

(2014) 11 MAD CK 0473

Madras High Court

Case No: Writ Petition Nos. 13901, 30851 to 30880 of 2013, 3211 to 3217, 9275 and 9276, 17628 to 17632, 11423 to 11426, 16296 of 2014, 4236 of 2013, 12690 and 12691, 13135, 24402 to 24404, 24405 to 24407, 24488 to 24491 of 2014, 24828 and 24829, 309 to 311, 1956 t

Interfit Techno Products Ltd.

APPELLANT

Vs

The Principal
Secretary/Commissioner of
Commercial Taxes

RESPONDENT

Date of Decision: Nov. 26, 2014

Acts Referred:

- Central Sales Tax Act, 1956 - Section 12, 15, 5, 5(3), 5(i)
- Tamil Nadu General Sales Tax Act, 1959 - Section 28, 28A
- Tamil Nadu Value Added Tax Act, 2006 - Section 15, 18, 18(1), 18(2), 18(3)

Citation: (2015) 81 VST 389

Hon'ble Judges: T.S. Sivagnanam, J

Bench: Single Bench

Judgement

@JUDGMENTTAG-ORDER

T.S. Sivagnanam, J.

The relief sought for in all these writ petitions are more or less identical and common grounds were raised by all the learned counsels appearing for the petitioners and the prayer made in the writ petitions having been resisted by the learned Special Government Pleader by advancing common arguments, the writ petitions were heard together and are disposed of by this common order.

2. To decide the controversy in this batch of writ petitions, it would suffice to take note of the facts in one of the writ petitions as except the products manufactured all transactions are said to be export sales. The facts as set out in W.P. No.24828 of 2012 are that the petitioner is engaged in the business of manufacture and sales of

Hosiery Garments and registered as dealer under the provisions of Tamil Nadu Value Added Tax Act, 2006 (VAT Act) and the Central Sales Tax Act, 1956(CST). The petitioner purchase yarn among other inputs inside the State of Tamil Nadu from various registered dealers on payment of VAT of 4% / 5% which is converted into fabric in the manufacturing unit of the petitioner and the fabric was thereafter processed and Hosiery garments were manufactured. The resultant Hosiery Garments were exported by the petitioner periodically.

3. It is submitted that during the knitting process, there was a process loss due to the flying of loose fibres and such loss was termed as invisible waste of yarn by the Trade and the same is less than 0.5% and such loss was unavoidable. It is further submitted that the yarn locally purchased from registered dealers had been put to a manufacturing process and therefore the petitioner availed Input Tax Credit of the VAT paid by them in purchases of yarn in terms of Section 19(1) read with Section 19(2)(ii) of the VAT Act. The resultant final product viz., Hosiery Garments being exported periodically, the petitioners made a claim for refund of Input Tax Credit on the purchases of yarn in terms of Section 18(2) read with 18(3) of the VAT Act. Such claim of refund was made in an application in Form W as prescribed under Rule 11(2) of VAT Rules, 2006. The refunds were granted to the petitioner periodically. While so, the place of business of the petitioners was inspected and the Inspecting Officers informed the petitioner that they have to pay VAT on the invisible loss, which was arrived at 5% of the total value of the yarn purchased by them. As that of the petitioner, the other persons, who were also involved in the same trade were required to pay VAT on the invisible loss of yarn emerging during manufacturing process.

4. Representation was made by the Textile Exporters Association to the Joint Commissioner of Commercial Taxes (Enforcement) as well as Joint Commissioner of Commercial Taxes, Coimbatore objecting to the proposal made by the assessing officers. It appears that the representations did not yield any result as desired by the Association. At that juncture, the Principal Secretary/Commissioner of Commercial Taxes issued a circular dated 20.10.2011 instructing that refund issuing Authority/the Assessing Authority, while considering the case of Manufacturing concerns, if there was any wastage of raw material during the manufacturing process, the Input Tax availed on such raw material, to the extent of the wastage, was required to be reversed; if excess refunds had been granted, taking into account such wastage, orders were required to be passed, which demands were required to be deducted from subsequent refunds payable to a dealer and if no refunds were payable, the same was to be recovered under the provisions of TNVAT Act. Further instruction was given in the circular that the Officers should not cite the circular while initiating proceedings, instead to cite relevant provisions of the Act. Therefore, Textile Exporters Association filed W.P. No.28114 of 2011 to prohibit the respondents from revoking or disallowing the claim on Input Tax Credit in respect of the members of the Association. In the affidavit in support of the writ petition, it was

stated that there was in fact no invisible loss of yarn and there was no requirement to effect any reversal for any process loss in terms of the scheme of the VAT Act. The Writ Petition was dismissed by order dated 14.12.2011 on the ground that the Association has no locus standi to file the writ petition claiming relief in respect of tax treatment in individual cases. Aggrieved by the same, the Association filed a Writ Appeal in W.A. No.966 of 2012. The Writ Appeal was dismissed by the Honourable Division Bench, by order dated 25.07.2012. An observation was made by the Honourable Division Bench that it is open to the Association whenever there is a need to conduct demonstration, they are entitled to approach the appropriate Authorities with appropriate representation for consideration and passing appropriate orders. Pursuant thereto notices were served on the petitioners proposing to bring to tax the invisible loss of yarn occurring during manufacture of knitted garments and it was fixed at 5% of the total value of the yarn purchased during a particular year.

5. The petitioners submitted their objections to the notice issued and thereafter for about two years nothing appears to have happened and during 2012, assessment proceedings were initiated, which compelled the petitioners to file writ petitions challenging the circular dated 20.10.2011 and in certain writ petitions, challenge is to the notices issued or proceedings initiated calling upon the petitioners to reverse the Input Tax Credit at uniform rate of 5% as well as consequential orders reversing the input tax credit availed to the extent of 4% / 5%. The other writ petitions viz., W.P. No.13901 of 2013 also challenges the impugned circular and only difference being the petitioner therein being the manufacture of S.G. Iron & S.S. Pipe Fittings and selling the same to locally and to outside State Dealers. The petitioner in W.P. No.9275 and 9276 of 2014 are manufacturers of Alloy Steel and Cast Iron viz., MS Scrap, Ferrous and non Ferrous purchased from local registered dealers and also from other States and they are exporting furnished goods directly under Section 5(i) of the CST Act. Though the products manufactured and exported by each of the writ petitioners might be different, the challenge to the impugned circulars are on common grounds, therefore, it may not be necessary to refer to the factual scenario in each of the writ petitions product wise.

6. Ms.R.Hemalatha, learned counsel appearing for the petitioners submitted that in terms of Section 19(1) read with 19(2)(ii) of the Act, the petitioner is entitled for Input Tax Credit on the entirety of tax paid on raw materials purchased from the registered dealers inside the State of Tamil Nadu as they have utilised all raw material for the use and manufacture of fabric. The Input Tax credit of the entire tax paid by them on purchases becomes available in terms of Section 19(2)(ii) of the VAT Act. It is submitted that the refunds granted to the petitioner in terms of Section 18(2) and 18(3) read with Rule 11(2) had been correctly made by the Assessing Officer and there is no provision under the Value Added Tax which requires reversal of ITC consequent to the process loss such as for invisible loss of raw material. Further it is submitted that the circular refers to Section 19(9) of the VAT Act and the

said provision deals with cases of theft, loss, destruction of goods and in such cases, no Input Tax Credit shall be available to a registered dealer and the Section do not deal about consumption of raw material in the manufacturing process and inevitable resultant process loss. Further it is submitted that the respondent has uniformly adopted 5% which is without any basis. That apart there is no power under the VAT Act for issuing the impugned circular and therefore, the impugned circular has no effect of law and has to be set aside. Further by commenting upon observation made in the order of assessment, wherein, the Assessing Officer has stated that the assessee has not reversed ITC on the invisible loss of raw material utilised in the manufacture, therefore, ITC is reversed in purchase value of raw material, it is submitted that the said observation is wholly untenable and unsustainable in law. Therefore, the learned counsel submitted that the impugned circular deserves to be set aside.

7. Mr. Raveekumar, learned counsel appearing for the petitioner submitted that there is no power under the VAT to issue circular; the Circular prescribes procedure which is not contemplated under the Act or Rules and the refund claims to be audited before the refund is processed is not as per the procedure stipulated under the Act; further the petitioners are not required to prove prior sufferance of tax at the hands of the vendor and in this regard, reliance was placed on the decision reported in [Sri Vinayaga Agencies Vs. Assistant Commissioner \(CT\) and Another, .](#) Further, by referring Section 19(9) of the VAT Act, it is submitted that the said provision is attracted when goods are damaged before manufacturing process and the term loss used in Section 19(9) cannot be isolated for / as invisible loss and a reading of the provision would clearly show that when goods are destroyed or there is theft and not used in the manufacture, hence goods are referred as essentially which are not gone through the process of manufacture. Learned counsel placed reliance on the decision in [Rainbow Steels Ltd. Muzaffarnagar and Birla Cotton Spinning and Weaving Mills Ltd., Delhi Vs. C.S.T., U.P. and State of U.P., .](#) Further it is submitted that in the absence of enabling provisions, the Authorities cannot proceed as directed in the circular and the effect of the circular amounts to double taxation. Further it is submitted that it is wastage as part of the purchase of raw material for which tax has already been paid. It is further submitted that it is not the case of the Department that if there is sale or wastage and most of which deductions were claimed are consumables. It is submitted that prior to the issuance of the impugned circular, refund claims were sanctioned and only after the circular, now orders have been passed reversing the ITC granted. Further by referring to the relevant Forms, it is submitted that invisible loss is not the wastage. Further it is submitted that because of the circular, there is a delay in processing the refund claim and a separate writ petition has been filed claiming interest on those refunds; further Form ""W"" is not referred to under Rule 8 which stipulates the procedure for assessment and when Form W is filed, it has to be considered on the materials available. Therefore, it is submitted that the entire proceedings are illegal and the

entire circular is illegal. In support of the contention, the learned counsel placed reliance on the decisions reported in CDJ 2012 MHC 5354 [M/S. Limtex (India) Pvt. Ltd., Robroy Tea Estate, Aravanu, Kotagiri, The Nilgiris vs. The Commercial Tax Officer, Kotagiri Assessment Circle, Kotagiri And Others], [Jinsasan Distributors Vs. The Commercial Tax Officer \(CT\) Chintadripet Assessment Circle No. 62, Cathedral Road Chennai 600086,](#), 2014-15 (20) TNCTJ 61 [M/S. Veelsons Energy Systems(P) Limited, Rep. By Director Shankar, Thuvakkudi, Trichy VS. The Commissioner Of Commercial Taxes, Chennai And Another].

