IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION (L) NO. 24184 OF 2023

The Hongkong and Shanghai Banking Corporation Ltd., through authorized representative Mr. Amit Patwardhan,52/60, HSBC Bank Building, Mahatma Gandhi Road, Fort, Mumbai – 400 001. … Petitioner

Versus

1. The Union of India, through the Secretary, Ministry of Finance, Department of Revenue, New Delhi.

2. Assistant Commissioner, CGST & Central Excise (Legacy Refunds), Mumbai Central Commissionerate, GST Bhavan, Mumbai – 20. …Respondents

Mr. Abhishek A. Rastogi a/w. Mr. Pratyushprava Saha, Ms. Akshita Shetty, Ms. Pooja M. Rastogi, Ms. Meenal Songire, Ms. Ronita Annalex for the petitioner.
Mr.Deepak Sharma with Mr. M.P. Sharma a/w. Ms. Mamta Omle for respondent no. 2.

CORAM: G. S. KULKARNI &
JITENDRA JAIN, JJ.
DATED: 08 November, 2023

ORAL JUDGMENT (Per G.S. Kulkarni, J.)

1. Rule, made returnable forthwith. Respondents waive service. By consent of the parties, heard finally.

2. This petition under Article 226 of the Constitution brings before the Court a peculiar case. The challenge as raised in this petition is in regard to an amount of Rs.56,19,84,075/- being retained by the respondents, which is

contended by the petitioner to be without any authority in law and not a tax as leviable or payable by the petitioner. The petitioner has contended that such amount was deposited by the petitioner with the respondents, to buy peace, in the event of any prospective demand towards service tax and interest on "interchange income". It is not in dispute that such amount was deposited under protest. It is also the case of the petitioner that no show cause notice in respect of an 'interchange income' was issued to the petitioner for the period from October, 2007 to June, 2012. It is in such context, the petition is filed praying for the following reliefs:

> *"a) issue a Writ of Certiorari or a Writ in the nature of Certiorari or any other writ, order or direction to quash the Order-in-Original No. Refund/ Bipin/ 09/ 2023-24 dated 19 June 2023 that is violative of Article 265 and 300A of the Constitution of India.;*
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> *b) issue a Writ of Mandamus or a Writ in the nature of Mandamus or any other writ, order or direction under Article 226 ofthe Constitution oflndia to declare that the retention of deposit of Rs.56,19,84,075 towards service tax and interest made 'under protest' to the Respondents is without authority of law and liable to be refunded along with interest;*
>
> *c) such further and other reliefs be granted as this Hon'ble Court may deem fit and proper."*

3. Briefly, the case of the petitioner is :- That from 27 August, 2012 to 18 October, 2012, the audit of petitioner's books and records for the period from March 2007 to April 2012 was undertaken by the department. On 22 October, 2012, the audit group raised objections for non-payment of service tax on the interchange income, earned during the said period. As a

fallout of the objections as raised by the audit group, although no demand was raised, the petitioner made a deposit of an amount of Rs.56,19,84,075/- between the period 22 October, 2012 to 3 June, 2013. The petitioner has contended that on 13 June, 2013, a Final Audit Report No. 198/2012-2013 was issued, however, no show cause notice was issued in relation to appropriation of aforesaid amounts, which was deposited by the petitioner under protest towards any tax demand.

4. Accordingly, the petitioner had taken up the issue with the department and had made requests for 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, on 29 May, 2018, the petitioner filed an 'application for refund' of the said amount along with interest. On such refund application, on 16 January, 2020, an Order-in-Original came to be passed by the designated officer, thereby rejecting the refund application of the petitioner. The petitioner being aggrieved by such Order-in-Original approached the Appellate Authority. The Appellate Authority by an Order-in-Appeal dated 30 March, 2021 remanded the matter for reconsideration of the eligibility of the petitioner and on merits of the petitioner's case.

5. It appears that in the intervening period, there were proceedings pending before different benches of the Tribunal as also before the High

Courts on the issue of taxability of the transactions in question, namely, service tax on interchange income. The said proceedings ultimately reached the Supreme Court in the proceedings of ***Commissioner of GST and Central Excise vs. M/s. CITIBANK N.A.***[1]. The learned Judges of the Division Bench of the Supreme Court delivered separate judgments. In the judgment authored by His Lordship Mr. Justice K.M. Joseph, the conclusions are found in paragraph 109. In the separate decision as rendered by Mr. Justice S. Ravindra Bhatt, His Lordship has agreed with the conclusions as arrived by Mr. Justice Joseph, being conclusion nos. (ii), (iii), (iv) and (vi). However, insofar as conclusion nos. (v), (vii) and (x) are concerned, His Lordship has taken a different view., while observing that the service tax is undoubtedly a value added tax, however, having characterized the service to be a single unified service, wherein service tax by way of business convenience, is collected from or remitted by the acquiring bank, on the value (whole MDR which includes the interchange fee that is retained by the issuing bank), taxable for the single service rendered by both the acquiring and issuing bank (Citibank), hence it cannot be called upon to pay service tax again, as this would result in double taxation. In such context, His Lordship also did not agree with the reasoning in the case of **ABN Amro Bank NV vs. Commissioner of Central Excise, Customs and Service Tax, Noida**[2]**.** It was hence observed that the question of

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1 Civil Appeal No. 8228 of 2019 dated 9 December, 2021

2 Appeal No. ST/1921/2012-CU(DB)

remand to the tribunal did not arise. His Lordship accordingly proceeded to dismiss the appeals filed by the revenue. As there was a split verdict on the case, it is submitted by Mr. Rastogi that the proceedings would now be decided by Larger Bench of the Supreme Court and to that effect, there is an order passed by the Supreme Court dated 9 December, 2021, which reads thus:

> " Hon'ble Mr. Justice K.M. Joseph pronouncing the judgment allowed the appeals while Hon'ble Mr. Justice S. Ravindra Bhat pronounced a separate and dissenting judgment dismissing the appeals, of the Bench comprising Their Lordships.
>
> In view of the divergence of opinion, place the papers before the Hon'ble the Chief Justice of India for constituting an appropriate Bench in the matter."

