

(2016) 02 GUJ CK 0046
In the Gujarat High Court

Case No : Special Civil Application Nos. 18128, 18945, 18946, 18951, 18953
and 18959 of 2015

State of Gujarat

APPELLANT

Vs

Essar Steel Ltd.

RESPONDENT

Date of Decision : 05-02-2016

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11B, Section 35F
Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 129E
Gujarat Sales Tax Act, 1969 — Section 49(2), Section 67
Gujarat Value Added Tax Act

Citation : (2016) 02 GUJ CK 0046

Hon'ble Judges : Harsha Devani and G.B. Shah, JJ.

Bench : Division Bench

Advocate : Manisha Lavkumar Shah, Government Pleader, for the Appellant;
Mihir Joshi, Sr. Advocate and Keyur Gandhi, Advocate for Nanavati Associates,
Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Harsha Devani, J.—1. All these petitions under Article 226 of the Constitution of India have been preferred by the petitioner - State of Gujarat through the Commissioner of Commercial Tax, challenging the common orders dated 23.07.2015 and 14.10.2015 in Miscellaneous Application No. 74 of 2015 and common order dated 14.10.2015 passed in Rectification Application No. 55 of 2015 passed by the Gujarat Value Added Tax Tribunal (hereinafter referred to as "the Tribunal").

2. Since all the petitions are directed against common orders of the Tribunal and the parties as well as the facts of the case are common, the same were taken up for hearing together and are decided by this common judgment.

3. The respondent - M/s. Essar Steel Limited is a Public Limited Company, which was granted the benefit of exemption under an Incentive Scheme framed under

section 49(2) of the Gujarat Sales Tax Act, 1969 (hereinafter referred to as "the Act"). The company manufactured Hot Briquetted Iron (HBI) in its pioneer unit (Unit I) and carried out commercial production of Hot Rolled Coils (HRC) at another of its units (Unit II). Various demand notices came to be issued to the respondent in the year 2005, which came to be challenged by it before this court by way of writ petitions being Special Civil application No. 14422 of 2005 and allied matters. Subsequently in July 2005, by separate orders passed in relation to Unit I and Unit II, the demand of sales tax came to be confirmed and penalty of 150% came to be levied by the Deputy Commissioner of Sales Tax. Notices seeking to impose penalty also came to be issued by the Commissioner of Sales Tax to Units I and II in revision proceedings, which were also challenged before this court by way of writ petitions. Vide orders dated 22.07.2005 issued under section 67 of the Act, the Commissioner of Sales Tax revised the assessment orders for the relevant years and also imposed penalty at the rate of 150%. All the above orders were subject matter of challenge before this court in different writ petitions. By a common order dated 28.03.2006 passed in Special Civil Application No. 14422 of 2005 and allied matters, the court, after discussing the merits of the case, was of the view that the petitioner Company (respondent herein) had not only made out a strong case for waiver of penalty and interest, but had also made out a strong case for exemption from deposit of the tax amount till final disposal of the appeals/revisions filed by the petitioner Company in respect of Unit I. As regards Unit II, the court was inclined to direct the petitioner company to make pre-deposit of 50% of only the tax amount without making pre-deposit of any interest or penalty. The court, accordingly, issued certain directions which shall be referred to at an appropriate stage.

4. By a common order dated 29.01.2015 made in Second Appeals No. 420 and 421 of 2013 and Cross Objections No. 2 to 2C of 2013, the Tribunal allowed the appeals of Unit II of the respondent and dismissed the cross objections filed by the Department. The Tribunal held that the resultant effect is that the appellant (respondent herein) is not liable to pay any tax, interest or penalty on the disputed transactions and there is no question of enhancement of penalty as prayed for by the Department in the cross objections.

5. Since, pursuant to the orders passed by the Tribunal, the amount paid by the respondent by way of pre-deposit was not refunded to it, the respondent moved the above referred Miscellaneous Applications No. 74 to 77 of 2015 before the Tribunal in the above referred second appeals, stating that by the order dated 29.01.2015, its second appeals had been allowed and the Department's cross objections had been dismissed; that the High Court by order dated 28.03.2006 had dismissed all the writ petitions filed by the respondent with directions amongst others to deposit 50% of the tax dues relating to Unit No. 2 and accordingly, it had deposited Rs. 212 crores as per the statement annexed therewith. It was pointed out that in respect of the revision orders passed in respect of Unit I, revision applications had been filed before the Tribunal being Revision Applications No. 34 to 39 of 2015, wherein the stand of the Department

