

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CWP-5625-2014

Pronounced on: 20th May, 2015

**The Jalandhar Iron & Steel Merchants
Association (Regd.), Jalandhar**

..... Petitioner

VERSUS

State of Punjab and others

..... Respondents

CORAM: **HON'BLE MR. JUSTICE RAJIVE BHALLA**
HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present: **Mr.Sandeep Goyal, Advocate, and**
Mr.J.S.Bedi, Advocate, for the petitioner.

Mr.Piyush Kant Jain, Addl.A.G, Punjab.

RAJIVE BHALLA, J.

By way of this order, we shall dispose of CWP-5625-2014, CWP-6042-2014, CWP-6046-2014, CWP-6085-2014, CWP-6221-2014, CWP-6222-2014, CWP-6251-2014, CWP-7907-2014, CWP-7951-2014, CWP-8025-2014, CWP-8095-2014, CWP-8141-2014, CWP-9229-2014, CWP-26767-2014, CWP-322-2015 and CWP-371-2015 as counsel for the parties state that common questions of law arise for adjudication. For the sake of convenience, facts are being taken from CWP-5625-2014.

The petitioner-association prays for issuance of a writ of certiorari, declaring Rule 21(8) of the Punjab Value Added Tax Rules, 2005 (hereinafter referred to as the 'Rules') and clarification,

Annexure P-4, ultra vires and/or inapplicable to the input tax credit already earned.

Counsel for the petitioner submits that Section 13(1) of the Punjab Value Added Tax Act, 2005 (hereinafter referred to as the 'Act') provides that a taxable person i.e. a dealer, is entitled to input tax credit on purchases made during the tax period, subject however to such conditions as may be prescribed. The first proviso to Section 13 of the Act, before it was amended, clarified that input tax credit shall not be available unless the goods are “for sale” within the State or in the course of inter-State trade or commerce etc. Section 13(5) of the Act places certain impediments on the right to claim input tax credit i.e. sets out a negative list which does not apply to iron and steel merchants. Section 15 of the Act which bears the title “Net tax payable by a taxable person” provides that the net tax payable for the tax period shall be determined by deducting the amount of input tax credit available to such person and would include input tax credit carried forward from the preceding tax period, if any.

The input tax credit was, therefore, earned by a taxable person on the date of purchase of taxable goods during a particular tax period and fructified into a tangible right on the date of purchase, provided the goods were “for sale” etc. but did not relate to the stock in hand or any reduced rate of tax. The State of Punjab, however, reduced the rate of taxation on iron and steel goods from 4% to 2% w.e.f. 25.01.2014 and in the exercise of its rule making powers

notified Rule 21(8), on 21.01.2014 but w.e.f 01.04.2014, to provide that input tax credit on goods lying in stock as input or output would earn input tax credit on the “sale” etc. of such goods “at the reduced rate of tax”. The effect of this amendment is that goods that had already earned input tax credit, lying in stock with a dealer, at the time of purchase would be reduced by reference to the reduced rate of taxation, in force on the date of the sale.

Counsel for the petitioner further submits that on the date of coming into force of Rule 21(8) there was no enabling provision in the Act, that empowered the State to reduce the rate of input tax credit already earned by reference to the sale of goods lying in stock or the reduced rate of tax. The amendment in the Act empowering the State of Punjab, to notify such a rule i.e. the first proviso to Section 13 of the Act came into effect on 01.04.2014. The new proviso deleted the words “are for sale” and replaced them with the words “are sold”. Similarly, the words “for use in the manufacture” etc. were replaced with the words “are used in the manufacture” etc., thereby enabling the State in the exercise of its rule making power to reduce input tax credit already earned on stock in trade, by reference to the reduced rate of taxation in force on the date of sale. The amended proviso to Section 13 of the Act having come into effect from 01.04.2014, the amendment in Rule 21(8) of the Rules could not come into force before the amendment of the first proviso to Section 13 of the Act. The State of Punjab has, however, applied

Rule 21(8) of the Rules, before the amendment of the proviso to Section 13 of the Act. Counsel for the petitioner refers to the tax payers' guide issued by the State of Punjab to assert that it is clearly recorded that there is no condition that goods covered by purchases should be sold or used, thereby clearly inferring an admission on the part of the State that input tax credit is not relatable to the reduced rate of tax.

