*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Judgment reserved on: 05 December 2023**
Judgment pronounced on: 14 December 2023

\+ W.P.(C) 11831/2023

M/S OM GEMS AND JEWELLERY ..... Petitioner
Through: Mr. Kishore Kunal and Mr. Mahesh Parmar, Advs.

versus

PRINCIPAL COMMISSIONER, DIRECTORATE OF INTERNATIONAL CUSTOMS, FREE TRADE AGREEMENTS (FTA) CELL NEW DELHI & ORS. ..... Respondents
Through: Ms. Anushree Narain, standing counsel with Ms. Simran Kumari Adv. for Respondent 1 & 3.
Mr. Aditya Singla Adv. for R-2.
Mr. Satish Aggarwala, Sr. Standing Counsel and Mr. Gagan Vaswani, Advocate for Respondent No.4/Customs

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

J U D G M E N T

YASHWANT VARMA, J.

1. The instant writ petition has been preferred for directions being framed commanding the respondents to finalize the provisional assessment in respect of **Bill of Entry**[1] No. 2894698 dated 12 October

[1] BOE

2015, as also to release the **Bank Guarantee**[2] dated 13 July 2016 which had been furnished by the petitioner awaiting finalization of the provisional assessment proceedings. For the purposes of considering the prayers as made it would be apposite to notice the following essential facts.

2. The petitioner is stated to be engaged in the business of import and trading of assorted gold jewellery and holds a valid **Importer Exporter Code**[3]. On 13 August 2009, the Agreement on Trade in Goods under the **Framework Agreement on the Comprehensive Economic Cooperation**[4] with the **Association of Southeast Asian Nations**[5], including Indonesia was entered into with India granting preferential treatment to goods imported from ASEAN countries. For purposes of implementing the terms of the FTA, the **Customs Tariff [Determination of Origin of Goods under Preferential Trade Agreement between the Government of Members States of the Association of South-East Asian Nations (ASEAN) and the Republic of India] Rules, 2009**[6] came to be notified on 31 December 2009.

3. As per the provisions made in the 2009 Rules, the **Certificate of Country of Origin**[7] was to constitute the principal basis for the purposes of extension of preferential treatment. In extension of the

[2] BG
[3] IEC
[4] FTA
[5] ASEAN
[6] 2009 Rules
[7] COO Certificate

FTA, the respondents proceeded to issue Exemption Notifications dated 01 June 2011 and 7 March 2012 granting benefit of "*nil*" rate of **Basic Custom Duty**[8] on goods falling in **Customs Tariff Heading**[9] 7113 19 10 when imported into India from a country listed in Appendix I of those Exemption Notifications. The origin of the imported goods was to be verified in accordance with the 2009 Rules.

4. Undisputedly, the articles which were imported by the petitioner fell within the ambit of CTH 7113 19 10. The import consignment in question was made on 12 October 2015 in terms of the BOE noted hereinabove and comprised of gold bangles of 91.7% purity weighing 27592.140 grams. According to the petitioner the said consignment was duly documented and was supported by the invoice, packing list and other documents issued by the supplier as well as the COO Certificate as contemplated under the 2009 Rules. Despite the imported goods being supported by valid documentation, the fourth respondent on 23 January 2016 invoked the powers conferred by Sections 17 & 18 of the **Customs Act, 1962**[10] and evinced its intent to undertake a provisional assessment.

5. The aforesaid opinion was based on the fourth respondent taking the position that the COO Certificates were liable to be verified. However, and in order to obtain immediate release of the imported articles, the petitioner made a prayer for provisional release. While dealing with the aforesaid prayer the fourth respondent required the

[8] BCD
[9] CTH
[10] Act

petitioner to submit a BG and a Bond for an amount equivalent to 100% of the differential BCD.

6. Aggrieved by the aforesaid, the petitioner preferred an appeal before the **Commissioner of Customs (Appeals), Kolkata**[11], who on 08 April 2016 passed an order permitting the release of the imported goods by acceptance of 20% of the duty along with a Bond. It was pursuant to the aforesaid order that the petitioner on 19 July 2016 submitted a BG for an amount of Rs. 22,07,264/-, a Bond for an amount of Rs.1,10,36,317/- and also paid Countervailing Duty amounting to Rs. 6,67,936/-. Upon submission of the aforesaid security, the imported articles were provisionally released.

7. However, and as would be evident from the record, the assessment as contemplated was not completed. This constrained the petitioner to address various reminders and representations calling upon the respondents to conclude the provisional assessment proceedings. The aforesaid communications have been enclosed along with the writ petition. Ultimately, and in terms of a communication dated 27 January 2021, the fourth respondent apprised the petitioner that the COO Certificates had been submitted for verification and that the aforesaid request addressed to the **Directorate of Revenue Intelligence**[12] was ultimately received on 17 September 2020 and which body had apprised the said respondent of the verification request having been duly forwarded. The fourth respondent thus stated that the provisional

[11] Commissioner
[12] DRI

assessment proceedings would be finalized only upon receipt of the verification report from the DRI.

