

(2006) 01 AHC CK 0179

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 1615 of 2002

Reva Enviro Systems (P) Limited

APPELLANT

Vs

State of U.P. and Assistant Commissioner (Assessment) Trade
Tax

RESPONDENT

Date of Decision : 19-01-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 144, 144
Constitution of India, 1950 — Article 265
Contract Act, 1872 — Section 72
Industrial Finance Corporation Act, 1948 — Section 3F(1)(a)
Uttar Pradesh Trade Tax Act, 1948 — Section 22, 29, 29(1)

Citation : (2006) 148 STC 279

Hon'ble Judges : Prakash Krishna, J;A.K. Yog, J

Bench : Division Bench

Advocate : Bharat Ji Agrawal, Piyush Agrawal and Praveen Kumar Misra, for the Appellant; M.R. Jaiswal and S.C., for the Respondent

Final Decision : Allowed

Judgement

A.K. Yog and Prakash Krishna, JJ.—The, main grievance of the petitioner is that although it has ultimately succeeded in its contention that there is no liability to pay any trade tax in respect of the Bio Gas Plant supplied and installed by the petitioner at Kesar Sugar Works and Indian Turpentine and Rosin Co. Bareilly for the assessment years 1987-88, 1990-91 and 1991-92, but the trade tax, which it deposited at the insistence of the respondents wrongly treating the said Bio Gas Plant as unclassified item, is not being refunded.

2. The petitioner, a private limited company, having its registered office at Nagpur entered into a tripartite agreement with Indian Turpentine and Rosin Company and Industrial Finance Corporation of India for installation of Bio Gas Generating Plant at the premises of Indian Turpentine and Rosin Company Bareilly. Similar agreement was entered into for supplying and installation of Bio Gas at Kesar Sugar Mills Baheri (District Bareilly). The Assistant Commissioner

(Assessment) Trade" Tax, Bareilly by means of three separate assessment orders for the aforesaid three relevant assessment years all dated March, 22nd, 1993 (collectively filed as annexure -1 to the writ petition) held that the supply and installation of Bio Gas Plant is liable, to be taxed under the provisions of U.P. Trade Tax Act at the rate of 10 per cent as unclassified item.

3. The petitioner unsuccessfully challenged these orders in three separate appeals which were decided by Deputy Commissioner (Appeals), Trade Tax by the common order dated 19th March, 1994. Thereafter, it filed three second appeals being appeals No. 231 of 1994, 232 of 1994 and 233 of 1994 for the assessment years 1990-91, 1987-88 and 1991-92 respectively before the Trade Tax Tribunal, Lucknow. The Tribunal allowed all the three appeals. It has recorded a finding that the supplies made by the petitioner through Industrial Finance Corporation of India to Indian Turpentine and Rosin Company Limited, Bareilly, the Bio Gas Generating and Equipment Treatment supplied by the petitioner is not liable to be taxed as it is covered by Notification No. 7038 dated 31st of January, 1985 under Entry 23 being item No. 30. But it directed that the question as to whether there was a relationship of lessor and lessee in between Industrial Finance Act of India and Indian Turpentine & Rosin Company has to be examined u/s 3F(1)(a) of the Act for the assessment years 1990-91 and 1991-92.

4. It may be pointed out that the Tribunal has passed two separate orders of the same date dated 3.12.1997, while allowing the appeal filed by the petitioner. But there is some variation in the operative portion of the two orders, which will be noticed at the later part of this judgment. It is not in dispute that two orders passed by the Tribunal have attained finality as the respondents did not prefer any further revision, against the aforesaid orders. Armed with the orders of the Tribunal the petitioner approached the Assessing Authority for the refund of the tax deposited by it for the aforesaid two assessment orders, who by the letter dated 1st of April, 2001, vide annexure -4, to the writ petition directed the petitioner to get the order of the Tribunal dated 3.12.1997 rectified as there is no specific order to refund the amount deposited by the petitioner. In the first para of this letter it is, mentioned that the petitioner has deposited Rs. 3,37,500/- on 7th of August, 1992 and Rs. 19,700/- on 9th of October, 1992 at Lucknow. Petitioner subsequently filed rectification applications u/s 22 of the U.P. Trade Tax Act (hereinafter called as the Act) before the Tribunal for incorporation of specific directions in its earlier order dated 3.12.1997 to refund the amount, deposited by the petitioner.

