2024 INSC 364

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3940 OF 2024

COMMISSIONER OF TRADE AND TAXES ...APPELLANT(S)

VERSUS

FEMC PRATIBHA JOINT VENTURE ...RESPONDENT(S)

J U D G M E N T

PAMIDIGHANTAM SRI NARASIMHA, J.

1. The issue for consideration before us is whether the timeline for refund under Section 38(3) of the Delhi Value Added Tax Act, 2004[1] must be mandatorily followed while recovering dues under the Act by adjusting them against the refund amount.

2. The brief facts relevant for our purpose are as follows. The respondent is a joint venture engaged in the execution of works contracts for the Delhi Metro Rail Corporation and makes purchases for this purpose. It claimed refund of excess tax credit

[1] Hereinafter 'the Act'.

amounting to Rs. 17,10,15,285/- for the 4th quarter of 2015-16 through revised return filed on 31.03.2017 and Rs. 5,44,39,148/- for the 1st quarter of 2017-18 through return filed on 29.03.2019, along with applicable interest under Section 42 of the Act. The appellant did not pay the refund even until 2022, pursuant to which the respondent sent a letter dated 09.11.2022 for the consideration of their refund. The Value Added Tax Officer passed an adjustment order dated 18.11.2022 to adjust the respondent's claims for refund against dues under default notices dated 30.03.2020, 23.03.2021, 30.03.2021, and 26.03.2022. The respondent then filed a writ petition before the Delhi High Court for quashing the adjustment order and the default notices.

3. By judgment dated 21.09.2023, impugned herein, the High Court quashed the adjustment order and directed refund of Rs. 17,10,15,285/- for the 4th quarter of 2015-16 and Rs. 5,44,39,148/- for the 1st quarter of 2017-18, along with interest as per Section 42 till the date of realisation.[2] In respect of the default notices, the High Court gave liberty to the respondent to avail statutory appeal under Section 74 of the Act.

[2] WP (C) 2491/2023, judgment dated 21.09.2023 ('Impugned judgment').

4. The present appeal is restricted to the issue of quashing the adjustment order. The High Court placed reliance on the Delhi High Court's judgment in *Flipkart India Private Limited* v. *Value Added Tax Officer, Ward 300*[3] to summarise the law on refund under Section 38. It held that the department must scrupulously adhere to the time limit for processing and issuing the refunds under Section 38. Whenever the department seeks to obtain necessary information under Section 59 of the Act, it must take steps within the time limit envisaged under the Act. Further, the refund amount can be adjusted only when an enforceable demand in the nature of tax or duty is pending against the assessee. The department does not have any legal right or justification to retain the amount beyond the time limit prescribed under Section 38.[4] In the facts of the present case, it was held that the mandate of the Act has not been followed and hence the adjustment order is not maintainable.[5]

5. We have heard the learned ASG for the department and Mr. Rajesh Jain, learned counsel for the respondent-assessee. The learned ASG has submitted that the timelines specified in Section

[3] 2023 SCC OnLine Del 5201.
[4] Impugned judgment, para 10.
[5] ibid, para 11.

38(3) are only to ensure that interest is paid if the refund is delayed beyond the statutorily prescribed period. However, he has argued, the timeline cannot be used to denude the power to adjust refund amounts against outstanding dues under Section 38(2). The refund can be adjusted as long as outstanding dues exist at the time when the refund is processed, even if it is beyond the stipulated timeline. The learned counsel for the assessee has supported the reasoning of the High Court and has placed reliance on several judgments of the Delhi High Court that affirm this position of law.[6]

6. We find no reason to interfere with the impugned judgment, which follows the view that has been consistently adopted by the High Court.[7] The finding of the High Court is based on the plain language of Section 38 of the Act, which reads as follows:

> "***38. Refunds***
>
> *(1) Subject to the other provisions of this section and the rules, the Commissioner shall refund to a person the amount of tax, penalty and interest, if any, paid by such person in excess of the amount due from him.*

[6] *Swarn Darsan Impex v. Commissioner, Value Added Tax*, 2010 SCC OnLine Del 4697; *Nucleus Marketing and Communication v. Commissioner of Delhi Value Added Tax*, 2016 SCC OnLine Del 3941; *Rockwell Industries v. Commissioner of Trade and Taxes*, 2019 SCC OnLine Del 8432; *ITD-ITD CEM JV v. Commissioner of Trade and Taxes*, 2019 SCC OnLine Del 9568; *Ramky Infrastructure Ltd v. Commissioner of Trade and Taxes*, 2023 SCC OnLine Del 4236; *Commissioner of Trade and Taxes v. Corsan Corviam Construction S.A. Sadbhav Engineering Ltd JV*, 2023 SCC OnLine Del 1900; *Flipkart India* (supra).

[7] ibid.

(2) Before making any refund, the Commissioner shall first apply such excess towards the recovery of any other amount due under this Act, or under the CST Act, 1956 (74 of 1956).

(3) Subject to sub-section (4) and sub-section (5) of this section, any amount remaining after the application referred to in sub-section (2) of this section shall be at the election of the dealer, either –

(a) refunded to the person, –

(i) within one month after the date on which the return was furnished or claim for the refund was made, if the tax period for the person claiming refund is one month;

(ii) within two months after the date on which the return was furnished or claim for the refund was made, if the tax period for the person claiming refund is a quarter; or

(b) carried forward to the next tax period as a tax credit in that period.

(4) Where the Commissioner has issued a notice to the person under section 58 of this Act advising him that an audit, investigation or inquiry into his business affairs will be undertaken or sought additional information under section 59 of this Act, the amount shall be carried forward to the next tax period as a tax credit in that period.