8. However, and as would be evident from the record even after the issuance of this communication, no further steps were taken by the respondents for finalizing the pending assessment. This led to the petitioner preferring an appeal assailing the communication of 27 January 2021 and for appropriate directions being framed commanding the third respondent to finalize the pending assessment. The aforesaid appeal ultimately came to be disposed of by the Commissioner in terms of an order dated 09 February, 2023 directing the respondents to finalize the provisional assessment as early as possible. The request of the petitioner for the order of the Commissioner being implemented also does not appear to have moved the respondents to finalize the provisional assessment proceedings. This position remained unchanged even when we heard learned counsels for parties and closed this matter for judgment.

9. Appearing for the petitioners, Mr. Kunal drew our attention to the provisions made in Section 18 of the Act and which sets out the procedure liable to be followed for the purposes of "*provisional assessment of duty*". Section 18 of the Act reads as under:

> "**18. Provisional assessment of duty**.— (1) Notwithstanding anything contained in this Act but without prejudice to the provisions of Section 46 [and Section 50],—
>
> (*a*) where the importer or exporter is unable to make self-assessment under sub-section (1) of Section 17 and makes a request in writing to the proper officer for assessment; or

(*b*) where the proper officer deems it necessary to subject any imported goods or export goods to any chemical or other test; or

(*c*) where the importer or exporter has produced all the necessary documents and furnished full information but the proper officer deems it necessary to make further enquiry; or

(*d*) where necessary documents have not been produced or information has not been furnished and the proper officer deems it necessary to make further enquiry,

the proper officer may direct that the duty leviable on such goods, be assessed provisionally if the importer or the exporter, as the case may be, furnishes such security as the proper officer deems fit for the payment of the deficiency, if any, between the duty as may be finally assessed or re-assessed, as the case may be, and the duty provisionally assessed.]

[(1-A) Where, pursuant to the provisional assessment under sub-section (1), if any document or information is required by the proper officer for final assessment, the importer or exporter, as the case may be, shall submit such document or information within such time, and the proper officer shall finalise the provisional assessment within such time and in such manner, as may be prescribed.]

(2) When the duty leviable on such goods is assessed finally [or re-assessed by the proper officer] in accordance with the provisions of this Act, then—

(*a*) in the case of goods cleared for home consumption or exportation, the amount paid shall be adjusted against the duty 78[finally assessed or re-assessed, as the case may be] and if the amount so paid falls short of, or is in excess of, 79[the duty 80[finally assessed or re-assessed, as the case may be]], the importer or the exporter of the goods shall pay the deficiency or be entitled to a refund, as the case may be;

(*b*) in the case of warehoused goods, the proper officer may, where the duty 81[finally assessed or re-assessed, as the case may be] is in the excess of the duty provisionally assessed, require the importer to execute a bond, binding himself in a sum equal to twice the amount of the excess duty.

[(3) The importer or exporter shall be liable to pay interest, on any amount payable to the Central Government, consequent to the final assessment order 83[or re-assessment order] under sub-section (2), at the rate fixed by the Central Government under Section [28-AA] from the first day of the month in which the duty is provisionally assessed till the date of payment thereof.

(4) Subject to sub-section (5), if any refundable amount referred to in clause (*a*) of sub-section (2) is not refunded under that sub-section within three months from the date of assessment of duty finally 85[or-re-assessment of duty, as the case may be], there shall be paid an interest on such unrefunded amount at such rate fixed by the Central Government under Section 27-A till the date of refund of such amount.

(5) The amount of duty refundable under sub-section (2) and the interest under sub-section (4), if any, shall, instead of being credited to the Fund, be paid to the importer or the exporter, as the case may be, if such amount is relatable to—

(*a*) the duty and interest, if any, paid on such duty paid by the importer, or the exporter, as the case may be, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

(*b*) the duty and interest, if any, paid on such duty on imports made by an individual for his personal use;

(*c*) the duty and interest, if any, paid on such duty borne by the buyer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

(*d*) the export duty as specified in Section 26;

(*e*) drawback of duty under Sections 74 and 75."

10. Learned counsel also drew our attention to the **Customs (Finalisation of Provisional Assessment) Regulations 2018**[13] and the timelines as stipulated therein for the purposes of finalization of provisional assessment. Regulations 4, 5 & 6 and which would have a bearing on the issue that stands raised, are extracted hereinbelow:-

[13] 2018 Regulations

"**REGULATION 4. Time-limit and manner for submission of documents or information for the purpose of finalisation of provisional assessment**.— (1) Where a provisional assessment is ordered by the proper officer for the reasons that,—

(*a*) the necessary documents have not been produced or information has not been furnished by the importer or the exporter; or

(*b*) the proper officer requires the importer or the exporter to produce any additional documents or information,

then such information or documents shall be made available by the importer or the exporter within one month from the date of such order of provisional assessment or the date of such requisition by the proper officer, as the case may be.

(2) The proper officer shall within fifteen days from the date of such order of provisional assessment, inform the importer or the exporter, in writing, the specific details of the information to be furnished or the documents to be produced.

(3) The proper officer may, for reasons to be recorded in writing, allow a further period not exceeding three months, on his own or at the request of the importer or the exporter, in case the documents or information are not made available within the time period specified in sub-regulation (1).

(4) The Additional Commissioner or Joint Commissioner of Customs, may further extend the time period referred for another three months, in case the documents or the information required to be submitted by the importer or the exporter or requisitioned by the proper officer have not been made available within the period as allowed above by the proper officer.

