

(2009) 04 AP CK 0001

Andhra Pradesh High Court

Case No: Writ Petition No's. 22266, 22270, 22297, 22306, 22385, 22386, 22404 and 22405
of 2008

M/s Pulp N"Pack Private Ltd. and
Tadimalla Nidadavote Mandal

APPELLANT

Vs

The Commercial Tax Officer and
The Deputy Commissioner (CT)
Eluru Division

RESPONDENT

Date of Decision: April 2, 2009

Acts Referred:

- Andhra Pradesh General Sales Tax Act, 1957 - Section 14, 14(4C), 19, 19(1), 20(1)
- Andhra Pradesh Value Added Tax Rules, 2005 - Rule 59(6)
- Central Sales Tax Act, 1956 - Section 9(2)
- Constitution of India, 1950 - Article 136, 198, 199, 200, 201
- Income Tax Act, 1961 - Section 143(1), 241

Citation: (2009) 2 APLJ 300 : (2009) 23 VST 573

Hon'ble Judges: Sanjay Kumar, J; Goda Raghuram, J

Bench: Division Bench

Advocate: S.R.R. Viswanath, for the Appellant; Special SC for Amicus Curiae, S.R. Ashok, S. Ravi and Krishna Koundinya, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

1. Orders passed in exercise of the power to withhold refunds u/s 33-C of the Andhra Pradesh General Sales Tax Act, 1957 (for short "the Act of 1957") is challenged in this batch of writ petitions.

2. M/s Pulp N"Pack Private Limited, Nidadavolu, West Godavari District, is the common petitioner in these writ petitions. It is a Small Scale Industry (SSI) engaged

in the trade of pulp moulded egg trays, corrugated boxes and waste paper. It was assessed to tax under the provisions of the Act of 1957 and the Central Sales Tax Act, 1956 (for short "the Act of 1956") for the assessment years 2001-02 to 2004-05. The petitioner claimed exemption from tax liability under both the enactments insofar as its turnover pertaining to second sales of pulp moulded egg trays was concerned placing reliance on G.O.Ms. No. 1091 Rev. (CT-II) Department dated 31.10.1994.

3. It was the case of the petitioner that it had purchased pulp moulded egg trays from Small Scale Industries (SSIs) in the State and had in turn subjected them to intra and inter state second sales. The petitioner claimed tax exemption in respect of this turnover relying on the aforestated G.O. The Commercial Tax Officer, Nidadavolu Circle, Nidadavolu, the first respondent in these cases, accepted its claim and granted exemption as sought. However, the Deputy Commissioner (Commercial Taxes), Eluru, the second respondent, exercised revisional jurisdiction under the Statute and held that the petitioner was not entitled to such exemption as the same was available only to a manufacturer-cum-seller of pulp moulded egg trays. Thereupon, demand notices were issued to the petitioner by the first respondent under both the enactments assessing to tax the turnover relating to second sales of pulp moulded egg trays.

4. Aggrieved thereby, the petitioner approached the Sales Tax Appellate Tribunal ("the STAT"), Visakhapatnam, by way of independent appeals. The appeals filed under the Act of 1957 were numbered as T.A. Nos. 57, 58, 59 and 60 of 2007 while the appeals under the Act of 1956 as T.A. Nos. 61, 62, 63 and 64 of 2007. As required by the statute, the petitioner deposited Rs. 3,05,232/- being 25% of the disputed tax under the Act of 1957 for the four assessment years viz, 2001-02 to 2004-05 and Rs. 25,28,421/- towards 25% of the disputed tax under the Act of 1956 for the same four assessment years, towards deposits required to be made as a condition precedent to preferring an appeal, hereinafter referred to as the "deposits".

5. The STAT, Visakhapatnam, by its orders dated 21.01.2008 and 18.02.2008 allowed the appeals filed under the Act of 1957 and the Act of 1956 respectively. Consequently, the petitioner made an application on 17.04.2008 seeking refund of the deposits. As there was no response from the Revenue, the petitioner filed these writ petitions complaining of non-feasance on the part of the respondent authorities inasmuch as Section 21(2) third proviso of the Act of 1957 which applied to the deposits made by the petitioner under the Act of 1957 and the said provision read with Section 9(2) of the Act of 1956 applied to the deposits made under the Act of 1956, required the respondent authorities to refund the deposits within sixty days from the date of receipt of the order passed by the appellate authority allowing the appeals.

6. The first respondent filed individual counter affidavits in the cases, admitting the facts narrated above. He recorded the fact that the Department had preferred

Revisions before this Court against the appellate orders passed by the STAT, Visakhapatnam, and the said Revisions, being Trev C. No. 83 of 2008 and batch, were pending consideration before this Court. He stated that pursuant to the order of the STAT, Visakhapatnam, consequential orders of refund dated 29.10.2008 had been passed by him giving effect to the said orders. In view of the pendency of the Revisions before this Court, it is stated, the respondents though had issued orders of refund on 29.10.2008, felt that the refund would not be feasible and would adversely affect the Revenue. Accordingly, the first respondent having obtained the previous approval of the second respondent, passed orders on 01.11.2008 invoking the power u/s 33-C of the Act of 1957 and withheld the refund of the deposits. Separate orders were passed in this regard in all the cases on the same date.

7. The petitioner filed rejoinders to the above counters stating that Section 33-C had no application to the facts of the instant case as it was clearly covered by provisions of the third proviso to Section 21(2) of the Act of 1957. The petitioner also pointed out that it had filed the present writ petitions before this Court on 13.10.2008 and it was only then that the respondent authorities had issued the refund orders on 29.10.2008, and immediately thereafter exercised jurisdiction u/s 33-C on 01.11.2008 and withheld the refunds lawfully due to the petitioner. The petitioner further contended that the said orders were without application of mind and were violative of the principles of natural justice as the petitioner was not given an opportunity of hearing before the passing of the said orders.

8. The petitioner was permitted to amend its prayer in the writ petitions taking note of subsequent development. The petitioner now challenges the validity of the orders dated 01.11.2008 passed by the first respondent withholding the refund in exercise of the powers conferred by Section 33-C of the Act of 1957.

9. As the matter involved the examination of the scope and extent of the powers of the Revenue to withhold refunds u/s 33-C of the Act of 1957 and such determination is of far reaching import and consequence, we deemed it appropriate to seek the assistance of learned Senior Counsel, Sri S.R. Ashok and learned Counsel Sri S. Ravi.

10. Heard Dr. S.R.R. Viswanath, learned Counsel for the petitioner, Sri K. Raji Reddy, learned Special Standing Counsel for Commercial Taxes and the learned Amicus Curiae.

The contentions on behalf of the petitioner are:

Section 33A to 33F were inserted in the Act of 1957 by Act 16 of 1963 w.e.f. 1.8.1963. These provisions are thus to be read in conjunction with the substantive provisions of Section 33 which deal with refund of tax or license fee. Further, the 3rd proviso to Section 21(2) which was added by Act 3 of 2002 w.e.f. 20.11.2001 enjoins the assessing authority to refund the amounts (of Twelve and half; Twenty-five; or Fifty percent of the difference of tax assessed by the assessing authority or revisional authority, as the case may be, and the tax admitted and paid by the appellant),

required to be deposited as the condition precedent to entertainment of an appeal, with simple interest calculated @ 18% p.a. if the refund were not made within sixty days from the date of receipt of an order passed Under Sections 19 or 21. In the context of provisions of Section 21(2) and 33 of the Act of 1957 (referred to above), the "pre-deposit" made preceding an appeal would not be covered by the provisions of Section 33C and may not be withheld.

While the interest payable on the "pre-deposit" amount [qua the third proviso to Section 21(2)] is 18% p.a. if the refund is made beyond sixty days from the date of receipt of an order passed Under Sections 19 or 21, the interest payable qua Section 33F(2) on the refund withheld u/s 33C is at 12% pa, and that too after a period of six months from the date of the order referred u/s 33C and till the date of the refund. Therefore the provisions of Section 33C cannot be construed as applicable to refund of the amounts deposited as a condition precedent to an appeal u/s 21(2). The amounts payable towards tax are remitted into the consolidated fund of the Union or of the appropriate State Under Article 226 of the Constitution while Under Article 284 the deposits made into any court to the credit of any cause, matter etc., would be paid into the public account of the Union or of the State. Further the deposits made as a condition precedent for filing an appeal are pursuant to a statutory prescription qua the legislative field under Entry 65 of List-II in the Seventh Schedule to the Constitution, while tax and license fees collected are traceable to the legislative power derived under Entry 54 of the said List. Thus the character of the "pre-deposit" is substantially distinct from a tax paid. The power to withhold refund u/s 33-C does not include the refund of "pre-deposit" made u/s 21(2) of the Act of 1957.

