

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.04.2019

CORAM

THE HONOURABLE DR.JUSTICE VINEET KOTHARI
AND
THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

Tax Case Appeal No.1806 of 2008

M/s.Tamil Nadu Minerals Limited
#31, Kamarajar Salai, TWAD House
Chepauk
Chennai-600 005.

... Appellant

Vs.

The Joint Commissioner of Income Tax
Company Range-III,
Chennai-600 034.

... Respondent

Tax Case Appeal filed under Section 260A of the Income Tax Act,
1961 against the order passed by the Income Tax Appellate Tribunal,
'C' Bench, Chennai dated 30.06.2008 in ITA No.1541/Mds/2007.

For Appellant : Mr.M.P.Senthilkumar

For Respondent : Mr.M.Swaminathan,
Senior Standing Counsel
assisted by
M/s.V.Pushpa and S.Premalatha
Standing Counsels
for Income Tax Department

JUDGMENT

(Delivered by DR.VINEET KOTHARI, J.)

Tamil Nadu Minerals Limited ("TAMIN" in short), a Government of Tamil Nadu Undertaking, engaged in the mining, manufacture and sale of granites, quarrying granite blocks from the mines leased out to it by the State Government itself, has filed this appeal under Section 260A of the Income Tax Act, 1961 ('Act' in short), raising the following substantial questions of law, arising from the order of the Income Tax Appellate Tribunal, 'C' Bench, Chennai dated 30.06.2008 in ITA No.1541/Mds/ 2007 for the Assessment Year 2004-2005, whereby the learned Tribunal held against the Assessee that the "nomination charges" paid by it to the State Government at the rate of 10% of the turnover of granite blocks was liable to be disallowed as an expenditure on account of Section 43B of the Act, since the said payment was not made within the time allowed for filing of Return of income for the Assessment Year 2004-2005, ie., 30.11.2004, but was paid to the State Government with a delay of 9 days on 09.12.2004, and thus the amount of Rs.11.54 Crores which was paid as 'nomination charges' by the present Assessee to the State Government, was disallowed as an expenditure in the computation of income in the present Assessment Year 2004-2005 and the tax

thereon was imposed by the Assessing Authority to the extent of about Rs.5 Crores for the year in question.

2.The questions of law on which the present appeal was admitted on 11.11.2008 are as follows:

"1.Whether on the facts and in the circumstances of the case, the appellate Tribunal was right in holding that the "nomination charges", being special levy imposed by the Government for allotment of land for quarrying of granite on nomination basis, can be equated with the terms "tax, duty, cess or fee" appearing in Section 43B(a), and the same had to be disallowed u/s.43B, when not paid within the due date for filing the return of Income?

2.Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in not holding that the payment of "nomination charges" is allowable business expenditure u/s.37 of the Act of 1961?"

3.The Commissioner of Income Tax (Appeals) as well as the learned Tribunal, negated the contentions of the Assessee in this regard and upheld the disallowance made by the Assessing Authority on the anvil of Section 43B of the Act.

4.Learned counsel for the Appellant/Assessee Mr.M.P.Senthilkumar submitted that the payment of nomination charges as fixed by the State Government in G.O.(D)No.232, Industries (MME 2) Department, dated 23.08.2002, was "lease rental" only and was a contractual payment and not a "statutory levy" and therefore, it did not fall within the ambit and scope of terms "tax, duty, cess or fees" which are only covered by Section 43B of the Act and therefore, the said provisions of Section 43B of the Act did not apply to the said payment of "nomination charges" by the Assessee, a Government of Tamil Nadu Undertaking, to the State Government. He drew our attention to Rule 8-C(7) of the Tamil Nadu Minor Mineral Concession Rules, 1959 ("Rules" in short) which provides for quarrying of granite by the State Government and granting of lease to a State Government Company or Corporation. The said Rule 8-C(7) of the Rules provides that the lessee (present Assessee), besides area assessment, shall pay seigniorage fee or dead rent at the rate prescribed, from time to time, in Appendix II to the said Rules. The said Rule further provides that the lessee shall also pay such other levies as may be prescribed by the State Government, from time to time.

5.Initially, G.O.(D)No.232, Industries (MME 2) Department, dated **23.08.2002**, provided for this special levy of Rs.6 Crores for the Assessee as 'nomination charges' to be levied for the Assessment Year 2001-2002, which was later on increased to 10% of turnover by G.O.(D)No. 317, Industries (MME2) Department, dated **23.12.2002**, and further increased to 15% of turnover by G.O.(D)No.156, Industries (MME2) Department, dated **01.08.2003**. The relevant extract of the initial Government Order in G.O.(D)No.232, dated 23.08.2002 is quoted below for ready reference:

ABSTRACT

Tamil Nadu Minerals Limited (TAMIN) - Special levy of "Nomination Charges" for the lands/Mines leased to Tamil Nadu Minerals Limited - Orders - Issued.

