

(2002) 03 CAL CK 0035

Calcutta High Court

Case No: Writ Petition No. 1531 of 2001

Eastern Coils Private Ltd.

APPELLANT

Vs

Commr. of C. Ex.

RESPONDENT

Date of Decision: March 21, 2002

Acts Referred:

- Central Excises and Salt Act, 1944 - Section 11B

Citation: (2003) 153 ELT 290

Hon'ble Judges: Amitava Lala, J

Bench: Single Bench

Advocate: Gopal Chakraborty, Udayan Chakraborty and S. Bhattacharya, for the Appellant; T.K. Hazra and R.N. Bandopadhyay, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

Amitava Lala, J.

This writ petition is related to matter of refund of the sum deposited by the petitioner pursuant to the direction of the authority or Tribunal in connection with a matter of Central Excise. The petitioners' contention is that the refund amount will be a sum of Rs. 10,00,000/- together with compound interest at the rate of 24% p.a. from the date of the deposit.

2. Under normal circumstances it appears to be a matter in connection with the money claim which ought not to be entertained by the writ court but the subject matter herein is unjust enrichment by the governmental authority in withholding such sum. Therefore, I hold that writ court can entertain try and determine the issue hereunder. Moreover, at the interim stage the authority was approached by the petitioners for having refund on the basis of any interlocutory order passed by a bench of this court which was acted upon by them and the refund of the principal sum of Rs. 10,00,000/-was made.

3. Therefore, the main issue in final hearing is whether refund of such sum will be made with interest or without interest. If such sum is directed to be refunded with interest what would be the rate and the cut off date from which it will be paid with consequential reliefs. The petitioner's contention is that the interest will have to be paid from the original date of deposit.

4. Mr. Gopal Chakraborty, learned Senior Counsel with the able assistance of Mr. Biswajit Bhattacharjee, learned counsel appearing with him contended that when the governmental authorities are insisting for pre-deposit or payment of statutory dues, if necessary, along with the interest they are similarly liable for refunding any sum with interest. A Governmental authority cannot make double play. A Governmental authority, cannot be construed as a privileged person. The basic element of unjust enrichment is based on such tests.

5. Mr. Chakraborty has relied upon a judgment reported in [Kay Foam Limited Vs. Union of India \(UOI\)](#), whereunder a Division Bench of Bombay High Court held that it is now well settled that the duty recovered without any authority of law cannot be retained by such authority and in such case refund will have to be made with interest. There the rate is fixed at 18% p.a. from the date of payment till the date of refund. He has also relied upon a judgment of Delhi High Court reported in [Elephanta Oil and Vanaspati Industries Ltd. and Another Vs. Union of India](#), whereunder the Division Bench held that when there is a cause of unjust enrichment the money has to be refunded by the governmental authority to the person concerned with a interest. There the rate of interest is fixed at 17.5% per annum. In [M/s. Shree Baidyanath Ayurved Bhawan Pvt. Ltd. Vs. State of Bihar and others](#), it was held that in case of refund of levy held by any authority will be made with interest and rate of interest was fixed @ 12% p.a. Such payment was directed to be paid along with costs. However it appears to this court that in all the cases writ jurisdiction of the court were invoked for the purpose of redressal of such grievance and the courts uniformly held in favour of refund with interest.

6. Then the next question arose what would be the rate of interest? Mr. Chakraborty submitted that the Parliament by way of amendment of Section 80 of the Negotiable Instruments Act provided that calculation of rate of interest will be 18% per annum when the rate is not so fixed. Therefore, at least such rate of interest is to be the appropriate rate for the purpose of the refund.

7. Mr. Kalyan K. Bandopadhyay, learned counsel appearing on behalf of the authority contended that the money which has been claimed by way of refund is the pre-deposit made by the petitioners for hearing appeal. Therefore, such deposit cannot be treated as an illegal recovery of money on account of any statutory claim from the petitioners. Hence if such sum is refunded, cannot be directed to be paid with interest. In fact, all the sums were not paid at a time but by way of instalments from 15th of October, 1989 till 15th of February, 1990 upon getting various concession in respect of making such pre-deposit. No application has been made to

get the refund. That apart, if the pre-deposits are not allowed with interest by the authorities a forum of appeal is available. The writ jurisdiction is not the proper forum for the purpose of redressal of such grievance. He relied upon a Division Bench Judgment of Bombay High Court reported in [Suvidhe Ltd. Vs. Union of India](#), where it has held that pre-deposit is not a payment of duty but a deposit for awaiting the right of appeal. Therefore, the doctrine of unjust enrichment will be inapplicable. The question of pre-deposit in case of Central Excise is governed by Section 35F of the Central Excises and Salt Act, 1944 which has got nothing to go in respect of Section 11B of such Act whereunder a duty is directed to be paid.

