HIGH COURT OF GUJARAT *(D.B.)*

SHANTI EXPORTS PVT LTD & 1
V/S
STATE OF GUJARAT & 3

Date of Decision: 22 April 2016

Citation: 2016 LawSuit(Guj) 850

Hon'ble Judges: Harsha Devani, G R Udhwani

Case Type: Special Civil Application

Case No: 20489 of 2015

Acts Referred:
Gujarat Sales Tax Act, 1969 Sec 45(6), Sec 47(4)(A), Sec 47(4)(b)
Gujarat Value Added Tax Act, 2003 Sec 39, Sec 37, Sec 36(1), Sec 38, Sec 73, Sec 36, Sec 39(1)

Final Decision: Petition allowed

Advocates: Devan Parikh,Kunal Nanavati, Hardik Vora

Judgement Text:-

Harsha Devani, J

[1] Heard Mr. Devan Parikh, Senior Advocate, learned counsel with Mr. Kunal Nanavati, learned advocate for M/s Nanavati Associates, learned advocates for the petitioners and Ms. Maithili Mehta, learned Assistant Government Pleader for the respondents.

[2] Having regard to the submissions advanced by the learned counsel for the

respective parties, the court is of the view that the matter requires consideration. Hence, issue Rule. Ms. Maithili Mehta, learned Assistant Government Pleader, waives service of notice of rule on behalf of the respondents.

[3] Considering the nature of the controversy involved in the present case and with the consent of the learned counsel for the respective parties, the matter was taken up for final hearing today.

[4] The petitioner, a Private Limited Company, is engaged in the business of spinning, weaving and finishing of textiles. In the year 2007, the petitioner company purchased the property of one M/s Arunoday Mills Limited (being land bearing Survey Nos.160/P, 161/A, 162/P, 163-A/P, 163/1/P, 163/1, 164/P and 20P in Morbi) by successfully bidding for the same in an auction conducted by IDBI Bank for sale of the said property on behalf of a consortium of secured creditors under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. M/s Arunoday Mills Ltd. was a registered dealer and was holding sales tax deferment benefit certificate for its Morbi unit. The assessment came to be made in the case of M/s Arunoday Mills Ltd. for financial year 2005-06, which culminated into an order dated 30.11.2008 raising a demand of Rs.33,40,497/- under the Central Sales Tax Act, 1956 (hereinafter referred to as the "CST Act") and a demand of Rs.1,16,30,733/- under the Gujarat Sales Tax Act, 1969 (hereinafter referred to as the "GST Act"), which included net tax dues of Rs.12,06,378/- under the CST Act and Rs.36,45,750/- under the GST Act. Interest and penalty also came to be levied under the said order. By an order dated 17.11.2008, the Deputy Commissioner of Commercial Tax cancelled the sales tax deferment benefit certificate granted in favour of M/s Arunoday Mills Ltd. on the ground that M/s Arunoday Mills Ltd. had discontinued business during the subsistence of the deferment period and had, therefore, violated the condition of the scheme. The above assessment orders and the order cancelling the deferment certificate came to be challenged by M/s Arunoday Mills Ltd. before the first appellate authority. However, such appeals came to be dismissed by an order dated 29.04.2009 on the ground of non-payment of predeposit by M/s Arunoday Mills Ltd.

[5] For the years 2003-04 and 2004-05, the Deputy Commissioner, Circle 22, Rajkot, issued a notice in Form-37 for the said assessment periods for charging interest under section 47(4)(a)(b) and 45(6) of the GST Act. By a letter dated 04.12.2008, M/s Arunoday Mills Ltd. replied that the entire property of the company was transferred to the petitioner company. Despite the aforesaid letter from M/s Arunoday Mills Ltd., no

