

(2021) 01 GAU CK 0012

In the Gauhati High Court

Case No : Writ Petition (C) No. 6314 Of 2017

M/S Va Tech Wabag Ltd

APPELLANT

Vs

State Of Assam And 2 Ors

RESPONDENT

Date of Decision : 20-01-2021

Acts Referred:

Assam Value Added Tax Act, 2003 — Section 50, 50(1)
Assam Value Added Tax Rules, 2005 — Rule 29, 29(1)(a)

Citation : (2021) 01 GAU CK 0012

Hon'ble Judges : Soumitra Saikia, J

Bench : Single Bench

Advocate : Dr. A. Saraf, P. Baruah, B. Choudhury

Final Decision : Allowed

Judgement

Assessment year, Payment of tax due under the Act, Excess amount paid by way of TDS

2006-07, "Rs.17,07,955.00", "Rs. 26,64,179.00

2007-08, "Rs. 2,07,081.0", "Rs. 49,48,973.00

2008-09, "Rs. 9,43,761.00", "Rs. 30,84,478.00

2009-10, "Rs. 6,91,875.00", "Rs. 10,36,863.00

Total amount paid, In excess=, "Rs.1,69,30,145.00

sufficient cause have been shown, the respondent No.3 ought to have granted the refund claim as per its application. In that view of the matter, the,,

impugned order rejecting the refund is bad in law and the same should be suitably interfered with and set aside and quashed.,,

10. Learned Senior counsel for the petitioner submits that when there is no dispute that the petitioner company had made excess payments towards,,

the VAT and the same is reflected in its Return filed and when the Department has also completed the assessments, then refusal to grant refund of",,,

amounts legitimately due to the petitioner company, will amount to withholding of revenue due to the petitioner by the Department on the Government",,,

which is not sanctioned by Law. The learned Senior counsel submits that in a democratic society governed by Rule of Law, every Government which",,,

claims to be inspired by ethical and moral values must do what fairness demands, regardless of legal technicalities. The Department/Government",,,

cannot be permitted to defeat a legitimate claim of the assessee for refund of excess VAT paid by resorting to technicalities. Fairness and Justice",,,

demands that such legitimate claim is duly entertained by the Department.,,,

11. Regarding the plea of the bar of limitation raised by the respondent Department, the learned Senior counsel submits that the Apex Court has held",,,

that when public bodies under the colour of public laws, recover public moneys, later discovered to be erroneous levies, there is no law of limitation",,,

especially for public bodies on the virtue of returning what was wrongly recovered to whom it belongs.,,,

12. Learned counsel for the petitioner refers to the following judgments of the Apex Court in support of his contentions:-,,

(i) (1978) 4 SCC 271 Hindustan Sugar Mills vs State of Rajasthan and Others.,,,

(ii) (1980) 2 SCC 437, M/S Shiv Shankar Dal Mills vs. State of Haryana.",,,

(iii) (1976) 38 SCC 99, Suresh Chandra Bose vs. State of West Bengal.",,,

(iv) C. Ex. Appeal No.8/2006, M. K. Jokai Agri Plantation P. Ltd. Vs. Commissioner of Central Excise and Service Tax, Dibrugarh Division.",,,

13. Mr. B. Choudhury, learned standing counsel appearing for the respondent submits that there is no infirmity in the order rejecting the refund claims",,,

by the respondent no. 3 by order dated 09-12-2016 and which is impugned in the present proceeding. He relies on the stand of the department,,

reflected by its affidavit filed before this Court. Mr. Choudhury submitted that the Departmental Authorities by following the law prescribed has rightly,,

rejected the application seeking refunds of the petitioner.,,,

14. After perusal of the pleadings on record and upon hearing of the learned counsels for the parties, it is seen that the issue in the present proceeding",,,

is only with regard to the correctness of the rejection of the application seeking refund, made by the respondent authorities on the ground that the",,,

same was filed beyond the prescribed period of 180 days without sufficient explanation being furnished explaining the delay in filing the application for,,
refund.,,

15. It would be relevant to refer to the provisions of refund under the AVT Act and Rules namely, under section 50 of the AVAT Act 2003 and Rules",,,

29 of the AVAT Rules 2005. The relevant extract of the Section and the Rules are reproduced below:,,

