

GAHC010110732016



**THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)**

Case No. : WP(C)/1503/2016

M/S CALCOM CEMENT INDIA LTD.
A COMPANY INCORPORATED UNDER THE PROVISIONS OF THE
COMPANIES ACT
1956 AND HAVING ITS REGISTERED OFFICE SITUATED AT SILPUKHURI
SOUTH BANK
SILPUKHURI
GUWAHATI-781003
ASSAM AND ITS FACTORY LOCATED AT PIPALPUKHURI
LANKA
NAGAON
ASSAM
REP. BY SRI MAHABIR PRASAD AGARWAL
THE AUTHORISED SIGNATORY OF THE PETITIONER COMPANY.

VERSUS

THE STATE OF ASSAM AND 3 ORS
REP. BY THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM
DEPARTMENT OF FINANCE and TAXATION
DISPUR
GUWAHATI- 781006
DIST. KAMRUP M
ASSAM.

2:THE COMMISSIONER OF TAXES

ASSAM KAR BHAWAN
DISPUR
GUWAHATI - 78 1006
ASSAM.
3:THE SUPERINTENDENT OF TAXES

GUWAHATI
UNIT-A
DIST. KAMRUP
ASSAM.

4:THE ASSISTANT COMMISSIONER OF TAXES

GUWAHATI
UNIT -A
DIST. KAMRUP
ASSAM.

Advocate for : MS.N GOGOI
Advocate for : SC
FINANCE and TAXATION appearing for THE STATE OF ASSAM AND 3 ORS

**BEFORE
HONOURABLE MR. JUSTICE KAUSHIK GOSWAMI**

ORDER

22.02.2024

1. Heard Ms. H. Jain, appearing on behalf of Ms. N. Hawalia, learned counsel for the petitioner. Also heard Mr. B. Choudhury, learned Standing Counsel, Finance Taxation Department.
2. Ms. H. Jain, learned counsel sought accommodation on behalf of Ms. N. Hawalia, learned counsel for the petitioner. It is noticed that this is an old pending matter of 2016 and the counsel seeking for adjournment also was not carrying the brief of the case. It is astonishing that in an old pending matter, adjournments are being sought in a casual manner. Be that as it may, the second copy of the Court file was given to the counsel.
3. This is a writ petition filed under Article 226 of the Constitution of India challenging the impugned actions of the respondent authorities in collecting entry tax from the petitioner Company on entry of packing materials into the State of Assam for packing of goods for sale.

4. The case of the petitioner, in brief, is that Section 321 of the Entry Tax Act, 2008 exempts entry tax on goods on which sales tax is levied and such goods are sold inside the state. Section 10(2) of the Assam Value Added Tax Act, 2003 (hereinafter referred to as 'the Act') provides that when goods are sold in a container/packing material, the packing material shall be deemed to be sold along with the goods. A combined reading of Section 321 of the Entry Tax Act, 2008 and Section 10(2) of the Assam Value Added Tax Act, 2003 makes it absolutely clear that there can be no entry tax on the packing materials, which are packed and sold along with goods inside the State of Assam.

5. Ms. H. Jain, learned counsel appearing for the petitioner, submits that this Court in WP(C) No.3939/2009 (*Tata Tea Ltd Vs. the State of Assam*) has already held that no entry tax shall be levied on the packing materials. She further submits that despite the ruling of this Court in the aforesaid case, the respondent authorities are insisting on the petitioner Company to deposit entry tax on the packing materials and pursuant to such demand by the respondent authorities, the petitioner Company has already paid huge amounts. She, accordingly prays for refund of Rs.58,26,773/- for the financial years 2010-11, 2011-12, 2012-13, 2013-14, 2014-15 and 2015-16, whereby the petitioner paid entry tax of Rs.5,48,948/-, Rs.3,60,904/-, Rs.6,87,117/-, Rs.13,75,593, Rs.15,12,432/- and Rs.13,41,778/- respectively on the import of packing materials into the State of Assam.

6. Mr. B. Choudhury, learned Standing Counsel, Finance Taxation Department, on the other hand, submits that the instant petition is not maintainable. He further submits that the petitioner Company can claim the refund under the provisions of the Assam Value Added Tax Act, 2003 and as such, the instant petition is not maintainable.

7. Section 50 of the Assam Value Added Tax Act, 2003 is reproduced hereunder for ready reference-

“Section 50 – Refund

(1) Subject to other provisions of this Act and the rules made hereunder, if it is found on the assessment or reassessment, as the case may be, that a dealer has paid tax, interest or penalty in excess of what is due from him, the Prescribed Authority shall, on the claim being made by the dealer in the prescribed manner and within the prescribed time, refund to such dealer the amount of tax, penalty and interest paid in excess by him :

Provided that, such refund shall be made after adjusting the amount of tax or penalty, interest or sum forfeited or all of them due from, and payable by the dealer on the date of passing of order for such refund.

