

Rajasthan Tax Board, Ajmer

1. Appeal No. 1301/2017/Jaipur
2. Appeal No. 1302/2017/Jaipur
3. Appeal No. 1303/2017/Jaipur
4. Appeal No. 1304/2017/Jaipur

M/s National Engg. Ind. Ltd.,
Khatipura Road, Jaipur

Appellant

VERSUS

1. Assistant Commissioner,
Anti-Evasion, Rajasthan-I,
Jaipur
2. Appellate Authority-II,
Commercial Taxes, Jaipur

Respondents

D.B.

SHRI V. SRINIVAS, CHAIRMAN

SHRI OMKAR SINGH ASHIYA, MEMBER

Present :

Shri M.L. Patodi,
Advocate
Shri Anil Pokharna
Dy. Govt. Advocate

for Assessee

for Revenue

Dated : 13/09/2018

JUDGMENT

1. These appeals have been filed by the appellant dealer (hereinafter called the "appellant") against orders of the Appellate Authority-II, Commercial Taxes, Jaipur (hereinafter called the "appellate authority") who vide his appellate order dated 16.08.2017, has upheld the orders of the Assistant Commissioner, Anti-Evasion, Rajasthan-I, Jaipur (hereinafter called the "assessing officer" or "AO") dated 09.12.2016 passed under section 18, 25, 55 and 61 of the Rajasthan Value Added Tax Act, 2003 (hereinafter called the "RVAT Act"). The details of the appellate as well as the assessment orders are mentioned below :-

Appeal No.	A.Y.	Appellate Authority's order Details		Assessing Authority's order Details (Amount disputed in present Appeals)			
		Appeal No.	order dated	order dated	Tax	Interest	Penalty
1301/2017	2013-14	348/AA-II/RVAT	16.08.2017	09.12.2016	5381342	2098974	10762684
1302/2017	2014-15	349/AA-II/RVAT	16.08.2017	09.12.2016	6491917	1753249	12983834
1303/2017	2015-16	350/AA-II/RVAT	16.08.2017	09.12.2016	7327931	1099207	14655862
1304/2017	2016-17 (I Qtr.)	351/AA-II/RVAT	16.08.2017	09.12.2016	2801102	420694	5602204

2. As a common issue is involved in all these appeals, therefore, these are disposed off by a common order. Copy of the order be placed on each relevant appeal file.
3. Brief facts leading to the present appeals are that the respondent assessee is a manufacturer of various types of bearings used for automotive, industrial and railway purposes. The Anti-Evasion Authorities surveyed the business premises of the appellant on 23.08.2016 and found that the appellant has purchased DEPB / Duty Scripts / Duty Free License within the State and has claimed and availed the Input Tax Credit (ITC) of the tax paid on purchase of these intangible goods. The enquiry officer found that no input tax credit is available on these items if the same are not disposed off in accordance with section 18 of the RVAT Act. Accordingly a case of Tax-Evasion was made out and it was transferred to the adjudicating officer (i.e. assessing officer in the present case), who after affording an opportunity to the appellant disallowed the input credit as availed by the appellant and levied interest on non-deposition of the due tax. The AO also held that since the appellant has availed wrong input tax credit and thus has caused evasion of tax, therefore, he imposed penalty u/s 61(2)(b) of the Act.
4. Being aggrieved of the assessment orders, the appellant preferred appeals before the appellate authority who vide his order dated 16.08.2017 confirmed the reversal of ITC and levy of interest and penalty and rejected the appeals. Against these appellate orders, the appellant has preferred Appeals u/s 83 of the RVAT Act before the Rajasthan Tax Board.
5. Learned counsel for the appellant submits that the applicant company has purchased DEPB License/Duty free license/Duty Credit Scrip from the registered dealers which were used for import of machinery/ raw material and that raw material was further used in manufacturing of the taxable goods in the State of Rajasthan. The claim of ITC on purchase of DEPB is on the basis of VAT charged by the selling dealer in the invoices. He further submits that the VAT paid on the purchase of such DEPB Scrips shall be deemed to be the input tax paid on the goods purchased for further use in manufacturing of the final

products, therefore, it fulfills the conditions of Section 18 and the appellant is eligible for ITC on these Duty Scrips/DEPB. On the issue of levy of penalty u/s 61 of the Act, he submits that in numerous judicial pronouncements, it has categorically been held that where dispute relates to classification of goods or the rate of tax and the transactions are well entered in the books of accounts of the dealer, then no penalty should be levied. He further referred the following case laws:

A. On the issue of ITC on DEPB/Duty Scrips

- i) Jagriti Plastics Ltd. Vs Commissioner of Trade & Taxes, ST.APPL 5/2015 date of judgment 01.10.2015 (Delhi)

B. On the issue of levy of penalty

- i) Sree Krishna Electricals Vs State of Tamil Nadu and another, [2009] 23 VST 249 (SC)
- ii) CTO AE Vs M/s. Durgeshwari Food Ltd., [2012] 32 TUD 3 (Raj.)
- iii) CTO Vs M/s J.K. Laxmi Cement Ltd., Appeal No. 1823/2014/Sirohi D/o 17.07.2017

6. Learned Deputy Government Advocate appearing for the respondent-Revenue submits that as per scheme of the section 18 of the RVAT Act, the ITC is allowed only in the cases as enumerated under clause (a) to (g) of sub section (1). Since the goods in question i.e. DEPB/duty credit scrips have been used for payment of the customs duty as a set off towards payment on import of the goods by the appellant, therefore, no ITC is available and the AO has rightly raised the demand for ITC already claimed by the appellant and for non-deposit of the due tax the interest has rightly been levied. He also submits that the appellant has wrongly availed the input tax credit which was not available to it, so the penalty u/s 61 of the Act has rightly been imposed. He further submits that the appellate authority has rightly confirmed the demand, so the appellate order deserves to be confirmed and appeals of the appellant may be rejected.

7. We have gone through the submissions of both the parties and perused the relevant record. The main question involved in present appeals is as to whether the purchase of DEPB or Duty Credit Scrips within the State after paying VAT on it, can a dealer claim ITC of the VAT so paid, if the goods in question

are used for set off against or payment of Customs Duty payable on import of certain goods- may be of machinery or raw material? Secondly, if it is found that ITC is not available on the DEPB/Duty Entitlement Scrips purchased within the State as it has not been used in accordance with section 18 of the Act, but the ITC was claimed by the dealer, whether in such a circumstance, the levy of penalty u/s 61 of the Act is justified or not?

8. This fact is not disputed that the appellant has purchased DEPB / Duty Entitlement Scrips within the State after paying VAT as per the notified rate and these Duty Entitlement Scrips / DEPB have been utilized against payment of the Customs Duty on import of machinery/raw material etc. In this regard, section 18 of the RVAT Act, 2003 is worth mentioning and the same is reproduced hereunder:-

"18. Input Tax Credit.- (1) Input tax credit shall be allowed, to registered dealers, other than the dealers covered by sub-section (2) of section 3 or section 5, in respect of purchase of any taxable goods made within the State from a registered dealer to the extent and in such manner as may be prescribed, for the purpose of-

- (a) sale within the State of Rajasthan; or***
- (b) sale in the course of inter-State trade and commerce; or***
- (c) sale in the course of export outside the territory of India; or***
- (d) being used as packing material of the goods, other than exempted goods, for sale; or***
- (e) being used as raw material ", except those as may be notified by the State Government," in the manufacture of goods other than exempted goods, for sale within the State or in the course of inter-State trade or commerce; or***
- (f) "being used as packing material of goods or as raw material in manufacture of goods for sale" in the course of export outside the territory of India; or***
- "(g) being used in the State as capital goods in manufacture of goods other than exempted goods,";***

however, if the goods purchased are used partly for the purposes specified in this sub-section and partly as otherwise, input tax credit shall be allowed proportionate to the extent they are used for the purposes specified in this sub-section.