5. The said applications were dismissed on the short ground that they have been filed beyond the prescribed period of limitation of three years and there is no provision to condone delay in filing of such application, vide order dated 16.8.2001 annexure -8 to the writ petition.

6. Feeling aggrieved against the aforesaid order, the present writ petition has been filed and a writ in the nature of Mandamus has been claimed to direct the respondents No. 1 and 2 to refund Rs. 3,37,500/- and Rs. 19,500/-, the trade

tax which was deposited in respect of the Bio Gas Plant during the assessment year 1990-91 and 1991-92 and also interest at the rate of 18 per cent per annum from 3.12.1997 till the date of refund has been claimed.

7. The respondents in their counter affidavit filed through Shri S.K. Gupta, Trade Tax Officer, Sector -4, Bareilly have not disputed the fact that ultimately the Trade Tax Tribunal, Lucknow vide its order dated 2nd of December, 1997 allowed all the appeals and held that no tax is payable on the supply and instalation of Bio Gas Plant, and the matter has become final between the parties, vide para 3. In the counter affidavit two issues have been raised by the respondents to deny petitioner's claim. One is that there is no direction in the order of the Tribunal dated 2nd of December, 1997, -by which the appeals were allowed and held that no tax is payable, to refund the tax deposited by the petitioner. Therefore, it has been pleaded that "until and unless there is an order for refund, no refund voucher can be issued vide para 3 (ii) of the counter affidavit." In this connection the further pleading is that the application moved by the petitioner for rectification has been rejected on 19.7.2001 as time barred by the Tribunal. Therefore, the order dated 3.12.1997 remains unamended to the extent that there is no specific order for refund. The other ground is that on record the petitioner or its principal has not deposited any tax for the assessment years in question namely 1987-88, 1990-91 and 1991-92. The certificate relied upon by the petitioner is of no avail to them as "the tax has been deposited for the assessment year " 1992-93 and hence it is clear that no tax has been deposited for the relevant assessment year." The same plea has been reiterated in para 5 of the counter affidavit. In para 6 of the counter affidavit the stand is that the tax deposited by Industrial Finance Corporation who have deposited the tax on behalf of the Indian Turpentine and Rosin Company is immaterial - until and unless there is an order for refund no refund voucher can be issued because u/s 29 the order for refund is a must.

8. Heard Shri Bharatji Agrawal, Senior Advocate assisted by Shri Piyush Agrawal for the petitioner and Shri MR. Jaiswal, learned standing counsel for the department.

9. It was argued by the petitioner that indisputably it has; been held by the Tribunal finally that there was no trade tax liability on the petitioner on the supply and installation of the Bio Gas plant. Therefore, in equity as well as under law, the petitioner is entitled for the refund of the tax amount deposited by it in pursuance of the assessment orders fixing the liability to pay the trade tax on the petitioner which have been ultimately set aside by the Tribunal. The respondent No. 4 vide his letter dated 1st of April, 2001, annexure - 4 to the writ petition has admitted that a sum of Rs. 3,37,500/- was deposited by Challan No. 73 on 7th of August, 1992 and Rs. 19,700/- by Challan No. 4 dated 9.10.1992, in the State Bank of India, Lucknow. The petitioner is entitled to get the refund of the aforesaid amount along with the statutory interest as per Section 29 of U.P. Trade Tax Act and the denial of the refund by the respondents amounts to the

illegal withholding of the aforesaid amount.

10. Elaborating the argument the learned Counsel submitted that even if there is no specific order passed by the Tribunal directing to refund the amount, the such direction is very much implicit the order. Reliance has been placed by him on following cases:-

1. Modi Industries Limited v. CST 1982 UPTC 1097.
2. Commissioner of Sales Tax, U.P. Vs. Auriaya Chamber of Commerce, Allahabad,
3. Belapur Sugar and Allied Industries Ltd Vs. Collector of Central Excise, Aurangabad,
4. S/s. Assam Roadways (Delhi) v. State of U.P. and Ors. 2005 UPTC 1106.