is that the payment of Rs. 212 crores made by the respondent relates to Unit II and hence, the penalty levied by the revision orders for Unit I cannot be adjusted and the respondent is liable to make payment towards the dues. It was the case of the respondent that if the payment made by it is treated as made only for Unit No. 2 and it is, therefore, required to make payment towards the dues raised by passing revision orders for Unit I, then correspondingly, it is entitled to refund of excess payment made by it for Unit II in view of the decision of the Tribunal in Second Appeals No. 420 to 423 of 2013 in its favour. The respondent, accordingly, sought a direction to the petitioner to forthwith grant refund of the amount of Rs. 77.33 crores as per the statement annexed at Annexure "C" thereto, together with interest admissible on such refund as per the provisions of the Act.

6. It appears that the Tribunal took up the above applications for hearing along with Revision Applications No. 34 to 39 of 2015 filed by the respondent against revision orders relating to Unit I. By a common order dated 27.07.2015, the Tribunal while admitting the revision applications and granting stay against recovery of the outstanding demand, had also directed the Department either to grant refund to the respondent which would be payable as a result of the orders passed by the Tribunal in the second appeals or obtain stay from the Gujarat High Court against such payment. It appears that the matters thereafter came up for hearing on 23.09.2015, whereupon, the Tribunal took note of the fact that the Department had neither obtained stay from the High Court, nor had it granted refund to the respondent in terms of the earlier directions and once again, directed the Department to grant refund to the respondent within a period of fifteen days from that date, failing which the Assistant Commissioner who prepared the statement was directed to remain personally present before it on 14.10.2015. The revision applications and the miscellaneous applications were kept for further hearing on 14.10.2015. On 14.10.2015, the petitioner moved rectification applications before the Tribunal being Rectification Application No. 55 to 58 of 2015, which came to be disposed of on the same day, by directing the petitioner to grant refund to the respondent Company as per the earlier order passed by the Tribunal on or before 30.10.2015. Being aggrieved, the petitioner has filed the present petitions challenging the above referred orders passed by the Tribunal.

7. Vide order dated 19.10.2015 made in Special Civil Application No. 18128 of 2015, notice came to be issued and interim relief came to be directed in terms of Paragraph 7(C) of the petition.

8. Ms. Manisha Lavkumar Shah, learned Government Pleader appearing on behalf of the petitioner, vehemently assailed the impugned orders by submitting that the Tribunal by issuing directions for refund of the amount deposited by the respondent, has exceeded its jurisdiction. It was contended that once the Tribunal decided the second appeals, it became functus officio and could not have thereafter passed any order in those proceedings. Therefore, the impugned order

to the extent it relates to the miscellaneous applications filed in the second appeals is without jurisdiction. It was pointed out that against the orders of the Tribunal, the petitioner has preferred appeals before this court and since there was some delay, delay condonation applications have been filed on which rule has been issued. Therefore, this court is seized with the matter. It was submitted that when the matter was pending before this court, propriety demanded that the Tribunal should refrain from passing any order issuing the kind of directions it has issued. It was submitted that the Tribunal has gone way beyond the scope of the matter before it. It was emphatically argued that the revisions filed by the respondent before the Tribunal, have no bearing on the facts of the second appeal and therefore, the Tribunal was not justified in clubbing the proceedings of the revision applications and the present applications for directions.

8.1 In support of her submissions, the learned Government Pleader placed reliance upon an unreported decision of this court in the case of *State of Gujarat v. Essar Oil Ltd.* rendered on 01.05.2015 in Tax Appeal No. 254 of 2015 and cognate matters wherein, against the order of the first appellate authority directing payment of pre-deposit of 20% of the tax demand and bank guarantee for the balance amount, the dealer went in appeal before the Tribunal. The Tribunal without considering the validity of the order of pre-deposit made by the first appellate authority, allowed the appeals and remanded the matter to the first appellate authority with a direction to decide the first appeals pending before him keeping in mind the decision of the Tribunal in the case of *ONGC Limited* in accordance with law within three months from the date of receipt of the order. The Tribunal also passed further orders directing that if the appeals are not decided within the stipulated period the amount paid by the dealer pursuant to its interim order shall be refunded and that once the existing bank guarantee expires, it shall not be required to be renewed. The Tribunal passed the above order despite the fact that it was brought to its notice that appeals against the order passed by the Tribunal in case of *ONGC Ltd.* were pending before the High Court and the High Court had admitted the appeals on substantial questions of law. This court while allowing the appeals, observed that once it was brought to the notice of the Tribunal that the appeals against its decision in the case of *ONGC Limited* are pending before this court and this court was seized with the matter, even to avoid any further multiplicity of proceedings, the Tribunal could not have insisted for disposing of the appeals by the first appellate authority following its earlier decision in the case of *ONGC Limited*, which are the subject matter of appeals before this court and that too, within a stipulated period of time.

