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

Appeal No. : 22 /2021
Date of Institution : 23-09-2021
Date of order : 30-05-2022

In the matter of:

M/s Mondelez India Foods Pvt. Ltd.,
(Earlier Know as Cadbury India Limited)
Hadbast No. 199, Village Sandholi, Baddi
Tehsil Nalagarh District Solan

.....Appellant

Vs

i) The Addl. ETC-cum-Appellate Authority,
Himachal Pradesh, Shimla.

ii) Assessing Authority-cum-AETC, Solan.

...Respondents

Parties represented by:-

Shri Amar Pratap Singh, Advocate with Shri Goverdhan Sharma, Advocate for the Appellant

Shri Rakesh Rana, Deputy Director Legal for the Respondent

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

ORDER

1.The Appellant has filed this appeal dated 22nd September, 2021 for the year 2012-13 under section 45(2) of the Himachal Pradesh Value Added Tax Act, 2005 against the First Appellate Authority order dated 8th July, 2021 passed by the Ld. Appellate Authority-cum-Additional Commissioner of State Taxes and Excise (Additional Excise & Taxation Commissioner) South Zone, Shimla, Himachal Pradesh.

2. The facts of the case briefly stated are that the M/s Mondelez India Foods Pvt. Ltd. (earlier known as M/s Cadbury India Ltd.) registered under TIN 02020200416 carrying on the business of manufacturing and sale of

confectionary goods was assessed by the Ld. Assessing Authority-I-cum-Assistant Excise & Taxation Commissioner, District Solan for the financial year 2012-13 under section 60 of the HP VAT Act, 2005 and on the basis of the EIU, Headquarters' letter No.26-6/EXN-H-EIU-Solan-2014-30161 dated 12th October, 2015, which stated as under:

"On perusal of the data available on the web portal of the department (i.e. the return and attached lists in form LP-1 and LS-1 for the purchaser and seller) huge mismatches worth Rs.12,48,10,11,270 in respect of Mondelez India Food Pvt. Ltd. Solan TIN 02020200416 for the years 2011- 12, 2012-13, 2013-14 and 2014-15 have been worked out as under:-

1. ***The dealer has shown less purchases from 25 dealers of Himachal Pradesh amounting to Rs.22,19,26,604/- in the year 2011-12, 2012-13 and 2013-14.***
2. ***The dealer has shown higher purchases in his VAT return from 11 dealers of Himachal Pradesh whereas selling dealers are not showing any sale to the purchasing dealer, so it seems to be false ITC claim by the purchasing dealer or sale suppression by the selling dealer.***
3. ***The dealer has shown less inter-state purchases in the year 2012-13, 2013-14 & 2014-15 amounting to Rs. 7,75,30,87,760/- in his VAT return.***
4. ***The dealer has shown less inter-state sale amounting to Rs.4,37,56,52,254/- in the year 2012-13, 2013-14 and 2014-15 in his VAT XV and VAT XV-A forms.***
5. ***Entries in column No.10(A)(2) of VAT XV-A form for the year 2011-12, 2012-13, 2013-14 and 2014-15 also need to be verified for veracity of claim made there in these columns.***

Prima facie it seems to be a case of purchase and sale suppression and tax evasion on the part of the dealer as per details enclosed herewith."

Thereafter, for year 2012-13, the Ld. Assessing Authority-I, Solan heard the Appellant on the following points: -

"1. Whether the dealer (appellant) has declared less purchases of Rs.18,39,32,698 in his LP-1 from 15 dealers for the year 2012- 13.

2. Whether the dealer has reflected higher purchases of Rs.12,46,08,899/- in his VAT return from 04 dealers for the year 2012-13 whereas the selling dealers are not showing any sales to the purchasing dealer, making it a case of false ITC claim by the purchasing dealer or suppression from the selling dealers.

3. Whether the dealer has depicted less interstate purchases in the year 2012-13 amounting to Rs.109,94,69,705/- as is clear from VAT XV and VAT VI-A.

4.Whether the dealer has depicted less interstate sales amounting to Rs.180,11,38,617/- in the year 2012-13 in his VAT XV and VAT XV-A."

