

SC affirms Bombay HC's decision, holding that interest and penalty cannot be levied on delayed payment of customs surcharge, CVD and SAD in absence of statutory provisions

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Summary

The Supreme Court has dismissed the SLP filed by the Revenue against the order of the Bombay HC, which had held that the interest and penalty on short/delayed payment cannot be levied on customs surcharge, additional duty of customs (CVD) and special additional duty (SAD), as there was no power under the customs law to impose interest or penalty on the said duties. The HC analysed that the provisions of the Customs Tariff Act, 1975, does not provide for or include interest and penalties, and the same is included under Section 28AB of the Customs Act, 1962. Accordingly, the HC opined that merely because there is a mechanism for assessment and collection of tax and penalty under the Customs Act, 1962, it does not mean the same can be borrowed even under the Customs Tariff Act, 1975. Further, the HC clarified that when penalty is an additional tax, the Constitution requires a clear authority of law for imposition thereof. Therefore, the HC had quashed the order of the Settlement Commission after concluding that it violated legal provisions.

Facts of the case:

- Mahindra and Mahindra Limited (hereinafter referred to as the 'petitioner') filed four applications before the Settlement Commission.
- Show cause notices (SCNs) were issued by the Settlement Commission, alleging that the petitioner had not declared the entire amount in relation to import with an intent to evade payment of customs duty.
- Subsequently, the Settlement Commission held that the duty demanded is payable along with interest at 10% of the customs duty but has partially waived the penalty.
- The petitioner submits that interest shall be charged on the delayed payment of tax only when the statute levying the tax contains a substantive provision regarding the same.
- Accordingly, the petitioner is of the view that the Settlement Commission cannot levy interest and penalty since there are no substantive provisions regarding the delayed payment of differential duty.
- Aggrieved by the order of the Settlement Commission, the petitioner has filed the present writ petition before the HC.

Bombay HC observations and ruling (Writ Petition No.1848 of 2009 dated 15 September 2022. Order dated 4 October 2022):

- **Penalty partakes the character of additional tax:** The HC observed that when a statute levies a tax, it does so by inserting a charging section and then proceeds to provide the machinery to make the liability effective. Subsequently, the statute provides the mechanism for recovery and collection of tax, including penal provisions meant to deal with defaulters. Therefore, penalty is not a continuation of assessment proceedings and there must be a charging section to create liability.
- **Constitution requires clear authority of law for imposition of penalty:** The HC observed that the charging sections for imposition of surcharge, CVD and SAD are Section 90(1) of the Finance Act, 2000, Section 3(1) and Section 3A(1) of the Customs Tariff Act, 1975, respectively. Irrespective of the fact that the Customs Act, 1962, provides for penalty and interest, the same cannot be treated as applicable for interest or penalty under the Customs Tariff Act, 1975. Accordingly, there is no room for presumption in cases of referential legislation.
- **Legislature does not intend to include interest and penalties on CVD and SAD:** The HC viewed that the intention of the legislature is clear with respect to the inclusion of interest and penalty only with regard to the anti-dumping duty and not for CVD and SAD. There is no substantive provision under Section 3 or Section 3A of the Customs Tariff Act, 1975, or Section 90 of the Finance Act, 2000, requiring payment of penalty or interest.
- **Provisions under Customs Act, 1962, cannot be borrowed:** The HC observed that Section 28 of the Customs Act, 1962, provides for recovery of dues and Section 28AB provide for interest on delayed payment of duty. The authorities cannot levy interest beyond the provisions of the Customs Act, 1962. Thus, Section 28AB cannot be borrowed for imposing interest on surcharge, CVD or SAD.
- **Settlement Commission's order quashed and set aside:** The HC stated that the authorities cannot include interest in the settlement arrived at by it on the ground that the petitioner has derived financial benefits by not paying the correct rate of duty when it was due. Therefore, the HC held that the order of the Commission to the extent of requiring the petitioner to pay interest at the rate of 10% against the four SCNs and penalty is liable to be quashed and set aside.

**SC observations and ruling [SPECIAL LEAVE PETITION (CIVIL)
Diary No(s). 18824/2023 order dated 28 July 2023]:**

- The SC has dismissed the SLP filed by the Revenue and upheld the Bombay HC's order.

Our comments

In the case of J.K. Synthetics Ltd., the Supreme Court ruled that interest can be levied and charged on late tax payments only if the statute that levies and charges the tax makes a substantive provision in this regard. In the absence of a substantive provision requiring the payment of interest, the authorities may not charge interest on tax for the purpose of collecting and enforcing payment.

Even in the case of Khemka and Co. (Agencies) Pvt Ltd, the Supreme Court held that a penalty is in addition to the tax and statutory liability. Hence, there must be a specific provision to levy a penalty.

The Bombay High Court's ruling was consistent with the preceding rulings and should be beneficial to importers facing similar challenges. Furthermore, taxpayers who previously paid interest and penalties on CVD, SAD, and surcharge may be eligible for a refund considering that the SC has upheld the Bombay HC's order.

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