(5) The Commissioner of Customs, may extend the time period further as deemed fit, in case the documents or the information required to be submitted by the importer or the exporter or requisitioned by the proper officer have not been made available even after the extension of time under sub-regulation (4).

(6) The documents or information required to be furnished by the importer or the exporter or requisitioned by the proper officer may be submitted in one instance.

(7) The importer or the exporter or his authorised representative or Customs Broker shall inform the proper officer in writing that

he has submitted all the documents or information to be furnished or requisitioned.

(8) For the purpose of these regulations, each Bill of Entry or Shipping Bill, as the case may be, that has been assessed provisionally shall be treated as a separate case of provisional assessment.

REGULATION 5. Time-limit for finalisation of provisional assessment.— (1) The proper officer shall finalise the provisional assessment within two months of receipt of:

(*a*) an intimation from the importer or the exporter or his authorised representative or Customs Broker under sub-regulation (7) of regulation 4; or

(*b*) a chemical or other test report, where the provisional assessment was ordered for that reason; or

(*c*) an enquiry or investigation or verification report, where the provisional assessment was ordered for that reason.

Provided that where the documents or information required to be furnished by the importer or the exporter or requisitioned by the proper officer are made available intermittently, the time period of two months shall be reckoned from the date of last intimation referred to in clause (a) above,:

Provided further that where the documents or information required to be furnished by the importer or exporter, as the case may be, or requisitioned by the proper officer are not made available or made partly available and no further extension of time has been allowed under sub-regulations (3), (4) or (5) of regulation 4, as the case may be, the proper officer shall proceed to finalise the provisional assessment within two months of the expiry of the time allowed for submission of the said documents or information.

(2) The Commissioner of Customs concerned may allow, for reasons to be recorded in writing, a further time period of three months in case the proper officer is not able to finalise the provisional assessment within the period of two months as specified in sub-regulation (1) above.

(3) This regulation shall not apply to such cases of provisional assessments, where Board has issued directions to keep that pending.

REGULATION 6. Manner of finalisation of provisional assessment.— (1) The provisional assessment shall be finalised as per the provisions of section 18 of the Act.

Provided that if the amount so paid at the time of provisional assessment or after adjustment under clause (a) to subsection (2) of section 18 of the Act, falls short of the duty finally assessed or re-assessed, as the case may be, and the importer or the exporter has not paid the deficiency, the shortfall shall be adjusted from the security, if any, obtained at the time of provisional assessment, under intimation to the importer or the exporter,:

Provided further that, if the amount so adjusted or paid falls short of the duty finally assessed or re-assessed, as the case may be, the importer or exporter of the goods shall pay the shortfall in terms of the provisions of section 18.

(2) The Bond executed at the time of provisional assessment with security, if any, shall be cancelled after finalisation of provisional assessment and the security shall also be returned, if there are no pending dues.

(3) Where the final assessment is contrary to the provisional assessment, the proper officer shall pass a speaking order following principles of natural justice.

(4) Where the final assessment confirms the provisional assessment, the proper officer shall finalise the same after ascertaining the acceptance of such finalisation from the importer or the exporter on record and inform the importer or exporter in writing of the date of such finalisation.

(5) Where a Bill of Entry or Shipping Bill is presented electronically on the Customs Automated system and is ordered to be provisionally assessed, the proper officer shall finalise the provisional assessment on the system also consequent to the procedure prescribed in these regulations."

11. Mr. Kunal contended that as would be manifest from a reading of Regulation 5 of the 2018 Regulations, the provisional assessment is liable to be finalized within a period of two months. Learned counsel also laid emphasis on Regulation 5(2) of the 2018 Regulations and which enables the Commissioner of Customs to extend the period for

finalization of assessment by a further period of three months in case the assessment is not completed within the time frame as specified in Regulation 5(1) of the 2018 Regulations. It was in the aforesaid backdrop that Mr. Kunal submitted that the 2018 Regulations themselves contemplate a maximum period of five months within which provisional assessment proceedings must be drawn to a close. Learned counsel also laid stress upon Regulation 5(2) of the 2018 Regulations and which while enabling the Commissioner of Customs to extend the time period for finalisation of assessment subjects the exercise of that power to the requirement of reasons being recorded by that authority in justification of extending the time line for passing final orders. According to learned counsel, even this procedure was not followed.

12. We note that in the instant case it is not the stand of the respondents that the petitioner was remiss in acceding to any request for submission of documents or material or for that matter effecting compliance with any condition or requirement communicated by the respondents. Quite apart from the respondents having failed to allude to any material which compelled the competent authority to doubt the self-assessment returns that had been submitted by the petitioner, it becomes pertinent to note that the self-assessment made by an importer or exporter, as the case may be, is liable to be accepted except "*where the proper officer deems it necessary to make further inquiries*", or "*where it is deemed necessary to subject any imported or exported goods to any chemical analysis or other tests*".

