

(2017) 01 GUJ CK 0134
In the Gujarat High Court
Case No : 17876 of 2016

M/S CROMPTON GREAVES LIMITED & ANR.

APPELLANT

Vs

STATE OF GUJARAT

RESPONDENT

Date of Decision : 19-01-2017

Acts Referred:

Constitution of India, Article 226 - Power of High Courts to Issue certain writs
Central Excise Act, 1944, Section 11(b) - Recovery of sums due to Government
Gujarat Sales Tax Act, 1969, Section 41, Section 41, Section 54, Section 54, Section 49(2), Section 49(2), Section 15(b), Section 15(b), Section 65(4), Section 65(4), Section 54(1)(aa), Section 54(1)(aa), Section 51(1)(aa), Section 51(1)(aa) - Assessment of taxes. - Interest on delayed refund. - Exemptions - Purchase tax payable on certain purchases of goods. - Appeal. - Interest on delayed refund. - Drawback, set off, refund etc.

Citation : (2017) 01 GUJ CK 0134

Hon'ble Judges : M R Shah, B N Karia

Bench : Division Bench

Advocate : Wadiaghandy & Co, Hardik Vora

Judgement

1. As common question of law and facts arise in both these petitions, both these petitions are decided and disposed of by this common judgment and order.
2. Rule. Shri Hardik Vora, learned AGP waives service of notice of Rule on behalf of the respondent State. In the facts and circumstances of the case and with the consent of the learned advocates for the respective parties, the matter is taken up for final hearing today.
3. In both these petitions under Article 226 of the Constitution of India, the respective petitioners have prayed for an appropriate, direction and order

directing the respondents to calculate and pay the interest at the rate of 9% p.a on the admitted amount of refund, as mandatory under Section 51(1)(aa) of the Gujarat Sales Tax Act, 1969 (hereinafter referred to as the "Act").

4. The short but interesting question of law posed for consideration of this Court is whether on the refund amount of predeposit, which the petitioner deposited while preferring the appeal before the learned Tribunal, when the petitioner has succeeded before the learned Tribunal and the demand of tax is set aside and consequently the amount of predeposit is refunded, the petitioner-dealer is entitled to interest on such refund of predeposit as mandatory under Section 54(1) (aa) of the Act.

5. For the sake of convenience, the facts in Special Civil Application No.17876 of 2016 are narrated, which in nutshell are as under: 5.1. That the assessment orders came to be passed by the Assessing Officer for Assessment Years 1994-95, 1995-96, 1996-97 and 1997-98 on 31.08.2008, in the case of petitioner no.1 company. By virtue of the aforesaid orders, the Assessing Officer inter alia found the petitioner no.1 dealer to pay tax under Section 15(B) of the Act and in view thereof pay additional demand of tax visavis purchases made by the petitioner no.1.

5.2. Being aggrieved and dissatisfied with the assessment orders passed by the Assessing Officer, the petitioner no.1 dealer preferred First Appeal before the Deputy Commercial Tax Commissioner. That while preferring the appeal/ appeals, the petitioners deposited some amount towards predeposit while preferring the appeal. On such deposit, the First Appeal came to be admitted by the Appellate Authority.

5.3. That subsequently by order dated 25.03.2003, the First Appellate Authority partly allowed the said appeal of the petitioner no.1 for all the assessment years.

5.4. Aggrieved by the order passed by the First Appellate Authority, the petitioner no.1 preferred Second Appeal before the Tribunal. That by judgment and order dated 31.08.2004, the learned Tribunal has allowed the appeal and has held that petitioner no.1 is entitled to claim the exemptions / benefits granted to it under Section 49(2) of the Act without submission of Form No.26. The learned Tribunal also concluded that purchases made by the petitioner no.1 from exempted units are to be considered as exempted goods and therefore, upon such purchases the tax is not leviable under Section 15 B of the Act. By holding so, the learned Tribunal remanded the matter back to the respondent no.3 - Joint Commercial Tax Commissioner to look into the matter afresh and in light of the observations of the learned Tribunal.

5.5. Subsequent thereto, in furtherance of the order passed by the learned Tribunal dated 31.08.2004, the respondent no.3 inquired into the matter afresh and passed the order dated 30.06.2015 for AY 1994-95 and the orders dated 21.07.2015 for the AY 1995-96, 1996-97 and 1997-98 respectively holding that as the petitioner no.1 holds the exemption certificate under Section 49(2) of the Act

as well as purchases goods from units that hold exemption certificate under Section 49(2) of the Act, imposition of additional tax under Section 15(B) of the Act is not permissible. Consequently, respondent no.3 declared that the additions made by the concerned Assessing Officer under Section 15B of the Act are required to be deleted from the total tax liability. The respondent no.3 also held that since the petitioner no.1 had already deposited the amount of tax in addition to the final tax liability computed by the respondent no.3, the petitioner no.1 is entitled to refund of such excess amount along with amount interest calculated as per the specifications given in the Act.

