(2015) 03 MAD CK 0040

In the Madras High Court

Case No : W.P. Nos. 8661 to 8663 of 2015 and M.P. No. 1 of 2015

WIPRO Ltd.	APPELLANT
Vs	
Assistant Commissioner Commercial Tax Department	RESPONDENT

Date of Decision : 26-03-2015

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

Citation : (2015) 52 GST 557

Hon'ble Judges : S. Vaidyanathan, J.

Bench : Single Bench

Advocate : Mohammed Shaffiq, for the Appellant; V. Haribabu, AGP(T), for the Respondent

Judgement

S. Vaidyanathan, J.—Heard the learned counsel for the petitioner and the learned Government Advocate (Taxes), who took notice for the respondent. These writ petitions have been filed challenging the orders of the respondent dated 19.12.2014.

2. The case of the petitioner Company is that they are engaged in the manufacture of Computers and peripherals and they are registered dealers and assessee on the file of the respondent. According to the petitioner Company, they filed monthly returns in compliance with the Tamil Nadu Value Added Tax, 2006 (hereinafter referred to as "the TNVAT Act"), discharging appropriate taxes within the prescribed time. According to the petitioner, the notices dated 19.12.2014, which were received on 5.2.2015, were issued proposing to disallow the Input Tax Credit for the assessment years 2011-12, 2012-13 and 2013-14 only for the reason that the selling dealers have not filed their returns and have not paid the tax, which was collected from the petitioner, is in violation of principles of natural justice and hence the petitioner is before this Court.

3. According to the learned counsel for the petitioner, on two grounds, the impugned notices are unsustainable. Firstly, the impugned notices themselves are without jurisdiction as the allegation is that the petitioner has breached the

provisions of TNVAT Act, when admittedly the sellers have done the same and hence any proceedings against the petitioner/buyer is clearly unsustainable and bad for want of jurisdiction. Secondly, the impugned notices are contrary to the various decisions of the Hon''ble Apex Court as well as this Court and hence they are liable to be set aside.

4. In support of the above contentions, the learned counsel for the petitioner has relied on the following decisions:--

(i) A decision of this Court in the case of Tvl. Raymix Concrete India (P.) Ltd. v. Asstt. Commissioner (CT) [W.P. No. 7522 of 2015, dated 18-3-2015], wherein this Court by relying on the earlier decision of this Court in W.P. No. 2038 of 2013, has held as follows:--

''3. Learned counsel for the petitioner submitted that the authority has passed an order holding that the petitioner is liable for non-payment of the selling dealer. He would further submit that this Court has considered the similar contention and allowed the W.P. No. 2038 of 2013 on 29.01.2013, which reads as follows:

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8. 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.

9. Sub-section (16) of Section 19 states that the input tax credit availed is provisional. It, however, does not empower the authority to revoke the input tax credit availed 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. It 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 subsection (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."

4. Learned Additional Government Pleader appearing for the respondent would submit that the petitioner has got alternative remedy to agitate the issue. He would further contend that the petitioner was given due opportunity and his objections were considered and the authority has passed a detailed order, which is extracted below:

"In the absence of documents proving that the selling dealers are not annual return filers and they are filing monthly return in Form I and paid tax dues to the Government along with the acknowledgment obtained either online or assessment Circle, the objections are over-ruled and confirmed the proposal."

5. Heard the learned counsel for the petitioner as well as the learned Additional Government Pleader appearing for the respondent and perused the documents available on record.

6. Having considered the submission made by both sides, more particularly paragraphs 8 and 9 of the decision, which is extracted supra, I am of the view that the writ petition has to be allowed and the alternative remedy is not a bar for entertaining the writ petition''.

(ii) A decision this Court in the case of Althaf Shoes (P) Ltd. Vs. Assistant Commissioner (CT), Valluvarkottam Assessment Circle, Chennai-6, , wherein this Court has held as follows:--

".............Going by the above said rule and read along with section 19(1) of the Tamil Nadu Value Added Tax, 2006 made it clear that so long as the purchasing dealer had 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 make 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 sellers'' 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."

(iii) A decision of this Court in the case of New Consolidated Construction Co. Ltd. v. Asstt. Commissioner (CT) [W.P. No. 6980 of 2015, dated 12-3-2015], wherein relying on the decision in Althaf Shoes (P.) Ltd.''s case (supra) has held as follows:--

3. The petitioner has challenged the impugned order on the ground of violation

of principles of natural justice and that the same is contrary to the law laid down by this Court in the case of Althaf Shoes (P) Ltd. Vs. Assistant Commissioner (CT), Valluvarkottam Assessment Circle, Chennai-6, . In the said decision, this Court considering somewhat an identical situation, the only difference being in the said case it was pertaining to refund and in the instant case, it pertains to Input Tax Credit, has held as follows:

"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."

4. Learned Additional Government Pleader (Taxes) also does not dispute the legal position. Since the impugned assessment order is only with regard to the reversal of Input Tax Credit, that too, solely based upon the verification with regard to the vendor, the same could not have been done. In the light of the decision referred supra and for all the above reasons, the petitioner is entitled to succeed and accordingly, this writ petition is allowed and the impugned order is quashed. No costs. Consequently, the connected miscellaneous petition is closed''.