13. We note that in the present case the Customs authorities have also not asserted that the petitioner had failed to submit the necessary documentation or furnished complete information. The detention of the goods and the initiation of provisional assessment proceedings thus appear to have been commenced solely for the purposes of the Customs authorities verifying the COO Certificates. The respondents have also failed to place for our consideration any material which may have been viewed in support of them doubting the COO Certificates which had been submitted by the petitioner. The record would reflect that although the imported goods were subjected to provisional assessment in January, 2016 those assessment proceedings had not been concluded till the time the writ petition was finally heard. It is thus manifest that the respondents have failed to conclude the assessment proceedings despite more than seven years having elapsed from the time the decision to follow the route placed in terms of Section 18 of the Act was taken.

14. That leaves the Court to examine whether the inordinate delay as caused in conclusion of the provisional assessment proceedings could be said to be justified. We find ourselves unable to hold in favour of the respondents on this score for the following reasons.

15. Mr. Singla, learned counsel appearing for the DRI has placed for our consideration a communication of 17 July 2023 addressed to the Pr. Commissioner of Customs (Airport & A.C.C.), Air Cargo Complex, N.S.C.B.I. Airport, Kolkata and which reads as follows:-

"Government of India
Ministry of Finance (Department of Revenue)
DIRECTORATE OF REVENUE INTELLIGENCE

7th Floor, Drum Shape Bldg., D Block, I.P. Bhawan, I.P.Estate, New Delhi-110002
Fax No.23370954, Tel: 23378629, 23379871

F.No.DRI/CI/BREF/9/2021-CI-O/o DG-DRI-HQ-DELHI

DATE: .07.2023

To,

The Pr. Commissioner of Customs (Airport & A.C.C.),
Air Cargo Complex, N.S.C.B.I. Airport,
Kolkata 700052

Sir,

Sub: Import of Gold Jewellery at ACC, Kolkata under Notification no. 46/2011-Cus (India-ASEAN PTAs/FTAs) - forwarding of documents for verification - Reg

This office is in receipt of letter dated 05.04.2023 from M/s. Om Gems & Jewellery on the above mentioned subject. The said letter was addressed to your office (copy enclosed).

2. In this regard, this office vide various letters to Board office, sought for status of verification of COOs in respect of 12 provisionally assessed Bills of Entry pertaining to 2015 against which Gold jewellery was cleared through Kolkata Air Cargo under Notification No.46/2011-Cus.

3. Further, in response to aforesaid letter, the FTA Cell vide letter dated 11.05.2023 (copy enclosed) informed that, multiple verification requests pertaining to verification of COOs issued for the export of Gold and Silver articles from the ASEAN countries under AIFTA were received from the field formations, namely Hyderabad, Delhi, Chennai among others, in light of DRI Alert Circular no. 10/2015-CI dated June 19, 2015. It was also stated that DRI vide its letter bearing reference no. 50/28/2015-CI/2785 dated July 28, 2015 forwarded verification request of a total of Twelve (12) COOs to the Board, 456/73/2023-FTACell4 referred to it by Kolkata Customs vide letter bearing reference no. S60(Misc)-221/2015CC dated July 22, 2015.

4. Further, it was stated by FTA Cell that verification requests for the representative CoOs along with Questionnaire were forwarded for causing verification from the Issuing Authorities in Indonesia vide D.O. letter dated October 20, 2015 and in response to Board's D.O. Letter dated October 20, 2015, verification reports were provided by the Issuing Authorities in Indonesia and the same were duly shared with field formations vide letter dated March 17, 2016 in response to the DRI Hqrs.'s aforementioned letter dated July 28, 2015.

5. This is for you information and necessary action in this regard.

as above

Heera Lal

Copy to: The Assistant Commissioner, Provisional Assessment Finalization Cell, Air Cargo Complex, N.S.C.B.I. Airport, Kolkata 700052 for information please."

16. As is manifest from the aforenoted communication, it is evident that the DRI had forwarded the verification request to the Competent Authority in Indonesia on 20 October 2015 and the issuing authorities had reverted back affirming the COO Certificates which had been submitted by the petitioner and that such information had been duly shared with field formations vide letter dated 17 March 2016. It is thus an undisputed fact that the COO Certificates stood duly verified as far back as March 2016. The fact that the DRI had duly circulated the verification reports is also evident from the communication of the Customs authorities dated 27 January 2021 which had taken note of the DRI letter dated 17 September 2020 in terms of which they had duly apprised those authorities of the verification request having been duly submitted. We thus find ourselves unable to find or discern any

justification in the apathy which prevailed and the abject failure of the Customs authorities to conclude the provisional assessment proceedings. We are thus of the firm opinion that the petitioner is not only entitled to the refund of the amounts represented by the BG which was submitted, the respondents are also liable to be saddled with interest for having retained those funds without any justifiable cause.

