

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.09.2019

CORAM

THE HONOURABLE DR.JUSTICE ANITA SUMANTH

W.P.NOS.28259 TO 28261 OF 2012

&

MP.NOS.1, 1 AND 1 OF 2012

Sungwoo Gestamp Hitech (Chennai) Limited,
Represented by its Chief Financial Officer,
K.S.Ravichandran

...Petitioner in the above W.Ps

Vs.

The Assistant Commissioner (CT),
Sriperumbudur Assessment Circle,
@ Varadharajapuram - 602 103.

...Respondent in the above W.Ps

Prayer:-

Writ Petitions filed under Article 226 of the Constitution of India, praying for the issuance of a Writ of Certiorarified Mandamus calling for the records on the files of the respondent in TIN No.33971662041/2006-07, 2007-08 and 2008-09 dated 07.09.2012 and quash the same insofar as it relates to levy of higher rate of tax as turnover of Rs.50,06,30,096/-, Rs.194,73,28,750/- and Rs.205,17,76,479/- and reversal of input tax credit to an extent of Rs.27,035/-, Rs.15,90,224/- and Rs.1,08,01,896/- being credit availed on capital goods and the penalty thereon while directing the respondent herein to re-do the assessment for the year 2006-07, 2007-08 and 2008-09.

For Petitioner : Mr.N.Prasad

For Respondent : Mr.V.Hari Babu
Additional Government Pleader

C O M M O N O R D E R

These three Writ Petitions challenge orders of assessment passed in terms of the Tamil Nadu Value Added Tax Act, 2006 (in short 'Act') for the periods 2006-07, 2007-08 and 2008-09, all dated 07.09.2012.

2. The petitioner is engaged in the manufacture of sheet metal components and effects sales to Hyundai Motor India Limited (in short 'Hyundai'). The issue that arises in these Writ Petitions relates to liability in terms of section 3(2) of the Tamil Nadu Value Added Tax Act, 2006 (in short 'Act').

3. Learned counsel for the petitioner states that Sl.No.67/Part B/First Schedule, deals with industrial inputs for use in manufacturing activity. Rule 6(3)(b) of the Tamil Nadu Value Added Tax Rules, 2007 (in short 'Rules') contemplates issuance of a certificate by the purchaser of an industrial input, which certificate, according to the petitioner, is only procedural and not a mandatory requirement. The petitioner had effected sales on the basis of invoices to Hyundai, which reflect clearly the value of the goods transferred. The petitioner had also claimed Input Tax Credit (ITC) on the basis of the tax remitted by the vendor, being 12.5%.

4. Pre-assessment notices were issued for the three years, all dated 23.11.2009, proposing to reverse credit, since the Assessing Officer was of the view that the correct rate of tax in respect of capital goods was 4% and not 12.5% and thus, according to him, excess ITC had been claimed by the petitioner.

5. Other issues were also raised with which I am not presently concerned, since the petitioner states that appeals have been filed challenging the same that are pending before the appellate authorities.

6. While this is so and though the petitioner had filed detailed replies objecting to the proposal contained in the pre-assessment notices, orders of assessment, confirming the pre-assessment proposals to disallow the difference of ITC came to be passed. The benefit claimed by the petitioner was also denied on the ground that no industrial input certificates (in short 'certificate(s)') were filed to substantiate its claim.

7. Learned counsel for the petitioner argues that the provisions of Rule 6(3)(b) do not mandate production of a certificate and the assessee is well entitled to support its claim for lower rate of tax with other documents and evidences that it may have in its possession. He relies, in this regard, on the judgments of the Supreme Court in the case of The State of Orissa V. M.A.Tulloch and Co. Ltd. ((1964) 15 STC 642) and Kedarnath Jute Manufacturing Co. Ltd. V. Commercial Tax Officer and others ((1965) 2 SCR 626). On the question of reversal of ITC, reliance is placed upon the case of Sara Leathers V. Commercial Tax Officer, Tambaram I Assessment Circle, Chennai ((2010) 30 VST 581).

8. Per contra, learned Additional Government Pleader for the Revenue points out that the prayer in writ petition is for a direction that a certificate as referred to in Rule 6(3)(b) was not mandatory and such direction cannot be granted in a Writ Petition. If at all, the petitioner should have filed a Writ of Declaration challenging the Rule itself, which has not been done in the present case. I see no merit in this objection as, ultimately, the question as to whether the certificate as referred to in Rule 6(3)(b) is mandatory or otherwise, arises from the assessment framed by the respondent which is under challenge before me.