(iv) a portion in page 0288 of the decision of this Court in the case of Sri Vinayaga Agencies Vs. Assistant Commissioner (CT) and Another, , which reads as follow:--

"............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. It 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 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."

(v) The Hon''ble Supreme Court in the case of Hindustan Poles Corporation Vs. Commissioner of Central Excise, Calcutta, , by referring to the series of Judgments of the Hon''ble Supreme Court quashed the show cause notices impugned therein by holding that in view of the settled legal position the activity of the appellants of merely joining of three pipes, one with other, of different dimensions to obtain a desired length can by no stretch of imagination be brought within the category of "manufacture". In paragraph No. 41 of the said Judgment, it is held as follows:--

"41. Before we part with this case, we would like to impress upon the respondent authorities that before issuance of show cause notices, the Revenue must carefully take into consideration the settled law which has been crystallized by a series of judgments of this Court. The Revenue must make serious endeavour to ensure that all those who ought to pay excise duty must pay but in the process the Revenue must refrain from sending of indiscriminate show cause notices without proper application of mind. There is absolutely imperative to curb unnecessary and avoidable litigation in courts leading to unnecessary harassment and waste of time of all concerned including Tribunals and courts".

(vi) paragraph No. 31 of the decision of the Hon''ble Supreme Court in the case of Union of India (UOI) and Another Vs. Vicco Laboratories, , which reads as follows:--

"31 Normally, the writ court should not interfere at the stage of issuance of show-cause notice by the authorities. In such a case, the parties get ample opportunity to put forth their contentions before the authorities concerned and to satisfy the authorities concerned about the absence of case for proceeding against the person against whom the show-cause notices have been issued. Abstinence from interference at the stage of issuance of show-cause notice in order to relegate the parties to the proceedings before the authorities concerned is the normal rule. However, the said rule is not without exceptions. Where a show-cause notice is issued either without jurisdiction or in an abuse of process of law, certainly, in that case, the writ court would not hesitate to interfere even at the stage of issuance of show-cause notice. The interference at the show-cause notice stage should be rare and not in a routine manner. Mere assertion by the writ petitioner that notice was without jurisdiction and/or abuse of process of law would not suffice. It should be prima facie established to be so. Where factual adjudication would be necessary, interference is ruled out".

(vii) paragraph No. 31 of the decision of the Hon''ble Supreme Court in the case of East India Commercial Co. Ltd.,Calcutta and Another Vs. The Collector of Customs, Calcutta, , which reads as follows:--

"31.................We, therefore, hold that the law declared by the highest court in the State is binding on authorities or tribunals under its superintendence, and that they cannot ignore it either in initiating a proceeding or deciding on the rights involved in such a proceeding. If that be so, the notice issued by the authority signifying the launching of proceedings contrary to the law laid down by the High Court would be invalid and the proceedings themselves would be without jurisdiction".

(viii) paragraph No. 3 of the decision of the Hon''ble Supreme Court in the case of Raza Textiles Ltd. Vs. Income Tax Officer, Rampur, , which reads as follows:--

"3..............The Appellate Bench appears to have been under the impression that the ITO was the sole judge of the fact whether the firm in question was resident or non resident. This conclusion is wholly wrong. No authority, much less a quasi-judicial authority, can confer jurisdiction on itself by deciding a jurisdictional fact wrongly. The question whether the jurisdictional fact has been rightly decided or not is a question that is open for examination by the High Court. If the High Court comes to the conclusion that the I.T.O. had clutched at the jurisdiction by deciding a jurisdictional fact erroneously, then the assessee was entitled for a writ of certiorari. It is incomprehensible to think that a quasi-judicial authority like the I.T.O. can erroneously decide a jurisdictional fact and thereafter proceed to impose a levy on a citizen..."

The decisions quoted by the learned counsel for the petitioner may not be applicable to the facts of this case, more particularly, the decision of the Hon''ble Apex Court in Vicco Laboratories case (supra). From the observations made in the said decision, it is clear that interference at the show cause notice stage should be rare and not in a routine manner. Mere assertion by the petitioner that notice was without jurisdiction would not suffice and it should be prima facie established to be so. Further, where only factual adjudication is necessary, interference should not be done by the Courts. In the case on hand, it is only a show cause notice. It may or may not be correct that for breach of the provisions of the sellers, action should be initiated only against those persons or against the petitioner. But it is for the petitioner to submit his explanation before the authority concerned to the show cause notices and if the same is established, the authority will have to consider the case of the petitioner and pass appropriate orders. Since factual adjudication is required in the case of the petitioner, this Court is not inclined to interfere with the show cause notices. However, it is open to the petitioner to submit his explanation/objections within a period of 15 days from the date of receipt of a copy of this order and if the respondent is not satisfied with the explanations, the petitioner shall be given an opportunity of being personally heard and put forth his submissions to clarify the same.

The writ petitions are disposed of with the above observations. No costs. Connected miscellaneous petitions are closed.

