(2012) 11 P&H CK 0175

In the Punjab And Haryana At Chandigarh

Case No : Civil Writ Petition No. 20823 and 18723 of 2012

Country Builder Pvt. Ltd. APPELLANT

Vs

State of Haryana and Others RESPONDENT

Date of Decision : 20-11-2012

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Haryana Value Added Tax Act, 2003 — Section 20, 20(11), 20(4), 20(9), 21

Citation : (2013) 170 PLR 77

Hon'ble Judges : G.S. Sandhawalia, J;Ajay Kumar Mittal, J

Bench : Division Bench

Advocate : Avneesh Jhingan, for the Appellant; Nitin Kaushal, A.A.G., Haryana for State, for the Respondent

Final Decision : Allowed

Judgement

G.S. Sandhawalia, J.—This shall dispose of two petitions namely CWP No. 20823 and 18723 of 2012, as common questions of facts are involved in both the cases. For facts, CWP No. 20823 of 2012 is being referred to. The present petition has been filed under Article 226 of the Constitution of India praying for issuance of a writ in the nature of certiorari quashing order dated 27.09.2012 (Annexure P-5) whereby, approval for withholding refund of Rs. 21,88,947/- was ordered by the Excise and Taxation Commissioner, Haryana-respondent No. 4 (hereinafter referred to as "The Commissioner") and for a direction to refund the said amount alongwith interest thereon.

2. The pleaded case of the petitioner is that it is a private limited company and engaged in the business of Contractor and a registered dealer under the Haryana Value Added Tax Act, 2003 (hereinafter referred to as "The Act") and also under the Central Sales Tax Act, 1956. The petitioner is having TIN No. 06461217440 and is registered at Faridabad in Haryana. The return for the assessment year 2008-09 had been filed which was taken up for scrutiny and assessment was finalized on 08.02.2012. The petitioner was found entitled to refund of Rs.

22,94,392/-, Since no refund was received, the petitioner approached the authorities and was informed that the audit had raised certain objections in May, 2012. The Deputy Excise & Taxation Commissioner, Faridabad East (hereinafter referred to as "DETC") recommended issuance of refund of Rs. 21,88,947/-. The departmental authorities were of the view that the finalization of audit objections would take time, therefore, a surety bond/security from the Director of the company be taken to safeguard the interest of the department. Surety bond was furnished for Rs. 23 lacs on 13.06.2012, which was verified and found to be genuine and solvent. However, the assessing authority was asked for a report, who was of the opinion that recovery was not possible in normal course. A notice of revision was issued to the petitioner on 29.08.2012 for 12.09.2012 and inspite of the request of the petitioner made on 24.08.2012 and 18.09.2012, order dated 27.09.2012 was issued u/s 21 of the Act withholding the refund. Referring to Section 21 of the Act, it was pleaded that the order was non-speaking and violative of principles of natural justice. Reliance was also placed upon decision of this Court in C.W.P. No. 19172 of 2006 titled M/s Ratti Woolen Mills v. State of Punjab and others, decided on 01.02.2007 (Annexure P-6).

3. In the written statement filed by respondents No. 1 to 4, it was admitted that vide assessment order dated 08.02.2012, refund of Rs. 21,88,947/- had been approved. It was, however, submitted that proceedings u/s 34 of the Act were pending before respondent No. 3 i.e. DETC (ST), Faridabad (East). It was further averred that respondents No. 2 and 3 were of the opinion that the revisional action would end up in drastic reduction of amount of refund and, therefore, a request was made to respondent No. 4 for ordering withholding of refund in terms of Section 21(2) of the Act. It was further submitted that the order by respondent No. 4 had been made after examining the satisfaction of respondents No. 2 and 3 as regards the adverse effect on recovery of tax dues. It was further pleaded that the petitioner had approached this Court without exhausting the statutory remedies of the first and second appeals provided under the Act. Reliance was placed upon the judgment of the Hon''ble Apex Court in Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others, The judgment in CWP No. 19172 of 2006 was sought to be distinguished on the ground that it was under the Punjab Act. It was further submitted that there is an under assessment amounting to Rs. 51,75,871/- as per the audit objections and, therefore, the surety bond of Rs. 23 lacs could not be considered adequate. The additional revenue of Rs. 28,75,872/- would be added if the audit objections are found to be correct Section 21 of the Act did not provide any provision for envisaging issuing of notice or affording of opportunity of hearing prior to an order u/s 21(2) of the Act. The order u/s 21 of the Act is appealable under Sections 33 and 36 of the Act.