At oral hearing, though not pleaded, it was also urged that the C.T.O., Nidadavolu, had no jurisdiction to pass an order u/s 33C of the Act of 1957. After the repeal of the Act of 1957 by the promulgation of the A.P. Value Added Tax Act 2001 ("VAT Act"), Section 80(2) of the VAT Act r/w Rule 59(6) of the AP Value Added Tax Rules, 2005 enjoins that only the Deputy Commissioner of the Division concerned where the refund does not exceed Rs. 10 lakhs and the Joint/Additional Commissioner in the O/o Commissioner of Commercial Taxes where the refund exceeds Rs. 10 lakhs, could exercise authority for withholding such refund. That the several orders dated 01.11.2008 (impugned in the writ petitions), passed by the 1st respondent invoking the power u/s 33C of the Act of 1957 (withholding the refund of the pre-deposit amounts), do not set out any or relevant reasons for exercise of the discretion and for arriving at the opinion that the grant of refund is likely to adversely affect the revenue and are therefore unsustainable.

Contentions by the learned Amicus:

Sri S.R. Ashok, learned Senior Counsel:

The power (to withhold refund) must be exercised with circumspection and responsibility and not merely on the ground or for the mere reason that an appeal or proceedings under the Act of 1957 is pending. Though the amount involved for refund may in a given circumstance constitute a sufficient ground to infer adversity to the interest of the revenue, there need be guidelines or policy instructions contouring the exercise of such discretion by the authority. Different authorities, in the absence of contouring guidelines are seen to arrive at varying and dissimilar conclusions as to what constitutes a sufficient ground warranting an inference of adversity to the interest of revenue. The exercise in practice has become arbitrary and whimsical.

The competent authority must independently apply the mind, weigh the pros and cons of withholding the refund. Withholding of the refund not only prejudicially affect an assessee but also visits the exchequer with pejorative consequences and therefore the taxpayer since the exchequer would be mulcted with the interest burden upon delayed refund and eventually proves counter productive to the interest of the revenue. The authority must therefore be satisfied, prima facie, that the facts and circumstances of a particular case warrant withholding of the refund. Such application of mind preceding the formation of an opinion to withhold refund must be reflected in an order passed u/s 33-C. The track record of the assessee concerned i.e., that the assessee would be likely to evade the process of law rendering it difficult for the revenue to recover the amounts in the event of the State succeeding in a pending appeal/proceedings may be a relevant circumstance for exercise of the power u/s 33-C. On this aspect the order passed must reflect a prima facie assessment that the revenue would be subject to difficulty in recovering the dues.

The assessment as to adversity to the interest of the revenue involves complex factors which must be examined and evaluated on a case to case basis by the concerned authority. The reasons underlying such individualized exercise of power on a rational assessment of the factors, must be set out in the order so as to obviate the possibility of arbitrariness and irrational subjectivity.

Since the provisions of Section 21(2) including the third proviso thereto specify the amounts to be deposited as a condition precedent to the entertainment of an appeal, as a percentage of the difference of tax ordered by the appellate or revisional authority as the case may be, even a "pre-deposit" partakes the character of a tax. The amount of "pre-deposit" is also covered by Section 33-C. The only distinction between the refund of tax on the one hand and the "pre-deposit" on the other is that the interest burden upon the revenue is different in respect of a delayed refund. The provisions of the third proviso to Section 21(2) and of 33-C could harmoniously operate and there is no apparent or operative conflict between them.

Sri S. Ravi, Advocate:

Adopts the contentions of Sri S.R. Ashok, learned Senior Counsel and supplements:

The mere filing of an appeal or other proceedings would not legitimize the exercise of discretion u/s 33-C of the Act of 1957 nor per se posits the inference of an adverse impact on the interest of the revenue. The fiscal needs of the State do not constitute a justifiable criterion for exercise of the power.

Where the concerned authority could objectively form an opinion that the recovery of dues from a particular assessee would be difficult in view of the past record, withholding of the refund would be justified.

The quantum of the amount to be refunded could be a relevant circumstance warranting exercise of discretion u/s 33-C, but to ensure uniform and normative standards, policy guidelines to structure the discretion of the authorities of the State ought to be issued. In the absence of rational guidelines, the subjective opinion of the several officers in the State (with regard to the quantum of refund warranting an inference of adversity), leads to arbitrariness, incoherence and chaos. The possibility of succeeding in an appeal or proceedings may be a relevant circumstance and an objective opinion in this aspect by the concerned authority must be formed and the reasons for such opinion recorded in an order passed u/s 33-C. Recording of reasons is unavoidable since the order is susceptible to judicial scrutiny. Refund should be the rule and withholding of the refund, the exception. The exceptional exercise of power must be structured with relevant reasons to minimize arbitrariness.

11. In the light of the competing positions by the assessee and the State, the following issues arise for determination:

A) Whether the power to withhold refund conferred on an assessing or licensing authority u/s 33C of the Act of 1957, is limited to refund of tax and license fee and excludes refund of the deposit by an assessee while preferring an appeal Under Sections 19 or 21 of the Act of 1957;

B) Whether the authority passing an order u/s 33C of the Act of 1957, withholding refund is required to record reasons and set out the facts and circumstances which constitute the basis for the formation of an opinion that the refund is likely to adversely affect the revenue; and

C) What is the normative range of circumstances that could be considered as "adversely affect the revenue" within the meaning of the said expression (phrase) in Section 33C of the Act of 1957?

Analysis of relevant statutory provisions:

Section 19 provides for an appeal by a dealer against any orders passed or proceedings recorded by any authority under the provisions of the Act of 1957 other than the order passed or proceedings recorded by an Additional Commissioner, a

Joint Commissioner, or a Deputy Commissioner under Sub-section (4C) of Section 14 of the Act of 1957. The Second proviso to Section 19(1), in substance enjoins deposit/payment of 12 1/2% of the difference of tax (as assessed by the assessing authority and the tax admitted by the appellant), as the condition precedent to the admission of an appeal.

Section 20(1) of the Act of 1957 confers a revisional power on the Commissioner of Commercial Taxes to suo motu call for and examine the records of any order or proceeding recorded by any authority, officer or person subordinate to it under the provisions of the Act of 1957 including an order passed or proceeding recorded in exercise of revisional jurisdiction by an Additional Commissioner, Joint Commissioner, Deputy Commissioner, Assistant Commissioner and Commercial Tax Officer under Sub-section (2) of Section 20, if such order or proceeding recorded is prejudicial to the interest of revenue; and empowers the Commissioner to initiate proceedings to revive, modify or set aside such order or proceeding and to pass such order in reference thereto as it thinks fit. Section 21 of the Act of 1957 deals with provisions relating to appeals to the Appellate Tribunal. Sub-section (1) enumerates an appellate remedy to a dealer objecting to an order passed or a proceeding recorded by any prescribed authority on appeal u/s 19, or by the Additional Commissioner, Joint Commissioner or Deputy Commissioner u/s 14 or under Sub-section (2) of Section 20.

The First proviso to Section 21(1) enjoins that no appeal against the order passed u/s 19 shall be admitted unless accompanied by proof of payment of 50% of the taxes as ordered by the appellate Dy. Commissioner u/s 19.

The Second proviso enjoins that no appeal against an order passed u/s 20(2) shall be admitted unless accompanied by proof of payment of the tax admitted to be due or any such installments thereof as might have become payable as the case may be, and 25% of the difference of the tax ordered by the reviewing authority u/s 20(2) and the tax admitted by the appellant.

The Third proviso to Sub-section (2) of Section 21 obligates the assessing authority to refund the amount of the deposited tax (of 12 1/2%, 25% or 50% of the difference of tax assessed by the assessing authority or revisional authority as the case may be and the tax admitted and paid by the appellant) with simple interest calculated @ 18% p.a. if the refund is not made within 60 days from the date of receipt of the order passed u/s 19 or 21 of the Act of 1957. The First, Second and Third provisos to Section 21(2) were added by Act 3 of 2002 w.e.f. 30.11.2001.

