

REGISTERED SPEED POST



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE

Office of the Principal Commissioner RA and
Ex-Officio Additional Secretary to the Government of India
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195/361/15-RA
195/362/15-RA / 8841

Date of Issue: 19.09.2022

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ORDER NO. 865/2022-CX (WZ)/ASRA/MUMBAI DATED 15.09.2022 OF THE
GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR, PRINCIPAL
COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT
OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

- Subject** : Revision Application filed, under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. CD/497 & 498/RGD/15 dated 19.05.2015 & No. CD/647/RGD/2015 dated 06.08.2015 passed by the Commissioner of CGST & Central Excise, Thane(Appeals).
- Applicant** : M/s. Huhtamaki PPL Ltd.,
(Formerly The Paper Products Ltd),
(Now Known as M/s. Huhtamaki India Ltd.)
L.B.S. Marg, Majiwade,
Thane - 400 601.
- Respondent** : The Commissioner of CGST & Central Excise, Thane.

ORDER

1. These Revision applications are filed by M/s. Huhtamaki PPL Ltd., (Formerly The Paper Products Ltd), (Now Known as M/s. Huhtamaki India Ltd.) L.B.S. Marg, Majiwade, Thane - 400 601 (hereinafter referred to as 'applicant') against the Orders in Appeal No. CD/497&498/RGD/2015 dated 19.05.2015 & No. CD/647/RGD/2015 dated 06.08.2015 passed by the Commissioner (Appeals), Thane.

2. The brief facts of the case are that the applicant was engaged in the manufacture of 'Printed & Adhesive Laminated Flexible Packaging Material' falling under Chapter 39 of the Schedule to the central Excise Tariff Act, 1985.

3.1 Applicant had filed two separate Rebate claims each totally amounting to Rs. 4,76,234/- and Rs. 4,87,910/- under Rule 18 of Central Excise Rules, 2002 in respect of the goods exported. Deputy Commissioner of Central Excise, Wagle-II Division, Thane sanctioned the rebate claims vide Orders-in-Original No. (i) 02(R)/W-II/2014-15 & (ii) 04(R)/W-II/2014-15 both dated 15.04.2014 sanctioning rebate claims totally amounting to Rs. 9,53,429/- under the provisions of Section 11B of the Central Excise Act, 1944 read with Rule 18 of the Central Excise Rules, 2002 and allowed the rebate amounting to Rs. 10,715/- as credit in their cenvat account as the same was paid in excess.

3.2 Applicant had filed another Rebate claim amounting to Rs. 4,87,975/- under Rule 18 of Central Excise Rules, 2002 in respect of the goods exported. Deputy Commissioner of Central Excise, Wagle-II Division, Thane sanctioned the rebate claims vide Order-in-Original No. 03(R)/W-II/2014-15 dated 15.04.2014 sanctioning rebate claim amounting to Rs. 4,87,808/- under the provisions of Section 11B of the Central Excise Act, 1944 read with Rule 18 of the Central Excise Rules, 2002 and allowed the rebate amounting to Rs. 167/- as credit in their cenvat account as the same was paid in excess.

4. Being aggrieved, the applicant filed appeal before Commissioner (Appeals-II), Mumbai seeking interest to the tune of Rs. 41,256/- & Rs. 29,675/- in respect of Orders-in-Original No. (i) 02(R)/W-II/2014-15 & (ii) 04(R)/W-II/2014-15 both dated 15.04.2014 and Rs. 29,680/- in respect of Order-in-Original No. 03(R)/W-II/2014-15 dated 15.04.2014 on delayed sanction of rebate claims. Commissioner (Appeal) while rejecting the appeal vide impugned Orders observed as under:-

4.1. In the instant case, the rebate sanctioning authority had sanctioned the rebate claims under the provisions of Section 11B of Central Excise Act, 1944 read with Rule 18 of the Central Excise Rules, 2002 and also allowed the rebate as credit in their cenvat account as those was paid in excess. The appellant has not been aggrieved by these orders to the extent of sanctioning of the rebate claims. An appeal is an application to reverse vary or set aside the judgement or decision of an inferior court on the ground that it is wrongly decided it is the contention of the appellant to grant interest on delayed sanction of the rebate claims. I find that this is not the subject issue in the impugned orders and nowhere it is coming on the records that they had raised this issue before the lower authority. All legal points must be agitated before original adjudicating authority. The Hon'ble Tribunal in the case of M/s Hindustan Lever Ltd reported in 2003/1511 ELT 387 (Tri-Mum) held as under