INDUSTRIES (MME-2) DEPARTMENT

G.O.(D)NO.232

DATED : 23.08.2002

ORDER:

Under Rule 8A of Tamil Nadu Minor Mineral Concession Rules, 1959, the Government grant lease in respect of granite quarries in Government lands to **private persons who offer highest amount through Tender-cum-auction process and the lease amount shall be paid by the lessee besides Dead Rent, Seigniorage fee etc.** as per the provisions contained in the said Rules. **However**, in respect of Tamil Nadu Minerals limited (TAMIN), a Government of Tamil Nadu Undertaking, the Government grant granite quarry lease to TAMIN under Rule 8C of Tamil Nadu Minor Mineral Concession Rules, 1959 **on nomination basis and not through tender-cum-auction process**. Since granite quarry leases on Government lands are

granted to TAMIN on nomination basis, TAMIN pays only Dead Rent, Seigniorage fee etc., **and not paying any lease amount to Government as in the case of private lessees.**

2.The Government, after considering **the quantum of land** leased to TAMIN under rule 8C of the Tamil Nadu Minor Mineral Concession Rules, 1959, **and the commercial exploitation value** of those lands with Tamil Nadu Minerals Limited, have decided **that a Special levy of Rs.6 crores as nomination charges be levied for the year 2001-2002.**

3.The Government **accordingly direct** that a Special levy of Rs.6 crores (Rupees six crores only) be levied as Nomination charges for the year 2001-2002 **for the lands/mines allotted to TAMIN.**

4.The Chairman and Managing Director, TAMIN is directed to arrange to remit the special levy of nomination charges ordered in para 3 above into Government account and send the details of remittance to Government immediately.

(BY ORDER OF THE GOVERNOR)

K.SKANDAN
SECRETARY TO GOVERNMENT

To

The Chairman and Managing Director,
TAMIN, Chennai-5.

The Commissioner of Geology and Mining,
Guindy, Chennai - 32.

The Accountant General, Chennai-18.

The Accountant General (Audit II), Chennai - 6.

Shri T.Theethan, Accountant General (Audit II),
Greaves Road, Chennai-6.

Copy to:

The Finance (BPE) Dept., Chennai-9.

Industries (OP II) Dept., Chennai-9.

Sf/scs

/FORWARDED/ BY ORDER/
SECTION OFFICER

6.Learned counsel for the Appellant / Assessee relied upon the judgment of the Hon'ble Supreme Court in the case of **Commissioner of Income Tax v. McDowell & Co.Ltd. [(2009) 314 ITR 167 (SC)]**, dealt with the case of furnishing of Bank Guarantee in place of actual payment and held that the Bank Guarantee furnished by the Assessee would not amount to "actual payment" as required under Section 43B of the Act as the tax, duty, cess or fee constituting a class of various imposts by the State, covered by the ambit and scope of Section 43B of the Act. He drew our attention to Paragraphs-10, 15, 16 and 17 of the said judgment of the Hon'ble Supreme Court, which are quoted below for ready reference:

"10.It would be pertinent to note that the expression now used in s.43B(i)(a) is **"tax, duty, cess or fee, by whatever name called"**. It denotes that items enumerated **constitute species of the same genus** and the expression **'by whatever name called'** which follows preceding words 'tax', 'duty', 'cess' or 'fee' has been used **ejusdem generis to confine the application** of the provisions not on the basis of mere nomenclatures, but notwithstanding name, **they must fall within the genus 'taxation' to which expression 'tax', 'duty', 'cess' or 'fee' as a group of its specie belong vis. compulsory**

exaction in the exercise of State's power of taxation

where levy and collection is duly authorised by law as distinct from amount chargeable on principle as consideration payable under contract.

.....

15. The well known and well settled characteristic of 'tax' in its wider sense includes all imposts. Imposts in the context have following characteristics:

- (i) The power to tax is an incident of sovereignty.
- (ii) 'Law' in the context of Art.265 means an Act of legislature and cannot comprise an executive order or rule without express statutory authority.
- (iii) The term 'tax' under Art. 265 r/w Art.366(28) includes imposts of every kind viz., tax, duty, cess or fees.
- (iv) As an incident of sovereignty and in the nature of compulsory exaction, a liability founded on principle of contract cannot be a "tax" in its technical sense as an impost, general, local or special.

16. This Court in the light of decisions starting from ***State of Bombay vs. F.N. Balsara AIR 1951 SC 318*** held that the expression "fee" is not used in the State excise laws or rules in the technical sense of the expression. By 'licence fee' or 'fixed fee' under excise laws relating to potable liquors/intoxicant is meant the price or consideration which the Government charges to

*the licences for parting with its exclusive privilege and granting them to the licencees. **There is no fundamental right to do trade or business in intoxicants.** The State under its regulatory powers has the right to prohibit absolutely every form of activity in relation to intoxicants, its manufacture, storage, export, import, sale and possession in all their manifestations these rights are vested in the State. The decision was reiterated in **Har Shankar vs. Dy. Excise & Taxation Commr. AIR 1975 SC 1121** and **State of U.P. vs. Sheopat Rai AIR 1994 SC 813.***

*17.In **Ahmedabad Urban Development Authority vs. Sharad Kumar Jayantgi Kumar Pasawalla AIR 1992 SC 2038** it was held that the crucial expression in s. 43B is "by way of". Therefore, it was the duty of Revenue authorities to ascertain whether the deduction which is to be tested on the touchstone of s. 43B(a) is the amount payable is by way of tax or duty or fee or cess. The High Court was justified in holding that the amount does not fall within the purview of s. 43B. The High Court's view is correct."*

7.Learned counsel for the Appellant / Assessee has submitted that the provisions of Section 43B of the Act, which are quoted below, were brought in, to ensure the timely payment of the Government

statutory dues in the form of tax, duty, cess or fee by whatever name called, under any law for the time being in force and the delay in payment thereof results in disallowance of such payment in the hands of the Assessee. He further submitted that the Proviso to Section 43B of the Act was later on inserted by the Finance Act, 1987, with effect from 01.04.1988 to somewhat relax the rigor of the said provisions of Section 43B of the Act and permitted such allowance, if such payment of tax, duty, cess or fee if not made before the end of previous year but was made before the due date of filing of the Return by the Assessee under Section 139 of the Act, the same would be allowed as a deduction. Section 43B of the Act, is quoted below for ready reference:

Certain deductions to be only on actual payment.

