CDJLawJournal

Citation : CDJ 2018 Kar HC 235

Court : High Court of Karnataka

Case No : Writ Petition Nos. 3636 & 4607-4624 to 4626 of 2018 (T-RES)

Judges : THE HONOURABLE MRS. JUSTICE S. SUJATHA

Parties : M/s. Abhay Solvents Private Limited Having Its Registered Office At Mantri Greens, Bengaluru, Rep. By Its Managing Director Hemanth Mehta Versus The Assistant Commissioner of Commercial Taxes Lgsto-510, Karnataka & Another

Appearing Advocates : For the Petitioner: K.P. Kumar, Senior Counsel, Veena J. Kamath for Kamath & Kamath, Advocates. For the Respondents: T.K. Vedamurthy, AGA.

Date of Judgment : 08-03-2018

Head Note :

Constitution of India - Articles 226 & 227 -

Judgment :

(These Writ Petitions are filed under Articles 226 and 227 of the Constitution of India, praying to quash the orders of the respondent dated 28.12.2017 vide Annex-A1 to A18 by issuing a writ of certiorari or any other writ or an order in the nature of a writ and direct the respondent to furnish to the petitioner all the details, documents and information as sought for by the petitioner vide its letter dated 27.12.2017 vide Annex-H and grant an opportunity of being heard to the petitioner by issuing a writ of mandamus.)

These petitions are filed challenging the correctness and legality of the order of the respondent dated 28.12.2017 as per Annexures-Al to A18, inter alia, seeking lor a direction to the respondent to furnish to the petitioner all the details, documents and information as sought for by the petitioner vide its letter dated 27.12.2017 as per Annexure-H and grant an opportunity of being heard to the petitioner.

2. The petitioner is a company engaged in the business of manufacturing of refined rice bran oil. The petitioner while in the process of manufacturing the refined rice bran oil obtained de-oiled rice bran as a by-product. While the rice bran oil was a taxable commodity under the Karnataka Value Added Tax Act, 2003 ['KVAT Act', for short], the de-oiled rice bran was an exempted product. The petitioner applied for partial rebate under Section 17 of the KVAT Act and accordingly restricted its claim of input tax credit to the extent of the inputs utilized towards the de-oiled rice bran. This court in the case of 'M/S. M.K. AGRO TECH PRIVATE LIMITED v. STATE OF KARNATAKA' in STRP Nos.774-794/20l3 held that principles of partial rebate under Section 17 of the KVAT Act cannot be applied in cases where there is an exempted by-product as opposed to an exempted final or end product. Based on the said Judgment, the petitioner approached this Court in Writ Petition Nos. 110509-525/2015 seeking for a direction to the concerned Authority to refund the input tax credit in respect of the tax period, March 2014 to July 2015. This Court following the decision of the Division

Bench in M.K. AGRO TECH's case supra, allowed the writ petitions and a direction was issued to Respondent No. 1 to process the application filed by the petitioner for refund of input tax paid in excess, refund the same, if not otherwise found disentitled. It was observed that in case the tax is refunded as ordered, the respondents are at liberty to obtain indemnity bond from the petitioner to the extent of amount refunded. Further refund shall be subject to result of special leave petitions pending in SLP [Civil] Nos.576-596/2014. Pursuant to the order passed by this Court, the respondent refunded the excess input tax credit in respect of tax period April 2015 to January 2017 after the indemnity bond executed by the petitioner. The Hon'ble Apex Court in its order dated 22.09.2017, in 'THE STATE OF KARNATAKA v. M/s. M.K. AGRO TECH PVT. LTD.,' set aside the decision of this Court in STRP Nos.774-794/2013 and held that the assessee was not entitled to claim full input tax credit and provisions of Section 17 of the KVAT Act, partial rebate was applicable. Subsequently, the respondent issued notice and sought to recover the refunded amount with interest placing reliance on the decision of the Hon'ble Apex Court in the case of M.K AGRO TECH supra, on the premise that the refund was subject to the result of the Hon'ble Supreme Court Judgment and sought for recovery on the basis of a circular issued by the Commissioner of Commercial Taxes ['CCT', for short] dated 9.10.2017.

