IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

SALES TAX APPLICATION NO. 3 OF 2015
WITH
SALES TAX APPLICATION NO. 4 OF 2015

M/s. Bharat Heavy Electricals Ltd.	**}**	**Applicant**
versus		
The State of Maharashtra	**}**	**Respondent**

Ms. Nikita Badheka i/b. Mr. Mukund M.Vaidya for the Applicant.

Mr. V. A. Sonpal-Special Counsel with Ms.Uma Palsuledesai-AGP for Respondent State.

CORAM :- S. C. DHARMADHIKARI &
G. S. KULKARNI, JJ.
DATED :- JULY 21, 2015

P.C. :-

These Applications are filed under section 61(1) of the Bombay Sales Tax Act, 1959, for a direction to the Tribunal to draw the statements of cases and refer to this Court questions of law and which are formulated at page 37 as under:-

> "(i) Whether on the facts, evidence and documents on record, the Tribunal was justified in rejecting the claim of deduction of turnover of sale under the BST Act, on account of cancellation of purchase order by HSEB-Hariyana State Electricity Board and taxing the same under BST Act?
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> (ii) Whether on the facts, evidence and submission on record the Tribunal was justified in rejecting all the claims under section 5(2) of CST Act without appreciating and adjudicating on the facts and evidence on each claim?
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> (iii) Whether on the facts, evidence and submission on record the Tribunal was justified in rejecting the claim of sales under section 5(2) of the CST Act?

> (iv) Whether on the facts, evidence and submission on record, the Tribunal erred in rejecting the plea of remission of interest when for majority of the claims the matter is remanded for verification rather than keeping the issue open for the Appellate Authority?"

2) The Applicant was assessed under the Central Sales Tax Act, 1956 (for short the "CST Act") on 30th March, 1993. The Applicant was finally assessed for the period 1st April, 1989 to 31st March, 1990 under the Bombay Sales Tax Act, 1959 (for short the "BST Act") on 20th February, 2004. The Applicant challenged the assessment under the CST Act before the Appellate Authority, namely, the Deputy Commissioner of Sales Tax (Appeals). This Appeal was kept pending as the Sales Tax Department had preferred an Appeal against the order passed by the Tribunal in the case of another dealer, namely, M/s. Siemens Limited being Second Appeal No. 6 of 1991, decided on 31st December, 1993. The Applicant claims that their case is identical with M/s. Siemens Limited. The Applicant complain that the Appeal was decided by the first Appellate Authority on 31st August, 2006.

3) In the absence of further and appropriate details being set out, we would presume that all that the Applicant is urging before us is that the orders passed by the Maharashtra Sales Tax Tribunal at Mumbai in Appeal Nos. 1636 of 2006 and 1637 of 2006, decided on 17th August, 2012 and the further orders passed in Rectification Application Nos. 78 of 2012 and 79 of 2012 on 16th December, 2013

raise certain questions of law and which we have reproduced hereinabove.

4) As far as the orders passed on the Reference Applications are concerned, these Reference Applications are numbered as Reference Application Nos. 116 of 2012 and 117 of 2012. They arise out of Second Appeal Nos. 1636 of 2006 and 1637 of 2006. The Tribunal passed an order on 11th June, 2014 and it was of the opinion that the only question which requires answer and opinion of this Court is question No. 3 under the BST Act. That question is reproduced below.

> "Whether on the facts, evidence and submission on record, the Tribunal erred in not adjudicating on the levy of tax on the difference in the sale price of goods sold against Form 15 and actual reduced sale price for which Form 15 was issued ignoring the clear evidence on record?"

5) However, Ms. Badheka would submit that as far as the BST Act is concerned, all questions as reproduced by the Tribunal at pages 292-293 are questions of law. Further, the rejection of all claims under section 5(2) of the CST Act also raise questions of law. That rejection is without appreciating and adjudicating the facts and evidence on each claim.

