

Under protest, deposits are not lawful levy; retention thereof by revenue is without the authority of law – Bombay HC

4 December 2023



Summary

The Bombay High Court (HC) has held that the amount deposited under protest by the petitioner would not partake the character of a lawful levy, and thus, retention of such amounts by the department is without authority of law. The HC noted that the department rejected the refund claim on the premise that a similar issue pertaining to the taxability of interchange income was pending before the Supreme Court (SC) in the case of Citibank. However, the HC stated that this is not a valid reason adopted by the authorities as such retention is without any authority of law and is violative of provisions of Article 265 of the Constitution. Accordingly, the HC has set aside the order rejecting the refund and allowed a refund of the amount deposited under protest by the petitioner, along with interest.

Facts of the case

- An audit was done on the Hongkong and Shanghai Banking Corporation Ltd (the petitioner) for the period from March 2007 to April 2012, pursuant to which objections were raised for non-payment of service tax on the interchange income earned during the said period.
- In furtherance to the above, no demand was raised by the department, but the petitioner voluntarily made a deposit of an amount of INR 56,19,84,075/- under protest.
- The final Audit Report was issued, but a Show Cause Notice (SCN) was not issued by the department for a period of approximately 11 years.
- Accordingly, the petitioner had taken up the issue with the department and had made requests for a refund of the subject amount as deposited. As no action was taken by the department and/or as the department continued to retain the amounts, the petitioner filed an 'application for refund' of the said amount along with interest.
- Thereafter, an order-in-original (OIO) was passed, rejecting the refund application.
- Aggrieved by the same, the petitioner filed an appeal before the appellate authority (AA). The AA set aside the earlier order and remanded the matter back to check the eligibility of the petitioner for a refund.
- Pertinently, during the intervening period, the issue of leviability of service tax on interchange income was under consideration before the SC in the case of Citibank, wherein separate decisions were being given by the different judges; therefore, the judgment was reserved with a larger bench.
- Considering the above, the Assistant Commissioner passed an impugned order dated 19 June 2023, rejecting the refund claim. Thereafter, the petitioner filed the present writ before the Bombay HC.

Petitioner's contentions:

- The petitioner contended that the amount was deposited only in good faith, and it had not accepted the department's view to levy tax on the interchange income in the event of any prospective demand in the future.
- The petitioner also contended that the reliance placed by the department upon the SC's decision in the case of Citibank was not valid in the present case because no SCN was issued by the department.

- Therefore, the petitioner submitted that the retention of the amounts by the department was without any authority of law and retention of the amount under protest leads to a violation of the provisions of Article 265 and Article 14 of the Constitution of India.

Respondent's contentions:

- The respondent contended that the right remedy before the petitioner was to file an appeal before the commissioner (appeals) against the order passed by the AA.
- The respondent placed its reliance on the judgment of the Apex Court in the case of Citibank, wherein a split verdict was delivered by the judges on the taxability issue of interchange income. Consequently, the judgment was pending a final verdict with the larger bench.
- Therefore, the department contended that the petitioner's demand for a refund was not sustainable, as the case with a similar matter was pending before the SC.

Bombay HC observations and judgement [Writ Petition (L) No. 24184 of 2023; Order dated 08 November 2023]:

- **Amount deposited under protest cannot partake the nature of tax or duty:** The petitioner had deposited the amount on the basis of the audit objection and on a fortuitous circumstance that the petitioner may face a levy on the interchange income. However, this would not *ipso facto* mean that any amount deposited under protest would partake the character of a lawful levy so as to bring about a legal consequence of the appropriation of amounts so deposited as a levy.
- **Department had no authority in law to retain the amount deposited under protest:** The HC noted that the impugned order was passed based on the premise that the issue similar to the present case pertaining to taxability of interchange income was reserved by the larger bench of the SC in case of Citibank. However, this was not a valid reason adopted by the authorities because the judgement of the SC was not applicable due to the difference in factual background. The present case was of retention without any authority of law as no SCN was issued or demand was raised by the department for a period of approximately 11 years. The department had clearly failed in setting into motion the provisions of law to raise any levy to collect service tax on the transaction in question.
- **Impugned order passed for rejecting the refund claim is violative of Article 265:** The HC emphasised that as per Article 265, no tax shall be levied or collected except by authority of law and noted that it is the obligation of the department to demonstrate that it had authority in law to withhold the amounts deposited by the petitioner. However, in the present case, the department had not raised any demand. Therefore, the HC held that the order passed was without authority of law and was violative of Article 265 of the Constitution.
- **Settled position under law to allow the refund if the department does not have the authority in law to retain such amount:** The HC relied on the judgement of the Bombay HC in the case of Grasim Industries Ltd., wherein it was held that 'once amounts were deposited by the petitioner and were retained by the department without the authority in law, the claim of the

petitioner for refund could not have been denied.'

- **The impugned order passed was set aside, and a refund was allowed:** The HC also relied on the judgement of the SC in the case of Kanhaiya Lal Makund Lal Saraf, wherein it was held that 'once it was established that the payment of tax has been made by the party under a mistake of law, the party is entitled to recover the same and the party receiving the same was bound to repay or return it and there was no question of any estoppel being applicable against the party demanding such payment.' Therefore, the HC in the present case held that the department had no authority to retain any amount and retaining such amount would lead to an unjust enrichment. Thus, the HC directed a refund of retained amounts along with interest to the petitioner.

Our comments

It is well settled that when any amount deposited by the assessee was retained by the department without the authority in law, the claim of the assessee for a refund cannot be denied.

A similar decision was made by the Bombay HC in the case of Grasim Industries Ltd. Even recently, the Karnataka HC, in the case of Bundl Technologies Pvt. Ltd., had held that the department could not retain the amount collected during investigations without issuing a Show Cause Notice and allowed a refund.

This is a welcome ruling by the Bombay HC and shall set precedence in similar matters. The taxpayers whose refund applications were initially rejected may take advantage of said ruling to demand a refund of the amount paid under protest if it was retained by the department without any authority of law.

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