

(2014) 11 MAD CK 0162

In the Madras High Court

Case No : Writ Petition No. 9265 of 2013 and M.P. Nos. 1 to 5 of 2013 and M.P. Nos. 1 to 5 of 2014

Infiniti Wholesale Limited

APPELLANT

Vs

The Assistant Commissioner (CT)

RESPONDENT

Date of Decision : 06-11-2014

Acts Referred:

Central Sales Tax Act, 1956 — Section 8(1)

Constitution of India, 1950 — Article 226

Tamil Nadu Value Added Tax Act, 2006 — Section 17, 18(2), 19, 19(1), 19(13)

Citation : (2015) 3 LW 202 : (2015) 82 VST 457

Hon'ble Judges : T.S. Sivagnanam, J

Bench : Single Bench

Judgement

T.S. Sivagnanam, J.—The petitioner, a Public Limited Company, incorporated under the Indian Companies Act, 1956, and registered as a dealer, on the file of the respondent, under the provisions of the Tamil Nadu Value Added Tax Act, 2006, (in short the Act), has filed this writ petition, challenging the order of assessment, dated 25.02.2013 for the assessment year 2011-12.

2. The petitioner is involved in trading of consumer items and wholesalers for various enterprises. The vendors of the petitioner are usually manufacturers of consumer durables and other goods and are said to be registered dealers and they raise Tax Invoices, as contemplated under Rule 10(2) of the Tamil Nadu Value Added Tax Rules, 2007, (VAT Rules).

3. The petitioner would state that it pay to its vendors the price as well as the tax charged and take Input Tax Credit (in short ITC). It is stated that during the relevant assessment year, a small portion of the purchases were made by the petitioner from registered dealers, outside the State of Tamil Nadu and those purchases were made, as purchases contemplated under Section 8(1) of the Central Sales Tax Act, 1956, and the petitioner has effected resale within the state of Tamil Nadu and paid tax. The petitioner would state that on the inter-

state purchases, it has not taken input tax credit.

4. The respondent has issued a notice, dated 20.07.2012, stating that, on verification of the returns filed by the petitioner for the assessment year 2011-12, certain defects were noticed, which are briefly stated as here-under:-

"(i) There is short reporting of turnover by the registered vendors of the petitioner in comparison to the purchase turnover of the petitioner to the tune of Rs. 3,37,50,298/-;

(ii) The vendors who are registered dealers have not filed returns for Rs. 66,784/-;

(iii) The vendors have not paid tax and yet petitioner has taken credit (termed as non assessee vendors), though assessment orders mentions the existing TIN Nos. of the vendors at Rs. 79,460/-;

(iv) The vendors are unregistered dealers and evaded tax to the tune of Rs. 34,73,089/-.

5. On the above allegations, the respondent proposed to reverse the ITC of Rs. 3,73,69,631/-, availed by the petitioner, as per Section 19(13) of the VAT Act. The petitioner was given liberty to file objections to the proposal made in the notice, dated 20.07.2012, in writing, with connected records, within ten days from the date of receipt of the order.

6. The petitioner submitted its reply, dated 05.08.2012, stating that they were in possession of valid tax invoice; vendors are registered dealers within the state of Tamil Nadu; credit was taken only on local purchase on the basis of tax invoices issued by local registered dealers; Section 19(13) of the Act had no applicability to a case, where credit had been taken on the basis of valid tax invoice. Without prejudice to the above contentions, the petitioner stated that they were in the process of obtaining confirmation from the vendors and that returns were filed and tax discharged at their hands and they will comply with the same, though Section 19(1) of the Act does not contain any such requirement and sought for two months time.

7. The petitioner appeared for personal hearing on 26.08.2012 and filed further objections on 10.10.2012, which was delivered in the office of the respondent, on 26.10.2012. In the further objections, dated 10.10.2012, the petitioner contended that the notice, dated 20.07.2012, did not specify the exact transaction, in respect of which there was a mismatch; requested assistance of the respondent in specifying the exact transactions from the returns of the vendors, as the petitioner, being purchaser was not in possession of the returns filed by the vendors. Without prejudice to the above two contentions, the petitioner submitted the confirmation to the tune of Rs. 2,60,92,645/-, which was based on the confirmations furnished by its vendors.

