raipur **Respondent**

Appearance

Shri Manish Saharan, Advocate for the appellant

Shri P.K.Gupta, (AR) for the respondent

CORAM: **Hon'ble Mrs. Rachna Gupta, Member (Judicial)**

Final Order No. 53105/2018

Per: Rachna Gupta

1. Present is an appeal directed against the order of Commissioner (Appeals) dated 17th April 2018.
2. The relevant facts are that the appellant M/s SKS Ispat Power Ltd. had filed the refund claim of Rs.6,03,113/- under the provisions of Section 11 B of Central Excise Act. The said refund was initially rejected vide Order-in-Original dated 23rd September, 2010 and the appeal thereof was also rejected vide order dated 7th August, 2011. Being aggrieved the appellant approached this Tribunal who vide final order No. E/5580/2017 dated 4th August 2017 allowed the appeal thereby allowing the refund. It is

thereafter that the appellant filed another application on 28th August, 2017 praying to process of refund app0lication dated 1st January, 2010 the said application was adjudicated initially vide Order-In-Original dated 2nd November, 2017 vide which the refund of service tax of Rs. 603113(as was originally prayed) submitted was allowed to be in cash however there was no order as to the payment of interest. Being aggrieved the appeal was filed the said appeal was dismissed vide order dated 17th April, 2018. Still being aggrieved is the impugned appeal has been filed.

3. I have heard Shri Manish Saharan Ld. Advocate for the appellant and Shri P.K.Gupta Ld. AR for the Revenue.

4. It is submitted on behalf of the appellant that the refund claims has to be considered within three months of it being applied else the liability of the Department to pay the interest arises. Since, the application in hand was initially filed on 1/1/2010 and the refund has been sanctioned only after the order of this Tribunal dated 4th August, 2017 in any circumstances the refund is beyond the period of three months of the aforesaid application thus invites the liability upon the Department as prescribed under Section 11 BB of Central Excise Act, 1944(the Act). The order under challenge is therefore alleged to be erroneous while denying the payment of interest along with the permissible refund. Same is prayed to be set aside, appeal is prayed to be allowed.

5. While rebutting these arguments Ld. DR has impressed upon Section 11 B Sub-Section 5(ec) of the Central Excise Act submitting that where the duty

is refundable as a consequence of judgment decree order or direction of Appellate Tribunal, the Appellate Tribunal or any court, date of such judgment decree order or direction becomes, the relevant date. Since the appellant therein had filed the application for refund after such judgment only on 28th August 2017 which was considered within a period of less than three months there was no question of granting of any interest on the amount refund. Justifying the order, Ld. DR has prayed for the appeal to be dismissed.

6. After hearing both the parties and perusing the case records, I am of the opinion that the question to be considered here is as to whether the Revenue is liable to pay interest under Section 11 BB of the Act of which commences from the date of expiry of three months from the date of receipt of application for refund or on expiry of the said three months period from the date on which the order of refund is made. For the purpose, the relevant provisions need to be looked into Section 11 B and 11BB as extracted below;

> *"**11B.Claim for refund of duty**.-(1) Any person claiming refund of any duty of excise and interest, if any, paid on such duty may make an application for refund of such duty and interest if any, paid on such duty to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise before the expiry of one year from the relevant date in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence including the documents referred to in section 12A as the applicant may furnish to establish that the amount of duty of excise and interest, if any, paid on such duty in relation to which such refund is claimed was collected from or paid by him and the incidence of such duty and interest if any, paid on such duty had not been passed*

on by him to any other person: Provided that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section as amended by the Act and the same shall be dealt with in accordance with the provisions of sub-section (2) as substituted by that Act:

Provided further that the limitation of one year shall not apply where any duty has been paid under protest.

(2) If, on receipt of any such application, the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise is satisfied that the whole or any part of the duty of excise and interest, if any, paid on such duty paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund:

Provided that the amount of duty of excise and interest, if any, paid on such duty of excise as determined by the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise under the foregoing provisions of this sub- section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to-----

(a) rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(b) unspent advance deposits lying in balance in the applicant's current account maintained with the Commissioner of Central Excise;

(c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;

(d) the duty of excise and interest, if any, paid on such duty paid by the manufacturer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

(e) the duty of excise and interest, if any, paid on such duty borne by the buyer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

(f) the duty of excise and interest, if any, paid on such duty borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify :

Provided further that no notification under clause (f) of the first proviso shall be issued unless in the opinion of the Central Government, the incidence of duty and interest, if any, paid on such duty has not been passed on by the persons concerned to any other person.

(3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal of any Court in any other provision of this Act or the rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in sub-section (2).

(4) ....

(5) ....

"Section 11BB, the pivotal provision, reads thus:

"11BB. Interest on delayed refunds.-

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 interest at such rate, not below five per cent and not exceeding thirty per cent per annum as is for the time being fixed by the Central Government, by Notification in the Official Gazette, on such duty 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 :

Provided that where any duty ordered to be refunded under sub-section (2) of section 11Bin respect of an application under sub-section (1) of that section made before the date on which the Finance Bill, 1995 receives the assent of the President, is not refunded within three months from such date, there shall be paid to the applicant interest under this section from the date immediately after three months from such date, till the date of refund of such duty.

