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

% **Judgment reserved on: 10 July 2023**
Judgment pronounced on: 14 July 2023

\+ W.P.(C) 4332/2022

M/S GOLDY ENGINEERING WORKS .....Petitioner

Through: Mr. Abhas Mishra and Mr. Kartikeya Matta, Advs.

versus

COMMISSIONER OF CENTRAL EXCISE & ANR.

..... Respondents

Through: Ms. Anushree Narain, SC with Mr. Mayank Srivastava, Adv.

\+ W.P.(C) 12143/2022

M/S SHARP MOULDS AND DIES .....Petitioner

Through: Mr. Abhas Mishra and Mr. Kartikeya Matta, Advs.

versus

COMMISIONER OF CENTRAL EXCISE AND ANR

..... Respondent

Through: Ms. Anushree Narain, SC with Mr. Mayank Srivastava, Adv.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE DHARMESH SHARMA

J U D G M E N T

YASHWANT VARMA, J.

1. These two writ petitions raise the common question of the date from which interest is leviable on an asserted delay in disbursal of refund under the **Central Excise Act, 1944**[1].

[1] 1944 Act

2. According to the petitioners, interest is liable to run from the date when the refund is determined and would not be dependent on any application or other positive step being taken by an assessee. This contention is controverted with the **Central Excise Department**[2] asserting that in light of the plain language of Section 11B read along with Section 11BB of the 1944 Act, the moving of an application is a prerequisite for computation of the date from which interest would be payable on a refund. It is this principal question which falls for determination.

3. For the sake of brevity, the Court deems it apposite to notice the facts as they obtain in the writ petition filed by **M/s Goldy Engineering Works vs. Commissioner of Central Excise & Anr.**[3] On 27 July 2006, a **Show Cause Notice**[4] is stated to have been issued to the petitioner, its proprietor, one M/S Aay Kay Engineering Works and its proprietor, in respect of certain goods which had been seized. The aforesaid SCN was followed by another SCN dated 29 January 2007 in terms of which the Department raised a demand for additional duty as well as proposing penal action again against the noticees for having violated the provisions of an exemption notification. The petitioner asserts that during the pendency of those proceedings, it was also forced to deposit an amount of Rs. 20,00,000. The SCNs were

[2] Department
[3] W.P.(C) 4332/2022
[4] SCN

ultimately finalized in terms of the order in original dated 08 February 2008.

4. In terms of the aforesaid order, the Additional Commissioner confirmed the duty demand of Rs. 45,31,574 /- under Section 11A of the 1944 Act and held the petitioners liable to pay the same along with interest thereon in accordance with Section 11AB of the 1944 Act. Further directions were framed for confiscation of cash amounting to Rs. 44,96,000/- and the imposition of monetary penalties amounting to Rs. 45,31,574/-. The amount of Rs. 20,00,000/- which had been deposited by the petitioners during the pendency of the SCN proceedings was also appropriated against the demands which stood crystallized.

5. Aggrieved by the aforesaid order, the petitioner preferred an appeal. That appeal came to be allowed *in toto* by the Appellate Authority in terms of its judgment dated 31 December 2008. The Department is stated to have preferred an appeal against that decision before the **Customs, Excise and Service Tax Appellate Tribunal**[5] which ultimately came to be dismissed on 27 September 2016. Admittedly, while an interim order operated on that appeal, the same came to be discharged once the appeal was dismissed by the CESTAT.

6. The petitioner thereafter and more particularly on 14 November 2016 filed a formal application for refund which had accrued in terms

[5] CESTAT

of the order passed by the Appellate Authority on 31 December 2008 and consequent to the challenge thereto being negatived by the CESTAT in terms of its judgment of 27 September 2016.

7. On 23 February 2017, an order is stated to have been drawn for grant of refund to the petitioner. The petitioner alleges that the aforesaid order of refund was never communicated to it and that despite repeated reminders, the respondents failed to apprise the petitioners of the status of its claim for refund constraining it to institute the present writ petition.

8. Upon notices being issued, the respondents have filed a counter affidavit in which it is primarily averred that upon a refund order being drawn, the amounts were remitted to the account of the petitioner electronically and duly credited therein on 01 March 2017. It is the categorical case of the respondents that despite the refund having been duly effected on 01 March 2017, the petitioner chose to raise the issue of interest payable on that refund after more than five years by way of the present writ petition. The respondents further assert that once the order of refund dated 23 February 2017 came to hold the field and was neither questioned nor assailed by the petitioner, it is not open to it to now claim any further interest on the same. In fact, the respondents aver that the said position was also communicated to the petitioner clearly in terms of its letters dated 31 July 2018 and 13 November 2018.

9. Addressing submissions on behalf of the petitioner, Mr. Mishra would contend that the stand as taken by respondents is wholly arbitrary since once the order in original had come to be set aside in appeal, they were obliged to refund the amounts that had been collected from the petitioner during the course of investigation and the proceedings which were initiated. It was his submission that the obligation of the respondents to effect that refund could not be hinged or made dependent upon an application being made by the petitioner and since such action was merely consequential, it should have been initiated by the respondents of their own volition. Mr. Mishra submitted that the retention of refund by the respondents despite the orders passed in appeal clearly amounts to unjust enrichment and the Court consequently must hold the respondent liable to pay interest for the period by which the actual refund was delayed.

10. Mr. Mishra submitted that the liability of the respondents to pay interest on a delayed refund is a question which is no longer res integra and stands settled in light of the judgment rendered by a Division Bench of the Gujarat High Court in **Shri Jagdamba Polymers Limited vs. Union of India & Ors.**[6]. Reliance was placed on the following principles as they came to be laid down by the High Court in that decision: -

> "**4.** In the meantime, since the adjudicating authority had already taken a view against the petitioners on the question of such classification, the petitioners pointed out these developments to the Commissioner (Appeals) before whom the appeals against the

[6] 2012 SCC OnLine Guj 4772

adjudicating authority's orders were pending. Such appeals were allowed by order dated 13-4-1991. Based on such order, the petitioners filed a refund claim for a sum of Rs. 1,20,63,349/- which was a principal sum of differential duty recovered from the petitioners by the Department. The Assistant Commissioner upon such refund claim passed his order-in-original dated 4-9-1996 and sanctioned refund only to the tune of Rs. 11,05,000/- which represented the amount secured by bank guarantee. With respect to rest of the claims, he ordered crediting the amount in the Consumer Welfare Fund on the ground that the petitioners had not established that the burden of differential duty was not passed on to the ultimate consumer. In short, on the ground of unjust enrichment, rest of the refund claim was rejected.

