

IN THE HIGH COURT OF JUDICATURE AT MADRAS
RESERVED ON : 29.9.2015 & PRONOUNCED ON : 12.4.2016

CORAM:

THE HONOURABLE MR.JUSTICE V.RAMASUBRAMANIAN
AND
THE HONOURABLE MR.JUSTICE T.MATHIVANAN

Writ Appeal Nos.1118 and 1119 of 2015
and
all connected pending MPs

Nokia India Sales Private Limited
rep. by its Authorized Signatory
Mr.M.S.Gajendrakumar. Petitioner/
Appellant in both Petitions

Vs.

1. The Assistant Commissioner (CT)
Sriperumbudur Assessment Circle,
Varadarajapuram, Chennai-123.
2. State of Tamil Nadu, through the
Secretary, Ministry of Finance,
Secretariat, Fort St. George,
Chennai - 9.

... Respondents
in both Petitions

APPEALS under Clause 15 of the Letters Patent, against the
common order dated 15.07.2015 in W.P.Nos.21265 and 21266 of 2014.

W.P.Nos.21265 and 21266 of 2014 : Writ Petition filed under
Article 226 of the Constitution of India, for the issuance of a
Writ of Certiorari, to call for the records comprising the
Impugned Order dated 25.6.2014 along with the order dated
30.07.2014 and consequent notices dated 25.06.2014 for the
Assessment Year 2013-14 issued by the Respondent No.1 and
consequential proceedings thereto and quash the same as
unconstitutional.

For Appellant : Mr.Arvind P.Datar and
Mr.P.S.Raman, Senior Counsel and
Mr.J.P.Singh and Ms.Garimachauhan for
Mr.Arunkarthik Mohan and Mr.K.Prahladbhat

For Respondents : Mr.AL.Somayaji, Advocate General for
Dr.Anitha Sumanth,
Special Government Pleader (Taxes)
Assisted by Mr.S.Manoharan Sundaram,
Additional Government Pleader (Taxes)

COMMON JUDGMENT

V.RAMASUBRAMANIAN, J

The appeals arise out of a common order passed by the learned Judge dismissing the writ petitions filed by the appellant, questioning the orders of assessment relating to the assessment years 2012-13 and 2013-14 under the Tamil Nadu Value Added Tax Act, 2006 (hereinafter referred to as the TNVAT Act, 2006).

2. We have heard Mr.Arvind P.Datar and Mr.P.S.Raman, learned Senior Counsel appearing for the appellant and Mr.AL.Somayaji, learned Advocate General assisted by Dr.Anitha Sumanth, learned Special Government Pleader (Taxes) appearing for the respondents.

BACKGROUND FACTS

3. The appellant is a company having a unit located in the Special Economic Zone at Sriperumbudur. The unit of the appellant was issued with a Letter of Approval dated 7.3.2011 by the Competent Authority for the setting up of a unit for the purpose of "Trading and Warehousing Services for Mobile Phone and Sets and Mobile Phone Parts and Accessories".

4. There is also another company by name Nokia India Private Limited, which has a manufacturing unit within the same Special Economic Zone. From the said manufacturing company namely Nokia India Private Limited, the appellant purchased mobile phones during the period 2012-13. The phones so purchased were either sold by the appellant in the Domestic Tariff Area after paying applicable duties and taxes including value added tax or transferred to the branches of the appellant located in other States, by way of stock transfer.

5. Suddenly, the appellant was issued with notices on various dates in May, June, July and September 2013, in relation to the assessment year 2012-13, on the ground that the appellant was liable to pay purchase tax on the value of the goods transferred by the appellant to their branches in other States. The appellant filed their objections on various dates in July, August and September 2013 and in January and May 2014.

6. However, the Assessing Officer passed two orders, both dated 25.6.2014, in respect of assessment years 2012-13 and 2013-14, holding that the appellant was liable to pay purchase tax on the inter-state stock transfer effected from the warehouse located in the Special Economic Zone at 14.5%. Claiming that both the orders of assessment were riddled with discrepancies, the appellant filed petitions for rectification under Section 84 of the TNVAT Act, 2006. The said petitions were dismissed by an order dated 30.7.2014.

7. Therefore, challenging the orders of assessment and the dismissal of the rectification petitions, the appellant filed two writ petitions in W.P.Nos. 21265 and 21266 of 2014. Both the writ petitions were dismissed by the learned Judge on the ground that the levy of purchase tax was in accordance with law. Aggrieved by the said order of the learned Judge, the appellant is before us.

CONTENTIONS BEFORE THE LEARNED SINGLE JUDGE

8. Fortunately, there are no disputes on facts. The only dispute is with regard to a pure and simple question of law relating to the interplay of Sections 12, 15 and 28 of the Tamil Nadu Special Economic Zones (Special Provisions) Act, 2005 (hereinafter called the TNSEZ Act, 2005) vis-a-vis Section 12 of the TNVAT Act, 2006.

9. The case of the appellant in the writ petitions was that under Section 12(1)(a) of the TNSEZ Act, 2005, every developer or Entrepreneur is entitled to exemption from the levy of taxes both on the sale as well as the purchase of goods, if such goods are meant to carry on the authorized operations. The Letter of Approval granted to the appellant by the Competent Authority permitted the appellant to carry on "Trading and Warehousing Services for Mobile Phone Hand Sets, Mobile Phone Parts and Accessories". According to the appellant, the inter-state stock transfer made by them to their own branches located in other States, is an operation authorised by the Letter of Approval and hence, the appellant claims that they have an exemption by virtue of Section 12(1)(a) of the Act. Such exemption, according to the appellant, is available notwithstanding anything

inconsistent therewith contained in any other State Law for the time being in force, by virtue of Section 28 of the TNSEZ Act, 2005.

10. However, the case of the appellant was resisted by the respondents on the short ground that under Section 15(a) of the TNSEZ Act, 2005, every removal of goods from the Special Economic Zone to the Domestic Tariff Area is chargeable to sales tax. Therefore, the respondents claim that the protection under Section 28 was not available to such cases.

