

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CIVIL APPLICATION NO. 5357 of 2019****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR.JUSTICE J.B.PARDIWALA****and****HONOURABLE MR.JUSTICE A.C. RAO**

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2	To be referred to the Reporter or not ?	YES
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

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MICROMAX INFORMATICS LIMITED

Versus

STATE OF GUJARAT

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Appearance:

MS ANUSURA, LD. COUNSEL WITH ADITYA A GUPTA(7875) for the
Petitioner(s) No. 1

MOHIT A GUPTA(8967) for the Petitioner(s) No. 1

MR AR GUPTA(1262) for the Petitioner(s) No. 1

MS MAITHILI MEHTA, AGP (1) for the Respondent(s) No. 1,2,3,4

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CORAM: HONOURABLE MR.JUSTICE J.B.PARDIWALA

and

HONOURABLE MR.JUSTICE A.C. RAO

Date : 07/08/2019

ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE J.B.PARDIWALA)

1. By this writ-application under Article 226 of the Constitution of India, the writ-applicant, a company duly registered under the provisions of the Companies Act 2013 has prayed for the following reliefs:-

18(A) Be pleased to issue a writ of mandamus or any other writ, order or direction to the Respondents to refund forthwith the disputed amount of tax i.e.1,49,27,723/- (One Crore Forty-Nine Lakhs Twenty-Seven Thousand Seven Hundred and Twenty Three rupees) appropriated by the Respondents through coercive action under Section 44 of the GVAT Act in terms of notice annexed at Annexure D to this petition to the petitioner.

(B) Be pleased to issue a writ of mandamus or any other writ, order or direction to the Respondents to refund forthwith the disputed amount of tax i.e.1,49,27,723/- (One Crore Forty-Nine Lakhs Twenty-Seven Thousand Seven Hundred and Twenty Three rupees), appropriated by the Respondents through coercive action under Section 44 of the GVAT Act in terms of notice annexed at Annexure D to this petition to the petitioner, as an ad-interim relief pending disposal of this Special Civil Application;

(BB) Be pleased to grant interest at the rate of 12% per annum along with the refunded amount from the date of illegal recovery done by the Respondents, i.e., from 15.02.2019 till the date of refund in the interest of justice and to further award costs of Rs.1 lakh in favour of the petitioner in the interest of justice.

(C) Be pleased to declare the recovery proceedings under Section 44 of the GVAT Act, 2002 by the Respondents pending stay application filed by the petitioner as being illegal, null & void ab-initio, without the authority of law, without jurisdiction and quash the recovery notice annexed at Annexure-D of this application.

(D) Be pleased to restrain the Respondents from taking any further steps with respect to the assets of the petitioner pending the adjudication of appeal filed by the petitioner before Respondent No.2 in terms of the stay order granted by the Respondent No.2 annexed at Annexure-J with this application.

(E) Be pleased to pass such other and further orders, which may be deemed fit in the interest of justice.

2. The case of the writ-applicant in its own words as pleaded in the

writ-application is as under:-

2.1 That the petitioner herein, Micromax Informatics Limited is an Indian consumer electronics company, duly registered under the provisions of the Companies Act, 2013, with its local office at C/o. Neeta Enterprises, T-30-31, Tirupati Estate, Opp. Ekta Hotel, Aslali Bye Pass Aslali, Ahmedabad 382427. It has its corporate office at Plot No.288A, Near Audi Service Center, Phase-IV, Sector 18, Udyog Vihar, Gurgaon – 122016, Haryana and is a registered dealer under the provisions of Gujarat Value Added Tax Act, 2003 (hereinafter, “GVAT Act”) and is hence entitled to the fundamental rights and legal rights enshrined under the Constitution of India and various statutes.

2.2 That the Respondent No.1 is the State of Gujarat through the office of Commissioner of Sales Tax; the Respondent No.2 is the Joint Tax Commissioner (Appeals), the Respondent No.3 is the Deputy Commissioner (Sales Tax) and Respondent No.4 is Commercial Tax Officer, Ghatak. All Respondents are authorities under the GVAT Act in accordance with the laws of India and have their offices at the address mentioned in the cause title hereinabove.

2.3 That the present writ petition has been filed aggrieved by the coercive action taken by the Respondents under Section 44 of the Gujarat Value Added Tax Act against the petitioner, whereby a coercive recovery of Rs.1,49,27,723/- [One Crore Forty Nine Lakh Twenty Seven Thousand Seven Hundred and Twenty Three only rupees] has been made by attaching the petitioner's bank account in lieu of the disputed VAT demand arising out of an Assessment Order dated 30.10.2018, which is a matter of challenge before Respondent No.2. The action by the Respondents is illegal

inasmuch as the coercive recovery has been made, while the appeal and stay application with respect to the said demand were pending adjudication before Respondent No.2.