8. Once again, the petitioner appeared before the respondent, on 10.01.2013,

and explained the matter. While reiterating its request that it needs the assistance of the Department/respondent to verify the transactions on the basis of the vendors' returns, so that the credit can be tallied, a written representation to the said effect was sent on 28.01.2013, by speed post, stated to have been received by the respondent, on 30.01.2013. While the facts stood thus, the respondent has passed the impugned assessment order, dated 25.02.2013.

9. The learned counsel for the petitioner, after elaborately referring to the facts, submitted that, since the petitioner has furnished confirmation to the tune of Rs. 2,60,92,645/- from its vendors, the respondent ought to have dropped the proposal to that extent and this submission was made, without prejudice to the contention that the impugned assessment order suffers from error apparent on the face of the record, as it wholly ignores Section 19(1) of the VAT Act. Further, it is submitted that the action of the respondent is arbitrary, as no cross verification was done, despite repeated requests. Further, it is submitted that the impugned order is bad in law, as no show cause notice was issued to the petitioner, as contemplated under Section 27 of the VAT Act and there was only one notice and that was prior to the amendment to Section 22 of the VAT Act. Further, it is submitted that no reasonable opportunity was granted to the petitioner and the respondent failed to follow the procedures set-out in Circular, dated 20.04.2001. In support of the said contention, the learned counsel for the petitioner placed reliance on the decisions of this Court, in the case of Althaf Shoes (P) Ltd. Vs. Assistant Commissioner (CT), Valluvarkottam Assessment Circle, Chennai-6, and Sri Vinayaga Agencies Vs. Assistant Commissioner (CT) and Another, .

10. The learned Additional Government Pleader appearing for the respondent raised a preliminary objection regarding the maintainability of the writ petition, contending that the petitioner should be directed to file an appeal before the Appellate Authority, in terms of Section 51 of the VAT Act and in support of such contention, reliance was placed on the decision of the Hon'ble Supreme Court, in the case of Union of India v. Tata Engineering and Locomotives Ltd., reported in AIR 1988 SC 287. On the merits of the assessment, the learned Additional Government Pleader contended that the petitioner has effected local purchases from the local dealers and availed ITC, but the vendors have not disclosed those sales effected to the petitioner in their Form-1 Returns or paid relevant taxes due thereof. Further, it is contended that, in other cases, the petitioner has effected local purchases from non-assesseees as well as unregistered dealers and has taken credit of ITC, on the strength of bogus invoices issued by those dealers/vendors, which works out to the tune of Rs. 3,73,69,691/-. It is further submitted that the petitioner has not discharged its obligation, as per Section 17 read with Section 19(1) of the VAT Act. Therefore, show cause notice was issued and after a lapse of five months, on 15.01.2012, the petitioner filed its reply and the further replies, dated 05.08.2012 and 10.10.2012, and the discussions, which were had on 10.01.2013, were for seeking extension of time and the writ petitioner was not given effective reply with documentary evidence. Hence, the

Department, having waited for nearly five months and in the absence of any documentary evidence produced by the petitioner in support of its claim, has passed the order of assessment.

11. In the counter affidavit, in paragraph 8, it is stated that, from the grounds raised by the petitioner (in the writ affidavit), it is understood that out of Rs. 3,73,69,691/- the petitioner has produced evidence for Rs. 2,60,92,645/- only and in respect of the remaining turnover the petitioner has not produced any documentary evidence. Therefore, it is submitted that the onus is on the petitioner to prove its claim, in terms of Section 17 of the VAT Act. On the above grounds, the learned Additional Government Pleader seeks to sustain the impugned order of assessment.

12. The petitioner has filed a reply affidavit, to the counter affidavit filed by the respondent, denying the allegation that the vendors of the petitioner are unregistered dealers and stating that all local vendors are registered dealers and one of the vendors, whom the respondent alleges to be a unregistered dealer is Whirlpool India and the departmental web-page itself indicates that Whirlpool India is a registered dealer and their Registration Certificate is valid. Therefore, it is stated that the impugned proceedings are outcome of total non-application of mind. The request made by the petitioner seeking the assistance of the Department to provide reconciliation for the balance figure has been reiterated in the reply affidavit. Further, it is stated that the confirmation certificates given by the vendors confirming payment of tax have been produced before the authority along with their reply dated 10.10.2012, which have not been taken into consideration.

13. I have heard the submissions made by the learned counsel for both sides and perused the materials available on record.

