(2013) 07 AHC CK 0051

In the Allahabad High Court

Case No : Writ Tax No. 1610 of 2010

Swadeshi Polytex Ltd. APPELLANT

Vs

Union of India and Others RESPONDENT

Date of Decision : 29-07-2013

Acts Referred:

Citation : (2013) 22 GSTR 516

Hon'ble Judges : Prakash Krishna, J;Manoj Kumar Gupta, J

Bench : Division Bench

Advocate : Rahul Agarwal, for the Appellant; R.C. Shukla and Shambhu Chopra, for the Respondent

Judgement

Manoj Kumar Gupta, J.—The moot question in this writ petition is the date from which the Revenue is liable to pay interest on delayed refund of excise duty; is it from expiry of three months from the date of application for refund u/s 11B(1) or the receiving of assent of the President to the Finance Bill, 1995 in cases covered by the proviso to section 11BB or from expiry of three months from the date of actual order of refund u/s 11B(2) of the Central Excise Act, 1944 (for short "the Act"). The facts of the case as are relevant for determining the aforesaid question are that the petitioner-company became entitled for refund of a sum of Rs. 10,69,322.95 as a result of its appeal being allowed by the Collector (Appeals) CEC, Ghaziabad by the order dated May 3, 1991, setting aside the adjudication order whereunder the amount in question was realised by making deductions from production incentive and MEG set off due to the petitioner. An application for refund was filed on August 5, 1991. It remained pending because of lackadaisical attitude of the authorities in spite of repeated reminders. It appears that the petitioner approached this court by way of Writ Petition Tax No. 522 of 2009 raising a grievance that its application for refund is not being decided and the writ petition was disposed of by an order dated February 25, 2009 directing the Revenue to decide the claim of the petitioner for refund within three months from the date of production of a certified copy of the order.

Consequent to the said direction, the Deputy Commissioner, CE, Div., Gzd. passed an order dated August 20, 2009 rejecting the application for refund dated August 5, 1991. The aforesaid order was subjected to challenge in appeal by the petitioner. The Commissioner (Appeals), CCE, Ghaziabad allowed the appeal, by an order dated December 1.4.2009, with the following observation:

Thus, the adjudicating authority while deciding the above case appears to have not examined the issue in its entirety and in the right perspective. As indicated hereinabove, pursuant to the passing of a favourable order by the appellate authority, the appellants filed the refund claim on August 5, 1991, but the same was not disposed of till August, 2009. There is no explanation, much less reasonable explanation as to why such an inordinate delay (delay about 18 years) has taken place in disposal of the case. The appellant-assessee should not suffer on account of such attitude of the lower authorities. The impugned order of the adjudicating authority being devoid of merits, as discussed supra is accordingly set aside.

The appeal is accordingly allowed with consequential relief to the appellants, if any, as discussed supra.

The aforesaid order of the Commissioner (Appeals) dated December 14, 2009 attained finality and in pursuance thereof a sum of Rs. 10,69,322.95 was sanctioned and refunded to the petitioner by a cheque dated August 5, 2010. Since no interest was paid to the petitioner on the said amount, the petitioner by an application dated November 11, 2010 represented before the Assistant Commissioner (Central Excise), Ghaziabad for payment of interest for the period April 1, 1985 to June 30, 2010. When no action was taken on the said application, the petitioner has approached this court by way of the present writ petition for a direction to the respondent-authority to calculate and pay interest to the petitioner for the aforesaid period as per the provisions of section 11BB of the Act.

2. The Revenue has filed a counter-affidavit in which several objection have been taken rebutting the claim of the petitioner. First being the plea of alternative remedy of appeal u/s 35(1) of the Vet. It has been stated that pursuant to the order dated December 14, 2009 passed u/s 11B(2) of the Act by the Commissioner (Appeals), the order for refund was passed on June 7, 2010 followed by the corrigendum dated August 5, 2010 and whereby no interest was paid to the petitioner and therefore the aforesaid orders should have been challenged by the petitioner by filing an appeal and the writ petition should be dismissed on the ground of availability of the alternative remedy. Secondly, in paragraph 35 of the counter-affidavit, the respondents have tried to explain the reason why the authorities refused to sanction interest in the following words:

The officer sanctioning the refund considered the date of the order passed by the Commissioner (Appeals), Ghaziabad to be relevant date for the sanction of refund. Perhaps, in view of the provisions of the Explanation to section 11BB of the Central Excise Act, 1944, the interest was not granted.