After scrutiny of the record for the year 2012-13 and hearing of the Appellant, the Ld. Assessing Authority-I, Solan vide his order dated 30.6.2017 found that –

(i) ***"the dealer has suppressed the purchases of Rs.10,02,37,414/-" from the 13 dealers;***

(ii) ***"the dealer....has actually purchased the raw material from the above four dealers....and submitted bill-wise detail alongwith invoices"; "....the company has not claimed the ITC on the purchases of raw material...Hence there is no case of false claim of ITC claim by the purchasing dealer."***

(iii) ***"....total difference (in inter-state purchases) comes to Rs.24,98,02,696/- (109,94,69,705 - 84,96,67,009). It is clear that the dealer has suppressed the inter-state purchases of Rs.24,98,02,696/-...".***

(iv) ***"The total difference (in inter-state sales) comes to Rs.91,85,91,912/-. Therefore it is clear that the dealer***

has suppressed the inter-state sales of Rs.91,85,81,912/- (should be 91,85,91,912)".

Before assessing the aforesaid suppressions to tax, the Ld. Assessing Authority confronted the Appellant with the aforesaid findings and afforded him repeated opportunity to furnish explanation as per the following remarks which are reproduced as under:-

" 1. Whether he has filed revised return for these purchases' u/s 16?

2.Whether he has corrected these figures in Annual Return u/s 16 & under rule 44?

3. Whether Appellant had intimated about this mismatch to the department?

4. Why the penalty u/s 16(8) should not be imposed?

On all the above queries the dealer could not provide the satisfactory reply. Therefore, after affording sufficient time and reasonable opportunity, the mismatch for the year 2012-13 Hs been assessed..."

The said Authority vide order dated 30.6.2017 determined the aggregate suppressions on the said counts at Rs.1,30,36,26,032 (Rs.1,26,86,22,022 + Rs.3,50,04,010 profit), and quantified the Tax, Interest and Penalty at Rs.14,55,57,219, Rs.10,91,67,917 and Rs.14,55,57,219 respectively which aggregated to Rs.40,02,82,355 in the behalf passed the Order dated 30th June, 2017.

3.The Appellant assailed the said Order dated 30th June, 2017 passed by the Ld. Assessing Authority by an appeal under section 45(1)(a) of the HP VAT Act, 2005 before the Ld. Appellate Authority-cum-Additional Commissioner of State Taxes and Excise South Zone, Shimla. The Ld. Appellate Authority-cum Additional Commissioner of State Taxes and Excise passed the Order dated 8th July, 2021 holding that:-

"..the appeal is partially allowed and the case is hereby remanded to the Assessing Authority to assess the case afresh taking into consideration the relevant provisions of the HP VAT Act, 2005 and rules framed thereunder. The Appellant dealer is also directed to present original audited books of accounts, like profit and loss account, balance sheet, trading account, ledger, bills/invoices etc. for the assessment year 2012-13

to the assessing authority concerned for appropriate verification of the sales and purchases of the appellant dealer within 30 days of the receipt of this order. The Assessing Authority is further directed to collaborate the books with the online portal (HIMTAS) data concerning the sales/purchases of the appellant dealer carried out for the assessment year 2012-13."

4.The Appellant, however, chose to assail the above Appellate Order dated 8th July, 2021 by preferring a Civil Writ Petition No.5109 of 2021 under Article 226 of the Constitution before the High Court. The High Court was pleased to dismiss the Appellant's petition, vide its Order dated 7th September, 2021 and held that:-

"3. In view of the availability of an alternate and efficacious remedy, we do not find it appropriate to entertain this petition.The Tribunal is entitled to entertain the appeal and also to grant an interim order as provided under sub-section (6) of the Himachal Pradesh Value Added Tax Act, 2005. Hence, we do not find any merit in this petition and the same is dismissed."

