IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.04.2018

C O R A M

THE HON'BLE MR.JUSTICE S.MANIKUMAR

AND

THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Tax Case No.104 of 2018

The State of Tamil Nadu
Represented by the Deputy Commissioner
(Commercial Taxes)
Coimbatore Division, Coimbatore-18 ... Petitioner

v.

Tvl.Shree Enterprises,
Mettupalayam. ... Respondent

Prayer: Tax Case Revision is filed under Section 38 (1) of the TNGST Act, 1959, to revise the order dated 18.07.2001, made in C.T.A.No.232 of 2000, on the file of the Tamil Nadu Sales Tax Appellate Tribunal (Additional Bench), Coimbatore, preferred against the order of the Additional Appellate Assistant Commissioner (CT) Main, Coimbatore, dated 31.1.2000 in A.P.No.578/99 preferred against the Assessment order dated 29.10.99;30.01.2000;22.09.1999;25.09.95;7.9.95 on the file of the Commercial Tax Officer, Mettupalayam, in TNGST No.328647/94-95.

For petitioner ... Mr.V.Hari Babu
Addl. Govt. Pleader (Taxes)

O R D E R

(Order of the Court was made by S.MANIKUMAR, J)

Instant Tax Case (Revision) is filed by the Revenue as against the order of the Sales Tax Appellate Tribunal dated 18.07.2001 made in C.T.A.No.232 of 2000, on the file of the Sales Tax Appellate Tribunal (AB), Coimbatore.

2. The brief facts of the case are as follows:

The assessee/respondent Tvl.Shree Enterprises, respondent/dealer, were finally assessed for the year 1994-95, on a total and taxable turnover of Rs.7,17,108/- under the Tamil Nadu General Sales tax Act, 1959 and vide proceedings dated 29.10.1999, the assessment was revised, so as to levy a higher rate of 8% on the turnover of Rs.7,17,108/- instead of 3% under Section 16(1)(b) and also to levy a penalty of Rs.61,850/- under Section 16(2) of the said Act.

3. On appeal, the Appellate Assistant Commissioner (CT) (Main), Coimbatore, in his proceedings in AP No.578 of 1999 dated 31.01.2000, has confirmed the higher levy of tax at 8%, but allowed the appeal in respect of the levy of penalty under Section 16(2) for Rs.61,850/- only.

4. Aggrieved against the order of the first appellate authority, the respondent/dealer filed second appeal in CTA No.232 of 2000, before the Tamil Nadu Sales Tax Appellate Tribunal (Additional Bench), Coimbatore.

5. On a careful consideration of the submissions made, and following the decision of this Court in M/s.T.S.R.Company, Madras Vs. State of Tamil Nadu, reported in 102 STC 70 [W.P.No.6689 of 1983 dated 02.03.1995], the Tribunal, vide common order dated 18.07.2001, refixed the levy of tax from 8% to 3% on the disputed turnover, as hereunder:

> "7. We have carefully considered the contentions of the learned counsel for the appellants and the respondent. The appellants are dealers in pulpwood who sell the goods to Tvl.South India Viscose Industries Ltd., or sale within the State. The purchasers who manufactured the goods, gave declaration form in Form XVII and claimed he concessional levy of tax provided under Section 3(3) of the TNGST Act, 1959. The appellants having received the declaration forms, claimed that they are entitled to the levy of tax at 3%. The Assessing Authority was of the view that the pulpwood is timber falling under VIth Schedule and not eligible for concessional rate of tax against issue Form XVII for the period upto 16.07.96. Enter that impression, the Assessing Authority as well as the appellate authority confirmed the levy of tax. The Hon'ble Supreme Court in Mukesh Kumar Aggarwal & Co., Vs. State of Madhya Pradesh and Others, held as follows:

"Legal Glossary, (published by the Ministry of Company Affairs Law & Justice) gives this meaning of 'Timber': "wood meant for building or such like use". In the Chambers 20th Century Dictionary, the meaning of the word 'Timber' is this:

'wood suitable for building or carpentry, whether growing or cut: standing trees of oak, ash, elm, (locality by custom) other kinds etc. (emphasis supplied).

