

(2020) 06 DEL CK 0071

In the Delhi High Court

Case No : Civil Writ Petition No. 13114 Of 2019, Civil Miscellaneous No. 7430 Of 2020

Team Hr Services Private Ltd

APPELLANT

Vs

Union Of India & Anr

RESPONDENT

Date of Decision : 10-06-2020

Acts Referred:

Constitution Of India, 1950 — Article 12, 226, 265
Central Excise Act, 1944 — Section 11B, 35F, 35FF
Indian Contract Act, 1872 — Section 72

Citation : (2020) 06 DEL CK 0071

Hon'ble Judges : Rajiv Sahai Endlaw, J;Asha Menon, J

Bench : Division Bench

Advocate : J.K. Mittal, Vandana Mittal, Aarti Sharma, P.S. Singh, Kuldeep Singh, Gurmeet, Niharika Gupta

Final Decision : Disposed Of

Judgement

Rajiv Sahai Endlaw, J

1. This petition under Article 226 of the Constitution of India seeks mandamus, directing the Assistant Commissioner, Central Tax, GST- Delhi East, GST Division, to forthwith refund with interest, "pre-deposit" of Rs.2,38,00,000/- made by the petitioner; it is stated that the appeal preferred by the petitioner against the order dated 3rd October, 2011 passed by the Commissioner, has been finally allowed by the Tribunal by order dated 22nd February, 2018 and revenue appeal preferred whereagainst by the respondents to this Court i.e. SERTA No.23/2018, has been dismissed on 24th August, 2018, declaring that the respondents had no right to retain the said money of the petitioner.

2. It is the case of the petitioner, (i) that an audit/investigation was conducted by the officers of the Service Tax Commissionerate, New Delhi, from 24th July, 2006 to 28th July, 2006, for the period 1st July, 2003 to 31st March, 2005 and a deposit of Rs.2,38,00,000/- was made by the petitioner on 27th October, 2006,

under protest, under pressure from the officers during the audit/investigation of the service tax records, as the officers insisted on the deposit by the petitioner, even without issuing any notice to show cause to the petitioner; (ii) that the petitioner, vide letter dated 30th October, 2006, informed the respondents that the deposit made on 27th October, 2006 was under protest and vide letter dated 26th February, 2007, informed the Joint Commissioner of Service Tax of the same and that despite lapse of a few months from the date of deposit, a show cause notice had not been received; (iii) that the Service Tax Department issued a show cause notice dated 28th July, 2008 to the petitioner, demanding service tax of Rs.4,66,39,061/- for the period of 1st July, 2003 to 31st March, 2005, admitting that the petitioner thereoutof had already deposited Rs.2,38,00,000/- under protest on 27th October, 2006; (iv) that the Commissioner (Adjudication) Service Tax, New Delhi passed the order dated 3rd October, 2011 in respect of the show cause notice dated 28th July, 2008 aforesaid, confirming the demand with interest and penalty and appropriated the amount of Rs.2,38,00,000/- aforesaid towards the same; (v) that the petitioner preferred an appeal before the Customs, Excise & Service Tax Appellate Tribunal (CESTAT)/Tribunal along with an application for interim stay; the Tribunal by order dated 24th September, 2012 allowed the stay application, by waiving of pre-deposit of the balance amount owing to deposit by the petitioner, though under protest, of the said sum of Rs.2,38,00,000/- and vide subsequent order dated 15th October, 2013, it was clarified that the stay would continue to operate till the pendency of the appeal; (vi) that vide Circular No.984/08/2014-CX dated 16th September, 2014 issued by the Central Board of Excise and Customs, Department of Revenue, Ministry of Finance, it was clarified that when an appeal is decided in favour of the assessee, the assessee is entitled to refund of amount with interest under Section 35FF of the Central Excise Act, 1944 and such refund should be made within fifteen days of receipt of letter seeking refund, irrespective of whether the Department was proposing to challenge the said order; (vii) that vide Master Circular No.1053/02/2017-CX dated 10th March, 2017 issued by the Board, it has further been clarified that when an appeal is decided in favour of assessee, the assessee is entitled for refund of the amount deposited along with interest, from the date of making deposit till the date of refund and such deposit is not payment of duty and will not be governed by the provisions of Section 11B of the Central Excise Act; (viii) that the Tribunal, vide final order dated 22nd February, 2018 allowed the appeal aforesaid of the petitioner, on the ground that the demand was barred by limitation; (ix) that the petitioner vide application dated 2nd May, 2018 sought refund of Rs.2,38,00,000/- deposited on 27th October, 2006; (x) that the respondents challenged the order dated 22nd February, 2018 of the Tribunal before this Court by filing SERTA No.23/2018, which was dismissed by this Court vide order dated 24th August, 2018, on the ground that no question of law arose; resultantly, the order of the Tribunal allowing the appeal of the petitioner was affirmed; (xi) that the petitioner again, on 11th March, 2019 sought refund of the amount aforesaid and on refund not being made, submitted reminders dated 16th April, 2019, 14th May, 2019 and 12th June, 2019; and, (xii) that the

