

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 01.08.2016

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

W.P.Nos.24402 to 24404 of 2014

and

24405 to 24407 of 2014

and

24488 to 24491 of 2014

and

connected M.Ps.

XOMOX SANMAR LTD.,
Represented by its
Authorized Signatory,
Mr.R.Padmanabhan,
No.9, Cathedral Road,
Chennai-86.

...Petitioner in W.Ps.24402 to
24404, 24405 to 24407 of 2014

Sanmar Foundries Ltd.,
Rep.by its Authorized Signatory
Mr.J.Ramdas,
No.9, Cathedral Road,
Chennai 86.

....Petitioner in W.Ps.24488 to
24491 of 2014

Versus

The Assistant Commissioner (C.T),
Mylapore Assessment Circle,
No.46, Greenways Road,
Chennai-600 028.

... Respondent in W.Ps.24402 to
24404, 24405 to 24407 & 24488
to 24491 of 2014

Thees Writ Petitions is filed under Article 226 of the
Constitution of India, seeking for a Writ of Certiorari

W.P.No.24402 of 2014 : to call for the impugned proceedings of
the respondent passed in TIN/33680923400/2007-2008, dated
10.07.2014 and quash the same in so far as the assessment
pertains to reversal of ITC for Rs.14,10,525/- under Section
18 of TNVAT Act, 2006.

W.P.No.24403 of 2014 : to call for the impugned proceedings of
the respondent passed in TIN/33680923400/2008-2009 dated
10.7.2014 and quash the same in so far as the assessment

pertains to reversal of ITC for Rs.45,18,690/- under section 18 of the TNVAT Act 2006.

W.P.No.24404 of 2014 : to call for the impugned proceedings of the respondent passed in TIN/33680923400/2009-2010 dated 10.7.2014 and quash the same in so far as the assessment pertains to reversal of ITC for Rs.57,23,227/- under section 18 of the TNVAT Act 2006.

W.P.No.24405 of 2014 : to call for the impugned proceedings of the respondent passed in TIN/33680923400/2010-2011 dated 10.7.2014 and quash the same in so far as the assessment pertains to reversal of ITC for Rs.27,10,176/- under section 18 of the TNVAT Act 2006.

W.P.No.24406 of 2014 : to call for the impugned proceedings of the respondent passed in TIN/33680923400/2011-2012 dated 10.7.2014 and quash the same in so far as the assessment pertains to reversal of ITC for Rs.53,48,353/- under section 18 of the TNVAT Act 2006.

W.P.No.24407 of 2014 : to call for the impugned proceedings of the respondent passed in TIN/33680923400/2012-2013 dated 10.7.2014 and quash the same in so far as the assessment pertains to reversal of ITC for Rs.60,99,759/- under section 18 of the TNVAT Act 2006.

W.P.No.24488 of 2014 : to call for the impugned proceedings of the respondent passed in TIN/33960920142/2008-2009 dated 10.7.2014 and quash the same in so far as the assessment pertains to reversal of ITC for Rs.22,17,223/- under section 18 of the TNVAT Act 2006.

W.P.No.24489 of 2014 : to call for the impugned proceedings of the respondent passed in TIN/33960920142/2010-11 dated 10.7.2014 and quash the same in so far as the assessment pertains to reversal of ITC for Rs.38,66,761/- under section 18 of the TNVAT Act 2006.

W.P.No.24490 of 2014 : to call for the impugned proceedings of the respondent passed in TIN/33960920142/2011-2012 dated 10.7.2014 and quash the same in so far as the assessment pertains to reversal of ITC for Rs.1,36,02,320/- under section 18 of the TNVAT Act 2006.

W.P.No.24491 of 2014 : to call for the impugned proceedings of the respondent passed in TIN/33960920142/2012-2013 dated 10.7.2014 and quash the same in so far as the assessment pertains to reversal of ITC for Rs.63,77,458/- under section 18 of the TNVAT Act 2006.

