

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 31.10.2019

CORAM :

THE HONOURABLE DR.JUSTICE ANITA SUMANTH

W.P.No.33571 of 2012

Chitrahahar Traders,
represented by its Proprietor,
R.Krishnamoorthy,
69, Karumarampalayam,
Uthukuli Main Road,
Tirupur 641 601. Petitioner

Vs.

- 1.The Assistant Commissioner (CT),
Assessment Cuddalore Taluk,
Sub-Jail Road,
Manjakuppam,
Cuddalore 607 001.
- 2.The State of Tamil Nadu,
rep. by its Secretary,
Commercial Taxes and
Registration Department,
Fort St. George,
Chennai 600 009. Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India, for the issuance of Writ of Certiorarified Mandamus, quashing the said proceedings by directing the First Respondent herein to give interest at the rate of 12% on the sum of Rs.6,02,08,601.00 withheld and kept by the State between 23.11.2005 and 29.7.2011.

For Petitioner :Mr.K.A.Parthasarathy
for Mr.N.Inbarajan

For Respondents:Mr.V.Haribabu
Additional Government Pleader (Taxes)

O R D E R

The petitioner is a partnership firm, an assessee in terms of the provisions of the Tamil Nadu General Sales Tax Act ('Act'), on the file of the first respondent and challenges his order dated 16.09.2011 seeking a quash of the same and a direction to him to grant interest at the rate of 12% on an

amount of Rs.6,02,08,601/- retained by the State Commercial Tax Authorities between the period 23.11.2005 and 29.07.2011.

2.Heard Mr.K.A.Parthasarathy for M/s.N.Inbarajan, learned counsels appearing for the petitioner and Mr.V.Haribabu, learned Additional Government Pleader (Taxes) appearing for the Commercial Taxes Department.

3.There are some dates and events that are relevant to the adjudication of this matter and I sequentially set the same out hereunder:

(i) On 16.02.2005, Neyveli Lignite Corporation Limited (NLC) issued a sale order in favour of the petitioner for sale and disposal of a condemned Briquetting and Carbonisation Plant (B & C Plant) as scrap. Tax at the rate of 4% was paid on the sale value.

(ii)On 04.07.2005, NLC sought a clarification from the Commissioner of Commercial Taxes as to the rate of tax on the sale of the condemned Plant.

(iii)On 15.09.2005, the Commissioner of Commercial Taxes reiterated its earlier instruction dated 04.07.2005 and the rate of tax stipulated therein, being 12%, as machinery.

(iv)On 22.11.2005, NLC, on the basis of the clarification issued by the Department informed the petitioner that the Tax differential was being adjusted and recovered from the deposit of the petitioner held by it.

(v)On 23.11.2005, NLC, after recovery of the same from the petitioners' deposit remits the differential under protest to its assessing officer.

(vi)In the meantime, clarifications dated 04.07.2005 and 15.09.2005 were challenged in W.P.No.39784 of 2005 by the petitioner and on 19.12.2006 the impugned clarifications were set aside and remitted for re-consideration to the file of the Commissioner.

(vii)On 16.04.2007, the Commissioner of Commercial Taxes reiterated the earlier circulars stating that the intentions of NLC as well as the petitioner was to effect sale/purchase of plant and machinery on 'as is where is' basis and hence the transaction would be taxable at 12% only.

(viii)This clarification was challenged by both NLC (in WP.No.28524 of 2007) and the petitioner (in WP.No.15072 of 2007). Both the writ petitions were allowed by this Court on 17.03.2008 in the following terms:

'In the light of the same, both the writ petitions will stand allowed as prayed for and the respondents are hereby directed to restore the tax at 4% and refund the balance to the appropriate parties. This exercise shall be undertaken without a period of eight weeks from the date of receipt of a copy of this order. The parties are directed to bear their own costs. Connected Miscellaneous Petitions will stand closed.'

(ix) On 27.05.2008, the aforesaid order dated 17.03.2008 was stayed and on 26.02.2010 the writ appeals filed by the Revenue challenging the order of the learned Single Judge dated 17.03.2008 was dismissed. Thus the Bench concluded that the transaction was one of sale of scrap, taxable at 4% only.