respondents, on the claim of the petitioner for refund, conducted a hearing on 20th August, 2019 but still failed to refund the said sum of Rs.2,38,00,000/- to the petitioner.

3. The petition came up first before this Court on 13th December, 2019 and thereafter on 17th December, 2019, when notice thereof was issued and it was ordered that in case the amount sought by the petitioner is refundable, the respondents should ensure that the amount is refunded with interest within four weeks therefrom. However, till 25th February, 2020, neither refund had been made nor any action taken pursuant to the order dated 17th December, 2019. During the hearing on 25th February, 2020, the counsel for the respondents assured this Court that refund orders will be issued by the next date of hearing. Finding that there was no compliance, neither of the order dated 17th December, 2019 nor of the order dated 25th February, 2020, vide order dated 3rd March, 2020, contempt notice was issued to the respondents, clarifying that in case the amount due to the petitioner was refunded with interest within one week therefrom, the contempt notice shall stand automatically discharged. The matter could not be taken up on the next date i.e. 16th March, 2020, owing to the prevalent Covid-19 situation.

4. The petitioner filed CM No.10820/2020 for early hearing and which was taken up on 13th May, 2020. It was the stand of the counsel for the respondents on that date that the reasons for not complying with the orders were set out in a counter affidavit which remained to be filed. Vide order dated 13th May, 2020, the counter affidavit was permitted to be filed and the application for early hearing allowed and the writ petition posted for hearing for today.

5. The respondents, in their counter affidavit have pleaded (a) that show cause notice dated 28th July, 2008 proposing a demand of Rs.4,66,39,021/-along with interest and penalty was issued to the petitioner and out of which a sum of Rs.2,38,00,000/- had been deposited by the petitioner under protest; (b) that on the said show cause notice being adjudicated in favour of the petitioner, on 12th March, 2019, a refund application was filed by the petitioner; (c) that refund sanction order was drafted by the then Assistant Commissioner but negative observations were raised by the pre-audit branch, Central GST Commissionerate, Delhi East and hence the refund application was rejected; (d) that the petitioner was informed of the said rejection of refund and was given an opportunity of personal hearing on 20th August, 2019, before processing the refund application; (e) that final rejection refund order signed on 13th September, 2019 was dispatched to the petitioner on 19th September, 2019 but was received back undelivered; (f) however, on 19th September, 2019 itself the petitioner was telephonically communicated the final rejection refund order dated 13th September, 2019; (g) that the petitioner has concealed the said facts; and, (h) that the refund application having been adjudicated vide final rejection refund order dated 13th September, 2019, the same has attained finality and the only remedy available to the petitioner is of filing of a statutory appeal thereagainst

before the competent authority.

