

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad**

REGIONAL BENCH-COURT NO. 3

Excise Tax Appeal No. 14081 of 2013- DB

(Arising out of OIA-SUR-EXCUS-002-APP-180-181-13-14 dated 30/08/2013 passed by Commissioner of Central Excise, Customs and Service Tax-SURAT-II(Appeal))

Gujarat Borosil Limited

Ankleshwar-Rajpipla Road,
Govali, Bharuch
Gujarat

.....Appellant

VERSUS

C.C.E. & S.T.-Surat-ii

New C.Ex Building...Opp. Gandhi Baug,
Chowk Bazar, Surat,
Gujarat- 395001

.....Respondent

APPEARANCE:

Shri, Anand Nainawati, Advocate for the Appellant

Shri, Tara Prakash, Assistant commissioner (AR) for the Respondent

**CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. C L MAHAR**

Final Order No. A/11711/2023

DATE OF HEARING: 01.06.2023
DATE OF DECISION: 18.08.2023

RAMESH NAIR

The issue involved in the present case is that whether, refund of pre-deposit made while filing the appeal before the tribunal is due from 3 months of passing of remand order by the Tribunal or after 3 months of passing order in de novo adjudication and consequential liability of department to pay interest thereon.

2. Shri, Anand Nainawati, Learned Counsel appearing on behalf of the appellant submits that the amount of pre-deposit is made for admission of the appeal before the tribunal. Once the appeal is disposed of the said pre-deposit made stand refundable to the assessee within 3 months from the date of the Tribunal's orders irrespective of whether the Tribunal's order is final on merit or remand to the Adjudicating Authority. Therefore, the department's contention in the present case that the refund is arising only after passing of de novo adjudication is irrelevant and illegal without any support of law.

2.1 He submits that this issue is not under dispute in the light of board circular and the judgments as follows:

- Voltas Limited Vs Union of India 1999 (112) E.L.T. 34 (Del.)
- Circular No: 802/35/2004-CX dated 08-Dec-2004
- AFCONS Infrastructure Ltd. Vs Union of India 2006 (193) E.L.T 278 (AP)
- Premier Machinery Mfg. Vs Commissioner of C.Ex.. Surat -1 2007 (219) E.L,T 632 (Tri-Ahmd.)
- Varsha Polymer Products Pvt Ltd Vs Commissioner of Cus., Kandla 2014 (301) E.L.T. 128 (Tri.- Ahmd)
- Poly Printers Vs Commissioner of C.Ex., Delhi 2008 (221) E.L.T. 285 (Tri.-Del)
- Venkateshwara Non-Ferrous Foundry Vs CC & CE (Appeals), Hyderabad 2007 (212) E.L.T. 546 (Tri.- Bang)

3. On the other hand Shri, Tara Parakash Learned Deputy Commissioner (AR) appearing on behalf of the revenue reiterates the findings of the impugned order.

3.1 He submits that after making pre-deposit for filing the appeal since the demand was not set aside and matter was remanded to the adjudicating Authority for passing de novo Order the refund of pre-deposit is payable only after setting aside the demand in the de novo adjudication process before that the refund of Pre-deposit is pre-matured, therefore, the lower authorities have rightly rejected the claim of interest made by the appellant.

4. We have carefully considered the submission made by both the sides and perused the record. We find that the limited issue in the present case to be considered by us is as to whether the refund of pre-deposit is payable within 3 months from the date of Tribunal's remand order or from the date of the de novo adjudication order.

4.1 We find that the pre-deposit for which the appellant has sought for the refund was paid specifically for entertaining the assessee's appeal by this tribunal, once the appeal was disposed of by way either setting aside the demand or by way of remand to the adjudicating authority, the demand of duty does not exist for the time being, therefore the amount of pre-deposit became refundable to the assessee. on the order of the tribunal the contention of the department in this case is that the refund is matured from the date of de novo adjudication order has no relevance for the reason that de novo adjudication is nothing to do with the pre-deposit made under Section 35F before this Tribunal.

4.2 This issue has been clarified by the CBEC in circular No. 802/35/2004-CX dated 8 December, 2004. The said circular is reproduced below:

Circular No. 802/35/2004-CX., dated 8-12-2004

F.No. 387/5/2001-JC

*Government of India
Ministry of Finance (Department of Revenue)
Central Board of Excise & Customs, New Delhi*

Subject : Return of deposits made in terms of Section 35F of the Central Excise Act, 1944 and Section 129E of the Customs Act, 1962.

