(2020) 12 CESTAT CK 0037

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Excise Appeal No. 61085 Of 2019

M/s Modern Dairies Ltd. @Hash Commissioner Of CE And ST- Panchkula

Date of Decision : 03-12-2020

Acts Referred:
Central Excise Act 1944 — Section 35F, 35FF

Citation : (2020) 12 CESTAT CK 0037

Hon'ble Judges : Ashok Jindal, J

Bench : Single Bench

Advocate : Krati Somani, Priyanka, Rajeev Gupta, H. S. Brar

Final Decision : Allowed

Judgement

1. The appellant is in appeal against the impugned order for rejecting their refund claim.

2. The facts of the case are that and audit was conducted for the period 2007-2008 and 2008-2009 during the period 20.04.2009 to 24.04.2009. On

24.04.2009, the appellant reversed the cenvat credit of Rs.17,67,816/- which was inadvertently entered in RG23C, part-II. Thereafter, on 16.09.2010 a

show cause notice was issued to the appellant to demand cenvat credit of Rs.78,30,427/- on account of wrong availment of cenvat of inputs used to

manufacture diary machinery and to appropriate amount of Rs.17,67,816/- already reversed. On 15.12.2010, the adjudication order was passed and

the demands were confirmed and penalties were also imposed. The appellant filed appeal on 20.03.2012 before this Tribunal, this Tribunal vide order

dated 12.02.2012 asked the appellant to make a pre deposit amount of Rs.15,00,000/- in terms of Section 35F of the Central Excise Act, 1944. The

appellant deposited the said amount of Rs.15,00,000/- on 15.05.2013. The appeal was finally disposed on 05.07.2018 by setting aside the impugned order. Thereafter, the appellant filed refund claim of Rs.15,00,000/- deposited by them on 12.09.2018. On 19.02.2019, the adjudicating authority held

that the refund was admissible to the appellant but was appropriated the amount against Rs.17,67,816/- as penalty and Rs.4,56,484/- as interest

confirmed vide order dated 15.12.2011 by holding that these demands were not set aside by the Final Order dated 05.07.2018. Thereafter, on

08.03.2019, the appellant filed a application for Rectification of mistake before this Tribunal and on 01.04.2019 the application for Rectification of

mistake was allowed. The appellant also filed appeal before the Ld. Commissioner (Appeals) on 18.04.2019. On 21.05.2019, this Tribunal passed the

Final order again by setting aside the demand of interest and penalty specifically. On 12.06.2019, the matter before Commissioner (Appeals) was

listed for hearing and it was stated by the appellant before the Ld. Commissioner (Appeals) that the demand of interest and penalty against which the

refund has been adjusted and have been set aside by this Tribunal but they have not received the detailed order. On 24.07.2019 a certified copy of the

order passed by the Tribunal was filed with the office of the Commissioner (Appeals). In the meantime, the Ld. Commissioner (Appeals) has passed

the impugned the order on 22.07.2019 and the same was sent to the appellant on 30.06.2019 and received by the appellant on 02.08.2019. On

08.08.2019, the appellant filed an application for rectification/modification of the order passed by the Ld. Commissioner (Appeals), but on 22.08.2019,

the appellant received a communication from the office of the ld. Commissioner (Appeals) that the order has already been passed before the

submission of the copy of the order of this Tribunal. Thereafter, on 29.10.2019, this appeal has been filed.

3. The Ld. Counsel for the appellant submits that the refund claim has already been sanctioned by the order dated 19.02.2019 by the adjudicating

authority and this Tribunal vide order dated 21.5.2019 has given the clear finding that no demand is sustainable against the appellant and the said order

was communicated to the Ld. Commissioner (Appeals) but without taking cognizance of the same, the impugned order has been passed which is in

gross violation of judicial discipline and submitted that the appellant is entitled for refund claim of the amount of Rs.15,00,000/- alongwith interest from

the date of deposit till its realization. The appellant relied on the decisions of M/s. Fujikawa Power and Another vs. CCE, Chandigarh-I - 2019 (11)

