

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 11.03.2021

CORAM:

THE HON'BLE Dr. JUSTICE ANITA SUMANTH

W.P. No.33280 of 2019
and WMP.Nos.33743 & 33744 of 2019

TCS Trade Links,
Rep by Proprietor T.Sibi Charkravarthi,
No.38/1, A.S. Pettai Main road,
Namakkal.

... Petitioner

Vs.

The State Tax Officer,
Namakkal (Town).

... Respondent

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to issue a writ of Certiorari, to call for the entire records of the respondent in TIN:33973123831/2011-12 dated 30.08.2019 and quash the order passed therein.

For Petitioner : Mr.A.P.Srinivas
For Respondent : Mr.Mohammed Shaffiq
Special Government Pleader
Ms.G.Dhanamadhri,
Government Advocate

O R D E R

Heard Mr.A.P.Srinivas, learned counsel for the petitioner and Mr.Shaffiq as well as Ms.Dhanamadhri, learned counsels for the respondent.

2. The Petitioner is a dealer on the file of the respondent officer in terms of the provisions of the Tamil Nadu Value Added Tax Act, 2006 (in short 'TNVAT Act'). The period of assessment is 2011-12. The petitioner was put to notice on 12.09.2012 that its turnover from sale of rice bran oil was less than Rs.5.00 crores, thus attracting exemption in terms of Entry 65/Schedule A of the Act. Thus, the tax collected on the sales, admittedly remitted to the Department, was proposed to be forfeited in terms of Section 40(2)(ii) and the Input Tax Credit (ITC) claimed, proposed to be reversed, along with penalty.

3. The petitioner filed a reply dated 08.11.2012 stating that its turnover was, in fact, in excess of Rs.5.00 crores (Rs.5,18,01,968/- to be exact) and hence it was not entitled to exemption. This culminated in an order dated 15.03.2018, where the stand of the petitioner was accepted and the proposals dropped. Thereafter, a notice came to be issued on 28.06.2019 proposing revision of assessment and the proposal contained in notice dated 12.09.2012 was reiterated. The petitioner was called upon to file written objections and also appear for a personal hearing. The petitioner duly filed written objections dated 13.08.2019 as well as appeared for a personal hearing and order dated 30.08.2019 has come to be passed rejecting the stand of the petitioner as against which, the present Writ Petition is filed.

4. There was a factual dispute on what the turnover of the petitioner was, and whether the interstate sales during the relevant year have been excluded and learned counsel were directed to confirm the particulars thereof. Notice dated 28.06.2019, at paragraph 1, states that the petitioner has reported varying figures of turnover for the same year. The turnover as per the returns filed was an amount of Rs.3,36,90,637/-, whereas the turnover reported in Annexure II of the returns filed was an amount of Rs.4,18,83,402/- and the turnover reported in the income tax return was an amount of Rs.5,18,01,968/-. No difficulty presents itself in regard to the first two turnovers, as both figures are less than Rs.5.00 crores. However, it is seen that turnover reported in the income tax return did not take into account the interstate sales that are to be excluded while computing turnover for the purpose of the TNVAT Act. Reducing a sum of Rs.97,59,386/-, the turnover for the purposes of the TNVAT Act is an amount of Rs.4,20,42,582/-. The stand of the revenue to the effect that the turnover is less than Rs.5.00 crores and that the petitioner is eligible to exemption, is thus vindicated.

5. Eligibility, however, does not tantamount to availment, and the question that presents itself is as to whether though eligible, an exemption could be thrust upon an assessee. The provisions of Section 19(5)(a) of the Act state that no ITC shall be allowed in respect of sale of goods exempted under Section 15 of the Act. However, it is for the eligible assessee to exercise such option, and claim exemption. If an assessee chooses not to avail the available exemption, then such option cannot be denied to it.

6. In this context, I draw an analogy from an identical situation that arose under the Central Excise Act, 1944, which came to be discussed by the Supreme Court in two judgments in the case of H.C.L. Limited vs. Collector of Customs, New Delhi, (130 ELT 405) and Collector of Central Excise, Baroda vs. Indian Petro Chemicals, (92 ELT 13) applied by me in Sudan Spinning Mills (P) Ltd. Vs. Commissioner of C. Ex., Madurai ((2019) 368 ELT 953).

7. The ratio decidendi in these decisions is that the assessee is entitled to the right of choice as between benefits, where multiple benefits are available. Applying the ratio to the present situation, the petitioner must not be forced to avail exemption merely because it is available. It is left to an assessee to decide how it wishes to arrange or organise its financial matters as long as such arrangement falls within the four corners of the law. An assessee is thus at liberty to eschew an exemption offered, and take/suffer the consequences. Mr. Shaffique distinguishes the above judgements pointing out that in those cases, the benefit offered was under Notifications. The assessee concerned were given the choice of opting between one or the other of two Notifications that extended different benefits in respect of the same activity/transaction. In the present case there is no such conflict and the assessee/petitioner has only one option for exemption.