8. Mr. Bakthasironmani, learned counsel appearing for the petitioner, who is engaged in Iron and Steel products submitted that Section 19(9)(iii) cannot be referred to missing material and referred to the White Paper submitted by the Government with regard to VAT regime and submitted that the circular cannot be made available in respect of assessment for the year 2006-07. Learned counsel also referred to the decision of the Honourable Supreme Court in the case of [Commissioner of Central Excise Vs. Indian Aluminium Co. Ltd.,](#).

9. Mr.N.Murali, learned counsel appearing for the petitioner submitted that Section 19(9) applies to goods which did not go into process of manufacture and all three contingencies under Sub Section (9) of Section 19 only refers to such goods; therefore, it is submitted that paragraph 13 of the impugned circular is contrary to Section 19(9) and there is no provision to reverse ITC on wastage. Further it is submitted that Rule 9 and 10 does not empower reversal of ITC on manufacturing loss and further Section 19(9) of the VAT Act contemplates as loss prior to manufacture or in the intermediary stage and unless the Rules are amended, action initiated by the respondent cannot be taken as it is illegal. Further it is submitted that under the Maharashtra VAT Act, 2002, Rule 55(5) is available and there is no such Rule under the TNVAT Rules and therefore, there can be no power given to the Assessing Officer to reverse the credit availed. Further it is submitted that since Section 19(9) are applicable only to cases before manufacture and the Section does not provide any procedure which is normally provided by mentioning in the manner prescribed. The learned counsel raised alternative plea stating that under the provisions of VAT Act, or the Rules, there is no requirement of determining the percentage of loss or wastage or what is intermediary loss for various types of industries. Further it is submitted that Section 19(9)(i) alone talks about reversal of tax credit and there is no such provision for reversion under Section 19(9)(ii) & (iii) and therefore, such provision is a piece of bad legislative drafting and therefore it is submitted that the language of the Statute is not clear and placed reliance on the decision in the case of [Govind Saran Ganga Saran Vs. Commissioner of Sales Tax and Others,](#). Further it is submitted that the dealer pays the price for the inputs whether it goes to the intermediary or final activity or not, however, the cost of such inputs is taken into consideration for final price of the final product which includes the cost of the raw material inclusive of wastage loss scrap. Therefore, the tax levied by the Revenue is on the full rate irrespective of the wastage or loss at the purchase

point and gets full rate of tax at the point of sale at the finished product. Therefore, both at the purchase and at the sale point, there is no loss to the revenue from the point of view of levy of tax and therefore, it is revenue neutral.

10. Mr.N.Sriprakash, learned counsel submitted that zero-rated sale under Section 18 of the Act is distinct and it is interpreted as an island under the scheme of the Act. In this regard, the learned counsel referred to the statutory provisions viz., Section 3(44), 5(1), Section 18(1), 18(2) of the Act. By referring to Sub Section (2) of Section 18, it is submitted that the dealer who makes zero-rated sale shall be entitled to refund of the Input Tax Credit paid by him on the purchase of goods used in the manufacture, therefore, the entire matter comes to a close and there could be no further enquiry into that. Reliance was placed on the decision of the Honourable Supreme Court in [M/s. Multimetals Ltd. Vs. Assistant Collector, Central Excise, Kota and others](#), which was followed in [Union of India and others Vs. Indian Aluminium Co. Ltd. and another](#),. Further it is submitted that even if there is loss of yarn in the manufacture process of Hosiery Garment, the petitioner is entitled to refund under Section 18(1) of the Act. Further it is submitted that Section 19 of the Act has absolutely no application to the entitlement of refund under Section 18(2) and Section 18 of the Act operates independently. Even assuming, it is applicable, the circular refers to Sub Section (9) of Section 19 of the Act. Admittedly, the yarn purchased is used in the manufacture, then to contend, it is destroyed in the process of manufacture, falls foul of Section 18(2) of the VAT Act. Further it is submitted that destroyed/destruction is put to end and which is a deliberate act and not an involuntary act. In this regard, learned counsel referred to the Websters Dictionary for the definition for the word destroyed as well as Black's Law Dictionary.

11. Alternatively, learned counsel submitted that even if it is the expression "destroyed" is stretched to mean manufacturing loss, Section 18 of the Act is a special scheme and Section 19 cannot be interpreted into Section 18 of the Act. By referring Section 18(3) of the Act, it is submitted that such a bar is not available under Section 19 and the benefit under Section 18 is a special benefit; with a condition, at this stage, it is to be noted that though the petitioner is not entitled to pay tax, yet, he is entitled to refund and that is why it is a special scheme. Further, it is submitted that Section 19 deals with Input Tax Credit and Sub Section (9) falls under Section 19 and it cannot be read into Section 18 and in this regard, relied on a decision in [Collector of Central Excise, Jaipur Vs. M/s. Raghuvar \(India\) Ltd.](#),. Further, it is submitted that in the instant case, it is not a credit and it is a refund under Section 18(1) and Section 19(9) operates in the field of credit. Further elaborate submissions were made referring to Form W under the Rules, which deals with refund claims. By referring to Rule 11(2) of the Rules, it is submitted that there is no power of review the refund ordered or revision of such an order granting refund. Further it is submitted that Section 27 also cannot be made applicable as it operates in different field. Sub Section 1(a) of Section 27 deals with turnover escaping

assessment. Clause (b) - assessment at lower rate Sub Section 2 of Section 27 deals with wrongly availed refunds and in both situation mens rea has to be established and the entire attempt under the scheme of Section 27 is to determine the tax due and the case of the petitioner since come under Section 18, there is no tax due at all as the sales are zero-rated sales. The Commissioner being conscious of the fact that the refund must end with the determination of the tax due; Section 27(4) of the VAT Act has directed that it has to be adjusted in the subsequent refund. Further Section 84 also cannot be pressed into service as process loss cannot be an apparent error. The learned counsel further submitted that though the assessee had given undertaking in Form W and such undertaking is with regard to details furnished in the Form and not for any other purpose. In this regard, reference was made to the decision of this Court in the case of [Eternit Everest Ltd. Vs. Union of India](#), .

12. Mrs. Hemalatha, while reiterating the submissions made by the other counsels, submitted that the petitioner had consumed and used raw material and manufacture valves and exported the same and by virtue of the impugned order, 5% has been deducted, the balance has to be refunded. Further it is submitted that question of filing revision or alternative remedy does not arise in the light of the circular issued by the first respondent.

13. Mr. Senniappan, learned counsel for the petitioner submitted that the export value contains the raw material purchased, though some are washed away in the dyeing process, it does not affect the right of the petitioner to take credit. Reliance was placed in the unreported decision of the Division Bench of this Court in T.C(R).1661 of 2008 dated 25.08.2010. It is further submitted that though there is wastage in the dyeing process, the value of the raw material goes along with it and therefore, reversing the credit does not arise. Further the word consumed used in Section 18(2) of the Act would also include evaporation. Further it is submitted that the circular has absolutely no sanction and cannot be used to deny the credit.

14. M/s. Ananda Gomathy Sivakumar, learned counsel submitted that there was process loss in their case as visible and it is only sludge and cannot be used and there is no commercial value and this aspect of the matter was not considered by the respondent and arbitrarily they have applied circular. In other respects, the learned counsel adopted the submission of Mr.N.Sriprakash.

15. On the above submissions, the learned counsel for the petitioners prayed for quashing the circular and to set aside the reversal of ITC to the extent of 5% made on the assessees.

16. Dr.Anita Sumanth, learned Special Government Pleader (Taxes) assisted by Mr. Cibi Vishnu, learned Additional Government Pleader and Mr.A.R. Jayaprathap, learned Government Advocate commenced her arguments by contending that invisible loss is not a new concept and the Honourable Division Bench of this Court in the case of [Al. Murugan Chettiar and Another Vs. State of Tamil Nadu](#), , in fact had

considered such concept in a case arising out of the provisions of Tamil Nadu General Sales Tax Act (TNGST), therefore, it is contended that the case as projected by the petitioner as if invisible loss is a new concept arising for the first time that too pursuant to the circular issued by the Commissioner is an incorrect submission.

17. It is further submitted that majority of the petitioners are manufacturers of Hosiery Garments and members of Tirupur Exporters Association which had filed a writ petition before this Court on behalf of its members in W.P.28114 of 2011. In the said writ petition, prayer was made to prohibit the respondents from revoking or disallowing the claim of Input Tax Credit in respect of the members of the petitioner association by treating 5% of the local purchase of yarn as invisible loss without authority of law. In the affidavit filed in support of the writ petition, the petitioner contended that there is no such loss/wastage as invisible loss in the process of conversion of yarn into cloth or Hosiery garments and the yarn used in the conversion of cloth is totally consumed/used and the weight of the cloth is equivalent the weight of the yarn used. It is submitted that the said writ petition was dismissed by order dated 14.12.2011 as against which the association preferred an appeal in W.A.966 of 2012 and the Honourable Division Bench of this Court did not find any reason to take a different view than what was taken by the learned Single Judge. However, an observation was made that it is open to the association that whenever there is a need to conduct demonstration, it is for them to approach the concerned officers with appropriate representation for consideration. It is submitted that all issues were raised in the earlier writ petition and got crystalised and now, the members of the association have filed these writ petitions taking an inconsistent stand than what was taken in the affidavit filed in the writ petition filed by the association and these writ petitions are after the dismissal of the writ appeal by the Honourable Division Bench. However, the liberty granted by the Division Bench was not availed of by the petitioners and the present writ petitions are not maintainable.

