



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29.11.2021

CORAM:

THE HONOURABLE MR.JUSTICE C.SARAVANAN

WP.Nos.15762 & 15763 of 2021

[Video Conferencing]

W.P.No.15762 of 2021

M/s.Ganam Homes and Estates Private Limited
Rep by its Director
Mr.R.P.Darrmalingam @ A.R.Dharmalingam
No.1379, Golden Villa, I Block,
6th Street, 18th Main Road,
VallalarKudiyeruppu
Anna Nagar West
Chennai - 600 040.
PAN No.AADCG5334P

...Petitioner

Vs.

1. The Deputy/Assistant Commissioner of Income Tax,
Central Circle - 2 (2),
Investigation Wing,
Room No.109, 1st Floor,
New No.46, M.G.Road,
Chennai - 600 034.

2. The Additional Commissioner of Income Tax,
Central Circle - 2,
Investigation Wing,
Room No.108, 1st Floor,
New No.46, M.G.Road,
Chennai - 600 034.

...Respondents

Prayer:-

Writ Petition filed under Article 226 of the Constitution of India to issue a Writ of Madamus directing the Respondents to refund the amount of Rs.95,20,460/- as determined by the 1st Respondent vide Order DIN: ITBA/REC/M/154/2020-21/10313544184 (1), dated 08.03.2021 along with interest to the Petitioner bearing PAN No.AADCG5334P within a time period to be stipulated by this Court.



W.P.No.15763 of 2021

M/s.RPD Earth Movers Private Limited
Rep by its Director
Mrs.D.Sangupathi
No.1379, Golden Villa, I Block,
6th Street, 18th Main Road,
VallalarKudiyeruppu
Anna Nagar West
Chennai - 600 040.
PAN No.AADCR6604B

...Petitioner

Vs.

1. The Deputy/Assistant Commissioner of Income Tax,
Central Circle - 2 (2),
Investigation Wing,
Room No.109, 1st Floor,
New No.46, M.G.Road,
Chennai - 600 034.

2. The Additional Commissioner of Income Tax,
Central Circle - 2,
Investigation Wing,
Room No.108, 1st Floor,
New No.46, M.G.Road,
Chennai - 600 034.

...Respondents

Prayer:-

Writ Petition filed under Article 226 of the Constitution of India to issue a Writ of Madamus directing the Respondents to refund the amount of Rs.91,05,200/- determined by the 1st Respondent vide Order DIN: ITBA/REC/M/154/2020-21/1031286244 (1), dated 05.03.2021 along with interest to the Petitioner bearing PAN No.AADCR6604B within a time period to be stipulated by this Court.

For Petitioner
in both WP's : Ms.Pushya Sitaraman, Senior Counsel
Assisted by
Mr.R.Murali

For Respondents
in both WP's : Mr.A.P.Srinivas,
Senior Standing Counsel

COMMON ORDER

W.P.No.15762 of 2021 has been filed for a direction to refund a sum of Rs.95,20,460/- as determined by the first respondent vide order DIN ITBA / REC / M / 154 / 2020 - 2021 / 10313544184(1) dated 08.03.2021 under Section 154 of the Income Tax Act, 1961.



WEB COPY

2.W.P.No.15763 of 2021 has been filed for a direction to refund a sum of Rs.91,05,200/- as determined by the first Respondent vide Order DIN: ITBA / REC / M / 154 / 2020-21 / 1031286244(1), dated 05.03.2021 under Section 154 of the Income Tax Act, 1961.

3.The case of the petitioner in W.P.No.15762 of 2021 is that during the previous year 2010-11, the petitioner had received advance from some of its customers which was not offered to income. The assessment was completed and an assessment order dated 31.03.2016 was passed for the Assessment Year 2011-12 [previous year 2010-11] , whereby the petitioner was made liable to pay tax on the advance received from various customers. It is submitted same amount was added to the taxable income of the petitioner on protection basis for the Assessment Year 2014-15 by determining the income as Rs.3,21,90,000/- after allowing an expenditure of Rs.30,000/-.

4.The petitioner preferred an appeal before the CIT (Appeals) against the Assessment Order dated 31.03.2016 for the Assessment Year 2011-2012. The petitioner's appeal was allowed by CIT (Appeals), vide order dated 23.02.2018. Further appeal before the Tribunal by the Department was also dismissed, vide order dated 03.12.2018. In these circumstances, the Department preferred appeal before this Court in TCA.No.505 of 2019.

