

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No.3163 of 2008

For Approval and Signature:

**HONOURABLE MR. JUSTICE AKIL KURESHI
HONOURABLE MS. JUSTICE HARSHA DEVANI**

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1 Whether Reporters of Local Papers may be allowed to see the judgment?

2 To be referred to the Reporter or not?

3 Whether their Lordships wish to see the fair copy of the judgment?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder?

5 Whether it is to be circulated to the civil judge?

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**SHRI JAGDAMBA POLYMERS LTD & 1 - Petitioner(s)
Versus
UNION OF INDIA & 2 - Respondent(s)**

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Appearance:

MR PARESH M DAVE for Petitioner(s): 1 - 2.

MR YN RAVANI for Respondent(s): 1 - 3.

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CORAM : HONOURABLE MR. JUSTICE AKIL KURESHI

and

HONOURABLE MS. JUSTICE HARSHA DEVANI

Date : 23/08/2012

**ORAL JUDGMENT
(Per : HONOURABLE MR. JUSTICE AKIL KURESHI)**

1. The petitioners have filed this petition seeking a writ, order or direction setting aside Order-In-Original dated 16-

5-2007 and Order-In-Appeal dated 5-9-2007. The petitioners have further prayed for a direction for payment of interest of Rs.23,59,504/- and the delayed payment of interest amount by the Central Excise authorities.

2. The petition arises in following factual background. The petitioner No.1 is a company registered under the Companies Act and is engaged in the business of manufacture of plastic products like HDPE and PP tapes etc. The petitioner No.2 is a Director of the petitioner No.1 company.

3. The petitioners manufacture various excisable goods such as HDPE and PP woven fabrics and bags which according to the petitioners were classifiable under Chapter 39 of the Central Excise Tariff Act, 1985 as articles of plastic. Revenue, however, held an opinion that such goods were classifiable under Chapters 54 and 63 as textile articles. As per the petitioners' understanding of the classification, rate of duty applicable to such goods, exemption from payment of certain duties as well as facility of modvat credit on the inputs used in the manufacturing of such goods was more favourable to the petitioners. Under the insistence of the Department, however, the petitioners paid higher duty under protest for the period between February, 1987 to February, 1992. The Madhya Pradesh High Court in the case of **Raj Packwell Ltd. and others** reported in 1990 (50) E.L.T. 201 decided the issue in favour of the trade and held that such goods were classifiable under Chapter 39 of the Tariff. The Central Board of Excise and Customs ('CBEC', for short) issued a circular No.8/92 dated 24-9-1992 in exercise of powers under section 37B of Central Excise Act, 1944 ('the Act', for short) clarifying that the goods

in question would be classifiable under Chapter 39.

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 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.

5. Aggrieved by such order of the Assistant Commissioner dated 4-9-1996, the petitioners filed an appeal before the Commissioner (Appeals) who by his order dated 18-2-1999 substantially allowed the appeal and held that the petitioners would be entitled to further refund of Rs.1,02,53,118/-. He accordingly modified the order of the Assistant Commissioner with consequential relief including interest, if any, admissible under section 11BB of the Central Excise Act, 1944. Relevant portion of the order reads as

under:-

“The ratio laid down in the above mentioned decision/ judgments is squarely applicable, in this case, in as much as, HDPE tapes are captively consumed in the manufacturing of fabrics/sacks. The adjudicating authority has already sanctioned and refunded the amount of Rs.11,05,000/- to the appellants and credited the remaining amount of Rs.1,09,58,349.09 to the Consumer Welfare Fund. However, it appears the amount credited to the Consumer Welfare Fund includes an amount of Rs.7,05,231.24 which is the duty paid on the HDPE tapes cleared from the factory and sold outside to the customers. In this case the appellants has clearly passed on the incidence of duty to the customers and as such not entitled to the refund. However he is entitled for the refund of remaining amount of Rs.1,02,53,112.53 [1,09,58,349.09 - 7,05,231.24]”