8.2 Reference was made to the provisions of section 78 of the Gujarat Value Added Tax Act, 2003 (hereinafter referred to as "the GVAT Act"), to point out that against the order of the Tribunal, appeal lies to the High Court. It was submitted that it is a settled legal position that an appeal is a continuation of the proceedings before the Tribunal and therefore, any relief which was claimed subsequent to the passing of the order of the Tribunal, could only have been

claimed before the High Court and the Tribunal having become functus officio, could not have entertained miscellaneous applications filed by the respondent. It was submitted that the prescribed period of limitation for preferring an appeal against the order of the Tribunal is 90 days; in the present case, the time limit for filing appeals expired on 29.04.2015 and there was a delay of 54 days in filing the appeals and hence, applications for condonation of delay had been filed. It was submitted that when the delay condonation applications were pending consideration before the court, the Tribunal ought to have stayed its hands and refrained from issuing any directions for grant of refund.

8.3 Referring to the order dated 28.03.2006 made in Special Civil Application No. 14422 of 2005 and allied matters, it was submitted that in terms of the order of the Division Bench, the pre-deposit made by the respondent in compliance with the said order would enure till the final adjudication of the appeals, viz., till the stage of the highest forum. It was pointed out that while deciding the second appeals, the Tribunal did not pass any consequential order directing refund of the amount deposited by the respondent; that once the second appeals stood decided, the Tribunal became functus officio and did not have any jurisdiction to entertain the miscellaneous applications. It was contended that the fact that such question was not raised before the Tribunal would not preclude the petitioner from raising it before this court, it being a pure question of law.

9. Opposing the petitions, Mr. Mihir Joshi, Senior Advocate, learned counsel with Mr. Keyur Gandhi, learned advocate for M/s. Nanavati Associates, learned advocates for the respondent, invited the attention of the court to the judgement and order dated 28.03.2006 passed by a Division Bench of this court in Special Civil Application No. 14422 of 2005 and allied matters, to point out that the court has held that as far as the liabilities of the petitioner company (the respondent herein) in respect of Unit II are concerned, till the hearing and final disposal of the appeals/revision filed by the petitioner Company, the respondent authorities shall not implement or enforce the impugned orders of levying tax, interest and penalty, subject to the condition that the petitioner Company deposits 50% of only the tax amount levied in respect of the Unit II within the time stipulated in the order (i.e. 50% of Rs. 423 crores as indicated in Annexure-II to the order). It was submitted that what was deposited pursuant to the order of this court was by way of pre-deposit for entertaining the appeals preferred by the respondent. Such deposit was to enure till the proceedings are decided by the Tribunal. It was pointed out that the pre-deposit was made in the case relating to Unit II in connection with the second appeals which have been decided in favour of the respondent and the entire demand has been set aside. Therefore, as on date, there is no demand pursuant to which the petitioner can retain the amount deposited by the respondent by way of pre-deposit. It was submitted that there is no provision in the GVAT Act for refund of the amount deposited by way of pre-deposit, therefore, the moment the appeal came to be decided in favour of the respondent, the petitioner was duty bound to return the pre-deposit amount without the respondent being required to make any application in that regard. It

was submitted that since the amount was not returned, the respondent was constrained to approach the Tribunal seeking directions for return of pre-deposit.