5.It is the case of the petitioner that pending the above Department's appeal in TCA.No.505 of 2019, the petitioner offered to settle the dispute by filling appropriate declarations under the provisions of the Direct Taxes Vivad se Vishwas Scheme for the Assessment Year 2011-12. The petitioner's case for settling the dispute was also accepted by the designated authority by issuance of Form-3 on 20.01.2021. The petitioner also remitted a sum of Rs.1,02,89,121/- on 05.03.2021.

6.The case of the petitioner in W.P.No.15763 of 2021 is identical. Here also, the petitioner was held liable to advance received by it during Assessment Year 2011-12 by Assessment Order dated 31.03.2016. The petitioner had successfully appealed before the CIT (Appeals) who by order dated 23.02.2018 allowed the appeal of the petitioner. The further appeal before the ITAT by the department was also dismissed on 03.12.2018. Aggrieved by the same, the Department had filed T.C.A.No.503 of 2019.

7.Under these circumstances, the petitioner sent a representation dated 30.11.2020 and 05.03.2021 to rectify the protective demand made for the Assessment Year 2014-15 and to refund a sum of Rs.79,62,787/- + interest of Rs.15,57,673/- under Section 244A of the Income Tax Act, 1961.



8. Meanwhile, for the Assessment Year 2014-15 [previous year 2013-14], same income was also offered to tax by the petitioner and a protective assessment was made by the respondent under Section 143-A of the Income Tax Act, 1961. Since the petitioner's case was settled on the aforesaid provisions of the Direct Taxes Vivad se Vishwas scheme, the Deputy Commissioner of Income Tax viz., for the Assessment Year 2011-2012, the first respondent passed an order under Section 154 of the Income Tax Act for the assessment year 2014-15 on 08.03.2021 by concluding that the petitioner was indeed entitled for refund of a sum of Rs.95,20,460/- i.e., a sum of Rs.79,62,787/- paid as proportionate tax paid on the advance which was offered as tax by the petitioner on the aforesaid amount of Rs.3,21,90,000/- and further interest under Section 244A of the Income Tax Act amounting to Rs.15,57,673/-.

9. During the pendency of the appeal, the petitioner opted for Vivad Se Vishwas Act Scheme and filed Form No.1 and Form No.2 under the scheme for the assessment year 2011-12 on 02.12.202. As per Circular No.7 of 2020 dated 04.03.2020 issued by Central Board of Direct Taxes, on settlement of dispute related to substantive addition under Vivad Se Vishwas, the Assessing Officer shall pass rectification order deleting the protective addition relating to the same issue in the case of the assessee.

10. Appearing on behalf of the petitioner, Ms. Pushya Sitaraman, learned Senior Counsel would submit that the respondents are bound to repay the amount which has been confirmed by the first respondent while passing the order under Section 154 of the Income Tax Act on 08.03.2021. The learned Senior Counsel has also drawn the attention to Circular No.7/2020, dated 04.03.2020 bearing reference F.No.IT (A)/1/2020-TPL, Government of India, Ministry of Finance, Department of Revenue, Central Board of Direct Taxes. In particular, reference was made to the Answer given to Question No.35, wherein the CMBT has answered as follows:

Question No.35 : If there is substantive addition as well as protective addition in the case of same assessee for different assessment year, how will that be covered? Similarly if there is substantive addition in case of one assessee and protective addition on same issue in the case of another assessee, how will that be covered under Vivad se Vishwas?

Answer : If the substantive addition is eligible to be covered under Vivad se Vishwas, then on settlement of dispute related to substantive addition AO shall pass rectification order deleting the protective addition relating to the same issue in the case of the assessee or in the case of another assessee."



11.The learned Senior Counsel for the petitioner further submits that despite the order passed under Section 154 of Income Tax Act, 1961 for the assessment year 2014-15, the respondents are refusing to refund the amount of Rs.95,20,460/- and therefore, submits that the writ petition deserves to be allowed.

