

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

Reserved on : 09.04.2024
Date of Decision :19.04.2024

1.

CWP No. 22260 of 2023 (O&M)

Suncity Buildcon Private Limited

State of Haryana and others

Versus

...Petitioner

...Respondents
2.

CWP No. 22258 of 2023 (O&M)

Essel Housing Projects Private Limited

State of Haryana and others

Versus

...Petitioner

...Respondents
3.

CWP No. 22265 of 2023 (O&M)

Suncity Projects Private Limited

State of Haryana and others

Versus

...Petitioner

...Respondents
4.

CWP No. 22268 of 2023 (O&M)

ABW Security

State of Haryana and others

Versus

...Petitioner

...Respondents

CORAM: HON’BLE MR. JUSTICE SANJEEV PRAKASH SHARMA
HON’BLE MRS. JUSTICE SUDEEPTI SHARMA

Present: Mr. Akshay Bhan, Senior Advocate assisted by
 Mr. Himanshu Gupta, Mr. Shantanu Bansal,
 Ms. Nazuk, Advocates, for the petitioners in
 CWP No. 22260 of 2023.

 Mr. Sandeep Goyal, Advocate and
 Ms. Aakriti, Advocate, for the petitioners in
 CWP Nos. 22258, 22265 and 222568 of 2023.

 Ms. Tanisha Peshawaria, Deputy Advocate General, Haryana.

SANJEEV PRAKASH SHARMA, J.

These cases came up for hearing on an application moved by the
petitioners for placing on record the replication. It is submitted that the issue

involved in these cases stands finally adjudicated by Hon'ble the Supreme Court in **Corporation Bank vs Saraswati Abharansala and another** 2009 (1) SCC 540 and is covered.

2. Learned counsel for the respondents have fairly conceded that the issue taken up by the petitioners stands covered by the aforesaid judgment. In order to decide these cases, therefore, we would advert briefly to the facts as setup in CWP No.22260 of 2023.

3. Learned senior counsel appearing for the petitioner in CWP No. 22260 of 2023 has also filed written submissions. The petitioner company - Suncity Buildcon Private Limited and other petitioners are engaged in the business of developing residential and commercial projects and registered under the Haryana Value Added Tax Act, 2003 (hereinafter to be referred as "the Act of 2003") as a lump sum dealer. The Haryana Value Added Tax Rules, 2003 (for short, 'the VAT Rules') have been framed under the Act by the State Government and a lump sum scheme under Rule 49 of the VAT Rules has been formulated which is in accordance with the composition as per Section 9 of the Act of 2003. Accordingly, as per Rule 49 of the VAT Rules, a contractor once registered under the said Rules, is liable to pay tax @ 4% of the total value consideration received or receivable for execution of the contract.

4. Admittedly, the petitioners have been registered under Rule 49 of the VAT Rules and accordingly have been depositing tax @ 4% of its total turn over excluding the value of the land as a lump sum dealer.

5. The Government of Haryana introduced the Haryana Alternative Tax Compliance Scheme for Contractors, 2016 (hereinafter to be referred as "the Scheme") vide notification dated 12.09.2016 in order to expedite the tax, interest

and penalty or other dues under the Act of 2003 for all contractors. As per Section 3 of the Scheme, the Scheme would be applicable to all contractors whether they have or they have not registered for lump sum scheme under Rule 49 of the VAT Rules. The Scheme was applicable upto 31.03.2014. It would be apposite to quote Clause 3 (1) and (2) of the Scheme which is relevant for the present purpose and reads as under:-

“3. Scope of Scheme

(1) This Scheme shall apply to all contractors, whether they have or have not opted for lump sum scheme under rule 49 of the Haryana Value Added Tax Rules, 2003.

(2) This Scheme shall apply irrespective of the fact that assessments are pending or have attained finality or assessment orders are pending before any authority under the Act or any court of law at the time of applying for the Scheme.”

