IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.06.2016

CORAM

THE HONOURABLE Mr. JUSTICE T.S.SIVAGNANAM

W.P.No.6966 of 2016
and
W.M.P.No.6182 of 2016

M/s.Dennis Steels Pvt Ltd.,
Represented by its Director,
Sholly Dennis,
Ekku Nagar, Arakkonam
Vellore District .. Petitioner

..Vs..

The Commercial Tax Officer
Arakkonam Assessment Circle
Arakkonam, Vellore District .. Respondent

Prayer:
Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorari to call for the records of the respondent in TIN 33834302070/2008-09 dated 10.12.2015 and quash the same.

For Petitioner : Mr.R.Kumar

For Respondent : Mr.Manokaran Sundaram, A.G.P.,(T)

ORDER

Heard Mr.R.Kumar, learned counsel appearing for the petitioner and Mr.Manokaran Sundaram, learned Additional Government Pleader appearing for the respondent and with the consent of the either side, the writ petition itself is taken up for final disposal.

2.The petitioner is a registered dealer under the provisions of the Tamil Nadu Value Added Tax Act, 2006 (TNVAT Act) and also under the provisions of the Central Sales Tax Act, 1956 (CST Act). The petitioner is engaged in the manufacturing of the TMT bars and has effected local sales, inter-state sales and has effected stock transfer to the branch situated in Kerala. The order impugned in the Writ Petition is the order of assessment for the year 2008-09. The petitioner was assessed with a total taxable income of Rs.19,49,61,231/- and Rs.19,49,61,231/- respectively for the year 2008-2009 under the provisions of the TNVAT Act by proceedings dated 28.02.2014 and the input tax credit was reversed with regard to wastage of scrap iron in the process of manufacture at 3% and on inter-state sales without C forms at 4%.

3. The petitioner filed a writ petition before this Court in W.P.No.11424/2014 challenging the reversal of Input Tax Credit on the estimated invisible loss of input used in the course of manufacture as per Section 19(5)(ii) of the TNVAT Act. In the said Writ Petition, the challenge was only with regard to the reversal of Input Tax Credit on the estimated invisible loss of input. With regard to the other issue pertaining to inter-state sale without C forms, the petitioner was agitating the matter before the Joint Commissioner (CT), Vellore Division. The Writ Petition filed by the petitioner was heard by this Court along with a batch of cases and this Court had disposed of the matter by a common order dated 26.11.2014. So far as the manner and method by which the Assessing Officer ascertained the quantum and loss of goods was considered and it was held as follows:

> "63. In the result,
>
> (1)...
>
> (2)...
>
> (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 examined 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 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 percentage stands set aside. However, liberty is granted to the concerned Assessing Officer to issue appropriate show cause notices to the petitioners clearly setting out what circumstances they propose to revise or call upon the petitioner to reverse refund sanctioned and after inviting objections proceed in accordance with law."

4. In terms of the above direction, the Assessing Officer was directed not to adopt an adhoc percentage while calculating the invisible loss of the inputs. Therefore, the Assessing Officer was required to go into the manufacturing process which may require inspection of the factory premises to see the nature of activity done by them.

5. After the writ petition was disposed of, the respondent had issued a notice dated 28.09.2015 for which the petitioner had submitted their reply on 16.11.2015. Thereafter, the respondent proposed to consider the same. In the show cause notice, apart from the issue relating to invisible loss, the petitioner was also called upon to explain as regards the proposal to reverse the ITC on purchase of Furnace Oil used as fuel and also with regard to reversal of ITC towards inter-state sales without C forms. The petitioner submitted their objections dated 16.11.2015 after which the impugned order has been passed. On perusal of the impugned order it is seen that the once again the Assessing Officer has fixed the percentage of invisible loss in the process of manufacture at 4%. However, there is no reasoning assigned as to how 4% has been adopted and it is only a adhoc estimation which was frowned upon by this Court in the earlier order.

6. So far as the reversal of ITC on purchase of Furnace Oil is concerned, the petitioner's case is that in their manufacturing activity, the Furnace Oil is an essential input material for melting the scrap. It is used as an input for manufacture and it is not damaged in transit or destroyed. The petitioner referred to the definition of input as defined under Section 2(23) of the TNVAT Act and contended that there is no provision under the TNVAT Act which requires reversal of ITC consequent to invisible loss of raw material and Section 19(9)

of the TNVAT Act only deals with the cases of loss, damage or destruction of inputs and they do not deal with cases relating to consumption of input material in the manufacturing process.

7. After referring to Sl.No.8 in Annexure-III to monthly return in Form No.I, which reads as “inputs damaged in transit or destroyed before manufacturing”, it was submitted that from the above wording it is clear that reversal of ITC should be made if the inputs are damaged in transit or destroyed before manufacture and the Annexure-III should be read along with Section 19(9) and in their case, the inputs were not destroyed before manufacture.

