IN THE GAUHATI HIGH COURT
THE HIGH COURT OF ASSAM, NAGALAND, MEGHALAYA, MANIPUR,
TRIPURA, MIZORAM AND ARUNACHAL PRADESH
SHILLONG BENCH

W.P.(C) No. 85(SH) of 2011

North Eastern Electric Power
Corporation Employees Provident
Fund Trust (NEEPCO EPF Trust)
Act, 1961 having its office at Brook Land
Compound, Lower New Colony,
Shillong-793003, represented by its
Secretary, Shri Pawan Kumar Agarwal,
Deputy Manager (Finance) : Petitioner

-vs-

1. Union of India
Ministry of Finance,
Government of India,
New Delhi.

2. Income Tax Officer, OSD
Assessing Officer, Office of the
Joint Commissioner of Income Tax
(Assessment), Special Range,
Shillong-793001

3. Commissioner of Income Tax
(Appeals), Aayakar Bhawan,
MG Road, Shillong-793001

4. Commissioner of Income Tax,
Aayakar Bhawan, MG Road,
Shillong-793001 : Respondents

BEFORE
THE HON'BLE MR JUSTICE T VAIPHEI

For the Petitioner	:	Mr VK Jindal, Sr Adv Mr S Dey, Adv
For the Respondents	:	Mr U Bhuyan, Sr Adv Mr A Hqazarika, Adv
Date of hearing	:	23.08.2011
Date of Judgment & Order	:	16-12-2011.

JUDGMENT AND ORDER

The inaction of the Income-Tax Authorities in not processing the returns of income-tax for the assessment years 1995-1996 to 1998-1999 on the ground of delay in filing those returns by the petitioner-Trust thereby denying refund of TDS amount of `8,93,773/- deducted by the concerned financial institutions, is the grievance in this writ petition.

2. The petitioner is a trust constituted by the registered Deed of Trust dated 20-2-1993, which was recognized under the Income-Tax Act, 1961 ("the Act" for short), and is having its registered office at Brook land compound, Lower New Colony, Shillong. It is the case of the petitioner-Trust that after its recognition by the Income-Tax authorities, any income received by it on behalf of a recognized provident fund is an income, which do not form a part of the total income and is, therefore, exempted from payment of income-tax under Section 10(25)(ii) of the Act. During the said assessment years of 1995-1996 to 1998-1999, the funds of the petitioner-Trust were invested as per the instructions of the Government of India in various financial institutions by yielding an income for the trust fund: these financial institutions deducted the income-tax at source from the incomes earned from such fixed deposits. In the assessment year 1995-1996, the amount so deducted was `52,003/-, `3,22,141/- for the assessment year 1996-1997, `2,78,475/- for the assessment year 1997-1998 and `2,41,154/- for the assessment year 1998-1999. According to the petitioner-Trust, as all the income generated by it is for and on behalf of a recognized Provident Fund, the total income, which becomes assessable under the Act during the

relevant year but did not exceed the maximum amount, is not chargeable to income-tax. Consequently, it was not required to submit or file any return of income-tax as required under Section 139 of the Act. However, in order to claim refund of the said TDS erroneously deducted by the financial institutions and paid to the Income-Tax authorities, the petitioner-Trust filed the returns for those assessment years before the respondent No. 2.

3. It is the further case of the petitioner-Trust that the respondent No. 2 (the Assessing Officer) passed the order dated 22-9-2000 to the effect that since the return of income-tax for those assessment years had been filed beyond the time-limit, they were treated as invalid returns and rejected the application for the TDS refunds. This prompted the petitioner-Trust to prefer Appeal No. SHILL-64/2000-01 on 21-12-2000, but the same was dismissed by the respondent No. 3 on 25-3-2004 as incompetent and without jurisdiction and advised it to avail of other remedies such as filing an application under Section 119 of the Act. The petitioner-Trust accordingly filed four separate petitions before the Chief Commissioner of Income-Tax, Shillong (CCIT) under Section 119(2) of the Act on 21-5-2004, which was received on 25-5-2004, for refund of the TDS. The Income-Tax Officer (Tech.) from the Office of the CIT by his letter dated 9-3-2006 intimated the petitioner-Trust to the effect that "for judicious exercise of direction provided under Section 119(2)(*b*), it is necessary that a comprehensive note is submitted by the petitioner to establish on record that it was prevented by reasonable cause from complying with provisions of Section 139 in so far as filing of return of income within the statutory time limit is concerned". In response to the aforesaid letter, the petitioner-Trust vide the letter

