(2016) 04 MAD CK 0163

In the Madras High Court

Case No : Tax Case Revision No. 63 of 2015

Sha Kantilal Jayantilal APPELLANT

Vs

State of Tamil Nadu RESPONDENT

Date of Decision : 12-04-2016

Acts Referred:

Citation : (2016) 339 ELT 520

Hon'ble Judges : V. Ramasubramanian and T. Mathivanan, JJ.

Bench : Division Bench

Advocate : Shri V. Sundareswaran, Advocate, for the Petitioner; Shri A.N.R. Jayapratap, AGP (T), for the Respondent

Final Decision : Dismissed

Judgement

V. Ramasubramanian, J.—This Tax Case Revision is filed by the assessee under Section 60(1) of the Tamil Nadu Value Added Tax Act, 2006, questioning the correctness of the order of the Tamil Nadu Sales Tax Appellate Tribunal, confirming the orders of the Assessing Officer and the Appellate Authority, reversing the input tax credit.

2. We have heard Mr. V. Sundareswaran, learned counsel for the petitioner and Mr. A.N.R. Jayaprathap, learned Additional Government Pleader (Tax) for the respondent.

3. The petitioner is an importer and exporter of spices, crude drugs, kiran items and chemicals. During the assessment year 2007-08, the petitioner purchased DEPB (Duty Entitlement Pass Book) licence and availed input tax credit to the extent of Rs. 6,10,355/-. They were allowed deduction on account of consignment sales outside the State.

4. However, the petitioner was served with a notice by the Assistant Commissioner (Commercial Taxes) dated 7-8-2009, proposing to reverse input tax credit to the extent of Rs. 2,01,164/- on the ground that the input availed for the goods sold without Form ''C'' had to be reversed and that as per Section

19(4), the input tax credit had to be availed over and above 3%, on the transfer of goods to other State otherwise by way of sale. It was also proposed in the notice to reverse the ITC claim for the purchase of DEPB to the extent they were used for their own purposes.

5. The petitioner gave a reply to the notice contending that they had effected purchases within Tamil Nadu, outside Tamil Nadu and also from other countries and that the import purchase and Inter-State purchases were more than 90%. Insofar as the Inter-State consignment sales effected without Form ''C'' is concerned, the petitioner claimed that they related to imported goods, for which, they had not claimed input tax credit.

6. However, the Assessing Officer passed an order dated 18-9-2009. By the said order, the proposal to reverse the input tax credit in respect of the Inter-State consignment sales was dropped, accepting the reply filed by the petitioner. However, insofar as the input tax credit claimed on the purchase of DEPB licences are concerned, the Assessing Officer held that the petitioner had accepted the proposal and paid a sum of Rs. 5,44,815/-. Therefore, the Assessing Officer confirmed the proposal.

7. But, the petitioner filed a statutory appeal under Section 51 of the Tamil Nadu Value Added Tax Act, 2006, to the Appellate Deputy Commissioner contending that the input tax credit was utilized for the purpose of import of goods and that therefore it cannot be reversed. However, by an order dated 23-11-2010, the Appellate Deputy Commissioner dismissed the appeal, holding that under Section 19(2), input tax credit can be allowed only for resale within the State, manufacturing or processing in the State or in the course of Inter-State trade or commerce. Since the petitioner had purchased DEPB licence from local registered dealer and used it for their imported goods to reduce the customs duty, the Appellate Deputy Commissioner held that the credit already given was liable to be reversed.

8. Aggrieved by the order of the Appellate Deputy Commissioner, the petitioner filed a further appeal under Section 58 of the Act to the Tamil Nadu Sales Tax Appellate Tribunal, Chennai Bench. But, the Tribunal, by an order dated 30-4-2015 dismissed the appeal in T.A. No. 22 of 2011. It is against the said order that the petitioner has come up with the above revision.

9. As seen from the order of the Tribunal, the main question that arose for consideration was as to whether the reversal of input tax credit of Rs. 5,44,815/- on the purchase of DEPB licence used for payment of import customs duty was in order or not. The Tribunal pointed out that Clauses (i) to (vi) of sub-section (2) of Section 19 indicate the circumstances, under which, input tax credit could be allowed for the purchase of goods made within the State from a registered dealer. But, DEPB licence is an incentive scheme formulated by the Government of India for the benefit of exporters to neutralise the incidence of basic customs duty on import. Though these licences are also held to be goods, the purchase of

such goods are not covered by any of the Clauses of sub-section (2) of Section 18. Therefore, the Tribunal dismissed the appeal forcing the petitioner to come up with the above revision.

