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HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment Reserved on 13.08.2019****Judgment Delivered on 06.09.2019****TAXC No. 43 of 2018**

*{Arising out of order dated 27.03.2018 passed by C.G. Commercial Tax Tribunal in
Reference Case No. R/55/29/2017}*

- M/s Univabs Sleepers Pvt. Ltd. MIG-11, Padmanabhpur, Durg Through Its Director, Shri Shamit Verma S/o Shri M.P. Verma, R/o Malviya Nagar, Durg (C.G.)

---- Applicant**Versus**

- State of Chhattisgarh Through The Commissioner of Commercial Taxes, Chhattisgarh, Vikrayakar Bhavan, Civil Lines, Raipur, Chhattisgarh.

---- Non-applicant**TAXC No. 44 of 2018**

- M/s Univabs Sleepers Pvt. Ltd. Ltd. MIG-11, Padmanabhpur, Durg Through Its Director, Shri Shamit Verma S/o Shri M.P. Verma, Resident of Malviya Nagar, Durg, Chhattisgarh.

---- Applicant**Versus**

- State of Chhattisgarh Through The Commissioner of Commercial Taxes, Chhattisgarh, Vikrayakar Bhavan, Civil Lines, Raipur, Chhattisgarh.

---- Non-applicant**TAXC No. 45 of 2018**

- M/s Univabs Sleepers Pvt. Ltd. Mig-11, Padmanabhpur, Durg Through Its Director, Shri Shamit Verma S/o Shri M.P. Verma, R/o Malviya Nagar, Durg, Chhattisgarh.

---- Applicant**Versus**

- State of Chhattisgarh Through The Commissioner of Commercial Taxes Chhattisgarh, Vikrayakar Bhavan, Civil Lines, Raipur, Chhattisgarh.

---- Non-applicant

TAXC No. 46 of 2018

- M/s United Vebs, MIG-11, Padmanabhpur, Durg Through Its Partner, Shri M. P. Verma S/o Late P.C. Verma, Resident of Malviya Nagar Durg, Chhattisgarh.

---- Applicant**Versus**

- State of Chhattisgarh, Through The Commissioner of Commercial Taxes, Chhattisgarh, Vikrayakar Bhawan Civil Lines, Raipur, Chhattisgarh.

---- Non-applicant

For Applicant	:	Shri Mool Chand Jain, Advocate.
For Non-applicant	:	Shri Siddharth Dubey, Deputy Government Advocate.

Hon'ble Shri P. R. Ramachandra Menon, Chief Justice**Hon'ble Shri Justice Parth Prateem Sahu, Judge****CAV Judgment****Per P. R. Ramachandra Menon, Chief Justice**

1. Correctness and sustainability of the order passed by the Chhattisgarh Commercial Tax Tribunal (for short, 'the Tribunal'), rejecting the application preferred for reference is put to challenge in these appeals preferred under Section 55(2)(b) of the Chhattisgarh Value Added Tax Act, 2005. As the issue is common and the grounds of challenge raised are also similar, all these matters were taken up together and heard accordingly.
2. The facts and figures are referred to as discussed in Tax Case No. 46 of 2018, except where it is separately referred to.
3. Applicant is engaged in the manufacture of R.C.C. Sleepers in the factory set up on the land belonging to the Railways, which has been given on the basis of a licence issued by them; as disclosed from a copy of the licence deed produced as Annexure RA/1. In the course of the manufacturing exercise pursued by the Applicant, the Applicant purchases steel, cement and such other consumables from various places and are brought to the factory premises situated on the land belonging to the Railways, where the factory is setup.