Section 33 enacts that the assessing authority or the licensing authority as the case may be, shall refund the tax or the license fee if any paid, provisionally by an assessee or licensee for any particular period if it is found to be in excess of the tax or the license fee payable by him for the said period, or on the option of the assessee or licensee to adjust such excess towards any tax or license fee due in

respect of any other period. Sections 33A to 33F were inserted by Act 16 of 1963 w.e.f. 1.8.1963. Section 33C empowers the assessing or licensing authority, if of the opinion that the grant of refund is likely to adversely affect the revenue, where an order giving rise to a refund to an assessee or licensee is the subject matter of an appeal or further proceeding or where any other proceedings under the Act of 1957 is pending, with the previous approval of the Dy. Commissioner, to withhold the refund till such time as the Dy. Commissioner may determine.

The provisions of Sections 33E and 33F deal with interest on delayed refund. Section 33E mandates that if the assessing authority or the licensing authority does not grant the refund within six months from the date on which the claim for refund is made by the assessee or the licensee u/s 33A, the State shall pay the assessee or licensee simple interest @ 12% p.a. on the amount directed to be refunded following the expiry of the period of six months aforesaid to the date of the order granting the refund. Section 33F enjoins that where a refund is due to the assessee or licensee in pursuance of an order referred to in Section 33B and the assessing or licensing authority does not grant the refund within a period of six months from the date of such order, the State shall pay the assessee or the licensee simple interest @ 12% p.a. on the amount of refund due from the date following the expiry of the period of six months aforesaid to the date on which the refund is granted.

Sub-section (2) of Section 33F deals with the refunds withheld under the provisions of Section 33C and enjoins the State Government to pay interest @ 12% p.a. on the amount of refund ultimately determined to be due as a result of the appeal or further proceedings for the period commencing after the expiry of six months from the date of the order referred to in Section 33C to the date the refund is granted.

The impugned order:

M/s Pulp N Pack Pvt. Ltd., Tadimalla are registered dealers and assesses on the rolls of the CTO, Nidadavolu. The assessment made by the CTO has been revised by the Deputy Commissioner in his reference second cited. Aggrieved by the revision orders, the dealer preferred appeal before the Sales Tax Appellate Tribunal, Visakhapatnam Bench, who allowed the appeal in its orders 3rd cited. The dealer paid a sum of Rs. 64,106-00 being 25% of the disputed tax as a statutory requirement for the appeal, and the sum has since been notified in refund notice in form C/IX 5th cited.

The appeal orders, issued by the Sales Tax Appellate Tribunal, Visakhapatnam have been challenged by the department as a TRC before the Hon'ble High Court of Andhra Pradesh. As the order giving rise to the refund has become the subject matter of appeal pending before the High Court of Andhra Pradesh, the Deputy Commissioner (CT), Eluru permitted the assessing authority to withhold the refund u/s 33-C of the APGST Act 1957.

As the order giving rise to refund became subject matter of appeal filed before the Hon"ble High Court, and as the grant of the refund is likely to adversely affect the revenue, the refund sum of Rs. 64,106-00 is hereby ordered to be withheld u/s 33-C of the APGST Act 1957 (read with Section 9(2) of the CST Act 1956) till the adjudication of the TRC by the Hon"ble High Court of Andhra Pradesh.

Sd/-

COMMERCIAL TAX OFFICER,
NIDADAVOLU

The deposits by the petitioner while preferring the several appeals before the STAT, Visakhapatnam Bench (at 25% of the disputed tax) are :

Assessment Year	APGST	CST
2001-02	79,042	3,96,927
2002-03	64,106	5,42,882
2003-04	69,723	6,47,005
2004-05	92,361	9,41,607

12. The total amount of pre-deposit under APGST and CST comes to Rs. 28,33,653/-.

Response of the Revenue:

The basic facts are admitted including that consequent on the orders of the STAT dated 18.02.2008 the 1st respondent passed the order dated 29.10.2008 for refund of the pre-deposit amounts.

Provisions of the 3rd proviso to Section 21(2) and of Section 33-C must be harmoniously construed and so construed the power to withhold the refund encompass refund of pre-deposit amounts. Since pre-deposits are with reference to a percentage of the disputed tax, the power to withhold the refund u/s 33-C is truly the power to withhold refund of a tax paid or part paid, as the case may be, by the assessee.

Supplementing the pleadings on behalf of the Revenue Sri Krishna Koundinya and Sri K. Raja Reddy learned Counsel would submit that as the adverse impact on the interest of revenue may arise in variegated, dynamic and complex raft of circumstances, differing from case to case, it is neither possible, pragmatic nor prudent that an order withholding refund (exercising the power u/s 33-C of the Act of 1957) could record reasons for exercising the power to withhold. Such a

requirement would unduly fetter the plenitude of discretion conferred u/s 33-C. The mere circumstance of pending of an appeal or further proceedings or any other proceedings under the Act, is sufficient to legitimize the exercise of discretion by the Assessing Authority to withhold the refund, echo the counsel for the Revenue.

Analysis of the issues:

(A) Whether the power to withhold refund conferred on an assessing or licensing authority u/s 33C of the Act of 1957, is limited to refund of tax and license fee and excludes refund of any amounts deposited by an assessee while preferring an appeal Under Sections 19 or 21 of the Act of 1957.

13. Section 9(2) of the Act of 1956 empowers the authorities under the Act of 1957 to exercise on behalf of the Government of India the powers to assess, collect or enforce payment of tax including any interest or penalty payable by a dealer under the Act of 1956, as if the tax, interest or penalty payable by such dealer is a tax, interest or penalty payable under the Act of 1957; and empowers the exercise of all or any of the powers available under the Act of 1957.

14. All the counsel have proceeded on the premise that the power to withhold refund (Under Section 33-C of the Act of 1957) extends to tax paid or amount deposited in respect of a liability under the Act of 1956 as well.

15. As noticed, while analyzing the relevant statutory provisions (supra), several provisions of the Act of 1957 enjoin deposit of amount as a condition precedent to preferring an appeal. Such deposit is enjoined under the second proviso to Section 19(1); and the first and second provisos to Section 21(2). The deposit enjoined by the second proviso to Section 19(1) or by the first and second provisos to Section 21(2), are specified as a percentage of the difference of tax assessed by the assessing authority and the tax admitted by the appellant, for the relevant assessment year [Section 19(1) second proviso]; as a specified percentage of the tax as ordered by the Appellate Deputy Commissioner u/s 19 [Section 21(2) first proviso]; and as a specified percentage of the difference of tax ordered by the revisional authority Under Sub-section (2) of Section 20 and the tax admitted by the appellant [second proviso to Section 21(2)].

16. In every case where the statutory provisions enjoin the requirement of a deposit as a condition precedent to the preferring of an appeal, whether u/s 19 or 21, the enjoined prescription to deposit is clearly with reference to the tax liability of a dealer.

17. Sri Viswanath, the learned Counsel for the petitioner would contend that Section 33 of the Act of 1957 enumerates the liability of the assessing authority or the licensing authority to refund the tax or license fee paid by an assessee or a licensee if found to be in excess of the tax or license fee payable for the relevant period and therefore the statutory provision empowering withholding of refund must be

construed ejusdem generis and as excluding refund of amounts (referred to by the petitioner as a pre-deposit), other than a tax or license fee. The contention in this behalf is elaborated by stating that the provisions of Sections 33A to 33F (which are inserted into the Act of 1957 by Act 16 of 1963 w.e.f 01.08.1963) must be construed in the context of the generic trajectory of Section 33 as originally enacted and on such construction the power to withhold a refund must exclude refund of the deposit which (it is contended), is neither a tax nor a license fee.

18. Section 33-C of the Act of 1957 reads as under:

33-C Power to withhold refund in certain cases: Where an order giving rise to a refund to an assessee or licensee is the subject matter of an appeal or further proceeding, or where any other proceeding under this Act is pending, and the assessing or the licensing authority is of the opinion that the grant of the refund is likely to adversely affect the revenue, the assessing or the licensing authority may, with the previous approval of the Deputy Commissioner, withhold the refund till such time as the Deputy Commissioner may determine.

19. The restrictive interpretation of Section 33-C of the Act of 1957, presented on behalf of the petitioner does not commend acceptance by this Court. As earlier analysed, the deposit is of a percentage of the tax determined to be due from the dealer on the basis of an order against which an appeal is preferred. While Section 33 enjoins that the Assessing or Licensing Authority as the case may be, shall refund the tax or license fee if any provisionally paid by an assessee or licensee in any particular period if found to be in excess of the tax or license fees payable for the said period or at the option of the assessee or licensee adjust such excess towards any tax or license fees due in respect of any other period; Section 33-C enacts a discretionary power in the assessing or licensing authority as the case may be, to withhold the refund, if of the opinion that the grant of refund is likely to adversely affect the revenue.