show cause notice was served upon the petitioner regarding the sales tax dues of M/s Arunoday Mills Ltd. and on 30.03.2010, the petitioner company was directly served with a demand notice for recovery of sales tax dues of M/s Arunoday Mills Ltd. amounting to Rs.6,95,87,721/- along with interest and penalty within two days from the receipt of the communication. The petitioner company after making inquiries, found that certain orders of assessment and reassessment had been made against M/s Arunoday Mills Ltd. for the years 2003-04, 2004-05 and 2005-06 and that the appeals had been preferred by the assessee, viz., M/s Arunoday Mills Ltd. pursuant thereto, as well as the fact regarding cancellation of the certificate issued in favour of M/s Arunoday Mills Ltd. with effect from 01.04.2003. The petitioner thereafter preferred appeals being Second Appeals No.405, 406 and 407 of 2010 before the Gujarat Value Added Tax Tribunal, Ahmedabad (hereinafter referred to as the "Tribunal") against the orders dated 29.04.2009 passed by the first appellate authority. During the pendency of the above appeals, the petitioner paid an amount of Rs.2,76,00,000/- towards tax liability of M/s Arunoday Mills Ltd. The petitioner also made further payment of Rs.4,00,00,000/- as per the directions issued by this court by its order dated 29.04.2010 passed in Special Civil Application No.6639 of 2010, pursuant to which, the attachment of the property and the bank account of M/s Arunoday Mills Ltd. was removed. The court while disposing of the petition, made it clear that the order was passed only by way of interim arrangement and without going into the merits of the case. It was further observed that if the petitioners succeed in the matters which are pending before the Tribunal, the Sales Tax Department shall grant the refund to the petitioners, in accordance with law. Pursuant to the above order, the second appeals came to be heard on merits by the Tribunal and came to be partly allowed, inasmuch as, it was held that the petitioner company is not liable to pay any amount of interest and penalty on the sales tax dues of M/s Arunoday Mills Ltd. Being aggrieved, the State Government preferred appeals before this court being Tax Appeals No.345, 346 and 347 of 2015. Civil Applications for stay also came to be filed in the said appeals. By an order dated 05.08.2015, the applications came to be dismissed on the ground that staying the impugned order passed by the Tribunal would tantamount to allowing the main appeal which is admitted and pending for hearing.

[6] It is the case of the petitioner that in view of the fact that the Tribunal had held that the petitioner company is not liable to pay interest and penalty, time and again, it made applications to the second respondent, seeking refund of the amount of interest and penalty already paid by it against the sales tax dues of M/s Arunoday Mills Ltd. Despite repeated reminders, since the amount was not refunded by the respondent authorities,

nor did the petitioner company receive any reply, the petitioners filed the present petition seeking a direction to the respondent authorities to refund the amount of interest and penalty paid by them towards the sales tax dues of M/s Arunoday Mills Ltd.

[7] The record of the case reveals that this petition came to be filed on 15.12.2015 and came up for hearing on 17.12.2015, whereupon, the court issued notice returnable on 13.01.2016. The respondents No.1 and 2 came to be served on 23.12.2015 and the respondents No.3 and 4 came to be served on 31.12.2015. It appears that in the meanwhile, on 08.01.2016, notice came to be issued to the petitioner under section 39(1) of the Gujarat Value Added Tax Act, 2003 (hereinafter referred to as the "GVAT Act"), proposing to withhold the amount paid by the petitioner. Thereafter, on 11.01.2016, the Assistant Commissioner of Commercial Tax, passed an order under section 39(1) of the GVAT Act, withholding the refund payable to the petitioners pursuant to the order passed by the Tribunal. The petitioners, therefore, moved an amendment seeking to challenge the order dated 11.01.2016 passed by the Assistant Commissioner of Sales Tax, Morbi, withholding the refund due to the petitioners, which came to be granted.

[8] Mr. Devan Parikh, Senior Advocate, learned counsel with Mr. Kunal Nanavati, learned advocate for the petitioners, vehemently assailed the impugned order by submitting that against the order passed by the Tribunal, the respondents had approached this court by way of tax appeals wherein applications for stay of the order passed by the Tribunal had been made. This court, by the order dated 05.08.2015, turned down the applications made by the respondents. It was submitted that once this court had not granted the applications made by the respondents for stay of the order passed by the Tribunal, it was thereafter not permissible for the respondents to resort to the provisions of section 39(1) of the GVAT Act and withhold the amount of refund. It was further pointed out that the refund which the petitioner is entitled to is not under the order of the Tribunal, but in view of the order passed by this court in Special Civil Application No.6639 of 2010 whereby, this court while directing the respondents to lift the attachment on the lands purchased by the petitioner, had directed the petitioner to deposit an amount of Rs.4,00,00,000/- (rupees four crores) with the Deputy Commissioner of Commercial Tax and had clarified that the order was only by way of an interim arrangement without going into the merits of the matter and that if the petitioner succeeds in the matter, the Sales Tax Department shall grant the refund to the petitioner. It was submitted that the amount not being in the nature of tax, penalty or interest paid by the petitioner under the provisions of the GVAT Act or CST Act, the

provisions of section 39(1) of the GVAT Act would not be applicable. In support of his submissions, the learned counsel placed reliance upon an unreported decision of this court in the case of State of Gujarat v. Essar Steel Ltd. rendered on 05.02.2016 in Special Civil Application No.18128 of 2015 and allied matters wherein, the court after considering the scheme of section 39 of the GVAT Act, had set aside the order passed by the respondent authorities. It was submitted that the above decision would be squarely applicable to the facts of the present case.