Thirdly, it has been further contented that in any view of the matter, the petitioner is not entitled to interest prior to August 26, 1995 in view of the proviso to section 11BB of the Act.

3. In rebuttal, it has been submitted that the orders dated June 7, 2010 and August 5, 2010 are only administrative orders sanctioning the refund pursuant to the order dated December 14, 2009 passed by the Commissioner (Appeals) u/s 11B(2) of the Act, and without any fetter for payment of interest and therefore it is not possible for the petitioner to file an appeal against a non-existent order. It has been further stated in the rejoinder affidavit that in any case, since there is already an order for refund u/s 11B(2) of the Act and which has attained finality and consequently there can be no justification on the part of the authorities in declining to grant interest to the petitioner in spite of it being a statutory liability since after insertion of section 11BB by the Finance Act, 1995.

4. We have heard Shri Rahul Agarwal, counsel for the petitioner and Shri R.C. Shukla, advocate for the Revenue and have considered rival submissions and perused the record.

5. Shri R.C. Shukla has raised a preliminary objection about maintainability of the instant writ petition on the ground that alternative remedy of filing appeal is available to the petitioner and therefore it should be relegated to the same and the writ petition cannot be entertained and should be dismissed. Elaborating his submission, Shri Shukla contended that the order for refund was sanctioned by the Deputy Commissioner (Central Excise), Ghaziabad by an order dated June 7, 2010 and by a corrigendum dated August 5, 2010. He submits that by the said order, the amount of Rs. 10,69,322.95 was sanctioned and refunded to the petitioner and it impliedly means that interest on the said amount has been refused and therefore the petitioner should have challenged the said order by filing an appeal u/s 35(1) of the Act. He further submits that because of non-filing of appeal by the petitioner, the aforesaid orders have attained finality and therefore, the writ petition should be dismissed.

6. Refuting the said argument, the counsel for the petitioner vehemently urged that the application of the petitioner for refund of excise duty filed u/s 11B(1) was allowed by an order passed in appeal by the Commissioner (Appeals) on December 14, 2009. He submits that in view of the Explanation to section 11BB, the aforesaid order amounts to an order of refund passed u/s 11B(2) of the Act. Thereafter, it was incumbent upon the authorities to refund the excise duty and interest as per the provisions of law and no further adjudication is required in this regard. He further submitted that the order dated June 7, 2010 which has been amended by a corrigendum dated August 5, 2010 only states that a cheque of Rs. 10,69,322.95 bearing No. 436297, dated August 5, 2010 in favour of M/s. Swadeshi Polytex Ltd. is being issued towards refund of excise duty. It is only a consequential order passed in compliance of the order of the Commissioner

(Appeals) dated December 14, 2009 and cannot be said to be an order declining the claim for refund of interest. He further submits that since the order dated December 14, 2009 has attained finality and therefore the administrative order passed on June 7, 2010 and as amended by the corrigendum dated August 5, 2010 cannot be treated to be an order of adjudication nor can the same go beyond the main order.

