

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date : 19.09 .2017

Coram

THE HONOURABLE MR.JUSTICE S.MANIKUMAR

and

THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

W.A.No.797 of 2017

Gail India Pvt. Ltd,
Rep. By its Deputy General Manager
Mr.A.Anbarasan,
Adiyakkamangalam,
Tiruvavarur Taluk. Appellant

Vs.

The Commercial Tax Officer,
Nagapattinam Assessment Circle,
Commercial Taxes Buildings,
Court Campus, Veliyapalayam,
Nagapattinam. Respondent

Writ Appeal filed under Clause 15 of Letters patent,
praying to set aside the order of this Court, dated 28.06.2016,
passed in W.P.No.35782 of 2015.

WP.NO.35782 of 2015:

Writ petitions filed under Article 226 of the Constitution of India, for issuance of writ of Certiorarified Mandamus, to call for records relating to the order in CST/223494/2006-2007, TIN/330439000682/2006-2007, DATED 26.06.2015, passed by the Respondent and to quash the same as aribitrary and illegal and to direct the respondent to revise he the assessment under section 84 of the TNVAT Act,2006, restoring the ITC wrongly reversed.

For Appellant	: Mr.Joseph Prabhakar
For Respondent	: Mr.K.Venkatesh
	Government Advocate

ORDER

This Writ Appeal has been filed by the appellant challenging the order of this Court dated 28.06.2016 passed in

W.P.No.35782 of 2015.

Writ petition filed under Article 226 of the Constitution of India, for issuance of Writ of Certiorarified Mandamus, to call for records relating to the order in CST/223494/2006-2007, TIN/330439000682/2006-07, dated 26.06.2015, passed by the Respondent and to quash the same as arbitrary and illegal and to direct the respondent to revised the assessment under section 84 of the TNVAT Act, 2006, restoring the ITC wrongly reversed.

2. Brief facts of the case of the appellant are as follows:

2.1 Appellant is a Central Public Sector Undertaking engaged in the business of transmission, distribution and marketing for Natural Gases and is registered with the respondent assessment circle under TNVAT Act, 2006 and CST Act, 1956. Appellant purchases Natural Gases from Oil and Natural Gas Commission (ONGC) and would re-sell the same to various customers.

2.2 VAT was introduced in Tamil Nadu w.e.f January 1, 2007 and Natural Gases attracted VAT at 4%. However, ONGC had erroneously charged VAT at 12.5% (instead of 4%) on sale of Natural Gases to the Appellant.

2.3 Out of the purchases made from ONGC, the appellant made local sale of natural gases totalling to Rs.82.93 Crores during the period January 2007 to March 2007. Out of the total local sale of Rs.82.93 Crores, sale to TNEB was Rs.23.29 Crores and the appellant charged 4% VAT on this sale (as per GO of TN Govt). As regards the balance sale of Rs.59.64 Crores (other than TNEB), the appellant charged VAT at 12.5% and remitted the amount of VAT so collected (12.5%) to the Government.

2.4 It is submitted that ONGC had committed an error in charging VAT at 12.5% (instead of 4%) on sale to the Appellant and thus, the Appellant also committed an error in charging VAT at 12.5% on their local sale. Similarly, the appellant wrongly reversed Input Tax Credit in each of their Inter-State sale transactions effected during the period January - March 2007. The total Inter-State sale value for the period January - March 2007 works out to Rs.14.98 Crores and the appellant wrongly reversed ITC at 12.5% (paid Tax) to the tune of Rs.1,52,01,304/-.

2.5 The appellant showed the above reversal of Input Tax Credit of 12.5% in each of the Inter-State Sale Invoices, collected the same from their buyers as part of sale price and remitted the same to the Government. Through a clarification letter of the Commissioner of Commercial Taxes, Tamil Nadu, the appellant realized that the rate of VAT for Natural Gases is

only 4% and that they are eligible for availing entire amount of VAT charged by the seller (ONGC) (whether 4% or 12.5%) and further realized that they have reversed 12.5% of ITC wrongly. Therefore, the Appellant filed an Application dated 29.05.2008 seeking refund [8.5% representing 12.5% minus 4%] on local sales, which was originally remitted by the Appellant to the Department. This was done by the Appellant to enable the Appellant to refund the same to its customers. The Appellant also gave an undertaking to refund the differential tax amount to its customers within a period of 3 months from the date of receipt of refund amount. However, the Respondent did not consider the request and passed an order under Section 22(2) of the TNVAT Act, 2006 assessing the Appellant at 12.5% vide Order dated 25.06.2008.

