

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

CENTRAL EXCISE APPEAL NO. 2/2021

M/s Fabrimax Engineering Pvt. Ltd.
A Company incorporated under the provisions of
Companies Act, 1956, having its Registered Office
at Plot No.J-20, MIDC Industrial Area, Hingna Road,
Nagpur 440016. Through its Director Mr.Pawan
S/o Omprakash Chokhani.

APPELLANT

....VERSUS.....

Commissioner of Central Excise
Telangkhedi Road, Civil Lines, Nagpur 440 001.

RESPONDENT

Shri S.S. Dewani, counsel for the appellant.
Shri S.N. Bhattad, counsel for the respondent.

CORAM : A. S. CHANDURKAR AND G.A. SANAP, JJ.

DATE ON WHICH ARGUMENTS WERE HEARD : 29TH JULY, 2021.

DATE ON WHICH JUDGMENT IS PRONOUNCED : 10TH AUGUST, 2021.

JUDGMENT (PER : A.S. CHANDURKAR, J.)

This appeal filed under Section 35G of the Central Excise Act, 1944 was heard on the following substantial question of law:-

“In the light of adjudication of Central Excise Appeal No.15 of 2016 by this Court on 22.02.2017 in the case of the present appellant itself, whether the appellant is entitled for refund under Rule 5 of the Cenvat Credit Rules read with Notification dated 18.06.2012 and Section 11B of the Central Excise Act, 1944?”

2. The aforesaid substantial question of law arises in view of the following facts:-

The appellant claims to have cleared finished goods under International Competitive Bidding (ICB) without payment of excise duty in view of notification dated 17.03.2012. Since the appellant was not in a position to utilize Cenvat credit on duty paid on inputs in view of the fact that majority of the finished goods were cleared under ICB there was an accumulation of Cenvat credit. Accordingly on 17.04.2015 the appellant filed a refund claim under Rule 5 of the Cenvat Credit Rules, 2004 (for short 'the said Rules') for an amount of Rs.96,53,590/-. The refund was claimed on account of duty paid on inputs used in the manufacture of finished goods cleared under ICB during the period from January-2015 to March-2015. On 12.05.2015 a show cause notice was issued to the appellant proposing to reject the refund as claimed principally on the ground that there was no "Physical Export" under Rule 5 of the said Rules for seeking refund. Since the clearances under ICB were treated as deemed exports it was proposed to refuse the refund. The appellant filed its reply on 29.06.2015 justifying its entitlement for refund. The Assistant Commissioner by his order dated 16.07.2015 rejected the refund claim which order was maintained on 11.03.2016 by the Commissioner (Appeals) and further on 11.02.2021 by the Customs, Excise and Service Tax Appellate Tribunal, Mumbai. Being aggrieved, the appellant has filed this appeal.

3. Shri S.S. Dewani, learned counsel for the appellant submitted that the question as to whether goods cleared under the notification dated 17.03.2012 against ICB at Nil rate of duty would entitle the appellant for refund under Rule 5 of the said Rules stands concluded in favour of the appellant especially in view of the earlier adjudication by this Court in Central Excise Appeal No.15/2016 in the case of the appellant itself. Referring to the order dated 17.06.2016 passed by the Customs, Excise and Service Tax Tribunal in proceedings pertaining to the appellant itself, he submitted that the Tribunal had recorded a finding that since the clearances made by the appellant under ICB were considered as exports this adjudication was challenged by the Revenue in the aforesaid appeal. It was held by this Court that the aforesaid conclusion arrived at by the Tribunal was justified and the finding that the clearances made by the appellant under ICB could be treated as exports was upheld. This adjudication was relied upon by the appellant before the Tribunal in the present proceedings but the same was disregarded for no justifiable reason. It was not permissible for the Revenue to re-agitate the aforesaid issue when the same had been answered against it previously especially in proceedings pertaining to the appellant itself. He further referred to the judgment of the *Gujarat High Court in Commissioner of Central Excise Versus Shilpa Copper Wire Industries* [2011 (269) ELT 17] to urge that clearances were made by one

100% export oriented unit to another 100% export oriented unit were deemed exports and were to be treated as physical exports for the purposes of entitling refund of unutilized Cenvat credit under Rule 5 of the said Rules. The aforesaid decision was thereafter consistently followed and infact was also referred to by the Tribunal in the earlier proceedings which culminated with the adjudication of Central Excise Appeal No.15/2016 referred to hereinabove. It was thus submitted that the appellant was entitled to refund under Rule 5 of the said Rules and the impugned orders refusing such refund were liable to be set aside.