"(2) The input tax credit under sub-section (1) shall be allowed only after verification of the deposit of tax payable by the selling dealer in the manner as may be notified by the Commissioner."

(3) Notwithstanding anything contained in this Act, no input tax credit shall be allowed on the purchases-

- (i) from a registered dealer who is liable to pay tax under sub-section (2) of section 3 or who has opted to pay tax under section 5 of this Act; or***

(ii) of goods made in the course of import from outside the State; or

(iia) of goods taxable at first point in the series of sales, from a registered dealer who pays tax at the first point;

Explanation.- For the purpose of this clause, "first point in the series of sales" means the first sale made by a registered dealer in the State; or"

(iii) where the original VAT invoice or duplicate copy thereof is not available with the claimant, or there is evidence that the same has not been issued by the selling registered dealer from whom the goods are purported to have been purchased; or

(iv) of goods where invoice does not show the amount of tax separately; or (v) where the purchasing dealer fails to prove the genuineness of the purchase transaction [xxx], on being asked to do so by an officer not below the rank of Assistant Commercial Taxes Officer authorised by the Commissioner.

(3A) Notwithstanding anything contained in this Act, where any goods purchased in the State are subsequently sold at subsidized price, the input tax allowable under this section in respect of such goods shall not exceed the output tax payable on such goods.

(4) The State Government may notify cases in which partial input tax credit may be allowed subject to such conditions, as may be notified by it.

9. If we go by the stipulations of the section 18(1) (a) to (g) as mentioned above, and match the use of the goods in question i.e. payment of customs duty on import of goods from out of the Country, then the following scenario emerges:-

Clauses of the Section 18(1)	Particulars	Whether the goods has been used as per the stipulation
(a)	sale within the State of Rajasthan; or	NO
(b)	sale in the course of inter-State trade and commerce; or	NO
(c)	sale in the course of export outside the territory of India; or	NO
(d)	being used as packing material of the goods, other than exempted goods, for sale; or	NO
(e)	being used as raw material, except those as may be notified by the State Government," in the manufacture of goods other than exempted goods, for sale within the State or in the course of inter-State trade or commerce; or	NO

(f)	being used as packing material of goods or as raw material in manufacture of goods for sale in the course of export outside the territory of India; or	NO
(g)	being used in the State as capital goods in manufacture of goods other than exempted goods	NO

As narrated above, the goods in question have not been used for the purposes as specified under clause (a) to (g) of section 18(1) of the RVAT Act, 2003, therefore, no ITC is available against the tax paid on purchase of DEPB / Duty Entitlement Scrips.

10. The appellant has referred a judgment of the Hon'ble Delhi High Court in the case of **Jagriti Plastics Ltd. Vs Commissioner of Trade & Taxes**, ST. Appl 5/2015 Judgment dated 01.10.2015 wherein the Hon'ble Court has allowed the input tax credit on purchase of DEPB which was used for payment of customs duty on the imports made by the dealer. In this regard, it is important to note that the provisions of the Delhi VAT Act are materially different from those of the RVAT Act. For ready reference, the Section 9 of the Delhi Value Added Tax Act, 2004 is reproduced hereunder:

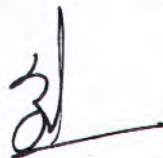
"9. Tax credit.

*(1) Subject to sub-section (2) of this section and such conditions, restrictions and limitations as may be prescribed, a dealer who is registered or is required to be registered under this Act shall be entitled to a tax credit in respect of the turnover of purchases occurring during the tax period where the purchase arises in the course of his activities as a dealer **and the goods are to be used by him directly or indirectly for the purpose of making-***

(a) sales which are liable to tax under section 3 of this Act; or

(b) sales which are not liable to tax under section 7 of this Act.

Explanation.- Sales which are not liable to tax under section 7 of this Act involve exports from Delhi whether to other States or Union territories or to foreign countries."