9. The petitioners filed a fresh claim before the Assistant Commissioner in which they claimed a sum of Rs. 39,79,530/- towards interest for the period prior to 26-5-1995 when section 11BB was not introduced in the Act. They claimed a further sum of Rs. 18,90,549/- as interest on such interest. The petitioners also claimed a sum of Rs. 23,59,504/- towards interest on the delayed payment of interest for the period between 1-4-2003 (i.e. the date on which the principal sum of refund was granted without interest) to 23-9-2004 (i.e. the date on which interest on delayed payment of refund was granted). Before us, the learned counsel for the petitioners clarified that the petitioners are pressing only the third element of this latest claim namely, for interest of Rs. 23,59,504/- towards delayed payment of interest. In this respect, the petitioners placed heavy reliance on the decision of Apex Court in the case of *Sandvik Asia Ltd.* v. *Commissioner of Income Tax-I, Pune* reported in 2006 (196) E.L.T. 257.

16. To our mind, the Deputy Commissioner committed a serious error in making above observations. Firstly, the petitioners had lodged their refund claims at the relevant time itself way back in the year 1991 when the question of classification was decided in their favour by the Commissioner. Secondly, the Department did not release the refund for a considerable period of time since such order of the Commissioner (Appeals) was challenged before the Tribunal. Thirdly, the Commissioner (Appeals) disposed of the petitioners' case on 11-10-2002 with respect to the refund and not with respect to the original claim of classification. Fourthly, the application filed by the petitioners on 10-1-2003 was a fresh application for refund and cannot be treated as the original application when the refund applications were already filed at the

relevant time. Fifthly, the Tribunal in case of *Bharat Heavy Electricals Ltd.* did not hold that the interest would be available only after three months of the date of the appellate order. In the said case, the question involved was of refund of pre-deposit. The assessee when in appeal was required to make pre-deposit of the duty demand. When the appeal was disposed of, refund was found payable out of such pre-deposit amount. It was in this background, the Tribunal observed that entitlement for refund would arise only when the appeal was finally disposed of in favour of the appellant by the Tribunal and that being so, no interest can be claimed for the period prior to the date of final order. In this case, it was thus clearly rendered in a different fact situation. Sixthly, the Government in its circular dated 27-3-1995 had clarified certain newly introduced provisions in taxing statutes. Section 27A was introduced in the Customs Act to provide for payment of interest on refunds of duty. Similar provision was also simultaneously made under section 11BB of the Central Excise Act. While clarifying section 27A of the Customs Act, in above circular it was provided as under:-

> 67.2.2 It has also been provided that in cases where appellate remedies are resorted to either by the Department or the assessee, the refund finally payable shall bear interest for the period starting from the date immediately after the expiry of the three months from the date of receipt of application under sub-section(1) of Section 27 till the date of refund of duty. As such, all quasi-judicial officers should be very careful in deciding the refund claims. It may be specifically noted that:-
>
> > (a) interest will be paid only on the amount of duty which is finally held to be refundable. For example, in case the assessee has claimed a refund for Rs. 60,000/- the Assistant Collector allows a refund of Rs. 10,000/- and on appeal the amount decided to be refunded is Rs. 30,000/- that the interest would be payable on the amount finally decided to be refundable viz. Rs. 30,000/- for the period commencing from the expiry of three months from the date of refund application till its payment.

With respect to section 11BB of the Central Excise Act, same clarification was adopted by providing as under:-

> 67.6 Similarly in the Central and Salt Act, 1944, new section 11AA and 11BB are proposed to be added and

> section 37 is proposed to be amended (so as relating to MODVAT) to provide for charging of interest on delayed payment of central excise duty and payment of interest on delayed refunds of such duty. The instructions contained in paragraphs 2 and 3 above will apply mutatis mutandis in respect of case under the CESA and may be followed in the manner indicated above.

The above circular was referred to and relied upon by the Division Bench of this court in case of *Afrique Tradelinks Pvt. Ltd.* (supra). The Bench held as under:-

> "11. In the facts of the instant case, while the Deputy Commissioner had determined the refund amount of Rs. 14,83,303/-, the appellate authority allowed the additional refund amount of Rs. 5,21,099/- and, therefore, there is no justification for denying the petitioners interest for the delay in payment of the said amount of Rs. 5,21,099/- for the period from the date of expiry of three months from 31.10.1995 when the petitioners had made the application for refund of the entire amount of Rs. 20,72,023/- out of which Rs. 14,83,303/- was directed to be refunded by the Deputy Commissioner's order dated 6.6.2000 and the balance amount of Rs. 5,21,099/- was ordered to be refunded by the Appellate Commissioner's order dated 26.2.2001."

As pointed out by the learned counsel for the petitioners, in case of *Ranbaxy Laboratories Ltd.* v. *Union of India* reported in 2011 (273) E.L.T. 3 (S.C.), the Apex Court in context of section 11BB of the Central Excise Act held that interest on delayed interest is payable under said application on expiry of a period of three months from the date of receipt of application for refund and not from the date of order of refund or appellate order allowing such refund.

18. As already noted, the petitioners were made to engage in continuous litigation for years together before initially their refund claims were sanctioned even after the issue of classification by the Board and the appeal was decided in their favour. Thereafter, on such refund, interest was improperly denied. Eventually, interest was also paid after a delay of 530 odd days. If such principal claim of refund was sanctioned with interest, question of further interest would not have arisen. In the present case, sizable amount of interest in excess of Rs. 1 crore was withheld wholly illegally for

over 530 days. With these peculiar facts, we may now look at some of the decisions cited before us.

19. In case of *Sandvik Asia Ltd.* (supra), the Apex Court considering the gross delay caused by the Department in realising the interest, held that such interest would be paid with interest. It was observed as under:-

> "28. 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."

