

BEFORE THE COMMISSIONER, STATE TAXES & EXCISE, H.P.,
SHIMLA-09
(Block No.30, SDA Complex, Shimla-09)

Claim No. 01/2023

Date of Institution 06.04.2023

Date of Decision 19.04.2023

In the matter of :

Sh. Ramesh Chauhan, S/o Rangila Ram, Toll Lessee Govindghat,
Kala Amb, Behral Units, Distt. Sirmour, Himachal Pradesh, Resident
of D-6, Pandav Nagar, Meerut, U.P.

...Claimant

Vs.

State of HP & Ors.

....Respondents

Claim to refund the amount as eligible in accordance with Condition No. 2.8.1 of the Announcements of Allotments for Lease of Right to Collect Toll by Auction-cum-Tender under H.P. Tolls Act, 1975 in respect of Govindghat and Kala Amb Toll Units.

Present: Sh. Rakesh Sharma, Advocate for the Claimant.
Sh. Sandeep Mandyal, Sr. Law Officer alongwith Sh. Sandeep Attri, ACST&E, Sataun Circle, Distt. Sirmour.

ORDER

1. This order shall dispose of the present claim for refund in respect of Govindghat and Kala Amb Toll Units. In fact, Sh. Ramesh Chauhan (hereinafter referred to as "Claimant") filed Civil Writ Petition No.760/2023 titled as "Ramesh Chauhan Vs. State of HP & Ors." before the Hon'ble High Court wherein sought directions for the refund of the amount in accordance with Condition No. 2.8.1 of the Announcements of the Allotments for Lease of Right to Collect Toll by Auction-cum-Tender under H.P. Tolls Act, 1975 (hereinafter referred to as "Announcements") in respect of Govindghat and Kala Amb Toll Units (amongst other reliefs).



2. The Hon'ble High Court vide its order dated 01.04.2023 was pleased to dispose of the above said CWP No. 760/2023 with the following directions:-

“3. In the given circumstances, we deem it appropriate to dispose of the instant petition by directing respondent No.2 to treat the instant petition as a claim/appeal and thereafter decide the same in accordance with law, by passing a speaking order within a period of two weeks from today. Ordered accordingly. Pending application(s), if any, also stands disposed of.”

3. Thereafter, in compliance to the directions issued by the Hon'ble High Court, the present writ petition is treated as claim and accordingly notices (of the present claim) were issued to the Claimant as well as the Respondents. The Ld. Counsel appearing on behalf of the Claimant stated at bar that he does not want to file any additional documents in support of the claim.
4. The Condition No. 2.8.2 mandated the Claimant to file claim along with all the papers as may be necessary to project his cause before the Dy. CST&E. Thereafter, the Dy.CST&E will have to make appropriate inquiry in the matter and if it is concluded by him that the toll lessee/claimant has really sustained some loss on account of circumstances mentioned in Condition No. 2.8.1, the Dy.CST&E will send the case along with his recommendations to the Commissioner of State Taxes & Excise for prior approval of refund. Thus, as per the mandate of Condition NO. 2.8.2 the recommendations by the Dy.CST&E is a condition precedent for the adjudication of the claim by the Commissioner, State Taxes & Excise.
5. The Claimant has based his claim by solely relying upon the recommendations made by the Dy.CST&E, Sirmour, the Claimant has neither urged nor questioned the grounds other than those mentioned in the recommendations dated 21.12.2022 (qua Govindghat Toll Unit) and recommendations dated 07.11.2022 (qua Kala Amb Toll Unit), respectively. Since, the



recommendations for claiming refund in respect of the Govindghat Toll Unit are made on the basis of the memorandum dated 01.04.2022 which imposed a ban on entry of mining vehicles from Himachal Pradesh and the recommendations for claiming refund in respect of Kala Amb Toll Unit are made on the basis of lockdown imposed for seven days w.e.f. 25.03.2020 to 31.03.2020, therefore, for the sake of brevity, the claims regarding Govindghat and Kala Amb Toll Units are being dealt with separately under the following heads:-

- A. Claim in respect of Govindghat Toll Unit.
- B. Claim in respect of Kala Amb Toll Unit.

