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In the Madras High Court

Case No : Writ Petition No. 7094 of 2013 and M.P. No. 1 of 2013

KSB Pumps Limited	APPELLANT
Vs	
Deputy Commissioner (CT) (FAC), Fast Track Assessment Circle-II and Another	RESPONDENT

Date of Decision : 08-04-2013

Acts Referred:

Citation : (2014) 68 VST 244

Hon'ble Judges : V. Dhanapalan, J

Bench : Single Bench

Judgement

V. Dhanapalan, J.—By consent of the learned counsel on either side, the writ petition itself is taken up for final disposal. Heard Mr. N.

Sriprakash learned counsel appearing for the petitioner and Mr. Manoharan Sundaram, learned Government Advocate appearing for the

respondents.

2. A challenge has been made to an order passed by the respondents u/s 27 of the Tamil Nadu Value Added Tax Act, 2006 confirming the

proposal with a partial modification and seeking to quash to the same in so far as it relates to the payment of Rs. 27,41,385.

3. Short facts pleaded by the petitioner are as follows:

(a) By an order dated May 13, 2011, the original assessment of the petitioner-company for the assessment year 2007-08 was completed u/s

22(3) of the Tamil Nadu Value Added Tax Act, 2006, hereinafter referred to as ""the TNVAT Act"". Subsequently, by notice dated August 5,

2011, the first respondent proposed to disallow the input-tax credit (for short, ""the ITC"") availed of by the petitioner during the months of April, May and June, 2007 to an extent of Rs. 27,41,385. The notice also contained certain other adverse proposals, which are not disputed by the

petitioner in the present writ petition.

(b) To the above notice, the petitioner submitted objections, vide letter dated August 24, 2011. By an order dated October 7, 2011, the first

respondent confirmed the proposal to treat the sum of Rs. 27,41,385 as ineligible credit and also issued a notice of assessment and demand in

form O for that amount.

(c) Aggrieved by the said order dated October 7, 2011, the petitioner filed first appeal before the second respondent, which was numbered as

A.P. No. 9 of 2011 and it was taken up for final hearing on December 11, 2012. The only dispute in the appeal related to the reversal of ITC of

Rs. 27,41,385 ordered by the first respondent. Before filing the appeal, the petitioner reversed the ITC amount of Rs. 27,41,385 while filing their

monthly returns for the month of October 2011, filed on November 19, 2011. The said reversal was undertaken by the petitioner from out of the

total ITC, which had accrued and had been accumulated under the TNVAT Act. That reversal was undertaken to comply with the requirement of

the second proviso to section 52 of the TNVAT Act. Only after taking note of the same, the appeal itself was duly numbered and taken up for final

hearing on December 11, 2012.

(d) Before the appeal was numbered, the first appellate authority, vide proceedings, dated December 8, 2011 sought to ascertain the date of

service of the assessment order impugned before him. Thus, only after a thorough examination of the petitioner having satisfied all the pre-

conditions for filing an appeal, that the appeal itself was numbered. Accordingly, the appeal was heard on merits. The Departmental Representative

appearing before the second respondent did not question or doubt the maintainability of the appeal and they submitted that the appeal itself can be

allowed, subject to the condition that the tax was in fact paid by the seller, which was to be ensured by the first respondent. The second

respondent, by the impugned order, dismissed the appeal as not maintainable. The said impugned order has been challenged on the ground that the

second respondent had violated the principles of natural justice when it had, instead of taking up the appeal on merits, dismissed the appeal on

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maintainability, without hearing the petitioner at all.

4. The second respondent, in his written instructions addressed to the Special Government Pleader (Taxes) has submitted that consequent to the

filing of this writ petition by the petitioner against the order passed by the Joint Commissioner (CT), Appeals, Coimbatore, in A.P. No. 9 of 2011

dated December 21, 2012, remarks have been called for the passing of a non-maintainability order after admitting the appeal u/s 52 of the

TNVAT Act. The written instruction referred to above reads as under:

In this connection, I submit that the appeal petition filed by the appellants M/s. K.S.B. Pumps against an order passed by the assessing officer in

the proceedings No. TIN/3390202737/2007-2008 dated October 7, 2011 has been admitted in the month of December 2011 by the erstwhile

Joint Commissioner (CT), Appeals, Coimbatore. The learned Joint Commissioner (CT), Appeals has taken into account input-tax credit available

at the credit which is provisional u/s 19(16) of the TNVAT Act, 2006 with the disputed tax due to be payable by the appellants in connection with

the appeal filed.