4. It is stated that Entry Tax in respect of such goods brought into the premises of the Railways was not being charged in terms of Section 3 (1) (a) of the Entry Tax Act, 1976 (for short, 'Act of 1976') as the authorities were having no doubt that the land belonging to the Railways would not fall within the meaning of the term 'local area' defined under the statute. Annexure RA/2 circular dated 03.02.1995 was issued by the Commissioner of Sales Tax, Madhya Pradesh (the State of Chhattisgarh being part of the said State at that point of time) to the effect that no tax under the Entry Tax Act was to be levied in respect of the goods brought into the land belonging to the Railways and the position continued almost till the end of the financial year on 31.03.1994. But things took a different turn, pursuant to the verdict passed by the Apex Court in the case of **Senior Divisional Mechanical Engineers vs. State of Orissa & Others** in Civil Appeal No. 4934 of 2008 (copy of which has been produced as Annexure RA/9), whereby the challenge raised by the authorities of the Railways against the verdict passed by the Orissa High Court with regard to the imposition of Entry Tax on the Diesel / High Speed Diesel Oil brought by the Railways for its consumption was repelled. The plea of the Railways with reference to the mandate of Article 285 of the Constitution of India and Section 184 of The Railways Act, 1989 was turned down and the verdict passed by the Orissa High Court was upheld, sustaining the taxable event. According to the Applicant, the said verdict stands on a different footing, despite which a circular dated 16.05.2011 (Annexure RA/8) was issued by the Commissioner of Commercial Taxes, Raipur, instructing levy of Tax on entry of goods into Railway area as well, treating it to be a 'local area'.
5. It is the case of the Applicant that the assessment for the relevant year had already been completed based on Annexure RA/2 circular dated 03.02.1995, to the effect that no Entry Tax was payable. But, based on the verdict passed by the Apex Court as mentioned above, the Assessing Authority re-opened the

assessment and huge liability was sought to be mulcted upon the shoulders of the Applicant, which is stated as *per se* wrong and illegal in all respects.

6. Coming to the specific case as pointed out in the application for reference, the assessment was finalized by the Assessing Authority levying Entry Tax with interest and penalty as per Annexure RA/4 order, which was sought to be challenged by filing an appeal before the Deputy Commissioner (Appeals). The specific contention raised by the Applicant was that the place to which the goods were brought by the Applicant / Assessee, was part of the Railway land which was not a local area as defined under Section 2(d) of the *Chhattisgarh Sthaniya Kshetra Me Mal Ke Praves Par Kar Adhiniyam, 1976* (for short, 'Adhiniyam of 1976'). The said contention was repelled and the appeal was dismissed as per Annexure RA/4 order, which made the Applicant / Assessee to prefer a further appeal before the Tribunal, which also did not turn to be fruitful. The said appeal came to be dismissed as per Annexure RA/7 order after the pronouncement of the verdict passed by the Apex Court in Annexure RA/9 case-***Senior Divisional Mechanical Engineers vs. State of Orissa & Others*** on 07.08.2008. The Commissioner issued Annexure RA/8 circular dated 16.05.2011 instructing to levy Entry Tax on entry of goods even into the 'Railway areas', treating it to be a 'local area'.
7. In the said circumstances, the Applicant filed an application for reference suggesting some questions of law. Referring to the verdict passed by the Apex Court as above (Annexure RA/9) and also a judgment passed by a learned Single Judge of this Court in the case of ***Budhwari Bazar Vyapari Sang & Others vs. State of Chhattisgarh & Others*** reported in (2016) 92 VST 97 (CG) it was held that the question of law having already been decided and declared, nothing remained to be referred further, and it was accordingly that the reference application was dismissed as per Annexure RA/10 order dated 27.03.2018. This made the Applicant to approach this Court by filing the above

case seeking for reference under Section 55(2)(b) of the C.G. Value Added Tax Act, 2005, suggesting the following questions as the questions of law to be referred:

“3.1 Whether under the fact and circumstances of the case entry of goods in to Railway area is liable to Entry Tax?

3.2 Whether the Hon'ble S.C. in case of Senior Divisional Mechanical Engineer vs. State of Orissa in C.A. No. 4934/2008 – order dated 07.08.2008 has decided the issue as to whether Railway area is a 'Local Area' or not?

3.3 Whether the decision of the Hon'ble S.C. has got a binding precedent though the decision is given on entirely different issue?

3.4 Whether the Hon'ble Tribunal has erred in law in not taking cognizance non applicability of the S.C. decision relied upon by the deptt.”

