BEFORE THE HIMACHAL PRADESH TAX TRIBUNAL, DHARAMSHALA, CAMP AT SHIMLA

Appeal No.	:	17/2023
Date of Institution	:	11-07-2023
Date of order	:	01-05-2024

In the matter of:

M/s R.K Steels, GT Road, Mohtli, Teh. Indora, Kangra, HP.

.....Appellant

Vs

i) Jt. CST&E, cum Appellate Authority, NZ, Palampur.
ii) ACST&E Cum Assessing Authority, Damtal Kandrori (HP).

.....Respondents

Parties represented by:-

Ms. Shilpa Dogra, Advocate for the Appellant.

Shri Sandeep Mandyal, Sr. Law Officer, of the department for the Respondents.

Appeal under Section 45 (2) of the Himachal Pradesh, Value Added Tax Act, 2005

Order

1. The present appeal has been filed by M/s R.K Steels, GT Road, Mohtli, Teh. Indora, Kangra against the order of the Jt. Commissioner State Taxes and Excise-cum- Appellate Authority, NZ, Palampur, Himachal Pradesh, dated 24-04-2023 vide which the appeals filed by the applicant for the years 2009-10 to 2015-16, against the order of the Assessing Authority Damtal (Respondent Number 2) vide which the Assessing authority has rejected the formula devised by the dealer to claim deferment incentive and also imposed interest and penalties under Section 19 and Section 16 of during the Assessment proceedings vide order dated 29-06-2022 respectively under the HP VAT Act, 2005, was upheld..
2. The brief facts are that M/s R .K Steels, GT Road, Mohtli, Teh. Indora, Kangra, Himachal Pradesh (hereinafter referred to as 'Appellant') is an industrial unit holding TIN 02060600393 and is engaged in manufacturing of steel wire. The appellant availed the facility of concession under Himachal Pradesh General Sales Tax (deferred payment of

tax) scheme 2005, which was issued under Notification Number EXN-F(1)-2/2004 dated 26-07-2005 for the financial year 2009-10 to 2015-16. It is pertinent to mention that an amendment in the Himachal Pradesh General Sales Tax Act, (deferred payment of Tax) scheme 2005 inserted Para 5-A as under :-

'5A:- Option by industrial units :- (1) notwithstanding anything contained in Para 5 of the said Scheme, the new and existing eligible industrial units other than those specified in the negative list, which have come into commercial production before 07-01-2023 and which, after the approval of the Director of Industries or other officers for authorities by him, undertake substantial expansion only after 07-01-2003 may either continue avail such facility or by making an application in Form S.T. (DP)-VII opt to pay 65% of the tax liability, for any tax period of a financial year, according to return, and upon making such payment, he shall be deemed to have paid the tax due from him according to such return. The option once exercised shall be final.

(2) The registered dealer (industrial unit) making payments of tax under sub- Para (1) of this Para shall be entitled to input tax credit under section 11 of the Himachal Pradesh Value Added Tax Act, 2005 in respect of intra-state sales, inter-state sale or transfer of goods on consignment basis or branch transfer basis.

The case was selected for scrutiny under Section 66 of the HP VAT Act, 2005 by the Assessing Authority as the case was not fulfilling the criteria of deemed assessment under Section 64 and 65 of the HP VAT Act, 2005. The Assessing Authority at the time of assessment observed that the dealer has wrongly calculated his gross VAT liability for the assessment years 2009-10 to 2015-16 and claimed an ITC which resulted in neck tax liability as zero of the dealer, the provisions of the deferment scheme shall not be operative owing to nil tax liability and therefore there won't be any question of claiming exemption in case of nil tax liability. Whereas in the present case, the dealer, despite his liability being nil, claimed deduction of Rs. 7,03,807/- for the year 2009-10, Rs. 5,10,544/- for the year 2010-11, Rs. 18,65,111/- for the year 2011-12, from output tax, as a claim of exemption under the scheme. By doing so the dealer avoided utilization of ITC to the tune of Rs. 7,03,807/- for the year 2009-10, Rs. 5,10,544/- for the year 2010-11, Rs. 18,65,111/- for the year 2011-12 against the tax liability of the dealer. The dealer has disclosed GTO of Rs. 47,17,02,855/- for the year 2012-13, Rs. 41,65,17,313/- for the year 2013-14, Rs. 41,51,007,273/- for the year 2014-15 and Rs. 41,94,78,218.47/- for the year 2015-16 the dealer has conducted stock transfer of Rs. 34,59,06,718 for the year 2012-13, Rs. 31,72,05,071/- for the year 2013-14, Rs. 33,15,81,834/- for the year 2014-15, Rs.

