IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

MAH. VALUE ADDED TAX APPEAL NO.6 OF 2024

The Addl. Commissioner of Sales Tax
VAT -I MS, Mumbai .. Appellant.

Versus

Ortek Computers .. Respondent.

Adv. Himanshu Takke, AGP with Mr. Amar Mishra, AGP, for the Appellant.

Adv. C.B. Thakar, for the Respondent.

CORAM: B. P. COLABAWALLA &
FIRDOSH P. POONIWALLA, JJ.
DATE: JANUARY 15, 2025

P. C.

1. The above Appeal is filed by the Revenue under Section 27 of the Maharashtra Value Added Tax Act, 2002 (the MVAT Act) impugning the Order dated 17th August, 2023 passed in Value Added Tax Second Appeal No. 99 of 2020 passed by the Fourth Bench of the Maharashtra Sales Tax Tribunal, Mumbai [for short "MSTT"].

2. According to the Revenue, the following questions of law arise for consideration:-

> *"(a) Whether the Sales Tax Tribunal on the true and proper construction of Section 51(7) of Maharashtra Value Added Tax, 2002, was justified in holding that mere filing of self-assessment returns under Section 20(1) r/w. Section 50 of the MVAT Act, 2002, is sufficient without filing application for refund as per law to claim refund when it is mandatory to file refund application on portal within stipulated limitation?*
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> *(b) Whether on the true and proper construction of Section 51(7) of Maharashtra Value Added Tax, 2002 is it mandatory to submit E-form-501, within stipulated period of limitation to claim refund despite filing of self-assessment returns under Section 20(1) r/w. Section 50 of the MVAT Act, 2002?*
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> *(c) Whether the Sales Tax Tribunal on the true and proper construction of Section 51(7) of Maharashtra Value Added Tax, 2002, erred in directing the Assessing Authority to process application of refund when it was neither filed as per law nor within limitation?*
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> *(d) Whether the impugned Judgment and Order dated 17th August, 2023, is contrary to the law laid down by this Hon'ble Court in case of Mahalaxmi Cotton and Ginning Pressing and Oil Industries v/s. The State of Maharashtra?*
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> *(e) Whether the issue of limitation with respect to claim of refund ought to be considered in view of the provisions of u/s. 23 of the MVAT Act?"*

3. From the facts of the present case, we find that the Appellant/Assessee before the Tribunal, being a dealer registered under the MVAT Act, had filed returns for the period 2010-2011 showing a refund of Rs.4,56,216/-. However, the said refund was not granted to the Assessee. Hence, a letter was written to the Nodal Officer. The Commissioner of State Tax (D-901), Nodal Division-5, vide Order dated 19th May, 2018, rejected the Assessee's request for refund on the ground that the Assessee had failed to apply for grant of refund within the prescribed time. It was mentioned

that the application for refund in respect of Assessment Year 2010-2011 was time barred under the provisions of Section 23 of the MVAT Act.

4. Being aggrieved by the rejection order, the Assessee preferred First Appeal before the Dy. Commissioner of State Tax (Appeal) E-905, Nodal Division-5, Mumbai. The learned Deputy Commissioner (Appeals), vide an Order dated 19th October, 2019, rejected the First Appeal of the Assessee holding that the letter given by the Asst. Commissioner of State Tax (D-901), Mumbai, dated 19th May, 2018, was not an order as mandated by section 26(1) of the MVAT Act, and therefore, the Appeal was not maintainable.

5. Being aggrieved by this decision, the Assessee preferred an Appeal to the MSTT. The MSTT, relying upon its decision in ***M/s. Om Shree Developers v/s. State of Maharashtra*** **[VAT/SA/134-135/2020, Pune Bench, decided on 12th October, 2021],** came to the conclusion that there was considerable substance in the contention of the Assessee/Appellant that the impugned orders passed by the Assessing Authority and First Appellate Authority are bad in law in view of the nature and scope of the provisions of Section 20(1), read with the provisions of Section 50 of the MVAT Act. The Tribunal also came to the conclusion that the letter rejecting the refund claim

of the Assessee would have to be treated as an order as contemplated under Section 26(1) of the MVAT Act because it determines the right of the Assessee to get a refund and depriving it the legitimate benefits as per provisions of law.