43B. *Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of—*

(a) *any sum payable by the assessee **by way of tax, duty, cess or fee, by whatever name called,** under any law for the time being in force, or*

(b) *any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for*

the welfare of employees, or

(c)any sum referred to in clause (ii) of sub-section (1) of section 36, or

(d)any sum payable by the assessee as interest on any loan or borrowing from any public financial institution or a State financial corporation or a State industrial investment corporation, in accordance with the terms and conditions of the agreement governing such loan or borrowing, or

(e)any sum payable by the assessee as interest on any loan or advances from a scheduled bank or a co-operative bank other than a primary agricultural credit society or a primary co-operative agricultural and rural development bank in accordance with the terms and conditions of the agreement governing such loan or advances, or

(f)any sum payable by the assessee as an employer in lieu of any leave at the credit of his employee, or

(g)any sum payable by the assessee to the Indian Railways for the use of railway assets,

*shall be allowed (irrespective of the previous year in which the liability liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him) **only in computing the income referred to in section 28 of that previous year in which such sum is actually paid by him :***

Provided that nothing contained in this section shall apply in relation to any sum which is actually paid by the assessee on or before the due date applicable in his case for furnishing the return of income under sub-section (1) of section 139 in respect of the previous year in which the liability to pay such sum was incurred as aforesaid and the evidence of such payment is furnished by the assessee along with such return.

8.Learned counsel for the Appellant / Assessee Mr.M.P.Senthilkumar has also relied upon the decision of the Hon'ble Supreme Court in the case of **Kerala State Electricity Board v. Kurien E.Kalathil**, reported in **(2000) 6 SCC 293**, and submitted that even the State or a State Government Undertaking can enter into a commercial contract like in the present case of lease of quarries of granites and therefore the payment made under the said contract read with Rule 8-C(7) of the Tamil Nadu Minor Mineral Concession Rules, 1959, will not be a statutory payment, but only a contractual payment and therefore, it will not fall within the mischief of four components covered by Section 43B of the Act, viz. tax, duty, cess or fees. He further urged that the words 'by whatever name called' employed in Section 43B of the Act will also refer back to these four components

only, which are compulsory imposts imposed by the State Government in exercise of its sovereign powers to tax only and not the other contractual payments like by 'nomination charges' as in the present case, which could not be covered by Section 43B of the Act. He also relied upon the following position of law in Paragraph-11 of the said judgment:

*"11.A statute may expressly or impliedly confer power on a statutory body to enter into contracts in order to enable it to discharge its functions. **Dispute arising out of the terms of such contracts or alleged breaches have to be settled by the ordinary principles of law of contract.** The fact that one of the parties to the agreement is a **statutory or public body will not by itself affect the principles to be applied.** The disputes about the meaning of a covenant in a contract or its enforceability have to be determined according to the usual principles of the Contract Act. Every act of a statutory body need not necessarily involve an exercise of statutory power. **Statutory bodies, like private parties, have power to contract or deal with property. Such activities may not raise any issue of public law.** In the present case, it has not been shown how the contract is statutory. The contract between the parties is in the realm of public law. **It is not a statutory***

contract. *The disputes relating to interpretation of the terms and conditions of such a contract could not have been agitated in a petition under Article 226 of the Constitution of India. That is a matter for adjudication by a civil court or in arbitration if provided for in the contract. Whether any amount is due and if so, how much and refusal of the appellant to pay it is justified or not, are not the matters which could have been agitated and decided in a writ petition. The contractor should have relegated to other remedies."*

9.Learned counsel for the Appellant / Assessee also relied upon the decision of the Constitutional Bench of the Hon'ble Supreme Court in the case of **State of West Bengal v. Kesoram Industries Ltd., reported in (2004) 266 ITR 721 (SC)** and urged that the Hon'ble Supreme Court clarified one aspect in the earlier decision of the Supreme Court in the case of **India Cement Limited v. State of Tamil Nadu, (1990) 1 SCC 12** and held that it is only "cess on royalty" which was intended to be meant as a levy of tax and not royalty itself. He therefore submitted that the cess on a payment of royalty only could be treated as tax within the scope of Section 43B of the Act, but not royalty itself even if the "nomination charges" paid by the Assessee was to be treated as payment of royalty by the Assessee.

He relied upon the following extract from the judgment of the Constitutional Bench of the Hon'ble Supreme Court in the case of **State of West Bengal v. Kesoram Industries Ltd. (cited supra):**