20. The deposit is neither in the nature of a court fee nor is an amount de hors the currently determined tax liability of the dealer. What is deposited is a part of the tax due at the time of such deposit, as assessed or determined by an authority and which assessment or order is the subject matter of an appeal by the dealer.

21. In support of the plea for a restrictive construction of the provisions of Section 33-C of the Act of 1957, Sri Viswanath, the learned Counsel for the petitioner contends:

(i) That the deposit required to be made; whether Under Sections 19 or 21 of the Act, is under a provision referable to the legislative field under Entry 65 of List-II, while the substantive power to tax is referable to the legislative field under Entry 54 of the said list; and

(ii) That while the tax paid by the dealer and collected by the State forms part of the Consolidated Fund of the State; the deposit made by a dealer and collected by the State as a condition precedent to filing an appeal is credited to the Public Fund of the State - vide Articles 266 and 284 of the Constitution, respectively.

The deposit is a distinct entity and does not comprise or partake the character of tax and thus falls outside the ambit of the power to withhold refund (of a tax or license fee), contends Sri Viswanath.

22. The above contention though creative and prima facie attractive, on analysis is without substance or force. As already analysed the deposit is a part of the tax liability of a dealer as assessed or determined by the specified authority Under Sections 19 or 20 of the Act of 1957 and against which order of assessment or determination an appeal is preferred. The power to tax is (under the legislative prescriptions in the Act of 1957) a legislative provision referable to the legislative field enumerated in Entry 54 of List-II. Entry 65 of this List has no application. Entry 65 of List-II enumerates the legislative field: jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List. Delineation of the powers, authority and jurisdiction to levy and collect tax; prescriptions of assessing, appellate and revisional authorities for the purpose; prescribing conditions as to deposit of amounts as a condition precedent to preferring an appeal or a revision, as the case may be; providing for penalties and other sanctions for transgression of the provisions; providing for payment of interest on delayed refunds; and empowering the withholding of refund, are several legislative measures (in the Act of 1957), integral to the legislative field enumerated in Entry 54. As Shah, J pointed out in *The Orient Paper Mills Ltd. v. The State of Orissa and Ors.* (1961) 12 STC 357: ... The power to legislate with respect to a tax comprehends the power to impose the tax, to prescribe machinery for collecting the tax, to designate the officers by whom the liability may be enforced and to prescribe the authority, obligations and indemnity of those officers. The diverse heads of legislation in the Schedule to the Constitution demarcate the periphery of legislative competence and include all matters which are ancillary or subsidiary to the primary head. Entry 65 enumerates a legislative field respecting conferral, withdrawal or amendment of jurisdiction and powers of all courts (except the Supreme Court) with respect to any of the matters in List-II. Conferral of a special appellate jurisdiction to the High Court (Under Sections 22 and 23 of the Act of 1957) are (illustratively) provisions referable to the exercise of the legislative field enumerated in Entry 65 of List-II. In any event even if the legislative prescription of a deposit as a condition precedent to preferring an appeal is a legislative exercise referable to Entry 65, such per se would not influence the construction of the contours of Section 33-C.

23. While Article 266(1) of the Constitution (Part XII) enacts inter alia that (subject to the provisions of Article 267, dealing with Contingency Fund), all revenues received by the Government of a State, all loans raised by that Government by the issue of

treasury bills, loans or ways and means advances and all moneys received by that Government in repayment of loans shall form one Consolidated Fund to be entitled "The Consolidated Fund of the State"; Sub-article (2) enjoins that all other public moneys received by or on behalf of Government of a State shall be credited to the Public Account of the State. Article 284 enacts that all moneys received by or deposited with (a) any officer employed in connection with the affairs of the Union or of a State in his capacity as such, other than revenues or public moneys raised or received by the Government of India or the Government of the State, as the case may be, and (b) any court within the territory of India to the credit of any cause, matter, account or persons, shall be paid into the public account of India or the public account of the State, as the case may be.

24. Article 266(3) enacts inter alia that no moneys out of the Consolidated Fund of India or the Consolidated Fund of a State shall be appropriated except in accordance with law and for the purposes and in the manner provided in the Constitution. Articles 198 - 207 (in Chapter III relating to State Legislation) of the Constitution set out the legislative procedure in respect of Money Bills. Article 204 sets out the procedure for introduction of a bill to provide for appropriation out of the Consolidated Fund of the State after grants are made by the Legislative Assembly as to the estimates as related to the expenditure charged upon the Consolidated Fund of the State. Articles 205 and 206 enact provisions relating to supplementary, additional or excess grants; and as regards votes on account, votes of credit and exceptional grant, respectively.

25. On a literal construction of the provisions of Article 284 it appears that all moneys other than revenues or public moneys received by or deposited with any officer employed in connection with the affairs of the State, in such capacity shall be paid into the Public Account of the State. If the moneys are revenues or public moneys as are referred to in Article 266(1) [viz., revenues received by the Government of a State, loans raised by that Government for the issue of treasury bills, loans or ways and means advances and moneys received by that Government in repayment of loans], such moneys will form part of the Consolidated Fund of the State and should not be paid into the Public Account of the State. It is only other moneys that are required to be paid into the Public Account of India. This is clear from the provisions of Article 266(2) as well. When it comes to moneys received by or deposited with any court to the credit of any cause, matter, account or person, such moneys irrespective of the nature or character of the moneys, are to be paid into the Public Account of India [Article 284(b)].

26. Article 267(2) enacts that the legislature of the State may by law establish a Contingency Fund in the nature of imprest to be entitled "The Contingency Fund of the State" into which shall be paid from time to time such sums as may be determined by such law and the said fund shall be placed at the disposal of the Governor of the State to enable advances to be made by him out of such Fund for

the purposes of meeting unforeseen expenditure pending authorization of such expenditure by the Legislature of the State by law Under Articles 205 or 206.

27. On an interactive analysis of the provisions of Articles 196 - 207, 266, 267 and 284 it is clear that drawals out of the Consolidated Fund of the State (except expenditure charged on the Consolidated Fund of the State) are subject to legislative oversight and appropriation either by way of appropriation bill; supplementary, additional or excess grant; or votes on account; votes of credit and exceptional grants. Even payments in the nature of an imprest into the Contingency Fund of the State are enjoined by Article 267 to be by law made by the legislature of the State. The legislative control enjoined by the relevant constitutional provisions referred to above, incorporate a measure of operational rigor for drawal of moneys from the Consolidated Fund of the State or the Contingency Fund of the State. These measures are for ensuring financial discipline. Article 284(a) enjoins payment into the Public account of the State only of those moneys other than revenues or public moneys raised or received by the Government of the State. Since the deposit by a dealer constitutes revenue (being the tax liability assessed or determined under the Act of 1956 or the Act of 1957, as the case may be) if the moneys are received or deposited with any officer employed in connection with the affairs of the Union or of a State, such deposit would form part of the Consolidated Fund of the State. Where however the deposit is with any court to the credit of any cause, matter, account or person, such deposit, even if it were a revenue raised by the Government of a State (as in the case of the deposit), shall be paid into the Public Account of India.

28. The constitutional intention appears to be to enable operational flexibility in respect of moneys deposited with any court so as to facilitate expeditious payment/refund of the deposit to the destination as determined by the court and to avoid the rigor of a legislative process for drawal of these moneys from the Consolidated Fund of the State.

29. In any event whether the deposit constitutes part of the Consolidated Fund of the State or the Public Account of the State, would neither determine the character of the deposit which, as already analysed represents a percentage of the determined tax liability of the dealer; nor would the custody of the deposit (whether in the Consolidated Fund or the Public Account of the State, as the case may be) influence the construction of the contours of Section 33-C of the Act of 1957.

30. On the above analysis, the power to withhold a refund (under Section 33-C of the Act of 1957) clearly includes the power to withhold the deposit made by a dealer Under Sections 19 or 21 of the Act. We hold accordingly on Issue (A).

(B) Whether the authority passing an order u/s 33C of the Act of 1957, withholding refund is required to record reasons and set out the facts and circumstances which constitute the basis for the formation of an opinion that the refund is likely to adversely affect the revenue.

31. The power u/s 33-C is a conditioned power, conditional upon the assessing authority forming the opinion that the grant of the refund is likely to adversely affect the revenue. The power conferred on the assessing authority is thus not an uncontoured power but is circumscribed by the requirement as to the formation of an opinion as to the adverse impact on the revenue. Since the power/ discretion conferred on the assessing authority is a public power, it must be exercised on an objective assessment of the relevant circumstances legislatively prescribed as adversely affecting the revenue. If the legislature intended that no grant of refund should be made whenever an appeal, a further proceedings or other proceedings under the Act is pending, there would have been a clear legislative prescription that no refund should/need be made pending an appeal or further proceedings.

