

(2013) 07 KAR CK 0014

In the Karnataka High Court

Case No : Sales Tax Appeal No's. 2792 to 2803 of 2012 C.H.-3

ADM Agro Industries Dharwad Private Limited

APPELLANT

Vs

State of Karnataka

RESPONDENT

Date of Decision : 03-07-2013

Acts Referred:

Karnataka Value Added Tax Act, 2003 — Section 36(1), 63, 63-A, 72(2)
Karnataka Value Added Tax Rules, 2005 — Rule 131(3)

Citation : (2013) 07 KAR CK 0014

Hon'ble Judges : P. Puttaraju, C.T.M.; Niazahmed S. Dafedar, D.J.M.

Bench : Division Bench

Advocate : M. Thirumalesh, for the Appellant; D. Devaraj, State Representative, for the Respondent

Judgement

P. Puttaraju, CTM

1. These twelve (12) appeals are filed u/s 63 of the Karnataka Value Added Tax Act, 2003 (for short, "the Act"). The same are directed against revision order dated 22nd May, 2012 concluded by the Joint Commissioner of Commercial Taxes (Administration), VAT Division, Dharwad (hereinafter referred to as the "First Revisional Authority" or for short, "FRA") in Case No. JCCT/Admn./DWD/SMR-1/11-12. The FRA has exercised powers by invoking Section 63-A of the Act, to revise the reassessment orders dated 30th October, 2008 concluded u/s 39(1) of the Act for the tax periods of April 2006 to March 2007 by the Deputy Commissioner of Commercial Taxes (Audit-II), Navanagar, Hubli (for short, "Assessing Authority" or "AA"). Subsequent to the revision order dated 22nd May, 2012, the FRA has passed rectification order for the tax periods confining to April 2006 to February 2007 on 5th July, 2012, wherein the FRA has conceded certain mistakes apparent on records and accordingly the rectification order has been passed. Aggrieved by this revision order followed by rectification orders, the present appeals are preferred. There is a delay in filing the appeals by 132 days for which an Interim Application No. I has been filed for the condonation

explaining the facts for the delay along with an affidavit. The same has been examined and the delay is due to awaiting of rectification order concluded by the FRA. Considering the same, the delay has been condoned and the appeals are admitted. In addition to this there is one more interim application vide I.A. No. III which is concerned with "stay" being requested. The said IA has been disposed of by granting conditional stay and also directing to submit compliance for the same. The I.A. No. II is an application for advancement of the case which has been conceded.

2. The relevant facts and grounds of the appeals in brief are stated as thus:

(i) The appellant is a private limited company registered under KVAT Act and Central Sales Tax Act, 1956, engaged in the business of manufacture of edible oil.

(ii) The manufactured products are also stock transferred to branches in other States.

(iii) The AA has concluded the reassessment orders under the Act on 30th October, 2008 which has been taken up for revision by the FRA and has issued revision order dated 22nd May, 2012.

(iv) The appellant submits that revision order passed by FRA revising the reassessment orders of the AA and consequential orders of levying interest and penalty respectively under Sections 36(1) and 72(2) of the Act for the tax period of April 2006, May 2006 to February 2007 and March 2007 are not sustainable in law or in the facts and circumstances of the case of the appellant.

(v) The appellant urges that FRA erred in not applying the correct provisions of the Act and Rules irrespective of whether a claim has been made or not in the original return or in the reply. The FRA ought to have applied the correct provisions of the Act specifically Rule 131(3) of the Karnataka Value Added Tax Rules, 2005. In this regard, the appellant has cited several case-laws and in particular has extracted a particular portion of the judgment rendered in case of Narsepalli Oil Mills Vs. The State of Mysore, . The appellant relies on the fact that the Hon"ble High Court has decided that even if the assessee makes a mistake in submitting a return, is not precluded by any law from preferring an appeal and showing to the Appellate Authority that the sales are in fact not exigible to tax and such matter has to be examined and determine the question whether or not the sales are exigible to tax. Relying on this finding, the request is made to direct the FRA to apply the correct provision namely Rule 131(3) of the KVAT Rules.