6. Mr. Rastogi would submit that however, the issue being canvassed by the petitioner in the present proceedings although on taxability, is an issue subject matter of consideration before the Supreme Court in the proceedings of Citibank, however, it would not affect the petitioner's case in the present proceedings as urged in the present petition, namely, the petitioner's entitlement to have the refund of the amount as deposited under protest, as there is no ascertainment of any tax liability payable by the petitioner.

7. Mr. Rastogi, drawing the Court's attention to the relevant events touching the issue in the present proceedings, would submit that as the demand proceedings were not initiated despite multiple follow ups, the petitioner was required to approach this Court in an earlier Writ Petition, being Writ Petition No. 2285 of 2023. However, during pendency of the said

petition, the petitioner was granted a hearing by respondent no. 2 and an Order-in-Original dated 19 June, 2023 came to be passed rejecting the Refund Application of the petitioner, after remand of the proceedings under the orders dated 21 April, 2021, passed by the Appellate Authority.

8. In the above circumstances, this Court by an order dated 18 August, 2023 disposed of Writ Petition No. 2285 of 2023 considering that as a fresh Order-in-Original has been passed, observing that if the petitioner is aggrieved by the same, the petitioner would be at liberty to impugn the Order-in-Original dated 19 June, 2023.

9. In pursuance of such liberty granted by this Court, the present petition was filed on 28 August, 2023. On 25 September, 2023, considering the peculiar facts of the case that the amount in question was deposited by the petitioner under protest, the Court directed the department to take an appropriate position, with an intention that, possibly the issues could be resolved on the rejection of refund application. However, it appears that our order for such reconsideration of the issues was completely misconstrued, as the Assistant Commissioner (legacy refund), CGST, Mumbai Central passed another Order in Original dated 19 October, 2023. On the earlier occasion and quite peculiarily, the Court was confronted with two original orders, being passed by the same authority. In this view of the matter, we had passed the

following order on 7 November, 2023 requesting the Designated Officer to place before the Court as to which would be the relevant Order-in-Original for the purpose of adjudication of the present proceedings.

> "1. Yesterday we were confronted with a situation that there are two Orders-in-Original as passed by the represented officer. We were really surprised at such approach of the concerned officer that he could pass a second Order-in-Original and that too alleged to be passed in pursuance of our clear orders, which were only in the nature of directing the Respondents to take a call on the refund application, in the peculiar circumstances of the case. This would never mean that a second Order-in-Original could be passed. We, therefore, adjourn the present proceedings for tomorrow to enable learned counsel for the Revenue to take instructions in writing as to which of the Order-inOriginal is required to be taken into consideration.
>
> 2. Today, Mr. Deepak Sharma, learned counsel for the Petitioner states that he could not obtain instructions and that it would be the prerogative of the Court to pass appropriate orders. We are surprised even at this stand of the concerned officer who is briefing Mr. Deepak Sharma as we are of the opinion that both the Orders-in-Original cannot stand.
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> 3. We accordingly would direct the concerned officer to give it in writing to Mr. Deepak Sharma as to what he intends to convey on the two Orders-in-Original. The concerned officer may clearly say so in the communication addressed to Mr. Deepak Sharma, so that further appropriate orders can be passed by this Court.
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> 4. Stand over to 8th November 2023."

10. In pursuance of such order, the Designated Officer Mr. Sudhakar J. Khobragade, Assistant Commissioner, CGST and Central Excise, Mumbai Central has placed on record a statement that respondent no. 2 is not pressing the Order-in-Original dated 19 October, 2023. Thus, for all purposes, as stated by learned counsel for the respondents, the second Order-in-Original dated 19 October, 2023 would not be relevant, as the same stands withdrawn

by the Designated Officer and that the rejection of the petitioner's refund application by Order-in-Original dated 19 June, 2023 needs to be taken into consideration.

11. It is on the above premise, we have heard the learned counsel for the parties.

12. Mr. Rastogi, in support of the prayers as made in the petitions would submit that the retention of the amounts in question by the respondent/revenue is without authority in law. He submits that admittedly such amount was paid under protest. It is submitted that this has also not been disputed by the respondents. He would submit that once the said amounts were deposited under protest, there was no warrant for the department to retain the said amounts, as this would amount to violation of the provisions of Article 265 of the Constitution of India. It is submitted that from the date of deposit of the amounts, which was almost about 11 years back, the amounts are enjoyed by the respondents and no show cause notice being issued or any steps otherwise taken to appropriate the said amounts in the manner known to law, so as to consider such amounts to be any legitimate and lawful liability of the petitioner to pay service tax on interchange income. It is submitted by Mr. Rastogi that the petitioner's objection of such amount being paid under protest, was also recorded in the Final Audit Report.

13. It is next submitted by Mr. Rastogi that the Order-in-Appeal dated 30 March, 2021 remanding the proceedings, required respondent no. 2 to render a decision on merits keeping in view relevant issues and the question of law as identified in paragraph 3 of the Order-in-Appeal. In such context, it is submitted that the observations as made in the impugned order in no manner can be sustained to reject the refund applicaton as made by the petitioner.

