IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.11.2019

CORAM

THE HONOURABLE DR. JUSTICE ANITA SUMANTH

W.P.No.29690 of 2014
MP.No.1 of 2014

Tulsyan NEC Ltd.
Represented by its General Manager
(Finance & Accounts)
M.Uma ...Petitioner

--Vs--

The Assistant Commissioner (CT) (FAC)
Broadway Assessment Circle
199, Thambu Chetty Street,
Chennai-600001 ...Respondent

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Prayer: Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ or order of direction or any other Writ in the nature Writ of Certiorari, calling for the records on the files of the respondent herein in TIN.No.33370040046/2013-14, dated 30.09.2014 and quash the same.

For Petitioner : Mr.N.Prasad

For Respondents : Mr.V.Haribabu
Additional Government Pleader

O R D E R

This is a matter where one cannot strictly say that there has been no adherence to the principles of natural justice. However, the tenor of the notices issued, the replies filed by the assessee and the impugned order, read in conjunction, make it clear that the Department had not revealed its mind as to the modification that it seeks to effect to the returned turnover. Specific queries have been raised, to which specific responses had been given by the petitioner. It is only in the impugned order of assessment that the Assessing Officer reveals what exactly he had in mind in regard to the proposed modification.

2. The assessee is a manufacture of steel and TMT bars and for the purpose of its business, purchased capital goods. The petitioner states that the quantum required to ensure continuous

production at 100% capacity is approximately 6000 KW of power for running furnaces and casting machines and the power requirement in respect of rolling mills is 8200 KVA. The manufacturing processes are said to be integrated and dependent on maintenance of heat as an essential element of the process itself. A power cut resulting in loss of heat, renders the products lying at interim state to be wasted in full.

3. Thus and particularly in view of the power cuts imposed by the State, the petitioner invested in a Captive Power Plant (CPP) to ensure continuous supply of electricity. The major components of CPP are (i) a turbine, run by engine and (ii) a boiler operated by coal firing mechanism, where the coal is carried by a conveyor system to the hoppers, which crush and pulverize the coal for firing the boiler.

4. The respondent really does not deny the position that the CPP constitutes capital goods in terms of Section 2(11) of the Tamil Nadu Value Added Tax Act, 2006 (in short 'Act') or that the petitioner is entitled to ITC in respect of the tax paid thereupon.

5. The bone of contention as revealed from a reading of the impugned order of assessment is that the petitioner has utilised the CPP to generate electricity, the turnover from which is exempt from tax. The officer relies on the provisions of Section 19(6) of the Act that state that no ITC shall be allowed on purchases of capital goods that are utilised exclusively in the manufacture of goods, the turnover from which is exempt under Section 15 of the Act. However, it is for the first time in the order under challenge, that the exact modification sought to be effected by the Assessing Officer is revealed, the Officer stating in the last paragraph as follows:

> Based on the details produced by the dealer it is clearly evident that the dealer have claimed input tax credit (ITC) for the capital goods which exclusively involved in power production i.e. exempted commodity and claimed ITC Rs.23138459/-
>
> As per 19(6) of the TNVAT act, no ITC shall be allowed on purchase of capital goods, which are exclusively in the manufacture of goods exempted under section 15.

6. The earlier notices merely call for details of the capital goods purchased, that have been duly furnished by the

assessee. Merely calling for details, both factual as well as numerical by the Officer and production of those details by the petitioner do not advance the process of assessment itself as it is only when the Officer crystalises the issue that he proposes to raise that the assessee can be said to be put to notice and effectively be afforded an opportunity to respond.

7. In the present case, the pre-assessment notices dated 24.06.2014 and 31.07.2014 call for details of nature of capital goods purchased, date of commencement of production, location and plant where the capital goods are used and commodity code. To what use the Assessing Officer intends to put these details are unknown till the order of assessment is actually received by the assessee.

8. I am thus of the view that though opportunity has been extended, it can hardly be said to be effective in the present case.

9. The petitioner has admittedly utilised for CPP for generation of electricity, which has mostly, according to it, been utilized in the manufacture of steel and TMT bars. Some portion of the electricity has been sold commercially. In communication dated 11.11.2014 post assessment, the petitioner has suo motu reversed a portion of the ITC originally claimed as credit attributable to the sale of electrical energy generated by the CPP. The reversal has been effected by the petitioner in its return for the month October 2014. This aspect of the matter could have well been explained by the assessee during the course of assessment, had only a proposal for assessment been made instead of merely calling for factual details.

10. It is also relevant to note that the provisions of Section 19(2)(iv) permit the availment of ITC in respect of capital goods used in the manufacture of taxable goods and 19(6) denies the availment of ITC on purchase of capital goods, used exclusively in the manufacture of goods exempted under Section 15. It is only by Tamil Nadu Act 21 of 2007 with effect from 1.1.2007 that a proviso was added to Section 19(6) to the effect that ITC on the purchase of capital goods used in the manufacture of both exempt and taxable goods shall be allowed prorata.

11. Thus, the prevailing position in law is to the effect that an assessee is entitled to ITC pro rata on capital goods used both in the manufacture of taxable as well as exempt

commodities. This aspect of the matter requires adjudication by the Officer. The impugned assessment order is thus set aside in the light of the fact that this position has neither been effectively captured or dealt with by the Assessing Officer in the impugned order nor for the reason that the pre-assessment proposals issued prior to completion of assessment do not put this issue for rebuttal to the assessee.

12. While setting aside the impugned order, I direct the assessee to appear before the Assessing Officer along with written submissions and quantification of the proportionate proposed claim of ITC and all supporting details in connection therewith, on 19.11.2019 at 10.30 a.m. No further notice need be issued in this regard. After hearing the petitioner and considering the details to be filed, an order of assessment de novo shall be passed by the Officer within a period of four weeks from date of conclusion of personal hearing, on merits and in accordance with law.

13. This writ petition is allowed in the aforesaid terms. Consequently, connected miscellaneous petition is closed. No costs.

Sd/-
Assistant Registrar(CCC)

//True Copy//

ska Sub Assistant Registrar

To

The Assistant Commissioner (CT) (FAC)
Broadway Assessment Circle
199, Thambu Chetty Street,
Chennai-600001

+1 cc to M/s.N.Inbarajan, Advocate, S.R.No.91943

+1 cc to the Spl.Government Pleader(taxes), S.R.No.92697

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SAI(CO)
SSM(14/11/2019)