3 It is the contention of the petitioner that the petitioner submitted a letter dated 9.12.2017 to the respondent, requesting to furnish a copy of the circular of the CCT on the basis of which recovery was sought to be made from the petitioner, which was refused by the respondent and directed the petitioner to obtain the same from the CCT directly. It is based on the CCT's circular, which was issued pursuant to the Judgment of the Hon'ble Apex Court in the case of M.K. AGRO TECH supra, demand notices were issued and orders were passed under section 10[5] read with section 69[1] of the KVAT Act, directing the petitioner to make payment of refund amount with interest from the date of the refund till the date of passing of the order. Being aggrieved by the same, petitioner is before this Court.

4. In the writ petition proceedings, learned counsel appearing for the petitioner has filed IA-2/2018 for impleading the CCT as Respondent No.2 to the proceedings. IA-3/2013 is filed seeking amendment of the writ petition under Order VI Rule 17 of the Code of Civil Procedure, 1908 read with Article 226 of the Constitution of India, to amend the writ petition. The additional relief sought by the petitioner is to quash the Circular No.09 of the CCT dated 9.10.2017 as per Annexure-J, by issuing a writ of certiorari or any other writ or order in the nature of writ. In a separate order passed by this Court, these two applications are allowed.

5. Learned Senior Counsel Sri K.P. Kumar, representing M/s. Kamath & Kamath, learned Counsel for the petitioner would submit as under:

[i] KVAT Act was repealed with effect from 1.7.2017 and on the very same day, Karnataka Goods & Services Tax Act, 2017 ['KGST Act', for short], has come into effect. In terms of Sections 173 and 174 of the KGST Act, the repeal of the KVAT Act shall not revive anything not in force or existing at the time of such repeal, the action or proceedings initiated subsequent to the KGST Act coming into force are not saved under the KVAT Act. KGST Act coming into force on 1.7.2017, the Judgment of the Hon'ble Apex Court dated 22.09.2017 in M.K. AGRO TECH case supra cannot be made applicable to invoke the provisions of the KVAT Act.

[ii] The notices issued by the respondent under Section 69 [1] of the KVAT Act would not empower the Authorities to demand /recover the refund amount with interest as sought for. Attention was drawn to Section 69 [1] of the KVAT Act to contend that rectification of mistake apparent from the record is amenable to Section 69 [1] of the KVAT Act with a view to rectify the same by the prescribed Authority, Appellate Authority or revising Authority. Application of the principles of law enunciated by the Hon'ble Apex Court in a subsequent Judgment cannot be construed as any mistake apparent on the record. The Authorities have refunded the amount based on the law holding the field on the date of passing of the refund order, if any subsequent order is passed by the Hon'ble Apex

Court modifying or annulling the said order of this Court, on the basis of which, refund order was issued, the same would riot be a ground to withdraw the refund order and to demand/seek recovery of the refund of the amount paid.

[iii] Notices, under Section 42 of the KVAT Act were issued for 'die tax period March 2010 to January 2017 based on the circular of the Commissioner dated 9.10.2017 calculating the refund amount with the applicable interest. Again issuing notices under Section 69[1] of the KVAT Act is arbitrary exercise of the respondent. The reply to the said notice was submitted by the petitioner on 27.12.2017. On the very same day, a letter was addressed bringing to the notice of the respondent that reply notice has been sent through RPAD and the same may be delivered in the next few days. Therefore, it was requested not to take any adverse action against the petitioner until reply notice was received. However, the respondent proceeded to pass the order impugned herein without providing an opportunity to the petitioner to put forth its explanation to the notices issued under section 69[1] of the KVAT Act. Further, the request letter dated 27.12.2017 was misinterpreted by the respondent as a letter submitted to seek time for filing detailed explanation. Without considering the detailed explanation dated 27.12.2017 filed, the orders impugned herein were passed on the ground that the issue involved relates to implementation of the Judgment of the Hon'ble Apex Court involving State revenue and hence granting further time would be unreasonable.

[iv] The request made by the petitioner to furnish the circular of the CCT dated 9.10.2017 was rejected by issuing endorsement dated 19.12.2017, informing that the same relates to the internal matters of administration of the Department. Therefore, in case of necessity of the said circular, petitioner can contact the CCT, Bengaluru. It was mandatory on the part of the respondent to provide the circular of CCT, the basis on which the impugned orders were passed before passing of the orders. It is settled law that any information/ documents/circulars relied upon by the Authorities must be made known to the Assessees while demand is made based on such material. The impugned orders passed are in violation of the principles of natural justice. On this ground alone, the orders impugned requires to be set aside.

