CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH

Excise Appeal No. 87542 of 2022

(Arising out of Order-in-Appeal No. SM/88/Appeals-II/ME/2022 dated 26.07.2022 passed by the Commissioner of CGST & Central Excise (Appeals-II), Mumbai)

Commissioner of CGST, Mumbai East **Appellant**
9th Floor, Lotus, Parel, Lotus Infocentre,
Parel (E), Mumbai 400 012.

Vs.

M/s. Hindustan Composite P. Ltd. **Respondent**
Peninsula Business Park, 8th Floor,
S.B. Marg, Lower Parel, Mumbai 400 013.

Appearance:

Shri Deepak Bhilegaonkar, Additional Commissioner, Authorised Representative for the Appellant
Shri Nitesh Agarwal, Chartered Accountant, for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

Date of Hearing: 27.03.2023
Date of Decision: 27.03.2023

FINAL ORDER NO. A/85578/2023

PER: SANJIV SRIVASTAVA

This appeal by the Revenue is directed against Order-in-Appeal No. SM/88/Appeals-II/ME/2022 dated 26.07.2022 passed by the Commissioner of CGST & Central Excise (Appeals-II), Mumbai. By the impugned order, Commissioner (Appeals) has observed as follows:-

"7. Respectfully following the orders of the higher forums, I find that the issue is now well settled and the lower adjudicating authority is directed to pay interest to the appellant, under Section 11BB of Central Excise Act, 1944, from the date of payment of tax by them under protest till the date of receipt by the Appellant immediately. Held accordingly."

2.1 Respondent has paid central excise duty on the intermediate product during the period August 1979 to March

1987 under protest. The issue involved in the case was finally decided by Hon'ble Supreme Court in the case of Hindustan Ferrodo Ltd. [1997 (89) ELT 16 (SC)] holding that excise duty is not payable on intermediate products arising during the manufacturing process as the same are not marketable. Accordingly respondent filed refund applications dated 23.06.1997 for Rs.3,31,806/- and Rs.4,55,347/- and another refund claim dated 03.07.1997 for Rs.28,49,762/-.

2.2 These refund applications were rejected by the refund sanctioning authority and appellate Commissioner on the ground of failure to produce the duty paying documents. Aggrieved respondent preferred an appeal before the Tribunal and the Tribunal vide order dated 29.12.2004 allowed the appeal in favour of the respondent for refund of the amount along with interest. In de novo process, the refund was again rejected on the ground of unjust enrichment.

2.3 Aggrieved respondent again approached CESTAT and CESTAT had vide order dated 21.01.2014 allowed the appeal of the respondent holding that unjust enrichment would not be applicable in the case. Adjudicating authority once again rejected the refund claim for the reason of unjust enrichment vide order dated 30.04.2019.

2.4 Respondent approached Hon'ble High Court by way of writ petition. Hon'ble High Court allowed the writ petition observing that the denial of refund on the ground of unjust enrichment vide order dated 30.04.2019 was contrary to the direction contained in Tribunal order dated 21.01.2014 and directed the refund be sanctioned to the respondent. The refund was sanctioned vide order of the original authority, dated 24.09.2019 and no interest was given to the respondent.

2.5 Aggrieved respondent filed appeal to Commissioner (Appeals) and the Commissioner (Appeals) has vide the impugned order allowed the appeal as referred in para 1 above, in favour of the respondent. Aggrieved Revenue has filed this appeal stating the following grounds:-

"3.1. In light of the aforementioned statutory provisions the respondent is not entitled for interest from the date of payment of tax, but, after 3 months from the date of filing the refund application. The assessee deposited the duty amount during the period from August 1979 to March 1987, but the claim of refund was filed on 23.06.1997 for Rs.3,31,806/- and Rs.4,55,347/- and 03.07.1997 for Rs.28.49.7621-

3.2. Further, while placing reliance on the judgements in the case of M/s Ranbaxy Laboratories Ltd. M/s Surajbhan Synthetics (P) Ltd), the learned appellate authority has held contrary to the ratio of the said rulings as, it was held in these cases that, the interest on delayed refund is payable on expiry of three months from the date of receipt of application under section 11(B)(1) of the C.Ex. Act, 1944. Therefore, the learned Commr (Appeals) conclusion have traversed beyond the mandate of the ruling of Hon'ble Supreme Court which is the law of land."