(vi) The second contention is with respect to the computation of non-deductible input tax. The appellant submits that FRA erred in not considering the local sales out of inter-State consignment purchases. In this regard, the appellant highlights the formula prescribed under Rule 131(3) of the KVAT Rules. Prayer is made to conclude such sales for the purpose of total sales while applying the formula prescribed under the said rule.

(vii) The third contention is against the non-application of Rule 132 of the KVAT

Rules for the purpose of "true apportionment". The FRA has rejected the appellant request to apply the provisions of said rule stating that the appellant had not made a claim in the return and the AA has also not invoked the said provisions. It is submitted that this amounts to stating that provisions of the Act and Rules would be applied to a dealer only if a claim is made at the earliest stage and not otherwise. Once again the appellant relies on the decision cited *supra* for this purpose. By not calculating the true apportionment, the non-deductible input tax has gone upto the extent of Rs. 9,10,176/-. Since FRA has failed to apply the correct rule, the appellant submits that the revision order is liable to be set aside to this extent and the FRA be directed to re-compute the tax in accordance with the provisions of the Act and Rules whether or not such claim is made in the returns.

(viii) The fourth contention is with respect to disallowance of the transitional relief available in case of the appellant. Without considering this, the tax liability has been fastened and so also the penalty and interest.

(ix) The fifth contention raised in the grounds is that the FRA has erred in not carrying forward of the refund of tax due for the tax period of October 2006. In this regard, the appellant relies on Rule 127(2) and assails the order of the FRA.

(x) Lastly, the appellant submits that since all the particulars are available in the books of accounts maintained relating to particulars of purchases, local sales, inter-State sales and stock transfers, the levy of penalty and interest is unjustified. The appellant urges that the word "shall" also to be construed as "may" in order to invoke Section 72(2) of the Act. In this regard, the appellant cites *Hindustan Steel Ltd. Vs. State of Orissa*, . In addition to this, two judgments of our Hon"ble High Court are also cited. The appellant relies on the circular instructions issued by the Commissioner of Commercial Taxes in Circular No. KSA.CR. 105/06-07, dated 26th June, 2006 to canvass that penalty and interest are not attracted when there is no deliberate act on the part of the appellant in not having applied the apportionment formula prescribed in Rule 131(3). This fact is not appreciated by the JCCT while revising the order. So far as the levy of interest is concerned, the appellant cites the decision of the Apex Court rendered in the case of *J.K. Synthetics Limited and Birla Cement Works and another Vs. Commercial Taxes Officer, State of Rajasthan and another*, and argues that no interest could be levied since the returns have been filed truly and with bona fide belief. The additional demand has been raised because of the reassessment order or revision order which is based on the books of accounts.

3. On the above grounds, the appellant prays to set aside the revision order passed by the FRA and direct the authority to re-compute the tax by applying the provisions of Section 17 of the Act read with Rules 131(3) and 132 of the KVAT Rules and also to direct the FRA to include the local sales of goods out of the purchases on consignment basis as part of total sales and to direct the JCCT to apply Rule 13 while computing the non-deductible input tax. Specific prayer is made to allow transitional relief as per law before computing the balance tax

payable, interest and penalty while setting aside the orders passes under Sections 72(2) and 36(1) by the AA consequent to the revisional order and rectification orders.

4. Heard the learned Counsel and the State Representative. The common question of law and facts are involved in these twelve appeal and hence the same are clubbed together and disposed of by this common judgment.

5. Perused the lower Court records. The following points arise for our consideration:

(1) Whether FRA has applied the formula prescribed under Rule 131(3)?

(2) Whether the FRA is correct in not including the sales out of purchases obtained on consignment basis as part of total sales for the purpose of formula prescribed under Rule 131(3)?

(3) Whether the FRA is correct in not applying Rule 132 while computing apportionment of deductible input tax and non-deductible input tax?

(4) Whether the FRA is correct in not according transitional relief if the appellant is entitled for the same?

(5) Whether the FRA is correct in not carrying forward refund available to the appellant in the month of October 2006?

(6) Whether the AA is correct in levying penalty and interest as per the directions of the FRA?

(7) Whether interference by this Tribunal is necessary?

(8) What order?

6. Our answer to the above points are as under:

Point No. 1: In the affirmative.

Point No. 2: In the negative.

Point No. 3: In the negative.

Point No. 4: In the negative.

Point No. 5: In the negative.

Point No. 6: In the negative.