5. Pursuant to the dismissal of the Petition by the Hon'ble High Court, the Appellant has filed the instant appeal against the impugned the 1st Appellate Authority order dated 8th July, 2021 mainly on the following two grounds, namely:-

(i) There cannot be multiple assessment proceedings for the same year and the Appellant has already faced the assessment proceedings on three occasions involving the same assessment year i.e. 2012-13; and

(ii) The impugned order dated 8th July, 2021 is without jurisdiction since it revives the assessment proceedings which stand barred by limitation under the HP VAT Act, 2005.

On these grounds the Appellant has sought the relief of setting aside this appellate order only *"to the extent the case has been remanded...for fresh assessment"*.

6. In order to complete the matrix of relevant facts and to appreciate the issues involved in this appeal, the following facts emerging from the record are essential to be noticed: -

(a) As regards the argument of multiple assessments, it does not seem to be correct because the Assessment Order dated 30.9.2020 appended as Annexure A-9 to the memorandum of Appeal specifically states that:

> *"A mismatch of Rs.290,06,08,322/- in the import and export data and Rs.38,85,41,597/- in the LP-1 of M/s Mondelez India Foods Ltd. (formally known as Cadbury India Ltd.) vis-à-vis LS-1 of various dealers in HP which was already decided vide the then Assessing Authority Order dated 30.06.2017 with creating a demand of Rs.40,02,82,355/-. The case is pending with 1st Appellate Authority-cum-Addl. Commissioner of State Taxes & Excise South Zone Shimla."*

Consequently, the order dated 30.9.2020 and the order dated 30.6.2017 being separate and distinct from each other are not repeat assessments.

(b) As regards the veracity and genuineness of accounts maintained by the Appellant made the following admissions of Appellant reproduced in Para 6 of the Appellate Authority Order dated 31.12.2014 passed in Appeal No.137-138/2014-15, annexed by the Appellant as Annexure A-3 to the memorandum of this Appeal under hearing is reproduced as under:

> *"6. ...It follows SAP system of accounting, and the accounting software of the Company is designed in such a way that the purchases in the name of selling dealers are incorporated in their names only when the quality control department of the Company approves those particular purchases. The quality testing procedures usually take two-three months and mismatch in monthly vis-à-vis LS-1 of the selling dealers is bound to happen."*

The above admission is an important evidence to show that the Appellant had not been maintaining regular day-to-day accounts as mandated by section 29 (1) of the HP VAT Act, 2005, which specifically provides that *"Every registered dealer.... shall maintain a true and upto date account of the value of goods purchased, manufactured and sold by him, or goods held by him in stock..".* The admitted method of maintenance of accounts doubtless renders the same to be impeachable and undependable, as these did not admittedly show day-to-day and upto date accounts of purchases, sales etc, and these

accounts earned liability for rejection. The Ld. Appellate Authority in its Appellate Order dated 31.12.2014 passed in Appeal No.137-138/2014-15 deprecated the said dubious and suspect method of maintaining accounts as follows:-

> *8. .....I do not feel convinced with the accounting method adopted by the appellant wherein every purchase as stated by the appellant takes two-three months for its incorporation in the name of the relevant selling dealer. The appellant should adopt the accounting procedures and practices which are incompatible with the prescribed procedures under the Act and the Rules wherein ample provisions to deal with purchases and purchase-returns are spelt out."*

It is significant that neither the Assessment Order dated 30.9.2020 (Annexure A-9) nor the Appellate Order in Appeals No.137-138/2014-15 have been appealed against or subjected to revision and, therefore, these have been accepted by the Appellant. Under section 45(3) it has been provided that:

> ***"Every order of the Tribunal, the Commissioner or any officer exercising the powers of the Commissioner, or the Additional Excise and Taxation Commissioner posted at State Headquarters or the order of the Deputy Excise and Taxation Commissioner or of the Assessing Authority or an officer incharge of check post or barrier or any other officer not below the rank of an Excise and Taxation Officer, if not challenged in appeal or revision, shall be final.";*** and

(c) In the Appeal filed in 2017 for the year 2012-13 attached as Annexure A-7 before 1st Appellate Authority , appended to the memorandum of the present appeal, the Appellant has unambiguously admitted that :-

(i) ***"Therefore, the Appellant made a bonafide mistake in under-reporting the purchases." [Para F.7(i)];***