18. Learned Special Government Pleader further submitted that the impugned orders in each of the writ petitions are revisable orders and the petitioner should be relegated to file a petition under Section 52 of the Act and the writ petition has to be dismissed as not maintainable. Further it is submitted that though there is no power under the VAT Act to issue circular, the impugned circular is not a statutory circular and it is in the form of guideline and the Assessing Officer has to consider each case and though the circular states that it should not be quoted by the Assessing Officer, nevertheless the circular is available in the official website of the Department, a public domain, and the petitioners have downloaded the circular from the official website. Therefore, it is submitted that the circular cannot be quashed on the grounds raised by the petitioners. Learned counsel referred to Clauses 10, 13 and 14 of the circular, which is in the nature of guideline and the VAT Rules provide for ascertaining quantities utilised to determine the input output ratio and the assessee did not produce the books and the relevant details and therefore, a suggestion has been made in the form of Circular and in all cases, the impugned

orders have been passed as no materials were produced by the petitioners.

19. Referring to White Paper on State Level VAT published by the Empowering Committee of State Finance Ministers dated 17.01.2005, it is submitted that the example given in paragraph 2.2 of the said publication has taken a case where the entire purchase quantity of the material has gone into production and several questions arose which have been answered in the official website as FAQs and the answers to Question Nos. 30, 34, 37 and 40 would be relevant and the sum and substance of the clarification is that the dealers are not eligible for Input Tax Credit on all the inputs and there are certain restrictions and conditions for eligibility of Input Tax Credit and the transactions not eligible for Input Tax Credit have been listed out and goods damaged in transit, goods stolen, destroyed or lost are not eligible for credit. Therefore, the Assessing Officer in the process of verifying the genuineness of the claim is bound to consider the quantum of Input Tax Credit eligible for the dealer for which Input Tax Credit analysis have to be made as regards the input output ratio. Further, by referring to Form W, the refund claim, it is emphasised in terms of Paragraph 2(viii)(a), the quantity has to be discussed by the dealer to ascertain as to whether the entire quantity purchased has gone into export and there is undertaking given by the dealer in Form W and this procedure has been elucidated and answered in Question No. 40 of the FAQ. Further it is submitted that the contention that Section 18 of the VAT Act is an island under the Act is incorrect since the right to claim ITC flows only from Section 19 and Section 18(1) and 18(2) used the words subject to such restrictions and conditions as may be prescribed and the prescription is under Section 19. Further it is submitted that Section 18 is general rule for zero-rated sale and however this is subject to Section 19 and the scheme under Section 19 applies to all registered dealers. However, it is submitted that the dealers have not placed any material to show Section 18 is an "island" within the provisions of the Act and the Act being a Taxation Statute, words cannot be inserted into the provisions. Further it is submitted that even in cases where there is inconsistency in the two special enactments, it has to be resolved on the basis of purpose and policy of enactment and intentment conveyed by the language, and as regards the language of the enactment, reference was made to the decision of the Honourable Supreme Court in the case of [Ashoka Marketing Ltd. and another Vs. Punjab National Bank and others,](#). Therefore, it is submitted that even assuming Section 18 and 19 are two separate compartments, the policy object and intent of the VAT Act has to be borne in mind. Distinguishing the decision relied on by the learned counsel for the petitioner in the case of Multimetals Ltd., Vs. Assistant Collector, Central Excise (Supra), it is submitted that the said decision arose out of a case interpreting notification issued by the Central Excise Rules 1944 and under the Cenvat Credit Rules; Rule 2(k) defines inputs to mean whether contained in the final product or not, it is in contradiction with the definition under the VAT Act in particular Section 2(23) and 2(24); once again referring to the decision of the Division Bench in the case of A.L. Murugan Chettiar (supra), it is submitted that

invisible loss cannot be regarded as part of turnover as it disappears and while computing the input output ratio, the Assessing Officer is entitled to take into consideration that portion of the loss which is occurring and to deny the credit to that extent. Further it is submitted that the petitioners are not challenging the provisions of the Act and their challenge is only to the circular. Further, it is submitted that in W.P.9275 and 9276 of 2014, the circular has been challenged in its entirety for which there is no cause of action and hence the writ petitions are liable to be dismissed. Further it is submitted that though the circular uses the word shall its tenor is suggestive and Form W in Clause 2(viii) uses the expression relating to the export and therefore to that extent, which has been exported could qualify for grant of credit and the machinery provision is available under Section 27(2) of the Act. On the above grounds, the learned Special Government Pleader (Taxes) prayed for dismissal of the writ petitions.

20. In reply, learned counsel for the petitioners submitted that the Honourable Supreme Court in the decision of *Multimetals Limited (supra)*, does not refer to the definition of input under the Central Excise Rules and by reading Section 2(23) of the VAT Act which defines "input" to mean goods including capital goods purchased by the dealer in the course of business, read along with Section 18(2) of the VAT Act entitles the dealer to refund of input tax paid on purchase of the goods which are exported as such or consumed or used in the manufacture of other goods that are exported as specified in Sub Section 1 of Section 18 of the Act. Therefore, the question which arose in *Multimetals Limited (supra)* is whether it is used in the manufacture and the Honourable Supreme Court was not dealing with definition of "input" under Cenvat or Central Excise Act. Further it is submitted that under Section 19(9)(iii) of the VAT Act, the word destroyed to mean the deliberate act on the part of the assessee and in this regard, reference is made to Form I and the Form does not speak of loss in the course of manufacture. Further it is submitted that the procedure under Section 19(16) of the VAT Act is not applicable to a case falling under Section 18 of the VAT Act and the order passed on a refund claim made under Form W is not a provisional order and once credit has been granted, there is no mechanism to reverse. By referring to the decision in the case of [Mathuram Agrawal Vs. State of Madhya Pradesh](#), in a Taxing Act, it is not possible to assume any intention or governing purpose of the statute more than what is stated in the plain language; it is not the economic results sought to be obtained by making the provision which is relevant in interpreting a fiscal statute and equally impermissible is an interpretation which does not follow from the plain, unambiguous language of the statute and the words cannot be added to or substituted. Further it is submitted that the illustration given under the FAQ supports the contention of the petitioner. Distinguishing the decision in the case of *A.L. Murugan Chettiar (supra)*, it is submitted that the decision is not applicable to the petitioners case as it was a different enactment and it is not dealing with credit. Further it is submitted that disposal of the earlier writ petition filed by the Association is not a bar to maintain

these writ petitions since the writ petition was dismissed on the ground of lack of locus standi. It is submitted that to the extent of loss is of no consequence for Section 18(2) of the VAT Act and loss is of no relevance and the moot question would be loss relevant or not while claiming refund under Section 18 of the VAT Act.

21. Mr.N.Murali, learned counsel for the petitioners reiterated the contention raised in the written submissions and submitted that the question would be whether the input come into manufacture or not and there is nothing more to be answered, if the answer to this question is satisfied.

22. Mr. Raveekumar, learned counsel would submit that by the impugned circular, the respondent are attempted to alter invoice price, which is impermissible in the light of the decision of this Court in [Jayam and Co. and Others Vs. The Assistant Commissioner \(CT\) and Others etc. etc.,](#) . Further it is submitted that there is no specific statute stating that Section 18(2) of the VAT Act is subject to restrictions under Section 19 of the VAT Act. Further it is submitted that all the refund claims have been sanctioned and the same are sought to be reversed solely based on the circular and mere change of opinion cannot be a ground to reopen. Further, it is submitted that the impugned circular is absolutely without jurisdiction and without any authority of law and Section 19(9) of the VAT Act does not speak of manufacturing loss.

23. Heard the learned counsels appearing on behalf of the petitioners and the learned Special Government Pleader appearing on behalf of the State. The following questions fall for consideration in these batch of writ petitions.

(1) Whether the impugned Circular No. 22/2011 dated 20.10.2011 is bad in law for want of jurisdiction to issue the same under the provisions of the TNVAT Act and the effect of such Circular on the assessments made by the Assessing Officer?

(2) Whether Section 18 of the TNVAT Act is a Scheme by itself or whether the benefit to a dealer under Section 18 is subject to the conditions prescribed under Section 19, more particularly Section 19(9) of the TNVAT Act ?

(3) Whether in the given facts and circumstances would it be sufficient for a dealer who claims refund under Section 18(2) of the TNVAT Act of the input tax paid on the purchase of the goods, to show that those goods are used in the manufacture and nothing more ? Whether the Assessing Authority should embark upon a fact finding exercise to ascertain the quantum of loss, if any ?

(4) If it is held that the relief under Section 18(2) of TNVAT Act is subject to Section 19 of TNVAT Act, whether the circumstances mentioned in Section 19(9)(i),(ii) and (iii) would cover manufacturing loss ?

(5) Whether the respondent assessing authorities were justified in adopting a uniform percentage as invisible loss and calling upon the dealer to reverse the Input Tax Credit availed to that extent ?

(6) Whether the petitioners/dealers are justified in contending that there is no machinery under the TNVAT Act to reverse the refund granted pursuant to an order passed on an application filed by the dealer in Form W under Rule 11(2) of the TNVAT Rules ?

24. Though the writ petitioners manufacture different products, all of them are exporters and availed benefit of Section 18 of the VAT Act, which covers zero-rated sales, defined under Section 2(44) of the VAT Act, which means sale of any goods, on which, no tax is payable, but credit for the input tax related to that sale is admissible. Broadly, the challenge in all these writ petitions are on two grounds, firstly, by contending that the Circular dated 20.10.2011 is illegal, without jurisdiction and could not have been a basis for reopening the refund claim. The second limb of argument is with regard to the effect of Section 19 of the VAT Act on refund claims made by the petitioners under Section 18(2) of the VAT Act. In this regard, a contention was raised that Section 18 of the VAT Act is an independent provision, an island by itself, and the claim for refund under Sub Section (2) of Section 18 is not contingent upon any conditions stipulated under Section 19 of the VAT Act.

25. The impugned Circular dated 20.10.2011 was issued in supersession of earlier circulars and on a reading of the preamble portion of the circular, one can decipher the intention behind the issue of such circular.

