

Court No. - 37

Case :- WRIT TAX No. - 1379 of 2023

Petitioner :- M/S Shree Agrawal Enterprises

Respondent :- State Of U.P. And 2 Others

Counsel for Petitioner :- Rishi Raj Kapoor

Counsel for Respondent :- C.S.C.

Hon'ble Ajay Bhanot,J.

Order in Interim Application

Heard Shri Rishi Raj Kapoor, learned counsel for the petitioner and Shri Ravi Shankar Pandey, learned Additional Chief Standing Counsel for the respondents-State.

Shri Rishi Raj Kapoor, learned counsel for the petitioner contends that the ingredients of Section 74 of the U.P.GST Act, 2017 are not made out from the show cause notice as well as orders passed by the revenue authorities as prerequisites of Section 74 of the U.P.GST Act are not satisfied.

The petitioner has assailed the order passed by the first appellate authority under the Uttar Pradesh Goods and Services Tax Act. The second appeal lies before the appellate tribunal under Section 112 of the Act. The appellate tribunal has not been made functional till date though it is informed that the notification has been made in that regard. The right of second appeal which is vested in the petitioner by the statute is being denied on account

of the failure of the appropriate Government to constitute the tribunal. Hence this writ petition.

The executive inertia cannot become the cause of denial of a statutory right. In this context it would be apposite to recall the observations made by the Supreme Court in **Supdt. of Taxes v. Onkarmal Nathmal Trust** reported at **(1976) 1 SCC 766**:

"17. The first contention on behalf of the State that it became impossible for the State to issue notice under Section 7(2) of the new Act within two years of the expiry of the period of return is unsound on principle and facts. The maxim *lex non cogit ad impossibilia* means that the law does not compel a man to do that which he cannot possibly perform. In the present appeals, the applications were moved in the High Court for stay of proceedings. The respondents challenged the validity of the Act, and, therefore, asked for an injunction restraining the State from taking proceedings under the Act. At no stage, did the State ask for variation or modification of the order of injunction. It is well known that if it is brought to the notice of a court that proceedings are likely to be barred by time by reason of any order of injunction or stay the court passes such suitable or appropriate orders as will protect the interest of the parties and will not prejudice either party. Even when certificate to appeal to this Court was granted on August 1, 1963, the State did not ask for any order for stay of operation of the judgment. That is quite often done. For the first time, on August 10, 1964 the State filed an application for stay of operation of the judgment of the High Court. The State did not take steps at the appropriate time. This Court on October 28, 1964 granted an interim order staying the operation of the High Court judgment. The interim order was made absolute on January 28, 1965 with certain conditions. The State cannot take advantage of its own wrong and lack of diligence. The State cannot contend that it was impossible to issue any notice within the period mentioned in Section 7(2) of the new Act. The State did not endeavour to obtain appropriate orders to surmount the difficulties by reason of the injunction against taking steps within the time contemplated in Section 7(2) of the new Act. The State is guilty of default. The State had remedies open to take steps by asking for modification of the order. The State had to assert the right that the State was entitled to demand taxes

and the respondent was liable to pay the same. The State followed the policy of inactivity. Inactivity is not impossibility. The order of injunction is not to be equated with an act of God or an action of the enemy of the State or a general strike."

The petitioner has consequently approached this Court invoking the extraordinary jurisdiction under Article 226 of the Constitution of India.

The short controversy which arises is the inconsistency of some interim orders passed by this Court as regards the amount of pre-deposit. One line of interim orders contemplates deposit of 30% of the amount out of which 10% which is deposited before the first appellate authority is liable to be adjusted. Some of the aforesaid category of interim orders passed in similar petitions are extracted hereunder.

In M/S Kent Cables Pvt. Ltd. vs. State Of U.P. And 2 Others (Writ Tax No. - 1372 of 2019) the following order was passed:

"The instant petition has been filed challenging the order of the First Appellate Authority under the U.P. Goods & Service Tax Act, 2017. Under the statute, a Second Appeal lies before the Appellate Tribunal. However, the same has not been constituted so far, therefore the petitioner has approached this Court by way of the instant petition.