3.1 We have heard Shri Deepak Bhilegaonkar, Additional Commissioner, Authorised Representative for the Revenue and Shri Nitesh Agarwal, Chartered Accountant for the respondent.

3.2 Arguing for the Revenue, learned AR submits that the interest in the present case needs to be paid after three months from the date of filing the refund application and not from the date of deposit of duty. He relied on the decision in the case of Ranbaxy Laboratories Ltd. and Surajbhan Synthetics (P) Ltd.

3.3 Arguing for the respondent, learned C.A. relied upon the following decisions in support of the impugned order:-

- Ucal Fuel Systems Ltd. [2014 (306) ELT 26 (Mad.)]
- Sandvik Asia Ltd. [2006 (196) ELT 257 (SC)]
- Pricol Ltd. [2015 (320) ELT 703 (Mad.)]
- Omjai Bhavani Silk Mills (P) Ltd. [2009 (243) ELT 560 (Tri.-Bang.)]
- Parle Agro Pvt. Ltd. [2022 (380) ELT 219 (Tri.-All.)]
- Shahi Exports Ltd. [2022 (58) GSTL 367 (Tri.-Chan.)].

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 Section 11BB of the Central Excise Act inserted in the statute with effect from 26.05.1995 by Finance Act, 1995 (22 of 1995) reads as follows:-

*"**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."*

4.3 From the plain reading of the above section it is evident that the interest in case of delayed refund is payable only for the period of delay beyond three months from the date of filing the application.

4.4 Hon'ble Supreme Court has in the case of Ranbaxy Laboratories Ltd. [2012 (27) STR 193 (SC)] held as follows:-

*"**9.** It is manifest from the afore-extracted provisions 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.*

***10.** It is a well settled proposition of law that a fiscal legislation has to be construed strictly and one has to look merely at what is said in the relevant provision; there is nothing to be read in; nothing to be implied and there is no room for any intendment. [See: Cape Brandy Syndicate v. Inland Revenue Commissioners,* *[1921] 1 K.B. 64 and Ajmera Housing Corporation & Anr. v. Commissioner of Income Tax, (2010) 8 SCC 739].*

11. *At this juncture, it would be apposite to extract a Circular dated 1st October 2002, issued by the Central Board of Excise & Customs, New Delhi, wherein referring to its earlier Circular dated 2nd June 1998, whereby a direction was issued to fix responsibility for not disposing of the refund/rebate claims within three months from the date of receipt of application, the Board has reiterated its earlier stand on the applicability of Section 11BB of the Act. Significantly, the Board has stressed that the provisions of Section 11BB of the Act are attracted "automatically" for any refund sanctioned beyond a period of three months. The Circular reads thus :*

"Circular No. 670/61/2002-CX, dated 1-10-2002

F. No. 268/51/2002-CX.8

Government of India

Ministry of Finance (Department of Revenue)

Central Board of Excise & Customs, New Delhi

Subject : Non-payment of interest in refund/rebate cases which are sanctioned beyond three months of filing - regarding.

I am directed to invite your attention to provisions of section 11BB of Central Excise Act, 1944 that wherever the refund/rebate claim is sanctioned beyond the prescribed period of three months of filing of the claim, the interest thereon shall be paid to the applicant at the notified rate. Board has been receiving a large number of representations from claimants to say that interest due to them on sanction of refund/rebate claims beyond a period of three months has not been granted by Central Excise formations. On perusal of the reports received from field formations on such representations, it has been observed that in majority of the cases, no reason is cited. Wherever reasons are given, these are found to be very vague and unconvincing. In one case of consequential refund, the jurisdictional Central Excise officers had taken the view that *since the Tribunal had in its order not directed for payment of interest, no interest needs to be paid.*

2. In this connection. Board would like to stress that the provisions of section 11BB of Central Excise Act, 1944 are attracted automatically for any refund sanctioned beyond a period of three months. The jurisdictional Central Excise Officers are not required to wait for instructions from any superior officers or to look for instructions in the orders of higher appellate authority for grant of interest. Simultaneously, Board would like to draw attention to Circular No. 398/31/98-CX., dated 2-6-98 [1998 (100) E.L.T. T16] wherein Board has directed that responsibility should be fixed for not disposing of the refund/rebate claims within three months from the date of receipt of application. Accordingly, jurisdictional Commissioners may devise a suitable monitoring mechanism to ensure timely disposal of refund/rebate claims. Whereas all necessary action should be taken to ensure that no interest liability is attracted, should the liability arise, the legal provision for the payment of interest should be scrupulously followed."