8. Heard Shri Mool Chand Jain, the learned counsel appearing for the Applicant as well as Shri Siddharth Dubey, the learned counsel representing the State / Department, at length.
9. The first and foremost contention raised by the learned counsel for the Applicant is that, as disclosed from Annexure RA/1 licence agreement, the property where the factory is set up by the Applicant (to which place the goods are brought from outside), is a land belonging to the Railways and hence, it is not a 'local area' as defined under Section 2(d) of the Adhiniyam of 1976. The next contention is that the challenge before the Apex Court in Annexure RA/9 judgment, which have been relied on by the Departmental Authorities / Tribunal to sustain the proceedings against the Applicant, stands entirely on a different footing. The challenge therein was with regard to the constitutional validity of levy of Entry Tax, in view of the provisions of Article 285 and 289 of the Constitution of India, read with Section 184 of the Indian Railways Act, 1989 and on the question whether Railway area was covered by the definition of 'local area', was neither referred to, nor decided therein. The learned counsel

further contented that the law and judicial precedents as cited by the Applicant including that of Division Bench of this Court in the case of ***Commissioner of Sales Tax, M.P. & Others vs. Cigarette Agencies*** reported in **2005 (2) MPLJ 25** and a Division Bench of the Madhya Pradesh High Court in the case of ***Jethani Cloth Stores, Bilaspur vs. Asstt. Sales Tax Officer, Bilaspur & Another*** reported in **(1982) 15 VKN 280** were not considered by the Tribunal; who, hence went wrong in not referring the questions to this Court, but for simply rejecting the application preferred in this regard. The last submission is that, the assessment had been finalized much earlier, but it came to be re-opened only with reference to the subsequent ruling rendered by the Supreme Court in Annexure R-A/9 despite the fact that subsequent ruling by any Court of law is not a ground for reopening the assessment, once it has become final. Reliance is sought to be placed on the decision rendered by the Apex Court in the case of ***Dy. Commissioner of Income Tax vs. Simplex Concrete Piles (India) Ltd.*** reported in **(2013) 23 STJ 263 (SC)** in this regard.

10. Incidentally, it is to be noted that the Applicants have filed IAs in all the four matters; seeking for amendment to the question to be referred, in addition to the four questions suggested in paragraph 3 of the memorandum of appeal. It is stated that while drafting the application dated 02.06.2018 filed before the Tribunal seeking for reference, the Applicant inadvertently omitted one question of law to be drafted and included and the same hence is sought to be incorporated by way of amendment in the following terms:

“3.5 Whether the reopening of the concluded assessment, on the basis of circular issued by the Commissioner relying upon a decision of the Hon'ble Supreme Court given on different ground and different facts, is valid in law.”

11. Serious objection is raised on the part of the State / Department by filing a reply to the effect that admittedly, it was never a question raised before the Tribunal

to be referred and as such, the order under challenge is not arising from such question to come within the purview of Section – and form a subject matter of challenge in the present proceedings. Reliance is sought to be placed on the verdict passed by the Apex Court in the case of ***Commissioner of Income Tax, Bombay vs. Scindia Steam Navigation Co. Ltd.*** reported in **AIR 1961 SC 1633** (copy produced as Annexure R/1) to the effect that a question which was never raised before the Tribunal could not be sought to be referred for the first time by raising it before the High Court.

12. The learned counsel representing the State also submits that the area where the factory has been setup by the Applicant is situated in the ward by name 'Badiyatola' as discernible from Annexure R/3 annexed to the reference application and that the said ward is situated within the local limits of the Municipality of Dongargarh. A list of the Wards of the above Municipality showing the Ward Badiyatola (Ward No. 7) is produced as Annexure A/1 alongwith I.A. No. 2 of 2019.
13. When the matter was heard by this Court on 08.08.2019, the IAs filed by the Respondent/State for taking additional documents on record, were allowed. On the very same day the learned counsel for the Applicant sought to withdraw the 'IAs for amendment' preferred in Tax Case Nos. 43 of 2018 and 46 of 2018 and accordingly they were dismissed as withdrawn. Now the applications for amendment remain only in the other two cases, which prayer is vehemently opposed by the learned counsel representing the Government.
14. Definition of few terms, as given under Section 2 of the Adhiniyam of 1976 will be worthwhile to be noted for easy reference:

“2. Definitions – (1) In this Act, unless the context otherwise requires,-

(a) xxx

(aa) “**entry of goods into a local area**” with all its grammatical variations and cognate expressions means entry of goods into that local area from any place outside thereof including a place outside the State for consumption, use or sale therein;