50. Refund : (1) Subject to other provisions of this Act and the rules made hereunder, if it is found on the assessment or reassessment, as the case",,,

may be, that a dealer has paid tax, interest or penalty in excess of what is due from him, the Prescribed Authority shall, on the claim being made by",,,

the dealer in the prescribed manner and within the prescribed time, refund to such dealer the amount of tax, penalty and interest paid in excess by him",,,

:,,

Provided that, such refund shall be made after adjusting the amount of tax or penalty, interest or sum forfeited or all of them due from, and payable by",,,

the dealer on the date of passing of order for such refund.,,

(2) Where the amount of input tax credit admissible to a registered dealer for a given period exceeds the tax payable by him for the period, he may",,,

subject to such restrictions and conditions as may be prescribed, seek refund of the excess amount, by making an application in the prescribed form",,,

and manner, containing the prescribed particulars and accompanied with the prescribed documents to the Prescribed Authority, or adjust the same",,,

provisionally with his future liability to tax in the manner prescribed.,,

Provided that the amount of tax or penalty, interest or sum forfeited or all of them due from, and payable by, the dealer on the date of such adjustment",,,

shall first be deducted from such refund before adjustment",,,

Rule 29. Refund." (1)(a) The application for refund as referred to in sub-section (1) of section 50 shall be made in Form-37 within one hundred,,

and eighty days from the date of assessment or reassessment, as the case may be:",,,

Provided that an application for refund made after the said period may be admitted by the Prescribed Authority, if he is satisfied that the dealer had",,,

sufficient cause for not making the application within the said period.,,

(b) An application for refund shall be signed and verified as in the case of application for registration in case of a registered dealer.,,

(c) The Prescribed Authority may reject, any claim for refund if the claim filed appears to involve any mistake apparent on the record or appears to be",,,

incorrect or incomplete, based on any information available on the record, after giving the dealer the opportunity to show cause in writing against such",,,
rejection.,,

(d) When the Prescribed Authority is satisfied that the refund claimed is due he shall record an order sanctioning the refund.,,

(e) When the amount to be refunded is more than rupees three lakh the Prescribed Authority shall take prior approval of Deputy Commissioner before,,

sanctioning such refund. The Deputy Commissioner shall not approve the refund if the amount to be refunded exceeds rupees ten lakhs but forward,,

such cases to the Commissioner for approval. Where the amount to be refunded is more than fifty lakhs, the Commissioner shall take prior approval of",,,

the Government before sanctioning such refund.,,

(f) When an order for refund is passed refund voucher in Form-38 shall be issued in favour of claimant if he desires payment in cash and advice in,,

Form-39, shall, at the same time be forwarded to the Treasury Officer concerned.",,,

(g) Where any amount refundable under this sub-rule is not refunded to the dealer within the period of ninety days of claim of refund made in,,

accordance with the provisions of clause (a) of this sub-rule, the refund voucher shall include the interest specified under section 52 covering the",,,

period following the end of the said period to the day of refund. The authority issuing such order shall simultaneously record an order sanctioning the,,

interest payable, if any, on such refund, specifying therein, the amount of refund, the payment of which was delayed, the period of delay for which",,,

such interest is payable and the amount of interest payable by the State Government and shall communicate the same to the Commissioner stating,,

briefly the reasons for the delay in allowing the refund:,,

Provided that in computing the period of ninety days, the following periods shall be excluded:-",,,

(i) any delay attributable to the conduct of the person to whom the refund is payable; and,,

(ii) the time during which any reasonable inquiry relating to the return or claim was initiated and completed and the time taken for adjustment by the,,
refunding authority of any tax, interest and other amount due.",,

(h) After the refund is sanctioned if the claimant desires to adjust the amount of refund due to him, the Prescribed Authority shall set off the amount to",,,
be refunded or any part thereof against the tax, if any, remaining payable by the claimant or against the future dues.",,