TMI 1197-CESTAT Chandigarh, M/s. Marshall Foundry & Engg. Pvt. Ltd. vs. Commissioner of CGSTFaridabad - 2019 (11) TMI 1269 and M/s Riba

Textiles Ltd. vs. Commissioner of CE & ST- Panchkula - 2020 (2) TMI 602. She also relied on the decision of the Hon'ble Madras High Court in the

case of Commissioner of Central Ex. Chennai-II vs. UCAL Fuel Systems Ltd. - 2011 (9) TMI 903. Further, she also relied on the decision of this

Tribunal in the case of Commissioner vs. Balaji Wire Pvt. Ltd. - 2018 (12) - TMI 1577-CESTAT Allahabad. In her argument, she submits that the

Revenue has relied on the decision of CCGST Mumbai vs. M/s Juhu Beach Resort Ltd. - 2019-TIOL-3596-CESTAT-MUM without considering the

decision of Sandvik Asia Limited vs. Commissioner of Income Tax- 2006 (196) ELT 257 (S.C.). Further, Revenue has relied on the decision of

Commissioner of CE & ST- vs. M/s Som Flavour Masala Pvt. Ltd. - 2020 (6) TMI 60-CESTAT CHANDIGARH. The said decision is not applicable

to the facts of this case as in the said decision, the decision of Hon'ble Madras High Court in the case of UCAL Fuel Systems Ltd. (supra) has not

been considered.

4. The Ld. AR opposed the contention of the Ld. Counsel for the appellant and submitted that as the appellant had failed to submit that the copy of the

order of this Tribunal dated 21.05.2019 before the Ld. Commissioner (Appeals), therefore, the Ld. Commissioner (Appeals) could not take the

cognizance of the order passed by this Tribunal. He also submitted that this Tribunal has not issued the order within one month of the hearing,

therefore, the department had no occasion to deal the issue in hand. He further submitted that as this Tribunal has already dealt the issue vide order

dated 21.05.2019 and the impugned order has been passed before submission of the said order before the Ld. Commissioner (Appeals), therefore, the

order of this Tribunal will prevail and he conceded the merits of the case but submitted that the matter be remanded back to the Commissioner

(Appeals) to pass the order after considering the order of this Tribunal dt. 21.05.2019.

5. With regard to claim of interest, it is his submission that the appellant has sought interest from the lapse of three months from 05.07.2018 and the

appeal has been finally disposed off vide order dated 21.05.2019, therefore, the refund in cash could not be dispersed to the appellant. In that circumstances, the matter be remanded back to the Ld. Commissioner (Appeals) to decide the matter afresh after considering the order of this

Tribunal dated 21.05.2019. He further submitted that the interest is not payable from three months from 05.07.2018 as the said order has not the final

order disposing the said appeal which was disposed off only on 21.05.2019. To support of this contention, he relied on the decision of the Hon'ble High

Court of Bombay in the case of CCE, Mumbai-III vs. CEAT LTD - 2013 (298) ELT 525 (Bom .w) herein it has been held that while disposing of the

appeal, the period upto the passing of the order on the Rectification of Mistake application by the Tribunal was excluding while deciding whether the

delay in filing the appeal was condonable or not? Also, he relied on the decision of this Tribunal in the case of Shri Lotus Exports vs. CCE, Trichy â?

2011 (245) STR 444 (Tri. Chennai) wherein it has been held that while deciding the limitation for filing appeal whether to be reckoned from the date of

the order in original or from the date of order passed on rectification application against said impugned order, it was held that the time limit for filing

appeal shall be computed from the date of the order on such rectification application. Therefore, in the present case, the date of finality of Excise

Appeal No. 652/2012 should be 21.05.2019 and not 05.07.2018.

