

IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL,
WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

BENCH-SM

COURT -IV

Excise Appeal No.E/51383/2018 -E [SM]

[Arising out of Order-in-Appeal No.21(RK) CE/JPR/2017 dated 09.02.2018 passed by the Commissioner (Appeals), Jaipur]

M/s. Arora Products

...Appellant

Vs.

CCE, Jaipur

... Respondent

Present for the Appellant : Ms. Sukriti Das, Advocates

Present for the Respondent: Mr. K Poddar, D.R.

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

Date of Hearing: 12/11/2018

Pronounced on :07/12/2018

Final ORDER NO. 53369/2018

PER: RACHNA GUPTA

The appellant herein is engaged in manufacture of chewing tobacco and unmanufactured tobacco packing machines (Capacity Determination and Collection of Duty Rules) 2010 are applicable to the appellant. Consequent to reduction in monthly rate of duty w.e.f. 13.04.2010, the appellant filed a refund claim of duty amounting to Rs.2,40,000/- paid in excess for the period from 13.04.2010 to 30.04.2010. The said refund was sanctioned vide the order of Dy. Commissioner dated 09.07.2010. However, out of the said sanctioned amount only Rs.73678/- were refunded to the

appellant in cash and remaining amount of Rs.1,66,322/- was adjusted against the outstanding arrears of interest on pending duty liability amounting to Rs.2,30,525/-. The said liability of Rs.2,30,525/- was proposed vide a show cause notice dated 28.11.2018 for the wrong availment of cenvat credit to the extent of the said amount. The said demand was confirmed vide the order of Dy. Commissioner dated 07.07.2004 alongwith the interest and the penalty. It is against the said interest that the amount of Rs.1,66,322/- was ordered to be adjusted. However, against the order dated 07.07.2004, an appeal was preferred in which the demand was upheld vide order dated 19.12.2005 except that penalty was reduced to Rs.5,000/- from Rs.10,000/-.

1.2 Being aggrieved, an appeal was preferred before CESTAT. This Tribunal vide order dated 19.07.2006 granted stay and waiver of penalty inasmuch as the duty amount was already deposited. However pending final hearing before this Tribunal, the interest of said Rs.1,66,322/- was ordered to be adjusted against the amount of Rs.2,30,525/- from the sanctioned refund of Rs.2,40,000/-. Vide the final order dated 01.10.2015 the order of Commission (Appeals) was set aside. Consequent thereto appellant filed a letter claiming consequential refund of amount pre-deposited in the said matter vide O-I-O No.09/2016 dated 09.11.2016. Rs.3,96,847/- in cash was refunded which also included in the impugned amount of Rs.1,66,322/-. Since the claim of refund of duty paid in excess was filed by appellant on 21.05.2010.

Therefore, the appellant was entitled to interest till the amount was refunded to him on 19.11.2016. Accordingly, the appellant claimed the interest vide his letter dated 28.11.2018. However, a show cause notice dated 19.11.2017 was issued proposing rejection of claim for the said interest. The rejection as proposed was confirmed vide the order of Assistant Commissioner dated 23.02.2017. The appeal before Commissioner (Appeals) was also rejected vide order dated 09.02.2018. Being aggrieved, the appellant is before this Tribunal.

2. I have heard Ms. Sukriti Das, Advocate for the appellant and Shri K. Poddar, Id. D.R. for the Department.

3. It is submitted on behalf of the appellant that the duty of Rs.2,40,000/- was ordered to be sanctioned vide an order of Assistant Commissioner dated 09.07.2010. However, the refund in cash of Rs.1,66,322/- was not made till 09.11.2016 i.e. after a delay of 6 years of the order of refund. According to Section 11BB of the Central Excise Act, 1944 , interest is payable in case the refund is not made within 3 months of the date of the application. The denial of the interest claim is therefore, erroneous and is liable to be set aside. Ld. Counsel has relied upon the following case laws:-

1. Prem Products v. CCE, Agra, 2017 (9) TMI 1541-CESTAT, Allahabad.
2. Munch Food Products Ltd. v. CCE, Delhi-I, 2016 (337) ELT 428 (Tri.-Delhi).

