

OD-6

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION
ORIGINAL SIDE

CEXA/9/2021
IA NO.GA/1/2022
COMMISSIONER OF SERVICE TAX, KOLKATA
VS.
SOURAV GANGULY

BEFORE :
THE HON'BLE JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
Date : 31st January, 2023.

Appearance :
Mr. K.K. Maiti, Adv.
Mr. Tapan Bhanja, Adv.
... for appellant.

Mr. J.K. Mittal, Adv.
Ms. Antara Choudhury, Adv.
Mr. Amitava Mitra, Adv.
Mr. Paritosh Sinha, Adv.
...for respondent.

The Court : This appeal filed by the revenue under Section 35G of the Central Excise Act, 1944 (the Act, for brevity) challenging the correctness of the order passed by the Customs, Excise and Service Tax Appellate Tribunal, East Zonal Bench, Kolkata (Tribunal) dated 14th December, 2020.

The revenue has raised the following substantial questions of law for consideration:

- a) Whether the learned Tribunal is right in entertaining such ground which relates to payment of interest on the entire amount deposited for

the period from the date of deposit with the Government till the said amount was transferred to the Registrar General of the Hon'ble High Court because being the appellate court the Learned Tribunal's jurisdiction is limited to examine the impugned Order-in-Original and nothing beyond than that and such ground of payment of interest was not the part of adjudication of the impugned Order-in-Original which is examined by the Learned Tribunal ?

- b) Whether on the facts and circumstances of the instant case the impugned order of the Learned Tribunal dated 14th December, 2020, as it directed to pay interest on the entire amount deposited for the period from the date of deposit with the Government till the said amount was transferred to the Registrar General of the Hon'ble High Court, is perverse inasmuch as per incuriam ?
- c) Whether the impugned order of the Learned Tribunal dated 14th December, 2020, as it directed to pay interest on the entire amount deposited for the period from the date of deposit with the Government till the said amount was transferred to the Registrar General of the Hon'ble High Court, is perverse and exceeded its jurisdiction as it failed to appreciate that the Hon'ble Division Bench of the High Court, by its order dated 14th August, 2019, has made it clear that no such interest is payable to the writ petitioner/the respondent herein on the entire amount as deposited by the respondent herein for the said period from the date of deposit with the Government till the said amount was transferred to the Registrar General of the Hon'ble High Court ?

We have heard Mr. K.K. Maiti, learned standing Counsel appearing for the appellant and Mr. J.K. Mittal, learned Counsel for the respondent/assessee.

The present litigation has had a chequered history which commenced with the issuance of the show cause notice dated 26th September, 2011 demanding service tax from the respondent/assessee in terms of Section 73(1) of the Finance Act, 1994 and interest under Section 75 of the said Act and proposing to levy penalty under Sections 76, 77 and 78 of the said Act. The said show cause notice culminated in an order of adjudication dated 12th November, 2012 by which the demand made by the show cause notice was confirmed along with direction to pay interest and penalty.

Challenging the said show cause notice the respondent/assessee filed writ petition before this Court being W.P. 3137 of 2013. During the pendency of the writ petition the appellant department was directed not to initiate any coercive action against the respondent/assessee for a time period. However, it appears that there was no specific order of interim stay granted in the said writ petition. Consequently, the appellant department initiated recovery proceedings by issuance of notice dated 10th January, 2014. This notice was challenged by the respondent/assessee by filing a writ petition before this Court being W.P. 2721(W) of 2014, which was dismissed by order dated 3rd February, 2014.

The respondent/assessee preferred two intra-court appeals before this Court, one against the order of the learned Single Bench refusing to grant any interim order in W.P. 3137 of 2013 and the other as against the dismissal of W.P. 2721(W) of 2014, dated 3rd February, 2014.

It appears that in the meantime recovery has been made from the respondent/assessee to pay a further sum of Rs.50 lakhs without prejudice to

his rights and contentions in the pending writ petition and upon payment of the further sum, the demands were stayed till the disposal of the writ petition. To be noted that in the order dated 12th February, 2013, there was an observation that in the event any recovery is effected from the respondent/assessee and if the respondent/assessee ultimately succeeds, he will be entitled to refund with interest. By order dated 30th June, 2016, WP No.3137 of 2013 was allowed thereby the show cause and the order in original were quashed. The learned Writ Court also directed that the respondent/assessee is entitled not only to a refund of the sum of Rs.1,51,66,500/- and a sum of Rs.50,00,000/- which he had deposited pursuant to the Court's order but also along with interest at the rate of 10% from the date of deposit till the date of payment. The Court also directed that the refund should be granted within a period of four weeks from the date of the said order.

