IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP-16213-2014
Date of decision:- 07.08.2015

Haryana Vanaspati & General Mill
...Petitioner

Versus

The State of Haryana and another
...Respondents

CORAM: HON'BLE MR. JUSTICE S.J. VAZIFDAR, ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE G.S. SANDHAWALIA

1. Whether reporters of local papers may be allowed to see the judgement?
2. Whether to be referred to the reporters or not?
3. Whether the judgement should be reported in the digest?

Present: Mr. Sandeep Goyal, Advocate,
for the petitioner.

Ms. Mamta Singla Talwar, Deputy Advocate General, Haryana.

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S.J. VAZIFDAR, A.C.J. (ORAL)

The petitioner has sought a writ of mandamus directing the respondents to pay the interest on the tax collected by them allegedly without authority of law and a writ of certiorari quashing an order dated 22.05.2014 (Annexure P12) passed by the Haryana Tax Tribunal and all other orders passed by the other authorities in so far as the petitioner's claim has not been allowed in full.

2. The assessment order dated 31.08.1994 was made in respect of the assessment year 1989-1990 under the Haryana General Sales Tax Act, 1973 (hereinafter referred to as the HGST Act) and under the Central Sales Tax Act, 1956 raising a tax demand of Rs. 14,17,071/- on the ground that the goods which had been purchased from within the State of Haryana had been sold on a consignment basis and stock transfer basis. A demand for interest was also raised. Penal action under Section 47 was directed to be taken separately. Under the Central Sales Tax Act, 1956, a demand of only Rs. 44/- was made.

The appeal against this order was dismissed by an order dated 29.07.2002 of the Joint Excise and Taxation Commissioner (A), Rohtak. It is important to note that the entire tax demanded had been paid by the petitioner to the respondents as a condition precedent to the maintainability of the appeal. The amounts had been paid between April, 1995 to August, 1996.

However, the petitioner's appeal was allowed by an order dated 05.12.2008 passed by the Haryana Value Added Tax Tribunal. The Tribunal set aside the order and remanded the matter to the assessment authority for assessment following the decision of this Court in the case of *State of Haryana and another Vs M/s Ambika Oil & Soap Industries, Rohtak*, 103 STC 190.

3. The Excise and Taxation Officer-cum-Assessing Authority accordingly passed a fresh order dated 28.05.2009 holding that the petitioner was entitled to a refund of Rs. 11,47,390/-. This amount was paid in December, 2009, but without interest as demanded by the petitioner. Interest was paid only for a period of four months from 15.08.2009 to December, 2009. On 15.06.2009, the petitioner applied for the refund. The assessing authority referred the case to the Excise and Taxation Commissioner for approval, as required by Rule 36, which was granted by a letter dated 29.12.2009. The assessing authority refunded the amount as recorded in a letter dated 04.01.2010. As the payment of refund was made late, interest for five months amounting to Rs. 80,314/- was also allowed. The same was, however, not paid as the matter was referred to the Excise and Taxation Commissioner for approval.

4. The petitioner filed an appeal before the first Appellate Authority claiming interest for the earlier period as well. The first Appellate Authority,

however, merely directed the assessing authority to pay interest of Rs. 80,314/- within 30 days from the receipt of its order dated 23.10.2012. The petitioner challenged this order before the Tribunal. It must be noted that the petitioner's contention before the Tribunal was that it was entitled to interest from 05.12.2008 i.e. the date of the order of the Tribunal setting aside the assessment order creating the additional demand of tax. Contending that the amount was refunded on 04.01.2010, the petitioner claimed interest from 05.12.2008 to 04.01.2010. The Tribunal, however, held that the assessing authority should have issued the refund voucher alongwith the fresh assessment order dated 28.05.2009 in view of Rule 35(1)(a). The Tribunal held that the petitioner was entitled to interest on the delayed payment of refund with effect from 28.05.2009 till the date of refund i.e. 04.01.2010. The Tribunal relied upon the judgement of this Court in the case of *M/s Khem Ram Devi Sahai Vs State of Haryana*, [2004] 23 PHT 330 (P&H).