8.1 It was emphatically argued that the respondents are also prohibited from exercising powers under section 39(1) of the GVAT Act by virtue of the doctrine of election, inasmuch as, the respondents had a choice to avail of any of the two remedies: one by way of stay application before this court seeking a stay of the implementation and operation of the order passed by the Tribunal; and secondly, withholding the amount of refund under section 39(1) of the GVAT Act. Once the respondents have elected to avail of the remedy before this court, it is not permissible for them to avail of the statutory remedy under section 39(1) of the GVAT Act to withhold the refund amount.

8.2 In conclusion it was urged that the impugned order passed by the fourth respondent under section 39(1) of the GVAT Act, deserves to be quashed and set aside, and the respondents are required to be directed to forthwith refund the amount deposited by the petitioners by virtue of the order passed by this court in Special Civil Application No.6639 of 2010.

[9] Vehemently opposing the petition, Ms. Maithili Mehta, learned Assistant Government Pleader for the respondents submitted that the petitioners had deposited an amount of Rs.4,00,00,000/- (rupees four crores) during the pendency of the proceedings before the Tribunal, which was to abide by the final outcome of the proceedings before the Tribunal. It was submitted that the amount paid by the petitioners being in the nature of payment towards tax, interest and penalty, it is permissible for the respondents, in exercise of powers under section 39(1) of the GVAT Act, to withhold the amount of refund if the Commissioner is of the opinion that the grant of such refund is likely to adversely affect the revenue. It was submitted that two requirements for exercise of powers under section 39(1) of the GVAT Act are that there should be an order of giving rise to a refund which should be subject matter of appeal or further proceedings, and

that the Commissioner should form an opinion that grant of such refund is likely to adversely affect the revenue. It was contended that in the facts of the present case, the respondents had preferred appeals against the common order passed by the Tribunal and hence, the order giving rise to refund was subject matter of appeal before this court. Referring to the impugned order, it was submitted that the Commissioner of Commercial Tax has recorded an opinion that the grant of refund would adversely affect the revenue. It was submitted that both the requirements for exercise of powers under section 39(1) of the GVAT Act are wholly satisfied and hence, the impugned order wholly meets with the ingredients of section 39(1) of the GVAT Act and therefore, there is no warrant for interference by this court. Under the circumstances, the petitioners are not entitled to any of the reliefs prayed for in the petition and that the petition being devoid of merits, deserves to be dismissed.

[10] The facts as emerging from the record reveal that against the order passed by the first appellate authority, the petitioners had preferred appeals before the Tribunal. Pending the appeals, the Tribunal had granted stay against the recovery in favour of the petitioners. In the meanwhile, the petitioners filed Special Civil Application No.6639 of 2010 before this court seeking lifting of attachment of the land and building, attachment of the plant and machinery, and also attachment of the UCO Bank account of the petitioners. During the course of hearing of the petition, the learned counsel for the petitioners restricted their prayer only to the extent of attachment of land in question. The court observed that it would be in the interest of justice if the petitioners are directed to deposit the amount of Rs.4,00,00,000/- (rupees four crores) with the Deputy Commissioner, Commercial Tax, Rajkot and upon deposit of such amount, the attachment of the Sales Tax Department on the land in question as well as the bank account shall be removed. The court made it clear that the amount already paid to the Sales Tax Department, the amount now being deposited pursuant to that order, and the remaining amount due, is subject to the final outcome of the matters which were pending before the Tribunal. It was made clear that the order was passed only by way of interim arrangement and without going into the merits of the case. It was further observed that if the petitioners succeed in the matter, which are pending before the Tribunal, the Sales Tax Department shall grant the refund to the petitioners, in accordance with law.

