IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.7008 OF 2015

Tahnee Heights Co-op. Housing Society Ltd. ... Petitioners.

Vs.

1.The Union of India & Ors. ... Respondents

Mr.Prakash Shah with Mr.Jas Sanghavi i/b. PDS Legal, for the Petitioners.

Mr.Pradeep S.Jetly, for the Respondents.

CORAM : S.C. DHARMADHIKARI &
G.S. KULKARNI*, JJ.*

DATE : 3rd August, 2015.

P.C. :

1. The petitioner is a co-operative housing society registered under the Maharashtra Co-operative Housing Societies Act,1960. The petitioner has allotted units / flats to their members in a building which is owned by it. The members contributed certain sums and on monthly basis enabling the petitioner to maintain and

repair the structures / building. The Commissioner of Service Tax determined that the amounts which are contributed and received by the petitioner are pursuant to the services rendered by it and therefore, service tax is liable to be paid.

2. The petitioner did not accept this position, paid the amount under protest, but later on there was adjudication in their favour. The petitioner lodged their refund claims. The petitioner received a show cause notice dated 28.3.2008 as to why this refund claim should not be rejected on the ground that the petitioner has defaulted in payment of service tax.

3. The petitioner replied and contested this position by pointing out that no service tax was liable to be paid under the category of 'club' or 'association' services as they are not providing any services. On 10.7.2009 the order-in-original was passed by the Assistant Commissioner of Service Tax, Mumbai, who rejected this refund claim aggregating to Rs.93,00,365/- on the ground that the petitioner is liable to pay service tax under this category in terms of Section 65(25-a) of the finance Act and the service tax amount is

correctly paid by them on monthly charges received by them from their members. Thus, the society's refund claims were rejected. An appeal against this order was also dismissed by the Commissioner (Appeals) by order dated 31.1.2011. Thereafter, the petitioner approached the Customs, Excise and Service Tax Appellate Tribunal against these orders and that Tribunal has allowed the petitioner's appeal by order dated 18.12.2014. Following this success in the Tribunal, the petitioner's claimed the amounts under the refund claims with interest. There is correspondence commencing from 6.1.2015 and copies thereof are annexed.

4. From the record it appears that the petitioner has been paid the principal sum but the claim of interest on the amount which was sought to be refunded has been refused, according to them, not for any other reason but only because of a communication of the department dated 22.6.2015 at page 31.

5. This communication states that the matter is still under dispute as the Department has not accepted the CESTAT order and is in the process of filing appeal against the said order. Therefore, the

request for payment of interest at this juncture is premature and cannot be considered.

6. An affidavit in reply has been filed reiterating this position and rather stating that after having received Rs.93,00,365/-, the petitioner must wait till the outcome of the proceedings which have been initiated before the Hon'ble Supreme Court.

7. We do not see how and why the petitioner should go on initiating proceedings as the order of the Tribunal is clear. The order passed on 18.12.2014 determines the dispute and about the recovery of the amount of tax itself. Once the Tribunal holds that the tax is not recoverable and sets aside the order-in-original and order-in-appeal, and allows the petitioner's request as contained in the appeal before the CESTAT with consequential reliefs, then, we do not see why the petitioner should go on litigating and against the order dated 3.6.2015 communicated to them on 9.6.2015 by the Department.

8. Mr.Jetly, learned Counsel appearing on behalf of the

Revenue, on instructions states that the appeal against the order of CESTAT has been lodged by the Department/ Revenue in the Supreme Court of India and is pending before the registry of that Court. The Department is taking steps to remove all office objections, get that appeal registered and, thereafter, placed before a bench of Hon'ble Supreme Court of India.

9. After hearing both sides and noting the request of the Revenue, we are mindful of the fact that some compliances and in procedural matters before the Supreme Court of India takes time. However, we do not find any justification and when the impugned order of the CESTAT was passed on 18.12.2014 and the appeal is indeed lodged in the Supreme Court of India, in the Revenue not taking any steps to comply with the procedural requirements. This only means that the Revenue having complied with the Tribunal's order and granted refund partially, has withheld the interest claim on a possible realisation that if this is also awarded and paid, the proceedings before the Supreme Court would be rendered infructuous. This cannot be the legal position nor can the understanding of the parties be based on the same. The Revenue

had ample time to obtain such interim order from the Supreme Court as is permissible in law so that it is relieved from the obligation to pay interest on the Principal sum. However, it has not taken any such steps and there are no interim prohibitory or restraint orders in Revenue's favour.

10. In the above circumstances, we can dispose of this Writ Petition with a direction that the Revenue should take requisite steps in the pending proceedings before the Hon'ble Supreme Court within a period of two months from the date of receipt of copies of this order and if within this period it is unable to obtain any interim stay or restraint order in the aforesaid terms, then, it must release the sums outstanding and towards interest within a period of four weeks from the date of expiry of the above period. In other words, on expiry of two months if there is no order in favour of the Revenue of the aforesaid nature, then, the all amounts be refunded and paid to the petitioner within four weeks from the date the time stated above has expired. However, we clarify that our order and direction is without prejudice to the rights and contentions of both sides. Our order and directions shall not preclude the Revenue from applying

for interim stay or interim relief nor the petitioner shall be prevented from arguing to the contrary.

11. The Writ Petition is disposed of in these terms.

(G.S.KULKARNI, J.) ***(S.C. DHARMADHIKARI, J.)***