"Reference earlier instructions on the above subject and looking to the instances arising out of non-implementation of the judicial orders, the Board has reason to review and reiterate the earlier Circulars on the subject of non-implementation of orders of CESTAT or any Final Authority in relation to returning pre-deposits made as per directions of CESTAT or any other Final Authority in terms of Section 35F of the Central Excise Act, 1944 & Section 129E of the Customs Act, 1962. The Board has taken a strict view with regard to non-returning of such deposits.

As we are all aware the CESTAT has in a

2. Number of such cases awarded interest on pre-deposits where its orders have not been implemented and the Department had challenged this and filed Civil Appeals in the Supreme Court.

3. The Board has noted the observations of the Hon'ble Supreme Court in its order dated 21-9-2004 and has decided that pre-deposits shall be returned within a period of three months of the disposal of the appeals in the assessee's favour.

4. Accordingly, the contents of the Circular No. 275/37/2000-CX. 8A dated 2-1-2002 [2002 (139) E.L.T. T38], as to the modalities for return of the pre-deposits are reiterated. It is again reiterated that in terms of Hon'ble Supreme Court's order such pre-deposit must be returned within 3 months from the date of the order passed by the Appellate Tribunal/Court or other Final Authority unless there is a stay on the order of the Final Authority/CESTAT/Court, by a superior Court.

5. Delay beyond this period of three months in such cases will be viewed adversely and appropriate disciplinary action will be initiated against the concerned defaulting officers. All concerned are requested to note that default will entail an interest liability, if such liability accrues by reason of any orders of the CESTAT/Court, such orders will have to be complied with and it may be recoverable from the concerned officers.

6. All Commissioners may advise implementation of these instructions and ensure their implementation through a suitable monitoring mechanism. Field formation may be suitably informed. Copies of the instructions issued may be endorsed to this office for information.

7. Commissioners under your jurisdiction should be advised that similar matters pending in the High Courts must be withdrawn and compliance reported. The Board has also decided to implement the CESTAT Orders already passed for

payment of interest and the interest payable shall be paid forthwith.

8. This issues with the approval of Chairman/Member (L&J), CBEC.

9. Kindly acknowledge receipt.”

4.3 From the above circular, it was categorically clarified and reiterates their earlier circular that in case of refund of Pre-deposit the dead line for refunding, this pre-deposit is 3 months from the date of Tribunal's order, accordingly if the refund is not granted within 3 months from the date of Tribunal's order thereafter the department is bound to pay the interest to the claimant. As regard the revenue's contention that the appellant have not filed the proper refund claim. We find that in various judgments it has been settled that as regard refund of pre-deposit, there is no requirement for filing a refund claim. The department must give the refund suo moto on the basis of Tribunal's order therefore merely because the appellant have not filed the proper refund claim within 3 months of the Tribunal order, department cannot be absolved from the liability of interest on the refund of pre-deposit. This issue has been considered in the following judgments:

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“6.The learned Senior Counsel for the petitioner has submitted that once an order of adjudication resulting into a demand forming subject matter of appeal was set aside, there was no occasion for withholding the amount deposited pursuant to the order of adjudication which had ceased to exist. The learned Standing Counsel for the respondents has opposed the prayer made by the petitioner, submitting that there is no specific power to make an order of remand conferred on the CEGAT. It has to be taken as an inherent power conferred on an Appellate Tribunal and there is nothing wrong if while exercising such a power to make a remand, the Tribunal chooses to qualify it by conditions without which the order of remand itself would not have been made. We have specifically asked the learned Counsel for the respondents if there is any statutory power or any principle of law conferring the Tribunal with such jurisdiction? None has been brought to our notice excepting what was already contended and noted hereinabove.

7. It cannot be denied that the demand against the petitioner was raised consequent to the order of adjudication. Section 35F of the Act under which the petitioner was required to deposit the amount of Rs. 50 lakhs speaks of 'deposit pending appeal'. It is clear that the amount so deposited remains a deposit pending appeal and is thereafter available for appropriation or disbursal consistently with the final order maintaining or setting aside the order of adjudication.

8. In this case, the matter has been remanded inasmuch as the Tribunal was of the opinion that the adjudication was not satisfactory and it required a fresh application of mind. In our opinion, once the order of adjudication was set aside, the Tribunal could not have ordered the amount of pre-deposit to be retained awaiting the order of adjudication. There is no provision in the law requiring certain amount to be retained as a pre-deposit pending finalisation of the

adjudication proceedings. As the amount is being withheld without any authority of law, it is liable to be refunded.

