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

Appeal No.	:	13 & 14/2017
Date of Institution	:	13-02-2017
Date of order	:	16-03-2024

In the matter of:

M/s Pritika industries Limited, Bathri Distt. Una (HP)

.....Appellant

Vs

i) The Deputy Excise and Taxation Commissioner, Cum Appellate Authority (NZ), Distt. Kangra (HP).
ii) The AETC Cum Assessing Authority, Distt. Una (HP)

.....Respondents

Parties represented by:-

Shri Ajay Vaidya, Advocate for the Appellant.

Shri Sandeep Mandyal, Sr. Law Officer (Legal) for the Respondents.

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

Order

1. The present appeals have been filed by M/s Pritika industries Limited, Bathri Distt. Una (HP) against the orders of Ld. Deputy. Excise and Taxation Commissioner-cum-Appellate Authority, NZ, Palampur, Distt. Kangra, Himachal Pradesh dated 27-09-2016 vide which the appeals filed by the applicant for the years 2011-12 & 2012-13 against the order of the Ld. Assessing Authority Una (Respondent Number 2) vide which the Assessing Authority has withhold the refund amount of Rs. 10,25,618/- and Rs. 12,85,482/- for the years 2011-12 and 2012-13 under the HP VAT Act, 2005 and the CST Act, 1956 ,was upheld.
2. The Brief facts of the case are that M/s Pritika industries Limited, Bathri Distt. Una (HP) is registered as dealer under the HP VAT Act, 2005 and also under the CST Act, 1956 vide TIN 02080200205. The dealer is manufacturer and is engaged in the business of Automotive and Tractors parts etc. The Assessing Authority

assessed the appellant for the years 2011-12 & 2012-13, as per Section 11 of the Act, a purchasing registered dealer is entitled to claim input tax paid or payable by purchasing dealer to the selling registered dealer. As per scheme of the Act read with Deferment scheme, the selling dealer collected VAT payable but deposited 65% of the tax collected as per scheme of the Act. The Appellant availed the Input Tax credit and Assessing Authority recognized the availing of ITC equal to tax paid by the Appellant. The Assessing Authority did not rejected quantum of ITC availed but restricted the credit on the ground of deposit of 65% by selling dealer. Thereafter, the Appellate Authority upheld the orders passed by the Assessing Authority allowing refund to the extent of 65% only vides its order dated 27-09-2016 and the appeals have been filed against this order.

3. Aggrieved by the order of Ld Appellate Authority the Appellant has filed these appeals before this Tribunal on the following grounds:

i) The Assessing Authority has simply restricted the credit on the ground of deposit of 65% by selling dealer. The Government has extended benefit to selling dealer and it is recovered from the buying dealer. It means the Government has granted benefit to a selling dealer at the cost of buying dealer. As per section 11, the appellant is entitled'to credit equal to tax paid or payable by purchasing dealer. The Appellant availed credit equal to a tax paid by him. The appellant applied for excess ITC. The denial of refund of excess credit is not only against the spirit of Section 11 as well as scheme of the Act itself.The denial of refund amounts to violation of ITC scheme as well as Act itself.

ii) That the State Govt. with intent to immediate collection of the revenue and at the same moment to grant relief to manufacturer/ dealers introduced a new scheme of 65% of payment of actual tax liability. The selling dealer availing benefit of exemption was required to levy and assess tax payable and he was liable to pay 65%v of the tax collected. The dealer is liable to pay tax indicated in the invoice and it is selling dealer who has right to withhold 35% of tax levied and deposit only 65% with the state authorities. The purchasing dealer is liable to pay tax equal to tax indicated in the invoice. He is, therefore, eligible to credit equal to tax paid by him. It is selling buyer who deposits 65% of tax collected. The Government has extended incentive to selling dealer and not purchasing dealer. The purchasing dealer is paying tax equal to an amount

indicated in invoice and taking credit of said amount. There is no provision in the Act or Rules made there under which provides that inspite of payment of full amount of tax shown in invoice, the buyer would be entitled to tax actually paid by selling dealer. It is not a case of evasion of tax on the part of selling dealer. It is a case of incentive scheme. Under the incentive scheme, the selling dealer has withheld 35% of tax collected. In the absence of any provision empowering the Assessing Authority to deny benefit of ITC equal to tax not paid by selling dealer or deny refund equal to tax not paid by selling dealer, the Assessing Authority had not fight to withhold refund equal to 35% of tax paid by appellant. Therefore, the action of respondent is arbitrary and unjustified.