20. Way back in the year 1992, a Division Bench of this court in case of *D.J. Works* (supra) had similarly in the background of the Income Tax Act, 1961 held that the assessee would be entitled to interest on delayed payment of interest.

21. We are conscious that ordinarily grant of interest flows either from statutory provision or contractual relations between the parties. In the present case, there is no statutory provision providing for interest on interest. In the present case, however, we find that the excise authorities acted rather unjustly and initially delayed not only the refund, but thereafter, unjustly withheld the interest payable thereon. At all stages, the petitioners had to approach higher authorities in further appeals. Though the Commissioner (Appeals) had specifically provided that the refund shall be granted alongwith interest under section 11BB if payable, the same was not realised on the ground that the interest would be payable only after the date of appellate order and that the refund application was filed after the date of the appellate order completely ignoring the fact that refund claims were filed much earlier and also ignoring the instructions of the CBEC issued in exercise of powers under section 37B of the Act.

22. In sum and substance, in the facts of the present case, the Department cannot avoid the liability of accounting for interest on the delayed payment of interest to the extent the same was paid late. Since such claim does not fall within the statutory provisions contained in section 11BB of the Act, in exercise of writ jurisdiction, we would not direct payment of such interest at the statutory rate but would provide for reasonable interest looking to

> the present trend. Under the circumstances, the petition is allowed. The respondents shall pay simple interest at the rate of 9% per annum on the sum of Rs. 1,06,12,678/- for the period between 1-4-2003 to 23-9-2004 which shall be done within a period of eight weeks from the date of receipt of a copy of this order. The petition is disposed of accordingly. Rule made absolute. No costs"

11. Mr. Mishra also placed reliance upon the decision rendered by the Allahabad High Court in **EBiz.Com Private Limited vs. Commissioner of Central Excise, Customs & S.T.**[7] where again while dealing with the question of the liability of the State to pay interest in case of a delay caused in effecting refund was dealt with and the issue answered in the following terms: -

> "**30.** Then we come on the question of interest on refund. In this regard, we find that a Division Bench of Delhi High Court in *Surinder Singh* v. *Union of India*, (2006) 204 ELT 534 (Del.) relying on Supreme Court's judgment in *Prince Khadi Woollen Handloom Producers Co-operative Indl. Society* v. *CCE*, (1996) 88 ELT 637 (S.C.), said that State, if has wrongly collected a tax from a person, and, even if there is no specific provision, still is liable to refund tax along with interest. Similar view was taken in *Kuil Fireworks* v. *CCE*, (1997) 95 ELT 3 (S.C.) and *CCE, Hyderabad* v. *ITC*, (2005) 179 ELT 15 (S.C.).
>
> xxx xxx xxx
>
> **31.** Recently also in *Union of India* v. *Tata SSL Ltd.*, (2007) 218 ELT 493 (S.C.), Court held that pre-deposit is refundable along with interest and for that purpose, relied on its decision in *Commissioner of Central Excise, Hyderabad* v. *I.T.C. Ltd.* (supra) and Central Board of Excise and Customs" Circular dated 8-12-2004.
>
> xxx xxx xxx
>
> **34**. The consensus of the authorities of various High Courts as well as Supreme Court is that any amount received by Revenue, as deposit or pre-deposit i.e. unauthorizedly or under mistaken notion, etc., cannot be retained by Revenue since it has no authority in law

[7] 2016 SCC OnLine All 4133

> to retain such amount and it must be refunded with interest. In view of above, we allow the writ petition directing the respondents to refund the entire amount refundable to the petitioner as a result of Commissioner's order dated 29-8-2012 with interest at the rate of 12% per annum, which shall be computed from the date, after three months of passing of order by Commissioner, till the amount is actually paid."

12. Mr. Mishra also sought to draw sustenance from the judgment rendered by a Division Bench of our Court in **Team HR Services Pvt. Ltd. vs. Union of India**[8] and referred to the following observations appearing therein in order to buttress the submissions that were advanced: -

> "**10.** We have yet further enquired from the Counsel for the respondents, whether not the respondents, inspite of being State within the meaning of Article 12 of the Constitution of India and expected to not act to the prejudice of its citizens, are acting as "finders keepers", by inspite of having been held to be not entitled in law to the entire amount of Rs. 4, 66, 39, 061/-, refusing to refund what has already been received and to which they have not been held to be entitled.
>
> xxx xxx xxx
>
> **12.** The respondents are reminded of Article 265 of the Constitution of India prohibiting any tax to be levied or collected except by authority of law. The respondents have also not pleaded a case of the petitioner being not entitled to refund, on the ground of the petitioner having passed of the liability to another as illustrated in the Nine Judge Bench's judgment of the Supreme Court in *Mafatlal Industries Ltd.* v. *Union of India*, (1997) 5 SCC 536 = (1997) 89 ELT 247 (S.C.). Allowing the respondents to retain the said amount, would also be in violation of Section 72 of the Contract Act, 1872, obliging a person to whom money has been paid by mistake or under coercion, repay the same. The said provision enshrines the principle of unjust enrichment and restitution and the respondents State, by refusing to refund the sum of Rs. 2, 38, 00, 000/-, are purporting to unduly enrich themselves.

[8] 2020 SCC OnLine Del 2602

13. We may however mention that the Counsel for the petitioner also, perhaps to bring the case of the petitioner within the Circular relied upon, has sought refund of the amount by calling it "pre-deposit", when it was not deposited by way of pre-deposit but under protest, even before any demand was raised and while the petitioner was still being investigated against Such deposits under protest, to ease the rigors which the Tax Authorities otherwise are entitled to impose, are not unknown and judicial notice has been taken thereof. However as long as the amount deposited is under protest and in which protest, as held in *Mafatlal Industries Ltd.* supra no grounds are required to be stated, no right thereto accrues in favour of the depositee till the depositee is held entitled in law thereto. Thus, the wrong nomenclature given by the petitioner to the deposit would not be a ground for allowing the respondents State to unduly enrich themselves. A Division Bench of this Court in *Indglonal Investment and Finance Ltd.* v. *Income Tax Officer*, (2012) 343 ITR 44 has held that refund provisions should be interpreted in a reasonable and practical manner and when warranted, liberally in favour of the assessee.