6. With regard to calculation of delay in disbursal of refund prior to 06.08.2014 section 35FF of the Central Excise Act deals the issue which

prescribed that prior to the commencement of the Finance Act, 2014, the interest shall be payable after expiry of three months from the date of

communication of the order of the appellate authority till the refund of such amount. As the amount of Rs.15,00,000/- have been deposited by the

appellant on 15.05.2013 in compliance to the provision of Section 35F of the Central Excise Act, 1944, therefore, the provision of Section 35FF as they

existed on the date of pre deposit are applicable and in that case no interest is payable for the period from the date of deposit till expiry of three

months from the date of communication of the final order of this Tribunal dated 21.05.2019. To support of this contention that he relied on the

decisions in the cases of M/s IFP Products (P) Ltd. vs. UOI in Writ Tax Appeal No. 653 of 2017, CC & GST, MUMBAI VS. JUHU Beach Resort

Ltd. - 2020 (371) ELT 622 (Tri.- Mumbai) and CCE & ST, Rohtak vs. Som Flavour Masala Pvt. Ltd. vide Final Order NO. 60385/2020 dated

02.03.2020.

7. In response to the submission made by the Ld. AR, the Ld. Counsel for the appellant submitted that there has been inordinate delay in sanctioning

the refund claim by the authorities, therefore, the appellant is entitled to claim interest on refund amount in terms of provision of Section 35FF of

Central Excise Act, 1944 from the date of deposit till actual refund.

8. After hearing both the sides, I find that the merits of the case have not been disputed either of the side which were decided in the favour of the

appellant vide order dt. 05.07.2018.

9. The issue involved in the matter is whether the appellant is entitled to claim the interest on delayed refund or not? If yes, then from which date?

The Section 35FF of the Central Excise Act, 1944 was relevant to decide the issue in hand, which is extracted herein blow:

â??SECTION 35FF â?" Interest on delayed refund of amount deposited under the proviso to Section 35F.

Where an amount deposited by the appellant in pursuance of an order passed by the Commissioner (Appeals) or the Appellate Tribunal

(hereinafter referred to as the appellate authority), under the first proviso to Section 35F, is required to be refunded consequent upon the

order of the appellate authority and such amount is not refunded within three months from the date of communication of such order to the

adjudicating authority, unless the operation of the order of the appellate authority is stayed by a superior court or tribunal, there shall be

paid to the appellant interest at the rate specified in Section 11BB after the expiry of three months from the date of communication of the

order of the appellate authority, till the date of refund of such amount.â??

The said provision of Section 35FF was amended w.e.f. 06.08.2014 and the amended provisions are not applicable to facts of this case as per the said

amendment.

10. As per the said provision, the assessee is entitled to claim the interest on delayed refund after the expiry of three months from the date of

communication of the order of the appellate authority till the date of refund of such amount.

11. In the matter in hand, the appeal was finally disposed of on 05.07.2018 by setting aside the impugned order and the pre-deposit made as per the

directions of this Tribunal on 15.05.2013, became refundable to the appellant. But the adjudicating authority held that the said amount is refundable to

the appellant but appropriated the said amount against interest and penalty which was already set aside by the order dt. 05.07.2018 and started another

round of litigation. The said act of the adjudicating authority shows the high handedness by not to refund the amount to the appellant. The same is in

contravention of the speech given by the Honâ??ble Finance Minister on 08.11.2019 where the Honâ??ble Finance Minister has said that the

Revenue Officers are the facilitators for the tax payer; whereas in this case, the act of the Revenue Officer does not seem to be a facilitator for the

tax payer. Therefore, as held by this Tribunal, the appellant is entitled to claim the refund of Rs.15 lacs. Furthermore, during the course of arguments,

it came to the knowledge of the Bench that the appellant filed the appeal against the order of the adjudicating authority appropriating the amount of

refund claim before the Commissioner (Appeals) and intimated to the ld. Commissioner (Appeals) vide letter dt. 12.06.2019 that this Tribunal has

allowed the refund to the appellant on 21.05.2019. Instead of taking note of the said fact, the ld. Commissioner (Appeals) dismissed the appeal filed by

the appellant without taking note of the decision of this Tribunal on 22.07.2019, whereas the order of this Tribunal was uploaded on the website itself

on 01.07.2019. The act of the ld. Commissioner (Appeals) cannot be appreciated.