Counsel for the petitioner further submits that the petitioner-association made a representation to the Government but instead of accepting the illegality perpetuated by the amendment, a clarification has been issued which further complicates the matter.

Counsel for the State of Punjab submits that input tax credit is available only when the dealer further sells the goods. This apart, Section 13 of the Act clearly postulates that input tax credit can be earned in such manner and subject to such conditions as may be prescribed. The State was, therefore, well within its power to notify Rule 21(8) of the Rules and prescribe further terms and conditions for availing input tax credit. The amendment applies only to the rate prevalent on the date of sale of stock in hand and, therefore, does not in any manner affect the rights of a dealer or in any manner reduce input tax credit on transactions that have already concluded. Counsel for the State of Punjab relies upon the following judgments: -

1. United Riceland Limited Vs. State of Haryana and

another (2011) 2 SCC 423;

2. R.K.Garg Vs. Union of India and others (1981) 4 SCC 675; and

3. Union of India and others Vs. Nitdip Textile Processors Private Limited and another (2012) 1 SCC 226.

We have heard counsel for the parties and perused provisions of the Act and the Rules.

The question that calls for an answer is whether on 21.01.2014, the Act empowered the State to notify Rule 21(8) of the Rules?

The Punjab Value Added Tax Act, 2005, provided before the first proviso to Section 13 of the Act was amended, that a person who purchases goods from another taxable person would earn input tax and would be entitled to off set this amount as “input tax credit” against his tax liability. To understand the concept of “input tax” and “input tax credit” and answer the question posed, it would be appropriate to reproduce the definitions of “input tax, input tax credit, output tax, return, return period, reverse input tax credit and the right to claim input tax credit, it would be necessary to reproduce relevant provisions of the Act and the Rules, which read as follows: -

“Section 2

(o) **“input tax”** in relation to a taxable person means value added tax (VAT), paid or payable under this Act by a person on the purchase of taxable goods for resale or for use by him in the manufacture or processing or packing of taxable goods in the State.

(p) **“input tax credit”** means credit of input tax (in short referred to a ITC) available to a taxable person under this Act.

(s) **“output tax”** in relation to a taxable person means the tax

charged or chargeable or payable in respect of sale and/or purchase of goods, as the case may be, under this act;

(zc) “**return**” means a true and correct account of business pertaining to the return period in the prescribed form;

(zd) “**return period**” means the period for which returns are to be furnished by a person;

(ze) “**reverse input tax credit**” means an amount of input tax credit, which is required to be reversed by a taxable person on account of: -

(i) Credit note for output tax received from the seller of goods on purchases in respect of which input tax credit is claimed;

(ii) Goods, returned subsequent to availing the input tax credit;

(iii) Goods, subsequently not used in accordance with the conditions prescribed for availing input tax credit; and

(iv) Having availed the credit required to reverse the same in accordance with the provisions of sub sections (8) and (9) of section 13.

(zm) “**tax period**” means a period for which a person is required to pay tax under this Act or the rules made thereunder.”

Section 13 (as it existed before the amendment)

INPUT TAX CREDIT

(1) A taxable person shall be entitled to the input tax credit, in such manner and subject to such conditions, as may be prescribed, in respect of input tax on taxable goods, including capital goods, purchased by him from a taxable person within the State during the tax period:

Provided that such goods are for sale in the State or in the course of inter-State trade or commerce or in the course of export or for use in the manufacture, processing or packing of taxable goods for sale within the State or in the course of inter-State trade or commerce or in the course of export:

Provided further that a taxable person shall be entitled to partial input tax credit in any other event, as may be provided in this section in such manner and subject to such conditions as may be prescribed:

Provided further that if, purchases are used partially for the purposes specified in this sub-section and the taxable person is unable to identify the goods used for such purposes, then the input tax credit shall be allowed proportionate to the extent, these are used for such purposes, in the prescribed manner:

Provided further that input tax credit in respect of purchase tax paid or payable by a taxable person under section 19, shall be allowed subject to the conditions laid therein.