14. To be fair to the Counsel for the respondents, he has only placed before us what is recorded in the final rejection refund order but reasoning wherein is illogical and contrary to the expected conduct from the State and unjustifiable. The said order does not disclose any ground or statutory provision whereunder the respondents State are entitled to retain the said amount of Rs. 2, 38, 00, 000/-.

15. No statutory mechanism whereunder the petitioner is entitled to seek refund in such circumstances also has been disclosed. It is thus not as if, we ought not to exercise our implicit discretion in exercising writ jurisdiction for the reason of any statutory remedy being available to the petitioner. When it is so and when the reasons disclosed in the order refusing refund are found to be illogical and *de hors* the statutory provision and further when it is found that the respondents State are illegally withholding money, a case for issuing a *mandamus* as sought is made out.

xxx xxx xxx

20. In the present case, as aforesaid, the amount of Rs. 2, 38, 00, 000/- was deposited by the petitioner of its own volition, during the audit/investigation, though under protest and the petitioner has not chosen to detail the circumstances in which the petitioner felt

compelled to make the deposit. The petitioner for the first time sought refund of the said amount vide letter dated 2nd May, 2018.

21. Considering the said facts, we do not find the petitioner entitled to interest at any higher rate than @ 6% per annum from the date of deposit i. e. 27th October, 2006 till the end of May, 2018 i. e. 31st May, 2018. However, we do not find any justification for the respondents retaining the said amount thereafter and find the respondents liable for interest with effect from 1st June, 2018 onwards and till date @ 7.5% per annum. While so enhancing the rate of interest, we have also taken into consideration the non-compliance by the respondents of the orders of this Court as detailed above, leading to a contempt notice being issued to the respondents and in response whereto Ms. Niharika Gupta, Assistant Commissioner in the Office of Division- Nehru Place, Central GST, Delhi East Commissionerate is present in the Court."

13. In addition to the above, Mr. Mishra also drew our attention to the Circular F.No. 275/37/2K-CX, 8A dated 02 January 2002 issued by the **Central Board of Excise and Customs**[9] where while dealing with the refund of pre-deposit made in terms of Section 35F of the 1944, the Board had framed the following advisory: -

"**F. No. 275/37/2K-CX. 8A, dated 2-1-2002**
Government of India Ministry of Finance
(Department of Revenue)
Central Board of Excise & Customs, New Delhi

1. All Chief Commissioners of Customs/Central Excise.
2. All Director Generals.
3. All Commissioners of Central Excise.
4. All Commissioners of Customs.

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

The issue relating to refund of pre-deposit 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

[9] Board

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 pert 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 pre-deposit as to whether:

(i) the High Court is right in granting interest to the depositor since the law contained in Section 35F 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 11B of the Act and are governed by the parameters applicable to the claim of refund of duty as the amount is deposited under Section 35F 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 the case of *Suvidhe Ltd.* and *Mahavir Aluminium* that the law relating to refund of pre-deposit has become final.

3. In order to attain uniformity and to regulate such refunds it is clarified that refund applications under Section 11B(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 concerned Assistant/Deputy Commissioner 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.

(Lakhinder Singh)
Joint Secretary to the Government of India"

14. In view of the aforesaid, learned counsel would submit that since the Department is itself bound by the circular issued by the Board, the writ petitions must succeed and the respondents held liable to pay interest for the period by which the refund was delayed.

15. Appearing for the respondents, Ms. Narain learned standing counsel, submitted that the reference to the Circular of the Board aforenoted is clearly misplaced since the same was dealing with a pre-deposit which may be made in compliance with the provisions contained in Section 35F of the Act. According to Ms. Narain, a pre-deposit which is effected in compliance with the conditions imposed by Section 35F, and which essentially constitutes a pre-condition for a statutory appeal being entertained, cannot possibly be placed on the same pedestal as a deposit of duty which is made consequent to the determination of liability upon an assessee. Learned counsel submitted that a *"pre-deposit"* made with reference to an appeal is not *"duty"* payable under the 1944 Act and thus those circulars would have no application.

16. Ms. Narain further submitted that insofar as the question of delayed refund is concerned, the same must necessarily be answered in light of the statutory scheme embodied in Sections 11B and 11BB alone and would not be guided by Section 35F of the 1944 Act. According to learned counsel, Section 11BB on its plain terms requires a person claiming a refund to make a formal application in respect thereof. It was submitted that the aforesaid application for refund is statutorily mandated to be made before the expiry of one year from the relevant date. The relevant date, according to Ms. Narain, has to be understood bearing in mind the provisions made in Section 11B(5)(B)(ec) of the 1944 Act and thus be liable to be understood, in light of the facts of the present writ petitions, as the date when the Appellate Authority proceeded to set aside the order in original.

17. It was further submitted by Ms. Narain that in terms of Section 11BB, interest is liable to be paid only if the refund is not affected within a period of three months from the date of receipt of an application made in accordance with Section 11B(1). According to learned counsel, undisputedly, the petitioner made that application for the first time on 14 November 2016 and the refund was granted on 01 March 2017. In view of the aforesaid, it was Ms. Narain‟s submission that refund if at all would be liable to be paid only if the date of 01 March 2017 be recognised to fall beyond the three month window as contemplated under Section 11BB when computed from 14 November

2016. The submission in essence was that the liability to pay interest on a refund would arise only if the same be effected three months after the making of an application for the same by the assessee.