6. Clause 4 (1) and (2) of the Scheme lays down the computation of liability, which reads as under:-

Computation of liability

4. (1) A contractor opting under this Scheme shall pay year wise, in lieu of tax, interest or penalty arising from his business, by way of one time settlement, a lump sum amount at the rate of one percent of the entire aggregate amount, received/ receivable for the business carried out during the year, without deduction of any kind. Further, a surcharge at the rate of five percent shall be charged on the amount so payable:

Provided that where the contractor has charged and collected tax from the buyers in any particular year and it exceeds the amount payable under this Scheme, then the amount of actual tax charged and collected during the year

shall be the amount payable for that particular year under this Scheme.

- (2) *No input tax credit on purchase of goods shall be admissible to the contractor under this Scheme. The liability under this Scheme shall also be irrespective of the liability of the sub-contractor under the Act. However, if the tax, interest or penalty already paid by him during the year covered under this Scheme exceeds the lump sum amount payable as per sub-clause (1) of clause 4 above, the excess amount shall be adjusted in subsequent year. Any excess amount left after such adjustments shall neither be refunded nor allowed to be adjusted against any other tax liability on the expiry of this Scheme.*

7. Thus, as per Clause 3 (2), the Scheme was applicable irrespective of the fact that assessments are pending or have attained finality or the assessment orders were pending before any authority under the Act or any Court of law. It essentially means that even those contractors who have not deposited the amount in terms of Rule 49 of the VAT Rules would be entitled to get the benefits of the Scheme.

8. As per Clause 4 of the Scheme, a contractor opting under the scheme shall pay year wise, in lieu of tax, interest or penalty from his business, by way of one time settlement, a lump sum amount @ 1% of the entire aggregate amount, received or receivable for the business carried out during the year, without deduction of any kind along with a surcharge @ 5%, therefore, bringing the total amount to be paid at 1.05% of the amount received or receivable for the business carried out during the year. As per Clause 4(2) of the Scheme, any excess amount less after the adjustment of the tax liability shall not be refunded or allowed to be adjusted against any other tax liability on the expiry of the scheme. The Scheme was to expire within ninety days from the date of notification i.e. 12.09.2016,

however, Clause 4 (2) of the Scheme vide notification dated 02.06.2017 was substituted, which is as under:-

“(2) No input tax credit on purchase of goods shall be admissible to the contractor under this Scheme. The liability under this Scheme shall also be irrespective of the liability of the subcontractor under the Act. However, if the tax, interest or penalty already paid by him during the year covered under this Scheme exceeds the lump sum amount payable as per sub-clause (1) of clause 4 above, the excess amount shall be adjusted against the total amount due and payable under the Scheme. Any excess amount left after such adjustments shall neither be refunded nor allowed to be adjusted against any other tax liability on the expiry of this Scheme.”

9. It was submitted by learned senior counsel for the petitioner that a conjoint reading of Clause 3 and Clause 4 of the Scheme would reveal that all the contractors were eligible to apply for the scheme and pay an amount @ 1% of the entire aggregate amount, received or receivable. Even if the assessment of the contractors has become final, they can take benefit of the scheme and discharge their liability at a lesser rate of 1%. Thus, the State of Haryana through the impugned notification has effectively reduced the amount leviable on all the contractors retrospectively.

10. Learned senior counsel appearing for the petitioner further submitted that when the State has modified the rate to 1% with a retrospective effect, it cannot retain any excess amount or tax that has been deposited by the contractors as per the dictum of Hon’ble the Supreme Court in **Corporation Bank’s** case (supra) as the retention of such amount would lead to violation of Article 14 and Article 265 of the Constitution of India.

11. Petitioner company – Suncity Buildcon Private Limited applied under the aforementioned Scheme and vide impugned order dated 20.01.2017,

which was further modified vide order dated 27.01.2017, the respondents denied the petitioner refund of ₹ 5,39,51,781/-.