12. Now, the issue comes that from which date the appellant is entitled to claim the interest till its realisation. Admittedly, as per Section 35FF of the

Act, the appellant was entitled to claim the interest on delayed refund after three months from the date of the order of this Tribunal. This Tribunal has

finally disposed of the appeal of the appellant on 05.07.2018.

13. The ld. A.R. relied on the decision of Honâ??ble Bombay High Court in case of CEAT Ltd (supra) to say that the date when the application for

Rectification of Mistake has been decided, from the said date, limitation for refund claim is to be reconed. As discussed above, in this case, the issue

has been settled by this Tribunal on 05.07.2018 finally by setting aside the impugned order, but the adjudicating authority after sanctioning the refund

claim, has adjusting the said amount by wrong interpretation of order of this Tribunal which does not amount to a mistake apparent on record;

therefore, the said decision is of no help to the appellant.

14. The ld. Counsel for the appellant has heavily relied upon the decision of this Tribunal in the case of M/s Fujikawa Power & Another (supra). The

facts of the said case are not applicable to the facts of the case in hand, as in the said case, the appellant did not deposit the amount as per the

directions of the appellate authority in terms of Section 35F of the Central Excise Act, 1944. In fact, the amount has been paid before filing the appeal

before the Tribunal. Further the reliance on the case of UCAL Fuel Systems Ltd (supra) it also no help, as in the said case, the amount was deposited

by the assessee during the course of investigation. Further the other case laws relied upon by the ld. Counsel for the appellant followed the decision in

the case of M/s Fujikawa Power & Another (supra); therefore, they are not relevant to the facts of the case in hand. In the case of Balaji Wire Pvt

Ltd (supra), relied upon by the ld. Counsel, the amount was paid by the assessee under protest. Moreover, in the case of M/s CNH Industrial India

Pvt Ltd (supra) also, the amount was paid by the assessee under protest. Therefore, those decisions are of no help to the appellant. On the other hand,

the ld. A.R. for the Revenue relied on the decision Som Flavour Masala Pvt Ltd (supra). The facts of the said case are not relevant to the facts of the

case in hand as in that case this Tribunal has held that refund claim is pre mature as no adjudication took place while deciding the claim of interest.

15. Further, I find that in the case of IFP Products (P) Ltd (supra), the issue has been dealt in details by the Honâ??ble Allahabad High Court,

wherein the Honâ??ble High Court has observed as under:

â??The aforesaid provision of Section 35FF of the Act was amended by the Finance Act No. 25 of 2014 with effect from 06.08.2014 and it

was provided that where any amount deposited by the party under Section 35F of the Act is required to be refunded consequent upon the

order of the Appellate Authority, it will carry an interest at the specified rate till the date of refund. It permits payment of interest at the

specified rate for the entire period, the amount remains deposited with the authority. However, the aforesaid provision has been subjected

to a proviso, which lays down that if any amount has been deposited prior to the enforcement of the Finance Act No. 25 of 2014 i.e. before

06.08.2014, it shall continue to be governed by the unamended provision of Section 35FF of the Act, which means that in cases of deposit made prior to 06.08.2014, interest would be payable only if the amount is not refunded within a period of three months from the date of

communication of the appellate order.

Apart from the above provision, there is no other provision, which permits payment of interest on the amount of excise duty deposited in

pursuance to the order of the Commissioner (Appeals) or the Tribunal by any party.

A composite reading of unamended Section 35FF and amended Section 35FF of the Act reveals that in respect of an amount deposited prior

to the commencement of the Finance Act No. 25 of 2014, interest on the refunded amount is payable only if it is not refunded within three

months of the communication of the order of the appellate authority entitling the refund and that too after the expiry of three months of the

communication of the order.

In the present case, the amount was deposited on 24.04.2014 and 28.04.2014, the appeal entitling the refund was allowed on 03.08.2016

and the refund was actually made on 28.11.2016.