7. We have given anxious consideration to the submissions made by the counsel for the parties in this regard. Admittedly, the demand of excise duty and on the basis of which, the respondents have succeeded in adjusting Rs. 10,69,322.95 from the production incentive and MEG set off due to the petitioner was set aside by the Collector (Appeals) by his order dated May 3, 1991. As a result of the said order, the petitioner become entitled for refund of the excise duty. It accordingly filed an application on August 5, 1991 for refund of the said amount. The application was wrongly not processed by the authorities till directions were issued in Writ Petition. No. 522 of 2009 to decide the same within three months. However, the said application was rejected by an order dated August 20, 2009 and aggrieved by which the petitioner filed an appeal, which was allowed by the Commissioner (Appeals) on December 14, 2009. The said order is referable to an order u/s 11B(2) in view of the Explanation to section 11BB. While passing a specific order for refund u/s 11B(2), the authority has to see only two things; first, that the application is within limitation and secondly, that the refund claim is relatable to one or the other items stipulated under different clauses of the first proviso to sub-section (2) of section 11B. In the instant case, after having regard to all these factors, the Commissioner (Appeals) has passed a specific order for refund dated December 14, 2009. The said order has attained finality. Thereafter, calculation of the amount required to be statutorily paid to the petitioner is ministerial act and under the garb thereof no fresh adjudication is possible nor is warranted. In such circumstances, we are of the considered opinion that the order dated June 7, 2010 and as amended by the corrigendum dated August 5, 2010 enclosing a cheque for the principal amount towards refund of excise duty to the petitioner is not an order of adjudication against which any appeal was required to be filed or was maintainable. The petitioner after noticing that only the principal amount has been refunded, rightly made grievance regarding non-payment of interest before the same authority by filing an application dated November 11, 2010 and when even thereafter interest was not paid, it rightly approached this court.

8. Admittedly, after the order for refund attained finality, the principal amount was paid to the petitioner. The only legal question regarding liability of the Revenue to pay interest is res integra. It has been repeatedly held by the apex court that relegating a person to avail of alternative remedy is a self imposed restriction and not a rule of law. In the facts of the instant case, we are satisfied that relegating the petitioner to any other forum will be travesty of justice. Trivial dispute regarding payment of interest is lingering for the last more than 20 years and it is high time when it should be set at rest. We therefore proceed to

examine the claim on merit.

9. It is not in dispute that the petitioner became entitled for refund of excise duty consequent to the order dated May 3, 1991 passed by the Collector (Appeals). The petitioner has filed the application for refund on June 5, 1991, i.e., after about three months from the relevant date and much before the expiry of the period of limitation, which at the relevant time was six months. It was rejected by an order dated August 20, 2009. However, the appeal filed against the said order has been allowed on December 14, 2009. The order of the Commissioner (Appeals) dated December 14, 2009 is referable to an order passed u/s 11B(2) of the Act. In the backdrop of the aforesaid factual position, the relevant provisions of law may be taken notice of. These are:

11B. Claim for refund of duty.--(1) Any person claiming refund of any duty of excise and interest, if any, paid on such duty may make an application for refund of such duty and interest if any, paid on such duty to the Assistant Commissioner of Central Excise or Deputy-Commissioner of Central Excise before the expiry of one war from the relevant date in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence including the documents referred to in section 12A as the applicant may furnish to establish that the amount of duty of excise and interest if any, paid on such duty in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty and interest if any, paid on such duty had not been passed on by him to any other person:

Provided that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of subsection (2) substituted by that Act:

Provided further that the limitation of one year shall not apply where any duty has been paid under protest.

(2) If, on receipt of any such application, the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise is satisfied that the whole or any part of the duty of excise and interest, if any, paid on such duty paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund:

Provided that the amount of duty of excise and interest, if any, paid on such duty of excise as determined by the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to--

(a) rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of

India;

(b) unspent advance deposits lying in balance in the applicant''s account current maintained with the Commissioner of Central Excise;

(c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;

(d) duty of excise and interest, if any, paid on such duty paid by the manufacturer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

(e) the duty of excise and interest, if any, paid on such duty borne by the buyer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

(f) the duty of excise and interest, if any, paid on such duty borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify:

Provided further that no notification under clause (f) of the first proviso shall be issued unless in the opinion of the Central Government, the incidence of duty and interest, if any, paid on such duty has not been passed on by the persons concerned to any other person.

(3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any court or in any other provision of this Act or the rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in sub-section (2).

Section 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 percent. and not exceeding thirty percent. 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:

Provided that where any duty ordered to be refunded under subsection (2) of section 11B in respect of an application under sub-section (1) of that section made before the date on which the Finance Bill, 1995 receives the assent of the President, is not refunded within three months from such date, there shall he paid to the applicant interest under this section from the date immediately after three months from such date, 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 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.

