(2012) 07 CAL CK 0113

In the Calcutta High Court

Case No : G.A. No. 3162 of 2011 Cexa No.1 of 2008

Madura Coats Private Limited	APPELLANT
Vs	
Commissioner of Central Excise, Kolkata IV Commissionerate	RESPONDENT

Date of Decision : 03-07-2012

Acts Referred:
Central Excises and Salt Act, 1944 — Section 11BB, 35F, 35FF, 35G
Finance Act, 2008 — Section 85

Citation : (2012) 192 ECR 232 : (2012) 285 ELT 188 : (2013) 18 GSTR 370

Hon'ble Judges : J.N. Patel, C.J;Sambuddha Chakrabarti, J

Bench : Division Bench

Advocate : J.P. Khaitan and Mr. Partha Banerjee, for the Appellant;N.C. Roy Chowdhury and Mr. K.K. Maity, for the Respondent

Judgement

J.N. Patel, C.J.—This is an application seeking clarification and/or modification of the judgment and order dated August 12, 2011 passed by this Court (Hon''ble Justice Bhaskar Bhattacharya and Hon''ble Justice Dr. Sambuddha Chakrabarti) in CEXA No.1 of 2008. It is the case of the petitioner that it had preferred an appeal u/s 35G of the Central Excise Act, 1944 against the order dated June 15, 2007 passed by the Customs, Excise and Service Tax Appellate Tribunal, East Zonal Bench, Kolkata (hereafter the ''the Tribunal'') in Excise Appeal bearing No. EDM-641 of 2006 in so far as the Tribunal did not pass any direction for payment of interest in spite of holding that the petitioner was entitled to refund of the sum of Rs. 14.98 crore. The appeal was admitted by this Court on May 5, 2011 for hearing on the substantial question of law as to whether the Tribunal below committed substantial error of law in not passing any direction for payment of interest in favour of the appellant in spite of holding that the appellant is entitled to interest on the delayed refund.

2. The matter was finally heard and the judgment came to be delivered on August 12, 2011. The appeal was allowed and the Court held that the sum of Rs. 14.98 crore paid by petitioner was by way of pre-deposit and in view of the

decision of the Hon''ble Supreme Court in Commissioner of Central Excise vs. ITC Limited, (2005) 179 ELT 15 (SC), interest was payable for the period commencing from three months after the final disposal of the matter till the date of refund.

3. The petitioner''s case was finally disposed of by the Supreme Court on February 24, 2005 and, therefore, the respondent was directed to pay interest on the delayed refund of the pre-deposit amount of Rs. 14.98 crore within two months from date in terms of the circular bearing No. 802.35.2004-CX dated December 8, 2004.

4. It is the contention of the petitioner that by letter dated August 24, 2011, the petitioner requested the Assistant Commissioner of Central Excise to pay interest in terms of the said judgment and order dated August 12, 2011 of this Hon''ble Court and the petitioner furnished its calculation in respect of the amount of interest @ 12% per annum amounting to Rs. 4,28,46,904/-.

5. As a result on September 28, 2011 the Assistant Commissioner, Central Excise issued a notice requiring the petitioner to show cause as to why interest should not be paid @ 6% per annum in terms of the notification bearing No.67/03-CE(NT) dated September 12, 2003 as the circular dated December 8, 2004 did not mention any rate of interest and as such interest was payable @ 6 % per annum in terms of the said notification dated September 12, 2003.

6. The petitioner contended that this Court having held that the decision of the Supreme Court in Commissioner of Central Excise vs. ITC Limited (supra) is applicable to the petitioner''s case, interest was payable @ 12% per annum and as there was no specific order as to the rate of interest, the Assistant Commissioner of Central Excise held that the interest was payable @ 6% per annum in terms of the said notification dated September 12, 2003 issued for the purposes of Section 11BB of the Act and, therefore, the petitioner seeks for clarification and/or modification of the judgment and order dated August 12, 2011 passed by this Court to specify the rate of interest for delay in refund of the amount paid by way of pre-deposit which according to the petitioner should be @ 12 % per annum as specified in the judgment delivered by the Supreme Court in the case of Commissioner of Central Excise vs. ITC Limited.

7. It is the case of the petitioner that as rate of interest at 12% per annum was determined by the Hon''ble Supreme Court in the case of Commissioner of Central Excise vs. ITC Limited (supra) after taking into consideration a draft copy of the circular proposed by the Central Excise which was placed by the Board on behalf of the Revenue for such refund, the notification bearing No. 67/03-CE(NT) dated September 12, 2003 fixing @ 6% per annum for the purposes of Section 11BB of the Act relied upon the Assistant Commissioner has no relevance in the matter of delayed refund of pre-deposit made u/s 35F of the said Act.

8. It is submitted that the said notification was also in force when the Hon''ble Supreme Court decided the case of Commissioner of Central Excise vs. ITC

Limited (supra) on December 2, 2004 and in fact, in order to get over the judgment of the Hon''ble Supreme Court in the case of Commissioner of Central Excise vs. ITC Limited (supra), the legislature brought in a separate provision by way of section 35FF with effect from May 10, 2008, subsequent to the material period involved herein, viz. May 25, 2005 to October 11, 2007 and, therefore, the rate of interest determined in the case of Commissioner of Central Excise vs. ITC Limited (supra) would be applicable and, therefore, the ourt may clarify and/ or modify the judgment and order dated August 12, 2011 so that the respondent is directed to pay interest @ 12 % per annum.