(ii) ***"The Appellant stock transferred the goods worth Rs.1997,95,71,014/- outside the State of Himachal Pradesh. However, in the annual return, the Appellant has shown the amount of stock transfer as Rs.2002,95,53,611/-. It is submitted that the above discrepancy in the annual return and the Form-F can be reconciled with the help of above datas.***

The Appellant made a bonafide mistake in under-reporting the stock transfer [Para F.7 ((iv)];

(iii) *Form-C of Rs.3,62,51,86,905/- were issued by the Excise and Taxation Department of Himachal Pradesh. The discrepancy in the purchase turnover of Rs.339,37,00,962/- reported in the Annual Return and the value of Form-C issued by the Excise and Taxation Department of Himachal Pradesh can be reconciled with the above Forms. Therefore, the Appellant made a bonafide mistake in under-reporting the inter-State purchases. [Para F.7 (v)]; and*

(iv) *In view of the above it is submitted that the Appellant made a bonafide mistake in reporting the correct figures of purchases and stock transfer. [Para F.8}.*

These admissions are important, bind the Appellant and it cannot be permitted to resile there from and advance any plea contrary to these admissions. Besides, it is significant that these admissions voluntarily made by the Appellant cast serious reflection on dependability of the accounts maintained by the Appellant.

These facts are germane to the issues under appeal deserved notice and cannot be overlooked in considering the present appeal.

7. Shri Amar Pratap Singh, Advocate, alongwith Shri Goverdhan Lal Sharma, Advocate, holding power of attorney appeared for the Appellant argued that Ld. Respondent Assessing Authority has done assessment in piecemeal by overlooking the provisions of the HP VAT Act, 2005, which contained no provision allowing such assessments. The Ld. Advocates cited the provisions of sections 21 and 23 of the HP VAT Act, 2005 and Rules 64,65, 66 and 40 of the HP VAT Rules, 2005, in this behalf and in their submissions made in memorandum of appeal also relied upon the judgment in Nayak Variety Store vs. CST (2008) 18 VST 500 (Orissa) to say that repeated tax audits and audit assessments for the same tax period(s) were not justified and were not in keeping with the provisions of the section 42 (6) and (7) of the Act and that the revenue interest is well protected by provisions of section 43 which

provided longer period of limitation. Further, when the statute provides for a particular procedure, the authority has to follow the same and cannot adopt other modes of performance. In this regard vide memorandum of appeal itself, reliance has been placed on decisions in Taylor v. Tailor (1875) 1 Ch.D.426, Hukam Chand Shyam LaL V. Union of India (1976) 2 SCR 1060, CIT v. Anjum M.H. Ghaswala (2001) 252 ITR 1 SC, Nazir 1ahmed v. King Emperor MANU/PR/0020/1936, Deep Chand v. State of Rajasthan (1962) 1 SCR 662 and Him Cement Workers v. State of Orissa (2001) 92 CLT 184 (Orrisa). On the plea of limitation and revival of assessment proceedings by the appellate order dated 8th July, 2021, the Ld. Counsels submitted that section 21(3) was silent regarding period of limitation for framing assessment, but sub-sections (5) and (6) of section 21 speak of framing best judgment assessment within five years, where a dealer having furnished returns fails to comply with the notice or where a dealer does not furnish the returns in respect of any period or where a dealer fails to apply for registration. The case of the Appellant neither falls under sub-section (2) nor under sub-section (4) of section 21. It is admitted that the proceedings in the instant case under appeal have been under section 21(3) which does not provide for any period of limitation, but the Ld. Counsels argued that in Joint Collector Ranga Reddy District and Another vs. D Narsing Rao and others (2015) 3 SCC 695 it has been held that when there is no period of limitation prescribed for exercise of any power, revisional or otherwise, such power must be exercised within a reasonable period. It was further argued that the Ld. Appellate Authority by remanding the case to the Assessing Authority has waived the period of limitation in section 24(1) of the Act. Judgments of the High Courts under section 153(2A) of the Income Tax Act were also cited. The Ld. Counsels, therefore, submitted that the Appellate Order dated 8th July, 2021 may be quashed and also further submitted that if the Assessing Authority passes fresh assessment order in compliance with the impugned order, it will cause grave financial hardship to the Appellant.

