(2005) 01 DEL CK 0089

In the Delhi High Court

Case No : WPC 4750 of 2001

Air Control and Chemical Engineering Co. Ltd. APPELLANT

Vs

Union of India (UOI) RESPONDENT

Date of Decision : 11-01-2005

Acts Referred:

Citation : (2005) 119 ECR 24

Hon'ble Judges : Madan B. Lokur, J;D.K. Jain, J

Bench : Division Bench

Advocate : D.A. Dave and Meenakshi Arora, for the Appellant; Siddharth Mridul and Vinay Nair, for the Respondent

Final Decision : Allowed

Judgement

Madan B. Lokur, J.—The Petitioner is aggrieved by a demand order dated 19th July, 1999 passed by the Superintendent of Central Excise, Ahmedabad as well as by an order dated 28th May, 2001 rejecting its representation against the demand order.

2. The Petitioner is engaged in the manufacture of refrigeration compressors, fans and blowers in Ahmedabad. There was some dispute between the Petitioner and the excise authorities at Ahmedabad regarding payment of excise duty on the differential value of compressors. Pursuant to this dispute, a notice dated 17th November, 1987 was issued to the Petitioner calling upon them to show cause why excise duty of about Rs. 1.95 crores be not recovered.

3. Feeling aggrieved by the show cause notice dated 17th November, 1987, the Petitioner filed SCA No. 1758/1988 in the Gujarat High Court praying that the show cause notice be set aside.

4. During the pendency of the proceedings in the Gujarat High Court, the Collector of Central Excise adjudicated upon the show cause notice and raised a demand of excise duty for a sum of about Rs. 1.55 crores for the period from November, 1982 to March ,1986.

5. By an order dated 21st February, 1990 the Gujarat High Court admitted the SCA for final hearing and granted interim relief to the Petitioner to the effect that instead of paying the duty demanded, it should furnish security of immovable property for the amount in dispute till the disposal of the SCA. The Petitioner was also directed to pay interest @ 12% per annum in case the SCA was dismissed.

6. However, sometime later, the Petitioner withdrew the writ petition with liberty to take recourse to the statutory remedy of filing an appeal before the Customs, Excise and Gold (Control) Appellate Tribunal (CEGAT). The Gujarat High Court continued its interim order till the Petitioner approached the CEGAT and the SCA was accordingly disposed of.

7. The statutory appeal filed by the Petitioner against the order of the Collector was heard by the CEGAT and by an order dated 2nd February, 1994, the demand of about Rs. 1.55 crores towards excise duty was confirmed and the Petitioner was also asked to pay interest @ 12% per annum on the amount in terms of the interim order passed by the Gujarat High Court. The operative portion of the order dated 2nd February, 1994 passed by the CEGAT is as follows:''''45.3 Thus, this point made by the assessed had no force and we consider that the demand of Central Excise duty of Rs. 1,55,22,150.60 has been correctly confirmed by the adjudicating Collector of Central Excise.

46. Keeping in view the totality of the circumstances however, we reduce the penalty from Rs. 40 Lakhs to Rs. 20 Lakhs.

47. The Tribunal while disposing of the stay application of the applicants on 13.12.1991, although observed that they have got no power to order the payment of interest, had accepted the offer of the learned Sr. Advocate for the appellants, for payment of interest by the appellants, at the rate of 12 percent in the event of their losing the appeal. We accordingly, exercising our inherent powers in view of the decision of the Hon''ble Supreme Court in the case of Income Tax Officer Cannanore v. M.K. Mohamed Kunhi reported in AIR 1969 SC 430, accept the offer of the learned Senior Advocate as to the payment of interest at the rate of 12 percent from the date of the order dated 21.2.1990 of the Hon''ble Gujarat High Court, on the duty demanded.

48. Subject to above, the appeal is otherwise rejected and the impugned order is confirmed.''''

8. Subsequently, the Petitioner filed a petition for special leave to appeal in the Supreme Court which was dismissed by an order dated 13th May, 1994.

9. The position as it stood, Therefore, was that the Petitioner was obliged to pay excise duty to the extent of about Rs. 1.55 crores with interest @ 12% per annum thereon as per the order passed by the Gujarat High Court on 21st February, 1990.

10. In view of the huge liability and also due to other factors, the Petitioner turned sick and eventually a reference was made to the Board for Industrial and

Financial Reconstruction (BIFR). An operating agency was appointed in respect of the Petitioner and a scheme for rehabilitation of the Petitioner was also framed and sanctioned on 25th March, 1999 by the BIFR.

11. In so far as the dues of the Respondents are concerned, the Sanctioned Scheme provided as follows:-

''''GOVERNMENT OF INDIA

(i) To consider acceptance of principal amount of excise duty in arrears and simple interest thereon accrued and due up to 31.3.99 in full as full and final payment payable in equal annual installments spread over nine years commencing from 180 days after sanction of scheme. The deferred excise liability will carry interest @ 12% p.a. + interest tax on reducing balance basis.

(ii) Excise Department also to close all the pending inquiries under the raids conducted by them on ACCEL and not levy any additional liability on the company.

