

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03.03.2021

CORAM:

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.No.22243 of 2018
and
W.M.P.No.26067 of 2018

M/s.Srinidhi Industries Limited,
New No..95, Old No.159, Krishna Talkies Road,
Erode - 638 003.
Represented by its Director Raghav Kanodia. Petitioner

Vs.

1. The Commissioner of Commercial Taxes,
Ezhilagam, Chepauk, Chennai.
2. The Assistant Commissioner (CT),
Nethaji Road Assessment Circle,
Erode. Respondents

Prayer: Writ Petition is filed under Article 226 of the Constitution of India praying for the issuance of Writ of Certiorari, to call for the records of the proceedings of the 2nd respondent in TIN No.33962882741/2013-2014 dated 04.05.2018 and quash the same.

For Petitioner : Mr.Ravee Kumar

For Respondents : Mr.Mohammed Shaffiq
Special Government Pleader
Asst. by
M/s.G.Dhanamadhri
Government Advocate

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O R D E R

This is a third round of litigation. The petitioner has challenged the impugned order passed by the respondent for the Assessment Year 2013-2014 denying Input Tax Credit on the materials used by the petitioner for generating Electricity for being wheeled through State Grade under power purchase agreement entered in TANGEDCO.

2.It is the case of the petitioner that it is engaged in the manufacture of yarn and for the purpose of manufacturer of yarn it had installed wind mills in wind energy parks

located outside the factory where wind energy generated was wheeled to TANGEDCO and equal quantum of power was drawn by the petitioner at its factory. The credit availed by the petitioner was sought to be denied on the ground that the wind mills were not capital goods within the meaning of Section 2 (11) of the TNVAT Act, 2006.

3.The learned counsel for the petitioner submits that the respondent has been taking different stand at different point of time in the same proceedings. He submits that in the earlier round, an order was passed on 09.01.2015. The respondent concluded that though the wind mill was used for production of electricity and the electricity was used in the manufacturer of yarn the taxable end product and that the wind mill was not included in the list of capital goods in the Section or rules of TNVAT Act. Further the Commissioner of Commercial Taxes, Chennai have clarified that the wind mill will not come under the definition of 'capital goods' in terms of clarification in Circular bearing reference VCC No.1113 dated 23.08.2007. The said order was set aside in W.P.Nos.11240 & 11241 of 2015 dated 04.07.2016. It is submitted that though the case was remitted back to the respondent to pass a fresh order without being influenced in the clarification dated 23.08.2007, the respondent has now passed the impugned order and has taken a totally different stand.

4.It is submitted that, in this round, in the impugned order, the respondent has now stated that the electricity so generated was sold only to the electricity department by way of barter and set off for the units of electrical energy consumed in units factory, offices and so on, and as such, wind mill was not 'capital goods' within the meaning of Section 2(11) of the Act.

5.The learned counsel for the petitioner submits that wind mills are indeed the capital goods for the purpose of Section 2(11) and 19(2) of the TNVAT Act and therefore credit availed on the capital goods cannot be denied to the petitioner. The learned counsel also drew my attention to the decision of this Court in W.P.(MD).No.4761 of 2011 dated 08.08.2019 wherein credit was sought to be denied to the petitioner on the capital power plant and reversed. He submits that the manufacture of electrical energy was considered to be used in the manufacture of final product and therefore credit was allowed.

6.He also refers to the decision of this Court in Tulsyan NEC Ltd Vs The Assistant Commissioner (CT)(FAC) in W.P.No.29690 of 2014 dated 06.11.2019 and other decision of this Court in M/s.RSM Autokast Ltd Vs The Commercial Tax Officer in W.P.Nos.23423 of 2012 and 3455 of 2017 rendered on 13.12.2019 wherein credit availed on wind mills/wind turbines

which were used for generating electricity for captive consumption in the manufacture of goods liable to tax were held to be capital goods. He submits that there was also the Court held that the no case was made out for reversing the input tax credit availed by the petitioner therein.

7. Defending the impugned order, the learned counsel for the respondent submits that the definition of 'capital goods' under Section 2(11) is very specific. He submits that Section 19(2)(iv) the expression used is 'capital goods' in the manufacture of taxable goods. He submits that there is a difference between use of goods as a 'capital goods' in the manufacture of taxable goods and used by the manufacture. In this connection, a reference is also made to the decision of the Hon'ble Supreme Court in Deputy Commissioner of Sales Tax Vs. M/s. Thomas Stephen & Co Ltd (1988) 2 SCC 264.

