A.F.R.

ORDER OD – 12

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (CUSTOMS)
ORIGINAL SIDE

CUSTA/3/2012
RAJENDRA KUMAR JAIN
VS
COMMISSIONER OF CUSTOMS (PORT) KOLKATA & ANR.

BEFORE :
THE HON'BLE JUSTICE SURYA PRAKASH KESARWANI
AND
THE HON'BLE JUSTICE RAJARSHI BHARADWAJ
Date : 9th May 2024.

Appearance:

Mr. Sudhir Mehta, Advocate
Mr. Anurag Bagaria, Advocate
… for the appellant.

Mr. K. K. Maiti, Advocate
… for the respondents.

1. Heard Sri Sudhir Mehta, learned counsel for the appellant and Sri K. K. Maiti, learned senior standing counsel, assisted by Sri Abhradip Maity, learned junior standing counsel for the respondents.

2. This appeal was admitted by this Court by order dated 14.06.2012, on the following substantial question of law:-

"Whether the Learned Tribunal is justified in law in not allowing the interest at the rate of 12 per cent per annum on the refund amount of pre-deposit?"

Facts

3. Briefly stated, facts of the present case are that on 20th August 1998, a sum of Rs.9,93,200/- was seized by the Director of Revenue Intelligence on the ground that it was liable to confiscation being sale proceeds of the goods which was liable for confiscation. By order dated 30.11.2018, the Adjudicating Authority held that the seized cash is not liable for confiscation but it imposed penalty of Rs.65 lakh upon the appellant and the aforesaid sum of Rs.9,93,200/- was sought to be appropriated against the penalty. The appellant preferred an appeal before the Customs, Excise and Service Tax Appellate Tribunal [for short, 'CESTAT'], in which, by order dated 22nd April 2000, the Tribunal directed that the aforesaid sum of Rs.9,93,200/- shall be treated as pre-deposit under Section 129E of the Customs Act, 1962. By order dated 17.12.2002, the Tribunal allowed the appeal of the appellant and set aside the order of confiscation and penalty. Thus, a sum of Rs.9,93,200/- held by the respondents as pre-deposit under Section 129E of the Customs Act, 1962 became refundable. Since the amount was not being refunded by the respondents, therefore, the appellant filed a writ petition No.1601 of 2005, which was disposed of by order dated 05.09.2005 directing the respondents to consider the appellant's

claim for refund within three weeks. On 01.12.2005, the Commissioner of Customs directed refund of Rs.9,93,200/- along with applicable rate of interest. On 05.01.2006, the Assistant Commissioner of Customs passed an order for refund of Rs.9,93,200/- and interest @ 6% per annum amounting to Rs.1,74,803/-. Since the interest was granted @ 6% per annum, therefore, the appellant became aggrieved with the order of the Assistant Commissioner. Consequently, he filed an appeal before the Commissioner (Appeal) on 21.02.2006, which was dismissed by the Commissioner (Appeal) by order dated 29.06.2006. Aggrieved, the appellant filed an appeal before the CESTAT on 19.07.2006, which was dismissed by the CESTAT by the impugned order dated 24.01.2012. Aggrieved with the order of the CESTAT, the appellant herein has filed the present appeal on 14.06.2012, which has been admitted on the afore-quoted substantial question of law.

Submissions

4. Learned counsel for the appellant submits that there was no provision under the Act providing for rate of interest on refund of pre-deposit. Earlier, the respondents were not granting refund, but it was pursuant to the judgment of Hon'ble Supreme Court in Commissioner of Central Excise, Hyderabad v. ITC Limited 2005 (179) ELT 15 (SC) that the Central Board of Excise and Customs issued a circular bearing No.802/35/2004-CX dated 08.12.2004 allowing payment of interest on

delayed refund of the amount of principal deposit. No rate of interest was provided under the aforesaid circular for delay in refund of pre-deposit beyond the period of three months. In the aforesaid case of ITC Limited (supra), Hon'ble Supreme Court granted interest on refund @ 12%. In similar circumstances, a coordinate Bench of this Court in Madura Coats Private Limited v. Commissioner of Central Excise, Kolkata – IV 2012 (285) ELT 188 (Cal.) has also granted interest @ 12% per annum on delayed refund of pre-deposit. He further submits that the amendment in Section 35FF was introduced with effect from May 10, 2008 by Section 85 of the Finance Act, 2008 (18 of 2008) providing applicability of rate of interest as governed under Section 11BB of the Central Excise Act. Since in the present matter of delayed refund of pre-deposit, entire events took place prior to May 2008, therefore, the appellant is entitled for interest at the rates provided by the coordinate Bench of this Court in Madura Coats Private Limited (supra) and by Hon'ble Supreme Court in ITC Limited (supra).