6. Pursuant to such appellate order of the Commissioner in which he provided for further refund of Rs.1,02,53,112/- with interest, if any, payable under section 11BB of the Central Excise Act, 1944, the Deputy Commissioner passed a consequential order dated 13-3-2003. In such order, though he sanctioned the refund for a sum of Rs.1,02,53,118/-, he did not allow any interest under section 11BB of the Act observing that the entitlement to refund arises only when the appeal is finally disposed off in the party's favour. The Deputy Commissioner relied on a decision of CEGAT in case of **Bharat Heavy Electricals Ltd. vs. Commissioner of C. Ex., Meerut** reported in 2002 (139) E.L.T. 591 (Tribunal) for this purpose. Relevant portion of such order dated 13-3-2003 reads as under:-

“As regards the issue of interest under section 11BB of the Central Excise Act, 1944, is concerned, it is clear that the entitlement to refund arises only when the appeal is

finally disposed off in the party's favour. This view has also been held by the Hon'ble CEGAT in the case of Bharat Heavy Electrical Ltd. V/s CCE, Meerut reported in 2002 (139) E.L.T. 591 (Tribunal). In this case the Commissioner (A) has finally disposed off the case on 11.10.02 and the party applied for refund on 10.1.03. Hence I am of the view that the assessee is not entitled for the interest under Section 11BB of the Central Excise Act, 1944.

In view of the above, I pass the following order.

Order

I hereby sanction the refund claim of Rs.1,02,53,118/- (Rs. One crore two lakhs fifty three thousand one hundred and eighteen only) under Section 11B of the Central Excise Act, 1944 to M/s. Shree Jagdamba Polymers Ltd. consequent to the final assessment under Rule 9(5) of Central Excise Rules, 1944."

7. Against such order of the Deputy Commissioner to the extent the petitioners were denied interest on the refund found due and payable, the petitioners preferred an appeal before the Commissioner (Appeals). Before the Commissioner (Appeals), the petitioners contended that the Deputy Commissioner did not grant interest on the delayed refund though the refund claim was lodged way back in the year 1994 and actual refund was paid only in March, 2003 i.e. almost after eight years. Commissioner (Appeals) thereupon passed his order dated 31-5-2004 and allowed the appeal. He was of the opinion that for the refund claim relatable to the period after insertion of section 11BB of the Act with effect from 26-5-1995, the petitioners would be entitled to interest on the delayed refund after three months from the date when the application for refund was filed. He also observed as under:-

"I further find that in this case the appellants have

filed refund claims prior to insertion of Section 11BB in Central Excise Act, 1944 w.e.f. 26-5-1995 providing for interest on delayed refund; The Hon'ble Tribunal in case of Hindustan Motors Ltd. v/s. CCE, Calcutta IV – 2003 (155) ELT.306 (Tri-Kolkata) have held that interest is not liable to be paid prior to insertion of Section 11BB of Central Excise Act, 1944 as there was no provision in the Act for payment of interest earlier. It is settled law that Commissioner (Appeals) being a creature of the Act cannot go beyond the law laid down by Act. In as much as there was no such provision for payment of interest prior to the date of insertion Section 11BB. Hence they are not entitled for payment of interest prior to 26-5-95. As regards interest after 26-5-95 I hold that appellants are entitled to interest from 26-5-95 till the date of refund of such duty.

7. I therefore set aside the impugned order and allow the appeal in terms of para 6 above.”

8. Armed with such order of the Commissioner dated 31-5-2004, the petitioners once again filed a claim of interest before the Assistant Commissioner for a sum of Rs.1,11,72,895/-. The Assistant Commissioner allowed a portion thereof by his order dated 23-9-2004. He sanctioned interest to the tune of Rs.1,06,12,678/-. Remaining claim of Rs.5,60,217/- was rejected on the ground that the same pertains to the period before insertion of section 11BB in the Act. The case of the petitioners is that the interest was released only in September, 2004 on the principal claim of refund which was held payable as far back as in 18-2-1999 by the Commissioner (Appeals). Thus, there was considerable delay in paying interest on the refund claim and such payment of interest should, therefore, carry further interest.

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. vs. Commissioner of Income Tax-I, Pune** reported in 2006 (196) E.L.T. 257.

10. The petitioners' such claim, however, was rejected in its entirety by the Assistant Commissioner by his order dated 16-5-2007 on the ground that such claim is not based on any statutory provision.