14. It is next submitted that the reliance on behalf of the revenue on the decision of the Supreme Court in ***Commissioner of GST and Central Excise vs. M/s. CITIBANK N.A.*** *(supra)* is misconceived in the present facts, as the respondent have no ground/cause to retain the amounts of the petitioner. It is his submission that this is a case where the respondents had not exercised its right to issue the show cause notice. It is submitted that even otherwise, the impugned order does not in any manner justify the withholding of the said amounts deposited by the petitioner under protest, and that too without adjudication, and more particularly considering the fact that for a period of 10 years, no show cause notice was issued. It is thus submitted that there was no warrant for the respondents to issue a show cause notice and no reason whatsoever to retain the amounts in question. It is Mr. Rastogi's submission that the rights of the petitioner as guaranteed by the Constitution not only under Article 265 of the Constitution but also under Article 14 stands clearly violated by the impugned actions as resorted by the respondents.

15. On the other hand, Mr. Dipak Sharma alongwith Mr. M.P. Sharma have made submissions on behalf of the respondents. Their submissions are on the case of the respondents as pleaded in the reply affidavit of Mr. Sudhakar J. Khobragade, Assistant Commissioner, CGST & Central Excise, Mumbai in his affidavit dated 21 September, 2023. The submissions on behalf of the respondents in opposing the petition is primarily on two counts, firstly, that the Order-in-Original dated 19 June, 2023 passed by the Adjudicating Authority would be required to be assailed by the petitioner by approaching the Commissioner (Appeals) being a statutory remedy of an appeal available to the petitioner. The second opposition is on the premise that the petitioner would not be justified in praying for the refund of the amounts, in view of the proceedings in the case of ***Commissioner of GST and Central Excise vs. M/s. CITIBANK N.A.*** *(supra),* pending before the Supreme Court. The affidavit-in-reply extensively sets out as to what is the conclusion as arrived by Mr. Justice K.M. Joseph in his Lordship's judgment and as to the dissenting view taken by Mr. Justice Ravindra Bhatt on certain issues. On such premise, the contention of Mr. Sharma is to the effect that the issues are now subjudice before the Supreme Court and as the matter would be required to be now decided by the Larger Bench of the Supreme Court in such situation, the respondents would be justified in retaining the amounts. The reply affidavit does not in any manner dispute that the amounts were deposited by the

petitioner under protest. It is also not being disputed that, such amounts were not deposited by the petitioner under any lawful demand raised by the respondents of any claim for payment of service tax.

16. Also, perusal of the reply affidavit would indicate that it is merely a recital of events. The relevant contents of the reply affidavit in opposition to the petition on the issue of decision of the Supreme Court in ***Commissioner of GST and Central Excise vs. M/s. CITIBANK N.A.*** *(supra)* are required to be noted, which reads thus:

> "i) Petitioner was heard. It was held that the issue of interchange fee in the matter of Citibank was heard by the Division Bench before the Hon'ble Supreme Court. The Two judges bench delivered a verdict wherein they agreed on a few aspects but gave a split verdict on few other points. The views shared by the Division bench judge were that Citibank as an issuing bank providing Service;
>
> i) 38. (B) On conclusion II, III & IV; I am in agreement with Justice Joseph that prior to 01.07.2012, the service of issuing bank fell within Section 65 (33a) (iii); interchange fee cannot be treated as interest as argued by Citibank; and Lastly the case that credit card transaction being a transaction in money and therefore excluded from the definition of "service" in section 65B (44) is unacceptable."
>
> They further held that the Tribunal's order in ABN Amro was unsustainable.
>
> 38. "(C)"On conclusion VI; I agree that the plea to discuss the appeals solely on the ground that no appeal was carried against the Order in ABN Amro (Supra) has no merit."
> & lastly, the judges opined that once tax is already paid on interchange fees by the acquiring bank, it cannot be collected again from the issuing bank as it would lead to double taxation.
>
> 38 "(D)" On conclusion V, VII-X service tax is undoubtedly a value added tax. However, having characterised the service to be a single unified service — wherein service tax by way of business convenience, is collected from/remitted by the acquiring bank on value (whole MDR which includes the interchange fee that is retained by the issuing bank) taxable for the

single service rendered by both the acquiring and issuing bank Citibank cannot be called upon to pay the service tax again us this would result in double taxation. In view of previous discussion, I do not agree with the reasoning in ABN Amro (supra).".

j) There was a split verdict on taxability of interchange fees. Their Lordships Justice Joseph was of the view that issuing banks earn interchange fees as consideration for providing card payment settlement service & service is taxable in hands of issuing bank as when issuing bank and acquiring bank are jointly providing a single unified service. Their Lordships Justice Bhatt held that Citibank was not liable to pay the service tax as the service provided by the respondent & acquiring bank were not separated & formed a part of a single unified service. The second point of difference was how they viewed service tax machinery provision. Justice Joseph was of the opinion that service was provided by the issuing bank & hence Citibank was liable to include the interchange fee, file refund & pay service tax on the same. Due to nonpayment of tax by Citibank. Justice Joseph found possibility of suppression by the issuing bank and sought to remand the matter to the Tribunal for confirmation of facts. However, Justice Bhatt on the other hand opined that since interchange fee is part of the acquirer bank's service, there was no need for Citibank separately disclosing and taxing part of the value in returns. Lastly Justice Josph opined that services provided by Citibank for which it charged an interchange fee would be liable to service tax and it does not amount to double taxation. Justice Bhatt noted that payment of service tax by Citibank would amount to double taxation as service was already collected from the acquiring bank on the entire value of MDR so it should be rendered as a single service by the acquiring and issuing bank as it is taxable as a single service.

k) Since there were dissenting opinions, the case will now be referred to the larger bench. If the Larger bench upholds Justice Joseph's opinion, then onus of proving payment of tax on MDR earned by the acquiring bank on the portion of income earned by the issuing banks shall lie upon the Citibank & if larger bench of Supreme Court goes with Justice's Bhatts opinion then it will be beneficial to the banking industry. Till the time larger bench gives its final verdict the ambiguity will continue.

l) The adjudicating authority held that the admissibility of refund can be determined only after the larger bench of the Apex Court gives final verdict & rejected the refund of Rs.56,19,84,075/-."

