

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 02.04.2019

Delivered on : 10.04.2019

CORAM:

THE HONOURABLE MR. JUSTICE SENTHILKUMAR RAMAMOORTHY

W.P.No.34721 of 2006

M/s.Rajapalayam Mills Ltd.,
P.A.C.R. Salai,
Rajapalayam - 626 117. Petitioner

Vs.

- 1.The Joint Commissioner of Commercial
Taxes (Revision Petition)
Chepauk, Chennai - 600 005.
- 2.The Deputy Commissioner (CT) (FAC),
Tirunelveli Division,
Tirunelveli.
- 3.The Commercial Tax Officer -1,
Rajapalayam. Respondents

PRAYER: Writ Petition is filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus to call for the records of the First Respondent in his proceedings in RP.No.J1/78/04, quash the order dated 15.02.2006 made therein and further direct the Third Respondent to grant refund of a sum of Rs.10,98,993/- to the Petitioner under Section 4-E of the Tamil Nadu General Sales Tax Act, 1959.

For Petitioner : Mr.B.Raveendran
for M/s.K.J.Chandran

For Respondents : Mr.G.Dhana Madhri
Government Advocate

O R D E R

This Writ Petition is filed to quash the order dated 15.02.2006 of the First Respondent herein and direct the Third Respondent to refund the sum of Rs.10,98,993/- to the Petitioner under Section 4-E of the Tamil Nadu General Sales Tax Act 1959

(the TNGST Act).

2.The Petitioner is a limited company, which is registered as a dealer on the file of the Third Respondent under the provisions of the TNGST Act. It is relevant to state that the Registration Certificate issued to the Petitioner mentions that Rajapalayam Textiles, a 100% Export Oriented Unit (EOU), is a Branch/Division of the Petitioner. Likewise, it also mentions that Rajapalayam Spintex, a 100% EOU, is also a Branch/Division of the Petitioner.

3.The Petitioner states that the aforementioned EOU's are subsidiary units of the Petitioner. As per Section 4-E of the TNGST Act, a 100% EOU is entitled to a refund of tax paid on purchase of goods, including consumables, packing materials and labels used by such unit in the manufacture, assembling, packing or labelling of goods manufactured within the state and sold by way of export by such unit. Section 4-E of the TNGST Act reads as under:

"Refund of Tax in certain cases__ A registered 100% export oriented unit or unit located in the Madras Special Economic Zone shall be entitled for refund of the whole of the tax paid by it on the purchase of any goods, including consumables, packing materials and labels, but excluding plant and machinery, which has been used by such unit in the manufacture and assembling, packing or labelling of goods manufactured within the State and sold by way of export by such unit"

4.In respect of the assessment year 1996-97, the two units of the Petitioner purchased cotton for use in the manufacture of other goods for export and claimed refund of taxes under Section 4-E of the TNGST Act in a sum of Rs.10,98,993/-. The Third Respondent proceeded with and completed the assessment and by Assessment Order dated 05.05.1998, it was accepted that the two 100% EOU's of the Petitioner are entitled to refund of tax and that the refund of tax would be made separately.

5.However, in view of the fact that the refund was not forthcoming, the Petitioner issued several reminders, including by letter dated 07.10.1999. Thereafter, the Third Respondent by proceedings dated 29.11.1999 rejected the claim for refund. In the said communication, the Third Respondent stated that the Petitioner had not paid tax on the purchase value of cotton to the sellers and that the Petitioner is not a 100% EOU. The third reason cited therein was that the claim for refund was made after the completion of the final assessment whereas the provisions of Rule 23(2C) provide for a claim of refund to be

made prior to the completion of final assessment.

6. According to the Petitioner, the Third Respondent failed to note that Section 4-E of the TNGST Act provides for refund of tax paid by the 100% EOU and does not specify that the tax should have been paid to the seller. Further, in the instant case, the two subsidiary units purchased cotton for use in the manufacture of other goods for export and cotton is taxable at the point of last purchase within the state. Therefore, the two subsidiary units of the Petitioner paid the tax while filing monthly returns and not to the sellers. As regards the second reason, according to the Petitioner, Section 4-E refers to the entitlement of the 100% EOU and not of the dealer. As regards the third reason that was cited, the Petitioner states that the claim for refund was considered and accepted at the time of completion of the original assessment and, therefore, it is evident that the claim was made before completion of final assessment.