8. He submits the Hon'ble Supreme Court concluded that the cashew shells which were used as fuel in the kiln and did not get transformed into the end product and therefore they were not been used as a raw material in the manufacture of final product. These have been used only in the aid of the manufacture of the goods by the assessee. Consumption must be in the manufacture as raw material or of other components which go into the making of the end product to come within the mischief of the section.

9. He submits that the Hon'ble Supreme Court concluded that these goods were used only as a manufacture of goods by the assessee and that consumption must be in the manufacture as a raw material or of other components making of the end product to come within Section 5-A(1)(a) of the Act.

10. The learned counsel for the respondent further placed relied on the decision of the Hon'ble Supreme Court in Collector of Central Excise, New Delhi Vs. M/s. Ballarpur Industries Ltd (1989) 4 SCC 566 to state that the issue as to whether ingredients qualified as a raw material or not would have to qualify the test i.e., ingredient should go into making of the end product in the sense that without its absence the presence of the end product, as such, is rendered impossible. This quality should coalesce with the requirements that its utilization is in the manufacturing process as distinct from the manufacturing apparatus.

11. He therefore submits that the wind mills at best were used as a manufacturing apparatus and not used in the manufacture of final product namely yarn and the factory and therefore the impugned orders passed by the respondent was to be sustained. The learned counsel for the respondent referred to decision of the Hon'ble Supreme Court in Maruthi Suzuki Ltd Vs. Commissioner of Central Excise, Delhi (2009) 9 SCC 193 wherein the Hon'ble Supreme Court was concerned with the use

of inputs used in or in relates of the manufacture of final product and part of price was hieved off for residential purpose. He submits that the Hon'ble Supreme Court considered the definition of input and the provisions of the CENVAT Credit rules 2002/2004.

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

13.The definition of capital goods in Section 2(11) of the TNVAT Act reads as under:

Section 211 Capital Goods means:-

- (a) plant and machinery, equipments, apparatus, tools, appliances or electrical installation for producing, making extracting or processing of any goods or for extracting or for bringing about any change in any substance for the manufacture of final products;
- (b) Pollution control, quality control, laboratory and cold storage equipments;
- (c) components, spare parts and accessories of the goods specified in (a) and (b) above;
- (d) moulds, dies, jigs and fixtures;
- (e) refractors and refractory materials;
- (f) storage tanks; and
- (g) tubes, pipes and fittings thereof;

14.The definition has extracted above is a vide import as the expression used is means. It not only includes plant and machinery, equipments, apparatus, tools, appliances or electrical installation for producing, making extracting or processing of any goods or for extracting or for bringing about any change in any substance for the manufacture of final products and it also includes goods used post manufacturing of other goods including pollution control equipments quality control equipment, laboratory and spares componenets accessories etc. Thus, the wind mill used by the petitioner qualifies as "capital goods" as long as it is used for the purpose of manufacture, processing, packing or storing of the goods in the course of business.

15.Under Section 19(2)(iv) uses the expression of 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 used as a "capital goods" in the

manufacture of taxable goods. The facts are not in dispute. The wind mill was for used of generating electricity and electricity to generated was wheeled off to the state Electricity Board under the power purchase agreement and the equivalent units were consumed by the petitioner. The petitioner was not charged for the equal units that were consumed at its factory under the power purchase agreement. The only net consumption was to be charged or to be paid to the petitioner under the agreement.

16.The decision of the Hon'ble Supreme Court cited by the learned counsel for the respondent in the context of Section 5(a) of the Kerala General Sales Tax Act, 1953 is not applicable to the facts of the case, as the case dealt with purchase tax. Similarly, the decision of the Hon'ble Supreme Court in Collector of Central Excise, New Delhi Vs. M/s.Ballarpur Industries Ltd (1989) 4 SCC 566 also cannot be applied to the facts of the case, since the law on the availability of the input tax credit on input and capital goods has been liberalised over a period of time after it was implemented in different states under different State VAT enactments.

