

**IN THE HIGH COURT FOR THE STATE OF TELANGANA,
HYDERABAD**

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W.P.No.4191 of 2022

Between:

M/s. Kirby Building Systems and Structures India Private Limited
Petitioner

VERSUS

The Assistant Commissioner,
State Tax, Charminar Division,
1st Floor, Gagan Vihar Complex,
Nampally, Hyderabad & 3 others

Respondents

JUDGMENT PRONOUNCED ON: 07.06.2022

THE HONOURABLE SRI JUSTICE UJJAL BHUYAN
AND
THE HONOURABLE MRS JUSTICE SUREPALLI NANDA

1. Whether Reporters of Local newspapers
may be allowed to see the Judgments? : Yes
2. Whether the copies of judgment may be
Marked to Law Reporters/Journals? : Yes
3. Whether His Lordship wishes to
see the fair copy of the Judgment? : **Yes**

UJJAL BHUYAN, J

*** THE HONOURABLE SRI JUSTICE UJJAL BHUYAN**

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Respondents

! Counsel for Petitioner : Mr. Karan Talwar

^ Counsel for the respondents: Mr. K.Raji Reddy

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> HEAD NOTE:

? Cases referred

1. Decision of the Gujarat High Court in
Torrent Power Ltd. vs. State of Gujarat,
decided on 15.04.2019.

THE HONOURABLE SRI JUSTICE UJJAL BHUYAN
AND
THE HONOURABLE MRS JUSTICE SUREPALLI NANDA
WRIT PETITION No.4191 of 2022

ORDER: *(Per Hon'ble Sri Justice Ujjal Bhuyan)*

Heard Mr. Karan Talwar, learned counsel for the petitioner and Mr. K.Raji Reddy, learned Senior Standing Counsel for Commercial Tax for the respondents.

2. By filing this petition under Article 226 of the Constitution of India, petitioner has prayed for the following reliefs:-

1. To set aside revision notice of assessment dated 11.07.2011;
2. To direct the respondents to refund a sum of Rs.40,00,000.00 to the petitioner; and
3. To direct the respondents to pay interest @ 1% per month for the delay in granting the refund.

3. Petitioner was a registered dealer under the Telangana Value Added Tax Act, 2005 (briefly referred to hereinafter as the 'VAT Act'). Petitioner is engaged in the business of manufacturing pre-engineered steel buildings.

4. For the assessment period 2008-09, assessment order was passed by the 1st respondent on 08.06.2009 under the VAT Act levying tax of Rs.1,14,858.00.

5. On the ground that the aforesaid order was prejudicial to the interest of the revenue, revised notice of assessment dated 11.07.2011 was issued by the 2nd respondent. Thereafter, respondent No.2 passed revisional order dated 29.07.2011 enhancing the levy of tax to Rs.1,51,63,868.00.

6. The aforesaid revisional order was challenged by the petitioner before this Court by filing W.P.No.22880 of 2011. This Court by order dated 30.08.2011 held that no personal hearing was granted to the petitioner before passing the revisional order. There was thus violation of the principles of

natural justice. Accordingly, the revisional order dated 29.07.2011 was set aside with a further direction to the 2nd respondent to pass fresh order in accordance with law. Accordingly, the revision was allowed.

7. Following the order passed by this Court, 2nd respondent issued revision notice dated 10.11.2011 providing for personal hearing on 28.11.2011. It is stated that the authorized representative of the petitioner had attended the personal hearing so fixed. Additionally written submissions were made on 01.12.2011. On 26.12.2011, petitioner deposited an amount of Rs.20,00,000/- for the aforesaid assessment period under protest. Likewise, a further amount of Rs.20,00,000/- was deposited by the petitioner under protest on 31.01.2012. Both the amounts were deposited by the petitioner by way of cheques, which were encashed by respondent No.2.

8. Though respondent No.2 issued final notice of hearing on 24.03.2012, no order of revision was passed by respondent No.2 thereafter. In the meanwhile, petitioner

submitted application dated 21.06.2017 before the 2nd respondent stating that following the order passed by this Court, the initial order of revision dated 29.07.2011 was set aside whereafter no fresh order of revision was passed. Since the limitation period of three years provided under Section 37 of the VAT Act had expired, petitioner sought for refund of the amount of Rs.40,00,000/- as paid by it. This was reiterated by subsequent applications dated 21.07.2017 and 08.11.2021.