26. The learned Special Government Pleader admitted that the impugned circular is not a statutory circular, but, nevertheless, it is a guideline issued to the Assessing Officer by the Commissioner, the Head of the Department. In the case of Canon India Private Limited Vs. State of Tamil Nadu and others in W.P. No.4042 of 2008 etc batch, an identical contention was raised by the petitioners therein contending that there is no enabling provision under the TNVAT Act to issue circulars and clarification, which would bind the Assessing Authorities and that the power to issue clarification and Advance Ruling was conferred on a State Level Authority comprising of the Commissioner of Commercial Taxes and two Additional Commissioners by insertion of Section 48A of the VAT Act from 27.09.2011. Therefore, it was contended that on the date on which the said clarification was issued, based on which, enhanced tax was demanded there was no enabling power to issue such clarification. In this regard, reliance was placed on the decision of the Division Bench of this Court in the case of [Texx One Private Ltd. Vs. Principal Commissioner and Commissioner of Commercial Taxes and Another,](#) wherein, the Honourable Division Bench held that on the date when the circular was issued, the Commissioner did not have statutory powers to issue such circular and the net result is that the circular has no statutory force. After taking note of the decision of the Honourable Division Bench, it was observed that the circular issued by the Commissioner though stated to be without jurisdiction, having been issued by the highest officer of the department, the Assessing Officers, who are subordinate

officers, cannot be expected to take a different view. In the light of the said finding, it was observed that there will be no necessity to avail the alternate remedy under the Act.

27. As noticed above, the respondent themselves admitted that the impugned circular has no statutory force. In such circumstances, the question of quashing the circular does not arise, as there was no power to issue such circular and this being not a statutory circular, not binding on the assessing authority. As pointed out in the case of Canon India (cited supra), the Assessing Officers, being Subordinate Officer to the Commissioner, cannot be expected to ignore the circulars. Therefore, the circulars, at best could be considered as a guideline for the Assessing Officer, but not a Rule Book, which the Assessing Officers should blindly follow without application of mind to the facts of each assessment or a claim for refund; at best, it could be construed as elucidating, the manner, in which the refund claims are to be processed. The impugned circular endeavours to ensure a procedure, by which the object behind which the circular issued was achieved.

28. When we refer to the impugned circular, it is seen that the Department was concerned about the large number of refund claims, which were settled throughout the State of Tamil Nadu and considerable amount of refund granted were found be improper. In the light of the said fact, circular was issued stating that abundant caution is required to check such refunds; meticulous care should be given in processing refund claims failing which serious incidents may escape detection. Further, it is stated that incidents came to light, where improper, irregular and incorrect refunds were issued. The circular refers to serious lapses noted as a result of random check of refund files. 13 such lapses are pointed out, which appear to be illustrative list of cases and not an exhaustive list.

29. Lapse No. 8 in the circular deals with No tax credit for wastage not made refunded. After referring to the relevant statutory provision, viz., Section 18 of the VAT Act read with Rule 11(2) of the VAT Rules, Section 19(18) read with Rule 10(10) (b) and Rule 11(1), the Commissioner has proceeded to issue certain guidelines regarding (i) Admissibility of refund claims with regard to time limit fixed under Section 18(3) of the VAT Act; (ii) Maintenance of the Consolidated refund register; (iii) Maintenance of Refund Register; (iv) the details which have to be verified while processing a refund claim in Form W; (v) manner in which export documents have to be examined; (vi) cases relating to rejection or revision of export value; (vii) prior sufferance of taxes; (viii) necessity to make Input and Output ratio analysis; (ix) Pointing out cases where two incorrect tax collection; excess tax collection or collection of tax in contravention of tax in contravention of the provisions of the Act by suppliers to exporters; (x) procedure to be followed to detect double claims of ITC; (xi) reversal of ITC on wastage by applying Section 19(9) of VAT Act; (xii) Refund on purchase of capital goods; (xiii) Declaration to be submitted in respect of deemed sale in the course of export under Section 5(3) of the Central Sales Tax Act, 1956;

(xiv) Audit by the Enforcement Wing; (xv) Prior approval to be obtained from Deputy Commissioner (CT) or by Joint Commissioner; (xvi) the manner in which written communication has to be sent; (xvii) procedure for internal audit; (xviii) Reconciliation of refunds with Banks/Treasury and (xix) Rectification of refund order.

30. The above is an overall view of the purport and intent of the circular issued by the Commissioner. The question now would be what is the effect of such circular on the refund claim made by the petitioner and whether the circular could be the starting point for issuance of notice to reopen the already sanctioned refund.

31. Now, we come to the first question framed for consideration. Viz., Whether the impugned Circular No. 22/2011 dated 20.10.2011 is bad in law for want of jurisdiction to issue the same under the provisions of the TNVAT Act and the effect of such Circular on the assessments made by the Assessing Officer?

The circular has been admitted to be a non-statutory circular, yet, having been issued by the Head of the Department would have an effect on the Assessing Authorities, therefore, is there a need to quash the circular. In the preceding paragraphs, the purpose and intent of the circular has been set out. The circular deals with various issues, one of which pertains to referred claims pertaining to zero-rated sales. Thus, reading the circular as a whole, apart from other issues, it appears that substantial number of refund claims pertaining to zero rated sale has arisen in the State of Tamil Nadu and on random check by the Department, several lapses were noticed which has led to the issuance of the circular. The Head of the Department is undoubtedly empowered to regulate the conduct of the business or manage the affairs of his establishment. The Head of the Department is entitled to give administrative instruction, which shall be binding on all his subordinates. The problem would arise only when certain subordinates without due application of mind mechanically apply the circular/guideline/instruction and proceed to take action unmindful of the factual and legal position. There might be cases where the administrative head will issue instructions to the subordinates for the day-to-day conduct of the affairs of the establishment. But in the instant case, the subordinate officers as well as the Commissioner are all authorities functioning under a taxation statute and each one of them exercising quasi judicial function. Therefore, even though the Commissioner may be the Head of the Department, the manner, in which a particular return is to be assessed or a refund has to be granted or refused cannot be issued in the form of guideline or instruction to the Assessing Officer.

32. The Assessing Officer, the first fact finding authority, who examines the return or refund claim is bound to ensure that the parameters prescribed under the statute are complied with. He is duty bound to apply his mind independently and scrutinise the assessment order or process the refund. Upon failure to do so, it would be clear abdication of the power and duties enshrined on the Officer. On a reading of the circular, it shows that the past experiences were not too pleasant for the Department, as random checks reveal several bogus refund claims. This has

prompted the Commissioner to issue guideline to his subordinate officers. While doing so the Commissioner has cautioned the Officers to act in accordance with the provisions of the statute and not quote the circular. Therefore, on the grounds raised by the petitioner, there is no necessity to quash the impugned circular as the same being non-statutory. Such a non-statutory guideline cannot transgress into the adjudicating power of the Assessing Officer or the Appellate Authority or refund authority under the provisions of the VAT Act. Therefore, at best, it could be a guideline issued to the Officers to wake up and get themselves reminded of all the statutory responsibilities cast upon them, while processing refund claims among other things. As stated earlier, the lapses, which have been mentioned in the circular, which appears to have to come to light during random check is illustrative and not exhaustive. There may be cases where random check did not reveal certain lapses; that does not mean those lapses are condoned as it has not been taken note of by the Commissioner while issuing circular; such interpretation would stifle the provisions of the Act.

33. The Honourable Division Bench in the case of [Madras Granites \(P\) Ltd. Vs. Commercial Tax Officer and Another](#), was considering the correctness of an order passed by the Tamil Nadu Taxation Special Tribunal. The contention was that the assessing officer solely proceeded to complete the assessment on the D-3 proposal given by the statutory officer. The Division Bench pointed out that the assessing officer is a quasi-judicial authority and in exercising his quasi-judicial function of completing the assessment, he is not bound by the instructions or directions of the higher authorities. Therefore, in the said case, the Assessing Officer having acted based on the directions of the higher authorities in completing the assessments, the assessments have held to be not sustainable in law. The Honourable Division Bench in the case of *Texx One Private Ltd., Vs. Principal Commissioner and Commissioner of Commercial Taxes, Chepauk, Chennai and Another* (supra) has held that a circular issued under Section 28 of the TNGST Act has statutory force, though, there is no corresponding provision in the TNVAT Act, empowering Commissioner to issue such circulars, in terms of Section 88(3)(i) of TNVAT Act, all clarifications, regulations, notifications or orders made or issued under TNGST Act and continuing in force before the commencement of the TNVAT Act, shall continue to remain in force in so far as they are not inconsistent with the provisions of the Act or Rules framed thereunder until they are repealed or amended.

34. In the light of the above decisions, the only conclusion that could be arrived at is that the assessing officer cannot be solely guided by the impugned guidelines and has to exercise his quasi-judicial powers. In any event there is no cause of action to challenge the impugned circular and such prayer made in one of the writ petitions in W.P.9276/2014 is rejected.

35. The Honourable Division Bench in the case of *Pizzeria Fast Foods Restaurant (Madras) Pvt. Ltd., Vs. Commissioner of Commercial Taxes, Chennai and others*

[supra] noted that the circular issued by the Commissioner under Section 28-A of the TNGST Act is not binding on the assessing authority or the appellate authority, yet, the fact that since the Commissioner is a superior authority to the assessing officer or appellate authority cannot be overlooked, it would be impracticable to expect the subordinate authority to take a view contrary to the view expressed by the Commissioner. Therefore, the Division Bench held that the writ petition was maintainable even without exhausting alternative remedy.

36. The decision in the case of [Ashok Lanka and Another Vs. Rishi Dixit and Others](#), was cited by the learned counsel for the petitioner to contend that the circular was bad in law. On a careful reading of the said decision, it is seen that the matter arose under the provisions of Chhattisgarh Excise Act, 1915 and the question was whether the circular issued by the Commissioner of Excise in terms of Section 7 of the said Act could override the rule making power of the State. In my view, the decision is clearly distinguishable on facts and does not render support to the cases on hand.