The most possible reason for admission of the appeal petition is that this is the first case under the TNVAT Act, 2006 in respect of this dealer Tvl.

K.S.B. Pumps and also the first case where instead of paying 20 per cent disputed tax separately, adjusted with ITC which is also in dispute.

Because of this reason, it has been clearly mentioned in the appeal order in para. 5 (sixth sentence) which reads as follows:

Though the appeal petition has been admitted inadvertently, before disposing the appeal petition, it is necessary to verify whether such appeal

eligible to be heard and orders passed at any point of time before passing any order.

With reference to the claim of the appellants in the writ petition that the appeal petition would have been returned demanding 25 per cent of the

disputed tax, it is submitted that the appellants filed the appeal petition only on the last day (i.e., 30th day of the receipt of the assessment order)

November 30, 2011. Had the appeal petition was returned as claimed by the appellants, any payment made would fall after the prescribed period

of 30 days which requires condonation of delay in payment of disputed tax. The appellants received original assessment order on November 1,

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2011 and the due date for filing appeal with disputed tax is November 30, 2011. The appellants filed the appeal petition only on the last day being

November 30, 2011. Thus at the later stage, the appeal petition cannot be returned to the appellants demanding to pay 25 per cent of the disputed

tax separately as the time has already barred by more than 30 days.

It is also submitted in respect of the Joint Commissioner (CT) Appeals, Coimbatore, this is the third case where the appeal has been filed in

respect of the assessment made under the TNVAT Act, 2006 for the year 2006-07. In respect of two cases pertaining to VAT period, being Tvl.

L.G. Balakrishnan Brothers, the appellants filed appeal petition and admitted in AP. 14/2010 and 8/2011 not at all required payment of disputed

tax as the assessment order resulted in NIL and excess of Rs. 33,80,908, respectively.

Further, when the dispute is itself, incorrect claim of input-tax credit, the same amount cannot be adjusted towards disputed tax payable against the

appeal.

Moreover there is also no provision under the TNVAT Act to adjust the disputed tax payable under the appeal provisions with that of the

provisional input-tax credit available on the hand as per the monthly returns for the month of October 2011.

The appellants also not filed a certificate of adjustment of tax towards two per cent of the disputed tax obtained from the concerned assessing

authority.

Further the incorrect adjustment of ITC towards disputed tax was also raised at the time of hearing the appeal for which the learned authorized

representative appearing for the appellants has stated that the provision of section 19(16) terming ITC as provisional is itself wrong.

In view of the above position, the appeal petition filed by the appellants TVL. K.S.B. Pumps was returned to the appellants by dismissing it as

non-maintainable.

5. On the background circumstances and pleadings, I have heard the learned counsel appearing for the parties and perused the material documents

made available on record.

6. It is seen that the assessing officer completed the original assessment in respect of the petitioner, for the assessment year 2007-2008, by an

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order dated May 13, 2011. However, by a notice dated August 5, 2011, the first respondent proposed to disallow the input-tax credit availed of

by the petitioner during the months of April, May and June, 2007 to an extent of Rs. 27,41,385. The petitioner submitted its explanation on August

24, 2011. But, by his order dated October 7, 2011, the first respondent confirmed the proposal and issued a notice of assessment and demand for

that amount. The petitioner went before the second respondent in appeal A.P. No. 9 of 2011. Though the second respondent heard the petitioner

on merits, by its order dated December 21, 2012, declined to hear the appeal on merits and dismissed the appeal in toto as not maintainable. The

reason for coming to such a conclusion, as stated by the second respondent in its order dated December 21, 2012, is that the appellants have not

fulfilled the condition specified under second proviso to section 52 of the TNVAT Act by paying 25 per cent of the disputed tax while filing the

appeal. Challenging such an order, the petitioner is before this court.

