

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29.01.2013

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THE HONOURABLE MR.JUSTICE R.SUDHAKAR

W.P.Nos.2036 to 2038 of 2013

**Sri Vinayaga Agencies**

**No.4/4B, Nergundram Pathai**

**100 Feet Road**

**Vadapalani**

**Chennai .. Petitioner in all the writ petitions**

**-vs-**

**1. The Assistant Commissioner (CT)**

**Vadapalani-I Assessment Circle**

**Chennai 600 106**

**2. The Assistant Commissioner (CT)**

**Palayamkottai Assessment Circle**

**Palayamkottai .. Respondents in all the writ petitions**

Petitions under Article 226 of the Constitution of India, praying for the issue of a Writ of Certiorari, to call for the records of the impugned orders in TIN No.33251463587, for the assessment years 2008-09, 2009-10 and 2010-11 respectively, dated 11.01.2013 received on 18.01.2013 on the files of the first respondent herein, quash the same.

**For Petitioner :: Mrs.Aparana Nandakumar**

**For Respondents :: Mr.Manohar Sundaram**

**Government Advocate (Taxes)**

**ORDER**

Heard the learned counsel for the petitioner and the learned Government Advocate for the respondents.

2. Though an alternative remedy is available in cases of this nature, when on going through the admitted facts of the cases and taking note of the reasons given by the authority in the orders impugned, the Court is of the view that there is a gross error on the part of the authority in holding that the petitioner is liable for the non-payment of tax by the selling dealer. This apparently is a

mistake which is admitted in the pre-revision notices and in the orders themselves. Therefore, the Court, in exercise of power under Article 226, is entitled to correct such gross injustice, arbitrariness and error apparent on the face of record.

3. The petitioner in these cases is a dealer in lubricants and has a valid TIN number issued by the respondent. The three assessment years relate to 2008-09, 2009-10 and 2010-11. In all these cases, the petitioner purchased lubricants from M/s Classic Enterprises, falling under the jurisdiction of the Assistant Commissioner (CT), Palayamkottai Assessment Circle, and the seller-M/s Classic Enterprises has a valid TIN No.3383556355. It appears that the enforcement wing officials of the first respondent-Department conducted an inspection on 13.7.2010 and on verification of the returns, it was found that the dealer at Palayamkottai Assessment Circle, namely, M/s Classic Enterprises, had not filed the monthly returns in Form-I and also not paid the tax to the department for the relevant period. Therefore, while accepting that the petitioner-dealer had paid the tax to the selling dealer, pre-revision notices were issued on 7.12.2012 in respect of each assessment year contending that input tax credit should be reversed on the failure of selling dealer in paying tax. The petitioner filed their detailed objections to the pre-revision notices stating that at the time of self-assessment under Section 22(2) of the Tamil Nadu Value Added Tax Act, 2006 (for short, "the TNVAT Act"), all the records relevant for claiming the input tax credit have been filed as annexure to the documents and they have been accepted by the Department. Even in the pre-revision notices, it is an admitted fact that the petitioner herein had paid the tax. The allegation is only against the selling dealer stating that they had not filed the Form-I returns nor paid the tax to the department. Therefore, it was contended by the petitioner that in terms of Section 19(1) of the TNVAT Act, they have complied with the requirement for claiming input tax credit at the time of self-assessment itself. The first respondent, after three years, has come to a different conclusion that the petitioner is not entitled to avail the input tax credit on the plea that the selling dealer did not file Form-I returns and did not pay the tax. Hence, the revision notices and the proposed penalty were hotly contested as improper, arbitrary and contrary to the provisions of the TNVAT Act. To further clarify the position, the specific objections of the petitioner are as follows:-

"We further state that M/s Classic Enterprises are still existing dealer till date and continuing business and also state inter alia that we had already stated before the Enforcement Wing officials that you had not issued any mismatch transaction audit notice and that the proper course was to ascertain whether the said M/s Classic Enterprises had remitted the tax collected from the purchasers to the treasury and not to insist that we should reverse tax paid to the seller and had to pay the tax again, which in fact has already been paid by us to seller which fact has also been admitted by you in the above said notice.