5.6. It is the case of the petitioners that adhoc deposits to the respondent authorities, made by the petitioner no.3 which have made prior to admission of the respective appeals was greater than the final liability of tax, petitioner no.1 was entitled to be granted a refund of the balance amount under Section 54 (1) (aa) of the Act. That thereafter, respondent no.2 passed the orders dated 31.05.2016 directing release of the stated amount in favour of the petitioner no.1 in view of the order of respondent no.3. According to the petitioner, however the amount stated in the said order of the respondent no.2 did not include the accurate amount of interest on such refund and according to the petitioners, they were entitled to interest at the rate of 9% p.a on such refund, more particularly, considering Section 54(1)(aa) of the Act. Hence, respective petitioners have preferred present Special Civil Applications for the aforesaid reliefs.

6. Shri Tanvish Bhatt, learned advocate has appeared on behalf of the respective petitioners and Shri Hardik Vora, learned AGP has appeared on behalf of the respondent State.

7. Shri Tanvish Bhatt, learned advocate for the petitioners has vehemently submitted that Section 54(1)(aa) of the Act entitled the assessee to claim interest at the rate of 9% p.a on the amount of refund from the date immediately following the order of closure of the accounting year till date of order of assessment. 7.1. It is submitted that it is now well settled principle of law that term "order of assessment under Section 41" as spelt out in Section 54(1)(aa) of the Act, includes the orders passed by the Appellate Authority in appeal filing against the order of Assessing Officer. In support of his above submission, he has heavily relied upon the decisions of the Division Bench of this Court in the case of State of Gujarat vs. Doshi Printing Press rendered in Tax Appeal No. 87 of 2015; in the case of Essar Power Limited vs. State of Gujarat, Commissioner of Sales Tax rendered in Sales Tax Reference No. 5 of 2005; in the case of State of Gujarat vs. Jupiter Engineer rendered in Tax Appeal No. 86 of 2015 and in the case of State of Gujarat vs. Star Industries rendered in Tax Appeal No. 222 of 2015.

7.2. It is submitted that therefore, when pursuant to the order passed by the respondent no.3, the petitioners are entitled to refund of tax paid in excess including amount of predeposit, which the petitioners deposited while preferring the appeals, the petitioners are entitled to interest at the rate of 9% p.a on such

amount of predeposit also.

7.3. It is further submitted by Shri Bhatt, learned advocate for the petitioners that any amount deposited as predeposit while preferring the appeal can be said to be towards part payment of tax and therefore, the amount is required to be refunded pursuant to the order passed by the Appellate Authority / Tribuna, in that case, the dealer is entitled to refund the same and / or get back the same with interest at the rate of 9% p.a as provided under Section 54(1)(aa) of the Act. Making above submissions and relying upon the above decisions, it is requested to allow the present petitions and direct the respondent to grant / award interest at the rate of 9% p.a on the amount of predeposit from the date of such deposit till it is refunded.

8. Present petition is vehemently opposed by Shri Vora, learned Assistant Government Pleader appearing on behalf of the State. 8.1. It is vehemently submitted by Shri Vora, learned AGP appearing on behalf of the State that with respect to the amount of predeposit, Section 54(1)(aa) of the Act shall not be applicable at all as the amount towards predeposit cannot be said to be deposit of tax. It is submitted that Section 54 of the Act shall be applicable in case of refund of tax and / or on delayed refund of tax.

8.2. Shri Vora, learned AGP appearing on behalf of the State has relied upon the decision of the Bombay High Court in the case of Suvidhe Ltd vs. Union of India reported in 1996(82) ELT 177 in support of his submission that any amount deposited towards predeposit cannot be said to be a payment of duty but can be said to be only a predeposit for availing the right of appeal.

8.3. Shri Vora, learned AGP has also relied upon the decision of the Hon''ble Supreme Court in the case of Commissioner of Customs (Import), Raigad vs. Finacord Chemicals (P) Ltd reported in AIR 2015 SC 2752, in support of his above submissions. It is submitted that therefore, the petitioners shall not be entitled to any interest on refund of amount of predeposit, more particularly, under Section 54(1) (aa) of the Act.

9. Heard the learned advocates for the respective parties at length.

10. The short but interesting question of law posed for consideration of this Court is whether on the refund of amount which was deposited as predeposit while preferring the appeal, which is necessiated becuase of the decision in apeal, whether the dealer is entitled to interest on such amount of predeposit or not ?