(x) On 16.03.2011, the Civil Appeal filed by the Revenue before the Supreme Court challenging the order of the Division Bench as aforesaid was dismissed in the following terms:

'The respondent has paid sales tax and surcharge at the higher rate of 12% per cent and five per cent while taking the goods out of the factory premises. In view of the present order passed today, the respondent becomes entitled for refund of overpaid amount which shall be assessed by the Department within a period of three months from today and the amount found due and payable to the respondent shall be refunded back to the respondent along with interest as payable in accordance with law within two months thereafter.

The appeal is dismissed with the aforesaid observations.'

(xi) On 29.07.2011, the tax remitted, of a sum of Rs.6,02,08,601/- was refunded along with surcharge.

(xii) Immediately thereafter, on 16.08.2011, a request was made by the petitioner for interest on the amount held by the respondents from 23.11.2005 to 29.07.2011 when it was paid over.

(xiii) On 16.09.2011, the impugned proceedings are passed rejecting the request for interest as against which a contempt application was moved before the Supreme Court in C.No.30 of 2012 in Civil Appeal No.2686 of 2011.

(xiv) On 28.09.2012, the contempt application comes to be dismissed by the Supreme Court which granted liberty to the petitioner to seek appropriate remedy against the proceeding dated 16.09.2011 in accordance with law.

(xv) Hence, this writ petition, filed on 10.12.2012 pursuant to the order of the Supreme Court dated 28.09.2012.

4. The legal issue that arises in this case is entitlement of the petitioner to interest in terms of Section 24(4) of the Act.

5. The learned Additional Government Pleader appearing for the Revenue argues that the provisions of Section 24(4) of the Act are categorical to state that interest would be payable thereunder only where the excess amount as determined in appeal, revision or review is not refunded to the assessee within a period of 90 days from the date of order of such assessment, revision of assessment or review. According to them, the language of Section 24(4) of the Act is clear and unambiguous in this regard.

6. In this case, the determination of the excess repayable to the petitioner was only on 16.03.2011 when the Supreme Court passed judgment in the matter directing the Department to quantify the excess within three months from 16.03.2011 and pay over the amount as determined within two months thereafter. Thus the timeline that was set by the Court was (i) a determination of the excess re-payable to be made on or before 10.06.2011 and (ii) the amount so determined to be paid over to the petitioner on or before 10.08.2011, in accordance with law. This has been complied with, the tax remitted having been paid over on 29.07.2011 along with surcharge.

7. The provisions of Section 24(4) of the Tamil Nadu General Sales Tax Act read thus:

'Section 24(4) : Where the tax paid under this Act is found to be in excess on final assessment or revision of assessment, or as a result of an order passed in appeal, revision or review, the excess amount shall be refunded to the dealer after adjustment of arrears of tax, if any, due from him. Where the excess amount is not refunded to the dealer within a period of ninety days from the date of the order of assessment or revision of assessment and in the case of order passed in appeal, revision or review within a period of ninety days from the date of receipt of the order, the Government shall pay by way of interest, where the amount refundable is not less than one hundred rupees, a sum equal to a sum calculated at the rate of one per cent or part thereof of such amount for each month or part thereof after the expiry of the said period of ninety days.'

8. Admittedly, the refund has been determined and paid over to the petitioner herein both within the timelines set out by the Supreme Court in judgement dated 16.09.2011 and the provisions of Section 24(4) of the Act. In my considered view, it is only if the said timelines had been breached that interest would statutorily, be payable. The provisions of Section 24(4) of the Tamil Nadu General Sales Tax Act specifically provide for (i) the quantification of refund (ii) the stage of such quantification, being final assessment/revision assessment/appellate, revisional, review order, (iii) refund of tax determined in such final assessment or order as in point (ii) above, (iv) prescription of a timeline for issue of such refund, being 90 days from the date of assessment/appellate order reaching finality (v) provision for interest in the event of breach of the aforesaid scheme. In the admitted facts and circumstances of the present case, the assessee finds no support from the provisions of Section 24(2) of the Act.