18. Ms. Narain submitted that the issue of interest which is liable to be paid under Section 11B was authoritatively ruled upon by the Supreme Court in **Ranbaxy Laboratories Limited vs. Union of India and Ors.**[10] where the following principles came to be enunciated: -

> "**12.** It is manifest from the aforeextracted provisions that Section 11-BB of the Act comes into play only after an order for refund has been made under Section 11-B of the Act. Section 11-BB of the Act lays down that in case any duty paid is found refundable and if the duty is not refunded within a period of three months from the date of receipt of the application to be submitted under sub-section (1) of Section 11-B of the Act, then the applicant shall be paid interest at such rate, as may be fixed by the Central Government, on expiry of a period of three months from the date of receipt of the application. The Explanation appearing below the proviso to Section 11-BB introduces a deeming fiction that where the order for refund of duty is not made by the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise but by an appellate authority or the court, then for the purpose of this section the order made by such higher appellate authority or by the court shall be deemed to be an order made under sub-section (2) of Section 11-B of the Act. It is clear that the Explanation has nothing to do with the postponement of the date from which interest becomes payable under Section 11-BB of the Act.
>
> **13.** Manifestly, interest under Section 11-BB of the Act becomes payable, if on expiry of a period of three months from the date of receipt of the application for refund, the amount claimed is still not refunded. Thus, the only interpretation of Section 11-BB that can be arrived at is that interest under the said section becomes payable on the expiry of a period of three months from the date of

[10] (2011) 10 SCC 292

receipt of the application under sub-section (1) of Section 11-B of the Act and that the said Explanation does not have any bearing or connection with the date from which interest under Section 11-BB of the Act becomes payable.

14. It is a well-settled proposition of law that a fiscal legislation has to be construed strictly and one has to look merely at what is said in the relevant provision; there is nothing to be read in; nothing to be implied and there is no room for any intendment. (See *Cape Brandy Syndicate* v. *IRC* [(1921) 1 KB 64] and *Ajmera Housing Corpn.* v. *CIT* [(2010) 8 SCC 739]"

19. Ms. Narain also drew our attention to the judgment of the Supreme Court in **Union of India and Ors. vs. Hamdard (Waqf) Laboratories**[11] where the issue of the interpretation to be accorded on Section 11B arose for consideration yet again. In *Hamdard*, the Supreme Court while reiterating the principles set out in *Ranbaxy Laboratories* held as follows: -

"**18.** The seminal issue is whether there has been delay in grant of refund and consequently, whether the respondent assessee is entitled to interest.

19. Keeping in view the enumerated facts, the submissions canvassed and the provisions referred to, it is necessary to appreciate the principle stated in *Ranbaxy Laboratories Ltd.* [*Ranbaxy Laboratories Ltd.* v. *Union of India*, (2011) 10 SCC 292] In the said case, the question arose whether the liability of the Revenue to pay interest under Section 11-BB of the Act commences from the date of expiry of three months from the date of receipt of application for refund or on the expiry of the said period from the date on which the order of refund is made. The two-Judge Bench after analysing the provision has held as follows: (SCC pp. 296-97, paras 12-13)

"*12*. It is manifest from the aforeextracted provisions that Section 11-BB of the Act comes into play only after an order for refund has been made under Section 11-B of the Act. Section 11-BB of the Act lays down that in case any duty

[11] (2016) 6 SCC 621

paid is found refundable and if the duty is not refunded within a period of three months from the date of receipt of the application to be submitted under sub-section (1) of Section 11-B of the Act, then the applicant shall be paid interest at such rate, as may be fixed by the Central Government, on expiry of a period of three months from the date of receipt of the application. The Explanation appearing below the proviso to Section 11-BB introduces a deeming fiction that where the order for refund of duty is not made by the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise but by an appellate authority or the court, then for the purpose of this section the order made by such higher appellate authority or by the court shall be deemed to be an order made under sub-section (2) of Section 11-B of the Act. It is clear that the Explanation has nothing to do with the postponement of the date from which interest becomes payable under Section 11-BB of the Act.

13. Manifestly, interest under Section 11-BB of the Act becomes payable, if on expiry of a period of three months from the date of receipt of the application for refund, the amount claimed is still not refunded. *Thus, the only interpretation of Section 11-BB that can be arrived at is that interest under the said section becomes payable on the expiry of a period of three months from the date of receipt of the application under sub-section (1) of Section 11-B of the Act* and that the said Explanation does not have any bearing or connection with the date from which interest under Section 11-BB of the Act becomes payable."

(emphasis supplied)

20. While dealing with the said facet, the Court also referred to the Circular dated 1-10-2002 issued by the Central Board of Excise and Customs, New Delhi whereby a direction was issued to fix responsibility for not disposing of the refund/rebate claims within three months from the date of receipt of the application. Appreciating the import of the said circular, the Court opined as follows: (*Ranbaxy Laboratories Ltd. case* [*Ranbaxy Laboratories Ltd.* v. *Union of India*, (2011) 10 SCC 292] , SCC p. 298, para 16)

"*16*. Thus, ever since Section 11-BB was inserted in the Act with effect from 26-5-1995, the Department has maintained a consistent stand about its interpretation. Explaining the intent, import and the manner in which it is to

be implemented, the circulars clearly state that the relevant date in this regard is the expiry of three months from the date of receipt of the application under Section 11-B(1) of the Act."

21. The ultimate conclusion was recorded thus: (*Ranbaxy Laboratories Ltd. case* [*Ranbaxy Laboratories Ltd.* v. *Union of India*, (2011) 10 SCC 292] , SCC p. 299, para 19)

> "*19.* In view of the above analysis, our answer to the question formulated in para 1 supra is that the liability of the Revenue to pay interest under Section 11-BB of the Act commences from the date of expiry of three months from the date of receipt of application for refund under Section 11-B(1) of the Act and not on the expiry of the said period from the date on which the order of refund is made."

22. We will be failing in our duty if we do not refer to the larger Bench decision rendered in *Mafatlal Industries Ltd.* v. *Union of India* [*Mafatlal Industries Ltd.* v. *Union of India*, (1997) 5 SCC 536] which has been emphatically relied upon by Mr Adhyaru, learned Senior Counsel for the Revenue. He has drawn our attention to paras 83 and 91. Relying on the said paragraphs, it is contended by Mr Adhyaru that the onus is on the assessee to satisfy the competent authority that he has not passed on the burden of duty to others, for the claim of refund is founded on the said bedrock. The Bench dealing with this facet has expressed thus: (SCC p. 615, para 83)

> "*83.* … Where the plaintiff-petitioner alleges and establishes that he has not passed on the burden of the duty to others, his claim for refund may not be reused. In other words, if he is not able to allege and establish that he has not passed on the burden to others, his claim for refund will be rejected whether such a claim is made in a suit or a writ petition. It is a case of balancing public interest vis-à-vis private interest. Where the plaintiff-petitioner has not himself suffered any loss or prejudice (having passed on the burden of the duty to others), there is no justice or equity in refunding the tax (collected without the authority of law) to him merely because he paid it to the State. It would be a windfall to him. As against it, by refusing refund, the monies would continue to be with the State and available for public purposes. The money really belongs to a third party—neither to the plaintiff-petitioner nor to the State—and to such third

party it must go. But where it cannot be so done, it is better that it is retained by the State. By any standard of reasonableness, it is difficult to prefer the plaintiff-petitioner over the State."

