HONOURABLE SRI JUSTICE M.S. RAMACHANDRA RAO

AND

HONOURABLE SRI JUSTICE T. VINOD KUMAR

Interlocutory Application No.3 of 2021 in Writ Petition No.17002 of 2020

and

Writ Petition No.17002 of 2020

O R D E R: *(Per Sri Justice M.S.Ramachandra Rao)*

The background facts

The petitioner is engaged in infrastructure development sector and is registered assessee with the Service Tax Department, Hyderabad under the Finance Act, 1994 and also under the Income Tax Act, 1961.

2. The petitioner filed its return of income under the Income Tax Act, 1961 for the assessment year 2018-19 on 24.10.2018 declaring 'Nil' income and claiming a refund of Rs.38,32,59,500/-. The said return was processed by the Centralised Processing Centre (for short 'the CPC'), Bangalore and an intimation was issued on 20.2.2020 under Section 143(1) of the Income Tax Act, 1961 by making an addition of income of Rs.8,88,44,222/- and thereby reducing the refund due to the petitioner to Rs.34,65,92,300/-.

3. The petitioner had also filed its Service Tax return under the Finance Act,1994 with the Central Excise Department for the period

October, 2013 to June, 2017. On the basis of the same, the Intelligence Wing of the Central Excise and Service Tax Department (DGCEI), now Director General of GST Intelligence (DGGI), Hyderabad (1st respondent) issued vide letter dt.22.03.2019, a Garnishee Notice under Section 73(1B) r/w Section 87(b)(i) of the Finance Act, 1994 to the Commissioner of Income Tax – C.P.C., Bengaluru for an amount of Rs.29,71,12,901/- towards Service Tax and interest amount of Rs.29,49,06,178/- totaling Rs.59,20,19,079/-. This was communicated to the petitioner vide letter dt.07.05.2019 by the Dy. Commissioner of Income Tax (I/C), Central Circle – 2(2), Hyderabad.

4. In July, 2019, Parliament approved an Amnesty Scheme by name ‘Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019’ (**for short, ‘SVLDRS’)** under the Finance Act, 2019 and the Government notified the same on 21.08.2019.

5. Petitioner filed application under the Scheme on 30.10.2019 and petitioner’s application for settlement of dues under the SVLDRS was accepted by the Designated Committee of the Tax Department. The Committee reviewed petitioner’s application and issued its approval vide Form No.SVLDRS-3 dt.28.01.2020 and the petitioner was asked to remit an amount of Rs.18,91,37,548/- as against the original liability of Rs.59,20,19,079/-.

6. As per the SVLDRS, payment of amount mentioned in Form No.SVLDRS-3 should be made as per timelines prescribed (and extended from time to time), failing which the order of the Designated Committee would be deemed to be automatically cancelled. The final date for making the above payment was 30.06.2020.

7. Petitioner contends that because of the COVID-19 Pandemic situation and its own financial difficulties, the only way the petitioner could discharge its liability as per Form No.SVLDRS-3 was by utilizing the Income tax refund of Rs.34,65,92,300/- which it was held entitled to. But, on account of the Garnishee Notice issued by the GST authorities to C.I.T. (C.P.C.), Bengaluru and Principal C.I.T. (Central), Hyderabad on 24.01.2019 and 22.03.2019 to remit Rs.59,02,23,755/- towards Service tax liability of the petitioner, the Income Tax Department did not pay to the petitioner the refund due to it for the Assessment Year 2018-19.

8. According to petitioner, it wrote letters dt.05.08.2019, 03.02.2020 and 14.02.2020 seeking modification of the Garnishee Notice dt.22.3.2019 to enable it to discharge its liability as per Form No.SVLDRS-3, but respondent nos.1 and Principal Commissioner of Central Tax, Hyderabad Commissionerate (2nd respondent) did not oblige the petitioner.

9. A phone call was received by the petitioner from the office of 2nd respondent on 17.07.2020 asking the petitioner if it could discharge the liability under the SVLDRS if the due date of payments determined under the Scheme is extended to 30.09.2020, and if so, the petitioner was asked to send a formal communication to that effect.

10. Petitioner sent a response to 2nd respondent by way of an e-mail dt.18.07.2020 that petitioner would be able to discharge its liability of Rs.18,91,37,548/- as per Form No.SVLDRS-3 and followed it up by a detailed representation dt.08.09.2020 to 2nd respondent with a copy marked to the Central Board of Indirect Taxes and Customs on 11.09.2020 explaining the exceptional circumstances the petitioner is in and requesting them to consider petitioner's plea positively.

11. But the efforts of petitioner to have the Garnishee Notice dt.22.3.2019 issued by the 1st respondent to the Income Tax Department withdrawn or modified did not succeed and the petitioner was disabled from discharging its Service tax liabilities determined under Form No.SVLDRS-3 by 30.06.2020 from out of the refund amount due to it from the Income Tax Department.

The prayer in the Writ petition

12. Petitioner therefore filed the Writ Petition in September, 2020 to :

(a) direct the Principal Commissioner of Central Tax, Hyderabad Commissionerate (2nd respondent) not to declare the petitioner as defaulter under the SVLDRS scheme and not to disallow the benefits made available to it under the Scheme and grant reasonable time to it for making payment as per the scheme;

(b) direct the DGGI (1st respondent) to modify the garnishee notice dt.22.03.2019 to Rs.18,91,37,548/- based on Form No.SVLDRS-3 issued by 2nd respondent; and

(c) restrain the respondent nos.1 and 2 from taking any coercive or punitive actions against petitioner-Company's officials and directors.

Events after filing of the Writ Petition:

13. On 01.10.2020, this Court issued 'Notice Before Admission' and Sri B. Narasimha Sarma, learned Senior Counsel for Central Taxes, took notice on behalf of respondent nos.1 and 2.