(emphasis supplied)

17. It is thus contended on behalf of the respondents that the petition ought not to be entertained and be rejected.

Analysis and Conclusion

18. We have heard learned counsel for the parties and with their assistance, we have perused the record. At the outset, some of the admitted facts are required to be noted. It appears to be not in dispute that for the period in question, there was an audit of the petitioner's books. The audit party had raised an objection on non-payment of service tax on the interchange transactions of the petitioner for the period October, 2007 to June, 2012. The petitioner, considering such audit objection and till the department takes an appropriate position in regard to any conclusion which would be drawn, voluntarily deposited the amounts in question, with the respondents in three tranches for the period from 22 October, 2012 to 3 June, 2013 totalling to an amount of Rs.56,19,80,075/-. Admittedly, such amounts were deposited under protest. In this regard, we are required to refer to the petitioner's letter dated 23 October, 2012 addressed to the Assistant Commissioner, in which the petitioner setting out the relevant facts as prevailing, categorically recorded that the deposit of such amount is being made in good faith, based on the suggestion of the learned Additional Commissioner. It was also recorded by the petitioner that the deposit should not be construed as acceptance of department's view mentioned in the letter dated 26 September, 2012 and that the petitioner continue to hold that the service tax would not be applicable, on the interchange income received by the issuing bank. It would be necessary to

note the contents of the said letter as addressed to the Assistant Commissioner, Service Tax-I(Audit), which reads thus:

> "The Assistant Commissioner, Service Tax - I (Audit)
> 2nd Floor, Madhu Industrial Estate
> PB Marg,
> Worli, Mumbai-400013
>
> Date: 23 October 2012
>
> Dear Sir,
>
> Sub: Letter- F NO. ST/HQ/EA-2000/Gr.04/Audit/HSBC/20l0 (dated 26 September 2012) (' Letter')
>
> Payment under protest of service tax on interchange income received by us as issuing bank for the period April 2007 to September 2007
>
> Centralised Service Tax Registration Number AAACT2786PST001
>
> ---
>
> We strongly believe that as we do not have any contractual relationship with the Merchant Establishment (ME) from where interchange income is earned by the acquiring bank and then shared with us as issuing bank, we are not liable to pay service tax on the same. In any case, it is our understanding that the acquiring bank pays service tax on the said income and then shares such tax paid income with us on a revenue sharing basis. Payment of tax on the same revenue twice would amount to double taxation.
>
> We, through Indian Bank Association (IBA) are in the process of seeking suitable clarification on this matter from CBEC. However, till we receive the favorable clarification, as a matter of co-operation with the department we offer to deposit an amount of Rs 33,921,088 (including education cess and higher and secondary education cess) strictly 'under protest' on 22 October 2012 for the period April 2007 to September 2007. Please find enclosed the challan evidencing the same as Annexure A.
>
> This payment, is also in line with the discussion with the Ld. Additional Commissioner who has confirmed that banks can 'make payment for the period April 2007 to September 2007 'under protest' pending the receipt of CBEC clarification. In case favorable clarification is issued by CBEC, the service tax paid under protest would be refunded back to the banks. During

> the IBA meeting it was also decided that no action would be taken by service tax department on the above matter once such payment has been made.
>
> The payment has been made in good faith based on the suggestion of the Ld. Additional Commissioner. The payment should not be construed as acceptance of department's view mentioned in the letter dated 26 September 2012 and we continue to hold that service tax should not be applicable on the interchange income received by the issuing bank.
>
> We request you to take the above on records and acknowledge the receipt of the same.
>
> Thanking you,
> Yours Faithfully,
>
> sd/-
> Sangeeta Mhatre
> Head Tax"
>
> (emphasis supplied)

19. The petitioner by its further letter dated 31 January, 2013 reiterated the said position. The relevant extract of the said letter reads thus:

> "In connection with the above, we once again reiterate that we strongly believe that as we do not have any contractual relationship with the Merchant Establishment (ME) from where interchange income is earned by the acquiring bank and then shared with us as issuing bank. We are not liable to pay service tax on the same. In any case, it is our understanding that the acquiring bank pays service tax on the said income and then shares such tax paid income with us on a revenue sharing basis. Payment of tax on the same revenue twice would amount to double taxation."

20. In the subsequent letter dated 4 June, 2013 addressed by the petitioner to the Assistant Commissioner, Service Tax-I(Audit), under the subject "*Payment under protest of service tax and interest on interchange income received by the petitioner as issuing bank*", for the period in question, the petitioner again reiterated that the deposit of the said amount as made by the

petitioner should not be construed as petitioner's acceptance of the department's view mentioned in the letter dated 26 September, 2012, and that the petitioner continues to hold that the service tax should not be applicable on the interchange income received by the issuing bank.