5. The question, therefore, is whether the petitioner is entitled to interest from the dates on which the petitioner paid the amounts to the respondents as a condition precedent to the maintainability of the appeal. The respondents contend that the provisions of the HGST Act and the Rules made thereunder do not entitle an assessee to interest in such circumstances.

6. Sections 25(5), 39(5) and 43 of the HGST Act in so far as they are relevant read as under:-

> *"25(5) If any dealer fails to pay tax as required by sub-section (2A) or by sub-section (3), he shall be liable to pay in addition to the tax payable, simple interest on the amount of tax remaining unpaid at one per cent per month from the date commencing with the date following the last date for the payment of tax, for a period of one month and at one and a half per cent per month thereafter during the*

period he continues to make default in the payment:

Provided that where the amount of tax not paid as required under sub-section (2A) or sub-section (3) does not exceed five hundred rupees, the interest payable thereon shall not exceed the amount of tax not so paid:

Provided further that for the purposes of calculation of interest, a period of fifteen days or more shall be deemed to be one month and the amount of fifty rupees or more but less than one hundred rupees shall be deemed to be one hundred rupees and a period of less than fifteen days and an amount of less than fifty rupees shall be ignored.

39(5) No appeal shall be entertained unless it is filed within sixty days from the date of the order appealed against and the appellate authority is satisfied that the amount of tax assessed and the penalty and interest, if any, recoverable from the person has been paid.

43. Refund

(1) The assessing authority or a person appointed to assist the Commissioner under sub-section (1) of section 3, as the case may be shall, in the prescribed manner, refund to a dealer or to any other person the amount of tax or penalty or interest paid by him in excess of the amount due from him under this Act, either by a refund voucher, or at the option of the dealer by adjustment of the amount so paid against the amount due from him in respect of any other period;

Provided that the assessing authority or a person appointed to assist the Commissioner under sub-section (1) of Section 3, as the case may be, shall first adjust the amount to be refunded towards the recovery of any amount due, on the date of adjustment from the dealer and shall then refund the balance, if any.

(2) Where an amount required to be refunded by the assessing authority to any person by virtue of an order issued under this Act is not so refunded to him within the period as may be prescribed, the dealer shall be entitled to

interest at such rates and on such terms and conditions as may be prescribed."

7. Rules 35 1(a) and (b) and 38 of the Haryana General Sales Tax Rules, 1975 in so far as they are relevant read as under:-

> *"35 1(a) While framing the assessment of a dealer, the assessing authority shall, after such scrutiny of its record and after making such enquiries as it considers necessary, determine the amount paid by him, in excess, if any, and thereafter direct the refund of such amount as may remain after deducting any amount due from him. The assessing authority shall then issue to the dealer at his option a refund payment in form S.T.R. 34 prescribed under the Punjab Subsidiary Treasury Rules or refund adjustment order in form S.T. 34 and send it alongwith the assessment order.*
>
> *(b) Where a refund of any amount paid by any dealer or other person becomes payable as a result of the order of any appellate or revisional authority or any court and the same is not the subject-matter of any further proceedings, the dealer or such other person shall make an application to the assessing authority concerned alongwith the original order or the copy thereof duly attested by the dealer, which constitutes the basis for refund, the assessing authority shall order the refund of excess amount in the manner specified in clause (a) within ninety days of the receipt of such application failing which interest shall be payable to the dealer or other person at the rate specified in sub-section (5) of Section 25 of the Act, unless the Commissioner for reasons to be recorded in writing condones the delay.*
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> *38. Order Sanctioning Interest on Delayed Refunds*
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> *(1) Where a refund payment order or a refund adjustment order is issued the authority issuing such order shall simultaneously record an order sanctioning the interest payable if any on such refunds, specifying therein, the amount of refund, the payment of which was delayed, the period of delay for which such interest is payable and the amount of interest payable by the State Government, and shall*