12. Learned counsel for the petitioners further submitted that even after adjusting the total amount payable under the Scheme, the excess amount is liable to be refunded and even as per Clause 4 (2) of the Scheme, as amended on 02.06.2017, cannot be denied to them and, therefore, being aggrieved by the impugned Clause 4 (2) of the Scheme as originally as well as substituted, the petitioners have preferred these writ petitions assailing the said clause to be in violation of Article 265 of the Constitution and thus, ultra vires.

13. The impugned order is dated 20.01.2017 whereby the refund is denied. It may be pointed out that the order denying refund is same in all the cases, however, the amount is different.

14. Learned counsel for the State has stated that the refund is required to be paid only after adjustment for the tax liability for the remaining years.

15. We have heard learned counsel for the parties.

16. We find that the scheme has been made applicable to all contractors whether they have opted or not opted for the lump sum scheme under Rule 49 of the VAT Rules. Thus, those who had earlier opted for lump sum scheme under Rule 49 of the VAT Rules and were paying @ 4% of the aggregate amount, would be placed in a disadvantageous position vis-à-vis those who did not even deposit the amount earlier and had not opted under Rule 49 of the VAT Rules. It is also noticed that the State has modified the rate of composition @ 1% with retrospective effect for all.

17. In **Corporation Bank**'s case (supra) Hon'ble the Supreme Court has held as under:-

18. Sales tax is leviable on sale of goods. It must be collected by the dealer as an agent of the State at such rate as may be specified. Neither the State nor the agent is entitled to collect tax at a rate higher than specified. The Kerala General Sales Tax Act, 1963 also contains a provision for refund in Section 44 thereof which reads as under :-

"Refund:- (1) When an assessing authority finds at the time of final assessment, that the dealer has paid in excess of what is due from him, it shall refund the excess to the dealer.

(2) When the assessing authority receives an order from any appellate or revisional authority to make refund of tax or penalty paid by a dealer it shall effect the refund.

(3) Notwithstanding anything contained in sub-section (1) and (2), the assessing authority shall have power to adjust the amount due to be refunded under sub-section (1) or sub-section (2), towards the recovery of any amount due on the date of adjustment, from the dealer.

(4) In case refund under sub-section (1) or sub-section (2) or adjustment under sub-section (3) is not made within ninety days of the date of final assessment, or as the case may be, within ninety days of the date of receipt of the order in appeal or revision or the date of expiry of the time for preferring appeal or revision, the dealer shall be entitled to claim interest at the rate of ten percent per annum on the amount due to him from the date of expiry of the said period upto the date of payment or adjustment."

19. Article 265 of the Constitution of India mandates that no tax shall be levied or collected except by authority of law. In terms of the said provision, therefore, all acts relating to the imposition of tax providing, inter alia, for the point at which the tax is to be collected, the rate of tax as also its recovery must be carried out strictly in accordance with law.

20. If the substantive provision of a statute provides for refund, the State ordinarily by a subordinate legislation could not have laid down that the tax paid even by mistake would not be refunded. If a tax has been paid in excess of the tax specified, save and except the cases involving the principle of 'unjust enrichment', excess tax realized must be refunded. The State, furthermore is bound to act reasonably having regard to the equality clause contained in Article 14 of the Constitution of India."

18. Thus, from the reading of the aforesaid judgment, it could be concluded that the conditions laid down under Clause (4) of the 2016 Scheme seek to create unjust enrichment in favour of the Revenue and unjustifiable clause having no nexus. It seeks to create a distinction and also benefits those contractors who had not been honestly paying their taxes which is disadvantageous to those contractors who had been regularly paying @ 4% tax in terms of Rule 49 of the VAT Rules.

19. In CWP No. 22258 of 2023, it has been stated that the petitioner had applied under the Scheme with regard to assessment for the Financial Year 2003-2004 to 2013-2014 vide Form TC-1. The application was accepted and the respondents concluded that the petitioner had deposited excess amount of ₹ 5,65,79,692/- but by the impugned order dated 27.01.2017, respondent no.2 has denied the refund of the excess amount and relied upon Clause 4 (2) of the 2016 Scheme.