9. on behalf of Revenue, an affidavit-in-opposition of the Assistant Commissioner of Central Excise has been filed and it is contended that an appeal being SLP No.35919/2011has been preferred against the Division Bench''s judgment and order dated August 12, 2011 along with a stay application which is now pending for hearing before the Hon''ble Supreme Court and in view of the fact that the matter is sub-judice before the Supreme Court for the payment of interest at what rate and which date thereby the present application is premature and not maintainable.

10. It is further contended that prior to Section 35FF was introduced there was no provision for payment of interest on deposit, pending appeal, of duty demanded or penalty levied as provided u/s 35F of the said Act.

11. It is submitted that Section 11BB was amended on 26.5.1995 to introduce payment of interest for delayed refunds and as provided u/s 11BB of the said Act and Central Government, being the only authorised authority has fixed payment of interest @ 6% per annum under the Notification No. 67/2003-CE(NT) dated September 12, 2003 and, therefore, any rate above 6% per annum in the present case to be fixed cannot exceed the rate fixed statutorily and, therefore, the rate of 12 % interest as claimed by the appellant, Madura Coats Pvt. Ltd., is arbitrary, contrary to statute and cannot be considered, as Section 35FF provides payment of interest on delayed refund of pre-deposit and expressly mentions the rate of interest would be as per Section 11BB and, therefore, the Assistant Commissioner by order dated October 10, 2011 intimated the appellant that he can be awarded only 6% interest being the only statutory relief and the said order is not liable for review or challenge.

12. It is submitted that the respondent had already paid interest @ 6% per annum amounting to Rs. 2,14,23,452/- to the appellant.

13. We have heard learned counsel for the parties. The petitioner has moved this Court for clarification and/or modification of the order limited to specifying the rate of interest of interest which the petitioner would be entitled to claim on the delayed refund of the pre-deposit amount of Rs. 14.98 crore.

14. While disposing of the appeal this Court held :

After hearing the learned counsel for the parties and after going through the materials on record, we find that in this case, the Hon''ble Supreme Court decided the matter finally on February 24, 2005 and thus, in view of the decision of the Supreme Court in the case of Commissioner of Central Excise vs. ITC Limited, reported in (2005) ELT 15, interest was payable for the period commencing from three months after the final disposal of the matter till the date of refund and thus, in this case interest was payable from May 25, 2005. It appears that the Central Board of Excise and Customs, pursuant to the aforesaid decision of the Supreme Court, has already issued a circular bearing No.802/35/2004-CX dated December 8, 2004 specifying the rate of interest in this regard.

(emphasis is ours)

15. Therefore, while setting aside the order of the Tribunal below the Court directed the respondent to pay interest to the appellant in terms of the circular dated December 8, 2004 on the pre-deposit for the delayed refund within two weeks.

16. It has been pointed out to us that though the Court had directed the respondent to pay interest to the appellant in terms of the aforesaid circular the petitioner has approached the Assistant Commissioner who found that the petitioner is entitled to interest @ 6% per annum and not 12 % per annum as awarded in the judgment of the Supreme Court in the case of Commissioner of Central Excise vs. ITC Limited (supra) which has been held to be applicable to the petitioner''s case.

17. We have no hesitation to come to the conclusion that the Revenue is trying to take advantage of the fact that this Court while referring to the circular did not mention the rate at which interest was to be paid to the petitioner considering the period for which interest was payable by the Revenue to the petitioner i.e. from May 25, 2005 upto October 11, 2007 i.e. for about 870 days.

18. The decision of the Supreme Court in the case of Commissioner of Central Excise vs. ITC Limited (supra) as regards refund of amount deposited u/s 35F was governing the field as the Supreme Court has upheld the direction for payment of interest and quantified it to be @ 12% per annum. The issue before the Supreme Court was whether the pre-deposit made as a pre-condition for the hearing of appeal under the Central Excise Act, 1944 was, on the assessee being ultimately successful, refundable to the assessee with interest as there was no provision in the Central Excise Act for payment of interest on such refund. It is in the course of hearing before the Supreme Court that the Learned Solicitor General after taking instructions made a statement that the Central Board of Excise and Customs proposes to issue a circular in connection with the payment of interest on all such pre-deposits. At the time a draft copy of the proposed circular was handed over to the Supreme Court there was no rate of interest specified in the proposal and, therefore, the Supreme Court awarded interest @ 12% per annum. Therefore, when this Court directed the respondent to pay

interest to the appellant in terms of the circular bearing No.802/35/204-CX dated December 8, 2004 on the pre-deposit of the delayed refund within two months from today it has to be construed that this Court meant the rate of interest which was awarded by the Supreme Court in the case Commissioner of Central Excise vs. ITC Limited which was the rate quantified by the Supreme Court in absence of any statutory provision in the said Act.

19. Therefore, in view of the fact that the period for which the petitioner is entitled to interest on the pre-deposit of the delayed refund was the same as in the case of Commissioner of Central Excise vs. ITC Limited (supra) parity demands that the petitioner is also entitled for interest @ 12% per annum.

20. In so far as the contention of the Revenue that the Central Government is the only authority to fix the rate of interest and that Section 35FF was brought in by providing rate of interest on payment of pre-deposit delayed refund and quantified the rate of interest to be the same as in Section 11BB would not apply to the petitioner''s case as Section 35FF has been introduced in the Act by way of an amendment inserted with effect from May 10, 2008 by Section 85 of the Finance Act, 2008 (18 of 2008). Therefore, we clarify that the petitioner is entitled to interest @ 12% per annum on the amount of refund. We direct that such interest shall be paid by the respondent/Revenue within two months of the date of this order.

21. The application is thus being disposed of accordingly.

22. There shall be no order as to costs. Urgent photostat certified copy of this order, if applied for, be given to the learned advocates of the parties upon compliance of necessary formalities.

J.N. Patel, C.J.

24. I agree.

