

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.01.2021

CORAM

THE HON'BLE MR. JUSTICE C.SARAVANAN

W.P. No. 12451 of 2018

and

W.M.P. No. 14584 of 2018

Sam Turbo Industry Pvt. Ltd.,
Represented by its Managing Director
S.K.Senthil Kumar,
No.76, Bharathi Park Cross Road,
No.7, P.B.No.2725,
Saibaba Colony,
Coimbatore - 641 011.

... Petitioner

Vs

1.The Assistant Commissioner (ST),
Saibaba Colony Circle,
Coimbatore - 641 018.

2.The Government of Tamil Nadu,
Represented by its Secretary,
Commercial Taxes Department,
Fort St. George,
Chennai - 600 009.

... Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari, to call for the entire records relating to TIN:33232060730/2015-2016 dated 19.04.2018 of the first respondent and quash the same.

For Petitioner : Mr.J.Shankarraman

For Respondents : Mr.R.Swarnavel
Government Advocate

ORDER

The petitioner has challenged the impugned order dated 19.04.2018, seeking to recollect a sum of Rs.63,49,386/-, which was earlier reversed by the petitioner as Input Tax Credit during the period between 01.04.2015 to 31.03.2016 unaware of

the fact that Section 19(2) (v) had been substituted & Section 19(5) (c) of the Tamil Nadu Value Added Tax Act, 2006 (Hereinafter referred to as TNVAT Act) had been deleted with effect from 01.04.2015.

2. On 13.06.2016, the petitioner had also sent a representation to the 1st respondent (Assistant Commissioner(ST), Coimbatore) highlighting the fact that it had wrongly reversed credit for a sum of Rs.68,31,355/- till April 2016. This fact was brought to the notice of the petitioner by his statutory auditor while conducting audit for a period during 2015-2016 under Section 63(a) of the TNVAT Act. It certified that the petitioner had wrongly reversed Input Tax Credit for a sum of Rs.63,49,386/- during the aforesaid period.

3. The petitioner thereafter sent another representation dated 17.02.2017, wherein it stated that the aforesaid sum was due to be refunded on account of the fact that the Input Tax Credit was wrongly reversed by them. However, no notice was issued by the respondents disputing the claim of the petitioner. Since there was a wrong reversal of the Input Tax Credit by the petitioner, the petitioner's suo motu availed Input Tax Credit for the aforesaid amount and adjusted the same towards the VAT liability during 2016-2017.

4. In the above background, the respondents issued notice dated 15.12.2016 and a Pre-Revision Notice dated 12.06.2017 which called upon the petitioner to pay back the aforesaid sum. The petitioner also participated in the said proceedings and gave a reply dated 13.07.2017. The 1st respondent (Assistant Commissioner (ST), Coimbatore) vide order dated 13.07.2017 bearing Reference No.TIN:33232060730/2015-2016 concluded as follows:-

"4. Reversal of ITC of Rs.63,49,386

They have explained that the disputed amount relates to ITC reversal made under Sec.19(5) (c) and for which they have filed a letter dated:20.2.2017 about the excess paid amount which they have adjusted for CST 2% and that they have given the monthly details. As claimed by them the reversal under Sec.19(5)(c) was done away with effect from 01.04.2015 and this fact was reflected in the Form WW. The certifying Chartered Accountant has clearly mentioned that the dealer has to claim a refund of Rs.63,49,386/-. So, the dealer's claim for Rs.63,49,386/- towards Input Tax Credit is acceptable."