12.The learned Senior Counsel for the petitioner has also drawn the attention to Circular No.71 dated 20.12.1971 issued by the Central Board of Direct Taxes under Section 119(2) (b) of the Income Tax Act, 1961. The learned Senior Counsel would further submit that the hardship faced by the assesseees on the ground of split implementation of the provisions of Income Tax was considered and it was clarified as under:

"In our opinion, no question of law, much less a substantial question of law, arises in these appeals. It is a settled principle that one particular income cannot be taxed in the hands of different assesseees. In the instant case, as the income has been substantively assessed in the hands of the main trust, the same income cannot be again assessed in the hands of the beneficiary trusts. For the sake of abundant caution, it has been directed by the Tribunal that the revenue should look into the facts and see whether the income which has been assessed on protective basis in the hands of the respondent trusts was, in fact, assessed in the hands of the main trust."

13.The learned Senior Counsel also submits that under somewhat similar circumstances as in the present case where the dispute was settled under 'Kar Vivad Samadhan Scheme, 1998' [KVSS], a batch of appeals numbering 284 was considered by the Special Bench of the Income Tax Appellate Tribunal, Ahmedabad in Punitaben Karsanbhai Patel Oral v. Income Tax Officer reported in 2007 (288) ITR 169 Ahd and allowed.

14.The learned Senior Counsel further submits that the views taken by the Special Bench was also affirmed by the Hon'ble Division Bench of the Gujarat High Court in the case of Commissioner of Income Tax v. Hirenbhai K.Patel reported in 2014 SCC OnLine Guj 15765. The learned Senior Counsel submits that in the above case, the case that fell for consideration before the Special Bench of the Income Tax was pertaining to the assessee which was a beneficiary Trust of the main Trust called S.K.Patel Family Trust having share of income from Main Trust and also interest income from the Main Trust along with their independent incomes. The Assessee had taken stand that the income attributable to the beneficiary Trusts are to be assessed in the individual hand of the beneficiary Trusts whereas the Income Tax department took a view that the income of the Main Trust should be assessed in its own hand. There the dispute regarding the taxability of income in the hands of main Trust, reached upto the jurisdictional High Court on



reference application and while the reference was pending before the Hon'ble High Court of Gujarat, the Government announced KVSS scheme under which the main Trust settled the dispute regarding taxability of income in its hand by paying appropriate tax and securing the relevant certificate of compliance from the concerned CIR/designated authority. It is submitted that as the income had been taxed in the hands of the Main Trust, the beneficiary Trust were held eligible for refund in the light of the above clarification of Board.

15.The learned Senior Counsel further submits that an identical submission of the respondents in the present case was taken which was turned down by the Special Bench of the Tribunal which decision has been now affirmed by the Hon'ble Division Bench of Gujarat High Court in Commissioner of Income Tax v. Hirenghai K.Patel reported in 2014 SCC OnLine Guj 15765 referred supra.

16.Supporting the impugned order and opposing these Writ Petitions, the learned Senior Standing Counsel for the respondents submits that the first respondent was incompetent to revise the assessment made on 31.03.2016 under Section 154 of the Income Tax Act, 1961. It is submitted further that the said exercise carried out by the respondent was contrary to the decision of the Hon'ble Supreme Court made in the case of Goetze (India) Ltd., vs. Commissioner of Income Tax reported in (2006) 204 CTR SC 182.

17.The learned Senior Standing Counsel for the respondents further submits that the Department is also in the process of passing appropriate orders under Section 263 of the Income Tax Act against the order passed by the first respondent under Section 154 of the Income Tax Act and therefore, submits that the relief sought for by the petitioner cannot be entertained.

18.The learned Senior Standing Counsel for the respondents further submits that though the petitioner had settled the dispute under the Vivad se Vishwas scheme for the assessment year 2011-12, the petitioner had admitted to the tax liability during the assessment year 2014-15 by filing the returns under Section 139 of the Income Tax Act, 1961. Therefore, the question of refund of the aforesaid amount paid during the assessment year 2014-15 cannot be straightaway allowed. It is submitted that the order passed by the respondent under Section 154 of the Act was without authority of law and there is a proposal to go for revision under Section 263 of the Income Tax Act, 1961.

19.It is submitted that in any event, the petitioner has an alternate remedy by way of an appeal before the Appellate Commissioner and therefore, the petitioner should be directed to approach the Appellate Commissioner as that would be the correct method of resolving the dispute.