10. Section 11BB was inserted with effect from May 26, 1995 by section 75 of the Finance Act, 1995 with an avowed object of compensating those asses-sees to whom refund is not made within reasonable time. Under the said provision, the liability to pay interest starts after the expiry of three months from the date of receipt of application under sub-section (1) of section 11B in cases where refund is not made within three months. The proviso stipulates that in respect of application made before the date on which the Finance Bill, 1995 received the assent of the President which is May 26, 1995, the period of three months shall be reckoned from such date. Thus the liability to pay interest on delayed refunds in cases covered by section 11BB is now a statutory liability and which cannot be given a go by on any account whatsoever. It is also evident from the language of section 11BB that the liability to pay interest accrues soon after expiry of a period of three months from the date of application or receiving of assent to the Finance Bill, 1995 by the President and it is not dependent on the date on which the order for refund is actually made u/s 11B(2) of the Act.

11. The counsel for the Revenue Shri Shukla laying emphasis on the opening sentence of section 11BB contended that it presupposes existence of an order u/s 11B(2). According to him, the liability to pay interest cannot start before passing of an order u/s 11B(2), which in the instant case came into existence only on December 14, 2009. The period of three months has to be calculated from the said date and accordingly the petitioner can claim interest only from March 14, 2010 onwards and not prior to it.

12. At first blush, the argument appears to be attractive, but on close scrutiny of the provisions of the Act, it has no legs to stand. The liability to pay interest comes into existence after the expiry of three months from the date of receipt of the application under sub-section (1) of section 11B of the Act. In ordinary state of affairs, what the Legislature comprehended while enacting section 11BB was that upon a person becoming entitled for refund and on his filing an application in this regard, it will be processed forthwith and necessary orders will be passed u/s 11B(2) of the Act without any delay. Soon thereafter, the refund will be made and in case where there is laxity on the part of the authorities and refund is not made within three months from the date of application, the assessee will be entitled to interest. The Legislature never had in its mind that the application for refund will not be processed for years together. It is for the said reason, that the Legislature while framing section 11BB has used the language referable to the chronological order in which the things were required to take place, i.e., soon after filing of application, order for refund will be passed, followed by actual refund of amount to the assessee and if there be any delay beyond three months in making payment, interest will be paid.

13. Legislature never intended that the application for refund should be kept pending for years together and thus the postponement of passing of order of

refund u/s 11B(2) has nothing to do with the interest liability of the Revenue which starts running upon expiry of the period of three months from the date of application. Any contrary interpretation will result in violence to the language employed u/s 11BB and will defeat the object with which section 11BB was inserted by the Finance Act, 1995 and will amount to extending premium for inefficiency and delay in processing the claim for refund.

14. In fact, the aforesaid view taken by us also find support from a Division Bench decision of this court in the case of U.P. Twiga Fiber Glass Limited Vs. Union of India (UOI) and Commissioner, Central Excise, . In the said case, the assessee become entitled for refund of excise duty under three different orders dated May 29, 1992, September 21, 1999 and May 14, 1992. He filed three separate applications for refund dated November 6, 1992, December 18, 1992 and February 26, 1991. Pursuant to these applications, refund was made on November 14, 2005. The assessee filed writ petition laying claim for interest on the late payments. This court upheld the plea of interest from August 26, 1995, it being a case under the first proviso to section 11BB. It was held that the liability to pay interest is not dependent on the orders passed u/s 11B(2) but is referable to the period contemplated u/s 11BB of the Act, i.e., three months after the date of filing of the application or in case coming under the first proviso three months after the Finance Bill, 1995 received the assent of the President.

15. Against the said judgment, an SLP was filed before the apex court which was dismissed. The apex court while putting it''s seal on the aforesaid judgment, cited with approval the judgment of the Rajasthan High Court in J.K. Cement Works Vs. Asstt. Commissioner of Central Excise and Customs, . It was held as under:

Heard both the parties.