[v] The Commissioner has no power to issue circular No.09/17-18 dated 9.10.2017 which is mainly based on the Judgment of the Hon'ble Apex Court in the case of M.K. AGRO TECH supra. Further, the CCT cannot direct the Authorities to levy penalty and interest as per the levies existed at that point of time for the relevant years of assessment/reassessment in view of the ratio of the Judgment of the Hon'ble Apex Court. The respondent-Authority demanding refund amount with post interest is without the authority of law and the same deserves to be quashed.

[vi] That the factual aspects of the present case are distinguishable from the case of M.K. AGRO TECH case, decided by the Hon'ble Apex Court. As such, the respondent demanding refund amount based on the Judgment of the Hon'ble Apex Court in the case of M.K. AGRO TECH supra, is wholly unjustifiable.

6. Learned Senior Counsel placed reliance on the Judgment of the Hon'ble Apex Court in the case of 'DEPUTY COMMISSIONER OF INCOME TAX AND OTHERS v. SIMPLEX CONCRETE PILES [INDIA] LIMITED' reported in [(2013) 11 SCC 373.

7. Learned Additional Government Advocate appearing for the revenue placed the submissions as under:

[i] Section 174[3][i] of the KGST Act contemplates that in consequence of, or to give effect to, any finding, direction or order made under any provision of the relevant repealed Acts or any Judgment, or order made by the Supreme Court, High Court or any other court whether before or after the commencement of KGST Act, any order, assessment or reassessment or any action may be made notwithstanding the repeal of the KVAT Act. The proceedings relates to the tax period April 2015 to January 2017, much prior to the KGST Act coming into force. Proceedings were pending under the

KVAT Act relating to these tax periods. Hence, claim of refund with interest by the respondent is saved under Section 173 of the KGST Act. Even otherwise, the said repeal of KVAT Act shall not invalidate the demand/ recovery of refund made to the petitioner by virtue of the order of this Court in Writ Petition Nos. 110509-525/2015, whereby the refund was ordered subject to the petitioner filing indemnity bond and subject to the result of the Judgment of the Hon'ble Apex Court in the case of M.K. AGRO TECH supra. The order impugned is based on the Judgment of the Hon'ble Apex Court dated 22.09.2017 which is the law of the land, binding on the Courts and the Authorities. Irrespective of the circular instructions issued by the CCT, it was mandatory on the part of the Assessee to make payment of refund amount with interest as the petitioner has furnished indemnity bond and accepted the Judgment of this Court in Writ Petition Nos. 110509-525/2015, it was the liability fastened on the Assessee to make payment.

[ii] The CCT in order to maintain uniformity in the assessments and for the smooth administration, to avoid incongruous decision of the Officers, issued the Circular dated 9.10.2017, bringing to the notice of the departmental authorities, the Judgment of the Hon'ble Apex Court in the case of M.K. AGRO TECH supra. It is no doubt true that the penalty and interest are directed to be levied, but no such penalty is levied in the case on hand. It is only interest has been levied which is in conformity with Section 36 [1] of the KVAT Act. The argument of the learned Senior Counsel, in as much as, not providing adequate opportunity to the petitioner would not be relevant since the respondent has acted upon the Judgment of the Hon'ble Apex Court in the case of M.K. AGRO TECH supra, which is binding on the authority as well as the Assessee.

[iii] The Assessee placing reliance on the Judgment of M.K. AGRO TECH supra, sought for refund of input tax credit, strangely now canvassing arguments that the said Judgment is not applicable to the facts of the present case.

[iv] Issuance of notice under Section 42 of the KVAT Act was only for the purpose of information. Further, though notice was issued under Section 69][1] of the KVAT Act, orders are passed under Section 10[5] read with Section 69[1] of the KVAT Act which was the provision invoked at the time of passing of the refund order. Even assuming there is wrong quoting of a provision, that would not invalidate the order. Section 10[5] of the KVAT Act empowers the respondent to proceed with the demand /recovery of the refund amount which was invoked while granting the refund.

8. Heard The learned Counsel for the parties and perused the material on record.

9. To answer the issues involved in these writ petitions, it is relevant to refer to the provisions of the KGST Act, in as much as, applicability of the KVAT Act to the present proceedings.