14. Time was again granted to the counsel for respondent nos.1 and 2 on 03.11.2020 to file counter-affidavit and the matter was directed to be listed on 14.12.2020.

The First Counter affidavit filed by respondent no.s 1 and 2 in November,2020

15. Thereafter, counter-affidavit was filed by respondent nos.1 and 2 on 16.11.2020.

16. In the counter-affidavit, the respondent nos.1 and 2 admitted that petitioner opted for SVLDRS and Form No.SVLDRS-3 dt.28.01.2020 was issued for Rs.18,91,37,548/- which petitioner was required to pay in (30) days and that the time for payment was later extended to 30.06.2020 by the Government.

They however, took a stand that the petitioner itself through its Managing Director had given a letter dt.04.04.2018 to the Senior Intelligence Officer, DGGI, Hyderabad that it has no objection to adjust its Income tax refund for the Assessment Year 2017-18 against its Service tax liability of Rs.27.52 crores + interest. They therefore contended that petitioner cannot now take a different stand and that the Garnishee Order dt.22.03.2019 was a valid one and it cannot be withdrawn till the amounts in question are recovered.

According to them, the Garnishee Order was issued to safeguard the Government's revenue which was admitted by the petitioner in the ST-3 Returns filed by the petitioner and not remitted to the Government's exchequer. It is contended that since the petitioner did not discharge the liability as per Form No.SVLDRS-3 by 30.06.2020, its application under the SVLDRS would automatically stand cancelled and the petitioner would become a defaulter.

Rejoinder of petitioner to the counter affidavit filed by respondent no.s 1 and 2

17. Petitioner filed a Rejoinder to the above counter-affidavit contending that the respondent nos.1 and 2 have failed to appreciate that SVLDRS is a beneficial scheme and cannot be narrowly interpreted, and all attempts should be made to fructify the legislative intent by liberally interpreting it to ensure that the mischief is suppressed, and that the attitude of respondent nos.1 and 2 defeats the very purpose of the scheme.

Petitioner also stated that the 3rd respondent had received a letter and notice dt.5.11.2020 under Section 87 of the Finance Act 1994 modifying the Garnishee Notice by increasing the demand of Service Tax dues of the petitioner to Rs.76,97,22,142/- and asking the Income Tax Department to makeover the refund due to the petitioner under the Income Tax Act,1961 for settlement of the said Service tax dues; and that *the respondent nos.1 and 2 forced the Income Tax Department to give to them on 24.11.2020 an amount of Rs.30,92,60,666/- out of Rs.34,65,92,300/- which was payable to the petitioner towards Income tax refund* . It is stated that the latter had thus adjusted the Income tax refund amount due to the petitioner towards the Service tax liability of the petitioner, and that this action of respondent nos.1 and 2 is patently illegal and untenable in law because the matter was *sub judice*, and respondent nos.1 and 2 had sought an adjournment in this Court.

I.A.No.3 of 2020

18. Petitioner filed I.A.No.3 of 2020 for filing an Additional Affidavit and also additional material papers.

I.A.No.4 of 2020 – the Application to amnd the prayer in the writ Petition

19. The petitioner also filed I.A.No.4 of 2020 seeking *amendment of the prayer in the Writ Petition* challenging the action of respondent nos.1 and 2 in taking Rs.30,92,60,666/- from the Income Tax Department and appropriating it towards liability determined under Form No.SVLDRS-3 dt.28.01.2020 of Rs.18,91,37,548/-; to direct the respondents to pay to the petitioner Rs.12,01,23,118/-; and not to declare the petitioner as a defaulter under the SVLDRS scheme 2019 or to take coercive action against itself, its directors and officials.

20. These two applications were allowed on 17.12.2020.

The interim order dt.17.12.2020 in W.P.No.17002 of 2020

21. On that day, the following order was also passed in Writ Petition No.17002 of 2020 :

> *"Since it is not in dispute that a refund of Rs.30.92 crores which the petitioner had got from the Income Tax Department pursuant to refund order passed on 20.02.2020 was appropriate towards Service Tax dues of the petitioner on 24.11.2020 by the respondents, and thus a substantial portion of Service Tax liability of the petitioner has now been discharged, the respondent nos.1 and 2*

are restrained from taking any coercive or punitive actions against the petitioner's company Officials and Directors.

……. ….."

I.A.No.3 of 2021

22. To vacate the said order, the respondent nos.1 and 2 filed I.A.No.3 of 2021 along with an additional counter affidavit.

23. To avoid repetition, we shall deal with the contents of the same later.

I.A.No.1 of 2021 and I.A.No.2 of 2021

24. The petitioner then filed I.A.No.1 of 2021 to implead the Dy. Commissioner of Income Tax, Circle-3(1), Hyderabad as the 3rd respondent and IA.No.2 of 2021 to incorporate certain additional grounds in the affidavit filed in support of the Writ Petition.

25. I. A.No.s 1 and 2 of 2021 were allowed on 06.01.2021 since the petitioner pleaded that the Income Tax Department is a necessary party and additional grounds needed to be raised on account of the events which had transpired after the filing of the Writ Petition. We shall deal with these additional grounds also later.

26. Sri J.V.Prasad, learned Senior Standing Counsel for the Income Tax Department took notice for the impleaded 3rd respondent and filed a counter affidavit, which also be dealt with by us later.

CONSIDERATION BY THE COURT:

27. Heard Sri Biswajeet Bhattacharjee, Senior Counsel for Sri C.Naveen Kumar, Counsel for petitioner, Sri B.Narasimha Sarma, Senior Standing Counsel for respondents 1 & 2, and Sri J.V.Prasad, Standing Counsel for 3rd respondent.