9. As there was no response, present writ petition has been filed seeking the reliefs as indicated above. Notice in this case was issued on 27.01.2022.

10. When the Court put a query to Mr. Raji Reddy, learned counsel for the respondents as to whether respondents would like to file counter affidavit, he submits that in view of the admitted facts, filing of counter affidavit may not be necessary. In this regard, he submits that he has written instructions of the respondents.

11. Learned counsel for the petitioner submits that following the order passed by this Court dated 30.08.2011, the

revisional order dated 29.07.2011 no longer exist as the same has been set aside. Though this Court had remanded the matter back to the revisional authority for passing of fresh order, no such order of revision has been passed till date. This would mean that the initial order of assessment dated 08.06.2009 would hold the field. Adverting to Section 37 of the VAT Act, he submits that the limitation for passing fresh order upon remand is three years, which period had long expired. Therefore, question of passing any revisional order now does not arise.

12. Learned counsel has also placed reliance on a division bench decision of the Gujarat High Court in **Torrent Power Ltd. vs. State of Gujarat**, decided on 15.04.2019, to contend that respondents are under an obligation to refund the amount deposited by the petitioner with adequate interest, as holding on to such deposit made by the petitioner would be in contravention of Article 265 of the Constitution of India. Rs.40,00,000/- deposit made by the petitioner cannot be construed to be payment of tax. It was a mere pre-deposit in anticipation of quantification of tax, which did

not materialize. Therefore, he submits that respondents may be directed to refund the amount deposited by the petitioner with adequate interest.

13. Mr. K.Raji Reddy, learned Senior Standing Counsel for the respondents submits that following the order passed by this Court dated 30.08.2011, respondent No.2 had issued notice of hearing immediately on 10.11.2011. Subsequently also, notice was issued to the petitioner on 24.03.2012. However, because of the uncertain situation prevailing in the State at that point of time leading to bifurcation of the erstwhile composite State of Andhra Pradesh, there was dislocation of files as well as re-location of officials. As a consequence, no hearing could take place and resultantly, no order could be passed. Faced with the present situation, Mr. Raji Reddy, however, submits that reasonable time may be granted to the respondents for making the refund.

14. Submissions made by learned counsel for the parties have received the due consideration of the Court.

15. As narrated above, there is no dispute as to the facts. Petitioner was initially assessed on 08.06.2009. On the ground that the assessment order was prejudicial to the interest of the revenue, revisional order was passed under Section 32 of the VAT Act on 29.07.2011 enhancing the levy of tax. The revisional order came to be challenged by the petitioner before this Court in W.P.No.22880 of 2011. This Court by order dated 30.08.2011 allowed the writ petition and set aside the revisional order dated 29.07.2011. The matter was remanded back to the revisional authority to pass fresh orders in accordance with law. Though respondent No.2 had issued notices dated 10.11.2011 and 24.03.2012 for hearing, which was attended to by the petitioner, no order of revision came to be passed.

16. When the revisional order was set aside by this Court, the consequence was that the original assessment order stood restored and continues till date since no fresh order of revision has been passed on remand.

17. Section 37 of the VAT Act deals with limitation in respect of assessments and re-assessments, etc., upon remand. Section 37 of the VAT Act is extracted hereunder:-

“37. Notwithstanding anything contained in sections 21 and 32 where an assessment, re-assessment, rectification in or revision of an assessment is made in respect of a dealer or any person in pursuance or in consequence of or to give effect to any finding or direction contained in an order under Sections 31, 32, 33, 34 and 35 or in an order of any court in a proceeding otherwise than by way of appeal or revision, such assessment, re-assessment, rectification in or revision of an assessment shall be made within three years from the date of receipt of such order by the prescribed or revising authority as the case may be:

Provided that if such appeal, order or order of any court has been subjected to further appeal, either partially or entirely, and if there are orders of stay prohibiting the authority concerned to pass consequential orders, the period of three years shall get extended by the period during which such stay orders were in force:

Provided further that if the subsequent appeal results in modification of such appeal, order or order of any court which is subjected to further

appeal, either partially or wholly, the period of three years shall be computed from the date of receipt of subsequent order of appeal but not from the date of receipt of the original appeal, order or order of any court which was subjected to further appeal.”