Further we also pray to drop the proposal to reverse the ITC which has been correctly availed by us and also to drop the proposal to levy penalty. We also request you to make proper enquiries at the Palayamkottai assessment circle to ascertain whether the said M/s Classic Enterprises has remitted the tax and has filed the returns for the assessment years 2008-09, 2009-10 and 2010-11 and also request you to cross examine the seller namely M/s Classic Enterprises in order to ascertain the true state of affairs."

4. Overruling these objections, the Assistant Commissioner (CT), Vadapalani-I Assessment Circle, relying upon Section 19(1), came to the conclusion that in order to claim input tax credit, the petitioner should have established that the tax due on such purchase had been paid in the manner prescribed and since the petitioner-dealer failed to prove that input tax credit on purchases from the selling dealer at Palayamkottai was paid by the selling dealer in the manner prescribed, the petitioner is not entitled to avail input tax credit. The authority also went on to hold that merely holding that tax would

have been paid will not help the buyer to claim ITC credit. According to the department, the tax due on purchases were not paid by the selling dealer and that was admitted by the dealer before the enforcement wing officials at the time of inspection. In the impugned orders, the first respondent has stated that after inspection on 13.7.2010, when the enforcement officials pointed out the said mistake of the selling dealer to the petitioner, the petitioner herein has not raised an issue with their dealer, and the proof for such objection to the selling dealer has not been filed along with the objections. Peculiarly, the first respondent-authority went on to hold as follows:-

"The dealer states that the sellers are still existing and doing business at Palayamkottai. If it is so what prevented them from discussing the issue with them and take the remedial measures. Finally, inasmuch as the facts remain that tax collected had not been paid by the seller and ITC was availed wrongly by the dealer at this end, law states that it has to be reversed as per the provision contained in Section 19(16) of TNVAT Act."

Reliance is placed on Section 19(16) as well to say that the input tax credit availed by the petitioner-registered dealer is provisional and the authority is empowered to revoke the same if it is found to be incorrect, incomplete or otherwise not in order.

5. The learned Government Advocate for the respondents states that Section 19(16) covers the contingency as is found in the present case and hence the orders of the authority are justified.

6. This Court is not inclined to accept any of the contentions raised in the impugned proceedings or the plea taken by the learned Government Advocate for the respondents, as the orders, on the face of record, appear to be totally irrational, arbitrary and capricious. Sub-sections (1) and (16) of Section 19, which have been relied upon by the authority, read as follows:-

"19(1). There shall be input tax credit of the amount of tax paid or payable under this Act by the registered dealer to the seller on his purchase of taxable goods specified in the First Schedule.

Provided that the registered dealer, who claims input tax credit, shall establish that the tax due on such purchase has been paid by him in the manner prescribed.

(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."

At the time of filing the self-assessment return under Section 22(2), the petitioner has followed the relevant rule viz., Rule 10(2) of the Tamil Nadu Value Added Tax Rules and the said rule reads as follows:-

"10(2). Every registered dealer who claims input tax credit under sub-section (1) of Section 19 shall, produce the original tax invoice, in support of his claim of the input tax credit, containing the following details, namely:-

- (a) A consecutive serial number;
- (b) The date on which the invoice is issued;
- (c) The name, address and the Taxpayer Identification Number of the seller;
- (d) The name, address and the Taxpayer Identification Number of the buyer;
- (e) The description of the goods;
- (f) The quantity or volume of the goods;

- (g) The value of the goods;
- (h) The rate and amount of tax charged; and
- (i) The total value of the goods."

Therefore, it cannot be said that input tax credit was wrongly availed.

7. 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 state 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 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.

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 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.

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

Index : yes 29.01.2013

Internet : yes

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To

1. The Assistant Commissioner (CT)

Vadapalani-I Assessment Circle

Chennai 600 106

2. The Assistant Commissioner (CT)

Palayamkottai Assessment Circle

Palayamkottai

R.SUDHAKAR, J.

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