33,99,70,063/-. The dealer has conducted inter-state purchase of Rs. 43,15,12,982/- for the year 2012-13, Rs. 38,42,89,968/- for the year 2013-14, Rs. 20,82,68,092/- for the year 2014-15 and Rs. 15,60,48,916/- for the year 2015-16 and made a local purchase of Rs. 1,32,19,893/- for the year 2012-13, Rs. 28,51,293/- for the year 2013-14, Rs. 5,64,50,896/- for the year 2014-15 and Rs. 10,36,33,672/- for the year 2015-16. The dealer has been assessed entry tax of Rs. 31,50,045/- for the year 2012-13, Rs.32,29,568/- for the year 2013-14 and Rs. 32,27,232/- for the year 2014-15 on stock transfer of Rs. 34,59,06,718/- for the year 2012-13, Rs. 31,72,05,071/- for the year 2013-14 and Rs. 33,15,81,834/- for the year 2014-15vide assessment order dated 31-05-2016. The dealer purchased the raw materials from other states and after manufacturing the goods, the same had been sent through stock transfer. As the stock transfer has already been subjected to Entry Tax, it is obvious that the goods purchased locally had not been used to manufacture the goods that had been sent through consignment sale, ITC of the dealer is not liable to be restricted in the light of Section 11(4) of HP VAT Act, 2005. Interstate purchase of Rs. 43.1 crore for the year 2012-13, Rs. 38.42 crore for the year 2013-14 and Rs. 20.8 crore for the year 2014-15against local purchase of Rs. 1.32 crore for the year 2012-13, Rs. 28.51 crore for the year 2013-14 and Rs. 5.6 crore for the year 2014-15 also corroborates the claim of the dealer that no locally purchase goods have been used in manufacture of goods sent through stock transfer. Therefore ITC to the dealer is allowed in toto. Above facts are sufficient to conclude that the dealer with the malafide intention of evading tax, resorted to manipulation in calculation of tax, sought unlawful deduction purported to be benefit of deferment scheme, from the gross tax liability and caused loss to the govt. revenue. Therefore the deduction claimed by the dealer is disallowed and penalty under Section 16(8) has been imposed for willfully maintaining incorrect account to evade the payment of tax. Thus, the Assessing Authority vides its orders dated 29-06-2022 denied the benefit of any exemption under the deferment scheme. Thereafter, the Appellate Authority upheld the orders of the Assessing Authority vide order dated 24-04-2023 stating that the dealer has not calculated his tax liability as per provisions of section 12 of HP VAT Act, 2005 rather he has devised his own formula in contravention of law which led to unlawful accumulation of ITC in favour of dealer causing loss to the Govt. Exchequer and the present appeal has been filed against this order.

3. Aggrieved by the order of Ld. Appellate Authority the appellant has filled the appeal before this Tribunal on the following grounds:-

i) *The assessing authority has made time barred assessment as the notice was issued under Section 21 and 32 of the HP VAT Act, 2005 which deals with the time limitation.*

ii) *The respondent has failed to understand the basic provisions of the scheme of deferment. The scheme has been issued under section 42(A) of the erstwhile Himachal Pradesh Sales Tax Act and the provisions applicable to scheme are as contained in that act and have nothing to do with the HP VAT Act.*

iii) *The respondent has failed to understand that the scheme of deferment has been notified on 30th March 2005, whereas the VAT Act has been notified on 1st April 2005 and as per the transitional provisions contained in section 62 of the HP VAT Act read with Rule 93 of HP VAT rules the conditions of exemption or deferment are the same as were existence under the H.P General Sales Tax Act, which has been repealed.*