5. Learned counsel for the respondents submits that the aforesaid amount of Rs.9,93,200/- was not a pre-deposit but it was made pre-deposit by order of the Tribunal in appeal. Therefore, the appellant is not entitled for interest @ 12%. He, however, admits that right from the date when the aforesaid amount was made by the CESTAT as pre-deposit, till the date of refund on 05.01.2006, there was neither any provision in the

Act nor in any notification providing for rate of interest on the delayed refund of pre-deposit and it was only pursuant to the order of Hon'ble Supreme Court and consequential circular issued by the Board that interest on refund of pre-deposit was being made.

Discussion and Finding

6. We have carefully considered the submissions of learned counsel for the parties and perused the paper book.

7. The dates, events and facts as afore-noted have not been disputed by learned counsel for the respondents before us. Thus, it remains undisputed that the seized cash of Rs.9,93,200/- was made pre-deposit by order of the CESTAT dated 22.04.2000 under Section 129E of the Customs Act, 1962. Admittedly, neither there was any provision nor any notification providing for rate of interest on delayed refund of pre-deposit. The pre-deposit made on 22.04.2000 was refunded to the appellant on 05.01.2006. It is pursuant to the judgment of Hon'ble Supreme Court in ITC Limited (Supra) that the Central Board of Excise and Customs issued the aforesaid circular dated 08.12.2004 allowing payment of interest on delayed refund, but this circular also does not provide rate of interest. Hon'ble Supreme Court in the case of ITC Limited (Supra), pursuant to which the aforesaid circular was issued by CBEC, directed for payment of interest @ 12% on delayed refund of pre-

deposit under Section 35F of the Central Excise Act, 1944, which is *pari materia* with the provision of Section 129E of the Customs Act.

8. In similar circumstances, a co-ordinate Bench of this Court in Madura Coats Private Limited v. Commissioner of Central Excise, Kolkata – IV 2012 (285) ELT 188 (Cal.) directed interest @ 12% on delayed refund of pre-deposit, holding as under:-

> *"14. We have heard learned counsel for the parties. The petitioner has moved this Court for clarification and/or modification of the order limited to specifying the rate of interest which the petitioner would be entitled to claim on the delayed refund of the pre-deposit amount of Rs.14.98 crore.*
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> *15. While disposing of the appeal this Court held:*
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> > *"After hearing the learned counsel for the parties and after going through the materials on record, we find that in this case, the Hon'ble Supreme Court decided the matter finally on February 24, 2005 and thus, in view of the decision of the Supreme Court in the case of Commissioner of Central Excise v. ITC Limited, reported in 2005 (179) ELT. 15, interest was payable for the period commencing from three months after the final disposal of the matter till the date of refund and thus, in this case interest was payable from May 25, 2005. It appears that the Central Board of Excise and Customs, pursuant to the aforesaid decision of the Supreme Court, has already issued a Circular Bearing No. 802/35/2004-CX., dated December*
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> *16. Therefore, while setting aside the order of the Tribunal below the Court directed the respondent to pay interest to the appellant in*

terms of the circular dated December 8, 2004 on the pre-deposit for the delayed refund within two weeks.

17. It has been pointed out to us that though the Court had directed the respondent to pay interest to the appellant in terms of the aforesaid circular, the petitioner has approached the Assistant Commissioner who found that the petitionere is entitled to interest @ 6% per annum and not 12% per annum as awarded in the judgment of the Supreme Court in the case of Commissioner of Central Excise v. ITC Limited (supra) which has been held to be applicable to the petitioner's case.

18. We have no hesitation to come to the conclusion that the Revenue is trying to take advantage of the fact that this Court while referring to the circular that did not mention the rate at which interest was to be paid to the petitioner considering the period for which interest was payable by the Revenue to the petitioner i.e. from May 25, 2005 upto October 11, 2007 i.e. for about 870 days.