37. In the light of the above, the question of quashing the impugned circular is unnecessary in the light of the stand taken by the respondents that the impugned circular is not statutory and at best could serve as guideline. A note of caution is added by observing that no Assessing Officer or Adjudication Authority exercising powers under the VAT Act or Rules framed thereunder can blindly follow the circular while considering a return or refund claim. Accordingly the challenge to the impugned circular is held to be unnecessary since the circular is a non-statutory circular and is in the nature of guideline and the prayer for quashing the circular is rejected. Question No. 1 is answered accordingly.

38. Question No. 2:- Whether Section 18 of the TNVAT Act is a Scheme by itself or whether the benefit to a dealer under Section 18 is subject to the conditions prescribed under Section 19(9) of the TNVAT Act ?

This issue raised by the petitioners is by contending that Section 18 is an Island by itself and not subject to conditions prescribed under Section 19(9) of the TNVAT Act.

VAT is an indirect tax on the domestic consumption of goods and services, except those that are zero-rated (such as food and essential drugs) or are otherwise exempt (such as exports). It is levied at each stage in the chain of production and distribution from raw materials to the final sale based on the value (price) added at each stage. It is not a cost to the producer or the distribution chain members, and whereas its full brunt is borne by the end consumer. It avoids the double taxation (tax on tax) of a direct sales tax.

39. At this stage, it would be necessary to quote the relevant provisions of the Act.

Section 2(23) input means any goods including capital goods purchased by a dealer in the course of his business.

Section 2(24) : input tax means the tax paid or payable under this Act by a registered dealer to another registered dealer on the purchase of goods including capital goods in the course of his business;

Section 2(44) :- zero rate sale means a sale of any goods on which no tax is payable but credit for the input tax related to that sale is admissible.

Section 18:- Zero-rating.- (1) The following shall be zero-rate sale for the purpose of this Act, and shall be eligible for input tax credit or refund of the amount of the tax paid on the purchase of goods specified in the First Schedule including capital goods, by a registered dealer in the State, subject to such restrictions and conditions as may be prescribed:-

(i) A sale as specified under sub-section (1) or (3) of Section 5 of the central Sales Tax Act, 1956 (Central Act 74 of 1956);

(ii) Sale of goods to any registered dealer located in Special Economic Zone in the State, if such registered dealer has been authorised to establish such units by the authority specified by the Central Government in this behalf; and

(iii) Sale of goods to International Organisations listed out in the Fifth Schedule.

(2) The dealer, who makes zero-rate sale, shall be entitled to refund of input tax paid or payable by him on purchase of those goods, which are exported as such or consumed or used in the manufacture of other goods that are exported as specified in sub-section (1), subject to such restrictions and conditions as may be prescribed.

(3) Where the dealer has not adjusted the input tax credit or has not made a claim for refund within a period of one hundred and eighty days from the date of accrual of such input tax credit, such credit shall lapse to Government.

Section 19:- 19. (1) There shall be input tax credit of the amount of tax paid or payable under this Act, by the registered dealer to the seller on his purchases of taxable goods specified in the First Schedule : Input tax credit. Provided that the registered dealer, who claims input tax credit, shall establish that the tax due on such purchases has been paid by him in the manner prescribed.

(2) Input tax credit shall be allowed for the purchase of goods made within the State from a registered dealer and which are for the purpose of

(i) re-sale by him within the State; or

(ii) use as input in manufacturing or processing of goods in the State; or

(iii) use as containers, labels and other materials for packing of goods in the State; or
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(iv) use as capital goods in the manufacture of taxable goods.

(v) sale in the course of inter-State trade or commerce falling under sub-section (1) of section 8 of the Central Sales Tax Act, 1956. Central Act 74 of 1956.

(vi) Agency transactions by the principal within the State in the manner as may be prescribed.

(3) (a) Every registered dealer, in respect of purchases of capital goods wholly for use in the course of business of taxable goods, shall be allowed input tax credit in the manner prescribed.

(b) Deduction of such input tax credit shall be allowed only after the commencement of commercial production and over a period of three years in the manner as may be prescribed. After the expiry of three years, the unavailed input tax credit shall lapse to Government.

(c) Input tax credit shall be allowed for the tax paid under section 12 of the Act, subject to clauses (a) and (b) of this sub-section.

(4) Input tax credit shall be allowed on tax paid or payable in the State on the purchase of goods, in excess of four per cent of tax relating to such purchases subject to such conditions as may be prescribed,-

(i) for transfer to a place outside the State otherwise than by way of sale; or

(ii) for use in manufacture of other goods and transfer to a place outside the State, otherwise than by way of sale: Provided that if a dealer has already availed input tax credit there shall be reversal of credit against such transfer.

(5) (a) No input tax credit shall be allowed in respect of sale of goods exempted under section 15

(b) No input tax credit shall be allowed on tax paid or payable in other States or Union Territories on goods brought into this State from outside the State.

(c) No input tax credit shall be allowed on the purchase of goods sold as such or used in the manufacture of other goods and sold in the course of inter-State trade or commerce falling under sub-section (2) of section 8 of the Central Sales Tax Act, 1956. Central Act 74 of 1956.

(6) No input tax credit shall be allowed on purchase of capital goods, which are used exclusively in the manufacture of goods exempted under section 15.

(7) No registered dealer shall be entitled to input tax credit in respect of-

(a) goods purchased and accounted for in business but utilised for the purpose of providing facility to the proprietor or partner or director including employees and in any residential accommodation; or

(b) purchase of all automobiles including commercial vehicles, two wheelers and three wheelers and spare parts for repair and maintenance thereof, unless the

registered dealer is in the business of dealing in such automobiles or spare parts; or

(c) purchase of air-conditioning units unless the registered dealer is in the business of dealing in such units.

(8) No input tax credit shall be allowed to any registered dealer in respect of any goods purchased by him for sale but given away by him by way of free sample or gift or goods consumed for personal use.

(9) No input tax credit shall be available to a registered dealer for tax paid or payable at the time of purchase of goods, if such-

(i) goods are not sold because of any theft, loss or destruction, for any reason, including natural calamity. If a dealer has already availed input tax credit against purchase of such goods, there shall be reversal of tax credit; or (ii) inputs destroyed in fire accident or lost while in storage even before use in the manufacture of final products; or 157 (iii) inputs damaged in transit or destroyed at some intermediary stage of manufacture.

(10) (a) The registered dealer shall not claim input tax credit until the dealer receives an original tax invoice duly filled, signed and issued by a registered dealer from whom the goods are purchased, containing such particulars, as may be prescribed, of the sale evidencing the amount of input tax.

(b) If the original tax invoice is lost, input tax credit shall be allowed only on the basis of duplicate or carbon copy of such tax invoice obtained from the selling dealer subject to such conditions as may be prescribed.

(11) In case any registered dealer fails to claim input tax credit in respect of any transaction of taxable purchase in any month, he shall make the claim before the end of the financial year or before ninety days from the date of purchase, whichever is later.

(12) Where a dealer has availed credit on inputs and when the finished goods become exempt, credit availed on inputs used therein, shall be reversed.

(13) Where a registered dealer without entering into a transaction of sale, issues an invoice, bill or cash memorandum to another registered dealer, with the intention to defraud the Government revenue, the assessing authority shall, after making such enquiry as it thinks fit and giving a reasonable opportunity of being heard, deny the benefit of input tax credit to such registered dealer who has claimed input tax credit based on such invoice, bill or cash memorandum from such date.

(14) Where the business of a registered dealer is transferred on account of change in ownership or on account of sale, merger, amalgamation, lease or transfer of the business to a joint venture with the specific provision for transfer of liabilities of such business, then, the registered dealer shall be entitled to transfer the input tax credit lying unutilized in his accounts to such sold, merged, amalgamated, leased or

transferred concern. The transfer of input tax credit shall be allowed only if the stock of inputs, as such, or in process, or the capital goods is also transferred to the new ownership on which credit has been availed of are duly accounted for, subject to the satisfaction of the assessing authority.

(15) Where a registered dealer has purchased any taxable goods from another dealer and has availed input tax credit in respect of the said goods and if the registration certificate of the selling dealer is cancelled by the appropriate registering authority, such registered dealer, who has availed by way of input tax credit, shall pay the amount availed on the date from which the order of cancellation of the registration certificate takes effect. Such dealer shall be liable to pay, in addition to the amount due, interest at the rate of one and a quarter per cent, per month, on the amount of tax so payable, for the period commencing from the date of claim of input tax credit by the dealer to the date of its payment.

(16) The input tax credit availed by any registered dealer shall be only provisional and the assessing authority is empowered to revoke the same if it appears to the assessing authority to be incorrect, incomplete or otherwise not in order.

(17) If the input tax credit determined by the assessing authority for a year exceeds tax liability for that year, the excess may be adjusted against any outstanding tax due from the dealer.

(18) The excess input tax credit, if any, after adjustment under sub-section (17), shall be carried forward to the next year or refunded, in the manner, as may be prescribed.

(19) Where any registered dealer has availed input tax credit and has goods remaining unsold at the time of stoppage or closure of business, the amount of tax availed shall be reversed on the date of stoppage or closure of such business and recovered.

Rule 11 :- Refunds- (1) The assessing authority shall issue refund of amount specified in Form P within ninety days from the date of service of the said Form, failing which the assessing authority shall also pay the interest at the rate prescribed under the Act along with such refund amount.

(2) The dealer who claims refund due to sale effected by him under sub-section (1) of Section 18 shall file an application in Form W to the assessing authority along with copies of invoices or bills of related purchases within one hundred and eighty days from the date of accrual of such claim. The assessing authority after verification of the correctness of the claim, shall issue refund within ninety days from the date of the receipt of the application in Form W.