7. It is necessary to state here that before filing the appeal, the petitioner has reversed the ITC amount of Rs. 27,41,385 while filing their monthly

returns for the month of October 2011, filed on November 19, 2011. That reversal was undertaken by the petitioners from and out of the total

ITC which had accrued and accumulated under the Act. In fact, the appellant had enclosed copies of the monthly returns for the month of

October, 2011 along with the appeal petition. The most unfortunate thing happened in this case is that the appellate authority, instead of insisting

the petitioner to pay 25 per cent of the disputed tax as pre-condition for filing the appeal, accepting the copies of the monthly returns as a proof of

payment required for filing the appeal, had numbered the appeal. The reason for such an act on the part of the second respondent, as given by him

in his written instructions, is that this is the first case under the TNVAT Act, 2006 in respect of this dealer. Though at the first instance the second

respondent ought not to have numbered the appeal without payment of 25 per cent of the disputed tax, later, while passing orders on the appeal

dismissed it as not maintainable. The relevant portion of the order reads as follows:

5. I have carefully considered the arguments of both the sides and the connected records made available for perusal. Perusal of the appeal petition

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filed by the appellants revealed the fact that the appellants aggrieved against the order of the assessing officer filed an appeal before this forum on

November 30, 2011 being 30th day of the receipt of the assessment order. By this way they fulfilled the basic condition required for filing the

appeal as prescribed u/s 52 of the TNVA Act, 2006. The present appeal shall be entertained and taken for hearing only if the appellants fulfilled

the conditions prescribed as per second proviso to section 52 of the TNVAT Act, 2006. The present appeal shall be entertained and taken for

hearing only if the appellants fulfilled the conditions prescribed as per second proviso to section 52 of the TNVAT Act, 2006. As per second

proviso to section 52 of the TNVAT Act, 2006, the appellants are required to furnish proof of payment of tax admitted by the appellants to be

due and twenty-five per cent of the difference of the tax assessed by the assessing authority and the tax admitted by the appellants. Though the

appeal petition has been admitted inadvertently, before disposing the appeal petition, it is necessary to verify whether such appeal eligible to be

heard and orders passed at any point of time before passing any order. Perusal of the appeal petition revealed the fact that the appellants, instead

of paying 25 per cent of the disputed tax separately, they have filed a copy of the monthly returns pertaining to the month of October 2011 as a

proof of payment required for filing the appeal. In the copy of the returns filed, the appellants made a reversal of ITC to the extent of Rs.

28,03,891 which included the value of Rs. 27,41,385 being the disputed reversal of input-tax credit made in this appeal. The appellants made

reversal of input-tax credit out of the ITC carry forward relating to the month of September 2011 and the ITC accrued during the month of

October 2011. While doing so, the appellants have shown in the return that ITC accrued during the month of November 2011 has reduced from

Rs. 26,82,675 to Rs. 1,21,216 and also arrived corresponding turnover as Rs. 1,75,05,117. Thus the appellants instead of paying disputed tax

separately, reversed the disputed ITC and shown as proof of payment to the Department. Using the available ITC on hand, the appellants adjusted

the 25 per cent of the disputed tax payable in the appeal by reversing the entire disputed ITC. As such there is no provision u/s 52 of the TNVAT

Act, 2006 to take the available credit of ITC as a proof of payment towards 25 per cent of the disputed tax by making necessary reversal as

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specified in annexure III of form 1 returns filed under the TNVAT Act, 2006 for the month of October 2011. Thus the appellants have made

reversal of ITC as early as November 19, 2011 before filing the appeal petition (November 30, 2011) in this forum. Moreover, the input-tax

credit claimed by the appellants in the monthly returns filed is provisional as per section 19(16) of the TNVAT Act, 2006. Section 19(16) reads as

follows:

19. (16) The input-tax credit availed of by any registered dealer shall be only provisional and the assessing authority is empowered to revoke the

same if it appears to the assessing authority to be incorrect, incomplete or otherwise not in order.

6. Thus from the above it is very clear that the ITC claimed by the appellants in the monthly returns filed is provisional and the assessing authority

can revoke the same. Thus unless it is finalized by the assessing authority, ITC claimed provisional. In fact, in this case, the assessment has been

finalized on May 13, 2011 and certain ITC were shown as eligible carry forward for the year 2007-08. But this ITC along with ITC claimed

during the year 2008-09, 2009-10, 2010-11 and 2011-12 were all provisional and accordingly the ITC shown as carry forward for the month of

October 2011 to the extent of Rs. 70,25,732 is only provisional and cannot be put to use for adjustment towards any dues other than output tax

due as per the monthly returns. Thus adjusting this ITC carry forward of Rs. 70,25,732 towards actual due of Rs. 6,85,346 being 25 per cent of

