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IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE

APOT/106/2017
IA NO:GA/2/2017 (Old No:GA/1047/2017)
COMMISSIONER OF CENTRAL EXCISE, KOLKATA-1 & ORS.
VS.
HALDIA PETROCHEMICALS LIMITED & ORS.

BEFORE :

THE HON'BLE JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE SUPRATIM BHATTACHARYA
Date : 7th September, 2022.

Appearance:
Mr. Bhaskar Prosad Banerjee, Adv.
...for appellants

Mr. Rahul Dhanuka, Adv.
Mr. Harsh Chowdhury, Adv.
... for Respondents

The Court : This intra-court appeal by the revenue is directed against the order dated 24th November, 2016 in W.P. No. 558 of 2010. The said writ petition was filed by the respondent herein to set aside the order passed by the revisional authority dated 2nd July, 2009 and for a direction to allow interest on the delayed refund/payment of rebate claim of the respondent. The Learned Single Bench by the impugned order allowed the writ petition following the decision of the Hon'ble Supreme Court in the case of *Ranbaxy Laboratories Limited vs. Union of India & Ors., (2011) 10 SCC 292.*

Aggrieved by the same, the revenue is before us by way of this appeal.

We have heard Mr. Bhaskar Prosad Banerjee, learned standing Counsel appearing for the appellants and Mr. Rahul Dhanuka, learned Counsel appearing for the respondents.

The argument of the revenue before us is that the application filed by the respondent claiming rebate was defective and ultimately, by orders passed by the revisional authority on various dates namely, 31st March, 2005, 16th March, 2005, 12th July, 2007 etc. the defects were held to be insignificant defects and technical defects and therefore the revisional authority held that the rebate claim could not have been rejected. It is submitted that thereafter the matter went back to the original authority and the rebate was allowed during April, 2005/July, 2007.

It is the case of the revenue that in terms of those orders passed by the adjudicating authority on de novo consideration, the rebate which was claimed by the respondent has been sanctioned and paid and the same was done within a period of three months from the date of such order and therefore, interest is not payable in terms of Section 11BB of the Central Excise Act, 1944.

In this appeal we are required to consider the correctness of the said contention. We have elaborately heard the learned Counsel appearing for the respondent on the said aspect. We need not labour much to answer the issue which has arisen for consideration in this appeal as we are guided by the decision of the Hon'ble Supreme Court in *Union of India vs. Hamdard (Waqf) Laboratories, 2016 (333) E.L.T. 193 (S.C.).* The facts in the said case was identical inasmuch as that application for refund in the said case was found to be defective and ultimately, the defect was rectified and the question was as to how to compute the three months period as stipulated in Section 11BB of the Act. The Hon'ble Supreme Court after taking note of the decision in the case of *Ranbaxy Laboratories (supra)* dismissed the appeal filed by the revenue. As we have noted that the facts in the case of *Hamdard (Waqf) Laboratories (supra)* is also identical to the facts of the case on hand, we take note of the following paragraphs which are relevant :-

"11. The facts which we have adumbrated hereinabove are not in dispute. It is contended by Mr. Adhyaru, learned senior counsel appearing for the Revenue that Section 11B which deals with grant of refund of duty has to be strictly construed and, if there is no compliance with the conditions enumerated therein, the application has to be rejected. Elucidating the said argument, learned senior counsel would submit that if there is a defective application or an application not meeting the requisite criteria stipulated under the statutory provision, it is to be held that there is no application in the eye of law and hence, the period has to commence from the date when the defects are rectified. In essence, the submission is that the prescription of three months in the said provision has to commence when the application is appositely rectified to bring it in order, and there has to be adjudication to arrive at the necessitous conclusion as enshrined in the said provision, otherwise, the persons who are not entitled to get refund would be in a position to avail the benefit of refund and the interest on technical score. To buttress the said submission, he has paid immense stress on the factual matrix. It is urged by him that there was no proper application and, in fact, when the defects were communicated, they were not appositely corrected and things only came to light at the time of adjudication and thereafter in quite promptitude, the amount was paid by way of a cheque and hence, the claim of interest is absolutely unjustified and resultantly, the grant of interest by the High Court is wholly unsustainable.

13. To appreciate the controversy in proper perspective, it is seemly to refer to the provisions dealing with refund and interest. Section 11B deals with claim for refund of duty and interest, if any, paid on such duty. The said provision reads as under :-

> "Section 11B. Claim for refund of duty and interest, if any, paid on such 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 year 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 :
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> 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 sub-section (2) substituted by that Act :
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> Provided further that the limitation of one year shall not apply where any duty and interest, if any, paid on such duty has been paid under protest.
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> (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 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) the 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).