The Section 12 referred in the scheme is of H.P sales tax act and not of VAT Act, Section 12 of the H.P Sales Tax Act provides the manner of payment of tax and nowhere provides the calculation of net tax liability.

iv) *The AO has not applied his mind in understanding that the input tax credit which is available to the dealer is on the basis of tax which has already been paid by the dealer and this is the advance payment of tax and while calculation the tax liability on the goods sold it has no role. It is to be considered for the purpose of payment of tax calculated under section 6 of the HP VAT Act, 2005.*

v) *The scheme of deferment allows the dealer to claim deferment of tax payable on the goods manufactured by it and pay in installments after 5 year, by notification dated 5th August 2005 the Govt. has given the option to pay upfront 65% of the tax payable on goods sold & forego the balance 35%*

vi) *The incentives are provides as per the provisions of industrial policy of 2004 and once the incentive certificate has been given by the industries Deptt. The taxation Deptt. Has no authority to deny the same by making its own rules and interpretation.*

The incentive rules 2004 and the rules regarding grant of incentives concessions and facilities to industrial units in H.P are traceable and are referable to the same powers available in section 42 A of the HP General Sales Tax Act and section 62(5) of the HP VAT Act, 2005 in on much as the notification dated 30-03-2005 notifying the H.P General Sales Tax Deferred payment of Tax

scheme 2005 in traceable to above said powers. Consequently the incentive rules 2004, and the deferment scheme are aimed towards the achievement of the same target an held by Hon'ble High Court of Himachal Pradesh in Gujarat Ambuja Cement Ltd. V/s Assessing Authority.

Further on any conceivable difference between the incentive Rules 2004 and the deferment Scheme 2005 the incentive rules 2004 having been notified with the approved of the council of minister will prevail and the incentive of deferment declared there in available to the dealer.

vii) The appellant has also relied upon judgments made by the Hon'ble Supreme Court in Lloyd Electrical and Engineering Ltd. V/s State of Himachal Pradesh (2016)1 Scc 560 (3 JJ).

4. The Ld. Counsel Ms Shilpa Dogra for the Appellant prayed that the appeal be accepted and the impugned order be quashed. The department version of allowing the deferment on the Net Tax Liability is not based on any facts and provisions of the Act and as per the scheme there is no net tax liability concept in the scheme. The tax is fully paid through DP I and the payment is to be made in discharge of the liability under DP II and has no connection with the input tax credit on the tax paid on the purchases made within the state. Section 42(A) of the Himachal Pradesh Sales Tax Act under which the scheme of Deferred payment of tax has been issued contains a non obstante clause of notwithstanding anything contained in any other provisions of this act and has overriding effect over the other provisions of the act.

Para 11(2) of the scheme has also overriding effect as it also contains non-obstante clause vide which it has been stated that the DP II issued by the Excise and Taxation Deptt. Is to be considered as proof of payment of tax and accordingly the liability stands shifted to DP which has to be paid after five years. And the liability under DP II can be discharged either from the input tax credit lying with the dealer or by cash payment as the dealer may prefer.

Section 5A added in the scheme also contains non-obstante clause and it gives an option to the dealer to pay the liability deferred in the DP II upfront instead of five years and for that the payment of 65% of the amount deferred in the DP II will be considered as the full payment of tax deferred.

In view of the clear position of law and the provisions of the deferred payment scheme the assessment for the period under dispute be framed as per the above method.

and the dealers be allowed the input tax credit as per the provisions of the act and the tax deferred against DP II be allowed to be paid through the input tax credit.

5. Sh. Sandeep Mandyal Sr. Law officer of the department stated that the petitioner has no case to agitate before this Tribunal as the issue arising herein is already addressed by the authority below and he prayed that his order dated 24-04-2023 may be upheld.

