

(1996) 08 P&H CK 0033

High Court Of Punjab And Haryana At Chandigarh

Case No: Civil Writ Petition No. 2565 of 1996

Tirath Ram Ahuja Ltd.

APPELLANT

Vs

The State of Haryana and
AnotherRESPONDENT

Date of Decision: Aug. 6, 1996**Acts Referred:**

- Haryana General Sales Tax Act, 1973 - Section 44(1)

Citation: (1996) 114 PLR 504**Hon'ble Judges:** N.K. Agrawal, J; Ashok Bhan, J**Bench:** Division Bench**Advocate:** S.K. Sarwal, for the Appellant; Ashok Gupta, for the Respondent**Final Decision:** Allowed

Judgement

N.K. Agrawal, J.

The petitioner was an assessee under the Haryana General Sales Tax Act, 1973 (hereinafter called the Act). The petitioner was, as a public limited company, engaged in the business of construction work on contract basis. The petitioner filed returns under the Act for three assessment years, namely 1990-91, 1991-92 and 1992-93. Since tax was due, sales tax was also paid as per the returns so filed. Assessments were finalized for the three years, vide orders dated 23.3.1995, 12.5.1995 and 12.5.1995. The following excess amounts of tax were found to be refundable to the petitioner under the assessment orders :-

Sr.No.	Assessment Year	Amount
1.	1990-91	Rs. 37,956/-
2.	1991-92	Rs. 87,535/-
3.	1992-93	Rs. 10,448/-

2. Refund vouchers were required to be issued to the petitioner along with the assessment orders but that was not so done. The petitioner made applications on 1.7.1995, 12.9.1995, 15.11.1995 and 8.12.1995 but refund vouchers were not issued and the amount of refund was withheld. The petitioner has, therefore, prayed for a mandamus to the respondents for the issuance of refund vouchers along with the interest from the date of deposit to the date of issue of refund vouchers of the three years in question.

3. The relevant provisions regarding the refund of excess amount of tax to a dealer can be seen in Section 43 of the Act, which reads as under :-

"43(1) - The assessing authority or a person appointed to assist the Commissioner under Sub-section (1) of Section 3, as the case may be shall, in the prescribed manner, refund to a dealer or to any other person the amount of tax or penalty or interest paid by him in excess of the amount due from him under this Act, either by a refund voucher or, at the option of the dealer by adjustment of the amount so paid against the amount due from him in respect of any other period;

Provided that the assessing authority or a person appointed to assist the Commissioner under Sub-section (1) of Section 3, as the case may be, shall first adjust the amount to be refunded towards the recovery of any amount due, on the date of adjustment from the dealer and shall then refund the balance, if any,

(2) where an amount required to be refunded by the assessing authority to any person by virtue of an order issued under this Act is not so refunded .to him within the period as may be prescribed, the dealer shall be entitled to interest at such rates and on such terms and conditions as may be prescribed. (see Rules 35, 36, 37, 38 and 39)."

4. From the perusal of the above provisions, it would be clear that the assessing authority has an obligation to refund the amount of tax or penalty or interest paid by dealer in excess of the amount due under the Act either by refund vouchers or, at the option of the dealer, by an adjustment order. The assessing authority has, however, been empowered to first adjust the amount to be refunded towards recovery of any amount due on the date of adjustment from the dealer. After such an adjustment, the balance amount, if any, shall be refunded to the dealer. Interest is payable to a dealer on the amount required to be refunded if such an amount is not refunded within the prescribed period.

5. The petitioner's case is that the amount found refundable in the three assessment years has not been paid without sufficient reason. It is stated that the amount payable by way of refund has to be paid unless the assessing authority, at the option of the dealer, makes an adjustment of the amount so payable against any amount due from the dealer in respect of any other period. Since no amount of tax is said to be due from the dealer in respect of any other period, the question of adjustment is said to have not arisen in the case of the petitioner.

6. The plea of respondents is that the assessing authority can withhold an amount of refund u/s 44 of the Act if the order giving rise to a refund is the subject-matter of an appeal or further proceedings under the Act. It is stated that, since the assessments for the three years in question were found to be suffering from certain legal infirmities, the orders were before the Deputy Commissioner for revision u/s 40 of the Act. In view of that, the assessing authority made a request to the Commissioner of Excise and Taxation for withholding the amount refundable to the petitioner and thereupon the Commissioner, vide order dated 17.5.1996, withheld the amount u/s 44 of the Act.