15. Sub-section (2) of Section 11B stipulates filing of an application by the assessee before the competent authority. It also postulates that the said authority is required to be satisfied that the whole or any part of the duty of excise and interest, if any, paid on such duty is refundable. The application, as submitted by Mr. Adhyaru, has to be an application in law. Section 11BB which

deals with interest on delayed refund clearly and categorically predicates that if any 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, there shall be paid to the applicant interest at the notified rate 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. The significant words are "expiry of three months from the date of receipt of such application". In the instant case, the application was filed on 25th August, 1999. The said application, needless to emphasise, was preferred under sub-section (2) of Section 11B. We have been apprised of the circular dated 30th May, 1995. It deals with interest of delayed refund under Section 11BB. Paragraph 2 of the said circular being relevant is reproduced below :-

> "2. Keeping the above in view, the following instructions are being issued regarding refunds claimed under section 11BB of CE & SA, 1944 :-
>
> (a) Refund application must invariably be filed in the office of the Assistant Collector and not with the Range Superintendent.
> (b) Immediately on receipt of an application, the same must be serutinized by an officer, not below the rank of an Inspector for its completeness.
> (c) Preliminary scrutiny should be carried out with regard to completeness of the information in the proforma already prescribed, verification of supporting documents to substantiate the refund claims and to evidence payment of duty.
> (d) An acknowledgment should be issued immediately after the above mentioned verification which will be an evidence of the receipt of refund application in terms of Section 11BB. The period of 3 months in terms of Section 11BB shall be counted from the date following the date of receipt of refund application up to the date of dispatch of cheque for refund.
> (e) The Collector should direct the Divisional Assistant Collector to designate an officer by name who will carry out the initial verification and issue the acknowledgment thereof.
> (f) Such acknowledgment must be issued within 48 hours of the receipt of the refund application, excluding holidays.
> (g) Where the refund application is found to be incomplete a letter shall be issued stating the deficiencies therein the additional information/document required within 48 hours of the receipt. In such cases the letter shall be issued only with the approval of a Superintendent and the period of 3 months,

for purpose of Section 11BB shall count from the date of receipt of all the requisite information or documents.

(h) The collector may use a cyclostyled Performa for the purpose of intimating the deficiencies or for acknowledgment of the receipt of the refund application.

(i) Check-lists of various documents which should be filed with the refund claims of different types are annexed herewith to be used as guidelines. However, the list may not be treated as exhaustive and any other documents, if required, may be included therein and called from the assessee."

17. The seminal issue is be whether there has been delay in grant of refund and consequently, whether the respondent-assessee is entitled to interest. Keeping in view the enumerated facts, the submissions canvassed and the provisions referred to, it is necessary to appreciate the principle stated in Ranbaxy Laboratories Limited (supra). In the said case, the question arose whether the liability of the Revenue to pay interest under Section 11BB of the Act commences from the date of expiry of three months from the date of receipt of application for refund or on the expiry of the said period from the date on which the order of refund is made. The two-Judge Bench after analyzing the provision has held as follows :-

> "12. 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 under Section 11B of the Act. Section 11BB of the Act lays down that in case any duty 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 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 of 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 under Section 11BB of the Act.
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> 13. Manifestly, interest under Section 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 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 under Section 11BB of the Act becomes payable.

21. As far the said principles are concerned, they are binding on us. But the facts in the case at hand are quite different. It is not a case where the assessee is claiming automatic refund. It is a case that pertains to grant of interest where the refund has been granted. The grievance pertains to delineation by the competent authority in a procrastinated manner. In our considered opinion, the principle laid down in *Ranbaxy Laboratories Limited* (supra) would apply on all fours to the case at hand. It is obligatory on the part of the Revenue to intimate the assessee to remove the deficiencies in the application within two days and, in any event, if there are still deficiencies, it can proceed with adjudication and reject the application for refund. The adjudicatory process by no stretch of imagination can be carried on beyond three months. It is required to be concluded within three months. The decision in *Ranbaxy Laboratories Limited* (supra) commends us and we respectfully concur with the same."

In the above decision the Hon'ble Supreme Court has taken note of the Circular issued by the Government of India in Circular no.130/41/95-CX, dated 30th May, 1995. The said Circular has issued instructions to field format was with regard to refund which have been claimed under Section 11BB of the Act. In terms of clause (f) of the said Instruction, acknowledgement has to be issued within 48 hours of the receipt of the refund application excluding holidays. Clause (g) states when refund application is found to be incomplete, a letter shall be issued stating the deficiency therein, the additional information/document required within 48 hours of the receipt.

