

Tax mistakenly deposited couldn't be retained by Govt. merely on ground that there was delay in claiming refund

Summary – The High Court of Gujarat in a recent case of Multibase India Ltd., (the Assessee) held that Tax mistakenly deposited cannot be retained by Government on ground of delay in claiming refund of excess tax, unless delay is gross or intentional or arising out of inaction and lethargy on part of assessee

Facts

- The assessee-company made payments of royalty to a French company after deducting tax at source at rate of 20 per cent. The assessee, later on, realized that under Double Taxation Avoidance Agreement between India and France the royalty paid by the assessee to the parent company would invite TDS liability only at the rate of 10 per cent and, thus, the assessee had made excess deduction of TDS. The assessee thereupon approached the Assistant Commissioner and requested for refund of the excess amount of TDS.
- The Assistant Commissioner rejected assessee's request on the ground that the application was beyond the period of limitation prescribed under the CBDT Circular dated 23-10-2007.
- The assessee further approached the CBDT for intervention by exercising powers under section 119, which had not been responded and was still pending.
- On writ petition:

Held

- The petitioner's application for refund of excess TDS deposited is not being decided primarily on the ground that same was filed after the period of limitation prescribed under the scheme. *Prima facie*, there is no ground to discard the petitioner's contention that there has been excess deposit of TDS as compared to what is prescribed under DTAA and, therefore, such excess deposit is required to be refunded, of course subject to fulfilment of conditions contained in the scheme. Be that as it may, these issues have not been examined by the department since at the very threshold, the Commissioner believed that the application is belated.
- Unless the delay is gross or intentional or arising out of inaction and lethargy on the part of the petitioner, tax mistakenly deposited cannot be retained by the Government on the ground of delay.
- Quite apart from the fact whether the authority itself under the scheme had power to condone the delay, section 119 clearly empowers the CBDT to do so. Sub-section (2) of section 119 further provides *inter alia* that without prejudice to the generality of the provisions contained in sub-section (1), the Board may, if it considers it necessary or expedient to do so for avoiding genuine hardships by general or special orders authorizing the income-tax authority or the Commissioner (Appeals) to

admit an application or claim for any exemption, deduction, refund or any other relief under the Act after the expiry of period prescribed under the Act by or under the Act for making such application or claim and deal with the same on merits in accordance with law.

- Thus, CBDT undoubtedly has powers to condone the delay even if one assumes the Commissioner does not have such powers. Ordinarily the CBDT would have to be to examine the issue and consider exercising such powers on the petition already filed by the petitioner. However, in the instant case, the dispute is lingering since quite some time. In any case, the delay is not gross and the repercussion in law is not widespread.
- Under the circumstances, it is proposed to condone the delay here itself and then require the competent authority before whom the petitioner's application for refund is pending to decide the same on merits. The competent authority shall consider the petitioner's application for refund on merits and decide the same in accordance with law.