32. The 3rd proviso to Section 21(2) of the Act of 1957 enjoins that the deposit be refunded with simple interest calculated @ 18% p.a. if the refund is not made within 60 days from the date of receipt of an order passed Under Sections 19 or 21.

33. Section 33-E provides that if the assessing authority does not grant the refund within 60 days from the date on which the claim for refund is made by the assessee u/s 33A (Section 33A provides that every claim for refund u/s 33, shall be made by the assessee in a form and verified as prescribed on or after the date on which the tax in respect of which a claim is made was directed to be refunded), the State Government shall pay the assessee simple interest @ 12% p.a. on the amount directed to be refunded, from the date following the expiry of the period of 6 months to the date of the order granting the refund.

34. Sub-section (1) of Section 33-F similarly enjoins a liability to pay interest in respect of a delayed refund due to the assessee pursuant to an order referred to in Section 33-B.

35. Sub-section (2) of Section 33-F enacts that where the refund is withheld under the provisions of Section 33C, the State Government shall pay interest @ 12% p.a. (on the amount of the refund ultimately determined to be due as a result of an appeal or further proceeding), for the period after the expiry of 6 months from the date of the order referred to in Section 33-C to the date the refund is granted.

36. From an interactive analysis of the provisions of the 3rd proviso to Sections 21(2), 33-C and 33-F(2) it is apparent: (a) that where no order withholding a refund is passed exercising power u/s 33C, simple interest @ 18% p.a. on the amount of deposit to be refunded shall have to be paid if refund of the deposit is not made within 60 days from the date of receipt of the order passed u/s 19 or 21; and (b) that where an order withholding a refund is passed u/s 33C and the amount of refund is ultimately determined to be due as a result of an order in an appeal or further proceeding, simple interest @ 12% p.a. shall become payable on the amount of refund determined to be due, if the same is paid after the expiry of 6 months from the date of the order referred to in Section 33-C to the date the refund is granted.

37. In the above circumstances an order u/s 33C withholding the refund does adversely impact the dealer. Not only is he deprived of a higher rate of interest payable by the State for delayed refund of the amounts deposited (at 12% as against 18% p.a.) but the period for which interest is payable is also postponed pejoratively to the dealer's interest i.e., after 60 days from the date of receipt of an order passed Under Sections 19 of 21 [vide the 3rd proviso to Section 21(2)]; as against the dealer's entitlement to only a lower percentage of interest (12% p.a.) and if the refund is withheld for a period beyond 6 months from the date of the order referred to in Section 33C [Section 33-F(2)].

38. Since Section 33-C confers a discretionary but not an absolute power to withhold refund and only on the formation of an opinion as to the adverse impact on revenue, the assessing authority must exercise discretion on relevant grounds and for germane reasons.

39. In India the parameters of judicial review of administrative discretion is substantially similar to analogous principles of English administrative law.

Expressions such as "may" and "it shall be lawful" are generally construed as permissive and not imperative. In England though the Second World Wartime and immediate post-war decisions indicate a judicial attitude towards strict literal interpretation of discretionary power, even involving powers enabling summary deprivation of personal liberty [*Liversidge v. Anderson* (1942) AC 206], there has since been a clear shift in the approach to judicial interpretation of discretionary powers. This shift influenced analogous judicial jurisdictions as well. In *Reade v. Smith* (1959) NZLR 996 a power vested in the Governor General to make such regulation as he "thinks necessary to secure the due administration" of an Education Act was held to be invalidly exercised in so far as his opinion as to the necessity for such a regulation was not reasonably tenable. In England in *Customs and Excise Commissioners v. Cure and Deeley Ltd.* (1962) QB 304 the powers of the Commissioner of Customs and Excise to make regulations for "any matter for which provision appears to them necessary for the purpose of giving effect" to the Act was not construed as constituting them as the sole judges and were in fact necessary for the purposes of the Act; and a regulation in which they gave themselves power to determine conclusively the amounts of tax payable, was held to be ultra vires. The Canadian Supreme Court in *Ronarelli v. Duplessis* (1959) SCR 120 observed "there is always a perspective within which a statute is intended to operate."

40. The 1968 English decision in *Padfield v. Minister of Agriculture, Fisheries and Food* (1968) AC 997 is a landmark decision. The Minister had refused to appoint a committee, as he was statutorily empowered to do at his discretion, to investigate complaints by members of the Milk Marketing Board that the majority of the Board had fixed milk prices in a way that was unduly unfavourable to the complaints. The House of Lords held that the Minister's discretion was not unfettered and that the reasons he had given for his refusal showed that he had acted ultra vires by taking

into account facts that were legally irrelevant by using his power in a way calculated to frustrate the policy of the Act. Four of their Lordships in *Padfield* (Reid, Hodson, Pearce and Upjohn, LJJ) further opined that even had the Minister given no reasons for his decision, the Court would not have been powerless to intervene; for once a *prima facie* case of misuse of power had been established, it would have been open to the court to infer that the Minister had acted unlawfully if he had declined to supply any justification at all for his decision.

41. As observed by Lord Upjohn in "*Padfield*", even though a statute confers an unfettered discretion upon a decision maker "the use of that adjective (unfettered), even in an Act of Parliament can do nothing to unfetter the control which the judiciary have over the executive, viz., that in exercising their powers the latter must act lawfully and that is a matter to be determined by looking at the Act and its scope and object in conferring a discretion upon the Minister rather than by the use of adjectives."

42. Even prerogative powers (which at an earlier point of time were not generally considered reviewable or at best reviewable on the narrowest terms - vide *R. v. Allen* (1862) 1 B & S 850; *de Freitas v. Benn* (1976) AC 239 are now considered not immune to review and on wider grounds- the majority of the Law Lords in *Council of Civil Service Unions v. The Minister for the Civil Services* (1985) AC 374, were of the opinion that the exercise of powers authorized by the prerogative may be reviewable when their exercise is open to the judicial review; it depends on the subject matter (per Scarman, Diplock and Roskill, L. JJ). The principle of review of prerogative powers was stated by Lord Scarman: the controlling factor in determining whether the exercise of prerogative power is subjected to judicial review is not its source, but its subject matter. In the same case Lord Diplock considered that a prerogative power may be subject to judicial review, if its exercise would have consequence for some person:

(a) by altering the rights or obligations of that person which are enforceable by or against him in private law; or (b) by depriving him of some benefit or advantage which either (i) he has in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment or (ii) he has received assurances from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.

43. If power granted for a particular purpose by the Statute, is exercised for a different purpose, that power has not been validly exercised. If the exercise of a discretionary power is influenced by considerations that cannot lawfully be taken into account or by the disregard of relevant considerations required to be taken into account, the Courts would hold that the power has not been validly exercised. The

interpretation of statutory purpose and of the relevancy of considerations are closely related; since the question in regard to the considerations taken into account in reaching a decision is normally whether that consideration is relevant to the statutory purpose. Where the statutory purpose is explicit, the power conferred, though discretionary, is a grant of discretion to be exercised within the locus of the permitted statutory purpose. Whether the exercise is consistent with the statutory purpose is an aspect falling within judicial review.

44. Despite initial reticence to propound as a general rule of law that reasons should be given for administrative decisions, English Courts have veered round to the view that such a requirement contributes to the development of administrative law. Donaldson, J put it succinctly when he observed in *Tramontana Armadona S.A. v. Atlantic Shipping Co., S.A.* (1978) 2 All. E.R. 870 having to give reasons concentrates the mind wonderfully. The advantages of a duty to give reasons has been considered in several decisions as (a) as having to provide an explanation for the basis of that decision is a salutary discipline for those who have to decide anything that adversely affects others; (b) as a principle of good administration; (c) as a principle which encourages a careful examination of the relevant issues, the elimination of extraneous considerations and consistency in decision making; (d) as a requirement which if implemented, provides guidance to others for structuring future decisions; (e) as a principle which protects the decision from unjustified challenges, because those adversely affected are more likely to accept a decision, if they know why it has been taken; and (f) as a requirement of basic fairness and respect for the individual, on the principle that those in authority over others should tell them why they are subjected to some liability or have been refused some benefit.