9. I had indicated as much in the course of the hearing as a result that, perhaps, the petitioner does not pursue this argument and offers a new one, one that does not arise from the pleadings; that it is entitled for compensation from the Department. The petitioner relies on the judgment of the Supreme Court in the case of Sandvik Asia Ltd. Vs. Commissioner of Income Tax I, Pune and others, (2006) 2 SCC 508) and State of Gujarat Vs. Doshi Printing Press (82 VST 384).

10. In Sandviks' case, the Supreme Court considered a prayer for grant of interest for delay in effecting refund pursuant to an appellate order. After analysing the provisions of Sections 244 and 244A of the Income Tax Act 1961, the Bench concluded that the statute did not provide for the payment of interest as prayed for. However on general principles the Bench held that the assessee ought to be compensated for the inordinate delay in receiving money legally due to it, in that case, seventeen long years. Thus the Department was directed to pay interest at the rate of 9% for part of the period when the petitioner was deprived of the capital.

11. The dictum of the judgment of the Supreme Court in Sandvik Asia (supra) was doubted by a subsequent Bench of the Supreme Court that had referred the issue for reconsideration and clarification. Consequently a Full bench had been constituted which, in Commissioner of Income Tax, Gujarat v. Gujarat Fluoro Chemicals (358 ITR 29) clarified the position in a batch of appeals involving the question of payment of interest/compensation by the Department to an assessee on delayed refunds granted in terms of the provisions of the Income Tax Act, 1961.

12. The facts in the case of Gujarat Fluoro Chemicals, one of the respondents in the aforesaid batch before the Supreme Court, was that the company/assessee in that case, had deducted tax at source at the rate of 30% under Section 195 of the Income Tax Act. By virtue of an amendment, the remittance made by the assessee became liable to be refunded and hence the assessee claimed such refund. In November 1990, the refund was sanctioned by the Assessing Authority. The assessee thereafter sought interest on the amount refunded. The request was rejected by all officers in the Departmental hierarchy as against whose orders the assessee approached the Central Board of Direct Taxes ('Board'). In April 1993, the Board rejected the assessee's claim on the ground that the provisions of Section 244A of the Act provided for interest on refund that was issued in pursuance of an order of assessment or penalty only, neither of which situation arose in the petitioners' case. The assessee challenged the order of the Board by way of writ petition seeking a mandamus directing the Department to award compensation/interest on the refund of tax for the

period from when it had effected the remittance i.e. July 1997 to November 1999 when the refund had been sanctioned. Relying on the observations of the Supreme Court in Sandvik Asia (supra), the writ petition had come to be allowed as against which order the revenue approached the Supreme Court. Relevant extracts from the judgment of the Full Bench in the batch of appeals are as follows:

4. We would first throw light on the reasoning and the decision of this Court on the core issue in Sandvik case (supra). The only issue formulated by this Court for its consideration and decision was whether an assessee is entitled to be compensated by the Income Tax Department for the delay in paying interest on the refunded amount admittedly due to the assessee. This Court in the facts of the said case had noticed that there was delay of various periods, ranging from 12 to 17 years, in such payment by the Revenue. This Court had further referred to the several decisions which were brought to its notice and also referred to the relevant provisions of the Act which provide for refunds to be made by the Revenue when a superior forum directs refund of certain amounts to an assessee while disposing of an appeal, revision etc.

5. Since, there was an inordinate delay on the part of the Revenue in refunding the amount due to the assessee this Court had thought it fit that the assessee should be properly and adequately compensated and therefore in paragraph 51 of the judgment, the Court while compensating the assessee had directed the Revenue to pay a compensation by way of interest for two periods, namely; for the Assessment Years 1977-78, 1978-79, 1981-82, 1982-83 in a sum of Rs.40,84,906/- and interest @ 9% from 31.03.1986 to 27.03.1998 and in default, to pay the penal interest @ 15% per annum for the aforesaid period.

6. In our considered view, the aforesaid judgment has been misquoted and misinterpreted by the assessee and also by the Revenue. They are of the view that in Sandvik case (supra) this Court had directed the Revenue to pay interest on the statutory interest in case of delay in the payment. In other words, the interpretation placed is that the Revenue is obliged to pay an interest on interest in the event of its failure to refund the interest payable within the statutory period.