REASONINGS OF THE LEARNED JUDGE

11. By the order impugned in these appeals, the learned Judge held (i) that the inter-state stock transfer to the branches of the appellant located in other States, would not come within the purview of the term "authorised operations"; (ii) that the liability of the appellant to pay purchase tax was not exempted in view of Section 15(a) of the TNSEZ Act, 2005; and (iii) that the appellant, after having availed the hospitality and resources of the State of Tamil Nadu, was not entitled to divert significant part of their turnover offered to other States by effecting inter-state stock transfers. After holding so, the learned Judge distinguished the decision of the Gujarat High Court on an identical issue in Torrent Energy Limited Vs. State of Gujarat [2014 (71) VST 582], but placed reliance upon a decision of another learned Judge of this Court in Tulsyan Nec Limited Vs. Assistant Commissioner (W.P.No.21453 of 2008 dated 9.1.2015). Therefore, the assessee has come up with the above appeals challenging the order of the learned Judge.

GROUND OFS OF APPEAL

12. Assailing the order of the learned Judge, it is contended by Mr.Arvind P Datar, learned Senior Counsel for the appellant-

(a) that when the Letter of Approval, issued by the Competent Authority on 7.3.2011, authorised the appellant to carry on trading and warehousing services and when condition No. (v) of the Letter of Approval authorised the appellant to supply and sell goods or services in the Domestic Tariff Area, the learned Judge erred in holding that the inter-state stock transfer by the appellant would not come within the purview of the term "authorised operations";

(b) that the provisions of Section 12(1) of the TNSEZ Act, 2005 are absolute in its mandate, in view of the overriding effect conferred under Section 28 ;

(c) that the provisions of TNSEZ Act have to be understood

and interpreted in the context of the SEZ policy of the State Government as well as Sections 50 and 51 of the Central Enactment on the same subject;

(d) that the reliance placed by the learned Judge upon Section 15 of the TNSEZ Act to come to the conclusion that every removal of goods from the SEZ to the Domestic Tariff Area would become chargeable to sales tax, is erroneous since Section 15(a) does not cover purchase tax;

(e) that even the reliance placed by the learned Judge upon Section 30 of the Central SEZ Act, was misplaced, as there is a fundamental difference between the taxable event for the levy of customs duty and the taxable event for the levy of sales tax or purchase tax;

(f) that the observation of the learned Judge that after having availed the hospitality of the State of Tamil Nadu, the appellant cannot effect inter-state stock transfer, that will enure to the benefit of another State where a local sale may be effected, is erroneous; and

(g) that the distinction sought to be made by the learned Judge to the decision of the Gujarat High Court in Torrent Energy Limited, is also erroneous.

13. Supplementing the above arguments, it is contended by Mr.P.S. Raman, learned Senior Counsel for the appellant that while Section 12(1)(a) of the TNSEZ Act, 2005, grants exemption from the levy of taxes both on the sale as well as the purchase of goods, Section 15(a) merely makes the goods removed from SEZ to Domestic Tariff Area chargeable to sales tax and additional sales tax, but not to purchase tax. He also submitted that if inter-state stock transfer by a company located in a SEZ cannot be taken to be an "authorised operation", then the same would lead to a very disastrous consequence namely that the exemption under Section 12(1) will go in entirety.

14. Referring to paragraphs 22 and 26(ii) of the counter affidavit filed by the respondents before the learned Single Judge, Mr.P.S.Raman, learned Senior Counsel further contended that even according to the respondents, exemption is provided from the levy of tax on transactions between units within the SEZ as well as exports. Therefore, he contended that there was no logic in denying the exemption in respect of purchase tax for inter-state stock transfers. The learned Senior Counsel also submitted that no obligation is cast upon a unit located in a Special Economic Zone, only to make exports. These units are allowed to effect local sales also, subject, however, to the condition that within a period of five years of establishment, their foreign exchange earning should be more than their foreign exchange spending. Therefore, it is his contention that an inter-state stock transfer cannot be treated differently.

15. In response to the above contentions, Mr.AL.Somayaji, learned Advocate General contended-

(a) that as per the SEZ policy of the State of Tamil Nadu, 2003, the very object of creating a SEZ was "to bring large dividends to the State in terms of economic and industrial development and the generation of new employment opportunities";

(b) that as per para 5(a) of the SEZ policy 2003, the units located in SEZs are entitled to exemption from all types of local taxes, only in respect of transactions made between units/establishments within the SEZs and in respect of supply of goods and services from the Domestic Tariff Area to the units in SEZs and hence, inter-state stock transfer is not entitled to the benefit of exemption;

(c) that while the exemption under Section 12(1)(a) is made available only to the sale or purchase of goods, the chargeability to sales tax under Section 15(a) is on the removal of goods from a SEZ to DTA and hence, the learned Judge was right in relying upon Section 15(a) to reject the claim of the appellant;

(d) that the expression "sales" would take within its purview "purchase", as held by a Bench of this Court in Sulochana Cotton Spinning Mills (P) Ltd. Vs. State of Tamil Nadu & others [(1995) 98 STC 125]; and

(e) that therefore, the order of the learned Judge does not call for any interference.

ANALYSIS OF RIVAL CONTENTIONS

16. From the rival contentions, which we have extracted above, it appears to us that all these contentions raised on both sides could be brought within the broad spectrum of two primary questions. They are:

(i) Whether the inter-state stock transfer effected by the unit located in SEZ, would come within the purview of the expression "authorized operations", in terms of the Letter of Approval granted by the Competent Authority? and

(ii) Whether the right conferred upon a Developer or Entrepreneur under Section 12(1), is circumscribed by the provisions of Section 15(a)?

QUESTION - (i)

17. In order to find an answer to the first question, it may be necessary to take note of the scheme of the Special Economic Zones Act, (Central Enactment) and the scheme of the TNSEZ Act, 2005.

18. The Parliament enacted the Special Economic Zones Act, 2005 with a view to provide for the establishment, development

and management of Special Economic Zones for the promotion of exports and for matters connected therewith or incidental thereto. Section 3(1) of the Act enables the Central Government, the State Government or any person, either jointly or severally, to establish a Special Economic Zone, for the manufacture of goods or rendering of services or for both or as a free trade and warehousing zone. Section 5 of the Act prescribes the guidelines for notifying an area as a Special Economic Zone. A careful look at Section 5 would show that these guidelines include (i) generation of additional economic activity; (ii) promotion of exports of goods and services; (iii) promotion of investment from domestic and foreign sources; (iv) creation of employment opportunities; (v) development of infrastructural facilities; and (vi) maintenance of sovereignty and integrity of India. The areas falling within the Special Economic Zone may be demarcated into (i) processing area for the manufacture of goods or rendition of services; (ii) area for trading or warehousing purposes; and (iii) non processing areas, other than those covered by the first two items.