17. We note that a Division Bench of this Court in **Ambika Vikas Udyog vs Directorate of Revenue Intelligence, Delhi Zone Unit & Anr.**[14] had deprecated the procedure of the respondents obtaining BGs' during the pendency of **Show Cause Notice**[15] and holding on to those monies for years together and during the pendency of the SCN proceedings. Coming down heavily on the respondents, the Court had in that decision observed as follows:-

> "**13.** Mr. Shubhankar Jha, learned counsel for the Petitioner, states that till date no adjudication order in the SCN dated 29th November, 2017 has been passed. He points out that there is no justification in law for the DRI's instructions to the MMTC not to release the security amount to the Petitioner. He referred to the decision of the Bombay High Court in *Lawson Tours and Travels (India) P. Ltd.* v. *Dy. Director, DGCEI, Zonal Unit, Mumbai*, (2015) 317 ELT 248 (Bom.) where in similar circumstances, the Bombay High Court quashed the communications issued to the banks freezing the accounts of those Petitioners pending the adjudication of the SCN.
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> **14.** Mr. Satish Aggarwala, learned Senior Standing Counsel for the DRI, on the other hand, refers to the decision of the Supreme Court in *Commissioner of Customs* v. *Euroasia Global*, (2009) 236 ELT 627 (SC) and a decision dated 19th August, 2010 of the Division Bench of this Court in LPA No. 146/2010 (*Directorate of Revenue Intelligence* v. *Laxman Overseas*). Mr. Aggarwala

[14] 2019 SCC OnLine Del 8802
[15] SCN

adds that despite hearing being fixed in the adjudication proceedings on 20th December and 27th December 2018, the Petitioner's representative failed to appear. He accordingly complains of non-cooperation by the Petitioner in completion of the adjudication proceedings. While not being able to point out any provision in the Act which permits the issuance of such 'instructions' to the MMTC to withhold the BG/security amount, Mr. Aggarwala submitted, on the strength of the above decisions, that the Petitioner should nevertheless be asked to furnish some form of security to the DRI if it were to withdraw the instructions given to the MMTC.

15. The above submissions have been considered by the Court. At the outset, it requires to be noticed that this Court in its order dated 13th April, 2018 itself made it very clear to the DRI that it had not stayed the proceedings pursuant to the SCN. This Court also required the Petitioner to cooperate in those proceedings. Although according to Mr. Aggarwala, the Petitioner's representative did not appear in the adjudication hearings, the partner of the Petitioner, who is present in the Court states that he did appear on 26th April, 2019 in the adjudication proceedings and that no further date of hearing has been communicated to him.

16. However, even assuming that the Petitioner failed to appear on the dates fixed in those proceedings, the Adjudicating Officer was supposed to proceed and pass the adjudication order in accordance with law. There was no restraint on him from doing so. On the contrary, it was made clear to him by this Court on 13th April 2018 itself that there was no stay of the proceedings. Consequently, the failure by the Petitioner to appear in those proceedings cannot be an excuse to delay the adjudication order.

17. In any event, the mere pendency of the proceedings in the SCN will itself not provide justification for continuing the instructions issued by the DRI to the MMTC to withhold the release of the security/BG amount which the Petitioner had deposited with the MMTC, as part of its obligation for procurement of gold through MMTC for export of gold jewellery in the manner indicated hereinbefore. Mr. Aggarwala has been unable to point out a single provision in the Act, which permits issuance of such instructions.

18. Section 110(3) of the Act permits the 'Proper Officer' "to seize any document or thing which in his opinion will be useful or relevant to any proceedings under this Act". This requires the

Proper Officer to actually apply his mind and pass a reasoned order under the said provision in regard to such 'seizure'. Once there is a seizure made under Section 110(3) of the Act, the time limit for issuance of an SCN would begin to run in terms of Section 110(2) of the Act. In the present case, the instructions to the MMTC were first issued on 29th October 2015, and reiterated on 17th December, 2015. If this was to be treated as some kind of a 'seizure', for the purpose of Section 110(3) of the Act, then clearly the SCN issued to the Petitioner, would be well beyond the time permitted in terms of Section 110(2) of the Act. Perhaps conscious of this difficulty, the DRI has nowhere in its counter affidavit sought to justify the impugned instructions given to the MMTC as a 'seizure' under Section 110(3) of the Act. Consequently, the Court understands the DRI as not seeking to justify the impugned instructions to the MMTC as a 'seizure' in terms of Section 110(3) of the Act.

19. In any event, the Court fails to understand as to how the instructions to the MMTC by the DRI that it should not release to the Petitioner the BG/security deposited by the Petitioner with the MMTC, could amount to a 'seizure'. The Court is unable to find any legal justification for issuance of such instructions. Section 110(3) of the Act cannot be invoked for such purpose and there is no other provision of the Act referred to by the DRI in its counter affidavit, as providing a legal basis for such instructions.

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24. For the aforementioned reasons, the Court finds no justification in law for continuation of the impugned instructions of the DRI to the MMTC by its letters dated 29th October, 2015 and 17th December, 2015. The said instructions are hereby quashed. MMTC will now proceed in the matter as if the two instructions dated 29th October, 2015 and 17th December, 2015 of the DRI are no longer operational. MMTC shall release the security/BG amount to the Petitioner, to the extent it is entitled in accordance with law, forthwith and in any event not later than 10 days from today."

18. From the above it is evident that the Court had deprecated the practice adopted by the respondents and had also struck down the instructions issued by the DRI.

