(2015) 03 MAD CK 0599

In the Madras High Court

Case No : Writ Petition (MD) No. 3697 of 2015 and M.P. (MD) No. 1 of 2015

Patel Wood Works APPELLANT

Vs

The Assistant Commissioner (CT) RESPONDENT

Date of Decision : 31-03-2015

Acts Referred:
Tamil Nadu Value Added Tax Act, 2006 — Section 17, 18(2), 19, 19(1), 22(2)

Citation : (2015) 03 MAD CK 0599

Hon'ble Judges : B. Rajendran, J

Bench : Single Bench

Advocate : R.D. Ganesan, for the Appellant; A. Muthukaruppan, Addl. Government Pleader, Advocates for the Respondent

Final Decision : Allowed

Judgement

B. Rajendran, J—The petitioner has sought for a Writ of Certiorarified Mandamus to call for the records of the respondent in his proceedings in TIN No. 33203440717/2010-11 and quash the order dated 25.02.2015 and further direct the respondent to consider the claim of ITC as per Section 19(1) of the TNVAT Act, in terms of the decisions of this Hon''ble Court reported in 50 VST 179, 60 VST 283 and also in W.P. No. 9265 of 2013 dated 06.11.2014.

2. The learned counsel for the petitioner challenges the impugned order mainly on two grounds:

"i) The reasons mentioned in the show-cause notice are not mentioned in the final order and the authority had arrived at a conclusion giving a totally different version for the order. Had this been taken in the show-cause notice, the petitioner would have given his objection. Thus, it violates the principles of natural justice.

ii) The authority has failed to take into consideration that the purchaser cannot be penalised even for the non-payment of tax by the seller."

3. According to the petitioner, all it requires is that the purchaser has to produce the way-bill and that has been done as per Rule 10 of TNVAT Act. Subsequently, he has also produced annexure 2, which is the payment of seller and that the liability of the petitioner is already over. That fact is not at all considered in the final order. It is against the principles laid down in the the decisions of this Hon''ble Court reported in 50 VST 179, 60 VST 283, hence it is palpably a wrong order.

4. The learned counsel appearing for the petitioner would also contend that the authority failed to take into consideration that the petitioner/purchaser as well as the seller has got officially authorized godowns in the Tuticorin Port yard itself and the purchase and sale culminated in the Tuticorin Port yard itself and hence, there is no question of production of way bill or Transfer bill. Without taking into consideration the vital aspect that sale is effected in one and the same place, the authority has issued impugned order. Further, according to him, no opportunity was given to the petitioner to explain the fact. Therefore, the impugned order is liable to be set aside.

5. The respondent, in his counter affidavit, mainly contend that in fact, the pre-revision notice was given on 12.01.2015 and on 02.02.2015, the petitioner appeared before the respondent and also given his reply along with some documents. Once again, notice was given on 30.01.2015 for personal hearing. On that day of personal hearing, the petitioner has not filed his objections and thereafter, final order was passed on 25.02.2015. Hence, the impugned order is passed in accordance with law. In the impugned order itself, they have clearly stated about the non-production of way-bill, even though the sale process was performed in the yard itself.

6. Heard both the parties.

7. The only point which has to be necessarily considered by this Court is in respect of giving sufficient reasons in the show-cause notice, by the authority.

8. In the show-cause notice, they have not mentioned about the production of way-bill, whereas in the final order, rejection is made on the ground that certain way-bills were not produced. As rightly pointed out by the learned counsel for the petitioner, the reason given in the show-cause notice are not the same as given in the final order and it is totally different. It is against the principles of natural justice. Consequently, even assuming for a moment that if at all the petitioner has produced the transport bills and noted lorry registration numbers in Form-8, it would not definitely show the petitioner is acting against the law, when admittedly the sale was performed in the Tuticorin Port yard itself. The material imported is woods and the sale and purchase prices have been transacted through bank transactions. Therefore, the question of way-bill and lorry registration numbers does not arise, especially in view the fact that the petitioner as well as the seller both of them have got officially registered godowns in the Tuticorin Port Yard, for which details, documents have been

produced to the authority concerned. This vital fact has not at all been considered by the authority. More over, it is an admitted fact that what has not been asked in the show-cause notice cannot be a ground for passing a final order. The authorities have failed to do so.

9. Secondly, as per the decisions of this Court reported in Althaf Shoes (P) Ltd. Vs. Assistant Commissioner (CT), Valluvarkottam Assessment Circle, Chennai-6, (2012) 50 VST 179 and Sri Vinayaga Agencies Vs. Assistant Commissioner (CT) and Another, (2013) 60 VST 283 , one thing is clear that it is for the purchaser to produce the way-bill. In this case, after the show-cause notice, the petitioner also produced annexure-2 and thereafter, tax has been paid by the selling agent. When that has been produced as early as on 22.01.2015 along with reply, no proper explanation has been given in the order and further opportunity has not been given.

