

(2016) 08 GUJ CK 0102

In the Gujarat High Court

Case No : Tax Appeal No. 668 of 2016 with T.A. No. 678 of 2016

State of Gujarat

APPELLANT

Vs

Unjha Pharmacy

RESPONDENT

Date of Decision : 29-08-2016

Acts Referred:

Citation : (2016) 341 ELT 211

Hon'ble Judges : Akil Kureshi and A.J. Shastri, JJ.

Bench : Division Bench

Advocate : Shri Pranav Trivedi, AGP, for the Appellant

Final Decision : Dismissed

Judgement

A.J. Shastri, J.(Oral) - Both the tax appeals are filed for the purpose of challenging the decision delivered by the Gujarat Value Added Tax Tribunal, Ahmedabad on 8-1-2015 with respect to assessment years 1998-99 and 1999-2000 and since the issues are identical and facts are similar, both the tax appeals are disposed of by this common judgment and order.

2. The following substantial questions of law are raised by the appellant for our consideration :

"(i) Whether the Hon'ble Tribunal was justified in holding that the respondent is entitled to interest on refund u/s. 54 of the erstwhile Gujarat Sales Act, 1969?

(ii) Whether the Hon'ble Tribunal was right in holding that the appeal proceedings are an extension of assessment proceedings?

(iii) Whether the Hon'ble Tribunal was justified in directing the first appellate authority to pass consequential orders in a specified time limit?

3. The brief facts leading to filing of present appeals are that the respondent is engaged in the business of manufacturing of Ayurvedic medicines and during the course of assessment proceedings, it was discovered by the department that

respondent had done URD purchase and hence, the purchase tax under Section 15B under the erstwhile Gujarat Sales Act, 1969 r/w Rule 42E of the Sales Tax Rules was leviable. Resultantly, on 22-1-2004 the assessing authority has passed an order to levy the purchase tax. It is against this order dated 22-1-2004, the respondent herein preferred appeal before the first appellate authority and the first appellate authority, after considering the submissions of the respondent, partly allowed the appeal of the respondent vide order dated 26-2-2004.

4. Against the said order passed by the first appellate authority on 26-2-2004, the respondent herein had preferred Second Appeal No. 548 of 2004 and another cognate Second Appeal No. 547 of 2004. The Tribunal, after considering the decision delivered in case of Ami Pigment, confirmed the refund on purchase tax. However, the Tribunal was of the view that respondent was entitled to interest under Section 54(1) of the erstwhile Gujarat Sales Act, 1969. The Tribunal came to this conclusion on the premise that the appeal proceedings are nothing but the extension of original assessment proceedings and hence, the respondent was ordered to be entitled to interest on refund under Section 54(1) of the erstwhile Gujarat Sales Act, 1969. It is against this order passed by the VAT Tribunal, the department has preferred the present tax appeals raising aforesaid substantial questions of law. The main plank of argument on behalf of the appellant was that the Tribunal has failed to appreciate that the respondent had called upon to pay the purchase tax as the gas was used as fuel for manufacturing process and the department has not withheld the amount of tax. It was also contended by the learned counsel for the Revenue that the Tribunal has wrongly held that appeal proceedings are nothing but the extension of original assessment proceedings and by raising such contentions, ultimately the substantial questions of law are raised and conveyed that the respondent is not entitled to interest on the refund under Section 54 of the erstwhile Gujarat Sales Act, 1969.

5. We have gone through the judgment delivered by the appellate Tribunal. Learned AGP, Mr. Pranav Trivedi candidly submitted that this very issue was dealt with by Coordinate Bench of this Court in earlier decision in case of State of Gujarat v. Doshi Printing Press rendered in Tax Appeal No. 87 of 2015 and allied matters on 9-2-2015 wherein, this Court has held that interest can be awarded even if it is not expressly barred by the statute or that the taxing statute is silent about the same. In that case, the Division Bench of this Court, after considering the decision of the Apex Court in case of Commissioner of Income Tax v. Gujarat Fluoro Chemicals, reported in (2014) 1 SCC 126 : 2013 (296) E.L.T. 433 (S.C.), held in Para 14 that interest can be awarded. Relevant Paras 13 and 14 of the said decision is reproduced, thus :