19. Under Section 7 of the Act, any goods or services exported out of or imported into or procured from the Domestic Tariff Area, are exempt from payment of taxes and duties under all enactments specified in First Schedule. Under Section 15 of the Act, any person intending to set up a unit for carrying on the authorised operations in a Special Economic Zone may submit a proposal to the Development Commissioner. He must, in turn, send the proposal to the Approval Committee. The proposal may be approved by the Committee with or without modifications or it can be rejected.

20. Section 26 of the Act (Central) entitles every Developer or Entrepreneur to the exemptions, drawbacks and concessions listed in Clauses (a) to (g) of Sub-Section (1) thereto. Section 29 makes it clear that the transfer of ownership in any goods brought into or produced or manufactured in any unit or the removal thereof from such unit, can be allowed subject to the terms and conditions stipulated by the Central Government.

21. Section 30 of the Central Act makes any goods removed from a Special Economic Zone to the Domestic Tariff Area, chargeable to duties of customs including anti-dumping, countervailing and safeguard duties. It will be of interest to note that Section 30 of the Central Enactment is exactly identical to Section 15 of the TNSEZ Act, 2005.

22. Section 50 of the Central Enactment empowers the State Government, to notify policies for developers and units and also to take suitable steps for enactment of any law, for the

purposes of giving effect to the provisions of this Act. The reason as to why the Central Enactment empowers the State Government to enact a law, is that in respect of taxes, levies and duties that could be imposed only by the State Government, by virtue of the relevant entries in List II of the VII Schedule to The Constitution, the Central Government is not competent to grant exemption. Therefore, while the Central Enactment provides for exemption to the units located in SEZs created thereunder, only in respect of the taxes, levies and duties that can be imposed by the Central Government, a State Enactment alone can provide for exemption from payment of taxes, levies and duties that can be imposed exclusively by the State Government.

23. Section 51 of the Central Enactment confers overriding effect upon the Act, vis-a-vis any other law. Section 53 declares a Special Economic Zone to be a territory outside the Customs Territory of India, for the purpose of undertaking the authorized operations. The Special Economic Zone will be deemed to be a port, inland container depot, land station and land customs station under Section 7 of the Customs Act, 1962.

24. In accordance with Section 50 of the Central Enactment, the State of Tamil Nadu enacted Act 18 of 2005. Section 2(f) of the Tamil Nadu Act made it clear that all words and expressions used, but not defined in the Tamil Nadu Act will have the same meaning, as assigned to them in the Central Enactment.

25. Section 3 of the Tamil Nadu Act is in pari-materia with Section 5(1) of the Central Enactment. Therefore, the Government is guided, while forwarding a proposal for establishment of a Special Economic Zone by 6 factors namely, (i) generation of additional economic activity; (ii) promotion of exports of goods and services; (iii) promotion of investment from domestic and foreign sources; (iv) creation of employment opportunities; (v) development of infrastructural facilities; and (vi) maintenance of sovereignty and integrity of India.

26. Section 12 of the Tamil Nadu Act, is exactly similar to Section 26 of the Central Enactment. In Clauses (a) to (h) of Sub-Section (1) of Section 12 of the Tamil Nadu Act, the list of exemptions that are available to every developer or entrepreneur, is provided and these exemptions are made available subject to the provisions of Sub-Section (2). Section 26(1) of the Central Enactment also contains a list of exemptions in Clauses (a) to (g) and these exemptions are also made available subject to the provisions of Sub-Section (2). In Sub-Section (2) of Section 12 of the Tamil Nadu Act as well as in Sub-Section (2) of Section 26 of the Central Enactment, the respective Governments are empowered to prescribe the manner, in

which, and the terms and conditions, subject to which, the exemptions shall be granted.

27. Both Section 12(1)(a) of the State Enactment as well as Section 26(1)(a) of the Central Enactment use the expression "authorized operations". Both these provisions make it clear that the benefit of exemption will be available only to those carrying on authorised operations. But, this expression is not defined in the State Enactment. Therefore, we have to fall back upon the definition of the same expression provided in Section 2(c) of the Central Enactment. This is permissible in view of Section 2(f) of the State Enactment that permits the borrowal of the definitions from the Central Enactment. Section 2(c) of the Central Enactment defines the expression "authorized operations" to mean operations which may be authorized under Sections 4(2) and 15(9). Section 4(2) of the Central Enactment empowers the Board of Approval to authorise the Developer to undertake in a SEZ, such operations, which the Central Government may authorise. Section 15(9) empowers the Development Commissioner to grant a Letter of Approval to set up a unit and undertake such operations, which the Development Commissioner may authorise. But, the Development Commissioner can grant a Letter of Approval under Section 15(9) only after the Approval Committee had granted approval. Section 15(9) also obliges the Development Commissioner to specifically mention in the Letter of Approval, the list of "authorized operations".

28. It will be of interest to note that there are no provisions in the TNSEZ Act, which are similar to Sections 4(2) or 15(9). Therefore, it appears that the power for the grant of approval and the procedure for making an application and processing the same are all to be found only in the Central Enactment, as there are no provisions in the State Enactment with regard to these matters. This is why Section 28 of the TNSEZ Act does not merely contain a non-obstante clause, but also contains a stipulation that the State Act shall be in addition to and not in derogation of the Central enactment.

