

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.12.2019

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.No.28392 of 2011

and

M.P.Nos.1 & 2 of 2011

M/s.Sri Jaya Timber Depot,
Rep. by its Proprietor,
No.85, North Wall Road,
Chennai - 79.

... Petitioner

vs

The Commercial Tax Officer,
Vallalar Nagar, Assmt Circle,
No.116, Angappa Naicken Street,
Chennai - 1.

... Respondent

Prayer: Writ Petition filed under Article 226 of Constitution of India, to issue a Writ of Certiorarified Mandamus, to call for the records of the respondent in the impugned order in TIN No.33901160929/07-08 dated 21.10.2011 and quash the same as ultra-virus and contrary to law and further direct the respondent to grant Input Tax Credit on sales to 100% Export Oriented Unit.

For Petitioner : M/s.C.Rekha Kumari

For Respondent : Mr.V.Haribabu
Additional Government Pleader

O R D E R

The Writ Petitioner is aggrieved by the impugned order dated 21.10.2011 passed by the respondent in TIN No.33901160929/07-08.

2.By the impugned order, the respondent has demanded a sum of Rs.1,57,757/- pursuant to the notice of assessment and has demanded a sum of Rs.3,15,574/- on 28.10.2011 from the petitioner.

3.It is the contention of the writ petitioner that the sale of 100% EOU would qualify as "zero rated" sale within the meaning of Section 18 of the TNVAT Act and therefore, the

petitioner was not required to reverse proportionate credit in terms of Section 19 of the TNVAT Act.

4. In this connection, the learned counsel for the writ petitioner drew my attention to certificate issued to 100% EOU confirming that the goods purchased from the writ petitioner were for used packing export of products.

5. The learned counsel for the writ petitioner also submits that this issue is now squarely covered by an order of this Court in Emerald Stone Export Vs. Assistant Commissioner (CT, FAC, Pudukkottai I Assessment Circle, Pudukkottai, 2011 SCC OnLine Mad 1415, wherein after referring the Section 5(3) and 5(1) of the Central Sales Tax Act, 1956, the Court held as follows:-

16. The fact that sale of goods in this case was in the course of export of goods out of the Territory of India is amplified by the documents submitted by the petitioner in support of the refund application by referring to the Export Invoice, Bill of Lading, etc.

17. Section 5(3) of CST Act, 1956, starts with a non obstante clause and overrides Section 5(1) of the Act. Therefore, the sale preceding the export sale will be a sale in the course of export. Therefore, the sale to the 100% EOU is the last sale preceding the sale occasioning the export of the goods out of the Territory of India and consequently, it will be sale in the course of export attracting Section 5(3) of CST Act, 1956. The provision of Section 5(3) of CST Act, 1956 specifically covers a sale in this case.

18. In this case, the petitioner has sold the goods to Tab India Pvt. Ltd., a 100% EOU and the documents submitted by the petitioner to the competent Refund Authority clearly satisfied the requirements that the sale was for the purpose of export of goods outside the territory of India by the EOU and it is in the course of export. Section 18(1) of TNVAT Act, 2006 and Section 5(3) of CST Act, 1956, clearly apply to the facts of the petitioner's case. The sale in this case falls under Section 5(3) of CST Act, 1956, and then Section 18(1) of TNVAT Act, gets attracted.

19. In such view of the matter, by virtue of Section 18(i) of the TNVAT Act, 2006 the petitioner is entitled to Input Tax Credit or refund of tax if it is a sale specified under sub-section (1) and (3) of Section 5 of CST Act, 1956, by treating it as Zero rated sale. The petitioner will therefore be entitled to the refund in this case. The petitioner is justified in seeking refund of the tax treating the sale as Zero rated sale.

20. The impugned order accepts that the sale was effected to 100% EOU. No provision of law has been shown as to how the sale to 100% EOU cannot be termed as Zero rated sales. Since the petitioner has established that the sale was in the course of export supported by the Bill of Lading, Export Invoice, etc., (i.e) the documents in support of the export, the Department cannot contend that Section 18 of the TNVAT Act, 2006, will not apply.