40. Zero-rated sale as defined under Section 2(44) of the VAT Act means sale of any goods on which no tax is payable, but credit for the input tax related to that sale is admissible. Section 18 of the VAT Act deals with zero rating and Sub Section (1)

defines what are zero rated sales for the purpose of VAT Act and shall be eligible for input tax credit or refund of the amount of tax paid on the purchase of goods specified in the First Schedule including capital goods, by a registered dealer in the State, subject to restrictions and conditions prescribed. In Clause (i) to (iii) under Section 18(1) lists out the zero rated sales which are eligible for the benefit of input tax credit. Sub Section (2) of Section 18 speaks of entitlement of a dealer who makes zero-rate sale, be entitled to refund of input tax paid or payable by him on purchase of those goods, which are exported as such or consumed or used in the manufacture of other goods that are exported as specified in Sub-Section (1) of Section 18, subject to restrictions and conditions as may be prescribed. Sub Section (3) of Section 18 stipulates the period within which, the refund claim has to be made which is 180 days from the date of making zero-rate sale failing which such credit shall lapse to Government.

41. From the above, it is clear that to enable a dealer to avail a benefit under Section 18 of the VAT Act, the sale effected by him shall be a sale of any goods on which no tax is payable. The statute gives him an incentive to take credit of the input tax by way of refund. The terms input tax credit or refund occurring in Sub Section (1) of Section 18 is of relevance while interpreting the term refund contained in Sub Section (2) of Section 18. It is relevant to point out that under the VAT regime no dealer has a right to claim input-tax credit independent of the provisions of Section 19. It has been held set-off provided under the VAT Act is in the nature of concession. (See [M. Mohammed Haji Manachithodi Agencies, Palakkad Vs. State of Kerala](#), . The Division Bench in the case of Jayam & Co. Vs. Assistant Commissioner (CT) Main Amaindakara Assessment Circle, Chennai and another (and other cases), while considering the validity of Section 19(20) of TNVAT Act, pointed out that there was distinction between the scheme of tax on sale of goods both under the VAT regime and under the Sales Tax Act existing prior to that; under the Sales Tax Act, except a few items, all other goods were taxable at the point of first sale in the State, therefore, tax was levied and collected only from the first seller. Contrary to this, the scheme under the VAT regime is that the tax collected by the first seller is given as input-tax credit to the second seller, and the tax paid by the second seller is given as input-tax credit to the third seller and ultimately the entire tax is borne by the consumer. It was pointed out that the tax paid on the value addition by a series of dealers is ultimately passed on to the consumer and dealers get reimbursement of the tax paid by them. It was further pointed out that since input tax credit shall be allowed only in the manner prescribed, the registered dealer cannot claim input-tax credit independent of Section 19 of the TNVAT Act. Further, it was pointed out that input tax credit is in the nature of concession or indulgence, could be availed of only in the manner prescribed under Section 19 of VAT Act. The law is well settled that the person, who claims exemption or concessional rate, must obey and fulfil the mandatory requirements exactly. Unless there is strict compliance with the provisions of the statute, the registered dealer is not entitled to claim input-tax

credit.

42. In the case of [USA Agencies Vs. The Commercial Tax Officer,](#) the Division Bench has considered the validity of Section 19(11) of the VAT Act. While considering the design of the VAT Act, its concept, coverage, compulsory requirement to be complied with and other relevant details, it was pointed out that the essence of VAT is in providing set-off for the tax paid earlier and this is given effect through the concept of input-tax credit/rebate. While considering the expression in the manner prescribed, it was pointed out that the said expression has been used in several places in Section 19 and in several other places in TNVAT Act including Section 18(2) of VAT Act. Considering the said expression being liberally used under the TNVAT Act, it is held that the expression in the manner prescribed occurring in Section 3(3) shall be referable only to the manner prescribed in Section 19 and such expression makes it clear that input tax credit could be availed of in the manner prescribed and one such modality and the time frame is prescribed under Section 19(11) of the Act and it is not merely procedural. Therefore, it was pointed out that it is a settled provision of law that a person claiming benefit of exemption must show that he satisfies the eligibility criteria and for the said purpose, the provision must be strictly construed.

43. The Honourable Division Bench of the Bombay High Court in the case of [M/s.Mahalaxmi Cotton Ginning Pressing and Oil Industries, Kolhapur Vs. The State of Maharashtra and Ors,](#) considered the validity of Section 48(5) of the Maharashtra Value Added Tax Act, 2002 which states that in no case, the amount of set-off or refund on any purchase of goods shall exceed amount of tax in respect of the same goods, actually paid, if any, under the Act or any earlier law, into the Government treasury except to the extent where purchase tax is payable by the claimant dealer on the purchase of the said goods effected by him. While considering the validity of the said provision, among other things, it was pointed out that when the set-off constitutes a concession granted by the Legislature; in the absence of a set-off under Section 48(5), the selling dealer would be liable under the charging provision of the MVAT Act, 2002 to pay tax on the sale consideration. There is no independent right to a set-off apart from Section 48; the entitlement to a set-off is created by the taxing statute and the terms on which a set-off is granted by the legislation must be strictly observed.

44. Section 19 of the VAT Act deals with input tax credit. Section 2(24) defines input tax to mean the tax paid or payable under the VAT Act by a registered dealer to any other registered dealer on the purchase of goods including capital goods in the course of his business. This tax paid by the registered dealer to another registered dealer on the purchase of goods is entitled to be availed as a credit termed as input tax credit provided that the registered dealer, who claims credit shall establish that the tax due on such purchases has been paid by him in the manner prescribed. Therefore, the amount which is sought to be refunded in the cases of zero rated sale

by filing application under Section 18(2) is that input tax paid by the dealer for the purchase of the goods and Section 18 gives such benefit to the registered dealer, despite the fact that no tax is payable by him on export sale. Therefore, the expression input tax credit cannot be divested from Section 18 of the VAT Act and Section 18 of the VAT Act only carves out an exception with regard to benefit which will accrue to the registered dealer since he is not liable to pay any tax on export sale and the tax paid by him on the purchase of goods under normal circumstances would be enjoyed by him as a credit, which is being granted to the registered dealer as a refund since there is no tax liability cast on him. Sub-Clause (i) to (iii) of Sub-Section (1) of Section 18 of the VAT Act speaks about types of zero rate sale which shall be eligible for input tax credit or refund of the amount of the tax paid on the purchase of goods specified in the First Schedule including capital goods, by a registered dealer in the State subject to such restrictions and conditions as may be prescribed. Therefore, for all practical purposes, the benefit which accrues to the registered dealer is in effect input tax credit and that will ripen into refund claim by the dealer under Sub-section (2) of Section 18. If such a reasoning is applied, then the resultant consequence is such input tax credit shall be available to the dealer subject to restrictions and conditions stipulated under Section 19 of the Act. Therefore, the contention raised by the learned counsel for the petitioners that Section 18 of the VAT Act is an independent provision and an island by itself for the VAT Tax regime and not dependant upon any contingency and any of the conditions stipulated under Section 19 of the VAT Act are arguments, which are stated to be rejected. There is no such exception carved out in the statute. Section 18 of the VAT Act does not begin with a non-obstante clause, rather, a procedure prescribed for cases of zero rated sale. As already observed, the proper test to be applied is not the terminology used viz., refund, but, in essence, what amount refunded is undoubtedly a credit, which is being refunded as there is no tax liability in zero-rated sale.

45. The learned counsel for the petitioner relied on the decision of the Honourable Supreme Court in the case of [J.K. Cotton Spinning and Weaving Mills Co. Ltd. Vs. Sales Tax Officer, Kanpur and Another](#), emphasising on the expression in the manufacture of goods used in Section 8(3)(b) of the Central Sales Tax Act, 1956 and contended that what is required to be proved by the petitioner is that the goods purchased by them is used for the manufacture of goods, which were exported. On a careful reading of the decision of the Honourable Supreme Court, it is seen that the Honourable Supreme Court, while considering the expression in the manufacture of goods held that it should normally encompass the entire process carried on by the dealer of converting the raw materials into finished goods. Further, while rendering such findings, the Honourable Supreme Court pointed out that there is no warrant for limiting the meaning of the expression in the manufacture of goods since the Legislature has contemplated that the goods to qualify under Section 8(3)(b) must be intended for use as raw materials or as plant,

or as equipment in the manufacture or processing of goods. The emphasis laid is on the usage of the words that such goods must be intended for use in the manufacture. However, there is no corresponding provision under the TNVAT Act and therefore, the decision is distinguishable on facts.

46. The learned counsel relied on the decision in the case of [M/s. Multimetals Ltd. Vs. Assistant Collector, Central Excise, Kota and others](#), which arose under the provisions of Central Excise and Salt Act, 1944 wherein an exemption provided under the Central Excise Tariff Act in respect of Copper and Copper Alloys in any crude form, which are used in the manufacture of pipes and tubes of copper and copper alloys. By referring to the Notification, which was subject matter of the said case, the learned counsel emphasised on the word are used employed in the said Notification and submitted that all that the petitioner has to establish for being entitled for refund under Section 18(2) of the TNVAT Act is to show that they used raw materials in the manufacture. However, this Court is not inclined to accept the submission for two reasons. Firstly, the Notification which was subject matter of consideration in the case of Multimetals (supra) was under the Central Excise Tariff Act, the scheme of which was entirely different and the purport and intent of the notification is different. In the cases on hand, we are not concerned with exemption provision, but statutory provision, as to whether it is contingent upon compliance of certain requirements since the benefit availed under the TNVAT is a set-off, it is a concession. However, the decision was rendered by interpreting Notification and the Honourable Supreme Court, while interpreting the Notification took note of the fact that if in the process of manufacture of pipes and tubes of copper and copper alloys out of copper and copper alloys in any crude form is used, exemption is granted as provided. Secondly, the emphasis is on the words in the manufacture of which duty paid copper or copper alloys in any crude form or manufacture thereof, are used. In my view, the correct interpretation would be to read the expression are used in conjunction in the manufacture of which and that would lead to the correct interpretation of the judgment, which does not render any assistance to the case of the petitioners.