29. The above conclusion is also fortified by the fact that the very Letter of Approval to the appellant herein was granted on 7.3.2011, not by any State Authority, but by the office of the Development Commissioner, MEPZ Special Economic Zone, the Department of Commerce of the Ministry of Commerce and Industry, Government of India. The Letter of Approval dated 7.3.2011, issued to the appellant by the Development Commissioner indicates the authorised operations the appellant is entitled to carry on. In column No.1 of the Letter of Approval, under the heading "Authorized Operations" it is indicated that no items of manufacture are to be undertaken. In column No.2, under the

heading "Authorized Operations", it is indicated that the appellant is entitled to carry on the following "service activities" namely "trading and warehousing services for mobile phone handsets and mobile phone parts and accessories". After column No.3, it is stated in the Letter of Approval that the approval was subject to about 14 terms and conditions stipulated therein. Condition nos.(i),(iv), (v) and (xiii) read as follows:

(i) You shall export the goods manufactured/ goods imported/ procured for trading and services, including items of trading as per provisions of the SEZ Act 2005 and rules made thereunder for a period of five years from the date of commencement of the production/ service activities. For this purpose, you shall execute the Bond-cum- Legal undertaking as prescribed under the SEZ Rules 2006.

(iv) You may import or procure from the DTA all the items required for your authorised operations under this approval except those prohibited under the ITC(HS) Classification of Export and Import items.

(v) You may supply/ sell goods or services in the DTA in terms of the provisions of the SEZ Act, 2005 and Rules and Orders made therein.

(xiii) If you fail to comply with the conditions stipulated above, this letter of Approval shall be cancelled as per the provisions of the SEZ Act, 2005 and the Rules and Orders made thereunder.

30. Therefore it is clear from the Letter of Approval that the appellant was obliged primarily to export the goods procured for trading and services. But, since the appellant was obliged to achieve positive net foreign exchange, only over a period of time, the Letter of Approval specifically permits the appellant to supply/sell goods or services in the DTA. Condition Nos.(i) and (v), if read harmoniously, would show that an export obligation is imposed upon the appellant, not with the idea of making the appellant a 100% export oriented unit. The appellant is entitled to apportion their exports and domestic sales in such a manner that they achieve a positive net foreign exchange within the stipulated period.

31. As we have indicated earlier, the Letter of Approval dated 7.3.2011 was issued in the name of the Development Commissioner. This is in terms of Section 15(9) of the Central Enactment. Since the Letter of Approval was issued in the name of the Development Commissioner, as contemplated under Section 15(9) of the Central Enactment, the operations indicated in the Letter of Approval as "authorised operations" very clearly satisfy the definition of the expression under Section 2(c). In other words, the inter-state stock transfer made by the

appellant to its own branches located outside the State, is very clearly authorised by Condition No.(v) of the Letter of Approval. Hence, the Department as well as the learned Judge were in error in thinking that an inter-state stock transfer would not come within the purview of the expression "authorised operations".

32. We cannot forget that the very entitlement of a unit located in a SEZ to the benefits of the privileges and concessions, is contingent upon the unit carrying on authorised operations. If a unit carries on any unauthorised operation, the very Letter of Approval is liable for cancellation in terms of Condition No.(xiii) that we have extracted above. In fact, the State has not withdrawn any of the other benefits, privileges or concessions to the appellant on the ground that they have stopped carrying on authorised operations. Therefore, to say that the inter-state stock transfer effected by the appellant would not be an authorised operation, is nothing but to take up an extreme position. The same is not permissible in the light of the Letter of Approval granted by the Development Commissioner in terms of Section 15(9) of the Central Enactment read with the definition of the expression "authorised operations" provided in Section 2(c) of the Central Enactment, read with Section 2(f) the TNSEZ Act, 2005. Therefore, the first question has to be answered in favour of the appellant.

QUESTION (ii) :

33. The second question that falls for our consideration is as to whether the right conferred upon a developer or entrepreneur under Section 12(1) is circumscribed by the provisions of Section 15(a) of the TNSEZ Act, 2005.

34. Section 12 of the State Enactment reads as follows:

"12 (1) Subject to the provisions of Sub-Section (2) every Developer or entrepreneur shall be entitled to the following exemptions, namely-

(a) exemption from the levy of taxes on the sale or purchase of goods under the Tamil Nadu General Sales Tax Act, 1959 if such goods are meant to carry on the authorised operations by the Developer or entrepreneur;

(b) exemption from the tax payable under the Tamil Nadu Additional Sales Tax Act, 1970;

(c) exemption from the tax payable under the Tamil Nadu Tax on Entry of Motor

Vehicles into Local Areas Act, 1990;

(d) exemption from the tax payable under the Tamil Nadu Entry of Goods into Local Areas Act, 2001;

(e) exemption from the tax payable under the Tamil Nadu Tax on Luxuries Act, 1981;

(f) exemption from the tax payable under the Tamil Nadu Entertainments Tax Act, 1939;

(g) exemption from the tax payable under the Tamil Nadu Advertisement Tax Act, 1983;

(h) exemption from the tax payable under the Tamil Nadu Tax on Consumption or Sale of Electricity Act, 2003 for electricity sold or consumed in a Special Economic Zone.

(2) The Government may prescribe the manner in which, and the terms and conditions subject to which, the exemptions shall be granted to the Developer or entrepreneur under Sub-Section (1)".

35. This Section 12 is actually in parimateria with Section 26(1) of the Central Enactment. Sub-Sections (1) of both these provisions, namely, Section 12 of the Tamil Nadu Act and Section 26 of the Central Act contain a list of exemptions available to a developer or entrepreneur. These exemptions, under both Enactments, are made available, subject only to Sub-Sections (2) of Section 12 of the Tamil Nadu Act and Section 26 of the Central Act. Sub-Sections (2) of both provisions empower the respective Governments to prescribe the manner, in which, and the terms and conditions, subject to which, the exemptions can be granted.

36. After listing out under Section 12(1) the exemptions available to a developer or entrepreneur, the State Enactment also provided, under Section 14, for the transfer of ownership in goods brought into or produced or manufactured in any unit in a SEZ. This Section also provides for removal of goods from the unit or zone and this Section is in parimateria with Section 29 of the Central enactment. Section 14 of the State Enactment reads:

"14. The transfer of ownership in any goods brought into, or produced or manufactured in any Unit or Special Economic Zone or removal thereof from such Unit or Zone shall be allowed, subject to such terms and conditions as may be prescribed".

