CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH
Single Member Bench

Excise Appeal No. 85371 of 2019

(Arising out of Order-in-Appeal No. PVNS/273/Appeals-Thane/TR/2018-19/5537 dated 02.11.2018 passed by the Commissioner of CGST & Central Excise (Appeals), Thane)

M/s. Guardian Castings Pvt. Ltd. **Appellant**
Gut No.92-1/115P/116/120/57P,
Village Abitgar, Wada Shahpur Road,
Wada, Dist. Palghar 421 303.

Vs.

Commissioner of Central Excise, Thane Rural **Respondent**
Utpad Shulk Bhavan, 4th Floor,
Bandra-Kurla Complex,
Bandra (E), Mumbai 400 051.

Appearance:

Shri G.E. Madham, Advocate, for the Appellant
Ms. Anuradha Parab, Assistant Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

Date of Hearing: 13.04.2022
Date of Decision: 13.04.2022

FINAL ORDER NO. A/85519/2022

This appeal is directed against Order-in-Appeal No. PVNS/273/Appeals-Thane/TR/2018-19/5537 dated 02.11.2018 passed by the Commissioner of CGST & Central Excise (Appeals), Thane, by which the Commissioner (Appeals) has held as follows:-

"Thus, from aforesaid judgment of Apex Court, it is clear that in the present case, appellant's eligibility to interest starts after three months from the date of receipt of application for refund. Consequent to order of Honorable Tribunal of Mumbai, appellant applied for refund on 14.10.2017. Therefore, interest on refund of Rs.2,35,058/- would become applicable from 14.01.2018. However, the impugned order vide which refund of Rs.2,35,058/- has been sanctioned is dated 22.12.2017, i.e. before three months from the date of application for refund.

Therefore, from the above, it is clear that appellant would not be entitled to any interest on the refund of Rs.2,35,058/-. Held Accordingly.

10 Accordingly, I reject the appeal filed by the appellant and uphold the impugned Order-in-original."

2.1 Certain demands were confirmed against the appellant for wrong availment of cenvat credit which they have deposited in 2005 vide TR-6 challan No. 30/04-05 dated 21.03.2005 under protest during the pendency of appeal with Commissioner (Appeals).

2.2 Tribunal had remanded the back to the original authority vide order No. A/1944/WZB/2006/C-V)SMC) dated 30.10.2006. In the remand proceedings, the original authority again confirmed the demand and the Commissioner (Appeals) vide order-in-appeal No. BR/98/Th-I/2013 dated 05.02.2013. Appellant filed appeal before the Tribunal being appeal No. E/86943/13 which was disposed of by the Tribunal vide order No. A/88469/17/SMB dated 03.07.2017 setting aside the entire demand.

2.3 Thereafter the appellant filed an application for refund to the jurisdictional Deputy Commissioner and the refund application was allowed to the extent of the amount deposited. As the refund application was allowed within three months from the date of filing, no interest was paid to the appellant. The order of the original authority has been upheld by the Commissioner (Appeals). Hence this appeal.

3.1 I have heard Shri G.E. Madham, Advocate for the appellant and Ms. Anuradha Parab, Assistant Commissioner, Authorised Representative for Revenue.

3.2 The Commissioner (Appeals) while disallowing the appeal filed by the appellant observed as under:-

"8. In a similar case of Bharat Heavy Electricals Ltd. (BHEL) Vs. Commissioner of Central Excise, Meerut reported in

2002(139)E.LT. 591(Tri.Del), Honorable Tribunal of Delhi held that -

The entitlement for refund would arise only when the appeal was finally disposed of in favour of the appellant by the Tribunal. If that be so, no interest can be claimed for the period prior to the date of Final Order.

The Honorable Delhi Tribunal, in the case of BHEL (supra), was considering whether interest is applicable from the date of deposit made in respect of mandatory pre-deposit under section 35F of Central Excise Act or otherwise. In the present case also the amount paid by appellant prior to finality of the case is akin to deposit. As mentioned above, Honorable Delhi Tribunal has held that such deposit can be refunded only after final disposal in favour of appellant by the Tribunal and interest cannot be claimed for the period prior to the date of Final Order. In the present case, the date of finality of case can be said to be 03.07.2017, i.e. the date on which the Mumbai Tribunal decided in favour of the appellant, which was subsequently accepted by the Department. Thus, appellant's plea for interest from 21.03.2005 is not sustainable. Therefore, interest on such deposit of appellant cannot be prior to 03.07.2017. Held Accordingly."

