
(2010) 11 AP CK 0020
In the Andhra Pradesh High Court
Case No : Writ Petition No. 9108 of 2010

Dr. Reddy's Laboratories Limited

APPELLANT

Vs

The Assistant Commissioner (CT) LTU and Another

RESPONDENT

Date of Decision : 03-11-2010

Acts Referred:

Andhra Pradesh General Sales Tax Act, 1957 — Section 33C
Andhra Pradesh Value Added Tax Act, 2005 — Section 15, 15(1), 2(24), 31, 33
Andhra Pradesh Value Added Tax Rules, 2005 — Rule 35, 37, 38(8), 38(9), 59
Central Sales Tax Act, 1956 — Section 5(1), 5(3)
Constitution of India, 1950 — Article 265

Citation : (2011) 37 VST 76

Hon'ble Judges : V.V.S. Rao, J;Ramesh, J

Bench : Division Bench

Advocate : S. Dwarakanath, for the Appellant; A.V. Krishna Koundinya, Special Standing Counsel for Commercial Taxes, for the Respondent

Final Decision : Allowed

Judgement

V.V.S. Rao, J.—An important recurring question concerning the authority of the State and its agents in the matter of refund of Value Added Tax (VAT) (sales tax as well), again falls for consideration in this writ petition in which fact of the matter is not at all disputed. The refund of duly paid VAT as certified by the competent tax authority, and the question of authorizing/approving such refund by an inferior authority also incidentally arises for consideration.

2. The petitioner, a manufacturer of drugs, is a VAT dealer on the rolls of the Assistant Commissioner (LTU), Punjagutta Division - first respondent herein. The assessment for 2005-06 was completed resulting in refund of VAT. The petitioner filed an application in Form No. 115 u/s 40 of the Andhra Pradesh Value Added Tax Act, 2005 (VAT Act) and Rule 37 of the Andhra Pradesh Value Added Tax Rules, 2005 (VAT Rules), claiming refund of about Rs. 3.53 crores. The first respondent conducted enquiry and while accepting the claim restricted the same to about Rs. 3.00 crores. On further enquiry by the Deputy Commissioner, the

refund was again restricted to about Rs. 2.87 crores. The petitioner then made an application for refund of the said amount to the second respondent, namely, the Joint Commissioner. On its being forwarded, the Joint Commissioner (CT), Audit-II disallowed the refund. Being aggrieved by the said order dated 06.4.2008, the petitioner preferred an appeal before the Sales Tax Appellate Tribunal. The same being T.A. No. 428 of 2008 was allowed on 01.6.2009. Thereafter the petitioner made an application dated 24.7.2009 to the first respondent. The same was forwarded to second respondent who, by communication 14.9.2009, instructed the first respondent to withhold the refund till the disposal of Tax Revision Case. An endorsement dated 16.2.2010 was made/issued by the first respondent aggrieved by which the present writ petition is filed. At the stage of admission itself, as directed by us, the Special Counsel for Commercial Taxes has filed the counter affidavit of the first respondent. The case of the petitioner stands admitted.

3. This Court heard the Counsel for petitioner and the Special Counsel. Sections 15, 38, 39 and 40 of VAT Act deal with refund of tax. Rule 35 read with Rule 59 of VAT Rules enumerate the prescribed authority and the procedure for claiming refund by a VAT dealer.

4. Section 15(1) appears in Chapter III of VAT Act, which contains the charging provision (Section 4) and other incidental provisions. The same confers a special power on the Government to grant refund to any person of tax paid on the purchases effected by him, "if it is necessary so to do in the public interest". Section 15 of VAT Act, thus, does not confer any right on any VAT dealer. It is a power on the Government to refund tax in public interest. The claim for refund under Sections 38 and 39 read with 40 of VAT Act appearing in Chapter V. (Procedure for administration of tax returns and assessment), however, deal with the right of a VAT dealer or right of TOT dealer to seek adjustment of excess tax paid in subsequent returns, or claim refund at the time of cancellation of registration. We shall presently point out the distinction between the Government granting refund under Chapter II, and the enforceable right of a dealer to seek refund of tax under the provisions of Chapter V, which is apparent and is given to understand the nature of the right.