Point No. 7: In the affirmative.

Point No. 8: As per the final order for the reasons hereunder:

REASONS

7. Point No. 1.--The question of applying Rule 131 arises only when the issue of partial rebate exists. There is no dispute to the fact that the appellant has

effected the sale of exempted goods, taxable goods and also non-taxable transactions. Therefore Section 17 has to be invoked and Rule 131 has to be applied. Perusal of the records reveals that the appellant while submitting the returns in Form VAT 100 for the impugned tax periods has applied formula which was in existence during the year 2005-06 under Rule 131. But with effect from 1-4-2006, this Rule 131 has been replaced by the new formula. The AA has followed the formula adopted by the appellant rather than the prescribed one under Rule 131. This is one of the reasons for the FRA to invoke Section 63-A(1) to revise the reassessment orders. For this purpose, the relevant Section 17 and relevant Rules 131 and 132 are reproduced hereunder:

17. Partial rebate.--Where a registered dealer deducting input tax.--

(1) makes sales of taxable goods and goods exempt u/s 5; or

(2) in addition to sales of taxable goods or the sales referred to in clause (1), despatches taxable goods or goods exempted u/s 5 outside the State not as a direct result of sale or purchase in the course of inter-State trade; or

(3) puts to use the inputs purchased in any other purpose (other than sale, manufacturing, processing, packing or storing of goods), in addition to use in the course of his business; [or]

[(4) falls under any of the above clauses and also purchases any petroleum product for use as fuel in production of any goods or captive power,]

apportionment and attribution of input tax deductible between such sales and despatches of goods or such purpose, shall be made in accordance with Rules or by special methods to be approved by the Commissioner or any other authorised person and any input tax deducted in excess shall become repayable forthwith.

131. Apportionment.--Apportionment of input tax in the case of a dealer falling u/s 17 shall be calculated as follows.--

(1) All input tax directly relating to sale of goods exempt u/s 5 other than such goods sold in the course of export out of the territory of India, is non-deductible.

(2) All input tax directly relating to taxable sales may be deducted, subject to the provisions of Section 11.

[(3) Any input tax relating to both sale of taxable goods and exempt goods, including inputs used for non-taxable transactions, the non-deductible input tax, may be calculated on the basis of the following formula:

(4) For the purpose of clause (3).--

(a) "Sale of taxable goods" would be the aggregate of the amounts specified in clauses (b), (c), (d), (e) and (f) of sub-rule (1) of Rule 3 relating to sale of goods other than those exempt u/s 5 which are not sold in the course of export out of the territory of India [and those sold in the course of import into the territory of India]; and

[(b) "Total sales" means total turnover less.--

(i) the amount specified in clause (a) of sub-rule (1) of Rule 3;

(ii) the deductions specified in clause (e) of sub-rule (2) of Rule 3;

(iii) the aggregate of sale prices received or receivable in respect of subsequent sale in the course of inter-State trade or commerce of any goods purchased in the course of inter-State trade or commerce during their inter-State movement;

(iv) the aggregate of sale prices received or receivable in respect of sale in the course of export out of the territory of India of any goods purchased in the course of export; and

(v) the aggregate of sale prices received or receivable in respect of sale in the course of import into the territory of India of any goods purchased in the course of import.]

(5) Where in the case of any dealer, the Commissioner is of the opinion that the application of the formula prescribed under clause (3) does not give the correct amount of deductible input tax, he may direct the dealer to adopt a special formula as he may specify.

132. Claims to input tax.--(1) Any dealer claiming input tax deduction under Rule 131, shall complete his return on a provisional basis each month, and the true apportionment for the year shall be made in the returns to be furnished for the sixth and final months of the year after calculating the apportionment under clause (3) or (5) of Rule 131 for the part period and the whole year.

(2) Where, under sub-rule (1), in any period of one month the total input tax due on a dealer's non-taxable transactions does not exceed five hundred rupees, all such input tax in that period shall be treated as input tax on taxable sales.

The FRA has applied the right formula for the impugned tax periods and hence Point No. 1 is answered in the affirmative.