28. There is no dispute that the petitioner's return of income for the assessment year 2018-19 was processed and an intimation dt.20.02.2020 was received by it under Section 143(1) of the Income Tax Act, 1961 stating that it is entitled to an Income Tax refund of Rs.34,65,92,300/-, though the petitioner had claimed a refund of Rs.38,32,59,500/-.

29. Petitioner itself admits that the Service Tax Dues and interest are owed by it under the provisions of the Finance Act, 1994 for the period October, 2013 to June, 2017 amounting to Rs.59,20,19,079/-.

30. Initially, the DGGI (1st respondent) addressed a letter dt.22.03.2019 to the Principal Commissioner of Income Tax(Central), Hyderabad, informing that the petitioner is liable to pay to the GST Department the said amount of Rs.59,02,23,755/-, and directing the Income Tax Department to credit to the GST Department the refund amount under the Income Tax Act, 1961, payable to the petitioner invoking Section 73(1B) read with Section 87 of the Finance Act, 1994 . This is the **first** Garnishee order.

31. The 3rd respondent states that on account of the said Garnishee Order, the Income Tax Department could not make the refund to the petitioner.

32. Admittedly, the Sabka Vikas (Legacy Dispute Resolution) Scheme, 2019 (SVLDRS) was introduced under the Finance Act, 2019 and the petitioner made application under the said Scheme for settlement of Service Tax Dues on 30.10.2019; petitioner's application was accepted by the Designated Committee and Form No.SVLDRS-3 dt.28.01.2020 was issued asking the petitioner to remit Rs.18,91,37,548/- as against the original liability of Rs.59,20,19,079/-. This amount was payable in four weeks but the time was extended up to 30.06.2020.

33. There is no dispute that the petitioner wrote letters dt.05.08.2019, dt.03.02.2020 and dt.14.02.2020 to the respondents 1 and 2 to modify the Garnishee Notice dt.22.3.2019 and restricting it to Rs.18,91,37,548/- to enable the petitioner to discharge its liability as per Form SVLDRS-3, but they did not modify the Garnishee Notice.

34. On account of such non-modification of the Garnishee Notice dt.22.03.2019 issued by the 1st respondent to the Income Tax Department, the Income Tax Department did not release to the petitioner, the Income Tax refund of Rs.34,65,92,300/- before 30.06.2020.

35. The petitioner contends that it had no other source of funds except the Income tax refund to make payment of the Service Tax Dues determined by the Designated Committee, and since the Income Tax department did not release the refund due to it, the petitioner could not pay the amount determined by the Designated Committee under the SVLDRS by 30.06.2020.

36. It is the contention of the counsel for the petitioner that the SVLDRS was introduced by the Union of India to provide relief to tax payers in the form of both dispute resolution as well as amnesty; that it was a beneficial scheme, which was narrowly interpreted by the respondents 1 and 2 instead of being liberally interpreted; that they should have adopted a reasonable and pragmatic approach so that a declarant can avail the benefits of the scheme and such a declarant like the petitioner cannot be put in a worse off condition than he was before making declaration under the Scheme; that when the Government of India even extended time upto 30.09.2020 for payment of dues under SVLDRS as per Circular dt.14.07.2020 and the petitioner had also agreed to make such payment in its *e*-mail dt.18.07.2020, the respondents 1 and 2 should have withdrawn or modified the Garnishee Notice dt.22.03.2019 by asking the Income Tax Department to withhold only Rs.18,91,37,548/- as determined in the Form SVLDRS-3 instead of the whole amount of income tax refund of Rs.34,65,92,300/- and that this action is not bonafide.

It is also petitioner's contention that since the Garnishee Notice was issued on 22.03.2019 *prior* to the announcement of the SVLDRS, 2019 by the Government of India, even if it was validly issued at that time, once the Designated Committee under SVLDRS reduce the demand from Rs.59,02,23,755/- to Rs.18,91,37,548/-, the original Garnishee Notice dt.22.03.2019 can no longer be valid and it was the obligation of the respondents 1 and 2 to withdraw the said Garnishee Notice dt.22.03.2019 or modify it as mentioned above.

There was no legal impediment to modify the Garnishee notice dt.22.3.2019

37. In para 3 of the counter affidavit initially filed in November, 2020, respondents 1 and 2 took a stand that there is no legal provision to withdraw any such Garnishee order dt.22.3.2019 issued till the amounts are recovered; and the Garnishee Order cannot be revised till the subject issues are settled by way of adjudication of the Show cause Notice dt.16.9.2019 issued to the petitioner. It is stated that it was issued by the 1st respondent for recovery of tax dues admitted by the petitioner during the course of investigation and to safeguard the revenue.

38. We do not agree with the said contention of respondents 1 and 2 for the following reasons.

39. There is no dispute that the SVLDRS Scheme was introduced by Finance (No.2) Act, 2019 and notified in the Gazette of India

Extra-ordinary on 01.08.2019. It was a one-time measure to free a large segment of tax payers from their pending disputes with the Tax Administration, unload the baggage and allow businesses to move on. It provides both dispute resolution and amnesty in regard to past disputes of Central Excise, Service Tax and several other Indirect Tax Enactments.