In words and phrases by John B. Saunders (Vol. 5) 'Timber' is heed to be:

'Trees less than six inches in diameter have been said not to be timber. (emphasis supplied)

In its popular sense, 'timber' is understood to be 'Imarathi-Lakdi'. In a popular-sense Timber' has certain association of ideas: as to its size, stability, utility, durability, the unit or measure of quantity and of valuation etc. The question is whether by the standards of these popular connotations, the 'wood-stacks' or 'wood-heaps' sold to, and purchased by, the appellants can be held to answer the popular notions of ''Timber''. When 'standing-timber, is sold as uncut tree different considerations may arise.

The nature of the "wood" sold is described in the letter, dated, 30.5.1985, addressed by the Divisional Forest officer. The subject matter of the sale has been referred to as 'Nilgiri fuel-wood'. The wood was offered for sale in stacks of the size of l x 1. 25 x 2 mtrs. With each piece of a length of 1.25 meters and a girth, at the thinner end, of not less than 10 cms. They were sold not by volume or by the number of pieces. The wood was offered with a particular kind of user in mind, viz, as a source of industrial-raw material for 'pulp' in the manufacture of synthetic fibre. As pointed out by the High-Court, in the returns filed by the respondents, it was mentioned that eucalyptus-plantation was a recent development and promoted with the specific- purpose for use in specifically in the preparation of pulp and sold throughout the state with this specific object.

The Commodity dealt with by the assessee is only pulpwood which could not come under 'timber' as held by the Supreme Court in the above mentioned judgment. Under these circumstances, the provisions of Section 3(#) are as below:-

"3(3). Notwithstanding anything contained in sub-section (1) or sub-section (2), the tax payable by a dealer in respect of any sale of goods mentioned in the First Schedule by such dealer to another for use by the latter as a component part of any other goods mentioned in that Schedule, which he intends to manufacture inside the State for sale shall be at the rate of only three per cent on the turnover relating to such sale :

Provided that the provisions of this sub-section shall not apply to

(a) Any sale of goods falling under items 19 and 20 in Part F and item 1 in Part E of the said schedule; and

(b) Any sale unless the dealer selling the goods furnishes to the assessing authority in the prescribed manner a declaration duly filled in and signed by the dealer to whom the goods are sold containing the prescribed particulars in a prescribed form obtained from the prescribed authority.

Provided further that any dealer who after purchasing ! the goods in respect of which he had furnished any declaration proves to the satisfaction of the assessing authority that he was unable to make use of that, goods so purchased for the purpose specified in the declaration, shall pay the difference of tax payable on the turnover relating to the sale of such goods at the rate prescribed and three percent.

Provided also that the dealer purchasing the goods maintains a separate stock account for each of the goods purchased by him under the scheme mentioned in this subsection showing such particulars as may be prescribed."

The first proviso is identical to the proviso to the previous sub-sec-3. It provides for the furnishing of a declaration by the selling dealer to declaration by the selling dealer to the Assessing

Authority to entitle him to the concessional rate of tax. The requirements of the proviso are:

1. Declaration must be furnished in the prescribed manner.

2. It must be filed within the prescribed period.

3. It must be duly filled in and signed by the purchasing dealer.

4. The declaration must contain the prescribed particulars in the prescribed form obtained from the prescribed authority.

On compliance with the above requirements, the selling dealers, without anything more will be entitled to the concession provided under the Section".

As regard the second proviso it implies that the purchasing dealer who fails to make use of all the goods for the purpose mentioned in the declaration, if disposes it in any other manner, is made liable to pay the difference between the tax prescribed under the first schedule and 3%. This corresponding to the second proviso to sub-section 4 was substituted by Act No.44 of 86, with some changes. The appellants are dealers in timber which also falls under the first schedule liable to tax at the rate prescribed in the first schedule. The purchaser is also liable to tax under the first schedule. In such circumstances, the buyer who furnishes the declaration forms is entitled to purchase the goods at the concessional rate provided under Section 3(3). As rightly argued by the learned counsel the decision of the Madras High Court in the case of T.S.R. and company reported in 1 TNCTJ Page 12, would squarely apply; that the final products produced by the manufacturer under any one of the entry under the first schedule is liable to pay tax at 3%. In that instance, the final product of the appellants would fall under entry 37 and Telecom Powder under entry 51 of the first schedule and therefore directly entitled to the concessional rate of tax. On a comparison of the judgment of the High Court of Madras, it is clear that the rate of tax prescribed for pulp is mentioned in the first schedule under residuary item and the purchaser who manufactured the goods also falls under the first schedule. In such circumstances the decision of the Madras High Court cited by the appellants would apply to the instant case.