2.6 Aggrieved by Order dated 25.06.2008 (VAT), the Appellant filed an Appeal before the First Appellate Authority and the First Appellate Authority vide its order dated 23.03.2009 dismissed the appeal.

2.7 Thereafter, the Appellant filed Second Appeal before the Sales Tax Appellate Tribunal. The Tribunal allowed Appeal T A No.23 of 2010 and passed an order dated 21.04.2011 holding that rate of VAT for Natural Gases is 4% and accordingly, ordered grant of refund to the Appellant.

2.8 Subsequent to the Tribunal's order dated 21.04.2011, the Appellant filed revised returns for January-March 2007 on 15.11.2011 under TNVAT Act, and carried forward the excess ITC of Rs.1,52,01,304/- for the year 2006-2007.

2.9 Whereas, the Respondent passed an order dated 23.06.2014 for the year 2006-07 and assessed the transactions of Sale of Natural Gases at 12.5% by taking a new ground that the power producers are not entitled to issue Certificate under Rule 6(3)(b) of the TNVAT Rules, 2006, for purchase of industrial input. Against the order, the Appellant had already filed a Writ Petition in W.P.No.25147 of 2014 and this Hon'ble Court in W.P.No.25147 of 2014 was pleased to issue Notice to department and that Writ Petition is pending as on date.

2.10 In the aforesaid circumstances, the Respondent took up the assessment proceedings for 2006-07 under CST Act' 1956 by issuing Notice on 23.10.2014. The Appellant once again referred to order of the Tribunal dated 21.04.2011, wherein the Tribunal gave a specific direction to the Respondent to assess Natural Gases at 4% and refund the excess tax collected. Pursuant to the above order of the Tribunal, the Appellant also made a representation to the Respondent in Letter dated 03.11.2014 to consider the revised returns filed on 15.11.2011 and permit the Appellant to carry forward the ITC of

Rs.1,52,01,304/- to the next year.

2.11 The Respondent passed an order dated 26.06.2015 rejecting the Appellant's request for refund/carry forward of ITC of Rs.1,52,01,304/- on the ground that the revised returns were filed on 15.11.2011 after a lapse of five years for the year 2006-07 and there is no provision in the Act and Rules to accept the revised returns filed after a period of nearly five years; and revised returns can be filed only within six months from the due date of a return as provided under Rule 7(9) of TNVAT Rules 2007 and Rule 5(1) of CST (Tamil Nadu) Rules 1957.

2.12 In the aforesaid order, the respondent had relied on Rule 7(9) of TNVAT Rules, 2007, inserted with effect from 6th May, 2010, which permits submission of revised returns within a period of six months in the event of noticing any omission or error. It is submitted that during 2006-2007, there was no provision restricting the submission of revised returns. It is submitted that Rule 7(9) of TNVAT Rules, 2007, inserted with effect from 6th May, 2010, would apply prospectively and therefore, it would not apply to the revised returns filed for the assessment year 2006-2007. This clear legal position now stands confirmed by this Court in the case of "Sri Mounika Traders Vs. Commercial Tax Officer, Perundurai reported in [2010] 035 VST 0277 (Mad)", wherein this Court held that revised returns could be filed by the assessee under the provisions of TNVAT Act, 2006.

2.13 The Appellant would, therefore, submit that the Appellant is entitled to get refund of Rs.1,52,01,304/-. Rejection of refund is in violation of Article 265 of the Constitution, which mandates that no tax shall be levied or collected, except by authority of law.

2.14 Aggrieved by order dated 26.06.2015 passed by the Respondent, the Appellant filed Writ Petition No.35782 of 2015 before this Court, and the said Writ Petition has been dismissed by this Court on 28.06.2016 stating that Section 41 of the TNVAT Act, 2006 was not considered by the Tribunal and when an alternative remedy was available, the Appellant could pursue the matter, in appeal.

3. Aggrieved against the order passed by this Court in W.P.No.35782 of 2015 dated 28.06.2016, the appellant has preferred this Writ Appeal by raising various grounds.

4. The learned counsel for the appellant would submit that the learned single Judge has erred in dismissing the writ petition for the following reasons:-

(a) The first reason is that even assuming but not admitting that Section 41 of the Tamil Nadu Value Added

Tax Act, 2006, would come in the way of refund to be granted to the appellant, still the fact that the order of the Tribunal dated April 21, 2011, having attained finality, Department could not take such a plea at writ proceedings, after four years.

(b) The second reason is that on merits the Learned Judge had failed to note that Section 41 of the Tamil Nadu Value Added Tax Act, 2006 has absolutely no application to the case of the Appellant. Therefore, the reason adduced by the respondent for rejection of the refund claimed, by citing Section 41 of the Tamil Nadu Value Added Tax Act, 2006 is completely wrong and misconceived.

