IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On	28.01.2020
Pronounced On	04.02.2020

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.Nos.27346 & 27347 of 2015
and
M.P.Nos.1 & 1 of 2015

Exelan Networking Technologies Pvt. Ltd.,
Represented by its Managing Director,
5/310, Pillaiar Koil Street,
Okkiampet, Thoraipakkam,
Chennai - 96. ... Petitioner in both W.Ps.

Vs.

1.Commercial Tax Officer,
Kilpauk Assessment Circle,
No.35, Halls Road,
Kilpauk, Chennai - 10.

2.The Assistant Commissioner,
Sholinganallur Assessment Circle,
No.141, Second Floor, Burma Colony,
First Main Road, Perungudi,
Chennai - 600 096. ... Respondents in both W.Ps.

Common Prayer: Writ Petitions filed under Article 226 of the Constitution of India, to issue a Writ of Mandamus directing the respondents to permit the petitioner adjust the input tax credit available to it for the purpose of payment of tax to fulfill the condition under 2nd proviso to Section 52 of the Tamil Nadu Value Added Tax Act, in respect of the appeals filed against the orders in CST 864303/2011-12 & CST 864303/2012-13 dated 29.05.2015.

For Petitioner : Mr.T.V.Lakshmanan in both W.Ps.

For Respondents : Mr.ANR. Jayaprathap, Government Advocate in both W.Ps.

C O M M O N   O R D E R

In the present Writ Petitions, the petitioner has prayed for directing the respondents to permit the petitioner adjust the input tax credit available to it for the purpose of payment of tax to fulfill the condition under 2nd proviso to Section 51 (wrongly mentioned as 52 in the prayer of the Writ Petitions) of the Tamil Nadu Value Added Tax Act, 2006, in respect of appeals filed against the orders in CST 864303/2011-12 & CST 864303/2012-13 dated 29.05.2015.

2.The petitioner wanted to pre-deposit 25% of the tax from and out of Input Tax Credit available with it. The appeals filed by the petitioner were summarily returned with a memo dated 14.08.2015 followed by two notices both dated 21.08.2015 for the respective Assessment Years.

3.It has been stated that as per the decision of this Court in Tvl. KSB Pumbs Ltd. Vs. Deputy Commissioner (CT), Fast Track Assessment Circle - II, Coimbatore, (2014) 68 VST 244 (Mad), the petitioner was required to pre-deposit 25% of the amount only in cash and adjustment from the Input Tax Credit was not permissible for the aforesaid purpose.

4.The learned counsel for the petitioner submits that the decision of this court in Tvl. KSB Pumbs Ltd. Vs. Deputy Commissioner (CT), Fast Track Assessment Circle - II, Coimbatore, (2014) 68 VST 244, cannot be cited to hold that the petitioner was not entitled to pre-deposit the amount out of Input Tax Credit lying unutilised for the purpose of Section 51 of the TNVAT Act, 2006 as in the facts of the said case the assessee had attempted to pre-deposit the amount out of disputed Input Tax Credit which itself was subject matter of the appeal. Learned counsel for the petitioner for the submits that in the facts of the present case that is not the issue and therefore denial of adjustment of input tax credit for the purpose of pre-deposit was not justified.

5.The learned counsel for the petitioner further submits that Section 51 of the TNVAT Act, 2006 does not contemplate pre-deposit only in cash. He further submits that once credit has been validly, there cannot be any restrictions. He further submits that even if the Input Tax Credit availed is provisional, it cannot be provisional at all times to come. He submits that as long as there is no proceeding to deny such credit, petitioner should be allowed to utilise the same for the purpose of pre-deposit of tax under Section 51 of the TNVAT Act, 2006.

6.Per contra, the learned Government Advocate for the respondents submits that pre-deposit has to be only in cash under Section 51 of the TNVAT Act, 2006. He further submits that as per the decision of this court in Tvl. KSB Pumbs Ltd. Vs. Deputy Commissioner (CT), Fast Track Assessment Circle - II, Coimbatore, (2014) 68 VST 244, pre-deposit cannot be permitted by way of adjustment of the input tax credit lying unutilised.

7.I have considered the arguments advanced on behalf of the petitioner and the respondents.