10. Section 173 of the KGST Act contemplates that KVAT Act has been repealed. Section 174, saving provision reads thus:

"174. Saving. (1) The repeal of the Acts specified in section 173 shall not—

(a) revive anything not in force or existing at the time of such repeal; or

(b) affect the previous operation of the repealed Acts and orders or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation, or liability acquired, accrued or incurred under the repealed Acts or orders under such repealed Acts-

Provided that any tax exemption granted as an incentive against investment through a notification shall not continue as privilege if the said notification is rescinded on or after the appointed day; or

(d) affect any tax surcharge, penalty, fine, interest as are due or may become due or any forfeiture or punishment incurred or inflicted in respect of any offence or violation committed against the provisions of the repealed Acts; or

(e) affect any investigation, inquiry, verification (including scrutiny and audit), assessment proceedings, adjudication and any other legal proceedings or recovery of arrears or remedy in respect of any such tax, surcharge, penalty, fine, interest, right, privilege, obligation, liability, forfeiture or punishment, as aforesaid, and any such investigation inquiry, verification (including scrutiny and audit), assessment proceedings, adjudication end. ether legal proceedings or recovery of arrears or remedy may be instituted, continued or enforced, and any such tax, surcharge, penalty, fine, interest, forfeiture or punishment may be levied or imposed as if these Acts had not been so repealed; or

(f) affect any proceedings including that relating to an appeal, revision, review or reference, instituted before, on or after the appointed day under the said repealed Acts and such proceedings shall be continued under the said repealed Acts as if this Act had not come into force and the said Acts had not been repealed.

(2) Not withstanding anything contained in section 173, for the purpose of giving effect to sub-section (1), the State Government may, by notification, in the Official Gazette make such provision as appears to it necessary or expedient, -

(a) for making omissions from, additions to and adaptations and modifications of the rules, notifications and orders issued under the repealed Acts;

(b) for specifying the authority, officer or person who shall be competent to exercise such junctions exercisable under any of the repealed Acts or any rules, notifications or orders issued thereunder as may be mentioned in the said notification.

(3) Notwithstanding anything contained in section 173, nothing contained in any of the repealed Acts limiting the time within which any action may be taken or any order, assessment or re-assessment may be made shall apply to an assessment or re-assessment made on the assessee or any person,-

(i) in consequence of or to give effect to, any finding, direction or order made under any provision of the relevant repealed Acts or any judgment, or order made by the Supreme Court, High Court or any other court whether before or after the commencement of this Act;

(ii) to rectify any error on account of the assessment of such assessee or person under this Act, instead of under the relevant enactment, provided such assessment or reassessment under the repealed Acts is made within the time specified in such repealed Acts,

(4) The repeal of the Acts referred to in section 1 73 shall not be held to prejudice or affect the general application of section 6 of the Karnataka General Clauses Act, 1899 (Karnataka Act III of 1899) with regard to the effect of repeal."

11. In terms of Section 174(l)(f), it is clear that the repeal of the Act specified in Section 173 shall not affect any proceedings including that relating to an appeal, revision, review or reference, instituted before, on or after the appointed date, under the said repeals Acts and such proceedings shall be continued under the said repealed Acts as if KGST Act had not come into force and KVAT Act had not been repealed. Further Subsection (3) of Section 174 envisages that notwithstanding anything contained in Section 173, despite any limitation contained in any of the repealed Acts or, assessment or re-assessment may be made on the assessee or any person in consequence of, or to give effect to, any finding or direction or order made under any provision of the relevant repealed Acts or any Judgment or order made by the Hon'ble Apex Court or High court or any other court whether before or after commencement of KGST Act.