7. In view of the fact that no appeal is provided against the rejection of the claim for refund under Section 4-E, the Petitioner filed a Revision Petition before the Second Respondent under Section 33 of the TNGST Act. However, by order dated 03.12.2003, the Second Respondent rejected the Revision Petition as not maintainable under Section 33 of the TNGST Act. In so holding, the Second Respondent stated that the rejection of a claim for refund is not a proceeding under Section 55 of the TNGST Act but a continuation of the Original Assessment Order dated 05.05.1998 and, therefore, an appeal ought to have been filed. In the said order, it was further held that the Third Respondent had stated in the Original Assessment Order dated 05.05.1998 that separate findings would be rendered in respect of the claim for refund. In light of the fact that an order passed under Section 33 is not appealable under Section 31 of the TNGST Act, the Petitioner filed a Second Revision Petition before the First Respondent. The said Revision Petition was rejected by order dated 15.02.2006 by confirming the orders passed by the Second and Third Respondents herein without any discussion or consideration. The order dated 15.02.2006 is the Impugned Order in this Writ Petition.

8. The case of the Respondents is that the Petitioner is an assessee as per the books of the Third Respondent herein. It has two cotton procurement units for purchase of cotton locally for the manufacture of cotton yarn. The Petitioner claimed a refund of tax, under Section 4-E of the TNGST Act, corresponding to the tax paid on the purchase value of cotton. In view of the fact that the dealer is not a 100% EOU, the claim was correctly rejected by the Third Respondent vide letter dated 29.11.1999. The Respondents admit that the two subsidiary units of the

Petitioner are 100% EOU's but submit that the Petitioner is not a 100% EOU and, therefore, the claim was validly rejected.

9. At the hearing, the learned counsel for the Petitioner reiterated the submissions in the affidavit in support of the Writ Petition. In addition, the learned counsel referred to the Registration Certificate of the Petitioner and pointed out as to how both the subsidiary units are mentioned therein as 100% EOU's. The learned counsel also referred to the Original Assessment Order and pointed out as to how the assessing officer had categorically stated that the purchases of cotton were made by the two 100% EOUs of the Petitioner and that the refund of the tax would be made separately. The learned counsel further pointed out as to how the claim for refund was subsequently rejected by letter dated 29.11.1999 for two reasons, namely, that the Petitioner had not paid tax on the purchase value of cotton to the sellers of cotton within the state and that the two units may be 100% EOU's but the Petitioner is not a 100% EOU. The learned counsel, thereafter, referred to the order passed in the two Revision Petitions and contended that the said orders are untenable and liable to be set aside by the Court.

10. In reply, the learned counsel for the Respondents referred to Rule 23(2C) and Form A-5 and contended that Section 4-E should be read with the said Rule and Form. According to the learned counsel for the Respondents, if so read, it is evident that the person claiming refund should provide a certificate from the selling dealer to the effect that tax was paid. In addition, the learned counsel also submitted that the Petitioner is not an exclusive EOU and is, therefore, not entitled to refund. Further, the learned counsel submitted that the assessing officer has the power to revise the original assessment within the specified time frame and that is precisely what was done in the instant case.

11. By way of rejoinder submissions, the learned counsel for the Petitioner referred to the Original Assessment Order at pages 5 and 6 of the typed set of papers filed by the Petitioner and pointed out that it evidences the payment of tax by the Petitioner on the purchase of cotton. Consequently, it was submitted that the Petitioner fulfilled the requirement in that regard.

12. The affidavit, counter affidavit, documents on record and the oral submissions of both parties were carefully considered.

13. Before dealing with the merits, a preliminary issue needs to be briefly considered. As per the Order dated 03.12.2003, as confirmed by Impugned Order dated 15.02.2006, the order rejecting the refund claim is an appealable order and, therefore, the revision petition is not maintainable. However, in the instant case, the Original Assessment Order dated

05.05.1998 records that the Petitioner is entitled to refund and that the refund would be made separately. Therefore, the Petitioner had no reason to challenge the Original Assessment Order. Subsequent thereto, the grievance of the Petitioner is that the refund was not made and upon issuance of reminders, in that regard, the refund claim was rejected on 29.11.1999. Aggrieved by the order rejecting refund, the Petitioner filed a revision petition under Section 33 of the TNGST Act because it is a non-appealable order under Section 31 thereof. According to the Petitioner, the Revision Petition was filed on the above basis and not on the ground that a rectification order was passed under Section 55 of the TNGST Act. On examining the relevant documents and the TNGST Act, it is clear that the contention of the Petitioner, in this regard, is correct and the findings of the Respondents, in this regard, are untenable.