21. The Final Audit Report also acknowledged the amount of Rs.56,59,76,901/- being the amount in question received as a spot payment. The relevant extract of the Final Audit Report reads thus:

> "In this regard, assessee inform that they have made the payment of Rs.2,934,521 (including education cess and higher and secondary education cess) along with applicable interest of Rs.1,058,305 on 9 October 2012. The copy of the cyber receipt evidencing the proof has been submitted on 10 October 2012. Further, assessee made the contention that the payment is merely to buy peace with the department and in good faith. The payment should not be construed as acceptance of department's view."
>
> (emphasis supplied)

22. It also appears to be not in dispute that on the above premise, the amounts were continued to be retained by the department, however, the department did not undertake any exercise of ascertaining such liability and/or raising a demand against the petitioner much less by issuance of a show cause notice. In fact, a show cause notice was never issued to the petitioner. It is in these circumstances, the petitioner had moved an application dated 24 May, 2018 praying for refund of such amounts, as deposited by it under protest along with interest. In the Refund Application, the petitioner *inter alia* made the following submissions:

> "2. During the course of audit, an issue concerning interchange income was detected by the concerned officers. Since the amount involved was high, the department was chasing to pay the amount demanded along with interest. HBBC bank made the payment of service tax demanded on such activity i.e. for income pertaining to interchange fee. However, the amount was paid under protest. The payment was made for the period October 2007 to June 2012. The payment was made on 21 March 2013 along with the submission that the amount is paid under protest and should not be construed to be acceptance of departments stand on the concerned issue. A copy of the said payment along with the letter submitted is attached as Exhibit C. Further, interest payment for the income i.e. interchange fee was paid by us on 04 June 2013. A copy of the challan evidencing the payment of interest with the under-protest letter is attached as Exhibit D.
>
> 3. It is emphasized that HSBC bank had made this payment under protest and the same was not to be construed as acceptance of departments stand for the interchange fee income. Pursuant to the payment, the department has neither issued any show cause notice nor taken any evasive action in this concern. A significant amount of time has lapsed after making the payments and accordingly, in consequence of the above, HSBC Bank is filing the present refund claim with your good office."
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> (emphasis supplied)

23. As noted above, on the petitioner's refund application, an Order-in-Original was passed on 16 January, 2020, which was set aside by an order dated 30 March, 2021 passed on the petitioner's appeal, by the Appellate Authority remanding the proceedings. It is on such remand, the impugned order dated 19 June, 2023 has been passed by the Assistant Commissioner (legacy refund), CGST rejecting the refund claim. The impugned order primarily proceeds on the premise that the issue in regard to interchange tax fees was subject matter of adjudication before the tribunal in the case of **Citibank N.A. vs. Commissioner of GST & Central Excise Chennai North ST/Misc/.40776/2017 & ST/40923/2017** as also in the case of **ABN Amro Bank (supra).** The Order-in-

Original records/refers to the orders passed by the Supreme Court in the case of **Citibank N.A.** to hold that such admissibility of the refund can only be determined after larger Bench of the Supreme Court decides the issue. The relevant observations as made in the impugned order reads thus:

> "3.15 I find that, the two-judge bench of Supreme Court gave a split verdict on taxability of interchange fees. Justice Joseph was of the view that issuing banks earn interchange fees as consideration for providing card payment settlement service and service is taxable in the hands of the issuing bank as when issuing bank and acquiring bank are jointly providing a single unified service. Justice Bhatt held that Citibank was not liable to pay the service tax as services provided by the respondent and acquiring bank were not separated and formed a part of a single unified service. The second point of difference was how the judges viewed service tax machinery provisions. Justice Joseph was of the opinion that since the service was provided by the issuing bank, Citibank was liable to include the interchange fee, file returns and pay service tax on the same. Due to the non-payment of tax by Citibank, Justice Joseph found a possibility of suppression by the issuing bank and sought to remand the matter to the Tribunal for confirmation of facts. However, Justice Bhat on the other hand opined that since interchange fee is part of the acquirer bank's service, there was no need for the Citybank separately disclosing and taxing part of the value in its returns. Lastly, Justice Joseph opined that the service provided by Citibank for which it charged an interchange fee would be liable to the service tax and it would not amount to double taxation. Justice Bhat noted that payment of service tax by Citibank would amount to double taxation as service tax was already collected from the acquiring bank on the entire value of MDR so it should be rendered as a single service by the acquiring and issuing banks as it is taxable as a single service.
>
> 3.17 In view of the above, the submissions made by the claimant and allowed by the Hon'ble Commissioner (Appeals) regarding the amount deposited by the Applicant with a pre-condition "That in case favorable clarification is issued by CBEC, the service tax paid under protest would be refunded back to the banks" is a deposit and has not been challenged. Hence, I am of the considered opinion that the admissibility of the refund can be determined only after the larger bench of the Apex Court gives its final verdict.
>
> 3.18 I find the submission made by the claimant that the remand proceedings should specifically address the prayers raised in the Writ Petition (Lodging) No. 3989/2023 filed by them with the Hon'ble Bombay High Court with prayer:

> "a) issue a Writ of Mandamus or a Writ in the nature of Mandamus or any other writ, order or direction under Article 226 of the Constitution of India to direct Respondent No. 2 to issue an order in relation to the refund claimed by the Petitioner (with interest) as per the prescribed procedure under Section 11 B of the Excise Act in a time-bound manner, giving effect to paragraphs 14.1 and 14.2 of the Order-in-Appeal No. SM / 49 / Appeals - II / MC /2021 dated 21 April 2021;
>
> b) issue a Writ of Mandamus or a Writ in the nature of Mandamus or any other writ, order or direction under Article 226 of the Constitution of India to declare that the retention of deposit of Rs.56,19,84, 075 towards service tax and interest made 'under protest' to the Respondents is without authority of law and liable to be refunded along with interest; ***
>
> 3.19 I also find that the retention of deposit is not without authority of law as the issue of levy/non-levy of service tax on interchange charges will be determined only after the larger bench of the Apex Court gives its final verdict."