9.1 Reliance was placed upon the decision of the Bombay High Court in the case of *Suvidhe Ltd. v. Union of India*, , 1996 (82) ELT 177 (Bom.), for the proposition that a deposit under section 35F of the Central Excise Rules and Act, 1994 is not a payment of duty, but only a pre-deposit for availing the right of appeal. Such amount is bound to be refunded when the appeal is allowed. It was submitted that the Tribunal has held the assessment order to be bad and therefore, refund of the pre-deposit is a consequence of the order inasmuch as refund of pre-deposit follows automatically. Accordingly, consequent to the order, the pre-deposit is required to be returned. It was urged that the Tribunal, therefore, was wholly justified in passing the impugned order, which is only consequential to the earlier order passed by the Tribunal. Reliance was also placed upon the decision of a Division Bench of the Bombay High Court in the case of *Nelco Limited v. Union of India*, , 2002 (144) ELT 56, for the proposition that the amount deposited under section 35F of the Central Excise Act as a condition precedent, for hearing of appeal, does not bear the character of duty but bears the character only of a security deposit, being a statutory condition precedent for hearing of the appeal. Reliance was also placed upon the decision of the Kerala High Court in the case of *Sreedharan v. Union of India*, , 2002 (93) FLR 303 for the proposition that when the declaration made by the Tribunal has become final, the respondents are bound to implement it even in the absence of a consequential direction. Even without any direction, the respondents being public authorities are bound to respect the declaration of law. It was submitted that therefore, once the Tribunal had allowed the appeals filed by the respondent, the petitioner herein was bound to implement the same and return the amount deposited by the respondent by way of pre-deposit without any direction from the Tribunal.

9.2 Next, it was submitted that merely because the GVAT Act does not make any provision for implementation of the order of the Tribunal, does not mean that the Tribunal is powerless so far as implementation of its order is concerned. In support of such submission, the learned counsel placed reliance upon the decision of a Division Bench of this court in the case of *Girishchandra R. Bhatt v. Dineshbhai V. Sanghvi, Principal and others*, , 1996 (1) GLH 523, for the proposition that if the court has powers to adjudicate, it also has powers to enforce the same. Right to adjudicate would be incomplete in absence of power to execute. The attention of the court was invited to the provisions of the Gujarat Primary Education Tribunal (Procedure) Order, 1987 referred to in the said judgment as well as the corresponding provisions of the Gujarat Value Added Tax Tribunal Regulations, 2008, to point out that similar provisions are contained in the Order of 1987 as well as in the Regulations of 2008 and therefore, the said decision would be squarely applicable to the present case.

9.3 As regards the contention raised on behalf of the petitioner that in respect of

the amount deposited by the respondent, it is required to move necessary application for refund under the provisions of section 36 of the GVAT Act, the attention of the court was invited to the provisions of section 36 of the said Act to point out that the same provide for refund of excess amount of tax paid by a person. It was submitted that the expression used is "paid" which is distinct from the expression "deposit". Therefore, section 36 of the GVAT Act would not be applicable to the facts of the present case. It was submitted that in any case, unlike section 11B of the Central Excise Act, 1944, section 36 of the said Act does not contemplate making of an application. Referring to the provisions of sub-section (2) of section 36 of the said Act, which provides that where any refund is due to any dealer, according to the return furnished by him for any period, such refund may provisionally be adjusted by him against the tax due and payable as per the returns furnished under section 29 for any subsequent period in the year, it was submitted that the same is indicative of the fact that the section contemplates tax paid. Referring to section 39 of the GVAT Act, it was pointed out that the same refers to refund of tax and is unrelated to pre-deposit. It was contended that apart from the fact that pre-deposit is different from payment of tax, section 39 of the GVAT Act would be attracted provided the Commissioner had made any order thereunder, whereas, in the facts of the present case, for six months, no order had been passed under section 39 of the said Act and hence, the Tribunal was justified in directing refund of the amount deposited by way of pre-deposit. Moreover, it is a settled practice before the Tribunal whereby such applications for refund are routinely made and the orders are passed thereon, however, in none of those cases, such orders have been challenged. It was submitted that there is no alternative procedure for return of the amount in case of pre-deposit and hence, the court may not interdict the operation of the order of the Tribunal.

9.4 As regards the question of propriety on the part of the Tribunal in directing refund of the pre-deposit when the appeals against the order of the Tribunal are pending before the High Court, it was submitted that the question regarding return of pre-deposit is not subject matter before the High Court. According to the learned counsel, even if the High Court were to stay the order of the Tribunal that would not revive the assessment order so as to entitle the petitioner to recover the amount determined thereunder. It was submitted that the appeals before this court are completely unconnected with the subject matter of this petition and that the amount deposited by the respondent being in the nature of pre-deposit, has no connection with the appeals before this court. It was urged that the pre-deposit enures till the appeal before the Tribunal is decided and has no connection with the appeal before the High Court and that once the assessment order is quashed, there is no question of retaining such amount inasmuch as the same is not a refund of tax. It was urged that as pre-deposit does not fall within the ambit of appeal, there is no overlap and consequently there is no impropriety at all on the part of the Tribunal. It was, accordingly, urged that the petitions being devoid of merit, deserve to be dismissed.

