Vortex Rubber Industries Private ... vs Commissioner Trade Taxes & Ors on 8 December, 2023

Author: Yashwant Varma

Bench: Yashwant Varma

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* IN THE HIGH COURT OF DELHI AT NEW DELHI
\+ W.P.(C) 15820/2023
VORTEX RUBBER
INDUSTRIES PRIVATE LIMITED ..... Petit
Through: Mr. Arif Ahmed Khan, Mr. L
Mahajan, Mr. Manoj Awasthi
and Ms. Gauri G
Advocates.
versus

COMMISSIONER TRADE TAXES & ORS. ..... Respondents
Through: Mr. Rajeev Aggarwal, ASC
along with Ms. Samridhi Vat
Advocate.
CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA
ORDER

% 08.12.2023 CM APPL. 63619/2023 (for exemption) Allowed, subject to all just exceptions. Application stands disposed of.

W.P.(C) 15820/2023

1. The grievance of the petitioner is a failure on part of the respondents to refund a pre-deposit amounting to Rs. 1,14,000/- along with interest of Rs. 1,02,272/- which was effected during the pendency of proceedings before the Delhi Value Added Tax, Appellate Tribunal ["Tribunal"] as well as a Bank Guarantee dated 08 December 2015 for an amount of Rs. 3,15,000/-.

2. Undisputedly, the Tribunal has decided the issue in favour of the writ petitioner in terms of its judgment dated 03 August 2022. We, This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 13/12/2023 at 02:52:01 for the purposes of completeness, deem it appropriate to notice the following decisions which have been rendered by this Court and which represent the consistent view taken that a pre-deposit does not tantamount to the payment of a tax or duty.

3. We take note of the decision rendered by this Court in Flipkart India Private Limited vs. Value Added Tax Officer, Ward 300 & Ors. [2023 SCC OnLine Del 5201] where it was pertinently observed as follows:-

> "24. Turning then to the question of whether the pre-deposit as made before the OHA could have been adjusted against any other tax dues, it was the submission of Mr. Gulati that a pre-deposit has never been understood to constitute a deposit of tax or duty which could be utilized for the purposes of adjustment. According to Mr. Gulati, the aforesaid position is no longer res integra and stands duly settled in light of the judgment of the Court in MRF Ltd. v. The Commissioner of Trade and Taxes & Anr.. Mr. Gulati referred to the following passages from that decision: -
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> "3. Learned counsel for the Revenue contends that the local sales tax authorities' decision not to grant interest on refund amount is justified because the provision of Section 30 of the Delhi Sales Tax Act, 1975 requires that the assessee who wishes to claim refund of tax paid should approach the authority in a particular manner (by filing form ST 21). It is submitted that the interest amounts would be due only from the time that procedure was followed and not before and that interest would be permissible only in accordance with that provision, i.e. Section 30(4) in the event the 90 days elapse. In this case, the judgment of the Court was delivered on 14.05.2015 and the petitioner approached the Sales Tax Department on 22.07.2015 and 20.11.2015. The Delhi Sales Tax authority's appeal by way of special leave before the Supreme Court was disposed of on 28.11.2016. In this background, the Revenue's burden of the song as it were is that since the 21 form was only filed on 25.05.2018 (as without prejudice measure) by virtue of this Court's order dated 09.05.2018, the interest on the refund can be granted having regard to the express provisions of Section 30 of Delhi Sales Tax Act with reference to the date concerned, i.e. 25.05.2018. The Revenue's contention, in this Court's opinion, is untenable. The judgment in Suvidhe (supra) This is a digitally signed order.
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> The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 13/12/2023 at 02:52:01 emphasized - although in the context of Section 11B (of the Central Excise Act) where the assessee had to approach and make a pre-deposit to the appellate authority-that such deposit sums would not amount to depositing or paying excise duty but rather to avail remedy of an appeal. The Bombay High Court observed as follows in Suvidhe Ltd. v. UOI 1996 (82) ELT 177 (Bom):
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> 1. Rule. By consent rule is made returnable forthwith. Heard parties.
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> 2. Show cause notice issued by the Superintendent (Tech.) Central Excise to the petitioner to show cause why the refund claim for Excise Duty and Redemption fine paid in a sum of Rs. 14,07,410/- should be denied under Section 11B of the Central Excise Rules and Act, 1944 (sic) is impugned in the present petition. The aforesaid

amount is deposited by the Petitioners not towards Excise Duty but by way of deposit under Section 35F for availing the remedy of an appeal. Appeal of the petitioners has been allowed by the Appellate Tribunal by its Judgment and order passed on 30th of November, 1993 with consequential relief. Petitioners' prayer for refund of the amount deposited under Section 35F has not received a favourable response. On the contrary the impugned show cause notice is issued why the amount deposited should not be forfeited. In our judgment, the claim raised by the Department in the show cause notice is thoroughly dishonest and baseless. In respect of a deposit made under Section 35F, provisions of Section 11B can never be applicable. A deposit under Section 35F is not a payment of Duty but only a pre-deposit for availing the right of appeal. Such amount is bound to be refunded when the appeal is allowed with consequential relief.