45. It is an intrinsic principle of administrative law, in India as well, that there is nothing like unfettered discretion immune to judicial review. In [Baldev Raj Chadha Vs. Union of India \(UOI\) and Others](#), Krishna Iyer, J emphasized absolute power is anathema under our constitutional order and naked and arbitrary exercise of power is bad in law. The Apex Court decision in [Suman Gupta and Others Vs. State of Jammu & Kashmir and Others](#), explicates the principle that the exercise of administrative power vested in a public authority must be structured with a system of controls, governed by both relevancy and reasons, relevancy in relation to the object which it seeks to serve and reason in regard to the manner in which it attempts to do so. An administrative power should be exercised within defined limits and in the reasonable discretion of the designated authority. The vesting of an absolute and uncontrolled power in an authority falls outside the Constitution altogether.

46. In *State of West Bengal v. Krishna Shaw* AIR 1990 SC 2205 the Supreme Court observed reasoned decision is not only for the purpose of showing that the citizen is receiving justice, but also a valid discipline for the Tribunal itself. Therefore,

statement of reasons is one of the essentials of justice.

47. In [Bharat Raja Vs. The Union of India \(UOI\) and Others](#), , the Supreme Court explained the position:

...The decisions of the tribunals in India are subject to the supervisory powers of the High Courts under Article 227 of the Constitution and of appellate powers of this Court under Article 136. It goes without saying that both the High Court and this Court are placed under a great disadvantage if no reasons are given and the revision is dismissed curtly by the use of the single word "rejected", or "dismissed". In such a case, this Court can probably exercise its appellate jurisdiction satisfactorily by examining the entire record of the case and after giving a hearing come to its conclusion on the merits of the appeal. This will certainly be a very unsatisfactory method of dealing with the appeal.

48. The principle (that recording of reasons is an integral component of a fair decision making process), was reiterated by a constitution Bench of the Supreme Court in [S.N. Mukherjee Vs. Union of India](#), .

49. While elaborate reasons as in the judgment of a Court may not be required, mere reproduction of the statutory language in the order would not make the order a "reasoned" one. Mechanical and stereotype reasons are not regarded as adequate vide *Imperial Chemical Industries v. Registrar of Trade Marks* AIR 1981 Delhi 190; *Union of India v. M.L. Capoor* AIR 1974 SC 87. As observed in *Union of India v. Essel Mining and Industries Limited* (2005) 6 SCC 675, it is not the number of pages but the sufficiency of reasons that is relevant. In *M.L. Capoor* (supra), Beg, J observed that the recording of reasons is practically the only remaining visible safeguard against possible injustice and arbitrariness. It was further observed reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject matter for a decision whether it is purely administrative or quasi judicial. They should reveal a rational nexus between the facts considered and the conclusions reached. Only in this way can opinions or decisions recorded be shown to be manifestly just and reasonable.

50. On behalf of the Revenue reliance is placed on the decision of a Division Bench of this Court in [Andhra Pradesh State Road Transport Corporation Vs. Commissioner of Income Tax](#), for the proposition that the grant of power to withhold a refund is legitimate. In our considered view this position is no longer res integra. In *Orient Paper Mills Ltd. v. The State of Orissa and Ors.* (1961) 12 STC 357, the validity of a sales tax legislation providing for withholding of refund of tax was upheld by the Constitution Bench of the Supreme Court as intra the legislative competence of the State Legislature under Entry 54 of List-II of Schedule-7 to the Constitution. This view was reiterated in *Burma Construction Company v. State of Orissa* (1961) 12 STC 816. In *APSRTC* (supra) the validity of Section 241 of the Income Tax Act, 1961 was

questioned as beyond the legislative competence of the State and as conferring a power to nullify the effect of the judgment of the High Court (the High Court had allowed a reference holding that the APSRTC is an institution meant for the advancement of the object of general public utility not involving the carrying on of any activity for profit and therefore this income is exempted from assessment to tax u/s 4(3)(i) of the old Act and Section 11 of the new Act). Repelling the challenge, the learned Division Bench of this Court held that the judgment of the High Court had not become final; an appeal thereagainst was filed by the Revenue u/s 261 of the Act before the Supreme Court; and that no nullifying of the judgment of the High Court was involved. Petitioner in this case does not impeach the vires of Section 33-C of the Act of 1957. It is contended that the exercise of power u/s 33-C requires the recording of reasons to show the basis for the opinion that the order of grant of refund would prejudicially affect the Revenue. The APSRTC judgment therefore affords no guidance on the issue that falls for consideration in this case.

51. Several judgments were cited at the bar to illustrate the several shades and nuances of judicial opinion on the construction of statutory provisions enabling withholding of refund. A learned Division Bench of this Court in *Sarvaraya Textiles Ltd. v. C.T.O., Kakinada* (1991) 82 STC 367, considered a writ seeking a direction to the Revenue to refund the tax collected towards Central Sales Tax for the years 1982-83 and 1983-84 on the ground that the assessment was set aside by the STAT in an appeal. The STAT had set aside the orders of assessment in respect of the aforesaid years and had remanded the matter to the Assessing Authority for fresh disposal in the light of the observations in its order. Consequent on the invalidation of the assessment orders, the refund became due. As the petitioner's representation for refund were not responded to, the writ petition was filed. After the institution of the writ petition, in exercise of powers u/s 33-C of the Act of 1957, an order was passed withholding refund on the ground that the refund would adversely affect the Revenue. Challenging the said order, another writ petition was filed and a common judgment rendered in both the writ petitions. It requires to be noticed that the principal contention on behalf of the petitioner was that the 2nd respondent should have passed the order after obtaining prior approval of the Deputy Commissioner concerned, whereas the 2nd respondent alone had issued the order, contrary to the provisions of Section 33-C. The record of the case however disclosed that the Assessing Authority had addressed a letter to the 2nd respondent containing an opinion that the grant of refund would adversely affect the Revenue. On the basis of the said letter, the 2nd respondent had permitted the Assessing Authority to withhold the refund. In the circumstances, the contention on behalf of the petitioner was found to be without a factual foundation. In *Sarvaraya* there was neither a consideration nor a discussion on whether reasons must be recorded while exercising the discretion u/s 33-C.

52. In *Gopi Bar v. Commercial Tax Officer, Palakol* (1997) 106 STC 188, the question for consideration was whether the High Court could direct refund of tax (in

implementation of the order of the appellate authority), after an order u/s 33-C of the Act of 1957 had been passed by the concerned authority. The petitioner had preferred an appeal to the Appellate Deputy Commissioner against an order of assessment for three years. The appellate authority allowed the appeal by an order dated 25-09-1995. The petitioner thereupon filed a writ petition seeking refund consequent on the appellate order. In the counter to the writ petition, it was asserted that the Joint Commissioner, Commercial Taxes had issued a notice on 24-06-1996 proposing to revive the order of the appellate authority and the Deputy Commissioner by an order dated 25-07-1996, exercising power u/s 33-C had ordered withholding of refund. The petitioner had contended that as the order (withholding the refund) was passed after institution of the writ petition, the order was invalid. Repelling the petitioner's contention this Court held that in view of the provisions of Section 33-C and an order having been passed in exercise of the said provision, no direction could be issued to direct the respondents to refund. Whether reasons need to be recorded in an order directing withholding of refund (in exercise of powers u/s 33-C) did not fall for consideration in Gopi Bar.

53. [Consolidated Petrotech Industries Ltd. Vs. Assistant Commissioner of Income Tax](#), a judgment of the Gujarat High Court considered the issue whether an order withholding refund is invalid for being a "non-speaking" order. An order u/s 143(1)(a) of the Income Tax Act, 1961 was passed computing the refund payable to the petitioner at Rs. 11,49,345-00. In the same order it was recorded: With the previous approval of and as determined by the Commissioner of Income Tax, Gujarat (Central), Ahmedabad, refund of Rs. 11,49,345 which is due to you as a result of the above order of the assessment year 1991-92 is withheld up to March 31, 1993, or the date of final order of the High Court for the years pending before it, whichever is earlier. Though the power to withhold a refund was available u/s 241 of the said Act, the petitioner contended that the power u/s 241 could not be resorted to merely on the ground that some proceedings are pending under the Act. Upholding the challenge, the Court held that mere fact that the order leading to refund was the subject matter of an appeal or further proceedings does not per se legitimize the exercise of power u/s 241; and the existence of such condition does not relieve the Assessing Officer from forming an opinion that the grant of refund is likely to adversely affect the Revenue. The Court held that the impugned order did not disclose that the Assessing Officer had formed such an opinion and had come to the conclusion that the refund was likely to adversely affect the Revenue; the order is a "non-speaking" order and no reasons are assigned for withholding the amount of refund. The Court accordingly quashed the order on the short ground that it failed to disclose reasons why the Assessing Officer believed that the refund was likely to adversely affect the Revenue.