(b) “**Entry tax**” means a tax on entry of goods into a local area for consumption, use or sale therein levied and payable in accordance with the provisions of this Act [and includes composition money payable under Section 7-A;]

(d) “**Local Area**” means the area comprised within the limits of a local authority;”

15. It has been clearly stipulated under Section 6 of the said Act dealing with the principles governing levy of Entry Tax on dealer or person under sub-section (1) (a), that Entry Tax shall not be payable unless the dealer or such person effects entry of goods specified in Schedule II or Schedule III into a 'local area'. Under Section 6 (1) (b), it is stated that where any such goods are consumed, used or sold in a local area by the dealer or such person, it shall be presumed, until the contrary is proved by him, that such goods had entered into that local area for consumption, use or sale there. The burden of proof is mentioned under Section 11, to the effect that the burden of proving the various incidences mentioned under Clauses (a) to (f) therein (including that a dealer or a person notified under sub-section 2 of Section 3 has not affected the entry of any goods specified in Schedule II or Schedule III into a local area for consumption, use or sale therein) shall be upon the dealer or such person as the case may be.
16. There is no dispute with regard to the fact that the goods brought by the Applicant herein are scheduled goods (i.e. either Schedule II or III) and the dispute is only with regard to the place to which the goods are brought, contending that the place being a land belonging to the Railways, it is not a 'local area'.

17. With regard to the law declared by the Division Bench of the Madhya Pradesh High Court in the case of ***Jethani Cloth Stores, Bilaspur*** (supra), the question considered was whether the goods were to be purchased from the registered dealers of a local area for getting exemption provided under the statute from the tax liability, which was answered in favour of the Assessee, holding that there was no qualification of a registered dealer and therefore, purchases made from every registered dealer, whether he was carrying on a business in a local area or not would qualify for exemption under the relevant provisions of law mentioned therein. The said case cited by the learned counsel for the Applicant is not relevant to decide the *lis* involved.

18. With regard to the question considered by the Division Bench of the Madhya Pradesh High Court in the case of **Commissioner of Sales Tax, M.P. & Others vs. Cigarette Agencies** (supra), the question considered as observed in paragraph 10 of the judgment was, whether entry of 'title deeds' into a local area would attract the liability of Entry Tax. The facts discussed therein reveal that the Assessee had his place of business at the Railway area of Bilaspur, which was not a 'local area' as defined under the Entry Tax Act. The Assessee had obtained certain cartons of cigarettes at the Railway area (Maldhakka) and delivered the same to the retailers of Bilaspur, Ambikapur, Raigarh and Manendragarh. It was the case of the Assessee, that the cigarette sale to retail dealers of Rajnandgaon, Raipur, Dhamthari and Jagdalpur were consigned directly to the said destinations from Bombay by the Golden Tobacco Company, Bombay. The 'bilties' (MTRs) for the goods were sent to the Assessee as Maldhakka, who after receiving the 'bilties' endorsed the same in favour of the dealers of Rajnandgaon, Raipur, Dhamthari and Raigarh. The said dealers caused entry of the goods in their respective areas and had also paid the Entry Tax. The Taxing Authorities over-ruled the objection and fixed the liability upon

the Assessee and ultimately, the learned Single Judge of the High Court held that mere entry of the 'title deeds' into local area would not come within the ambit of levy of Entry Tax Act. It was further held that the sale of 'bilties' took place at Maldhakka, which was not a 'local area' and hence the Assessee was not liable to satisfy the Entry Tax.

19. The matter was taken up before the Division Bench at the instance of Revenue and after considering the relevant provisions of law and the precedents, the Division Bench affirmed the view taken by the learned Single Judge and the appeal preferred at the instance of the Revenue was dismissed. This also does not support the case of the Applicant, as the specific case of the Applicant was with regard to the goods actually brought into the area in question and not the title deeds.
20. It is true that the exact question whether the goods brought into a land belonging to the Railways would constitute a 'local area' in terms of the Section 2(d) of the Adhiniyam of 1976, as such was not considered by the Apex Court in Annexure RA/9 judgment. But it has been noted that the Applicant was none other than the Railways who imported Diesel / High Speed Diesel Oil for its consumption as received at the various Railway Consumer Depots at Rayagada, Kurda and Titlagarh for consumption. The trucks loaded with the Railway consignment were detained at various check posts for collection of Entry Tax under the Orissa Entry Tax Act, 1999 (for short, 'Act of 1999'). The liability mulcted upon the Railways was sought to be challenged mainly contending that Railways were not liable to pay Entry Tax levied under the Act of 1999, in view of the specific provision contained in Article 289 of the Constitution of India and under Section 184 of the India Railways Act, 1989. The applicability of Article 285 and Section 184 of the Railways Act, 1989 were considered in the context of the Entry Act being levied under the Act of 1999, placing reliance on the verdict passed by the Apex Court in **1964 (3) SCR 787**,