23. In para 91, this Court was dealing with the constitutional validity of Section 11-B. It was contended that there is no reason why the person who becomes entitled to refund of duty, as a result of appeal or courts order, should also be made to apply and satisfy all the requirements of sub-sections (1) and (2) of Section 11-B, when he is entitled to such refund as a matter of right. The said contention was not accepted by the Court and while not accepting, the larger Bench stated that: (*Mafatlal Industries case* [*Mafatlal Industries Ltd.* v. *Union of India*, (1997) 5 SCC 536] , SCC pp. 621-22, para 91)

"*91*. … Such a holding would run against the very grain of the entire philosophy underlying the 1991 Amendment. The idea underlying the said provisions is that no refund shall be ordered unless the claimant establishes that he has not passed on the burden to others. Sub-section (3) of the amended Section 11-B is emphatic. It leaves no room for making any exception in the case of refund claims arising as a result of the decision in appeal/reference/writ petition. There is no reason why an exception should be made in favour of such claims which would nullify the provision to a substantial degree. So far as „lack of incentive" argument is concerned, it has no doubt given us a pause; it is certainly a substantial plea, but there are adequate answers to it. Firstly, the rule means that only the person who has actually suffered loss or prejudice would fight the levy and apply for refund in case of success. Secondly, in a competitive market economy, as the one we have embarked upon since 1991-1992, the manufacturer's self interest lies in producing more and selling it at competitive prices — the urge to grow. A favourable decision does not merely mean refund; it has a beneficial effect for the subsequent period as well. It is incorrect to suggest that the disputes regarding classification, valuation and claims for exemptions are fought only for refund; it is for more substantial reasons, though the prospect of refund is certainly an added attraction. It may, therefore, be not entirely right to say that the prospect of not getting the refund would dissuade the manufacturers from agitating the questions of exigibility, classification, approval of price lists

or the benefit of exemption notifications. The disincentive, if any, would not be significant. In this context, it would be relevant to point out that the position was no different under Rule 11, or for that matter Section 11-B, prior to its amendment in 1991. Sub-rules (3) and (4) of Rule 11 (as it obtained between 6-8-1977 and 17-11-1980) read together indicate that even a claim for refund arising as a result of an appellate or other order of a superior court/authority was within the purview of the said rule though treated differently. The same position continued under Section 11-B, prior to its amendment in 1991. Sub-sections (3) and (4) of this section are in the same terms as sub-rules (3) and (4) of Rule 11; if anything, sub-section (5) was more specific and emphatic. It made the provisions of Section 11-B exhaustive on the question of refund and excluded the jurisdiction of the civil court in respect of all refund claims. Sub-rule (3) of Rule 11 or sub-section (3) of Section 11-B (prior to 1991) did not say that refund claims arising out of or as a result of the orders of a superior authority or court are outside the purview of Rule 11/Section 11-B. They only dispensed with the requirement of an application by the person concerned which consequentially meant non-application of the rule of limitation; otherwise, in all other respects, even such refund claims had to be dealt with under Rule 11/Section 11-B alone. That is the plain meaning of sub-rule (3) of Rule 11 and sub-sections (3) and (4) of Section 11-B (prior to 1991 Amendment). There is no departure from that position under the amended Section 11-B. All claims for refund, arising in whatever situations (except where the provision under which the duty is levied is declared as unconstitutional), has necessarily to be filed, considered and disposed of only under and in accordance with the relevant provisions relating to refund, as they obtained from time to time. We see no unreasonableness in saying so."

24. As far as the said principles are concerned, they are binding on us. But the facts in the case at hand are quite different. It is not a case where the assessee is claiming automatic refund. It is a case that pertains to grant of interest where the refund has been granted. The grievance pertains to delineation by the competent authority in a procrastinated manner. In our considered opinion, the principle laid down in *Ranbaxy Laboratories Ltd.* [*Ranbaxy Laboratories Ltd.* v. *Union of India*, (2011) 10 SCC 292] would apply on all fours to the case at hand. It is obligatory on the part of the Revenue

> to intimate the assessee to remove the deficiencies in the application within two days and, in any event, if there are still deficiencies, it can proceed with adjudication and reject the application for refund. The adjudicatory process by no stretch of imagination can be carried on beyond three months. It is required to be concluded within three months. The decision in *Ranbaxy Laboratories Ltd.* [*Ranbaxy Laboratories Ltd.* v. *Union of India*, (2011) 10 SCC 292] commends us and we respectfully concur with the same."

20. Ms. Narain further submitted that the requirement of a formal application being made and as put in place in terms of Section 11B serves an important and salutary purpose. According to learned counsel, while making that application the person who claims refund must also declare that the incidence of duty or interest thereon has not been passed on to any other person. According to learned counsel, the respondents on their own would be in no position to ascertain whether the disputed tax liability had been passed on to any person and therefore the said issue is necessarily made dependent upon a positive declaration being made to that effect by the assessee. According to learned counsel, the aforesaid issue assumes added significance especially when a question of refund is raised. It was the submission of learned counsel that unless the assessee makes a declaration on lines consistent with Section 11B(1) and the respondents are satisfied that the burden of tax has not been passed on, any refund that may be made would clearly amount to unjust enrichment. It is these rival submissions which fall for consideration.