19. We note that interest has been duly recognized as being a necessary corollary to a wrongful retention of capital. We deem it apposite to extract the following passages from the decision of a Division Bench of the Allahabad High Court in **Wig Brother (Builder & Engineers) & Anr. Vs Union of India & Ors.**[16]

> **"27.** It may be mentioned that money doubles in six years (because of interest). In this case, the petitioner has avoided payment of cess for about 12 years, counting from the date of the demand notice dated 20.7.1991. Thus, even though we are dismissing this petition, the petitioner has really won the case, because he did not have to pay interest from 20.7.1991 till today.
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> **28.** It may be mentioned that there is misconception about interest. Interest is not a penalty or punishment at all but is the normal accretion on capital. Had the petitioner paid the amount in question in July, 1991, when it was due, the respondents would have invested the same somewhere and earned interest thereon. Instead, the petitioner has kept the money with himself for about 12 years and has earned interest thereon. Hence for every Rs. 100 which the petitioner had to pay in July, 1991, he has in fact, earned an additional Rs. 300. This is because Rs. 100 becomes Rs. 200 after six years, and in another six years this Rs. 200 doubles and becomes Rs. 400. Thus, even though we have dismissed this writ petition today, the petitioner has really not only won the case (because of the interim order of this Court) he has really earned Rs. 300 for every Rs. 100 he had to pay. Thus, even though we are dismissing this petition the petitioner has got three time more amount than what he has to pay now. All this happened because of the interim order of this Court staying the demand."

20. Reiterating the principles which were laid down in *Wig Brother*, Katju J. while speaking as a member of the Bench of the Supreme

[16] 2003 SCC OnLine All 773

Court in **Alok Shanker Pandey v. Union of India & Ors.**[17] had held as follows:-

> "**8.** We are of the opinion that there is no hard-and-fast rule about how much interest should be granted and it all depends on the facts and circumstances of each case. We are of the opinion that the grant of interest of 12% per annum is appropriate in the facts of this particular case. However, we are also of the opinion that since interest was not granted to the appellant along with the principal amount, the respondent should then in addition to the interest at the rate of 12% per annum also pay to the appellant interest at the same rate on the aforesaid interest from the date of payment of instalments by the appellant to the respondent till the date of refund of this amount, and the entire amount mentioned above must be paid to the appellant within two months from the date of this judgment.
>
> 9. It may be mentioned that there is misconception about interest. Interest is not a penalty or punishment at all, but it is the normal accretion on capital. For example if A had to pay B a certain amount, say 10 years ago, but he offers that amount to him today, then he has pocketed the interest on the principal amount. Had A paid that amount to B 10 years ago, B would have invested that amount somewhere and earned interest thereon, but instead of that A has kept that amount with himself and earned interest on it for this period. Hence, equity demands that A should not only pay back the principal amount but also the interest thereon to B."

21. We further note that the issue of interest being paid on monies unjustifiably retained, albeit in the context of pre-deposits, again fell for consideration of the Supreme Court in **Sandvik Asia Ltd. v. CIT**[18]. While dealing with the liability of the department to bear that burden in case of unjustified retention of monies, the Supreme Court had observed as follows:-

[17] (2007) 3 SCC 545
[18] (2006) 2 SCC 508

"**29.** In our view, there is no question of the delay being "justifiable" as is argued and in any event if the Revenue takes an erroneous view of the law, that cannot mean that the withholding of monies is "justifiable" or "not wrongful". There is no exception to the principle laid down for an allegedly "justifiable" withholding, and even if there was, 17 (or 12) years' delay has not been and cannot in the circumstances be justified.

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31. At the initial stage of any proceedings under the Act any refund will depend on whether any tax has been paid by an assessee in excess of tax actually payable to him and it is for this reason that Section 237 of the Act is phrased in terms of tax paid in excess of amounts properly chargeable. It is, however, of importance to appreciate that Section 240 of the Act, which provides for refund by the Revenue on appeal, etc., deals with all subsequent stages of proceedings and therefore is phrased in terms of "any amount" becoming due to an assessee.

32. The Delhi High Court in *Goodyear India Ltd. case* [(2001) 249 ITR 527 (Del)] held that an assessee is entitled to further interest under Section 244 of the Act on interest under Section 214 of the Act which had been withheld by the Revenue. The case of the Revenue was that interest payable to an assessee under Section 214 of the Act was not a refund as defined in Section 237 of the Act and hence no interest could be granted to the assessee under Section 244 of the Act. The Court held that for this purpose Section 240 of the Act was relevant which referred to refund of "*any amount becoming due to an assessee*" and that the said phrase would include interest and hence the assessee was entitled to further interest on interest wrongfully withheld. It is also important to appreciate that the Delhi High Court also referred to the Gujarat High Court decision in *D.J. Works case* [(1992) 195 ITR 227 (Guj)] and read it as taking the same view. This supports the view of the appellant on the correct reading of the Gujarat decision.

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44. In the present context, it is pertinent to refer to the circular or trade notice issued by the Central Excise Department on the subject of refund of deposits made in terms of Section 35-F of the Central Excise Act, 1944 and Section 129-E of the Customs Act, 1962. The circular is reproduced hereunder:

"Refund/Return of deposits made under Section 35-F of Central Excise Act, 1944 and Section 129-E of the Customs Act, 1962—Clarifications:

1. The issue relating to refund of predeposit made during the pendency of appeal was discussed in the Board meeting. It was decided that since the practice in the Department had all along been to consider such deposits as other than duty, such deposits should be returned in the event the appellant succeeds in appeal or the matter is remanded for fresh adjudication.