"In the first sentence the word "royalty" occurring in the expression - "royalty is a tax", is clearly an error. What the majority wished to say, and has in fact said, is - "cess on royalty is a tax". The correct words to be printed in the judgment should have been "cess on royalty" in place of "royalty" only. The words "cess on" appear to have been inadvertently or erroneously omitted while typing the text of judgment. This is clear from reading the judgment in its entirety. Vide paras. 22 and 31, which precede para. 34 above said, their Lordships have held that "royalty" is not a tax. Even the last line of para. 34 records "royalty on mineral rights is not a tax on land but a payment for the user of land". The very first sentence of the paragraph records in quick succession"... as such a **cess on royalty being a tax on royalty, is beyond the competence of the State Legislature..." What their Lordships have intended to record is"... that cess on royalty is a tax, and as such a cess on royalty being a tax on royalty is beyond the competence of the State Legislature..." That makes correct and sensible reading. A doubtful expression occurring in a judgment, apparently by mistake or**

inadvertence, ought to be read by assuming that the court had intended to say only that which is correct according to the settled position of law, and the apparent error should be ignored, far from making any capital out of it, giving way to the correct expression which ought to be implied or necessarily read in the context, also having regard to what has been said a little before and a little after. No learned judge would consciously author a judgment which is self-inconsistent or incorporates passages repugnant to each other. Vide para. 22, their Lordships have clearly held that there is no entry in List II which enables the State to impose a tax on royalty and, therefore, the State was incompetent to impose such a tax (cess). The cess which has an incidence of an additional charge on royalty and not a tax on land, cannot apparently be justified as falling under entry 49 in List II."

10.Learned counsel for the Assessee also drew our attention to the decision of the Hon'ble Supreme Court in the case of **Allied Motors (P.) Ltd. v. Commissioner of Income Tax**, reported in **(1997) 224 ITR 677 (SC)**, to explain the object of the insertion of Section 43B of the Act and later on insertion by a Proviso thereto by the Finance Act, 1987, as clarified by the Finance Minister on the floor of the Parliament in the Budget Speech, which is quoted below from the aforesaid judgment.

"The Budget Speech of the Finance Minister for the year 1983-84, reproduced in [1983] 140 ITR (St.) 31, is to the same effect.

Section 43B was, therefore, clearly aimed at curbing the activities of those taxpayers, who did not discharge their statutory liability of payment of excise duty, employer's contribution to provident fund, etc., for long periods of time but claimed deductions in that regard from their income on the ground that the liability to pay these amounts had been incurred by them in the relevant previous year. It was to stop this mischief that section 43B was inserted. It was clearly not realised that the language in which section 43B was worded, would cause hardship to those taxpayers who had paid sales tax within the statutory period prescribed for this payment, although the payment so made by them did not fall in the relevant previous year. This was because the sales tax collected pertained to the last quarter of the relevant accounting year. It could be paid only in the next quarter which fell in the next accounting year. Therefore, even when the sales tax had in fact been paid by the assessee within the statutory period prescribed for its payment and prior to the filing of the income- tax return, these assesseees were unwittingly prevented from claiming a legitimate deduction in respect of the tax paid by them. This was not intended

by section 43B. Hence, the first proviso was inserted in section 43B. The amendment which was made by the Finance Act of 1987 in section 43B by inserting, inter alia, the first proviso, was remedial in nature, designed to eliminate unintended consequences which may cause undue hardship to the assessee and which made the provision unworkable or unjust in a specific situation.

Looking to the curative nature of the amendment made by the Finance Act of 1987, it has been submitted before us that the proviso which is inserted by the amending Finance Act of 1987, should be given retrospective effect and be read as forming a part of section 43B from its inception. This submission has taken support from decisions of a number of High Courts before whom this question came up for consideration. The High Courts of Calcutta, Gujarat, Karnataka, Orissa, Gauhati, Rajasthan, Andhra Pradesh, Patna and Kerala appear to have taken the view that the proviso must be given retrospective effect. Some of these High Courts have held that "sum payable" under section 43B(a) refers only to the sum payable in the same accounting year, thus excluding sales tax payable in the next accounting year from the ambit of section 43B(a). The Delhi High Court has taken a contrary view holding that the first proviso to section 43B operates only prospectively. We will refer only to some of these judgments.

Explanation 2 was added to section 43B by the Finance Act of 1989 with retrospective effect from April 1, 1984. The Memorandum explaining the reasons for introducing Explanation 2, states, inter alia, as follows ([1989] 176 ITR (St.) 123) : —

"24. Under the existing provisions of section 43B of the Income-tax Act, a deduction for any sum payable by way of tax, duty, cess or fee, etc., is allowed on actual payment basis only. The objective behind these provisions is to provide for a tax disincentive by denying deduction in respect of a statutory liability which is not paid in time. The Finance Act, 1987, inserted a proviso to section 43B to provide that any sum payable by way of tax or duty, etc., liability for which was incurred in the previous year will be allowed as a deduction, if it is actually paid by the due date for furnishing the return under section 139(1) of the Income-tax Act, in respect of the assessment year to which the aforesaid previous year relates. This proviso was introduced to remove the hardship caused to certain taxpayers who had represented that since the sales tax for the last quarter cannot be paid within that previous year, the original provisions of section 43B will unnecessarily involve

disallowance of the payment for the last quarter.

Certain courts have interpreted the provisions of section 43B in a manner which may negate the very operation of this section. The interpretation given by these courts revolves around the use of the words 'any sum payable'. The interpretation given to these words is that the amount payable in a particular year should also be statutorily payable under the relevant statute in the same year. This is against the legislative intent and it is, therefore, proposed, by way of a clarificatory amendment and for removal of doubts, that the words 'any sum payable', be defined to mean any sum, liability for which has been incurred by the taxpayer during the previous year irrespective of the date by which such sum is statutorily payable.

This amendment will take effect from April 1, 1984."