10. Since the revision to this Court is maintainable under Section 60(1) of the Act, only on the ground that the Appellate Tribunal had either decided erroneously or failed to decide any question of law, we have to see if the Tribunal has wrongly decided or failed to decide a question of law.

11. According to the petitioner, the scope of Section 19(2) has been wrongly interpreted by the Tribunal, without appreciating the definitions of the expression ''input'' and ''input tax'' given in sub-sections (23) and (24) of Section 2 of the Act and without appreciating the effect of the charging provision under Section 3(3). It is also the further contention of the petitioner that the categories mentioned in Clauses (i) to (vi) of sub-section (2) of Section 19 are only enumerative and not exhaustive.

12. In the light of the above, we are of the considered view that the following questions arise for our consideration :

(i) Can the Department deny the benefit of input tax credit for the duty paid by the petitioner on the purchase of DEPB licences, when such licences are considered to be "goods" within the meaning of Section 2(21) and the tax paid on the purchase of such licences are considered as "input tax" under Section 2(24) and also when the charging provisions in Section 3(3) clearly entitle a registered dealer to such a benefit?

(ii) Is the list mentioned in Clauses (i) to (vi) of sub-section (2) of Section 19 enumerative or exhaustive?

Question (i) :

13. Tamil Nadu Value Added Tax Act, 2006, is an Act to consolidate and amend the law relating to the levy of tax on the sale or purchase of goods in the State of Tamil Nadu. The Act speaks about various types of levies such as (a) levy of taxes on sale of goods; (b) levy of taxes on the right to use any goods; (c) levy of tax on transfer of goods involved in works contract; (d) levy of tax on food and drinks, bullion and jewellery; (e) levy of tax on sugarcane; and (f) levy of purchase tax.

14. Though a variety of levies are contemplated under the Act, the Act seeks to protect a registered dealer from double taxation. The Act seeks to give this protection in the form of what is known "input tax credit" under Section 19. Instead of extracting Section 19 in entirety, at the cost of few more pages, we would better summarise the scheme of Section 19, which provides for input tax credit, in simple terms, without technical jargons as follows :-

(i) Sub-section (1) of Section 19 entitles a registered dealer to input tax credit, of the amount of tax paid or payable under the Act, to the seller, on the purchases of taxable goods specified in the First Schedule, subject to the condition that the registered dealer establishes that the tax on such purchases had actually been paid by him in the manner prescribed.

(ii) Sub-section (2) stipulates that input tax credit should be allowed for the purchase of goods made within the State from a registered dealer, if such purchase was for any one of the 6 purposes indicated in Clauses (i) to (vi) of sub-section (2).

(iii) Sub-section (3) provides for input tax credit, in respect of purchases of capital goods, whenever they are used in the manufacture of taxable goods.

(iv) Sub-section (4) allows input tax credit on tax paid or payable in the State on the purchase of goods in excess of a prescribed percentage, if the purchases are intended either for transfer to a place outside the State otherwise than by way of sale or for use in the manufacture of other goods and transferred to a place outside the State otherwise than by way of sale.

(v) Sub-sections (5) and (6) stipulate four contingencies, under which, no input tax credit can be allowed. They are : (a) sale of goods exempted under Section 15; (b) goods brought into the State from outside the State; (c) purchase of goods sold as such or used in the manufacture of other goods and sold in the course of Inter-State Trade or Commerce; and (d) purchase of capital goods used exclusively in the manufacture of goods exempted under Section 15.

(vi) Sub-sections (7), (8), (9) and (10) of Section 19 list out the circumstances, under which, a registered dealer will not be entitled to input tax credit.

(vii) Sub-section (11) indicates the period, within which, a registered dealer should make a claim for input tax credit.

(viii) Sub-section (12) indicates the contingencies, when a credit availed on inputs would get reversed.

(ix) Sub-section (13) speaks about the denial of input tax credit to a registered dealer, who issues an invoice or bill or cash memo without actually entering into a transaction of sale, with a view to defraud the Government Revenue.

(x) Sub-section (14) provides for transfer of input tax credit, whenever the business of a registered dealer is transferred on account of change of ownership due to sale, merger or amalgamation etc.

(xi) Sub-section (15) speaks about the consequences of cancellation of the certificate of registration of the selling dealer.

(xii) Sub-section (16) speaks about the power of the assessing authority to revoke the input tax credit, under certain circumstances.