6) Our attention is invited to the memo of Appeal before the Tribunal and equally the grounds. The argument is that the Appellant had supplied goods to Faridabad Thermal Plant in the year 1987-88 and the transaction was treated as cancelled. Though the sale was reflected

in the year 1987-88 under the Central Act, credit note and the final acceptance of rejection is in the year 1989. Therefore, the Appellant claimed that the credit note be allowed as reduction in the turnover under the Central Act for the year 1989-90. The Appellant also claimed that the sales made to National Thermal Power Corporation Limited (NTPC) in the year 1989-90 be held as sales in the course of imports. They have also prayed that the common 'C' Forms, both duplicate copies and xerox copies in place of originals have been submitted to authorities and same should be allowed. Thereafter, it was pointed out that the Deputy Commissioner erred in overlooking the submissions made by the Appellant/Applicant to grant benefit of the credit notes issued to Haryana State Electricity Board (HSEB) under the Central Act and the Appellant was denied refund of Rs.20.28 lacs. The Applicant thereafter pleaded that separate affidavits have been filed by the Applicant up to the year 1990 even for the transactions eligible for exemption under section 5(2) of the Central Act. It has paid the tax at the rate of 4% treating the same as inter-state sale. In the detailed note, it has pointed out that the Applicant has realised that it is entitled to refund of Sales Tax paid by them.

7) It is argued before us that the objection raised before the Tribunal in the main round, namely, during the course of hearing of the

Appeals, is that the Applicant is requesting the Tribunal to presume that the sales effected by them are in the course of imports. There was no evidence produced particularly of a purchase order by the foreign supplier. There is no evidence that the goods were imported and some goods were sold to NTPC. However, Ms. Badheka would submit that this is incorrect because the same Tribunal in the second round, namely, in the Rectification Applications modified and rectified its orders. In the Rectification Applications, it was pointed out that the files pertaining to this issue contain all the relevant evidence, statements of facts and copies of pending proceedings before the authorities. The Rectification Applications point out as to how each of the documents have been referred. The Applicant is Government of India undertaking involved in the project of national importance. It is pointed out that the affidavits filed were supported by specific documents. Each and every contract has been referred therein. Our attention is invited to pages 252 to 254 of the paper book, wherein in the Rectification Applications, the materials have been pointed out. Our attention is also invited to the order on the Rectification Applications and where the Tribunal holds that there were some errors and they came to be corrected, then, all the more this is a fit case where this Court should entertain the questions as they are questions of law. The finding that there was no evidence produced is perverse.

8) Thus, our attention is invited to the orders passed by the Tribunal and it is submitted that these questions and essentially on claims under section 5(2) of the Central Act need to be admitted.

9) On the other hand, it is submitted by Mr. Sonpal that there is no substance in this Application, inasmuch as the CST Act in which section 5 appears deals with a case of sale or purchase of goods in the course of import or export. Mr. Sonpal would submit that a sale or purchase of goods shall be deemed to take place in the course of export of the goods out of the territory of India only if the sale or purchase either occasions such export or is effected by a transfer of documents of title to the goods after the goods have crossed the Customs frontiers of India. Similarly, in the case of imports, the deeming fiction will come into play only if the sale or purchase either occasions such import or is effected by such transfer of documents of title to the goods before the goods have crossed the customs frontiers of India. Mr. Sonpal submits that none of the tests and which are relied upon as laid down in the case of *K. Gopinathan Nair vs. State of Kerala* reported in **(1997) 105 STC 580** are satisfied in this case. Therefore, the finding of fact, namely of absence of any evidence does not raise any questions of law. The finding cannot be termed as perverse. This is not a case where the Applicant had material to substantiate their claim. Now after two rounds a purely factual aspect need not be entertained.

10) In the rejoinder, Ms. Badheka submitted that section 5(2) of the CST Act must be read in its entirety. If so read, it has two limbs. The first is if the sale or purchase occasions such import. A sale or purchase of goods shall be deemed to take place in the course of the import also if it is effected by a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India. She relies upon a Judgments of the Hon'ble Supreme Court of India in the case of *Indore Ltd. and Anr. vs. Commercial Tax Officer and Ors.* reported in **(2010) 34 VST 509** and *Deputy Commissioner of Agricultural Income Tax and Sales Tax, Ernakulam vs. Indian Explosives Ltd.* reported in **(1985) 60 STC 310**. She would submit that the question therefore is a question of law.