6. I have heard the Ld. Counsel and the Ld. Govt. Counsel for the respondent in detail and perused the record as well. The point for consideration raised by the appellant pertains to the issue of application of deferment scheme in letter and spirit. In the interest of justice and given the fact that the matter pertains to the year 2009-10 to 2015-16. I proceed to decide the present appeal on merits, as per points below:

   i) The contention raised by the appellant regarding limitation period it is seen that under section 21(5) of the HP VAT Act, 2005 the case does not qualify to be declared as time barred. As per the provision of above mentioned section if the dealer does not comply with the terms of notice the assessing authority shall within five years after the expiry of such period, proceed to assess to the best of his judgment the amount of tax due from the dealer. The assessing authority could have proceeded to pass an ex parte order under section 21(5) of HP VAT Act, 2005. Section 21(5) does not require that the assessment should be concluded within five years. It speaks of a time frame, during which the Assessing Authority must proceed to assess the tax. It does not provide that the assessment should be concluded within five years. Proceeding of assessment begins with the issue of notice under section 21(2) or 21(4) of HP VAT Act, 2005. The Assessing Authority had proceeded to assess the dealer within five years from the date of filling annual return but assessment was kept on pending due to the reason of appeals pending at Hon'ble High Court and at the level of Appellate Authority. Therefore, in the present case the Assessing Authority has proceeded to assess the dealer well in time as prescribed in Section 21(5) of HP VAT Act, 2005.

   ii) The contention raised by the appellant that the provisions applicable to the scheme are contained in the Himachal Pradesh Sales Tax Act and has nothing to do with the HP VAT Act, 2005 is not acceptable as amendment issued under notification number EXN-F(1)-2/2004 dated 26-07-2005 clearly says 'In exercise of the powers conferred by sun section (1) of Section 62 of Himachal Pradesh Value Added Tax Act, 2005 (Act No. 12 of 2005) as amended by the Himachal Pradesh Value Added Tax (Amendment) Ordinance, 2005 (Ordinance No. 8 of 2005), the

Governor of Himachal Pradesh is pleased to make the following amendments in the Himachal Pradesh General Sales Tax (Deferred Payment of Tax) Scheme, 2005 (hereinafter called the 'said Scheme') with immediate effect.' The transitional provisions under the HP VAT Act, 2005 under sub section (1) of Section 62 says- '. (1) Any registered dealer, who would have continued to be so liable to pay tax under the Himachal Pradesh General Sales Tax Act, 1968, (hereinafter in this section called the 'said Act') had this Act not come into force, shall be deemed to be registered under this Act. Also, **Section 62(5)** reads as - Any dealer who manufactures and sells goods and who, immediately before the commencement of this Act, was enjoying the benefit of any incentive of sales tax leviable on the sale of manufactured goods under the said Act and who would have continued to be eligible for such incentive on the date of commencement of this Act, had this Act not come into force, may be allowed by the State Government, by notification, --

a) to continue to avail of the benefit of exemption from payment of tax on the sale of manufactured goods made by such dealer himself for the unexpired period, subject to the condition that no input tax credit shall be allowed to the subsequent dealer purchasing goods manufactured and sold by such dealer (industrial unit), or

b) to opt, in the prescribed manner, to avail of the facility of making deferred payment of tax for the unexpired period of incentive instead of availing the exemption specified in clause (a), or

c) To continue to avail of the facility of making deferred payment of tax on the sale of manufactured goods made by such dealer himself for the unexpired period and such dealer (industrial unit) shall be eligible to issue tax invoice and to claim input tax credit subject to the provisions of section 11 of this Act.

iii) As per the assessment order done by the Assessing Authority and admissions made before the Appellate Authority, the appellant has not disputed his CST and VAT liabilities. It means that the appellant had not disputed the figure of tax liability determined by the Assessing Authority which shows that there is merit in evaluation of gross turn over, ITC to be claimed and amount retained on closing stock by the Assessing Authority. Moreover, in the appeal, the appellant has not disputed the incidence of taxation provided under section 3 of the CST Act, 1956 and Section 4 of the HP VAT Act, 2005 which is the basis to determine CST & VAT liability on the appellant.

iv) The section 12 of the HP VAT Act, 2005 provides: "The net tax payable by a registered dealer for a tax period shall be the difference between the output tax plus purchase tax, if any, and the input tax credit, which can be determined from the following formula, namely:-

Net Tax Payable = (O+P)-I"

Net tax payable denotes tax liability wherein 'O' signifies output tax payable for any tax period, 'P' signifies purchase tax paid by a registered dealer for any tax period and 'I' signifies the input tax paid or payable for said tax period, including input tax credit, if any, carried forward form any preceding tax period as determined under Section 11. As such, on the basis of above provision of the Act, benefit of 35% tax rebate has been rightly allowed on the basis of tax liability of the appellant, i.e. on net tax payable. Policy of upfront payment infact is not required to be mixed up with the normal provisions of the Act relating to the ITC. While claiming ITC the dealer claims the ITC on the basis of tax liability.

