

**(2016) 10 BOM CK 0059**  
**In the Bombay High Court**  
**Case No : Writ Petition No. 3555 of 2016**

Jindal Drugs Pvt. Ltd.

APPELLANT

Vs

Union Of India

RESPONDENT

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**Date of Decision :** 07-10-2016

**Acts Referred:**

**Citation :** (2016) 342 ELT 17

**Hon'ble Judges :** S.C. Dharmadhikari and B.P. Colabawalla, JJ.

**Bench :** Division Bench

**Advocate :** S/Shri Prakash Shah with Mihir Mehta i/b PDS Legal, for the Petitioner; S/Shri M. Dwivedi with Sham V. Walve, Advocates, for the Respondent

**Final Decision :** Disposed Off

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## Judgement

B.P. Colabawalla, J. - Rule. Respondents waive service. By consent of parties, rule made returnable forthwith and heard finally.

2. By this Writ Petition filed under Article 226 of the Constitution of India, the Petitioner challenges the validity and legality of the Order-in-Original No. R-2359/AJP/AC/KLB/15-16, dated 28th January, 2016 (for short the "impugned order") passed by Respondent No. 2 ("the Assistant Commissioner of Central Excise") purporting to reject part of the refund claim of the Petitioner as well as non-payment of interest on the refund already granted.

3. The brief facts giving rise to the present controversy are that the Petitioner i.e. Jindal Drugs Pvt. Ltd. (formerly known as "M/s. Jindal Drugs Ltd.") is engaged in manufacture of Cocoa powder/Cocoa Butter falling under Chapter sub-heading No. 1804 00 00 and 1805 00 00 of the Central Excise Tariff Act, 1985 (hereinafter referred to as the "Tariff Act"). The Petitioner undertakes labelling/ repacking of Cocoa Butter and other products at its Taloja Factory which amounts to manufacture in terms of Note 3 of Chapter 18 of the First Schedule to the Tariff Act read with Section 2(f) of the Central Excise Act, 1944 (for short "the Act").

4. The Petitioner had applied for and was granted registration Bearing No. AAACJ1000AXM006 on 21st May, 2008 under Rule 9 of the Central Excise Rules, 2002 as a manufacturer. The Petitioner availed the Cenvat credit of the duty paid on the inputs received and utilised the same for the payment of duty on the goods cleared for home consumption.

5. It is the case of the Petitioner that it claimed refund of unutilized Cenvat credit under Rule 5 of the Cenvat Credit Rules, 2004. Respondent No. 2 disputed the entitlement of the Petitioner to the Cenvat credit of the duty paid on inputs on the ground that the activities undertaken by the Petitioner did not amount to manufacture. However, this dispute has been resolved in favour of the Petitioner by a majority order of the Appellate Tribunal vide Order No. A/914/15/EB, dated 20th March, 2015 pronounced on 16th April, 2015.

6. It is further stated that pending the decision of the Appellate Tribunal, the Petitioner continued to export the Cocoa Butter/Cocoa Powder without payment of duty under Bond and periodically filed applications seeking refund of the unutilized Cenvat credit under Rule 5 of the Cenvat Credit Rules in respect of the goods exported.

7. Accordingly, the Petitioner filed periodic refund applications under Notification No. 27/2012-Central Excise (N.T.), dated 18th June, 2012 (as amended) read with Rule 5 of the Cenvat Credit Rules as under :-

