

Before M.M. Kumar, & Jaswant Singh, JJ.

M/S NEW INDIA CONSTRUCTION COMPANY—*Petitioner*

versus

STATE OF HARYANA AND ANOTHER—*Respondents*

CWP No. 8247 of 2009

22nd July, 2009

Constitution of India, 1950—Art. 226—Haryana Value Added Tax Act, 2003—Ss. 20 & 21—Company filing application for payment of refund amount—Commissioner failing to pass order withholding of refund within 90 days as required u/s 21(2)—Refund amount required to be paid on expiry of period of 90 days forthwith—Company also held entitled to simple interest u/s 20(10) on refund amount.

Held, that no order on the application for refund was passed by the Excise and Taxation Commissioner within a maximum statutory period of 90 days. The assessment order in the present case was passed on 12th December, 2008. An application was filed by the Company on 24th December, 2008 under sub-section (5) of Section 20 of the Act before the Assessing Officer. As per para 2 of the written statement, the Deputy Excise and Taxation Commissioner had written to Excise and Taxation Commissioner, Haryana for withholding of refund under Section 21 of the Act,—*vide* letter dated 29th January, 2009 and the Excise and Taxation Commissioner, asked for clarification. According to the averments made, the Deputy Excise and Taxation Commissioner had sent reminders requesting for passing of order withholding of refund, which were received on 9th June, 2009. The maximum period of 90 days prescribed by the statute that expired in April/ May, 2009, if the aforesaid period is counted from the date of making of reference on 29th January, 2009. It is patent that the order of refund was passed on 9th June, 2009, which is after a period of more than 4½ months. Accordingly, proviso to sub-Section (2) of Section 21 of the Act would come in operation and the refund amount was required to be paid on the

expiry of period of 90 days forthwith. The 'Company' would, therefore, be entitled to simple interest under sub-section (10) of Section 20 of the Act @ 1% per month on the amount worked out in the assessment order dated 12th December, 2008.

(Para 10)

Kamal Sehgal, Advocate, *for the petitioner.*

Ms. Ritu Bahri, DAG, Haryana *for the respondents.*

M.M. KUMAR, J.

(1) The petitioner-company (for short 'the company') has approached this Court with a prayer for issuance of directions to the respondents to refund an amount of Rs. 15.65,888 in respect of the assessment year 2005-2006 in accordance with the assessment order dated 12th December, 2008 (Annexure P-1) passed by the Assessing Authority. The 'Company' has also claimed statutory interest as per the provisions of sub-section (10) of Section 20 of the Haryana Value Added Tax Act, 2003 (for brevity, 'the Act').

(2) Brief facts of the case are that a refund amount of Rs. 15.65.888 was found due to the 'Company' by the Assessing Officer in his assessment order dated 12th December, 2008 (P-1) in respect of the Assessment Year 2005-2006. The 'Company' filed an application on 24th December, 2008 under sub-section (5) of Section 20 of the Act before the Assessing Officer (P-2), who referred the application to the Commissioner under sub-section (1) of Section 21 of the Act. As per the aforesaid provision, the Commissioner is empowered to pass an order of withholding of refund. But such an order has to be passed within the maximum period of 90 days from the date of receipt of the reference order. If the order withholding of refund is not made by the Commissioner within a period of 90 days of making of reference to him then according to the proviso appended to sub-Section (2) of Section 21 of the Act, the revenue is bound to make payment of refund forthwith. It has come on record that reference was made on 29th January, 2009 and no order withholding of refund was passed within the period of 90 days

as per the requirement of sub-section (2) of Section 21 of the Act and, therefore, it is claimed that the amount of refund was liable to be paid to the 'Company' forthwith. The delay in making the refund would result into payment of interest under sub-Section (10) of Section 20 of the Act @ 1% per month on the amount worked out in the assessment order.