11. On bare perusal of the above section of the Delhi VAT Act, it is apparent that the tax credit is available to a dealer in respect of the purchase made in the course of his business activities and the goods are used by him directly or indirectly for the purpose of making sales. The Hon'ble Delhi High Court in the above referred judgment has analysed the terms 'be used by him directly or indirectly' and allowed the input tax credit on the purchase of DEPB Scrip. But provisions of the RVAT Act, precisely as contained in section 18, are not identical to the section 9 of Delhi VAT Act, therefore, the said judgment cannot be applied in the cases under the RVAT Act.
12. It is worth mentioning that the State of Maharashtra has specifically allowed ITC on purchase of DEPB which is used for payment of customs duty. Section 48 of the Maharashtra Value Added Tax and the corresponding rule No. 54 provides for the conditions and goods entitled for admissibility of set off whereby it has been clearly provided that set off is available on import licenses, duty free advance licenses and any other scrips issued under the Foreign Trade (Development and Regulation) Act, 1992.
13. Similarly, the State of Kerala has also allowed the ITC on DEPB by inserting an explanation to section 13 (Refund of input tax in the case of export or interstate sale) of the Kerala Value Added Tax Act, 2003, which is as under:-

"Explanation :- For the removal of doubt it is hereby clarified that where input tax is paid on the purchase of Duty Entitlement Pass Book or any similar license for the import of any goods and goods so imported are used, consumed or disposed of in the manner specified in this sub-section, the input tax paid on the purchase of such Duty Entitlement Pass Book or any similar license shall for the purpose of this section and section 11, be deemed to be the input tax paid on the goods imported."

14. On perusal of the provisions of various States about allowability of ITC it appears beyond any doubt that wherever any particular State intended to allow the ITC on DEPB for any use, the specific provision was made in their statutes. So, had the State Legislature any intent to allow input credit on purchase of DEPB /Duty Entitlement Scrips, which is

subsequently used against payment of customs duty, the express provisions could have been incorporated. But the language of the section 18 does not provide any such availability of ITC. Therefore, it is held that ITC shall not be allowed on purchase of DEPB /Duty Entitlement Scrips when the same is used for payment of Customs duty. In the backdrop of the legal position discussed above, the AO has rightly disallowed the ITC and has rightly levied interest on non-deposit of the due tax. Therefore, the appellate order on this issue is confirmed and appeals of the appellant on this issue are rejected.

15. So far as the issue of imposition of penalty under section 61 of the Act is concerned, it has been held by the Hon'ble Supreme Court as well as the Hon'ble Rajasthan High Court that where the transactions are entered in the books of accounts of the assessee and the dispute relates to classification of goods or rate of tax only, the penalty provisions should not be invoked in such cases. The judgments worth mentioning in this regard are:-

- (i) Shree Krishna Electricals Vs. State of Tamil Nadu & Another (2009) 11 SCC 687
- (ii) Reckitt Benckiser India Ltd Vs. ACTO, SB STR No. 7/2012 order dated 07.04.2017 (RHC)
- (iii) CTO Vs Durgeshwari food Ltd (2012) 32 TUD 3 (Raj.)

16. Moreover, this has been a consistent view of the Hon'ble High Court as well as the Rajasthan Tax Board that penalty u/s 61 of the Act should not be imposed when the transactions are entered in the books of accounts of the assessee or that dispute relates to classification of goods or rate of tax. Since the present matter also relates to interpretation of the law as to whether the ITC on purchase of the intangible goods i.e. DEPB/Duty Entertainment Scrip would be available or not when the same is used for payment of the customs duty, and this fact is not in dispute that the transactions were well recorded in the books of accounts of the assessee, therefore, the penalty as levied under section 61 of the Act by the AO, does not stand justified in light of the above mentioned



judicial pronouncements. Accordingly, the penalty as imposed by the AO is set aside and order of the appellate authority on this count is also set aside. Thus, the appeals of the appellant on this issue are accepted.

17. Accordingly, the appeals filed by the appellant are partly accepted.
18. Order pronounced.



(OMKAR SINGH ASHIYA)
Member



(V. SRINIVAS)
CHAIRMAN