

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH

SERVICE TAX APPEAL NO. 50935 OF 2021

(Arising out of Order-in-Appeal No. 137/Central Tax/Appl-II/Delhi/2019 dated 05.02.2020 passed by the Principal Commissioner of Central Goods & Service Tax, Delhi-South Commissionerate, New Delhi)

**Principal Commissioner of Central
Goods & Service Tax**

Delhi South Commissionerate,
3rd Floor, E.I.L. Annexe Building
Bhikaji Cama Place,
New Delhi – 110066

...Appellant

VERSUS

**M/s. Emaar MGF Construction
Pvt. Ltd.**

306-308, Square One, Saket,
New Delhi – 110017

...Respondent

WITH

**SERVICE TAX CROSS OBJECTION NO. 50556 OF 2021
(Filed by the Respondent)**

APPEARANCE:

Shri Harshvardhan, Authorized Representative for the Department

Shri Puneet Agarwal, Shri Yuvraj Singh and Shri Chetan Kumar Shukla,
Advocates for the Respondent

**CORAM: HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)**

**Date of Hearing: 05.08.2022
Date of Decision: 02.09.2022**

FINAL ORDER NO. 50806/2022

JUSTICE DILIP GUPTA:

The Department has filed this appeal to assail the order dated 05.02.2020 passed by the Commissioner of Central Tax (Appeals)-II, Delhi¹ by which the appeal filed by M/s. Emaar MGF Construction Pvt.

1. the Commissioner (Appeals)

Ltd.² to assail the order dated 12.09.2019 passed by the Assistant Commissioner sanctioning refund of the pre-deposit amount but denying interest has been allowed with a direction that interest shall be paid on the pre-deposit amount in terms of section 35FF of the Central Excise Act, 1944³, as amended on 06.08.2014, from the date of deposit of the said amount.

2. Cross objection has been filed by the respondent with a prayer that interest should be granted on delayed payment @ 12% per annum from the date of deposit till the date of refund.

3. It transpires from the records that a show cause notice dated 30.08.2011 was issued to the respondent demanding service tax with interest and penalty and this demand was confirmed by the adjudicating authority by order dated 30.04.2013. Feeling aggrieved, the respondent filed an appeal before the Tribunal on 05.08.2013. Section 83 of the Finance Act, 1994⁴ makes applicable the provisions of sections 35F and 35FF of the Excise Act to service tax matters. Section 35F, as it stood prior to 06.08.2014, required the person desirous of filing an appeal to deposit the amount demanded under the order against which the appeal was being filed, but the Tribunal could, under the first proviso, dispense with such deposit subject to such conditions as it deemed fit to safeguard the interest of the Revenue. The appellant moved an application before the Tribunal for waiver of pre-deposit and by an order dated 11.05.2016, the Tribunal disposed of the application by directing that a pre-deposit of Rs. 30 crores should be made within a period of eight weeks.

2. the respondent
3. the Excise Act
4. the Finance Act

4. This order passed by the Tribunal was assailed by the respondent before the Delhi High Court and by an order dated 30.08.2016, the order passed by the Tribunal was modified to the extent that instead of Rs. 30 crores an amount equal to 7.5% of the total demand of Rs. 130 crores should be deposited within three months. This amount of Rs. 10,13,90,100/- was deposited by the respondent on 28.11.2016.

5. The appeal filed by the respondent before the Tribunal was ultimately allowed by the Tribunal by order dated 29.04.2019.

6. The respondent, thereafter, filed an application for refund of the amount deposited towards pre-deposit with interest. The Assistant Commissioner, by the order dated 12.09.2019, sanctioned refund of Rs. 10,13,90,100/- but interest on this amount was denied. The respondent preferred an appeal before the Commissioner (Appeals) for grant of interest and, as noticed above, the appeal was allowed holding that interest should be paid under the provisions of section 35FF, as amended on 06.08.2014. The reason assigned in the said order is that the respondent had deposited an amount equivalent to 7.5% of the total demand of service tax in terms of the order passed by the Delhi High Court and this is the amount contemplated under the amended provisions of section 35F. The Commissioner (Appeals), therefore, held that as the amount was deposited under the amended provisions of 35F, payment of interest on the pre-deposit amount would be governed by the amended provisions of section 35FF. The relevant portion of the order passed by the Commissioner (Appeals) is reproduced below:

“(i) I find that the appellant have deposited the amount of Rs. 10,13,90,100/- on 28.11.2016 i.e. after enactment of amended Section 35F of the Central Excise Act, 1944 ('the Act'). The proviso below this Section provides that “the amount deposited under section 35F, prior to the commencement of the Finance (No. 2) Act, 2014, shall continue to be governed by the provisions of section 35FF as it stood before the commencement of the said Act.” **In the present appeal, what is peculiar to distinguish it from other cases is that the appellant have deposited 7.5% of total demand of service tax under new Section 35F of the Act. This is evident from the judgment of Hon'ble Delhi High Court 2016 (45) STR 38 (Del)] wherein it has been held that: -**

“The appellant is aggrieved by the order of the Central Excise and Service Tax Appellate Tribunal (CESTAT) inasmuch as it has granted waiver of pre-deposit to a limited extent. As against the demand for Rs. 130 crores, the stay of pre-deposit was granted to the extent of Rs. 100 crores, this having left the appellant with an obligation to deposit Rs. 30 crores as a pre-condition for hearing its appeal.

3. Learned counsel urged that the nature of contract is such that service tax per se is not leviable. This position is not disputed by the learned counsel for the respondent. It is next contended that having regard to the present nature of law with effect from 6-8-2014, the pre-deposit should not exceed 7½% of the demand. We are of the opinion that having regard to the totality of circumstances, the appellant should deposit an amount equal to 7½% of the total demand, i.e. Rs. 130 crores, within three months. Subject to compliance with the order, the appellant should be heard and its case disposed of on merits.”

(iii) It is quite clear in the above judgment that the appellant have contended that they must be allowed to pay the pre-deposit as per new Section 35F of the Act. The Hon'ble High Court has allowed this plea. This conclusion also finds support from perusal of new Section 35F of the Act *****

(iv) In view of the Order by the Hon'ble High Court, it is clear that the pre-deposit has been made by the appellant under amended Section 35F of the Act. Also, I

note that the appeal filed by the appellant has earlier been dismissed by the Hon'ble CESTAT. The same has been restored on 28.11.2016 only after making pre-deposit by the appellant as per new Section 35F of the Act. **As such, the interest on pre-deposit shall be granted in terms of Section 35FF as amended w.e.f. 06.08.2014 viz. from the date of deposit of said amount.**

The appeal is allowed in above terms."

(emphasis supplied)

7. It is this order dated 05.02.2020 passed by the Commissioner (Appeals) that has been assailed by the Department before the Tribunal on the ground that the provisions of the unamended 35FF would be applicable for payment of interest and not the amended provisions of section 35FF.

8. To appreciate the submission advanced by the learned authorized representative appearing for the Department and the learned counsel for the respondent, it would be necessary to reproduce the relevant portions of the unamended and the amended provisions of sections 35F and 35FF of the Excise Act and they are as follows:

Section 35F prior to 6.8.2014

"35 F: Deposit, pending appeal, of duty demanded or penalty levied.--

Where in any appeal under this Chapter, the decision or order appealed against relates to any duty demanded in respect of goods which are not under the control of Central Excise authorities or any penalty levied under this Act, the person desirous of appealing against such decision or order shall, pending the appeal, deposit with the adjudicating authority the duty demanded or the penalty levied:

PROVIDED that where in any particular case the Commissioner (Appeals) or the Appellate Tribunal is of opinion that the deposit of duty demanded or penalty levied would cause undue hardship to such person, the Commissioner (Appeals) or, as the case may be, the Appellate Tribunal, may dispense with such

deposit subject to such conditions as he or it may deem fit to impose so as to safeguard the interest of revenue:

PROVIDED FURTHER that where an application is filed before the Commissioner (Appeals) for dispensing with the deposit of duty demanded or penalty levied under the first proviso, the Commissioner (Appeals) shall, where it is possible to do so, decide such application within thirty days from the date of its filing.