(Emphasis supplied)

12. *Thus, ever since Section 11BB was inserted in the Act with effect from 26th May 1995, the department has maintained a consistent stand about its interpretation. Explaining the intent, import and the manner in which it is to be implemented, the Circulars clearly state that the relevant date in this regard is the expiry of three months from the date of receipt of the application under Section 11B(1) of the Act.*

13. *We, thus find substance in the contention of learned counsel for the assessee that in fact the issue stands concluded by the decision of this Court in U.P. Twiga Fiber Glass Ltd. (supra). In the said case, while dismissing the special leave petition filed by the revenue and putting its seal of approval on the decision of the Allahabad High Court, this Court had observed as under :*

"Heard both the parties.

In our view the law laid down by the Rajasthan High Court succinctly in the case of J.K. Cement Works v. Assistant Commissioner of Central Excise & Customs reported in 2004 (170) E.L.T. 4 vide Para 33 :

"A close reading of Section 11BB, which now governs the question relating to payment of interest on belated payment of interest, makes it clear that relevant date for the purpose of determining the liability to pay interest is not the determination under subsection (2) of Section 11B to refund the amount to the applicant and not to be transferred to the Consumer Welfare Fund but the relevant date is to be determined with reference to date of application laying claim to refund. The non-payment of refund to the applicant claimant within three months from the date of such application or in the case governed by proviso to Section 11BB, non-payment within three months from the date of the commencement of Section 11BB brings in the starting point of liability to pay interest, notwithstanding the date on which decision has been rendered by the competent authority as to whether the amount is to be transferred to Welfare Fund or to be paid to the applicant needs no interference."

The special leave petition is dismissed. No costs."

14. *At this stage, reference may be made to the decision of this Court in Shreeji Colour Chem Industries (supra), relied upon by the Delhi High Court. It is evident from a bare reading of the decision that insofar as the reckoning of the period for the purpose of payment of interest under Section 11BB of the Act is concerned, emphasis has been laid on the date of receipt of application for refund. In that case, having noted that application by the assessee requesting for refund, was filed before the Assistant Commissioner on 12th January 2004, the Court directed payment of Statutory interest under the said Section from 12th April 2004 i.e. after the expiry of a period of three months from the date of receipt of the application. Thus, the said decision is of no avail to the revenue.*

15. *In view of the above analysis, our answer to the question formulated in para (1) supra is that the liability of the revenue to* *pay interest under Section 11BB of the Act commences from the date of expiry of three months from the date of receipt of application for refund under Section 11B(1) of the Act and not on the expiry of the said period from the date on which order of refund is made."*

4.5 In the case of Surajbhan Synthetics (P) Ltd., similar view has been expressed by the Hon'ble Apex Court.

4.6 During the course of argument, learned counsel relied upon the decision in the case of Sandvik Asia Ltd. [2006 (196) ELT 257 (SC)]. On going through the judgment we find that the issue under consideration before the Hon'ble Apex Court as per para 16 was in respect of interpretation of Sections 237, 240, 243 and 244 of the Income Tax Act, 1961. The said sections are reproduced below:-

*"**237. Refunds**. If any person satisfies the Income-tax Officer that the amount of tax paid by him or on his behalf or treated as paid by him or on his behalf for any assessment year exceeds the amount with which he is properly chargeable under this Act for that year, he shall be entitled to a refund of the excess.*

***240. Refund on appeal, etc.** - Where, as a result of any order passed in appeal or other proceeding under this Act, refund of any amount becomes due to the assessee, the Income-tax Officer shall, except as otherwise provided in this Act, refund the amount to the assessee without his having to make any claim in that behalf."*

***240. Refund on appeal, etc.** - Where, as a result of any order passed in appeal or other proceeding under this Act, refund of any amount becomes due to the assessee, the Assessing Officer shall, except as otherwise provided in this Act, refund the amount to the assessee without his having to make any claim in that behalf :*

[7][Provided that where, by the order aforesaid,-

(a) an assessment is set aside or cancelled and an order of fresh assessment is directed to be made, the refund, if any, shall become due only on the making of such fresh assessment;

(b) the assessment is annulled, the refund shall become due only of the amount, if any, of the tax paid in excess of the tax changeable on the total income returned by the assessee".]"