(2) Where the amount of input tax credit admissible to a registered dealer for a given period exceeds the tax payable by him for the period, he may, subject to such restrictions and conditions as may be prescribed, seek refund of the excess amount, by making an application in the prescribed form and manner, containing the prescribed particulars and accompanied with the prescribed documents to the Prescribed Authority, or adjust the same provisionally with his future liability to tax in the manner prescribed.

Provided that the amount of tax or penalty, interest or sum forfeited or all of them due from, and payable by, the dealer on the date of such adjustment shall first be deducted from such refund before adjustment.”

8. It appears that under Section 50 a dealer can claim refund in the prescribed manner and within the prescribed time in case the dealer has paid tax in excess of what is due from him.

9. Rule 29(1) of the Assam Value Added Tax Rules, 2005 is also reproduced hereunder for ready reference.

“29. Refund. (1)(a) The application for refund as referred to in sub-section (1) of Section 50 shall be made in Form-37 within one hundred and eighty days of the end of the relevant tax period:

Provided that an application for refund made after the said period may be admitted by the Prescribed Authority, if he is satisfied that the dealer had sufficient cause for not

making the application within the said period.

(b) An application for refund shall be signed and verified as in the case of application for registration in case of a registered dealer.

(c) The Prescribed Authority may reject, any claim for refund if the claim filed appears to involve any mistake apparent on the record or appears to be incorrect or incomplete, based on any information available on the record, after giving the dealer the opportunity to show cause in writing against such rejection.

(d) When the Prescribed Authority is satisfied that the refund claimed is due he shall record an order sanctioning the refund.

(e) When the amount to be refunded is more than rupees one lakh the Prescribed Authority shall take prior approval of Deputy Commissioner before sanctioning such refund. The Deputy Commissioner shall not approve the refund if the amount to be refunded exceeds rupees three lakhs but forward such cases to the Commissioner for approval. Where the amount to be refunded is more than fifteen lakhs, the Commissioner shall take prior approval of the Government before sanctioning such refund.

(f) When an order for refund is passed refund voucher in Form-38 shall be issued in favour of claimant if he desires payment in cash and advice in Form-39, shall, at the same time be forwarded to the Treasury Officer concerned.

(g) Where any amount refundable under this sub-rule is not refunded to the dealer within the period of ninety days, the refund voucher shall include the interest specified under Section 52 covering the period following the end of the said period to the day of refund. The authority issuing such order shall simultaneously record an order sanctioning the interest payable, if any, on such refund, specifying therein, the amount of refund, the payment of which was delayed. the period of delay for which such interest is payable and the amount of interest payable by the State Government and shall communicate the same to the Commissioner stating briefly the reasons for the delay in allowing the refund:

Provided that in computing the period of ninety days, the following period shall be excluded:-

(i) any delay attributable to the conduct of the person to whom the refund is payable;

and

(ii) *the time during which any reasonable inquiry relating to the return or claim was initiated and completed and the time taken for adjustment by the refunding authority of any tax, interest and other amount due.*

(h) *After the refund is sanctioned if the claimant desires to adjust the amount of refund due to him, the Prescribed Authority shall set off the amount to be refunded or any part thereof against the tax, if any, remaining payable by the claimant or against the future dues.*

(i) *The Prescribed Authority shall enter in a register in Form-40 particulars of all the refunds allowed in pursuance of assessment orders, all applications for refunds and of the order passed thereon.”*

10. A bare reading of Rule 29 indicates that a time frame is prescribed for making the application for refund in the prescribed Form, i.e, Form 37. Further, power is also given to the prescribed authority to condone the delay for filing the application within the prescribed period, if sufficient cause is shown.

11. What transpires from the above is that there is a detailed mechanism prescribed under the provisions of law for claiming refund. It appears from the decision of this Court in *Tata Tea Ltd. (Supra)*, that there is no entry tax leviable on the packing materials. In such situation, it appears that the petitioner has paid tax in excess of what was due to him.

12. Be that as it may, as the Act and Rules provides a mechanism for filing application for refund in such situation, this Court is of the view that the petitioner has approached this Hon'ble Court by not exhausting the remedy provided under the law and hence, is not entitled for any relief from this Court. As such, there is no justification for keeping this matter pending any longer.

13. However, in the interest of justice, this Court directs that the petitioner be

at liberty to make an application under Section 50 of the Act by submitting all the details in the prescribed form within a period of 1(one) month from today and if such application is made, the authorities in calculating the prescribed time shall exclude the time spent from filing the writ petition till submission of the application as directed and thereafter, consider the application for refund on its merit. The exercise shall be completed preferably within a period of 2(two) months from the date of submission of the said application by the petitioner.

14. With the aforesaid observation and direction, this writ petition is disposed of.

JUDGE

Comparing Assistant