40. In **Capgemini Technology Services India Limited vs. The Union of India and Ors**[1]**,** a Division Bench of the Bombay High Court held:

> *"From the above, we find that as a one time measure for liquidation of past disputes of Central Excise and Service Tax, the SVLDR Scheme has been issued by the Central Government. The SVLDR Scheme has also been issued to ensure disclosure of unpaid taxes by an eligible person. This appears to have been necessitated as the levy of Central Excise and Service Tax has now been subsumed in the new GST Regime. From a reading of the statement of object and reasons, it is quite evident that the scheme conceived as a one time measure, has the twin objectives of liquidation of past disputes pertaining to central excise and service tax on the one hand and disclosure of unpaid taxes on the other hand. Both are equally important: amicable resolution of tax disputes and interest of revenue. As an incentive, those making the declaration and paying the declared tax verified as determined in terms of the scheme would be entitled to certain benefits in the form waiver of interest, fine, penalty and immunity from prosecution. This is the broad picture the concerned authorities are to keep in mind while dealing with a claim under the scheme."*

[1] MANU/MH/1428/2020(DB)

41. In **Vaishali Sharma vs. Union of India and Ors**[2] and in **Seventh Plane Networks Private Limited vs. Union of India and Ors.**[3]**,** the Delhi High Court also held:

> *" In the opinion of this Court, a liberal interpretation has to be given to the Scheme as its intent is to unload the baggage relating to legacy disputes under the Central Excise and Service Tax and to allow the businesses to make a fresh beginning."*

42. We respectfully agree with the said view that the SVLDRS Scheme has to be given a liberal interpretation and not a narrow interpretation.

43. The stand taken by respondents 1 and 2 that the Garnishee Notice dt.22.03.2019 cannot be amended is contrary to the Circular No.996/3/2015-CX, dt.28.02.2015 issued by the Central Board of Excise and Customs.

44. The said Circular No.996/3/2015-CX, dt.28.02.2015 specifically clarified that Garnishee Notices issued under Section 87(1B) of the Finance Act, 1994 can be amended or withdrawn, when the assessee comes forward for payment of arrears after issuance of Garnishee Notice to the persons from whom money is due to the assessee and that under Section 21 of the General Clauses Act, 1897, the power to issue an order includes power to add, amend, vary or rescind the order, and that an interpretation that a Garnishee Notice

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[2] MANU/DE/1529/2020(DB)
[3] MANU/DE/1555/2020(DB)

cannot be amended or rescinded would make the provisions unworkable provided the interests of the revenue is suitably safeguarded. The said Circular also permitted recovery of arrears in installments.

45. In our opinion, the circumstance mentioned in the Circular under which the Garnishee notices can be modified or withdrawn or amended cannot be taken as exhaustive and is merely illustrative; and if like in the instant case, there is a reduction of liability of Service Tax dues determined under a scheme like SVLDRS, the authority issuing the Garnishee notice not only has a power to withdraw or modify it, but it is his bounden duty to do so. Such a construction will advance the cause of justice and the object of schemes like the SVLDRS scheme.

46. We therefore hold that it was the duty of the respondents 1 and 2 to (a) take note of the coming into force of the SVLDRS Scheme, (b) its object and purpose, (c) the acceptance of petitioner's application dt.30.10.2019 by the Designated Committee by issuing Form SVLDRS-3 dt.28.01.2020 reducing the Service Tax demand to Rs.18,91,37,548/-, and (d) either modify or withdraw the Garnishee Notice dt.22.03.2019.

47. This would have enabled the petitioner to settle the dues before 30.06.2020 and get the benefit of the SVLDRS Scheme.

48. However, in our opinion, without any valid reason, this was scuttled by respondents 1 and 2 for reasons which do not appear to us to be *bonafide*. We hold that the said inaction of respondents 1 and 2 is arbitrary and unreasonable and violative of Article 14 and 300A of the Constitution of India.

49. We are fortified in our view by the decision of the Supreme Court in **CIT v. J.H. Gotla**[4]**,** wherein the Supreme Court held that while construing a provision of a taxing statute, a construction which results in equity rather than injustice, should be adopted. In that case, the Supreme Court held:

> *"47.……Though equity and taxation are often strangers, attempts should be made that these do not remain always so and if a construction results in equity rather than in injustice, then such construction should be preferred to the literal construction."*

50. Admittedly, **a Second Garnishee Notice** dt.05.11.2020 was issued by the Dy. Commissioner of Central Tax (GST Division) to the Assistant Commissioner of Income Tax, Cirlce-3(1), Hyderabad, modifying the demand from Rs.59,02,23,755/- mentioned in the first Garnishee Order dt.22.03.2019 to Rs.76,97,22,142/- in the second Garnishee Notice dt.05.11.2020.

51. The upward revision of the Service Tax dues from Rs.59,20,19,079/- in the garnishee notice dt.22.03.2019 issued by 1st

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[4] 1985(4) SCC 343

respondent to Rs.76,97,22,142/- mentioned in the second garnishee notice dt.05.11.2020, runs contrary to the very claim of the respondents 1 and 2 in their counter affidavit that they cannot amend or withdraw the first garnishee notice dt.22.03.2019 and is self-contradictory.

52. This second Garnishee Notice dt.05.11.2020 was admittedly issued *after* the Dy. Commissioner of Income Tax, Circle-3(1), Hyderabad, addressed a letter to the Additional Director General of GST Intelligence, Hyderabad Zonal Unit, Hyderabad, on 22.10.2020 *offering to manually issue amount available with the said Office, if a "Garnishee Notice" is to be issued to it;* and following it up by the Assistant Commissioner of Income Tax, Circle-3(1), Hyderabad, writing *another* letter on 03.11.2020 to the Principal Commissioner, Central Tax, Hyderabad Central Commissionerate(2nd respondent), asking the latter who issued a fresh Garnishee Notice.

53. This was done by the Income Tax Authorities knowing fully well that the petitioner had filed a grievance petition on 28.04.2020 under Section 119(1)(a) of the Income Tax Act, 1961 to the CBDT to issue a direction to the CPC, Bangalore to process its refund of Rs.34,65,92,300/- as per intimation dt.20.02.2020 issued under Section 143(1) of the Income Tax Act, 1961.