10. In this context, it is relevant to extract the following portions in Althaf Shoes (P) Ltd. Vs. Assistant Commissioner (CT), Valluvarkottam Assessment Circle, Chennai-6, (2012) 50 VST 179 .

"Going by the above said rule and read along with Section 19(1) of the Tamil Nadu Value Added Tax 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 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. Going by Section 17 of the Tamil Nadu Value Added Tax Act that the burden on the purchasing dealer rest to the extent of showing that he is not liable to tax under the Act and read in the context of the fact that the assessee had given his seller''s TIN number and had also produced the invoices evidencing the purchase of materials of payment of tax, I do not think that the Revenue can successfully canvass its claim that the assessee is not entitled to have the refund.

As already pointed out, 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. As already pointed out, the Revenue does 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, I do not think that the Revenue could deny the claim of the assessee.

The respondent had filed counter contending that the order passed by the respondent is amenable to appeal remedy, hence, writ may not be issued. I do not think that the mere presence of an appeal remedy is a thumb rule for rejecting the claim in matters of this nature where the facts are not in any manner controverted by the Revenue and that the assessee had complied with the requirements as given under Rule 10(2) of the Tamil Nadu Value Added Tax Rules."

11. It is also relevant to extract the following portions in Sri Vinayaga Agencies Vs. Assistant Commissioner (CT) and Another, (2013) 60 VST 283 .

"The provision of Section 19(1) clearly states that input-tax credit can be claimed by the registered dealer, provided if the registered dealer establishes that the tax due on such purchase has been paid by him in the manner prescribed. The pre-revision notices and the orders clearly stated in paragraph 3 that the petitioner herein had paid the tax to the selling dealer. If that be the case, the petitioner''s case squarely falls under the proviso to Section 19(1) of the TNVAT Act. That is availed of only by following rule 10(2). It is also not in dispute that the self-assessment has been made under Section 22(2) of the TNVAT Act and therefore the petitioner was justified in claiming the input-tax credit.

It is another matter that the selling dealer has not paid the collected tax and that liability has to be fastened on the selling dealer. It cannot be mulcted on the petitioner-purchasing dealer, which had shown proof of payment of tax on purchases made.

Sub-section (16) of Section 19 states that the input-tax credit availed of is provisional. It, however, does not empower the authority to revoke the input-tax credit availed of on a plea that the selling dealer has not paid the tax. It only relates to incorrect, incomplete or improper claim of input-tax credit by the dealer. It is not so in these cases. In the present case, the petitioner-dealer, admittedly, had paid the tax to the selling dealer and claimed input-tax credit and that was accepted at the time when the self-assessment was made. Even the pre-revision notices and the orders under challenge fairly state that the petitioner-dealer had paid tax to the dealer, is therefore, for the Department to proceed against the selling dealer for recovery of tax in the manner known to law. The provision under which the present action has been initiated, namely invoking sub-section (16) of Section 19, does not appear to be correct on the admitted facts as above. All the revision orders revising the input-tax credit on the admitted case of tax having been paid to the selling dealer, therefore, are found to be totally incorrect, erroneous and contrary to the provisions of the TNVAT Act and Rules. As a result, all the orders are liable to be set aside.

For all the above reasons, the impugned orders are set aside and the writ petitions are allowed. Consequently, M.P. No. 1 of 2013 is closed. No costs."

12. A learned Single Judge of this Court also in a writ petition in W.P. No. 9265 of 2013, has held as follows:

"22. In the case of Althaf Shoes (Pvt) Limited, 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 turn over 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 assessees 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 the TNVAT rules read along with Section 19(1) of the Tamil Nadu Value Added Tax 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 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. The Section 19(1) states that input-tax credit can be claimed by the registered dealer, if the registered dealer 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 herein had paid the tax to the selling dealer. If that be the case, the petitioner''s case 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 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."

13. Therefore, the above said propositions of law will clearly indicate that the authority should have taken into consideration the tax paid by the seller and as stated supra, even as per the Rule 10(2) of the TNVAT Act, there is no violation. Since both the purchaser and the seller have godowns in Tuticorin Port yard itself, the question of producing way-bill and noting of lorry registration numbers does not arise at all.

14. In view of the decisions of this Court referred to above and since the authority has not even followed the procedures under the TNVAT Act, the impugned order is liable to be set aside.

15. In the result, the writ petition is allowed and the impugned proceedings of the respondent in TIN No. 33203440717/2010-11, dated 25.02.2015 is set aside, with liberty to the authority to issue fresh notice in accordance with law. In that case, the petitioner will also be given an opportunity. No costs. Consequently, connected M.P.(MD). No. 1 of 2015 is also closed.