For Petitioner in
all Writ Petitions : Mr.N.Murali

For Respondent in
all Writ Petitions : Mr.Manokaran Sundaram
Additional Government Pleader

C O M M O N O R D E R

Heard Mr.N.Murali, learned counsel appearing for the petitioner in all Writ Petitions and Mr.Manokaran Sundaram, learned Additional Government Pleader, appearing for the respondent in all Writ Petitions.

2. The petitioner, who is a registered dealer under the provisions of the Tamil Nadu Value Added Tax, 2006 (hereinafter referred as "TNVAT Act") and Central Sales Tax Act, 1956 (hereinafter referred as "CST Act"), has filed all these Writ Petitions challenging the orders of assessment for the relevant years. Since the legal issues raised in all these Writ Petitions are identical, the Writ Petitions are heard together and are disposed of by a common order.

3. At the time of filing these Writ Petitions in 2014, several issues were raised, challenging the impugned assessments. However, in the light of the decision of this Court in the case of INTERFIT TECHNO PRODUCTS Vs. PRINCIPAL SECY. reported in (2015) 81 VST 389 (Mad), all those issues stood answered by the said decision and this position is clearly admitted by the learned counsel for the petitioner. Thus, the only issue which survives for consideration in all these Writ Petitions pertain to preference of Set-off.

4.The following facts would be sufficient for disposal of the Writ Petitions.

4.1 . The petitioner in W.P.Nos.24402 to 24407 of 2014 is engaged in the manufacture of Industrial Valves and the petitioner in W.P.Nos.24488 to 24491 of 2014 is engaged in the manufacture of Iron and Steel Castings and the Writ Petitions in W.P.Nos.24402 to 24407 of 2014 pertain to the Assessment years 2007-08, 2008-09, 2009-10, 2010-11, 2011-12 and 2012-13 and the Writ Petitions in W.P.Nos.24488 to 24491 of 2014 pertain to the Assessment years 2008-09, 2010-11, 2011-12 and 2012-13.

4.2 The petitioner has export sales, during the year and the same has been categorized as "Zero Rated Sale" under Section 18 read with Section 2(44) of Tamil Nadu Value Added Tax Act, 2006 (in short "TNVAT Act"). The petitioner claimed

ITC on its purchases and since, there were different types of sale such as Local, Inter-state and Export, the adjustment of ITC was done on the same month of the purchases in respect of the above said sales. The petitioner chose the option of adjustment method from and out of the methods provided under Section 18(1) and (3) of TNVAT Act in their monthly returns in Form-I .

4.3 The contention raised by the petitioner with regard to preference of set off is on the following lines:-

After the proportionate apportionment of ITC in respect of different type of sale, the petitioner made the preference of set-off by firstly, taking the set off of proportionate ITC relating to Export in the following order viz.,

- (i) Local Sale (Set-off against VAT liability)
- (ii) CST Sale (Set-off against CST liability)
- (iii) Balance ITC carry forward to the next year

Though the above method was adopted by the petitioner, the respondent made the Set-off in the following manner relating to local and CST sale:-

- (i) Local sale (Set-off against VAT liability)
- (ii) CST sale (Set-off against CST liability) and
- (iii) Balance ITC in relating to export sale was denied on the ground that the petitioner did not file Form-W.

5. Mr.N.Murali, learned counsel for the petitioner submits that the method adopted by the respondent in giving preference of Set-off of apportionment of ITC is unscientific and defies logic and without jurisdiction. It is pointed out that preference of Set-off of apportionment ITC relating to Export must be given priority since under Section 18 deals with "Zero Rated Sale". Further, it is submitted that Section 18(3) is the only provision under TNVAT Act, which provides time limit of adjustment of ITC relating to Zero Rated Sale i.e., within 180 days from the date of accrual and such credit (upto 31.03.2010) and 180 days from the date of making Zero Rated Sale (from 01.04.2010). It is further submitted that after exhausting the proportionate ITC in export the other apportionment of proportionment ITC may be set-off against CST / local sale. Further, the learned counsel submits that Section 18 as well as Rule 11 of the TNVAT Rules do not specify any separate procedure regarding preference for set off of ITC in respect of "Zero Rated Sale". Therefore, the contention raised is that, the respondent has no jurisdiction to adopt a preference for Set-off in order to deny the carry forward of ITC which is detriment to the interest of the petitioner. By referring to the decision of the Hon'ble Division Bench of this Court in the case of M/s.Jayam and Co., reported in 65 VST 260, it is submitted that the essence of VAT is in providing set-off for the tax paid earlier and this is given effect through the concept of

