

(2005) 05 AHC CK 0255

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 303 of 2000

S/S Assam Roadways

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 24-05-2005

Acts Referred:

Constitution of India, 1950 — Article 226
Uttar Pradesh Trade Tax Act, 1948 — Section 10, 13A(4), 29, 29(2)
Uttar Pradesh Trade Tax Rules, 1948 — Rule 90

Citation : (2005) 05 AHC CK 0255

Hon'ble Judges : Rajes Kumar, J; R.K. Agrawal, J

Bench : Division Bench

Advocate : Alok Kumar, for the Appellant; M.R. Jaiswal, C.S.C., for the Respondent

Final Decision : Allowed

Judgement

Rajes Kumar, J.—The present writ petition under Article 226 of the Constitution of India, the petitioner seeks the following reliefs-

(i) Issue a writ order or direction in the nature of mandamus commanding the respondent No. 3 to give the refund of Rs. 50,000/- to the petitioner for which petitioner become entitled after the order of the Tribunal dated 03.11.1995 in view of Section 29 of the U.P. Trade Tax Act.

(ii) Issue a writ order or direction in the nature of mandamus commanding the respondent No. 3 to calculate and pay the interest @ 18% per annum on Rs. 50,000/- from the date of the Tribunal order dated 03.11.1995.

(iii) Issue any other writ order or direction which this Hon'ble High Court may deem fit and proper under the facts and circumstances of the case.

(iv) Award cost of the petition to the petitioner.

2. The brief facts of the case set out in the writ petition are that the petitioner is

a Transporter engaged in transporting the goods of various parties from one place to another place. The petitioner booked certain goods from Delhi in Vehicle No. DIG 7081 for delivery of the same at Assam. While entering inside the State of U.P. at T.P. Nagar Check Post, Ghaziabad, the driver of the Vehicle obtained Transit Pass No. 3019 dated 17.11.1991 in respect of goods loaded in Vehicle and it is alleged that on 19.11.1991, the driver of the Vehicle submitted the said Transit Pass to the Check Post Officer, Tamkuhi Raaj, Deoria for necessary endorsement. The Check Post Officer instead of passing the said Transit Pass, seized the goods and demanded security at Rs. 79,514/- for the release of the goods. The seized goods was finally released on furnishing of Bank guarantee for Rs. 50,000/- as directed by the Tribunal. In pursuance of the seizure of the goods respondent No. 3 levied penalty at Rs. 79,514/- u/s 13-A(4) of the Act vide order dated 11.1.1993. The petitioner filed appeal before the Assistant Commissioner (Judicial) which was dismissed vide order dated 02.02.1994. It is stated that during the pendency of appeal, respondent got the Bank guarantee encashed for Rs. 50,000/- and adjusted the said amount with the amount of penalty levied vide order dated 11.1.1993. Against the order of Assistant Commissioner (Judicial), Trade Tax, petitioner filed Second Appeal before the Tribunal u/s 10 of the Act. The Division Bench of Tribunal, Varanasi vide order dated 13.11.1995, allowed the appeal and set aside the penalty order. It is, stated that after getting the certified copy of the Tribunal order dated 03.11.1995, petitioner approached the respondent No. 3 for refund of the amount which was recovered by encashing the Bank guarantee of Rs. 50,000/-. It is stated that the respondent No. 3 has not given any heed on the submission of the petitioner. Thereafter, several applications have been sent by post and finally an application-dated 20.12.1999 has been filed. Even no action has been taken on the application-dated 20.12.1999, therefore, the present writ petition has been filed.

3. In paragraph 3 of the Counter Affidavit, it is stated that the deponent had no knowledge about the order of Tribunal and after receiving the petition, deponent had got knowledge about the order of Tribunal dated 03.11.1995, by which, the Tribunal has quashed the penalty order. It is, stated that the original file was not traceable and he deponent had prepared a duplicate file and after tracing out all the records from various offices, prepared the refund voucher for Rs. 50,000/- and informed the petitioner on 03.9.2000 by registered post. With regard to the averment made in paragraph 15, 16 and 17 of the writ petition about filing of certified copy of the Tribunal order dated 03.11.1995 and the application for claim of refund in the counter affidavit in paragraph 8, it has only been stated that there was no evidence to prove that the deponent had filed copy of Tribunal order dated 03.11.1995 in the office of the deponent.