Learned counsel for the petitioner points out that while filing First Appeal, the petitioner had deposited 10% of the disputed tax liability as provided under sub-section (6) of Section 107 of the Act. He submitted that an appeal before the Tribunal would be competent only if 20% of the remaining amount of tax in dispute is deposited in addition to the amount deposited before the First Appellate Authority. He submitted that the petitioner is ready and willing to deposit 20% of the remaining amount of tax in dispute.

Accordingly, the petitioner is permitted to deposit 20% of the remaining amount of tax in dispute and as soon as the said amount is deposited, the recovery proceedings for the balance amount shall remain stayed as provided under sub-section (9) of Section 112 of the Act.

The Revenue, which is already represented, may file counter affidavit within three weeks.

List in the third week of January, 2020.”

In M/S Tulsi Steels vs. State Of U.P. And 2 Others (Writ Tax No. - 953 of 2022), the following order was passed:

“1. Present petition has been filed against the order of the First Appeal Authority. Since the Tribunal has yet not been constituted, the present petition is being entertained at this stage.

2. Matter requires consideration.

3. All respondents may file counter affidavit within a period of six weeks. Petitioner shall have two weeks thereafter to file rejoinder affidavit.

4. List thereafter.

5. In the meanwhile, it is directed that the petitioner shall deposit 30% of the disputed amount of tax in accordance with Section 112(8) of the Central Goods and Services Tax Act 2017 within a period of three weeks from today and in which event, the recovery proceedings for the balance amount of tax, penalty and fine under order dated 20.10.2021 for A.Y. 2019-20, shall remain stayed till disposal of the instant petition.

6. Any amount already deposited be adjusted against deposit to be made under this order.”

In M/S Nandan Sales Corporation vs. State Of U.P. And 2 Others (Writ Tax No. - 903 of 2023) the following order was passed:

“Heard learned counsel for the petitioner and the learned Standing Counsel for the State-respondents, revenue.

Matter requires consideration.

All respondents may file counter affidavit within four weeks. Petitioner

shall have one week thereafter to file rejoinder affidavit. List thereafter.

In the meanwhile, it is directed that the petitioner shall deposit 30% of the disputed amount of tax in accordance with Section 112(8) of the Central Goods and Services Tax Act 2017 within a period of three weeks from today and in which event, the recovery proceedings for the balance amount of tax, penalty and fine shall remain stayed till disposal of the instant petition.

Any amount already deposited be adjusted against deposit to be made under this order.”

However, there seems to be another view wherein 50% of the disputed tax amount was directed to be deposited before granting interim protection. The order rendered in **M/S Virender Kumar Projects Pvt Ltd vs. State Of U.P. And 2 Others (Writ Tax No. - 945 of 2023)** is reproduced hereunder:

“In the meantime, no coercive action shall be taken against the petitioner pursuant to the impugned order, provided the petitioner deposits 50% of the disputed tax amount in accordance with law within a period of two weeks from today.

Any amount already deposited by the petitioner be adjusted against the deposit to be made under this order.”

Clearly, in the facts of these cases, there appears to be inconsistency in the interim orders granted by this Court.

The Uttar Pradesh Goods and Services Tax Act as well as the Central Goods and Services Tax Act contemplate pre-deposit of certain amounts i.e. 10% of the of the disputed tax liability before the first appellate authority. In addition to that, 20% of the disputed tax liability is liable to be deposited before the second appellate authority at the time of institution of the appeal. The relevant provision is liable

to be extracted hereunder:

“Section 112. Appeals to Appellate Tribunal

.....

(8) No appeal shall be filed under sub-section (1), unless the appellant has paid--

(a) in full, such part of the amount of tax, interest, fine, fee and penalty arising from the impugned order, as is admitted by him; and

(b) a sum equal to twenty per cent. of the remaining amount of tax in dispute, in addition to the amount paid under sub-section (6) of section 107, arising from the said order, [subject to a maximum of fifty crore rupees,] in relation to which the appeal has been filed."