8. In reply thereto learned counsel appearing for the petitioners contended that unauthorized levy is the main cause which has been resulted to an appeal whereunder the pre-deposit was made in connection with such unauthorised levy. Therefore, it would be wrongful to say that the pre-deposit is totally unconnected with an unauthorised levy. Hence, they are entitled to get refund of such sum as directed by the CEGAT (Customs, Excise and Gold (Control) Appellate Tribunal along with interest.

9. Upon hearing the rival contentions of the parties I am of the view that a valid question of law is involved hereunder. In the court of Equity the prime question is to consider the equitable justice provided valid question of law is involved. The equitable principle cannot proceed on a fixed parameters of consideration. It has to be flexible.

10. In this case, the primary question is whether there is any unjust enrichment or not. The question of unjust enrichment will borne from the unjust point of view. It cannot be so mechanically understood that the same will be applicable on a nomenclature of "levy" with interest but not the nomenclature of "deposit". I have to go to the root of the cause. The cause is that the authority imposed certain levy on account of Central Excise. It was contested by the petitioners which was proceeded upto the extent of the appeal before the Appellate Tribunal. Amount of pre-deposit was made when the lower authority imposed levy of the similar amount. The intention of the legislature is that the Tribunal should not be overburdened without the test of bona fide. If the petitioners loose the battle and failed to pay any amount, the sum so deposited can be adjusted in favour of the authority against their claim. Therefore, in effect, it is a claim. In a recent Division Bench Judgment, Madras High Court, in 2001 (133) E.L.T. 278 (Mad.) (Commissioner of C. Ex., Chennai v. Calcutta Chemical Co. Ltd.) held that assessee is entitled to get interest on pre-deposit. Therefore, in between the two judgments of the courts of similar strength more recent and reasoned judgment will be more commendable upon this court.

11. Therefore, whether the claim is in the nature of "levy" or "deposit" both are coming under one umbrella i.e. "refund". There is specification under the law that the pre-deposit cannot be regarded as "refund". If appellate authority or Tribunal held that amount so deposited cannot be withheld but will be refunded, the

governmental authority cannot be held to be privileged person in refunding the same without interest.

12. Now the second question is what would be the rate of interest.

13. So far the refund in any form including the refund of pre-deposit is concerned, there is no fixed rate of interest to be declared as appropriate. In [Kuil Fireworks Industries Vs. Collector of Central Excise and another](#), Supreme Court held that the pre-deposit made by assessee to be returned to him with interest @ 12% per annum. But I do not find any analysis or fixation of rate of interest as 12% in the said judgment. Similarly, in [Commissioner of C. Ex. Vs. Calcutta Chemical Co. Ltd.,](#) I find that a Division Bench of Madras High Court held the rate of interest for refund of pre-deposit would be @ 15%. I find there the earlier judgment reported in [Kuil Fireworks Industries Vs. Collector of Central Excise and another](#), was referred. I do not find any clarification as to why court ultimately held that out of the two rates of interest i.e. 18% and 15%, rate of 15% will be accepted. Even there is no explanation as to the rate. A Bombay High Court Division Bench judgment reported in [Suvidhe Ltd. Vs. Union of India](#), held that refund of pre-deposit will be made along with interest @ 15% per annum. Therefore, fixation of rates appears to be rule of thumb. In such circumstances one aspect is very clear that in absence of any fixed rate of interest provision laid down in the Negotiable Instruments Act will be followed. Such Act, clarifies that whenever no agreed rate of interest is available usual banking rate of interest will govern the field. It can be safely said at present the usual banking rate of interest cannot be less than 18% per annum. Therefore, rate of 18% per annum will be justifiable rate of interest.

14. Hence, I say that the petitioner will be entitled for interest @ 18% per annum on the principal sum of refund of pre-deposit by the authorities.

15. The third question is that what would be appropriate date from which calculation will be made? Obviously it will be calculated from the date of the last order. Such last order will be the date of the order of CEGAT or any further order finally passed by any court whereunder the order of CEGAT was challenged. In the instant case since the order of the CEGAT reached its finality, interest will be paid from such date i.e. 3rd January, 2001 till realisation. To avoid further increase of amount on account of interest, the payment on such account is directed to be made to the petitioners within one month from the date of the communication of the order.

16. Thus, the writ petition stands disposed of.

17. No order is passed as to costs either for this application or on account of claim of refund with interest.

18. Xeroxed certified copies of this judgment will be supplied to the parties within seven days from the date of putting requisites for drawing up and completion of the

order and certified copy of this judgment.

19. All parties are to act on a signed copy minute of the operative part of this judgment on the usual undertaking and subject to satisfaction of the Officer of the court in respect as above.