19. The decision of the Supreme Court in the case of Commissioner of Central Excise v. ITC Limited (supra) as regards refund of amount deposited under Section 35F was governing the field as the Supreme Court has upheld the direction for payment of interest and quantified it to be @ 12% per annum. The issue before the supreme Court was whether the pre-deposit made as a pre-condition for the hearing of the appeal under the Central Excise Act, 1944 was, on the assessee being ultimately successful, refundable to the assessee with interest as there was no provision in the Central Excise Act for payment of interest on such refund. It is in the course of hearing before the Supreme Court that the Learned Solicitor General after taking instructions made a statement that the Central Board of Excise and Customs proposes to issue a circular in connection with the payment *of interest on all such pre-deposits. At the time a draft copy of the proposed circular was handed over to the Supreme Court there was no rate of interest specified in the proposal and, therefore, the Supreme Court awarded interest @ 12% per annum.* ***Therefore, when this Court directed the respondent to pay interest to the appellant*** *in terms of the Circular Bearing No. 802/35/204-CX., dated December 8, 2004 on the pre-deposit of the delayed refund within two months from today it has to be construed that* ***this Court meant the rate of interest which was awarded by the Supreme Court in the case of Commissioner of Central Excise v. ITC Limited which was the rate quantified by the Supreme Court in absence of any statutory provision in the said Act****.*

20. ***Therefore, in view of the fact that the period for which the petitioner is entitled to interest on the pre-deposit of the delayed refund was the same as in the case of Commissioner of Central Excise v. ITC Limited (supra) parity demands that the petitioner is also entitled for interest 12% per annum****.*

21. In so far as the contention of the Revenue that the Central Government is the only authority to fix the rate of interest and that Section 35FF was brought in by providing rate of interest on payment of pre-deposit delayed refund and quantified the rate of interest to be the same as in Section 11BB would not apply to the petitioner's case as Section 35FF has been introduced in the Act by way of an amendment inserted with effect from May 10, 2008 by Section 85 of the Finance Act, 2008 (18 of 2008). ***Therefore, we clarify that the petitioner is entitled to interest @ 12% per annum on the amount of refund****. We direct that such interest shall be paid by the respondent/Revenue within two months of the date of this order."*

9. Learned senior standing counsel for the respondents now states that the Government of India, Ministry of Finance (Department of Revenue), New Delhi has issued a notification No. 70/2014/Customs (N.T.) dated 12.08.2014 in exercise of powers conferred under Section 129EE of the Customs Act, 1962 fixing the rate of interest @ 6% per annum for the purposes of the said Section and, therefore, the same rate of interest is applicable. We do not find any substance in this submission of learned senior standing counsel for the respondents. Reason is that the said notification is dated 12.08.2014. The rate of interest on delayed refund of pre-deposit shall be governed by the law laid down by Hon'ble Supreme Court in ITC Limited (supra) as well as a coordinate Bench of this Court in Madura Coats Private Limited (supra) till a statutory provision in the Act was enacted and a notification was issued thereunder providing for rate of interest on delayed refund of pre-deposit. With effect from the date on which the provision came in the statute, it shall hold the field and the rate of interest shall be governed by it. Since the period in question is prior to the notification providing for rate of interest on delayed refund of pre-deposit, issued under the Act, therefore, the case of the appellant shall be governed by the law laid down by the coordinate Bench of this Court in Madura Coats Private Limited (supra).

10. For all the reasons afore-stated, the appeal is **allowed**, the impugned order No. A-34/KOL/2012 dated 23.01.2012 in Customs Appeal No.C/A/231/2006 [Shri Rajendra Kumar Jain v. Commissioner of Customs (Port), Kolkata] passed by the Customs, Excise and Service Tax Appellate Tribunal, East Zonal Bench, Kolkata is hereby set aside and it is held that the appellant is entitled for payment of interest @ 12% on the delayed refund of the amount of pre-deposit, which shall be paid by the respondents to the appellant within one month from the date of production of a certified copy of this order. The substantial question of law is answered in negative i.e. in favour of the appellant and against the respondents.

(SURYA PRAKASH KESARWANI, J.)

I agree.

(RAJARSHI BHARADWAJ, J.)

S. Kumar