12. Section 38 of the KVAT Act deals with the assessment of tax. In terms of the returns filed under Section 35 of the KVAT Act, there is a deemed assessment under Section 38(1) of the KVAT Act. Thus on the returns filed by the assessee under Section 35 of the Act, refund was claimed on the ground that the input tax deductible by the dealer exceeds the output tax payable by him mainly relying on the Division Bench Judgment of this Court in M.K. AGROTECH's case supra. Refund claimed or the adjustments sought by the dealer not being responded, petitioner approached this Court in W.P.No. 110509-525/2014 whereby this court considered the arguments of the parties and placing reliance on the Judgment of this court in STRP 774-794/2013 M.K. AGROTECH's case supra, passed the order which reads thus:

"3. It is not in dispute and indeed it is submitted by the learned AGA that the matter is covered by the decision of Division Bench dated 17.07.2014 in STRP Nos. 774-794 of 2013. However, it is submitted by him that Special Leave Petitions have been preferred by the State against the said judgment and the matters are pending before the Apex Court where no interim order has been granted. The petitioner has further placed reliance on the decision in W.P. Nos. 1095-1100/2015 disposed of on 27.04.2015 wherein, following the order passed by the Division Bench, this Court has directed the respondents to process the application filed by petitioners for refund and to refund the amount to which they are found entitled by obtaining indemnity bond from the petitioners and subject to the result of pending Special Leave Petitions. The orders passed in the connected writ petitions are also placed on record for the perusal of this Court.

4. In the result, by following the decision of the Division Bench and the orders subsequently passed in the writ petition pursuant to the judgment rendered by the Division Bench, these writ petitions are allowed. A direction is issued to respondent No. 1 to process the application filed, by petitioner for refund of input tax paid in excess, as per Annexure B' and refund the same, if not otherwise found disentitled. In case the tax is refunded as ordered respondents are at liberty to obtain indemnity bond from the petitioner to the extent of amount refunded.

It is also ordered that refund shall be made within a period of two weeks from the dale of receipt of a copy of this order and from the date the petitioner furnishes indemnity bond, whichever is later.

It is made clear that refund shall be subject to result of Special Leave Petitions pending in S.L.P. (Civil) Nos.576-596 of 2014."

(emphasis supplied)

13. Thus it is made clear that refund shall be subject to result of Special Leave Petition pending in SLP (CIVIL) Nos. 576-596/2014. The Judgment of M.K. AGROTECH's case supra was reversed by the Hon'ble Apex Court in Civil Appeal Nos. 15049-69/2017 by its Judgment dated 22.9.2017. It is based on the said Judgment, proceedings are initiated by the respondent- authorities to demand/recover the refunded amount pursuant to the directions issued by this Court in W.P.Nos. 110509-525/ 2015.

14. The contention of the learned Senior counsel that KGST Act having come into force on 1.7.2017 and the KVAT Act being repealed on the same day, respondent-authorities have no power to recover the refunded amount cannot accepted for the reason that the refund order was directed to be passed by this Court in W.P.Nos. 110509-525/2015 subject to the result of the Special Leave Petition pending before the Hon'ble Apex Court. It was further ordered that respondents are at liberty to obtain indemnity bonds from the petitioner to the extent of amount refunded. The refund orders are passed after obtaining the indemnity bonds from the petitioner to the extent of the amount refunded. Though the subject matter of W.P.Nos. 110509-525/2015 was relating to the tax period from March 2014 to July 2015, refund orders are issued for 22 months based on the said order of this court subject to the indemnity bonds executed by the petitioner. Hence repeal of the KVAT Act on 1.7.2017 would not affect the proceedings initiated by the Authorities in view of Section 174(l)(f) and (3) of KGST Act.

15. It is true that ordinarily no rectification is allowable based on the subsequent judgment passed by the High Court or the Apex Court, but in the peculiar facts and circumstances of the case when the petitioner has approached this court seeking refund of the amount referring to the Judgment of the Division Bench in M.K. AGROTECH's case supra and obtained an order, it is obligatory on the part of the petitioner to obey the orders of this court. However, the conduct of the petitioner turning around and assailing the proceedings initiated by the respondent authorities to demand/recover the refund amount cannot be appreciated. Insisting for the notification to be published in terms of Section 174(2) of the KGST Act, the assessee cannot deviate from the undertaking given by filing indemnity bonds before the authorities while getting the refund orders.