4. In CWP No. 18723 of 2012 filed prior in point of time, the petitioner had sought refund of Rs. 22,94,392/- alongwith interest. Notice of motion was issued on 20.09.2012, however, thereafter, the withholding order was passed on 27.09.2012 by respondent No. 4 which now is the subject matter of challenge in

CWP No. 20823 of 2012. Accordingly, both the cases are being decided by a common order.

5. Counsel for the petitioner submitted that the order dated 27.09.2012 is a non-speaking order without recording any reasons in writing passed at the back of the petitioner and is liable to be quashed on this ground, alone. Under the provisions of the Act in view of Section 20 and Rules 41 and 42, the authorities were under an obligation to refund the amount within a period of 60 days and thereafter were liable to pay interest @ 1% per month.

6. Counsel for the State, on the other hand, submitted that since a revision notice dated 28.08.2012 had been issued by the DETC and in pursuance of the same, the Commissioner had accorded the approval for withholding of the refund, the action of the State was justified.

7. After hearing learned counsel for the parties, we are of the opinion that the writ petition is liable to the allowed. It is a common case of the parties that vide assessment order dated 08.02.2011, it had been directed that the refund voucher for Rs. 22,94,392/- was to be issued as per the order of the Assessing Authority. However, at the stage of getting the approval from the higher authorities, the DETC opined that since there were objections by the audit, surety and security bonds be taken from the Director of the company equivalent to the amount of refund. The surety bond was also accepted on 13.06.2012 by the DETC and file was sent to the JETC for further examination and necessary action. Thereafter the order was passed that the Assessing Authority be asked to make a report as to whether recovery can be effected in normal course if refund is allowed and further if an additional demand is created in the revisional order whether recovery would be possible. Accordingly, orders were passed that the refund be withheld. In pursuance of the said proceedings, a revision notice was also issued on 28.08.2012 u/s 34 of the Act and the petitioner filed an application on 18.09.2012 for payment of the refund. Thereafter, the withholding order was passed on 27.09.2012 which reads as under:-

Whereas refund amounting to Rs. 21,88,947/- (Rupees Twenty one lac eighty eight thousand nine hundred and forty seven only) for the year 2008-09 under Haryana Value Added Tax Act, 2003 is due to M/s Country Builder Pvt. Ltd., Faridabad holding TIN 06461217440.

And whereas order giving rise to refund is subject matter of further proceedings.

And whereas it has been certified that recovery of the amount ultimately found due will be adversely affected later on, if the refund is allowed.

Now, therefore, I Anurag Rastogi, IAS, Excise & Taxation Commissioner, Haryana, Panchkula in exercise of the powers conferred u/s 21 of Haryana Value Added Tax Act, 2003 do hereby accord approval for withholding of refund of Rs. 21,88,947/- (Rupees Twenty one lac eighty eight thousand nine hundred and forty seven only) due to M/s. Country Builder Pvt. Ltd., Faridabad.

8. The primary issue that arises for adjudication in this case would be whether the respondents were justified in withholding refund u/s 21 of the Act.

9. Section 21 of the Act reads as under:-

[Power to withhold refund]

21.- (1) Where an order giving rise to a refund is the subject matter of further proceedings and the taxing authority interested in the success of such proceedings is of the opinion that the grant of the refund is likely to adversely affect the recovery in the event of success of such proceedings, he may, for reasons to be recorded in writing, withhold the refund and shall, if such authority is below the rank of Commissioner, refer the case, within thirty days of the application for the refund, to the Commissioner for order.

(2) If a reference has been made to the Commissioner under sub-section (1) in time, he may either pass an order withholding refund or direct that refund be made on furnishing of security except cash security of the like amount or decline to withhold the refund.

10. Section 21 provides that where an order gives rise to the refund and is a subject matter of further proceedings, then the Taxing Authority which may be adversely affected in the event of success of such proceedings may withhold the refund for the reasons to be recorded in writing. The matter is to be referred to the Commissioner, who may pass such an order for directing withholding of refund or refund could be made on furnishing of security or decline to withhold the refund.