Section 35F post 6.8.2014

“35 F: Deposit of certain percentage of duty demanded or penalty imposed before filing appeal

The Tribunal or the Commissioner (Appeals), as the case may be, shall not entertain any appeal —

- (i) under sub-section (1) of section 35, unless the appellant has deposited seven and a half per cent. of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of a decision or an order passed by an officer of Central Excise lower in rank than the Principal Commissioner of Central Excise or Commissioner of Central Excise;
- (ii) against the decision or order referred to in clause (a) of sub-section (1) of section 35B, unless the appellant has deposited seven and a half per cent. of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against;
- (iii) against the decision or order referred to in clause (b) of sub-section (1) of section 35B, unless the appellant has deposited ten per cent. of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against :

PROVIDED that the amount required to be deposited under this section shall not exceed rupees ten crores:

PROVIDED FURTHER that the provisions of this section shall not apply to the stay applications and appeals pending before

any appellate authority prior to the commencement of the Finance (No. 2) Act, 2014.

Section 35FF prior to 6.8.2014

“35 FF: Interest on delayed refund of amount deposited under the proviso to section 35F.

Where an amount deposited by the appellant in pursuance of an order passed by the Commissioner (Appeals) or the Appellate Tribunal (hereinafter referred to as the appellate authority), under the first proviso to section 35F, is required to be refunded consequent upon the order of the appellate authority and such amount is not refunded within three months from the date of communication of such order to the adjudicating authority, unless the operation of the order of the appellate authority is stayed by a superior court or tribunal, there shall be paid to the appellant interest at the rate specified in section 11BB after the expiry of three months from the date of the order of the appellate authority, till the date of refund of such amount.”

Section 35FF post 6.8.2014

“35 FF: Interest on delayed refund of amount deposited under section 35F.

Where an amount deposited by the appellant under section 35F is required to be refunded consequent upon the order of the appellate authority, there shall be paid to the appellant interest at such rate, not below five percent and not exceeding thirty-six percent per annum as is for the time being fixed by the Central Government, by notification in the Official Gazette, on such amount from the date of payment of the amount till the date of refund of such amount.

PROVIDED that the amount deposited under section 35F, prior to the commencement of the Finance (No.2) Act, 2014, shall continue to be governed by the provisions of Section 35 FF as it stood before the commencement of the said Act.”

9. It is seen that prior to 06.08.2014, section 35F required the person desirous of filing an appeal against an order relating to any

duty demanded to deposit the duty demanded, but the Tribunal could, under the first proviso, direct for dispensing with the deposit subject to such conditions that the Tribunal deemed fit to impose to safeguard the interest of the Revenue if it was of the opinion that the deposit of duty demanded would cause undue hardship to such a person.

10. The amended provisions of section 35F provide that the Tribunal shall not entertain any appeal unless the appellant deposited 7.5% of the duty in dispute. The second proviso contemplates that the provisions of the section shall not apply to stay applications and appeals pending before the appellate authority prior to the commencement of the Finance Act No. 2 of 2014, i.e. 06.08.2014.

11. It is, therefore, clear that the amended provisions of section 35F will not apply if stay applications and appeals were pending before the Tribunal prior to 06.08.2014.

12. The respondent had filed the appeal before the Tribunal on 05.08.2013 with an application for waiver of pre-deposit. Both the appeal and the stay application were, therefore, pending prior to 06.08.2014 before the Tribunal. It is for this reason that the Tribunal, exercising powers under the proviso to the unamended section 35F, directed for deposit of Rs. 30 crores instead of Rs. 130 crores, which was subsequently modified by the Delhi High Court to an amount equivalent to 7.5% of the total demand.

13. The issue that arises for consideration in this appeal is regarding payment interest on refund of the amount deposited towards the pre-deposit.

14. Under the provisions of the unamended section 35FF, any amount deposited in pursuance to an order passed by the Tribunal

under the first proviso to section 35F (as it stood prior to 06.08.2014) was required to be refunded consequent upon the order of the Tribunal, but if such amount was not refunded within three months from the date of communication of the order to the adjudicating authority, the appellant became entitled to interest at the rate specified in section 11BB of the Excise Act after the expiry of three months from the date of communication of the order of the appellate authority till the date of refund of such amount.