14. The preliminary objection, raised by the learned Additional Government Pleader appearing for the respondent, is with regard to the maintainability of the writ petition. It is his further contention that under Section 51 of the Act, the petitioner has got an effective alternative remedy of appeal and without exhausting the same, the petitioner cannot maintain the writ petition. But, on the other hand, the petitioner contended that the impugned order of assessment is an outcome of total non-application of mind, failure to afford reasonable and effective opportunity to the petitioner and refusing to accede to the request made by the petitioner for assistance from the Department for reconciliation/ verification of the vendors' details/tax payment. That the confirmation letters given by the vendors showing payment of tax has been totally ignored and the contention that no documents were produced by the petitioner is a wholly untenable claim and a perverse observation. Further more, the impugned order of assessment is a non-speaking order. That apart, other factual and legal contentions have been raised.

15. It is the settled legal principle that, in all cases, where an alternate remedy is

provided for, would not automatically oust the jurisdiction of this Court, under Article 226 of the Constitution of India. Each case has to be decided on facts and there can be no straight jacket formula. On a perusal of the records placed before this Court, it is seen that the notice, dated 20.07.2012, was issued solely on the premise that the petitioners' vendors either have not paid taxes or they are non-assesses or unregistered dealers. As noticed above, the allegations made in the show cause notice has been categorized under four heads, namely, Revenue mismatch, seller return not filed, purchases from non-assessee dealers and purchases from unregistered dealers.

16. The petitioner in its reply, dated 10.10.2012, has explained that considering the quantum of transaction effected, it has taken considerable effort to identify the transaction, in its records, and the petitioner is not able to reconcile the disputed amount, as contained in the notice, and requested for exact details of the transactions, in relation to which the mismatch has been alleged, so as to enable it to provide satisfactory response. Despite such a stand, the ledger confirmation received from the parties (vendors) were furnished with the request to take them on record.

17. Further, it was pointed out that the petitioner has claimed ITC based on valid tax invoice issued by the seller and it is not on account of any default on their part that the ITC has been proposed to be reversed. Therefore, considering the confirmations received from its business partners, a request was made to the respondent to go through the details and advise the petitioner about the further course, by enclosing the copy of such confirmation letters received from various organizations, such as, M/s. Videocon, M/s. Carrier, M/s. Fugi Film, M/s. Hindustan Lever Limited, M/s. Preethi Kitchen Appliances Pvt. Ltd., M/s. Premier Elmech Systems Pvt. Ltd., M/s. Sharp Business Systems India Ltd., M/s. Symphony Ltd., M/s. Karbon Mobiles, M/s. Optimimus Infracom Limited, etc., Subsequently, another representation, dated 15.01.2013, was sent by the petitioner, reiterating its earlier stand, requesting for details regarding the mismatch among other things. Even thereafter, the copies of the tax invoices issued by M/s. Sony India Pvt. Ltd., M/s. PE Electronics, M/s. Cyberstar Infocom (P) Ltd., M/s. Whirlpool India Limited and the certificate of registration under the VAT Act of M/s. Sony India Ltd., and website information of registration of Whirlpool India Limited were produced. In spite of all these communications and documents, the respondent, in the impugned proceedings, has stated that the objections filed by the petitioner were examined and held that the petitioner has not filed any documentary evidence in support of their contention and in the absence of any documents, the objections could not be verified and therefore, the objections filed by the petitioner are overruled and the proposal in the notice, dated 20.07.2012, is confirmed.

18. Thus, it is evidently clear that the respondent failed to apply his mind to the submissions made by the petitioner and the documents produced. The impugned order, apart from being a non-speaking order, is vitiated on account of non-

application of mind and an order devoid of reasons. In such circumstances, the petitioner need not be compelled to avail the alternate remedy under the Act. Hence, the preliminary objection raised by the learned Additional Government Pleader with regard to maintainability is rejected.

19. While deciding the preliminary objection, in the preceding paragraphs, the facts have been referred to and the objections/representations submitted by the petitioner have been adverted to. It is rather surprising to note that, as to how some of the dealers, who are stated to be unregistered dealers in the impugned order, are infact registered dealers, holding valid registration. In respect of the same, there is no explanation in the counter affidavit. Therefore, there is a fundamental error committed by the respondent, even at the stage of issuance of the show cause notice. This inherent defect was not reconciled inspite of the petitioner pointing out such glaring deficiencies. This amounts of abdication of the powers vested with the assessing authority and undoubtedly, arbitrary.