20. By way of rejoinder, the learned Senior Counsel for the petitioner submits that the decision of the Hon'ble Supreme Court in the above case cannot apply as the said case was rendered in the context of peculiar facts of the aforesaid case. It is submitted that the return was filed on 30.11.1995 by the appellant/assessee therein and on 12.01.1998, the assessee wanted to claim deduction by way of a letter before the Assessing Officer which was disallowed by the Assessing Officer on the ground that there was no provision for amending the return.

21. The learned Senior Counsel further submitted that in the said case the appeal filed by the assessee was allowed and on further appeal made by the department, the department appeal was allowed. It is further submitted that the decision was rendered in the context of Section 254 of the Income Tax Act and that the said decision does not in anyway relate to the power of the Assessing Officer to entertain the claim for revision, otherwise than by filing revised return. Therefore, the said decision is also of no consequence.

22. The learned Senior Counsel also referred to the admission of the respondents in Paragraph 8 of the counter wherein the respondents had categorically admitted that for the assessment year 2011-12, appropriate tax has been paid by the petitioner and therefore, there is no justification in not refunding the amount.

23. Heard the learned Senior Counsel appearing for the petitioner and the learned Senior Standing Counsel appearing on behalf of the respondents. Perused the orders passed under Section 154 of the Income Tax Act on 08.03.2021 for the assessment year 2014-15 and the settlement of case under the Vivad se Vishwas scheme under VSV Act, 2020 for the Assessment Year 2011-12.

24. There is no dispute that the petitioner has paid the tax for the relevant assessment year viz., 2011-12 and therefore, the protective assessment for the year 2014-15 results in excess payment of tax. The petitioner cannot be taxed twice on the same income. Ultimately, the purpose of exercising power under the Act is only intended to collect correct and just tax under the provisions of the Income Tax Act, 1961 from an assessee. The Act is not intended either to collect or retain any amount which is not due from an assessee.

25. In this connection, a reference may be made to the decision of the Hon'ble Supreme Court in Unichem Laboratories Ltd vs. Collector of Central Excise, Bombay reported in (2002) 7 SCC 145 wherein the Hon'ble Supreme Court held that it is no part of duty of the department to levy and collect tax which is not due to the department. Relevant passage from the said decision reads as follows:



WEB COPY

"12. For the aforementioned reasons, we are of the view that denial of benefit of the notification to the appellant was unfair. There can be no doubt that the authorities functioning under the Act must, as are in duty bound, protect the interest of the Revenue by levying and collecting the duty in accordance with law-no less and also no more. It is no part of their duty to deprive an assessee of the benefit available to him in law with a view to augment the quantum of duty for the benefit of the Revenue. They must act reasonably and fairly."

26.The above passage squarely applies to the facts of the present case as the department has also not disputed the fact that the petitioner has settled the dispute under the Vivad se Vishwas scheme for the assessment year 2011-12 as a consequence of which the tax offered and paid by the petitioner during the assessment year 2014-15 had become excess.

27.That apart, under Section 237 under Chapter XIX of the Income Tax Act, there is no limitation prescribed for granting refund of the amount paid in excess as tax. Therefore, I do not find any merits in the submissions made by the learned Senior Standing Counsel appearing on behalf of the respondents. Therefore, these Writ Petitions deserves to be allowed.

28.These Writ Petitions are thus allowed. No costs. The respondents are directed to ascertain the correct amount and refund the amount paid in excess for the Assessment Year 2014-15 by the respective petitioner together with interest preferably within a period of 45 days from the date of receipt of a copy of this order.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

pgp

To

1. The Deputy/Assistant Commissioner of Income Tax,
Central Circle - 2 (2),
Investigation Wing,
Room No.109, 1st Floor,
New No.46, M.G.Road,
Chennai - 600 034.



2. The Additional Commissioner of Income Tax,
Central Circle - 2,
Investigation Wing,
Room No.108, 1st Floor,
New No.46, M.G.Road,
Chennai - 600 034.

+2ccs to Mr.M.Vivekanandan, Advocate SR. Nos.61789, 61790
+2ccs to Mr.A.P.Srinivas, Advocate SR. Nos.61867, 61868

WP.Nos.15762 & 15763 of 2021

KG (CO)
PR (09/03/2022)