IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.06.2017

CORAM

THE HONOURABLE MR.JUSTICE RAJIV SHAKDHER
AND
THE HONOURABLE MR.JUSTICE R.SURESH KUMAR

W.A.No.763 of 2015
and
M.P.No.1 of 2015

M/s.Inko Chemicals India (P) Ltd.,
rep. by its Managing Director,
Mr.N.Ravindran ... Appellant/Petitioner

Vs.

The Commercial Tax Officer,
Kilpauk Assessment Circle,
7th Floor, 'Dowlath Towers',
Taylors Road, Kilpauk,
Chennai - 600 010. ... Respondent/Respondent

APPEAL under Clause 15 of the Letters Patent against the order dated 22.04.2015, passed in W.P.No.11846 of 2015 on the file of this Court.

W.P.No.11846 of 2015 : To issue a Writ of Certiorarified Mandamus, to call for the records of the respondent vide proceedings bearing No.TIN/33861026800/2013-14 dated 27.2.2015 and quash the same as being contrary to the principles laid down by this court in the Judgement reported in (2007) 9 VST 478 (Madras) Amutha Metals Vs Commercial Tax Officer, Mannady (East) Assessment Circle, Chennai with further direction to the respondent to pass an order afresh in accordance with the principle laid down by this court in (2006) 146 STC 642 Madras Granites (P) Ltd. Vs Commercial Tax Officer Arisipalayam Circle Salem and another.

For Appellant : Mr.S.Raveekumar

For Respondent : Mr.S.Kanmani Annamalai,
Additional Government Pleader

J U D G M E N T

(Judgment of the Court was delivered by RAJIV SHAKDHER,J.)

1. This is an appeal preferred by the Assessee against the order dated 22.04.2015, passed by the learned single Judge. The learned single Judge, dismissed the Writ Petition, on the ground that an alternative remedy, by way of appeal, was available to the Assessee.

2. In order to adjudicate upon the appeal, the following broad facts are required to be noticed.

2.1. For the Assessment Year (A.Y.) 2013-14, the Assessee reported total turnover of Rs.6,02,71,144/- and taxable turnover, which was quantified at the same amount.

2.2. It appears that the Enforcement Wing of the Revenue, on 03.09.2014, conducted an audit, whereupon, discrepancies were noticed, purportedly, in the returns filed by the Assessee under the Tamil Nadu Value Added Tax Act, 2006 (in short, 'TNVAT Act'). Accordingly, the Revenue served a notice dated 04.12.2014 on the Assessee, in which, proposals were made to levy tax, on account of the following discrepancies, that had, evidently, come to fore in the audit, conducted by the Enforcement Wing.

i) Wrong claim of Input Tax Credit (in short, 'ITC') on the purchases effected from dealers, who had not reported the transaction in the returns filed by them.

ii) Suppression of import purchase.

iii) Reversal of ITC on inter-state sales.

iv) VAT tax due on other income.

v) Discount allowed.

vi) Wrong claim of ITC on the purchases effected from dealers, whose registration certificates had been cancelled.

vii) Parallel set of sale bills issued on various dates.

viii) Turnover, in respect of which, 'C' Form declaration was not filed.

2.3. In response to the said notice, the Assessee file a detailed reply dated 19.02.2015.

3. The Commercial Tax Officer (in short, 'the CTO'), was not impressed with the stand taken by the Assessee, and, accordingly, he confirmed the demand and penalty raised vide notice dated 04.12.2014.

