

**(2014) 04 RAJ CK 0122**

**In the Rajasthan High Court**

**Case No :** Civil Writ Petition No. 1149 of 2014

Chhote Lal Virendra Kumar Jain

APPELLANT

Vs

Union of India

RESPONDENT

**Date of Decision :** 09-04-2014

**Acts Referred:**

Central Excises and Salt Act, 1944 — Section 35(2A), 35-B, 35C(2A)  
Finance Act, 1994 — Section 67, 68, 69, 70, 73(1)

**Citation :** (2014) 45 GST 443 : (2014) 36 STR 495 : (2014) 75 VST 449

**Hon'ble Judges :** J.K. Ranka, J;Ajay Rastogi, J

**Bench :** Division Bench

**Advocate :** P.K. Kasliwal, Advocate for the Appellant; Sarvesh Jain, Advocate for the Respondent

## **Judgement**

Ajay Rastogi, J.—Heard counsel for the parties. The petitioner is a proprietorship firm & providing maintenance service under contract/agreement to the service receiver i.e. respondent, Jaipur Nagar Nigam.

2. The brief facts culled out are that a show cause notice dt. 18.10.2010 (Ann. 1) came to be served upon petitioner alleging that he has failed to pay service tax payable during the period 16.6.2005 to 31.3.2010 and thus contravened the provisions of Sections 67, 68, 69, 70 of Chapter V of the Finance Act, 1994 read with Rules 4, 5, 6, 7 of Service Tax Rules, 1994.

3. In response to the notice dt. 18.10.2010, the petitioner submitted his reply and taking note of the explanation furnished by the petitioner, the (Commissioner, Central Excise & Customs), Jaipur-I, (adjudicating authority) vide its order dt. 21.2.2012 held ad infra-

(i) I confirm u/s 73(1) of the Finance Act, 1994 the demand of service tax amounting to Rs. 83,51,306/- (Rs. Eighty Three Lakh Fifty One Thousand Three Hundred Six only) (including Education and S&H Education Cess) and order it to be recovered from M/s. Chhote Lal Virendra Kumar Jain, SB-116-117, Mangal

Marg, Lalkothi, Jaipur along with interest in terms of Section 75 of the said Act.

(ii) I also impose a penalty of Rs. 83,51,306/- (Rs. Eighty Three Lakh Fifty One Thousand Three Hundred Six Only) on M/s. Chhote Lal Virendra Kumar Jain, SB-116-117, Mangal Marg, Lalkothi, Jaipur u/s 78 of the Finance Act, 1994. However benefit of reduced penalty of 25% as per proviso to Section 78 *ibid*, is available to the noticees subject to the condition that Service Tax demand of Rs. 83,51,306/- and the interest payable thereon (on Rs. 83,51,306/-) u/s 75, is paid within thirty days from the date of communication of this order and further subject to the condition that the benefit of reduced penalty (25% of Rs. 83,51,306/-) shall be available if the amount of penalty so determined has also been paid within the period of thirty days from the date of communication of this order.

(iii) I impose a penalty of Rs. 200/- per day w.e.f. 01.05.2006 per day for the period during which such failure continued or at the rate of 296 of the amount of Service Tax due, per month, whichever is higher, till the date of actual payment of outstanding Service Tax, subject to maximum of service tax amount outstanding and payable/late paid up to 9.5.2008 u/s 76 of the Finance Act, 1994.

4. Against the order of adjudicating authority, appeal came to be preferred before the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) u/s. 86 of the Finance Act, 1994 along with an application for waiver of pre deposit seeking interim protection pending appeal. The Id. Tribunal after hearing the parties, vide its order dt. 20.9.2012 found *prima facie* case in favour of the petitioner and taking note of the interest of the revenue and the financial hardship of the appellant into consideration, passed the order which reads *infra*-

We looked into a sample work order of the appellant Shri Suresh Jaiswal. That shows that there were various activities carried out by that appellant to make the park useful. *Prima facie*, keeping aforesaid averments of both sides in view and also with the changed conception of law, we are of the belief that pre-deposit should be called for in all the three cases. As an interim measure, we direct all the three appellants to deposit 15% of service tax demand in each case within eight weeks from today and make compliance on 20.12.2012. Subject to deposit, there shall be waiver of pre-deposit of balance dues during pendency of the appeal or for a period of six months whichever is earlier.

