

(2015) 02 AHC CK 0056

In the Allahabad High Court

Case No : Civil Misc. Writ (Tax) Petition Nos. 590 and 591 of 2014

Sony India Pvt. Ltd.

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 10-02-2015

Acts Referred:

Uttar Pradesh Trade Tax Act, 1948 — Section 29

Uttar Pradesh Value Added Tax Act, 2008 — Section 15, 31, 40, 55

Citation : (2015) 2 ADJ 745

Hon'ble Judges : Satish Chandra, J.; Tarun Agarwala, J.

Bench : Division Bench

Advocate : S.D. Singh, Amit Mahajan and Gaurav Mahajan, for the Appellant;
C.B. Tripathi, Advocates for the Respondent

Judgement

Tarun Agarwala, J.—The petitioners are engaged in the business of trading in electronic and information technology products such as mobile/cellular phone, laptop, computer, video camera etc. The petitioner imports these products from outside the territory of India and sells them within the State of U.P. as well as outside the State of U.P. after charging Value Added Tax and Central Sales Tax at the rates applicable to such products. For the month of April 2013, the authority passed a provisional assessment order assessing the tax at Rs. 31,75,00,000 under the Value Added Tax Act, 2008 (hereinafter referred to as the VAT Act) and Rs. 27,75,00,000.00 under the Central Sales Tax Act, 1956 (hereinafter referred to as the CST Act). For the month of May 2013, the assessing authority passed a provisional assessment order assessing the tax at Rs. 44,20,00,000.00 under VAT Act and Rs. 22,35,00,000.00 under Central Sales Tax Act. The petitioner, being aggrieved by the provisional assessment order, filed separate appeals under Section 55 of the U.P. VAT Act, which was, eventually, allowed by an order dated 21.3.2014 and the matters were remanded back to the assessing authority to pass a fresh assessment order. The assessment proceedings are pending before the assessing authority as on date and no fresh assessment order has been passed as yet. At the time when the petitioner filed the appeal under

Section 55 of the VAT Act, the petitioner also filed an application for stay of the disputed demand. The appellate authority granted an interim stay of only 50% of disputed amount of tax. The petitioner took the matter to the Tribunal, which granted only 75% stay of the disputed amount. The High Court directed the petitioner to furnish security with regard to the disputed amount under the CST Act. The petitioner filed a Special Leave Petition, wherein the Supreme Court directed the petitioner to deposit 10% of the amount demanded amount and furnish bank guarantee to the extent of 40% of the amount demanded. Based on the said orders, the petitioner deposited a sum of Rs. 16,06,94,740.00 of the tax under protest for the month of April and May, 2013 under the VAT Act and the CST Act.

2. After the appeal was allowed by the appellate authority by an order dated 21.3.2014, the Supreme Court dismissed the Special Leave Petition as infructuous. The Supreme Court however, left it open to the petitioner to recover the amount deposited by way of pre-deposit from the respondent authority. The Supreme Court also indicated that the respondent authority will pay the amount of pre-deposit and release the bank guarantee in accordance with law. For facility, the order of Supreme Court dated 17.4.2014 is extracted hereunder:

"At the time of hearing of these petition, the Ld. Counsel for the petitioner submitted that during the pendency of these petitions, the appeal filed by the petitioner before the Additional Commissioner (Appeals-II), Commercial Tax has already been decided in its favour on 21st March, 2014.

In the aforesaid circumstances, the petitions have become infructuous.

It would be open to the petitioner to recover the amount deposited by way of pre-deposit from the respondent authority.

We are sure that the respondent authority shall pay the amount of pre-deposit and release the bank guarantee in accordance with law.

The special leave petitions are disposed off as having become infructuous."

3. Based on the order of the Supreme Court and the order of the 1st Appellate Authority allowing the appeal of the petitioner, an application was filed under Section 40 of the VAT Act before the appellate authority praying for refund of Rs. 16,06,94,740.00. This application was rejected by the Joint Commissioner (Corporate Circle), Commercial Tax, Noida, respondent No. 3 by an order dated 26.6.2014 on the ground that the same has been adjusted on the outstanding demand of tax for the assessment year 2010-11. The petitioner, being aggrieved by the said order, filed a rectification application under Section 31 of the VAT Act, which was rejected by an order dated 11.8.2014. The petitioner, being aggrieved by the said order, has filed the present writ petition for the quashing of the orders dated 11.8.2014 and 26.6.2014 and has also prayed for a writ of mandamus commanding the respondent No. 3 to refund the amount deposited by the petitioner to the tune of Rs. 16,06,94,740.00.