11. The petitioners approached the appellate authority against such order of the Assistant Commissioner by filing two separate appeals since the Assistant Commissioner had passed two separate orders. Such appeals also came to be rejected by two separate orders both dated 5-9-2007. The Commissioner (Appeals) was of the opinion that in the earlier appeal before the Commissioner, the petitioners had not made any claim for further interest. The Commissioner had granted benefit of interest on the late payment of refund only with effect from 26-5-1995. In absence of any claim before the Appellate Commissioner and the petitioners having accepted the order of

the Appellate Commissioner, they cannot now claim interest on the delayed interest. On this ground, the appeals were dismissed.

12. At that stage, the petitioners have filed this petition and confined their prayer to interest on the delayed payment of interest for a period of 541 days between 1-4-2003 to 23-9-2004.

13. Learned counsel Shri Paresh Dave for the petitioners submitted that the revenue authorities grossly erred in rejecting the petitioners' claim for interest. He assailed such orders raising following contentions:-

- (1) that there was gross delay at the hands of the Department at all stages, initially while sanctioning the refund of the petitioners and thereafter in releasing the interest thereon.
- (2) It was contended that when the Appellate Commissioner held that the petitioners were entitled to refund, such refund ought to have been released alongwith interest. Such interest would become due after three months from the date of refund application. Though the Appellate Commissioner had directed the Assistant Commissioner to grant such refund as payable under section 11BB of the Act, the Assistant Commissioner failed to provide for any such interest. The petitioners, therefore, had to carry out further appellate proceedings.

- (3) The counsel submitted that despite the petitioners succeeding on the legal issue, the Assistant Commissioner initially did not release substantial portion of the refund claim on the ground of unjust enrichment at which stage also the petitioners had to approach higher authorities for correction of such order.
- (4) Counsel submitted that in the facts of the present case, the Department cannot escape the liability of paying interest on interest merely on the ground that the statutory provisions do not specifically provide for the same. Counsel submitted that the present is a case of extreme hardship and even in the facts of the case, such interest should be held payable.

13.1 In support of his contentions, the counsel relied on the following decisions:-

- (i) In case of Sandvik Asia Ltd. (supra) wherein in context of provisions contained in Income Tax Act, 1961, the Apex Court observed that tax can be collected only in accordance with law and, therefore, in case of collection of excess tax or withholding of any amount from the assessee without authority of law, revenue must compensate the assessee.
- (ii) The counsel also relied on a decision of this court in case of **D.J. Works vs. Deputy Commissioner of Income-Tax** reported in 195 ITR 227 wherein this court upheld the assessee's claim for interest on wrongfully

withheld interest observing that such withheld interest becoming due and payable partakes the character of excess amount of tax refundable.

- (iii) In case of **Chimanlal S. Patel vs. Commissioner of Income-Tax and Another** reported in 1994 (210) ITR 419 wherein a Division Bench of this court had taken a similar view.
- (iv) In case of **Afrique Tradelinks Pvt. Ltd. vs. Union of India** reported in 2004 (61) R.L.T. 726 (Guj.) wherein a Division Bench of this court, interpreting provisions of Customs Act, 1962 which are in pari materia to similar provisions made in the Central Excise Act, held that interest would accrue on a refund claim not after three months from the date of the appellate order in favour of the assessee, but after three months from the refund application.

13.2 Counsel referred to the decision of the Tribunal in case of **Bharat Heavy Electricals Ltd. (supra)** to contend that in such decision also, the Tribunal did not lay down the proposition that interest would be payable from period of three months after the assessee's appeal is allowed finally. Counsel drew our attention to a decision of a Division Bench of Allahabad High Court in the case of **Super Electronics vs. Commissioner of C. Ex., Meerut-II** reported in 1999 (113) E.L.T. 792 to contend that even before the Assistant Commissioner declined to pay interest to the petitioners, the Allahabad High Court had held that such interest would be payable after three months of the date of the refund

application itself.