10. This court has considered the submissions advanced by the learned counsel for the respective parties and has perused the record and proceedings as produced before the court and the judgement and order dated 28.03.2006 made in Special Civil Application No. 14422 of 2008 as well as the paper-book as was filed before the Tribunal, which has been submitted by the learned counsel for the respondent.

11. The record of the case reveals that what was subject matter of challenge before this court in Special Civil Application No. 14422 of 2005 and allied matters, were the notices dated 04.02.2005 in respect of Unit II as well as the order dated 15.07.2005 of the Commissioner of Sales Tax cancelling the decision dated 16.08.2002 and separate orders dated 16.07.2008 passed by the Deputy Commissioner of Sales Tax (Corporate Cell-II), Ahmedabad in respect of the Unit I and Unit II, confirming the demand of sales tax and levying penalty of 150% for the years 1998-99, 1999-2000 and for the years 2001-02 to 2004-05 as well as the orders dated 22.07.2005 passed under section 67 of the GVAT Act. The court, in its order dated 28.03.2006, observed that ordinarily, when the disputes are subject matter of appeals/revisions, this court would not entertain the petitions, but for the reasons set out in the order, the court had gone into the arguments advanced by the learned counsel for the respective sides for the limited purpose of considering the question of pre-deposit. Insofar as Unit I is concerned, the court found that a prima facie case had been made out, inter alia, for exemption from deposit of tax amount till disposal of the appeals/revisions filed by the Company. As regards Unit II, the court was inclined to direct the petitioner Company to make pre-deposit of 50% of only the tax amount without making pre-deposit of any interest or penalty. The court, accordingly, issued the following directions:

"A. It is directed that till final hearing and disposal of the appeals/revisions filed by the petitioner Company, the respondents authorities shall not make any recovery of any tax, interest or penalty in respect of unit No. 1 of the petitioner Company for the period from 1995-96 till 2004-05 on the ground that HBI manufactured by the petitioner Company in its unit No. 1 at Hazira with the tax free purchase of raw materials was transferred to unit No. 2 of the petitioner Company for the purpose of manufacturing HRC, if ultimately the final product was sold within the State of Gujarat.

B. As far as the liabilities of the petitioner Company in respect of unit No. 2 are concerned, till the hearing and final disposal of the appeals/revisions filed by the petitioner Company, the respondent authorities shall not implement or enforce the impugned orders of levying tax, interest and penalty, subject to the condition that the petitioner Company deposits 50% of only the tax amount levied in respect of unit No. 2 within the time limits stipulated in this order (i.e. 50% of Rs. 423 crores as indicated in Annexure II to this order). Such amount i.e. 50% of the tax amount for the period from 1995-96 to 2004-05 shall be first reduced by Rs. 75 crores already deposited and the balance amount shall be deposited in

twelve equal monthly installments. The first such installments shall commence from 31st May 2006 and last such installment shall be deposited by 30th April, 2007.

C. These interim directions shall operate during pendency of the appeals/revisions before the appellate authority/tribunal subject to the condition that on behalf of the petitioner Company an undertaking shall be filed by 31st May 2006 that -

(i) The petitioner Company shall co-operate for expeditious disposal of the appeals/revisions,

(ii) In case the petitioner Company finally loses in the proceedings right upto the Hon"ble Supreme Court, the petitioner Company will pay the amounts as may be determined.

D. (i) The deposits to be made pursuant to this order shall be without prejudice to the rights and contentions of the parties and shall enure till the final disposal of the appeals/revisions before the appellate authority/Tribunal and in order to ensure that there are no multiplicity of proceedings, the Tribunal shall decide the revisions as expeditiously as possible and preferably by 30th June, 2007. The deposits shall, therefore, enure for stay of operation, implementation and execution of the impugned orders till all the proceedings are decided by the Tribunal.

(ii) xxx

(iii) xxx

E. It is clarified that the revisional/appellate authority is at liberty to decide the matters in accordance with law without being influenced by any observations made in this order or the directions regarding pre-deposit. The observations have been made for the limited purpose of considering the request for pre-deposit and the directions regarding pre-deposit have also been made having regard to the questions of prima facie case and financial hardship. This Court may not be treated to have expressed any final opinion on any of the controversies between the parties either regarding the merits of the disputes or the preliminary contentions sought to be raised by the petitioner Company."