11. In the present case, the petitioner has specifically pleaded in para no. 11 of the writ petition that the company had a gross receipt of Rs. 5,11,72,855/- for the year 2009-10 and there was a refund due of Rs. 14,92,405/- Gross receipts for the year 2010-11 were of Rs. 5,73,73,005/- and there was a refund due of Rs. 19,16,371/- and also for the year 2011-12, there was a refund of Rs. 18,78,480/- and thus the respondents were wrong in saying that recovery could not be effected. The respondents have not controverted the aforesaid factual averments of the petitioner.

12. In the present case, on reference the Commissioner has passed the order without giving any reasons and only following the reference. The said order is apparently an order which is a non-speaking order and without any application of mind and is liable to be quashed on this ground itself. Under sub section 2 of Section 21, the Commissioner has three options on reference. He could either pass an order withholding refund, or direct refund on furnishing of security except cash security, or thirdly decline to withhold the refund. Thus, the reasons for passing the order are in built in sub section (2) of Section 21 of the Act The Commissioner has thus to give reasons for declining for withholding the refund on the furnishing of the security and could not without any reasons withhold the refund.

13. A perusal of the order reproduced above goes on to show that no reasons have been given in the order dated 27.09.2012. It was noticed that the order giving rise to refund was subject matter of further proceedings and it had been certified that the recovery of the amount ultimately found due would be adversely affected later on, if the refund is allowed and the refund was directed to be withheld. Section 21 of the Act provides that the Taxing Authority itself is to record reasons in writing and if the authority is below the rank of the Commissioner, he is to refer the case within 30 days of the application for refund to the Commissioner.

14. This Court, in National Agricultural Co-operative Marketing Federation of India Ltd. Vs. State of Haryana and Others, while examining the provisions of Section 44 of the Haryana General Sales Tax Act, 1973 on the issue of the power to withhold the refund, held that where the Commissioner had failed to record any reasons as to how recovery is likely to be affected it would make the order wholly unsustainable and liable to be set aside. The relevant part of the judgment reads as under:-

7. A perusal of impugned order dated 28.4.2006 (P. 8) shows that it has recorded a finding granting approval to withhold refund of Rs. 4,32,21,206/- by observing that recovery of the aforesaid amount would be adversely affected later on if the refund is allowed. The Commissioner has failed to record any reason as to how the recovery is likely to be affected. The order is totally laconic as it does not give any reasons. There is not even a whisper of the material forming basis of aforesaid satisfaction by the Commissioner. The impugned order is wholly unsustainable in the eyes of law and is, thus, liable to be set aside.

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10. In similar circumstances this Court has quashed order withholding refund in the case of Sadhu Overseas Vs. State of Haryana and Another, and Ratti Woolen Mills v. State of Punjab, (2007) 29 P.H.T. 556. It may be pertinent to point out that the order withholding refund of huge amount running into crores should not be mechanically passed and the authorities working under the Act are required to be sensitized that the entrepreneurs who have limited liquidity are likely to suffer in their business enterprise. If the business enterprise comes to a stand still it does not advance the interest of the revenue because the State would stop earning revenue when the business of an entrepreneur comes to a grinding halt. The State authorities would be better advised if the aforesaid rationale is kept in view. While passing order withholding refund a balanced approach has to be adopted.

15. Thus, withholding order of refund is held to be legally unsustainable, the order dated 27.9.2012 (Annexure P-5 in CWP No. 20823 of 2012) is hereby quashed. The next corollary that follows is whether the petitioner is entitled to refund at requisite interest thereon.

16. That a perusal of Sections 20(4) to 20(11) goes on to show that where the

excess amount has been paid, refund will be allowed by the Assessing Authority and shall carry interest @ 1% per month. u/s 20(9), the refund after a period of 60 days from the date of making application shall carry simple interest at the rate of one per cent per month. Similarly, sub-section 10 of Section 20 provides for refund within 60 days of the passing of the order. Sections 20(4) to 20(11) of the Act read as under:-

20(4) Where the assessing authority finds on assessment of a dealer that he has paid any amount in excess of tax, interest or penalty assessed or imposed on him under this Act, it shall allow refund of the excess amount or allow the same to be carried forward for adjustment with future tax liability, as the case may be.

(5) Any amount refundable to any person as a result of an order passed by any court, appellate authority or revising authority, shall be refunded to him on an application containing the prescribed particulars accompanied with the prescribed documents made in the prescribed manner to the prescribed authority.

(6) The amount refundable under the foregoing provisions of this section to any person shall be subject to the approval in the prescribed manner of the prescribed authority who may, by order in writing passed after providing opportunity of being heard to the affected person, change the amount of refund or order that no refund is due.