Explanation : Where any order of refund is made by the Commissioner (Appeals), Appellate Tribunal or any Court against an order of the Assistant Commissioner of Central Excise, under sub-section (2) of section 11B, the order passed by the Commissioner

(Appeals), Appellate Tribunal or, as the case may be, by the Court shall be deemed to be an order passed under the said sub-section (2) for the purposes of this section."

7. The bare perusal of these provisions makes it clear that the appellant has to file the application praying for refund of any duty of excise and interest within one year from the relevant date i.e. within 1 year from the date of assessee became entitled for that refund. Once such application is made as per Sub-Section 2 of 11B of the Act Assistant Commissioner has to pass an appropriate order and if the refund as claimed is allowed it has to be made within three months of the application as was made by the asseessee under said Section 11 B. Though the Department is relying on explanation in Sub-clause 5(ec) of this Section but perusal thereof shows that clause (ec) is relevant for sub-Section 5 only which further classifies that the period of three months to reckon from the date of judgment decree order or direction is applicable only in the case where any application under Section 11 B sub-Section 1 has not been filed.

8. A conjoint reading of all the above said provisions further makes it clear that;

> "Section 11BB of the Act comes into play only after an order for refund has been made under Section 11B of the Act. Section 11BB of the Act lays down that in case any duty paid is found refundable and if the duty is not refunded within a period of three months from the date of receipt of the application to be submitted under sub-section (1) of Section 11B of the Act, then the applicant shall be paid interest at such rate, as may be fixed by the Central Government, on expiry of a period of three months from the date of receipt of the application. The Explanation appearing below Proviso to Section 11BB introduces a

deeming fiction that where the order for refund of duty is not made by the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise but by an Appellate Authority or the Court, then for the purpose of this Section the order made by such higher Appellate Authority or by the Court shall be deemed to be an order made under sub-section (2) of Section 11B of the Act. It is clear that the Explanation has nothing to do with the postponement of the date from which interest becomes payable under Section 11BB of the Act. Manifestly, interest under Section 11BB of the Act becomes payable, if on an expiry of a period of three months from the date of receipt of the application for refund, the amount claimed is still not refunded. Thus, the only interpretation of Section 11BB that can be arrived at is that interest under the said Section becomes payable on the expiry of a period of three months from the date of receipt of the application under Sub-section (1) of Section 11B of the Act and that the said Explanation does not have any bearing or connection with the date from which interest under Section 11BB of the Act becomes payable."

9. This has been appreciated by Hon'ble Apex Court in the case of ***Ranbaxy Laboratories (supra) vs. Union of India & ORS*** *2011-TIOL-105-SC-CX* ***and Gurjat State Fertilizers and Chemical Ltd. vs. Commissioner of Central Excise and Service Tax, Anand*** *2018-TIOL-485-CESTAT-AHM.*

10. The Hon'ble Apex Court has also clarified that the Boards own Notification dated 1/10/2002 has given a clear direction to the Department in case claims of non payment of interest in refund/rebate cases clarifying that the authority has not to wait for any order specifically payment of interest. The moment department becomes liable under Section 11 BB the consequence of payment of interest shall follow. The above adjudication is very much binding on this Tribunal.

11. In addition I am of the opinion that the Explanation to Section 11 BB further clarifies the controversy which says that where any order of refund is made

by Commissioner (Appeals) Appellate Tribunal, National Tax Tribunal or any Court against the an order of Assistance Commissioner of Central Excise under sub-Section 2 of Section 11 B, the order passed by the Commissioner(Appeals), Appellate Tribunal or as the case may be shall be deemed to be an order passed under the sub-section 2 of the sub-Section B for the purposes of this Section. It stands absolutely clear that the application as has been referred in Section 11 B sub-Section 1 only has to be considered for the purposes of Section 11BB. In the present case the order of this Tribunal dated 4th August 2017, in view of the said explanation, reverts back to stage of order of the Assistant Commissioner dated 23rd September, 2010.

12. The argument of the Department that the application to be considered is the one as was filed after the order of 4th August 2017 i.e. the one which was moved on 24th August 2010, is, therefore, not sustainable. Once the situation despite the order of 4th August 2017 stands reverts to the stage of order of September, 2011, the application which was adjudicated vide the said order only has to be considered. Apparently and admittedly the refund is much delayed since the said date that is 1/1/2010. The automatic liability of the Department under Section 11 BB of the Act stands involved.

13. As the result of above discussion controversy stands adjudicated in the terms that the period of three months as mentioned in Section 11 BB of the Act is to reckon from the date of application as was filed under Section

11(1) of the Act and not from the application as was filed after the order of refund. Thus the Department without any specific directions was liable to pay the interest.

14. The order under challenge is, therefore, set aside appeal stands allowed.

(Dictated and pronounced in open court)

(Rachna Gupta)
Member(Judicial)

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