5. However, the above order passed on 13.07.2017 was sought to be reversed by an officer of the same rank who succeeded the

officers (the 1st respondent) who passed the said order. Thus, a fresh notice dated 26.02.2018 was issued to the petitioner and proposed to recover the aforesaid amount from the petitioner which was suo moto availed as Input Tax Credit after the wrong reversal by the petitioner. Paragraph (6) of the said notice reads as under:-

"6. The order passed by this Assessing Officer in his order in TIN 33232060730/2015-16 dated 13.07.2017 did not empower the dealer to take re-credit the wrong reversal of ITC amount of Rs.63,49,386/- by issuing refund notice in Form 'p' and informing the dealer about excess amount available to the dealers, as per Rule 8(6) of the TNVAT Rules, 2006. No form in 'p' was issued and no excess amount of ITC was arrived as per the order dated:13.07.2017."

The petitioner also replied to the same vide a reply dated 28.02.2018 and 27.03.2018 placed reliance on certain case laws and provisions of the TNVAT Act, 2006.

6. The respondent vide impugned order dated 19.04.2018 bearing reference in TIN:33232060730/2015-2016 has ultimately concluded that re-opening of the assessment was permissible on change of opinion as per the decision of the Allahabad High Court reported in General De confiteria India Limited Vs State of Uttar Pradesh and others, (2010) 33 VST 569 and that mere wrong quoting or non-mentioning of any provisions of the Act, would not be sufficient to take away the jurisdiction of the Assessing Officer for revision of assessment or will not disentitle the authority to make fresh assessment as per the decision of this Court in Singaravelar Spinning Mills(P) Ltd., Vs State of Tamil Nadu and another, (2011) 43 VST 54. A reference was also made to two other decisions of this Court in 89 STC 133 (All) (1993), 31 STC 44 (Madras) 1973 in R.E.M.Ramakutty Nadars Vs State of Madras.

7. The learned counsel for the respondents submits that even though there is no dispute that the petitioner had wrongly reversed the Input Tax Credit to the extent of Rs.63,49,386/- which was duly certified by the Chartered Accountant under Section 63(A) of the TNVAT Act as was observed by the Assessing Officer in his order dated 13.07.2017, it was not open for the petitioner to take suo motu credit of the aforesaid amount and adjust the same to discharge the tax liability on the goods sold subsequently. The learned counsel for the respondents further submits that the petitioner should have complied with the requirements of Section 19(18) of the TNVAT Act, 2006 as per which the excess Input Tax Credit, if any, after assessment under sub-section (17), shall be carried forward to the next year or refunded, in the manner, as may be prescribed.

8. It is submitted that it was incumbent on the part of the petitioner to file revised returns in terms of Rule (7) sub-rule (9) of the TNVAT Rules, 2007, which reads as under:-

Rule (7) sub-rule (9)

"If a dealer having filed a return, finds any omission or error therein, other than as a result of an inspection or audit or receipt of any other information or evidence by the assessing authority, he shall file a revised return rectifying the omission or error within a period of six months from the last day of the relevant period to which the return relates. Where, as a result of such revised return, the tax payable by the dealer increases, the dealer shall furnish along with such revised return, proof of payment of tax and interest due thereon under sub-section (4) of Section 42 of the Act."

It is therefore submitted that it was not open for the petitioner to take suo motu credit of the erroneous debit made by it. It is submitted that only after such procedure is followed, the question of refund in Form-P can be made.

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

10. The facts are not in dispute in this case. The petitioner had wrongly debited excess amounts of input tax credit even though Section 19(2)(v) had been substituted and Section 19(5)(c) of the Tamil Nadu Value Added Tax Act, 2006 had been deleted in 2015 by Tamil Nadu Act 5 of 2015 with effect from 01.04.2015.

11. Earlier, Assistant Commissioner of Commercial Taxes had also confirmed the same vide order dated 13.07.2017 and therefore stated that proposals made in notice dated 12.06.2017 was being dropped.

12. However, the 1st respondent, who succeeded the officer who passed order dated 13.07.2017, issued a notice dated 26.02.2018 (signed on 27.02.2018) to the petitioner and stated that the Assessing Authority had not empowered the petitioner to take the credit of the wrong reversal of ITC amounts of Rs.63,49,386/- by issuing refund in Form 'P' as per Rule 8(6) of the Tamil Nadu Value Added Tax Rules, 2006 vide order dated 13.07.2017.