4. Heard Sri Alok Kumar, learned Counsel for the petitioner and Sri M.R. Jaiswal, learned Standing Counsel.

5. Learned Counsel for the petitioner submitted that after receipt of certified

copy of the Tribunal order dated 03.11.1995 same was filed alongwith an application for refund of the amount of Rs. 50,000/- before the respondent No. 3 on 15.1.1996, thereafter when the refund was not given, several applications were moved on 14.8.1996, 12.2.1997, 17.9.1997, 22.4.1998 and 16.2.1999. He submitted that the aforesaid dates of the applications are mentioned in paragraph 7 of the application dated 20.12.1999 which is Annexure-5 to the writ petition and the applications of these dates, have not been specifically denied in the Counter affidavit and since the refund could not made within three months from the date of order of Tribunal, petitioner is entitled for the interest @ 18% u/s 29 of the Act.

6. Learned Standing Counsel submitted that the order of Tribunal has not been received by the deponent and for the first time, deponent came to know about the order of Tribunal when the writ petition was filed. Original file was not traceable which was got prepared and thereafter, petitioner has been informed vide letter No. 2154 dated 03.9.2000 that the refund voucher is prepared and the petitioner may collect the voucher and therefore, petitioner is not entitled for the amount of interest.

7. Learned Standing Counsel further submitted that no refund can be granted unless there is a specific order of refund. In support of his contention, he relied upon the Division Bench decision of this Court in the case of Indodan Milk Products Ltd. v. State of U.P. and Anr. reported in 1983 UPTC 583.

8. Having heard learned Counsel for the parties, we have given our anxious consideration to the submissions made by the learned Counsel for the parties Section 29 reads as follows:-

Section 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 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 month 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 percent 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 percent" the words "twelve percent" were substituted.

(3) Notwithstanding any judgment, decree or order of any Court of authority, no refund shall be allowed of any tax or the due under the 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.)."

9. There is no dispute that the refund was due from the order of Tribunal dated 03.11.1995. The refund has also been given to the petitioner and there is no dispute in this regard. Only dispute is with regard to the interest payable u/s 29 of the Act. The submission of petitioner is that on the receipt of certified copy of the Tribunal order dated 03.11.1995, the same was filed alongwith the application for refund on 15.1.1996 and when the refund was not given, further applications were moved on 14.8.1996, 12.2.1997, 17.9.1997, 22.4.1998, 16.2.1999 and finally on 20.12.1999. In the Counter affidavit, there is no specific denial about the applications given on the aforesaid dates for refund of the amount. As per the Counter-affidavit original file was not traceable, therefore, it appears that filing of applications could not be denied. There is no material to dispute the claim of the petitioner. It is also reasonable to believe that after the receipt of the order of Tribunal, the refund application would have been filed immediately. When a refund is due, there is always anxiety of the receiver to get the money at an earliest. In these circumstances, we have no reason to dispute the claim of petitioner that the copy of order of Tribunal was filed before the respondent No. 3 alongwith an application for refund on 15.1.1996. It is also not believable that the order of Tribunal dated 03.1.1995 could not be received by the respondent till the year 2000. The explanation that the original file had lost is mere a pretext to deny the refund and deny the payment of interest, which can not be believed. Thus, on the facts and circumstances of the case, we are of the opinion that the refund arising from the order of Tribunal dated 02.11.1995 was not given within three months from the date of receipt of such order and therefore, the respondents are liable to pay the interest @ 18% from the date of first application dated 15.01.1996 till the date of intimation dated 03.9.2000. Respondent is also liable to pay interest @ 10% on the amount of interest till the date of payment of interest which we direct the respondents to pay within thirty days from today.