14. As regards the merits, on reading Section 4-E, it is evident that the word used therein is 'unit' and not 'dealer'. As such, there is no doubt that a 100% EOU is entitled to the refund on satisfying the prescribed conditions. The use of the word 'unit' instead of the word 'dealer' is significant especially in the context of a statute wherein tax is ordinarily imposed on the dealer. In the instant case, it is the admitted position that the two units of the Petitioner are 100% EOU's. The Original Assessment Order reflects that the total turnover, as determined, of the Petitioner for the Assessment Year 1996-97 is Rs.88,79,38,565/- and the total taxable turnover is Rs.44,07,16,178/-. As against the said total turnover, the refund claim is confined to the taxes paid on the turnover of Rajapalayam Spintex, namely, Rs.5,68,212/- and that paid on the turnover of Rajapalayam Textiles, namely, Rs.5,30,781/- aggregating to Rs.10,98,993/-. Thus, it is evident that the refund claim is confined to taxes paid on purchases of cotton by the two 100% EOU's of the Petitioner and does not extend to the other divisions of the Petitioner. It is also evident from the Original Assessment Order that the said two units of the Petitioner paid taxes on the purchases made by them at 2% to 4%.

15. The word 'unit' is not specifically defined in the TNGST Act. Accordingly, it has to be understood as per common or trade parlance. One of the meanings of the word 'unit', as per the Oxford Essential Dictionary, 2012 Edition, is "one complete thing or group that may be part of something larger". Similarly, the Reader's Digest Great Illustrated Dictionary, 1st Edition, defines 'unit' as "an individual, group, structure or other entity regarded as an elementary structural or functional constituent of the whole". From the Registration certificate, it is evident that Rajapalayam Textiles and Rajapalayam Spintex are not separate legal entities but are branches/divisions of the dealer, Rajapalayam Mills Limited, in whose name the Registration Certificate was issued. If the meaning ascribed to

the word 'unit' in the aforementioned dictionaries is applied and viewed in the factual context of the Registration Certificate and the Assessment Order, it becomes clear that the two units are constituents of the Petitioner.

16. This leads to the question as who is entitled to make the application for refund: should it necessarily be made by the unit or could it be made by the dealer albeit in respect of the 100% EOUs. The answer to this question is also fairly simple: if the unit is a distinct legal entity and, more importantly, is registered as a dealer in its own right, the unit should make the application; if not, only the legal entity/registered dealer should make the application albeit by confining the refund claim to the taxes paid by the 100% EOU.

17. The other aspect to be considered is whether the condition prescribed in Rule 23(2C) read with Form A-5 is satisfied in the instant case. As stated earlier, the documents evidence payment of taxes by the two units on the cotton purchased by them for making goods for export but taxes were not paid to the sellers because of the point of imposition of tax on purchase of cotton. Therefore, the question arises as to whether the condition was complied with. In this regard, a Five Judge Bench of the Hon'ble Supreme Court in the COMMISSIONER OF CUSTOMS AND CENTRAL EXCISE Vs. HARI CHAND SHRI GOPAL, (2011) 1 SCC 236 in the context of construction of an exemption notification, wherein strict construction is to be adopted- held as follows:

"34. The test for determining the applicability of the substantial compliance doctrine has been the subject of a myriad of cases and quite often, the critical question to be examined is whether the requirements relate to the "substance" or "essence" of the statute, if so, strict adherence to those requirements is a precondition to give effect to that doctrine. On the other hand, if the requirements are procedural or directory in that they are not of the "essence" of the thing to be done but are given with a view to the orderly conduct of business, they may be fulfilled by substantial, if not strict compliance. In other words, a mere attempted compliance may not be sufficient, but actual compliance with those factors which are considered as essential."

18. The said view and principle was affirmed and followed in a more recent judgment of a Five Judge Bench of the Hon'ble Supreme Court in THE COMMISSIONER OF CUSTOMS Vs. DILIP KUMAR, (2018) 9 SCC 1. A fortiori, in the context of a refund

application, the principle of substantial compliance would apply. If so applied, it is clear that the two 100% EOUs paid taxes at 2-4% on the purchases made by them and thereby substantially complied with the conditions under Section 4-E read with Rule 23 (2C) and Form A-5. Therefore, the claim for refund is valid and, consequently, the Impugned Order dated 15.02.2006 is liable to be quashed.

19. In view of the foregoing discussion, the Writ Petition is allowed and the Impugned Order is quashed. Consequently, the Respondents are directed to refund the sum of Rs.10,98,993/- to the Petitioner within a period of 90 days from the date of receipt of a copy of this order. If the said amount is not paid within 90 days, it shall carry interest at 12% per annum from the 91st day until the date of payment. There shall be no order as to costs.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1. The Joint Commissioner of Commercial Taxes (Revision Petition)
Chepauk, Chennai - 600 005.

2. The Deputy Commissioner (CT) (FAC),
Tirunelveli Division,
Tirunelveli.

3. The Commercial Tax Officer -1,
Rajapalayam.

+1cc to the Special Government Pleader, S.R.No. 35963

W.P.No.34721 of 2006

RK(CO)
GN(29/05/2019)