5. The conspectus of Sections 38, 39 and 40 of VAT Act read with Rules 35 and 59 of VAT Rules would reveal the following.

6. The question of refund arises in two situations. First, in the case of a VAT dealer effecting sales under Sections 5(1) and (3) of the Central Sales Tax Act, 1956. In such a case, if the input tax credit exceeds the amount of tax payable on condition of proving that the exports have been made outside the territory of India, the excess VAT shall be refunded within a period of 90 days. In the second category of cases, the VAT dealer can claim refund of excess tax credit available at the end of the second year after the commencement of the Act, and thereafter in the return to be filed in the month of March every year. Such cases of input tax credit claimed as refund shall be refunded within 90 days from the date of

receipt of the claim. In either case, it is for the VAT dealer to satisfy the authority prescribed by producing the accounts and records in substantiation of the claim. If the prescribed authority fails to make refund, in either of these situations, the amount of refund shall carry simple interest at 12% per annum. Yet another category of situations provided in Section 39 of VAT Act is if the decision of assessing authority is reversed by the appellate authority u/s 31, or the appellate authority u/s 33, or appellate Tribunal u/s 33, or the High Court u/s 35, and the dealer can claim refund which shall be made within a period of 90 days as otherwise it would carry interest at 12% per annum for the period of delay. "Authority prescribed" is not defined in the VAT Act. As per Section 2(24) of VAT Act, "prescribed" means prescribed by the Rules made under VAT Act. Rule 59 of VAT Rules specifies the authorities for the purpose of exercising powers, namely, registration of VAT/TOT dealers, receipt of tax returns, assessment/reassessment, search and seizure, imposing penalties, passing orders for forfeiture, prosecution etc. Serial No. 6 in the table under Rule 59 of VAT Rules deals with refund of VAT and TOT. A Deputy Commercial Tax Officer as authorized by the Commercial Tax Officer (CTO) is competent to refund or adjust the excess tax paid to a TOT dealer u/s 38(7) of the VAT Act read with Rule 35 of VAT Rules. For the purpose of Section 38(1), (2), (3) and (6) of the VAT Act and Rule 35 of the VAT Rules, the authorities for the purpose of ordering refund are: (i) CTO - if the amount does not exceed Rs. 50,000/-; (ii) in the case of LTU dealers, the Assistant Commissioner - if the sum does not exceed Rs. 2,00,000/-; (iii) the Deputy Commissioner - in case the sum does not exceed Rs. 10,00,000/-; and (iv) in case the sum exceeds Rs. 10,00,000/- - the Joint/Additional Commissioner in the Office of the Commissioner of Commercial Taxes. At this stage, it is imperative to refer to Section 40 of VAT Act, which reads as under.

40. Power to adjust, withhold refunds

(1) The Commissioner or the authority prescribed shall have the power to adjust any amount due to be refunded against any tax, penalty and interest outstanding against a VAT dealer or a TOT dealer or any other dealer.

(2) Where an order giving rise to a refund is the subject matter of an appeal or further proceeding, or where any other proceeding is pending, and the authority prescribed is of the opinion that the grant of the refund is likely to adversely affect the revenue, the authority prescribed may, with the previous approval of the Deputy Commissioner, withhold the refund till such time as the Deputy Commissioner may determine.

(3) Where any demand of tax or penalty or both is disputed by a VAT dealer or TOT dealer before any appellate authority or Sales Tax Appellate Tribunal or High Court and the demand becomes finally due either partly or fully an interest at the rate of one percent per month shall be charged from the date such tax or penalty was originally due.