7. As we have already noticed, in Sandvik case (supra) this Court was considering the issue whether an assessee who is made to wait for refund of

interest for decades be compensated for the great prejudice caused to it due to the delay in its payment after the lapse of statutory period. In the facts of that case, this Court had come to the conclusion that there was an inordinate delay on the part of the Revenue in refunding certain amount which included the statutory interest and therefore, directed the Revenue to pay compensation for the same not an interest on interest.

8. Further it is brought to our notice that the Legislature by the Act No. 4 of 1988 (w.e.f. 01.04.1989) has inserted Section 244A to the Act which provides for interest on refunds under various contingencies. We clarify that it is only that interest provided for under the statute which may be claimed by an assessee from the Revenue and no other interest on such statutory interest.

9. With the aforesaid clarification we now refer back all the matters before a Two Judge Bench of this Court to consider each case independently and take an appropriate decision one way or the other.

13. Thus the law as regards the payment of interest by the Revenue Department in cases of delay in issuing refunds stands settled by the Full Bench that holds (i) that only interest provided under the revenue statute in question may be claimed by an assessee and none other and (ii) discretion in terms of Article 226 of the Constitution of India is always available to be exercised by the Court in ascertaining whether any compensation over and above statutory interest on refunds would be liable to be paid to an assessee. As I understand, this discretion will be exercised on a case to case basis bearing in mind the actual delay that has been occasioned, the applicable facts and circumstances and the merits of the matter, to some extent.

14. To clarify, the Court will note whether the issue on merits in regard to which the refund is sought was one that had been settled for long, but still agitated by the Revenue. The Court will also take into account the trajectory of the litigation to ascertain whether such litigation that had caused the delay had been pursued vexatiously and whether such delay could have been avoided at all.

15. The Full Bench in Gujarat Fluoro has observed in paragraph-7 of the judgement that compensation will be due to the assessee on account of the prejudice caused to it by being made to wait inordinately after the statutory period provided for such refund. Thus, prejudice caused, if any, is also a factor to be taken into consideration.

16. The Division Bench to which the matter stood remanded by the Full Bench has further referred the matter to the High Court for consideration in the light of the principles laid down by the Full Bench.

17. In the present case, I have set out the sequence of events commencing from 2005 in relating to the taxable event giving rise to the refund. In July 2005, NLC had first sought a clarification from the Commissioner in regard to the rate of tax on the turnover from sale of the condemned B & C plant. The clarification was adverse to the assessee and the litigation that commenced thereafter was settled only on 16.03.2011 by the Supreme Court. Thus the assessee seeks compensation for the loss of capital, in respect of the amount of tax recovered from it for the period 22.11.2005 to 29.07.2011.

18. The principles that govern the grant of compensation as laid down by the Full Bench in Gujarat Fleuro have been set out at paragraphs 12-14 above.

19. I now proceed to apply the same to the facts and circumstances of the present case. Clearly, there is a dispute on the interpretation of law in this matter. According to the petitioner the turnover from sale of the B and C plant is to be taxed at the rate of 4% as scrap, whereas, according to the Revenue, it is to be taxed as machinery at the rate of 12%. The Department relies on a clarification issued by the Special Commissioner that was challenged all the way up to the Supreme Court that finally held in favour of the petitioner. The question is as to whether this difference in interpretation of law which has led to the elapse of time taken by litigation, entitles the petitioner to compensation.

20. The Supreme Court, to my mind, has unambiguously stated that compensation, by its very nature can be paid only in cases where there has been injury suffered by virtue of any action. No doubt, in this case, the petitioner has been deprived of the tax recovered from it on 23.11.2005. Such recovery was however, pursuant to an assessment made on NLC. Though the assessment has ultimately been quashed, the recovery of the tax was undertaken at the relevant point in time, pursuant to a proper legal process, in accordance with law. I also note that the petitioner had had the option to, at the relevant point in time, obtain a stay of recovery of the demand from it by NLC, say by approaching this Court in terms of Article 226 of the Constitution of India, but did not choose to do so. The recovery of the disputed amount effected on 23.11.2005 by the Department is in line with statutory authority and cannot be assailed. The petitioner has no doubt been deprived of the amount recovered from it but that is as a fallout of the legal position under the TNGST Act and nothing more. Incidentally there is no perversity/vexatiousness (for

want of a better word) that has even been alleged, let alone established by the petitioner before me. Thus, directing the payment of compensation in a case of this nature would tantamount to opening Pandora's box and consequently the flood gates for similar requests. The prayer of the petitioner for compensation is thus rejected.