20. In the counter affidavit, in paragraph 8, the respondent admits that the petitioner has produced verification vouchers/evidence for payment of tax to the tune of Rs. 2,60,92,645/- as against the alleged amount of Rs. 3,73,69,691/-. If that be so, it is not known as to why the Assessing Officer has failed to take note of the evidence produced and give credit to the same, while finalizing the assessment. Having accepted that the documents were received from the petitioner, the respondent has made a false statement in the assessment order stating that the petitioner/dealer has not produced any document. Therefore, the assessment order is arbitrary and stands vitiated.

21. Further, it is to be pointed out that the show cause notice itself is vague. Be that as it may, the petitioner, while submitting its reply, has stated that the petitioner is ready to produce the necessary verification certificates from its vendors, though there is no such statutory requirement. In respect of matters, where they had no access to the vendors' accounts they sought assistance of the respondent. This request, which appears to be a reasonable request, was not considered by the respondent.

22. In the case of Althaf Shoes (Pvt.) Ltd., cited supra, the petitioner was a dealer and exporter of finished leather and other products, who claimed refund of ITC under Section 18(2) of the VAT Act in respect of the exports made. Though the refund was granted, subsequently notice was issued seeking to withdraw the relief on the ground that its dealer had not reported the sales turnover and remitted tax and an order was passed, withdrawing the relief granted and levying penalty. While considering the said case, it was held that the circular issued by the Commissioner clearly states that so long as the vendor is found to be a registered dealer on the files of the Revenue, the claim of the assessee for refund could not be rejected nor delayed. Revenue in the said case did not deny, as a matter of fact, that the assessee's vendors are all registered dealers on the files of the Revenue and the assessee had also given the TIN number of these vendors. When such particulars are available, it is for the Revenue to take

necessary action against the vendors, who had not remitted tax collected by them to the State. Without taking recourse to that, the Revenue could not deny the claim of the assessee. Going by Rule 10(2) of TN Vat Rules read along with section 19(1) of the TN Vat Act, it is clear that so long as the purchasing dealer has complied with the requirements as given under Rule 10(2), the claim of the purchasing dealer cannot, by any length of reasoning, be denied by the Revenue. The mere fact that the Revenue had not made an assessment on the assessee's vendor, per se, cannot stand in the way of the assessing officer considering the claim of the assessee under section 19 of the Tamil Nadu Value Added Tax Act. A reading of the circular issued by Commissioner along with the provisions of the Act makes it clear that there is nothing repugnant in the said circular issued by the Commissioner as a head of the Department as regards the provisions of the Act on input-tax credit claim. Holding so, allowed the writ petition.

23. In the case of Sri Vinayaka Agencies, cited supra, the petitioner was dealer in lubricants, purchasing lubricants from a registered dealer. On inspection, it was found that the vendor/dealer had not filed monthly returns nor paid tax to the Department. Though the petitioner had paid tax to the selling dealer, revision notice was issued proposing that the ITC should be reversed on the failure of the selling dealer in paying the tax. Allowing the said writ petition, it was held that at the time of filing the self-assessment return under Section 22(2), the petitioner-dealer had followed Rule 10(2) of the Tamil Nadu Value Added Tax Rules, 2007, and therefore, could not be said to have wrongly availed of input tax credit wrongly. Section 19(1) states that input-tax credit can be claimed by a registered dealer, if he establishes that the tax due on such purchase has been paid by him in the manner prescribed and that was accepted at the time when the self-assessment was made. The pre-revision notices and the orders clearly stated that the petitioner-dealer had paid the tax to the selling dealer. If that be the case, it was held that the petitioner's case therein squarely fell under the proviso to Section 19(1) of the Act. Further, it was another matter that the selling dealer had not paid the collected tax. The liability had to be fastened on the selling dealer and not on the petitioner-dealer which had shown proof of payment of tax on purchases made. The orders were thus set-aside.

24. This Court is of the view that the above referred to decisions squarely cover the case on hand. The only conclusion that could be arrived is the ITC availed by the petitioner could not have been proposed to be reversed or reversed on the grounds stated by the respondent, i.e., the selling dealer has not filed returns or not paid taxes or they were unregistered dealers or their registrations were retrospectively cancelled.

25. As noticed above, the exercise of the jurisdiction by the respondent itself is ex-facie arbitrary and the proceedings are not only vitiated by serious procedural infirmities, but are arbitrary and unreasonable and without jurisdiction and held to be illegal. Therefore, the writ petition is allowed and the impugned order, dated 25.02.2013, is hereby set-aside. No costs. Consequently, the connected

MPs are closed.