In Re. The Bill to Amend S. 20 of the Sea Customs Act, 1878, and S. 3 of the Central Excises and Salt Act, 1944 and also in the case of ***N.D.M.C vs. State of Punjab & Others*** reported in **1977 (7) SCC 339**. It was held by the Bench that there was a difference between direct tax on property and on income, as against indirect tax on the manufacture of goods or entry of goods into the local area for sales tax and this dichotomy made it to be kept in mind of constitutional scheme under Article 285 and 289 of the Constitution of India. It was accordingly held that, the verdict passed by the Orissa High Court against the Railways fixing the liability to satisfy Entry Tax for having brought the scheduled goods to the local area for their consumption was affirmed and upheld. After making an analysis of Section 3(1) and Section 36 of the Act of 1999 and Section 184 of the Railways Act, 1989, the Bench observed that the Octroi Duty was being levied by the Municipalities under the local enactment, which indicated that Octroi Duty was duty on the goods brought within the limits of Municipal area for consumption, use or sale therein.

21. Section 131 of the Orissa Municipal Act, 1950 refers to the power of the Municipality to impose taxes including Octroi Duty on the goods brought within the limits of the Municipal area. The significant thing to be noted, as held by the Apex Court, was that Octroi Duty could fall within the ambit of Section 184 (1) as a tax in aid of the fund or any local authority; which will not apply to the tax of Entry Tax leviable under Section 3(1) of the said Act of 1999 (which tax is imposed and collect by the State Government). It was also observed that the words “any tax” in Section 184 of the Railways Act, 1989 was required to be read in the context of Article 285 of the Constitution of India and to be understood as any tax on property or income as a direct tax.
22. Coming to the instant case, it is very much evident from the additional document produced as Annexure A/1 by the Respondent/State alongwith IA No. 2 of 2019 and as admitted from the part of the Applicant in Annexure R/3 annexed to the

reference application (as mentioned in paragraph 4 of I.A. No. 2 of 2019) that the factory of the Assessee is located at 'Badiyatola' which is Ward No. 7 of the Municipality, Dongargarh. Insofar as the place in question is situated in the 'local area' as notified by the Municipality and further since this aspect is not disputed specifically by the Applicant / Assessee, it cannot but be held that the goods were brought by the Applicant / Assessee to the 'local area' and as such the assessment was finalized accordingly, mulcting the Entry Tax. This being the position, the question suggested by the Applicant / Assessee as involving 'questions of law', seeking to have it referred by filing an application before the Tribunal, did not contain any pith or substance. In the said circumstances, rejection of the said application as per Annexure RA/10 order dated 23.07.2018 (which is under challenge) is not liable to be entertained.

23. With regard to the last submission made by the learned counsel for the Applicant that the assessment already finalized was not liable to be reopened on the basis of a Circular issued by the Commissioner with reference to a subsequent ruling rendered by the Supreme Court is not correct or sustainable and that such a question is also to be included as part of the question to be referred by the Tribunal, the learned counsel sought to place reliance on the verdict passed by the Supreme Court in the case of ***Dy. Commissioner of Income Tax vs. Simplex Concrete Piles (India) Ltd.*** (supra). The Apex Court held in the said case that, once the limitation period of 4 years provided under Section 127/149(1A) of the Income Tax Act, 1969 had expired, the question of reopening the assessment by the Income Tax Department would not arise. It was also held that, when the assessment order was passed, the law as declared by the jurisdictional High Court was that civil construction work carried out by the Assessee would be entitled for the benefit of Section 80 (H)(h). Though the said view was reversed subsequently by the Supreme Court, the subsequent reversal of legal position would not authorize the Department to

reopen the assessment which stood closed on the basis of law as it stood at the relevant time.