From the language employed in the above order, it is apparent that the amount which the respondent has been directed to pay is by way of pre-deposit for entertaining the appeals and not towards payment of tax levied under the orders which were subject matter of challenge before the Tribunal.

12. In this backdrop, the merits of the rival submissions have to be examined.

13. Insofar as the provisions of the Gujarat Sales Tax Act are concerned, provision for appeal is made under section 65 thereof. However, since by virtue of the provisions of section 100 of the Gujarat Value Added Tax Act, 2003, the Gujarat Sales Tax Act, 1969 has been repealed, the appeals before the Tribunal

appear to have been filed under section 73 of the GVAT Act. Sub-section (4) of section 73 of the GVAT Act, which is relevant for the present purpose, reads thus:

"73. Appeal.

(4) No appeal against an order of assessment shall ordinarily be entertained by an appellate authority, unless such appeal is accompanied by satisfactory proof of payment of the tax 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."

14. On a plain reading of the provisions of sub-section (4) of section 73 of the GVAT Act, it appears that while the amount deposited under section 35F of the Central Excise Act, 1944 and section 129E of the Customs Act is by way of deposit pending the appeal, the amount paid under sub-section (4) of section 73 of the GVAT Act appears to be in the nature of payment of tax. However, it is not necessary to enter into any discussion in that regard, inasmuch as, in the present case, the amount deposited by the respondent is not under subsection (4) of section 73 of the GVAT Act, nor has the appellate authority passed any order under the proviso to subsection (4) of section 73 of the GVAT Act.

15. In the facts of the present case, this court, in exercise of powers under Article 226 of the Constitution of India, has directed the respondent to make a pre-deposit of 50% of the tax amount and has restrained the revenue authorities from implementing or enforcing the orders impugned in the appeals. The court has further observed that the interim directions shall operate during pendency of the appeals/revisions before the appellate authority/Tribunal, subject to the conditions stipulated therein. The court has further observed that the deposits to be made pursuant to that order shall be without prejudice to the rights and contentions of the parties and shall enure till the final disposal of the appeals/revisions before the appellate authority/Tribunal and that the deposits shall enure for stay of operation, implementation and execution of the impugned orders till all the proceedings are decided by the Tribunal.

16. On a plain reading of the directions issued by this court, it is evident that the same envisage that upon the respondent Company depositing 50% of the tax amount, further recovery under the orders impugned before the Tribunal would be stayed and such interim orders would enure till the final disposal of the appeals before the Tribunal. From the language employed in the said orders, it is clear that what the respondent has been directed to pay is by way of pre-deposit

and not payment of tax under the orders which were subject matter of challenge before the Tribunal. Therefore, the amount deposited by the respondent being in the nature of pre-deposit, once the Tribunal has allowed the appeals and decided the same in favour of the respondent, the consequence would be automatic and the respondent would be entitled to refund of the amount paid by way of pre-deposit.

17. It has been contended on behalf of the petitioner that, upon the appeals being adjudicated in favour of the respondent, the respondent ipso facto does not become entitled to return of the amount deposited by it as a condition precedent for entertaining the appeal and that a refund application would be required to be made under the provisions of the GVAT Act which would be decided in accordance with law. It would, therefore, be apposite to refer to the relevant provisions for refund as contained in the GVAT Act.

18. Section 36 of the GVAT Act provides for refund of excess payment and lays down that subject to the other provisions of the Act and the rules, the Commissioner may refund to a person the amount of tax, penalty and interest, if any, paid by such person in excess of the amount due from him. Provided that, the Commissioner shall first apply such excess towards the recovery of any amount due under the Act or the earlier laws and shall then refund only the balance amount, if any; provided further that no adjustment under the provision shall be made towards a recovery of an amount due that has been stayed by an appellate authority. On a perusal of the provisions of section 36 of the GVAT Act as a whole, there is nothing therein to indicate that the same requires an application to be made prior to refund of any amount by a person. Moreover, what section 36 of the Act contemplates is refund of any amount of tax, penalty and interest paid by a person in excess of the amount due from him. In the facts of the present case, the amount paid by the respondent is by way of a pre-deposit pursuant to the above order passed by this court, which in terms of the said order, would enure till the final disposal of the appeals. Therefore, such amount cannot be termed as an amount of tax paid as envisaged under sub-section (1) of section 36 of the GVAT Act.