6. In light of these findings of the Tribunal, we also perused the decision of the Tribunal passed in **M/s. Om Shree Developers (supra)**. In this decision, the Tribunal has clearly taken a view that there are two provisions under the MVAT Act for granting refund - (a) by filing Form 501, which is an application to grant an early refund; and (b) obtaining refund as per the order of assessment.

7. The Tribunal (in M/s. Om Shree Developers), after relying upon the decision of this Court in the case of ***Vichare and Co. Pvt. Ltd., v/s. State of Maharashtra & Others***[1]***,*** came to the conclusion that the Department had misconstrued the legal provisions and the right to get a refund under Section 51 (1) to (7) of the Act. The Tribunal held that if the dealer has paid an excess amount than what it is liable to pay, then the excess is not the property of the Department, or of the Government, but it is the property of the dealer, who is entitled to get a refund after scrutiny of the returns. In these circumstances, the Tribunal (in M/s. Om Shree Developers) allowed the Appeal and directed

1 (2015) SCC Online Bom 3954

the Assessing Authority to scrutinize/ assess the returns submitted by the Appellant [i.e. Om Shree Developers], in accordance with law, at the earliest.

8. This Order of the Tribunal in **M/s. Om Shree Developers (supra)** has been accepted by the Department and has not been challenged. Once this is the case, we are of the opinion that the Department cannot pick and choose and file an Appeal in the present case, when it has chosen not to file an Appeal in the case of **M/s.Om Shree Developers (supra).** In taking this view, we are supported by the decision of the Hon'ble Supreme Court in the case of ***Boving Fouress Ltd., v/s. Commissioner of Central Excise, Chennai***[2]. Paragraphs 11, 12 and 13 are the relevant paragraphs and read thus:-

> *"11:- This Court in a catena of decisions has held that where the department accepts the principle laid down by the Tribunal in one case and let it become final, then the department is not entitled to raise the same point in other cases. The department canot pick and choose. [See: The decisions of this Court in Union of India & Others v. Kaumudini Narayan Dalal & Another – (2001) 10 SCC 231; Collector of Central Excise, Pune v. Tata Engineering & Locomotives Co. Ltd.,- 2003 (158) E.L.T. 130 (S.C.); Birla Corporation Ltd., v. Commissioner of Central Excise- 2005 (186) E.L.T. 266 (S.C.); and Jayaswals Neco Ltd. v. Commissioner of Central Excise, Nagpur – 2006 (195) E.L.T. 142 (S.C.). It has been held in all these cases that if no appeal is filed against an earlier order or the earlier appeal involving the identical issue was not pressed by the Revenue, the Revenue is not entitled to press the other appeals involving the same question. In Birla Corporation Ltd., (supra),this Court observed as follows:-*
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> > *"In the instant case, the same question arises for consideration and the facts are almost identical. We cannot permit the Revenue to take a different*

2 2006 (202) E.L.T. 389 (SC)

> *stand in this case. The earlier appeal involving identical issue was not pressed and was, therefore, dismissed. The respondent having taken a conscious decision to accept the principles laid down in Pepsico India Holdings Ltd. [2001 (130) E.L.T. 193] cannot be permitted to take the opposite stand in this case. If we were to permit them to do so, the law will be in a state of confusion and will place the authorities as well as the assessee in a quandary.*

> *12:-* <u>*The principle in Birla Corporation Ltd. (supra) is being followed consistently.*</u>

> *13:-Since admittedly the point involved in the present case is identical to the point involved in Sulzer's case (supra) and the department having accepted the principle laid down therein, the department cannot be permitted to take a different stand in the present appeals."*

(emphasis supplied)

9. We are of the opinion that in the light of the above discussion, the present Appeal does not give rise to any substantial question of law. We, therefore, dispose of the above Appeal with a slight modification that the returns submitted by the Assessee for the Assessment Year 2010-2011 be scrutinized, in accordance with law, at the earliest. If, after scrutiny, the refund is payable, the refund shall be paid over to the Assessee. This entire exercise shall be completed by the Department within a period of six months from today.

10. Appeal is accordingly disposed of. No order as to costs.

11. This order will be digitally signed by the Private Secretary/ Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

[FIRDOSH P. POONIWALLA, J.] **[B. P. COLABAWALLA, J.]**