11. The learned standing counsel in reply submitted that in absence of any specific direction, in the order of Tribunal to refund the amount of tax to the petitioner, the respondents, are justified in refusing to refund the amount of tax, if any, deposited by the petitioner. He submitted that in the absence of a specific direction by the higher authority or court no refund can be granted to the petitioner, notwithstanding the- fact that ultimately it has "been found that the assessment order levying the tax on the petitioner was illegal and has been set aside, by the higher authority. It was also submitted that there is some dispute with regard to the amount, if any, deposited by the petitioner during the relevant assessment year i.e. 1987-88, 1990-91 and 1991-92. The tax amounting to Rs. 3,37,5.00 and Rs. 19,700/- were deposited in the assessment year 1992-93. In this connection strong reliance was placed by him on the relevant corresponding paragraphs of the counter affidavit.

12. We have given careful consideration to the respective submissions of the learned Counsel for the parties. Following two questions fall for determination of this Court:-

1. Whether tax deposited by the petitioner in pursuance of the assessment order which has been ultimately set aside can be refunded to the petitioner even in absence of specific direction by such appellate authority to refund the excess tax?
2. Whether the petitioner is entitled to get refund of the tax amounting to Rs. 3,37,500/- deposited by Challan No. 73 dated 7th August, 1992 and Rs. 19,700/- deposited by Challan No. 4 dated 9.19.1992 in the State Bank of India, Lucknow Branch, in the facts and circumstances of the case?

13. Pleadings of the parties show that there is no dispute that -(i) the petitioner was subjected to assessment orders for the three relevant assessment years by the Assessing Officer; (ii) demands were created against it and these orders have been set aside in second appeals filed by the petitioner before the Tribunal by two separate orders, on identical grounds.

14. In the second appeal No. 232 of 1994 relevant to the assessment year

1987-88 the Tribunal set aside the order of the First Appellate Authority with direction that a copy of the said order may be placed in the connected files. In second appeals No. 255 of 1994 and 234 of 1994 for the assessment years 1990-91 and 1991-92 respectively while setting aside the order of the First Appellate Authority, the Tribunal made a further note in its operative portion of the order that the relationship of lessor and lessee in between Industrial Finance Corporation of India and ITRC be examined u/s 3F(1)(a) of the Act. Undoubtedly there is no specific direction in either of these two orders of the Tribunal to refund the tax amount if deposited by the petitioner as a consequence of setting aside the order of the first appellate authority. The application filed for rectification to incorporate the necessary direction having been dismissed as time barred by the Tribunal, the validity of claim of refund of the petitioner in such circumstances requires adjudication in this petition.

15. Section 29 of the Act, which deals with the refund of any amount of tax, fees or other dues paid in excess of amount due from him under the Act, reads:

29. Refund. - (1) The assessing authority shall, in the manner prescribed, refund to a dealer any amount of tax, fees or other dues paid in excess of the amount due from him under this Act:

Provided that the amount found to be refundable shall first be adjusted towards the tax or any other amount outstanding against the dealer under this Act or under the Central Sales Tax Act, 1956 (Act 74 of 1956) and only the balance, if any, shall be refunded.

(2) If the amount to be refunded in accordance with Sub-section (1) is not refunded as aforesaid within three months from the date of order of refund passed by the Assessing Authority, or as the case may be, from the date of receipt by him of the order of refund, if such order is passed by any other competent authority or Court, the dealer shall be entitled to simple interest on such amount at the rate of eighteen per cent per annum from the date of such order [or, as the case may be the date of receipt of such order of refund by the assessing authority] to the date of the refund]:

Provided that for calculation of interest in, respect of any period after the 26th day of May, 1975, this Sub-section shall have effect as if for the words "six months" the words "three months" were substituted and for the words "six per cent" the words "twelve per cent" were substituted.

(3) Notwithstanding any judgment, decree or order of any Court or authority, no refund shall be allowed of any tax or fee due under this Act on the turnover of sales or purchases or both, as the case may be, admitted by the dealer in the returns filed by him or at any stage in any proceedings under this Act.

(Explanation 1. -The date of refund shall be deemed to be the date on which intimation regarding preparation of the refund voucher is sent to the dealer in the-manner prescribed.

Explanation 11.- The expression "refund" includes any adjustment under the proviso to Sub-section (1).]