7. Sections 38 and 39 of the VAT Act confer right to claim refund/ adjustment of

VAT and/or TOT subject to the power of the Commissioner or prescribed authority to adjust any amount due to be refunded against any tax, penalty and interest outstanding against a VAT/TOT dealer. Sub-section (2) of Section 40 of the VAT Act confers power on the authority prescribed to withhold the refund if, "the grant of refund is likely to adversely affect the Revenue". The order to withhold shall be made with prior approval of the Deputy Commissioner till such time he may determine. In the case on hand, indisputably the first respondent on the advice of the second respondent passed the impugned endorsement u/s 40(2) of the VAT Act. Therefore, it is necessary to consider the issue as to whether Section 40(2) of the VAT Act is intended to take away the right conferred under Section 38 and 39 of the VAT Act. Is it possible to argue that any refund would adversely affect the Revenue during the pendency of appeal or further proceeding? If the intention of the Legislature was to bar refund under Sections 38 and 39 of VAT Act, the discretion vested in the prescribed authority to withhold refund would not have found place in the statute. The right to seek refund and the right to claim interest, in the event refund is not made within the prescribed period of 90 days, would indicate that mere pendency of an appeal or further proceeding is no ground to withhold refund. If the appeal of VAT/TOT dealer goes against the Revenue, they can still withhold the refund on the premise that there is likelihood of revision to the High Court u/s 34(1) of the VAT Act. Rule 35 of the VAT Rules deals with the procedure for refund. Sub-rules (8) and (9) of Rule 38 of VAT Rules, stipulate that any lapse in refunding the excess paid tax would be penalized by levy of interest at 12% per annum for the period of delay. Similar questions have been considered by this Court in the two following cases.

8. In *M/s Pulp N'Pack Private Ltd. and Tadimalla Nidadavote Mandal Vs. The Commercial Tax Officer and The Deputy Commissioner (CT) Eluru Division*, a Division Bench of this Court considered Section 33C of the Andhra Pradesh General Sales Tax Act, 1957 (APGST Act) (which stands repealed by VAT Act), which is almost in pari materia with Section 40(2) of VAT Act. It was held that, "Since Section 33C confers a discretion but not an absolute power to withhold refund and only on the formation of an opinion as to the adverse impact on Revenue, the assessing authority must exercise discretion on relevant grounds and for germane reasons. "It was further held that, "On an analysis of the authorities and on first-principle analysis as well, it is clear and we accordingly hold that exercise of power u/s 33C of the Act of 1957 (ordering withholding of refund) (a) cannot be on the mere and only reason that an appeal or further or other proceedings under the Act is pending; and (b) the order must record reasons and must set out the relevant facts and circumstances constituting the basis for the formation of an opinion that the grant of refund would adversely affect the Revenue." Dealing with the phrase "adversely affect the Revenue" appearing in Section 33C of APGST Act (as in Section 40(2) of VAT Act), this Court laid down thus.

The legislative intent underlying the conferment of the discretion (to order

withholding of refund) is clear from the architecture of Section 33C. If the legislative intent were that wherever an order giving rise to a refund is the subject matter of appeal or further proceedings or other proceedings under the Act is pending, the provision would have clearly enjoined that no refund need be made till the conclusion of the appeal or further proceeding. Such is not the legislative prescription.... The structural prescription that only when an order (giving rise to a refund) is the subject matter of an appeal or further proceedings or where any other proceedings under the Act is pending, is to ensure legislative vitality to grant of power to withhold the refund. Article 265 of the Constitution enjoins that no tax shall be levied or collected except by authority of law. The taxing legislation, whether the Act of 1956 or the Act of 1957 together with the schedules thereunder and other executive instructions relating to exemptions or clarifications constitute the cornucopia of legislative authority for the levy and collection of tax, within the meaning of Article 265. Where a quasi judicial or judicial authority determines in appeal or further or other proceedings the liability of an assessee or licensee such determination constitutes the liability to tax of an assessee or licensee within the raft of legislative authority. The assessee or licensee cannot be subjected to a tax liability beyond such determination. Therefore any levy or collection or even the withholding of any excess amount (of or towards a tax) levied or collected from an assessee or licensee, beyond what has been determined in the appeal or further proceedings, would fall foul of Article 265. Refund of the excess amount levied and collected is in the circumstances a constitutional necessities and any legislation enabling the withholding of the refund (finally determined as due), in the circumstances would be ultra vires the legislative power of the State.... Where however an order giving rise to a refund is the subject matter of an appeal or further proceeding or any other proceeding under the Act is pending, it would mean that the determination of the tax liability of an assessee or licensee by an appellate authority under the Act is not final but is in a measure tentative and subject to further consideration in such appeal or further proceedings whether before a Tribunal or a court. The structural condition that an order giving rise to a refund must be the subject matter of appeal or further proceedings or any pending other proceeding under the Act, is thus a prescription to ensure that the conferral of the discretion to withhold a refund is within constitutional limits.