11. It is required to be noted and it is not in dispute that in the present case, the assessment order came to be passed against the petitioners dealer and it was held by the Asssessing Officer for AY 199495 to 199798 that the petitionersdealer is liable to pay tax / additional tax under Section 15 B of the Act and raised additional demand of tax visavis purchaess made by the petitioner no.1. That the First Appellate Authority partly allowed the appeal / appeals for all the assessment years. However, on further appeal preferred before the learned

Tribunal, the learned Tribunal has held that the petitioner no.1 is entitled to claim the exemptions / benefits granted to it under Section 49(2) of the Act and the purchases made by the petitioner no.1 from exempted units are to be considered as exempted goods and hence not liable to pay additional tax upon such purchases under Section 15 B of the Act. However, while preferring the appeals, the petitioners deposited some amount, as predeposit, as required under Section 65(4) of the Act, which is a statutory requirement while preferring appeal. That thereafter, the appeals are allowed and the tax liability has been set aside. That thereafter, the appropriate authority has refunded the amount deposited which are found to be in excess to the liability, however without any interest on the amount of predeposit. It is the case of the petitioners that on refund of such amount of predeposit which is required to be refunded pursuant to the order passed by the Appellate Authority, the petitioners are entitled to interest at the rate of 9% p.a as provided under Section 54(1)(aa) of the Act. On the other hand, it is the case on behalf of the State that Section 54(1) (aa) of the Act shall be applicable only in the case of refund of any tax amount. 11.1. It is true that what is deposited by the petitioners was by way of predeposit and as a condition for availing the right of appeal. The amount to be deposited towards predeposit while preferring the appeal would be under Section 65(4) of the Act which reads as under: Section 65(4) . No appeal against an order of assessment with or without penalty or against an order imposing penalty shall ordinarily be entertained by an appellate authority, unless such appeal is accompanied by satisfactory proof of payment of the tax with or without penalty or, as the case may be, of the payment of the penalty in respect of which an appeal has been preferred; PROVIDED that an appellate authority may, if it thinks fit, for reasons to be recorded in writing, entertain an appeal against such order: (a) without payment of tax with penalty (if any) or as the case may be, of the penalty, or (b).on proof of payment of such smaller sum as it may consider reasonable , or (c) on the appellant furnishing in the prescribed manner security for such amount as the appellate authority may direct.

11.2. Considering subsection(4) of Section 65 of the Act, whatever the amount is deposited would be towards payment of the tax / part payment of the tax, may be as a condition precedent for availing right of appeal. In a given case, if the appeal against the assessment order is dismissed and the tax liability / demand of tax is confirmed, in that case, whatever amount deposited at the time of preferring the appeal may be by way of predeposit is required to be given credit and the balance amount of tax liability is required to be thereafter deposited with the interest as provided under the Act.

12. Section 54 provides for interest on delayed refund and it provides that where amount as required to be refunded by the Commissioner to any person by virtue of an order of assessment under section 41 is not so refunded to him within a period of ninety days of the date of order, shall pay to such person simple interest at the rate of 9% per annum on the said amount from the date immediately following the expiry of the period specified in clause (a) or, as the

case may be, clause (b) to the date of the refund. Explanation 2 to proviso further provides that in the case of an order relating to refund passed in appeal or in revision, the period of ninety days shall be calculated from the date of the receipt of such order by Sales Tax Officer.

12. 1. Therefore, on conjoint reading of the subsection(4) of Section 65 and Section 54, on the appeal being allowed and th tax liability is either reduced or set aside by the appellate authority in that case, concerned person shall be entitled to get back the said amount / refund the said amount with interest on completion of 90 days from the date of order passed by the Appellate Authority / Tribunal. Any other contrary view shall deprive interest of the concerned person. However, consdiering Section 54 the period of 90 days shall be calculated from the date of reciept of such order by the Sales Tax Officer (order passed by the Appellate Authority / Tribunal).

13. Now, so far as reliance placed upon the decision of the Hon''ble Supreme Court in the case of Finacord Chemicals (P) Ltd (supra) is concerned, it is required to be noted that in the case before the Hon''ble Supreme Court Department wanted to deny the refund of predeposit on the ground of unjust enrichment and to that Hon''ble Supreme Court has observed that as the amount was deposited pursuant to the order passed by the High Court and as a condition for the release of the goods, the principle of unjust enrichment would not be applicable. It is to be noted that ultimately, the Hon''ble Supreme Court held that the assessee is entitled to the interest on refund of said amount. Similarly, in the case of Suvidhe Ltd (supra), the Bombay High Court held that the principle of unjust enrichment and / or Section 11(b) of the Central Excise shall not be applicable. 13.1. As per the catena of decisions of this Court, more particulalry, referred to herein above and which are relied upon by the learned advocate for the petitioners, the dealer is entitled to interest under Section 54(1)(aa) of the Act on refund arising from the appellate order. In the present case, the petitioners are entitled to refund the amount arising and / or pursuant to the appellate order. Therefore, there is no reason to deny the interest on delayed payment of such refund, more particularly, on refund of amount deposited as a predeposit and while preferring the appeal, however subject to provision of Section 54 of the Act i.e. the period of 90 days shall be calculated from the date of receipt of the appellate order by the Sales Tax Officer.

14. In view of the above and for the reasons stated above, both thess petitions succeed. It is held that respective petitioners shall be entitled to interest at the rate of 9% p.a on the amount deposited by them as predeposit while preferring the appeal against the assessment order, however simple interest at the rate of 9% p.a shall be calculated from the date on completion of 90 days of the order passed by the Appellate Authority / Tribunal and period of 90 days shall be calculated from the date of receipt of the appellate order / Tribunal, by the Sales Tax Officer. Rule is made absolute to the aforesaid extent in each of the petition. No costs.