It would be more appropriate to cit the decision of Madras Electrical Conductors (P) Ltd., vs. State of Tamil Nadu reported in 101 STC 127, which is extracted hereunder:-

> "10. Section 3(3) of the Act has been enacted to provide for a concessional rate of levy in respect of sale of goods with the ultimate object of benefiting only a purchaser/defaulter of goods mentioned in the First Schedule for use as a component part of any other goods which he intends to manufacture inside the State for sale on the turnover relating to such sale. But for this benefit or concession shown in favour of the purchaser/defaulter his liability to pay tax to his vendor on such sales effected to him by his seller would have been more, the rates of tax being otherwise higher. The seller of the purchaser/defaulter is therefore, necessarily extended this concessional rate on condition that he obtains and produces before the assessing authority of the seller the form XVII signed and furnished by the dealer to whom the goods have been sold at the concessional rate as contemplated under section 3(3) of the Act. Apart from the conditions specified in section 3(3) itself to avail of the concessional rate contemplated therein, the form XVII prescribed for the purpose to which the purchaser subscribes his signature also contains the specific undertakings given by the purchaser/defaulter to abide by the conditions in section 3(3). When the purchaser/defaulter contravenes the conditions subject to which he availed of the benefit of paying a concessional rate of tax to his vendor on sales effected to him, the purchaser/defaulter not only renders himself liable to be prosecuted under section 45(2)(e) for such contraventions, but also incurs the liability to be penalised under section 23, the penalty being the recovery of a sum not exceeding one and a half times the tax otherwise (that is the tax but for availing the concessional rate of tax) would have been

payable by the purchaser to his vendor on the sales effected to him of the goods purchased by issuing the form XVII. Section 23, therefore, takes care to stipulate that if penalty has been imposed in respect of a case under section 23, on the same facts no prosecution for an offence under section 45 shall be instituted. Thus it could be seen that the scheme underlying sections 3(3), 23 and 45(2)(e) is to see that a person who abused and misused a privilege and concession, is made to repent and the State is enabled to recover from him not only the legitimate tax due to the State on a transaction which came to be lost to the State by the misconduct and abuse committed by the purchaser/defaulter, but also the penalty. That such is the aim, purpose and object of these provisions is also made clear by the judicial pronouncements that if the declaration given in form XVII turns out to be false in the sense that the goods purchased have not been used as declared in the prescribed form the purchaser alone is exposed to the penalties under sections 23 and 45(2)(e) and not the seller who has been held to be automatically entitled to the concessional rate of tax on the production to his assessing authority the declaration in form XVII furnished by the purchaser to the seller vide [1968] 22 STC 269 (Mad.) (Premier Electro-Mechanical Fabricators v. State of Madras) and [1993] 89 STC 438 (Mad.) (State of Tamil Nadu v. Madras Petro Chem Ltd.). The said view was taken by the Division Benches which decided those cases even de hors the amendment which inserted the 2nd proviso to section 3(3) in 1986, though the later decision in [1993] 89 STC 438 (Mad.) (State of Tamil Nadu v. Madras Petro Chem Ltd.) also held to have drawn support for the view taken in [1968] 22 STC 269 (Mad.) (Premier Electro-Mechanical Fabricators v. State of Madras) by virtue of the said later amendment by the Tamil Nadu Act 44 of 1986. Therefore, to disintegrate the chain of link in these provisions and to construe the scope of section 23 in isolation by confining its ambit to an assumed notion or concept of turnover of the offender/purchaser being allowed to overtake and nullify the real purport of the words "turnover relating to the sale of such goods" which words, in our view, really mean and refer to the turnover relating to the sale price for which the goods were sold to the purchaser/defaulter by his seller at concessional rate of tax by obtaining the form XVII. The assumption made in [1977] 40 STC 310 (Mad.) [Elgi Equipments (Private) Limited v. State of Tamil Nadu] to reject such a stand taken on behalf of the Revenue, viz., that in a case where after giving declaration the purchaser/defaulter sells the same goods as spare parts the penalty would be levied with reference to the sales turnover of the person who gave the declaration and contravened the same is also unwarranted since the question of dealing with a second or subsequent sale of the First Schedule goods in the same condition in which it was purchased does not arise at all and what is ensured under section 23 is the recoupment of the loss estimated at a sum not exceeding one and a half times the tax payable on the turnover which escaped proper rate of assessment. Section 23 deals with a person purchasing goods and who is guilty of an offence under clause (e) of sub-section (2) of section 45 on account of failure to make use of the goods for the declared purpose and, therefore, the words "sale of such goods" inevitably is indicative of the sale to the offending purchaser since non-compliance with the conditions relating to the use for the declared purpose of such goods only attracted liability of the purchaser/defaulter to penalty under section 23 of the Act."