10. In the case of Trade Link India, Ghaziabad v. Trade Tax Officer, Ghaziabad and Anr. 2002 UPTC 136 this Court had occasion to consider the provision of Section 29 of the Act in which, it has held as follows:-

"8". From the conjoint reading of Section 29(2) of the Act and Rules 90 of the Rules, it is clear that the Statute had itself taken care to afford sufficient time to the authorities for scrutinizing the record and making verification of the claim of refund and that is why a period of three months has been stipulated, after expiry of which, the interest would start running, its amount is not refunded within the said period. The manner in which, the interest is to be calculated, its starting

point, as also the date upto which, the interest shall be paid, has all been specified in Section 29(2) of the Act. Thus, the plea of bona fide making enquiry and taking about an year in actually refunding the amount will not absolve the respondents from their liability to pay interest as per Section 29(2) of the Act. There is no justification on the part of the respondents in not paying the interest at the rate of 18 per cent per annum from the date of order till date of refund in terms of Section 29(2) of the Act."

11. In the case of M/S Bai Govind Bhola Nath Construction Corporation, Allahabad (supra), this Court has followed the aforesaid decision in the case of M/S Trade Link India (supra) and has held that u/s 29 of the Act a period of 90 days has been provided in order to enable the Trade Tax Authorities to make verification of the claim of refund and that is why the interest starts running when the refund is not made within a period of 90 days. It has further held that the plea of verification appears to have been taken by the respondents to cover up their deeds of not granting lawful refund within a stipulated period and, therefore, it is not accepted. It has further held that as the respondents have themselves refunded the entire amount, which was sought to be adjusted against the demand for future years, there is no justification as to why they should not be asked to pay interest also. Moreover, there is no dispute regarding the amount of refund for these years, as it finds mention in the orders of the authorities itself.

12. We find that this Court in the case of Oriflame India Private Ltd. v. Assistant Commissioner (Assessment-1) Trade Tax, NOIDA, district Gautam Budh Nagar and another in Civil Misc. Writ Petition No. 24 of 2000 decided on 8.10.2004, has directed the payment of interest where the refund had not been given within 90 days from the date of the order. While following its earlier decisions in the case of M/S Trade Link India (supra), this Court has held as follows:-

"Respectfully following the aforesaid decision, we are of the considered opinion that the respondent ought to have refunded the amount within a period of 90 days from the date of the order for refund and the refund for any reason whatsoever has not been made within the aforesaid period, they are liable to pay interest as provided u/s 29(2) of the Act. In this view of the matter as the refund has been given after 90 days from the order of refund i.e. 27th March, 1999 the petitioner is entitled for the interest from 27th March, 1999 till the date of actual refund. We are not impressed by the submission made by the learned counsel for the petitioner that the petitioner is entitled for the interest from the date of deposit as the amount of refund and interest is governed by Section 29(2) of the Act, which does not permit the refund unless there is specific order of refund."

13. This Court in the case of Mikky Coal Trader, Chandausi Varanasi v. State of U.P. and Ors., in Civil Misc. Writ Petition No. 178 of 2001, decided on 22.9.2004, has dealt with the preparation of refund vouchers in the following words:-

"It may be mentioned here that for preparation of the refund voucher the

authorities are required only to verify as to whether the amount, which is sought to be refunded, has been deposited by the petitioner or not and as to whether there is any specific order of refund. No further enquiry to produce books of account is required to be made and this appears to have been done only to avoid giving of the refund voucher. According to the respondents its revision against the order of Tribunal granting refund is pending before this Court in which no interim order has been passed and the refund order is being withheld while awaiting the decision of this Court. It may be mentioned here, neither under the U.P. Trade Tax Act nor under the rules, there is any provision which provides for withholding of the refund order where the matter is pending before the higher Court in which no interim order has been passed. Thus withholding of the refund order/voucher is arbitrary and is based on wholly irrelevant considerations."

14. One of us (Rajes Kumar, J.), in the case of Ratan Lal Om Prakash Cement Dealer, Khurja v. Commissioner of Sales Tax, 2004 UPTC 439 , has held that if the claim to refund the amount has become due under the order of the Assessing Authority then merely because in appeal, it is modified or the appeal is dismissed, the date of the order of refund for that amount would not get postponed and it would run from the date of the earlier order.

15. This Court has held as follows:

"7" Tribunal and authorities below have acted illegally in holding that the interest was not payable because refund was allowed within three months from the order of Tribunal dated 11th November, 1991, treating the order of Tribunal dated 11th November, 1991 as order by which refund was directed. In fact, refund order was passed by first Appellate Authority on 13th March, 1986 against which, appeal was rejected by the Tribunal vide order dated 11th November, 1991. Tribunal has only confirmed the view of First Appellate Authority directing the refund and has not passed any fresh order for refund."

