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WP.No.22241 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.06.2022

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THE HONOURABLE **DR. JUSTICE ANITA SUMANTH**

W.P.No.22241 of 2019 &
W.M.P.No.21522 & 21524 of 2019

Tvl.Rashtriya Ispat Nigam Limited
Rep. by its Authorized Signatory
No.1, Valluvarkottam High Road,
Chennai-600034

... Petitioner

Vs.

1.The Deputy Commissioner (CT) III
Office of Joint Commissioner LTU,
Dugar Towers,
No.34, Marshall Road,
Egmore, Chennai-8

2.The Assistant Commissioner of State Tax,
Valluvarkottam Circle,
Chennai-6

... Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari, calling for the records on the impugned order no.221105190001329 dated 24.06.2019 in GSTIN 33AABCR0435L1ZL from the files of the second respondent herein and quash the same.

For Petitioner : Mr.Poojesh J.
For Respondents : Mr.Richardson Wilson
Additional Government Pleader



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ORDER

Heard Mr.Poojesh.J learned counsel for the petitioner and Mr.Richardson Wilson, learned Additional Government Pleader for the respondents.

2. The facts as relevant to decide this writ petition are as follows:

(i) The petitioner was registered as a dealer under the provisions of the Tamil Nadu Value Added Tax Act, 2006 (in short 'TNVAT Act') and Central Sales Tax Act, 1956 (in short 'CST Act').

(ii) The petitioner was being regularly assessed under both TNVAT and CST Acts and for the period 2015-16 had claimed concessional rate of tax at 2% under Section 8(1) of the CST Act.

(iii) An audit was conducted by the Enforcement Wing of the Commercial Taxes Department in August 2016, when the petitioner had been unable to substantiate its claim of concessional levy to the fullest extent, as claimed by it.

(iv) It thus, deposited an amount of Rs.40,00,000/- towards non-availability of a portion of the C-Forms as on the date of audit.

(v) When the order of assessment was passed on 30.12.2016, the determination of tax revealed excess of Rs.38,91,410/- insofar as the



petitioner was in a position to provide the necessary statutory declaration Forms during assessment.

(vi) The excess was adjusted for the period until 30.06.2017 leaving an amount of Rs.11,94,312/- (in short 'amount in question') as credit balance.

(vii) With the inception of the Tamil Nadu Goods and Services Tax Act, 2017 (in short 'TNGST Act') with effect from 01.07.2017, the petitioner became entitled to the credit of the amount determined as excess, being Rs.11,94,312/-.

(viii) Section 140 of the TNGST Act admittedly lays an embargo against the availment of credit where such credit is attributable to a claim under the CST Act, providing only for a refund of the amount.

(ix) The petitioner made a request before the 1st respondent/Deputy Commissioner seeking refund of the amount in question.

(x) The refund claim was not acted upon, also admittedly.

(xi) The petitioner was well aware of the position that it could not claim transition of the amount in question in light of the bar under Section 140(1). Thus and rightly, it did not, initially, seek transition in the TRAN-1 filed by it in the GST Portal.

(xii) However with the ticking of the clock, the petitioner grew



apprehensive that it would be denied the refund and would also miss the bus as far as claiming of the credit was concerned.

(xiii) The extension of time granted for filing of TRAN-1 till 27.12.2017 came as a boon for the petitioner which filed a TRAN-1 claiming the refund as credit carried forward.

(xiv) The above admittedly, constitutes an inadmissible claim, and there is no doubt either in the Court's mind nor in the mind of the petitioner, in this regard.

3. It is in the aforesaid circumstances that the impugned order has come to be passed by the respondent who, vide a show cause notice, had initially proposed to reject the transition of the ITC and confirmed the proposal holding the petitioner liable to penalty for wrongful transition, ineligible credit as well as interest from 27.12.2017 till date of order for such ineligible claim. This order is challenged in this writ petition.

4. The submissions of Mr.Poojesh. J, learned counsel for the petitioner are that the petitioner is well aware of the wrongful claim but has been pushed to the corner since its claim for credit had admittedly been kept pending from 2017 without favour of any response. He relies on a decision of the Telangana High Court in the case of *Magma Fincorp Ltd. Vs. State of*



Telangana and Others, [(2019) 3 ALD 695].

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5. He also relies on a decision of this Court in the case of *DMR Constructions Vs. The Assistant Commissioner, Commercial Tax Department*, [(2021) 91 GSTR 278] for the reason that the learned Judge in that case, has applied the decision of the Telangana High Court in *Magma Fincorp Ltd.* (supra) as well as *Ganges International Private Ltd. Vs. The Assistant Commissioner of GST & Central Excise*, [(2022) 1 Writ LR 431] wherein learned Single Judge has invoked the doctrine of necessity, though in distinguishable circumstances. In fine, claims of the petitioner in that case were remanded to the assessing authority for de novo consideration.

6. He draws attention to the provisions of section 42(5) of the TANVAT Act read with Section 9 (2) of the CST Act and Section 174 of the TNGST Act in support of his submission that he is legally entitled to the claim of refund. He would reiterate the submission that the transition, while being admittedly incorrect, was only done to protect the interests of the petitioner and to save the amount in question from being lost forever.

7. Per contra, Mr. Richardson, learned Additional Government Pleader for the respondents would draw my attention to Section 142(8)(b) of TNGST Act, that reads thus:



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142. Miscellaneous transitional provision.-

8. a

b. Where in pursuance of an assessment or adjudication proceedings instituted, whether before, on or after the appointed day under the existing law, any amount of tax, interest, fine or penalty becomes refundable to the taxable person, the same shall be refunded to him in cash under the said law, and the amount rejected, if any, shall not be admissible as input tax credit under this Act.