3. In respect of such a deposit the doctrine of unjust enrichment will be inapplicable. In the circumstances, the petition succeeds. The impugned show cause notice, which is annexed at Exhibit-F to the petition, is quashed and the respondents are directed to forthwith refund the aforesaid amount of Rs. 14,07,410/- along with interest thereon at the rate of 15% p. a.

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4. Rule is made absolute in the aforestated terms. Respondents will pay the petitioners the cost of the petition."

4. The Supreme Court endorsed the view of the Bombay High Court. In Nestle India Limited (supra), the Karnataka High Court following the same thread of reasoning, held that the pre-deposit amount was not towards tax but rather to avail the remedy of an appeal. The subsequent judgment in W.S. Retail (supra) was rendered especially in the context of the provisions of the Karnataka VAT Act and other enactments. It relied upon the logic in Suvidhe (supra) and Nestle (supra) and stated as follows:

"42. To the same effect, the Division Bench of the Delhi High Court in Voltas Limited v. Union of India [1999 (112) ELT 34 (Delhi)], also held that the pre-deposit under Section 35F of the Act is a deposit pending appeal and it is not available for appropriation or disbursal by the Revenue Department.

Paragraph-7 of the said judgment is also quoted below for ready reference:--

> "7. It cannot be denied that the demand against the petitioner was raised consequent to the order of adjudication. Section 35F of the Act under which the petitioner was required to deposit the amount of Rs. 50 lakhs speaks of „deposit pending appeal. It is clear that the amount so deposited remains a deposit pending appeal and is thereafter available for appropriation or disbursal consistently with the final order maintaining or setting aside the order of adjudication."

43. The learned Single Judge of the Kerala High Court in Alwaye Sugar Agency v. Commercial Tax Officer, Alwaye 2011 (42) VST 517 also dealt with a similar controversy as is involved in the present case and under the provision of This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 13/12/2023 at 02:52:01 „Amnesty Scheme announced in Kerala in the Budget Speech of 2010, the learned Single Judge directed that a sum of Rs. 75,000/- deposited by the petitioner-assessee under the said Scheme, cannot be adjusted against the interest portion under Section 55C of the Act, which is also akin to Section 42(6) in KVAT Act and the Court allowed the Writ Petition with the following observations:--

> "More so since, once the Scheme is announced and specified to be commenced from the 1st day of the relevant financial year, for a specified period, it may not be proper for the State/Department to augment the revenue collection by resorting to coercive steps before the defaulters get an opportunity to apply for and obtain the benefit of the Scheme, which otherwise can only defeat or frustrate the Scheme itself and in turn, the „Policy of the Government. In the above circumstances, this Court finds that the course pursued by the respondents; issuing Ext. PA rejecting Ext. P2 preferred by the petitioner seeking the amount deposited as a token of willingness to clear the liability availing the benefit of the Scheme proposed in Ext. PI and consciously appropriating the said amount against 'interest' portion under the cover of Section 55C, is not correct or sustainable. Accordingly, Ext.P4 is set aside. The respondents are directed to pass fresh orders quantifying the liability of the petitioner, in the application preferred for extending the benefit under the "Amnesty Scheme", giving credit to a sum of Rs.
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> 75,000/- paid by him vide Ext. P2, as payment towards a portion of the liability under the scheme, and effect appropriation, in tune with the terms of the Scheme."

5. It is clear from the above discussion that pre-deposit sums which the assessee is compelled to pay to seek recourse to an appellate remedy, do not necessarily bear the stamp or character of tax, especially when it succeeds on the particular plea. That being the case, the insistence upon a procedural step, i.e. filing of a form which is purely for the purpose This is a digitally signed order.

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administrative convenience cannot in any manner fix the period or periods of limitation when the amounts became due on the question of interest. The fact that the amounts were due and payable from the date the appeal was allowed is not in dispute. In these circumstances, the postponement of the period from when interest became calculable is incomprehensive and illogical. For these reasons the petitioner is entitled to interest calculable from the date when its appeal was allowed by this Court by order dated 14.05.2015. The respondents shall ensure that the amounts are processed and credited to the petitioner's account within four weeks. The petition is allowed in these terms."