8.Section 19 (1) permits a registered dealer to avail Input Tax Credit of the tax paid on the input purchased on payment of tax from a registered dealer within the State. As per section 19 (2) of the TNVAT Act, 2006, credit shall be allowed for the purpose specified therein:-

> Section 19 - Input Tax Credit-
>
> (2) Input tax credit shall be allowed for the purchase of goods made within the State from a registered dealer and which are for the purpose of -
>
> (i) re-sale by him within the State; or
> (ii) use as input in manufacturing or processing of goods in the State; or
> (iii) use as containers, labels and other materials for packing of goods in the State; or
> (iv) use as capital goods in the manufacture of taxable goods.
> (v) sale in the course of inter-State trade or commerce falling under sub-section (1) of section 8 of the Central Sales Tax Act, 1956.
> (vi) Agency transactions by the principal within the State in the manner as may be prescribed

9.Thus, Input Tax Credit is not intended for being utilised for payment of pre-deposit. At the same time, as per Section 19 (18) of the TNVAT Act, 2006, excess input credit, if any, after adjustment under Sub-Section shall be carried forward for the next year or refunded in the manner as may be prescribed. As per Rule 10(10)(b) of the Tamil Nadu Value Added Rules, 2007, in case where Input Tax Credit as determined by the Assessing Officer for any registered dealer, for a year, exceeds the tax liability for that year, it may be adjusted and the excess Input Tax Credit may be adjusted against any arrears of tax or any other amount due from him. If there are no arrears under the

Act, or after adjustment there is still an excess of Input Tax Credit, Assessing Authority shall serve Form P upon such dealer. Rule 11 of the aforesaid Rule contemplates the issue of reference of such amounts.

10.Thus, excess Input Tax Credit is to be refunded back if after adjustment there is balance available. Therefore, it is evident that if the amount of credit can be refunded, they can also be adjusted towards pre-deposit of the tax liability for the purpose of Section 51 of the TNVAT Act, 2006. It may be useful to also refer to some of the decisions rendered in the context of Section 35F of the Central Excise Act, 1944. In the context of the aforesaid provision which also contemplats pre-deposit of amount, the Jharkhand High Court, Allahabad High Court, Karnataka High Court and Gujarat High Court have taken a view that such pre-deposit can be allowed for the purpose of Section 35F of the Central Excise Act, 1944.

11.A Division Bench of Jharkhand High Court in case of Akshay Steel Works Pvt. Ltd. Vs. Union of India, 2014 (304) ELT 518 and a Single Judge of Allahabad High Court in case of India Casting Company Vs. CEGAT, New Delhi, 1998 (104) ELT 17 and a decision of the Karnataka High Court in Union of India Vs. Vikrant Tyres Ltd., 1999 (35) RLT 427 (Kar) have recognised pre-deposit through adjustment in Modvat/Cenvat Credit Account.

12.In paragraphs 7 and 8, the Gujrat High Court has taken a view in Cadila Health Care Pvt. Ltd. Vs. Union of India, 1998 (104)ELT 17(All), in its order dated 26/06/2018 has held as follows:-

> 7.Coming to the central issue, the Commissioner does not appear to be correct in his stand. Essentially, credit in an assessee'scenvat account is a duty he has already suffered which he can encash for specified purposes subject to conditions laid down under the Rules. As observed by Division Bench of Jharkhand C/SCA/1981/2018 ORDER High Court in case of Akshay Steel Works Pvt. Ltd (supra) there is nothing in the Rules preventing an assessee from availing such cenvat credit for the purpose of pre-deposit. Similar view was taken by the learned Single Judge of Allahabad High Court in case of India Casting Company (supra). Petitioners had also pointed out that even departmental authorities have been accepting such formula.
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> 8. In the result, impugned communications are quashed. Pre-deposit made by the petitioners by

availing cenvat credit shall be accepted for the purpose of section 35F of the Central Excise Act. The appeals shall be heard by the Commissioner on merits.

13.In the light of the above discussion, I am inclined to accept the contention of the petitioner that for the purpose of pre-deposit under Section 51 of the TNVAT Act, 2006 an assessee can utilise the excess Input Tax Credit provided, the aforesaid Input Tax Credit itself is not the subject matter of the dispute or where any notice has been issued to deny such tax credit as was done in the case of Tvl. KSB Pumbs Ltd. Vs. Deputy Commissioner (CT), Fast Track Assessment Circle - II, Coimbatore, (2014) 68 VST 244 (Mad). To deny such right would amount to improper denial of right of appeal to an assessee.

14.Accordingly, the present Writ Petitions stand allowed. No cost. Consequently, connected Miscellaneous Petitions are also closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

To

1.The Commercial Tax Officer,
Kilpauk Assessment Circle,
No.35, Halls Road,
Kilpauk, Chennai - 10.

2.The Assistant Commissioner,
Sholinganallur Assessment Circle,
No.141, Second Floor, Burma Colony,
First Main Road, Perungudi,
Chennai - 600 096.

+1cc to Mr.T.V.Lakshmanan, Advocate Sr.8377
+1cc to the Special Government pleader Sr.9612

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srg 10/03/2020