(i) The Prescribed Authority shall enter in a register in Form-40 particulars of all the refunds allowed in pursuance of assessment orders, all",,,

applications for refunds and of the order passed thereonâ??.,,

16. It will also be relevant here to extract the impugned order dated 09-12-2016 passed by the respondent No. 3. For ready reference the impugned,,

order available at Page No.36 as Annexure-V is extracted below:,,

â??XXXXXXXXXX,,

ORDER,,

Dealer was asked to furnish reasons for late submission of refund application. Dealer has submitted that they had filed application within time for,,

which they have failed to furnish any proof.,,

In view of the above submission I have no alternative but to reject the application to the dealer for under delay in filing the refund application.,,

Inform dealer accordingly.,,

Sd/,,

Illegible,,

Act, Unit-A",,,

17. In view of the facts narrated above as pleaded by the contesting parties, let us examine the judgments of the Apex Court as well as by this Court",,,

relied upon by the learned Senior counsel. In the case of Hindustan Sugar Mill vs Sate of Rajasthan (Supra), the Apex Court has culled out the ratio",,,

that even if there is no legal liability of the Central Government towards an assessee, it must be remembered that in a democratic society governed by",,,

the Rule of Law, every government which claims to be inspired by ethical and moral values must do what is fair and just to the citizens regardless of",,,

the technicalities. The Apex Court held that legitimate claim of the assessee for reimbursement of the sales tax on an amount of fare paid cannot be,,

defeated by a Government by adopting a legalistic attitude rather do what fairness and justice demands. In every civilized state the Apex Court held,,

the motto must be "let right be done.",,

18. In the case of M/S Shiv Shankar Dal Mills (supra), the Apex Court held as under:",,

"XXXXXXXXXX,,

Where public bodies, under colour of public laws, recover people's moneys, later discovered to be erroneous levies, the dharma of the situation admits",,

of no equivocation. There is no law of limitation, especially for public bodies, on the virtue of returning what was wrongly recovered to whom it",,

belongs. Nor is it palatable to our jurisprudence to turn down the prayer for high prerogative writs, on the negative plea of "alternative remedy",,

since the root principle of law married to justice, is ubi jus ibi remedium.",,

XXXXXXXXXX,,

2..... it is fair to be guided by the strategy of equity by asking those who claim the service of the judicial process to embrace the basic rule of,,

distributive justice, while moulding the relief, by consenting to restore little sums, taken in little transactions, from little persons, to whom they belong.",,

XXXXXXX,,

6. Article 226 grants an extraordinary remedy which is essentially discretionary, although founded on legal injury.",,

XXXXXXXXXX",,

19. In the case of C. Ex. Appeal No.8/2006, M. K. Jokai Agri Plantation P. Ltd. Vs. Commissioner of Central Excise and Service Tax, Dibrugarh",,

Division, a Division Bench of this Court held as under:",,

"XXXXXXXXXX,,

The appellant having been once found to be eligible for exemptions and refund of duty paid, denial of benefit of exemptions and refund on the ground",,

of delay, in our considered opinion, will cause grave injustice which cannot be permitted. Even otherwise, it is well settled law that non-following of",,

procedural requirement cannot deny the substantive benefit, otherwise available to the assessee. Also exemptions made with a beneficial object like",,

growth of Industry in a Region have to be liberally construed and a narrow construction of the Notification which defeats the object cannot be,,

accepted.,,

XXXXXXXXXXâ??.,,

20. It is seen that Section 50 of the Assam Value Added Tax, 2003 provides that, if it is found on assessment or reassessment that a dealer has paid",,

tax, interest or penalty in excess of what is due from him, the Prescribed Authority shall, on a claim being made by the dealer in the prescribed manner",,

and within the prescribed time refund to the dealer the amount of tax, penalty and interest paid in excess by him.",,

21. The Rule 29 of the Assam Value Added Tax Rules 2005 provides that a claim for refund as provided under Section 50(1) of the AVAT Act, 2003",,

shall be made in Form 37 within 180 (one hundred and eighty days) from the date of assessment or reassessment. The said Rule prescribes the,,

manner in which the Form is to be filled and submitted seeking claim of refund. Provisio to Rule 29(1)(a) of the AVAT Rules gives a latitude to the,,

Prescribed Authority to entertain an application seeking refund submitted even after the prescribed period of 180 (one hundred and eighty days) from,,

the date of assessment or reassessment as the case may be. The Prescribed Authority may consider the refund claim if it is satisfied that the dealer,,

had sufficient cause for not making an application within the said period. What will be sufficient cause has not been described in the statute. The,,

