

(2009) 10 MAD CK 0078

In the Madras High Court

Case No : Writ Petition No's. 10736 to 10739, 17313 to 17316 and 20185 of 2009 and M.P. No's. 1, 1, 1, 1 and 1 of 2009

Sara Leathers

APPELLANT

Vs

The Commercial Tax Officer

RESPONDENT

Date of Decision : 19-10-2009

Acts Referred:

Central Sales Tax Act, 1956 — Section 5, 5(1), 5(3)

Tamil Nadu General Sales Tax Act, 1959 — Section 22(2)

Tamil Nadu Value Added Tax Act, 2006 — Section 18, 18(1), 18(2), 19, 40(2)

Citation : (2010) 30 VST 581

Hon'ble Judges : Chitra Venkataraman, J

Bench : Single Bench

Advocate : V. Sundareswaran, for the Appellant; R. Mahadevan, AGP, for the Respondent

Judgement

Chitra Venkataraman, J.—The common issue in these writ petitions relates to disallowance of the claim of the petitioner in respect of refund

of tax paid by him at 12.5% as against 4% chargeable thereon. The said claim is made by virtue of Section 18(2) of the Tamil Nadu Value Added

Tax Act, 2006 (hereinafter referred to as "the Act"). Apart from this common issue, W.P. Nos. 10736 to 10739 of 2009 relates to a question

regarding input tax credit on the ""paper board"" used by the petitioner as insole for the shoes exported. The assessment in W.P. Nos. 10736 to

10739 and 17313 to 17316 of 2009 relate to the period January, 2007 to June, 2007 and the assessment with respect to W.P. No. 20185 of

2009 relates to July, 2007 to September, 2007.

2. The contention of the petitioner herein is that the petitioner is a registered dealer carrying on business in leather goods and exporting the same.

The petitioner is an assessee on the file of the respondent under the provisions of the Act. The petitioner states that in respect of the assessment

years 2006-07, 2007-08 and 2008-09, while issuing the refund voucher in Form P, the respondent restricted the claim of the petitioner at 50% of

the total refund without proper adjudication and calling for the records. The petitioner's contention is that the tax paid by the petitioner in respect

of raw materials were appropriated towards penalty u/s 42 of the Act, which is under challenge in W.P. Nos. 10736 to 10739 of 2009. The

petitioner submits that having accepted the assessment with the proper rate of tax in respect of capital goods purchased and used as input, the

respondent should not have restricted the claim at 4%; that the difference available at 8.5% has to be refunded to the petitioner and the respondent

has gone against the provisions of the Act and adjusted the amount towards penalty in the subsequent year. In this regard, learned Counsel for the

petitioner places reliance on Section 18 of the Act particularly to Section 18(2).

3. On notice, the respondent has filed counter before this Court, wherein the respondent has taken a stand that in respect of the tax paid at 12.5%,

when the petitioner had paid the tax at the rate exceeding the rate permitted under the Act, refund is a matter between the purchaser and the seller

and on that score, the petitioner cannot claim refund of the entire amount. It is admitted in the counter that the petitioner had been assessed at 4%

as applicable to sale of capital goods and hence restricted the claim of refund to the petitioner to the balance of tax payable, paid over and above

4%. The respondent further referred to Section 40(2)(i) of the Act, which is analogous to Section 22(2) of the Tamil Nadu General Sales Tax Act,

1959 and submitted that going by the provisions of Section 17(2) of the Act, the burden is on the petitioner to prove the claim and the petitioner

had not discharged the burden as regards the ITC. Consequently, the petitions have to be rejected.

4. I do not agree with the stand taken by the respondent herein. The provisions of Section 18, particularly 18(1) and (2) of the Act reads as

follows:

Section 18. Zero rating - (1) The following shall be zero rate sale for the purpose of this Act, and shall be eligible for input tax credit or refund of

the amount of the tax paid on the purchase of goods specified in the First

Schedule including capital goods, by a registered dealer in the State,
subject to such restrictions and conditions as may be prescribed:

Section 18(1)(i) A sale as specified under Sub-section (1) or (3) of Section 5 of the Central Sales Tax Act, 1956; (Central Act 74 of 1956)

Section 18(1)(ii) Sale of goods to any registered dealer located in Special Economic Zone in the State, if such registered dealer has been

authorised to establish such units by the authority specified by the Central Government in this behalf; and

Section 18(1)(iii) Sale of goods to International Organisations listed out in the Fifth Schedule.