"13. In addition to the above, the principles of compensatory measure may apply if the taxing statute is silent about the said aspect. The Legislature may control quantification of interest or the entitlement of interest on refund subject to meeting with the test of constitutional provision. But, when the legislature is silent about entitlement of interest on refund of the tax amount already paid by

the citizen, the interest can be considered by way of a compensatory measure. The reference may be made to the decision of the Apex Court in case of Sandvik Asia Ltd. v. Commissioner of Income Tax and Others reported in (2006) 280 ITR 643 (SC) read with the subsequent decision of the Apex Court in case of Commissioner of Income Tax v. Gujarat Fluoro Chemicals reported in (2014) 1 SCC 126 wherein, the Apex Court did maintain the aspect of interest by way of compensatory measure but did not approve the interest on such interest while considering the aspect of compensatory measure. At this stage, we may refer to the recent decision of this Court in case of Gujarat Fluoro Chemicals Ltd. v. Commissioner of Income Tax and Others in Special Civil Application No. 12855 of 1994, decided on 30-1-2015 wherein, the matter was remanded by the Apex Court in view of its Larger Bench judgment in case of Gujarat Fluoro Chemicals (supra). In the said matter, the contention was raised by the counsel for the Revenue that unless the interest was expressly provided on any amount of refund, interest cannot be awarded by way of compensation. After considering the said contention, this Court, in the above-referred decision, at paragraph Nos. 11 to 17 observed thus :-

"11. In the case of Sandvik Asia Limited v. Commissioner of Income Tax and Others (supra), it is true that the matter was pertaining to the payment of advance tax and the Apex Court also found that there was harassment and agony to the Assessee, but on the aspect of compensation to the Assessee, the Apex Court, in the said decision under the head as to whether on general principles the Assessee ought to have been compensated for the inordinate delay in receiving monies properly due to it, has observed from paragraphs 75 to 81 thus :-

Whether on general principles the assessee ought to have been compensated for the inordinate delay in receiving monies properly due to it?

Learned counsel for the appellant says that it cannot be denied that it has been deprived of the use of its monies for periods ranging from 12 to 17 years. It also cannot be denied that such deprivation is solely due to the actions of the Revenue which have been held by this Court to be contrary to the provisions of the Act, on general principles it ought to be compensated for such deprivation.

In the impugned order, the Bombay High Court has held that no compensation is required to be paid since ... there was a serious dispute between the parties, which was ultimately ordered to be paid pursuant to the order passed by this Court on 30-4-1997. Undisputedly, the amount pursuant thereto was paid on 27-3-1998. ... The Court further held that since the amount was paid once the controversy was resolved there was no wrongful retention of monies. No authority can ever accept an obligation to make payment and simply refuse to pay. In each and every case an authority must at least claim to act in accordance with law and hence claim it has no obligation to pay for some reason or another. When the claims of the authority are found to be unsustainable or erroneous by the Courts it follows that the authority has acted wrongfully in the sense of not in

accordance with law and compensation to the party deprived must follow. If the decision of the High Court is upheld it would mean that there can never be any wrongful retention by an authority until this Court holds that their stand is not in accordance with law. Therefore, that on this issue as well, the impugned judgment cannot be sustained and ought to be reversed.

In the present context, it is pertinent to refer to the Circular on Trade Notice issued by the Central Excise Department on the subject of refund of deposits made in terms of Section 35F of the Central Excise Act, 1944 and 129E of the Customs Act, 1962. The Circular is reproduced hereunder :

"Refund/Return of deposits made under Section 35F of CEA, 1944 and Section 129E of Customs Act, 1962 Clarifications. The issue relating to refund of pre-deposit made during the pendency of appeal was discussed in the Board Meeting. It was decided that since the practise in the Department had all along been to consider such deposits as other than duty, such deposits should be returned in the event the appellant succeeds in appeal or the matter is remanded for fresh adjudication.

2. It would be pertinent to mention that the Revenue had recently filed a Special Leave Petition against Mumbai High Court's order in the matter of Nelco Ltd., challenging the grant of interest on delayed refund of pre-deposit as to whether :

(i) the High Court is right in granting interest to the depositor since the law contained in Section 35F of the Act does in no way provide for any type of compensation in the event of an appellant finally succeeding in the appeal, and
(ii) the refunds so claimed are covered under the provisions of Section 11B of the Act and are governed by the parameters applicable to the claim of refund of duty as the amount is deposited under Section 35F of the Central Excise Act, 1944.

The Hon'ble Supreme Court vide its order dated 26-11-2001 dismissed the appeal. Even though the Apex Court did not spell out the reasons for dismissal, it can well be construed in the light of its earlier judgment in the case of Suvidhe Ltd. and Mahavir Aluminium that the law relating to refund of pre-deposit has become final.