15. The Department contends that since the amount was deposited by the respondent pursuant to an order passed by the Tribunal under the first proviso to the unamended section 35F, it would be the unamended provisions of section 35FF that would be attracted.

16. The respondent, however, contends that the amended provisions of section 35FF would be applicable as the amount towards pre-deposit was deposited on 28.11.2016, which is a date after 06.08.2014 on which date section 35FF was amended.

17. The Commissioner (Appeals) relied upon the order passed by the Delhi High Court on 30.08.2016 to conclude that since the amount towards pre-deposit was determined by taking into consideration the amended provisions of section 35F, the amended provisions of section 35FF would be applicable for payment of interest. It would, therefore, be necessary to reproduce the order passed by the Delhi High Court and it is as follows:

"Issue notice. Sh. Pramod Kumar Rai, Sr. Standing Counsel accepts notice.

2. The appellant is aggrieved by the order of the Central Excise and Service Tax Appellate Tribunal (CESTAT) in as much as it has granted waiver of pre-deposit to a limited extent. **As against the demand for ₹130 crores, the stay of pre-**

deposit was granted to the extent of ₹100 crores, thus having left the appellant with an obligation to deposit ₹30 crores as a pre-condition for hearing its appeal.

3. Learned counsel urged that the nature of contract is such that service tax per se is not leviable. This position is not disputed by the learned counsel for the respondent. **It is next contended that having regard to the present nature of law with effect from 06.08.2014, the pre-deposit should not exceed 7½% of the demand. We are of the opinion that having regard to the totality of circumstances, the appellant should deposit an amount equal to 7½% of the total demand, i.e. ₹130 crores, within three months. Subject to compliance with the order, the appellant should be heard and its case disposed of on merits.**

4. **The impugned order of the CESTAT is modified to the above extent."**

(emphasis supplied)

18. It is seen that the Delhi High Court, in the said order, noticed that against the demand of Rs. 130 crores, the Tribunal had granted stay of only Rs. 100 crores, leaving the appellant with an obligation of depositing Rs. 30 crores as a pre-condition for hearing of the appeal by the Tribunal. The Delhi High Court also noticed that w.e.f. 06.08.2014 the provisions of section 35F had been amended to the extent that 7.5% of the demand was required to be deposited. It is taking into consideration the totality of the circumstances that the Delhi High Court directed that an amount equal to 7.5% of the total demand of Rs. 130 crores should be deposited by the appellant towards pre-deposit, instead of Rs. 30 crores as directed by the Tribunal and to this extent the order passed by the Tribunal was modified.

19. This direction has been misconstrued by the Commissioner (Appeals) to mean that the Delhi High Court had held that the

amended provisions of section 35F would be applicable and so interest would be payable under the amended provisions of section 35FF. This conclusion drawn by the Commissioner (Appeals) is clearly wrong. The High Court, after noticing that learned counsel for the department had admitted that service tax would not be leviable on the contract in issue and the fact that the nature of law had changed w.e.f. 06.08.2014 and having regard to the totality of the circumstances had merely modified the order passed by the Tribunal for pre-deposit of the amount by requiring that an amount equivalent to 7.5% of the total demand should be deposited. The Delhi High Court did not hold that the provisions of amended section 35F would be applicable.

20. Thus, the reasoning adopted by the Commissioner (Appeals) to grant interest under the amended provisions of section 35FF of the Excise Act is not correct and cannot be accepted.

21. Learned counsel for the appellant, however, submitted that even if the unamended provisions of section 35F would apply to the facts of the present case, then too, the respondent would be entitled to interest under the amended provisions of section 35FF, more particularly when the amount towards the pre-deposit was deposited on 28.11.2016. To support this contention, learned counsel for the respondent placed the amended provisions of section 35FF and submitted that in the present case the amount was deposited under section 35F. Learned counsel also submitted that there is no reason as to why interest should be denied to the appellant once the amount was deposited and is required to be refunded. In support of this contention, learned counsel placed reliance of the decisions of the Allahabad High

Court in **Hello Minerals Water (P) Ltd. vs. Union of India**⁵ and **M/s. IFP Products (P) Ltd. vs. Union of India and another**⁶ as also upon the decision of the Tribunal in **M/s. Elegant Developers vs. Commissioner, Central Excise & CGST, Delhi-South**⁷.