16, Section 69(1) of the KVAT Act contemplates for rectification of mistakes. Section 69(2) provides that any amendment which has the effect of enhancing an assessment or otherwise in accordance with law of the person concerned shall not be made unless the prescribed authority, appellate authority or revising authority, as the case may be, has given notice to the person concerned of its intention to do so and has allowed the person concerned the opportunity of showing cause, in writing, against such amendment. As could be observed from the records that no enhancement of an assessment or otherwise increasing of the liability of the dealer has been made by the Prescribed authority in rectifying the refund orders passed under Section 10(5) of the Act. Indisputably the impugned orders are passed under Section 10(5) r/w Section 69(1) of KVAT Act. Admittedly, assessee had no objections at the time of passing of the refund orders under Section 10(5) of the Act. However, now it is argued that the power under Section 10(5) r/w Section 69(1) of the Act cannot be exercised/invoked by the prescribed authority to withdraw the refund/ demand/initiate proceedings for recovery of refunded amount. Section 10(5) provides for refund or adjustment of the excess amount whereunder input tax deductable by the dealer exceeds the output tax. An order of recovery/demand of refunded amount has to be passed pursuant to the disposal of the appeal before the Hon'ble Apex Court as ordered by this court while directing the respondent-authorities to refund the amount. Hence, respondent-authorities demanding the refund amount cannot be found fault with or it cannot be held that proceedings initiated by the prescribed authority under Section 10(5) r/w Section 69(1) is not valid.

17. In view of the submissions made by the learned counsel for the revenue it is clear that Annexure-C notice issued under section 42 of the KVAT Act is only for the purpose of information to the assessee and has no legal force and the same cannot be enforced. The same is held to be only for the purpose of information. Parallel proceedings initiated by the Deputy Commissioner if any, is not the subject matter of the present proceedings, there is no overlapping as such and hence, the argument of the petitioner on this ground also fails.

18. The challenge is made to the circular issued by the Commissioner of commercial taxes dated 9.10.2017 solely on the ground that the Commissioner has observed, on the ratio of the Judgment of the Hon'ble Apex Court , penalty and interest shall be levied as per the levies as existed at that point of time for the relevant years of assessment or re-assessment. It can be held that circular issued by the Commissioner of Commercial Taxes is only incorporating the executive instructions intended in the department in order to maintain uniformity in collecting taxes, interest and penalty, finalising the assessments or initiating any proceedings in furtherance of achieving the benefit of the judgment of Hon'ble Apex Court.

19. It is trite law that penalty is not automatic, while imposing penalty, it is mandatory to provide an opportunity of hearing to the dealer but in the batch of present cases, no such penalty is levied by the prescribed authority.

20. As regards levy of interest, it is apt to refer to the judgment of the Constitution Bench of the Hon'ble Apex Court in the case of J.K. SYNTHETICS LTD. -VS- COMMERCIAL TAXES OFFICER reported in (1994) 94 STC 422 whereby the Hon'ble Apex Court has observed thus:

'Before we proceed further we must emphasise that penalty provisions in a statute have to be strictly construed and that is why we have pointed out earlier that the considerations which may weigh with the authority as well as the Court in construing penal provisions would be different from those which would weigh in construing a provision providing for payment of interest on unpaid amount of tax which ought to have been paid. Section 3, read with Section 5 of the Act, is the charging provision whereas the rest of the provisions provide the machinery for the levy and collection of the tax. In order to ensure prompt collection of the tax due certain penal provisions are made to deal with erring dealers and defaulters and these provisions being penal in nature would have to be construed strictly. But the machinery provisions need net be strictly construed. The machinery provisions must be so construed as would enable smooth and effective collection of the tax from the dealers liable to pay tax under the statute. Section 11B provides for levy of interest on failure of the dealer to pay tax due under the Act and within the time allowed. Should this provision be strictly construed or should it receive a broad and liberal construction, is a question which we will have to consider in determining the sweep of the said provision.

It is well-known that when a statute levies a tax it does so by inserting a charging section by which a liability is created or fixed and then proceeds to provide the machinery to make the liability effective. It, therefore, provides the machinery for the assessment of the liability already fixed by the charging section, and then provides the mode for the recovery and collection of tax, including penal provisions meant to deal with defaulters. Provision is also made for charging interest on delayed payments, etc. Ordinarily the charging section which fixes the liability is strictly construed but that rule of strict construction is not extended to the machinery provisions which are construed like any other statute. The machinery provisions must, no doubt, be so construed as would effectuate the object and purpose of the statute and not defeat the same.

But it must also be realised that provision by which the authority is empowered to levy and collect interest, even if construed as forming part of the machinery provisions, is substantive law for the simple reason that in the absence of contract or usage interest can be levied under law and it cannot be recovered by way of damages for wrongful detention of the amount.

