

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.11.2017

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

W.P.Nos.28271 to 28275 of 2017 & 28559 to 28563 of 2017 and
W.M.P.Nos.30384 to 30388 of 2017 & 30708 to 30712 of 2017

M/s.Mahaveer Trading Company,
rep. by its Proprietor,
118/3, Annapillai Street,
Chennai-600 079.

.... Petitioner
in all W.Ps.

Vs.

The Assistant Commissioner (CT),
Peddunaickenpet Assessment Circle,
Chennai.

.... Respondent
in all W.Ps.

Petitions filed under Article 226 of the Constitution of India praying for issuance of Writ of Certiorari, to call for the records of the respondent in TIN/33840281366/ 2007-08, 2008-09, 2009-10, 2011-12, 2010-11 2012-13, 2013-14, 2014-15, 2015-16 & 2016-17, respectively, dated 28.09.2017 and quash the same.

For Petitioner : Mr.Adithya Reddy

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

सत्यमेव जयते
COMMON ORDER

Heard Mr.Adithya Reddy, learned counsel appearing for the petitioner and Mr.S.Kanmani Annamalai, learned Additional Government Pleader, appearing for the respondent. With consent on either side, these writ petitions are taken up for final disposal, as the respondent has given written instructions to the learned Government Pleader (Taxes), vide letter dated 06.11.2017.

2.The petitioner is a registered dealer and involved in

the business of buying and selling export/import licences such as REP licence and DEPB licence etc. The petitioner's case is that these licences fall under Entry 70 of Part B of First Schedule to the Tamil Nadu Value Added Tax Act, 2006 (hereinafter referred as "the TNVAT Act") and taxable at the rate of 5%. The petitioner is stated to have purchased these licences from registered dealers on payment of tax and has availed input tax credit under Section 19(1) of the TNVAT Act. The respondent issued a single notice dated 01.08.2017, for all the assessment years. In the said notice, the respondent states that they were deemed to have been assessed under Section 22(2) of the TNVAT Act for the relevant assessment years and subsequently, their monthly returns were verified and it was noticed that they have effected purchases of DEPB licences for all the assessment years and availed input tax credit on the concerned purchases. It was observed that despite the fact that the DEPB licences are goods, they are certainly different and distinct from the goods that can be imported on the strength of those licences. This licence confers a right to import goods and it is used for the purpose of payment of import duty alone. Therefore, it was observed that if input tax credit is allowed to the petitioner, the benefit that they claim becomes double benefit. In other words, it was stated that the petitioner cannot claim input tax credit unless he satisfies that the tax paid or payable was in respect of goods specified in the First Schedule. The respondent, while not disputing the fact that the DEPB licences are goods, would state that they do not fall under the First Schedule and in the light of the decision of the Hon'ble Division Bench of this Court, in the case of Sha Kantilal Jayantilal vs. The State of Tamil Nadu reported in (2017) 97 VST 295 (Mad), the purchase of DEPB licence is not eligible for availing input tax credit. Therefore, the respondent proposed to reverse the input tax credit availed by the petitioner and also proposed to levy penalty. To the above referred notice dated 01.08.2017, the petitioner submitted their objections on 06.08.2017, contending that the decision in the case of Sha Kantilal Jayantilal (supra) is not applicable to them and in the said judgment, the assessee was an importer, who had utilized the DEPB licence for reducing his duty liability and the petitioner is not an importer, but a trader in such licences.

3. In support of his contention, the petitioner has referred to the decision of the Hon'ble Division Bench of the Delhi High Court in the case of Jagriti Plastics Limited vs. Commissioner of Trade & Taxes and N.F.Impex Pvt. Ltd., vs. Commissioner of Trade & Taxes in S.T.Appeal Nos.5 & 23 of 2015 dated 01.10.2015, and the clarification issued by the Commissioner of Commercial Taxes dated 28.06.2007, in respect of

another dealer requested for dropping the proceedings.

4.The respondent issued final notice dated 23.08.2017, stating that the contentions raised by the petitioner in their objections dated 06.08.2017, are not acceptable and in the decision of Sha Kantilal Jayantilal (supra), the Court has not discussed on the eligibility between the importer and trader discrepancy and the judgment elaborately discussed the eligibility of input tax credit on DEPB licences. The respondent has quoted paragraphs 28 to 32 of the above referred judgment and opined that the DEPB licences whether in the hands of the importer or trader, irrespective of its usage is not eligible for input tax credit, for the reason that it does not fall under the First Schedule. With a view to afford one more opportunity to the petitioner, the respondent fixed a date for personal hearing on 06.09.2017, at 11:00 a.m. The petitioner submitted their further objections dated 14.09.2017, to the final notice dated 23.08.2017, pointing out that the DEPB licence fall under the heading "Intangible goods like copy right, pattern, REP licence" specified in Entry 70 of Part B of First Schedule to the TNVAT Act. The petitioner placed reliance on the Proceedings of the Authority for Clarification and Advance Ruling, issued under Section 48-A of the TNVAT Act, dated 25.07.2012, wherein it has been clarified that DEPB licences are taxable at 5% under Entry 70 of Part B of First Schedule to the TNVAT Act.