2. It would be pertinent to mention that the Revenue had recently filed a special leave petition against Mumbai High Court's order in the matter of *NELCO Ltd.*, challenging the grant of interest on delayed refund of predeposit as to whether:

(*i*) the High Court is right in granting interest to the depositor since the law contained in Section 35-F of the Act does in no way provide for any type of compensation in the event of an appellant finally succeeding in the appeal, and,

(*ii*) the refunds so claimed are covered under the provisions of Section 11-B of the Act and are governed by the parameters applicable to the claim of refund of duty as the amount is deposited under Section 35-F of the Central Excise Act, 1944.

The Hon'ble Supreme Court vide its order dated 26-11-2001 dismissed the appeal. Even though the Apex Court did not spell out the reasons for dismissal, it can well be construed in the light of its earlier judgment in *Suvidhe Ltd.* and *Mahavir Aluminium* that the law relating to refund of predeposit has become final.

3. In order to attain uniformity and to regulate such refunds it is clarified that refund applications under Section 11-B(1) of the Central Excise Act, 1944 or under Section 27(1) of the Customs Act, 1962 need not be insisted upon. A simple letter from the person who has made such deposit, requesting the return of the amount, along with an attested xerox copy of the order-in-appeal or CEGAT order consequent to which the deposit made becomes returnable and an attested xerox copy of the challan in Form TR6 evidencing the payment of the amount of such deposit, addressed to the Assistant/Deputy Commissioner concerned of Central Excise or Customs, as the case may be, will suffice for the purpose. All pending refund applications

already made under the relevant provisions of the indirect tax enactments for return of such deposits and which are pending with the authorities will also be treated as simple letters asking for return of the deposits, and will be processed as such. Similarly, bank guarantees executed in lieu of cash deposits shall also be returned.

4. The above instructions may be brought to the notice of the field formations with a request to comply with the directions and settle all the claims without any further delay. Any deviation and resultant liability to interest on delayed refunds shall be viewed strictly.

5. All the trade associations may be requested to bring the contents of this circular to the knowledge of their members and the trade in general.

6. Kindly acknowledge receipt.

45. A close scrutiny of the contents of the circular dated 2-1-2002 would disclose as to the modalities for return of predeposits. It again reiterated that in terms of the Supreme Court order such predeposit must be returned within three months from the date of the order passed by the tribunal, court or other fiscal authority unless there is a stay on the order of the fiscal authority, tribunal or court by a superior court. The Department has very clearly stated in the above circular that the delay beyond the period of three months in such cases will be viewed adversely and appropriate disciplinary action will be initiated against the defaulting officers concerned, a direction was also issued to all concerned to note that the defaulter will entail an interest liability if such liability accrues by reason of any orders of the tribunal/court such orders will have to be complied with and it may be recoverable from the officers concerned. All the Commissioners were advised implementation of these instructions and ensure their implementation through a suitable monitoring mechanism. It is also specifically mentioned that the Commissioners under the respective jurisdiction should be advised that similar matters pending in the High Courts must be withdrawn and compliance reported and that the Board has also decided to implement the orders passed by the Tribunal already passed for payment of interest and the interest payable shall be paid forthwith.

46. The facts and the law referred to in paragraph (supra) would clearly go to show that the appellant was undisputably entitled to interest under Sections 214 and 244 of the Act as held by the

various High Courts and also of this Court. In the instant case, the appellant's money had been unjustifiably withheld by the Department for 17 years without any rhyme or reason. The interest was paid only at the instance and the intervention of this Court in Civil Appeal No. 1887 of 1992 dated 30-4-1997. Interest on delayed payment of refund was not paid to the appellant on 27-3-1981 and 30-4-1986 due to the erroneous view that had been taken by the officials of the respondents. Interest on refund was granted to the appellant after a substantial lapse of time and hence it should be entitled to compensation for this period of delay. The High Court has failed to appreciate that while charging interest from the assesses, the Department first adjusts the amount paid towards interest so that the principle amount of tax payable remains outstanding and they are entitled to charge interest till the entire outstanding is paid. But when it comes to granting of interest on refund of taxes, the refunds are first adjusted towards the taxes and then the balance towards interest. Hence as per the stand that the Department takes they are liable to pay interest only up to the date of refund of tax while they take the benefit of assesses' funds by delaying the payment of interest on refunds without incurring any further liability to pay interest. This stand taken by the respondents is discriminatory in nature and thereby causing great prejudice to lakhs and lakhs of assesses. Very large number of assesses are adversely affected inasmuch as the Income Tax Department can now simply refuse to pay to the assesses amounts of interest lawfully and admittedly due to them as has happened in the instant case. It is a case of the appellant as set out above in the instant case for Assessment Year 1978-79, it has been deprived of an amount of Rs 40 lakhs for no fault of its own and exclusively because of the admittedly unlawful actions of the Income Tax Department for periods ranging up to 17 years without any compensation whatsoever from the Department. Such actions and consequences, in our opinion, seriously affected the administration of justice and the rule of law.