dated 24-5-2006 submitted a detailed comprehensive note by explaining that the delay in filing the returns to the Office of the CCIT, Shillong was caused by the bifurcation of NEEPCO into NEEPCO and Power Grid Corporation with consequential bifurcation of the fund transferred by EPFO into cash and securities, stabilization of computerized system, delay in audit of the account, non-issue of IT exemption Certificate under Section 10(25) by the respondent authorities, etc. No action was, however, taken by the respondents in respect of the application filed by the petitioner under Section 119(2)(*b*) of the Act despite eleven reminders made by it on various dates. The application so filed under Section 119(2)(*b*) of the Act before the CCIT, Shillong was, however, transferred to CIT, Shillong. The Assistant Commissioner of Income-Tax (Tech.) in the Office of the CCIT by his letter dated 10-2-2010 informed the petitioner-Trust that the refund of less than `10,00,000/- lies with the CIT. However, the CIT by his order dated 9-6-2010 refused to condone the delay in filing the returns for the aforesaid assessment years on the ground that it was not a case of genuine hardship as envisaged under Section 119(2(*b*) of the Act. Contending that the stance taken by the respondent authorities is contrary to law, the petitioner-Trust is now filing this writ petition for appropriate relief.

4. The writ petition is opposed by the respondent authorities who have now filed their affidavit-in-opposition. The case of the respondent-authorities as pleaded in their affidavit-in-opposition is that under Section 239(2)(*c*) of the Act, the claim of refund can be allowed only if such claim is made within one year from the last date of the Assessment Year for which such claim is made. As the petitioner-Trust

has failed to comply with Section 239(2)(*c*) of the Act, the CIT rightly disallowed the claim of refund: such belated claim is treated as an invalid claim by virtue of the power vested upon him by the provisions of Section 239(2)(*c*) of the Act. It is also stated by the answering respondents that the CIT rightly rejected the application of the petitioner under Section 119(2)(*b*) of the Act as there was neither genuine hardship nor could it show a reasonable cause for the delay: the case of the petitioner squarely falls within the ambit of Section 239(2)(*c*) of the Act. In other words, the claim for refund could not be entertained under Section 239(2)(*c*) of the Act since the petitioner had failed to file the return within the stipulated period. It is also contended that the Assessing Officer can only act upon any return if it is filed under Sections 139(1), 139(4) and 239(2)(*c*) of the Act: none of the aforesaid provisions were invoked by the petitioner for filing of the income-tax returns. The question of invoking Section 147 also does not arise inasmuch as this is not a case of escapement of income. The answering respondents deny that the delay has been caused by them by taking more than 10 years to decide the question of refund of the TDS amount: there is no delay as such. It is submitted by the answering respondents that the impugned orders dated 22-9-2000 and 9-6-2010 are valid and do not call for the interference of this Court: the writ petition is liable to be dismissed. These are the main contentions of the answering respondents.

5. Before proceeding further, it may be apposite to refer to the provisions of Sections 119(2)(*b*), 139(1) and (4) and 239 of the Income Tax Act, which are as under:-

"119. (2) Without prejudice to the generality of the foregoing power.—

(*b*) the Board may, if it considers it desirable or expedient so to do for avoiding genuine hardship in any case or class of cases, by general or special order, authorise any income-tax authority, not being a Commissioner (Appeals) to admit an application or claim for any exemption, deduction, refund or any other relief under this Act after the expiry of the period specified by or under this Act after the expiry of the period specified by or under the Act for making such application or claim and deal with the same on merits in accordance with law;

139. (1) Every person.—

a) **being a company or a firm; or**

b) **being a person other than a company or a firm, if his total income or the total income of any other person in respect of which he is assessable under this Act during the period year exceeded the maximum amount which is not chargeable to income tax, shall, on or before the due date, furnish a return of his income or the income of such other person during the previous year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed:**

*** * * *Omitted* * * ***

(4) Any person who has not furnished any return within the time allowed to him under sub-section (1), or within the time allowed under a notice issued under sub-section(1) of section 142,may furnish the return for any previous year at any time before the expiry of one year from the end of the relevant assessment year or before the completion of the assessment, whichever is earlier:

*** * * *Omitted* * * ***

239. (1) Every claim for refund under this Chapter shall be made in the prescribed form and verified in the prescribed manner.