"6. The Departmental Representative raises the contention that the goods ought to be correctly classified as bathing preparations in Heading 33.07. This was not a case before the Commissioner and it is not permissible for him to raise this contention at this stage. The judgment of the Supreme Court in Warner Hindustan Ltd. v. CCE 1999 (113) ELT 24, holding that "it is impermissible for the Tribunal to consider the case that has led for the first time in appeal because the stage for setting out the factual before the authorities below" is sufficient authority for this view. The classification in Heading 33.04 confirmed by the Commissioner therefore cannot be upheld."

4.2. Respectfully following the above decision, I hold that the appellant cannot make a new case in appeal and accordingly the appeals filed by the appellant are liable to be rejected.

In view of the above, the appeal filed by the appellant is rejected.'

5. Being aggrieved by the impugned Orders in appeal, the applicant filed present Revision Applications mainly on the following grounds:

5.1 Ld. Commissioner (Appeals) failed realize that the orders in originals were pursuant the claims filed the appellants under 11B unless an order original passed the claims, factual and legal wrongs, omissions, defects the order cannot either pre-empted before the adjudicating authority.

5.2 Section 11BB of the Act. Relevant portion produced below:

'If any duty ordered to be refunded under sub-section (2) of Section 11B to any applicant is not refunded within 3 months from the date of receipt application under Sub section (1) of that section, there shall be paid to the applicant interest at such rate.....'

Ld. Commissioner Appeals failed to realise that original authority was legally obliged to abide by these provisions and his omission to comply with these provisions has to be the issue arising out of the orders in originals. What is legally due and ought to have been given in the order in original if omitted, cannot be brushed aside under the frivolous logic of 'not being the subject of the order in original' or 'making a new case'. What is mandatory ought to have been given and not given; its agitation cannot be a new case. The Ld. Commissioner (Appeals) erred in not realizing that the order in originals were deficient in as much as non-compliance to the provisions of Section 11BB of the Act.

5.3 The Ld. Commissioner (Appeals) has ignored the settled position of law. In following judgments it has been clearly held that interest has to be paid if the refund is not paid within 3 months from the date of receipt of refund application.

- a. Ranbaxy Laboratories reported in 2011 (273) ELT 3 (SC)
- b. UP Twiga Fiber Glass reported in 2009 (243) ELT A27 (SC)
- c. Ballarpur Industries reported in 2008 (229) ELT 498 (Bom)
- d. Rama Vision reported in 2004 (170) ELT 13 (Tri-LB)
- e. Mumbai High Court Order Dtd. 02.02.2015
- f. Order-In-Appeal No. CD 66 & 67/M-III/2015 Dtd. 27.01.2015 passed by Comm(A) granting interest.

6.1 A Personal hearing in this case was held on 23.02.2022 and Shri P.K.Shetty, Advocate of the applicant appeared for personal hearing and reiterated his earlier points. He submitted that short point here is payment of interest on delayed sanction of rebate. He stated the Commissioner(Appeals) has rejected his claim on the ground that its fresh claim which he contended to be not correct.

6.2 Respondent made submissions dated 02.02.2022 wherein they stated :-

6.2.1 Applicant submits that Interest under Sec. 11BB of CEA 1944 is required to be paid after three months from the date of application for refund. Interest payment automatically applies for the delayed period and there is no need to separately make a claim. It is settled law that interest has to be paid for delayed refunds beyond the period of 3 months.

6.2.2 Applicant submit that CBEC has issued Circular No. 670/61/2002-CX dated 1.10.2002 directing the field formation to settle the refund/rebate claims without any delay and with interest wherever applicable. Therefore, is clear that interest to be paid wherever the refund is delayed beyond three months from the date filing the refund.