> *communicate the same to the dealer to whom the interest is payable and also to the Commissioner stating briefly the reasons for the delay in allowing the refund.*
>
> *(2) Where an order for the payment of interest on delayed refunds under sub-rule (1) has been made, the sanctioning authority shall issue to the dealer interest payment order in form S.T. 35."*

8. In view of Section 39(5), the petitioner was compelled to pay the tax assessed in order to have its appeal entertained. Sub section (1) of Section 39 provides that an appeal from every original order including an order under Section 40 passed under the HGST Act or the Rules shall lie to the authority stipulated in sub clauses (a), (b) and (c) thereof. Sub section (2) provides for a further appeal against the orders passed by certain authorities to the Tribunal. It is important to note that Section 39 (5) of the HGST Act requires an assessee to pay the amount of the tax assessed and the penalty or interest, if any, recoverable in order to have an appeal under sub section (1) entertained.

Sub section (5) of Section 39 provides that no appeal shall be entertained unless the appellate authority is satisfied that the amount of tax and the penalty or interest, if any, recoverable from the person has been paid. Thus, sub section (5) does not merely require the assessee filing the appeal to deposit the amount before the authority or the Tribunal, but to pay the amount of tax, penalty and interest in order to have his appeal entertained. The tax, penalty or interest, if paid, is, therefore, enjoyed by the revenue. The petitioner had admittedly paid the amounts to the authorities. The authorities have had the benefit thereof from the date of payment. If the appeal succeeds, the assessee is entitled to a refund of such an amount as may be directed by the Appellate Authority. Absent any statutory bar, there is no justification for denying a successful assessee interest upon the amount(s) to be refunded for the period during which the revenue had the benefit thereof. The revenue suffers no loss thereby for it has enjoyed the benefit of the money during this period. It has enjoyed the benefit of the money that it was never entitled to.

9. In equity, the petitioner's claim is established. The question is whether the claim is barred by any provision of law. We think not. The question also is whether interest is payable in law. It is, in view of the judgements of this Court, binding on us. We, therefore, need look no further while granting interest.

10. Before referring to the binding judgements supporting the claim for interest, we will deal with the respondents' contention against the grant thereof.

11. Ms. Mamta Singla Talwar, learned Deputy Advocate General, Haryana submitted that there is an implied bar on the payment of interest in view of sub section (2) of Section 43. The submission is not well founded.

Section 43(2) entitles an assessee to interest in certain circumstances. Sub section (1) of Section 43 merely requires the assessing authority to refund in the prescribed manner the person concerned the amount of penalty, tax or interest paid by him in excess of the amount due from him under the HGST Act either by a refund voucher or at the option of the assessee, by adjustment. There is no implied, much less an express, bar on the payment of interest on the amount liable to be refunded.

Sub section (2) entitles the dealer to interest at such rates and on such terms and conditions as may be prescribed in cases where the amount required to be refunded by the assessing authority by virtue of an order issued under the HGST Act is not so refunded to him within the period as may be prescribed. On behalf of the respondents, we are invited to read Section 43 (2) with Rule 35(b). Clause (b) of sub rule (1) of Rule 35 entitles the assessee to interest at the rate specified in Section 25(5) of the HGST Act, where there is a failure to refund any amount ordered by the Appellate or Revisional Authority within ninety days of the receipt of an application by the assessee for the same. The revenue is not bound to wait for an application before refunding amounts adjudicated by the Appellate or the Revisional Authority to be due from it to any person. The revenue is bound to refund the amount forthwith subject of course to any challenge to the order. Rule 35(1)(b) only provides a higher rate of interest, namely, that specified in Section 25(5) of the HGST Act in the event of there being a delay in the payment of the refund even after a period of ninety days of an application for the same by the assessee. Section 25(5) stipulates interest at the rate of 1% per annum for a period of one month and thereafter at the rate of 18% per annum during the period of the default. It is an additional benefit or safeguard and in fact a minimal guarantee to the assessee who has been kept out of his money despite an order of the Appellate or Revisional Authority and the expiry of a period of ninety days from the date of an application by the assessee for refund in accordance with the order of the Appellate or Revisional Authority. Neither Section 43, nor Rule 35(1)(b) bars the payment of interest for the period prior thereto.