A. Claim in respect of Govindghat Toll Unit:

- (i) As far as the Govindghat Toll Unit is concerned, this (i.e. Govindghat Toll Unit) was allotted in favour of the claimant for the year 2022-23 and has been granted lease of right to collect toll through auction-cum-tender process for Rs. 7,79,00,000/-.
- (ii) The claimant alleged that the District Officer, Dehradun Government of Uttarakhand has issued office memorandum in furtherance to notification dated 10.11.2021 issued by Industrial Development (Mining) of Uttarakhand Govt. dated 10.11.2021 whereby the vehicle(s) entering from outside the State i.e. Himachal Pradesh, Haryana and U.P. transporting RBM and boulders (except minor minerals, dust and grit) were not allowed to enter that (Uttarakhand) State except under very special circumstances, where such transport was stated to be permitted for a limited period by that State Government only for official work under the prescribed conditions.
- (iii) The Ld. Counsel for the Claimant contended that due to ban imposed by the Govt. of Uttarakhand regarding the entry of vehicles carrying boulders, minor minerals has resulted into recurring loss to him. The Ld. Counsel further contended that on account of losses, the claimant could not deposit the monthly installments. The Ld. Counsel for the claimant further argued that DCST&E, Sirmour vide his letter dated 21.12.2022 clearly recommended the case for consideration under Condition No. 2.8.1 of the Announcements for refund of loss



amounting to Rs.1,08,65,520/- by holding that the circumstances arose due to situation caused by the order dated 01.04.2022 by Uttarakhand Govt. and such circumstances may be covered under "Force Majeure".

- (iv) The perusal of the claim vis-à-vis the refund made thereon it is evident that recommendations qua the refund have been made by the DCST&E, Sirmour solely on the basis of memorandum dated 01.04.2022 purported to have been issued in furtherance to the notification dated 10.11.2022 issued by the Govt. of Uttarakhand. The claimant has also mentioned the liabilities and the amount of refund as per 2.8.1 in tabular form as under:-

Year	Liability (Rs.)	Refund as per 2.8.1 Condition (Rs.)
2019-2020	0	13,71,220
2021-2022	0	23,85,765
November 2022	0	1,08,65,520
December 2022	62,32,000	14,03,463
Position as on 24.01.2023 (Date of notice)	62,32,000	1,60,25,968
Excess with the Department		97,93,968/-

Out of the aforesaid amount, an amount of Rs. 13,71,220/- is not taken into consideration as the same pertains to Kala Amb Toll Unit (as it is evident from the recommendations dated 07.11.2022) and it will be dealt with separately. Thus, as per claimant himself he has admitting a liability amounting to Rs. 62,32,000/- and is claiming refund as per Condition No. 2.8.1 amounting to Rs. 1, 46,54,748/- (minus an amount of Rs. 13,71,220/- which pertains to Kala Amb barrier).

- (v) Thus, it is crystal clear that the claim submitted by the Claimant himself shows that under the garb of refund he is claiming adjustment by claiming deduction of the liability amounting to Rs. 62,32,000/- from the amount which in fact is sought to be claimed as refund by invoking Condition No. 2.8.1 of the Announcements. Thus, it is crystal clear from the claim submitted by the claimant itself that he has not paid any amount rather the claimant is claiming adjustment of the amount from the liability he has already incurred after making the deduction with respect of the amount which is claimed by him by invoking Condition No. 2.8.1.



- (vi) At the very outset, the claim put forth by the claimant is totally in contravention of Section 10 of the HP Tolls Act, 1975 which provides that:

"10. Refund.-The Assistant Excise and Taxation Commissioner or the Excise and Taxation Officer in charge of the district either suo-moto or on an application shall, in the prescribed manner, refund to the lessee or any other person, with the prior approval of the Commissioner, any amount of lease money paid by such lessee or person under this Act, if the amount of lease money so paid is in excess of the amount due from him under this Act: Provided that refund shall only be allowed to the lessee in the event of any loss sustained on account of law and order situation, natural calamity or by acts of God or force majeure: Provided further that no refund under this section shall be allowed unless the claim for refund is made within a period of one year from the date on which such claim accrues."

- (vii) The collateral reading of the relief claimed by the claimant vis-a-vis provisions envisaged under Section 10 of the HP Tolls Act shows that the refund so claimed can only be made if the claimant has paid the lease money in excess of the amount due from him under the provisions of the Act. Further, in the present case, the claimant has not paid any amount in excess of the lease amount which the claimant is under obligation to pay under the provisions of the HP Tolls Act vis-a-vis Toll Announcements.