13. Under these circumstances, wrong adjustment of ITC towards the tax due under CST Act, 1956 for the year 2016-17 was stated to be not an order.

14. The only contention of the respondents was that the petitioner had wrongly availed input tax credit and adjusted the same towards the tax liability without obtaining any statutory order of refund from the Assessing Authority concerned. Under the circumstances, it has been stated that ITC claimed by the petitioner was not in accordance with Section 19(11) of the Tamil Nadu Value Added Tax Act, 2006. It was stated that the petitioner was required to file a revised return to claim refund of the amount instead of making it suo motu adjustment.

15. Though the petitioner replied to the notice dated 26.2.2018 (signed on 27.02.2018), the 1st respondent proceeded to pass the impugned order dated 19.04.2018. The scheme of the Tamil Nadu Value Added Tax Act, 2006 contemplates filing of returns under Section 21 of the said Act. Rule 7 of the Tamil Nadu Value Added Tax Rules, 2007 mirrors Section 21 of the Tamil Nadu Value Added Tax Act, 2006.

16. Earlier, the Assessing Officer was required to pass an order of assessment under Section 22 of the Tamil Nadu Value Added Tax Act, 2006 read with Rule 8 of the Tamil Nadu Value Added Tax Rules, 2007. However, after the amendment to the Tamil Nadu Value Added Tax Act, 2006 vide Tamil Nadu Act 23 of 2012, the concept of deemed assessment was introduced.

17. To give more credibility to such assessment, Section 63A was also introduced for assessee's whose total turnover including zero rate sale and a sale in the course of interstate trade or commerce and specified in Section 3 of the Central Sales Tax Act, 1956 in a year exceeds Rupees One Crore. Such assessee was required to get their accounts in respect of that year, audited by a Chartered Accountant and submit a report of such audit in the prescribed Form, duly signed and verified by the Chartered Accountant to the Assessing Authority, within the period as may be prescribed. To give effect to the above provision, Rule 16-A to Tamil Nadu Value Added Tax Rules, 2007 was also introduced. The audit report has to be filed in Form "WW". The informations in the audit report are intended to facilitate the Assessing Authority to reopen the assessment in case there is any shortfall in the payment of tax.

18. Therefore, the Assessing Authority was required to accept the return submitted for the year by the dealer and if the returns were in the prescribed form and accompanied with the prescribed documents and proof of payment of tax, there was deemed assessment for the year in the 31st day of October of the succeeding order.

19. The Assessing Authority is expected to pass a revised order of assessment if any defects are pointed out by the

auditor in Form "WW". Since the petitioner was under a mandatory audit under Section 63A of the Tamil Nadu Value Added Tax Act, 2006, question of filing a revised return for claiming refund under Rule 11 of the Tamil Nadu Value Added Tax Rules, 2007 was unnecessary.

20. The certificate in Form "WW" by the auditor on 15.12.2016 certified that the petitioner had wrongly debited an amount of Rs.63,49,386/- and that the petitioner was entitled to claim a refund of the aforesaid amount. It was a sufficient reason for the Assessing Authority to revise the assessment and issue Form 'P' to the petitioner suo motu.

21. Since the petitioner was under audit under Section 63A of the Tamil Nadu Value Added Tax Act, it was not necessary for the petitioner to file a revised returns under Rule 8 (9) of the Tamil Nadu VAT Rules, 2007 as there is an exception provided under Rule 8(9) of the Tamil Nadu Value Added Tax Rules, 2007. Whereas, a result of an inspection or audit or on receipt of any other information or evidence by the Assessing Officer, there is omission or error, assessee is not required to file a revised return.