11) We have heard extensively both sides on this point. We have also perused the application and all Annexures thereto. We are of the opinion that insofar as the question based on section 5(2) of the CST Act is concerned, that cannot be entertained and as a question of law. The Applicant, throughout, has argued that there was a very thick file containing 219 pages comprising of detailed affidavit filed by the Deputy General Manager. This affidavit gives details about the status of BHEL (Applicant) and NTPC. It gives all details of participation in national projects and practice followed by the Applicant. The Applicant, in the year 2012, could not provide 100% complete document in

relation to the claim under section 5(2) of the CST Act for the year 1989-90. However, the available documents were sufficient to allow the claim. The affidavit of DGM Smt. Kalavathi Krishnan is also filed. Then, there is a reference to the objections which have been raised by the Comptroller and Auditor General of India (CAG). A reference is also made to the minutes and records of certain meetings between NTPC and BHEL. However, we find all this as not sufficient for the purpose of terming the question as a question of law and to be answered by this Court. In this regard, what we find is that the Tribunal gave the Applicant enough opportunities. The Tribunal has noted the rival contentions in the appellate order. The Tribunal has equally noted and concluded that the matter has been handled rather casually. In para 14 of the Appellate order at page 232 of the paper book, the Tribunal has observed that it is the contention of the Appellant that such supplies as per their claim which they initially claimed as inter-state sale liable to Central Sales Tax Act at the rate 4% as supplier has received the 'C' Form, are now claimed as sales in the course of import covered under section 5(2) of the Central Act, 1956. Even in support of such contention, only xerox copies are kept in four files. Out of this, NTPC Farakka file contains around 15 pages containing correspondence copies and one contract agreement of 5 pages which do not give the scope of contract or the nature of work.

The papers which are then submitted only show that the Applicant had submitted some bid documents and the NTPC had accepted them resulting into contract. However, the actual contract document or any certified copy is not produced nor is there any certified copy. The explanation given is that as far as such documents are concerned, they pertain to national projects and in the interest of safety and security, the original cannot be parted with. They are kept at one place. Such an explanation hardly inspires confidence, because, then, there was no need to introduce xerox copies. If the xerox copies could have been made available and stated to be of certain originals or certain true copies, then, those should have been produced and at the right stage. There is thus no prohibition in law or privilege. The Tribunal found that even the filing containing xerox copies is not properly paginated nor the xerox copies by themselves have any evidenciary value. In the circumstances, from paragraph 15 onwards, the Tribunal found that the claim under section 5(2) cannot be granted. The basic tests which are to be satisfied have thus not been satisfied. We do not find that the discussion in the order passed and from paras 15 to 22 raises any question of law.

12) When an attempt was made in the garb of filing a Rectification Application to have this claim re-agitated, the Tribunal

opined and in our view rightly that the matter has been handled at the end of the Applicant themselves in such a manner that it is not possible to consider leave alone grant the claim. The Applicant has failed to produce original contract copies and documents pertaining to the contract. At page 271 in para 15 of the order passed on the Rectification Application, the same reasons as above assigned at the initial stage are reiterated. The argument that is canvassed before us now that the Tribunal failed to appreciate evidence on record has been rightly rejected because what was sought to be produced was hardly sufficient to prove the transaction and in terms of the statutory provisions. Therefore, we do not see how such findings can be termed as perverse. The finding to be perverse and vitiated on that ground must be rendered without referring to relevant and germane materials on record or omitting from consideration such germane and relevant materials though referred and pointed out from the record. Such is not the case in the present matter. We are therefore of the opinion that it is not necessary to refer to any decisions on the ambit and scope of section 5(2) of the CST Act and relied by either parties. Once the discussion does not raise any question of law, then, the Application to that extent deserves to be rejected. It is accordingly rejected.

13) However, on perusal of the orders passed by the Tribunal in the Second Appeals, Rectification Applications and the Reference Applications, we are of the view that even the other questions under the BST Act and except the one referred cannot be termed as questions of law. There, the manner in which they are framed themselves would indicate as to how the documents in regard thereto have been referred and wherever necessary, the initial errors have been corrected during the course of the Rectification Applications and while dealing with them. The only question which we find and which can be said to be a question of law is regarding the power of remission of interest. Our attention has been invited to section 9 of the CST Act and sections 45 and 55 of the BST Act. Whether the powers of remission of interest are available while dealing with claim under the Central Sales Tax as such claims have to be decided and determined by the authorities under the Bombay Sales Tax Act, is a question of law. The Tribunal is therefore directed to refer the following question of law for our opinion and answer:-

> "Whether on the facts, evidence and submission on record, the Tribunal erred in rejecting the plea of remission of interest when for majority of the claims the matter is remanded for verification rather than keeping the issue open for the Appellate Authority?""

14) Save and except the above additional question, which shall be referred by the Tribunal for our opinion, the Application is rejected.

The Tribunal to comply with our order within a period of eight weeks from the date of receipt of copy of this order. It shall draw up a statement of facts and forward all the relevant papers and record in order to enable this Court to answer the above question.

(G.S.KULKARNI, J.) **(S.C.DHARMADHIKARI, J.)**