8. Point No. 2.--In the revision order which is under challenge, it is observed that the FRA has excluded the local sales effected out of the goods obtained from outside the State from "Total sales". In paragraph No. 5 of the impugned order, the FRA has come to the conclusion that the input tax is not involved in such consignment receipts. But for the purpose of Rule 131(3), total sales is specifically defined which is reproduced above. The only exclusions prescribed under the said sub-rule has to be deducted from the total sales and the authorities exercising powers under the Act cannot deviate from the statute and rules. This is evident from the impugned revision order at paragraph No. 4. Therefore, it is decided that the FRA has erred in computing the total sales for the purpose of Rule 131(3). Therefore, Point No. 2 is answered in the negative.

9. Point No. 3.--No doubt Rule 132 envisages or provides the opportunity for the registered dealer who falls u/s 17 to compute partial rebate as per the said rule.

In case of stock transfers, the dealer has the opportunity to claim the correct deductible input tax by submitting returns for the half year and for the whole year. This has not been done by the appellant but still the FRA while revising the orders of the AA ought to have applied the said rule for the purpose of right apportionment of deductible input tax. By doing so, the Revisional Authority could have arrived to disallow the correct non-deductible input tax. Therefore Point No. 3 is answered in the negative.

10. Point No. 4.--The appellant is in fact eligible for transitional relief as per the order of this Tribunal in STA No. 335 of 2010, dated 3rd March, 2011. The order portion of the said STA reads as under:

ORDER

The appeal is allowed for the year 2005-06 and the case is remitted back to the AA to reverify the claims of rebate on transitional stock and to allow the same in accordance with law and to issue Form VAT 270 to the appellant.

In pursuant to the same, the ACCT, LVO-310, Dharwad has issued order after a lapse of two years on 28th May, 2013 stating that the necessary steps are being taken to issue Form VAT 270 to accord transitional relief of Rs. 71,05,583/-. The Tribunal order as well as the proceedings are submitted by the learned Counsel and brought to our notice that inspite of directions from this Tribunal still Form VAT 270 is not yet granted. It is unfortunate for such undue delay causing hardship to the appellant. Therefore we are constrained to issue directions to the FRA to take appropriate steps in accordance with to accord transitional relief and then to re-computed the tax liability, interest and penalty also. Under these circumstances, it is necessary to remand the case back to the FRA to revise the impugned order in accordance with law. Therefore Point No. 4 is answered in the negative.

11. Point No. 5.--Even though the appellant has credit of input tax by virtue of carry forward for the month of October 2006, the same is not considered by the FRA while concluding the impugned order. The correct reason is also not assigned for the denial of such input tax credit. Therefore, Point No. 5 is answered in the negative.

12. Point No. 6.--Perusal of the FRA and AA's records reveals that the FRA has issued directions to levy penalty and interest as per the provisions of the Act. This is the concluding para of the impugned revision order. The AA has implemented the orders of the FRA after following the statutory procedure. However, the AA has not taken cognizance of transitional relief and it is not his mistake because Form VAT 270 had not been issued by the concerned authority namely ACCT, LVO-310, Dharwad. It is the duty of the FRA to ensure issuance of Form VAT 270 as per the orders of this Tribunal cited supra. Secondly, after the remanding of the case, the liability of tax, penalty and interest emerges correctly as per the observations made above. Therefore it is necessary for this purpose also to remand the case back to FRA to pass orders afresh in accordance with

law. Hence Point No. 6 is answered in the negative.

13. Point No. 7.--As we have concluded that the FRA has erred in not implementing Rule 132 and also erred in computing the "total sales" for the purpose of Rule 131(3) to allow deductible input tax, it is necessary to remand the case back to the FRA. Hence our interference is needed in remitting the case. Hence Point No. 7 is answered in the affirmative.

Point No. 8.--Hence, we proceed to pass the following order.--

ORDER

(1) All the twelve (12) appeals are allowed.

(2) The impugned order of the FRA is set aside and remitted back to FRA to pass orders in accordance with law and following the observations made above.

(3) Keep the original judgment in STA No. 2792 of 2012 and copies of the same in STA Nos. 2793 to 2803 of 2012.

(4) The Registrar of the Tribunal is directed to comply Regulation 53(b) of Chapter IX of Karnataka Appellate Tribunal Regulations, 1979 by communicating this order to the persons mentioned therein.

(5) The office is directed to send back the lower authorities records immediately within 15 days.