6. A perusal of the final rejection refund order dated 13th September, 2019 shows that the same also does not dispute that the sum of Rs.2,38,00,000/- deposited by the petitioner on 27th October, 2006 was under protest and the said order records, (I) that on the petitioner preferring appeal to CESTAT, because the petitioner had already deposited more than 50% of the tax element, though under protest, the condition of pre-deposit was waived; (II) that CESTAT set aside the impugned order dated 3rd October, 2011 only on the question of limitation; (III) that the petitioner had filed the refund claim well within the prescribed time; (IV) that vide Circular dated 16th September, 2014, where the appeal is decided in favour of the assessee, the assessee shall be entitled to refund of the amount deposited along with interest at the prescribed rate from the date of making of the deposit to the date of refund; (V) that the appeal preferred by the petitioner had been decided in favour of the petitioner only on the question of limitation; (VI) that the amount of Rs.2,38,00,000/- had been deposited by the petitioner, under protest, during the course of audit/ investigation and not by way of pre-deposit pursuant to appeal before the CESTAT-thus the Circular dated 16th September, 2014 was not applicable to the facts, though pre-deposit for filing an appeal is not payment of duty but the deposit by the petitioner of Rs.2,38,00,000/- was not by way of pre-deposit and the CESTAT had allowed the appeal of the petitioner only on limitation, though not finding the petitioner to be having a case on merit; (VII) that even the High Court in its order dated 24th August, 2018 had not gone into the merits of the case; (VIII) that thus the deposit of Rs.2,38,00,000/- by the petitioner, though under protest, was made against service tax liability and which liability had not been decided in any of the Court's orders; (IX) that therefore the claim of refund of the amount of Rs.2,38,00,000/- was not admissible; (X) that none of the judgments cited by the counsel for the petitioner dealt with treating the amount deposited by way of tax, though under protest, to be a pre-deposit for refund purpose; and, (XI) that thus the amount of Rs.2,38,00,000/- deposited by the petitioner against service tax liability and which liability had not been set aside by CESTAT, was not refundable.

7. The purport of the aforesaid order of the respondents declining refund to the petitioner and which forms the defence of the respondents to this petition, is that since the petitioner had deposited the said amount of Rs.2,38,00,000/-, even though under protest, before preferring the appeal to CESTAT and not by way of pre-deposit under Section 35F of the Central Excise Act, notwithstanding the appeal of the petitioner against total demand of Rs.4,66,39,061/-, and in which the said sum of Rs.2,38,00,000/- had been adjusted, being allowed, the petitioner was not entitled to refund of Rs.2,38,00,000/-.

8. We have enquired from the counsel for the respondents, whether not the aforesaid logic in the order declining refund, leads to a absurd situation where, the respondents, notwithstanding their demand for the entire sum of

Rs.4,66,39,061/- (and against which the sum of Rs.2,38,00,000/- deposited under protest had been adjusted) being set aside by CESTAT on the ground of being barred by time, are entitled to appropriate the amount of Rs.2,38,00,000/- already deposited by the petitioner and demand with respect where to has also been set aside. We have further enquired, whether not the said logic treats Rs.2,38,00,000/- out of the total demand of Rs.4,66,39,061/- differently from the balance, with the respondents being entitled to recover/appropriate Rs.2,38,00,000/- but not being entitled to recover the balance demanded amount. It was not the case of the respondents before the Commissioner or before CESTAT or before this Court that the deposit by the petitioner of Rs.2,38,00,000/- even though under protest, was within time and only the demand for the balance amount was barred by time and thus the amount of Rs.2,38,00,000/- should be permitted to be appropriated. The Commissioner as well as the CESTAT dealt with the entire demand as one and set aside the same and now the same cannot be bifurcated.

9. Since the emphasis of the counsel for the respondents, during the hearing, also is on the Circular providing for refund of pre-deposit amount being not applicable to deposit under protest, we have further enquired, how and under what head have the respondents appropriated Rs.2,38,00,000/-, when the entire demand of Rs.4,66,39,061/- of which it was a part, stands set aside.