(iii) xxx xxx''''

12. On the basis of the Sanctioned Scheme, particularly taking advantage of the expression used therein that the Government of India will consider acceptance of the principal amount of excise duty carrying interest @ 12% per annum, the Respondents considered the matter and apparently relying upon Section 11BB of the Act, passed the impugned demand order dated 19th July, 1999 claiming interest at 17.5% compounded at the end of each month with effect from the date of confirmation of the demand and thereafter at 20% per annum for the period from 29th May, 1995. Reliance in this regard was placed upon certain notifications issued by the Government.

13. The Petitioner, as mentioned above, represented against the demand order and offered payment of interest @ 12% per annum. This was rejected by the second impugned order dated 28th May, 2001.

14. Learned counsel for the Petitioner contended before us that Section 11BB of the Act was introduced with effect from 26th May, 1995 and that it did not have any retrospective effect. The argument, Therefore, was that it would not apply to a demand sought to be created by the show cause notice dated 17th November, 1987. It was also contended that, all along, interest @ 12% per annum had been accepted by both parties inasmuch as even though, strictly speaking, no interest was required to be paid by te Petitioner, this liability was placed upon the Petitioner by the Gujarat High Court while granting interim relief and was also (in a sense) confirmed by the CEGAT when it passed its order dated 2nd February, 1994. The rate of interest @ 12% per an unattained finality when the Supreme Court dismissed the SLP filed by the Petitioner. It was submitted that even at the time when the Sanctioned Scheme was being finalized, in the proceedings held on 1st September, 1998 with the operating agency, that is Industrial Finance Corporation of India Ltd. (IFCI), the Respondents had accepted that interest @ 12% per annum would be due from 21st February,1990 till date of payment. This

is reflected in the minutes of the proceedings which read as under:-

''''Department of Excise

The representative of Excise Deptt. mentioned that the outstanding against the ACCEL was as under: -

(Rs. in lakhs)

Central Excise Duty 155.22Penalty 20.00

Moreover further interest was payable on Central Excise Duty @ 12% from 21.2.90 till the date of payment.

He also mentioned that there was no provision of waiver/reduction of Central Excise duty/penalties/interest under Central Excise Act.''''

15. On the other hand, learned counsel for the Respondents contended that there was no obligation on the Respondents to accept interest @ 12% per annum and as per the Sanctioned Scheme the Respondents were only required to consider acceptance of interest@ 12% per annum. Therefore, after looking into the matter, it was decided that interest should be charged as per the notifications issued by the Central Board of Excise and Customs and so a demand was raised at 17.5% per annum and 20% per annum for different periods. It was submitted that there was nothing wrong in what the Respondents had done and that the demand notice did not require any interference by this Court.

16. There is no dispute that Section 11BB of the Act, on the basis of which interest at a rate over 12% per annum is being claimed, has no retrospective effect. That being so, there may perhaps be no reason why the Petitioner should be called upon to pay any interest at all. However, learned counsel for the Petitioner had no objection at all to payment of interest. Indeed, he clearly stated that his client was prepared to pay interest as required by the Gujarat High Court. The issue, Therefore, is really about the rate of interest.

17. We are of the view that on the facts of this case, the Respondents cannot demand any interest over 12% per annum. The Gujarat High Court while entertaining the writ petition filed by the Petitioner had clearly indicated that in case the Petitioner does not succeed in the writ petition, it will have to pay interest @ 12% per annum. This was accepted by the Respondents. The Respondents did not, at any point of time, demand any higher rate of interest than 12% per annum.

18. When the Petitioner approached the CEGAT, it was again made clear by the CEGAT that the Petitioner will be required to pay interest @ 12% per annum, relying upon the view expressed by the Gujarat High Court. This was also not challenged by the Respondents at any stage. In view of the fact that two authorities have determined the liability of the Petitioner to pay interest @ 12% per annum, we do not think it appropriate to permit the Respondents to charge a higher rate of interest particularly when here has been no protest from them in

this regard.

19. Even while the Sanctioned Scheme was under discussion with IFCI as the operating agency, the rate of interest that was agreed, as mentioned in the minutes of the proceedings held on 1st September, 1998 indicates that only 12% interest was to be charged from the Petitioner from 21st February, 1990 onwards. It is true that when the scheme was eventually sanctioned, the BIFR had permitted the Respondents to consider acceptance of the principal amount of excise duty with interest at 12% per annum. But, we are of the view that this consideration has to be read in the overall context of the facts of the case and what had transpired earlier. This consideration did not mean that the Respondents could raise a new controversy about the rate of interest. On the contrary, the consideration was more or less in the nature of a direction to the Respondents to accept interest @ 12% per annum based on what had happened in the past, namely, the order passed by the Gujarat High Court as well as the CEGAT. In any case ,we read the Sanctioned Scheme in such a manner that interest beyond 12% per annum cannot be demanded by the Respondents.

20. Looking to the overall facts and circumstances of the case, it is not possible for us to sustain the demand of interest as claimed by the Respondents @ 17.5% and 20% per annum for different periods. We make it clear that the demand raised by the Respondents to this extent is not at all justified and that the Petitioner will be liable to pay interest only @ 12% per annum with effect from 21st February, 1990 as per the Sanctioned Scheme approved by the BIFR.

21. The writ petition is, accordingly, allowed to the extent mentioned above. There will be no order as to costs.