24. From the perusal of the impugned order, it is clearly seen that the petitioner asserted that respondent no. 2 had no authority to retain the said amount, which was voluntarily deposited under protest. In our opinion, this would be relevant in the context of the petitioner's contention based on the provisions of Article 265 of the Constitution.

25. As noted by us hereinabove, the stand of the respondents in the reply affidavit is nothing but what the impugned order provides for. When the petitioner is before us asserting violation of provisions of Article 265 of the Constitution, which provides that "No tax shall be levied or collected except by authority of law", this would certainly pre-suppose that the amounts which are levied and collected in accordance with law can only be retained and not

otherwise. Thus, the department would need to demonstrate that it had authority in law to withhold/appropriate the amounts as deposited by the petitioner towards tax. This is certainly not the case, as the department is alleging that the amounts which are retained by the department are in fact tax levied or collected in accordance with law. The stand taken by the department to retain the amount is only on the basis of a forfuitous circumstances, namely, the petitioner having voluntarily deposited the amount and the legitimacy of any such amounts as deposited is an issue relevant, in the adjudication of the proceedings in the case of **Citibank N.A.** (supra).

26. We are not persuaded to accept the reasons as set out in the impugned order, as urged before us in the reply affidavit, to be any ground which would provide any legitimacy to the department to retain the amounts which were deposited under protest, and which is not an ascertained amount of tax much less levied and collected. We may also observe that when clearly such amounts were deposited by the petitioner under protest and categorically not accepting any liability to pay service tax on such count, the department was not precluded from taking an appropriate position at the relevant time, and/or surprisingly it was not adviced to do so, to raise a demand against the petitioner in the manner known to law, in contesting the position taken by the petitioner by issuance of a show cause notice. In the absence of such steps being taken, the legal character of the deposit of the said amounts, as made by the petitioner

with the department, would continue to remain as amounts deposited under protest and retained by the department not as a tax or under an authority in law.

27. In these circumstances, in our opinion, such rejection of the refund application is squarely hit by the provisions of Article 265 of the Constitution, as the action of the department results in withholding/retaining amounts, not levied in accordance with law or collected under authority of law.

28. Also it was not unjustified for the petitioner to invoke the writ jurisdiction of this Court and more particularly, when the petitioner contends violation of its rights under Article 265 read with provisions of Article 14 as raised before us. It is not the case that the petitioner had not knocked the doors of the authority by a lawful refund application. It is also not the case that the petitioner has directly invoked the jurisdiction of this Court under Article 226 of the Constitution. As rightly contended on behalf of the petitioner, the petitioner is a reputed bank having large scale operations in the country and is an entity of reputation. There is nothing on record to suggest that in the event any recovery is initiated against the petitioner, the department would not be in a position to recover any lawful dues. We are not shown any such situation or proceedings against the petitioner.

29. Be that as it may, on behalf of the department we are also not shown any provision under the Finance Act, 1994 which would authorise the department to retain said amounts and in the situation peculiar to the present case. If there are no supporting provisions under the Finance Act for withholding of the service tax deposited by the petitioner under protest, then certainly retention/withholding of such amounts would amount to an action without the sanction and authority in law. Such amounts, hence, would be required to be refunded to the petitioner.

30. Insofar as the department's contention on the basis of split decision in the case of **Citibank N.A.** is concerned, it may be correct that the issue as involved in such case would now be resolved by the larger Bench, however, in our opinion, in the context of the present facts, adjudication of such issue may not be relevant as far as the issue before us is concerned. This more particularly that for the period in question, no show cause notice was issued by the department to the petitioner in the manner known to law. We are also not shown any material, that the deposit in question as made by the petitioner under protest, would have any lien of the department under law, that too merely because an issue on the interchange income is pending adjudication in the case of **Citibank N.A.** (supra).

31. We may also observe that in the present case the amounts in question were deposited by the petitioner under protest and without admitting any liability of being taxed under the head "Interchange Income". As seen from the letters as addressed by the petitioner in such context, the sound of the 'alarm bells' that the deposit of the amounts in question was under protest and without admitting of any liability of levy, was quite loud so as to activate the respondents to initiate the process to recover service tax on such count. Even assuming that the amounts were to be paid under mistake of law, a party would be entitled to recover the same and the party receiving the same is bound to repay or return the amounts. It is well settled that no distinction can be made in respect of tax liability and / or of any other liability even considering the provisions of Section 72 of the Contract Act. We may refer to the decision of the Constitution Bench's of the Supreme Court in the case of '**The Sales Tax Officer, Banaras and Ors. Vs. Kanhaiya Lal Makund Lal Saraf**"[3], (in which, the Supreme Court made the following observations which, in our opinion, are applicable to the facts of the present case). In the said case, the appellant had paid sales tax on forward transaction which were held to be *ultra vires* by the High Court and it was in such context refund of the amounts was claimed by the appellant therein, and the same was not granted, hence the appellant had approached the High Court invoking Article 226 of the Constitution of India