In our view the law laid down by the Rajasthan High Court succinctly in the case of J.K. Cement Works Vs. Asstt. Commissioner of Central Excise and Customs, vide paragraph 33:

A close reading of section 11BB, which now governs the question relating to payment of interest on belated payment of interest, makes it clear that relevant date for the purpose of determining the liability to pay interest is not the determination under sub-section (2) of section 11B to refund the amount to the applicant and not to be transferred to the Consumer Welfare Fund but the relevant date is to be determined with reference to the date of application laying claim to refund. The non-payment of refund to the applicant-claimant within three months from the date of such application or in the case governed by the proviso to section 11BB, non-payment within three months from the date of the commencement of section 11BB brings in the starting point of liability to pay interest, notwithstanding the date on which the decision has been rendered by the competent authority as to whether the amount is to be transferred to Welfare Fund or to be paid to the applicant.

The SLP is dismissed. No costs.

16. Similar view has been taken by the apex court in Ranbaxy Laboratories Ltd. Vs. Union of India (UOI) and Others, . The apex court held as follows (page 327 of 11 GSTR):

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 u/s 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 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 u/s 11BB of the Act. Manifestly, interest u/s 11BB of the Act becomes payable, if on an 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 u/s 11BB of the Act becomes payable.

17. The apex court concluded the judgment holding that:

In view of the above analysis, our answer to the question formulated in paragraph (1) supra is that the liability of the Revenue to pay interest u/s 11BB of the Act commences from the date of expiry of three months from the date of receipt of application for refund u/s 11B of the Act and not on the expiry of the said period from the date on which the order of refund is made.

18. It will be apt to notice that the Central Board of Excise and Custom, New-Delhi was aware of the malady of keeping the applications for refund pending for years together. It therefore issued a circular dated October 1, 2002 (annexure 12) wherein it clarified that interest on delayed refunds is payable in case refund/ rebate claim is sanctioned beyond the prescribed period of three months of the filing of the claim. It also referred to its earlier circular wherein a direction was issued to identify officers who are responsible for not disposing of refund claims within three months from the date of the receipt of the application as it was unnecessarily burdening the State exchequer. Thus, the Central Board of Excise

and Customs, New Delhi which is the nodal agency to ensure compliance of the provisions of the Act, had itself expounded and clarified the provisions relating to payment of interest on delayed refunds.

19. The circular can be read as a contemporaneous understanding and exposition of the intention and purport of the provisions of law. The courts have treated contemporary official statements as contemporary exposition and used them as aids to interpret even recent statutes. Thus in Collector of Central Excise, Guntur Vs. Andhra Sugar Ltd., Venkataraypurama, Mukharji J., (as his Lordship) then was said:

It is well-settled that the meaning ascribed by the authority issuing the notification, is a good guide of a contemporaneous exposition of the position of law. Reference may be made to the observations of this court in K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another, . It is a well-settled principle of interpretation that courts in construing a statute will give much weight to the interpretation put upon it at the time of its enactment and since, by those whose duty has been to construe, execute and apply the same enactment.

20. In view of the aforesaid discussion, we have no hesitation in holding the liability to pay interest on delayed refunds starts on expiry of three months from the date the application for refund is filed or in cases covered'' by the proviso to section 11BB, on expiry of three months from the date the Finance Bill, 1995 received the assent of the President and not from the date of passing of actual order for refund u/s 11B(2) of the Act.

21. In the instant case, the application for refund was filed on August 5, 1991 and therefore it is a case covered by the first proviso to section 11BB of the Act. Consequently, the petitioner will be entitled to interest after three months from the date the Finance Bill, 1995 received the assent of the President being May 26, 1995. Thus interest is payable to the petitioner from August 26, 1995 till the date of refund.

22. Before parting, it may be pointed out that although in the writ petition relief has been claimed for payment of interest from November 5, 1991, i.e., after three months of filing of the application for refund but Shri Rahul Agarwal, counsel for the petitioner during the course of argument has stated that he has instruction to give up claim of interest for the period anterior to that contemplated by the proviso to section 11BB. In view of it, it is not necessary for this court to refer to the decision in the case of Hello Minerals Water (P) Ltd. Vs. Union of India (UOI), cited by the petitioner, wherein interest was awarded based on equitable principles under common law.

23. Accordingly, the writ petition is allowed and respondent No. 3 is directed to calculate the interest as aforesaid within two weeks from the date of production of a certified copy of this order before him and pay the said amount to the petitioner within two weeks thereafter. In the circumstances of the case, no order as to cost.

