(2016) 03 BOM CK 0006

In the Bombay High Court

Case No : Writ Petition No. 6339 of 2015

Tien Yuan India Pvt. Ltd. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 01-03-2016

Acts Referred:

Citation : (2016) 336 ELT 52

Hon'ble Judges : S.C. Dharmadhikari and G.S. Patel, JJ.

Bench : Division Bench

Advocate : Prakash Shah, i/b PDS Legal, for the Petitioner; Y.S. Bhate, i/b Kirankumar J. Phakade, Advocates, for the Respondent

Final Decision : Disposed Off

Judgement

1. Rule. Respondents waive service. By consent Rule made returnable forthwith.

2. This petition under Article 226 of the Constitution of India is directed against the respondents who are Authorities under the Central Excise Act, 1944.

3. On the basis of a legal right and conferred by Section 11BB of the Central Excise Act, 1944, the petitioners are seeking a Writ of Mandamus or any other appropriate Writ, Order or Direction directing and commanding these Respondents to forthwith sanction and grant interest on a sum of Rs. 2,00,00,000/- deposited by the Petitioner on 7th September, 2006 till the date of actual payment under Section 11B of the Central Excise Act, 1944 ("the Act").

4. At the outset, Mr. Shah, learned Advocate appearing on behalf of the Petitioner would submit that the interest is due and payable from the date of the application seeking refund till the date of payment.

5. Mr. Shah would rely upon the order passed by the Assistant Commissioner, Central Excise, Taloja Division, Belapur Commissionerate dated 28th April, 2015, which reads thus :

"(i) In view of the above, I sanction an amount of Rs. 1,74,75,648/- (Rs.

2,00,00,000 - Rs. 25,24,352) (Rupees One Crore Seventy Four Lacs Seventy Five Thousand Six Hundred and Forty Eight Only) by way of Refund granted under provisions of Section 11B to M/s. Tien Yuan India Pvt Ltd. in respect of the refund claim for Rs. 2,00,00,000/- (Rupees Two Crore only), filed by them.

(ii) The amount of refund claim sanctioned may be remitted to them by ECS (NEFT/RTGS) and necessary entry may be passed in the refund register."

6. Mr. Shah then invites our attention to Section 11BB of the Central Excise Act, 1944 which came to be inserted by Act 22 of 1995 with effect from 26th May, 1995. That has undergone certain changes by Act 40 of 2001 and by Act 10 of 2000. The provision 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 Gazzette 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 where any duty ordered to be refunded under sub-section (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 be 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, 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."

7. Mr. Shah?s submission is that once there is an order of refund of duty and which is traceable under sub-section (2) of Section 11B, then to the applicant to whom this amount is not refunded within three months from the date of receipt of the application under sub-section (1) of that Section, there shall be paid interest 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. That interest is to be paid on such duty from the date immediately after the expiry of the period of three months from the date of receipt of such application till the date of refund of such duty. Mr. Shah, therefore, submits that in the instant case the refund came to be granted admittedly under Section 11B of the Act. If there was delay in refund, then, interest on delayed refund is the mandate which follows from Section 11BB of

the Act. He would, therefore, submit that the interest be granted as claimed.

8. On the other hand, Mr. Bhate appearing for the Revenue would submit that the interest is not payable because the petitioner did not pay the amount but deposited it in terms of an interim order of the Customs, Excise and Service Tax Appellate Tribunal ("Tribunal"). Once there was no payment of duty, then, the interest as claimed is not payable. Hence, he relies upon the stand taken in the Affidavit in Reply. Mr. Bhate would submit that the Petition be dismissed.

9. We have, with the assistance of the advocates appearing for both the sides, perused the Petition and all annexures thereto. It is not necessary to go into the recovery or the proceedings pursuant to which the petitioner brought in the sum of Rs. 2,00,00,000/-. The Affidavit in Reply goes on to narrate as to how the payment of duty was an obligation of the petitioner/assessee and which was not discharged. The essential facts have not been disputed by the Revenue at all.

10. We find that the findings of the Assistant Commissioner at Page 147 of the paper-book refer to a payment of Rs. 2,00,00,000/- stated to be deposited voluntarily by the petitioner/assessee on 7th September, 2006 during the investigation process. Why that payment was made and in what circumstances need not detain us. The findings proceed to rely upon the show-cause notice which is styled as show cause cum demand notice. There was an adjudication order styled as "Order-in-Original". Upon such an order, the petitioner approached the Tribunal. The Tribunal then decided the matter. It may be that the Tribunal decided in favour of the assessee and against the Revenue and the Revenue has brought an appeal against the Tribunal?s order which is admitted and pending in this Court. Nonetheless, the order of the Tribunal has not been stayed. It is in these circumstances that the Assistant Commissioner proceeded to consider the claim for refund. At Page 149 of the paper-book, the Assistant Commissioner worked out the amount. He, therefore, also worked out the interest. He came to a conclusion that since Notice of Motion for stay filed by the department was rejected by this Court, he was granting the assessee?s application in terms of the applicable provisions and the instructions. The operative part of that order is reproduced by us only with a view to appreciate the argument of Mr. Shah.

11. Mr. Shah is right in contending that the refund is granted under provisions of Section 11B of the Act. Our attention is invited to Section 11B which enables claiming of refund. Sub-section (2) of that provision sets out as to what is to be done after receipt of the application of refund. If, on receipt of any such application, the Authority 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. In the present case, however, the credit to the Fund has not taken place, simply because the provisos to this sub-section would be attracted. The proviso says that the credit to the Fund may not take place and instead the amount shall be paid to the applicant if it is relatable to what is set

out in the clauses in the proviso. Once the case was not of a credit to the Fund, but of payment to the applicant, then in terms of the Section itself and the order made in the present case, it is a refund. If it is a refund and granted accordingly, then the amount must be disbursed within the period specified by law. If it is not so refunded, then the obligation to pay interest must follow. If that is how the judgments of the Hon?ble Supreme Court and of this Court read, then we do not find any reason to deviate from Section 11BB(1) of the Act in the present case.

12. We are unable to agree with Mr. Bhate that the amount was not refunded pursuant to any claim or application for refund or that the voluntary payment by the petitioner of duty amount was a deposit. We are also not in agreement with him when he says that the petitioner brought in the sum only when the Tribunal imposed a condition and not otherwise. All this is contrary to the factual position on which the Revenue Official proceeded and made the order of 28th April, 2015. We would not allow the Revenue now to question or go behind such findings and conclusions and which we have referred above in details. Once from Pages 147-149 of the paper-book, the Assistant Commissioner approached the matter in terms of Section 11B of the Act but the amount as directed to be refunded was not refunded within the time provided by the statutory provision, that, this is a fit case to award interest that is to be awarded for delayed refund. If the duty ordered to be refunded under sub-section (2) of Section 11B is not refunded within three months from the date of receipt of the application under sub-section (1) of Section 11B of the Act, then, the award of interest must follow as mandated by Section 11BB(1) of the Central Excise Act, 1944.

13. In the present case, the application made for refund under Section 11B is dated 4th October, 2006. The amount of refund as directed in terms of the order dated 28th April, 2015 has been disbursed and paid on 28th April, 2015 by RTGS.

14. Therefore, the petitioners are entitled to interest at the rate of 6% from the expiry of the period of three months from the date of the application, meaning thereby the amount shall carry interest at the rate of 6% per annum from 4th January, 2007 to 27th April, 2015. This figure shall be calculated and the amount be paid within a period of two weeks from the date of receipt of a copy of this order.

15. Rule made absolute in these terms. No costs.