(c) Third reason is that during the period 2006-2007, there is no provision restricting the submission of revised returns; Rule 7(9) of TNVAT Rules, 2007 inserted from 6th May 2010, would apply prospectively and therefore, it would not apply to the revised returns filed by the appellant for the assessment year 2006-2007. The learned counsel would rely on the decision of this Court reported in [2010] 035 VST 0277 (Mad) {Sri Mounika Traders Vs. Commercial Tax Officer, Perundurai}, wherein this Court held that revised returns could be filed by the assessee under the provision of TNVAT Act, 2006. The learned counsel for the appellant would further submit that as per Section 84 of Tamil Nadu Value Added Tax Act, 2006, an assessing authority or an appellate or revising authority (including the Appellate Tribunal) may, at any time within five years from the date of any order passed by it, rectify any error apparent on the face of the record.

5. The learned counsel for the respondent would reiterate the submission made before the Writ Court that the reversal of input tax credit given effect to, is not actually the reversal of input tax credit, but the same is the VAT amount, not availed, and this amount was shown as reversal credit, because of the reason that there is no appropriate column in the monthly return form. After taking note of the decision of the Sales Tax Appellate Tribunal, in the Second Appeal filed by the petitioner, for the earlier assessment year, the respondent issued notice to the petitioner dated 16.12.2014, proposing to revise the returns by exercising power under Section 27 of the TNVAT Act. The objection filed by the petitioner was considered by the respondent and order has been passed rejecting the stand taken by the petitioner.

6. The learned counsel for the respondent would further submit that the learned single Judge dismissed the writ petition by accepting the submission made by the respondent that the order of the Tribunal dated 21.04.2011 is of little avail to the

petitioner, since the Tribunal did not take into account the provisions of Section 41 of the Tamil Nadu Value Added Tax Act, 2006 and also on the ground that the issue involves complicated and disputed questions of fact and therefore, pray this Court to dismiss the Writ Appeal.

7. We have heard the learned counsel for both sides and perused the material available on record.

8. The appellant/petitioner is Gail (India) Pvt Ltd and have challenged the order passed by the respondent/Commercial Tax Officer, Nagapattinam Assessment Circle, Commercial Tax Buildings, Nagapattinam, in CST/223494/2006-2007, TIN/330439000682/2006-07, dated 26.06.2015 by filing Writ Petition in W.P.No.35782 of 2015 before this Court. The same was disposed of by this Court, with the observation that the Court was not inclined to entertain the Writ petition against the order impugned, but inclined to direct the petitioner to avail the appeal remedy and the petitioner was given liberty to file the appeal, within a period of 30 days from the date of receipt of a copy of that order, and the same shall be entertained by the Appellate Authority without reference to the limitation aspect.

9. From the perusal of records, it is seen that the appellant has sought for refund of Rs.1,52,01,304/- which was wrongly reversed by the appellant, but the respondent has rejected the same. It is averred that the appellant had declared the total taxable turn over for the year 2006 - 2007 before the concerned authorities for the sale effected during the period January - March 2007. The appellant had made Inter-State sale of Natural Gases for a value of Rs.14.98 Crores and charged C.S.T at 4% against C Form. The CST collected was also remitted to the Department. However, the Appellant committed an error by reversing / paying the entire amount of VAT charged by ONGC under the bonafide impression that they cannot avail any Input Tax Credit at all, if they made Inter-State sale. The appellant was under the wrong notion that for inter state sale, they have to reverse the entire input tax credit of 12.5% charged by the seller ONGC. This error occurred due to introduction of VAT system of taxation from 01.01.2007. The total Inter-State sale value for the period January-March 2007 worked out to Rs.14.98 Crores and the appellant reversed ITC at 12.5% tax and wrongly paid Rs.1,52,01,304/-.

10. The appellant showed the above reversal of Input Tax Credit of 12.5% in each of the interstate sale invoices, collected the same from their buyers as part of sale price and remitted the same to the Government. Only after they got a clarification from the Commissioner of Commercial Taxes, Tami Nadu about the rate of tax applicable to Natural Gases that the

natural gases are taxable at 4% under Entry 67 of Part-B of First Schedule with effect from 01.01.2007, based on Commissioner's clarification, the Appellant now realized that the rate of VAT for Natural Gas was only 4% and they are eligible for availing the entire amount of VAT charged by the seller ONGC and further realized that they have reversed 12.5% of ITC wrongly. Hence, the Appellant filed an application seeking refund of 8.5%, (total of 12.5% minus 4%) on local sales, which was remitted by the appellant to the department. The respondent did not consider the request and passed an order under Section 22(2)(c) of the TNVAT Act, 2006 assessing the Appellant at 12.5%, vide Order dated 25.06.2008. Aggrieved by the Order dated 25.06.2008, the appellant filed an appeal before the First Appellate Authority and the First Appellate Authority, vide order dated 23.03.2009 dismissed the appeal.