10. We have yet further enquired from the counsel for the respondents, whether not the respondents, inspite of being State within the meaning of Article 12 of the Constitution of India and expected to not act to the prejudice of its citizens, are acting as "finders keepers", by inspite of having been held to be not entitled in law to the entire amount of Rs.4,66,39,061/-, refusing to refund what has already been received and to which they have not been held to be entitled.

11. Though there is no clarity of the circumstances under which the petitioner deposited the said sum of Rs.2,38,00,000/- during audit/investigation but the undisputed position remains that the deposit was under protest and against anticipated liability and which liability though fructified by the respondents was set aside by the CESTAT and which order has attained finality. It is not the case of the respondents that the said deposit was voluntary or by way of self-assessment and which has been accepted by the respondents and in which case the respondents could perhaps have argued that the said deposit was voluntary and not refundable, as was the case in Commissioner of Income Tax, Bhopal Vs. Shelly Products (2003) 5 SCC 461. On the contrary, the assessment done by the respondents and the demand raised in pursuance thereto, of Rs.4,66,39,061/- and where against Rs.2,38,00,000/- was adjusted, has been set aside in entirety and as of today there is no assessment which had attained finality assessing the liability of the petitioner to tax of Rs.2,38,00,000/-. The respondents as State can recover and/or retain as tax only such amounts which are assessed and found due as tax and which assessment has attained finality. The respondents, as State, cannot retain even a single paise of the assessee, unless has been

found due towards tax liability and which is not the case here. At the time when the amount of Rs.2,38,00,000/- was deposited, there was no assessment and no demand.

12. The respondents are reminded of Article 265 of the Constitution of India prohibiting any tax to be levied or collected except by authority of law. The respondents have also not pleaded a case of the petitioner being not entitled to refund, on the ground of the petitioner having passed of the liability to another as illustrated in the Nine Judge Bench's judgment of the Supreme Court in *Mafatlal Industries Ltd. Vs. Union of India* (1997) 5 SCC 536. Allowing the respondents to retain the said amount, would also be in violation of Section 72 of the Contract Act, 1872, obliging a person to whom money has been paid by mistake or under coercion, repay the same. The said provision enshrines the principle of unjust enrichment and restitution and the respondents State, by refusing to refund the sum of Rs.2,38,00,000/-, are purporting to unduly enrich themselves.

13. We may however mention that the counsel for the petitioner also, perhaps to bring the case of the petitioner within the Circular relied upon, has sought refund of the amount by calling it "pre-deposit", when it was not deposited by way of pre-deposit but under protest, even before any demand was raised and while the petitioner was still being investigated against. Such deposits under protest, to ease the rigors which the Tax Authorities otherwise are entitled to impose, are not unknown and judicial notice has been taken thereof. However as long as the amount deposited is under protest and in which protest, as held in *Mafatlal Industries Ltd. supra* no grounds are required to be stated, no right thereto accrues in favour of the deposittee till the deposittee is held entitled in law thereto. Thus, the wrong nomenclature given by the petitioner to the deposit would not be a ground for allowing the respondents State to unduly enrich themselves. A Division Bench of this Court in *Indglonal Investment and Finance Ltd. Vs. Income Tax Officer* (2012) 343 ITR 44 has held that refund provisions should be interpreted in a reasonable and practical manner and when warranted, liberally in favour of the assessee.

14. To be fair to the counsel for the respondents, he has only placed before us what is recorded in the final rejection refund order but reasoning wherein is illogical and contrary to the expected conduct from the State and unjustifiable. The said order does not disclose any ground or statutory provision whereunder the respondents State are entitled to retain the said amount of Rs.2,38,00,000/-.

15. No statutory mechanism whereunder the petitioner is entitled to seek refund in such circumstances also has been disclosed. It is thus not as if, we ought not to exercise our implicit discretion in exercising writ jurisdiction for the reason of any statutory remedy being available to the petitioner. When it is so and when the reasons disclosed in the order refusing refund are found to be illogical and de hors the statutory provision and further when it is found that the respondents State are illegally withholding money, a case for issuing a mandamus as sought

is made out.

