

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
KOLKATA**

REGIONAL BENCH – COURT NO.1

Service Tax Appeal No.76059 of 2023

(On behalf appellant)

(Arising out of Order-in-Appeal No.442/GHY(A)/Commr./ST/DIB/2023 dated 24.08.2023 passed by Commissioner of CGST & Excise, Guwahati)

M/s Brahmaputra Cracker an Polymer Limited

Administrative Building, Lepetkatta, Dibrugarh, Assam-786006

Appellant

VERSUS

Commissioner of CGST & Excise, Dibrugarh

Milan Nagar, F Line, PO-C.R.Building, Dibrugarh-786003

Respondent

APPERANCE :

Shri M.P.Bagaria, Chartered Accountant for the Appellant

Shri K.Chowdhury, Authorized Representative for the Respondent

CORAM:

HON'BLE MR.ASHOK JINDAL, MEMBER (JUDICIAL)

HON'BLE MR.K.ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO.75765/2024

DATE OF HEARING : 22 .04.2024

DATE OF PRONOUNCEMENT : 25.04.2024

Per Ashok Jindal :

By way of this appeal, the appellant is contesting the interest on delayed refund.

2. The facts of the case are that the appellant established a Gas Cracker Project for overall development of Assam and the said project started commercial production w.e.f. 02.01.2016. After commencement of production, the appellant accumulated huge losses. These losses were incurred on account of payment of interest by the appellant for borrowings from the banks, promoters and Oil Industry Development Board for operational and working capital requirements.

2.1 DGCEI initiated proceedings by way of issuance of show-cause notice that the appellant was earning income by way of charging/recovering amounts under PRS from the contractors for delay in supply/service contract but was not discharging service tax thereon.

2.2 Therefore, after adjudication, an amount of service tax of Rs.7,90,08,905/- was confirmed along with interest and various penalties were imposed against the appellant.

2.3 On receipt of the adjudication order on 10.10.2018, the appellant deposited whole of the amount of service tax demanded on 28.12.2018 under protest and communicated the said facts to the respondent.

2.4 The appellant has also filed an appeal before this Tribunal and this Tribunal set aside the demand confirmed against the appellant.

2.5 After receipt of the order dated 04.05.2022 passed by this Tribunal, the appellant claimed the refund of the pre-deposit along with interest on 03.06.2022.

2.6 On 01.09.2022, the amount of Rs.7,90,08,905/- paid under protest was refunded to the appellant. No interest was paid by the adjudicating authority to the appellant.

2.7 The appellant filed an appeal before the Id.Commissioner (Appeals) for demanding interest from the date of deposit i.e.28.12.2018 till 01.09.2022.

2.8 The Id.Commissioner (Appeals) rejected the claim of interest.

2.9 Being aggrieved with the said order, the appellant is before us.

3. The Id.Counsel for the appellant submits that the appellant is entitled to claim interest under Section 35FF of the Central Excise Act, 1944 as they have paid the said amount under protest as it was a

deposit. As they were paying interest by borrowings from the bank, he claimed that the interest is to be granted at the rate of 12% per annum. For that, he relied on the decision of this Tribunal in the case of Parle Agro Private Limited Vs. Commissioner of CGST & Excise reported in 2021-TIOL-306-CESTAT-Allahabad, to say that the amount deposited during investigation and/or pending litigation is ipso-factor pre-deposit and interest is payable on such amount to the appellant in successful in the appeal from the date of deposit till the date of refund.

3.1 He also relies on the following decisions :

(i) Pr.Commissioner of CGST & Excise, New Delhi Vs. Emmar MGF Construction Private Limited : 2021 (55) GSTL 311 (Tri.-Del.) ;

(ii) Kesar Enterprises Vs. Commissioner of CGST & Excise, Noida : 2022 (380) ELT 319 (Tri.-All.) ;

(iii) Allied Chemicals & Pharmaceuticals Private Limited Vs. Commissioner of CGST & Excise, Jaipur : 2022 (382) ELT 371 (Tri.-Del.) ;

(iv) Raj Kumar Batra Vs. Commissioner of Customs (Preventive) – (2024) 17 Centax 73 (Del.) W.P.(C) No.2711 of 2023 and C.M.Appl.No.28919 of 2023, decided on 23.02.2024.

4. On the other hand, the Id.A.R. for the Revenue, opposes the contention of the Id.Counsel and submits that admittedly, w.e.f. 06.08.2014 as per amendment to Section 35F of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994 to file an appeal, the assessee is required to make a pre-deposit of 7.5% of the amount of service tax confirmed. If any amount deposited by the appellant over and above 7.5% of demand of service tax, the same cannot be

considered as to be deposited. Therefore, the provisions of Section 35FF of the Central Excise Act, 1944, are not applicable to the balance amount deposited by the appellant i.e. 92.5%.

5. Heard both sides and considered the submissions.

6. On going through the facts which are not in dispute that the appellant made a deposit on 28.12.2018 of whole of the demand confirmed by way of adjudication i.e. Rs.7,90,08,905/- before filing the appeal, but as per amended provisions of Section 35F of Central Excise Act, 1944, which are applicable to the Finance Act, 1994 and the Service Tax Laws to file appeal before this Tribunal, the appellant was required to make pre-deposit of 7.5% of demand of Service Tax.

7. Prior to 06.08.2014, the assessee was required to make payment of the whole of the demand confirmed by way of impugned order before filing the appeal before this Tribunal, although, this Tribunal was having discretionary power to waive whole of the demand, for part of the demand or ask for deposit of whole of the amount confirmed against the appellant, is to be per-deposited.

8. As prior to 06.08.2014, the assessee was required to make pre-deposit for whole of the demand confirmed by way of impugned order to file an appeal before this Tribunal, the said provision has forgone w.e.f. 06.08.2014 and the mandatory provision was brought into the Statute and as per the said provisions to file appeal before this Tribunal, the assessee is required to make pre-deposit of 7.5% of service tax confirmed against them.

9. Admittedly, in this case, the appellant has made the pre-deposit of whole of the demand of service tax although under protest, but the same

was not required to be paid by the appellant to file appeal before this Tribunal.

10. In that circumstances, the appellant is entitled to claim the interest on 7.5% of the demand of service tax deposited (Rs.7,90,08,905/-) on 28.12.2018 till its realization i.e. 01.09.2022.

11. In terms of the decision of this Tribunal in the case of Parle Agro Private Limited (supra), the appellant is entitled for interest at the rate of 12% per annum.

12. In conclusion, we hold that the appellant is entitled to interest on 7.5% of Rs.7,90,08,905/- from 28.12.2018 till 01.09.2022 at the rate of 12% per annum.

13. Accordingly, the appeal is disposed off.

(Pronounced in the open court on **25.04.2024**)

Sd/
(Ashok Jindal)
Member (Judicial)

Sd/
(K.Anpazhakan)
Member (Technical)

mm