21. For the purposes of evaluating the submissions aforenoted, it would be apposite to notice the statutory provisions which apply. The issue of refund and the interest payable in case of delay is governed by Sections 11B and 11BB. The said provisions are reproduced hereinbelow: -

> **"Section 11-B. Claim for refund of [duty and interest, if any, paid on such duty].—** (1) Any person claiming refund of any [duty of excise and interest, if any, paid on such duty] may make an application for refund of such [duty and interest, if any, paid on such duty] to the Assistant [Principal Commissioner of Central Excise or Commissioner of Central Excise] [or Deputy [Principal Commissioner of Central Excise or Commissioner of Central Excise]] before the expiry of [two years] [from the relevant date] [in such form [and manner]] as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in Section 12-A) as the applicant may furnish to establish that the amount of [duty of excise and interest, if any, paid on such duty] in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such [duty and interest, if any, paid on such duty] had not been passed on by him to any other person:
>
> Provided that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of sub-section (2) as substituted by that Act :
>
> Provided [further] that the limitation of [two years] shall not apply where any [duty and interest, if any, paid on such duty] has been paid under protest.
>
> [* * *]
>
> [(2) If, on receipt of any such application, the Assistant [Principal Commissioner of Central Excise or Commissioner of Central Excise] [or Deputy [Principal Commissioner of Central Excise or Commissioner of Central Excise]] is satisfied that the whole or any part of the [duty of excise and interest, if any, paid on such duty] paid by the applicant

is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund:

Provided that the amount of [duty of excise and interest, if any, paid on such duty] as determined by the Assistant [Principal Commissioner of Central Excise or Commissioner of Central Excise] [or Deputy [Principal Commissioner of Central Excise or Commissioner of Central Excise]] under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to—

(a) rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(b) unspent advance deposits lying in balance in the applicant"s account current maintained with the [Principal Commissioner of Central Excise or Commissioner of Central Excise];

(c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;

(d) the [duty of excise and interest, if any paid on such duty] paid by the manufacturer, if he had not passed on the incidence of such [duty and interest, if any, paid on such duty] to any other person;

(e) the [duty of excise 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;

(f) the [duty of excise and interest, if any paid on such duty] borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify:

Provided further that no notification under clause (*f*) of the first proviso shall be issued unless in the opinion of the Central Government the incidence of [duty and interest, if any, paid on such duty] has not been passed on by the persons concerned to any other person.

(3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or

any Court or in any other provision of this Act or the rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in sub-section (2).

(4) Every notification under clause (*f*) of the first proviso to sub-section (2) shall be laid before each House of Parliament, if it is sitting, as soon as may be after the issue of the notification, and, if it is not sitting, within seven days of its reassembly, and the Central Government shall seek the approval of Parliament to the notification by a resolution moved within a period of fifteen days beginning with the day on which the notification is so laid before the House of the People and if Parliament makes any modification in the notification or directs that the notification should cease to have effect, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be, but without prejudice to the validity of anything previously done thereunder.

(5) For the removal of doubts, it is hereby declared that any notification issued under clause (*f*) of the first proviso to sub-section (2), including any such notification approved or modified under sub-section (4), may be rescinded by the Central Government at any time by notification in the Official Gazette.]

[*Explanation*.— For the purposes of this section,—

(A) "refund" includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(B) "relevant date" means,—

(a) in the case of goods exported out of India where a refund of excise duty paid is available in respect of the goods themselves or, as the case may be, the excisable materials used in the manufacture of such goods,—

(i) if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves India, or

(ii) if the goods are exported by land, the date on which such goods pass the frontier, or

(iii) if the goods are exported by post, the date of despatch of goods by the Post Office concerned to a place outside India;

(b) in the case of goods returned for being remade, refined, reconditioned, or subjected to any other similar process, in

any factory, the date of entry into the factory for the purposes aforesaid;

(c) in the case of goods to which banderols are required to be affixed if removed for home consumption but not so required when exported outside India, if returned to a factory after having been removed from such factory for export out of India, the date of entry into the factory;

(d) in a case where a manufacturer is required to pay a sum, for a certain period, on the basis of the rate fixed by the Central Government by notification in the Official Gazette in full discharge of his liability for the duty leviable on his production of certain goods, if after the manufacturer has made the payment on the basis of such rate for any period but before the expiry of that period such rate is reduced, the date of such reduction;

[(*e*) in the case of a person, other than the manufacturer, the date of purchase of the goods by such person;]

[(*ea*) in the case of goods which are exempt from payment of duty by a special order issued under sub-section (2) of Section 5-A, the date of issue of such order;]

[(*eb*) in case where duty of excise is paid provisionally under this Act or the rules made thereunder, the date of adjustment of duty after the final assessment thereof;]

[(*ec*) in case where the duty becomes refundable as a consequence of judgment, decree, order or direction of appellate authority, Appellate Tribunal or any court, the date of such judgment, decree, order or direction;]

(*f*) in any other case, the date of payment of duty.]

Section 11-BB. Interest on delayed refunds.— If any duty ordered to be refunded under sub-section (2) of Section 11-B to any applicant is not refunded within three months from the date of receipt of application under sub-section (1) of that section, there shall be paid to that applicant interest at such rate, not below [five] per cent and not exceeding thirty per cent per annum as is for the time being fixed [by the Central Government, by notification in the Official Gazette,] on such duty from the date immediately after the expiry of three months from the date of receipt of such application till the date of refund of such duty:

Provided that where any duty ordered to be refunded under sub-section (2) of Section 11-B in respect of an application under sub-section (1) of that section made before the date on which the Finance Bill, 1995 receives the assent of the President, is not refunded within three months from such date, there shall be paid to the applicant interest under this section from the date immediately after three months from such date, till the date of refund of such duty.

Explanation.— Where any order of refund is made by the Commissioner (Appeals), Appellate Tribunal [National Tax Tribunal] or any court against an order of the Assistant [Principal Commissioner of Central Excise or Commissioner of Central Excise] [or Deputy [Principal Commissioner of Central Excise or Commissioner of Central Excise]], under sub-section (2) of Section 11-B, the order passed by the Commissioner (Appeals), Appellate Tribunal [, National Tax Tribunal] or, as the case may be, by the court shall be deemed to be an order passed under the said sub-section (2) for the purposes of this section.]"

22. It would also be pertinent to notice Sections 35F and 35FF in order to highlight the distinction between the statutory scheme underlying refund of duty and the return of a pre-deposit made in connection with an appeal that may be preferred. Those two provisions are extracted hereinbelow: -

"Section 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 35-B, 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 35-B, 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.