- (viii) The claimant is asking for refund by invoking Condition No. 2.8.1 of the Announcements which provides that:

"2.8.1 In the event of any loss sustained by the toll lessee on account of law and order situation, natural calamity or by acts of God, and force majeure the Dy. Commissioner of State Taxes & Excise or the Asstt. Commissioner of State Taxes & Excise I/C of the district either suo-moto or on an application made to him, with the prior approval of the Commissioner of State Taxes & Excise, Himachal Pradesh may refund any amount of lease money paid by such lessee."

Thus, the perusal of the Condition No. 2.8.1 also stipulates refund of any amount of lease money paid by such lessee.

- (ix) Furthermore, "**Refund**" even in common parlance means the act of returning money received previously, therefore, the previous payment of money is a condition precedent for claiming "Refund". Admittedly, in the present case, the claimant is putting forth his case for adjustment of amount by setting of liability already incurred from the amount purported to have been calculated as



refund in terms of Condition No. 2.8.1 which is otherwise legally impermissible as per Section 10 of the HP Tolls Act vis-à-vis Condition No. 2.8.1 of the Announcements.

- (x) As far as sustainability of claim of refund on the basis of memorandum dated 01.04.2022 purported to have been issued by the Govt. of Uttarakhand is concerned, it is crystal clear that the directions issued in the said memorandum are not at all binding as far as conditions envisaged in the Toll announcements for the year 2022-23 are concerned in as much as the HP Govt has formulated the Toll Policy by keeping in view its economic and topographic situation in order to enhance Govt. revenue.
- (xi) The Claimant has participated in the bid for allotment of lease right to collect toll by auction-cum-tender after fully understanding the terms and conditions of the Announcements voluntarily and out of his own free will and volition.

Furthermore, the perusal of the memorandum dated 01.04.2022 shows that there was not an absolute ban on the movement of vehicles which would otherwise render impossible the performance of the contract on the part of the Claimant. In fact, it was only the vehicles involved in the transportation of RBM and Boulders (except minor minerals, dust and grit) from outside the State were not generally permitted. Further, the movement of such vehicles was however permitted for the limited period by the said State Government only for official work under the prescribed conditions.

- (xii) Notably, it is evident from the recommendation that the Mining Officer, Distt. Sirmour at Nahan has informed that the District Magistrate has imposed a ban on the transportation of washed sand from Himachal Pradesh to Uttarakhand only and other minerals were allowed to be sold and transported from Himachal Pradesh to Uttarakhand. However, it was intimated that it was not possible to comment on the contention of Toll Lessee (Claimant) that there was a huge loss in the toll collection due to the ban imposed by the District Magistrate, Dehradun on the transportation of washed sand. It was further intimated that there was no record available in their office in order to ascertain as to what quantity of mineral being transported to Uttarakhand. The recommendations have been made only on the basis of sample survey of the current year in question and no comparative data of previous year(s)/month(s) has either been submitted by the Claimant or taken into consideration.



- (xiii) Significantly, the Claimant under the garb of the Memorandum dated 01.04.2022 (issued by the Uttarakhand Government) is projecting as if the Toll lease of Govindghat Toll Unit was allotted in favour of the Claimant only in respect of mining vehicles passing through the said barrier. However, the terms and conditions envisaged in the Announcements is also with respect to the Goods vehicles mentioned in the Schedule-II of the Announcements which also includes Small Goods Vehicles, Passenger Vehicles, Small Passenger Vehicles, Private Vehicles, Tractor as well as Motor Rickshaw etc. There is not even a single averment in the present claim or in the recommendation to substantiate qua the quantum of movement of vehicles crossed/passed through Govindghat Barrier other than the mining vehicles.
- (xiv) As far as Force Majeure is concerned, Clause 2.8.1 of the Announcements deals with the situation where a loss is sustained by the Claimant on account of law and order situation, natural calamity or by acts of God and Force majeure. In fact, Force Majeure Clause triggers when extraordinary circumstances exist.
- (xv) As discussed earlier, the Toll units and Announcements have been notified/framed by taking into consideration the topographic and economic conditions prevailing in the State of HP. The Claimant has participated in the bid for Allotment of Lease Rights to Collect Toll by Auction-cum-Tender under H.P. Tolls Act, 1975 after fully understanding the terms and conditions of the Announcements and the Claimant is under statutory obligation to comply the provisions of the HP Tolls Act and the Conditions envisaged in the Announcements, thereof. Further Condition No. 1.5 of the Announcements also provides that the Claimant/lessee shall be bound to comply with provisions of the Act. In other words, neither the toll units have been notified nor the Announcements have been framed by the State of H.P. by taking into consideration the relaxation/ban whatsoever given or imposed by the neighboring states.
- (xvi) In this background especially the fact that there was not an absolute ban on the movement of vehicles and even the vehicles which were banned were also permitted by the said State Government for the limited period only for official work under the prescribed conditions, therefore, the Force Majeure clause is not applicable in the present case.