3.3 In case of Cubex Tubings [2022-TIOL-451-CESTAT-HYD] Hyderabad Bench has on the same issue held as follows:

"4. To appreciate the submissions advanced by Shri PVB Chary, learned counsel for the appellant and Shri AVLN Chary, learned authorized representative appearing for the Department, it would be necessary to reproduce the provisions of section 35FF of the Excise Act, as it stood prior to 6.08.2014 and after 06.8.2014.

Prior to 6.8.2014

"35 FF: 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 the order of the appellate authority, till the date of refund of such amount."

Post 6.8.2014

"35 FF: 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 percent 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 35 FF as it stood before the commencement of the said Act."

8. It is not in dispute that the amount towards pre-deposit under section 35F of the Excise Act was deposited by the appellant on 30.08.2012, which date is prior to 06.08.2014 on which date section 35FF of the Excise Act was amended. The proviso to section 35FF of the Excise Act, as it stood after amendment on 06.08.2014, clearly stipulates that the amount deposited under section 35F of the Excise Act prior to 06.08.2014 shall continue to be governed by the provisions of section 35FF of the Excise Act as it stood before 06.08.2014. Thus, the appellant would not be entitled to claim interest on the pre-deposit amount as the provisions of section 35FF of the Excise Act, as it stood prior to its amendment on 06.08.2014, would be applicable. This is for the reason that section 35FF of the Excise Act, as it existed prior to 06.08.2014, provided that where the amount deposited towards pre-deposit under section 35F of the Excise Act 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, 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 the order of the appellate authority, till the of refund of such amount. In other words, if the amount is refunded within three months from the date of communication of the order, interest would not be paid.*

9. In the present case, it is not in dispute that the amount towards pre-deposit was deposited on 30.08.2012 and that the amount was sanctioned within three months from the date of communication of the order of the Tribunal to the adjudicating authority. The appellant would, therefore, not be entitled to claim interest. This is what was observed by the Deputy Commissioner as also the Commissioner (Appeals) while rejecting the claim of the appellant for payment of interest.

10. This view finds support from the judgment of the Allahabad High Court in IFP Products (P) Ltd. vs. Union of India and Anr Writ Tax No. 653 of 2017 decided on 20.09.2017. The High Court held that in view of the proviso to the amended provisions of section 35FF of the Excise Act, the unamended provisions of section 35FF of the Excise Act would be applicable under which no interest can be paid if the amount is deposited within three months from the date of communication of the order of the Appellate Tribunal and the relevant observations made in the judgment are reproduced below:

"Section 35FF of the Act provides for the payment of interest on delayed refund of amount deposited under Section 35F of the Act.

The aforesaid provision as it stood at the relevant time i.e. on 03.08.2016 or 28.11.2016, when the appeal of the petitioner was allowed and the amount was refunded provided that where any amount deposited in pursuance of the order of the Commissioner (Appeals) or the Appellate Tribunal is required to be refunded consequent upon the order of the Appellate Authority, such amount shall be refunded and if it is not so refunded within a period of three months from the date of communication of the order of the Appellate Authority, interest *shall be payable at the rate specified under Section 11BB of the Act after the expiry of the aforesaid three months.*

A reading of the aforesaid provision reflects that any amount deposited pursuant to the order passed by any Authority is liable to be refunded within a period of three months from the date, the order is set aside by the Appellate Authority and in case, it is not so refunded within three months of the communication of the appellate order, interest at the specified rate shall be payable on it for the delayed period after three months.

The aforesaid provision of Section 35FF of the Act was amended by the Finance Act No. 25 of 2014 with effect from 06.08.2014 and it was provided that where any amount deposited by the party under Section 35F of the Act is required to be refunded consequent upon the order of the Appellate Authority, it will carry an interest at the specified rate till the date of refund.

It permits payment of interest at the specified rate for the entire period, the amount remains deposited with the authority. However, the aforesaid provision has been subjected to a proviso, which lays down that if any amount has been deposited prior to the enforcement of the Finance Act No. 25 of 2014 i.e. before 06.08.2014, it shall continue to be governed by the unamended provision of Section 35FF of the Act, which means that in cases of deposit made prior to 06.08.2014, interest would be payable only if the amount is not refunded within a period of three months from the date of communication of the appellate order.