(2) Input tax credit shall be allowed only to the extent by which the amount of tax paid in the State exceeds four percent on purchase of goods –

(a) sent outside the State other than by way of sale in the course of inter-State trade or commerce or in the course of export out of territory of India; and

(b) used in manufacturing or in packing of taxable goods sent outside the State other than by way of sale in the course of inter-State trade or commerce or in the course of export out of the territory of India.

(3) Where a taxable person sends any goods as such or after being partially processed for further processing on job work basis, he shall debit the ITC by four percent of the value of such goods. If such goods after processing are received back by such person, the ITC debited at the time of despatch, shall be restored. Such person shall, however, be required to produce proper evidence in the shape of records, challans or memos or any other document evidencing receipt of such goods, whenever asked for

(4) Input tax credit on furnace oil, transformer oil, mineral turpentine oil, water methanol mixture, naphtha and lubricants, shall be allowed only to the extent by which **the amount of tax paid in the State exceeds four per cent:**

Provided that these goods are used in production of taxable goods or captive generation of power.

(5) A taxable person under this section, shall not qualify for input tax credit in respect of the tax paid on purchase of, -

(a) automobiles including commercial vehicles, two wheelers, three wheelers and spare parts for the repair and maintenance thereof, unless the taxable person is in the business of dealing in such automobiles or spare parts;

(b) petrol, diesel, aviation turbine fuel, liquefied petroleum gas and condensed natural gas, unless the taxable person is in the business of selling such products;

(c) civil structure and immovable goods or properties;

(d) office equipment and building material, unless the taxable person is in the business of dealing in such goods;

(e) furniture fixtures including electrical fixtures and fittings, unless the taxable person is in the business of such goods;

(f) air-conditioning units, air circulators and refrigeration units, unless the taxable person is in the business of dealing in such goods or where air-conditioning, air circulating or refrigeration is essential for sale or storage of taxable goods or in the manufacturing process of taxable goods;

(g) weigh bridge, except when installed inside the manufacturing premises for use in the manufacturing process of taxable goods;

(h) goods used in manufacture, processing or packing of goods specified in Schedule 'A';

(i) goods used in generation, distribution and transmission of electrical energy unless such generation, distribution and transmission of electrical energy is for captive consumption, in which case, it would be allowed subject to the provisions of sub-section (4) of this section;

(j) the provisions of food, beverage and tobacco products, unless the taxable person is in the business of selling food, beverage and

tobacco products; and

(k) goods used for personal consumption or gifts.

(6) A person, who was earlier registered for VAT and has subsequently got himself registered for TOT, shall reverse the input tax credit availed by him before such change of option, on the stock of goods held by him on the day, when he is registered as a registered person.

(7) A person, who was earlier registered for TOT and has subsequently got himself registered for VAT, shall not be entitled for input tax credit on the stock of goods held by him on the day, when he got registered as a taxable person and shall be liable to pay TOT on such stock, if sold within thirty days from such date.

(8) A person, who exports goods out of India and has claimed refund of input tax under sub-section (2) of section 18, shall reverse the input tax credit, if any, availed by him on such goods.

(9) A person shall reverse input tax credit availed by him on goods which could not be used for the purposes specified in sub-section (1) of this section or which remained in stock at the time of closure of the business.

(10) Where the selling taxable person has made any modification in respect of a sale by issuance of debit or credit note on the invoice book, the purchasing taxable person shall make necessary adjustment of input tax credit availed.

(11) Input tax credit shall be non-transferable, except where the ownership of the business of a person is entirely transferred.

(12) Save as otherwise provided hereinafter, input tax credit shall be allowed only against the original VAT invoice and will be claimed during the period in which such invoice is received.

(13) In case the original VAT invoice is lost or mutilated, the input tax credit will be available only after the designated officer has determined the credit in the prescribed manner.

(14) If upon audit or cross verification or otherwise, it is found that a taxable person has made a false input tax credit claim, the Commissioner or the designated officer, as the case may be, shall order for recovery of the whole or any part of such input tax credit, as the case may be, without prejudice to any action or penalty provided for in this Act.