3 AIR 1959 SC 135

inter alia praying for refund of the amounts. The appellant succeeded before the High Court which issued a writ of mandamus directing that the appellant be refunded the amounts as paid to the respondents. An appeal filed by the department was dismissed. In a certificate under Article 133(1)(b) of the Constitution, the proceedings reached the Supreme Court. In such context, the Court examined the issue whether the appellant would be entitled to a refund of the tax amount, as withheld by the respondent-department. The Constitution Bench dismissing the department's appeal held that the respondent had made the payments voluntarily under a mistake of law which would disentitle the respondent from receiving the amounts in question. It was held to be a settled principles of law that once it was established that the payments, even though it be of a tax, has been made by the party labouring 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. In such a situation, it was held that there was no question of any estoppel being applicable against the party demanding such payment (in the present case the petitioner). The Court has made the following observations:-

> "26. Re (i) :The respondent was assessed for the said amounts under the U.P. Sales Tax Act and paid the same; but these payments were in respect of forward transactions in silver. If the State of U.P. was not entitled to receive the sales tax on these transactions, the provision in that behalf being ultra vires, that could not avail the State and the amounts were paid by the respondent, even though they were not due by contract or otherwise. The respondent committed the mistake in thinking that the monies paid were due when in fact they were not due

and that mistake on being established entitled it to recover the same back from the State under S. 72 of the Indian Contract Act. It was, however, contended that the payments having been made in discharge of the liability under the U. P. Sales Tax Act, they were payments of tax and even though the terms of S. 72 of the Indian Contract Act applied to the facts of the present case no monies paid by way of tax could be recovered. We do not see any warrant for this proposition within the terms of S. 72 itself. Reliance was however, placed on two decisions of the Madras High Court (1) reported in Municipal Council, Tuticorin v. Balli Bros, AIR 1934 Mad 420 and (2) Municipal Council, Rajahmundry v.™ Subba Rao, AIR 1937 Mad 559, It may be noted, however, that both these decisions proceeded on the basis that the payments of the taxes there were made under mistake of law which as understood then by the Madras High Court was not within the purview of S. 72 of the Indian Contract Act. The High Court then proceeded to consider whether they fell within the second part of S. 72, viz., whether the monies had been laid under coercion. The court held on the facts of those cases that the payments had been voluntarily made and the parties paying the same were therefore not entitled to recover the same. The voluntary payment was there — considered in contradistinction to payment under coercion and the real ratio of the decisions was that there was no coercion or duress exercised by the authorities for exacting the said payments and therefore the payments having been voluntarily made, though under mistake of law, were not recoverable. The ratio of these decisions, therefore, does not help the appellants before us. The Privy Council decision in AIR 1949 PC 297 (Supra) has set the whole controversy at rest an if it is once established that the payment, even though it be of a tax, has been made by the party labouring under a mistake of law the party is entitled to recover the same and the party receiving the same is bound to repay or return it. No distinction can, therefore, be made in respect of a tax liability and any other liability on a plain reading of the terms of S. 72 of the Indian Contract Act, even though such a distinction has been made in America. vide the passage from Willoughby on the Constitution of the United States, Vol. 1, P. 12 op. cit. To hold that tax paid by mistake of law cannot be recovered under S. 72 will be not to interpret the law but to make a law by adding some such words as "otherwise than by way of taxes" fter the word "paid".

27. If this is the true position the fact that both the parties, viz... the respondent and the appellants were labouring under a mistake of law and the respondent made the payments voluntarily would not disentitle it from receiving the said amounts. The amounts paid by the respondent

under the U. P. Sales Tax Act in respect of the forward transactions in silver. had already been deposited by the respondent in advance in accordance with the U. P. Sales Tax Rules and were appropriated by the State of U. P, towards the discharge of the liability for the sales tax on the respective assessment orders having been passed. Both the parties were then labouring, under a mistake of law, the legal position as established later on by the decision of the Allahabad High Court in AIR 1952 All 764 subsequently _ confirmed by this Court in AIR 1954 SC 459 not having been known to the parties at the relevant dates. This mistake of law became apparent only on May 3, 1954, when this Court confirmed the said decision of the Allahabad High Court and on that position being established the respondent became entitled to recover back the said amounts which had been paid by mistake of law. The state of mind of the respondent would be the only thing relevant to consider in this context and once the respondent established that the payments were made by it under a mistake of law, (and it may be noted here that the whole matter proceeded before the High Court on the basis that the respondent had committed a mistake of law in making the said payments), it was entitled to recover back the said amounts and the State of U. P. was bound to repay or return the same to the respondent irrespective of any other consideration. There was nothing in the circumstances of the case to raise any estoppel against the respondent nor would the fact that v the payments were made in discharge of a tax liability come within the dictum of the Privy Council above referred to Voluntary payment of such tax liability was not by itself enough to preclude the respondent from recovering the said amounts, once it was established that the payments were made under a mistake of law. On a true interpretation of S. 72 of the Indian Contract Act the only two circumstances there indicated as entitling the party to recover the money back are that the monies must have been paid by mistake or under coercion. If mistake either of law or of fact is established, he is entitled to recover the monies and the party receiving the same is bound to repay or return them irrespective of any consideration ' whether the monies had been paid voluntarily, subject however to questions of estoppel, waiver, limitation or the like. If once that circumstance is established the party is entitled to the relief claimed. If, on the other hand, neither mistake of law nor of fact is established, the party may rely upon the fact of the monies having been paid under coercion in order to entitle him to the relief claimed and it is in that position that it becomes relevant to consider whether the payment has been a voluntary payment or a payment under coercion. The latter position has been elaborated in English law in the manner following in Twyford v. Manchester Corporation, 1946 Ch 236 at p. 241 where Romer J. observed:

> "Even so, however, respectfully agree with the rest of Walton J.'s judgment, particularly with his statement that a general rule applies namely, the rule that, if money is paid voluntarily, without compulsion, extortion or undue influence, without fraud by the person to whom it is paid and with full knowledge of all the facts, it cannot be recovered, although paid without consideration, or in discharge of a claim which was not due or which alight have been successfully resisted."
>
> (emphasis supplied)

The principles of law as enunciated in the aforesaid decision are squarely applicable in the facts of the present case, inasmuch as, it was certainly on the basis of the audit objection and on a forfituous circumstance, that the petitioner may face a levy on the interchange income, the petitioner had deposited the amount in question under protest. However, this would not *ipso facto* mean that any deposit of the amount 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. It would be too far-fetched for the department to take such position to retain the amounts. For such reason, even assuming that the deposit of the said amount is under a mistake of law, even in that event, the department would not have any authority to withhold the said amounts.