4. Shri S.N. Bhattad, learned counsel for the respondent opposed the aforesaid submissions. According to him the Tribunal had taken a correct view of the matter and the claim for refund had been rightly refused. He referred to the submissions filed on behalf of the respondent on record to urge that the earlier adjudication in Central Excise Appeal No.15/2016 did not adjudicate the substantial question involved in the present appeal. The learned counsel however did not dispute the fact that the said adjudication between the said parties had attained finality.

5. On hearing the learned counsel for the parties and after giving due consideration to their respective submissions, we are of the

view that the substantial question of law as framed has to be answered in favour of the appellant. It is undisputed that for the period from January-2014 to December-2014 the present appellant had claimed similar refund of Cenvat credit under Rule 5 of the said Rules on the ground that said credit remained unutilized due to clearances of the final products under ICB. The Tribunal by its judgment dated 17.06.2016 considered the judgment in the case of *Shilpa Copper Wire Industries* (supra) and held that in view of that decision, the clearances made by the appellant herein to ICB had to be considered as exports for being entitled to claim refund of Cenvat credit. The Revenue proceeded to challenge that adjudication by filing Central Excise Appeal No.15/2016 and this Court on 22.02.2017 upheld the order of the Tribunal. It is thus clear that for the earlier period from January-2014 to December-2014 the claim for refund made by the appellant under Rule 5 of the said Rules was upheld by the Tribunal as well as by this Court. Notably this adjudication pertains to the appellant itself. Despite the fact that the aforesaid orders were placed before the Tribunal in the present proceedings it has not given due weightage to the same but has sought to distinguish the same on untenable grounds. In view of the fact that the claim for refund based on Rule 5 of the said Rules as made by the appellant was allowed for the entire period which adjudication was upheld by this Court there was no reason to disregard such adjudication especially when in those

proceedings the Tribunal itself had followed the ratio of the decision in *Shilpa Copper Wire Industries* (supra). We find that the entitlement to refund under Rule 5 of the Rules stands established in view of the legal position referred to above as the claim as made has been disallowed in a manner contrary to law. In that view of the matter the substantial question of law as framed is answered by holding that the appellant is entitled for refund under Rule 5 of the said Rules read with notification dated 17.03.2012 and Section 11B of the said Act. Consequently, the order passed by the Customs, Excise and Service Tax Appellate Tribunal, Mumbai on 11.02.2021 in Excise Appeal No.86434/2016 is set aside.

6. During the course of hearing of the appeal the learned counsel were heard on an additional substantial question of law as under:

“That, if the appellant is entitled for refund under Rule 5 of the said Rules whether the amount of refund would carry interest in view of provisions of Section 11BB of the said Act?”.

For said purpose the learned counsel for the respondent was called upon to verify as to whether the calculation of the refund claim as made by the appellant was correct and in accordance with law. On 27.07.2021 the respondent has filed pursis alongwith communication dated 26.07.2021 issued by the Deputy Commissioner, CGST and Central Excise, Division Hingna in which it has been stated that there was no

error in the amount of refund claim by the assessee as per the formula given in Rule 5 of the said Rules. As noted above the amount of refund claim was calculated at Rs.96,53,590/-. Thereafter the learned counsel have been heard on the aforesaid substantial question of law.