8. The respondent while considering the said issue has referred to a decision in the case of M/s.Perfect Wheels (P) Ltd., Gurgoan v. State of Haryana - (2014) 49 PHT 371 (HTT) FB. It is brought to the notice of this Court by the learned counsel for the petitioner though in the impugned order of assessment, it is stated that the said decision is a decision of the Punjab and Haryana High Court, the copy of the judgment produced would reveal that it is a judgment of a three judge bench of Haryana Tax Tribunal at Chandigarh and not that of the High Court.

9. Be that as it may, the Assessing Officer after referring to the said judgment has held that the petitioner is not entitled to any relief and therefore the reversal of Input Tax Credit on Furnace Oil is confirmed. As already noticed, there is also a direction to reverse ITC towards inter-state sales without C forms. Thus, three issues arise for consideration, namely,

1. Invisible loss in the process of manufacture
2. Reversal of ITC on purchase of Furnace Oil used as fuel
3. Reversal of ITC towards inter-state sales without C forms

10. With regard to the first issue, inspite of the earlier direction issued by this Court (referred supra), once again the Assessing Officer has committed an error by adopting an Adhoc percentage. The Assessing Officer has not made any endeavor to ascertain as to whether the representation made by the dealer is justifiable or not. The Assessing Officer did not embark a fact finding exercise to ascertain the quantum of loss of the goods which were purchased on which the tax was paid vis-a-vis the goods manufactured from and out of the goods purchased. No endeavor was made in this regard. Therefore, this Court has to necessarily interfere with the said finding with regard to the invisible loss in the process of manufacture which has now been fixed by the Assessing Officer at 4%. Therefore, the said question is decided in favour of the petitioner and the finding is set aside.

11. So far as the second issue regarding the usage of Furnace Oil as fuel, the same has been decided against the petitioner by referring to the decision of the Haryana Tax Tribunal. It is pointed out by the learned counsel appearing for the petitioner that the description of the product as per Schedule E of the Haryana Value Added Tax Act, which reads out the goods which are eligible for ITC, the description of goods is petroleum products and the circumstances in which Input Tax shall be nil is when used as a fuel. It is submitted that there is a difference between the entries in schedule A of Haryana Value Added Tax Act and the description of goods as per serial no.67 of the first schedule to Tamil Nadu Value Added Tax Act, which describes industrial inputs which includes consumables. Therefore, it is the case of the petitioner that the Furnace Oil is a consumable.

12. That apart, it is pointed out that Annexure 12 has only recently being amended and given effect to from 29.01.2016 which refers to inputs damaged during intermediary stage of manufacture and this entry was not there prior to 29.01.2016. Hence, these issues have to be considered by the respondent and the reliance placed on the decision of the Haryana Tax Tribunal is misconceived, as it will not apply to the facts and circumstances of the present case. Accordingly, the finding rendered with regard to the reversal of ITC on purchase of Furnace Oil used as fuel is set aside.

13. The next issue is with regard to the reversal of ITC towards inter-state sales without C forms. It is seen that as against the said issue, the petitioner had filed a revision petition in R.P.No.51/2015 before the Joint Commissioner (CT), Vellore Division and the matter was disposed of only on 03.05.2016. Though the revision petition has been dismissed, the Assessing Officer has been directed to pass year wise order under Section 27(2) of the TNVAT Act. Therefore, the reversal of ITC towards inter-state sales without C forms, determined at Rs.1,11,706/- is set aside with a direction to the Assessing Officer to comply with the direction issued by the revisional authority viz., the Joint Commissioner (CT), Vellore Division in his order dated 03.05.2016 made in R.P.No.51/2015.

14. In the light of the above discussions, the Writ Petition is allowed and the matter pertaining to the issue nos.1 and 2 viz., ''Invisible loss in the process of manufacture'' and ''Reversal of ITC on purchase of Furnace Oil used as fuel'' are remitted back to the respondent for fresh consideration, with a direction to the respondent to conduct an inspection of the petitioner's factory, get himself acquainted with the manufacturing process, then consider the objections placed by the petitioner and thereafter, take a decision in accordance with law. With regard to the reversal of ITC towards interstate

sales without C forms, the respondent is directed to comply with the order passed by the Joint Commissioner (CT), Vellore Division in his order dated 03.05.2016 made in R.P.No.51/2015. Consequently, connected miscellaneous petition is closed. No costs.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

pgp

To

The Commercial Tax Officer
Arakkonam Assessment Circle
Arakkonam, Vellore District

+1cc to Mr.R. Kumar, Advocate, S.R.No.31834

CA(CO)
EU(30/06/2016)

W.P.No.6966 of 2016
and
W.M.P.No.6182 of 2016