54. We fail to understand the anxiety of the Income Tax Department in attempting to deny refund of Income Tax to the petitioner and going out of its way to cooperate with the Service Tax Department by even soliciting from the latter, a fresh Garnishee Notice in order to see that the petitioner does not get the income tax refund, (which was payable as per the intimation issued to the petitioner under Section 143(1) of the Act on 20.02.2020, and by continuing to retain the income tax refund amounts till November, 2020 without any valid reason). We are of the opinion that this action of the Income Tax Department is not bonafide and indicates a prejudice against the petitioner.

55. Refunds of income tax to tax payers are governed by Chapter XIX of the Income Tax Act, 1961.

56. Section 240 of the Income Tax Act, 1961 states:

> *"**240. Refund on appeal, etc.**— Where, as a result of any order passed in appeal or other proceeding under this Act, refund of any amount becomes due to the assessee, the Assessing Officer shall, except as otherwise provided in this Act, refund the amount to the assessee without his having to make any claim in that behalf:*
>
> ***Provided** that where, by the order aforesaid,—*
>
> *(a) an assessment is sent aside or cancelled and an order of fresh assessment is directed to be made, the refund, if any, shall become due only on the making of such fresh assessment;*
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> *(b) the assessment is annulled, the refund shall become due only of the amount, if any, of the tax paid in excess*

of the tax chargeable on the total income returned by the assessee."(emphasis supplied)

57. Section 243, 244 and 244 A of the Income Tax Act,1961 deal with award of interest on delayed refund to the assessees.

58. In **Union of India v. Tata Chemicals Ltd**[5]**,** the Supreme Court held that if an amount becomes due to the assessee by virtue of an order passed in appeal, reference, revision, rectification or amendment proceedings, the assessing officer is *bound to* refund the amount to the assessee *without the assessee being required to make any claim in that behalf*. It held:

> ***"15.*** *Section 240 of the Act provides for refund on appeal, etc. The section envisages that if an amount becomes due to the assessee by virtue of an order passed in appeal, reference, revision, rectification or amendment proceedings, the assessing officer is bound to refund the amount to the assessee without the assessee being required to make any claim in that behalf. The expression 'other proceedings under the Act' used in Section 240 of the Act, are wide enough to include any order passed in proceedings other than the appeals under the Act.*
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> ***16.*** *Section 244 of the Act provides for interest on refunds where no claim is made or required to be made by the assessee. The said section envisages that where a refund is due to the assessee in pursuance of an order passed under Section 240 of the Act, and the assessing officer does not grant the refund within a period of three months from the end of the month in which such order is passed, the Central Government shall pay to the assessee a simple interest of 15% per annum on the amount of*

[5] 2014(6) SCC 335

refund due from the date immediately following the expiry of the period of three months as aforesaid to the date on which the refund is granted.

……

30. ….. Interest payment is a statutory obligation and non-discretionary in nature to the assessee. In tune with the aforesaid general principle, Section 244-A is drafted and enacted. The language employed in Section 244-A of the Act is clear and plain. It grants substantive right of interest and is not procedural. The principles for grant of interest are the same as under the provisions of Section 244 applicable to assessments before 1-4-1989, albeit with clarity of application as contained in Section 244-A.

31. ….A general right (sic duty) exists in the State to refund any tax collected for its purpose, and a corresponding right exists to refund to individuals any sum paid by them as taxes which are found to have been wrongfully exacted or are believed to be, for any reason, inequitable. The statutory obligation to refund carried with it the right to interest also. This is true in the case of the assessee under the Act."

59. Thus, there is a statutory duty imposed on the State to refund any tax collected for its purpose, and a corresponding right exists to the assessees to get refund of any sum paid by them as taxes which are found to have been wrongfully exacted or are believed to be, for any reason, inequitable.

60. Section 241A mentions under what circumstances a refund can be withheld by the Income Tax Department. It states:

"241A. Withholding of refund in certain cases.— For every assessment year commencing on or after the 1st day of April, 2017, where refund of any amount becomes due to the assessee under the provisions of sub-

section (1) of Section 143 and the Assessing Officer is of the opinion, having regard to the fact that a notice has been issued under sub-section (2) of Section 143 in respect of such return, that the grant of the refund is likely to adversely affect the revenue, he may, for reasons to be recorded in writing and with the previous approval of the Principal Commissioner or Commissioner, as the case may be, withhold the refund up to the date on which the assessment is made.".

61. Admittedly, the Income Tax department has not chosen to exercise it's power under this provision to withhold the refund.

62. What the Income Tax department has done is that, after the second Garnishee notice was issued to it by the Service Tax department on 5.11.2020, **the 3rd respondent paid on 24.11.2020** by Chq.No.309093 and 309094, a sum of Rs.3,73,31,630/- towards TDS and **Rs.30,92,60,666/- to the Dy. Commissioner, Central Tax (GST), Hyderabad**, i.e., Rs.34,65,92,300/- **which the petitioner was entitled to get as Income Tax refund, to the Service Tax department**.

63. Thus the 3rd respondent has thus *set off* Rs.30,92,60,666/- out of the income tax refund of Rs.34,65,92,300/- due to the petitioner against the Service Tax dues of the petitioner.