Rs. 27,41,385 for entertaining the appeal is not correct as the ITC claimed is only provisional and not made final till date. This amounts to non-

payment of 25 per cent of the disputed tax while filing the appeal before this forum as required u/s 52 of the TNVAT Act, 2006. Thus it is crystal

clear that the appellants have not fulfilled the conditions specified in the second proviso to section 52 of the TNVAT Act, 2006. Thus the eligibility

of filing the appeal before this forum is not available for the appellants and hence, in view of the above facts, I decline to hear this appeal on merits

and dismiss this appeal petition in toto as non-maintainable.

8. It would be appropriate here to look into the relevant proviso to section 52 of the TNVAT Act. Second proviso to section 52 reads as under:

52. Appeal to Appellate Joint Commissioner.--. . .

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Provided further that in the case of an order u/s 22, section 24, section 26 or subsections (1), (2), (3) and (4) of section 27, section 28, or section

29, no appeal shall be entertained under this sub-section unless it is accompanied by satisfactory proof of the payment of the tax admitted by the

appellant to be due or of such installments thereof as might have become payable, as the case may be and twenty-five per cent of the difference of

the tax assessed by the assessing authority and the tax admitted by the appellant.

9. Thus, it is clear from the above proviso that, no appeal can be entertained unless it is accompanied by satisfactory proof of the payment of the

tax admitted by the appellant to be due or of such installments thereof as might have become payable, as the case may be and twenty-five per cent

of the difference of the tax assessed by the assessing authority and the tax admitted by the appellant. Admittedly, such payment of 25 per cent has

not been made by the petitioner while filing the appeal. Though it is claimed by the petitioner that it had reversed the I.T.C. as early as on

November 19, 2011 itself, while the appeal was filed only on November 30, 2011, it is seen from the provisions to the TNVAT Act that the input-

tax credit claimed by the petitioner in the monthly returns is only provisional and that the assessing authority is empowered to revoke the same if it

appears to him to be incorrect or otherwise not in order. Section 19 of the TNVAT Act deals with input-tax credit. Sub-section (16) to section 19

of the Act reads as follows:

19. (16) The input-tax credit availed by any registered dealer shall be only provisional and the assessing authority is empowered to revoke the

same if it appears to the assessing authority to be incorrect, incomplete or otherwise not in order.

10. On a combined reading of the above two provisions makes it clear that no person shall be entitled to have the appeal numbered without

meeting out the statutory requirement of depositing 25 per cent of the disputed tax amount. The stand of the petitioner that it has revised the

disputed amount from its I.T.C. and this may be treated as payment of the disputed amount of tax cannot be accepted by any stretch of

imagination as the provisions in the TNVAT Act categorically provides that the input-tax credit availed of by any registered dealer is only

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provisional and that the assessing authority is empowered to revoke the same if it appears to him to be incorrect or otherwise not in order. Thus,

the decision rendered by the appellate authority in returning the appeal as not maintainable cannot be found fault with.

11. At this juncture, Mr. N. Sriprakash, learned counsel appearing for the petitioner looking into the legal position, fairly submitted that the

petitioner may be permitted to pay 25 per cent of the disputed tax so that the appeal may be disposed of on merits and this court may pass

appropriate orders to that effect. In my considered opinion, the plea of the learned counsel appearing for the petitioner merits acceptance because,

the mistake on the part of the petitioner in not paying the 25 per cent of the disputed tax while filing the appeal cannot only be attributed to the

petitioner. The second respondent is equally responsible for having allowed such a mistake to be crept in. The appellate authority ought not to have

numbered the appeal when it is presented without the proof of payment of 25 per cent of the disputed tax. Though the second respondent had

corrected its earlier mistake of numbering the appeal later by dismissing the appeal as not maintainable, as far as the petitioner is concerned it had

lost an opportunity of putting forth its contentions on the merits of the matter. Accordingly, this writ petition stands disposed of with a direction to

the petitioner to re-submit the appeal papers along with payment of 25 per cent of the disputed tax, within a period of two weeks from the date of

receipt of a copy of this order. On such filing of the appeal by the petitioner, the appellate authority shall take up the matter and proceed to dispose

of the same on merits and in accordance with law. Connected miscellaneous petition is closed. There shall be no orders as to the costs.

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