3. Ronald Pharmaceuticals Pvt. Ltd. v. CCE & ST, Vadodara-I, - 2014 (310) ELT 777 (Tri. – Admd.)
 4. International Paper APPM Ltd. v. CCE, C & ST, Vishakhapatnam-I, 2017 (2) TMI 617 CESTAT Hyderabad.
 5. Indu Nissan Oxo Chem Industries v. CCE & ST, Vadodara-I – 2016 (II) TMI 1222- CESTAT, Ahmadabad.
 6. CC, Airport & ACC, Bangalore v. Pfizer Products India Pvt. Ltd., - 2015 (324) ELT 259 (Kar.)
 7. C.C. (Airport & Administration), Kolkata v. Amarnath Enviroplast Ltd. – 2014 (304) ELT 301 (Tr. – Kolkata)
 8. National Steel Industries Ltd. v. Union of India – 2001 (134) ELT 616 (M.P.).
 9. CCE, Mumbai v. Johnson & Johnson Ltd. – 2016 (335) ELT 163 (Tri.-Mumbai)
 10. CCE, Bangalore v. Stella Rubber Works (Unit-II – 2012 (276) ELT 404 (Kar.)
4. Ld. D.R. for the Department on the other hand has submitted that the refund was sanctioned in the year 2010 itself. The payment in cash was also made within 3 months in due compliance of Section 11 B of CEA, 1944. It is only the part of said refund was withheld, as to be adjusted against the outstanding liability of the appellant. The said liability has been set aside and has been decided in favour of appellant vide the order of this Tribunal dated 01.10.2015. The entire refund as claimed vide application dated 07.10.2016 was refunded on 09.11.2016 i.e. very much within 3 months of the

sanction. No question of interest at all arises. Appeal is prayed to be dismissed.

5. After hearing both the parties, I am of the opinion that there is no dispute that whenever the amount was sanctioned, the refund thereof was made within the statutory limit of 3 months as prescribed by Section 11B of CEA, 1944. The only controversy is that the amount of said refund which got initially adjusted against the outstanding liability of the appellant, if subsequently that liability is set aside, the said period of 3 months has to be counted whether from the date of the initial sanctioning order or from the date of doing away the liability qua which the said amount was adjusted. There is no dispute to the legislative intent that whatever amount is sanctioned, the refund thereof has to be made within 3 months. Section 11B (2) is relevant, which reads as follows:-

Section 11B (2)

(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 as determined by the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise under the foregoing provisions of this subsection 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 account current maintained with the Principal Commissioner of Central Excise or 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.*

6. This provision makes it clear that it is not the whole, but the part of the claim can be held refundable. Section 11BB reads as follows:-

"Section 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 11B in 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, National Tax Tribunal or any court against an order of the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise, under sub-section (2) of section 11B, the order passed by the Commissioner (Appeals), Appellate Tribunal, National Tax 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 makes it clear that the refund has to be made within 3 months from the date of receipt of application. Part of refund in the present case within 3 months is not disputed. Since the liability against which the remaining part was adjusted has been subsequently set aside by the order of this Tribunal, Explanation B (ec) to sub-clause (5) of 11 B requires reliance ,which reads as follows:-

"Explanation (B) (ec) to sub-clause (5) of Section 11

B of Excise Act

(ec) in case where the duty becomes refundable as a consequence of judgment, decree, order or direction of appellate authority, Appellate Tribunal or any court, the date of such judgment, decree, order or direction;"

8. Thus, the period of 3 months under Section 11BB has to reckon from the decision of Tribunal doing way the liability against which part of sanctioned refund was adjusted. Admittedly, the said adjusted amount of Rs.1,66,322/- has been refunded within 3 months of the said order. Question of levy of any interest does not at all arise. Otherwise also the said amount was adjusted against the liability of paying interest. Seen from this angle also there arises no question of levy of interest on interest. The Larger Bench of this Tribunal in the case of **Indian Thermoplastics Pvt. Ltd. V/s. Commission of Customs, Kolkata- 2004 (164) ELT 156 (Tri.-LB)** has held that the applicant is entitled to interest from the date of final order passed by the Tribunal and if the amount is refunded within 3 months of the order of Tribunal, the same will be in consonance with the principle as contained under Section 11BB of CEA, 1944. The said decision has been upheld by Hon'ble Supreme Court while disposing of a Civil Appeal No. 1789/2005 wherein the Court has held that the interest on amount pre-deposited pending appeal is payable only from the date of final order in favour of the assessee, as the entitlement to refund arises only when the appeal got finally disposed of. Drawing support from these adjudication, I

am of the opinion that case law relied upon by the appellant is not applicable to the facts and circumstances of the present case. The Adjudicating Authorities below have committed no error while declining the entitlement of the appellant for interest on the amount sanctioned in its favour. Order is accordingly upheld. Appeal is dismissed.

[Pronounced in the Open Court on 07.12.2018]

(RACHNA GUPTA)
MEMBER (JUDICIAL)

Anita