21. The petitioner relies on a decision of the Gujarat High Court in State of Gujarat vs. Doshi Printing Press (82 VST 384). The petitioner in that case had suffered an order of assessment, preferring an appeal against the same before the Appellate Authority. The authority granted relief pursuant to which the assessee sought a refund of the tax that had been remitted earlier, subsequent to assessment. The request of the assessee was rejected, which order was challenged in appeal before the Tribunal, successfully.

22. The Division Bench before which the revenue carried the matter in further appeal, considered the following question of law:

'Whether the Hon'ble Tribunal has erred in holding that the dealer is entitled to interest under Section 54(1)(AA) on the refund, arising from the appellate order'.

23. The Bench considered the provisions of Sections 41 and 54(1)(AA) of the Gujarat Sales Tax Act, dealing with the 'Assessment of taxes' and 'Interest on delayed refunds' respectively. General Sales Tax enactments differ from State to State. The Gujarat Sales Tax Act provides for the grant of interest on the refund of any amount becoming due to a dealer by virtue of an order of assessment under Section 41 of that Statute. Section 54 providing for interest on delayed refunds is set out hereunder:

Section 54 : Interest on delayed refunds

(1)1[(aa) Where refund of any amount becomes due to the dealer by virtue of an order of assessment under section 41[for the specified year], he shall, subject to the provisions of this section, be entitled to receive, in addition to the said amount, simple interest at the rate of fourteen per cent. per annum on the said amount from the date immediately following the date of closure of the accounting year to which the said amount relates to the date of order of assessment:

Provided that where dealer has paid any amount after the closure of the accounting year and such amount is required to be refunded, no interest shall be payable for the period from the date of closure of such accounting year to the date of payment of such amount:

Provided further that no interest shall be payable on the amount of refund which does not exceed rupees one hundred.]

3[Explanation.--For the purposes of this clause, the expression "specified year" means --

(i) the financial year commencing from the 1st April, 1993;

(ii) the calender year commencing from the 1st January, 1993;

(iii) Samvat year 2049 commencing from the kartak sud akam;

(iv) co-operative year commencing from the 1st October, 1993; or (v) any such year thereafter.]

4[(a) Where an amount required to be refunded by the Commissioner to any person by virtue of an order of assessment under section 41 is not so refunded to him within a period of thirty five days of the date of the order; or

(b) Where an amount required to be refunded by the Commissioner to any person by virtue of any other order made under this Act is not so refunded to him within a period of ninety days of the date of the order, the state Government shall pay such person simple interest at 5[fourteen per cent] per annum on the said amount from the date immediately following the expiry of the period specified in clause (a) or, as the case may be, clause (b) to the date of the refund:]

Provided that no interest shall be payable where an appeal or revision application is filed or where an application has been made to the Tribunal to refer to the High Court any question of law.

Explanation 1.--If the delay in granting the refund within 6[the period specified in clause (a) or (b)] is attributable to the dealer, whether wholly or in part the period of the delay attributable to him shall be excluded from the period for which interest is payable.

Explanation 2.--In case of an order relating to refund passed in appeal or in revision, the period of ninety days shall be calculated from the date of the receipt of such order by the Sales Tax Officer.

(2) Where any question arises as to the period to be excluded for the purposes of calculation of interest under the provisions of this section, such question

shall be determined by the Commissioner whose decision shall be final.