37. Keeping in mind the features of Sections 12 and 14, let us now have a look at Section 15. Section 15 of the State Enactment is exactly similar to Section 30 of the Central enactment. Therefore, it will be useful to read both of them together in a tabular form as follows:

Section 15 of State Act :	Section 30 of Central Act :
"15. Subject to the conditions specified in the rules made by the Government in this behalf- (a) any goods removed from a Special Economic Zone to the Domestic Tariff Area shall be chargeable to sales tax and additional sales tax under the Tamil Nadu General Sales Tax Act, 1959 and the Tamil Nadu Additional Sales Tax Act, 1970 and the entry tax under the Tamil Nadu Entry of Motor Vehicles into Local Areas Act, 1990 and the Tamil Nadu Entry of Goods into Local Areas Act, 2001, where applicable as leviable on such goods when imported; and (b) the rate of sales tax, additional sales tax and entry tax, if any, applicable to goods removed from a Special Economic Zone shall be at the rate in force as on the date of such removal, and where such date is not ascertainable, on the date of payment of tax."	"30. Subject to the conditions specified in the rules made by the Central Government in this behalf- (a) any goods removed from a Special Economic Zone to the Domestic Tariff Area shall be chargeable to duties of customs including anti dumping, countervailing and safeguard duties under the Customs Tariff Act, 1975, where applicable as leviable on such goods when imported; and (b) the rate of duty and tariff valuation, if any, applicable to goods removed from a Special Economic Zone shall be at the rate and tariff valuation in force as on the date of such removal, and where such date is not ascertainable, on the date of payment of duty."

38. What is important for us to note from Section 30 of the Central Act and Section 15 of the State Enactment is that both of them use the every same expression "any goods removed from a SEZ to the DTA". Both of them also use the same expression "shall be chargeable". Both Sections make the chargeability contingent upon the conditions specified in the Rules made by the respective Governments.

39. But, there is an essential difference between the field of operation of Section 30 of the Central Act and Section 15 of the State Act. For all practical purposes, a Special Economic

Zone is treated as a territory out of India. Therefore, the moment goods are removed from a Special Economic Zone and they enter a Domestic Tariff Area, an import takes place. An importer becomes liable to pay duties of customs, anti-dumping, countervailing and safeguard duties, the moment the imported goods arrive into the territory of India. The chargeability to duties of customs, countervailing duty etc., does not depend upon the question as to whether the importer proposes to make use of the goods for his own consumption or for sale in India. Even in cases where the importer proposes to process those goods to make out of them yet another product so as to re-export them to the same or another country, the chargeability does not get removed. He would only be entitled, upon re-export, to duty drawback or credit, etc.

40. In other words, the arrival of goods into the Domestic Tariff Area from Special Economic Zone is exactly akin to the arrival of imported goods into the territory of India. The event that gives rise to the chargeability to the duty of customs, anti-dumping etc., is the very arrival of the goods into the territory of India. But in contrast, the taxable event in respect of provisions of the TNGST Act, TNVAT Act etc., is the sale or purchase of goods that takes place within the territory. But unfortunately, Section 15 of the State Enactment has simply borrowed (or copied and pasted), the very language in Section 30 of the Central Enactment, without realizing the folly. This appears to have given rise to a confusion as to the interpretation of Section 15 of the State Enactment. One has to understand the expression "removed" appearing in Section 30 of the Central enactment slightly differently from the same expression appearing under Section 15 of the State Enactment. While the expression "removed" appearing in the Central Enactment, signifies an event giving rise to the chargeability to duty of customs, the expression "removed" appearing in the State Enactment, by itself, does not give rise to a taxable event. Therefore, the proper method of interpreting the expression "removed" is to ask a question as to whether the removal gives rise to an event chargeable to duty or chargeable to tax. The application of Section 15 of the State Enactment would depend only upon our answer to this question.

41. In simple terms, we can understand what a Special Economic Zone is and what possible scenarios could emerge when goods are removed from a SEZ. As we have stated earlier, a Special Economic Zone is to be treated as a foreign territory located within the territory of India. Fortunately, this proposition is not seriously contested by the learned Advocate General for the State. So long as authorised operations, as permitted by the Development Commissioner in his Letter of

Approval, are carried on, a Special Economic Zone is to be treated only as foreign territory located within the territory of India. Therefore, no event that takes place within such Special Economic Zone can be taken to be a taxable event or event chargeable to any of the duties.

42. Now, let us see what happens to the goods or services that emanates from a unit located in the Special Economic Zone. There are four possible scenarios. The first is that the goods may be exported to a foreign country. We do not think that there is any Special Economic Zone in the country, within which is located an airport or a seaport, so as to enable a unit inside the Special Economic Zone to export their goods and services directly from the Special Economic Zone, without such goods or services ever entering a Domestic Tariff Area. Even if the goods or services produced by a unit in a Special Economic Zone are entirely exported, those goods and services will have to necessarily enter the Domestic Tariff Area before reaching the airport or seaport.

43. The second scenario is that the goods or services produced by a unit located inside the SEZ are sold to a local purchaser within the State, in which, the SEZ is located. When such an event takes place, the goods are removed from the SEZ to the Domestic Tariff Area and they are supplied to the local purchaser within the State. In such cases, a taxable event takes place in terms of the provisions of the Tamil Nadu General Sales Tax Act, 1959 or TNVAT Act, 2006. This position is admitted by both sides and in so far as such direct sales made by the appellant to a local purchaser within the State are concerned, the appellant is said to have admitted the said liability and also paid sales tax, additional sales tax etc.

44. The third possible scenario is where the goods or services produced by a unit located within the SEZ of a particular State, are sold to a purchaser located in yet another State. In such a case, the sale takes place within the scope of the Central Sales Tax Act, 1956. Therefore, the seller namely the unit located in SEZ pays sales tax either under Section 8(1) or under Section 8(2) of the Central Sales Tax Act, 1956, as the case may be.

45. The fourth scenario is where the goods or services produced by a unit located in a SEZ are removed from the SEZ to the Domestic Tariff Area for the purpose of transferring them to the branches or godowns of the same manufacturer, located in other States. When this happens, no taxable event takes place either within the SEZ or in the Domestic Tariff Area of the State, in which, the SEZ is located.