8. The Central Excise Act 1944 permits the issuance of Notifications in terms of Section 37B of that enactment. There is not, in my view, any discernible distinction between an exemption offered under Notification (as is the case under Central Excise law) or under the Schedule to the Act (as in the case before me. The crux of the matter remains that the assessee must have freedom to choose whether or not it wishes to avail of the benefit offered.

9. The exemption available under Entry 65/Schedule A is an option that has not been availed by the present petitioner and I see no legal flaw in the choice made. The petitioner will have to sink or sail on the basis of the decision taken by it, qua exemption. In this case, the petitioner has, while eschewing exemption, claimed ITC on purchases. The respondent, while rejecting the claim for ITC has fortified the tax collected in terms of Section 41 of the TNVAT.

10. Section 41 of the TNVAT Act reads as follows:

41. Forfeiture of tax collected.-- If any person collects any amount by way of tax and his turnover for the year falls short of the taxable limit specified under this Act, the sum so collected shall be remitted to the Government and forfeited, after deducting the eligible input tax credit claim, if any, on the corresponding purchases.

11. The provisions of Section 41(1)(ii) provide for the forfeiture of the tax collected and remitted in a situation where the turnover of the assessee is less than the taxable limit. The clause also provides that in such an event the assessee would be entitled to ITC on the purchases made. The provision as it stands, substituted the provision as it stood earlier, reading as follows:

41. Forfeiture of tax collected:- If any person collects any amount by way of tax and his turnover for the year falls short of the taxable limit specified, the sum so collected shall be remitted to the Government and forfeited wholly.

12. The amendment by Tamil Nadu Act 2 of 2012 is with effect from 01.04.2012 and thus the question that is argued is whether the grant of ITC enabled by the amended provision as it now stands, is applicable for prior periods. The statement of objects and reasons at the time of amendment in 2012, read as follows:

If any person collects any amount by way of tax and his turnover for the year falls short of the taxable limit specified, the sum so collected shall be remitted to the Government and forfeited wholly as per Section 41 of the Tamil Nadu Value Added Tax Act, 2006 (Tamil Nadu Act 32 of 2006). Such persons cannot avail the benefit of input tax credit on their purchases.

2. The Government have, therefore, decided to amend the said section 41 of the said Act prospectively i.e. 1st April, 2012 to the effect that the amount collected as tax by any person or registered dealer will be forfeited to the Government after deducting the eligible input tax credit claim, if any, on the corresponding purchases if his turnover for the year falls short of the taxable limit specified under the said Act.

3. The Bill seeks to give effect to the above decision.

13. As per the objects, the substitution of the provision is prospective. Where an entity whose turnover is less than taxable limit has collected tax and remitted it into the Treasury in time, it is now given the benefit of ITC.

14. The grant of credit is conditional upon the status of a dealer as 'taxable', and hence a dealer falling outside the ambit of taxability was not extended the benefit of ITC, which is a concession under the statute, as seen from a reading of the charging section, Section 3, read with Section 19, dealing with Input tax credit.

15. The position in the present writ petition is however, different and distinguishable. The petitioner is admittedly, a dealer whose turnover far exceeds the threshold of taxability. It is only by virtue of the exemption provided under Schedule that it might escape taxability, if it so chooses. Such choice, in my view, must be its. Thus, in this case, there is no bar under the statute for availment of credit, subject to the tax

liability being met in full. The bar under Section 19(5)(a) applies only in cases of 'sale of goods exempted under section 15' and not where such exemption is provided but not availed. The purpose of the bar under section 19(5)(a) is to deny a double benefit to an assessee and there has, in this case, been no double claim as admittedly, the tax has been remitted in entirety. The provisions of Section 41(1) refer to a different situation and do not advance the case of the revenue in the facts and circumstances of this case.

16. The feature of input tax credit is what gives value added taxes their main economic characteristic, that of neutrality. The full right to deduction of input tax through the supply chain, with the exception of the final consumer, ensures neutrality of the tax, whatever be the nature of the product, the structure of the distribution chain and the technical means used for its delivery, either via brick and mortar establishments, physical delivery or the Internet. This is a measure of avoiding the ills of cascading taxes. To deny the petitioner the benefit of ITC by thrusting an exemption not claimed by it, upon it, will, in my view, be contrary to the scheme of the enactment.

17. This Writ Petition is allowed. No costs. Connected Miscellaneous Petitions are closed.

Sd/-

Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

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To

The State Tax Officer,
Namakkal (Town).

+1cc to Mr.A.P.Srinivas , Advocate SR.No. 15591

+1 cc to Spl Government Pleader(Taxes) Sr.No. 16136

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and WMP.Nos.33743 & 33744 of 2019

ss co

A.SK(30.03.2021)