While interpreting section 43B without the first proviso, some of the High Courts, in order to prevent undue hardship to the assessee, had taken the view that section 43B would not be attracted unless the sum payable

by the assessee by way of tax, duty, cess or fee was payable in the same accounting year. If the tax was payable in the next accounting year, section 43B would not be attracted. This was done in order to prevent any undue hardship to assesseees such as the ones before us. The memorandum of reasons takes note of the combined effect of section 43B and the first proviso inserted by the Finance Act, 1987. After referring to the fact that the first proviso now removes the hardship caused to such taxpayers, it explains the insertion of Explanation 2 as being for the purpose of removing any ambiguity about the term "any sum payable" under clause (a) of section 43B. This Explanation is made retrospective. The Memorandum seems to proceed on the basis that section 43B read with the proviso takes care of the hardship situation and hence Explanation 2 can be inserted with retrospective effect to make clear the ambit of section 43B(a). Therefore, section 43B(a), the first proviso to section 43B and Explanation 2 have to be read together as giving effect to the true intention of section 43B. If Explanation 2 is retrospective, the first proviso will have to be so construed. Read in this light also, the proviso has to be read into section 43B from its inception along with Explanation 2.

This position is reinforced by a Departmental Circular No. 550, dated January 1, 1990 (see [1990] 182 ITR (St.))

114, 123): —

"Amendment of provisions relating to certain deductions to be allowed only on actual payment.

15.1. Under the existing provisions of section 43B of the Income-tax Act, 1961, a deduction for any sum payable by way of tax, duty, cess or fee, etc., is allowed on actual payment basis only. The objective behind these provisions is to provide for a tax disincentive by denying deduction in respect of a 'statutory liability' which is not paid in time. The Finance Act, 1987, inserted a proviso to section 43B to provide that any sum payable by way of tax or duty, etc., liability for which was incurred in the previous year will be allowed as a deduction, if it is actually paid by the due date of furnishing the return under section 139(1) of the Income-tax Act, in respect of assessment year to which the aforesaid previous year relates. This proviso was introduced to remove the hardship caused to certain taxpayers who had represented that since the sales tax for the last quarter cannot be paid within the previous year, the original provisions of section 43B will unnecessarily involve disallowance of the payment for the last quarter.

15.2. Certain courts have interpreted the provisions of section 43B in a manner which may negate the very operation of this section. The interpretation given by these courts revolves around the use of the words 'any sum payable'. The interpretation given to these words is that the amount payable in a particular year should also be statutorily payable under the relevant statute in the same year. Thus, the sales tax in respect of sales made in the last quarter was held to be totally outside the purview of section 43B since the same is not statutorily payable in the financial year to which it relates. This is against the legislative intent and, therefore, by way of inserting an Explanation, it has been clarified that the words 'any sum payable', shall mean any sum, liability for which has been incurred by the taxpayer during the previous year irrespective of the date by which such sum is statutorily payable . . ."

The departmental understanding also appears to be that section 43B, the proviso and Explanation 2 have to be read together as expressing the true intention of section 43B. Explanation 2 has been expressly made retrospective. The first proviso, however, cannot be isolated from Explanation 2 and the main body of section

43B. Without the first proviso, Explanation 2 would not obviate the hardship or the unintended consequences of section 43B. The proviso supplies an obvious omission. But for this proviso the ambit of section 43B becomes unduly wide bringing within its scope those payments, which were not intended to be prohibited from the category of permissible deductions."

11. On the other hand, Mr. M. Swaminathan, learned counsel appearing for the Revenue, made the following submissions. He urged that the payment in question of 'nomination charges' is nothing but a statutory payment under Rule 8-C(7) of the Rules for which the State issued Government Orders from time to time and therefore, such payments made by the Assessee would be in the nature of tax, duty, cess or fees only. He emphasised the words 'by whatever name called'. He submitted that the name given in the Government Order, viz. Nomination Charges, would not alter the character of payment made by the Assessee to the State Government in exercise of its statutory powers under Rule 8-C(7) of the Rules and therefore Section 43B stood attracted and the delayed payment thereof after the due date for filing return of income under Section 139 of the Act which expired on 30.11.2004, whereas the payment of such "nomination charges" were

made by the Assessee only on 09.12.2004 and therefore it was rightly disallowed by all the three authorities below in the hands of the Assessee and the present appeal of the Assessee has no merit.

12.He relied upon the decision of the Hon'ble Supreme Court in the case of **Commissioner of Income Tax, Kerala v. Travancore Sugars & Chemicals Limited**, reported in **(2015) 58 taxmann.com 86(SC)**, wherein the Hon'ble Supreme Court held that the "Vend Fee" collected by the State Government from the Assessee on bulk sale of arrack which was to go to a fund for repairs / replacement of old machineries, would be 'fee' and attracted Section 43B of the Act, if the same is not actually paid before the expiry of the relevant previous year. Paragraphs 8 to 10 of the said judgment are quoted below for ready reference:

"8.Shri Arijit Prasad also referred us to the Notes on clauses which preceded the 1989 amendment which reads as follows:-

*'21.2 The words "tax" and "duty" have been the subject matter of judicial interpretation and there is a controversy as to whether they cover statutory levies like cess, fees, etc. Some appellate authorities have held that such **cess or***

fees cannot be covered by the expressions "tax" or "duty". Such an interpretation is against the legislative intent and, therefore, by way of clarification, an amendment has been carried out to provide that cess or fees by whatever name called, which have been imposed by any statutory authority, including a local authority, will be allowed as a deduction only if these are actually paid.'