5. After expiry of period of six months, a notice dt. 3.10.2013 came to be served upon petitioner from the office of respondent that the interim protection was for a period of six months and appeal is still pending but the stay granted by the CESTAT automatically stands vacated and called upon the petitioner to deposit the balance towards service tax along with interest and penalty in terms of order of the adjudicating authority under intimation to this office failing which necessary action shall be initiated for recovery of outstanding dues.

6. After notices came to be served upon petitioner, application dt. 30.10.2013

was filed before CESTAT seeking extension of order of pre deposit passed by the Tribunal dt. 20.9.2012 and that application was listed before the Tribunal on 23.1.2014. It has been alleged that the department was duly informed about the application filed before CESTAT seeking extension of the order of pre deposit passed by the Tribunal and intimation was also sent to the department regarding listing of the application before the Tribunal on 23.1.2014 and grievance of the petitioner is that despite proper intimation was sent to the department, notice u/ S. 87(b) of the Finance Act, 1994 was served on their Banker ICICI Bank, Nagar Nigam Branch, Jaipur to freeze account of the petitioner on 21.1.2014 and on 22.1.2014, a day prior to (23.1.2014), the date on which the application for extension of stay was coming up for hearing, the bank account of the appellant was debited and the total money of Rs. 3477714/- lying in the bank account of the petitioner was credited by the respondent to their own bank account and when the matter came before the Tribunal obviously after hearing the parties, the Id. Tribunal under its order dt. 23.1.2014 granted extension and observed as under:--

On condition of pre-deposit as stipulated, the petitioner was granted waiver of pre-deposit and by implication stay of recovery of the adjudicating liability. As the stay has expired in view of provisions of Sec. 35(2A) of the Central Excise Act, 1944, this application is filed seeking extension of stay. As the appeal could not be disposed of for no fault of the petitioner but in view of pendency of several older appeals, we extend operation of the stay granted on 20.9.2012, in so far as the petitioner is concerned, to operate during pendency of the appeal. This application is accordingly, disposed of".

7. It is pertinent to refer that after extension of the stay order passed by the Tribunal dt. 23.1.2014, a letter was sent from the office of respondent on 29.1.2014 to their Banker that in view of extension of stay order granted by the Tribunal, the proceedings initiated pursuant to notice dt. 21.1.2014 stands withdrawn with effect from 28.1.2014 which appears to be the date on which the respondent as alleged received intimation of the order passed by the Tribunal dt. 23.1.2014 in their office. But the fact is that the order dt. 23.1.2014 was passed by the Tribunal in the presence of the authorized representative of the department and whose presence is very much recorded in the order itself, however, the fact remains that after the proceedings stands withdrawn by the department after extension of the stay order initially granted on 20.9.2012 how far the department was justified and within its rights to still retain the amount which was recovered after attachment of the bank account of the petitioner by debiting its account on 22.1.2014.

8. The petition has been primarily filed for assailing attachment proceedings & notice dt. 21.1.2014 and consequent effect of recovery which was initiated by the respondent department by debiting the account of the petitioner on 22.1.2014 and the grievance of the petitioner further is that once the stay order has been extended by the Tribunal after hearing the parties on 23.1.2014 that

became operative by fiction of law during the interregnum period and the department is not justified to still retain the money at one time recovered by debiting the account of the petitioner on 22.1.2014 in view of the subsequent development taken place.