The action of the 3rd respondent in transferring Rs.30,92,60,666/- payable to the petitioner to the Respondent no.s 1 and 2 for set off against the service Tax dues violates Sec.245 of the Income Tax Act,1961

64. We shall now consider whether this act of the Income Tax department is valid as per law.

65. Such power to Set Off is conferred on the Income Tax authorities by Section 245 of the Income Tax Act, 1961. It states:

> ***"245. Set off of refunds against tax remaining payable.***—*Where under any of the provisions of this Act a refund is found to be due to any person, the Assessing Officer, Deputy Commissioner (Appeals), [1][Principal Commissioner or Commissioner] (Appeals) or [2][Principal Chief Commissioner or Chief Commissioner] or [1][Principal Commissioner or Commissioner], as the case may be, may, in lieu of payment of the refund, set off the amount to be refunded or any part of that amount, against the sum, if any, remaining payable under this Act by the person to whom the refund is due, after giving an intimation in writing to such person of the action proposed to be taken under this section." (emphasis supplied)*

66. Thus a set off is permitted to be made by an Assessing Officer of the income tax refund due to an assessee only as against "*sum, if any, remaining payable under this Act*". Thus the Assessing Officer can adjust the Income Tax refund due to an assessee *only against Income Tax dues,* and not towards any other dues of an assessee such as Service Tax dues under the Finance Act, 1994.

67. The 3rd respondent is a creature of the Income Tax Act, 1961 and is obliged to discharge his functions strictly in accordance with the provisions of the Income Tax Act, 1961; and he is not entitled to act in violation of the said provisions of the said Act by allowing a *set off* of Income tax refund due to the petitioner against Service tax dues of the petitioner under the Finance Act, 1994.

68. Merely because the Principal Chief Commissioner of Income Tax, Hyderabad vide letter dt.20.11.2020 accorded approval for adjusting income tax refund against dues to the Service Tax Department, the action of the 3rd respondent, which is *per se* illegal and in violation of Section 245 of the Income Tax Act, 1961, does not get validated.

69. To a specific question put to Sri J.V. Prasad, Senior Standing Counsel for 3rd respondent, why the 3rd respondent acted in this manner, he replied that if the 3rd respondent had not complied with the Garnishee Notice dt.05.11.2020 issued under Section 87 of the Finance Act, 1994, the 3rd respondent would be deemed to be '*an assessee in default*' under Clause (iii) of Sub-Section (b) of Section 87 of the Finance Act, 1994.

70. We do not agree with this submission because:

(a) Section 65(7) of the Finance Act, 1994 defines the term 'assessee' as under :

> ***"Section 65(7)** : 'assessee' means a person liable to pay the service tax and includes his agent*."

(b) In our view, the 3rd respondent / the Income Tax Department can never be an 'assessee' as defined under Section 65(7) of the Finance Act, 1994 because it is not liable to pay service tax as it is the

department of the Government of India mentioned in Clause (a) of Section 66-D of the Finance Act, 1994 (which gives the negative list of services exempted from service tax).

(c) Once the 3rd respondent is not an 'assessee' under the Finance Act, 1994, it can never be an 'assessee in default' under Clause (iii) of Sub-Section (b) of Section 87 of the Finance Act, 1994.

71. Therefore, we hold that the payment made on 24.11.2020 by the 3rd respondent of Rs.30,92,60,666/- to the respondents 1 and 2 towards Service Tax dues of the petitioner is contrary to Section 245 of the Income Tax Act, 1961.

The Letter dt.4.4.2018 given by petitioner does not operate as estoppel against petitioner

72. The Respondents 1 and 2 have taken a stand that petitioner itself through it's Managing Director had given Letter dt.4.4.2018 and an affidavit to the Commissioner of Income Tax, CPC, Bangalore that the later can pay to the Central Excise Department the Service Tax to be determined out of the refund issued for Asst. Year 2018-19 and so the petitioner is estopped from now challenging the setting off of the Income Tax refund against the Service Tax dues.

73. In our opinion, this plea is without any merit because there is no estoppel against a statute. (**Sri Hari Krishna Mandir trust v. State of Maharashtra**[6]**, Taparia Tools v. CIT**[7] **).**

74. When Section 245 of the Income Tax Act,1961 permits a set off only as against the Income Tax dues, merely because the petitioner gave such a letter or an affidavit, the 3rd respondent cannot pay the Income Tax refund due to the petitioner to the Service Tax Department towards the Service Tax dues.

75. Assuming for the sake of argument without conceding that the Income Tax Department was entitled to make over to the respondents 1 and 2, the Income Tax refund payable to the petitioner to clear the Service Tax dues of the petitioner on account of the letter dt.04.4.2018 and the affidavit given by the petitioner agreeing to the said arrangement, why the Income Tax Department did not choose to do so between 20.02.2020 (the date when intimation under Section 143(1) of the Income Tax Act, 1961 was given to the petitioner determining that the petitioner is entitled to a refund of Rs.34,65,92,296/-) and 30.06.2020 (the last date for payment by the petitioner of the Service Tax dues of Rs.18,19,37,548/- determined as per Form No.SVLDRS-3 dt.28.01.2020) is not explained by the 3rd respondent.

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[6] (2020) 9 SCC 356
[7] (2015) 7 SCC 540

76. Nothing prevented the 3rd respondent from transferring to the respondents 1 and 2 the amount of Rs.18,19,37,548/- from out of the Income Tax refund of Rs.30,92,60,666/- *before* 30.06.2020 and transfer the balance with interest under Section 243(1)(b) of the Act to the petitioner, if the 3rd respondent claims that it was entitled to do so on 24.11.2020. This would have protected the petitioner from becoming a defaulter under the SVLDRS scheme and enable it to get the benefits under the said Scheme. This inaction of the 3rd respondent is arbitrary and is not bonafide.

77. Moreover, when the petitioner was held entitled to refund of Rs.30,92,60,666/- as per the intimation issued on 20.2.2020 under Sec.143(1) of the Income Tax Act,1961 to it after deducting Rs.3,73,31,630/- towards TDS, the Income Tax Department is obligated to make a refund with 15% interest to the petitioner of the said amount as per Section 243(1)(b) of the Income Tax Act, 1961.