18. From the above, it is evident that when an order of assessment, re-assessment, rectification or revision of an assessment is made following an order of any Court, the same is required to be made within three years from the date of receipt of such order by the prescribed or revising authority.

19. In the instant case, the remand order of the High Court is dated 30.08.2011. Though date of receipt of the order of the High Court is not on record, it can safely be presumed that when 2nd respondent had issued consequential notice dated 10.11.2011 for hearing, it would mean that before that date, it had received copy of the High Court’s order. There is also no dispute to the fact that in anticipation of a revisional order levying higher taxes, petitioner had deposited a sum of Rs.40,00,000/- in two tranches though under protest. Insofar

the levy of tax under the assessment order dated 08.06.2009 is concerned, the same has already been paid by the petitioner.

20. As to the status of the quantum of amount of Rs.40,00,000/- paid by the petitioner, this aspect was gone into by a division bench of the Gujarat High Court in **Torrent Power Ltd.** (supra). It has been held as follows:-

“In the present case, the petitioners have made an application for refund for the first time on 11.8.2015 wherein it was stated that the assessment for the year 2006-2007 under section 34 of the GVAT Act was completed in February 2011 accepting the facts and figures as per annual return and VAT audit report. In August 2013, flying squad issued notice in Form 401 seeking details of amount collected towards maintenance of fly ash collection system. The petitioners voluntarily deposited the amount towards tax and interest on administrative charges collected for maintaining fly ash collection system under protest for FY 2006-2007 to 2010-2011 for five years. It was conveyed to the petitioners by the flying squad that the jurisdictional ward office would pass the necessary orders in this regard. The petitioners received notices for revision of assessment orders for the financial years 2007-

2008 and 2008-2009. Reassessment proceedings for financial year 2009-2010 were completed covering the fly ash related transactions, whereas the transactions for the financial year 2010-2011 were covered under regular assessment order passed under section 34 of the GVAT Act. The petitioners therefore, submitted that no action was initiated so far by the department to adjudicate the matter pursuant to the amount collected for the year 2006-2007. The petitioners also submitted that the time limit for passing the order for revision/reassessment as per the provisions under the GVAT Act has already expired. Thus in facts of the case, respondent authorities are withholding the amount paid under protest by the petitioners for the year 2006-2007 without there being any assessment, reassessment or revision order being passed by the authorities under the provisions of Act. Since the action of the respondent authorities in retaining the amount deposited by the petitioners under protest, is not backed by any authority of law, in view of provisions of Article 265 of the Constitution of India, the respondents have no authority to retain the same. As the petitioners have made an application for refund within the period of limitation and as the respondent authorities have not decided the same till date, the two basic requirements are to be satisfied; one the amount of duty in relation to which

refund is claimed is paid by the petitioners and two, the incidence of such tax has not been passed by the petitioners to any other person. So far as both the requirements are concerned, same are satisfied inasmuch as the petitioners have paid the amount under protest is not in dispute. It is also not in dispute that no assessment, reassessment or revision order is passed and the time limit for passing such order has already been expired. It is also not in dispute that the petitioners have not passed over the incidence of such tax to any other person.”

21. We are in respectful agreement with the views expressed by the Gujarat High Court. The aforesaid amount cannot be construed to be an amount paid as tax or levy. It is in the nature of a pre-deposit. Therefore, provision of Section 38 of the VAT Act which deals with refund of tax would not be applicable in the present case.

22. Following the above, we direct respondent No.2 to refund Rs.40,00,000/- to the petitioner with interest @ 6% per annum to be computed from 21.06.2017 when the petitioner first raised the demand for refund. Let the refund along with interest be paid by respondent No.2 to the petitioner within a

period of three (03) months from the date of receipt of a copy of this order.

23. This disposes of the Writ Petition. However, there shall be no order as to costs.

24. As a sequel, miscellaneous applications pending, if any, in this Writ Petition, shall stand closed.

UJJAL BHUYAN, J

SUREPALLI NANDA, J

Date: 07.06.2022
KL

Note: L.R. copy to be marked.
(B.o.)
KL