243. Interest on delayed refunds. - *(1) If the Income-tax Officer does not grant the refund -*

(a) in any case where the total income of the assessee does not consist solely of income from interest on securities or dividend, within three months from the end of the month in which the total income is determined under this Act, and

(b) in any other case, within three months from the end of the month in which the claim for refund is made under this Chapter,

the Central Government shall pay the assessee simple interest at (twelve) per cent per annum on the amount directed to be refunded from the date immediately following the expiry of the period of three months aforesaid to the date of the order granting the refund.

Explanation : If the delay in granting the refund within the period of three months aforesaid is attributable to the assessee, whether wholly or in part, the period of the delay attributable to him shall be excluded from the period for which interest is payable.

(2) Where any question arises as to the period to be excluded for the purposes of calculation of interest under the provisions of this section, such question shall be determined by the Commissioner whose decision shall be final.

244. Interest on refund where no claim is needed. *- (1) Where a refund is due to the assessee in pursuance of an order referred to in section 240 and the Income-tax Officer does not grant the refund within a period of [three months from the end of the month in which such order is passed], the Central Government shall pay to the assessee simple interest at [twelve]* *per cent per annum on the amount of refund due from the date immediately following the expiry of the period of [three] months aforesaid to the date on which the refund is granted.*

(1A) Where the whole or any part of the refund referred to in sub-section (1) is due to the assessee, as a result of any amount having been paid by him after the 31st day of March, 1975, in pursuance of any order of assessment or penalty and such amount or any part thereof having been found in appear or other proceeding under this Act to be in excess of the amount which such assessee is liable to pay as tax or penalty, as the case may be, under this Act, the Central Government shall pay to such assessee simple interest at the rate specified in sub-section (1) on the amount so found to be in excess from the date on which such amount was paid to the date on which the refund is granted :

***Provided** that, where the amount so found to be in excess was paid in instalments, such interest shall be payable on the amount of each such instalment or any part of such instalment, which was in excess, from the date on which such instalment was paid to the date on which the refund is granted :*

***Provided further** that no interest under this sub-section shall be payable for a period of one month from the date of the passing of the order in appear or other proceeding :*

***Provided also** that where any interest is payable to an assessee under this sub-section, no interest under sub-section (1) shall be payable to him in respect of the amount so found to be in excess.*

(2) Where a refund is withheld under the provisions of section 241, the Central Government shall pay interest at the aforesaid rate on the amount of refund ultimately determined to be due as a result of the appear or further proceeding for the period commencing after the expiry of three months from the end of the month in which the order referred to in section 241 is passed to the date the refund is granted."

4.7 On perusal of the said sections and section 11BB of Central Excise Act, we do not find that these sections are in pari materia. Accordingly the reliance placed by the counsel on the above referred decision of Hon'ble Supreme Court would not be proper.

4.8 Respondent has relied upon various other decisions which do not help the cause of the respondent for the reason that these decisions do not take note of the decision of Hon'ble Supreme Court in the case of Ranbaxy Laboratories Ltd.

4.9 Further the amounts deposited by the respondent in the present case are not in nature of deposits made during investigation but is a duty paid by the respondent under protest. Duty paid under protest is for all the legal purposes and the amount deposited as duty though payment of the same is protested.

5.1 In view of the discussions above, we find merits in the appeal of the Revenue. The interest under Section 11BB of the Central Excise Act is required to be paid to the respondent for any delay beyond three months from the date of filing the refund claims viz. 23.06.1997 and 03.07.1997.

5.2 The order of Commissioner (Appeals) allowing the interest to be paid from the date of deposit is set aside. Revenue should as per their appeal pay the interest to the respondent within a month's time from the date of receipt of this order.

5.3 Appeal is allowed as indicated in para 5.1 & 5.2 above.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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