Challenging the said order dated 30th June, 2016 by which the writ petition was allowed, the revenue preferred intra-Court appeal before this court in MAT 1609 of 2016. The Division Bench by judgment dated 16th February, 2017 held that the respondent/assessee should challenge the correctness of the order of adjudication passed by the Commissioner of Service Tax, Kolkata dated 12th November, 2012 by filing an appeal before the learned Tribunal and that the learned Writ Court committed mistake in entertaining the writ petition. Accordingly, the respondent/assessee was directed to prefer appeal as against the adjudication order and a time frame was also fixed for preferring such appeal with a further direction to condone the delay in filing the appeal. At the time when the appeal was entertained by the Division Bench, by order dated 16th February, 2017 while staying the portion of the judgment and order by which

refund was granted, directed the Department to deposit the amount with the Registrar General of this Court within a time frame with a further direction to keep the amount invested in a short term interest bearing fixed deposit account in any nationalised bank. The Division Bench also directed the respondent/assessee to effect the mandatory pre-deposit before the Tribunal and upon effecting such deposit such deposit, direction was issued to the Registrar General of this Court to refund the amount which was deposited by the respondent/assessee pursuant to the orders passed by the learned writ Court.

In view of the above direction, the Division Bench directed that the amount which was deposited by the Department pursuant to the interim order passed by the Division Bench on 16th February, 2017 to be refunded to the respondent/assessee along with interest. Ultimately, the matter was taken up by the learned Tribunal and by the impugned order the appeal has been allowed.

Before us in this appeal the revenue has questioned only the grant of interest on the amount which was sanctioned as refund. Before we proceed further we need to point out that the order passed by the learned Tribunal has been given effect to and the Deputy Commissioner, Joka Division, Kolkata South CGST & Cx. Commissionerate by order dated 25th January, 2021 has sanctioned the refund along with interest and the said amount has been paid to the respondent/assessee on 9th February, 2021. If that is so, it is not clear as to why the revenue has preferred this appeal and contesting the order passed by the learned Tribunal directing payment of interest.

Learned Advocate appearing for the respondent/assessee would submit that the appellant/department has not placed before this Court an important fact that although an appeal had been preferred by the Department as against

the order of the Deputy Commissioner, Joka Division, Kolkata South CGST & Cx. Commissionerate dated 25th January, 2021, the fact that refund has already granted with interest on 9th February, 2021 has not been disclosed.

Be that as it may, we are to consider as to whether the learned Tribunal was justified in granting interest. This issue has been dealt with as the sixth issue by the tribunal and we extract the finding recorded by the learned tribunal on the said issue.

- “79. *The appellant has also claimed interest from the date the amount was deposited by the appellant in pursuance of the impugned order till the date amount was transferred to the Registrar General of the Calcutta High Court.*
80. *It transpires from the records that after the passing of the order dated November 12, 2012 by the Commissioner, the appellant deposited the confirmed demand of Rs.1,51,66,500/- on February 26, 2014 and subsequently also deposited an amount of Rs.50 lacs on March 21/26, 2014 in compliance of an interim order dated March 10, 2014 passed by the Calcutta High Court, in the Writ Petition filed by the Commissioner. The said Writ Petition filed by the appellant was allowed by a learned Judge of the High Court on June 30, 2016 and the amount deposited was directed to be refunded with interest at the rate of ten per cent per annum from the date of deposit till the date of payment. The Department however, filed an appeal before a Division Bench of the Calcutta High Court against the order of the learned Judge and by an interim order dated February 16, 2017, the Division Bench directed that the amount of Rs.2,01,66,5000/- (1,51,66,500+50,00,000/-) to be deposited by the Department with the Registrar General of the High Court, which amount was to be invested in an interest bearing fixed deposit. The Division Bench, by judgement and order dated August 14, 2019, allowed*

the appeal filed by the Department and directed that the amount deposited by the Department with the Registrar General of the High Court shall be returned to the appellant with accrued interest as on the date of refund.

81. *The contention of the appellant is that no interest has been paid to the appellant from the date of deposit of the amount of Rs.1,51,66,500/- on February 26, 2014 with the Government till the date the said amount was deposited by the Government with the Registrar General of the High Court. Likewise, the appellant has not been paid interest on Rs.50 lacs from the date it was deposited with the Government on March 21/26, 2014 till the said amount was deposited by the Government with the Registrar General of the High Court. It has, therefore, been urged by learned counsel of the appellant that the appellant should get interest on the amount of Rs.2,01,66,5000/- from the date of deposit with the Government till the said amount was transferred to the Registrar General of the High Court, if it is ultimately held that the appellant is not entitled to pay service tax.*
82. *As the appeal filed by the appellant is being allowed and the demand confirmed by the Commissioner is being set aside, there is no reason why the appellant should not been granted interest on the amount of (Rs.1,51,66,500 and Rs.50,00,000) deposited with the Government from the date of deposit of the amount upto the date of transfer of the said amount to the Registrar General of the High Court.*
83. *Thus, for all the reasons above, the impugned order dated November 12, 2012 passed by the Commissioner is set aside and the appeal is allowed. The appellant shall also be entitled to interest on the amount of Rs.1,51,66,500/- and Rs.50,00,000/- from the date of deposit of the amount with the Government upto the date the amount was transferred to the Registrar General of the High Court at the rate of ten per cent per annum. This amount shall be paid to the appellant within a period of one month from the date of this*

order, failing which the appellant would be entitled to get interest at the same rate from the date of this order upto the date of payment of the amount.”