Explanation.—For the purposes of this section "duty demanded" shall include,—

(i) amount determined under Section 11-D;

(ii) amount of erroneous CENVAT credit taken;

(iii) amount payable under Rule 6 of the CENVAT Credit Rules, 2001 or the CENVAT Credit Rules, 2002 or the CENVAT Credit Rules, 2004.]"

"Section 35-FF. Interest on delayed refund of amount deposited under Section 35-F.—Where an amount deposited by the appellant under Section 35-F 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 per cent and not exceeding thirty-six per cent 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 35-F, 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."

23. The Court, at the outset notes, that Section 11B(1) in clear and unambiguous terms contemplates the making of an application for

refund being made by any person claiming refund of any duty of excise and interest paid on such duty. The claim of refund insofar as the petitioner is concerned arose in the backdrop of the order in original coming to be set aside in appeal. The petitioner appears to have made an application for refund ultimately and only after the departmental appeal before the CESTAT came to be dismissed.

24. We deem it apposite to observe that the mere pendency of an appeal or an order of stay that may operate thereon would not detract from the obligation of any person claiming a refund making an application as contemplated under Section 11B(1) within the period prescribed and computed with reference to the "relevant date". We do so observe in light of the indubitable principle that an order of stay that may operate in an appeal does not efface the demand or the obligation of refund that may have sprung into existence. It merely places the enforcement of the order appealed against in abeyance. The order of stay would, in any case, be deemed to have never existed once the appeal comes to be dismissed.

25. We further note that the subject of interest on delayed refund which is governed by Section 11BB itself prescribes the starting point for payment of interest on delayed refunds to be the date when an application under Section 11B(1) is received. On a conjoint reading of Sections 11B and 11BB of the 1944 Act, therefore, we come to the irresistible conclusion that interest on delayed refund is clearly

dependent upon the making of a formal application as stipulated by Section 11B of the 1944 Act.

26. We also find merit in the contention canvassed by Ms. Narain who had submitted that a refund of duty and interest paid thereon is liable to be viewed as distinct from a pre-deposit that may be made in compliance with Section 35F of the 1944 Act. The Circular of the Board too strikes an identical position when it is stated that a deposit which is made in compliance with a statutory pre-condition for the preferment of an appeal cannot be viewed as "duty". It is the aforesaid aspect which appears to have weighed with the Board in proceeding to formulate its directive for refunds being effected immediately upon an appeal coming to be decided in favour of the assessee and not being made dependent upon any application being made in respect thereof.

27. The aforesaid position stands further fortified when one reads Section 35FF of the 1944 Act. As would be evident from a reading of that provision, Section 35FF as distinct from Section 11B does not require the making of a formal application by the assessee. In fact and contrary to Section 11B, the said provision uses the expression *"....there shall be paid to the appellant interest....."*. Thus, the language of Section 35FF is an embodiment of the manifest obligation of the respondents to refund the pre-deposit consequent to an order passed by the Appellate Authority notwithstanding an application having not been made by the depositor.

28. The distinction between Sections 11B and 35FF is also evident when one bears in mind the language employed in the latter and which stipulates that interest would commence from the date when the amount deposited by the appellant under Section 35F is required to be refunded consequent to an order passed by the Appellate Authority. Section 35FF thus indicates that interest would commence from the date of the order of the Appellate Authority as distinct from the making of an application which is prescribed to be the starting point insofar as Section 11BB of the 1944 Act is concerned.

29. Regard must also be had to the fact that in the case of refund of duty, it is also incumbent upon the assessee to declare and establish that the burden of tax has not been passed on. Absent that declaration, any refund that may be made would itself amount to the assessee being unjustly enriched. The making of an application and a declaration to the aforesaid effect is thus not merely an empty formality. This too appears to reinforce the imperatives of an application being formally made before a claim for refund is considered.

30. That only leaves the Court to consider the decisions which were cited by Mr. Mishra for our consideration. However, before proceeding to do so, we deem it pertinent to enter the following prefatory observations. A levy of interest on refund must undoubtedly follow where it is found that the amount has been unjustifiably retained or remitted with undue delay. The respondents cannot be

permitted to retain moneys which are otherwise not due or are otherwise liable to be returned. The solitary question which stands raised in these matters is the date from which that interest would flow. In *Shri Jagdamba Polymers*, the High Court on facts had found that the refund was inordinately delayed even though a claim for the same had been promptly lodged. This is clearly evident from Para 7 of the report. The said decision is thus clearly not an authority for the proposition that a refund must automatically follow de hors the requirements of Sections 11B and 11BB.

31. In *eBIZ*, the Allahabad High Court was not dealing with a claim for refund of "duty" but an amount deposited in the course of investigation. The High Court further went on to hold that even in the absence of a statutory provision if it be found that tax or duty had been wrongly collected, it would be liable to be refunded. There cannot be a dispute with regard to the aforenoted general proposition. What we seek to emphasize here is that in the present case, the issue of refund is duly regulated by two statutory provisions whose prescriptions would necessarily have to be adhered to. However, for reasons aforenoted we find ourselves unable to endorse the observation appearing in Para 34 of the report where a deposit of duty and a pre deposit were considered to be identical concepts. As was noted hereinbefore, a pre-deposit made as a condition of filing an appeal is in any case not considered to be "duty" even by the respondents.

32. The decision of this Court in *Team HR Services*, had frowned upon the distinction sought to be advocated by the respondents there between a deposit made under protest and a pre-deposit made in connection with an appeal. As would be further evident from a reading of Paras 14 and 15 the counsel appearing for the respondents had also failed to draw the attention of the Court to any statutory provision which governed the issue of refund. The aforesaid decision is thus clearly distinguishable especially when undisputedly, in the present matters the issue of refund is governed by the provisions of Sections 11B and 11BB.

33. Accordingly, and for all the aforesaid reasons, the instant writ petitions shall stand disposed of on the following terms. The respondents shall revisit the issue of payment of interest in light of the observations made hereinabove. Interest, if any, shall be liable to be computed and paid to the petitioners if it be found that the refund was effected beyond a period of three months when computed from the date when the respective applications were made and received.

YASHWANT VARMA, J.

DHARMESH SHARMA, J.

July 14, 2023
bh