46. If we keep in mind all the above four different possible scenarios, the answer to the second question that has arisen for consideration before us, would not pose any great difficulty. In all the four different possible scenarios we have indicated above, there is certainly a removal of goods from the SEZ to the Domestic Tariff Area. In other words, a direct export from a unit located in a SEZ to a foreign country cannot take place without the goods being removed from the SEZ to the Domestic Tariff Area, unless an airport or seaport is also located within the SEZ. Similarly, a direct sale to a local purchaser within the State cannot also take place without the goods being removed from the SEZ to the DTA. Likewise, an inter-state sales in terms of the Central Sales Tax Act cannot also take place without the goods being removed from the SEZ to the DTA of the State, within which, the SEZ is located.

47. If the expression "removed" appearing under Section 15 (a) is to be understood in the manner, in which, the State Government has argued before us, the following consequences would become inevitable: (i) whenever the goods are removed from the Special Economic Zone to the Domestic Tariff Area, they would have to pay sales tax etc., as stipulated in Section 15 (a), since the contingency prescribed in Section 15(a) happens; (ii) whenever any goods are removed from a Special Economic Zone to the Domestic Tariff Area for the purpose of being supplied to a purchaser located in a different State, by way of inter-state sales, even then sales tax and additional sales tax as stipulated under Tamil Nadu General Sales Tax Act, 1959 and the Tamil Nadu Additional Sales Tax Act, 1970 would become payable.

48. The above consequences are not what are contemplated by Section 15 of the Act. Therefore, we are of the considered view that the expression "removed from a SEZ to a DTA" appearing in Section 15(a) has to be correlated to a taxable event. This is made clear by the rider contained in the last part of Section 15 (a). This rider reads as "where applicable as leviable on such goods when imported"

49. Whenever an inter-state stock transfer takes place, the State, in which, the factory is located, cannot levy and collect the local sales tax, as no taxable event takes place in the State. This is why Section 15(a) uses the rider "where applicable as leviable". Take for instance a case where imported goods arrive at the Chennai Port. When the importer of such goods is located in Andhra Pradesh or Karnataka and such importer takes the imported goods from Chennai Port to his own godown in Andhra Pradesh or Karnataka, so as to sell them in his State, no sales tax under the Tamil Nadu General Sales Tax Act

becomes leviable on this imported goods. This is what is signified by the rider appearing in the last part of Section 15 (a).

50. The fallacy in the interpretation given by the respondents to Section 15(a) could be understood very easily by looking at it from another angle. The respondents agree that if an export takes place from a unit located in SEZ to a foreign country, Section 15(a) does not get attracted even if the goods are removed from the SEZ to a DTA. The respondents also agree that even in cases where an inter-state sales takes place from a unit located in a SEZ, Section 15(a) does not have any application, despite the goods being removed from the SEZ to a DTA. Whenever a direct sale takes place from a unit located in SEZ to a local purchaser within the State, the chargeability of tax arises not because of the removal from SEZ to DTA, but because of the taxable event namely sale. Therefore, if the expression "removed" has to be understood in one particular manner in respect of three contingencies namely (i) export (ii) direct sales and (iii) inter-state sales, it cannot be understood differently in the context of inter-state stock transfer alone.

51. Therefore, we are of the considered view that Section 15 (a) does not actually circumscribe Section 12(1)(a) of the Act. The argument of the respondents that appears to have weighed by the learned Single Judge was that a company like the appellant, after having availed the hospitality of a particular State, cannot deprive that State of its revenue, cannot at all be sustained. We have already indicated four possible scenarios. At least in two out of those four scenarios, namely in the case of export and in the case of inter-state sales, the State, in which, SEZ is located is deprived of its revenue.

52. In *Torrent Energy Limited Vs. State of Gujarat* [(2014) 71 VST 582], the State Authorities levied value added tax/purchase tax on capital goods and fuel used in the generation of energy, by a company that was engaged in the business of generation and distribution of power. The assessee placed reliance upon Section 21(1)(c) of the Gujarat Special Economic Zone Act, 2004 that exempted all sales and transactions within the processing area of a SEZ, from sales tax, purchase tax, etc. Section 22 of the SEZ Act also conferred an overriding effect for the Gujarat SEZ Act upon all other enactments. But, the State relied upon certain provisions of the Gujarat Value Added Tax Act, which levied purchase tax even upon SEZ Units on zero rated sales. But, a Division Bench of the Gujarat High Court held that without there being any provision giving the prescriptions contained in Gujarat VAT Act, primacy over Section

21 of the SEZ Act, no purchase tax could be levied under the VAT Act. The overriding effect given to the SEZ Act under Section 22, was held by the Gujarat High Court not to have a limited application.

53. But, the above decision had been distinguished by a learned Judge of this Court in a decision rendered on 09.01.2015 in *Tulsyan Nec Ltd. v. The Assistant Commissioner* on the ground inter alia (i) that Section 21 of the Gujarat SEZ Act and Section 12 of the Tamil Nadu SEZ Act are not in pari materia, (ii) that the petitioners in *Tulsyan* were claiming input tax credit on the sales effected to the Units in Special Economic Zone, and (iii) that there is a marked and material difference with regard to zero rated sale as per Section 5-A of the Gujarat VAT Act and as per Section 18 of the TNVAT Act.

54. The distinguishing features pointed out by a learned Judge in *Tulsyan Nec. Ltd.*, appealed to the learned Judge against whose orders the present appeals arise. Hence, the learned Judge held that the decision of the Gujarat High Court in *Torrent Energy Ltd.* is not worthy of acceptance.

55. But, in the order under appeal, the learned Judge omitted to see that the comparison drawn between Section 5-A of the Gujarat VAT Act and Section 18 of the Tamil Nadu VAT Act are of no application to the cases on hand. Section 5-A of the Gujarat VAT Act and Section 18 of the Tamil Nadu VAT Act deal with zero rating. Therefore, they are not what are applicable to the cases on hand.

56. What are applicable to the cases on hand are Section 9 of the Gujarat VAT Act and Section 12 of the Tamil Nadu VAT Act. Section 12 of the Tamil Nadu Value Added Tax Act, 2006 seeks to levy purchase tax on every dealer, who, in the course of his business, purchases from a registered dealer or from any other person, any goods (the sale or purchase of which is liable to tax under this Act) in circumstances in which no tax is payable by that registered dealer on the sale price of such goods under the Act. But, this levy is made only when any of the activities indicated in Clauses (a) to (d) of Sub-section (1) of Section 12 are performed.