8.Shri Rakesh Rana, Ld. Deputy Director (Legal) alongwith Shri Devkant Parkash Khachi, Deputy Commissioner STE, Solan argued that under section

45(6) of the HP VAT Act, 2005, the Ld. Appellate Authority is required to pass such order on appeal as it deems just and proper. The Appellant who is dealing in manufacturing and sale of confectionary items has been found indulging in suppression of transactions of purchases and sales and evading tax payable under the Act to the detriment of the State revenues. The Appellate Authority has remanded the case for appreciating the relevant provisions of law and assessing the case afresh after appropriate verification of the purchases and sales and also corroborates the same with the online portal (HIMTAS). The Order dated 30.6.2017 passed by the Ld. Assessing Authority under section 60 of the HP VAT Act, 2005 vide which the tax, interest and penalty amounting to Rs.14,55,57,219, Rs.10,91,67,917 and Rs.14,55,57,219 respectively aggregating to Rs. 40,02,82,355 has been imposed under the relevant sections of the Act, shows large-scale suppression of purchases and sales and this involved huge magnitude of loss of State revenue, which cannot be ignored.

9. I have heard the arguments of both the parties, perused the record and considered the law on the subject. It is observed that the order dated 30.6.2017 passed by the Ld. Assessing Authority-I, Solan has been passed on the basis new findings of the of the letter dated 12.10.2015 of the Excise and Taxation Department HQ, reproduced herein above in Para 2 of this order, from the Economic Intelligence Unit (EIU) Headquarters, which revealed huge mismatch of the purchases and sales in the returns of the Appellant, involving not properly assessed tax liability running into several hundred crores of Rupees as mentioned in the above order. The above order is an original assessment order of mismatches of transactions made by the Appellant as provided under Rule 66 of the HP VAT Rules, 2005 against which the Appellant filed appeal before the Ld. Appellate Authority. In my considered opinion, it is not a case of repeated assessment as contended on behalf of the Appellant. The order dated 30.6.2017 has been passed in view of the admitted mismatches in form LP-1 and LS-1 of the purchasing and selling dealers as observed by the EIU Headquarters as per section 60 of the Act which is reproduced below:

*"**60. Scrutiny of returns.—** (1) Without prejudice to the provisions of sub- section (4) of section 21, at any time in the year, the Assessing Authority may undertake scrutiny of returns filed for any tax period for ascertaining compliance of the provisions of sub-sections (3) and (4) of section 16 and to check correctness of application and calculation of rates of tax, penalty and interest payable, claim of input tax credit and payment of full amount of tax according to such return.*

(2) If any mistake is detected as a result of scrutiny made as per provisions of sub-section (1), the Assessing Authority shall serve a notice in the prescribed form on the dealer to make payment of the extra amount of tax, penalty and interest."

Section 21 (2) of the HP VAT Act, 2005 which is the basic provision for selection of cases for scrutiny and quantifying tax liability etc. is also reproduced below:

"The State Government may prescribe the manner of selection of cases for scrutiny of returns filed by the dealers specified in sub-section (1) and the Assessing Authority shall in respect of each selected case, serve on the dealer a notice in the prescribed manner requiring him, on a date and at a place specified therein, either to attend in person or to produce or cause to be produced any evidence on which such dealer may rely in support of the returns filed by him under sub-section (1) and after hearing the dealer and considering the evidence produced by him assess the amount of tax, if any, due from him."

Accordingly, the above sections 60 and 21(2) of the Act require to be read conjointly in the context of scrutiny of returns and assessment of tax from the concerned dealer. It must be observed that as per the criteria prescribed by the State Government for selection of cases for scrutiny, Rule 66(i) of the HP VAT Rules, 2005 requires that cases where "gross turnover exceeding one hundred lakh rupees in a year", 'may be taken up for scrutiny'. The gross turnover of the Appellant during the year under appeal, being Rs. 1,30,36,26,032/- necessarily qualifies for scrutiny. As such, it is held that the scrutiny of the returns made by the Ld. Assessing Authority vide his Order dated 30.6.2017 is within the contemplation of law aforesaid and

does not call for any interference. Besides section 21(2) of the Act, which is an edict of the Legislature, requires to be construed based on the language employed by the Legislature because it is legally well settled that *"It is only from the language of the statute that the intention of the legislature must be gathered, for the legislature means no more and no less than what it says."* The language of the said provisions is clear and explicit, and effect must be given to it.