9. There are no disputes as far as the facts are concerned. Industrial inputs are defined in Entry 67/Part B/First Schedule to the Act as follows:

'67. Industrial inputs, that is to say, any goods falling under Part-C of this Schedule, including consumables, packing materials and labels but excluding plant and machinery, ethyl alcohol, absolute alcohol, methyl alcohol, rectified spirit, neutral spirit and cement, for use in manufacture and for use in assembling, packing or labelling in connection with such manufacture, inside the State, of goods other than those falling under Second Schedule.'

10. The provisions of Rule 6(3)(b), which I am called upon to interpret in this case, read as follows:

'Rule 6 Accounts (1).....

.....
R.6(3)(b) Every registered dealer who is a manufacturer or producer and purchases industrial inputs to use them in manufacture of taxable goods shall issue a certificate to the seller containing the details of his Taxpayer Identification Number, the details of goods purchased, details of goods manufactured and the name and address and Taxpayer Identification Number of the seller.'

11. The issue for determination is as to whether the provisions of Rule 6(3)(b) are mandatory such that the certificate mentioned therein is the only method by which a dealer/assessee could support his claim in terms of Section 3(2) of the Act.

12. A plain reading of Rule 6(3)(b) does not support this conclusion as the Rule only states that the purchaser shall obtain a certificate from a registered dealer, who is a manufacturer or producer of industrial input and nowhere states

that the same has to be produced in support of the claim of reduced rate by an assessee.

13. The Supreme Court, in the case of M.A.Tulloch (supra) was concerned with the production of a Declaration under Section 5(2)(a)(ii) of the Orissa Sales Tax Act (14 of 1947) and Rule 27(2) of the Orissa Sales Tax Rules, 1947, which read as follows:

'Section 5(2)(a)(ii)-sales to a registered dealer of goods specified in the purchasing dealer's certificate of registration as being intended for resale by him in Orissa..... and on sales to a registered dealer of containers or other materials for the packing of such goods:

Provided that when such goods are used by the registered dealer for purposes other than those specified in his certificate of registration, the price of goods so utilised shall be included in his taxable turnover.'

'Rule 27(2). Claims for deduction of turnover under sub-clause (ii) of clause (a) of sub-section (2) of section 5- A dealer who wishes to deduct from his gross turnover on sales which have taken place in Orissa the amount of a sale on the ground that he is entitled to make such deduction under sub-clause (ii) of clause (a) of sub-section (2) of section 5 of the Act, shall produce a copy of the relevant cash receipt, or bill according as the sale is a cash sale or a sale on credit in respect of such sale and a true declaration in writing by the purchasing dealer or by such responsible person as may be authorised in writing in this behalf by such dealer that the goods in question are specified in the purchasing dealer's certificate of registration as being required for resale by him or in the execution of any contract:

Provided that no dealer whose certificate of registration has not been renewed for the year during which the purchase is made shall make such a declaration and that the selling dealer shall not be entitled to claim any deduction of sales to such a dealer.'

14. Upon considering the relevant provision and Rule, the Bench observes that nothing therein disentitled a selling dealer to a deduction, if the dealer was in a position to adduce evidence other than the Declaration to justify his eligibility for the deduction claimed. A distinction is thus made between the dealer obtaining such a declaration from the seller and the production of the same before the authority.

15. To elaborate, while such production might create a positive entitlement, non-production, by itself, would not vitiate the right of an assessee, if the assessee were otherwise able to establish entitlement to the relief sought. The Bench in conclusion states as follows:

'We are, therefore, of the opinion that the High Court came to a correct conclusion. The High Court is correct in holding that the production of a declaration under rule 27(2) is not always obligatory on the part of a selling dealer when claiming the exemption. It is open to him to claim exemption by adducing other evidence so as to bring the transaction within the scope of section 5(2)(a)(ii) of the Act. In this case, the Sales Tax Officer was satisfied by a mere statement of the dealer and it has not been shown that in fact the registration certificate of the buying dealer, M / s S. Lal & Co., did not contain the statement that the goods were intended for resale by him in Orissa.

16. In the impugned order of assessment, the Assessing Officer proceeds on two grounds:

Firstly he states that it was mandatory for the petitioner to have filed Industrial Input Certificates to substantiate the claim of lower rate of tax on the sale of finished goods and these having not been furnished, the proposal for higher rate of tax was confirmed. Secondly, in regard to the rate of tax itself, he states that if sold as industrial input, the commodities were liable to be taxed at the higher rate at 12.5% instead of 4%. Thus, notwithstanding that the invoices specifically stipulate and reveal that the rate of tax as paid by the vendor was 12.5%, the claim of ITC was restricted to 4%, the correct rate of tax, according to the Assessing Officer.