This Court has further deprecated the practice of the authorities in not granting refund when it became due and also non payment of interest in the following words:-

"9" It is seen that the Trade Tax authorities are acting arbitrarily and unfairly in refunding the amount. They are expected to show promptness in realizing tax due and at the same time, they should be prompt and fair in refunding the excess amount. Normally, they try to defer the refund on one pretext or the other. It is also seen that the Trade Tax authorities acts unfairly in not paying the interest due u/s 29(2), therefore, it is incumbent upon the authority to pay interest alongwith the amount refundable and as a part of the statutory responsibility. Non payment of interest due u/s 29(2) amounts to flouting the law and not discharging its statutory obligations. Senior Officers may see that the Assessing Authority may also pay interest due alongwith the refund voucher and in case, if they fails to pay, necessary action may be taken against them."

16. In the case of Orient Paper Mills (supra) the Apex Court has upheld the

Assistant Commissioner's order Erroneous granting interest @ 9% on that sum, even where an assessee deposits any amount pursuant to a direction given by the High Court and subsequently the amount is refunded, in the absence of any specific direction by the High Court for grant of interest.

17. In the case of M/S Man Power Services & Security (supra), this Court had declined to grant interest on the amount of refund on the ground that there was no specific order of refund in the assessment order dated 2.7.2002 and actually order of refund had been passed only on 18.11.2003 and the petitioner therein had received the amount shortly thereafter, much within the stipulated period. While holding so, the Court followed its earlier decision in the case of Indodan Milk Products Ltd. v. State of U.P. and Anr. 1983 UPTC 583, wherein this Court has held as follows:-

"The legislature obviously intended that the interest on the amount be refunded would accrue only if the same was not refunded within three months of the order of refund made by the Assessing Authority or receipt by the Assessing Authority of such an order by any other competent authority or Court. In view of the amendment made the obligation to pay interest did not arise merely because there was some order by the Assessing Authority or any other competent authority by virtue of which the amount has eventually to be refunded to a dealer. The amendment contemplated a specific order of refund by the Assessing Authority or by any other competent authority or Court.

18. The Apex Court in the case of Commissioner of Income Tax, West Bengal-1, Calcutta Vs. Simon Carves Limited, , has held that the taxing authorities exercise quasi-judicial powers and in doing so they must act in a fair and not a partisan manner. Although it is part of their duty to ensure that no tax which is legitimately due from an assessee should remain unrecovered, they must also at the same time not act in a manner as might indicate that scales are weighed against the assessee. We are wholly unable to subscribe to the view that unless those authorities exercise the power in a manner most beneficial to the revenue and consequently most adverse to the assessee, they should be deemed not to have exercised it in a proper and judicious manner.

19. In Civil Misc. Writ Petition No. 1599 of 2004 Triveni Feuls v. State of U.P. decided on 06.5.05, the Division Bench of this Court on a consideration of various decisions of this Court and Apex Court directed the authorities concerned to pay @ 18% from the date of order and further to pay interest @ 10% on the amount of interest till its payment. A sum of Rs. 10,000/- exemplary cost has also been awarded.

20. The Division Bench decision of this Court in the case of Indodan Milk Products Ltd. v. State of U.P. and Anr. 1983 UPTC 583 is not applicable to the present case. In the present case. Tribunal vide order dated 03.11.1995 passed a specific order that if any amount is deposited, the same may be refunded.

21. In the result, writ petition succeeds and is allowed in p As the amount of

refund has already been paid, we issue a writ of mandamus commanding the respondents to pay interest on the amount of refund as also interest unlawfully and unjustifiably withheld the payment of interest within thirty days from today as directed above. Since the amount of refund and also interest is unnecessarily being withheld by the respondent and the amount has also been refunded when the petitioner approached this Court by means of the present writ petition, the respondent has also exposed himself for payment of exemplary costs which we direct the respondent to pay Rs. 10,000/- to the petitioner. This amount of costs shall also be paid within thirty days from today.