4. For the assessment year 2009-10, the assessing authority rejected the books of account and passed a best judgment assessment order under VAT Act as well as under CST Act. The petitioner, being aggrieved by the said assessment order filed an appeal under Section 55 of the Act alongwith a stay application. The 1st Appellate Authority granted stay of the order to the extent of 50%, which was increased by the Tribunal to 80%. The High Court in revision directed the petitioner to deposit 10% in cash and furnish bank guarantee. Based on the said orders, the petitioner deposited a sum of Rs. 3,63,95,862.00. The appeal of the petitioner was allowed by the 1st appellate authority by an order dated 21.3.2014 and the matter was remanded to the appellate authority to pass a fresh assessment order where the matter is pending consideration. After remand by the 1st appellate authority, the petitioner filed an application for refund of Rs. 3,95,862.00 and for release of the bank guarantee. The appellate authority by an order dated 11.8.2014 rejected the application for refund but however, released the bank guarantee. The petitioner, being aggrieved by the said order, has filed the present writ petition praying for the quashing of the order dated 11.8.2014 and for a mandamus directing the appellate authority to refund the amount of Rs. 3,63,95,862.00, deposited by the petitioner under the conditional stay order for the assessment year 2009-10 under the VAT Act and the CST Act.

5. In this background, we have heard Sri S.D. Singh, the learned Senior counsel alongwith Sri Gaurav Mahajan, learned counsel for the petitioner and Sri C.B. Tripathi, learned Special Counsel for the State.

6. Sri C.B. Tripathi contended that no amount can be refunded, inasmuch as the amount deposited by the petitioner under the conditional stay order has been adjusted towards the outstanding demand for the assessment year 2010-11. Sri Tripathi further stated that the amount deposited for the assessment year 2009-10 cannot be refunded because there is no order of refund passed by the appellate authority while remitting the matter to the assessing authority and, consequently, until and unless an order of refund is passed, no amount can be refunded under Section 40 of the VAT Act.

7. In support of his submission, Sri Tripathi has placed reliance upon a decision of the Full Bench of this Court in *Lucent Technologies (P) Ltd. v. Commissioner, Trade Tax, U.P. Lucknow*, decided on 12.8.2014 as well as a decision of the Supreme Court in *Commr. of Sales Tax, U.P. Vs. Hind Lamps Ltd.*, wherein the provision of Section 29 of the U.P. Trade Tax Act, 1948 was considered. According to Mr. Tripathi the provision of Section 29 of the U.P. Trade Tax Act is *pari materia* to the provision of Section 40 of the VAT Act.

8. Having heard the learned counsel for the parties, we find that Section 40 of the VAT Act provides for a refund to the dealer for the amount of tax paid by him in excess to the amount due for him. For facility, sub clause (1) and sub clause (2) of Section 40 of the VAT Act, which is relevant for the purpose of this case, are extracted hereunder:

"40 (1) Subject to other provisions of this Act, the assessing authority shall in the manner prescribed, refund to the dealer an amount of tax, fee, or other dues paid in excess of the amount due from him under this Act: (See Rule 50)

PROVIDED that amount found to be refundable shall first be adjusted towards tax or any other amount outstanding against the dealer under this Act or under The Central Sales Tax Act, 1956 or under the erstwhile Act and only the balance if any shall be refunded:

PROVIDED FURTHER that refund of excess amount of input tax credit, shall, without prejudice to other conditions, be subject to conditions and restrictions of Section 15.

2. Where amount found refundable in accordance with the provisions under sub-section (1), is not refunded within thirty days from the date of order of refund passed by the assessing authority or where order giving rise to refund is passed by any other authority or Court, from the date of receipt of such order by the assessing authority by due process, the dealer shall be entitled to simple interest on such amount at the rate of twelve percent per annum from the date of such order passed by the assessing authority or from the date of receipt of the order giving rise to refund passed by any other authority or Court, till the date refund is made:

PROVIDED that where refund relating to excess amount of input tax credit due on the basis of returns filed by the dealer, is not allowed within the time prescribed under Section 15, the dealer shall be entitled to simple interest on such amount at the rate of twelve percent per annum from the date on which refund becomes due and till the date refund is made."