(xiii) Sub-section (17) deals with the contingencies, when the input tax credit determined by the assessing authority for a particular year exceeds the tax liability for that year.

(xiv) Sub-section (18) speaks about the carrying forward of the excess input tax credit to the next year.

(xv) Sub-section (19) deals with the reversal of input tax credit, whenever goods remain unsold at the time of closure of the business.

(xvi) Sub-section (20) deals with one more contingency, when the input tax credit can be reversed.

15. Therefore, it appears that Section 19 was conceived by the Legislature to be a complete Code in itself, as it speaks of (i) entitlement to tax credit (ii) the transactions on which, the entitlement would arise (iii) the persons, who are entitled to tax credit (iv) the transactions on which, there is no entitlement (v) persons, who are not entitled to tax credit (vi) the manner and the period, within which, a claim for credit is to be made (vii) the circumstances, under which, the credit availed could be reversed and the authority, who is competent to reverse the credit (viii) the circumstances, under which, transfer of input tax credit could be allowed (ix) the circumstances, under which, the credit could be carried over to the next year and so on and so forth.

16. From the scheme of Section 19(1), it appears that to become eligible for input tax credit, the following conditions should be satisfied by a person :

(i) he should be a registered dealer;

(ii) he must have paid or become obliged to pay a tax under this Act, to the seller on the purchase of taxable goods; and

(iii) such taxable goods, on the purchase of which, he paid or became liable to pay tax under the Act, are also specified in the First Schedule.

17. Keeping in mind the scheme of Section 19 as enumerated above, if we come back to the case on hand, it is seen that what the petitioner claims is an input tax credit on the amount of duty paid for the purchase of a DEPB licence. The claim of the petitioner is that a DEPB licence is also a "goods" within the meaning of the expression "goods" under Section 2(21), which reads as follows :-

"2(21) "goods" means all kinds of movable property (other than newspapers, actionable claims, stocks and shares and securities) and includes all materials, commodities and articles including the goods (as goods or in some other form) involved in the execution of works contract or those goods to be used in the fitting out, improvement or repair of movable property; and all growing crops, grass or things attached to, or forming part of the land which are agreed to be severed before sale or under the contract of sale;"

18. According to the petitioner, the DEPB licences purchased by him not only constitute goods within the purview of Section 2(21), but also constitute "input" within the meaning of the expression under Section 2(23) and constitute "input tax" within the meaning of Section 2(24). Sections 2(23) and 2(24) read as follows :-

"2(23) "input" means any goods including capital goods purchased by a dealer in the course of his business;"

"2(24) "input tax" means the tax paid or payable under this Act by a registered dealer to another registered dealer on the purchase of goods including capital goods in the course of his business;"

19. On the basis of the above definitions and on the basis of the charging Section namely Section 3(3), it is contended by the learned counsel for the petitioner that the duty paid on DEPB licences, are liable to be given credit to. Reliance is placed on the language of Section 3(3), which reads as follows :-

"3(3) The tax payable under sub-section (2) by a registered dealer shall be reduced, in the manner prescribed, to the extent of tax paid on his purchase of goods specified in Part-B or Part-C of the First Schedule, inside the State, to the registered dealer, who sold the goods to him."

20. In support of his contention that DEPB licences constitute goods within the meaning of the Act, the learned counsel for the petitioner relies upon the decision of the Supreme Court in Yasha Overseas v. Commissioner of Sales Tax 2008 (17) VST 182 (SC) = 2015 (322) E.L.T. 7 (S.C.).

21. We have carefully considered the above submissions.

22. Before considering the issue as to whether DEPB licences constitute "goods" within the meaning of Section 2(21) of TNVAT Act, 2006, it may be useful to look at the ratio decidendi of the decision of the Supreme Court in Yasha Overseas. The said decision arose under interesting circumstances. In H. Anraj v. The State of Tamil Nadu 1986 (1) SCC 414, the Supreme Court held that lottery tickets constituted "goods" within the meaning of the expression "goods" as given in the Tamil Nadu General Sales Tax Act, 1959 and the Bengal Finance (Sales Tax) Act, 1941.