Input Tax Credit. Input Tax Credit is given only to ameliorate the cascading effect of tax burden and by virtue of Section 3 (3), the tax payable by the registered dealer shall be reduced in the manner prescribed, the extent of tax paid on his purchase of goods specified in Part-B or Part-C, inside the State to the registered dealer, who sold the goods to him. Thus, Input Tax Credit is creature of statute. It is submitted that by applying the above legal principle enunciated by the Hon'ble Division Bench of this Court, preference of set-off as done by the respondent will increase the tax burden and that is not intention of the legislation and the preference of Set- off as done by the respondent would defeat the object of VAT legislation.

6. The learned counsel appearing for the petitioner in order to demonstrate as to how they have made the Set-off as by way of illustration providing the details in a tabulated form for the assessment year 2007-2008 in respect of the petitioner in W.P.No.24402 to 24407 of 2014. For better appreciation the same is quoted herein below:-

"AS PER PETITIONER

TOTAL ELIGIBLE ITC

Zero Rated Sales	59,60,726
CST Sales	64,08,193
VAT Sales	9,09,400
TOTAL ELIGIBLE ITC	1,32,78,320

The above ITC on Zero Rated
Stage 1 Sales was

adjusted first Against VAT
Sales
VAT liability
ITC on Zero Rated Sales
available

59,60,726

Less: VAT Liability (21,09,027)

Balance ITC on Zero Rated
Sales available

38,51,699

The balance ITC on Zero
Stage 2 rated sale was
adjusted against CST Sales
Liability

TOTAL CST LIABILITY	97,58,768
Less: Balance ITC on Zero Rated Sales Available	(38,51,699)

Balance CST Liability	59,07,069
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The above Balance CST
Liability was
adjusted against the ITC on
CST Sales

	64,08,193
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The balance available ITC has been carry
Stage 3 forwarded to the Next year

Available ITC on CST Sales	64,08,193
Less: CST LIABILITY ADJUSTED	(59,07,069)

BALANCE ITC ON CST Available	5,01,124
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Add: ITC on VAT Available	9,09,400
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BALANCE ITC CARRY FORWARDED TO NEXT YEAR	14,10,525
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AS PER DEPARTMENT

WEB COPY

Total Eligible	1,32,78,320
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Adjusted out of VAT ITC	9,09,400	
Adjusted out of export ITC	11,99,627	
Total	21,09,027	(21,09,027)

Adjusted out of CST		
ITC	64,08,193	
Adjusted out of export		
ITC	33,50,575	
Total	97,58,768	(97,58,768)

To be reversed 14,10,524

7. The learned counsel for the petitioner submitted that the procedure adopted by the petitioner is scientific and sub serves the object for which, the concept of Input Tax Credit was brought about. The learned counsel referred to the decision of the Hon'ble Division Bench of Andhra Pradesh High Court in the case of MAXWROTH PLYWOODS P. LTD. Vs. ASST. COMMR. reported in (2013) 62 VST 573 (AP)

8. The respondent in the written instruction given to the learned Additional Government Pleader (Taxes), dated 30.01.2015, which is in the form of a draft counter affidavit with regard to the contention raised by the petitioner on the preference of Set-off has contended as follows:-

"J. The method of Set-off of ITC adopted by the respondent is scientific and flawless.

K. If the preference of Set-off is first given to the export sales, it will take an indefinite period for the complete adjustment of ITC since the petitioner has not been claiming refund. The adjustment of ITC will never be made within the period of one hundred and eighty days enshrined in Section 18(3). Such a situation would not have been envisaged while the provisions were enacted.

L. Section 18(3) stipulates that the ITC has to be either fully adjusted or refund claimed within a period of one hundred and eighty days from the date of accrual of such input tax credit / making zero-rate sales. There is no provision made that any set-off must be only for the zero-rate sales.