iii) *It is submitted that as per Section 5A of the Himachal Pradesh General Sales Tax (Deferred Payment of Tax) Scheme 2005 introduced vide notification dated 26-07-2005 the relevant extraction is as under:-*

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 07-01-2003 and which, after the approval of the Director of industries or other officers so authorized by him, undertake substantial expansion only after 07-01-2003 may either continue to 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 the 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 sales or transfer of goods on consignment basis or branch transfer basis".*

iv) *That Respondents had erred by not taking into considerations care of provisions of section 28(1), 12(4), 11(1), 11(5)(5) and 2(m) as discussed earlier. Moreover over the assessing authority is binging with the provisions of H.P. VAT Act and not the provision and treasury rules.*

v) *That the impugned orders as passed by Respondents are without application of mind and the bare perusal of impugned orders would go to show that same has been passed in a very cursory and slipshod manner vitiating the same.*

vi) *That the Respondent has misinterpreted the pleadings/arguments of the appellant and traveled beyond the principals applicable to the case as also has committed serious illegality while coming to conclusion that the appellant was liable to pay entry tax penalty and interest whereas the Hon'ble High Court has observed in many of its interim order that the interest has to be paid only after the final disposal of the matter.*

Prayers

In the light of the above, it is prayed that:

(1) That the impugned order may kindly be quashed and set aside being arbitrary, unreasonable without the mandate of law with consequential relief;

(2) The respondent may kindly be directed to refund the entire amount along with interest;

4. The Ld. Counsel for the Appellant prayed that the appeals be accepted and the impugned order be quashed. The Ld. Counsel for the appellant also relied upon the judgments which are as under:-

   i) Supreme Court in Commissioner of Sales Tax Vs. Industrial Coal Enterprises, 1999 SCR, 871.

   ii) Tamil Nadu Electricity Board and another Vs. Status Spinning Mills Limited, 2008 SCR, 870.

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 27-09-2016 may be upheld. The appellant had applied for refund for the year 2011-12 for Rs. 29,30,336/- and Rs.36,72,792/- for the year 2012-13. However, Assessing Authority vide its order dated 10-08-2015 and 10-02-2016 respectively sanctioned the refund of Rs. 19, 04,718/- and Rs. 23, 87,310/- for the years 2011-12 and 2012-13 respectively. It is pertinent to mention that the Appellant unit M/s Pritika

Industries, Bathri Distt. Una has purchased in parts item M/s Pritika Auto Cast Pvt. Ltd, which has been owing Tax @ 65% on upfront payment basis as per para 5 A (Added by HP Govt. Notification EXN-F-2/2004 dated 26-07-2005 of the HP General Sales Tax (Deferred Payment of tax) Scheme, 2005. The Appellant has paid full tax to the seller but the seller has deposited tax @ 65% as per the above referred provisions. The Assessing Authority, has rightly, came to the conclusion that the selling dealer has paid only 65% of the output tax, hence refund is allowed only to the extent of 65%. He further submitted that as per the HP Financial rules only that amount can be refunded which stand actually paid to the treasury.