The above decision, squarely applies to the appellants case. The appellants are entitled for the relief sought for by them, in view of the above decision. Respectfully following the above decision, we direct the Assessing Authority to refix the levy of tax at 3% on the disputed turnover as sanctioned."

6. Aggrieved against the order of the Tribunal, State has filed the instant Tax case (Revision) on the following substantial question of law:

1. The tribunal failed to consider that the Special Commissioner and Commissioner of Commercial Taxes, Chennai in the letter No.Acts, Cell.I/59532/98, dt.06.07.99 has clarified that pulpwood fall under

entry 84(1) of First Schedule which relates to Timber and which is not eligible to purchase against Form XVII for the period from 01.04.1994 to 16.07.1996.

2. The tribunal failed to consider that pulpwood is nothing but timber and it was shifted to sixth schedule with effect from 01.04.1995, therefore, the order of the assessing authority is just and proper in disallowing the claim of concessional levy of tax under Sec. 3(3) of the TNGST Act.

3. The Tribunal as well as the First Appellate Authority failed to consider that the assessment years relate to 1994-95 and 95-96 and the commodity Timber was shifted to sixth schedule with effect from 01.04.1994, the concessional levy of tax under Sec.3(3) is not applicable to the dealer's case for the assessment years under reference.

7. Though, Mr.V.Hari Babu, learned Additional Government Pleader (Taxes) sought for reversal on ground No.1, extracted supra, we are not inclined to accept the same and reverse a well considered order of the tribunal, which has relied on the decision of the Hon'ble Supreme Court in Mukesh Kumar Aggarwal & Co., Vs. State of Madhya Pradesh and others dated 18.12.1987 and decision of this Court in M/s.T.S.R.Company, Madras Vs. State of Tamil Nadu, reported in 102 STC 70 [W.P.No.6689 of 1983 dated 02.03.1995]

8. Added further, on this day, Mr.V.Hari Babu, learned Additional Government Pleader (Taxes) further submitted that considering the nature of case, Government have also issued orders for waiver of differential concessional rate of sales on the sale of eucalyptus timber payable under Tamil Nadu General Sales Tax Act, 1959 for the period between 01.04.1994 and 16.07.1996 in G.O.Ms.No.92, Commercial Taxes and Registration (D2) Department dated 06.06.2016. The said Government Order is extracted hereunder.

ABSTRACT

Waiver - Waiver of differential concessional rate of tax on the sale Eucalyptus timber payable under the Tamil Nadu General Sales Tax Act, 1959 for the period from 1.4.1994 to 16.7.1996 - Orders - issued.

COMMERCIAL TAXES AND REGISTRATION (D2) DEPARTMENT

G.O.(Ms.) No.92 Dated: 06.06.2016

துன்முகி, வைகாசி 24

திருவள்ளுவர் ஆண்டு 2047

Read:

1. G.O.(2D) No.158, Commercial Taxes (D2) Department, dated
31.10.2008.
2. From the Principal Secretary / Commissioner of Commercial
Taxes Letter No.DC-II/61898/2007 dated 5.6.2013.
3. Government Letter No.8766/D2/2014 dated 26.07.2013
4. Minutes of the waiver committee reference DC-II/61898/2007
dated 3.2.2015.
5. From the Principal Secretary/Commissioner of Commercial
Taxes Letter No.DC-II/61898/2007, dated 11.2.2015.