16. A bare perusal of the aforesaid section would show that a duty is cast upon the Assessing Authority by using the word "shall" to refund any amount of tax, fees or other dues paid in excess of the amount due from a dealer in the manner prescribed, The learned standing counsel could not point out either with reference to any provision under the Act "or Rules framed thereunder that there should be a specific order, as pleaded in the counter affidavit to refund the excess amount of tax to a dealer.

17. Chapter XV of U.P. Trade Tax Rules 1948 prescribes the procedure for refund. It contains Rules 89 to 105. None of these Rules do provide that a claim of refund shall not be entertained unless and until there is a specific order to that effect. On the contrary Rule 90 says that when a claim for refund is made, the Assessing Officer shall after proper scrutiny of all the relevant records and necessary verification, satisfy himself that amount is refundable. It further provides that if no dues are outstanding against the dealer for any. year the refund voucher shall be prepared, A conjoint reading of Section 29 with Rule 90 on its plain language casts a duty on the Assessing Authority to refund the amount if it is refundable after a proper scrutiny of all relevant records and necessary verification. The word "shall" used in Section 29(1) as well as Rule 90 does not leave any doubt that it is duty of the Assessing Authority to refund to a dealer any amount of tax etc. paid in excess of the amount due from such dealer under this Act. We find that a Division Bench of this Court in the case of *Modi Industries Limited v. Commissioner of Sales Tax 1982 UPTC 1097* in para 8 has clarified the" law by expressly holding that if a dealer has paid any amount in excess of his sales tax liability as determined under the assessment order he shall be entitled to refund of the excess amount paid. The relevant paragraph reads as follows:-

By virtue of the proviso appended to Sub-section (I) the mount found refundable to the dealer shall be adjusted towards the tax or any other amount outstanding against him under the State or the Central Sales Tax Act and only the balance is to be refunded It is also clear that what is to be adjusted is the outstanding dues against the dealer. If on the date when the assessment order is passed nothing is outstanding against the dealer the whole amount paid in excess of the dues under the Act is to be refunded. It is not open to the Assessing Authority to withhold that amount for more than three months without incurring the liability for interest It would lead to absurd results if it is accepted that unless the Assessing Authority passes a separate and express order of refund the dealer will not be entitled to any interest on the amount refundable to him. If the dealer has paid any amount in excess of his sales tax liability as determined under the assessment order he will be entitled to refund of the excess amount paid. If for some reason the Assessing Authority refuses or fails to pass an order directing refund to the excess amount aid, can it be legitimately urged that the dealer

would not be entitled to any interest on the amount because no express order for refund has been passed. That could not possibly have been the legislative intents in enacting Sub-section (2) of Section 29 which entitles the dealer to claim interest if the excess amount is not refunded within three months from the order of the date of refund passed by the Assessing Authority or from the receipt by him of the order of refund passed by any other competent authority or Court. Once it is found either by the Assessing Authority or by any other competent authority or Court that the amount paid by the dealer was in excess of his tax liability determined under the Act the dealer would be entitled to interest if the amount is not refunded within three months.

18. In the phrase "other dues paid in excess amount due from him under this Act", the word "due" is of significance and it supports the contention of the petitioner that any amount paid in excess of the amount due under the Act is liable to be refunded to him. Neither the Act nor the Rules framed thereunder do prescribe any period of limitation for claiming the refund of the excess amount deposited by a dealer, over and above the admitted tax liability.

19. In *Hind Lamps Limited v. CST* 2004 NTN (24) 254 it has been held that on a correct interpretation of Section 29 of the Act, as soon as the order is set aside, any amount deposited over and above the admitted tax liability is refundable to the dealer on principle of restitution. The principle of restitution is well recognized principle of law and finds place in Section 144 of CPC 1908. This exposition of law has been approved by a Division Bench of this Court in a judgment yet to be reported in Civil Misc. Writ Petition No. 62 and 63 of 2006 *Ellora Mechanical Products Pvt. Limited v. State of U.P. and Ors.* decided on 13th of January, 2006 wherein it has been observed as follows:-

We are in respectful agreement with the aforesaid decision of this Court. As the petitioner has deposited a sum of Rs. 6,73,264/- during the pendency of the appeals and the same is not referable to any admitted tax liability, the petitioner is entitled for the refund. Even on a plain reading of Section 29(1) of the U.P. Trade Tax Act, it is clear that a duty is cast upon the Assessing Authority to refund to a dealer any amount of tax, fees or other dues paid in excess of the amount due from him under the Act. Till such time assessment is not made, any amount due under the Act shall be referable to the admitted tax liability only. Any amount which is deposited in excess of admitted tax liability upon interim orders passed by the appellate authority or by this Court, in the absence of determination of the liability either by virtue of an assessment or otherwise, cannot be said to be an amount due under the Act.