The practices in go in other High Courts will also fortify the narrative. The Patna High Court in **M/s Cohesive Infrastructure Developers Pvt. Ltd. vs. The Central Board of Indirect Taxes and Customs and Others (Civil Writ Jurisdiction Case No. 15438 of 2023)** while deciding the interim application in similar facts also made the following directions:

"6. This Court is, therefore, inclined to dispose of the instant writ petition in the following terms:-

(i) Subject to deposit of a sum equal to 20 percent of the remaining amount of tax in dispute, if not already deposited, in addition to the amount deposited earlier under Sub-Section (6) of Section 107 of the B.G.S.T. Act, the petitioner must be extended the statutory benefit of stay under Sub-Section (9) of Section 112 of the B.G.S.T. Act. The petitioner cannot be deprived of the benefit, due to non- constitution of the Tribunal by the respondents themselves. The recovery of balance amount, and any steps that may have been taken in this regard will thus be deemed to be stayed. It is not in dispute that similar relief has been granted by this Court in the case of SAJ Food Products Pvt. Ltd. vs. The State of Bihar & Others in C.W.J.C. No. 15465 of 2022.

(ii) The statutory relief of stay, on deposit of the statutory amount, however in the opinion of this Court, cannot be open ended. For balancing the equities, therefore, the Court is of the opinion that since

order is being passed due to non- constitution of the Tribunal by the respondent- Authorities, the petitioner would be required to present/file his appeal under Section 112 of the B.G.S.T. Act, once the Tribunal is constituted and made functional and the President or the State President may enter office. The appeal would be required to be filed observing the statutory requirements after coming into existence of the Tribunal, for facilitating consideration of the appeal.

(iii) In case the petitioner chooses not to avail the remedy of appeal by filing any appeal under Section 112 of the B.G.S.T. Act before the Tribunal within the period which may be specified upon constitution of the Tribunal, the respondent- Authorities would be at liberty to proceed further in the matter, in accordance with law.

(iv) If the above order is complied with and a sum equivalent to 20 per cent of the remaining amount of the tax in dispute is paid then, if there is any attachment of the bank account of the petitioner pursuant to the demand, the same shall be released."

Further, the Patna High Court in **PCPL and RK - JV a Joint Venture vs. The State of Bihar and others (Civil Writ Jurisdiction Case No. 3733 of 2023)** also issued the following directions while deciding the applications:

“This Court is, therefore, inclined to dispose of the instant writ petition in the following terms:-

(i) Subject to deposit of a sum equal to 20 percent of the remaining amount of tax in dispute, if not already deposited, in addition to the amount deposited earlier under Sub-Section (6) of Section 107 of the B.G.S.T. Act, the petitioner must be extended the statutory benefit of stay under Sub-Section (9) of Section 112 of the B.G.S.T. Act. The petitioner cannot be deprived of the benefit, due to non- constitution of the Tribunal by the respondents themselves. The recovery of balance amount, and any steps that may have been taken in this regard will thus be deemed to be stayed. It is not in dispute that similar relief has been granted by this Court in the case of SAJ Food Products Pvt. Ltd. vs. The State of Bihar & Others in C.W.J.C. No. 15465 of 2022.

(ii) The statutory relief of stay, on deposit of the statutory amount, however in the opinion of this Court, cannot be open ended. For balancing the equities, therefore, the Court is of the opinion that since order is being passed due to non- constitution of the Tribunal by the respondent-Authorities, the petitioner would be required to present/file

his appeal under Section 112 of the B.G.S.T. Act, once the Tribunal is constituted and made functional and the President or the State President may enter office. The appeal would be required to be filed observing the statutory requirements after coming into existence of the Tribunal, for facilitating consideration of the appeal.

(iii) In case the petitioner chooses not to avail the remedy of appeal by filing any appeal under Section 112 of the B.G.S.T. Act before the Tribunal within the period which may be specified upon constitution of the Tribunal, the respondent- authorities would be at liberty to proceed further in the matter, in accordance with law."