(2) No claim shall be allowed, unless it is made within the period prescribed hereunder, namely:-

- ***(a)*** **where the claim is in respect of income which is assessable for any assessment year commencing on or before the 1st day of April, 1967, four years from the last day of such assessment year;**
- ***(b)*** **where the claim is in respect of income which is assessable for the assessment year commencing on the first day of April, 1968, three years from the last day of assessment year;**
- ***(c)*** **where the claim is in respect of income which is assessable for any other assessment year;**
- ***(d)*** **where the claim is in respect of fringe benefits which are assessable for any assessment year commencing on or after the first day of April, 2006, one year from the last day of such assessment year.**

7. According to the respondent authorities, the respondent No. 4 rejected the application of the petitioner under Section 119(2)(*b*) of the Act as there was neither genuine hardship nor could it show any reasonable cause for the delay in claiming the refund. Similarly, the claim of refund made by the petitioner could not be entertained under Section 239(2)(*c*) of the Act in view of the non-filing of return within the stipulated period. It is the further contention of the revenue that an Assessing Officer can act upon any return only if it is filed in accordance with Sections 139(1), 139(4) and 239(*c*) of the Act: none of these provisions were invoked by the petitioner for filing the income tax returns. There is no dispute that since all the income generated by the NEEPCO EPF Trust is for and on behalf of its recognized provident fund, the total income which becomes assessable under the Act during the relevant year but does not exceed the maximum amount is not chargeable to income-tax, filing of return is not required. As for the reason for the delay in claiming the refund, it has been explained by the petitioner that there was bifurcation of NEEPCO and Power Grid Corporation of India in 1991, which affected its case and it took many years to get its account separated and audited; that after the formation of the Trust, the EPFCO was supposed to have transferred the EPF account of the members with the fund of the Trust, but the newly created Trust had been subjected to the problems of finalization of the accounts due to software problems and delay in transfer of Fund by EPFO and that extension of time for filing of returns of income were sought from the AO on 14-11-1995 and on 21-12-1995 and that IT exemption certificates were not issued by the AO despite petitions being made. The revenue authorities were not impressed with the explanation of the petitioner for condoning the delay. Be that as it may, the fact

remains that the revenue authorities do not dispute the entitlement of the petitioner for refund of the deducted amount. The question to be decided then is, whether the revenue authorities can take the shelter of technicalities to deny refund of the income-tax deductions made at source, which do not legitimately belong to them?

6. In this connection, the two cases cited by the senior counsel for the petitioner, namely, ***Pala Marketing Co-Op. Society Ltd. v. Union of India and others, 2008 (1) KLJ 561 and R. Seshammal v. Income-Tax Officer and another, (1999) 237 ITR 185***, appear to have a direct bearing on the instant case. In ***Pala Marketing (****supra*), the facts of the case are that the petitioner was a co-operative society engaged in marketing agricultural produce of its members. Even though, the society was entitled to exemption from income-tax during the assessment year 1997-98, it remitted an advance tax of `10 lakhs during the accounting year. Besides this, an amount of `47,957/- was recovered by others from petitioner's bills towards tax deduction at source. The petitioner's audit was done by the auditor appointed under Section 63(4) of the Kerala Co-operative Societies Act, 1969. Invariably, the statutory audit was delayed and for the current accounting year also, the petitioner's audit was completed only on 28-1-2000. After completion of audit, the petitioner filed return claiming refund of advance tax and TDS remitted by others through Ext.P5 application. The Assessing Officer rejected the return as time-barred and consequently declined to refund. The application filed by the petitioner before the Board of Direct Taxes under Section 119(2)(*b*) of the Act for condonation of delay in filing the refund application was rejected. The Kerala High Court held that Chapter XIV of the Act is mainly oriented to

ensure assessment and recovery of tax to protect the interest of the Revenue, whereas Chapter XIX provides for refund and an application in this regard can be entertained only if it is filed within the time limit prescribed under Section 239 of the Act; that if the delay is not condoned by the Board under Section 119(2)(b), such application cannot be processed under Section 139(1) or 139(4) of the Act and that in order to consider belated return for refund on merit, delay has to be necessarily condoned by the Board under Section 119(2)(b) of the Act. The Kerala High Court therein observed that the Board should condone the delay if failure to condone the delay causes genuine hardship to the assessee, no matter whether the delay in filing the return is meticulously explained or not. What is "genuine hardship" is also explained therein. According to the Kerala High Court, the genuine hardship contemplated under Section 119(2) is financial hardship caused to the assessee if delay is not condoned. It accordingly held that if the delay was not condoned in that case, "the co-operative society will be deprived of `10 lakhs and odd which it was otherwise not liable to pay by virtue of the exemption claimed under Section 80P of the Income-Tax Act".