(15) The onus to prove that the VAT invoice on the basis of which, input tax credit is claimed, is bonafide and is issued by a taxable person, shall lie on the claimant.

Section 2(o) of the Act defines “input tax” as the value added tax paid or payable on the purchase of taxable goods meant for resale or for use to manufacture, process or pack taxable goods in the

State, thereby postulating that “input tax” is tax “paid” or “payable” at the rate in force at the time of purchase of taxable goods. Section 2(p) of the Act defines “input tax credit” to mean the credit of any tax available to a taxable person thereby clarifying that value added tax paid at the time of purchase of taxable goods meant for resale or “for manufacture” etc. to be credited to the account of the taxable person shall be the “input tax credit” available to such a person. Section 2(s) defines the term “output tax”. Section 2(zc) defines the word “return” and Section 2(zd) defines the words “return period”. Section 2(zm) defines “tax period” to mean the period for which a person is required to pay tax under the Act or the Rules.

Section 13 of the Act titled as “input tax credit” sets out the parameters for availing input tax credit. The first proviso (relevant for the present controversy), as it existed i.e. on the date of introduction of Rule 21(8) before it was amended w.e.f. 01.04.2014, provided that input tax credit shall not be “available” unless the goods are “for sale” within the State etc., thus, postulating that input tax credit already earned would be available if the goods are for sale etc. Section 13(5) of the Act notifies a negative list which admittedly however does not apply to the case in hand.

A conjoint appraisal of these provisions reveals that value added tax paid at the rate in force on the date of purchase of goods from a taxable person, becomes input tax credit on the date of purchase, if the purchased goods are for resale etc., in the manner

prescribed, thereby providing that input tax credit earned by a taxable person on the date of purchase of taxable goods, at the rate of taxation in force, during a particular tax period would be his input tax credit provided the goods are for resale/sale etc. in the State of Punjab or for inter-state trade or commerce or in the course of export or for use in the manufacture, processing or packing of taxable goods for sale within the State or inter State transaction and in the course of export etc. The respondents do not deny that members of the petitioners-association purchased goods for resale/sale and manufacture etc., in the State of Punjab and had already earned input tax credit, regarding the goods lying in stock, on 21.01.2014. The dispute is confined to Rule 21(8) of the Rules.

The State of Punjab w.e.f. 21.01.2014 reduced the rate of taxation, on these goods (iron and steel) from 4% to 2% and simultaneously amended Rule 21 of the Rules to incorporate Rule 21 (8), which reads as follows: -

“5. In the said rules, in rule 21, after sub-rule (6), the following sub-rule shall be added, namely: -

(7) xxx xxx xxx

(8) Where some goods as input or output are lying in the stock of a taxable person and where rate of tax on such goods is reduced from a particular date, then from that date, input tax credit shall be admissible to the taxable person on the sale of goods lying in stock or on using the goods as input for manufacturing taxable goods, at the reduced rate.”

A perusal of Rule 21(8) of the Rules reveals that with respect to goods lying in stock the input tax credit already earned

shall be admissible at the reduced rate i.e. the rate of taxation prevalent on the date of their sale. As referred to above, the rate of taxation was reduced from 4% to 2% from 21.01.2014. The input tax credit already earned would, therefore, be availed with respect to goods lying in stock, at 2%. The petitioner-members, as is apparent from the facts, had paid tax @ 4% while purchasing the goods and had earned input tax credit @ 4%. The goods having been purchased for resale within the State of Punjab, the right to avail input tax credit @ 4% per annum stood crystalised, as a determinate right subject to availing this right during the return period or by carrying it forward. The State, however, by enacting Rule 21(8) of the Rules, has reduced the admissible amount of input tax credit already earned from 4% to 2%. We cannot possibly dispute the legislative competence of the State in the exercise of its power of delegated legislation to enact such a rule but the question, as we have also noticed, is not the legislative competence of the State but is whether on 21.01.2014 there was any provision in the statute that empowered the State of Punjab to notify Rule 21(8) of the Rules to provide that goods that have already earned input tax credit would avail input tax credit at the reduced rate of taxation applicable on the date of sale thereby reducing input tax credit already earned on goods lying in stock by reference to the reduced rate of tax prevalent on the date of their sale etc.