9. The Supreme Court in *Hind Lamps* (Supra) interpreted the expression "found to be refundable" as an amount that is refundable as a result of adjudication. The Supreme Court held that there must be an order passed by the authority for refund of the amount and only then the amount becomes refundable to a dealer. The Supreme Court held as under:

"The expression used is "found to be refundable". In other words, it must be as a result of adjudication. The amount has to be found to be refundable. In the instant case, there is no such adjudication. Even otherwise, the power of adjustment lies with the authority under the statute. While granting refund, he has to first find out whether there is any amount which has to be adjusted against tax or other amounts outstanding against the dealer under the Act or the Central Act and the balance has to be refunded. This power of adjustment lies only with the authority under the statute. The dealer cannot make any adjustment on his own, and not certainly under the proviso to sub-section (1) of Section 29 of the Act as has been held by the High Court. Explanation I makes the position further clear that the date of refund shall be deemed to be the date on which first intimation regarding preparation of refund voucher is sent to the dealer in the prescribed manner. Obviously, therefore, date of refund is relatable

to the intimation regarding the preparation of the refund voucher. Explanation II shows that the expression? refund? includes the adjustment which is permissible under the proviso to sub-section (I). It is to be noted that the manner in which the refund has to be granted is provided in Rules 89 and 90 appearing in Chapter XV." 10. Similar view was given by the Full Bench of this Court in Lucent Technology (Supra).

11. In the instant case, we find that the petitioner deposited a sum of Rs. 16,06,94,740.00 for the month of April and May, 2013 under the VAT Act and under the CST Act, which orders have been set aside. The petitioner thereafter filed an application under Section 40 of the VAT Act, which was rejected on the ground that the amount has been adjusted towards the outstanding demand for the assessment year 2010-11. The petitioner thereafter filed a rectification application contending that the outstanding amount payable for the assessment year 2010-11 was only Rs. 11,25,88,286.00 and there were no other outstanding demand for any assessment year and, therefore, the balance amount of Rs. 4,81,06,454.00 should be refunded. This rectification application was also rejected. The Special Counsel for the State admitted that only Rs. 11,25,88,286.00 was outstanding for the assessment year 2010-11 but contended that since no order of refund was passed by the appellate authority in the appeal of the petitioner, the respondents were not obliged to refund the amount under Section 40 of the VAT Act.

12. We are of the opinion that it is not necessary that an order of refund is required to be passed by the assessing authority in the assessment order or by the appellate authority. If no orders are passed, it is always open to the assessee to file an application under Section 40 of the VAT Act for refund of the amount upon which the competent authority is obliged to adjudicate on that application and pass an order for refund if after adjustment towards outstanding tax any amount is found to be in excess and which is required to be refunded. By not passing an order of refund when the amount is found to be refundable would amount to be judicial misconduct. We find that there was an error apparent on the record and the rectification application was rightly filed, which was rejected mechanically without application of mind. The outstanding amount due for the assessment year 2010-11 was only Rs. 11,25,88,286.00. The petitioner had deposited a sum of Rs. 16,06,94,740.00 and, consequently, an excess amount of Rs. 4,81,06,454.00 was liable to be refunded since admittedly there were no other outstanding dues against the petitioner. Similarly, for the assessment year 2009-10, an amount of Rs. 3,63,95,862.00 was also liable to be refunded in the absence of any outstanding dues against the petitioner. We are also of the opinion that the Supreme Court in its order had clearly directed the respondents to refund the excess amount deposited by the petitioner.

13. In the light of the aforesaid, the impugned orders dated 11.8.2014 and 26.6.2014 are quashed. The writ petitions are allowed and a writ of mandamus is issued commanding the respondent No. 3 to refund an amount of Rs.

4,81,06,454.00 for the assessment year 2013-14 for the VAT Act and the CST Act and Rs. 3,63,95,862.00 for the assessment year 2009-10 under VAT Act and the CST Act within six weeks from the date of production of a certified copy of this order. In the circumstances of the case, parties shall bear their own costs.