M. Merely because Section 18 of the TNVAT Act, 2006 does not prescribe the method of preference of Set-off of ITC, the petitioner cannot claim that the benefits should be given to them."

9. After elaborately hearing the learned counsel for the parties and perusing the materials available on record, the undisputed position is that the Section 18 of the TNVAT Act does not prescribe the method of preference of Set-off of ITC. Therefore, in the absence of any statutory provision with regard to method of preference, it has to be seen as to whether the procedure adopted by the petitioner is just and proper and sub serves the object behind the Act or whether the action of the respondent is justified. At this juncture, it

would be beneficial to refer to the decision of the MAXWORTH PLYWOODS P. LTD. Vs. ASST. COMMR. reported in (2013) 62 VST 573 (AP). In the said case, the petitioner claimed Input Tax Credit, relatable to the Assessment years 2005-06 and 2006-07 and, as in the instant case, adjusted Input-Tax Credit against Output payable on its trading activity, and the remaining Input-Tax Credit against the output tax payable by its manufacturing unit. The petitioner's (therein) case was that adopting any other method would result in they not being able to avail of the tax deferment benefits, as the period stipulated for tax deferment came to an end by March, 2007. However, the Assessing Officer issued a notice proposing that Input-Tax Credit should be adjusted first against the output tax payable by the petitioner's (therein) manufacturing unit, and the balance alone should be utilized for adjustment against the output tax payable on their trading activity. The petitioner raised their objections to the said proposal and ultimately, the Assessing Officer did not accept the objections raised by the petitioner and confirmed the proposal. This was put to challenge before the Andhra Pradesh High Court and the Court after considering the submissions, held as follows:-

" 6. the first respondent admits that there is no specific rule providing for the manner in which he had assessed the petitioner to tax. Under Article 265 of the Constitution of India no tax can be levied or collected except by authority of law and in the absence of a procedure, similar to the one adopted by him, being prescribed by law it is not open to the assessing authority to contend that a particular mod should be adopted, or that the procedure adopted by the assessee is not rational. It is the petitioner's case that the method of adjustment of input tax against the output tax payable, adopted by them would enable them to avail of the benefit of the balance tax deferment in its entirety which they would otherwise not be in a position to utilize as the period of availment of tax deferment expired by March, 2007. The assessing authority cannot insist on the assessee adopting a particular method which would deny them the benefit of utilization of the balance available tax deferment in its entirety, and instead pay tax. The impugned order of assessment, to the extent the assessing authority adjusted the input tax credit first against the manufacturing activity of the petitioner and the balance against their trading activity, is neither a method authorized by law nor can such a method be forced on the assessee as it is to their detriment. The assessment order must, to this limited extent, be set-aside."

10. On a reading of the above judgment, it shows that the Court considered the issue and found that when there is no specific Rule providing the manner in which the petitioner had to be assessed to tax, which is not open to the Assessing Authority to contend that the particular mode should be adopted or that the procedure adopted by the assessee is not rational and that the Assessing Authority cannot insist on the assessee adopting a particular method which would deny them the benefit of utilization of the balance available tax deferment in its entirety, and instead of paying tax.

11. In my view, the above decision of Andhra Pradesh High Court over which I am in respectful agreement would squarely apply to the facts of the present case and unless and until the respondent is able to clearly demonstrate that the procedure adopted by the petitioner is contrary to the Statute, then the question would be as to why the petitioner should not be permitted to adopt the preference of Set-off as done by them in the Returns for the relevant assessment years. Even in the contentions raised by the respondent as set out above, the respondent does not dispute the fact that under Section 18 of the TNVAT Act, no procedure has been prescribed with regard to the method of preference of Set-off of ITC. Therefore, prima-facie, this Court is of the view that the procedure adopted is favourable to the assessee, more particularly, in the light of the object behind the VAT regime. However, in the instant case, this Court does not propose to render a specific finding, because the impugned order does not discuss this issue, though the same was raised in the objection appears to have not been emphasised by the dealer as well as the Assessing Officer, as there were other issues for consideration. Since the other issues have now been settled in the light of the decision in the case of INTERFIT TECHNO PRODUCTS Vs. PRINCIPAL SECY. (referred to supra), the respondent should redo the assessment with regard to the presence of Set-off and examine as to whether the procedure adopted by the petitioner is just and proper. While doing so, the respondent shall also take into consideration the observation made by this Court in the preceding paragraph as well as the decision of the Andhra Pradesh High court and examine its relevancy and applicability to the facts of the present case.