9. For the foregoing reasons, the petition is allowed. The impugned order of the Appellate Tribunal in so far as it directs the amount of pre-deposit not to be refunded and to be retained until a fresh order of adjudication is passed, is set aside. It is directed that the amount shall be refunded to the petitioner within a period of four weeks from today. No order as to costs."

4.4 In the case of AFCONS Infrastructure Ltd. (supra) the similar view was taken by the Andhra Pradesh High Court as under:

"17.As noticed supra, on the authority of the judgment of the Supreme Court in Commissioner of Central Excise, Hyderabad v. I.T.C. Ltd. (supra), the assessee is entitled to refund of the pre-deposit made as a pre-condition for hearing of the appeal on the assessee being ultimately successful. In the case on hand, it is contended that final orders have not been passed by the CEGAT as an order of remand has been passed by it. As a matter of fact, the order dated 3-3-1997 passed by the learned CEGAT has not been placed before us. However, operative portion of the order has been extracted in Paragraph 5 of the affidavit filed in support of the writ petition. A perusal thereof would show, a fact, which is not in dispute, that while allowing the appeal, learned CEGAT remanded "the matter to the adjudication Commissioner of Central Excise for de novo consideration". The order of the learned Collector was set aside. Though it is a remand order for de novo consideration by the Commissioner of Central Excise, insofar as the appeal before the learned CEGAT is concerned, the matter can be said to have been finally disposed of setting aside the order of the learned Collector. The pre-deposit made by the petitioner under Section 35F is thus liable to be refunded with interest. A deposit under Section 35F is for availing the remedy of appeal. Such amount has to be returned when the appeal is allowed, as in the case on hand. As already noticed, pre-deposit amount of Rs. 28,00,000/- has been adjusted against re-adjudication demand. The question of interest and payment thereof alone has to be considered by the respondent authorities. Accordingly, the writ petition is allowed in part with a direction upon the respondents to pass orders for payment of interest in accordance with the concerned Circular referred to in the order of the Supreme Court in Commissioner of Central Excise, Hyderabad v. I.T.C. (supra) within a period of one week from the date of communication of a copy of this judgment and order."

4.5 further in the case of Premier Machinery Mfg. (supra) the tribunal considering the same issue related to interest on refund of pre-deposit, given the following order:

"[Order]. - The dispute in the present appeals relates to grant of interest on the amount deposited by the appellant in terms of Tribunal's stay order, when the impugned order was ultimately set aside and matter remanded. It is seen that the subject pre-deposited amount of Rs. 1.50 lacs has been refunded to the appellant, but the interest does not stand paid on the ground that the appellant is entitled for interest on refund amount when the decision comes in their favour in as much in the instant case, the matter was only remanded, it cannot be said that decision was in their favour.

2. I note that the matter was remanded by Tribunal vide order dated 27-7-97. The Astt. Commissioner of Central Excise rejected the refund claim of the deposited duty by his order dated 21-4-99, by observing that the party is not entitled for the refund till the case is finally decided in de novo proceedings. It is

not understood as to why the Astt. Commissioner did not pass the order in de novo proceedings and instead of finalising the same, had chosen to reject the refund claim on the ground of non-finalisation of de novo proceedings. Be as it may be, Commissioner (Appeals) has allowed the refund claim, but, rejected the interest part on the ground that the issue has not attained finality. It is to be seen that when the matter is remanded by Tribunal, impugned order confirming demand of duty gets set aside and the effect as if no order confirming demand of duty exists. As such, any deposits made by appellant in terms of such impugned order become refundable to the appellant. Surprisingly, Commissioner (Appeals) has held that the appellant is entitled for refund of pre-deposit but without interest. The same logic which applies for refund of pre-deposit amount would apply to interest also. When the appeal is allowed by way of remand, assessee would be entitled to interest on the refund of pre-deposit. There is no justification for holding otherwise.

3. *Accordingly, I allow appellant's claim of interest and direct authorities below to calculate the same in accordance with the law.*

4. *Appeal is disposed off in above terms."*

5. In view of the above decision of the High Court and Tribunal and also other decision cited by the appellant coupled with the board circular there is absolutely no doubt in our mind that appellant are entitled for the interest from the 3 months of the order of the tribunal till the refund was granted.

6. Accordingly the impugned order is set aside appeal is allowed, with consequential relief.

(Pronounced in the open court on 18.08.2023)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(C L MAHAR)
MEMBER (TECHNICAL)