5.Further, the petitioner placed reliance on the decision of the Hon'ble Supreme Court in the case of Government of A.P. and another vs. B.Satyanarayana Rao reported in (2000) 4 SCC 262. for the proposition that the rule of per incuriam can be applied, wherein, the Court omits to consider a binding precedent of the same Court or the Superior Court rendered on the same issue or where a Court omits to consider any statute while deciding that issue.

6.Therefore, it was contended that in Sha Kantilal Jayantilal (supra), the Court omitted to note Entry 70 of Part B of First Schedule to the TNVAT Act. Therefore, it was contended that the said judgment is per incuriam and not binding. The petitioner has also participated in the personal hearing pursuant to which the impugned orders have been passed. Though the impugned assessment orders are four page orders, more than three and a half pages of the orders refer to the first notice dated 01.08.2017, the objections filed by the petitioner dated 06.08.2017, the final notice dated 23.08.2017, and the further objections filed by the petitioner dated 14.09.2017.

The discussion is only in the last paragraph of the impugned order, wherein, the respondent refused to accept the stand taken by the petitioner on the ground that the decision in Sha Kantilal Jayantilal (supra), is not per incuriam and since DEPB licences are not falling under First Schedule of the TNVAT Act, the question of granting input tax credit does not arise. The respondent in the written instructions given by the learned Government Pleader (Taxes), reiterated the stand taken in the impugned order, after referring to Section 22(2) and Section 27 (2) of the TNVAT Act.

7. Two aspects, which are very important in the case on hand have been failed to be considered by the respondent. As pointed out earlier, the respondent while issuing the first notice dated 01.08.2017, would accept that DEPB licences are considered as goods. It denies the relief to the petitioner on the sole ground that the goods do not fall under the First Schedule. If that is so, how the respondent should treat the transaction especially, when the petitioner has taken a stand that the facts in the case of Sha Kantilal Jayantilal (supra), were entirely different.

8. One more important aspect, which the respondent has failed to take into consideration is the advance ruling given by the authority under Section 48-A of the TNVAT Act. The said ruling is binding on the assessing officer. The assessing officer cannot get over the advance ruling unless and until, on facts, the respondent is able to establish that the said ruling will not apply to the facts of the present case. Though the petitioner had specifically raised this issue in their further reply dated 14.09.2017, the respondent has not considered the same. That apart, the respondent has relied upon a clarification issued by the Commissioner issued in favour of another dealer as early as in the year 2007 vide letter dated 28.06.2007. Though the said clarification would not be binding on the respondent, yet it should be of persuasive value, since it was clarified that if the dealers resold DEPB licence, they have to pay tax at the rate of 4% (as it stood then). It is further clarified that in that event, they are eligible to input tax credit to the extent of DEPB licence resold by them.

9. In so far as assessment for the years 2007-08 to 2010-11 is concerned, the petitioner in addition to other points in their first objection dated 06.08.2017, specifically stated that the re-opening of assessment is barred by limitation, as it cannot be re-opened after a lapse of five years and the five years period came to an end on 30.10.2017.

10.I find that this issue has not been considered by the respondent while passing the impugned orders dated 28.09.2017, for those 4 years.

11.In the light of the above discussion, this Court is of the considered view that the assessing officer should re-consider the matter afresh taking note of the factual issues, as to whether the assessment for the years 2007-08 to 2010-11 is barred by limitation, the advance ruling dated 25.07.2012 in ACAAR 14/2012-13, the clarification issued by the Commissioner of Commercial Taxes dated 28.06.2007, and the decision in the case of Jakridi Plastics Limited (supra) and re-do the assessment in accordance with law.

12.For the above reasons, these writ petitions are allowed, the impugned orders are quashed and the matters are remanded to the respondent for fresh consideration to deal with all the issues as pointed out in the preceding paragraphs after affording an opportunity of personal hearing to the authorized representative of the petitioner. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar

//True copy//

Sub Assistant Registrar

abr

To

The Assistant Commissioner (CT),
Peddunaickenpet Assessment Circle,
Chennai.

+1cc to Mr.Adithya Reddy, Advocate SR.No.81077
+1cc to Government Pleader SR.No.80429

W.P.Nos.28271 to 28275 of 2017
and 28559 to 28563 of 2017

PVS (CO)
GN(19/12/2017)