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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Sep-12-2006

Reported in : (2006)(113)ECC288

Judge : R Abichandani

Appellant : Afcons Infrastructure Ltd.

Respondent : Commissioner of Central Excise

Judgement :

1. This appeal has been preferred against the order of the Commissioner (Appeals) made on 25.08.2004 upholding the order dated 11.12.2003 made by the Assistant Commissioner holding that interest cannot be granted on the refund amount of the pre-deposit and further that it could not be granted also because the refund was sanctioned within the stipulated time of three months.

2. It appears that the appellant had made a refund application on 30.6.2003 for refund of the pre-deposit amount of Rs. 4,30,000/-. The said amount was deposited on 15.10.1994 as pre-deposit under Section 35F of the Central Excise Act, 1944, on the direction of the Tribunal in the context of the hearing of the appeal which involved the question whether excise duty was payable on 'Caisson Gate'. The Tribunal had allowed the appeal by its order dated 14.5.2003 [reported in 2003 (156) ELT 56 (Tri. Del)] and the assessee became entitled to the refund of the pre-deposit amount. The said application dated 30.6.2003 was, therefore, submitted seeking the refund of the pre-deposit amount with interest. Pursuant to

the said application, the pre-deposit amount of Rs. 4,30,000/- was ordered to be refunded and such refund came to be sanctioned under Section 11B of the said Act. The cheque of the said amount was forwarded with the sanctioned order dated 14.8.2003 made by the Assistant Commissioner.

2.1 Thereafter, by letter dated 10.9.2003 the Assistant Commissioner informed the appellant that the refund claim was sanctioned within the prescribed time limit and hence the question of payment of interest did not arise. Thereafter, the appellant again by letter dated 11.11.2003 made a request for the claim of the interest on the refund of the pre-deposit amount. In response thereto, the appellant was informed that the interest could not be granted on the refund of pre-deposit and also on the ground that the refund was made within the stipulated time of three months.

2.2 In the appeal, preferred by the assessee against the said order denying interest, the Commissioner (Appeals) held that interest could not be granted because payment of interest on pre-deposit was not mandated under the Act. It was held that wherever interest was awarded, it was by independent judicial forums, and the Commissioner (Appeals) being a creature of the Act could not grant any relief outside the mandate of the Central Excise Act, 1944.

3. The learned Counsel appearing for the appellant has contended that the law laid down by the Hon'ble the Supreme Court in Kuil Fireworks Industries v. CCE awarded on pre-deposit which was refunded was binding on all Courts in view of the provisions of Article 141 of the Constitution of India, and therefore, since the Hon'ble the Supreme Court awarded interest in the case of refund of pre-deposit, interest could be awarded from the date of the making of such deposit pursuant to the order of the Tribunal/Court. It was submitted that since the amount was deposited pursuant to the condition of interim stay, it was in the interest of justice to award interest on such amount which became refundable by virtue of the decision of the Tribunal holding that 'Cassion Gate' was not excisable goods. It was argued that since the appellant was deprived of the use of his amount which was required to be pre-deposited, and had suffered a loss of interest thereon, it was incumbent on the authorities to refund the amount with interest. He further

submitted that on the doctrine of stare decisis the proposition that interest should be awarded in such cases adopted by the decisions of the Tribunal and Courts should be followed, exhorting this bench 'to show courage to do justice'. The learned Counsel placed heavy reliance on the circular dated 8.12.2004 (CBE &C Circular No. 802/35/2004-CX), more particularly on paragraph 5 thereof in which it was, inter-alia, stated that all concerned were requested to note that default will entail an interest liability, if such liability accrues by reason of any orders of the CESTAT/Court, such orders will have to be complied with, and it may be recoverable from the concerned officers.

3.1 In support of his contentions, the learned Counsel placed reliance on the following decisions:Kuil Fireworks Industries v. CCE out from paragraph 7 of the judgment that the Supreme had directed that the amount of Rs. 2,00,000/- which was deposited by the appellant be refunded to the appellant with interest @ 12% and the bank guarantee of Rs. 1,50,000/- furnished by the appellant shall stand discharged. The dispute before the Hon'ble the Supreme Court in this case was in the context of the order of the Appellate Tribunal, which was set aside by the Hon'ble the Supreme Court quashing the demand raised by the Assistant Collector. As a result amount of Rs. 1,50,000/- paid by that appellant towards the impugned demand of excise and a further sum of Rs. 1,50,000/- paid in terms of the interim order of the Tribunal, were ordered to be refunded with interest @ 12%.