[11] From the above facts, it is evident that insofar as the payment of any amount for the purpose of hearing of the appeals as contemplated under section 73 of the GVAT Act is concerned, the Tribunal had already granted interim relief in favour of the

petitioners by staying the recovery against them. However, since the petitioners wanted the attachment over the lands and the bank account to be lifted, this court had directed the petitioners to deposit further amount of Rs.4,00,00,000/- (rupees four crores) with the respondent authorities for the purpose of lifting the attachment on the lands and the bank account. Evidently therefore, such amount had not been paid towards tax, interest or penalty as contemplated under section 73 of the GVAT Act, but had been paid by way of deposit by virtue of the above order passed by this court, as a condition for lifting the attachment on the lands and the bank account.

[12] Ultimately, the petitioners partly succeeded in the appeals before the Tribunal, which held that the petitioners are not liable to pay interest and penalty on the amount of tax referred to in certificate of deferment. The State of Gujarat, being aggrieved, has preferred the appeals before this court against the order passed by the Tribunal. Along with the appeals, the State had also preferred civil applications for stay being Civil Applications No.414, 415 and 416 of 2015. The said applications came to be rejected by an order dated 05.08.2015. However, the respondents, at the relevant time, did not deem it fit to pass any order under section 39(1) of the GVAT Act. The petitioners herein, therefore, pursued the matter with the respondent authorities seeking refund of the amount deposited by them pursuant to the order of this court. When there was no response from the respondent authorities, the petitioners filed the present petition. This court issued notice on 17.12.2015, which was made returnable on 13.01.2016. In the meanwhile, after service of notice upon the respondents, the fourth respondent Assistant Commissioner of Commercial Tax issued a notice dated 08.01.2016 to the petitioners proposing to take action under section 39(1) of the GVAT Act and ultimately, before the returnable date, the impugned order dated 10.01.2016 came to be made under section 39(1) of the GVAT Act, withholding the refund of the amount deposited by the petitioners.

[13] Section 73 of the GVAT Act makes provision for appeal. Sub-section (4) thereof prohibits entertaining of an appeal by an appellate authority unless such appeal is accompanied by proof of payment of tax in respect of which an appeal has been preferred. The proviso thereto provides that the appellate authority may, if it thinks fit, for reasons to be recorded in writing, entertain an appeal against such order,

> (a) without payment of tax with, penalty (if any) or, as the case may be, of the penalty, or (b) on proof of payment of such smaller sum as it may consider reasonable, or (c) on the appellant furnishing in the prescribed

manner, security for such amount as the appellate authority may direct.

[14] In the present case, a perusal of the record of the case reveals that the Tribunal has entertained the appeals preferred by the petitioners upon payment of a smaller sum and has granted stay against the recovery of the balance amount. Therefore, there was no question of recovery of the balance amount during the pendency of the appeals, nor was the petitioner obliged to pay any further amount till the final disposal of the appeals. However, this court in Special Civil Application No.6639 of 2010, while directing release of attachment over certain properties, by an order dated 24.09.2010, directed the petitioner to deposit a further sum of Rs.4,00,00,000/- (rupees four crores) subject to the final disposal of the appeal, with a clarification that if the petitioner succeeds in the appeal, the respondents shall refund such amount to the petitioner in accordance with law.

[15] In the above backdrop, the first question that arises for consideration is the character of the amount deposited by the petitioner pursuant to the order passed by this court, as to whether it can be said to be payment of tax or penalty as envisaged in the proviso to section 73 of the GVAT Act. In the opinion of this court, the answer would be in the negative because in view of the order passed by the Tribunal granting stay against further recovery, the question of payment of any amount under the orders impugned before the Tribunal would not arise. Therefore, such amount would not partake the character of tax or penalty, as contemplated under the proviso to section 73 of the GVAT Act.

[16] From the facts noted hereinabove, it clearly emerges that the amount of Rs.4,00,00,000/- deposited by the petitioners pursuant to the order dated 24.09.2010 passed by this court in Special Civil Application No.6639 of 2010, not only does not take the colour of tax or penalty, it is also not in the nature of pre-deposit. It is merely an amount deposited by the petitioners under the directions of the court as a condition for lifting the attachment over the lands of the petitioners. In terms of the order of the court, if the petitioners succeeded, the amount was required to be returned to them. Since such amount is not in the nature of tax or penalty or even predeposit, in the opinion of this court, the respondent authorities have no authority to withhold the same.

[17] At this juncture, reference may be made to the unreported decision of this court in the case of State of Gujarat v. Essar Steel Ltd. , on which reliance has been placed by the learned counsel for the petitioners, wherein it has been held thus:

"17. It has been contended on behalf of the petitioner that, upon the appeals being adjudicated in favour of the respondent, the respondent ipso facto does not become entitled to return of the amount deposited by it as a condition precedent for entertaining the appeal and that a refund application would be required to be made under the provisions of the GVAT Act which would be decided in accordance with law. It would, therefore, be apposite to refer to the relevant provisions for refund as contained in the GVAT Act.