4. The Assessee, being aggrieved, filed a Writ Petition, under Article 226 of the Constitution, in which, inter alia, it raised the ground that there was a breach of principles of natural justice. Furthermore, the Assessee claimed that the CTO had not applied his mind, independently, before issuing the notice dated 04.12.2014. It was the Assessee's stand that the CTO had gone, merely, by the discrepancies, which cropped up in

the audit conducted by the Enforcement Wing. Besides this, the Assessee, apparently, also argued that at least, with respect to two (2) aspects of the Assessment Order, i.e., aspects which related to the purported wrong claim of ITC on the purchases effected from dealers, who had not reported the transaction in their returns and the alleged wrong claim of ITC on purchases effected from dealers whose registration certificates had been cancelled, stood covered by two (2) separate judgements of the Division Bench of this Court; these being : judgement dated 09.09.2016, passed in W.A.No.775 of 2016, titled: The Assistant Commissioner (CT) V. M/s.Infiniti Wholesale Ltd., and the judgement rendered, in the matter of: Assistant Commissioner (CT), Broadway Assessment Circle, Chennai V. Bhairav Trading Company, [2016] 96 VST 315 (Mad).

4.1. It appears that the learned single Judge was not persuaded by the submissions made by the counsel for the Assessee and, accordingly, as indicated above, relegated the Assessee to an alternative remedy.

5. Mr.S.Raveekumar, who appears for the Assessee, has reiterated his submissions, as noted above, before us.

6. Mr.S.Kanmani Annamalai, who appears on behalf of the Revenue, similarly, has taken the line, which the learned single Judge has noted in the impugned judgement.

7. Before we proceed further, it may be convenient to extract the calculations made in the Assessment Order by the CTO, with regard to the tax/ITC reversal and penalty levied by him under Section 27(3) and 27(4) of the TNVAT Act.

| S.No. | Description | Value | Tax due/ Reversal of ITC |
|---|---|---|---|
| 1 | Wrong claim of ITC on the purchase effected from the dealers who have not reported in the monthly return as sales | 5556235 | 805684 |
| 2 | Suppression of Import purchase | 3391101 | 491710 |
| 3 | Reversal of ITC on interstate Sales | | 89670 |
| 4 | VAT Tax due on Other Income | 190441 | 27614 |
| 5 | Discount Allowed | 137536 | 18835 |

| S.No. | Description | Value | Tax due/ Reversal of ITC |
|---|---|---|---|
| 6 | Wrong claim of ITC on the purchases effected from Registration cancelled dealers | 54353738 | 7881286 |
| 7 | Parallel Set of Sale Bills issued in various dates | 141682290 | 15925532 |
| | Total | | 25240331 |
| | Penalty due @ 150% on Rs.16463691 under section 27(3) of the TNVAT Act | | 24695536 |
| | Penalty due @ 100% on Rs.8776640 under section 27(4)(ii) of the TNVAT Act | | 8776640 |

| | Tax/ITC Reversal | Penalty u/s 27(3) | Penalty u/s 27(4) |
|---|---|---|---|
| Due | 25240331 | 24695536 | 8776640 |
| Paid | 117284 | Nil | Nil |
| Balance | 25123047 | 24695536 | 8786640 |

8. A perusal of the aforementioned table would show that tax/ITC has been reversed under seven (7) heads and penalty has been separately calculated for suppression of taxable turnover and incorrect/wrong claim of ITC.

8.1. In so far as the suppression of taxable turnover is concerned, penalty has been pegged at Rs.2,46,95,536/-, while in so far as the wrong claim of ITC is concerned penalty is crystallised at Rs.87,76,640/-. Furthermore, on being queried, learned counsel for the Assessee has categorically taken the stand before us, that he would not be challenging the tax demanded or ITC reversal, carried out in respect of the aspects referred to in Serial No.3,4,5 of the table extracted herein above; these being:

| S.No. | Description | Value | Tax due/ Reversal of ITC |
|---|---|---|---|
| 3 | Reversal of ITC on interstate Sales | | 89670 |
| 4 | VAT Tax due on Other Income | 190441 | 27614 |

| S.No. | Description | Value | Tax due/ Reversal of ITC |
|---|---|---|---|
| 5 | Discount Allowed | 137536 | 18835 |

8.2. As regards the aspects referred to against Serial Nos.2 and 7 are concerned, learned counsel for the Assessee says that the Assessee will assail the tenability of the same by taking recourse to a statutory remedy. Thus, in effect, counsel for the Assessee restricts the scope of the appeal, only with regard to the aspects referred to in serial numbers 1 and 6 of the table set out above.