16. It is perhaps for this reason only that even while issuing notice of the petition, directions for refund were made and which remain uncomplished with.

17. We are unable to find any justification for the respondents to retain the said amount of Rs.2,38,00,000/-. We have thus enquired from the counsel for the respondents, what should be the rate of interest for which the respondents should be held liable.

18. The counsel for the respondents states that as per the statute, the respondents are liable for interest @ 6% per annum only.

19. Per contra, the counsel for the petitioner has drawn attention to:

(A) Sandvik Asia Ltd. Vs. Commissioner of Income Tax-I, Pune (2006) 2 SCC 508 where interest @ 9% per annum was awarded;

(B) Surinder Singh Vs. Union of India 2006 SCC OnLine Del 1863 (DB) where interest @ 12% per annum was granted on delayed refund;

(C) Hello Minerals Water (P) Ltd. Vs. Union of India 2004 SCC OnLine All 2187 (DB) where interest @ 10% per annum was granted;

(D) Hindustan Coca-Cola Beverages Pvt. Ltd. Vs. Union of India 2013 SCC OnLine Guj 1487 (DB) where interest @ 9% per annum and future interest @ 6% per annum was granted; and,

(E) Ebiz.com Pvt. Ltd. Vs. Commissioner of Central Excise, Customs & S.T. 2017 (49) S.T.R. 389 (All.) where costs of Rs.50,000/- were imposed on the Department.

20. In the present case, as aforesaid, the amount of Rs.2,38,00,000/- was deposited by the petitioner of its own volition, during the audit/investigation, though under protest and the petitioner has not chosen to detail the circumstances in which the petitioner felt compelled to make the deposit. The petitioner for the first time sought refund of the said amount vide letter dated 2nd May, 2018.

21. Considering the said facts, we do not find the petitioner entitled to interest at any higher rate than @ 6% per annum from the date of deposit i.e. 27th October, 2006 till the end of May, 2018 i.e. 31st May, 2018. However, we do not find any justification for the respondents retaining the said amount thereafter and find the respondents liable for interest with effect from 1st June, 2018 onwards and till date @ 7.5% per annum. While so enhancing the rate of interest, we have also taken into consideration the non-compliance by the respondents of the orders of this Court as detailed above, leading to a contempt notice being issued to the respondents and in response where to Ms. Niharika Gupta, Assistant Commissioner in the Office of Division-Nehru Place, Central GST, Delhi East Commissionerate is present in the Court.

22. The respondents are expected to at least now, on or before 15th July, 2020 refund the amount of Rs.2,38,00,000/- with interest @ 6% per annum from 1st November, 2006 to 31st May, 2018 and with interest @ 7.5% per annum from 1st June, 2018 till the date of refund on or before 31st July, 2020. However, if the said amount is not refunded by 15th July, 2020, the rate of interest with effect from 1st August, 2020 shall stand enhanced to 12% per annum. A mandamus to the said effect is issued to the respondents GST Department.

23. We would be failing in our duty, if do not also record another contention of the counsel for the respondents. It was also the contention of the counsel for the respondents that the petitioner had concealed the facts in the petition, as disclosed in the counter affidavit accompanied with documents. However, once the respondents are not found entitled to the monies of the petitioner and/or are found to be unjustifiably retaining the same, the said argument would not entitle the respondents to appropriate what is not due to them.

24. Having heard Ms. Niharika Gupta, Assistant Commissioner, we are of the view that no purpose will be served in proceeding with the contempt proceedings and the contempt notice issued vide order dated 3rd March, 2020 is discharged.

25. The respondents having however indulged in frivolous litigation, are burdened with costs of Rs.25,000/- payable to the petitioner along with the amounts with respect where to mandamus has been issued.

26. The petition is disposed of.