(5) The Commissioner may, as a condition of the payment of a refund, demand security from the person pursuant to the powers conferred in section 25 of this Act within fifteen days from the date on which the return was furnished or claim for the refund was made.

(6) The Commissioner shall grant refund within fifteen days from the date the dealer furnishes the security to his satisfaction under sub-section (5).

(7) For calculating the period prescribed in clause (a) of sub- section (3), the time taken to –

(a) furnish the security under sub-section (5) to the satisfaction of the Commissioner; or

(b) furnish the additional information sought under section 59; or

(c) furnish returns under section 26 and section 27; or

(d) furnish the declaration or certificate forms as required under Central Sales Tax Act, 1956,

shall be excluded

(8) Notwithstanding anything contained in this section, where –

(a) a registered dealer has sold goods to an unregistered person; and

(b) the price charged for the goods includes an amount of tax payable under this Act;

(c) the dealer is seeking the refund of this amount or to apply this amount under clause (b) of sub-section (3) of this section;

no amount shall be refunded to the dealer or may be applied by the dealer under clause (b) of sub-section (3) of this section unless the Commissioner is satisfied that the dealer has refunded the amount to the purchaser.

(9) Where –

(a) a registered dealer has sold goods to another registered dealer; and

(b) the price charged for the goods expressly includes an amount of tax payable under this Act,

the amount may be refunded to the seller or may be applied by the seller under clause (b) of sub-section (3) of this section and the Commissioner may reassess the buyer to deny the amount of the corresponding tax credit claimed by such buyer, whether or not the seller refunds the amount to the buyer.

(10) Where a registered dealer sells goods and the price charged for the goods is expressed not to include an amount of tax payable under this Act the amount may be refunded to the seller or may be applied by the seller under clause (b) of sub-section (3) of this section without the seller being required to refund an amount to the purchaser.

(11) Notwithstanding anything contained to the contrary in sub-section (3) of this section, no refund shall be allowed to a dealer who has not filed any return due under this Act."

7. Sub-section (1) provides that any amount of tax, penalty and interest that is in excess of the amount due from a person shall be refunded to him by the Commissioner. Sub-section (2) permits the Commissioner to first apply such excess to recover any other amount that is due under the Act or the Central Sales Tax Act, 1956. Sub-section (3), which is relevant for our purpose, provides the assessee with the option of getting the refund or carrying it forward to the next tax period as a tax credit. In case of refund,

Section 38(3)(a) provides the timeline for refund from the date on which the return is furnished or claim for refund is made as: (i) within one month, if the period for refund is one month; (ii) within two months, if the period for refund is a quarter. Sub-section (4) provides that if notice has been issued under Section 58 or additional information has been sought under Section 59, then the amount shall be carried forward to the next tax period as tax credit. Sub-sections (5) and (6) pertain to security. Sub-section (7) provides certain exclusions while calculating the period under sub-section (3). Sub-sections (8)-(10) pertain to refund in cases of sale to registered and unregistered dealers. Lastly, sub-section (11) provides that the refund shall not be allowed to a dealer who has not filed any return that is due under the Act.

8. The language of Section 38(3) is mandatory and the department must adhere to the timeline stipulated therein to fulfil the object of the provision, which is to ensure that refunds are processed and issued in a timely manner.

9. In the present case, Section 38(3)(a)(ii) is relevant as both the refunds in the present case pertain to quarter tax periods. Therefore, as per Section 38(3)(a)(ii), the refund should have been processed within two months from when the returns were filed

(31.03.2017 and 29.03.2019), which comes up to 31.05.2017 and 29.05.2019. The default notices are dated 30.03.2020, 23.03.2021, 30.03.2021, and 26.03.2022. It is therefore evident that the default notices were issued after the period within which the refund should have been processed. Sub-section (2) only permits adjusting amounts towards recovery that are "due under the Act". By the time when the refund should have been processed as per the provisions of the Act, the dues under the default notices had not crystallised and the respondent was not liable to pay the same at the time. The appellant-department is therefore not justified in retaining the refund amount beyond the stipulated period and then adjusting the refund amount against the amounts due under default notices that were issued subsequent to the refund period.

10. Further, the learned ASG's contention that the purpose of the timeline provided under sub-section (3) is only for calculation of interest under Section 42[8] would defeat the object of the provision.

[8] The relevant portion of Section 42 reads:

"***42. Interest***

(1) A person entitled to a refund under this Act, shall be entitled to receive, in addition to the refund, simple interest at the annual rate notified by the Government from time to time, computed on a daily basis from the later of –

(a) the date that the refund was due to be paid to the person; or

(b) the date that the overpaid amount was paid by the person, until the date on which the refund is given.

Such an interpretation would effectively enable the department to retain refundable amounts for long durations for the purpose of adjusting them on a future date. This would go against the object and purpose of the provision. This contention is hence rejected.

11. In view of the above, we dismiss the present appeal and affirm the impugned judgment directing the refund of amounts along with interest as provided under Section 42 of the Act.

12. Pending applications, if any, are disposed of.

.....J.
[PAMIDIGHANTAM SRI NARASIMHA]

.....J.
[PRASANNA BHALACHANDRA VARALE]

NEW DELHI;
MAY 01, 2024

PROVIDED that the interest shall be calculated on the amount of refund due after deducting therefrom any tax, interest, penalty or any other dues under this Act, or under the Central Sales Tax Act, 1956 (74 of 1956):

PROVIDED FURTHER that if the amount of such refund is enhanced or reduced, as the case may be, such interest shall be enhanced or reduced accordingly.

Explanation.- If the delay in granting the refund is attributable to the said person, whether wholly or in part, the period of the delay attributable to him shall be excluded from the period for which the interest is payable."