25. It was further pointed out that the principles laid down in MRF Ltd. were again reiterated in Rakesh Kumar Garg & Ors. v. The Deputy Commissioner of Central Excise, Division - I & Ors. where the Court had held as under: -

> "3. The two-fold submissions have been made on behalf of the petitioners. Firstly, that the amounts paid as pre- deposit (before CESTAT) and pursuant to the directions of this court, while pursuing the appeals under Section 35G, did not bear the character of "tax" and consequently, when relief was finally granted, interest had to be paid from the date of deposit. The other submission is that if the amended Section 35FF (i.e. amended w.e.f. 06.08.2014) were to be treated as prospective, it would be arbitrary as it would deny the benefit of interest upon amounts which never bore the character of tax.
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> 4. This court is of the opinion that the petitioners are entitled to relief in view of the consistent view taken in this regard by the courts. In Suvidhe Ltd. v. UOI, 1996 (82) ELT 177 (Bom), it was held that the amount paid as pre-deposit, for pursuing the appellate remedy or for any other reason mandated by law, cannot be treated as a tax as that is only a condition for pursuing the appellate remedy. This view was affirmed by the Supreme Court in Union of India v. Suvidhe Ltd., 1997 (94) ELT A 159 (SC). In Nestle India Ltd. v. Assistant Commissioner of Central Excise, 2003 (154) ELT 567 also, a similar view was adopted. The latest judgment of the Karnataka High Court in M/s W.S. Retail Services v. State of Karnataka, W.P.(C)No.33176/2017 and connected cases (decided on 14.11.2017) referred to all these decisions as well as the decision of this court in Voltas Ltd. v. Union of India & This is a digitally signed order.

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5.We notice that recently in MRF Ltd. v. The Commissioner of Trade and Taxes & Anr., W.P.(C)No.3118/2018 (decided on 10.08.2018), this very Division Bench had taken a similar view - in the context of pre-deposits made under the Delhi VAT Act.

6. In view of the above discussion, the petitioners' contention that they are entitled to interest from the date of the final order of the CESTAT, is justified and warranted. As to the second submission made with respect to the invalidity of Section 35FF on account of its prospective nature, the court

recollects that the provisions of law ought not to be read in a manner so as to invalidate them. In view of the interpretation preferred by the above judgment, the alleged unconstitutionality no longer subsists."

26. Our attention was also drawn to a recent decision rendered by this Court in Otis Elevator Company (India) Ltd. v. Commissioner of Value Added Tax & Ors. where upon noticing MRF Ltd., we had held as follows:-

> "11. MRF Limited has unequivocally held that a deposit made in terms of a provision connected with the preferment of an appeal cannot be treated to be tax or duty. In fact that is the position which has been consistently held by various courts as would be evident from the discussion which follows. It thus remains undisputed that a pre-deposit cannot partake the character of a tax or duty. This since, it would clearly be connected only with the right of the assessee to pursue an appeal.
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> 13. As is manifest from a clear reading of sub-section (1), the said provision relates to a claim made by a person for refund of an amount of tax paid by him. The express language as employed in Section 30(1) itself takes the case of refund of pre-deposit out from the rigors of the procedural formalities which are contemplated therein. We further note that as in the present case, claims for refund which may arise as a consequence of an order passed by the Appellate Authority or a Court would be governed by Section 30(4) of the Act.
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> 15. In our considered opinion a pre-deposit would become This is a digitally signed order.
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> The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 13/12/2023 at 02:52:02 refundable the moment an Appellate Authority comes to hold in favour of the assessee and demands come to be annulled. This principally since pre-deposit is not tax or duty and the refund of which alone is regulated by Section 30(1) of the Act. We note that the decision of the Bombay High Court in Suvidhe Limited was assailed before the Supreme Court. While dismissing the appeal of the Union, the Supreme Court in Union of India Vs. Suvidhe Limited held as follows:-
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> "3. The show-cause notice issued by the Superintendent (Tech.), Central Excise to the petitioner to show cause why the refund claim for excise duty and redemption fine paid in a sum of Rs 14,07,410 should not be denied under Section 11-B of the Central Excise Act, 1944 is impugned in the present petition. The aforesaid amount is

deposited by the petitioners not towards excise duty but by way of deposit under Section 35-F for availing the remedy of an appeal. Appeal of the petitioners has been allowed by the Appellate Tribunal by its judgment and order passed on 30-11-1993 with consequential relief. The petitioners' prayer for refund of the amount deposited under Section 35-F has not received a favourable response. On the contrary, the impugned show-cause notice is issued as to why the amount deposited should not be forfeited. In our judgment, the claim raised by the Department in the show-cause notice is thoroughly dishonest and baseless. In respect of a deposit made under Section 35-F, provisions of Section 11-B can never be applicable. A deposit under Section 35-F is not a payment of duty but only a pre-deposit for availing the right of appeal. Such amount is bound to be refunded when the appeal is allowed with consequential relief.