17.In fact, in the context of pollution control equipments, this Court held that it is too late in the day to state it was not used in the manufacture of final product. The provisions of the TNVAT Act, 2006 has taken note of the judicial pronouncements and the liberal interprenur given to the expression of 'capital goods' by the Court in the context of CENVAT Credit Rules 2002-2004 and under the Central Excise Rules, 1944 as it stood then. The purpose of the Act is to ensure tax is only on the value addition and not to the tax.

18.Further, the Government has also issued a circular which was noted by this Court DCW Limited Vs. The Appellate Deputy Commissioner and another in W.P.Nos.1161,1672 and 1673 of 2015 vide its order dated 31.01.2019. Relevant portion of clarification was extracted which reads as under:-

But on 22.07.2015, in response to a query raised by the chemnplast Sanmar Limited, Chennai, the Government had clarified the issue in its letter No.Acts Cell 5/21619/15 dated 22.07.2015. The clarification reads as under:

(i)VAT paid on inputs used in captive power plant qualifies for input tax credit to the extent the power and steam is used for manufacture of final products.

(ii)VAT paid on capital goods used in their captive power plant (power generated to be used only in this dealer's own manufacturing plant) is eligible for input

tax credit under Section 19(3) of TNVAT Act, 2006 read with Rule 10(4) of TNVAT Rules, 2007.

19. That apart, the decision of this court in M/s. RSM Autokast Ltd Vs The Commercial Tax Officer in W.P.Nos.23423 of 2012 and 3455 of 2017 rendered on 13.12.2019 has not been appealed against. There it was held as follows:-

9. It is not the case of the respondent that the electricity generated was sold by the petitioner. Therefore, invocation of Section 27(2) read with Section 19(6) of the Tamil Nadu VAT Act, 2006 to deny credit was without any justifiable legal basis. In my view since proportionate quantum of electricity generated was used by the petitioner for the manufacturing purpose, there is no justification denying credit availed on tax paid on such wind turbines.

10. The assessment orders passed by the respondent also indicates that there were no exempted turnovers during the aforesaid assessment years. Further, Section 15 of the Act deals only with sale of goods specified in the 4th schedule or the goods exempted by notification by the government by any dealer. In this case, the electricity generated has not been sold but has been consumed captively.

11. There are no restriction under the rules which are attracted to the facts and circumstances of the present case to deny the credit to the petitioner. The issue is also now covered by following two decisions:-

(i) Brahma Putra Metallica Limited Vs. State of Jharkhand through the Secretary cum-Commissioner, Commercial Taxes Department, Government of Jharkhand and Others, 2019 SCC Online Jhar 816: (2019) 67 GSTR 277

(ii) Sri Pathi Paper and Boards (P) Ltd., Coimbatore 641 045 Vs. The State of Tamilnadu Rep by the Secretary, Commissioner Taxes and Registration Department, Fort St. George, Chennai - 9 and other in W.P.No.4761 dated 08.08.2019.

12. In the light of the above discussion, the question as to whether the petitioner was entitled to avail credit on tax paid on wind turbine is to be answered in favour of the petitioner. There is no case for invoking proviso to Section 19 (6) of the Tamil Nadu VAT Act, 2006. Consequently,

imposition of penalty is also liable to be set aside.

13. Therefore, the impugned order passed by the respondent is set aside and accordingly both the writ petitions are allowed with consequential relief to the petitioner. No cost. Consequently, connected miscellaneous petitions are closed.

20. These provisions have been incorporated with a view to reduce the effects of the duty/taxes and consumers and therefore legitimate benefits cannot be denied to the assessee. I do not find any merits in the impugned order passed by the respondent.

21. In the light of the above observations, the impugned order is set aside. Accordingly, this writ petitions stands allowed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (CS-VII)

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Sub Assistant Registrar

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To

1. The Commissioner of Commercial Taxes,
Ezhilagam, Chepauk, Chennai.
2. The Assistant Commissioner (CT),
Nethaji Road Assessment Circle,
Erode.

+1cc to the Special Government Pleader (Taxes), SR.No.14063

+1cc to Mr.S.Ravee Kumar, Advocate, SR.No.13410

W.P.No.22243 of 2018

and

W.M.P.No.26067 of 2018

SR-II (CO)

RLP (13.07.2021)