6.2.3 Applicant further submit it is settled law by the Apex Court that interest to be paid for the delayed refund under Section 11BB after expiry three months the date of filing the refund complete all respects. There is no dispute the instant case that the rebate paid beyond the stipulated time three months therefore, interest payable to the Applicants. They refer and rely upon following judgements support their submissions.

Ranabaxy Laboratories Vs UOI-2011(273) ELT 3(SC)
U.P.Twiga Fibre Glass-reported 2009(243) ELT A27 (SC)
Ballarpur Industries reported 2008(229)ELT 498(BOM)
Rama Vision reported 2004(170) ELT 13 (Tri-LB)

7. Government has carefully gone through the relevant case records available in case files, submissions and perused the Orders-in-Original and Orders-in-Appeal.

8. On going through the revision applications, Government finds that Order-in-Appeal No. CD/497 & 498/RGD/15 dated 19.05.2015, was received by the applicant on 29.07.2015 and the revision application was filed on 19.11.2015 and there was a delay of 23 days after the initial 90 days period. The delay falls within condonable limit of 90 days. The applicant has not filed any application for condonation of delay. However, in the interest of justice, Government Suo Moto condones the delay and proceeds to examine the case on merits.

9. Government observes that in the instant case, the issue involved is whether the applicant is entitled to the interest on delayed sanction of rebate claims which has been denied by the Commissioner (Appeals) on the grounds mentioned in para 4 supra.

10. In the case of CCE, Vapi Vs Manisha Pharma Plast Pvt. Ltd. (2005(191)E.L.T.297(Tri.-Mumbai) CESTAT, Mumbai vide its Order dated 12.01.2005 dismissed Revenue appeal and upheld Commissioner (Appeals) Order wherein it was held that incidence of duty had not passed on to customer and

therefore, amount of refund claim is payable to assessee and not creditable to Consumer Welfare Fund. Subsequent to this Order dated 12.01.2005, the appellant Manisha Pharma Plast Pvt. Ltd. filed miscellaneous application seeking order from the Tribunal (Mumbai) to direct the department to comply with its order dated 12-1-2005 to the extent that the statutory amount of interest due on the refund sanctioned amounting to Rs. 2,53,81,156.02 be ordered to be paid to them which was being denied by the department. The CESTAT (Mumbai) while dismissing the Misc. application filed by the appellant vide its Order dated 05.10.2006 [2007 (5) S.T.R. 11 (Tri. - Mumbai)], observed as under:

4. We have considered the submissions. We find that the Tribunal has vide its earlier Order Nos. M/71-72/WZB/2005-C-III/EB dated 22-8-2005 clearly held that there were no direction for grant of interest by any of the authority i.e. the adjudicating authority, Commissioner (Appeals), Tribunal or Hon'ble Gujarat High Court. We cannot sit in judgment over the above finding given by a co-ordinate Bench. As regards plea of automatic sanction of refund without requiring the applicants to make a specific claim for interest, we find that all these facts including Rajasthan High Court Order and the Board's Circular were in existence prior to issue of Tribunal order and have also been brought to the notice of the Tribunal at the time of filing the first miscellaneous application seeking similar relief. No new fact has come into existence. We further note that as observed by the Rajasthan High Court and also clarified by the Board vide its circular dated 1-10-2002 the interest has to be automatically granted and there is no requirement for the applicant to seek any relief from the appellate authorities. In such circumstance the applicant should seek interest from the department and on their failure to do so should ask for issue of an appealable order and should follow the appeal procedure seeking relief against such denial of interest. The recent Tribunal's order cited by the applicant is not relevant as in that case the Revenue has come in appeal against the order of Commissioner (Appeals) who has specifically ordered grant of interest which order was upheld by the CESTAT. In the present case, there is no order for payment of interest by Commissioner (Appeals) or the Tribunal in their earlier orders as has also been held by the Tribunal vide its earlier order dated 22-8-2005 on the first miscellaneous application filed by the applicant.