21. The term 100% EOU is self-explanatory and it has not been properly appreciated by the authority. All that Section 18 of the TNVAT Act, 2006, provides for is that sale should be in the course of export. If the EOU has made the export and proof of export has already been brought on record, Section 18 of the TNVAT Act, 2006, has to automatically apply. The impugned order does not even state as to how a sale to an 100% EOU which is meant for export promotion, does not fall under Section 18(i) of TNVAT Act, 2006. This is a total misconception and misreading of the provisions of the Act.

22. In the result, the findings of the authority in the impugned orders are perverse and based on a misreading of the provisions of Section 18(i) of TNVAT Act, 2006 and Section 5(3) of the CST Act, 1956. Accordingly, the impugned orders are set aside and the writ petitions are allowed as prayed for.

Consequently, the connected Miscellaneous Petitions are closed. No costs.

6. The learned counsel for the petitioner submits that the above decision was confirmed by a Division Bench of this Court at Madurai in W.A.Nos.558 & 559 of 2013 dated 14.12.2018. Therefore, the learned counsel for the petitioner submits that

the order passed by the respondent Commercial Tax Officer was liable to be set aside as reversal for input tax credit (ITC) under Section 19 (2) of the TNVAT Act, 2006 does not arrive.

7. Per contra, Mr. V. Haribabu the learned AGP for the respondent submits that the petitioner has an alternate remedy before the Appellate Court and therefore the present Writ Petition is liable to be dismissed on that ground alone. He further submits that the petitioner has himself not claimed the sale to 100% EOU as "zero rated" sale in their assessment order in FORM-21 dated 01.03.2011 for the assessment year of 2007-2008 and therefore, the transactions on which proportionate credit has to be denied under the provisions of Rule 19 read with Section 27 of the TNVAT Act, 2006 cannot be faulted. Since the petitioner has not claimed as "zero rated" sale tax, the respondent has justified in asking the petitioner to reverse the proportionate credit under Rule 19 of the TNVAT Rules, 2006.

8. The learned AGP further submits that in absence of any evidence to support of the sale by way of Form-H and other alleged documents, the petitioner cannot now treat the sale which has been declared "exempted sales" as "zero rated" sale within the meaning of Section 18 of the TNVAT Act.

9. Heard the learned counsel for the petitioner and the respondent. I have considered the arguments advanced by the learned counsel for the petitioner and the respondent.

10. Though the production of Form-H would be a relevant factor for consideration whether the sale had taken place in the course of export since the petitioner had indeed effected sale to a 100% EOU which has been duly certified by the purchaser for the value of Rs.50,73,629/-, therefore, the issue has to be examined by the authorities under the Act whether the petitioner had indeed effected to "zero rated" sale while effecting the sale to Chettinad Morimura Semiconductor Material Pvt. Ltd. The applicability of the above judgment cited by the learned counsel for the petitioner would require re-consideration by the respondent.

11. In the light of the above, I set aside the impugned order and remit the case back to the respondent, to pass an appropriate order by examining whether the petitioner had indeed effected "zero rated" sale to 100% EOU. The respondent is directed to pass an appropriate order on merits, without getting influenced by the content of the Assessment order dated 01.03.2011, within a period of six weeks from the date of a copy of this order.

12.The Writ Petition stands disposed in terms of the above observations. No cost. Consequently, connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar(CS-VI)

// True Copy//

Sub Assistant Registrar

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To

The Commercial Tax Officer,
Vallalar Nagar, Assmt Circle,
No.116, Angappa Naicken Street,
Chennai - 1.

+1cc to Mr.C.Rekha Kumari, Advocate, SR.No.102039.

+1cc to Government Pleader, SR.No.102261.

W.P.No.28392 of 2011
and
M.P.Nos.1 & 2 of 2011

SSD(CO)
CSR: 27/01/2020