b) The decision of the Hon'ble the Supreme Court in CCE, Hyderabad v. ITC Ltd. reported in 2005 (179) ELT 15 (SC), was referred for making a comment that the said decision did not give facts or reasons and therefore, it was not law laid down by the Hon'ble the Supreme Court. The question before the Hon'ble the Supreme Court was whether pre-deposit made as a pre-condition for hearing of appeal was refundable to the assessee with interest. The learned Solicitor General stated before the Court that the CBEC proposed to issue a circular in connection with payment of such interest. A draft for the proposed circular was handed over and the Court directed that its contents should form part of the order. Having regard to the contents of the draft circular, it was directed to comply with the final order impugned before the Hon'ble the Supreme Court and payment of interest in terms of the draft circular.Elephanta Oil and Vanaspati Industries Ltd. v. Union of India ,

for pointing out that in paragraph 8 of the judgment the High Court had directed the respondent to pay to the petitioner interest @ 17.5% per annum from the date of deposit of the amount till it was refunded within four weeks from the date of this order. It appears that the redemption fine was deposited for getting delivery of goods pursuant to the order of the Collector of Customs confiscating the goods and giving option to redeem on payment of fine, and the delivery of the goods was taken. However, since the Appellate Tribunal allowed the appeal, the amount of redemption fine was ultimately refunded. The writ petition was preferred seeking a direction to pay interest @ 17.5% per annum on quarterly basis on the amount of refund. It will be observed that no question of refund of pre-deposit or payment of interest on refund dealt with by Section 11BB of the Act had arisen.

d) The decision of the Gujarat High Court in Shree Ram Food Industries v. UOI , was cited to point out from paragraph 15 of the judgment that while holding that the petitioner was entitled to refund of Rs. 5,40,847/- (being excess payment of duty) the authorities were directed to grant the refund along with interest @ 12% from the date of the order of the Commissioner of Central Excise till the date of payment.Sharda Synthetics Ltd. and Hindustan Wire Products Ltd. v. CCE, Mumbai and CCE, Chandigarh reported in 2003 (89) ECC 85 (Tri), was cited for the proposition that even when the matter is remanded to the adjudicating authority, the amount of pre-deposit is required to be refunded. The Tribunal referred to the circular of the Board dated 2.1.2002 clarifying that deposits should be returned in the event the appellants succeed in the appeal or the matter is remanded for fresh adjudication. In paragraph 9 of the judgment, the Tribunal held that both the appellants were entitled to interest as the amount of pre-deposit was refunded immediately after the order was made by the Tribunal.

Relying on the decision of the larger bench of the Tribunal in Sheela Foam Pvt. Ltd. v. CCE, Noida the Tribunal held that the assessee was eligible to interest on the amount of pre-deposit from the date of expiry of three months from the date of the receipt of the final order dated 19.10.94 made by the Tribunal till the date of payment.Ram Bai v. Commissioner of Income Tax referred to for the proposition that the ITO could not have applied the test different from that laid down by the full bench judgment of the Andhra Pradesh High Court which was holding the field at

the relevant time.

4. The learned authorized representative for the department supported the reasoning and findings of the authorities below contending that all refunds were governed by the provisions of Section 11B and even the refund of the pre-deposited amount of duty was, in the context of interest payable on refund governed by the provisions of Section 11BB of the Act. It was submitted that the circular issued by the Board was in the context of refund of pre-deposits, which were required to be expeditiously made and in cases where interest was required to be paid in accordance with the provisions of Section 11BB. It was argued that award of interest by the superior Courts in exercise of their constitutional powers while making the orders on refund will not empower the authorities under the said Act to award interest on refund contrary to the statutory provision of Section 11BB which had a direct bearing on award of interest on refunds.

4.1 In support of his contention, the learned authorized representative for the department referred to the decision of the Larger Bench of the Tribunal in Sheela Foam Pvt. Ltd. v. Commissioner of Central Excise, Noida the judgment, that the Larger Bench directed the respondent to refund the amount of Rs. 61.70 lacs deposited by the appellant with the department within a period of ten days with interest @ 12% from the date of expiry of three months from the date of the receipt of the copy of the final order of the Tribunal and not from the date of the refund application. The Tribunal took note of the circular dated 2.1.2002, indicating that delay of refund would invite liability for interest.