10.1 In the aforesaid case the application for refund was filed on 30-12-1999 - On 21-12-2001 order passed whereby Department admitted refund, but

transferred it to Consumer Welfare Fund, However, Appeal against this was allowed by Commissioner (Appeals), on 1-10-2003 holding that there was no unjust enrichment. Against this, Department's appeal before CESTAT, Mumbai was dismissed on 12-1-2005 (2005(191)E.L.T. 297(Tri-Mumbai). - Further appeal of Department filed before High Court Gujarat was dismissed on 18-7-2005 [2008(222)E.L.T. 511 (Guj.). Department paid refund amount to assessee on 26-6-2005. The applicant thereafter filed Special Civil Application before Hon'ble Gujarat High Court claiming that they reserved their right to claim interest in terms of Section 11B of the Central Excise Act, 1944.

10.2 While dismissing the Special Civil Application/petition, vide its judgment dated 19.12.2008 [2010 (262) E.L.T. 165 (Guj.)], their Lordships observed as under :-

30.1 *It is not in dispute that order dated 5-10-2006 was not challenged by the petitioners by filing an appeal under Section 35G of the Central Excise Act, 1944 at the relevant time and it is only belatedly that the same is made a subject matter of challenge in a writ petition under Article 226 of the Constitution of India. This Court is of the opinion that in view of the liberty reserved by order dated 21-2-2007, passed in Civil Application No. 2738 of 2008, it is open for the revenue to question the maintainability to the challenge to order dated 5-10-2006 in a writ petition. To allow the challenge to order dated 5-10-2006 by amendment in a pending petition will amount to do away with the bar created by delay, laches and acquiescence. A fact which cannot be denied by the petitioners is that order dated 5-10-2006 was not challenged by them until the same was sought to be challenged by moving amendment in a pending petition in the year 2007. This Court is conscious of the fact that while allowing the application for amendment by order dated 21-2-2007, the Court reserved liberty in favour of the revenue to question the challenge to the said order before this Court. Allowing to challenge either order dated 22-8-2005 or order dated 5-10-2006 will amount to doing away with the statutory period prescribed for filing an appeal against such order, which is 180 days.*

31. *Coming to the crux of the matter, what is required to be seen is that the petitioners filed application for refund on 30-12-1999; on the said application, an order was passed on 21-12-2001, whereby the department admitted the refund, but transferred the amount to Consumer Welfare Fund; being*

aggrieved by that order, the petitioners filed an appeal before the Commissioner (Appeals), which was allowed by order dated 1-10-2003 holding that there was no unjust enrichment on the part of the petitioners; against this order, the department filed an appeal before the CESTAT; in the said appeal, the petitioners filed cross objections; the CESTAT by order dated 12-1-2005 dismissed the appeal filed by the department and allowed the cross-objections; against that order, the department filed before the High Court and that appeal was finally dismissed by the High Court on 18-7-2005. That being so, the petitioners finally became entitled to refund on 18-7-2005, whereas the department has already paid refund amount to the petitioners on 26-6-2005. That being so, the interest which can be allowed to be paid to the petitioners is only from the final adjudication in the matter (as the decision of the High Court was not carried further in appeal), i.e. from 18-7-2005, whereas the department has already paid the amount of refund to the petitioners on 26-6-2005 and therefore, there is no question of passing any order of payment of interest to the petitioners. Otherwise also, for a substantial period, the amount was lying with the Consumer Welfare Fund and not with the department.

32. In the result, the petition fails. The petitioners are not entitled to receive any interest amount on the refund amount, as after the High Court dismissed the appeal of the department's appeal on 18-7-2005, the finality was achieved by the controversy, whereas the department had already refunded the amount on 26-6-2005 and therefore, no relief can be granted to the petitioners.

32.1 As discussed earlier, the challenge to orders dated 22-8-2005 and 5-10-2006 also fails. As discussed hereinabove, in view of the order passed by this Court on the applications for amendment, it was open for the department to question the maintainability of challenge to these orders and relying upon the averments of paras-5 to 9 of the affidavit filed by the department, the entertainment to the challenge to these two orders will amount to not only condoning the delay, laches and acquiescence on the part of the petitioners but will also amount to rendering nugatory the provisions of filing an appeal within the stipulated period of 180 days. Rule is discharged. No costs.