54. The issue again fell for consideration by the Orissa High Court in a 1997 judgment in Gannon Dunkerley & Co., Ltd. v. Sales Tax Officer and Anr. (2003) 133 STC 534. Exercising power u/s 14-D of the Orissa Sales Tax Act 1947, the authority

withheld refund of tax. On facts, the appellate Commissioner of Commercial Tax had recorded that a second appeal had been preferred against an order in first appeal qua which the refund became due. The authority had recorded in the order: In view of the amount of security available with the department, in case the second appeal order goes in favour of the State it would be difficult for collection of sales tax dues now claimed towards refund by the dealer. Thus the nature of case attracts the provision for withholding of refund u/s 14-D of the Orissa Sales Tax Act. Accordingly on the basis of proposal of the A.C.C.T., Sambalpur range at page 2/c refund of Rs. 11,09,682 for the year 1992-93 under the Orissa Sales Tax Act in case of Gannon Dunkerly & Co., Ltd. SAIII-1685 may be withheld till the disposal of second appeal filed by the State. This order was challenged. In the counter affidavit the reasons for withholding the refund were stated in the following terms: The creditworthiness of the petitioner in the market is not known and it is not known whether there was chance of recovery of tax in case ultimately the cases are decided in favour of the Revenue. Further the details of movable and immovable property of the petitioner-dealer was not available to the Sales Tax Department. The Commissioner deemed fit to withhold the refund in exercise of the jurisdiction conferred u/s 14-D of the Orissa Sales Tax Act.

...The proposal was accompanied by a prescribed proforma containing details regarding the dealer. It has been mentioned therein that the dealer is not a permanent resident of the State of Orissa, that there is every possibility of the dealer shifting the place of business outside the State, his credibility in the market was not known, the security deposit available with the department is only Rs. 3,500 the details of movable and immovable property of the dealer was not available with the department and his business antecedents were such that it might not pay the dues, if called upon to do so subsequently. While quashing the order withholding the grant of refund and remitting the matter for de novo consideration by the authority, the Court observed: ...Opinion means something more than mere retailing of gossip or of hearsay; It means judgment or belief that is a belief or conviction resulting from what one thinks on a particular question. (See [Dolgobinda Paricha Vs. Nimai Charan Misra and Others](#),). It means "Judgment or belief based on grounds short of proof. (Concise Oxford English Dictionary). If a man is to form an opinion and his opinion is to govern, he must form it himself on such reasons and grounds as seem good to him. (Per Lord Bramwell in Allcroft v. London (Bishop) (1891) AC 666). Merely filing of appeal or pendency of further proceeding under the Act cannot per se be a ground for withholding refund. Additionally, the Commissioner has to be of the opinion that grant of refund is likely to adversely affect the Revenue.

6. It is fairly accepted by the learned Counsel for Revenue that petitioner is one of most reputed concerns of the country. His stand is that creditworthiness is different concept from reputation as a leading concern. It is also fairly accepted that the petitioner was not granted any opportunity to show its creditworthiness. It is true as

pointed by the learned Counsel for Revenue, a pre-decisional hearing is not warranted when the Commissioner proposes to act in terms of Section 14-D of the Act. But at the same time the desirability of it being in possession of all relevant materials which would weigh with him while taking a decision cannot be lost sight of. No attempt appears to have been taken to get the relevant information. When an opinion is formed about creditworthiness of a person relevant details have to be considered. In that case, the concerned party can be asked to provide details. Whether the details are complete and/or acceptable is another aspect. But without making any enquiry whatsoever about creditworthiness of a person, formation of an opinion cannot be a legitimate exercise.

55. In [SHREYANS INDUSTRIES LTD. Vs. COMMISSIONER OF INCOME TAX and Another](#), the petitioner had claimed refund consequent on an order of the Commissioner of Income Tax (Appeals). The Revenue had preferred an appeal to the Tribunal against the appellate order. Exercising power u/s 241 of the Income Tax Act 1961 (after obtaining the prior approval of the Commissioner of Income Tax), an order withholding the refund was passed. The High Court while quashing the impugned order observed that nothing was stated in the order of the Assessing Authority or in the order of the Commissioner of Income Tax justifying withholding of the refund. The record does not indicate why the interest of the Revenue is likely to be adversely affected in the event of refund being ordered. The Court also observed that even in the written statement it had not been suggested that the assessee is not paying the tax, or filing the returns regularly, or that it is in arrears of tax relating to any assessment year. From the written statement it is clear that the assessee was entitled to refund of a huge amount which had been ordered to be withheld under the impugned order. The High Court ruled that some facts are required to be brought on record to justify the withholding of the refund. The mere and only fact that the order is challenged either before the tribunal or the High Court, is no ground to withhold the refund or to reach a conclusion that the refund would adversely affect the Revenue. As no material was available on record which could justify the withholding of refund and as the assessee is not shown to be in default in the payment of income tax dues or even in the matter of filing of returns, the order recommending withholding of refund and the order granting approval for withholding the refund is unjustified.

56. On an analysis of the authorities and on first principle analysis as well, it is clear and we accordingly hold that exercise of power u/s 33-C of the Act of 1957 (ordering withholding of refund) (a) cannot be for the mere and only reason that an appeal or further or other proceedings under the Act is pending; and (b) the order must record reasons and must set out the relevant facts and circumstances constituting the basis for the formation of an opinion that the grant of refund would adversely affect the Revenue. We hold accordingly on this issue.

(C) What is the normative range of circumstances that could be considered as "adversely affect the revenue" within the meaning of the said expression (phrase) in Section 33C of the Act of 1957?

57. As briefly noticed during the analysis of issue(b), a conditioned power/discretion is conferred on the Assessing or Licensing authority u/s 33C of the Act of 1957. There are three conditions precedent to the exercise of the discretion. Firstly the order giving rise to a refund must be the subject matter of an appeal or further proceedings, or any other proceeding under the Act must be pending. Secondly, the assessing or licensing authority must obtain the prior approval of the Deputy Commissioner to withhold the refund and the time till which the refund may be withheld shall be determined by the Deputy Commissioner. These (two) conditions are in the nature of structural conditions; the nucleus of the first condition being a fact circumstance viz., that the order giving rise to a refund is subject matter of an appeal or further proceedings or any other proceedings under the Act is pending. The second condition is in the nature of a procedural prescription, legislatively intended to provide a check on possible arbitrary exercise of discretion by the assessing or licensing authority, as the case may be, by enjoining that the exercise of discretion (to withhold the refund) be preceded by the previous approval of a higher authority. The third condition precedent to the exercise of discretion is however a substantive condition viz., that the assessing or the licensing authority should form an opinion that the grant of the refund is likely to adversely affect the revenue.

58. In the light of the clear phraseology of Section 33C, the structural and procedural conditions precedent must exist in fact and be satisfied. The substantive condition shall equally be observed, for a valid exercise of the discretion to withhold the refund. It is axiomatic that no discretion u/s 33C may be exercised where the order giving rise to refund is not the subject matter of an appeal or further proceeding or where no other proceeding under the Act is pending. Similarly no such order may be passed by the assessing or licensing authority without obtaining the prior approval of the Deputy Commissioner. It is equally mandatory that the assessing or licensing authority should form an opinion that the grant of the refund is likely to adversely affect the revenue.

59. The legislative intent underlying the conferment of the discretion (to order withholding of refund) is clear from the architecture of Section 33C. If the legislative intent were that wherever an order giving rise to a refund is the subject matter of appeal or further proceedings or other proceedings under the Act is pending, the provision would have clearly enjoined that no refund need be made till the conclusion of the appeal or further proceeding. Such is not the legislative prescription.

60. The structural prescription that only when an order (giving rise to a refund) is the subject matter of an appeal or further proceedings or where any other

proceedings under the Act is pending, is to ensure legislative vitality to grant of power to withhold the refund. Article 265 of the Constitution enjoins that no tax shall be levied or collected except by authority of law. The taxing legislation, whether the Act of 1956 or the Act of 1957 together with the schedules thereunder and other executive instructions relating to exemptions or clarifications constitute the cornucopia of legislative authority for the levy and collection of tax, within the meaning of Article 265. Where a quasi judicial or judicial authority determines in appeal or further or other proceedings the liability of an assessee or licensee such determination constitutes the liability to tax of an assessee or licensee within the raft of legislative authority. The assessee or licensee cannot be subjected to a tax liability beyond such determination. Therefore any levy or collection or even the withholding of any excess amount (of or towards a tax) levied or collected from an assessee or licensee, beyond what has been determined in the appeal or further proceedings, would fall foul of Article 265. Refund of the excess amount levied and collected is in the circumstances a constitutional necessitus and any legislation enabling the withholding of the refund (finally determined as due), in the circumstances would be ultra vires the legislative power of the State.