20. u/s 10(5), Tribunal has been given power to pass the various kinds of orders while disposing of an appeal and under Clause (C) it may order such amount of tax, fee or penalty or other moneys as has been raised in excess of the due amount to be refunded according to the provisions of the Act. The said provision enumerates the various kinds of orders which may be passed by Tribunal while disposing of an appeal finally. The power conferred on the Tribunal u/s 10(5) ? of

the Act is of consequential nature, The order to refund excess amount of tax due under the Act is in the nature of a corollary of the ultimate liability determined by the Tribunal. The said power is in the nature of enabling provision and in absence of a express order to the effect, it inheres in the order when the appeal is allowed and the order of the subordinate authority to it is varied. The rights of the parties flow from the main part of the order which determines the rights and liabilities of the appellant before it. For example a second appeal is filed at the instance of the department and the order of the first appellate authority is set aside and the tax liability is enhanced by the order of the Tribunal, in such situation also in absence of direction to pay the shortage, if any, the liability to pay the amount of tax due, it necessarily follows from the main portion of the order fixing liability of a dealer. The primary function of an appellate authority is to hear and decide an appeal and determine the rights and liabilities of the parties before it. The consequential order on the basis of such determination is not of much importance. What is important is the decision of issues and the rights and liabilities of concerned parties. In case of any ambiguity in such cases the proper course is to look into the main order namely the points adjudicated in the order. The other things naturally follows it, which are more procedural in nature and they do not effect the ultimate outcome or decision of such appeal on merits.

21. Emphasis of the respondents on the "form" of the order of the Tribunal is clearly in ignorance of is "substance". It is beyond pale of doubt that a fair reading of the order of the Tribunal conveys only one conclusion that there was no trade tax liability on the petitioners on such supplies of bio gas plant in the relevant assessment years. The learned standing counsel could not dispute this proposition but continued to harp that in the absence of specific direction grant of refund is not possible.

22. In this connection Rule 71 of U.P. Trade Tax Rules is also relevant. It has made a provision for giving effect to a Revisional order. It says that, if any, order passed on an appeal or revision has the effect of varying any order, the Sales Tax Officer (Assessing Officer) shall refund excess tax or fees or realized deficit, as the case may be.

23. The rights and obligations of the parties must be found within the four corners of the Act but in interpreting relevant procedural provisions, fairness and justice should be the approach and even in a fiscal statute, equity should prevail wherever" language permits, as observed by the Supreme Court in paragraph 17 of Commissioner of Sales Tax, U.P. Vs. Auriaya Chamber of Commerce, Allahabad, The case before the Apex Court also arose under the provisions of U.P. Sales Tax Act and question of grant of refund of Sales Tax (now called as Trade Tax) paid by a dealer on FORWARD contracts on the basis of the unchallenged assessment -order when subsequently in another case it was held that such levy is ultra-vires of the Act. The Supreme Court approved the judgment of the High Court granting refund of the tax on such contracts even

though the assessment: order was not subject to challenge in appeal by the assessee, in view of Article 265 of Constitution of India and Section 72 of the Indian Contracts Act, 1992, the payment of tax by the dealer was under a mistake of law " and the realisation of the revenue authorities was also a mistake. Therefore, the Apex Court observed that such sum should be refunded on the principle of Section 72 of the Indian Contract Act. It is to be noted that in para 29 the Apex Court observed " but the rules or procedures are handmaids of justice and not its mistress. It is apparent in the scheme of Act that; sales tax is leviable only on valid transaction. If excess amount is realised, refund is also contemplated by the scheme of the Act.... In certain circumstances refund specifically has been mentipned."