11. Further contention of the appellant is that he filed Second Appeal before the Sales Tax Appellate Tribunal and the Tribunal had allowed the appeal in T.A.No.23 of 2010 and passed the order dated 21.04.2011 holding that the rate of VAT for Natural Gases is 4% and accordingly, ordered grant of refund to the Appellant. It is submitted by the learned counsel for the appellant that the said order of the Tribunal has not been challenged by the Department. Though the above said order has not been challenged by the Department, considering the submission made by the Department that there is no indication in the assessment records as to what the disputed tax would represent, the Tribunal is of the view that the Assessing Officer could be directed to consider the same and if it pertains to tax under the VAT Act 2006, suitable orders may be passed taking into consideration the claim of the assessee.

12. Subsequent to Tribunal's order dated 21.04.2011, the appellant filed revised returns for January-March 2007 on 15.11.2011 under TNVAT Act, and carried forward the excess ITC of Rs.1,52,01,304/- for the year 2006-2007. Whereas, the respondent passed an Order dated 23.06.2014 for the year 2006-2007 and assessed the transactions of Sale of Natural Gases at 12.5% by taking a new ground that the Power Producers are not entitled to issue certificate under Rule 6(3)(b) of the TNVAT Rules 2006, for the purchase of industrial input. Against which, the appellant has filed a Writ Petition in W.P.No.25147 of 2014 and notice was ordered by this Court and the same is pending till date.

13. The respondent, by their assessment proceedings for 2006-2007 under CST Act' 1956, has issued notice on 23.10.2014. The appellant has filed a representation to the respondent on 03.11.2014 to consider the revised returns filed on 15.11.2011 and to permit the appellant to carry forward the ITC of Rs.1,52,01,304/- to the next year. The respondent passed an

order dated 26.06.2015 rejecting the appellant's request for refund/carry forward of ITC of Rs.1,52,01,304/- on the ground that the revised returns were filed on 15.11.2011 after a lapse of 5 years for the year 2006-2007 and there is no provision in the Act and Rules to accept revised returns filed after a period of nearly five years under Rule 7(9) of TNVAT Rules 2007 and Rule 5(1) of CST (Tamil Nadu) Rules 1957 and the revised returns are supposed to be filed within a period of six months from the due date of return. But the appellant's submission is that during the period 2006-2007, there is no provision restricting the submission of revised returns; the aforesaid Rule inserted from 6th May 2010, would apply prospectively and therefore, it would not apply to the revised returns filed by the appellant for the assessment year 2006-2007 and relied on the decision of this Court in the case of Sri Mounika Traders Vs. Commercial Tax Officer, Perundurai reported in [2010] 035 VST 0277 (Mad), wherein this Court held that revised returns could be filed by the assessee under the provision of TNVAT Act, 2006. The relevant paragraph reads as under:-

"Section 22(6)(a) of the Act showed that after completion of the assessment under Section 22(4), the assessee was entitled to apply to the assessing authority for reassessment "along with correct and complete return". The expression "correct and complete return" and the power conferred upon the assessing authority to carry out reassessment, were all indications that a revision return could be filed by the assessee under the provisions of Tamil Nadu Value Added Tax Act. Therefore, the respondent might keep an open mind and examine the revised return, as otherwise the assessment order passed on February 27, 2009 might become vulnerable."

In view of the above, the appellant seeks for refund of Rs.1,52,01,304/-. However, the respondent has rejected the claim of the appellant. According to the appellant, rejection of refund is in violation of Article 265 of the Constitution, which mandates that no tax shall be levied or collected, except by authority of law. Aggrieved by Order dated 26.06.2015, the appellant has filed W.P.No.35782 of 2015 and the same was disposed of by directing the appellant to avail appeal remedy. The present Appeal is filed by the appellant, by raising various grounds, as against the order passed by the learned Single Judge. Except the ground "O" raised in the memorandum of grounds of appeal viz., "O. It is submitted that facts are not disputed at all in this case. Refund has been allowed by the Tribunal and the Respondent should have complied with the order of the Tribunal. The respondent, without complying with the order of

the Tribunal had rejected the refund on new grounds both of which on merits are completely wrong. Therefore the only question of law that arises is whether the Respondent could reject the refund despite order of the tribunal having been accepted by the Department", all other grounds are repetition of grounds raised before the authorities and the learned Single Judge.