(3) In the written statement filed by the respondents, the broad factual position has not been disputed. It has been pointed out that the Deputy Excise and Taxation Commissioner-cum-Revisional Authority, Panchkula, initiated revisional proceedings on 3rd January, 2009 exercising powers vested in him under Section 34 of the Act. It is claimed that he had written to the Excise and Taxation Commissioner, Haryana for withholding of refund under Section 21 of the Act. *vide* letter dated 29th January, 2009. The Commissioner had sought clarification which were duly sent with the request for withholding of refund. The order of withholding refund was subsequently received on 9th June, 2009. In the meanwhile, the Revisional Authority under Section 34 of the Act had finalised the proceedings *vide* order dated 1st June, 2009, whereby refund of Rs. 52,028 was allowed and refund voucher was accordingly issued on 2nd June, 2009. The order was duly served on the dealer on 2nd June, 2009 (R-2/1). It is claimed that the instant petition is liable to be dismissed as having been rendered infructuous

(4) Mr. Kamal Sehgal, learned counsel for the 'Company' has vehemently argued that the amount of refund has become payable to the 'Company' on the day when period of 90 days had expired after making of reference on 29th January, 2009. He has pointed out that period of 90 days expired in April, 2009 and the order withholding the refund had admittedly been passed on 9th June, 2009, which is far beyond the statutory period of 90 days. He has submitted that as per proviso appended to sub-section (2) of Section 21 of the Act, if no order within 90 days is passed then the amount of refund has to be paid to the company forthwith. Mr. Sehgal has also argued that the company would be entitled to interest under sub-Section (10) of Section 20 of the Act @ 1% per month on the amount worked out in the assessment order dated 12th December, 2008.

(5) Ms. Ritu Bahri, learned State counsel has, however, submitted that refund as per the order of revisional authority dated 1st June, 2009, has been paid to the 'Company', is worked out to be Rs. 52,028. The 'Company' is not left with any cause of action as the petition has now been rendered infructuous. She has contended that at best the 'Company' could be awarded interest on the actual refund amount which has been found due.

(6) In order to appreciate the controversy raised in this petition, it would first be appropriate to read the provisions of sub-sections (4) and (10) of Section 20 of the Act, which reads thus :—

“20 Refund

(1) (3) *** *** ***

(4) Where the assessing authority finds on assessment of a dealer that he has paid any amount in excess of tax, interest or penalty assessed or imposed on him under this Act, it shall allow refund of the excess amount or allow the same to be carried forward for adjustment with future tax liability, as the case may be.

(5) to (9) ***** ***

(10) Any amount due to a dealer under sub-section (4) but not refunded to him within sixty days from the date of passing the order allowing the refund, shall carry with it simple interest at the rate of one percent per month for the period from the date of passing the order allowing the refund to the date when the refund is made.”

(7) The scheme of Section 20 of the Act as unfold, *inter alia*, through sub-Section (4) is that when an Assessing Authority finds after assessment that a dealer has paid any amount in excess of tax, interest or penalty assessed or imposed upon him under the Act, the Assessing Authority must allow refund of the excess amount or it may allow the same to be carried forward for adjustment with future tax liability. The amount is refundable to the dealer on an application containing the prescribed particulars accompanied with the prescribed documents made in the prescribed manner to the prescribed authority. The amount refundable to any person has been made subject to the approval in the prescribed manner of the prescribed

authority, who is obliged to pass an order in writing after affording an opportunity of being heard to the affected person. However, sub-section (4) of Section 20 has to be read with sub-Section (10) which stipulates that any amount due to a dealer under sub-Section (4), which has not been refunded to him within 60 days from the date of passing the order along with the refund must carry with it simple interest @ of 1% per month for the period from the date of passing the order along with the refund to the date when the refund is made.

(8) It would also be advantageous at this stage to peruse Section 21 of the Act which entitles the Competent Authority to pass an order for withholding of refund. Section 21 of the Act is reproduced as under :—

“Section 21 POWER TO WITHHOLD REFUND

- (1) Where an order giving rise to a refund is the subject matter of further proceedings and the taxing authority interested in the success of such proceedings is of the opinion that the grant of the refund is likely to adversely affect the recovery in the event of success of such proceedings, he may, for reasons to be recorded in writing, withhold the refund and shall, if such authority is below the rank of Commissioner, refer the case, within thirty days of the application for the refund, to the Commissioner for order.
- (2) If a reference has been made to the Commissioner under sub-section (1) in time, he may either pass an order withholding refund or direct that refund be made on furnishing of security except cash security of the like amount or decline to withhold the refund :

Provided that if no order withholding the refund is received within ninety days of making the reference to the Commissioner, the refund shall be given forthwith.”

