

Refund arising out of Tribunal's order must be granted to assessee even if dept. preferred appeal before HC

Summary – The High Court of Gujarat in a recent case of Essar Steel Ltd., (the Assessee) held that where assessee filed appeal before Tribunal and had pre-deposited 50 per cent of disputed tax, when Tribunal allowed assessee's appeal, refund of amount of pre-deposit was consequential to order of Tribunal and same had no connection with appeal preferred by revenue before High Court which remained pending

Facts

- Against the order passed by the lower authority, the assessee filed an appeal before the Tribunal under section 73.
- Thereafter the assessee, pursuant to the order passed by the High Court on 28-3-2006 in Special Civil Application, had deposited 50 per cent of the disputed tax amount by way of pre deposit for entertaining the appeal.
- The Tribunal by an order dated 29-1-2015 allowed the appeal holding that the assessee was not liable to pay any tax.
- Since, pursuant to the order passed by the Tribunal, the amount paid by way of pre deposit was not refunded, the assessee moved a Miscellaneous Application before the Tribunal seeking a direction to the Assessing Authority to forthwith grant refund of the amount deposited by way of pre deposit.
- The Tribunal by an order dated 14-10-2015 directed the Assessing Authority to grant refund to the assessee on or before 30-10-2015.
- On writ petition filed by revenue challenging order of Tribunal dated 14-10-2015:

Held

Earlier order of High Court dated 28-3-2006

- From the language employed in the order dated 28-3-2006 passed by the High Court in Special Civil Application filed by the assessee, it is clear that what the assessee has been directed to pay is by way of pre deposit and not payment of tax under the order which was subject matter of challenge before the Tribunal. Therefore, the amount deposited by the assessee being in the nature of pre deposit, once the Tribunal has allowed the appeal and decided the same in favour of the assessee, the consequence would be automatic and the assessee would be entitled to refund of the amount paid by way of pre deposit.

Contentions of revenue

- It has been contended by the revenue that upon the appeal being adjudicated in favour of the assessee, the assessee *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 VAT Act which would be decided in accordance with law.

Provisions relating to refund

- Section 36 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 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 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 instant case, the amount paid by the assessee is by way of a pre deposit pursuant to the order passed by the High Court, which in terms of the said order, would enure till the final disposal of the appeal. Therefore, such amount cannot be termed as an amount of tax paid as envisaged under sub-section (1) of section 36.
- Section 39 provides for power to withhold refund in certain cases and sub-section (1) thereof 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. Sub-section(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.
- Thus what section 39 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. The question of refund under section 39 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.
- Besides assuming for the sake of argument that the provisions of section 39 are applicable to the facts of the instant case, from the facts as emerging from the record, there is nothing to show that the Commissioner has withheld the amount deposited by the assessee in exercise of powers under

section 39 after recording satisfaction as envisaged therein. Therefore, no cause has been made out by the revenue for withholding the amount deposited by the assessee.

- The amount deposited by the assessee is in the nature of pre deposit. The assessee having succeeded in the appeal, whereby the Tribunal has held that there is no liability to pay tax, the revenue has no legal authority to withhold the amount deposited by the assessee by way of pre deposit.
- The amount deposited by the assessee being in the nature of pre deposit and not payment of tax, the amount deposited by it is bound to be refunded in view of the fact that the appeal has been allowed by the Tribunal.

Jurisdiction of Tribunal

- The question that then arises for consideration is whether the Tribunal acted within the bounds of its jurisdiction in issuing direction of the refund of the amount deposited by the assessee by way of pre deposit.
- On a perusal of the provisions of the VAT 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.
- 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 decision of the Gujarat High Court rendered in the case of *Girishchandra R. Bhatt v. Dineshbhai V. Sanghvi*, 1996 (1) GLH 523, wherein it has been held 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, would be squarely applicable to the facts of the instant case.

Whether order passed by Tribunal lacks propriety

- On the question of propriety on the part of the Tribunal in entertaining the application made by the assessee despite the fact that the appeal filed by the revenue against the order of the Tribunal was pending before the High Court, it may be noted that the appeal has been preferred against the order dated 19-1-2015 made by the Tribunal, whereas the application filed before the Tribunal was for the return of the amount of pre deposit. The refund of the amount of pre deposit is consequential of the order of the Tribunal and the same has no connection with the appeal preferred by the revenue before the High Court.

- Even if the order of the Tribunal was to be stayed, the assessment order would not spring into operation entitling the revenue 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 appeal. 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.

Conclusion

- In view of the aforesaid, the impugned order passed by Tribunal deserved to be upheld.