[18] Section 36 of the GVAT Act provides for refund of excess payment and lays down that subject to the other provisions of the Act and the rules, the Commissioner may refund to a person the amount of tax, penalty and interest, if any, paid by such person in excess of the amount due from him. Provided that, the Commissioner shall first apply such excess towards the recovery of any amount due under the Act or the earlier laws and shall then refund only the balance amount, if any; provided further that no adjustment under the provision shall be made towards a recovery of an amount due that has been stayed by an appellate authority. On a perusal of the provisions of section 36 of the GVAT Act as a whole, there is nothing therein to indicate that the same requires an application to be made prior to refund of any amount by a person. Moreover, what section 36 of the Act contemplates is refund of any amount of tax, penalty and interest paid by a person in excess of the amount due from him. In the facts of the present case, the amount paid by the respondent is by way of a pre-deposit pursuant to the above order passed by this court, which in terms of the said order, would enure till the final disposal of the appeals. Therefore, such amount cannot be termed as an amount of tax paid as envisaged under sub-section (1) of section 36 of the GVAT Act.

[19] Section 37 of the GVAT Act makes provision for provisional refund and section 38 makes provision for interest on refund and are not relevant for the present purpose. Section 39 of the GVAT Act provides for power to withhold refund in certain cases and lays down that where an order giving rise to a refund is the subject matter of an appeal or further proceeding or where any other proceeding under the Act is pending and the Commissioner is of the opinion that grant of such refund is likely to adversely affect the revenue, he may, after giving the dealer an opportunity of being heard, withhold the refund till such time as he may determine. Sub-section (2) thereof provides that where a refund is withheld under sub-section (1), the dealer shall be entitled to interest as provided under section 38, if as a result of the appeal or further proceeding, he becomes entitled to refund.

[20] Thus, what section 39 of the GVAT Act contemplates is that where an order giving rise to a refund is the subject matter of an appeal or further proceeding or where any other proceeding under the Act is pending and the Commissioner is of the opinion that grant of such refund is likely to adversely affect the revenue, he may withhold such amount, after giving an opportunity of hearing to the party. In the opinion of this court, the question of refund under section 39 of the GVAT Act would arise provided there is a payment of tax. Though the expression refund may also be used for returning the amount of pre-deposit, there is a clear distinction between the character of the amount paid by way of tax and by way of pre-deposit pending the appeal. This court is in agreement with the view taken by the Bombay High Court in the case of Nelco Limited v. Union of India that the amount deposited as a condition precedent for hearing an appeal, does not bear the character of duty but bears the character only of a security deposit, being a condition precedent for hearing of the appeal. Besides, assuming for the sake of argument that the provisions of section 39 of the GVAT Act are applicable to the facts of the present case, from the facts as emerging from the record, there is nothing to show that the Commissioner has withheld the amount deposited by the respondent in exercise of powers under section 39 of the said Act after recording satisfaction as envisaged therein. Therefore, no cause has been made out by the petitioner for withholding the amount deposited by the respondent Company."

18. In the opinion of this court, the above decision would be squarely applicable to the facts of the present case. In fact, the petitioner stands on a stronger footing, inasmuch as, in this case, the amount deposited is not even in the nature of pre-deposit but simply a deposit as a condition for lifting the attachment. Besides, the facts reveal that the petitioner has succeeded before the Tribunal. Therefore, as on date, there is an order of the Tribunal in favour of the petitioner. The petitioner has already paid the tax amount which is due and payable under the order passed by the Tribunal. Thus, as on date, no amount is outstanding payable by the petitioner. The appeal preferred by the State of Gujarat before this court is in respect of the amount of penalty and interest imposed by the assessing authority, which has been set aside by the Tribunal.

19. As noticed earlier, the respondents together with the appeals, had also filed stay applications on which this court has passed orders in the following terms:

"Considering the prayer made in this civil application, it appears that staying the impugned order passed by the learned Tribunal would tantamount to allowing the main tax appeal, which is admitted and pending for hearing. Hence, this Civil Application is dismissed."