10. In his arguments, the Appellant also endeavored to take benefit of section 21 of the HP VAT Act, 2005 and reliance was also placed on the judgment of the Hon'ble High Court of Orissa in Nayak Variety Store vs. CST (2008) 18 VST 500 (Orissa). However, plain reading of the above provisions of section 60 of the HP VAT Act, 2005 clearly shows that there cannot exist any intention of law which enables the Appellant dealer to reap benefit resulting from oversight or lack of information relating to certain transactions, which are otherwise liable to be taxed. Any technical grounds urged in the appeal cannot prevent the authorities from undertaking fresh/revised assessments, de-novo, when certain transactions of sales and purchases had been ignored in the initial assessment. The various judgments cited by the Appellant, including mainly the judgment in Nayak *Variety Store Case* (Orissa) have no relevance to the facts of this case especially in view of the provisions of section 60 and 21 (2) of the HP VAT Act, 2005 and the Rule 66 of the Rules. Further, the requisite procedure of notice and hearing have been fully complied with by the Ld. Assessing Authority before passing the Order dated 30-06-2017, and these are not disputed by the Appellant as well. Therefore, the contentions of the Appellant cannot be accepted. The facts mentioned in Para 6 of this Order not only show repeated voluntary admissions which bind the Appellant, but also the Appellate Authority observations made in the 1st Appellate Authority Order dated 31.12.2014 in Appeals No.137-138/2014-15, which have attained statutory finality under section 45(3) of the Act, which directly hold as wrong and illegal the accounting method adopted by the appellant. Similarly, Appellant's act of non-appeal against the Assessment Order dated 30.9.2020 (Annexure A-9), and the Appellate Authority Order dated 31.12.2014 clearly shows

are also relevant.

Appellant's satisfaction with those orders which consequentially confers legal finality on these orders not only by efflux of appellate time of 60 days but by operation of law contained in section 45 (3) of the Act. Hence the orders become equally and legally binding upon the Appellant, and he cannot now wriggle out from natural consequences of the same. Accordingly, it is clear that the Appellant has itself made voluntary admissions of mistakes and admitted faulty maintenance of accounts contrary to section 29 of the HP VAT Act, 2005 and having availed of the full opportunity of hearing, and having failed to furnish defense by satisfactory explanation of lapses committed by it, despite about twenty opportunities before the Assessing Authority, cannot have any valid ground to assail the Order dated 30.6.2017 (Annexure A-6) passed by the Ld. Assessing Authority-I, Solan. The same order is therefore upheld and declared to be valid and in accordance with law. The Appellate Order dated 8.7.2021 (A-1) having not considered these aspects and being contrary to law is resultantly quashed and set aside. In the result, the appeal filed by the Appellant is devoid of any merit and the same is hereby dismissed.

11. Copy of this order be sent to the parties concerned and the case file, after due completion, be consigned to the record room.

(Akshay Sood)
Chairman,
HP Tax Tribunal,
Camp at Shimla

Dated 30-05-2022

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Copy to:-

1. The Commissioner State Taxes & Excise, Himachal Pradesh, Shimla-09.
2. The Addl. Commissioner-Cum-Appellate Authority SZ, Shimla.
3. The Assessing Authority, Cum-AETC, Solan, Distt. Solan.
4. M/s Mondelez India food Pvt. Ltd., Hadbast No. 199, Village Sandholi, Baddi Tehsil Nalagarh District Solan.
5. Shri Goverdhan Sharma, Advocate for the Appellant.
6. The Dy. Director, Law O/o Commissioner of State Taxes & Excise.

Sweejan Sharma
Reader
HP Tax Tribunal
Camp at Shimla