47. The decision in the case of [Steel Authority of India Ltd. Vs. Collector of Central Excise](#), is an appeal filed challenging the order passed by the CEGAT and the question was whether the appellant was entitled for concessional rate of duty. The exemption notification provided for exemption in respect of raw naphtha which is intended in the use of manufacture of fertiliser exempting the manufacturing process. It was held that raw naphtha is utilised in its plant for the manufacture of fertiliser and the benefit of exemption notification is extended. In the present proceedings, the petitioner has approached this Court by way of writ petitions challenging the circular as well as the orders of assessment which are in most cases exparte orders since the dealer did not respond to the show cause notice. The assessing officer also made an ad hoc assessment and adopted a uniform percentage stating that the same is treated as invisible loss and direction was issued

to reverse the ITC. The net result is there has been no examination of the manufacturing process as to what is the actual manufacturing loss or production loss or invisible loss. This cannot be done without examining each manufacturing process or identical manufacturing process. Infact, the association of Textile Exporters were granted liberty by the Honourable Division Bench to make a demonstration before the concerned assessing officer. It is not known as to why they did not avail such opportunity which should have been availed as it is the appropriate method for ascertaining as to whether on facts there is a process loss or a manufacture loss. Therefore, the decision does not render support to the case of the petitioner.

48. While on this issue, as pointed out by the learned Special Government Pleader, the concept of invisible loss came up for consideration before the Honourable Division Bench of this Court in the case of [Al. Murugan Chettiar and Another Vs. State of Tamil Nadu](#), and in the said case, the assessee contended that in the matter of estimated purchase value, the value of the quantity in terms of weight which had disappeared owing to driage or other reasons should not be taken note of. The Honourable Division Bench pointed out that if an assessee maintains correct accounts of purchases, then, even though after purchase, the raw cotton gets reduced in weight and therefore, what is termed as invisible loss occurs to the assessee, that subsequent development would have nothing to do with the determination of the purchase turnover at the time of purchase. It was further pointed out that even as there is no provision in the Act making allowance for driage or wastage in the manufacturing process of a commodity which is taxable at purchase point, even so, there cannot be an estimated allowance for driage or wastage in cases where purchase value has perforce to be estimated in the absence of correct data or figures in the assessee's accounts.

49. Therefore, the issues raised by the petitioner being questions of fact cannot be adjudicated in the writ petition and the decision of the Honourable Supreme Court in the case of [Ashoka Marketing Ltd. and another Vs. Punjab National Bank and others](#), would fully support the conclusion arrived by this Court, wherein, the Honourable Supreme Court pointed out that disputed questions of fact cannot be adjudicated in the writ petition, more so, in taxation matters. Furthermore in none of the Writ Petition, there is any challenge to the statutory provisions of the TNVAT Act.

50. In the light of the above, Question No. 2 is answered against the petitioners and it is held that Section 18 of the VAT Act is not an independent provision, not a scheme by itself and forms part of the statute. Consequently, the Input tax credit or refund, which is claimed under Section 18 of the VAT Act is subject to restrictions and conditions under Section 19 of the Act.

51. Question No. 3:- Whether on the given facts and circumstances would it be sufficient for a dealer who claims refund under Section 18(2) of the TNVAT Act of the

input tax paid on the purchase of the goods to show that those goods are used in the manufacture and nothing more; Whether the Assessing Authority should embark upon a fact finding exercise to ascertain the quantum of loss ?

Question No. (4) If it is held that the relief under Section 18(2) of TNVAT Act is subject to Section 19 of TNVAT Act, whether the circumstances mentioned in Section 19(9)(i),(ii) and (iii) would cover manufacturing loss ?

It has been the endeavour of the learned counsel appearing for the petitioners to impress upon this Court that all that the petitioners is expected to establish is that he has paid input tax on the purchase of the goods and nothing more is required. To substantiate the contention, reference has been made to definition contained in Section 2(24) of the VAT Act read with Section 18 of the Act. It is submitted that for a refund claim under sub section (2) of Section 18, all that the registered dealer is to prove is that he has paid tax on the purchase of those goods, which are used in the manufacture of other goods that are exported. While answering Question No. 2, it has been held that Section 18 of the VAT Act cannot be divested from the other provisions of the Act and whatever claim made under Section 18(2) of the VAT Act was subject to the restrictions and conditions under Section 19 of the VAT Act.

52. Section 18(1) of the Act stipulates that the eligibility for input tax credit or refund shall be subject to restrictions and conditions as may be prescribed. Similar expression is found in sub section (2) of Section 18. In my view, the restrictions and conditions found in Section 19 of the VAT Act, is the only provision, which deals with the manner in which input tax credit is admissible. Therefore, the dealer is bound to satisfy that his sale is a zero rated sale and that he is entitled for input tax credit as he has paid tax on purchases effected by him and those goods purchased have been exported as such or consumed or used in the manufacture of other goods and on establishing the same would be entitled to the credit subject to such restrictions and conditions as may be prescribed.

53. If we look at Section 19 of the VAT Act, there are various restrictions and conditions imposed. Sub Section (2) of Section 19 deals with input tax credit for purchase of goods made within the State from a registered dealer, which are for the purpose of the circumstances set out in Clauses (i) to (vi) under Section 19(2). Sub Section (3) of Section 19 deals with purchases of capital goods in the use of manufacture of taxable goods and the manner in which input tax credit is permissible. Sub Section (4) of Section 19 deals with input tax credit on tax paid by him in the State on the purchase of goods, in excess of three per cent of tax relating to such purchases subject to such conditions. Sub Section (5) of Section 19 deals with sale of exempted goods under Section 15; allowability of tax paid in other States or Union Territories; input tax paid by any other States or Union Territories on goods brought into this State from outside the State and allowability of input tax on the purchase of goods sold as such or used in the manufacture of other goods and sold in the course of inter-State trade or commerce falling under sub section (2) of

Section 8 of the Central Sales Tax Act, 1956. Sub Section (6) of Section 19 places a clear embargo stating that no input tax on purchase of capital goods, which are used in the manufacture of goods exempted under Section 15 and the proviso provides that the purchase of capital goods which are used in the manufacture of exempted goods and taxable goods, input tax credit shall be allowed to the extent of its usage in the manufacture of taxable goods in the manner prescribed. Sub Section (7) of Section 19 deals with circumstances in which the registered dealer shall not be entitled to input tax credit. Sub Section (8) of Section 19 prohibits the credit being allowed in respect of any goods purchased for sale but given away by him by way of free sample or gift or goods consumed for personal use. Sub Section (9) of Section 19 states that no input tax credit shall be available to a registered dealer for tax paid or payable at the time of purchase of goods setting out three circumstances under Section (9) of Section 19. Therefore, if any one of the circumstances stand attracted, no input tax credit shall be available to the registered dealer. Having held that Section 19 cannot be read in isolation, it necessarily follows that the benefits which flow to the dealer under Section 18 is subject to restrictions and conditions stipulated under Section 19 of the Act.

54. In the light of the above, the registered dealer, who claims for refund of the input tax under Section 18(2), which itself in the nature of credit has to first satisfy that the circumstances set out in Section 19(9) are not attracted. Therefore, it is not sufficient for the registered dealer to merely state or show that the goods were used in the manufacture and there is nothing more to be done by him and he would be entitled to the entire credit of the tax paid by him on the input by way of refund. The said contention cannot be accepted in the light of the discussion made above. In such circumstances, the dealer is bound to prove that the circumstances set out in Section 19 of the VAT Act are not attracted, which places embargo on the right of the registered dealer to avail input tax credit and satisfy the Assessing Officer that none of the circumstances set out under Section 19 of the VAT Act prohibit the claim made by the dealer for which it is essential for the Assessing Authority to embark upon on fact finding exercise on each individual claim which may be unique and distinct. Therefore, the Assessing Officer has to conduct an exercise by which it is to be ascertained as to whether the representation made by the dealer is justified and is not hit by any of the restrictions and conditions contained in Section 19 of the Act.

55. In all these cases, despite different products manufactured by the petitioners, the respective Assessing Officers have reopened the refund claims already sanctioned or refused to process the refund claims and issued notices to the dealers. The dealers did not respond since some of the dealers viz., Hosiery manufacturers through their Association filed Writ Petition before this Court. The writ petition was dismissed on the ground that the association cannot canvass individual tax claims. The view taken was affirmed by the Honourable Division Bench. It is to be noted that the Hosiery Manufacturers in the earlier round of litigation stated that there is no loss of goods in the goods purchased by them and

the entire material was converted into final product. However, in the present batch of cases, a different contention has been raised which appears to be a contradictory stand, wherein, the petitioners would admit that there is loss of input which occurs in the process of manufacture, which cannot be to the extent of 5% probably 0.5% which is invisible loss. Therefore it is the duty of the dealer to factually establish that the circumstances set out under Clauses (i) to (iii) in Section 19(9) are not attracted in their process of manufacture. The interpretation given by the petitioners to Clause (i) to (iii) of Section 19(9) as to its applicability can be decided without examining the facts of each process which has to be done by the assessing officers. The yarn may be blown off in the process of manufacture or the metal may get evaporated in the process of manufacture etc. Nevertheless, the dealers now admit that there is quantity of the input which does not form part of the final product and the question would be whether this missing quantity of input, which does not form part of the final product could be taken for the purpose of availing input tax credit, which is in the form of refund to dealers (zero-rated). Whether the loss which is said to be minimal in the case of textile manufacturers, which according to them is not a loss by destruction cannot be adjudicated in these writ petitions as it is essentially a question of fact. Clause (i) of Section 19(9) uses the expression for any reason. Therefore whether it is a process loss or manufacturing loss or destruction or theft, loss while process loss or manufacturing loss or destruction or theft, loss while in storage, damage in transit or destruction at some intermediary stage of manufacture are to be established before the assessing officer by the dealer and to satisfy the assessing officer that loss of the goods purchased is not covered under any one or more of the contingencies under Section 19(9) of the Act. The Assessing Officers appear to have been impulsive after issuance of the impugned guideline partly precipitated by the dealers since they did not avail opportunity granted by the Honourable Division Bench before whom they agreed to demonstrate their manufacturing process before their concerned Assessing Authority that there is no loss of material. Be that as it may, the earlier round of litigation did not decide the merits of the issue. Therefore, the same cannot be an embargo for the petitioners, who may be the members of the earlier writ petitioner association and in any event, there was no finding on the legal issues while deciding the earlier writ petitions or that matter in the Writ Appeal. Question Nos. 3 and 4 are answered accordingly.