23. After 10 years of the decision in H. Anraj, another question arose before the Supreme Court in Vikas Sales Corporation v. Commissioner of Commercial Taxes 1996 (4) SCC 433, as to whether a replenishment licence (REP licence) granted under the 1992-1997 Export-Import Policy could be taken to be goods under the Tamil Nadu, Karnataka and Kerala General Sales Tax Acts. After referring to the definition of the expression "goods" as given in Section 2(7) of the Sale of Goods Act, 1930, the definition of the expression "movable property" under the General Clauses Act and the definition of the expression "goods" under the Central as well as the State Sales Tax Laws, the Supreme Court held in Vikas Sales Corporation that REP licences are neither chose-in-actions nor actionable claims, but constituted goods that have an inherent value and also traded as such, independent of and unrelated to the goods that can be imported on their basis. Consequently, the Court held that REP licences were goods.

24. But, in Sunrise Associates v. Government of NCT of Delhi 2006 (5) SCC 603, a Constitution Bench of the Supreme Court overruled the decision in H. Anraj and

held that the sale of lottery ticket was not a sale of goods. When the Constitution Bench was considering the correctness of the decision in H. Anraj, with reference to the decision in Vikas Sales Corporation, an issue was raised by the State of Maharashtra as to whether DEPB licences could constitute goods attracting Sales Tax under the Bombay Sales Tax Act, 1959 or not. But, the Constitution Bench refused to go into the same.

25. Therefore, a question arose in Yasha Overseas as to whether the three-Judge Bench decision in Vikas Sales Corporation, [holding that the transfer/sale of an import licence called replenishment licence (REP licence) granted under the 1992-97 Exim Policy was exigible to sales tax] stood impliedly overruled by the Constitution Bench decision in Sunrise Associates wherein it was held that lottery tickets were actionable claims and were, therefore, excluded from the definition of "goods" under the Sales Tax Act.

26. After analysing in great detail, the decisions in H. Anraj, Vikas Sales Corporation and Sunrise Associates, the Supreme Court came to the conclusion in Yasha Overseas that the decision in Sunrise Associates did not affect the position in sofar as REP licences are concerned and that the decision in Vikas Sales Corporation reflected the correct legal position. Having arrived at such a conclusion with regard to REP licences, the Court then went on to consider whether the rationale applied in respect of REP licences could be equally applied in the case of DEPB licences.

27. It was contended on behalf of the assessees in Yasha Overseas that the transfer of a DEPB licence was nothing more than a mere transfer of a credit in the pass book and that therefore, such a credit could never be called goods under the Sales Tax Laws. Alternatively, it was contended that the sale of DEPB licence involved a mere transfer of the right to claim credit on a future import and that therefore, it could at the most be an actionable claim. But, both the contentions were rejected and the Supreme Court held that like REP licences, a DEPB licence also has its intrinsic value and that a purchaser buys something for its value. Eventually, the Supreme Court held that DEPB licences are goods within the meaning of the Sales Tax Laws.

28. Therefore, Mr. V. Sundareswaran, learned counsel for the petitioner is basically right in contending that DEPB licences are goods. But, the mere fact that these licences constitute goods within the meaning of Section 2(21) of Tamil Nadu Act, 32 of 2006, is not sufficient to make the petitioner entitled to input tax credit.

29. The Act not merely defines the expression ''goods''. The Act defines the expression ''capital goods'' under Section 2(11). It also defines the expression ''declared goods'' under Section 2(16) and it defines the expression ''exempted goods'' under Section 2(20). Therefore, the expression ''goods'' appearing in every provision has to be understood in the context in which the expression is used and the adjective along with which, it is used. It is relevant to point out that

the charging section namely Section 3 predominantly uses the expression ''goods'' without any adjective, whether it be in relation to sale or purchase.

30. But, a look at Section 19(1), which provides for input tax credit shows that the entitlement for such credit is restricted only to the amount of tax paid or payable under the Act by the registered dealer to the seller on his purchases of taxable goods specified in the First Schedule. Therefore, unless the claim for input tax credit relates to the tax paid or payable on the purchase of taxable goods specified in the First Schedule, it is not possible to grant credit.

31. Insofar as the First Schedule is concerned, the same is divided into three parts namely Part A, Part B and Part C. While Part A gives a list of goods, which are taxable at the rate of 1%, Part B gives a list of goods, which are taxable at the rate of 5%. Part C gives a list of items, which are taxable at higher rates. We are not concerned in this case with the rates.

32. But, it can be seen from the First Schedule that DEPB licences are not included in any of the parts namely Part A, Part B and Part C. Therefore, the goods in relation to which, the petitioner claims input tax credit namely DEPB licences, despite coming within the purview of the expression ''goods'' under Section 2(21), do not constitute goods specified in the First Schedule. Hence, Section 19(1) has no application.