19. Section 37 of the GVAT Act makes provision for provisional refund and section 38 makes provision for interest on refund and are not relevant for the present purpose. Section 39 of the GVAT Act provides for power to withhold refund in certain cases and lays down that where an order giving rise to a refund is the subject matter of an appeal or further proceeding or where any other proceeding under the Act is pending and the Commissioner is of the opinion that grant of such refund is likely to adversely affect the revenue, he may, after giving the dealer an opportunity of being heard, withhold the refund till such time as he may determine. Subsection (2) thereof provides that where a refund is withheld under sub-section (1), the dealer shall be entitled to interest as provided under section 38, if as a result of the appeal or further proceeding, he becomes entitled to refund.

20. Thus, what section 39 of the GVAT Act contemplates is that where an order giving rise to a refund is the subject matter of an appeal or further proceeding or where any other proceeding under the Act is pending and the Commissioner is of the opinion that grant of such refund is likely to adversely affect the revenue, he may withhold such amount, after giving an opportunity of hearing to the party. In the opinion of this court, the question of refund under section 39 of the GVAT Act would arise provided there is a payment of tax. Though the expression "refund" may also be used for returning the amount of pre-deposit, there is a clear distinction between the character of the amount paid by way of tax and by way of pre-deposit pending the appeal. This court is in agreement with the view taken by the Bombay High Court in the case of *Nelco Limited v. Union of India* (supra) that the amount deposited as a condition precedent for hearing an appeal, does not bear the character of duty but bears the character only of a security deposit, being a condition precedent for hearing of the appeal. Besides, assuming for the sake of argument that the provisions of section 39 of the GVAT Act are applicable to the facts of the present case, from the facts as emerging from the record, there is nothing to show that the Commissioner has withheld the amount deposited by the respondent in exercise of powers under section 39 of the said Act after recording satisfaction as envisaged therein. Therefore, no cause has been made out by the petitioner for withholding the amount deposited by the respondent Company.

21. As noticed earlier, the amount deposited by the respondent Company is in the nature of pre-deposit. As is explicit on a plain reading of the order dated 28.03.2006 made by this court in Special Civil Application No. 14422 of 2005 and allied matters, such pre-deposit would enure till the final disposal of the appeals. The respondent Company having succeeded in the appeals whereby the Tribunal has held that there is no liability to pay tax, the petitioner has no legal authority to hold on to the amount deposited by the respondent by way of pre-deposit for stay of recovery of the demand that had arisen under the orders impugned before the Tribunal. As held by the Bombay High Court in the case of *Suvidhe Ltd. v. Union of India* (supra), a deposit under section 35F of the Central Excise Rules and Act, 1994 is not a payment of duty, but only a pre-deposit for availing the right of appeal. Such amount is bound to be refunded when the appeal is allowed with consequential relief. On the same analogy, the amount deposited by the respondent being in the nature of pre-deposit and not payment of tax under the provisions of the Sales Tax Act, the amount deposited by it is bound to be refunded in view of the fact that the appeal has been allowed by the Tribunal.

22. The question that then arises for consideration is whether the Tribunal acted within the bounds of its jurisdiction in issuing directions of the refund of the amount deposited by the respondent by way of pre-deposit pursuant to the above order passed by this court. On a perusal of the provisions of the GVAT Act, it is evident that there is no provision therein for return of the amount deposited by way of pre-deposit during the pendency of the appeal. In this regard, it may be apposite to refer to the decision of this court in the case of *Girishchandra R.*

Bhatt v. Dineshbhai V. Sanghvi, Principal and others (supra), wherein the court has held thus:

"22. Xxxxx Clause 7 providing for stay of the execution of the order is suggestive of the fact that it was in the mind of the legislature that a situation to execute orders may arise. It has appeared that there is nothing in this Procedure Order for enforcement or execution of the order that may be passed by the Tribunal. In absence of any express provision for the execution and that State Government would have thought it fit to avoid any situation that may rise because of absence of such specific provision that the Tribunal need not be without any power to enforce its own orders, Clause 14 provides to meet that exigency. xxxxx To make adjudication complete and effective, clause 14 provides for application of provisions to follow the procedure of Code of Civil Procedure as far as it is applicable. This may also be read to provide for the enforcement or execution of the order as per the procedure prescribed in the Civil Procedure Code. This is how the Civil Procedure Code is brought in by clause 14. It will be relevant to refer that where jurisdiction to adjudicate and decide rights and liabilities is conferred by a statute, power to enforce said rights and liabilities must be provided. If it is not provided specifically, it should be impliedly read in, if the same can be read from some of the provision to make the Code or the Act complete for the purpose of determining and adjudicating finally the issue which came before the Tribunal. It can be said that if a court has power to adjudicate, it also has power to enforce the same. Right to adjudicate would be incomplete in absence of power to execute."