14. In this regard, Section 41 of the Tamil Nadu Value Added Tax Act, 2006, as amended with effect from April 1, 2012 is reproduced below:-

"41. Forfeiture of tax collected. - If any person or registered dealer collects any amount by way of tax or purporting to be by way of tax and his turnover for the year falls short of the taxable limit specified under this Act, the sum so collected shall be remitted to the Government and forfeited, after deducting the eligible input tax credit claim, if any, on the corresponding purchases."

15. The learned counsel for the appellant would submit that as per Section 84 of Tamil Nadu Value Added Tax Act, 2006, an assessing authority or an appellate or revising authority (including the Appellate Tribunal) may at any time within five years from the date of any order passed by it, rectify any error apparent on the face of the record. Section 84 of the TNVAT Act deals with the Power of the Authority to rectify any error apparent on the face of the record, which reads as under:-

(1) An assessing authority or an appellate or revising authority (including the Appellate Tribunal) may, at any time within five years from the date of any order passed by it, rectify any error apparent on the face of the record. Provided that no such rectification which has the effect of enhancing an assessment or any penalty shall be made unless such authority has given notice to the dealer and has allowed him reasonable opportunity of being heard.

(2) Where such rectification has the effect of reducing an assessment or penalty, the assessing authority shall make any refund, which may be due to the dealer.

(3) Where any such rectification has the effect of enhancing an assessment or penalty, the assessing authority shall give the dealer

a revised notice of assessment or penalty and thereupon the provisions of this Act and the Rules made thereunder shall apply as if such notice has been given in the first instance.

(4) The powers under sub-section (1) may be exercised by the assessing authorities even though the original order of assessment, if any, passed in the matter has been the subject matter of an appeal or revision.

(5) The provisions of this Act relating to appeal and revision shall apply to an order or rectification made under this Section as they apply to the order in respect of which such order or rectification has been made.

16. The authority below has considered the said submission made by the appellant and passed an order rejecting the claim as early as on 26.06.2015, which ought to have been taken on appeal, which includes an Appeal under Section 51 where forfeiture has been done under Section 41. But, challenging the above rejection order dated 26.06.2015, the appellant has filed the Writ Petition. The learned Single Judge while disposing of the Writ Petition has directed the appellant to avail the Appeal remedy and to prefer an Appeal as against the impugned order dated 26.06.2015 passed by the Commercial Tax Officer within a period of 30 days. The learned Single Judge, while disposing of the Writ Petition, has also taken into consideration the submission made by the respondent counsel with regard to the reference made under Section 27 of TNVAT Act, and came to the conclusion that when there is an alternative remedy available, bypassing the same, the Writ Petition filed by the petitioner cannot be entertained. Despite there being an alternative remedy, Writ remedy under Article 226 of the Constitution can be invoked only under such circumstances when principles of natural Justice is violated on the face of the record.

17. The Hon'ble Apex Court, in a decision reported in (2010) 8 Supreme Court Cases 110 (United Bank of India ..vs.. Satyawati Tondon and others), by placing reliance on various decisions, held that the High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute. The relevant portion is extracted hereunder:-

"41. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a 19 petition under Article 226 of the

Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc., the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.

18. While expressing the aforesaid view, we are conscious that the powers conferred upon the High Court under Article 226 of the Constitution to issue to any person or authority, including in appropriate cases, any Government, directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of self-imposed restraint evolved by this Court, which every High Court is bound to keep in view while exercising power under Article 226 of the Constitution."

18. In the present case, the appellant has to avail the appeal remedy under the statute, which cannot be given a go-by, by invoking the Writ Jurisdiction directly. Therefore, no interference is warranted against the order passed by the learned Single Judge. It is left open to the appellant to approach the Appellate Authority.

19. The Writ Appeal is dismissed, thereby confirming the order of the learned Single Judge dated 28.06.2016 made in W.P.No.35782 of 2015. No Costs.

Sd/-

ASST. REGISTRAR

/TRUE COPY/

SUB ASST. REGISTRAR

To

The Commercial Tax Officer,
Nagapattinam Assessment Circle,
Commercial Taxes Buildings,
Court Campus, Veliyapalayam,
Nagapattinam.

+1 CC to Mr. Joseph Prabhakar Advocate SR.NO.68455

Pre-delivery Judgment in

W.A.No.797 of 2017

MN (CO)
VC (28/10/2017)



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