3. In order to attain uniformity and to regulate such refunds it is clarified that refund applications under Section 11B(1) of the Central Excise Act, 1944 or under Section 27(1) of the Customs Act, 1962 need not be insisted upon. A simple letter from the person who has made such deposit, requesting the return of the amount, along with an attested Xerox copy of the order-in-appeal or CEGAT order consequent to which the deposit made becomes returnable and an attested Xerox copy of the Challan in Form TR6 evidencing the payment of the amount of such deposit, addressed to the concerned Assistant/Deputy Commissioner of Central Excise or Customs, as the case may be, will suffice for the purpose. All pending refund applications already made under the relevant provisions of the Indirect Tax Enactments for return of such deposits and which are pending with the authorities will also be treated as simple letters asking for

return of the deposits, and will be processed as such. Similarly, bank guarantees executed in lieu of cash deposits shall also be returned.

4. The above instructions may be brought to the notice of the field formations with a request to comply with the directions and settle all the claims without any further delay. Any deviation and resultant liability to interest on delayed refunds shall be viewed strictly.

5. All the trade associations may be requested to bring the contents of this circular to the knowledge of their members and the trade in general.

6. Kindly acknowledge receipt. [Source : M.F.(D.R.) F. No. 275/37/2 KCX.8A, dated 2-1-2002] "A close scrutiny of the contents of the Circular dated 2-1-2002 would disclose as to the modalities for return of pre-deposits. It again reiterated that in terms of the Supreme Court order such pre-deposit must be returned within 3 months from the date of the order passed by the Tribunal, Court or other fiscal authority unless there is a stay on the order of the fiscal authority, tribunal, court by a superior court. The Department has very clearly stated in the above circular that the delay beyond the period of 3 months in such cases will be viewed adversely and appropriate disciplinary action will be initiated against the concerned defaulting officers, a direction was also issued to all concerned to note that defaulter will entail a interest liability if such liability accrue by reason of any orders of the Tribunal/Court such orders will have to be complied with and it may be recoverable from the concerned officers. All the Commissioners were advised implementation of these instructions and ensure their implementation through a suitable monitoring mechanism. It is also specifically mentioned that the Commissioners under respective jurisdiction should be advised that similar matters pending in the High Courts must be withdrawn and compliance reported and that the Board has also decided to implement the orders passed by the Tribunal already passed for payment of interest and the interest payable shall be paid forthwith.

The facts and the law referred to in paragraph (supra) would clearly go to show that the appellant was undisputably entitled to interest under Sections 214 and 244 of the Act as held by the various High Courts and also of this Court. In the instant case, the appellant's money had been unjustifiably withheld by the Department for 17 years without any rhyme or reason. The interest was paid only at the instance and the intervention of this Court in Civil Appeal No. 1887 of 1992, dated 30-4-1997. Interest on delayed payment of refund was not paid to the appellant on 27-3-1981 and 30-4-1986 due to the erroneous view that had been taken by the officials of the respondents. Interest on refund was granted to the appellant after a substantial lapse of time and hence it should be entitled to compensation for this period of delay. The High Court has failed to appreciate that while charging interest from the assessee, the Department first adjusts the amount paid towards interest so that the principle amount of tax payable remain outstanding and they are entitled to charge interest till the entire outstanding is paid. But when it comes to granting of interest on refund of taxes, the refunds

are first adjusted towards the taxes and then the balance towards interest. Hence as per the stand that the Department takes they are liable to pay interest only upto the date of refund of tax while they take the benefit of assessee's funds by delaying the payment of interest on refunds without incurring any further liability to pay interest. This stand taken by the respondents is discriminatory in nature and thereby causing great prejudice to the lakhs and lakhs of assessees. Very large number of assessees are adversely affected inasmuch as the Income Tax Department can now simply refuse to pay to the assessees amounts of interest lawfully and admittedly due to that as has happened in the instant case. It is a case of the appellant as set out above in the instant case for the assessment year 1978-79, it has been deprived of an amount of Rs. 40 lakhs for no fault of its own and exclusively because of the admittedly unlawful actions of the Income Tax Department for periods ranging up to 17 years without any compensation whatsoever from the Department. Such actions and consequences, in our opinion, seriously affected the administration of justice and the rule of law.

Compensation :

The word "Compensation" has been defined in P. Ramanatha Aiyar's Advanced Law Lexicon 3rd Edition 2005 page 918 as follows :

"An act which a Court orders to be done, or money which a Court orders to be paid, by a person whose acts or omissions have caused loss or injury to another in order that thereby the person damnified may receive equal value for his loss, or be made whole in respect of his injury; the consideration or price of a privilege purchased; something given or obtained as an equivalent; the rendering of an equivalent in value or amount; an equivalent given for property taken or for an injury done to another; the giving back an equivalent in either money which is but the measure of value, or in actual value otherwise conferred; a recompense in value; a recompense given for a thing received recompense for the whole injury suffered; remuneration or satisfaction for injury or damage of every description; remuneration for loss of time, necessary expenditures, and for permanent disability if such be the result; remuneration for the injury directly and proximately caused by a breach of contract or duty; remuneration or wages given to an employee or officer."