9. On a reading of the document on which Shri C.N. Sreekumar has placed reliance, namely, a Government of Kerala order dated 28.04.1988, what becomes clear is that the Government proposed to impose and then imposed a levy on three sugar mills by way of collecting of vend fee of **Rs.0.50 paisa per bulk litre of arrack sold by them which would go into a fund which would then be used for the repair/replacement of old machinery and equipment in these three mills.** This document shows that the vend fee collected from the three mills is, in fact, a fee in the classic sense of the term as used in 'Commissioner, Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt' 1954 SCR 1005. It is clear, on a reading of this document, that the State compulsorily takes from the three mills, a vend fee for the purpose of conferring a special benefit on the said three mills, viz., the repair and replacement of existing

machinery and equipment.

10. On facts in the present case, it is clear that the amendment made to Section 43B is attracted. Even if the **vend fee that is paid by the respondent to the State does not directly fall within the expression 'fee' contained in Section 43B(a), it would be a 'fee' by 'whatever name called'**, that is even if the vend fee is called 'privilege' as has been held by the High Court in the judgment under appeal. This being the case, we find that question No.2 which was answered in favour of the assessee and against the Revenue by the High Court was not answered correctly."

13. Learned counsel for the Revenue relied upon the decision of the Income Tax Appellate Tribunal Delhi Bench 'G' in the case of **I.Kay Holding Co. (P.) Ltd., v. Deputy Commissioner of Income Tax, Spl.Range 8 , New Delhi, [(2009) 32 SOT 586 (Delhi)]**, in which a Bench of Income Tax Appellate Tribunal dealt with SEBI Turnover charges payable on the basis of the turnover of the Assessee dealing with shares and securities, wherein the learned Tribunal, in Paragraph-7 relying upon the decision of the Delhi Bench of the Tribunal in the case of ITO v. Sureshchand Jain ([2006] 100 ITD 435 (Mum.)), held that Section 43B stood attracted for such SEBI turnover charges. He

submitted that in the present case, the "nomination charges" are also paid by the Assessee on the basis of turnover after the initial Government Order, and the same would also attract the provisions of Section 43B of the Act.

14.Learned counsel for the Revenue also relied upon the decision of the Rajasthan High Court in the case of **Commissioner of Income Tax v. Popular Minerals**, reported in **(2002) 258 ITR 593**, wherein the Division Bench of the Rajasthan High Court, relying upon the decision of the Hon'ble Supreme Court in the case of **India Cement Limited v. State of Tamil Nadu**, **(1991) 188 ITR 690 (SC):(1990) 1 SCC 12**, held that royalty payment is a tax and therefore, Section 43B would apply.

15.It may be noted here itself that the decision of the Hon'ble Supreme Court in the case of India Cement Limited stood clarified later on by the Constitution Bench decision of the Hon'ble Supreme Court in the case of **State of West Bengal v. Kesoram Industries Ltd.**, reported in **(2004) 266 ITR 721 (SC)** and since the decision of the Rajasthan High Court was rendered prior to the aforesaid clarification made by the Constitution Bench in the year 2004, the said decision of

the Rajasthan High Court stands impliedly overruled by the aforesaid Constitution Bench decision of the Hon'ble Supreme Court.

16. Similarly, the decision of the Madhya Pradesh High Court in the case of **Commissioner of Income Tax v. Gorelal Dubey, (1998) 232 ITR 246**, wherein royalty paid by the Assessee was treated as tax, is also impliedly overruled now.

17. Learned counsel for the Revenue also drew our attention to the Circular issued by the Central Board of Direct Taxes in Circular No.674 dated 29.12.1993, in which the Board held that the sales tax payment under the Deferral scheme notified by the State Government would meet the requirements of 'actual payment' within the meaning of Section 43B of the Act. It was also notified that the amount of sales tax liability converted into loans may be allowed as deduction in the assessment for the previous year in which such conversion has been notified by or under Government Orders. He, therefore, submitted that since the payment in question was under the Government Order, Section 43B of the Act would stand attracted in the present case also.

18.We have heard the learned counsels at length and perused the materials on record including the case laws cited.

19.There is no dispute that the Assessee is a Government of Tamil Nadu Undertaking and is fully owned by the State Government itself. Equally, there is no dispute about the existence of Lease Deed for the Granite Quarry between the State Government and the present Assessee-TAMIN. A copy of the Lease Deed dated **16.11.1995** was produced before us for perusal. The said Lease Deed refers to Rule 8-C(7) of the Tamil Nadu Minor Mineral Concession Rules, 1959, as well. In Clause-2 of the Annexure to the said lease deed, the present Assessee clearly undertook to pay the seigniorage fee or dead rent as may be prescribed from time to time by the State Government. Rule 8-C(7) of the Rules also clearly provides for such other levies as may be prescribed by the State Government from time to time. We may state here that the payment of seigniorage fee prescribed in Appendix II of the Rules at the fixed rates irrespective of the quantum of minerals extracted by the Assessee, is not the question before us. It is the "other levies" in the name of "nomination charges" in the second part of Rule 8-C(7) of the Rules, is the question before us. In exercise of its aforesaid powers only, the State Government has issued the

aforesaid Government Orders. G.O.(D)No.232 dated 23.08.2002 prescribes for fixed levy of Rs.6 Crores for the year 2001-2002 as payable by the Assessee. Later on, the said levy in the name of 'nomination charges' was linked to turnover of the Assessee, initially at the rate of 10% of the turnover, then 15% of the turnover. There is no doubt that the State Government has prescribed the said levy known as 'Nomination Charges' to be paid by the Assessee, nonetheless, in our clear opinion, it remains a contractual payment under the contract of lease of Quarries between the State Government and the Assessee – TAMIN, a Government of Tamil Nadu Undertaking. It is either in the nature of Lease rent or Royalty payable by TAMIN to the State Government, which otherwise has the exclusive rights over the said Mines and Minerals.