In the facts on hand, there were eight rebate claims which were filed by the respondent. By way of Illustration if we take up the first rebate claim, it was filed on 24th April, 2001. Thereafter it was returned and a revised return was filed on 16th July, 2001, which was returned by the Kolkata B Division with a direction to file the claim before the Midnapore Division on 29th August, 2001 and the respondent had filed the same before the Midnapore Division on 30th August, 2001, which was returned by the Division with a direction to file the claim before the Kolkata B Division, which direction was complied by the respondent and the claim was filed before the Kolkata B Division on 28th January, 2002, which claim was rejected by the Kolkata B Division for want of jurisdiction on 31st July, 2002. Thereafter, the Commissioner of Central Excise, Kolkata 1 advised the respondent to file the claim before the Maritime Commissioner, which direction was complied with and application was filed before the Maritime Commissioner on 23rd September, 2002.

The other seven claim petitions have also been rejected belatedly as that of the first claim petition. Thus, the timelines prescribed by the Government of India in the Circular dated 30th May, 1995 has been given a go-bye by the department. It is interesting to note that rebate claims were rejected on certain technical and frivolous grounds. This has been specifically pointed out by the revisional authority. By way of illustration, we refer to the order passed by the revisional authority dated 31st March, 2005 which was filed against the order in appeal dated 27th February, 2004 passed by the Commissioner of Central Excise (Appeals), Kolkata. The revisional authority after elaborately considering the facts, pointed out that the lower authorities have rejected the rebate claim on technical/procedural infractions, the correctness of which was decided by the revisional application and after noting the decision of the Tribunal as well as the decision of the Hon'ble Supreme Court in *Mangalore Chemicals & Fertilizers Ltd. vs. Dy. Commissioner, 1991(55) E.L.T. 437(S.C.)* held that a distinction has to be made between the procedural condition of technical nature and a substantive condition and non observance of a procedural condition of technical nature was condonable while that of the latter is not condonable as it is likely to facilitate commission of fraud and introduces administrative inconveniences. It is not clear as to why the authorities had adopted a hypertechnical approach and kept the rebate claims pending for more than a year. That apart, we have also noted that the appellant was directed to file the claim petitions before different authorities which has also substantially contributed to the delay. In any event, as pointed out by the Hon'ble Supreme Court, the explanation contained in Section 11BB of the Act 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 Section 11BB the order made by such higher appellate authority or by the court shall be deemed to be an order made in Sub-section (2) of Section 11B of the Act. As pointed out by the Hon'ble Supreme Court, the explanation has nothing to do with the postponement of the date on which interest becomes payable under Section 11BB of the Act.

The learned standing Counsel for the appellant would contend that while allowing the revisional application filed by the government (order impugned in the writ petition), the authority had noted that the rebate became admissible after the de novo order was passed by the adjudicating authority in pursuance of the revisional authority's order condoning certain technical infractions and procedural lapses and the rebate claim having been settled within a period of three months therefrom, that is, the date of order passed by the adjudicating authority on de novo consideration, no interest is payable. In fact, this was the very issue which was before the Hon'ble Supreme Court in *Hamdard (Waqf) Laboratories* (supra) which has been answered against the revenue and in doing so, the Hon'ble Supreme Court took note of the decision in *Ranbaxy Laboratories Limited* (supra).

Thus, we are of the view that the respondent/writ petitioner is entitled to statutory interest in accordance with Section 11BB of the Act from the date immediately after the expiry of three months from the date of receipt of the rebate claims till the date of refund of the same.

This direction shall be complied with by the appellant within a period of four months from the date of receipt of the server copy of this order.

With the above direction, the appeal stands dismissed.

The stay application also stands dismissed.

(T.S. SIVAGNANAM, J.)

(SUPRATIM BHATTACHARYA, J.)

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(**Replaced portion**)

In the facts on hand, there were eight rebate claims which were filed by the respondent. By way of Illustration if we take up the first rebate claim, it was filed on 24th April, 2001. Thereafter it was returned for filing a revised claim on 16th July, 2001 and thereafter once again returned on 29th August, 2001 with a direction to file the claim before the Maritime Commissioner. This direction was complied with by the respondent by filing it before the said authority on 30th August, 2001. Subsequently, the Maritime Commissioner returned the application on 8th January, 2002 with a direction to the appellant to file the claim before the Kolkata B Division. This direction was also complied with by the respondent by filing it before the said authority on 28th January, 2002. It is only on 31st July, 2002 the first rebate claim was rejected.