20. It is noticed that the petitioner in CWP No. 22260 of 2023 has stated that he had applied under the Scheme with regard to assessment for the Financial Year 2007-2008 to 2013-2014 vide Form TC-1. The application was accepted and the respondents concluded that the petitioner had deposited excess amount of ₹ 5,39,51,781/- but by the impugned order dated 27.01.2017, respondent no.2 has denied the refund of the excess amount and relied upon Clause 4 (2) of the 2016 Scheme.

21. In CWP No. 22265 of 2023, it has been stated that the petitioner had applied under the Scheme with regard to assessment for the Financial Year 2003-2004 to 2013-2014 vide Form TC-1. The application was accepted and the respondents concluded that the petitioner had deposited excess amount of ₹ 16,83,89,177/- but by the impugned order dated 27.01.2017, respondent no.2 has denied the refund of the excess amount and relied upon Clause 4 (2) of the 2016 Scheme.

22. In CWP No. 22268 of 2023, it has been stated by the petitioner that the petitioner company had applied under the Scheme with regard to assessment for the Financial Year 2006-2007 to 2013-2014 vide Form TC-1. The application was accepted and the respondents concluded that the petitioner had deposited excess amount of ₹ 8,15,35,785/- but by the impugned order dated 27.01.2017, respondent no.2 has denied the refund of the excess amount and relied upon Clause 4 (2) of the 2016 Scheme.

23. In view of the settled law in **Corporation Bank**'s case (supra) by Hon'ble the Supreme Court, we find that Clause 4(2) of the 2016 Scheme, is in violation of Article 265 of the Constitution of India, in so far as it enables the respondent-State to retain an amount which admittedly has been deposited in

excess of the total tax payable in terms of the 2016 Scheme which had been made applicable retrospectively. The amount deposited or collected has to be in accordance with law and by authority of law. Article 265 of the Constitution of India reads as under:-

“265. Taxes not to be imposed save by authority of law

No tax shall be levied or collected except by authority of law.”

24. Clause 4(2) of the 2016 Scheme, thus, enables the State to unjustly retain the excess amount that has been paid by the petitioner and would be, therefore, in blatant violation of Article 265 of the Constitution of India and the petitioners are entitled for refund of the same. If Clause 4(2) of the 2016 Scheme is allowed to be retained, the same would be discriminatory and make unequals among equals inasmuch as those, who were defaulters, would be better placed and put to a disadvantageous position and such a construction of a clause would be not sustainable on the anvil of Article 14 of the Constitution of India.

25. Keeping in view our aforesaid findings, we therefore, read down Clause 4 (2) of the Scheme as it originally existed and substituted on 02.06.2017 to be read after deleting the following part of the Clause as under:-

“Any excess amount left after such adjustments shall neither be refunded nor allowed to be adjusted against any other tax liability on the expiry of this Scheme.”

26. Such part of the condition of Clause 4 (2) of the Scheme is held to be *ultra vires* to Article 265 of The Constitution of India and contrary to the Law as expressed by Hon’ble the Supreme Court in **Corporation Bank’s** case (supra). Accordingly, the orders rejecting the claim of refund dated 20.01.2017 and supplementary order dated 27.01.2017 impugned in all the four writ petitions

denying the refund of the excess tax amount paid earlier by them is quashed and set aside and it is held that the petitioners are entitled for the refund of the said amount. They would also be entitled to receive interest as per rules on the said refund. The exercise of payment of refund shall be done within a period of four weeks henceforth, failing which further interest @ 9% shall be payable on the refund amount in addition to the interest required to be paid to them.

27. The writ petitions are allowed accordingly.
28. All pending applications shall stand disposed of.
29. No costs.

(SANJEEV PRAKASH SHARMA)
JUDGE

19.04.2024
VS

(SUDEEPTI SHARMA)
JUDGE

Whether speaking/reasoned Yes/No

Whether reportable Yes/No