20. There is no doubt that even the State Government can enter into a commercial contract, the execution, implementation or even dispute redressal of which will be governed by the Contract Law and not by Statutory Laws. It is for parting with the monopolistic rights of the State Government like in the case of Trading of Liquor, over the Minor Minerals, viz. Granite, in the present case. But for the leasehold conferred by the State Government in favour of the present Assessee

– TAMIN, the Assessee would not have any right to exploit the minerals / granites in the present case. The lease right is the only right conferred by the State Government upon the Assessee under the Rules. The exception made for the Government Undertakings under Rule 8-C(7) of the said Rules, is that the Government Undertaking do not have to undergo the process of bidding in open auctions for taking such leases of Quarries from the State Government and therefore they form a Special Class. Rule 8-C has been separately carved out under these Rules, to provide for Dead rent and Seigniorage fee. Sub-Rule(7) of Rule 8-C provides for 'other levies' also as may be prescribed from time to time. Merely because the said levy is prescribed by the Government Orders issued by the State Government, it does not bear the character of a statutory levy much less as a tax, duty, cess or fees, the four components covered by Section 43B of the Act and all these four imposts have a definite and defined connotations in law. While the tax is a compulsory levy by the State Government going to the General Revenue of the State, the Duty is an indirect tax, the incidence of which could be passed on to the customers. Cess is a tax for specific purpose, while fees envisages a *quid pro quo*. Such revenue in the form of fees has to be spent by the State for specific purposes only like cess.

21.A little research into these imposts would be apposite here. These terms have the connotations delineated by Apex Court and Authors in the following manner:

CESS

21.1.Means a duty in the nature of duty of excise and customs, imposed and collected on motor spirit commonly known as petrol and high speed diesel oil for the purposes of this Act, **[Section 2(b), Central Road Fund Act, 2000 (India)]**.

21.2.Is also a tax, but is a special kind of tax. Generally tax raises revenue which can be used generally for any purpose by the State, ***Vijayalashmi Rice Mill v. CTO, (2006) 6 SCC 763.***

21.3.The term cess is commonly employed to connote a tax with a purpose or a tax allocated to a particular thing suggested by the name of the cess, such as health cess, education cess, road cess etc. This is a well-settled position of law. However, it also means an assessment or levy. Depending on the context and purpose of levy, cess may not be a tax; it may be a fee or fee as well. It is not

necessary that the services rendered from out of the fee collected should be directly in proportion with the amount of fee collected. It is equally not necessary that the services rendered by the fee collected should remain confined to the persons from whom the fee has been collected. Availability of indirect benefit and a general nexus between the persons bearing the burden of levy of fee and the services rendered out of the fee collected is enough to uphold the validity of the fee charged. As per *Sinha, J. (dissenting)*, conceptually fee and tax stand on different footings; whereas the element of tax is based on the principle of compulsory exaction, the concept of fee relates to the principle of quid pro quo. The validity of tax cannot, therefore, be upheld on the ground that the same would be a fee, ***State of W.B. v. Kesoram Industries Ltd., (2004) 10 SCC 201.***

21.4. The word "cess" is used in Ireland and is still in use in India although the word rate has replaced it in England. It means a tax and is generally used when the levy is for some special administrative expense which the name (health cess, education cess, road cess etc.) indicates, ***Shinde Bros. v. Commr., AIR 1967 SC 1512: (1967) 1 SCR 548.***

21.5.Means the goods and services tax compensation cess levied under Section 8 of Goods and Services Tax (Compensation to States) Act, 2017, **[Section 2(1)(c), Goods and Services Tax (Compensation to States) Act, 2017 (India)]**.

22.TAX

22.1.“A tax” is a compulsory exaction of money by public authority for public purposes enforceable by law and is not payment “for services rendered”. This definition brings out the essential characteristics of a tax as distinguished from other forms of imposition which, in a general sense, are included within it. It is said that the essence of taxation is compulsion, that is to say, it is imposed under statutory power without the tax-payer's consent and the payment is enforced by law. The second characteristic of tax is that it is an imposition made for public purpose without reference to any special benefit to be conferred on the payer of the tax. This is expressed by saying that the levy of tax is for the purposes of general revenue, which when collected, forms part of the public revenues of the State. As the object of the tax is not to confer any special benefit upon any particular individual there is, as it is said, no element of “quid pro quo” between the tax-payer and the public authority. (See Findlay Shirras

on *Science of Public Finance*, Vol. 1). Another feature of taxation is that as it is a part of the common burden, the quantum of imposition upon the tax-payer depends generally upon his capacity to pay, ***Commr., Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, AIR 1954 SC 282: 1954 SCR 1005: 20 Cut LT 250.***

22.2.A tax is undoubtedly in the nature of a compulsory exaction of money by a public authority for public purposes, the payment of which is enforced by law. But the other and equally important characteristic of a tax is, that the imposition is made for public purpose to meet the general expenses of the State without reference to any special advantage to be conferred upon the payers of the tax, ***Ratilal Panachand Gandhi v. State of Bombay, AIR 1954 SC 388: 1954 SCR 1055: 56 Bom LR 1184.***