2.4 That on 14.03.2017, the petitioner received a notice under Section 34 of the GVAT Act for audit assessment. The notice did not specify the grounds of inquiry. The petitioner accordingly produced the books of accounts, sales invoices, credit and debit notes related to FY 2014-15.

2.5 That on 30.10.2018, a non-speaking assessment order was passed by the Respondent No.3 i.e. Deputy Commissioner of State Tax (Corporate-2) Division-I, Ahmedabad (hereinafter referred to as the "Assessing Officer") under Section 34(1) of the Gujarat Value Added Tax Act, 2003 ("GVAT" Act) whereby the Assessing Officer wrongly assessed the payable tax due against the appellant for the FY 2014-15 and directed the appellant to pay a sum of Rs.1,49,27,723/- [One Crore Forty Nine Lakh Twenty Seven Thousand Seven Hundred and Twenty Three rupees] inclusive of the interest.

2.6 That the petitioner filed an appeal under Section 73 of the GVAT Act, 2003 r/w Rule 54 along with stay application against the assessment order dated 30.10.2018 before Respondent No.2 on 21.01.2019 (hereinafter referred to as "Appeal").

2.7 The assessment order has been challenged inter alia as being in violation of natural justice, as it was issued without issuing a proper and detailed show cause notice prior to the assessment. Further, the assessment order is a non-speaking order, inasmuch as it does not disclose the basis for excess demand in the order. It is most pertinent to mention that the

impugned order discloses no basis whatsoever for demand raised therein. The petitioner filed the pending Appeal based on the information gathered from the annexures received with the impugned order and inquiries made.

2.8 From the documents annexed with the assessment order, it seems that the assessment has been done without accounting for adjustment in sales made in lieu of the goods which were returned by the purchasing dealers of the Appellant and tax benefit worth INR 7,858,080/- has been disallowed on that account. Further some adjustment (INR 365,776) has been disallowed due undisclosed reasons. The petitioner has produced credit notes and corresponding debit notes as proof of the aforesaid sales return.

2.9 The Appeal alongwith the application was fixed for hearing on 29.01.2019. However, the petitioner's counsel was informed that due to some internal notification, all the matters related to appeal before VAT Commissioner were to be transferred before the GST Commissioner. For this reason, the matter was not taken up for hearing on 29.01.2019 and the petitioner's counsel was informed that the next date will be intimated in due course.

2.10 That in the meanwhile, on 25.01.2019, the petitioner's bank received a notice under Section 44 of the GVAT Act from Respondent No.3, Assistant Commissioner of Sales Tax, Gujarat demanding the release of disputed amount (hereinafter referred to as the "Recovery Notice"). It is most pertinent to mention here, that no copy of the said notice was ever served on the petitioner. The petitioner learned about the said notice through its bank, Kotak Mahindra, when they served a notice on the petitioner, received on 04.02.2019, to inquire whether there was a stay order on recovery.

2.11 That on 05.02.2019, the petitioner responded to the Bank's notice by intimating them about the pendency of stay application and appeal and, requesting them to not release the amount in light of settled position of law that no coercive action for recovery can be taken during the pendency of stay application. A response on the same lines was also served on Respondent No.3. It is humbly submitted that the authorities were duly informed about the pendency of the stay application on 05.02.2019.

2.12 Thereafter, the petitioner's counsel approached Respondent No.2 before whom the appeal was pending, and informed them about the recovery notice. That Respondent No.2 was requested to hear and dispose-off the stay applications at the earliest. That the Respondent No.2 on 07.02.2019, directed the Petitioner to pay 20% of the disputed tax within a week as pre-deposit and pre-condition to grant of stay and assured a stay order on fulfillment of the said condition. The said direction was recorded in the "Rojkam" maintained by Respondent No.2.

2.13 The petitioner's counsel simultaneously gave a representation to recovery officer, i.e. Respondent No.4, i.e. the Commercial Tax Officer at Ghatak, to not undertake any coercive action in light of pendency of the stay application and the direction given by Respondent No.2, along with the proof of filing of appeal and stay application.

2.14 That on 08.02.2019, the petitioner made a payment of 20% of the disputed tax amount, i.e.Rs.16,44,767/- in terms of the directions dated 07.02.2019. However, there was some confusion as to whether 20% of the interest amount was to be paid or not, as a copy of the direction dated 07.02.2019 was not provided to the Petitioner by Respondent No.2. The

petitioner's counsel informed the factum of payment to Respondent No.2 vide a representation and obtained clarification regarding the rest of the amount. Upon obtaining clarification 12.02.2019, the petitioner paid the rest of the 20% amount i.e.Rs.13,40,777/- on 14.02.2019.