22. It has been found as a fact that the unamended provisions of section 35F would be applicable to the facts of the present case. The unamended provisions of section 35FF of the Excise Act have, therefore, to be examined first to determine whether interest on delayed refund of amount would become payable to the appellant. The 'Heading' of the section is "interest on delayed refund of amount deposited under the proviso to section 35F". A 'Heading' can certainly be regarded as providing a key to the interpretation, for it gives a broad and general indicator of the nature of the subject-matter dealt with thereunder. The appellant had deposited the amount pursuant to an order passed by the Tribunal under the first proviso to section 35F. Thus, on a plain reading of the provisions of section 35F, it is clear that the appellant would be entitled to interest under this section. If that be so, the appellant would not be entitled to any interest since the amount was refunded to the appellant within three months from the date of communication of the order.

23. The contention of the learned counsel for the appellant is that the amended provisions of section 35FF would apply if the amount is deposited after 06.08.2014. To examine this contention, it would be necessary to examine the 'Heading' to section 35FF, as it stood post

5. 2004 (174) E.L.T. 422 (All.)
6. 2017 (9) TMI 1376 – Allahabad High Court
7. 2000 (3) TMI 751 – CESTAT New Delhi

06.08.2014, and it is "interest on delayed refund of amount deposit under section 35F".

24. The 'Heading' of the amended section 35FF does not deliberately make a mention of any amount deposited under the proviso to section 35F for the simple reason that post 06.08.2014 the amount is deposited under the amended section 35F and not the proviso to the unamended section 35F. Section 35FF, post 06.08.2014, provides that where an amount deposited by the appellant under section 35F is required to be refunded consequent upon the order of the appellate authority, there shall be paid to the appellant interest at such rate, not below 5% and not exceeding 36% on such amount from the date of payment of the amount till of such amount. It is, therefore, apparent that the amended section 35FF deals with amount that is deposited post 06.08.2014 under section 35F and not to any amount that is deposited under the proviso to the unamended 35F. This position is further clarified by the proviso to the amended section 35FF. It provides that the amount deposited under section 35F, prior to the commencement of the Finance (No. 2) Act, 2014, shall continue to be governed by the provisions of section 35FF as it stood before the commencement of the said Act. The proviso, therefore, clearly spells out that if any amount is deposited under the unamended section 35F, it shall continue to be governed by the unamended section 35FF. This is also clear since after section 35F there is a comma and there is a comma also after 2014. It is only under the proviso to the unamended section 35F that the amount is determined towards pre-deposit. On the other hand, it is the amended section 35F that requires the appellant to deposit 7.5% of the duty.

25. Thus, a clear distinction has been drawn between the amount deposited under the unamended provisions of section 35F and the amended provisions of section 35F. It has no relevance to the date of deposit. The relevance is to the provision under which the amount is deposited. In the present case, as noticed above, the amount was deposited by the respondent pursuant to the directions issued under the unamended provisions of the 35F. Such being the position, interest on delayed refund of amount would continue to be governed by the unamended provisions of section 35FF.

26. The decision of the Allahabad High Court **Hello Minerals Water**, on which reliance has been placed by the learned counsel for the appellant, would not be applicable since in the present case payment of interest is governed by the statutory provisions. The decision of the Allahabad High Court in **IFP Products** is not applicable to the facts of the case. The view taken by a learned member of the Tribunal in **Elegant Developers** making applicable the amended provisions of 35FF of the Excise Act, merely because the deposit was made on 06.10.2015, fails to correctly appreciate the provisions of the amended section 35FF.

27. It is not in dispute that if the unamended provisions of section 35FF are applicable to the facts of the present appeal, no interest would be payable to the respondent since the amount was deposited within three months from the date of communication of the order.

28. The Cross Objections filed by the respondent seeking higher rate of interest would have to be rejected since interest itself is not payable to the appellant.

29. Thus, for all the reasons stated above, the order dated 05.02.2020 passed by the Commissioner (Appeals) deserves to be set aside and is set aside. The appeal is, accordingly, allowed. The cross objections filed by the respondent deserve to be rejected and are rejected.

(Order Pronounced on 02.09.2022)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

Shreya