There cannot be any doubt that the award of interest on the refunded amount is as per the statute provisions of law as it then stood and on the peculiar facts and circumstances of each case. When a specific provision has been made under the statute, such provision has to govern the field. Therefore, the Court has to take all relevant factors into consideration while awarding the rate of interest on the compensation.

(Emphasis supplied)

12. The aforesaid shows that in the above referred decision, the Apex Court did maintain that the interest on the amount of refund, if provided by the statute, such would govern the field, but the Court has to take all relevant factors into

consideration while awarding rate of interest on compensation.

13. In the latter decision of the Larger Bench of the Apex Court in the case of Commissioner of Income Tax, Gujarat v. Gujarat Fluoro Chemicals (supra) at paragraphs 5, 6 and 7, it was observed and held as under :-

5. Since there was an inordinate delay on the part of the Revenue in refunding the amount due to the assessee this Court had thought it fit that the assessee should be properly and adequately compensated and, therefore, in paragraph 51 of the judgment, the Court while compensating the assessee had directed the Revenue to pay a compensation by way of interest for two periods, namely; for the assessment years 1977-78, 1978-79, 1981-82, 1982-83 in a sum of Rs. 40,84,906 and interest at 9 per cent from March 31, 1986, to March 27, 1998, and in default, to pay the penal interest at 15 per cent per annum for the aforesaid period.

6. In our considered view, the aforesaid judgment has been misquoted and misinterpreted by the assesseees and also by the Revenue. They are of the view that in Sandvik case (supra) this Court had directed the Revenue to pay interest on the statutory interest in case of delay in the payment. In other words, the interpretation placed is that the Revenue is obliged to pay an interest on interest in the event of its failure to refund the interest payable within the statutory period.

7. As we have already noticed, in Sandvik case (supra) this Court was considering the issue whether an assessee who is made to wait for refund of interest for decades be compensated for the great prejudice caused to it due to the delay in its payment after the lapse of statutory period. In the facts of that case, this Court had come to the conclusion that there was an inordinate delay on the part of the Revenue in refunding certain amount which included the statutory interest and therefore, directed the Revenue to pay compensation for the same not an interest on interest.

14. The aforesaid shows that in the latter decision of the Larger Bench, it was held that the decision in the case of Sandvik Asia Limited v. Commissioner of Income Tax and Others (supra) cannot be read to mean that Revenue is obliged to pay interest on interest in the event of its failure to refund the interest payable within the statutory period. The Apex Court further held that in the peculiar facts and circumstances of the case of Sandvik Asia Limited v. Commissioner of Income Tax and Others (supra), the Court had come to the conclusion that there was inordinate delay on the part of the Government to refund certain amount, which includes statutory interest and, therefore, directed the Revenue to pay compensation for the same, but not interest on interest.

15. In our view, as per the above referred observations of the Apex Court in the case of Commissioner of Income Tax, Gujarat v. Gujarat Fluoro Chemicals (supra), obligation on the part of the Government to pay compensation for non-payment of the statutory interest by way of interest on interest was not

approved. Further, in the above referred decision of the Larger Bench of the Apex Court at paragraph 7, it was observed that the interest provided under the statute, which may be claimed by the assessee from the Revenue would be available and interest on such statutory interest would not be available.

16. From the conjoint reading of the decision of the Apex Court in the case of *Sandvik Asia Limited v. Commissioner of Income Tax and Others* (supra) and the latter decision of the Larger Bench in the case of *Commissioner of Income Tax, Gujarat v. Gujarat Fluoro Chemicals* (supra), it appears that the liability to pay interest on interest by the Revenue is not approved and to that extent the contention of the Revenue can be maintained. But the further contention of the Revenue that no interest whatsoever would be payable if the refund of the amount of tax or refund of the amount deposited towards tax is to be made, no interest whatsoever would be available by way of compensatory measure.

17. In our view, the general principles for awarding compensation to the assessee for the delay in receiving monies properly due to it is not disapproved by the Larger Bench of the Apex Court in the case of *Commissioner of Income Tax, Gujarat v. Gujarat Fluoro Chemicals* (supra)."

14. In our view, the above-referred observation made by this Court in the above-referred decision in case of *Gujarat Fluoro Chemicals* (supra) is a complete answer to the contention of the learned A.G.P. that the interest can be awarded even if not expressly barred by the statute or that the taxing statute is silent about the same."

6. Therefore, since the issue is covered by the decision of this Court dated 9-2-2015 rendered in Tax Appeal No. 87 of 2015 and allied matters, we see no reason to deviate from the same. In the present tax appeals, no question of law arises and hence, both the tax appeals are dismissed.