24. In that case, the request for refund had been rejected on the ground that the refund arose consequent to an appellate order whereas the entitlement to refund in terms of Section 54 was only pursuant to an assessment order. In that context, the Bench held that an order of assessment passed by a competent authority would merge with an order passed by an Appellate Authority in appeal and upon such merger of the order of assessment with an appellate order an assessee who had succeeded in appeal would become entitled to a refund on the relief granted in appeal. If this were not to be so, there would be a discrimination as regard the treatment accorded to refunds qua an appellate order vis-à-vis an assessment order.

25. The Bench thereafter relied heavily on the judgment of the Supreme Court in the case of Sandvik Asia (supra) as well as the Full Bench in the case of Gujarat Fluro Chemicals (supra) concluding that interest can be awarded if not expressly barred by statute or if the taxing statute were silent about the same. This view had been taken by an earlier Bench of the Gujarat High Court in Sourashtra Chemical Limited v. State of Gujarat (S.A.No.603 of 2007, decided on 01.08.2014) and was followed by the Bench in the case of Doshi Printing Press as well.

26. The question that arose before the Gujarat High Court in the case of Doshi Printing Press (supra) turns on the specific provisions of the Gujarat General Sales Tax Act. No analogy can be drawn from that case, since admittedly, the Tamil Nadu General Sales Tax Act does not have analogous provisions and stands on a totally different footing. Thus, in my considered view the reliance placed by the petitioner on the decision of the Gujarat High Court in Doshi Printing Press (supra) is misplaced.

27. In the light of the discussion above, I am of the view that this Writ Petition has no merit and I thus dismiss the same. No costs.

Sd/-

Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

Vs/sl
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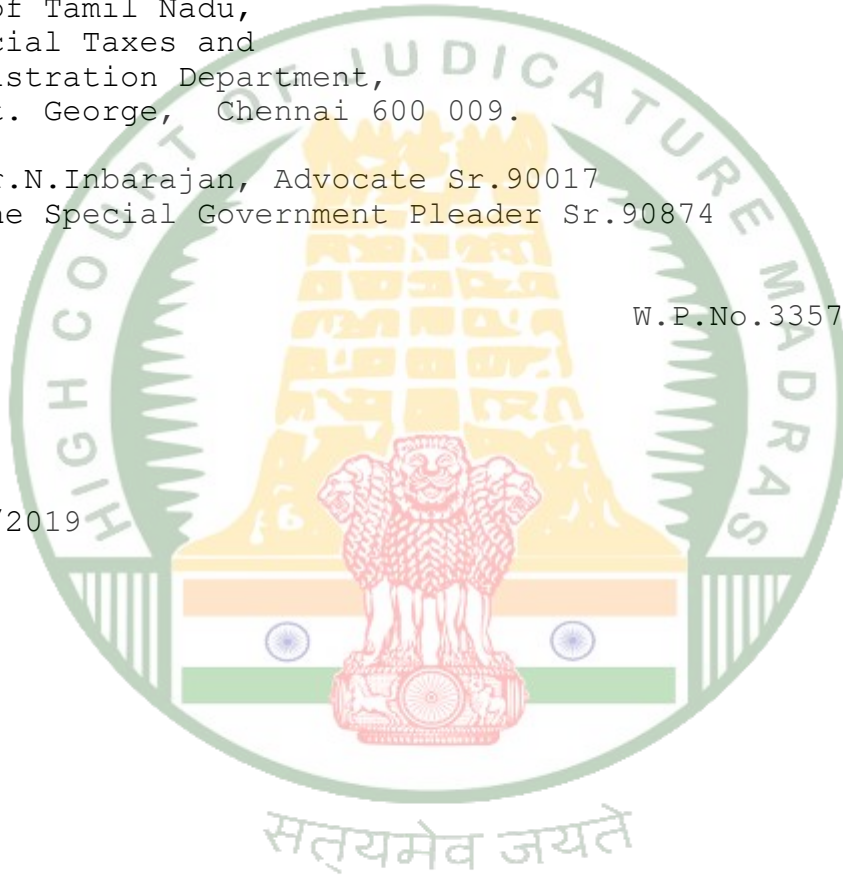
1.The Assistant Commissioner (CT),
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2.The Secretary,
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+1cc to Mr.N.Inbarajan, Advocate Sr.90017
+1cc to the Special Government Pleader Sr.90874

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srg 03/12/2019



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