57. In contrast to the above, Section 9 of the Gujarat VAT Act, as amended by Amendment Act 9 of 2008, sought to levy purchase tax whenever a dealer, liable to pay tax under the Act, purchased taxable goods, the sale of which is zero rated under Section 5-A. Section 9 of the Gujarat VAT Act did not speak about the levy of purchase tax upon those purchases, which happened under circumstances in which no tax was payable on the

sale of such goods. Therefore, Section 9 of the Gujarat VAT Act and Section 12 of the Tamil Nadu VAT Act may not be comparable.

58. But, what ought to have been seen was whether the provisions of Section 12(1) read with Section 28 of the Tamil Nadu SEZ Act would have overriding effect upon Section 12 of the Tamil Nadu VAT Act, 2006 or not. The Gujarat High Court was concerned in *Torrent Energy Ltd.*, with a very similar question as to whether Sections 5-A read with Section 9(5) of the Gujarat VAT Act would prevail over Sections 21 and 22 of the Gujarat SEZ Act or not. Therefore, we are of the considered view that the learned Judge, in the orders impugned in the present appeals, could not have distinguished *Torrent Energy Ltd.* merely on the basis of the decision in *Tulsyan*.

59. For a moment, we shall keep aside *Torrent Energy Ltd.* and consider the interplay of Section 12(1) read with Section 28 of the Tamil Nadu SEZ Act vis-a-vis Section 12 of the Tamil Nadu VAT Act, 2006. We have already extracted Section 12 of the Tamil Nadu SEZ Act, 2005 in paragraph 34. Section 28 of the Tamil Nadu SEZ Act, 2005 reads as follows:

"The provisions of this Act shall be in addition to and not in derogation of the Special Economic Zones Act, 2005 and shall have effect notwithstanding anything inconsistent therewith contained in any other State law for the time being in force."

60. Interestingly, the Gujarat High Court was also confronted with an amendment made to Sections 5-A and 9(5) of the Gujarat VAT Act, under Amendment Act 9 of 2008, in the light of the provisions of Sections 21 and 22 of the Gujarat SEZ Act, 2004. Section 22 of the Gujarat SEZ Act, which contained the clause relating to overriding effect, was anterior to the amendments introduced in 2008 to the Gujarat VAT Act. Section 22 of the Gujarat SEZ Act also used the very same phrase "for the time being in force", as is used in Section 28 of the Tamil Nadu SEZ Act, 2005. Tamil Nadu VAT Act, 2006 is a subsequent legislation and hence, it is contended before us, as it was contended before the Gujarat High Court that the phrase "for the time being in force" cannot cover a subsequent legislation or a subsequent amendment. But, the Gujarat High Court overruled the said objection on the basis of three decisions of the Supreme Court in *Thyssen Stahlunion v. Steel Authority of India* [AIR 1999 SC 3923], *Management of MCD v. Prem Chand Gupta* [AIR 2000 SC 454] and *Union Territory of Chandigarh v. Rajesh Kumar Basandhi* [(2003) 11 SCC 549].

61. Since the phrase found in Section 28 of the Tamil Nadu SEZ Act, 2005, namely "any other State law for the time being in force", as per the decisions of the Supreme Court referred to by the Gujarat High Court, cannot be given a restricted meaning so as to apply only to the enactments in force at that time, we are of the considered view that the overriding effect conferred upon Section 28 of the Tamil Nadu SEZ Act, 2005, will cover even Section 12 of the Tamil Nadu VAT Act, 2006. Therefore, even if we independently analyse the provisions of Section 12(1) read with Section 28 of the Tamil Nadu SEZ Act, 2005 vis-a-vis Section 12 of the Tamil Nadu VAT Act, 2006, we would come to the very same conclusion as arrived at by the Gujarat High Court in Torrent Energy Ltd.

62. However, Mr. AL. Somayaji, learned Advocate General contended that the very object of levy of purchase tax under Section 12(1) of the Tamil Nadu VAT Act, 2006 was to cover those cases in which no tax is payable on the sale price of certain goods. According to the learned Advocate General, this intention of the legislature is made clear by the use of the phrase "in circumstances in which no tax is payable by that registered dealer", appearing in Section 12(1) of the Tamil Nadu VAT Act, 2006.

63. Let us now test the above contention, after taking a look at Section 12 of the TNVAT Act, 2006, which reads as follows:
"Section 12: Levy of purchase tax.-

(1) Subject to the provisions of sub-section (1) of section 3, every dealer, who in the course of his business purchases from a registered dealer or from any other person, any goods (the sale or purchase of which is liable to tax under this Act), in circumstances in which no tax is payable by that registered dealer on the sale price of such goods under this Act, and either -

(a) consumes or uses such goods in or for the manufacture of other goods for sale or otherwise; or

(b) disposes of such goods in any manner other than by way of sale in the State; or

(c) despatches or carries them to a place outside the State except as a direct result of sale or purchase in the course of inter-State trade or commerce or in the course of export out of the territory of India; or

(d) installs and uses such goods in the factory for the manufacture of any goods,

shall pay tax on the turnover relating to the purchase aforesaid at the rate specified in the Schedules to this Act.

(2) Notwithstanding anything contained in clause (24) of section 2, the dealer who pays tax under sub-section (1) shall be entitled to input tax credit on the goods specified in the First Schedule."

64. The plain language of Section 12(1) indicates that purchase tax is leviable upon every dealer, who, in the course of business, purchases any goods in circumstances in which no tax is payable by that registered dealer on the sale price of such goods under the Act. But, this levy under Section 12(1) is offset by the input tax credit that is allowed under Sub-section (2) of Section 12. Therefore, Sub-section cannot be read in isolation from Sub-section (2).

65. Moreover, the primary condition for the invocation of Section 12(1) is that the purchase by one dealer should be in circumstances in which no tax is payable by the selling dealer on the sale price of the goods. The phrase "in circumstances" appearing in Section 12(1), goes along with the activity of "purchase", as seen from the language employed therein. The said phrase does not go along with the word "dealer".

66. In other words, Section 12(1) becomes applicable when the activity of purchasing, happens in circumstances in which no tax is payable on the activity of selling. The leviability of the purchase tax under Section 12(1) focusses not on the actors, but on the activity.