22. In case, there was shortfall in payment of tax, it was incumbent on the part of such assessee to pay the tax. On the other hand, if there was excess payment or wrong debit, the officers can order refund either by way of cash refund or allow adjustment of the amount towards tax liability for the future period. The onus of revising the assessment was in the Assessing Authority.

23. After 2012, there is only deemed assessment. There is no real assessment of the VAT returns and therefore once such discrepancies are brought to the notice of the Assessing Authority, it was incumbent on the part of the Assessing Authority to have passed an order of revised assessment and ordered refund or demanded tax in case where there was a short payment of tax.

24. Since there is no dispute that there was excess debiting of input tax credit by the petitioner, the Assessing Authority ought to have allowed the petitioner to adjust the credit of such input tax credit for tax liability for the succeeding period or refunded the same to the petitioner. On the other hand, if there was a shortfall in payment of tax, it was incumbent on the part of the Assessing Authority to pass a revised assessment order and demand tax and accept payments made by an assessee or in the event of failure to pay such differential tax, initiate appropriate recovery proceedings in accordance with the provisions of the Act.

25. Further, as per Section 19(17) of the Act, if the input tax credit determined by the Assessing Authority for the year exceeds the tax liability for that year, the excess may be adjusted against any outstanding tax due from the dealer.

26. Under Section 19(18), excess input tax credit, if any, after adjustments under sub section (17), shall be carried forward to the next year or refunded, in the manner, as may be prescribed.

27. In the facts of the present case, the excess has been adjusted suo motu by the petitioner. Rule 11 of the Tamil Nadu Value Added Tax Rules, 2007 which contemplates a procedure for claiming refund was inapplicable as all refunds have to emanate from an order of department.

28. Such refunds are governed by the procedure under Rule 8 (4), Rule 8(6), Rule 14(18) & Rule 14(22) of the Tamil Nadu Value Added Tax Rules, 2007. Refunds in Form 'P' are pursuant to the orders passed by the Assessing Authority in the course of assessment. For instance, under Rule 10(10)(b) of the Tamil Nadu Value Added Tax Rules, 2007, in cases where the input tax credit as determined by the Assessing Authority for any registered dealer, for a year, exceeds the tax liability for that year, it may adjust the excess input tax credit against any arrears of tax or any other amount due from him. If there are no arrears under the Act or after the adjustment there is still an excess of input tax credit, the Assessing Authority shall serve a notice in Form P upon such dealer.

29. In this case, there is no dispute regarding the tax liability of the petitioner. The petitioner had wrongly debited amount which stands concluded. Therefore, refunds under Section 19(17) of the Tamil Nadu Value Added Tax Act, 2006 read with Rule 8(4), Rule 8(6), Rule 14(18) & Rule 14(22) of the Tamil Nadu Value Added Tax Rules, 2007 are not applicable where the officers of the Commercial Tax Department fail to revise the assessment.

30. Even if Rule 11 of the Tamil Nadu Value Added Tax Rules, 2007 was applicable, it was incumbent on the part of the Assessing Officer to pass appropriate order under Rule 11 of the Tamil Nadu Value Added Tax Rules, 2007. The issue is revenue neutral. Instead of making a cash refund to the petitioner, the petitioner has suo motu taken to re-credit and discharge its tax liability for the subsequent period. Since there is no loss to the revenue and the issue is revenue neutral, the impugned order is liable to be quashed.

31. However, refund under Rule 11 of the Tamil Nadu Value Added Tax Rules, 2007 is to be in Form 'P' pursuant to an order of the Assessing Authority. The onus passing an order of refund in Form 'P' is in the Assessing Authority. Therefore, the petitioner cannot be penalised if there is a failure to pass a refund order.

32. In any event, there is no dispute that the petitioner was entitled to a refund. Therefore, the respondent ought to have refunded the amount. In this connection, decision of the Supreme Court in Unichem Laboratories Vs. Commissioner of Central Excise, (2002) 7 SCC 145 is invited. The Hon'ble Supreme Court held that it is no part of the duty of the officer of the Department to deny the benefit which is legitimately due to an assessee.