Period

Date of Filing

Amount

October - 2012

07/06/13

1,27,52,779/-

November - 2012

11/06/13

75,22,938/-

December - 2012

11/06/13

1,28,93,276/-

January - 2013

12/06/13

77,71,702/-

February - 2013

13-8-2013

74,24,270/-

March - 2013

14-8-2013

99,65,764/-

April - 2013

14-8-2013

42,65,979/-

May, 2013 and June, 2013

26-11-2013

3,45,08,728/-

July, 2013 to September, 2013

26-11-2013

2,40,76,855/-

October, 2013 to December, 2013

22-4-2014

7,13,19,317/-

January, 2014 to March, 2014

29-5-2014

8,34,37,785/-

April, 2014 to June, 2014

11/09/14

7,54,11,780/-

July, 2014 to September, 2014

24-12-2014

9,27,44,336/-

8. Vide eight Orders-in-Original of various dates, Respondent No. 2, rejected the said refund claims filed by the Petitioner and thereby denied the refund of unutilized credit under Rule 5 of the Cenvat Credit Rules on the ground that the activities undertaken by the Petitioner did not amount to manufacture. Aggrieved

by these orders, the Petitioner has filed eight Appeals with the Commissioner of Central Excise (Appeals). Vide his Order-in-Appeal Nos. 757 to 764/BEL/2015, dated 28th October, 2015 the Commissioner (Appeals) was pleased to allow the aforesaid eight Appeals following majority orders of the Appellate Tribunal and held that the impugned orders of the Refund Sanctioning Authority (Respondent No. 2) are liable to be set aside and ordered that refund be sanctioned to the Petitioner without any delay.

9. Pursuant to the aforesaid order passed by the Commissioner (Appeals), Respondent No. 2, by the impugned order, sanctioned the refund of Rs. 42,79,82,902/- and ordered re-credit of Rs. 1,61,12,607/- out of the total refund of Rs. 45,60,91,106/- claimed by the Petitioner for eight quarters beginning from October, 2012 to September, 2014. Respondent No. 2 rejected a part of the refund to the extent of Rs. 1,61,12,607/- on the ground that there was erroneous calculation of the refund amount in terms of the formula prescribed under Notification 27/2012-C.E. (N.T.), dated 20th June, 2012, due to non-consideration of the value of scrap sale of corrugated boxes in the turnover value. Respondent No. 2 allowed the re-credit of the same to the Petitioner. The other rejection of refund of Rs. 1,19,95,597/- was due to non-consideration of the revised refund claims that were filed by the Petitioner at the instance of the Revenue. This amount was neither granted as a refund nor allowed as a re-credit. Respondent No. 2, in the impugned order also did not grant interest on the delay in sanctioning/granting the refund to the Petitioner under Section 11BB of the Act. It is in these circumstances that the present Writ Petition has been filed inter alia seeking a mandamus directing Respondent No. 2 to forthwith sanction to the Petitioner the refund as claimed by them as well as interest on the delayed refund as per Section 11BB of the Act.

10. After this matter was argued and reserved for judgment, the parties mentioned the matter and stated that as per the letter dated 29th September, 2016 issued by Respondent No. 2, both parties have come to an agreement that the total refund due to the Petitioner is Rs. 44,46,42,651/- out of which Rs. 42,79,82,902/- has already been paid. Hence, the Petitioner is entitled to the balance refund of Rs. 1,66,59,749/-. It is further agreed that the petitioner shall debit the Cenvat balance of Rs. 46,64,152/- from its Cenvat account. This being the position, the only issue now to be decided by us is whether the Petitioner is entitled to any interest under Section 11BB of the Act.

11. In this factual backdrop, Mr. Prakash Shah, learned counsel appearing on behalf of the Petitioner, submitted that the actions of Respondent No. 2 in not granting interest to the Petitioner were wholly perverse and directly contrary to the provisions of Section 11BB of the Act. He laid great emphasis on Section 11BB which deals with interest on delayed refunds which inter alia stipulates that 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 the application under sub-section (1) of Section 11B, then, the Applicant would be

entitled to such rate of interest (as notified), 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. He submitted that in the present case the original refund applications were filed on various dates ranging from June, 2013 to December, 2014 and reproduced earlier.

12. These applications were rejected by Respondent No. 2 on the grounds that they were filed on a monthly and bi-monthly basis instead of quarterly basis as per Rule 5 of Cenvat Credit Rules, 2004 read with Notification No. 27/2012-C.E. (N.T.). Respondent No. 2 also contended that as the Petitioner had not debited the claim amount at the time of making the claim and therefore the Petitioner's final product (Cocoa Butter) did not amount to manufacture.