24. It is in the above context that a new question has been framed as Question No. 3.5, seeking to have it amended for being incorporated as one of the questions omitted to be included in the application filed before the Tribunal seeking for reference by filing the relevant IAs in these cases. As mentioned already, the I.As. for amendment in Tax Case Nos. 43 of 2018 and 46 of 2018 have already been dismissed as withdrawn. There is a stiff opposition from the part of the Government counsel with regard to the amendment in the other two cases, pointing out that a question which was never raised before the Tribunal for being considered as a matter for reference, can never be brought up for consideration before this Court for the first time, in view of the law declared by the Apex Court in the case of **Commissioner of Income Tax, Bombay vs. Scindia Steam Navigation Co. Ltd.** reported in **AIR 1961 SC 1633**. In the said case, an application was filed under Section 66(1) of the Income Tax Act, 1961 (which is akin to Section 55(2) of the Chhattisgarh Value Added Tax Act, 2005); but the question referred by the Tribunal for opinion of the High Court was somewhat different. The main contention raised before the Supreme Court was whether it was open for the High Court to go into the question, particularly as to the applicability to the relevant proviso to the provision concerned, which was neither raised before the Tribunal nor considered by it and hence could not therefore be said to be a question arising 'out of the order of the Tribunal', which alone could be referred for decision of Court under Section 66(1). After referring to the relevant provisions of law and the precedents, the Apex Court gave its conclusion as it appears in paragraph 31(per majority) as follows:

“(1) When a question is raised before the Tribunal and is dealt with by it, it is clearly one arising out of its order.

(2) When a question of law is raised before the Tribunal but the Tribunal fails to deal with it, it must be deemed to have been dealt with by it, and is therefore one arising out of its order.

(3) When a question is not raised before the Tribunal but the Tribunal deals with it, that will also be a question arising out of its order.

(4) When a question of law is neither raised before the Tribunal nor considered by it, it will not be a question arising out of its order notwithstanding that it may arise on the findings given by it.”

25. From the above, it is clear that the Applicant having admitted that the 'Question No. 3.5', as now sought to be incorporated as a question of law to be considered by making necessary amendment was not a point / question raised or considered before / by the Tribunal and hence, this issue is not liable to be entertained by this Court. It is also the submission by the learned counsel for the Respondent / State that, even if the reference is answered in favour of the Applicant and the matter is remitted to the Tribunal, by virtue of the facts disclosed from Annexure A/1 produced alongwith I.A. No. 2 of 2019 showing that the factory belonging to the Applicant is situated in Ward No. 7 of the Dongargarh Municipality and since the said notification is not under challenge, it can only be held that it was to the said 'local area' that the goods were being by the Applicant for consumption / use / sale and hence the liability fixed upon the Applicant is within the four walls of the law. We find considerable force in the said submission as well.
26. In this context, it is also relevant to note the contents of Annexure RA/1 'Licence Agreement' executed between the Applicant and the Railways. The last clause i.e. 'Clause No. 23' is having some relevance with regard to the dispute raised by the Applicant and hence, the same is extracted below:

“23. Occupier do hereby agree temporarily to occupy from the 1st day of November 1988 the plot of ground shown on the attached Plan on the conditions stated above and occupier do further agree to pay 7819.00 (Rupees Seven thousand eight hundred nineteen only) as occupation fees for such temporary use of the said plot plus local taxes and cesses and all municipal rates and taxes, if any, to the Government as and when demanded and also agrees to pay the occupation fees whenever enhanced by the Railway Administration with retrospective effect.”

From the above, it is clear that the Railways/licensor had clearly alerted the Applicant / Assessee that it would be for the Applicant / licensee to satisfy the various charges / fees as mentioned therein in respect of the use of the said plot plus local taxes, such as all Municipal rights and taxes, if any to the Government as and when demanded; besides the liability to satisfy the occupation fees, whenever enhanced by the Railways with retrospective effect. Having agreed to the said terms, it was never open for the Applicant to have taken a 'U-turn'.

27. In the above facts and circumstances, we conclude that the applications are devoid of any merit. They are dismissed accordingly.

Sd/-

(P. R. Ramachandra Menon)
Chief Justice

Sd/-

(Parth Prateem Sahu)
Judge