Provision for charging interest u/as, it seems, introduced in order to compensate for the loss occasioned to the Revenue due to delay. But then interest was charged on the strength of a statutory provision, may be its objective was to compensate the Revenue for delay in payment often:. But regardless of the reason which impelled the Legislature to provide for charging interest, the Court must give that meaning to it as is conveyed by the language used and the purpose to be achieved. Therefore, any provision made in a statute for charging or levying interest on delayed payment of tax must be construed as a substantive law and not adjectival law."

21. In the light of the said judgment, it can be held that interest is levied in order to compensate any loss occasioned to the revenue due to delay. The dealer was liable to pay the tax in terms of Section 10 of the KVAT Act. In view of the said judgments of this court in M/s M.K. AGROTECH's case supra applying the principles enunciated therein, net tax was computed and refund was claimed before this court, on the submissions made by the revenue that the matter is subjudiced before the Hon'ble Apex Court, refund order was directed to be made subject to the result of the decision of the Hon'ble Apex Court. Had no refund was made, the tax amount would have been utilized by the revenue. In other words, there is a delay caused in making the payment of legitimate taxes to the department. However, levy of interest under Section 36 shall be subject to hearing in the peculiar circumstances of the case on hand. It is true that interest would have been attracted if there is any omission on the part of the dealer if no output tax paid or short paid or higher input tax claimed. The prescribed authority ought to have examined this aspect of the matter in providing an opportunity of hearing to the petitioner. It is strange to observe that the dealer filed a reply on 27.12.2017 submitting that a detailed reply has been submitted through RPAD and the same may take about 3-4 days to reach the prescribed authority instead of directly submitting the detailed reply. The prescribing authority proceeded to conclude the proceedings as the assessee sought time to file reply, no such

time is required to be granted in view of the judgment of the Hon'ble Apex Court. Tax refunded being liable to be paid as discussed above, demand of tax is not hit by the principles of natural justice.

22. The commissioner's circular dated 9.10.2017 is attacked by the dealer mainly on the count that no penalty and interest can be levied without providing an opportunity of hearing. As aforesaid, proceedings initiated to demand/recover the tax refunded based on the Judgment of the Hon'ble Apex Court as well as this court in W.P.Nos. 110509-525/2015 coupled with the indemnity bond filed by the dealer may not be held to be unjustifiable as levying of interest is compensatory in nature but the same requires an opportunity to the petitioner to put-forth his .reasons or explanation in as much as quantification is concerned in the facts and circumstances of the present case. Reasonable opportunity is quintessential as much as levying penalty. Hence Commissioner issuing circular instructions though for the smooth functioning or administration of the department, no instructions to levy penalty or interest automatically, could be issued though the order of the Hon'ble Apex Court on merits of the case is in favour of the revenue. On this point the circular issued by the Commissioner dated 9.10.2017 has to be read down. Levy of penalty and interest shall be subject to providing reasonable opportunity of hearing to the assessee in the circumstances of the case though ordinarily interest is automatic.

23. Indeed, once indemnity bond is furnished, the payment of tax refunded is mandatory and the same cannot be assailed by the petitioner. Hence, confirming the demand of tax refunded, the matters are remanded to the prescribed authority to examine the levy of interest applicable to the tax demanded. Though an attempt was made by the learned senior counsel that an undertaking was given before this court only relating to 16 months and not to 22 months, the refund orders are passed for 22 months on furnishing of the indemnity bonds by the assessee in terms of the order of this court in W.PNos.110509-525/2015. Hence, the petitioner cannot turn back and dispute the demand of tax made by the prescribed authority. Hence, the following:

ORDER

i) Petitions are allowed in part.

ii) Demand of refunded tax amount is confirmed.

iii) Commissioner's circular dated 9.10.2017 is read down to the effect that levy of penalty/interest is not automatic, while demanding refunded tax, on the ratio of the judgment of the Hon'ble Apex Court in M/s M.K. AGRO TECH's, supra, opportunity of hearing is mandatory to levy penalty / interest.

iv) Matters are remanded to the prescribed authority to provide an opportunity of hearing inasmuch as the levy of interest and prescribed authority shall proceed to pass appropriate orders in accordance with law in quantifying the interest amount.

CDJLawJournal