20. Thus, the court, while dismissing the stay applications filed by the State of Gujarat, has categorically observed that allowing the application would tantamount to allowing the tax appeal. Therefore, as rightly submitted by the learned counsel for the petitioner, the respondents having once elected to approach this court with stay applications, and having invited orders on merits, whereupon the court has turned down the plea of the respondents for staying the order of the Tribunal, now cannot seek to overreach the order passed by this court under the purported exercise of powers under section 39(1) of the GVAT Act. Besides, the sequence of events that have unfolded as noticed hereinabove, also indicate mala fide intention on the part of the officers of the respondents to avoid refund of the amount payable to the petitioner under one pretext or the other. As noticed earlier, despite the fact that the order passed by the Tribunal in the second appeals is dated 22nd February, 2015, against which, tax appeals came to be preferred before this court and stay applications came to be rejected on 05.08.2015, at no point of time the respondents thought it fit to exercise powers under section 39(1) of the GVAT Act. The petitioners had been pursuing the matter before the respondent authorities seeking refund of the amount in question, however, to no avail. Left with no other option, the petitioners approached this court by way of the present petition wherein, notice came to be issued on 17.12.2015, which was made returnable on 13.01.2016. It is only upon service of notice of this petition on the respondents that, by a notice dated 08.01.2016 the petitioner was called upon to explain as to why the proposed action under section 39(1) of the GVAT Act should not be taken. The time given to the petitioner for answering the notice dated 08.01.2016 was till 11.01.2016. Considering the short span of time granted to it, the petitioner, obviously was not in a position to respond to the notice properly. However, in undue haste, on 11.01.2016, just two days before the returnable date, the order under section 39(1) of the GVAT Act came to be passed withholding the amount in question till the final disposal of the appeal before the High Court. In other

words, the respondents have granted themselves the stay, which the High Court had refused to grant. Evidently, therefore, the action of the respondents is not bona fide.

[21] Apart from the above, the impugned order dated 11.01.2016 has been passed in exercise of powers under section 39(1) of the GVAT Act. Section 39 of the GVAT Act makes provision for power to withhold refund in certain cases. Sub-section (1) thereof provides that where an order giving rise to a refund is the subject matter of (i) appeal, or (ii) further proceeding, or (iii) where any other proceeding under the Act is pending, and the Commissioner is of the opinion that grant of such refund is likely to adversely affect the revenue, he may, after giving the dealer an opportunity of being heard, withhold the refund till such time as he may determine. Therefore, before passing an order under section 39(1) of the GVAT Act, the Commissioner has to record satisfaction that the grant of refund is likely to adversely affect the revenue. In the opinion of this court, when statute provides that the Commissioner has to form an opinion that grant of refund is likely to adversely affect the revenue, it means that the Commissioner has to record as to why he believed that the grant of refund is likely to adversely affect the revenue. Mere reference to the language of the statute in the order under section 39(1) of the GVAT Act is not sufficient compliance of the provisions thereof. Adverting to the facts of the present case, the petitioner has claimed refund pursuant to the decision of the Tribunal rendered in Second Appeals No.405, 406 and 407 of 2010, whereas, against the order of the Tribunal, the Government has preferred appeals which are still pending. Since, the proceedings of the appeals are pending and, grant of refund is likely to adversely affect the revenue, the notice under section 39(1) of the GVAT Act has been issued to the petitioner. However, nowhere in the order has it been recorded, as to why grant of refund would adversely affect the revenue. Thus, the Assistant Commissioner of Commercial Tax has mechanically passed the order under section 39(1) of the GVAT Act without recording the necessary satisfaction. Thus, even on merits, the impugned order is unsustainable.

[22] In light of the above discussion, the court is of the view that the respondents having elected to prefer stay applications against the impugned order passed by the Tribunal and having invited an order on merits, there was no justification in thereafter invoking the provisions of section 39(1) of the GVAT Act for withholding the refund which arose in the light of the order of the Tribunal. The impugned order dated 11.01.2016 passed under section 39(1) of the GVAT Act, therefore, cannot be sustained.

[23] For the foregoing reasons, the petition succeeds and is, accordingly, allowed. The impugned order dated 11.01.2016 passed by the Assistant Commissioner of Commercial Tax, Morbi, in exercise of powers under section 39(1) of the Gujarat Value Added Tax Act, 2003 is hereby quashed and set aside. The respondent authorities are directed to forthwith refund the amount deposited by the petitioners pursuant to the order dated 24.09.2010 passed by this court in Special Civil Application No.6639 of 2010. Rule is made absolute accordingly with no order as to costs.