17. Coming to the first ground, a perusal of the relevant statutory provision as well as Rule do not bring home the point that the production of an industrial input certificate is mandatory to avail the benefit of Section 3(2) of the Act. No doubt, Rule 6(3)(b) refers to an industrial input certificate stating that such certificate ought to be procured by the purchaser from the seller. However, if this were not done, the assessee, as held by the Supreme Court in the case of M.A.Tulloch (supra) is always entitled to support its claim based on other supporting documents.

18. I also draw support from an analogy drawn in the context of Section 70 of the Act dealing with transit pass. The provisions of section 70 require a dealer to produce a transit

pass at the last check point prior to exit from the State in order to confirm that goods have indeed, exited the State. In the absence of such transit pass, the Assessing Authority was entitled to assume that the goods had been sold within the State and are amenable to State tax.

19. The Supreme Court, in *Sodhi Transport Co. and another Vs. State of Uttar Pradesh and another* [(1986) 62 STC 381 (SC)], considered the provisions of the Uttar Pradesh State Sales Tax Act which contains provisions in parimateria with Section 70 of the Tamil Nadu Value Added Tax Act, in fact even stricter, since the phrase used therein is 'shall produce a transit pass', interpreting the same to state that non-production of a transit pass was not fatal as the burden of establishing exit of the goods from the State would then revert back to the assessee, who could well prove the same by reference to other supporting material. The presumption that the goods have not exited the State was thus rebuttable, enabling the dealer to draw support of other materials in its possession in this regard.

20. The Department has also accepted the ratio of the judgment of the Supreme Court in the case of *Sodhi Transport* (supra) and has issued Circular No.26/2014 dated 16.06.2014 in line with the same.

21. In the light of the discussion as aforesaid, I am of the view that non-production of a Declaration under section 6(3) (b) is not fatal to the claim of the assessee. Having said so, the Assessing Authority has in the impugned order found that only a supporting statement was filed by the petitioner and had no actual particulars of transactions such as work order, inward delivery challan, quantity received and outward delivery challan were supplied. If at all the petitioner was of the view that its claim was in order, the burden rested upon it to justify such claim with whatever material that it could furnish. Such factual particulars do not appear to have been filed.

22. Thus while holding that the Declaration in terms of Section 6(3)(b) is not the only evidence in support of the claim of the petitioner and that the petitioner is well entitled to produce any other supporting evidence as it may be in a position to, this issue is remanded back to the Assessing Officer to be re-done after hearing the petitioner, within a period of four weeks from the date of receipt of a copy of the order.

23. With regard to the second ground, the case of the petitioner hinges on the provisions of Section 19(2)(iv) of the Act, as per which, ITC shall be allowed on all purchases of goods made within the State, for the purpose of use as capital goods. Thus, according to the assessee, whatever may be the rate

of tax as per Schedule to the Act, ITC is available on the tax actually remitted.

24. This Court, in the case of Sara Leathers (supra) considered the claim of refund by an assessee. The petitioner therein had claimed refund that had been restricted by the Assessing Officer on the ground that the proper rate of tax in respect of the goods was much less than what had been remitted. The applicable statutory provision in that case was Section 18 dealing with zero-rating and upon consideration of the matter, this Court has expressed the view that the right of input tax credit, when the payment of tax per se is not disputed, is absolute. If the Revenue were to be extended the discretion to either restrict the claim of refund or a claim of input tax credit when the payment of tax was itself undisputed, then it would give rise to a case of unjust enrichment where having received the tax at a particular rate, the claim of ITC in that regard was restricted. Evidently, this cannot be so and for these reasons, the second ground is allowed.

25. These Writ Petitions are allowed in the aforesaid terms. No costs. Consequently, connected Miscellaneous Petitions are closed.

Sd/-

Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

Sl

To

The Assistant Commissioner (CT),
Sriperumbudur Assessment Circle,
@ Varadharajapuram - 602 103.

+1cc to Mr.N.Inbarajan, Advocate, S.R.No.79905

+1cc to the Special Government Pleader(T), S.R.No.80801

W.P.Nos.28259 to 28261 of 2012
&
MP.Nos.1, 1 and 1 of 2012

BR(CO)
CS/20/02/2020