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Dear Professional Colleague,

Interest allowable on refund of pre-deposit

We are sharing with you an important judgment of Hon'ble Delhi High Court in the case of **Afcons Infrastructure Ltd. Vs. Union of India [(2014) 49 taxmann.com 79 (Delhi)]** on the following issue:

Issue:

Whether communication of appellate order to the Commissioner would amount to communication to the Adjudicating Authority while determining interest to be paid under Section 35FF of the Central Excise Act, 1944 ("the Excise Act")?

Facts and background:

Afcons Infrastructure Limited ("**the Appellant**") preferred an appeal against the order of the Commissioner of Central Excise Delhi-I, to the Hon'ble CESTAT, Delhi and in accordance of the direction of the Hon'ble Tribunal, the Appellant made a pre-deposit of Rs. 55 lakhs. The Hon'ble Tribunal decided the matter in favour of the Appellant vides its order dated March 4, 2011 and such order was served on jurisdictional Commissioner of Central Excise, Delhi-I ("**the Commissioner**") on March 16, 2011.

The Department refunded pre-deposit on October 18, 2011 but without interest under Section 35FF of the Excise Act on pretext that the Commissioner was not Adjudicating Authority and interest starts only after communication of appellate order to Adjudicating Authority. In the instant case, the appellate order was not served to the Adjudicating Authority till September 1, 2011 and therefore, interest would start only after 3 months from date of communication of appellate order to the Adjudicating Authority.

Section 35FF of the Excise Act (as was prevalent prior to August 6, 2014) has been reproduced hereunder for the ease of reference:

"35FF. Where an amount deposited by the appellant in pursuance of an order passed by the Commissioner (Appeals) or the Appellate Tribunal (hereinafter referred to as the appellate authority), under the first proviso to section 35F, is required to be refunded consequent upon the order of the appellate authority and such amount is not refunded within three months from the date of communication of such order to the adjudicating authority, unless the operation of the order of the appellate authority is stayed by a superior court or tribunal, there shall be paid to the appellant interest at the rate specified in section 11BB after the expiry of three months from the date of communication of the order of the appellate authority, till the date of refund of such amount."

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Being aggrieved, the Appellant preferred a writ petition before the Hon'ble High Court of Delhi for payment of interest.

Held:

The Hon'ble High Court of Delhi noted that Section 2(a) of the Excise Act defines the term 'Adjudicating Authority' as under: -

"It means any authority competent to pass any order or decision under this Act, but does not include the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963, or the Commissioner of Central Excise (Appeals) or The Appellate Tribunal."

Further, the Hon'ble High Court held that ***in terms of the Section 2(a) of the Excise Act, any authority competent to pass any order or decision under the Excise Act would fall within the expression the 'Adjudicating Authority' apart from the Central Board of Excise and Customs, the Commissioner of Central Excise (Appeals) and the Appellate Tribunal.***

Therefore, the Commissioner would fall within the definition of Adjudicating Authority. Hence, the Appellant was entitled to interest at 6% per annum for period after expiry of 3 months from date of service of appellate order to the Commissioner.

Important to note changes in Section 35FF of the Excise Act w.e.f August 6, 2014 vide the Finance (No.2) Act, 2014:

Section 35FF of the Excise Act has been amended to provide for interest on delayed refund of pre-deposit from the date of pre-deposit made till the date of refund as against earlier provisions where interest was payable only if pre-deposit was not refunded within 3 months from date of communication of order of Appellate Authority.

Effective from August 6, 2014, Section 35FF of the Excise Act reads as under:

"Where an amount deposited by the appellant under section 35F 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 5% and not exceeding 36% 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 amount till, the date of refund of such amount.

Provided that the amount deposited under section 35F, prior to the commencement of the Finance (No. 2) Act, 2014, shall continue to be governed by the provisions of section 35FF as it stood before the commencement of the said Act."

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However, the new provisions are applicable only to the pre-deposit made under Section 35F of the Excise Act after August 6, 2014. Further, the rate of interest has been fixed at 6% per annum vide Notification No. 24/2014-CE (NT) dated August 12, 2014.

Furthermore, the Central Board of Excise and Customs vide Circular No. 984/08/2014-CX dated September 16, 2014 has clarified that the refund of pre-deposit made by the assessee should not be withheld on the ground that Department is proposing to file an appeal or has filed an appeal against the order granting relief to the assessee. The concerned Jurisdictional Commissioner should ensure that refund of pre-deposit should be made within the stipulated time of 15 days of the receipt of the letter of the assessee seeking refund.

Hope the information will assist you in your Professional endeavors. In case of any query/information, please do not hesitate to write back to us.

Thanks & Best Regards

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