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 with reference to allowing of input tax credit refund. I partly agree with the petitioner that the Appellate Authority should have given more detailed and speaking reason while rejecting the appeal. In the last Para, the Appellate Authority while dismissing the appeals is relying on the order of HP Tax Tribunal dated 29-07-2015 in the case of M/s Pooja Cotspin Ltd. Distt. Solan Vs. Excise and Taxation Commissioner Cum Revisional authority, Himachal Pradesh. In the interest of justice and given the fact that the matter pertains to the years 2011-12 & 2012-13, I proceed to decide the present appeals on its merits, as per points below:

   i) As per the admission of the appellant before Assessing Authority, the appellant has admitted his CST and VAT liabilities. It means that the appellant had not disputed the figure of tax liability determined 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.

   ii) The section 11(1) of the HP VAT Act, 2005 provides: " *Subject to the provisions of this Act, the input tax credit which a purchasing registered dealer (hereinafter in this section called the purchasing dealer') may claim, in respect of taxable sales made by him during the tax period, shall be-*

(a) The amount of input tax paid or payable by such purchasing dealer to the selling registered dealer, on the turnover of purchases of such goods as have been sold by him during the tax period; and

(b) Calculated and allowed as provided in this section, and subject to such other conditions as may be prescribed.

The dealer has claimed ITC on account of purchase of inputs from M/s Pritika Auto caste (P) Ltd. the said selling dealer had opted for 65% affront payment deposited VAT accordingly. It is seen that the selling dealer has claimed incentives of deferred tax into the HP VAT Act vide HP Govt. Notification No. EXN-F-(1) 2/ 2004- 30/3-2005. Further, vide an amendment to the deferrement scheme dated 26-07-2005 , the selling dealer has claimed the facility of paying @ 65% of the tax liability. Perusal of the said notification makes it very clear that deferred payment of tax scheme was applicable to the selling dealer. As per section 11 of the HP VAT Act, 2005, the purchasing dealer can claim ITC even though the selling dealer opted for deferrement scheme. As per the order of Assessing Authority dated 10-08-2015 it is seen that as per he has relied upon Himachal Pradesh VAT Rules and explained that amount only can be refunded which stand actually paid. The Assessing Authority has simple restricted the credit on the ground of deposit of 65% by selling dealer. The order of the Assessing Authority has allowed ITC to the tune of 65% of selling dealers affront VAT liability and denied the 35% refund of tax liability. As per Section 11 of the Act, a purchasing registered dealer is entitled to claim input tax paid or payable by purchasing dealer to the selling registered dealer. There is no condition under Section 11 that deemed payment under the deferrement scheme shall not be treated as payment and hence, the appellant having received the invoice as evidence of payment of tax is entitled to claim refund under Section 28 of the HP VAT Act, 2005.

As Per Section 28 of Himachal Pradesh VAT Act, 2005, 28(1)

The Assessing Authority either suo-moto or on an application shall in the prescribed manner (after final determination of liability,) refund to a

registered dealer or any other person any amount of tax, interest or penalty paid by such dealer or any such other person under this Act, if the amount of tax, penalty or interest so paid is in excess of the amount due from him under this Act, either by a refund voucher or, at the option of the dealer or such other person, by adjustment of the amount so paid with the amount due from him, in respect of any other period.'

The perusal of the said provision clearly binds the tax Assessing Authority to grant refund prescribed under the act if the dealer is fulfilling the criteria.

iii) The leading case which is also cited in the orders of 1st Appellate Authority M/s Pooja Cotspin Ltd. Distt. Solan Vs Excise and Taxation Commissioner passed by HP Tax Tribunal on dated 03-09-2015, was further challenged in Civil Revision Petition No. 226 of 2015 in the High Court of Himachal Pradesh, Shimla where it was ruled that the petitioner is entitled to refund of entire amount of ITC setting aside the orders of HP Tax Tribunal. The observations made by the HP High Court in the said case are as under:-

'However, sub-section 7 of Section 11 places an embargo on claim to ITC by a purchasing dealer in certain specific exigencies. A part of the claim of refund has been disallowed to the petitioner by wrong application of Section 11(70(c)(iii) of the Act, as already held above. The entitlement of the petitioner to claim refund of ITC was never the issue. It was the quantum of refund which had been bone of contention between the parties. Under Rule 45(6), the dealer opting to pay lump-sum is not required to issue tax invoices under Section 30, whereas sub Section 1 of Section 30 mandates the issuance of tax invoices by one registered dealer to another which forms the basis to make purchasing registered dealer entitle for claim of ITC. Under sub section 3 of Section 30, the issuance of tax invoices is barred in certain cases which include the payment of presumptive tax under Section 7 or lump-sum tax under sub section 2 of section 16 of the Act. It is not the case of respondent No. 1 that selling dealer had not issued tax invoices in the case. These provisions clearly define and distinguish the fields where ITC can be claimed under the Act and where it is prohibited.