13. Mr. Shah submitted that the Petitioner, aggrieved by these orders-in-original, filed Appeals before the Commissioner of Central Excise (Appeals), who thereafter set aside the orders of Respondent No. 2 and was pleased to grant the refunds. Mr. Shah further submitted that Respondent No. 2 passed the impugned order ex parte without giving the Petitioner any opportunity to be heard. Respondent No. 2 then rejected part of the claim without hearing the Petitioner and without putting the Petitioner to notice of the purported rejection of the part of the refund claim. We must mention here that this rejection is part of the refund claim has now been resolved between the parties as per the letter dated 29th September, 2016 issued by Respondent No. 2 and referred to earlier. Mr. Shah further submitted that though Respondent No. 2 has now granted the entire refund as agreed, he did not grant any interest on delayed refunds and as mandated by Section 11BB of the Act. He therefore prayed that the impugned order be set aside and the matter be sent back to Respondent No. 2 for the limited purpose of calculating and paying interest to the Petitioner in terms of Section 11BB of the Act.

14. On the other hand, Mr. Dwivedi, learned counsel appearing on behalf of Respondent Nos. 2 and 3, submitted that the interest-free period of three months for processing the refund claim would start from the date of receipt of a complete refund application. Mr. Dwivedi submitted that in the facts of the present case, the Department will be liable to pay interest only from the date on which the revised refund claims were filed by the Petitioner. Mr. Dwivedi therefore disputed the period for which interest could be granted. Mr. Dwivedi further stated that the refund applications filed were rejected as they had not been filed in the prescribed manner as per the Act. The Petitioner had filed applications for refund on a monthly and bi-monthly basis and therefore, such application was rejected. Mr. Dwivedi stated that the authorities would be liable to pay interest only on a valid and complete refund application. In the facts of this case, such application was only received much later when the Petitioner filed its revised refund claim on a quarterly basis. Therefore, the Petitioner would be entitled to interest only from the date of the revised claim being filed and not from the date of the original refund application, was the submission.

15. We have heard the learned counsels at length and perused the papers and proceedings in the Writ Petition as well as the annexures thereto. Before we deal with the present controversy, it would be appropriate to set out certain provisions of the Act. Section 11B deals with a claim for refund of dues and inter alia stipulates that any person claiming refund of any duty or interest paid by him or borne by him, may make an application in such form and manner as may be prescribed for such refund, to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise before the expiry of one year from the date of payment of such duty or interest. This section further stipulates that the application shall be accompanied by such documentary or other evidence as the applicant may furnish to establish that the amount of duty or interest in relation to which such refund is claimed was collected from, or paid by him, and the incidence of such duty or interest has not been passed on by him to any other person. Thereafter, Section 11BB deals with interest on delayed refunds and reads as under :-

"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.

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, 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."

16. This section clearly stipulates that if any duty is ordered to be refunded under sub-section (2) of Section 11B of the Act to the applicant and the same is not refunded within three months from the date of receipt of such application under sub-section (1) of Section 11B of the Act, then the applicant would be entitled to interest at such rate as more particularly stipulated in the said section. This interest would be payable immediately after the expiry of three months from the date of receipt of such application till the date of refund of the duty. In a nutshell, what this section stipulates is that, once an application for refund has been made and the same is granted within a period of three months of receipt of such application, there would be no liability to pay interest. However, if the refund is granted after the expiry of the period of three months from the date of receipt of the application, then interest would also be payable on the amount of refund granted, from the date immediately after the expiry of three months from the date of receipt of such application, till the date of refund.

17. We must make a note here that these very provisions under the Act came up for consideration before the Supreme Court in the case of *Ranbaxy Laboratories Ltd. v. Union of India* - (2011) 10 SCC 292 : 2011 (273) E.L.T. 3 : 2012 (27) S.T.R. 193 (S.C.). The Supreme Court, after noting the provisions of Sections 11B and 11BB of the Act, (of the SCC report) held as under :-

"12. 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 the 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 the 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.