9. The reply to the petition has been filed and only objection which has been raised by the respondent is that initial stay order granted by the Tribunal dt. 20.9.2012 was automatically vacated after expiry of period of six months and accordingly the respondent was within their rights to initiate proceedings for recovery of balance amount and since the order of extension has been granted by the Tribunal on 23.1.2014, by that time money has been recovered by the department a day prior on 22.1.2014 & there could not now be a reverse entry and the effect would be that further proceedings for recovery of the balance amount could not be initiated and that is the reason for which the letter has been issued by the department dt. 29.1.2014 that in the changed circumstances further proceedings initiated in reference to the notice issued u/s. 87(b) of the Finance Act, 1944 be treated as withdrawn but as regard the reverse entry is concerned and prayed for by the petitioner in the present facts & circumstances of the case cannot be claimed by him.

10. It is an admitted case of the parties that the condition which was stipulated by the Tribunal while granting waiver from pre deposit vide order dt. 20.9.2012 was fully complied with by the petitioner and 15% of the tax as per the order of the Tribunal was deposited within the stipulated period and after expiry of the period of six months application was filed by the petitioner on 30.10.2013 and despite best efforts the application was listed before the Tribunal on 23.1.2014 and this Court can presume that it was well within the knowledge of the department of the application for extension being listed on 23.1.2014 and just to prepone the proceedings notice was served u/s. 87(b) of the Finance Act, 1944 dt. 21.1.2014 to the banker for freezing their account and debited on 22.1.2014 and when the matter came up before the Tribunal on 23.1.2014, in presence of the parties, the stay order earlier granted to the petitioner dt. 20.9.2012, was extended to continue pending appeal. Thus, by fiction of law, the stay remain operative during the intervening period as well.

11. It will be appropriate to take note of Sec. 35C(2A) of Central Excise Act, 1944 (introduced by Finance Act, 2002) which reads ad infra:--

35-C(2-A) The Appellate Tribunal shall, where it is possible to do so, hear and decide every appeal within a period of three years from the date on which such appeal is filed:

Provided that where an order of stay is made in any proceeding relating to an appeal filed under sub-section (1) of Section 35-B, the Appellate Tribunal shall dispose of the appeal within a period of one hundred and eighty days from the date of such order:

Provided further that if such appeal is not disposed of within the period specified

in the first proviso, the stay order shall, on the expiry of that period, stand vacated.

12. The third proviso in Sec. 35C(2A) inserted by the Finance Act, 2013 reads *ad infra*:

Provided also that where such appeal is not disposed of within the period specified in the first proviso, the Appellate Tribunal may, on an application made in the behalf by a party and on being satisfied that the delay in disposing of the appeal is not attributable to such party, extend the period of stay to such further period, as it thinks fit, not exceeding one hundred and eighty-five days, and in case the appeal is not so disposed of within the total period of three hundred and sixty-five days from the date of order referred to in the first proviso, the stay order shall, on the expiry of the said period, stand vacated.

13. It appears that the provision has been made for the purpose of curbing dilatory tactics of such of the assesseees who after getting interim order in their favour to continue by delaying the disposal of the proceedings and that certainly deprive the revenue not only of the benefit of the assessed value but at the same time of the decision on point which may have impact on other pending matters. But, at the same time, the third proviso has been inserted in Sec. 35C(2A) by the Finance Act, 2013 cannot be construed as punishing the assesseees for matters which may be completely beyond their control and we can take judicial notice of pendency of appeals and work load assigned to the Tribunals and it is not possible for the Tribunal to dispose of the matters under the mandate of law. Occasionally for the reason of other administrative exigencies for which the assessee cannot be held liable and if there is no reason attributable to the assessee regarding delay in disposal of the pending appeal or non-cooperation and if appeal could not have been heard which is beyond control of the petitioner/ assessee at least some balance has to be made to protect the right and interest of the assessee during intervening period the appeal remain pending before the Tribunal.