12. We are invited to exercise our extra-ordinary jurisdiction under Article 226 of the Constitution of India and not jurisdiction in any other proceeding such as in a Civil Suit or even in arbitration proceedings. The judgements of this Court in similar matters have upheld the right of assesses to interest in such circumstances.

13. Mr. Goyal relied upon the judgement of a Division Bench of this Court in *M/s Sonu Rice Mills, Ellanabad, Sirsa Vs State of Haryana and others*, STI 2000 PB&HN (High Court) 13. The appeal filed by the petitioner against the assessment was allowed on 11.06.1999 with the direction that the amount paid by the petitioner to the department be refunded immediately. After waiting for four months, the petitioner therein submitted an application to the assessing authority for refund of the amount. The amount was, however, not refunded. Following a judgement dated 05.09.1994 passed by the Division Bench of this Court in CWP-2372-1994 titled as *Sagar Motor Company Vs State of Haryana and another*, the Division Bench directed the respondents to refund the amount with interest at 12% per annum from the date of the deposit till the date of payment.

14. In *Sagar Motor Company Vs State of Haryana and another (CWP-2372-1994),* the Excise and Taxation Officer imposed a penalty. The assessee deposited the amount of penalty and filed an appeal before the Joint Excise and Taxation Commissioner (Appeals). The appeal was allowed. The authorities, however, failed to refund the amount leading the petitioner to file the writ petition for the refund alongwith interest. The Division Bench by an order and judgement dated 05.09.1994 held:-

> *"Inspite of notice and sufficient time allowed to the respondents, they have not filed any reply.*
>
> *Admittedly, the appeal has been allowed and the petitioner has become entitled to the refund of the amount deposited by it. Consequently, we dispose of the writ petition with a direction to the respondents to refund the amount of penalty deposited by the petitioner alongwith interest at the rate of 12% per annum* ***from the date of deposit till*** *the date of payment."*
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> *(emphasis supplied)*

15. In *M/s Khem Ram Devi Sahai Vs State of Haryana*, (2004) 23 PHT 330 (P&H) relied upon by the Tribunal, the petitioner's assessment was finalized by an assessment order dated 26.03.2003 and the petitioner was found entitled to a refund of Rs. 85,175/-. It is important to note that the petitioner restricted his claim for interest from 26.03.2003 which was granted. The Court held:-

> *"Having heard the counsel for the parties, we are satisfied that the petitioner deserves to succeed in its claim for interest. In the case of Saurabh Kumar & Bros. [2002] 127 STC 556; (2001) 18 PHT 336, this Court had noticed rule 35 of the Rules (sic) and held that if the refund is not issued with the assessment order, the department is liable to pay interest. Thus, it has been correctly claimed that the department was liable to issue refund on March 26, 2003. It has also been correctly pointed out that the subsequent order dated December 19, 2003 did not absolve the department of its liability to issue refund as no demand can be created from a retrospective date. This issue stands settled in the case of Saurabh Kumar & Bros. [2002] 127 STC 556 (P&H); (2001) 18 PHT 336, where under identical circumstances the dealer was held to be entitled to interest. In that case, a penalty of Rs. 50,000/- had been imposed by the Assessing Authority on May 3, 1994. This order was challenged in appeal which was allowed on November 26, 1997. However, on acceptance of appeal, the amount deposited was not refunded. Since the representations of the petitioner yielded no result, the petitioner approached the High Court. The department had taken the stand that the appellate authority while cancelling the penalty on November 26, 1997 had remanded the matter to the Assessing Officer for fresh consideration. The Assessing Officer vide his order dated June 25, 2001, had again imposed the penalty of Rs. 50,000/- and, thus, it was contended that no refund of interest was due to the petitioner in that writ petition. This contention was negatived by this Court on the ground that the dealer had become entitled to refund on November 26, 1997 when the penalty had been cancelled and matter remanded. It was further held that the subsequent order dated June*

> *25, 2001 could not impose penalty from a retrospective date."*

In this case, the petitioner restricted his claim for interest from the date of the assessment order under which he was entitled to the refund. The petitioner did not claim interest from the date of the deposit. The Division Bench granted interest for the period claimed, but did not hold that interest is not payable from the date of the deposit.