2.15 That, in the meanwhile, to the utter shock of the petitioner, the Respondent No.1 coerced the Bank to release a demand draft to the tune of Rs.1,49,27,723/- [One Crore Forty Nine Lakh Twenty Seven Thousand Seven Hundred and Twenty Three rupees], i.e.the entire disputed demand and encashed the same on 15.02.2019 vide DD No.ING150219007, without any advance notice to the petitioner.

2.16 That the petitioner's counsel brought this to the notice of Respondent No.2 who passed an order of stay on recovery operative until 31.05.2019 on 18.02.2019. The Respondent No.2 addressed this order to Respondent No.4 as well.

2.17 That the petitioner's counsel gave filed applications for refund of the amount recovered through coercive action on 18.02.2019. However, no response to the said application has been received by the petitioner. In the meanwhile, the Respondent No.2 has informed the petitioner that he is not in a position to pass an order of refund pending disposal of the appeal. It is pertinent to note that the petitioner has not been provided with a copy of the daily orders of "rojkam", despite specific requests with respect to the same.

3. Thus, the picture that emerges from the materials on record is that the company received a notice dated 14/03/2017 under Section 34 of the GVAT Act for the audit assessment. On 30/10/2018 the assessment

order came to be passed by the respondent no.3 herein i.e.the Deputy Commissioner of State Tax (Corporate-2), Division-I, Ahmedabad under Section 34(1) of the Gujarat Value Added Tax Act, 2003 whereby, the Assessing Officer assessed the payable tax due against the company for the F.Y.2014-15 and directed the company to pay a sum of Rs.1,49,27,723/- [Rupees One Crore Forty Nine Lakh Twenty Seven Thousand Seven Hundred and Twenty Three only] inclusive of the interest. The company preferred an appeal under Section 73 of the Act 2003 read with Rule 54 alongwith the application for stay against the assessment order dated 30/10/2018.

4. It appears that on 25/01/2019, the banker of the company received a notice under Section 44 of the Act from the respondent no.3 demanding the release of the amount referred to above. It is not in dispute that no copy of the said notice was ever served on the company and the company was not even aware regarding such notice. The appeal preferred by the company alongwith the stay application was fixed for hearing on 29/01/2019. However, on that day, the matter was not taken up for hearing. The company informed its bank on 05/02/2019 about the pendency of the appeal and the stay application and also, requested not to release the amount.

5. It appears that thereafter, the appellate authority passed an order dated 07/02/2019 directing the company to deposit 20% of the disputed tax within a week as pre-deposit and pre-condition to grant of stay.

6. It is not in dispute that the amount of Rs.29,85,544/- as a pre-deposit came to be deposited constituting 20% of the disputed amount.

7. Despite deposit of the 20% of the amount towards the pre-deposit

as ordered by the appellate authority, the respondent no.1 coerced the bank to release a demand draft to the tune of Rs.1,49,27,723/- [Rupees One Crore Forty Nine Lakh Twenty Seven Thousand Seven Hundred and Twenty Three only] i.e. the entire disputed amount and encashed the same on 15/02/2019 vide D.D. No.ING150219007 without any advance notice to the company.

8. The position, as on date, is that the respondent no.1 is holding an amount of Rs.1,49,27,723/- as well as the amount of Rs.29,85,544/- [20% pre-deposit].

9. In such circumstances, the writ-applicant prays that as the amount of Rs.29,85,544/- has been deposited as ordered by the appellate authority, the amount of Rs.1,49,27,723/- should be refunded by the respondent no.1 with interest at the rate of 12% p.a.

10. Having heard the learned counsel appearing for the parties and having gone through the materials on record, we are of the view that the action on the part of the concerned authorities could be termed as absolutely high-handed and arbitrary. The facts of this case speak for themselves. In the course of the hearing of this matter, the Officer assisting the learned AGP went to the extent of even making a statement that the amount of Rs.1,49,27,723/- is not to be recovered from the writ-applicant. He conceded to the fact that while determining this amount, there is an error. He also conceded to the fact that amount of Rs.75 lakh and odd out of Rs.1,49,27,723/- is only to be taxed.

11. In the wake of such statement being made by the concerned Officer assisting the learned AGP, following order came to be passed by this Court dated 31/07/2019.