24. It is not out of place to mention here that the judgment of S.C. in the case of M/s. Auraiya Chambers Commerce (supra) should be read in the light of subsequent judgment of Nine Judges Bench dealing with the refund of excess excise duty paid by dealer as also doctrine of unjust enrichment in the case of Mafatlal Industries Limited v. Union of India JT 1996 (II) S.C. 283 by majority it has been held that the claim for refund can succeed "under law if the petitioner alleges and establishes that he has not passed on the burden of duty to another person as in the case of passing of burden to another, the real loss or prejudice is suffered by the person who has ultimately borne the burden and only that person can legitimately claim the refund.

25. The Apex Court has made certain observations in the case of Hindusthan Sugar Mills Vs. State of Rajasthan and Others, wherein it has been observed that "though there was no legal liability on the Central Government but as we are living in a democratic society covered by the rule of law and every government which claims to be inspired by ethical and moral values must do what is fair and just to citizen, regardless of legal technicalities. " The Supreme Court hoped and trusted that Central Government would not seek to defeat a legitimate claim of the assessee for reimbursement of sales tax. In that case, a "legalistic attitude" but would do what fairness and justice demands refund was ordered. These observations though were made about 35 years ago but it appears they have not been understood by the tax authorities in their right perspective and the case in hand is a glaring example of the apathy and indifferent attitude of the taxmen, to the assessee. The taxing authority. is under duty to pecover the legitimate revenue from the tax payers. But in exercise of that power they should not be overzealous to hold the legitimate claim of refund of excess payment of tax.

26. While it is true that collection of revenue is a serious matter for the State and the bounden duty of the authorities functioning under the Act is to implement the provisions of the Act, there should be safety and assurance to an honest tax payer. An honest tax payer should not be subjected to unnecessary harassment and an action not warranted in law, which can be of very serious consequence to the tax payer if is allowed to remain without correction, such harassment and brow beating of an honest tax payer will otherwise drive even such honest tax

payer to become cynical and lead to a situation where tax payers will get a feeling that paying taxes honestly is not worthwhile exercise; that the tax authorities are a menace to the society rather than simply being representatives of the State for enforcing the tax provisions vide (2005) 142 S.T.C. 153. *Rauhavendra Sherrigal v. Assistant Commissioner of Commercial Taxes*.

27. The other case relied upon by the learned Counsel for the petitioner *Belapur Sugar and Allied Industries Ltd Vs. Collector of Central Excise, Aurangabad*, does not advance the case of the petitioner further.

28. The last case relied upon by the learned Counsel for the petitioner *S/S Assam Roadways (Delhi) v. State of U.P.* 2005 JPTC 1106 is an authority wherein a Division Bench of this Court has awarded interest upon the interest amount of refund.

29. In view of the above discussion, therefore, we are of the opinion that the authorities are duty bound under law as well as in equity to refund the excess amount of tax realized from the petitioner even if there is no specific direction, u/s 29 of the Act, subject to doctrine of unjust enrichment as firmly laid down by Apex Court in the, case of *Mafatlal Industries Ltd.* (supra).

QUESTION NO. 3

30. Now we take up the second question involved in the present writ petition and are of the opinion that the department has sought to raise the controversy just for the sake of raising it, without there being any justification. The Trade Tax Officer, Bareilly by means of his letter No. Refund/YA. KA. Aa-4/2000-2001 dated 1st of April, 2001 in response to the application filed by the petitioner for refund stated that as per office record the petitioner has deposited a sum of Rs. 3,37,500/- on 7th of August, 1992 and Rs. 19,700/- on 9th of October, 1992 at Lucknow. The said letter is reproduced below.?-

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31. Reference of this letter has been made in para 10 of the writ petition. A bare perusal of the above letter would clearly show that no dispute was raised by the then officer that the aforesaid two amounts referred to in the letter were not deposited by the petitioner. The contents of this paragraph has been dealt with in para 5 of the counter affidavit. The contents of paragraphs 5 and 6 of the counter affidavit are reproduced below:-

5. That in reply to the contents of paragraph JO of the writ petition it is stated that the Trade Tax Officer, Sector-4 Bareilly has rightly refused the refund as there was no orders for refund in the Tribunal's decision dated 3. 12.1997. On the other hand as per record no tax has- been deposited by the petitioner for the assessment year 1987-88, 1990-91 and 1991-92.