47. The word "compensation" has been defined in P. Ramanatha Aiyar's *Advanced Law Lexicon*, 3rd Edn., 2005, p. 918 as follows:

"An act which a court orders to be done, or money which a court orders to be paid, by a person whose acts or omissions have caused loss or injury to another in order that thereby the person damnified may receive equal value for his loss, or be made whole in respect of his injury; the consideration or price of a privilege purchased; something given or obtained as an equivalent; the rendering of an equivalent in value or amount; an equivalent given for property

> taken or for an injury done to another; the giving back an equivalent in either money which is but the measure of value, or in actual value otherwise conferred; a recompense in value; a recompense given for a thing received; recompense for the whole injury suffered; remuneration or satisfaction for injury or damage of every description; remuneration for loss of time, necessary expenditures, and for permanent disability if such be the result; remuneration for the injury directly and proximately caused by a breach of contract or duty; remuneration or wages given to an employee or officer."
>
> **48.** There cannot be any doubt that the award of interest on the refunded amount is as per the statutory provisions of law as it then stood and on the peculiar facts and circumstances of each case. When a specific provision has been made under the statute, such provision has to govern the field. Therefore, the court has to take all relevant factors into consideration while awarding the rate of interest on the compensation."

22. While we are conscious of the correctness of the decision in *Sandvik Asia* having been doubted by the Supreme Court and the matter presently stands referred for the consideration of a Larger Bench in light of the order passed in **Commissioner of Income Tax, Gujarat Vs. Gujarat Fluoro Chemicals**[19], we note that while framing that reference the Supreme Court has not doubted the compensatory character of interest that may be imposed in case of unjustified retention of monies of an assessee. Their Lordships doubted the view taken on the facts of *Sandvik Asia* bearing in mind that advance tax or tax deducted at source loses its identity once it gets subsumed in a demand of tax created in terms of an assessment.

23. A more lucid explanation of the liability to pay interest is found in the decision of the Supreme Court in **Union of India v. Tata**

[19] (2012) 13 SCC 731

Chemicals Ltd.[20]. Highlighting the compensatory element of such interest being provided by courts, the Supreme Court had held as follows:-

> "**37.** A "tax refund" is a refund of taxes when the tax liability is less than the tax paid. As per the old section an assessee was entitled for payment of interest on the amount of taxes refunded pursuant to an order passed under the Act, including the order passed in an appeal. In the present fact scenario, the deductor/assessee had paid taxes pursuant to a special order passed by the assessing officer/Income Tax Officer. In the appeal filed against the said order the assessee has succeeded and a direction is issued by the appellate authority to refund the tax paid. The amount paid by the resident/deductor was retained by the Government till a direction was issued by the appellate authority to refund the same. When the said amount is refunded it should carry interest in the matter of course. As held by the Courts while awarding interest, it is a kind of compensation of use and retention of the money collected unauthorisedly by the Department. When the collection is illegal, there is corresponding obligation on the Revenue to refund such amount with interest inasmuch as they have retained and enjoyed the money deposited. Even the Department has understood the object behind insertion of Section 244-A, as that, an assessee is entitled to payment of interest for money remaining with the Government which would be refunded. There is no reason to restrict the same to an assessee only without extending the similar benefit to a resident/deductor who has deducted tax at source and deposited the same before remitting the amount payable to a non-resident/foreign company.
>
> **38.** Providing for payment of interest in case of refund of amounts paid as tax or deemed tax or advance tax is a method now statutorily adopted by fiscal legislation to ensure that the aforesaid amount of tax which has been duly paid in prescribed time and provisions in that behalf form part of the recovery machinery provided in a taxing statute. Refund due and payable to the assessee is debt-owed and payable by the Revenue. The Government, there-being no express statutory provision for payment of interest on the refund of excess amount/tax collected by the Revenue, cannot shrug off its apparent obligation to reimburse the deductors lawful monies with the accrued interest for the period of undue retention of such monies. The State having received the money without right,

[20] (2014) 6 SCC 335

> and having retained and used it, is bound to make the party good, just as an individual would be under like circumstances. The obligation to refund money received and retained without right implies and carries with it the right to interest. Whenever money has been received by a party which *ex ae quo et bono* ought to be refunded, the right to interest follows, as a matter of course."

24. On an overall consideration of the above, we find that the claim for interest as raised by the petitioner clearly merits acceptance. As we had found hereinabove, the DRI had duly completed the COO Certificates verification exercise and had also shared the requisite results thereof with the respondents. Despite the above, the respondents failed to conclude the provisional assessment proceedings. The information in respect of the COO Certificate verification had been shared with the field authorities way back in 2016. There was thus no justification for the respondents having failed to render a closure to the proceedings at that stage itself. We were also not apprised of any other legal impediment that may have operated and restrained the respondents from finalizing the provisional assessment. It also becomes pertinent to note that the provisional assessment itself was initiated not on an allegation of any undervaluation or wrongful declaration of the value of goods, the same was founded solely on the opinion formed by the respondents that the COO Certificates merited verification. In view of the above, we are of the considered opinion that the indolence exhibited by the respondents is rendered wholly arbitrary.

25. The writ petition consequently stands allowed. The respondents are directed to release the BG and any other monies retained forthwith subject to whatever final orders that they may choose to pass while

finalizing the provisional assessment proceedings. The petitioner is also held entitled to be compensated by way of payment of interest @ 6% per annum on that refund which shall commence from 17 March 2016 when the DRI shared the verification reports till such time as the monies are ultimately repaid.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

DECEMBER 14, 2023/kk