10.3 Being aggrieved by the aforesaid judgement of Hon'ble Gujarat High Court, M/s Manisha Pharmo Plast Pvt. Ltd. filed Civil Application 4432 of 2009 before Hon'ble Supreme Court which came to be decided in favour of the applicant vide judgment dated 06.08.2020.[2020(374)E.L.T.145(S.C.)]. While allowing the appeal

filed by M/s Manisha Pharmo Plast Pvt. Ltd. Hon'ble Supreme Court observed as under :-

2. *The High Court, vide impugned judgment [2010 (262) E.L.T. 165 (Guj.)], has denied relief of statutory interest payable to the appellant under Section 11BB of the Central Excise Act, 1944 read with the Circular No. 670/61/2002-CX.8, dated 1-10-2002 issued by the Government of India, Ministry of Finance (Department of Revenue), Central Board of Excise & Customs, New Delhi. The High Court noted that the appellant had filed application for refund on 30-12-1999 but denied the relief of interest on the finding that the adjudication of the claim attained finality only after dismissal of the proceedings before the High Court on 18-7-2005; whereas the Department had already paid refund amount to the appellant on 26-6-2005. These facts are not in dispute.*

3. *In light of these facts and the exposition in paragraph 17 in Ranbaxy Laboratories Ltd. v. Union of India & Ors. [(2011) 10 SCC 292 = 2011 (273) E.L.T. 3 (S.C.) = 2012 (27) S.T.R. 193 (S.C.)], it was not open to the Department to deny the relief of statutory interest. Paragraph 17 of the said decision reads thus :-*

"17.

4. *The approval of the dictum of the Rajasthan High Court [2004 (170) E.L.T. 4 (Raj.)] in paragraph 17 referred to above, directly deals with the claim of the appellant before this Court who had made application for refund on 30-12-1999 and, therefore, the statutory interest ought to commence after non-payment within three months from the date of application, being the starting point envisaged by Section 11BB of the Act. We find no reason to deviate from the view so taken in Ranbaxy Laboratories Ltd. (supra).*

5. *Hence, this appeal should succeed. The claim of the appellant regarding statutory interest under Section 11BB of the Act is allowed in the above terms. The amount be calculated and paid expeditiously and not later than three months from today. The impugned judgment of the High Court in this regard is set aside. Appeal is allowed in the aforementioned terms. There shall be no order as to costs.*

11. As the facts of the present case are akin to case law discussed above and therefore, relying on the Hon'ble Supreme Court's Judgment discussed supra as well as relying on Hon'ble Supreme Court's judgment in the case of M/s. Ranbaxy Laboratories Ltd. v. UOI reported on [2011 (273) E.L.T. 3 (S.C.)] wherein Hon'ble Supreme Court has held in unambiguous terms that liability of the Revenue to pay interest under Section 11BB of Central Excise Act commences from the date of expiry of three months from the date of receipt of application for refund under

Section 11B(I) *ibid* and not from the expiry of said period from the date on which order of refund is made, Government holds that the impugned Order-in-Appeal is not just & legal and is liable to be set aside and that interest @ of 6% p.a. is payable from the date of expiry of three months from the date of receipt of application for refund under Section 11B(I).

12. In view of the above discussion and findings, the Government sets aside the impugned Orders in Appeal No. CD/497 & 498/RGD/2015 dated 19.05.2015 & No. CD/647/RGD/2015 dated 06.08.2015 passed by the Commissioner (Appeals), Thane and allows the instant Revision Application with consequential relief.


(SHRAWAN KUMAR)

Principal Commissioner & ex-Officio
Additional Secretary to Government of India

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ORDER No. 865/2022-CX (WZ) /ASRA/Mumbai DATED 15.9.2022

To,
M/s. Huhtamaki PPL Ltd.,
(Formerly The Paper Products Ltd),
(Now Known as M/s. Huhtamaki India Ltd.)
L.B.S. Marg, Majiwade,
Thane - 400 601.

Copy to:

1. The Commissioner of CGST & Central Excise, Thane.
2. The Commissioner of CGST (Appeals), Thane.
3. The Assistant / Deputy Commissioner, CGST & Central Excise, Wagle-II Division, Thane.
4. Mr. P.K.Shetty, Advocate. B-102, Kailas Industrial Complex, Hiranandani-Vikhroli-Link Road, Vikhroli (West), Mumbai - 400 079.
5. Sr. P.S. to AS (RA), Mumbai.
6. Guard file.
7. Spare Copy.