32. In our opinion, the petitioner time and again had made its position clear pointing out to the department, that the said amounts were deposited/paid under protest. The petitioner had pursued its claim and that too by making a proper refund application. It is not the case that the petitioner had

abandoned its claim. 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. Thus *ex-facie* the department has no authority to retain such amount. In fact, retaining such amount would amount to an unjust enrichment. Also, the case of the petitioner being hit by the case of unjust enrichment, is not the case of the department.

33. It is well settled that once such 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. In such circumstances, it was appropriate for the petitioner to invoke the jurisdiction of this Court under Article 226 of the Constitution praying for writ for directing refund of money illegally retained / withheld. The law in this regard is well settled. In such context, we may usefully refer to a recent decision of the Division Bench of this Court in **Grasim Industries Ltd. Vs. Assistant Commissioner of Income Tax**[4] wherein the Division Bench has held that refusal of the department to return the amount and retaining the same, was unauthorised and in the facts of the case amounted to unjust enrichment at the hands of the department. The Court summerising the principles of law in that regard when the revenue had retained said amounts deducted as tax at source, observed that the fees received were not taxable in India and consequently, no tax would be deducted out of

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source by the petitioner to a foreign entity concerned in the said proceedings. The observations of the Court in such context are required to be noted, which read thus:-

> "23. In our view, the refusal of the Department to return the amount and retaining the same is unauthorized by law and would only amount to unjust enrichment by the Department on technical grounds.
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> 24. The Apex Court in CIT v. Shelly Products [2003] 129 Taxman 271/261 ITR 367, as relied upon by Mr. Mistri, has held that where an assessee chooses to deposit by way of abundant caution advance tax or self-assessment tax which is in excess of his liability on the basis of return furnished or by mistake or inadvertence or on account of ignorance, included in his income any amount which is exempted from payment of income tax or is not an income within the contemplation of law, he can certainly make such claim before the concerned authority for refund and he must be given that refund on being satisfied that refund is due and payable. Non giving the refund, in our view, would be in breach of Article 265 of the Constitution of India which states, "no tax shall be levied or collected except by authority of law".
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> In New India Industries Ltd. v. Union of India AIR 1990 (Bom.) the Court held that taxes illegally levied must be refunded. The doctrine of unjust enrichment has to be applied after having regard to the facts of each case.
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> 26. In Balmukund Acharya v. Dy. CIT (2009)_176 Taxman 316/310 ITR 310 (Bom.) the Court held that the authorities under the Act are under an obligation to act in accordance with the law. Tax can be collected only as provided under the Act. If any assessee, under a mistake, misconceptions or on not being properly instructed is over assessed, the authorities under the Act are required to assist him and ensure that only legitimate taxes due are collected. Paragraphs No. 31,32 and 33 of Balmukund Acharya (supra) read as under:
>
> > "31. Having said so, we must observe that the Apex Court and the various High Courts have ruled that the authorities under the Act are under an obligation to act in accordance with law. Tax can be collected only as provided under the Act. If any assessee, under a mistake, misconceptions or on not being properly instructed is over assessed, the authorities under the Act are required to assist him and ensure that only legitimate taxes due are collected (see S.R. Kosti v. CIT [2005]_276 ITR 165 (Guj.), CPA Yoosuf v. ITO [1970]_77 ITR 237 (Ker), CIT v. Bharat General Reinsurance Co. Ltd. [1971]_81 ITR 303 (Delhi), CIT v. Archana R. Dhanwatey [1982]_136 ITR 355 (Bom.).

> 32. If particular levy is not permitted under the Act, tax cannot be levied applying the doctrine of estoppel. (See Dy. CST v. Sreeni Printers [1987] 67 SCC 279.
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> 33. This Court in the case of Nirmala L. Mehta v. A. Balasubramaniam, CIT (2004]_269 ITR 1 has held that there cannot be any estoppel against the statute. Article 265 of the Constitution of India in unmistakable terms provides that no tax shall be levied or collected except by authority of law. Acquiescence cannot take away from a party the relief that he is entitled to where the tax is levied or collected without authority of law. In the case on hand, it was obligatory on the part of the Assessing Officer to apply his mind to the facts disclosed in the return and assess the assessee keeping in mind the law holding the field."

34. As a result of the above discussion, it is limpid that the respondents have retained the amounts in question without authority in law. Such amounts are required to be refunded to be petitioner along with interest.

35. In the light of the above discussion, the petition needs to succeed. It is accordingly allowed in terms of prayer clauses (a) and (b). Refund of the amount be granted to the petitioner as ordered along with applicable interest within a period of four weeks from the day a copy of this order is available to the parties.

36. Rule is made absolute in the above terms. No costs.

(JITENDRA JAIN, J.) (G. S. KULKARNI , J.)