6. That in reply to the contents of paragraph 11 of the writ petition, it is stated that the letter of Industrial Finance Corporation of India i.e. Finance Company who have deposited the tax of behalf of ITR is immaterial- until and unless there is an order for refund no refund voucher can be issued because u/s 29 the order for refund is a must.

32. The letter of the Industrial Finance Corporation of India Ltd. is also reproduced below:-

Please refer to our letter No. 317 dated the 7th March, 2001 and discussions undersigned had with Shri Prem Chopkar, Accounts Officer of the Company today on the subject.

2. As requested by you, we confirm that sums of Rs. 3,37,500/- and Rs 19,700/- were deducted towards sales tax (2%) from the sale consideration of Rs. 188 lakhs payable by 1FC1 to you viz. Reva Enviro Systems (P) Ltd. in regard to supply of Bio-gas Generating and Effluent Treatment Plant installed at factory premises of the Indian Turpentine & Rosin Co. Ltd. at Bareilly in terms of Allahabad High Court order dated the 10th April, 1992. The sum so deducted was paid with Sales Tax Authorities on the 7th August, 1992 (Rs. 3,37,500/-) and on 9th October, 1992 (Rs. 19,700/-) (copies of Challans enclosed), Since amount had been deducted from the sale consideration, we do not have any objection for payment of sum of Rs. 3,57,200/- by Trade Tax Authorities to the Company viz. Reva Enviro System Pvt. Ltd. You may approach Trade Tax Authorities in the matter.

33. These paragraphs do show that for the first time the deponent of the counter affidavit Shri S.K. Gupta, Trade Tax Officer, Sector-4. Bareilly, has stated that as per record no tax has been deposited by the petitioner for the relevant assessment years. In the same breath in the next paragraph it has been stated that deposit made by the Industrial Finance Corporation of India is immaterial. The case of the petitioner is that the aforesaid sum was deducted by the Industrial Finance Corporation out of the bills of the petitioner and were deposited by it on behalf of the petitioner (vide para 11 of the writ petition). The TDS certificate was filed as annexure-5 to the writ petition. Its genuineness or correctness has not been disputed in para 6 of the counter affidavit which is in reply to the contents of para 11 of the writ petition. It is not case of the department that the Industrial Finance Corporation of India is claiming that amount as payment of tax in their account. The pith and substance is that the amount v. as deducted, by the Industrial Finance Corporation of India and was deposited with the department on behalf of the petitioner. It does not, therefore,

lie in the mouth of the department to say that the aforesaid tax amount was not deposited by the petitioner.

34. However, to protect the interest of Revenue it is made clear that if the aforesaid two amounts as mentioned in the letter dated 1st of April, 2001 of the then Sales Tax Officer have been credited or refunded to Industrial Finance Corporation of India, the same shall not be treated to have been deposited for and on behalf of the petitioner. Otherwise the petitioner "shall be entitled to get the refund of the same.

35. A feeble defence has also been taken in paragraph 3 (vi) of the counter affidavit that since the tax under the aforesaid two challans were deposited in the month of August and October, 1992 therefore these deposits relate to the assessment year 1992-93. The said objection is wholly untenable as these deposits were made in respect of the assessment years 1990-91 and 1991-92, which is apparent from annexure -A (letter dated 1st of April, 2002 of the then Saks. Tax Officer).

36. In the result we hold that the petitioner is entitled to get the refund of Rs. 3,37,500/- and Rs. 19,700/- deposited by and or on behalf of the petitioner for the assessment years 1990-91 and 1991-92 at Lucknow through challans No. 73 and 4 with interest at rate of 18 per cent as per Section 29(2) of the Act. The said amount shall be refunded to the petitioner within a period of one month from the date of production of certified copy of this order. In case of failure, the respondents shall also be liable to pay interest upon the interest amount as ordered by this Court in the case of S/S Assam Roadways (Delhi) (supra). By moulding the relief we quash the last paragraph of the order dated 1st of April, 2001 (annexure-4) and the order of the Tribunal dated 16/21st August, 2001 (annexure-8 to the writ petition).

37. Writ petition is allowed. No order as to costs.