33. DEPB licences do not even fall under any of the categories mentioned in Section 19(2). The case of the petitioner does not even fall under sub-section (3) or sub-section (4) of Section 19. Therefore, our answer to the first question of law would be that the Department was right in denying the benefit of input tax credit in respect of the duty paid by the petitioner on the purchase of DEPB licences, despite the fact that these licences constitute goods within the meaning of Section 2(21).

34. Despite the fact that DEPB licences are goods, they are certainly different and distinct from the goods that can be imported on the strength of those licences. These licences confer a right upon the licensees to import goods at some concession. It is only the goods that are imported on the strength of these DEPB licences, that may fall within the ambit of Section 19(1) provided a tax is payable or paid under the Tamil Nadu Value Added Tax Act, 2006 on those goods and those goods are also listed in the First Schedule to the Act.

35. Apart from the fact that DEPB licences purchased by the petitioner are not goods enumerated in the First Schedule, it is to be pointed out that the petitioner does not pay any tax under this Act namely the Value Added Tax Act on these purchases. What the petitioner is now seeking is a credit for the duty paid.

36. In addition, the petitioner has used these DEPB licences, for the purpose of payment of import duty. Therefore, the benefit that they are claiming now under the Tamil Nadu Value Added Tax Act appears to be a double benefit. As we have pointed out earlier, the petitioner cannot claim credit, unless he satisfies all the

three conditions specified in Section 19(1) namely (i) that he is a registered dealer (ii) that he actually paid or became liable to pay tax on the purchase of taxable goods and (iii) that the tax paid or payable was in respect of goods specified in the First Schedule. The petitioner does not satisfy all the three conditions. Hence, the denial of input tax credit on the purchase of DEPB licences is perfectly in order and the first question of law is answered against the petitioner.

Question (ii) :

37. The second question of law as to whether the purposes indicated in Clauses (i) to (vi) of sub-section (2) of Section 19 are enumerative or exhaustive. As we have pointed out earlier, Section 19(2) directs input tax credit to be allowed for the purchase of goods made within the State from a registered dealer, if they are for the purposes indicated in Clauses (i) to (vi) therein. The purposes indicated in these clauses are (i) re-sale within the State (ii) use as input in manufacturing or processing of goods in the State (iii) use as containers, labels and other materials for packing of goods in the State (iv) use as capital goods in the manufacture of taxable goods (v) sale in the course of Inter-State trade or commerce falling under Section 8(1) of the Central Sales Tax Act, 1956 and (vi) agency transactions by the principal within the State.

38. We have already summarised the scheme of Section 19 in Paragraph 14 above and indicated that Section 19 is a complete Code in itself. There are 20 sub-sections under Section 19, each of which serves a different purpose. While sub-Section (2) gives a list of purposes for the purchase of goods within the State, which would make a registered dealer entitled to input tax credit, sub-section (3) speaks about a similar entitlement in so far as the purchases of capital goods are concerned. Sub-sections (5) and (6) indicate the circumstances, under which, the input tax credit cannot be allowed.

39. But, the entitlement of a registered dealer to input tax credit, does not arise solely out of sub-section (2) of Section 19. It arises actually out of sub-section (1) of Section 19. But, since Sub-Section (1) covers all types of purchases of all types of goods specified in the First Schedule by all types of registered dealers, it is generic in nature. Out of such generic entitlement stipulated in sub-section (1), the statute carves out -

(i) certain purchases made for the purposes specified in sub-section (2) within the State

(ii) certain purchases of capital goods under sub-section (3)

(iii) certain purchases, made for purposes indicated in sub-section (4), etc.

40. Therefore, entitlement, non-entitlement, etc., are covered with reference to specifics in the other sub-sections of Section 19. It does not mean that the very entitlement to credit could be traced only to sub-sections (2) to (4) and the non-entitlement could be traced to sub-sections (5) to (10). If a dealer satisfies the

essential conditions stipulated in sub-section (1), he is entitled to credit. Therefore, we are of the considered view that sub-section (2) of Section 19 is enumerative and not exhaustive. The second question of law is answered accordingly.

41. But, our answer to the second question of law as above, will not actually advance the cause of the revision petitioner. This is in view of our answer to the first question of law that no input tax credit can be claimed merely on the purchase of DEPB licences. Therefore, despite the fact that on the second question of law, we agree with the submission of the learned counsel for the petitioner, the revision petitioner is not entitled to any relief.

42. Therefore, we hold that the revision filed by the petitioner is liable to be dismissed. Accordingly, it is dismissed. No costs.