8. The above provision, clearly, places a restriction on the availment of credit of any amount of refund to which the taxable person is entitled under the erstwhile laws. He really need not labour on this position for the reason that it is nobody's case that the petitioner is at all entitled to credit/transition. All the petitioner wants is a refund of the amount in question. In addition, the petitioner would pray that the penalty and interest levied under the impugned order be set aside as the act of transition, though incorrect, was only to ensure the protection of its interest.

9. Having considered the detailed submissions of both learned counsel, I am of the categorical view that the petitioner must succeed on the facts and circumstance of the case.

10. The provisions of Section 42(5) of the TNVAT Act provide for the



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payment and recovery of tax, penalty etc. and cast a mandate upon the Commercial Taxes Department to refund any excess determined within a period of 90 days from date of order of assessment/revision/appellate order. Where the refund exceeds the stipulated time of 90 days, the Government is liable to pay interest where the amount is not less than one hundred rupees, a sum equal to a sum calculated at the rate of half percent or part thereof for such amount for each month or part thereof.

11. In the present case, the petitioners' request for refund has been made as early as on 19.07.2017. The position of law has been understood by the petitioner correctly as, in the request made for refund dated 19.07.2017, the petitioner states as follows:

With reference to the above, refund amount of Rs.38,91,410/- was processed at your end against CST based on the above given assessment order for the year 2015-16 during the month of Feb' 17 and the same is being adjusted by us against CST payment from Feb' 17 till June' 17. An amount of Rs.11,94,312/- is yet to be utilized against the refunded amount.

Because of the transition from TNVAT to GST from 1st July' 17, above given unutilized amount cannot be adjusted against GST payment. Hence, we kindly request you to refund the amount as early as possible.



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12. The motives of the petitioner are found to be bonafide in law, since it not only asks for a refund but also states that it is not entitled for transition under GST laws.

13. Admittedly, the respondent has sat tight on the petitioners' request and in the counter filed, the reasons set out are as follows:

11. In respect of points raised in Sl.No.(a & b) in the grounds of the affidavit, it is humbly submitted that the petitioner has stated that since they have not received response from the First respondent on their request to refund the excess amount available at the end of the month of June 17 under the CST Act, they have carried the amount forward into the Tran 1 in the fear of avoiding limitation which had been imposed on the Tran 1 filing. The excess after adjustment, was not refunded immediately as there existed technical problems in giving VAT refunds through online, due to introduction of TNGST. However, once, the online issue was resolved, all dealer were given legacy refunds. However, the dealer has taken 11,94,312 amount into TRAN 1 wrongly. He must have claimed refund once the technical issue under TNVAT Act was resolved. In view of the petitioners statement this writ petition deserves no consideration and hence the same may be dismissed.

14. It is indeed curious that the respondent should expect the



petitioner to wait till its house has been brought to order, that is, once technical issues faced by it stand resolved and thereafter persist with the request for refund. This Court is unable to appreciate how the petitioner is expected to be aware of the technical difficulties faced by the officer or indeed, why such delay should enure to its detriment.

15. The petitioner is entitled to the claim for refund, prima facie, as evidenced by order dated 30.12.2016 of the first respondent wherein the amount in question has been determined as excess payment and there is no dispute raised in this regard.

16. Coming to the imposition of penalty and levy of interest under the impugned order, I am of the view that sustaining the same would be hyper-technical. No doubt, the petitioner has made an inadmissible claim of transition. However, I have noticed earlier that it was a last ditch effort by a desperate assessee and I reiterate that view.

17. The counter of the respondent would support the delay for refund citing technical problems. Such technical problems are still ongoing and thus, the petitioner cannot be expected to wait indifferently for refund. While this is the position on the other hand, the extension of time for filing of TRAN 1 also had a date of cut-off, being 27.12.2017.



18. Thus, while the filing of a TRAN 1 is clearly misconceived, the petitioner is protected by the intention to protect its claim for refund in the face of the unjustified, and admitted delay on the part of the respondents. That apart, the provisions of Section 74 would be applicable only in the case of wrongful availment/utilization of ITC by reason of fraud. The pre-condition for invocation of Section 74 is that the revenue must establish willful misstatement or suppression to evade tax.

19. In the present case, the question evasion of tax does not arise since it is not an assessment but only determination of the correctness of availment of ITC. In such a case, what would be relevant is to see whether the availment of credit is with the intent of evading tax.

20. The petitioner has made a categorical statement of law in its communication dated 19.07.2017, extracted in paragraph 11 supra making it clear that it is aware of the position of law as regards the claim of refund. The disclosure is clear and it appears unambiguous that the intentions of the petitioner are only to protect its interests.

21. That apart, the statement in counter in regard to the delay and the fact that the effort of the petitioner has throughout been only to claim a



refund persuade me about the bonafides of its actions. As a consequence, the ingredients of Section 74 do not stand satisfied in the present case. The impugned order to this extent, is set aside.

22. Let the refund claim dated 19.07.2017 be processed on merits by the State Taxes Officer/R1, and paid over to the petitioner with interest till 27.12.2017, being the date when the TRAN 1 application was filed by the petitioner, within a period of four weeks from date of receipt of copy of this order.

23. As the TRAN-1 filed by the petitioner, is admittedly incorrect in law, it does not hold any force, and the question of availment of credit does not arise. This writ petition is allowed in the aforesaid terms. Connected miscellaneous petitions are closed. No costs.

20.06.2022

Index : Yes
Speaking Order
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DR.ANITA SUMANTH, J.

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