The learned authorized representative also relied upon the decision of the Hon'ble the Supreme Court in CCE, Hyderabad v. ITC Ltd. (supra), in which the Hon'ble the Supreme Court appending the proposed circular which was to be issued by the CBEC, with its order and directing that its contents will form part of the order, disposed of the appeal holding that in view of this order, any judgment of any High Court holding to the contrary will no longer be good law. The Hon'ble the Supreme Court was concerned in that case with the issue whether the pre-deposit made as a pre-condition for hearing of the appeal under the Central Excise Act, 1944, was, on the assessee being ultimately successful, refundable to the assessee with

interest. According to the learned authorized representative for the department, the said circular came to be issued on 8.12.2004 [See 2004 (174) ELT T.9]. Referring to that circular from the paper book at Annexure P/7, it was contended that the emphasis of the instructions contained therein was on return of pre-deposits made as per direction of the CESTAT in terms of Section 35F. It was stated therein that, in terms of the Hon'ble Supreme Court's order, such pre-deposits must be returned within three months from the date of the order passed by the Appellate Tribunal/Court or other final authority, unless there was a stay on the order by a superior Court. The learned authorized representative for the department finally referred to the decision of the Gujarat High Court in Padmanabh Silk Mills v. Union of India , in which after considering the decisions of the Tribunal and also the decision in Kuil Fireworks Industries v. CCE (supra), the division Bench of the High Court in the context of provisions of Sections 11B and 11BB of the said Act, held that from the bare reading of Section 11B(2) and 11BB of the Act, it was clear that if the concerned authority was satisfied with the case of the applicant for refund, then it was to be paid within three months from the date of receipt of the application and if it was not paid then the interest had to be paid on it under Section 11BB of the Act.

5. The short question involved in this appeal is whether the appellant - assessee was entitled to claim interest on the amount of refund of the pre-deposit made by the appellant on 15.10.1994 under Section 35F of the Act as a condition for hearing of the appeal, which ultimately came to be decided in favour of the assessee entitling the appellant to get the refund of the pre-deposit amount of Rs. 4,30,000/- 6. Undisputedly, the amount of Rs. 4,30,000/- was ordered to be refunded to the appellant by refund letter dated 14.8.2003 at Annexure P/2 to the memo of appeal. Since no interest was awarded, the appellant by communication dated 11.12.2003 claimed interest on the refund amount @ 15% per annum from 15.10.94 to 14.8.2003 which worked out to about Rs. 5,70,000/-, as stated in that communication. The authority was informed by the said letter to make a speaking order if it was not inclined to sanction the interest despite the precedents quoted therein. Again, by communication dated 11.12.2003, the appellant requested the authority to make a speaking order if the claim of interest on refund was not accepted.

7. The claims for refund of duty are dealt with by Section 11B of the Act. Under Sub-section (2) of Section 11B if, on receipt of an application claiming refund the Assistant Commissioner/Deputy Commissioner of Central Excise is satisfied that the whole or any part of the duty of excise paid by the applicant is refundable, he may make an order accordingly and the amounts so determined shall be credited to the 'fund' unless if it relates to any of the items (a) to (f) enumerated in the proviso to Sub-section (2) of Section 11B.8. Admittedly, in the present case, the order of refund, a copy of which is at Annexure P/2, was made under Section 11B of the said Act as specifically mentioned in the said sanction order, forwarding a cheque of the amount of Rs. 4,30,000/- in settlement of the refund claim.

8.1 The appellant had become entitled to the refund consequent upon the order of the Tribunal setting aside the demand of duty on the ground that 'Cassian Gate' was not excisable goods. The said amount was deposited as a condition for hearing the appeal under Section 35F while deciding the application for stay. Under Section 35F of the Act, in cases where the appeal before the Tribunal related to any duty demanded in respect of goods which were not under the control of the Central Excise authorities, or penalty levied under the Act, the person desirous of appealing against such decision or order shall, pending the appeal, deposit with the adjudicating authority the duty demanded or the penalty levied subject to the proviso thereunder which enabled the Appellate Tribunal to dispense with such deposit, subject to such conditions as may deem fit to be imposed so as to safeguard the interest of revenue. It is evident from the provisions of Section 35F that ordinarily, unless dispensed with, the entire duty was required to be deposited when a person is desirous of appealing against the order demanding such duty. However, when the Appellate Tribunal is of the opinion that the "deposit of duty" demanded would cause hardship, it may dispense with such deposit of duty subject to conditions. It is clear from the wordings of Section 35F of the Act that the pre deposit will be of the duty demanded under the order, if the appellant desirous to challenge it. Merely because such deposit of duty demanded is described as pre-deposit for the purpose of hearing the appeal, it would not lose the character of a whole or partial deposit of the duty demanded, pending the appeal. The expression "deposit of duty demanded" in Section 35F leaves no scope for any doubt that the amount

which is ordered to be deposited as a condition for hearing the appeal, which is in common parlance described as "pre-deposit", does not lose the character of the deposit as being that of duty demanded.