This matter was last notified on 17th July, 2019. On that day, the concerned officer was personally present in the Court. The concerned officer made a statement that the department has already undertaken the necessary process for the refund of the amount of Rs.1,07,98,892/-. The statement was also made that this particular amount shall be refunded by 31st July, 2019. There are many larger issues involved in this writ application. However, as there is no dispute with regard to the amount, referred to above, it was expected that this amount, at least, should be refunded.

Post this matter on 7th August, 2019 in the first five matters. The officer concerned shall personally remain present on 7th August, 2019.

We expect that by 7th August, 2019, at least, the amount, referred to above, is refunded.

Direct service is permitted.

12. As on date also, the respondent no.1 is ready and willing to refund only an amount of Rs.1,07,98,892/-. It still wants to hold on to the entire amount Plus the amount deposited by the writ-applicant towards 20% of the pre-deposit as ordered by the appellate authority.

13. We remind the respondents of the two decisions of this Court; – First, in the case of **Automark Industries (I) Ltd. Vs. State of Gujarat and Ors. (Special Civil Application No.13641 of 2015)**, wherein this Court observed as under:-

“The fourth respondent is required to keep in mind the fact that the petitioner has preferred appeals before the first appellate authority and that the stay applications are pending. That if the stay applications are allowed or partly allowed, the petitioner would be required to deposit only a part of the demand covered under the notice or may be even granted complete unconditional stay. Under the circumstances, it is expected of the fourth respondent to stay his hands till the stay application of the petitioner is decided, unless the stay application is not decided on account of default on the part of the petitioner or it is found that the petitioner is unnecessarily delaying the hearing of the stay application. However, in the absence of any exceptional circumstances, there is no warrant for the respondent authorities to proceed to initiate coercive recovery in exercise of powers under section

44 of the Act by attaching the bank accounts of the petitioner.”

“In the opinion of this court, the conduct of the fourth respondent in attaching the bank accounts under section 44 of the Act in the facts and circumstances of the case was not warranted when the appeals preferred by the petitioner together with the stay applications were pending consideration before the first appellate authority.”

14. The Second decision is of the Andhra Pradesh Court in the case of ***Anab-e-Shahi Wines and Distilleries Private Limited Vs. Appellate Deputy Commissioner, Secunderabad Division, Nampally, Hyderabad 21 APSTJ 98 AND Katuri Medical College and Hospital Vs. Commercial Tax Officer & Others, 62 VST 185 (AP)***, wherein the Court observed as under:-

“The basis of the principle in Anab-E-Shahi Wines case [1995] 98 STC 386 (AP); 21 APSTJ 98, is that if recoveries of disputed tax or penalty are made where stay application is pending before the appellate authorities, the appeal itself would be rendered infructuous and that the assessee who is aggrieved by an order of assessment has been given a statutory right of appeal which cannot be rendered infructuous by being forced to pay the disputed tax or penalty pending the appeal.”

15. We were inclined to take a very strict view of the matter. This is not the way and the manner to recover tax. The department should not get so-much desperate for the revenue. The revenue is to be collected in accordance with law. The action at the end of the authorities in the present case is nothing short of extortion.

16. In such circumstances referred to above, we direct the respondents to refund the amount of Rs.1,49,27,723/- [Rupees One Crore Forty Nine Lakh Twenty Seven Thousand Seven Hundred and Twenty Three only] with interest at the rate of 6% p.a. from the date of 15/02/2019.

17. At this stage, the learned AGP submitted that the interest may not

be awarded and the Officers concerned tender their apology for what has been done in the present matter.

18. When interest is awarded by the Court, our normal feeling is that it is so awarded by way of penalty or punishment. But interest in all cases is not granted by way of penalty or punishment. In this regard, reference may be made to the decision of the Supreme Court in the case of *Alok Shanker Pandey Vs. Union of India, 2007 AIR (SC) 1198*, wherein the concept of grant of interest has been explained in the following manner:

“It may be mentioned that there is misconception about interest. Interest is not a penalty or punishment at all, but it is the normal accretion on capital. For example if A had to pay B a certain amount, say ten years ago, but he offers that amount to him today, then he has pocketed the interest on the principal amount. Had A paid that amount to B ten years ago, B would have invested that amount somewhere and earned interest thereon, but instead of that A has kept that amount with himself and earned interest on it for this period. Hence equity demands that A should not only pay back the principal but also interest thereon to B.”

19. The amount of Rs.1,49,27,723/- [Rupees One Crore Forty Nine Lakh Twenty Seven Thousand Seven Hundred and Twenty Three only] with interest at the rate of 6% p.a. from the date of 15/02/2019 shall be refunded to the writ-applicant within a period of One week from today without fail.

20. The petition is disposed of accordingly.

(J. B. PARDIWALA, J)

(A. C. RAO, J)

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