

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: 05.08.2014

W.P.(C) 4931/2012

AFCONS INFRASTRUCTURE LTD

..... Petitioner

versus

UNION OF INDIA AND ORS

..... Respondents

Advocates who appeared in this case:

For the Petitioner : Ms Maneesha Dhir, Advocate with Ms Geeta Sharma, Mr Ishan Sanghi
and Mr Karan Batura, Advocates
For the Respondents : Mr Mukesh Anand, Advocate for R-1
Mr Satish Kumar, Advocate for R-1 & R-2

CORAM:

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SIDDHARTH MRIDUL

J U D G M E N T

BADAR DURREZ AHMED, J (ORAL)

1. Earlier a Division Bench of this Court had dismissed the writ petition by virtue of an order dated 12.09.2013. The writ petition was essentially concerned with the payment of interest by the Revenue to the petitioner on account of petitioner's succeeding in its appeal before the Customs, Excise and Service Tax Appellate Tribunal where the petitioner had earlier been directed to make a pre-deposit of ₹55,00,000/- (Rupees Fifty Five Lakhs) for hearing of the appeal. Although the said amount of ₹55,00,000/- (Rupees

Fifty Five Lakhs) has been refunded to the petitioner pursuant to the order passed by the said Tribunal on 04.03.2011, the petitioner was not paid any interest on the refund amount. It is for this reason that the petitioner had approached this Court by way of the present writ petition.

2. However, the petitioner's request for payment of interest on the refund was, as pointed out above, initially rejected by this Court by virtue of the order dated 12.09.2013. Subsequently, the petitioner filed a review petition being R.P. No.565/2013. By virtue of the order dated 14.03.2014, the Division Bench which had passed the earlier order, allowed the review petition and recalled its order dated 12.09.2013. This was so because the said Division Bench was informed that the order dated 04.03.2011 passed by the tribunal had been dispatched to all the parties including the petitioner and two certified copies of the said order were also dispatched and sent to the Commissioner of Central Excise, Delhi-I and were duly served upon him. It is later that the said Commissioner of Central Excise, Delhi-I by a letter dated 05.09.2011 had requested for three more certified copies which were also furnished. The Division Bench also noted that in the additional affidavit filed on behalf of the respondent it was accepted that the order passed by the tribunal had been communicated to the jurisdictional commissioner i.e. the

Commissioner of Central Excise, Delhi-I.

3. The Division Bench by virtue of its order dated 14.03.2014 noted that in the earlier order dated 12.09.2013 the impression which the Bench carried was that the order dated 04.03.2011 passed by the said Tribunal had not been served on the respondent till 01.09.2011. But, as the fact stood clarified that the order dated 04.03.2011 had actually been served in the office of the Commissioner of Central Excise, Delhi-I on 16.03.2011, the question arose as to whether the service of a certified copy on the Commissioner of Central Excise, Delhi-I would constitute due service for the purposes of section 35FF of the Central Excise Act, 1944 (hereinafter referred to as 'the said Act'). It is for these reasons that the Division Bench which passed the order on 14.03.2014, recalled its earlier order dated 12.09.2013 and directed that the matter be listed before the roster Bench for consideration of the following question:-

“Whether service of a certified copy on the Commissioner of Central Excise, Delhi-I would constitute due service for the purpose of section 35FF of the Central Excise Act, 1944?”

4. This is how the matter is before us. We first need to examine the provisions of section 35FF of the said Act, which reads as under:-

“35FF. 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.”

5. A plain reading of the above provision would indicate that in case the refund, consequent upon an appellate authorities order, is not made 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, it shall carry interest at the rate specified in section 11BB of the said Act after the expiry of the period of three months from the date of communication of the order of the appellate authority, till the date of actual refund.

6. The reference to the expression “adjudicating authority”, has to be seen in the light of the definition given in section 2(a) of the said Act.

Section 2(a) of the said Act reads as under:-

“2(a) “adjudicating authority” means any authority competent to pass any order or decision under this Act, but does not include the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963), Commissioner of Central Excise (Appeals) or Appellate Tribunal.”

7. It is evident that apart from the Central Board of Excise and Customs, the Commissioner of Central Excise (Appeals) and the Appellate Tribunal, any authority competent to pass any order or decision under the said Act would fall within the expression “adjudicating authority”. We put a pointed question to the learned counsel appearing on behalf of the Revenue as to whether the Commissioner of Central Excise, Delhi-I would be competent to pass an order of refund pursuant to the order dated 04.03.2011 passed by the Tribunal. The answer was that he would be competent to do so, although, normally it is the Assistant Commissioner who grants the refund order. Even otherwise, in the facts of this case, the adjudication order (order-in-original) had, in any event, been passed by the Commissioner of Central Excise, Delhi-I. Thus, in whichever manner the case is looked at, the Commissioner of Central Excise, Delhi-I would fall within the expression “adjudicating authority” as appearing in section 35FF of the said Act.

Therefore, the relevant question to ask is on which date was the order passed by the Tribunal communicated to the “adjudicating authority” (i.e., the Commissioner of Central Excise, Delhi-I). Clearly, this fact has been recorded in the order dated 14.03.2014 itself that the order passed by the Tribunal on 04.03.2011 was served on the Commissioner of Central Excise, Delhi-I on 16.03.2011. Therefore, the refund ought to have been made on or before 16.06.2011. However, the refund was actually made on 18.10.2011. Therefore, interest was payable under section 35FF of the said Act to the petitioner for the period 16.06.2011 to 18.10.2011.

8. Now, the only question remaining is with regard to the rate of interest. Section 35FF clearly stipulates that the rate of interest would be that as specified in section 11BB of the said Act. Section 11BB of the said Act 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:

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 [National Tax 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.]”

9. It is apparent from the above provision that the rate of interest has to be specified by the Central Government by a notification in the official gazette. However, the rate cannot be below five per cent and cannot exceed thirty per cent per annum. As per the notification No.67/2003-CE(N.T.) dated 12.09.2003 which was applicable during the relevant period, the Central Government has fixed the rate of interest at six per cent per annum for the purposes of section 11BB of the said Act. It is that rate of interest

which shall be applicable in the present case also.

10. Consequently, the writ petition is allowed by directing that interest shall be paid by the revenue to the petitioner for the period 16.06.2011 to 18.10.2011 at the rate of six per cent per annum. The said interest shall be paid within a period of four weeks from today.

11. The writ petition stands allowed in the above terms. There shall be no order as to costs.

BADAR DURREZ AHMED, J

SIDDHARTH MRIDUL, J

AUGUST 05, 2014

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