7. According to the learned counsel for the appellant in view of the provisions of Section 11BB of the said Act the appellant is entitled to interest on the amount of refund to which the appellant has been found entitled. Placing reliance on the decision in *Commissioner of Central Excise, Hyderabad Versus ITC Ltd.* [(2005) 13 SCC 689], *Vikram Ispat Versus Union of India* [2009 (234) ELT 74], *Ranbaxy Laboratories Limited Versus Union of India & Others* [(2011) 10 SCC 292], *Commissioner of Central Goods and Service Tax and Central Excise, Daman Versus Alfa Packaging* [AIRONLINE 2019 BOM 1322] and the judgment of the Division Bench of this Court at the Principal Seat in **Writ Petition No.1775/2020** [*Qualcomm India Private Limited Versus Union of India & Others*] decided on 21.05.2021 it was submitted that on the expiry of the period of three months from the receipt of the application for refund, the appellant would be entitled to receive interest till the amount is received by it. It was submitted that the refund application dated 15.04.2015 preferred by the appellant under Rule 5 of the Cenvat Credit Rules was received by the respondent on 17.04.2015. Hence, on

the expiry of the period of three months from that date, the appellant would be entitled to receive interest.

On behalf of the respondent it was submitted that since the claim for refund was found to be inadmissible there would be no occasion to award interest from the period of three months on receipt of the application as prayed for. In any event, the amount of interest would have to be calculated by the concerned Authority and no directions in that regard need to be issued by the Court.

8. On hearing the learned counsel for the parties on the additional substantial question of law we find that this issue stands concluded by the judgment of the Hon'ble Supreme Court in *Ranbaxy Laboratories Limited* (supra). This very question as regards commencement of the period for the purposes of paying interest on delayed refund under Section 11BB of the said Act was considered alongwith the aspect as to the date from which the entitlement to interest arises. It has been held in clear terms that the liability of the Revenue to pay interest under Section 11BB of the said Act commences from the date of expiry of three months from the date of receipt of the application for refund under Section 11B(1) of the said Act and not on the expiry of the period from the date on which the order of refund is made. This decision has thereafter been consistently followed and hence it is now a settled

position that the entitlement to interest on delayed refund would commence on the expiry of the period of three months from the date of receipt of the application for refund till the date of payment of refund. In that view of the matter the contention raised on behalf of the respondent that since this Court has now held the appellant entitled for refund under Section 11B of the said Act, the payment of interest under Section 11BB would be governed by such adjudication.

In the decision relied upon by the learned counsel for the appellant in *Commissioner of Central Excise, Hyderabad* (supra) the rate of interest was applied at 12% per annum. However in the subsequent decision in *Ranbaxy Laboratories Limited* (supra), the jurisdictional Excise Officer had been directed to determine the amount of interest under Section 11BB of the said Act and make the payment thereafter. This course has been subsequently followed by this Court in *Alfa Packaging* and *Qualcomm India Private Limited* (supra). We are therefore inclined to follow the same course. The additional substantial question of law is accordingly answered by holding that since the appellant is found entitled for refund under Rule 5 of the said Rules the amount of refund would carry interest under Section 11BB of the said Act on the expiry of three months from 17.04.2015 on which date the refund application was received by the respondent till actual payment of the amount of interest.

9. In the light of the answers to the aforesaid substantial questions of law, the following order is passed:

- (I) The order dated 11.02.2021 passed by the Customs, Excise and Service Tax Appellate Tribunal, Mumbai (Regional Bench) in Excise Appeal No.86434/2016 is set aside.
- (II) It is held that the appellant is entitled to refund under Rule 5 of the Cenvat Credit Rules for the amount of Rs.96,53,590/- which has been verified by the Deputy Commissioner CGST and Central Excise, Division Hingna by the communication dated 26.07.2021.
- (III) The aforesaid amount of refund shall be paid with interest in terms of Section 11BB of the Central Excise Act, 1944. The amount of interest shall be calculated by the Authority that has issued the show cause notice dated 12.05.2015 in the light of the observations made hereinabove. That amount be calculated and paid to the appellant within a period of eight weeks from today.

10. Central Excise Appeal No.2 of 2021 is allowed in aforesaid terms leaving the parties to bear their own costs.

(G.A. SANAP, J.)

(A.S. CHANDURKAR, J.)