78. As held in **K.Lakshmanya & Co. v. CIT[8],** the statutory obligation of the Income Tax department to refund excess tax is non-discretionary and carries with it the right to interest and the latter is 'parasitical' i.e., the assessee has a substantive right to get interest on the income tax refund if it is delayed by the Income Tax Department. In the said decision, the Supreme Court followed it's decision in **Tata Chemicals Ltd** (5 supra)**.**

[8] (2018) 11 SCC 620

79. There is no explanation forthcoming in the counter affidavit of the 3rd respondent or from the counsel for the 3rd respondent, why the Income Tax department had not paid till date any interest statutorily due and payable to the petitioner on account of the intimation dt.20.2.2020 issued to it under Section 143 (1) of the Act.

80. This inaction on the part of the Income Tax Department in not paying to the petitioner interest @ 15% p.a on the refund from 20.5.2020 (the date of expiry of the 3 month period as per Section 243 (1) (b) of the Income Tax Act,1961) which it is entitled to get on account of the delay in making payment of refund, is arbitrary, illegal and violates Art.14, 300A of the Constitution of India and also Section 243(1) (b) of the Income Tax Act,1961.

81. We do not agree with the plea of the respondents 1 and 2 that the petitioner had time from 28.01.2020 (the date when Form No.SVLDRS-3 was issued) till 30.06.2020 (the last date for payment of the amount determined under the said Form by the Designated Committee) and that the petitioner did not utilize this time and is falsely trying to portray that it was deliberately deprived of the opportunity to pay the dues determined under Form No.SVLDRS-3.

82. The further contention of the respondents 1 and 2 that the petitioner is expected to *pay* the amounts determined under the SVLDRS Scheme as per Sub-Section (5) of Section 127 and that the

petitioner did not pay and consequently he was rightly declared as a defaulter, also does not appeal to us because the 3rd respondent ought to have released the full Income Tax refund amount of Rs.30,92,60,666/- before 30.06.2020 to the petitioner as mandated under the Income Tax Act, 1961, and the petitioner would have utilized the same to *pay* before 30.06.2020 the amount of Rs.18,91,37,548/- determined in Form No.SVLDRS-3 on 28.01.2020 by the Designated Committee.

83. The respondents 1 and 2 (having kept quiet by not amending the Garnishee notice dt.22.03.2019 issued to the Income Tax Department, by reducing the amount mentioned therein to Rs.18,91,37,548/-) prevailed over the Income Tax Department and prevented the latter from releasing the Income Tax refund of Rs.30,92,60,666/- to the petitioner, and thus disabled the petitioner from utilizing the same to *pay* the amount of Rs.18,91,37,548/- determined in Form No.SVLDRS-3 on 28.01.2020 by the Designated Committee.

The respondents cannot be allowed to take advantage of their own wrong

84. The respondents cannot be allowed to take advantage of their own wrong and blame the petitioner for its inability to pay within time the amount of Rs.18,91,37,548/- determined in Form No.SVLDRS-3

on 28.01.2020 by the Designated Committee and label the petitioner as a "defaulter".

85. In **Kusheshwar Prasad Singh v. State of Bihar**[9], the Supreme Court reiterated the well established legal principle that "no party can take advantage of his own wrong" in the following terms:

> ***"14.*** *In this connection, our attention has been invited by the learned counsel for the appellant to a decision of this Court in* ***Mrutunjay Pani v. Narmada Bala Sasmal***[10] *wherein it was held by this Court that where an obligation is cast on a party and he commits a breach of such obligation, he cannot be permitted to take advantage of such situation. This is based on the Latin maxim* ***commodum ex injuria sua nemo habere debet*** *(no party can take undue advantage of his own wrong).*
>
> ***15.*** *In* ***Union of India v. Major General Madan Lal Yadav***[11] *the accused army personnel himself was responsible for delay as he escaped from detention. Then he raised an objection against initiation of proceedings on the ground that such proceedings ought to have been initiated within six months under the Army Act, 1950. Referring to the above maxim, this Court held that the accused could not take undue advantage of his own wrong. Considering the relevant provisions of the Act, the Court held that presence of the accused was an essential condition for the commencement of trial and when the accused did not make himself available, he could not be allowed to raise a contention that proceedings were time-barred. This Court (at SCC p. 142, para 28) referred to Broom's Legal Maxims (10th Edn.), p. 191 wherein it was stated:*
>
> *"It is a maxim of law, recognised and established, that no man shall take advantage of his own wrong; and this maxim,*

[9] (2007) 11 SCC 447
[10] AIR 1961 SC 1353
[11] (1996) 4 SCC 127

which is based on elementary principles, is fully recognised in courts of law and of equity, and, indeed, admits of illustration from every branch of legal procedure."

16. *It is settled principle of law that a man cannot be permitted to take undue and unfair advantage of his own wrong to gain favourable interpretation of law. It is sound principle that he who prevents a thing from being done shall not avail himself of the non-performance he has occasioned. To put it differently, "a wrongdoer ought not to be permitted to make a profit out of his own wrong". (emphasis supplied)*

86. A plea is raised in the additional counter affidavit by respondents 1 and 2 that they are not aware prior to February, 2020 that the petitioner was entitled to get Income Tax refund. If really this was true, it is for them to explain why they issued the Garnishee notice dt.22.03.2019 (prior to February,2020) to the Income Tax Department under Section 87 of the Finance Act, 1994.