A perusal of the Act reveals that on 21.01.2014 there was

no provision in the Statute that empowered the State to enact a rule to provide that input tax credit already earned on goods lying in stock shall now be availed and calculated by reference to the reduced rate of taxation prevalent on the date of their sale. The amendment conferring such a power by amending the first proviso to Section 13 of the Act, admittedly, came into force on 01.04.2014 by deleting the words “are for sale” etc. and replacing them with the words “unless such goods are sold” etc., thereby for the first time linking the availing of input tax credit to the rate prevalent on the date of the “sale of goods” etc. to the rate of taxation in force on the date of sale.

The amended proviso to Section 13 of the Act, reads as follows:-

“Provided that the input tax shall not be available as input tax credit unless such goods “are sold” within the State or in the course of inter-State trade or commerce or in the course of export or are used in the manufacture, processing or packing of taxable goods for sale within the State or in the course of inter-State trade or commerce or in the course of export.”

The amendment in the first proviso to Section 13 of the Act introducing the words “are sold” etc. came into effect on 01.04.2014. The State of Punjab was, therefore, empowered in the exercise of its power of delegated legislation to notify a rule linking the availing of input tax credit already earned, to their sale, on 01.04.2014. Rule 21(8) of the Rules which resonates the first proviso to Section 13 of the Act by linking the availing of input tax credit to goods sold and thereby to the reduced rate of taxation, came into effect on 21.01.2014 on which date there was no statutory

provision enabling the State, in the exercise of its power of delegated legislation, to notify a rule that input tax credit would be “availed” on the sale of goods lying in stock or their manufacture etc. by reference to the reduced rate of taxation, prevalent at the time of “sale/manufacture” etc. of goods that had already earned a determinate amount of input tax credit.

The State may be well within its power to alter the terms & conditions of availing input tax credit by a piece of subordinate legislation but as subordinate legislation may only be notified if it is relatable to statutory power enabling the State to notify such a rule, but the absence of such a provision in the statute, empowering the State to notify such a rule, between 21.01.2014 and 01.04.2014, in our considered opinion, did not empower the State, in the exercise of its power of delegated legislation to notify Rule 21(8) of the Rules on 21.01.2014.

We, therefore, have no hesitation in holding that on the date of introduction of sub Rule (8) of Rule 21 of the Rules, the State did not possess any power, emanating from the Act, to confine the availing of input tax credit to the reduced rate of tax on stock in trade i.e. transactions that had concluded with the dealer already earning input tax credit. A further perusal of the amendment in the first proviso to Section 13 of the Act reveals that it is not retrospective but applies to transactions after 21.01.2014. The amendment in the rule, which came into effect prior to the amendment the Act could,

therefore, not be enforced, by the respondents before 01.04.2014 to take away a vested right already determined without statutory sanction.

We, therefore, allow the writ petitions and hold that in the absence of any provision in the statute enabling the State of Punjab to notify Rule 21(8) of the Rules w.e.f. 21.01.2014, the said provision would come into effect from 01.04.2014. However, since the notification by which Rule 21(8) of the Rules was added to the Rules, was obviously issued in view of the fact that the respondents were simultaneously, or soon thereafter, reducing the rate of taxation on various goods and as such, the notification was intended to ensure that the public exchequer does not suffer a loss by granting input tax credit at higher rates than the tax actually deposited (after lowering the rate of taxation), we grant liberty that if the public exchequer is adversely affected on account of the fact that we have held the notification of Rule 21(8) of the Rules to be an act of excessive delegation, the respondents may roll back the lowered rates of taxation, as per law, for the period between 21.01.2014 to 31.03.2014 to the level at which it was existing prior to the notification lowering such rate.

[RAJIVE BHALLA]
JUDGE

20th May, 2015
Shamsher S.Sabharwal

[AMOL RATTAN SINGH]
JUDGE