12. In the result, except the issue relating to preference of Set-off, all other issues which are assigned in the impugned assessment orders are disposed of in terms of the direction issued in the decision of INTERFIT TECHNO PRODUCTS (referred to supra), more particularly, the directions contained in paragraph Nos. 61 and 62 therein, which reads as follows:-

"61/

<https://hcservices.ecourts.gov.in/hcservices/> In the light of the above conclusion, the

decision relied on by the learned counsel for the petitioner in the case of Binani Industries Limited Vs. Assistant Commissioner of Commercial Taxes VI Circle, Bangalore and Others [2007] 6 VST 783 (SC) with regard to reopening of the assessment does not render assistance to the case of the petitioners. Accordingly Question No.6 is answered against the petitioners.

62. In the result,

(1) the challenge to the impugned circular is held to be unnecessary since the circular is a non statutory circular and is in the nature of guideline and the prayer for quashing the circular is rejected.

(2) Section 18 of the TNVAT Act is not an independent or a separate stand alone provision under the provisions of TNVAT Act but subject to other provisions of the Act including Section 19 of the VAT Act.

(3) For the reasons assigned, it is not sufficient for a dealer claiming refund under Section 18(2) of the Act to show that he has paid input tax on the goods purchased; that those goods are used in the manufacture and nothing more but there is duty upon the dealer to satisfy the Assessing Authority that the claim is not hit by any of the restrictions or conditions contained under Section 19 of the VAT Act. In this regard, it is essential for the Assessing Authority to embark upon the fact finding exercise to ascertain the quantum of loss of the goods which were purchased on which tax was paid vis-a-vis the goods manufactured from and out of the goods purchased and to examine as to whether they fall within any of the restrictions contained in Section 19 of the VAT Act. The Assessing Officer has to conduct an exercise by which it is to be ascertained as to whether the representation made by the dealer is justified and is not hit by any any of the restrictions and conditions contained in Section 19 and in particular Section 19(9) of the VAT Act.

(4) It is held that the Assessing Authorities are not justified in adopting uniform percentage as invisible loss and calling upon the dealer to reverse the input tax credit availed to that extent. Consequently, all notices issued to the petitioner for reopening and all consequential order passed reversing the input tax credit to the extent of either 4% or 5% or on adhoc per centage stands set aside. However, liberty is granted to the concerned Assessing Officer to issue appropriate show cause

notices to the petitioners clearly setting out under what circumstances they propose to revise or call upon the petitioner to reverse refund sanctioned and after inviting objections proceed in accordance with law.

(5) The undertaking given by the dealer in Form W is with regard to information furnished for the purpose of verification by the Assessing Officer under Rule 11(2) of the VAT Rules for being entitled to refund under Section 18(2). Therefore, it is not as if the Act does not provide a remedy in the event of a wrong or erroneous refund sanctioned when Section 18 cannot be treated as an independent provision but subject to restrictions and conditions under Section 19 of the VAT Act."

13. With regard to preference of Set-off, the findings rendered by the Assessing Officer is set-aside and the matter is remanded to the Assessing Officer to redo the assessments on the said head, after issuing notice to the petitioner and after affording an opportunity of personal hearing and in the light of the directions issued in the preceding paragraphs.

14. With the above observations, Writ Petitions are disposed of. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

r n s

To

The Assistant Commissioner (C.T),
Mylapore Assessment Circle,
No.46, Greenways Road,
Chennai-600 028.

+12cc's to Mr.N.Murali, Advocate, S.R.Nos.43500 & 43501
+1cc to the Special Government Pleader(T), S.R.No.43587

W.P.Nos.24402 to 24404 of 2014 &
24405 to 24407 of 2014 &
24488 to 24491 of 2014 and
connected M.Ps.

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