8.3. We may also note that in so far as that aspect of the notice dated 04.12.2014 was concerned, which dealt with the turnover that was not covered by 'C' Form declarations, the CTO himself in his order dated 27.02.2015, has indicated that this aspect of the matter will be discussed and assessed separately under the Central Sales Tax Act, 1956 qua the year in issue, i.e., 2013-14. Therefore, this aspect of the matter, we are not required to dwell upon.

8.4. Given this factual situation, we are called upon to rule only with respect to the aspects referred to against serial Nos.1 and 6 of the table extracted above.

8.5. According to us, both aspects are no longer res integra, in so far as this Court is concerned.

9. In Infiniti Wholesale Ltd case, a Division Bench of this Court has held that merely because the selling dealer has not disclosed the transaction in his monthly return that cannot by itself furnish a cause to seek tax or reversal of ITC from the purchasing dealer. Similarly, in respect of the other aspect, that is, the impact of de-registration of selling dealer, the Division Bench of this Court in Bhairav Trading Company case, has come to the conclusion that it cannot lead to reversal of ITC or levy of tax on the Assessee.

9.1. Besides the aforesaid judgements, several judgements have been rendered by Single Judges of the Court on the very same aspects, including the ones referred to hereafter :

i) Sri Vinayaga Agencies V. Assistant Commissioner (CT), Vadapalani - I Assessment Circle, Chennai and another - [2013] 60 VST 283 (Mad) and

ii) Order dated 05.01.2017, passed in W.P.Nos.275 to 279 of 2017, titled: My Electronics V. Commercial Tax Officer.

iii) Order dated 12.01.2017, passed in W.P.No.1009 of 2017, titled: International Flavours & Fragrances India Pvt. Ltd. V. Assistant Commissioner (CT).

10.Having regard to the aforesaid state of the law,we are of the view that the Assessee, at least, in respect of these aspects should not have been relegated to an alternative remedy. This is apart from the larger issue,which the Assessee had raised in the writ petition, which is,as to whether a proposal could have been made by the CTO, to levy tax/or seek reversal of ITC solely based on the discrepancies pointed out by the Enforcement Wing, while conducting an audit.

10.1. This issue, we are not called upon to rule on, at present, since, the Assessee has indicated to us that it would be filing an appeal with respect to the aspects referred to against Serial Nos.2 and 7, as noted in the table set out hereinabove.

11. Accordingly, the Writ Appeal is partly allowed. The Assessment Order dated 27.02.2015 is set aside to the extent it relates to aspects referred to against serial Nos.1 and 6, as set forth in the table above. The resultant consequences of which would be that penalty under Section 27(4), amounting to Rs.87,76,640/-, shall also stand set aside. The remaining part of the Assessment Order dated 27.02.2015 shall remain unimpaired. The Assessee will, however, have the liberty to assail the same, by taking recourse to a statutory remedy, albeit, in accordance with law.

12. Consequently, the connected Miscellaneous Petition is closed. However, there will be no order as to costs.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Sub Assistant Registrar

To

1.The Commercial Tax Officer,
Kilpauk Assessment Circle,
7th Floor, 'Dowlath Towers',
Taylors Road, Kilpauk, Chennai - 600 010.

2.The Sub Assistant Registrar,
Appeal Examiner Section,
High Court, Madras 104.

+1cc to Mr.P.Hari Babu, Advocate, S.R.No.43223
+1cc to the Special Government Pleader(T), S.R.No.43068

W.A.No.763 of 2015
and M.P.No.1 of 2015

SJ(CO)
CA(06/07/2017)