56. Question No. 5:- Whether the respondent / assessing authorities were justified in adopting a uniform percentage as invisible loss and calling upon the dealer to reverse the Refund / Input Tax Credit availed to that extent ?

In the light of the conclusion arrived in respect of Questions 1 to 4 in the preceding paragraphs, it is to be seen as to whether the respondent/Assessing Officers could have adopted a uniform percentage and taken that as a basis and reopened the refund claims. The answer to this question should be in the negative, since each Assessment proceedings is an independent proceedings, the Assessing Officer cannot ignore facts. He is expected to go through the books of accounts, the details

furnished etc. In all these cases, the claim for refund is based on a statutory form viz., Form W, which states the information required to be furnished under three heads viz., (1) Particulars of the goods exported, (2) Particulars of the Input tax paid and (3) Amount of refund claimed. Based on these particulars, the Assessing Officer has to independently apply his mind and ascertain as to what is the description of goods exported; the quantity of the goods exported; the value and other details to establish export. While coming to the particulars of the input tax paid, apart from the statutory requirements such as TIN Number of the seller etc., the quantity on which the input tax was paid is also one of the information to be furnished by the dealer. Another column, which is relevant in Clause (vii) is input tax credit relatable to the export. In the said column, three types of information is required to be furnished viz., quantity of inputs relatable to the export (b) value (c) Input tax on (b). After furnishing all these details, the dealer states the amount which he claims as refund; the dealer certifies that the information is correct and undertake to refund, on demand being made, if any refund is made erroneously to him and a further declaration that there is no parallel claim for the refund on the same year. After filing of Form W, the duty enjoined upon the Assessing Officer is not a ministerial act. This is precisely what the impugned circular attempt to focus on. Form W Claim for refund is not a single window procedure where the refund is automatic. Such an interpretation is not tenable and it is not in consonance with the scheme of the Act.

57. VAT Act was introduced, since in the erstwhile structure, there were problems of double taxation of commodities and multiplicity of taxes, resulting in a cascading tax burden. Under VAT, a set-off is given for input tax as well as tax paid on previous purchases and the benefits which flow to a dealer on the introduction of VAT was that he is entitled to

- (i) a set-off will be given for input tax as well as tax paid on previous purchases.
- (ii) other taxes, such as turnover tax, surcharge, additional surcharge etc were abolished,
- (iii) rationalisation of the overall tax burden.
- (iv) general fall in the prices of products.
- (v) self-assessment procedure by the dealers themselves.
- (vi) increase in transparency.
- (vii) higher revenue growth.

58. Therefore, going by the object of the enactment, the Assessing Officer is bound to examine the refund claim under Section 18 in accordance with the procedure stipulated for availing input tax credit by applying Section 19 of the VAT Act and it is only then, the Authority can pass an order on a refund claim. Therefore, the processing of refund application under Form W is in effect akin to an assessment

proceedings since the benefit which flows under claim in Form W, is in effect, the amount which the dealer avail as refund would be a credit if the transaction was not a zero rated sale. The learned counsel for the petitioners placed reliance on the decision of the Honourable Supreme Court in the case of [Union of India and others Vs. Indian Aluminium Co. Ltd. and another,](#) which arose out of the appeals filed by the Union of India Vs. Collector of Central Excise and the question regarding levy of excise duty on aluminium dross and skimmings, which were removed by the assessee without payment of duty. The Honourable Supreme Court examined the said manufacturing process and rendered the finding. The question whether in the manufacturing process, there is process loss is undoubtedly a question of fact. Whether lesser quantity of raw material would be sufficient to achieve the quantity of end product is also question of fact. Therefore, this decision in fact would render support to the conclusion of the Court stating that there cannot be a uniform percentage fixed by the authority and it has to be based on the individual manufacturing process. Hence, Question No. 5 is answered in favour of the petitioners and it is held that the Assessing Officers were not justified in adopting uniform percentage as invisible loss and calling upon the dealer to reverse the refund/input tax credit availed to that extent. Consequently, all notices issued to the petitioner for reopening and all consequential order passed reversing the input tax credit to the extent of either 4% or 5% or ad hoc basis stands set aside. However, liberty is granted to the concerned Assessing Officer to issue show cause notices to the petitioners clearly setting out the circumstances under which they propose to revise or call upon the petitioner to reverse refund sanctioned and after receiving their objections shall proceed in accordance with law.

59. Question No. 6 : Whether the petitioners/dealers are justified in contending that there is no machinery under the TNVAT Act to reverse the refund granted pursuant to an order passed on an application filed by the dealer in Form W under Rule 11(2) of the TNVAT Rules ?

This question is relatable to Question No. 5. While answering Question No. 5 in favour of the dealers, it has been held that the Assessing Officer cannot adopt uniform procedure and direct reversal of the refund to the extent of 4% /5 % stating that the credit availed to that extent is relatable to the invisible loss of the material purchased which has been used in the manufacture. According to the petitioner, once a refund has been sanctioned, it is final for all purposes and there is no procedure prescribed under the Act for reversing the refund sanction. This submission does not merit acceptance in the light of the reasoning given above that whatever refund sanctioned under Section 18(2) of the Act, which in effect a credit in the hands of the dealer is subject to the restrictions and conditions in Section 19 of VAT Act. If there is wrong availment of refund, furnishing of wrong information or any other matter, which ultimately leads to a conclusion that the refund ordered was incorrect or erroneous then, the Assessing Officer is entitled to direct the petitioner to reverse the same. Further more, the assessee has given an

undertaking in Form W agreeing to refund the amount which was paid erroneously. It is submitted by the learned counsel for the petitioner that this undertaking is relatable only to information furnished in Form W and therefore, it does not empower the Assessing Officer to review the order passed under Sub Section 2 of Section 18. This contention also does not merit acceptance for two reasons. Firstly, Form W is a statutory form under Rule 11(2) of the VAT Rules and the said rule empowers the Assessing Authority to verify the correctness of the claim before issuing refund. The correctness of the claim deals with the particulars furnished relatable to the transaction. Therefore, the undertaking given by the dealer in Form W is with regard to information furnished for the purpose of verification to be done by the Assessing Officer under Rule 11(2) of the VAT Rules for being entitled to refund under Section 18(2). Therefore, it is not as if the Act does not provide a remedy in the event of a wrong or erroneous refund sanctioned as it has been held that the refund claim under Section 18 is subject to restrictions and conditions contained under Section 19.

60. Having held that Section 18 is not an island by itself but subject to restrictions and conditions laid down in Section 19 of VAT Act and having observed that there cannot be uniform yardstick in all types of manufacturing process; to ascertain as to whether there is process loss or manufacture loss or invisible loss, there is no necessity to examine as to what is stated to be a loss by the petitioner, whether it is invisible loss or whether it is destruction loss or whether it would be falling within any one of the parameters specified in Sub-Section 9 of Section 19 of VAT Act, this being a question of fact has to be established by the dealer when called upon by the authority. Therefore, those questions are left open. It was contended by the petitioner that there is no power to review of the decision or order passed under Section 18 of VAT Act, since it is an independent provision. This Court has held that Section 18 of VAT Act is subject to the restrictions and conditions under Section 19 of VAT Act. Therefore, if in a given cases of wrong availment, Section 19 provides for reversal. Therefore, it is incorrect to state that once the refund is granted, reopening does not arise. Such interpretation is not in consonance with the scheme of the Act; more so, when what is given to the petitioner is concession or set-off.

61. In the light of the above conclusion, the decision relied on by the learned counsel for the petitioner in the case of [Binani Industries Ltd., Kerala Vs. Assistant Commissioner of Commercial Taxes, VI Circle, Bangalore and Others](#), with regard to reopening of the assessment does not render assistance to the case of the petitioners. Accordingly Question No. 6 is answered against the petitioners.

62. In the result,

(1) the challenge to the impugned circular is held to be unnecessary since the circular is a non statutory circular and is in the nature of guideline and the prayer for quashing the circular is rejected.

(2) Section 18 of the TNVAT Act is not an independent or a separate stand alone provision under the provisions of TNVAT Act but subject to other provisions of the Act including Section 19 of the VAT Act.

(3) For the reasons assigned, it is not sufficient for a dealer claiming refund under Section 18(2) of the Act to show that he has paid input tax on the goods purchased; that those goods are used in the manufacture and nothing more but there is duty upon the dealer to satisfy the Assessing Authority that the claim is not hit by any of the restrictions or conditions contained under Section 19 of the VAT Act. In this regard, it is essential for the Assessing Authority to embark upon the fact finding exercise to ascertain the quantum of loss of the goods which were purchased on which tax was paid vis-a-vis the goods manufactured from and out of the goods purchased and to examine as to whether they fall within any of the restrictions contained in Section 19 of the VAT Act. The Assessing Officer has to conduct an exercise by which it is to be ascertained as to whether the representation made by the dealer is justified and is not hit by any of the restrictions and conditions contained in Section 19 and in particular Section 19(9) of the VAT Act.

(4) It is held that the Assessing Authorities are not justified in adopting uniform percentage as invisible loss and calling upon the dealer to reverse the input tax credit availed to that extent. Consequently, all notices issued to the petitioner for reopening and all consequential order passed reversing the input tax credit to the extent of either 4% or 5% or on ad hoc per centage stands set aside. However, liberty is granted to the concerned Assessing Officer to issue appropriate show cause notices to the petitioners clearly setting out under what circumstances they propose to revise or call upon the petitioner to reverse refund sanctioned and after inviting objections proceed in accordance with law.

(5) The undertaking given by the dealer in Form W is with regard to information furnished for the purpose of verification by the Assessing Officer under Rule 11(2) of the VAT Rules for being entitled to refund under Section 18(2). Therefore, it is not as if the Act does not provide a remedy in the event of a wrong or erroneous refund sanctioned when Section 18 cannot be treated as an independent provision but subject to restrictions and conditions under Section 19 of the VAT Act.

63. The Writ petitions are disposed of accordingly. No costs. Connected MPs are closed.