The dealer has not determine his tax liability as per above formula accordingly, I am convinced by the observations made by the Assessing Authority that as per the interpretation of the exemption given under deferment scheme and as per Section 12 of HP VAT Act, 2005 the benefit of deferment scheme shall be availed by the dealer only when the tax liability to pay in cash arises. As per admission of the appellant he has discharged his all liability through ITC which means that net tax liability comes out to be NIL, which indicated that the said deferment scheme cannot be applied on NIL tax liability as per provisions of the scheme, it is thereby inferred that only when any tax liability accrues on the part of dealer then only the dealer is supposed to availed the benefit of scheme. On the contrary of the facts, the dealer has not calculated his liability as per provisions of Section 12 of the HP VAT Act, 2005 rather has divide his own formula as per his own suitability.

The plea of the appellant to allow credit of input tax paid and charge 65% of output VAT would result in subverting the very concept of value addition tax and would lead to negative effect. The reliance is placed on the judgment delivered by Supreme Court in the case of *Union of India V. Dharmendra Textile Processor (2008) 18 VST 180 has clearly held that* ***"it is well settled Principle of law that the court cannot read anything into a statutory provision or a stipulated condition which is plain and unambiguous. A statute is an edict of the***

Legislature. The language employed in a statute is the determinative factor of legislative intention…. Legislative casus omissus cannot be supplied by judicial interpretative process."

v) Further, it is seen that the impugned orders dated 29-06-2022 cannot held to be a non speaking orders. The impugned orders are self explanatory describing the application of deferred scheme in consonance with Section 11 & Section 12 of the HP VAT Act, 2005. Very significance facts are available on record that the appellant has significant locally purchased goods under closing stock at the end of the year. As per Section 11 of the HP VAT Act, 2005 ITC can only be availed on local purchase of goods that has been sold during the tax period. ITC involved in unsold stock cannot be claimed, which is thus rightly retained by the orders of the Assessing Authority.

vi) The judgment cited by the Ld. Counsel the case of Lloyd Electrical and Engineering Ltd. V/s State of Himachal Pradesh (2016)1 Scc 560 (3 JJ) is not applicable in the context of the present case as the facts and the circumstances of the case is different and in the present case dealer has caused loss to the state exchequer by unlawful claim of certain amount by reducing the tax rate which resulted in unlawful accumulation of ITC in favour of the dealer. Also it was founded that ITC was also unlawfully claimed on unsold stock. As such, I am of the view that the order of Assessing Authority is legal and principle of natural justice has been honored.

7. For the aforesaid reasons, the appeal does not merit consideration and is dismissed. The impugned order of the Assessing Authority dated 29-06-2022 and the order of the Appellate Authority 24-04-2023 are upheld.

8. Copy of this order is sent to the parties concerned. File after due completion be consigned to the record room.

Priyatu Mandal
Chairman,
HP Tax Tribunal, Dharamshala,
Camp at Shimla

HP Tax Tribunal Camp at Shimla,
Block No 30, Sub Complex Shimla-9

Endst. No. HPTT/CS/2024 - 66 to 70 **Dated:** 01/05/2024

Copy forwarded for information to:-

1. The Commissioner State Taxes & Excise, Himachal Pradesh, Shimla-09.
2. ACST&E Cum Assessing Authority, Damtal Kandrori (HP).
3. M/s R.K Steels, GT Road, Mohtli, Teh. Indora, Kangra, (HP).
4. Ms. Shilpa Dogra, Advocate for the Appellant.
5. Sh. Sandeep Mandyal, Sr. Law Officer, HQ.

Reader
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