14. In the instant case, the Tribunal after hearing the parties on application dt. 30.10.2013 filed by the assessee seeking extension of stay order passed by the Tribunal dt. 20.9.2012, was of the view that the appeal could not be disposed of for no fault of the petitioner assessee but in view of pendency of other old appeals and that was the reason which prevailed upon the Tribunal to extend operation of the stay granted dt. 20.9.2012 during pendency of appeal vide its order dt. 23.1.2014, in our considered view, after the stay order granted on 20.9.2012 has been allowed to continue to be operative during pendency of appeal vide order dt. 23.1.2014, the proceedings which have been initiated by the department during the intervening period which have been treated to be withdrawn vide their later communication dt. 29.1.2014 by fiction of law, became honest and inoperative and the very initiation of the proceedings by the respondent u/s. 87(b) of the Finance Act, 1944 dt. 21.1.2014 served on the banker of the petitioner and the bank account of the petitioner which was debited

through bank attachment on 22.1.2014 could not be held justified in the eye of law and we find substance in the submission made by the petitioner that after passing of the order by the Tribunal dt. 23.1.2014 respondents remain under obligation to refund the money which was recovered from the petitioner by debiting the petitioner's account on 22.1.2014 and the very initiation of the proceedings deserves to be quashed in the eye of law in view of the order of Tribunal dt. 23.1.2014.

15. Be that as it may, it is the settled principles of law and which is consistent and recognized that where a case is not considered because of multiplicity of business of the Court the party ought not to be prejudiced by that delay and when an act of the Court can prejudice no man, ditto would be for an omission in keeping with the aforesaid principles that if the matter has not been taken up for consideration on a given date at least the litigant cannot be left to suffer for such reason over which he has no control. The reason or cause for such eventuality could be many and usually as we have noticed that because of heavy load of work but still litigant cannot be made to suffer for these reasons but keeping in view the mandate of law by introducing Sec. 35C(2A) by Finance Act, 2002 and a third proviso added by Finance Act, 2013 in particular, it will be for the Tribunal to see that the matters must be decided within the period stipulated under the mandate of law, at the same time, where definite stay order has been granted, such cases must be heard on priority basis.

16. Before finally concluding the judgment, we would like to observe that it is a case of peculiar nature which is brought to our notice that initially the stay order was passed by the Tribunal of pre deposit on certain conditions granting waiver of pre deposit after detailed discussion on 20.9.2012 and after the notice came to be served by the department on 3.1.2014 much prior thereto application was filed by the petitioner dt. 30.10.2013 before the Tribunal seeking extension of stay granted on 20.9.2012 and knowing it fully well that application is coming up before the Tribunal on 23.1.2014 such hasty steps by service of notice u/s. 87(b) of the Finance Act, 1944 on 21.1.2014 freezing the bank account of the petitioner pursuant to notice dt. 3.1.2014 and to recover the amount by debiting the petitioner's bank account on 22.1.2014 i.e. a day prior to the date i.e. 23.1.2014 on which date the application for extension was coming up before the Tribunal cannot be appreciated and it tantamount to overreaching the process of law which cannot be approved by this Court.

17. We, however, make it clear that we are not examining the matter on merits and what is being observed by us is only confined to the disposal of the present writ petition and the Tribunal may not be influenced/inhibited by the observations made or considered in any collateral proceeding pending in any court of law or before adjudicating authority and the Tribunal may decide the pending dispute independently and it is also expected that pending appeal of the petitioner may be decided expeditiously in accordance with law. Consequently, the writ petition succeeds and stands allowed. The notice issued u/s. 87(b) of the Finance Act,

1944 dt. 21.1.2014 and further action debiting the petitioner's Bank account dt. 22.1.2014 are hereby quashed and set aside and the respondents are directed to refund the amount which was debited on 22.1.2014 from the petitioner's bank account within two weeks. No costs.