7. This then takes me to the decision of the Madras High Court in ***R. Seshammal v. Income-Tax Officer & anr., (1999) 237 ITR 185***. That was a case in which even though proceedings were initiated under Section 148 of the Income-Tax Act, those proceedings were dropped by the Income-Tax Officer on the ground that there was no chargeable income, on which tax could be levied. When he passed that order, he had before him the return which had been filed by the petitioner, wherein the income for the relevant assessment year was shown as "nil"

and the details of the amounts paid as advance tax were also set out. The petitioner had paid `3,324 on September 6, 1982, a similar sum of `3,324 on December 13, 1982 and yet another sum of `37,160 on March 2, 1983, in all totalling `43,808. The Income-Tax Officer did not find any inaccuracy in the return submitted by the assessee. The petitioner received an intimation from the Income-Tax Officer dated July 17, 1990, refusing to refund the amount to her on the ground that the return of income-tax had not been filed voluntarily before the Income-Tax Officer in time as per Section 139(1) of the Act and that the refund had also not been applied for by the assessee in time under Section 237 of the Act. The defence put forwarded by the revenue for the refusal to refund the amount paid by the petitioner under the mistaken notion was that refund was permissible only when the person who paid the amount is found to be one who was required to pay the tax, and that amount, refund of which is claimed is in excess of what he was required to be paid as tax. Holding that the assessee was entitled to have refund of the excess amount, the Madras High Court held at paragraphs 5, 6 and 7 of the judgment as follows:

> "5. Section 237 of the Act does not specify that an assessment order must be made and that some amount must be found to be payable as tax and that some amount in excess of that amount should have been paid. It is not a pre-condition for invoking that section that some liability for tax must have been cast upon the person claiming refund.
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> *6. According to the Department there had been some delay in claiming the refund by the assessee. The amounts had been paid in the year 1982-83. The proceedings under Section 148 of the Act were dropped on July 17, 1990. The petitioner who is a widow had applied to the Board on August 11, 1990, under Section 119(2)(b) of the Act. By the impugned letter of April 4, 1991, the Income-Tax Officer conveyed to the petitioner the Central Board of Direct Taxes's decision to reject the petitioner's request without setting out any reasons.*

> *7. This is hardly the manner in which the State is expected to deal with the citizens, who in their anxiety to comply with all the requirements of the Act pay monies as advance tax to the State, even though the monies were not actually required to be paid by them and, thereafter, seek refund of the monies so paid by mistake after the proceedings under the Act are dropped by the authorities concerned. The State is not entitled to plead hyper-technical plea of limitation in such a situation to avoid return of the amounts. Section 119 of the Act vests ample power in the Board to render justice in such a situation. The Board has acted arbitrarily in rejecting the petitioner's request for refund."*

8. I am in respectful agreement with the above observations of the Hon'ble Kerala High Court and the Madras High Court. The petitioner-Trust, in this case, is also being deprived of a sum of `8,93,773/- for which it cannot be blamed at all: it has no liability whatsoever to pay this amount to the Revenue. Yet, the Revenue has refused to refund the same by taking some hyper-technical view of the matter. If the petitioner-Trust is being deprived of a sum of `8,93,773/- which legitimately belongs to it due to perverse view taken by the Revenue, is it still rational to say that no genuine hardship is being caused to it? I do not think so. In my opinion, the Revenue is acting like a small-time trader, and is in danger of being accused as interested in enriching itself unjustly at the expense of a citizen: this another form of State extortion from a helpless tax-payer. The Revenue also does not dispute that the petitioner-Trust has no liability whatsoever to it to pay the aforesaid amount. Therefore, I am constrained to observe that the Revenue has not properly applied its mind to the facts of the case and has in the process completely overlooked the provisions of Section 119(1)(*b*) of the Act. The attitude of the Revenue, to say the least, is in 'defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at'. True, no specific or express provision is engrafted in this

Section to deal with refund of TDS erroneously deducted when there is admittedly no due from the assessee. But then, this is precisely the reason, in my considered view, for enacting Section 119((1)(*b*) of the Act: this is in the nature of an inherent power granted to the Central Board of Direct Taxes to entrust any income-tax authority other than a Commissioner (Appeals) to admit an application or claim for exemption, refund even belatedly and dispose of the same in accordance with law. The Parliament was obviously not unmindful of the possibility of future occurrence of innumerable situations which are likely to cause genuine hardships to citizens in course of collection of revenue such as the one herein but which could not be foreseen by it at the time of enacting the legislation, and it is apparently with view to meet such exigencies that Section 119(1(*b*) of the Act was engrafted. In my judgment, Section 119(1)(b) is the appropriate provision top deal with cases of this nature. No other issue remains for consideration.

9. For what has been stated in the foregoing, this writ petition succeeds. The petitioner is entitled to condonation of the delay in filing the claim for refund. Resultantly, the respondent authorities are directed to process the application of the petitioner-Trust for refund `8,93,773/- and refund the amount in accordance with law along with interest at the rate of 12% per annum with effect from the date when the application for refund was first filed before the respondent No. 2. The entire exercise shall be completed within a period of three months from the date of receipt of this judgment from the petitioner-Trust.

JUDGE

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