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ORDER:

The commodity 'Timber' was taxable at 8% at First Point of sale under item 23, Part-D of the First Schedule to the Tamil Nadu General Sales Tax Act, 1959, till 31.3.1994. From 1.4.1994 it was transferred from First Schedule to Sixth Schedule and taxable at 8% at First Point of sale and Second point of sale in the State (item No.11) and it was omitted with effect from 17.7.1996 from the Sixth Schedule.

2. The Principal Secretary / Commissioner of Commercial Taxes in his letter fifth read above has stated that since the commodity 'Timber' was brought in Sixth Schedule during the period from 1.4.1994 to 16.7.1996, levy of tax at concessional rate of tax against Form XVII under Section 3(3) of the Tamil Nadu General Sales Tax Act, 1959 is not allowable since concessional rate of levy is allowable in respect of goods falling under First Schedule only. It was also clarified that the goods falling under Sixth Schedule were not eligible to purchase against Form XVII for the period from 1.4.1994 to 16.7.1996. Accordingly, in the reference first read above, the Government issued orders for waiver for an amount of Rs.1,69,90,128/- in respect of 41 dealers being the differential rate of tax between 85 and 3%. Surcharge, Additional Surcharge and penalty payable in respect of the period from 1.4.1994 to 16.7.1996 on the sale of Eucalyptus timber under the Tamil Nadu General Sales Tax Act, 1959.

3. Subsequently, the Principal Secretary / Commissioner of Commercial Taxes in his letter second read above sent a proposal in respect of three dealers who were not included in the Government Order first read above for waiver of differential

concessional rate of tax (8% - 3% = 5%) for the period from 1.4.1994 to 16.7.1996 on the sale of Eucalyptus timber for an amount of Rs.6,44,277/- (Rupees Six lakh forty four thousand two hundred and seventy seven only) as detailed below:-

Division	Name of the dealer	Assessment Year	Amount in (Rupees)				
			Tax	Surcharge	Additional Surcharge	Penalty	Total
Chennai (South)	Janatha Timber and Saw Mill	1994-95 1995-96	133917 124477	20123 18672	6708 6224	--- ---	160748 149373
Salem	District Forest Officer, Sathyamangalam	1994-95 1995-96	150460 38796	22570 5820	--- ---	--- ---	173030 44616
Tirunelveli	Gokul Match Industries	1994-95	----	----	---	116510	116510
Total			447650	67185	12932	116510	644277

4. In the reference third read above, the Principal Secretary / Commissioner of Commercial Taxes was requested to place the above proposal before the Waiver Committee for its decision.

5. The Principal Secretary / Commissioner of Commercial Taxes in the reference fourth read above has placed the proposal before the waiver committee as follows and requested to issue waiver orders in the reference fifth read above:-

"Considering the fact that the dealers have purchased timber against Form XVII at the concessional rate of 3% only, the supplementary proposal for waiver of differential concessional rate of tax (8%-3%=5%) for the period from 1.4.1994 to 16.7.1996 on the sale of Eucalyptus timber for an amount of Rs.6,44,277/- (Rupees six lakh forty four thousand two hundred and seventy seven only) was placed before the Waiver Committee for its decision." The Waiver Committee has agreed to the above proposal.

6. The Government after careful examination, have decided to accept the recommendation of the waiver committee and waive the differential concessional rate of tax (8% - 3% = 5%) for the period from 1.4.1994 to 16.7.1996 on the sale of Eucalyptus timber for an amount of Rs.6,44,277/- (Rupees Six lakh Forty Four Thousand two Hundred and Seventy seven only) under item 7 of Appendix 21 of Chapter-II of the Tamil Nadu Financial Code Volume-II.

7. This order issues with the concurrence of the Finance Department vide its U.O.No.26421/Fin (Revenue)/2015, dated 7.7.2015.

9. In the light of the above discussion, orders impugned is sustained. Tax Case (Revision), is dismissed. No Costs.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

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To

1.The Tamil Nadu Sales Tax Appellate Tribunal (Additional Bench), Coimbatore.

2.The Appellate Assistant Commissioner (CT) Main, Coimbatore.

3.The Commercial Tax Officer, Mettupalayam.

4.The Deputy Commissioner, (Commercial Taxes) Coimbatore Division, Coimbatore-18.

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