All the aforesaid dates are earlier to 06.08.2016, the date of enforcement of Finance Act No. 25 of 2014. Thus, in view of the proviso to the

amended Section 35FF of the Act, the payment of interest to the petitioner would be governed by the unamended Section 35FF of the Act.

Accordingly, if at all the petitioner would be entitled to interest on the amount refunded, it will be for the period the amount had remained

with the respondents after three months from the date of communication of the appellate order.

Sri Mathur at this stage submits that the amount deposited by the petitioner was not under Section 35F rather it was deposited as a duty and

the claim was made for refund under Sections 11B and 11BB of the Act.

The submission is devoid of any force, inasmuch as the petitioner had deposited the duty of excise on 24.04.2014 and 28.04.2014 pursuant

to the order of the Tribunal, which would essentially be a deposit under Section 35F of the Act. The deposit under Section 35F of the Act

also contemplates the deposit of excise duty and not any other amount.

Sri Mathur next argued that merely for the reason that there is no express provision for the payment of interest for the entire period, the petitioner cannot be denied interest on the amount that had remained with the Department for the entire period, it was with the Department.

In support of his submission, he has placed reliance upon the decision of the Division Bench of this Court dated 26.04.2017 passed in

Central Excise Appeal No. 127 of 2015, R.H.L. Profiles Limited Vs. Commissioner, Customs, Excise and Services, Kanpur.

In the said case, the sole question, which came up for consideration, was whether the Tribunal was justified in rejecting the claim of interest

on the amount refunded on the ground that there is no provision for paying interest on such amount.

The aforesaid question was answered in favour of the assessee and against the Department holding that where the amount was illegally

detained by the Revenue and ultimately, refunded, the assessee is entitled to interest even though there may not be a specific provision to

that effect. This was laid down following the decision of the Apex Court in the case of Union of India through Director of Income Tax Vs.

TATA Chemicals Limited (2014) 6 SCC 335, wherein it was held that when the collection is illegal, there is corresponding obligation on the

Revenue to refund such amount with interest.

The aforesaid decisions would not be any help of the petitioner inasmuch as there was neither any illegal detention nor any unauthorized

collection of any amount by the Revenue, rather the said amount was deposited by the petitioner pursuant to the interim direction of the

Tribunal.

The law is well settled that the taxing statutes have to be construed strictly and when there is no specific provision for doing a particular

thing, the same cannot be done either in equity or on compassionate basis.

All other decisions, which have been cited on behalf of the petitioner, only observes that when there is a delay on the part of the Revenue in

refunding the amount, the Revenue is liable to pay interest by way of compensation.

In the case we are dealing, there is no undue delay on the part of the Revenue in refunding the amount. The amount has refunded more or

less within the period of three months from the date of the order of the Tribunal entitling the refund.

The period of three months for refunding the amount has to be computed from the date of communication of the order of the Tribunal. The

date of communication of the appellate order has not come on record.

The application for refund was moved by the petitioner on 05.09.2016 and therefore, in the absence of any date of communication of the

order, the date of the application would be recognized as the date of communication of the appellate order.

In addition to the above, the application of the petitioner for refund was decided vide order dated 28.11.2016 and the petitioner was held

entitled to the refund of the excise duty deposited pursuant to the interim orders of the Tribunal. The petitioner was not held entitled to any

interest.

The petitioner has not objected to the said order and has neither challenged it in appeal or has asked for its rectification.

The above order having become final and accepted by the petitioner by taking he refund without interest with no protest, no further relief in

exercise of extra ordinary jurisdiction can be extended to the petitioner.

In view of the aforesaid facts and circumstances, we do not find any merit in this petition to direct for payment of any interest on the amount

refunded in the absence of any specific provision providing for payment of interest for the entire period, the amount had remained in

custody of the Revenue. Accordingly, the writ petition is dismissed.â??

16. In view of the above discussions and observations, I hold that the appellant is entitled to refund of pre-deposit of Rs.15,00,000/- along with interest

on delayed refund from 19.02.2019 the day on which the refund claim was allowed till its realization. In these terms, the appeal is disposed of.

(Order pronounced on 03.12.2020)