61. Where however an order giving rise to a refund is the subject matter of an appeal or further proceeding or any other proceeding under the Act is pending, it would mean that the determination of the tax liability of an assessee or licensee by an appellate authority under the Act is not final but is in a measure tentative and subject to further consideration in such appeal or further proceedings whether before a Tribunal or a court. The structural condition that an order giving rise to a refund must be the subject matter of appeal or further proceedings or any pending other proceeding under the Act, is thus a prescription to ensure that the conferral of the discretion to withhold a refund is within constitutional limits.

62. The other structural condition as to the prior approval of a higher authority is, as already observed, legislatively intended to operate as a check on what would otherwise have been the sole discretion of the assessing authority. The provisions of Section 33C are in pari materia borrowed from Section 241 of the Income Tax Act 1961 (omitted by the Finance Act 2001, w.e.f. 1.1.2001). Another legislative intendment of the prescription (that the order must be preceded by the approval of higher authority), appears to be that the assessing authority ought not exclusively be conferred the discretion, as the exercise of such discretion in the event of the eventual success of the assessee would mulct the exchequer with the liability to interest for the period the refund is withheld.

63. On the above analysis the structural conditions precedent constitutes the factual and procedural condition subject to which alone the discretion may be exercised. On this analysis, on the mere fulfillment of the structural conditions precedent, the assessing authority is not absolved of the other statutory obligation to confirm to the substantive requirement of forming an opinion that the amount of refund is

likely to adversely affect the revenue. What constitutes a pejorative effect on the revenue is therefore the crucial issue.

64. Every refund where due consequent on an order giving rise to a refund cannot be considered as adversely affecting the revenue. The revenue, as we have already considered is entitled to levy and collect only such amount towards tax as legislatively authorized (Article 265). Refunding the excess amount of tax levied and collected in compliance with an order (in an appeal or further proceeding) cannot thus be considered as adversely affecting the revenue per se. Therefore not only must the structural conditions precedent (as indicated above) be fulfilled but the substantive condition as well.

65. Decisions of this Court in APSRTC, Sarvaraya Textiles Ltd., and Gopi Bar (19, 22 & 23 supra) afford no guidance on the conceptual contours of the phrase "adversely affect the revenue". What circumstances adversely affect the revenue was not in issue in these decisions and there was no pronouncement either, on this aspect.

66. The following decisions elucidate in some measure the legitimate range of considerations which could provide the basis for the formation of an opinion that an order of refund would adversely affect the revenue:

In Consolidated Petrotech Industries Ltd. (supra) the learned Bench of the Gujarat High Court (in a case arising u/s 241 of the Income Tax Act 1961) held that the existence of the structural conditions does not relieve the assessing authority from forming an opinion that the grant of refund is likely to adversely affect the revenue. As the order impugned did not indicate the formation of such an opinion and the order was a nonspeaking one, it was invalidated.

67. Arijit Pasayat, J. (as His Lordship then was) in Gannon Dunkerley & Co. Ltd. (supra) observed that an opinion means a judgment, belief or conviction resulting from what one thinks on a particular question. This should be passed on grounds short of proof. If one is to form an opinion and the opinion is to govern, he must form it himself on such reasons and grounds as seem good to him. Mere filing of an appeal or pendency of further proceedings under the Act can not per se be a ground for withholding a refund. The opinion that grant of refund is likely to adversely affect the revenue must be formed. In the facts of the case before it the Orissa Division Bench in Gannon Dunkerley & Co. Ltd. concluded that the revenue/assessing authority must be in possession of all relevant material which are relevant for taking a decision (to withhold the refund). Financial stability, creditworthiness are relevant considerations when considering the question whether grant of refund would adversely affect the revenue, observed the Bench.

68. In Shreyans Industries Ltd. (supra) the court observed that the singular fact that an order (giving rise to a refund) is under challenge either before the Tribunal or the High Court is not a ground to withhold the refund or to reach a conclusion that the refund would adversely affect the revenue. The court found that while a huge

amount was withheld on the mere ground of a pending appeal before the Tribunal, no material was available on record which justified withholding of the refund. The court observed that the petitioner was not found to be in default of any payment of income tax dues or even in the matter of filing of returns. Consequently the order withholding the refund was quashed.

69. From the cases that come before this Court involving exercise of the power u/s 33C of the Act of 1957, there is apparent, as in this batch of cases, a mechanical approach to the exercise of the structured grant of discretionary power. Often, an order withholding the refund merely reproduces the statutory phrase that grant of refund would adversely affect the revenue.

70. Different assessing authorities, whether exercising discretion under the Act of 1957 or in respect of the Act of 1956 pass an order without adverting to any fact or circumstance constituting the basis for the formation of the opinion that the refund would adversely affect the revenue. No norms or principles could even be culled out from the several orders, as to the basis for the formation of an opinion. The process followed for the exercise of the discretion/ in the circumstances becomes arbitrary and wholly subjective.

71. The assessment and the formation of an opinion as to whether the grant of refund is adverse to the interest of revenue involves a complex range of factors and circumstances. These must be examined and evaluated in each case by the assessing authority and the order u/s 33C must record reasons in justification and must disclose a rational assessment of the facts and circumstances on the basis of which the opinion is formed. Only in this way and following such procedure would the assessing authority discipline his jurisdiction and exercise this grant of public power in a rational and fair manner.

72. In our considered view it would be appropriate for the State Government or the Commissioner to spell out guidelines to contour the exercise of discretion for the exercise u/s 33C, indicating therein the range of conditions and circumstances the existence of which would constitute relevant factors for the exercise of discretion u/s 33C. From the guidance available from the precedents *Gannon Dunkerley & Co. Ltd.*, *Shreyans Industries Ltd* (25 & 26 supra) and on the analysis of the constitutional and statutory position considered supra, we consider it appropriate to indicate some of the circumstances which are relevant and germane for a valid exercise of the discretion to withhold refund u/s 33C, as under:

(A) An order withholding a refund cannot be passed unless the order giving rise to a refund is the subject matter of an appeal or further proceedings or other proceedings under the Act are pending thereagainst;

(B) The fact that an order giving rise to a refund is the subject matter of an appeal or further proceeding or other proceedings under the Act are pending, is per se and by itself a justification for the exercise of power u/s 33C;

(C) The amount involved in the refund by itself is not a ground for withholding refund; and

(D) The track record, financial stability and creditworthiness of the assessee taken together with the amount involved for the refund; whether an interplay of the above factors rationally posit an inference that if the refund would be granted it would be difficult for the revenue to recover the amounts, in the event of the State succeeding in an appeal or further proceedings (instituted against an order giving rise to a refund); due consideration of the fact that in the event of the assessee's success in the appeal or further proceedings preferred by the Revenue, the State would be mulcted with an avoidable interest liability; the fact that withholding of the refund would also have an adverse economic impact on the business of the assessee, are among the relevant circumstances which would constitute an adverse affect on the revenue.

73. We have merely indicated some of the circumstances which we considered germane to the lawful formation of an opinion that grant of refund would adversely affect the revenue. It is for the appropriate coordinating authority, the State or the Commissioner as the case may be, to issue a set of guidelines so as to bring about a conceptual uniformity in the exercise of discretion (by various assessing or licensing authorities) to withhold the refund, u/s 33C of the Act of 1957.

74. We place on record our appreciation and gratitude to Sri S.R. Ashok, the learned Senior Advocate and Sri Ravi S, learned Advocate for assisting this Court. Sri S.R.R. Viswanath, the learned Counsel for the petitioner, Sri K.Raji Reddy, the learned Special Standing Counsel for Commercial Taxes who appeared for the respondents in this batch of cases and Sri Krishna Koundinya, the learned Counsel who also assisted this Court on invitation have presented a balanced and comprehensive raft of arguments. We record our appreciation to these counsel.

75. Coming to the facts of the present case, none of the orders impugned in this batch of writ petitions record any reasons whatsoever nor set out any facts or circumstances for recording that the grant of refund is likely to adversely affect the revenue. These orders cannot therefore be sustained. Consequently the several orders of the 1st respondent, dated 01-11-2008, impugned in this batch of writ petitions, are set aside.

76. The writ petitions are allowed as above. There shall however be no order as to costs.