67. In a Special Economic Zone, the actors are conferred with certain benefits, under Section 12(1) of the Tamil Nadu Special Economic Zones Act, 2005. This is seen from the fact that Section 12(1) of the Tamil Nadu SEZ Act speaks only about "developer or entrepreneur". Section 12(1) of the Tamil Nadu Special Economic Zones Act, 2005, does not exempt the activities, but exempts the developer or entrepreneur.

68. Therefore, when we look at the interplay between Section 12(1) of the Tamil Nadu VAT Act, 2006 and Section 12(1) of the Tamil Nadu SEZ Act, 2005, it could be seen easily that the former seeks to cover activities, while the latter seeks to cover the actors. A developer or entrepreneur enjoys exemption from levy of all taxes listed under Clauses (a) to (h) of Sub-section (1) of Section 12 of TNSEZ Act, 2005, because of being located in a SEZ and because of being a developer or entrepreneur within the meaning of the said Act. A dealer

located in a SEZ and selling goods to another dealer, does not enjoy the benefit of non payment of tax on the sale price of his goods, merely because of any circumstances under which the activity of selling takes place. He enjoys such a benefit because of being a developer or entrepreneur in a SEZ.

69. Therefore, at the outset, Section 12(1) of the TNVAT Act, 2006 is not intended to cover developers and entrepreneurs located in Special Economic Zones. In any event, Clause (a) of Sub-section (1) of Section 12 of TNSEZ Act, 2005 exempted a developer or entrepreneur from the levy of taxes both on the sale as well as the purchase of goods, under the Tamil Nadu General Sales Tax Act, 1959. Therefore, we are unable to sustain the objections of the learned Advocate General.

70. As a matter of fact, after the Government of India announced the concept of Special Economic Zones in the year 2000, through a revision in the EXIM Policy 1997-2002, with a view to provide an internationally competitive and hassle free environment for export production, the Government of Tamil Nadu also issued a policy for Special Economic Zones in the State of Tamil Nadu in the year 2003. Paragraph 5(a) of the Policy Note issued by the Government of Tamil Nadu reads as follows:

"Developers of SEZs, and industrial units and other establishments within the SEZs will be exempted from all local taxes and levies, including Sales Tax, Turnover Tax, VAT, Purchase Tax, Mandi Tax, Octroi, Electricity Cess, or any other kind of Cess or any other levy of the State Government in respect of all transactions made between units/establishments within the SEZs, and in respect of the supply of goods and services from the Domestic Tariff Area to units/establishments in SEZs. However, applicable Sales Tax and VAT as and when introduced, shall be leviable on goods manufactured in SEZs but sold locally."

71. The Tamil Nadu Act 18 of 2015 was enacted only in pursuance of the above policy. Therefore, the stand taken by the respondents does not appear to be in tune with the policy of the State and the express language of the statute. The learned Judge has lost sight of these aspects and hence, the order of the learned Judge is liable to be set aside.

72. In the light of the foregoing and in the light of our answer to the two broad questions that arose for consideration in these appeals, we are of the considered view that the appeals of the appellant deserve to be allowed.

73. Accordingly, the writ appeals are allowed, the common order of the learned Judge is set aside and the writ petitions are allowed. No costs. Consequently, all connected pending MPs are closed.

Sd/-
Assistant Registrar (CS VII)

//True Copy//

Sub Assistant Registrar

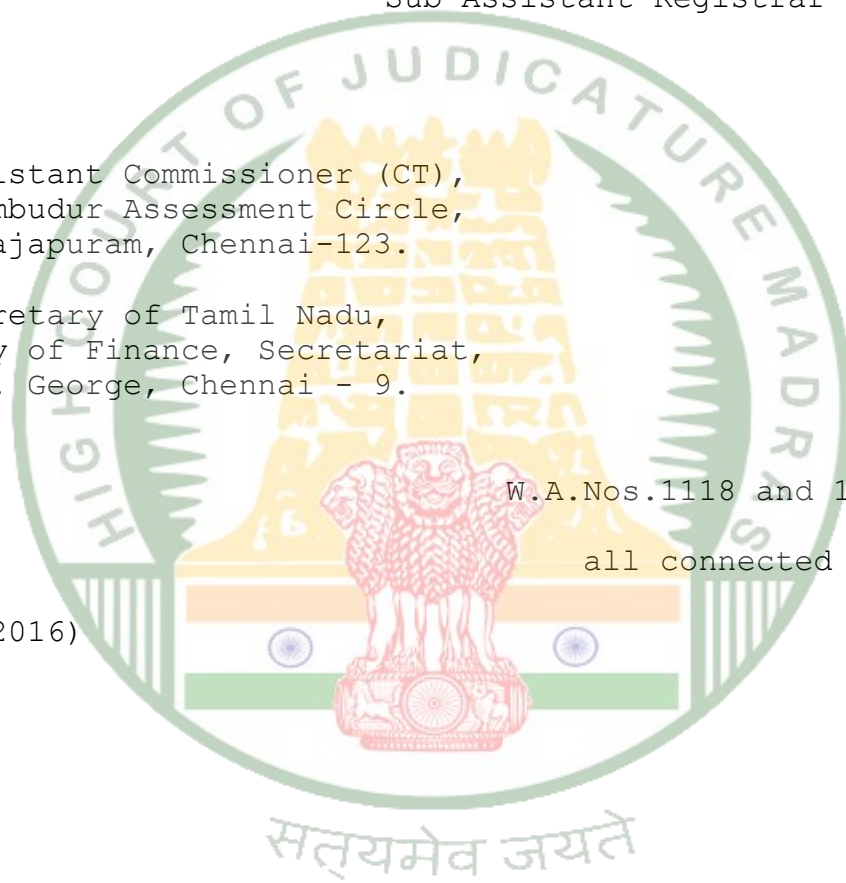
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To

1. The Assistant Commissioner (CT),
Sriperumbudur Assessment Circle,
Varadarajapuram, Chennai-123.
2. The Secretary of Tamil Nadu,
Ministry of Finance, Secretariat,
Fort St. George, Chennai - 9.

W.A.Nos.1118 and 1119 of 2015
&
all connected pending MPs

AD (CO)
CA (12/05/2016)



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