B. Claim in respect of Kala Amb Toll Unit:

- (i) As far as Kala Amb Toll Unit is concerned, this (i.e. Kala Amb Toll Unit) was allotted to the Claimant for the period from 01.04.2019 to 31.03.2020 through Auction-cum-Tender for an annual fee of Rs. 7,15,00,000/-.
- (ii) The Dy.CST&E, Sirmour vide his letter dated 07.11.2022 has recommended that refund of lease money paid in 2019-20 for the period of 7 days (lockdown period) w.e.f. 25.03.2020 to 31.03.2020 to the tune of Rs. 13,71,220/- on pro-rata basis on the Annual Toll Fee.
- (iii) In fact, the Dy.CST&E, Sirmour has made the computation of an amount of Rs. 13,71,220/- and its recommendation thereof by taking into consideration;

Firstly, an Annual Toll Fee for the year 2019-20 which was 7,15,00,000/-

Secondly, the Dy.CST&E has computed the daily Toll fee by dividing the Annual Toll Fee from 365 days which comes out to be 1,95,890/-

Lastly, the Dy.CST&E has multiplied the said amount of Rs. 1,95,890/- by 7 (i.e. period w.e.f. 25.03.2020 to 31.03.2020) and thereafter worked out a aforesaid amount of Rs. 13,71,220/-.

Thus, the Dy.CST&E, Sirmour has recommended this amount of Rs. 13,71,220/- for refund vide his aforesaid recommendation dated 07.11.2022 under Condition No. 2.8.1 of the Announcements.

- (iv) For deciding the real point in controversy in respect of Kala Amb Toll Unit, the Condition No. 2.8.1 of the Announcements is again reproduced here as under:

"2.8.1 In the event of any loss sustained by the toll lessee on account of law and order situation, natural calamity or by acts of God, and force majeure the Dy. Commissioner of State Taxes & Excise or the Asstt. Commissioner of State Taxes & Excise I/C of the district either suo-moto or on an application made to him, with the prior approval of the Commissioner of State Taxes & Excise, Himachal Pradesh may refund any amount of lease money paid by such lessee."

Thus, it is crystal clear from the above said Condition no. 2.8.1 that the Claimant must have sustained loss on account of any of the circumstances mentioned in the said condition for calming any refund of any amount of lease money. Therefore,



sustaining of loss is co-related and has to be read in conjunction with the claim of refund of any amount of lease money.

In other words, sustaining of loss (on account of any of the circumstances specified in Condition No. 2.8.1) is a condition precedent for claiming of refund of any amount of lease money and for invoking condition no. 2.8.1, the loss must have been sustained by the lessee (Claimant).

- (v) This fact is further fortified from the Condition No. 2.8.2 of the Announcements which provides that the Dy.CST&E after making appropriate inquiry in the matter (on the basis of claim as well as all the papers filed by the Claimant) and if it is concluded that the Toll Lessee has really sustained some loss on account of circumstances mentioned in the Condition No. 2.8.1 send the case along with his recommendations to the Commissioner, State Taxes & Excise through Zonal Head for prior approval of refund.
- (vi) Thus, in the present case, the Dy.CST&E, Sirmour in his recommendations dated 07.11.2022 has simply calculated the amount of Rs. 13,71,220/- of lease money without determining any loss sustained by the Toll lessee and unless and until the business income/revenue is not determined, no loss can be computed. Even, the recommendations are silent about the income of the Claimant from 1st March, 2020 uptill 24th March, 2020.
- (vii) As a matter of fact, for computing loss, the following points/steps ought to have been taken into consideration:-

Firstly, the addition of all the income of the month(s)/year(s), as the case may be;

Secondly, the addition of all the expenses of the month(s)/year(s) as the case may be;

Lastly, the calculation of the difference by subtracting total expenses away from the total income. Thereafter, the net result would be profit or loss.

Thus, the manner in which the recommendations have been made by the Dy.CST&E, Sirmour for refund of lease money is not only in contravention of Condition No. 2.8.1 as well as 2.8.2 but also contrary to the general principles for determining/computing loss; hence the same is not legally sustainable.



