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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(C) 11757/2016

RAKESH KUMAR GARG & ORS. ..... Petitioners
Through : Mr. Krishna Kant and Mr. M.P. Sahay, Advs.

versus

THE DEPUTY COMMISSIONER OF CENTRAL EXCISE, DIVISION -I, & ORS. ... Respondents
Through : Mr. Harpreet Singh, Sr. Standing Counsel with Ms. Suhani Mathur, Adv. for R-1 & 2.
Ms. Shiva Lakshmi, CGSC with Mr. Siddharth Singh and Mr. Ruchir Ranjan Rai, Advs. for R-3.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE A. K. CHAWLA

<u>O R D E R</u>
% **26.09.2018**

<u>W.P.(C) 11757/2016</u>

By the order dated 10.12.2015 in CEAC Nos.01-03/2011 and connected cases (i.e. Rakesh Kumar Garg v. Commissioner of Central Excise), this court had quashed and set aside the order of the Customs Excise Service Tax and Appellate Tribunal (CESTAT) dated 06.08.2010. The CESTAT had upheld the order of the Commissioner of the Central Excise, who had imposed penalty under Rule 209A read with Rule 26 of the Central Excise Rules, 2002. The penalty imposed was Rs.3 crores each. The CESTAT had substantially reduced the penalty amount – which was higher as far as the petitioners/appellants were concerned (ranging between Rs.21 lakhs and 25 lakhs). The court in its operative directions, while allowing the appeals, stated as follows :

> *"74. For the aforementioned reasons, the Court sets aside the order of the CESTAT dated 6th August, 2010 restricting the penalty amount vis-à-vis each of the Appellants to Rs.5 crores. The amounts deposited by the Appellants during the pendency of these appeals will be returned to them together with any interest accrued thereon. The guarantees furnished by the Appellants shall stand discharged."*

The order in original, made by the Deputy Commissioner was that since the application (for refund) was made on 05.04.2016, it could be granted w.e.f. 13.05.2016 (i.e. within 3 months from the date of receipt of the application). The adjudicating authority therefore, declined to grant any interest even while sanctioning the refund of Rs.5 crores to the present petitioners.

The two-fold submissions have been made on behalf of the petitioners. Firstly, that the amounts paid as pre-deposit (before CESTAT) and pursuant to the directions of this court, while pursuing the appeals under Section 35G, did not bear the character of "*tax*" and consequently, when relief was finally granted, interest had to be paid from the date of deposit. The other submission is that if the amended Section 35FF (i.e. amended w.e.f. 06.08.2014) were to be treated as prospective, it would be arbitrary as it would deny the benefit of interest upon amounts which never bore the character of tax.

This court is of the opinion that the petitioners are entitled to relief in view of the consistent view taken in this regard by the courts. In *Suvidhe Ltd. v. UOI,* 1996 (82) ELT 177 (Bom), it was held that the amount paid as pre-deposit, for pursuing the appellate remedy or for any other reason mandated by law, cannot be treated as a tax as that is only a condition for pursuing the appellate remedy. This view was affirmed by the Supreme Court in *Union of India v. Suvidhe Ltd.,* 1997 (94) ELT A 159 (SC). In *Nestle India Ltd. v. Assistant Commissioner of Central Excise,* 2003 (154) ELT 567 also, a similar view was adopted. The latest judgment of the Karnataka High Court in *M/s W.S. Retail Services v. State of Karnataka,* W.P.(C)No.33176/2017 and connected cases (decided on 14.11.2017) referred to all these decisions as well as the decision of this court in *Voltas Ltd. v. Union of India & Ors.,* 1999 (112) ELT 34 Del.

We notice that recently in *MRF Ltd. v. The Commissioner of Trade and Taxes & Anr.*, W.P.(C)No.3118/2018 (decided on 10.08.2018), this very Division Bench had taken a similar view – in the context of pre-deposits made under the Delhi VAT Act.

In view of the above discussion, the petitioners' contention that they are entitled to interest from the date of the final order of the

CESTAT, is justified and warranted. As to the second submission made with respect to the invalidity of Section 35FF on account of its prospective nature, the court recollects that the provisions of law ought not to be read in a manner so as to invalidate them. In view of the interpretation preferred by the above judgment, the alleged unconstitutionality no longer subsists.

In view of the foregoing discussion, the writ petition is allowed. The impugned order is hereby quashed. The respondents are hereby directed to calculate the interest due and payable to the petitioners, from the date when the appeals were allowed by this court (i.e. 10.12.2015). The writ petition is allowed in these terms.

Rev.P.No………(not numbered)

The review petition is dismissed as not pressed.

S. RAVINDRA BHAT, J

A. K. CHAWLA, J

SEPTEMBER 26, 2018/aj