13. Manifestly, interest under Section 11BB of the Act becomes payable, if on 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.

14. 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. IRC* [(1921) 1 KB 64] and *Ajmera Housing Corpn. v. CIT* [(2010) 8 SCC 739].)

15. At this juncture, it would be apposite to extract a Circular dated 1-10-2002, issued by the Central Board of Excise and Customs, New Delhi, wherein referring to its earlier Circular dated 2-6-1998, 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 the 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. The Board has been receiving a large number of representations from the 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, the Board would like to stress that the provisions of Section 11BB of the 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 the higher appellate authority for grant of interest. Simultaneously, the Board would like to draw attention to Circular No. 398/31/98-CX, dated 2-6-1998 [(1998) 100 E.L.T. T-16] wherein the 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, the 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)

"16. Thus, ever since Section 11BB was inserted in the Act with effect from 26-5-1995, 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."

(emphasis supplied)

18. On a harmonious reading of the provisions of Sections 11B and 11BB along with the observations of the Supreme Court, it is abundantly clear that once a refund is granted to an applicant and the said refund is not given to the applicant within three months from the date of receipt of the refund application, the applicant would automatically be entitled to receive interest on the said refund, from the date immediately after the expiry of three months from the date of receipt of such refund application, till the date of refund of such duty.

19. Applying this law to the facts of the present case, we find that originally the Petitioner had made applications for refund on the various dates as set out above. However, these applications were not granted by Respondent No. 2 on the ground that the activity undertaken by the Petitioner did not amount to manufacture and therefore, they would not be entitled to any refund. The Petitioner thereafter filed revised refund claims on quarterly basis at the instance of Respondent No. 2. Previously, the Petitioner has filed the refund applications on monthly and bi-monthly basis. What is important to note is that the rejection of refund was not on the ground that it was incomplete or that all the relevant documents were not submitted by the Petitioner. Aggrieved by the rejection, the Petitioner subsequently filed an appeal before Respondent No. 3, who granted the refund to the Petitioner. We find that the original refund applications were complete in all respects and the applications were rejected by Respondent No. 2 on merits.

20. Looking to all these facts, we are unable to agree with the submission of Mr. Dwivedi that the interest on the refund should be granted from the date immediately three months after the receipt of the revised refund claims. We find that the original refund applications were complete in all respects and the refund was rejected purely on its merits. These orders of Respondent No. 2 have been set aside by the Commissioner (Appeals) and the refund was granted to the Petitioner. We are unable to accept the arguments of Mr. Dwivedi that the refund applications were only complete in all respects only after filing of the revised refund claim. What is important to note that the revised claim was only a calculation and was submitted as the same was insisted upon by Respondent No. 2.

21. In light of these facts, and having rejected Mr. Dwivedi's argument, we hold that the Petitioner would be entitled to interest on the sum of Rs. 44,46,42,651/- from the date immediately after expiry of three months from the date of receipt of the original refund applications (as set out earlier), till the date of receipt of the refund amount. In addition and as agreed between the parties, the Petitioner shall be entitled to a refund of Rs. 1,66,59,749/- being the remaining amount of the refund claim which was rejected by Respondent No. 2. Further, the Petitioner is directed to debit the Cenvat balance of Rs. 46,64,152/- from its Cenvat

account. For the limited purpose of calculating and paying the interest as well as the refund of Rs. 1,66,59,749/-, the matter is remanded back to Respondent No. 2. It is clarified that Respondent No. 2 shall not undertake any other or further exercise, other than in terms of what is stated earlier. To undertake this process, we grant Respondent No. 2 six weeks time, which shall commence from the date of receipt of a copy of this order.

22. For all the aforesaid reasons, rule is made absolute in the aforesaid terms. However, in the facts and circumstances of this case, there shall be no order as to costs.