Section 18(2) The dealer, who makes zero rate sale, shall be entitled to refund of input tax or payable by him on purchase of those goods, which

are exported as such or consumed or used in the manufacture of other goods that are exported as specified in Sub-section (1), subject to such

restrictions and conditions as may be prescribed.

5. Going by the said provisions of the Act, while Section 18(1) gives the details about the zero rating under certain stated circumstances, Sub-

section 2 deals with the right of a dealer, who makes a zero rating sale, for a refund of the input tax paid or payable by him on purchase of those

goods which are exported as such, or consumed or used in the manufacture of exported goods as specified under Sub-section (1). Sub-section (3)

provides for a default clause that where the dealer has not adjusted the input tax credit or made a claim for refund within a period of 180 days from

the date of accrual of such ITC, the same shall lapse to the Government.

6. Given the fact that the choice of an adjustment of the input tax credit is given to the assessee, the question of a suo motu adjustment by the

Revenue, hence, does not arise, more so, when an assessee seeks a refund of the ITC as provided for under Sub-section (2). It is admitted that

the petitioner had in fact paid the tax at 12.5% which could not be refuted by the seller. If there had been a charging of tax by the seller when

effected the sale to the purchaser at the rate over and above what is payable under the Act, all that the Revenue could do is to proceed against the

seller of the goods for charging the purchaser at a rate not legally sustainable. Equally so, unlike in the earlier provisions of the Repealed Act, once

the purchaser proves as regards the actual payment of tax at a rate which is not

as per the provisions of the Act, the question of proving the passing on of the liability does not arise. The provisions contained u/s 19 of the Act relating to input tax credit, hence, herein assumes significance in considering the claim of refund u/s 18(2) of the Act. In the circumstances, going by the very provisions of Section 18(1) of the Act, given the fact that the sale by the petitioner is zero rated and that the petitioner is entitled to the benefit of Section 18(2) of the Act for the refund of the input tax paid on the purchase of goods under the stated circumstances, the petitioner's claim for refund of amount paid as per the assessment order has to be given in toto without any adjustment whatsoever.

7. Learned Additional Government Pleader submits that having regard to the wording in Section 18(2) "input tax paid, payable," it stands to reason that what has been remitted to the Government has to be returned back only to the remitter of the tax and in this case, the petitioner not being a person who had remitted the tax to the Government, the refund could not be ordered and hence he, supports the order of the authority concerned.

8. I do not agree with the contention of the learned Additional Government Pleader, who overlooks the fundamental fact of difference between the earlier Act and the present Act that when the ITC claim clearly shows that the purchaser, the petitioner herein, had paid the tax at 12.5%, the question of the seller coming forward before the authority concerned as regards the collection of tax or as to the proof on the passing of liability does not arise. Learned Additional Government Pleader contended that Section 18(2) does not have any restrictive words to mean that the dealer"" could refer only a purchaser to grant a refund. I reject this line of contention outright, as going by Section 18(2) of the Act, which is very emphatic in its wording, that the dealer referred to therein to claim a refund is one who had paid the tax on purchase of those goods that are exported and such consumed goods used in the manufacture of other goods which are exported and are specified under Sub-section (1). Hence, given the fact that the zero rating of tax is as per Section 18 of the Act and the same is only at the hands of a purchasing dealer of goods and not at the hands of the seller, who sells the capital goods, the acceptance of the stand of the Department would only amount to either ignoring Section 18 or cutting down the width of Section 18 of the Act, for that matter, even to

overlook Section 19 of the Act .

9. In the circumstances, I do not accept the submission of the learned Additional Government Pleader that the petitioner, who is a purchaser of the

capital goods, is not entitled to have the benefit of total refund of the amount. The provisions of Section 18(2) of the Act has to be given its full

thrust and consequently, I reject the plea of the learned Additional Government Pleader. In the circumstances, the claim of the petitioner as regards

the refund of tax without any reduction has to be accepted. Consequently, all the writ petitions stand allowed as far as this aspect is concerned.

10. However, with reference to Writ Petition Nos. 10736 to 10739 of 2009, the petitioner has raised yet another issue as regards the assessability

of paper board. The decision on this has to go only before the authorities constituted under the Act. Hence, while rejecting this prayer, considering

that the assessment in question related to the period April, 2007 to June, 2007, the petitioner is permitted to file revisions under the provisions of

the Act within a period of four weeks from today.

11. Accordingly, the impugned orders as regards refund of tax alone are set aside, W.P. Nos. 10736 to 10739 of 2009 are partly allowed and

W.P. Nos. 17313 to 17316 and 20185 of 2009 are allowed. No costs. Consequently, all the connected miscellaneous petitions are closed.