- (viii) Significantly, this forum cannot be oblivious of the fact that piquant and unprecedented situation arose due to the Covid-19 and in order to mitigate the hardships of the lessee(s) including the Claimant, the Govt. of HP accorded the approval of extension of Toll Policy, 2019-20 upto 31.05.2020 and operation of the Toll Policy, 2020-21 from 1st June, 2020 to 31st May, 2021. Not only this, the Toll Lessee(s) were allowed to deposit the monthly Toll Fees for April and May, 2020 on the basis of their actual collection of toll fee.

In addition to above, the Govt. of H.P. vide its letter dated 18th July, 2020 has directed the field authorities not to take any coercive action against the Toll Lessee(s) for non-compliance of Condition No. 2.3.13 (of the Announcements for the year, 2020-21) which mandated for the deposit of advance amount.

- 6 Furthermore, the Claimant is seeking the following relief :-

"The respondent be directed to refund the amount determined as eligible for refund in accordance with condition no. 2.8.1 of the Announcement of the Allotments for Lease to Right to Collect Toll by Auction-cum-Tender under H.P. Toll Acts, 1975 as per Annexures P-10 and P-11 or the respondents be directed to make a reconciliation statement and determine Net Amount Payable/Refundable."

It is evident from the above stated relief clause that the relief so claimed is not only mutually in consistent but also mutually destructive in as much as on the one hand the Claimant is seeking refund on the basis of the recommendations dated 21.12.2021 (qua Govindghat Toll Unit) and dated 07.11.2021 (qua Kala Amb Toll Unit) and on the other hand seeking the directions to make the reconciliation statement and determined net amount payable/refundable.

- 7 The Condition No. 2.8.2 provides that :



"2.8.2 For obtaining the above relief the affected toll lessee will file a claim before the Dy. Commissioner of State Taxes & Excise/ Asstt. Commissioner of State Taxes & Excise I/C. of the district along with all papers as may be necessary to project his cause, within a period of one year from the date on which such claim accrues. The Dy. Commissioner of State Taxes & Excise, In-charge/ Asstt. Commissioner of State Taxes & Excise I/C will make appropriate inquiry in the matter and if it is concluded that the toll lessee has really sustained some loss on account of circumstances mentioned in condition 2.8.1 above, he will send the case along

with his recommendations to the Commissioner of State Taxes & Excise, Himachal Pradesh through the Addl./Joint Commissioner of State Taxes & Excise of the zone concerned for prior approval of refund."

Thus, it is crystal clear from the above said Condition No. 2.8.2 that the onus lies upon the Claimant to project his case and file all the papers as may be necessary in support of the claim. In other words, the burden of proof lies upon the Claimant to prove his claim for refund. Thus, the manner in which the Claimant has asked for the relief clearly shows that the Claimant has failed to discharge the onus lies upon him and wants the other side to prove his case which is against the spirit of aforesaid Condition No. 2.8.2.

Furthermore, it is settled law that the Force majeure cannot be invoked just because the contract allegedly became financially and commercially onerous or difficult to perform.

8. In view of the discussions made hereinabove and after going through the facts and circumstances brought to my notice in each case (as required under Condition No. 2.8.3 of the Announcements), I am of the considered opinion that it is not necessary to give approval to refund the amount and the same is liable to declined and is accordingly declined and the claim filed by the Claimant is hereby rejected. In view of the decline of the approval and rejection of the claim, the Addl. CST&E-cum-Collector (SZ), Shimla is directed to proceed against the Claimant in accordance with law. Let the copy of this order be supplied to all concerned. File after completion be consigned on record room.

Announced on 19th Day of April, 2023

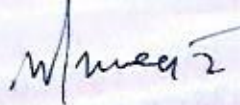


Yunus, I.A.S.
Commissioner of State Taxes & Excise
Himachal Pradesh

Indst. No: STE-Reader/CST&E/2023-1112-16 dated: 19-04-2023

Copy is forwarded to:-

- 1) Addl. CST&E (SZ), H.P., Kasumpti, Shimla-09 .
- 2) Dy.CST&E, Distt. Sirmour at Nahan, H.P.
- 3) Sr. Law Officer, Legal Cell.
- 4) Sh. Ramesh Chauhan, S/o Rangila Ram, Toll Lessee
Govindghat, Kala Amb, Behral Units, Distt. Sirmour, Himachal
Pradesh, Resident of D-6, Pandav Nagar, Meerut, U.P.
- ✓ 5) IT Cell, O/o CST&E, H.P., Shimla-09.



Reader to
Commissioner of State Taxes & Excise
Himachal Pradesh