It is the submission of the learned senior counsel for the appellant that the learned Tribunal had heard the argument and reserved judgment on 17th January, 2020, but the decision was rendered only on 14th December, 2020 and this being contrary to the CESTAT Procedure vide order No.4 of 2019 dated 17th July, 2009. The order is to be held to be non est and the appeal should be directed to be heard afresh. In this regard, the learned senior counsel has made elaborate reference to the procedure dated 17th July, 2009.

Learned Advocate appearing for the respondent/assessee, on the other hand, had placed before this Court judgments of the Hon'ble Supreme Court in *R.C. sharma v. Union of India* reported in (1976) 3 SCC 574; *Anil Rai v. State of Bihar* reported in (2001) 7 SCC 318; *Devang Rasiklal Vora v. Union of India* reported in 2003 SCC OnLine Bom 798; *Shivsagar Veg. Restaurant v. Assistant Commissioner of Income Tax* reported in 2009 SCC OnLine Bom 1088 and *M.H. Hoskot v. State of Maharashtra* reported in (1978) 3 SCC 544. These judgments have been pressed into service to show that unless the delay is unreasonable, the decision of the Tribunal cannot be held to be non est in law.

In our considered view, there may not be any necessity for us to examine the effect of the CESTAT Procedure dated 17th July 2009 qua the order passed by the learned Tribunal dated 14th December, 2020 as the period during which the orders were reserved by the Tribunal would fall during which lockdown was imposed and the Hon'ble Supreme Court had also extended the period of limitation under various statutes. Therefore, on the said ground, the order

passed by the learned Tribunal cannot be held to be non est in law. That apart, no such substantial question of law has been suggested by the revenue in this appeal. Having steered clear of this issue, now we need to consider as to whether the learned Tribunal was justified in granting interest at the rate of 10%. The endeavour of the learned senior counsel appearing for the appellant is to convince this Court to state that the learned Tribunal has no power to grant interest. We are not persuaded to accept the said submission in view of the clear language of Section 11BB of the Central Excise Act which empowers even the Assistant Commissioner to grant interest in case where there is a delay in refund. If the Assistant Commissioner of Central Excise is empowered to grant interest, it goes without saying that such power was enure in favour of the appellate authority namely, the Commissioner of Central Excise as well as the Tribunal which will test the correctness of the order passed by the Commissioner and also this Court, in exercise of power under Section 260A of the Income Tax Act. Therefore, there is sufficient power vested with the Tribunal considering the facts and circumstances of the case to grant interest. However, in this case the facts are exceptional and peculiar. More particularly, because of the earlier round of litigation before this Court. These aspects have been clearly taken note of by the Tribunal in its impugned order and precisely for such reason we had quoted paragraphs 79 to 84 of the order passed by the learned Tribunal. The proceedings before the Tribunal can be very well construed to be a continuation of the proceedings which commenced before this Court in the year 2013 when the respondent/assessee first questioned the correctness of the show cause notice and the order in original by filing a writ petition being WP/3137/2013. In the said writ petition an order was passed on 12th February,

2013 wherein the Court while refusing to grant an order of interim stay held that if the respondent/assessee succeeds in the writ petition, he will be entitled to claim refund of the entire amount together with interest. Therefore, such right to claim interest not only emanates from the statutory provision of Section 11BB of the Central Excise Act but also pursuant to the orders passed by this Court in the writ petition filed by the respondent/assessee before this Court. This order passed by the learned writ Court binds the intra parties namely, the department as well as the respondent and, therefore, it will be too late for the day for the appellant/department to contend that no interest is payable.

That apart, the learned writ Court while allowing the writ petition by order dated 30th June, 2016 had quantified the quantum of interest at the rate of 10%. The factual matrix has been thoroughly examined by the Tribunal and interest has been directed to be paid only from the date on which the amount was recovered till it was deposited with the Registrar General of this Court and, therefore, we find that there can be no error in directing such payment of interest. That apart we note that the total interest which was sanctioned and refunded to the respondent/assessee is Rs.59,85,338/-. If that be so, then the present appeal will be hit by the monetary limit fixed by the CBIC in its Circular dated 22nd August, 2019 which fixed the monetary limit of Rs.1 crore for the revenue to pursue appeals before this Court against the order passed by the Tribunal. Therefore, on that score also we are of the view that the revenue is liable to be non suited. That apart there is nothing on record to indicate that the case on hand would fall within any one of the exception which have been curved out in the circular issued by the CBIC.

Thus, for the above reason we find that there is no question of law arising for consideration in this appeal. Accordingly, the appeal ((CEXA/9/2021) fails and is dismissed.

Consequently, the connected application for stay (IA No.GA/1/2022) also stands closed.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)