9. The Division Bench therein held that, "prior approval of the Deputy Commissioner for withholding the refund would not be sufficient to satisfy the requirements of law."

10. Section 40(2) of the VAT Act was considered by a Division Bench comprising one of us *Bharath Sanchar Nigam Limited Vs. State of Andhra Pradesh and The Deputy Commissioner (CT), Government of Andhra Pradesh, Abids Division*, Whether authorities prescribed have unfettered right to withhold the amount payable to the assessee by way of refund u/s 40(2) of VAT Act? After analyzing Section 40 of VAT Act, the Division Bench held.

11. It is deplorable that the State, which is supposed to act fairly, has come out with a case that TRC No. 245 of 2008 has been filed against the order of the STAT in T.A. No. 1142 of 2007 and, therefore, the power u/s 40(2) of the APVAT Act has been exercised. It is also pertinent to note that by not making payment of the refund, the respondent-authorities, who are litigants before this Court in the TRC, wherein the validity of the order dated November 28, 2007 in T.A. No. 1142 of 2007 passed by the STAT has been challenged, have granted stay to themselves. A litigant cannot decide that he would not implement the order passed by a lawful authority because he has challenged the validity of the said order before a higher forum. Unless the higher forum stays implementation of the said order, the order passed by the concerned authority must be complied with.... It is also pertinent to note that in the event of the State succeeding in the aforesaid TRC, the petitioner will have to make payment of tax along with interest thereon and, therefore, in that event, the State is not to suffer at all, whereas, at present, when the petitioner has already succeeded before the STAT and if the amount payable to the petitioner is withheld, the petitioner would be adversely affected.

12. The above two precedents conclusively show that on a mere subjective opinion that the refund would affect the Revenue adversely, it cannot be withheld. The Government as a litigant to the case before the appellate Tribunal cannot be permitted to withhold the refund only on the ground that they intend to file a tax revision case. Section 40(2) of the VAT Act requires prior approval to withhold the refund by the Deputy Commissioner. When the statute prescribes the authority and also prescribe other authorities for refund/adjustment of VAT/TOT, notwithstanding the fact that the approving authority is a higher official, the legislative choice of conferring power on the Deputy Commissioner cannot be ignored. Even if the Joint Commissioner, by virtue of Rule 59 of VAT Rules, is the authority to approve refund if the amount exceeds Rs. 10,00,000/-, in the event of withholding refund, necessary approval of the Deputy Commissioner has to be obtained. We do not find any inconsistency or incongruity therein. More often than not any quasi-judicial authority would be inferior in the organizational set up in comparison to an authority who takes administrative decisions. On that ground also the advice of the second respondent to the first respondent based on which the impugned endorsement is issued cannot be sustained.

13. Before parting with this case, we are compelled to observe certain things that are recurring in the VAT administration in the State of Andhra Pradesh especially in the area of refunds/ adjustments. More often than not we have come across cases where Joint Commissioners/Additional Commissioners have sent proposals for refund to the Government and the approval never comes from the Government. As observed by the Division Bench in BSNL, so as to achieve the distinction of enforcing a fair tax paying structure, the State must act fairly. If the appropriate prescribed authority decides the amount to be refunded, any lapse on the part of the State Government or any of its agents in withholding the same would certainly be violative of Article 265 of the Constitution of India.

Repeated contravention of Constitution provision cannot be approved. The State Government would do well to prescribe a time schedule to ensure timeliness in granting approvals for refund of the amounts which it appears has been in place not by reason of the statute or the delegated legislation but only because of certain executive instructions. As there is no challenge to these instructions, we refrain from saying anything more. The argument that the delayed refund would attract interest at 12% per annum is no answer if one appreciates the fact that no businessman or merchant would like the money to be locked up just for the sake of 12% return on the refund, which might come long after the requirement for money is over. Keeping this in view, we direct the Government to pass appropriate orders in all pending refund matters within a period of six weeks.

14. In the result, for the above reasons, the writ petition is allowed as prayed for. The respondents shall consider refunding the amount of Rs. 2,87,14,114/- (Rupees two crores eighty seven lakhs fourteen thousand one hundred and fourteen only) within a period of four weeks from the date of receipt of a copy of this order.