(9) According to sub-Section (1) of Section 21 of the Act if an order, which results into refund, is subject matter of further proceedings and the Competent Authority is of the view that grant of refund could adversely affect the recovery in case of success of such proceedings then it may withhold the refund after recording reasons within a period of 30 days of

the application. According to sub-Section (2) of Section 21 of the Act on a reference made to the Commissioner under sub-Section (1) he is obliged to either pass an order withholding the refund or direct that the refund be made on furnishing of security. The proviso below sub-section (2) of Section 21 of the Act stipulates that if no order withholding the refund is received within 90 days of making the reference to the Commissioner then the refund shall be given forthwith.

(10) When we examine the facts of the present case in the light of the aforesaid provisions of Sections 20 and 21 of the Act, it becomes evident that no order on the application for refund was passed by the Excise and Taxation Commissioner within a maximum statutory period of 90 days. The assessment order in the present case was passed on 12th December, 2008. An application was filed by the 'Company' on 24th December, 2008 under sub-Section (5) of Section 20 of the Act before the Assessing Officer (P-2). As per para 2 of the written statement, the Deputy Excise and Taxation Commissioner had written to Excise and Taxation Commissioner, Haryana for withholding of refund under Section 21 of the Act, vide letter dated 29th January, 2009, and the Excise and Taxation Commissioner, Haryana, asked for clarification. According to the averment made, the Deputy Excise and Taxation Commissioner had sent reminders requesting for passing of order withholding of refund, which were received on 9th June, 2009. The maximum period of 90 days prescribed by the statute had expired in April/may, 2009, if the aforesaid period is counted from the date of making of reference on 29th January, 2009. It is patent that the order of refund was passed on 9th June, 2009, which is after a period of more than 4½ months. Accordingly, proviso to sub-Section (2) of Section 21 of the Act would come in operation and the refund amount was required to be paid on the expiry of period of 90 days forthwith. The 'Company' would, therefore, be entitled to simple interest under sub-Section (10) of Section 20 of the Act @ 1% per month on the amount worked out in the assessment order dated 12th December, 2008.

(11) At this stage, Mr. Sehgal, learned counsel for the company, however, takes a fair stand that the Revisional Authority had passed an order on 2nd June, 2009 as per averment made in para 3(R-2/1) and a refund amount of Rs. 52,028 has been allowed. Accordingly, he has stated that

interest may be calculated till 1st June, 2009 on the refund amount found due in the assessment order dated 12th December, 2008 and thereafter the interest be calculated on the amount found due by the Revisional Authority. He has also stated that any amount which might be found due to the revenue may be deducted from the total amount of interest to be calculated and found payable to the petitioner under sub-Section (10) of Section 20 of the Act.

(12) As a sequel to the above discussions, this petition succeeds. The respondents are directed to calculate the amount of interest till 1st June, 2009 @ 1% per month on the total amount of refund found due to the 'Company' in the original assessment order dated 12th December, 2008, namely, Rs. 15,65,888 and at the same rate on the refund found due by Revisional Authority with effect from 2nd June, 2009 till date of payment. Thereafter, the total sum of refund amount determined by the Revisional Authority alongwith total interest so calculated shall be paid within 2 weeks from receipt of a copy of this order. If any amount which might still be found due to the revenue shall be deducted from the total amount of refund found due plus interest to be calculated as per the directions already issued. Keeping in view the statutory violation of the express provision of Section 21(2) of the Act, the respondents must be saddled with cost of Rs. 20,000. The amount shall be paid at the first instance by the respondents to the 'Company', which shall be recoverable from the Officer who has committed violation of the provision by ignoring to permit the release of refund amount determined by the assessment order dated 12th December, 2008 on expiry of 90 days as per proviso to Section 21(2) of the Act. Accordingly, the respondent-State is directed to forthwith hold an enquiry. If the Excise & Taxation Commissioner is found to be remiss in his duties then the amount be recovered from him. The enquiry be completed within a period of four months from the date of receipt of a copy of this order and compliance report be sent to this Court within a month thereafter.

R.N.R.