Section 44 of the Act reads :-

"44-Power to withhold refund

(1) Where an order giving rise to a refund is the subject-matter of an appeal or further proceedings, or where any other proceedings under this Act are pending, and assessing authority or a person appointed to assist the Commissioner under Sub-section (1) of Section 3, as the case may be, is of the opinion that the grant of the refund is likely to adversely affect the recovery, he may withhold the refund and refer the case to the Commissioner for order. The orders passed by the Commissioner shall be final.

(2) The period during which the refund remains so withheld shall be excluded for the purpose of calculation of interest u/s 43."

7. The assessing authority has been vested with the power u/s 44(1) of the Act. As reproduced above, to withhold the refund where the order giving rise to the refund is the subject-matter of an appeal or other proceedings. It is also necessary that the assessing authority should hold an opinion that the grant of refund is likely to adversely affect the recovery. If the assessing authority is of such opinion, he may withhold the refund and refer the case to the Commissioner for order.

8. The respondents were required to file reply to the present writ petition within 4 weeks, vide this Court's order dated 25.4.1996. Notice of motion had earlier been issued to the respondents on 20.2.1996. The Deputy Commissioner passed the order on 18.4.1996 u/s 44(1) of the Act withholding the refund. It is thus apparent that the respondents have attempted to cover up their inaction by passing an order after the filing of the present petition by the assessee. The Commissioner also passed the order of approval subsequently vide order dated 17.5.1996. Reply to the present petition was filed by the respondents on 24.5.1996 in this Court. From these facts, it is evident that the respondents have withheld the amount refundable to the petitioner without any sufficient cause. Order made by the Deputy Commissioner on 18.4.1996 makes it abundantly clear that this order has been passed under the cover of Section 44 (1) of the Act only to seek protection of this provision, which protection was not at all available. The respondents' plea, that the assessment orders, under which excess amount of tax as found refundable, were subject of

revision, has also no substance. The respondents have not disclosed in their reply nor any other information has been furnished to show as to when orders u/s 40 of the Act were made by the revisional authority. The Commissioner may, on his own motion, call for the record of any case pending before the assessing authority or appellate authority for the purposes of satisfying himself as to the legality or propriety of any proceedings or any order made therein. The respondents have not made it clear as to when the Commissioner called for the record of the assessment proceedings u/s 40 of the Act. The order withholding the amount of refund passed by the Deputy Commissioner on 18.4.1996 exposes the respondents to the charge that the amount of refund was withheld without authority. In the order of the Commissioner dated 17.5.1996, there is no specific reference to the revision u/s 40 of the Act. The order inter alia contains the following two paras :-

"Whereas the proceedings under the Haryana General Sales Tax Act, 1973, are still pending in this case."

"Whereas it has been certified that recovery of this amount will be adversely affected later on, if the refund is allowed."

9. The order of Commissioner does not make a mention of any revisional proceeding pending u/s 40 of the Act. The action of the respondents is) not found to be sustainable in the eye of law.

10. A similar question was examined by this Court in Civil Writ Petition No. 15683 of 1995 (M/S. Sanjay Industries v. State of Haryana and Ors.). It was held in that case, vide order dated 10.1.1996, that withholding of the amount of refund was not appropriate after the Sales Tax Tribunal had set aside the orders of re-assessment. The applications filed by the assessee for refund of the excess amount of tax had been rejected by the Department on the ground that proceedings under the Act were pending against the assessee. That plea was found to be not true and, therefore, the assessee was held entitled to the refund of the amount along with interest.

11. The petition stands allowed. The respondents are directed to refund the amount paid by the assessee in excess of the tax due as per the assessment orders passed by the assessing authority for the assessment years 1990-91 1991-92 and 1992-93. Interest at the rate of 12 per cent per annum shall also be paid to the petitioner on the amount from the date it became due till actual payment to the petitioner. The respondents shall also pay costs amounting to Rs. 1000/- to the petitioner.