16. *M/s Khem Ram Devi Sahai Vs State of Haryana's* judgement followed a decision of the Division Bench of this Court in *Saurabh Kumar & Bros. Vs State of Punjab and others, [2002] 127 STC 556 (P&H).* In *Saurabh Kumar & Bros. Vs State of Punjab and others*, penalty was imposed by the assessing authority. The petitioner paid the penalty and filed the appeal. The appeal was allowed on 26.11.1997. The amount deposited was, however, not refunded. The petitioner submitted a representation on 06.06.1998 requesting for refund, but did not receive the same leading the petitioner to file the writ petition. Interest was granted on the basis of Section 12 of the Punjab General Sales Tax Act, 1948 which is not the same as the HGST Act which is involved in the case before us. Section 12(3) of the Punjab General Sales Tax Act, 1948, is, however, similar to Section 25(2) of the HGST Act and reads as under:-

> *"12(3) Where any amount required to be refunded by the assessing authority to any person by virtue of an order issued under this Act is not refunded to him within ninety days of the date of the order, the dealer shall be entitled to get simple interest on such amount at the rate of one percentum per month from the date immediately following the date of expiry of the said period for a period of one month and thereafter at the rate of one and a half percentum per month till the refund is made;*
>
> *Provided that for the purpose of calculation of the interest, part of a month shall be considered*

as one month and any amount less than one hundred rupees shall be considered as one hundred rupees."

It does not appear to have been contended in this case either, that interest is payable even for the period prior to the date of the order granting the refund. The Division Bench did not hold that interest from the date of the deposit is not payable.

17. We are, therefore, bound by the aforesaid judgements of this Court in *M/s Sonu Rice Mills, Ellanabad, Sirsa Vs State of Haryana and others* and *Sagar Motor Company Vs State of Haryana and another.* Interest is payable from the date of the deposit.

18. In this view of the matter, it is not necessary to consider Mr. Goyal's submission based on Rule 38 and the judgement of the Gujarat High Court relied upon by him in the case of *State of Gujarat Vs Doshi Printing Press*, (2015) 82 VST 384 (Guj).

19. Ms. Talwar relied upon the following order of the Supreme Court in *Commissioner of Central Excise, Hyderabad Vs ITC Limited*, 2005 (13) SCC 689:-

"Order

1. The issue in this appeal and in several other appeals is whether the predeposit made as a precondition for the hearing of the appeal under the Central Excise Tariff Act, 1985 was, on the assessee being ultimately successful, refundable to the assessee with interest. The learned Solicitor General has taken instructions and has stated before this Court that the Central Board of Excise and Customs proposes to issue a circular in connection with the payment of interest on all such predeposits. A draft copy of the proposed circular has been handed over to this Court. Having regard to the contents of the draft circular we direct compliance with the final order impugned before us and payment of interest in terms of the draft circular. The draft circular shall be

> *appended to and the contents form part of this order. The appeal is disposed of. In view of this order any judgement of any High Court holding to the contrary will no longer be good law."*

20. That case was under the Central Excise Tariff Act, 1985. The present matter is under the HGST Act. This case, so far as the Central Sales Tax Act, 1956 is concerned, was only for an amount of Rs. 44/-. Further, the draft circular referred to in the order was not even relied upon. The order does not support the respondents' case.

21. In these circumstances, the petition is disposed of by modifying the impugned order by directing the respondents to pay interest at 12% per annum on the amounts deposited from the dates on which the deposits were made till payment.

(S.J. VAZIFDAR)
ACTING CHIEF JUSTICE

(G.S. SANDHAWALIA)
JUDGE

07.08.2015
Amodh

Whether to be referred to the reporter	Yes √	No