Prescribed Authority is given the liberty to entertain such claims that may be filed even after the expiry of prescribed period of 180 (one hundred and,,

eighty days) from the date of assessment or reassessment on sufficient causes being shown by the dealer. Accordingly, it is implied under the",,

provisions of Section 50 of the AVAT Act 2003 read with Rule 29(1)(a) AVAT Rules 2005 that if cause(s) shown by a dealer are not considered to,,

be sufficient then the Prescribed Authority must reflect and disclose the reasons therefor in the order passed by the Prescribed Authority rejecting any,,

claim for refund made by a dealer, namely the petitioner company in the present proceeding.",,

22. The Departmentâ??s Notice dated 21-05-2015 at page 32 of the writ petition called upon the petitioner to submit proof of submission of,,

applications or otherwise submit reasons for late filing of refund applications. The petitioner duly responded to the Notice issued by the Department. A,,

copy of the refund application of 2006-07 originally submitted was also stated to

have been enclosed with the reply submitted. However, as discussed",,,
 above the department vide the impugned order dated 09-12-2016 rejected the
 claims of refunds sought by the petitioner. It is evident from the recital,,
 of the impugned order that the question of the delay which occurred in filing the
 refund petition, whether ought to be condoned or not, was not",,,
 adequately addressed to by the respondent No.3. There was also no reference to
 the application seeking refund and/or the relevant orders of,,
 assessment which indicates the refund available/payable to the petitioner. There
 was no reference in the impugned order, regarding any enquiry etc.",,,
 made by the Departmental Officer to have arrived at a finding that the
 applications were not filed, which the petitioner on the contrary had claimed it",,,
 had filed within the relevant time although no acknowledgement was received.
 That fact whether verified by the respondent authorities from the,,
 records before arriving at the conclusion as has been done by the impugned
 order, is not discernable from the impugned order.",,,

23. This exercise of the respondent authorities although not reflected in the
 recital of the impugned order, the same is now sought to be supported by",,,
 way of an affidavit filed on 03.09.2020 in respect of the impugned order which
 was passed on 09-12-2016. It is also stated in paragraph 4 of the,,
 affidavit filed by the Department before this court that the petitioner failed to
 submit any reasonable, logical and substantive reasons for not filing",,,
 application within the prescribed time. Such explanation in a subsequent affidavit
 pursuant to the impugned order passed will amount to permitting the,,
 Department to expand the scope of an order passed by the Departmental Officer
 exercising quasi-judicial jurisdiction and which is not permissible,,
 under the statute. It has long been held that orders passed by administrative or
 quasi judicial authorities are required to stand or fall on its own.,,,
 Subsequent explanations by way of affidavit(s) cannot be permitted in order to
 improve an order already passed by the Departmental Officer. The,,
 principle enunciated in the Judgment of the Apex Court in the case of Mohinder
 Singh Gill, reported in (1978) 1 SCC 405 is still a good law. Relevant",,,
 paragraph of the Judgment is extracted below:,,

â??XXXXXXXXXXXX,,

8. The second equally relevant matter is that when a statutory functionary
 makes an order based on certain grounds, its validity must be judged by the",,,

reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning",,,

may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the",,,

observations of Bose, J. in Gordhandas Bhanji AIR 1952 SC 16.",,,

Public orders, publicly made, in exercise of statutory authority cannot be construed in the light of explanations subsequently given by the officer",,,

making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have",,,

public effect and are intended to effect the acting and conduct of those to whom they are addressed and must be construed objectively with reference,,,

to the language used in the order itself.,,,

Orders are not like old wine becoming better as they grow older.,,,

XXXXXXXXXXâ?,,

24. In view of all the above discussions, the writ petition is allowed. The impugned order dated 09.12.2016 and Communication No. 3589-90 dated 17-",,,

12-2016 is interfered with and is accordingly set aside and quashed.,,,

25. The matter is remanded back to the respondent authorities to re-decide on the question of grant of refund as prayed for by the writ petitioner",,,

keeping in view the law laid down by the Apex Court.,,,

26. Writ petition is allowed to the extent indicated above. No order as to costs.,,,