Apart from the above provision, there is no other provision, which permits payment of interest on the amount of excise duty deposited in pursuance to the order of the Commissioner (Appeals) or the Tribunal by any party. A composite reading of unamended Section 35FF and amended Section 35FF of the Act reveals that in respect of an amount deposited prior to the commencement of the Finance Act No. 25 of 2014, interest on the refunded amount is payable only if it is not refunded within three months of the communication of the order of the appellate authority entitling the refund and that too after the expiry of three months of the communication of the order.

In the present case, the amount was deposited on 24.04.2014 and 28.04.2014, the appeal entitling the refund was allowed on 03.08.2016 and the refund was actually made on 28.11.2016.

All the aforesaid dates are earlier to 06.08.2016, the date of enforcement of Finance Act No. 25 of 2014. Thus, in view of the proviso to the amended Section 35FF of the Act, the payment of interest to the petitioner would be governed by the unamended Section 35FF of the Act.

Accordingly, if at all the petitioner would be entitled to interest on the amount refunded, it will be for the period the amount had remained with the respondents after three months from the date of communication of the appellate order."

11. This judgment of the Allahabad High Court was followed by the Division Bench of the Tribunal in M/s. Fujikawa Power vs. CCE & ST, Chandigarh-I Excise Appeal No. 60966 of 2019 decided on 26.11.2019.

12. A learned Member of the Tribunal in Hindustan Agro Insecticides, also observed as follows:

"5. I have considered the arguments made in the appeal memorandum and the relevant legal provisions. The proviso to amend Section 35FF makes it clear that in respect of any amounts pre-deposited prior to 6-8-2014 will continue to be covered by the provisions of the unamended Section 35FF. The unamended provisions provided for payment of interest only if the pre-deposit was not refunded within three months from the date of communication of the order of the appellate authority. Therefore, no interest is payable to the appellant in this case. The impugned order is correct and calls for no interference. Accordingly, the appeal is rejected and the impugned order is upheld."

13. Learned counsel for the appellant, however, placed reliance upon a decision of a learned Member of the Tribunal in J.K. Cement Works. In this case the pre-deposit was made on 31.03.2006 but the appellant succeeded before the High Court on 25.01.2018. While claiming refund of the pre-deposit amount, the contention that was advanced was that the appellant would also be entitled to interest under the amended provisions of *section 35FF of the Excise Act. The learned Member allowed payment of interest, even though the amount was refunded within three months from the date of communication of the order following the decision of the Supreme Court in Sandvik Asia Ltd. This judgment of the Supreme Court does not deal with the issue in hand. The main issue that arose before the Supreme Court was whether an assessee is entitled to be compensated by the Income Tax department for the delay in paying to the assessee the amount admittedly due. The delay in the matters before the Supreme Court were for various periods ranging from 12 to 17 years and the Supreme Court noticed that there was no justifiable reason for withholding the amount for such long period time. Interest on the amount refunded was granted to the appellant but the appellant also claimed interest on the Advance Tax that was paid. It is in this context that the Supreme Court held that interest was also required to be paid on the Advance Tax since Advance Tax has also to be treated as paid pursuant to an order for assessment. The decision the learned Member of the Tribunal in J.K. Cement Works, therefore, does not lay down the correct position of law and would not come to the aid of the appellant.*

14. The decision of the Tribunal in Riba Textiles also does not help the appellant as it also relies upon the decision of the Supreme Court in Sandvik Asia Ltd.

15. The judgment of the Delhi High Court in MRF Limited will also not help the appellant. This judgment holds that the pre-deposit amount which is required to be deposited when an appeal is preferred does not bear the character of a tax and, therefore, the filing of a form which is purely for the purpose of administrative convenience cannot in any manner fixe the period of limitation.

16. In the present case, section 35F of the Excise Act, as it stood prior to 06.08.2014, provides for payment of interest only if the pre-deposit amount is not refunded within a period three months from the date of communication of the order to adjudicating authority. This is what has been observed by the Commissioner (Appeals).”

4.1 Respectfully following the above order of the Delhi Bench, I do not find any merits in the appeal filed. The same is rejected.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

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