As noticed above, it has not been the case of the department that the claim of the petitioner for ITC refund was not tenable. In such circumstances, to deny a part of claim of refund by applying Section 7 or Section 16(2) of the Act is clearly arbitrary. Even the principle of proportionality cannot be applied in cases where provisions of law are not juxtaposed, rather have their application in different situations.

There is no dispute on facts that the selling dealer i.e. M/s Samana Industries limited had initially availed the benefit of deferred payment subsequently converted to upfront payment of 65% of the payable amount by virtue of provisions of notification dated 26-07-2005. It was provided in said notification that the upfront payment of 65% of the tax liability for any tax period of financial year shall be deemed to be payment of the tad due according to the return of the assessee. Therefore, deficit, if any, of 35% in receipt of tax suffered by the State was its voluntary ct under a scheme formulated by it. Such deficit to the State coffers cannot be made basis for penalizing the petitioner who was not at fault'.

Thereafter, the department of Excise and Taxation moved to Hon'ble Supreme Court via SPECIAL LEAVE PETIONER (Civil) Diary No. 3761/2023 arising out of impugned judgment in CRP No. 226/2015 passed by the High Court of Himachal Pradesh at Shimla in case of **State of Himachal Pradesh & Ors. Vs. M/s Pooja Cotspin (P) Ltd.,** this petition was dismissed by the Supreme Court, thus, leading to the finality of the orders passed by the High Court of Himachal Pradesh.

Accordingly, I am convinced by the observation made by the Hon'ble High Court of Himachal Pradesh. This aspect should have been necessarily considered by Appellate Authority while deciding the appeal. The assessment done in this case should had not been done in a perfunctory manner and is warranted upon proper adjudication as to willful default and the presence of means rea.

iv) The law cited by the Ld. Counsel in the cases of Supreme Court in Commissioner of Sales Tax Vs. Industrial Coal Enterprises, 1999 SCR, 871; and Tamil Nadu Electricity Board and another Vs. Status Spinning Mills Limited, 2008 SCR, 870 also supports the case for entitled benefit

granted to the interested dealer if given under some exemption notification and hence the same is being relied upon. Thereby, the denial of ITC of 35% of tax liability, the intent and purpose of Exemption and deferrement Scheme laid down by the Government stands to be lost.

The collateral reading of the above stated judgments and in view of the discussions made hereinabove, I find that the appeals should be allowed and hence accepted and the impugned order dated 27-09-2016 of Appellate Authority is set aside. It is also declared that the appellant shall be entitled to the refund of balance input tax credit along with the payment of interest @ 6% per annum from the date it fell due till the date of actual payment.

7. On the fact and circumstances, the appeals of the appellant are accepted and the order of the appellate authority dated 27-09-2016 is quashed and set aside.
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

H P Tax Tribunal Camp at Shimla
Block No 30, SDA Complex Shimla-9

Endst. No. HPTT/CS/2024 – 2870 32 **Dated:** 16/03/2024

Copy forwarded for information to:-

1. The Commissioner State Taxes & Excise, Himachal Pradesh, Shimla-09.
2. The DCST&E Cum- Assessing Authority Una, Distt. Una, HP.
3. M/s Pritika industries Limited, Bathri Distt. Una (HP).
4. Sh. Ajay Vaidya, Advocate for the appellant.
5. Sh. Sandeep Mandyal, Sr. Law Officer, HQ.

Reader
HP Tax Tribunal
Dharamshala

H P Tax Tribunal Camp at Shimla.
Block No 30, SDA Complex Shimla-9