(7) Before any refund is given to any person under this Act it shall be first adjusted with any amount due from him under this Act or the Central Act for any period and the balance, if any, only shall be refunded to him.

(8) Any amount ultimately found due to any person, which he paid as a result of an order passed under this Act, shall be refunded to him with simple interest at the rate of one per cent per month for the period from the date of payment to the date when refund is given to him.

(9) Any amount, not falling within sub-section (8), refunded after a period of sixty days from the date of making an application under subsection (5) shall carry with it simple interest at the rate of one per cent per month for the period from the date of making the application to the date when the refund is made.

(10) Any amount due to a dealer under sub-section (4) but not refunded to him within sixty days from the date of passing the order allowing the refund, shall carry with it simple interest at the rate of one per cent per month for the period from the date of passing the order allowing the refund to the date when the refund is made.

(11) Where any question arises as to any period to be excluded for the purposes of calculation of interest payable under sub-section (9) or sub-section (10) because the delay for the period in question has been due to the fault of the assessee entitled to the refund, such question shall, after giving the assessee a reasonable opportunity of being heard, be determined by the Commissioner by an order in writing.

17. As per Rule 41(4) of the Haryana Value Added Tax Rules, 2003 also, interest is to be paid @ 1% per month from the date of order to the date when the refund payment order is issued. The said Rule reads as under:-

Rule 41. (4) While framing the assessment of a dealer for any period, the assessing authority shall, after such scrutiny of its record and the record maintained by the dealer and after making such enquiries as it considers necessary, determine the output tax, purchase tax, input tax and the amount of tax paid by the dealer for the assessment period. If the assessing authority finds that the sum of tax paid and input tax exceeds the sum of output tax and purchase tax, it shall determine the excess amount and from the excess amount it shall then deduct any amount due from the dealer, whether under the Act or the Central Act and it shall allow from the balance amount refund of the amount determined in accordance with the provisions of sub rules (1), (2) and (3). If the balance amount falls short of the amount determined under sub-rules (1), (2) and (3), the refund shall be restricted to the balance amount otherwise it shall be allowed in full and the balance left thereafter, if any, shall be carried forward for adjustment with future tax liability. The assessing authority shall, + in respect of the amount to be refunded to the dealer, issue to him at his option a refund payment order in form S.T.R. 34 prescribed under the Punjab Subsidiary Treasury Rules or refund adjustment order in Form VAT-G9 and where it fails to do so within sixty days of the date of the assessment order allowing the refund, there shall be paid interest to the claimant at the rate of one per cent per month from the date of the order to the date when the refund payment order or refund adjustment order, as the case may be, is issued to him.

18. That under the Act, the refund had to be paid to the petitioner within 60 days, failing which, interest was liable to be paid. The assessment was done on 08.02.2012 and thereafter no action was taken, rather surety bond was accepted on 13.06.2012 and the revision notice was issued on 28.08.2012 much after the expiry of 60 days. This Court in Bhasin Associates Vs. State of Haryana and Others, Sales Tax Cases (P & H) 109 and M/s. Khem Ram Devi Sahai v. State of Haryana and another, S.T.I. 2004 Punjab & Haryana High Court 9 has directed that the refund be made to the petitioner alongwith interest. Again in C.W.P. No. 4611 of 2012 titled M/s. Anant Raj Cons. & Development (P) Ltd. v. State of Haryana and another, decided on 19.11.2012, this Court has also held likewise.

19. Adverting to the issue of alternative remedy raised by the State, it has been time and again held that where the action of the State is totally without jurisdiction, and when the principles of natural justice have been violated, this Court under Articles 226 and 227 of the Constitution of India would not be barred from exercising jurisdiction even though there was an alternative remedy provided under the Statute, Reference can be safely made to the judgments of the Hon''ble Apex Court in M.P. State Agro Industries Development Corporation Ltd. and Another Vs. Jahan Khan, , and Union of India (UOI) and Others Vs. Tantia Construction Pvt. Ltd., Accordingly, the present petition is allowed and the

respondents are directed to refund sum of Rs. 21,88,947/- alongwith interest @ 1% per month from the date after expiry of 60 days after passing of the assessment order i.e. 08.04.2012 till payment. The said amount be paid to the petitioner within a period of one month from the date of receipt of certified copy of the order.