87. We also do not agree with the plea of respondents 1 and 2 that the Garnishee notice issued on 22.03.2019 by the DGCEI and the amounts determined under SVLDRS are two different issues. In our opinion, they are both interrelated because the Garnishee notice was issued to recover the Service Tax dues payable by the petitioner, and under the SVLDRS, the quantum of Service Tax dues of the petitioner was admittedly reduced from Rs.59,20,19,079/- to Rs.18,91,37,548/-; and any modification of the liability for the benefit of the assessee, ought to result in a modified Garnishee order, which would have

enabled the petitioner to utilize the Income Tax refund to pay the reduced Service Tax liability as per SVLDRS.

88. Accordingly, we hold that:

(i) the stand taken by respondents 1 and 2 that the Garnishee Notice dt.22.03.2019 cannot be amended is contrary to the Circular No.996/3/2015-CX, dt.28.02.2015 issued by the Central Board of Excise and Customs is arbitrary, unreasonable and unsustainable;

(ii) it was the duty of the respondents 1 and 2 to (a) take note of the coming into force of the SVLDRS Scheme, (b) its object and purpose, (c) the acceptance of petitioner's application dt.30.10.2019 by the Designated Committee by issuing Form SVLDRS-3 dt.28.01.2020 reducing the Service Tax dues to Rs.18,91,37,548/-, and (d) either modify or withdraw the Garnishee Notice dt.22.03.2019. This would have enabled the petitioner to settle the dues before 30.6.2020 and get the benefit under the SVLDRS scheme.

(iii) without any valid reason, this was scuttled by respondents 1 and 2 for reasons which do not appear to us to be *bonafide* and that the said inaction of respondents 1 and 2 is arbitrary and unreasonable and violative of Article 14 and 300A of the Constitution of India.

(iv) The action of the Income Tax Department in soliciting from the Service Tax Department, a fresh Garnishee Notice in order to see that the petitioner does not get the income tax refund, (which was payable as per the intimation issued to the petitioner under Section 143(1) of the Act on 20.02.2020, and by continuing to retain the income tax refund amounts till November, 2020 without any valid reason), is not bonafide and indicates a prejudice against the petitioner.

(v) the payment made on 24.11.2020 by the 3rd respondent of Rs.30,92,60,666/- to the respondents 1 and 2 towards Service Tax dues of the petitioner is contrary to Section 245 of the Income Tax Act, 1961.

(vi) When Section 245 of the Income Tax Act,1961 permits a set off only as against the Income Tax dues, merely because the petitioner gave a letter dt.04.04.2018 or an affidavit, the 3rd respondent cannot pay the Income Tax refund due to the petitioner to the Service Tax Department towards the Service Tax dues.

(vii) Nothing prevented the 3rd respondent from transferring to the respondents 1 and 2 the amount of Rs.18,19,37,548/- from out of the Income Tax refund of Rs.30,92,60,666/- before 30.06.2020 and transfer the balance with interest under Section

243(1)(b) of the Act to the petitioner, if it claims that it validly did so on 24.11.2020. This would have protected the petitioner from becoming a defaulter under the SVLDRS Scheme and enabled it to get the benefits under the said Scheme. This inaction of the 3rd respondent is arbitrary and is not bonafide

(viii) the inaction on the part of the Income Tax Department in not paying to the petitioner interest @ 15% p.a on the refund from 20.5.2020 (the date of expiry of the 3 month period as per Section 243 (1) (b) of the Income Tax Act,1961) which it is entitled to get on account of the delay in making payment of refund, is arbitrary, illegal and violates Art.14, 300A of the Constitution of India and also Section 243(1) (b) of the Income Tax Act,1961.

(ix) respondents cannot be allowed to take advantage of their own wrong and blame the petitioner for its inability to pay within time the amount of Rs.18,91,37,548/- determined in Form No.SVLDRS-3 on 28.01.2020 by the Designated Committee and label the petitioner as a “defaulter”.

Conclusion and relief

89. Having regard to the above findings recorded by us, we feel that it would be a travesty of justice to allow the plan of respondent No.s 1 to 3 to somehow or other ensure that petitioner gets the tag of a

'defaulter' in payment of Service Tax dues, to succeed. We strongly deprecate their actions and deem it appropriate pass the following order in the interests of justice.

90. Accordingly, the Writ Petition is allowed; the petitioner shall be deemed to have made payment of Rs.18,91,37,548/- determined under Form No.SVLDRS-3 dt.28.01.2020 before 30.06.2020; the respondents are restrained from declaring that the petitioner had committed a default under the SVLDRS Scheme 2019 and also restrained from taking any coercive action against the Directors, officials of the petitioner or against the petitioner; the respondents 1 and 2 are directed to release to the petitioner the amount of Rs.12,01,23,118/- out of the Income Tax refund amount of Rs.30,92,60,666/- payable to it within four (4) weeks; the 3rd respondent shall pay petitioner interest on the sum of Rs.30,92,60,666/- from 21.5.2020 (the date of expiry of the 3 month period as per Section 243 (1) (b) of the Income Tax Act,1961) till 24.11.2020 at 15% per annum within four (4) weeks; the respondents 1 and 2 shall also pay petitioner interest at 15% per annum on Rs.12,01,23,118[12]/- from 25.11.2020 till date of payment within four (4) weeks; costs of Rs.10,000/- (Rupees ten thousand only) shall also be paid by respondent no.1 and respondent no.3 to the petitioner within four (4) weeks. I.A.No.3 of 2021 is dismissed.

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[12] Rs.30,92,60,666/- less Rs.18,91,37,548/- = Rs.12,01,23,118/-

91. Pending miscellaneous petitions, if any, in this Writ Petition shall stand closed.

M.S.RAMACHANDRA RAO, J

T.VINOD KUMAR, J

Date: 28.04.2021

Ndr/gra