4. In respect of such a deposit the doctrine of unjust enrichment will be inapplicable. In the circumstances, the petition succeeds. The impugned show-cause notice, which is annexed at Ext. F to the petition, is quashed and the respondents are directed to forthwith refund the aforesaid amount of Rs 14,07,410 along with interest thereon @ 15% p.a. from the date of the order of the Appellate Tribunal This is a digitally signed order.

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5. Rule is made absolute in the aforestated terms. The respondents will pay the petitioners the costs of the petition."

16. We further find that the Supreme Court in Commissioner of Customs (Import), Raigad vs. Finacord Chemicals (P) Ltd. & Others reiterated the aforesaid position as would be evident from paragraphs 17 and 18 of the report which are extracted hereinbelow:-

"17. It is the order dated 7-8-1996 which was passed by this Court in Union of India v. Suvidha Ltd. [Union of India v. Suvidha Ltd., (2016) 11 SCC 808 : (1997) 94 ELT A-159 (SC)] dismissing the special leave petition which was filed by the Union of India against the judgment of the High Court of Bombay in Suvidhe Ltd. v. Union of India [Suvidhe Ltd. v. Union of India, (1996) 82 ELT 177 (Bom)] . Since the special leave petition was dismissed in limine, we would like to reproduce para 2 of the judgment of the High Court wherein the High Court had observed that in case of such deposits, provisions of Section 11-B of the Customs Act (sic Central Excise Act, 1944) will have no application. This para reads as under: (Suvidhe Ltd. case [Suvidhe Ltd. v. Union of India, (1996) 82 ELT 177 (Bom)], ELT p. 178) "2. Show-cause notice issued by the Superintendent (Tech.) Central Excise to the petitioner to show cause why the refund claim for excise duty and redemption fine paid in a sum of Rs 14,07,410 should be denied under Section 11-B of the Central Excise Rules and Act, 1944 (sic) is impugned in the present petition. The aforesaid amount is deposited by the petitioners not towards excise duty but by way of deposit under Section 35-F for availing the remedy of an

appeal. Appeal of the petitioners has been allowed by the Appellate Tribunal by its judgment and order passed on 30-11-1993 with consequential relief. The petitioners' prayer for refund of the amount deposited under Section 35-F has not received a favourable response. On the contrary the impugned show-cause notice is issued why the amount deposited should not be forfeited. In our judgment, the claim raised by the This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 13/12/2023 at 02:52:02 Department in the show-cause notice is thoroughly dishonest and baseless. In respect of a deposit made under Section 35-F, provisions of Section 11-B can never be applicable. A deposit under Section 35-F is not a payment of duty but only a pre-deposit for availing the right of appeal. Such amount is bound to be refunded when the appeal is allowed with consequential relief."

(emphasis in original)

18. By another Circular No. 802/35/2004-CX dated 8-12- 2004 issued by the Board, the Board emphasised that such amounts should be refunded immediately as non-returning of the deposits attracts interest that has been granted by the courts in a number of cases."

17. A Division Bench of our Court in Xerox India Ltd. vs. Assistant Commissioner, Ward-114 (Special Zone) Department of Trade & Taxex Government of NCT as well as in Rakesh Kumar Garg vs. Dy. Commr. of Central Excise, Division-I have taken an identical position. We further find that the issue of pendency of the Special Leave Petition against the judgment in MRF limited was duly noted by the Court in Jiwand Singh and Sons vs. Special Commissioner of Trade and Taxes & Ors.. However, the legal character of a pre-deposit was again held not to be that of a duty or tax. We thus find that the petitioner is clearly justified in seeking refund of the amount of pre-deposit together with interest computed from the date of the order passed by the Tribunal."

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38. The failure of the respondents to refund the amount of pre- deposit and even adjusting the sum of Rs. 1,00,00,000/- deposited in that respect on 16 November 2015 is also clearly arbitrary and untenable. Our Court has consistently taken the position that a pre- deposit does not partake the character of a tax or duty. Those are sums which are deposited by an assessee solely for the purposes of pursuing its remedy of appeal. The consistent line as struck in this respect was duly recognized by the Court in its recent decision in Otis Elevators. We are thus of the firm opinion that the respondents were neither entitled in law to retain the pre-deposit amount of Rs. 1,00,00,000/- nor could it have been utilized for adjustment purposes."

4. In view of the above and since no other legal impediment has been pointed out, we direct the respondents to effect the refund within This is a digitally signed order.

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period of three weeks from today along with interest wherever statutorily payable under Sections 38 and 42 of the Delhi Value Added Tax, 2004.

5. Consequently, the writ petition along with pending application shall stand disposed of.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

DECEMBER 08, 2023/vp This is a digitally signed order.