13.3 Counsel drew our attention to a clarification issued by the Finance Ministry when the statutory provisions contained in section 27A of the Customs Act and similar provisions under section 11BB in the Central Excise Act were introduced. Relying on such clarifications, the counsel contended that the position was made amply clear by the Government of India itself under which it was clarified that interest would be payable after three months of the receipt of the refund application and not from the date of the appellate order finally allowing the appeal of the assessee. On this basis, the counsel would contend that the Assistant Commissioner had no reason whatsoever to reject the petitioners' claim for interest.

14. On the other hand, learned counsel Shri Ravani appearing for the Department opposed the petition contending that in absence of any statutory provision providing for interest on interest, the petitioners' claim was rightly rejected by the revenue authorities. He submitted that the Assistant Commissioner had proceeded on the basis of law declared by the Tribunal in the case of Bharat Heavy Electricals Ltd. (supra) which was prevailing at the relevant time. He submitted that on the basis of such decision, if the Assistant Commissioner construed the statutory provision as to making interest payable to the petitioners only after a period of three months from the date of the appellate order allowing the petitioners' claim for refund, it cannot be stated that he acted either unjustly or without proper application of mind. Counsel submitted that since the Assistant Commissioner had passed an order

bonafide holding a certain legal opinion on the basis of the decision of the Tribunal to back such an opinion which held the field at the relevant time, it cannot be stated that the Assistant Commissioner acted malafide either in facts or in law.

14.1 Counsel further submitted that the petitioners' claim for interest should be judged in light of the statutory provisions contained in section 11BB of the Act. When such provision does not provide for any interest on delayed payment of interest, such claim should not be accepted. He submitted that payment of interest is governed either by a statute or under contractual agreement between the parties. In the present case, neither the statute nor the contractual relations provided for any payment of interest on delayed release of interest. Delay, if any, therefore, in payment of such interest would not entail any further liability on the Department to pay interest thereon.

15. Having thus heard learned counsel for the respective parties and having perused the documents on record, we may highlight a few salient features of the case. As already noted, the petitioners and the Department had a dispute with respect to correct classification of the goods manufactured by the petitioners. Under protest, the petitioners were, on the insistence of the Department, made to pay duty at the higher rate. The petitioners, while paying such duty under protest continued their dispute with the Department and ultimately succeeded in establishing that the goods were classifiable under Chapter 39 and that therefore, excess duty was collected from them. In fact, CBEC had issued a clarification in exercise of powers under section 37B of the

Act on the basis of a decision of Madhya Pradesh High Court and clarified this position in favour of the trade. On the basis of such clarification, when the petitioners succeeded before the Appellate Commissioner in the question of classification of goods, they approached the Assistant Commissioner seeking refund of a sum of Rs.1,20,63,349/-. The Assistant Commissioner though held that the duty was paid in excess, sanctioned refund of only Rs.11,05,000/-. The rest of the claim was ordered to be deposited in the Consumer Welfare Fund on the ground that the petitioners failed to establish that there was no unjust enrichment. The petitioners were once again compelled to approach the Appellate Commissioner who while granting additional refund of Rs.1,02,53,118/- by his order dated 18-2-1999 further provided that such refund shall be paid alongwith interest, if any, under section 11BB of the Act. Pursuant to such order, the Deputy Commissioner though granted the refund of the principal sum, held that no interest was payable on the ground that entitlement to refund arises only when the appeal is disposed off in favour of the petitioners. In the present case, the Commissioner (Appeals) had finally disposed off the case on 11-10-2002 and the petitioners had applied for refund on 10-1-2003. In that view of the matter, he was of the opinion that no interest under section 11BB was payable.

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. vs. 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.

17. Legal position is thus abundantly clear. It is true that the decision of this court in case of *Afrique Tradelinks Pvt. Ltd. (supra)* and the Apex Court in the case of *Ranbaxy Laboratories Ltd. supra* were rendered subsequent to the Deputy Commissioner taking a contrary view. However, the Departmental clarification itself was sufficiently clear and was binding on the Deputy Commissioner. Reference to the decision of the Tribunal in case of *Bharat Heavy Electricals Ltd.* was wholly erroneous. All that the Allahabad High Court in case of *Super Electronics (supra)* provided was for interest after three months of the date of refund application.

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.

(Akil Kureshi, J.)

(Harsha Devani, J.)

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