The purpose of grant of interim orders in a lis and the need for consistency in granting orders in similar cases was underlined in **Siliguri Municipality v. Amalendu Das** reported at **(1984) 2 SCC 436**. The relevant paragraph is reproduced hereunder:

"4. We will be failing in our duty if we do not advert to a feature which causes us dismay and distress. On a previous occasion, a Division Bench had vacated an interim order passed by a learned Single Judge on similar facts in a similar situation. Even so when a similar matter giving rise to the present appeal came up again, the same learned Judge whose order had been reversed earlier, granted a non-speaking interlocutory order of the aforesaid nature. This order was in turn confirmed by a Division Bench without a speaking order articulating reasons for granting a stay when the earlier Bench had vacated the stay. We mean no disrespect to the High Court in emphasizing the necessity for self-imposed discipline in such matters in obeisance to such weighty institutional considerations like the need to maintain decorum and comity. So also we mean no disrespect to the High Court in stressing the need for self-discipline on the part of the High Court in passing interim orders without entering into the question of amplitude and width of the powers of the High Court to grant interim relief. The main purpose of passing an interim order is to evolve a workable formula or a workable arrangement to the extent called for by the demands of the situation keeping in mind the presumption regarding the constitutionality of the legislation and the vulnerability of the challenge, only in order that no irreparable injury is occasioned. The Court has therefore to strike a delicate balance after considering the pros and cons of the matter lest larger public interest is not jeopardized and institutional embarrassment is eschewed."

Similarly in **Vishnu Traders v. State of Haryana, 1995 Supp (1) SCC 461**, it was observed:

“3. In the matters of interlocutory orders, principle of binding precedents cannot be said to apply. However, the need for consistency of approach and uniformity in the exercise of judicial discretion respecting similar causes and the desirability to eliminate occasions for grievances of discriminatory treatment requires that all similar matters should receive similar treatment except where factual differences require a different treatment so that there is assurance of consistency, uniformity, predictability and certainty of judicial approach.”

The imperative of giving identical treatment to litigants in cases involving congruent issues was also underlined by the Supreme Court in **Bir Bajrang Kumar v. State of Bihar** reported at **AIR 1987 SC 1345** by holding thus:

"1. Special leave is granted. Heard the counsel for the parties. After going through the record of the case it appears that one of the cases involving an identical point has already been admitted by the High Court but another identical petition was dismissed by the same High Court. This, therefore, creates a very anomalous position and there is a clear possibility of two contradictory judgments being rendered in the same case by the High Court. In these circumstances, we allow this appeal and set aside the order dismissing CWJC No. 183 of 1985. This appeal is remanded to the High Court to be heard along with CWJC No. 5728 of 1984 which is pending hearing."

Similar view was taken by Supreme Court in **Vinod Trading Co. v. Union of India** reported at **(1982) 2 SCC 40**.

The ratio of the above holdings can be distilled in this manner. In congruent facts, identical interim orders are liable to be granted, otherwise an anomalous situation will be created where similarly situated persons will be

accorded differential treatment leading to discrimination and violation of Article 14 of the Constitution of India.

The second aspect which requires to be given weight is that the assessee cannot be faulted for what is essentially a failure of the Government. The statute contemplates deposit of 10% plus 20% of the disputed tax liability before the first and second appellate authorities respectively. By imposing a demand of 50% in these matters, the assesseees will be penalized for no fault of theirs. This is the rationale which is borne out from the first set of interim orders rendered in **M/S Kent Cables (supra)**, **M/S Tulsi Steels (supra)** and **M/S Nandan Sales Corporation (supra)**.

The grant of interim orders in the aforesaid manner made in the said orders passed by this Court balances the interests of revenue as well as the rights of the assesseees. However, it needs to be clarified that it is always open to the Court to grant interim orders which are at variance with the aforesaid orders in peculiar facts and circumstances of a particular case while exercising writ jurisdiction in the interests of justice.

In the wake of the preceding discussion, I am persuaded by the view taken by the learned single Judges of this Court in **M/S Kent Cables (supra)**, **M/S Tulsi Steels (supra)** and **M/S Nandan Sales Corporation (supra)** in preference to the requirement to deposit 50% of the

disputed tax liability.

The application for interim relief is finally disposed of with the following direction:

A. The petitioner shall deposit 20% of the disputed tax liability in addition to the earlier deposit before the assessing authority (which is 10% of the disputed tax amount). Subject to the aforesaid deposit, the recovery proceedings of the balance amount shall remain stayed till the decision of this writ petition.

Order in Writ Petition

Learned counsel for the respondents to file counter affidavit.

List this matter on 15.01.2024.

Order Date :- 4.12.2023

Ashish Tripathi