8.2 In cases where the duty demanded under the impugned order is already paid or recovered and the appellant challenges such an order before the Appellate. Tribunal in accordance with the appeal provisions no such condition would be required to be imposed for deposit of the duty demanded in view of its being already demanded or recovered, as the case may be. In all cases where the duty demanded under the order challenged before the Tribunal, is either paid under protest or recovered or wholly or partially paid by way of pre-deposit under Section 35F for hearing the appeal, the question of refund of such duty paid under protest/recovered under the order impugned/ wholly or partially paid by an order made under Section 35F of deposit of duty demanded, the question of refund would necessarily arise under Section 11B, when the order confirming the demand of duty is set aside by the Tribunal. In all such cases, therefore, the provisions of Section 11BB will get necessarily attracted.

8.3 Under Section 11B(2), the authority on being satisfied that the whole or any part of duty of excise paid is refundable to the applicant, would make order of the refund of the determined amount.

Section 11B does not provide for award of interest on such refund and a separate provisions has been made in Section 11BB in relation to interest on delayed refunds.

8.4 Section 11BB, referring to the provisions of Section 11B(2) under which refund is ordered, lays down that if the duty ordered to be refunded is not refunded within three months from the date of the receipt of the application under Sub-section (1) of Section 11B, the applicant will be paid interest, as indicated thereunder 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 amount.

8.5 The explanation which has relevance to the present dispute reads as under: 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 or Deputy 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.

This explanation appears to have been incorporated because Section 11B(2) refers to order of refund made by the Assistant Commissioner or Deputy Commissioner of Central Excise. In view of this explanation even when the order of refund is made by the Appellate Tribunal or any Court against an order of the Assistant Commissioner or Deputy Commissioner which was made under Sub-section (2) of Section 11B, such Appellate order of the Tribunal or the court 'shall be deemed to be an order passed under the said Sub-section (2) (of Section 11B) for the purpose of this section'. Therefore, in cases where the appeals are filed in the Appellate Tribunal against the order rejecting the claim for refund wholly or partially rejecting the claim of refund with interest, the order of the Appellate Tribunal shall be deemed to be an order passed under Sub-section 11B(2) for the purposes of award of interest on delayed refunds under Section 11BB. In other words, even in an appeal which arises before the Tribunal from any order partially denying the claim of refund with interest, when the interest is to be awarded it will have to be in consonance with the provisions of Section 11BB and the interest shall be paid to such applicant at the rate indicated on such duty, from the date immediately after the expiry of three months from the date of receipt of such application for refund till the date of refund of such duty. There is absolutely no scope under the said provisions either for Assistant/Deputy Commissioner or the Appellate Tribunal or Court to award interest on the refund amount from any date earlier than the date immediately after the expiry of three months of the date of receipt of such application. The appellant would, therefore, not be entitled to interest on the refund claim from 15.10.1994, being the date on which the deposit of partial amount of duty demanded was made by the appellant under Section 35F of the Act for the hearing of the appeal.

8.6 Admittedly, the refund claim was sanctioned within three months from the date of the application for refund. Obviously, therefore, the appellant was not entitled to

claim interest on the refund of Rs. 4,30,000/- being the pre-deposit of the duty demanded under the order, which was challenged before the Tribunal under Section 35F of the Act.

The Tribunal, while entertaining the claim of interest of the present nature, cannot overlook the provisions of Section 11BB of the Act, which would apply in all cases of interest on delayed refunds. The decision in Kuil Fireworks Industries in which the Hon'ble the Supreme Court while directing the refund of duty, awarded interest cannot generate power to award interest for the Tribunal contrary to the provisions of Section 11BB of the Act since the award of interest under that decision is obviously relatable to the plenary powers of the Supreme Court. Even the award of interest by the High Courts in exercise of their writ jurisdiction will not constitute a ratio creating power of the Tribunal or revenue authorities to award interest contrary to the provisions of Section 111BB on the delayed refunds. As held by the Hon'ble the Gujarat High Court Padmanabh Silk Mills v.Union of India (supra), where specific application is made under Section 11B(2) of the Central Excise Act, 1944 for interest on delayed refund then the same had to be considered and decided by the authority in the light of the provisions of Section 11B(2) as well as Section 11BB of the Act, as Section 11BB provides interest for delayed refund of duty and not of deposit. It was held that the authority was, therefore, right in rejecting the refund on delayed refund. The Hon'ble High Court held in paragraph 11 of the judgment that, from a bare reading of Section 11B(2) and 11BB of the Act, it was clear that if the concerned authority was satisfied on the claim of the applicant for refund, then the refund was to be paid within three months from the date of the receipt of the application, and if it was not so paid then interest had to be paid on it under Section 11BB of the Act. This decision of the Hon'ble Gujarat Court fortifies the conclusion that the claim for interest made by the appellant in respect of the refund of the deposited amount was not maintainable under Section 11BB of the Act, since the refund application of the appellant was disposed of within three months of its receipt.

9. For the foregoing reasons, there is no warrant for interfering with the impugned order which is made for valid reasons. The appeal is, therefore, dismissed.

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