23. A perusal of the Gujarat Value Added Tax Tribunal Regulation, 2008 shows that the same contains provisions which are in pari materia to that of the Gujarat Primary Education Tribunal (Procedure) Order, 1987. Regulation 44 bears the heading "Tribunal to follow provisions of Civil Procedure Code in the matters not provided in these regulations" and postulates that the Tribunal shall, in any matter not provided for in these regulations, follow the procedure, as far as it is applicable, laid down in the Code of Civil Procedure, 1908 as may be amended from time to time. Having regard to the similarity of the provisions under two regulations, the court is of the view that the said decision would be squarely applicable to the facts of the present case.

24. Reference may also be made to the decision of the Orissa High Court in the case of Hindustan Aeronautics Ltd. v. Cuttack and others, , (2014) 69 VST 310 (Orissa), on which reliance has been placed by the learned counsel for the respondent, wherein the court has made reference to the following observations of the Supreme Court in the case of Smt. Savitri v. Gobind Singh Rawal, , AIR 1986 SC 984:

"Every Court must be deemed to possess by necessary intendment all such powers as are necessary to make its orders effective. This principle is embodied in the maxim "ubi aliquid conceditur, conceditur ed id sine quo res ipsa esse non potest (where anything is conceded, there is conceded also anything without

which the thing itself cannot exist) (Vide Earl Jowitt's Dictionary of English Law 1959 Edition, page 1797). Whenever anything is required to be done by law and it is found impossible to do that thing unless something not authorised in express terms be also done then that something else will be supplied by necessary intendment. Such a construction though it may not always be admissible in the present case however would advance the object of the legislation under consideration. A contrary view is likely to result in grave hardship to the applicant, who may have no means to subsist until the final order is passed. There is no room for the apprehension that the recognition of such implied power would lead to the passing of interim orders in a large number of cases where the liability to pay maintenance may not exist. It is quite possible that such contingency may arise in a few cases but the prejudice caused thereby to the person against whom it is made is minimal as it can be set right quickly after hearing both the parties."

25. On the question of propriety on the part of the Tribunal in entertaining the applications made by the respondent despite the fact that the appeal filed by the petitioner was pending before this court, it may be noted that till the date of hearing of the petition, the delay in filing the appeals had not been condoned. Besides, the appeals have been preferred against the orders dated 29.01.2015 made by the Tribunal in Second Appeals No. 420 to 423 of 2015 with Cross Objections No. 2 to 2C of 2013, whereas the applications filed before the Tribunal were for the return of the amount of pre-deposit. In the opinion of this court, refund of the amount of pre-deposit is consequential of the orders of the Tribunal and the same has no connection with the appeals preferred by the petitioner before this court. As rightly submitted by the learned counsel for the respondent, even if the orders of the Tribunal were to be stayed, the assessment orders would not spring into operation entitling the petitioner to recover the amount under the same. The impugned order passed by the Tribunal, therefore, cannot, in any manner, be said to come in conflict with any order that may be passed by the High Court in the appeals. Having regard to distinct nature of the proceedings before the High Court and before the Tribunal, it cannot be said that the order passed by the Tribunal lacks propriety. Insofar as the decision of this court in the case of State of Gujarat v. Essar Steel Limited (supra) is concerned, the same would not be applicable to the facts of the present case, inasmuch as, the same was rendered in a totally different set of facts as referred to hereinabove, wherein, though the decision of the Tribunal in the case of ONGC Limited was subject matter of appeal before the High Court, the Tribunal in an appeal against an order of pre-deposit made by the first appellate authority, remanded the matter to the adjudicating authority to decide the same in terms of its previous decision in the case of ONGC Limited, that too, within a stipulated time frame. In the facts of the present case, as noted hereinabove, the controversy before the High Court has nothing to do with the pre-deposit made by the respondent pending the appeals before the Tribunal. Under the circumstances, the said decision would not be applicable to the facts of the

present case.

26. In the light of the above discussion, this court does not find any infirmity in the impugned order passed by the Tribunal so as to warrant interference. The petitions, therefore, fail and are, accordingly, dismissed. The interim relief granted earlier stands vacated in each of the petitions. Notice is discharged in each of the petitions, with no order as to costs.