33. As it is not even the case of the respondent that the petitioner had wrongly debited the aforesaid amount of Rs. 63,49,386/- in excess and was entitled for refund of the aforesaid amount, the impugned order passed by the respondent is liable to be quashed as no useful purpose would be served by relegating the petitioner to file a revised return at this distant point of time as procedures have to give way where an assessee is entitled to a substantial benefit.

34. Therefore, the impugned order passed by the respondent is quashed while giving liberty to the respondent to initiate appropriate proceedings to recover amounts if there is any error in the calculation of the amount of Rs.63,49,386/- which was reclaimed suo motu and adjusted by the petitioner towards its tax liability for the subsequent period.

35. The present Writ Petition stands allowed with the above observation. No Costs. Consequently, the connected writ miscellaneous petition is closed.

Sd/-

सत्यमेव जयते
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

arb

To

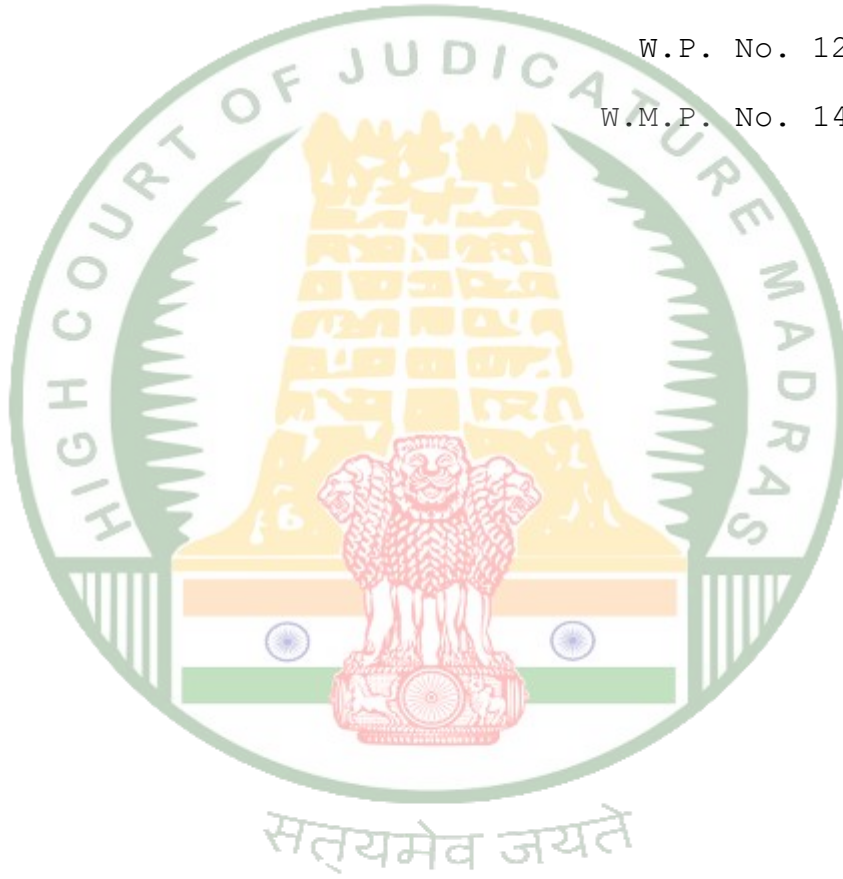
1.The Assistant Commissioner (ST),
Saibaba Colony Circle,
Coimbatore - 641 018.

2. The Secretary,
Government of Tamil Nadu,
Commercial Taxes Department,
Fort St. George,
Chennai - 600 009.

+1cc to the Special Government Pleader, S.R.No.1361

SRA (CO)
SM/22/02/2021

W.P. No. 12451 of 2018
and
W.M.P. No. 14584 of 2018



WEB COPY