22.3.An impost; a tribute imposed on the subject; an excise; tallage. The general principles of taxation are these: — (1) The subjects of every estate ought to contribute to the support of the Government as nearly as possible in proportion to their respective abilities; that is, in proportion to the revenue which they respectively

enjoy under the protection of the State. In the observation or neglect of this maxim consists what is called the equality or in-equality of taxation. (2) The tax which each individual is bound to pay ought to be certain and not arbitrary. The time of payment, the manner of payment, the quantity to be paid, ought all to be clear and plain to the contributor and to every other person. (3) Every tax ought to be levied at the time or in the manner, in which it is most likely to be convenient for the contributor to pay it. (4) Every tax ought to be so contrived as both to take out and keep out of the pockets of the people as little as possible over and above what it brings into the public treasury of the State. Taxes are either direct or indirect. A direct tax is one that is demanded from the very persons who are intended or desired to pay it. Indirect taxes are those which are demanded from one person, in the expectation and intention that he shall indemnify himself at the expense of another, such as the excise or customs. [Wharton's Law Lexicon.]

23. **Tax and Fee**

23.1. The distinction between a tax and a fee lies primarily in the fact that a tax is levied as a part of a common burden, while a fee is a

payment for a special benefit or privilege. Fees confer a special capacity, although the special advantage, as for example in the case of registration fees for documents or marriage licences, is secondary to the primary motive of regulation in the public interest, (vide Findlay Shirras on *Science of Public Finance*, Vol. I). **Commr., Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, AIR 1954 SC 282: 1954 SCR 1005: 20 Cut LT 250.**

23.2.A fee is generally defined to be a charge for a special service rendered to individuals by some governmental agency, **State of Gujarat v. Akhil Gujarat Pravasi V.S. Mahamandal, (2004) 5 SCC 155.**

23.3.Taxation includes every charge or burden imposed by the sovereign power upon persons, property or property right, for the use and support of the Government and to enable it to discharge its appropriate functions and in that broad definition there is included a proportionate levy upon persons or property and various other methods or devices by which revenue is extracted from persons and property. The term "tax" is to be read in all-embracing and sweeping

sense. Such methods or device used by the Government from time to time are not ordinarily open to serious questions but their scope and application vary according to the nature of the subject under discussion and the circumstances under which they are used. (Para 47), ***State of U.P. v. Jaiprakash Associates Ltd., (2014) 4 SCC 720.***

24. ***Taxation and impost*** — “Taxation” includes the imposition of any tax or impost, whether general or local or special and “tax” shall be construed accordingly. Though it is not an exhaustive definition and only shows what is included in the word one is struck immediately by its width of language. Though it speaks of any tax or impost, it goes a step further and adds “whether general or local or special”, indicating thereby that no special or local considerations are relevant and even a general non-discriminatory levy must be regarded as taxation. The definition of taxation speaks of impost. The word “impost” in its general sense means a tax or tribute or duty and may be on persons or on goods. In a special sense it means a duty on imported goods and on merchandise, ***Sea Customs Act, S. 20(2), In re, AIR 1963 SC 1760, 1784: (1964) 3 SCR 787: (1964) 1 ITJ 671***

25.FEES

25.1.Is generally defined to be a charge for a special service rendered to individuals by some governmental agency. The amount of fee levied is supposed to be based on the expenses incurred by the Government in rendering the service, though in many cases the costs are arbitrarily assessed. Ordinarily, the fees are uniform and no account is taken of the varying abilities of different recipients to pay. These are undoubtedly some of the general characteristics, but as there may be various kinds of fees, it is not possible to formulate a definition that would be applicable to all cases, **Commr., Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, AIR 1954 SC 282: 1954 SCR 1005: (1954) 1 MLJ 596: 20 Cut LT 250.**

25.2.Property peculiar; reward or recompense for services. Also an estate of inheritance divided into three species: (1) fee-simple absolute; (2) qualified or base fee; (3) fee-tail, formerly fee-conditional.[Wharton's Law Lexicon.]

25.3.Fees are a sort of return or consideration for services rendered, which makes it necessary that there should be an element of *quid pro quo* in the imposition of a fee. There has to be a corelationship between the fee levied by an authority and the services rendered by it to the person who is required to pay the fee, **Govt. of A.P. v. Hindustan Machine Tools Ltd., (1975) 2 SCC 274.**

25.4.Perquisites allowed to officers in the administration of justice, as a recompense for their labour and trouble, ascertained either by Acts of Parliament, by rule or order of Court or by ancient usage.[Wharton's Law Lexicon.]

25.5.Mean the charges specified by the food authority for clearance of imported food consignments, **[Regulation 2(j), Food Safety and Standards (Import) Regulations, 2017(India)].**

26.**Levy and Fee**

26.1.A levy in the nature of a fee does not cease to be of that character merely because there is an element of compulsion or

coerciveness present in it, nor is it a postulate of a fee that it must have direct relation to the actual services rendered by the authority to each individual who obtains the benefit of the service. If with a view to provide a specific service, levy is imposed by law and expenses for maintaining the service are met out of the amounts collected there being a reasonable relation between the levy and the expenses incurred for rendering the service, the levy would be in the nature of a fee and not in the nature of a tax. It is true that ordinarily a fee is uniform and no account is taken of the varying abilities of different recipients. But absence of uniformity is not a criterion on which alone it can be said that it is of the nature of a tax. A fee being a levy in consideration of rendering service of a particular type, correlation between the expenditure incurred by the Government and the levy must undoubtedly exist, but a levy will not be regarded as a tax merely because of the absence of uniformity in its incidence or because of compulsion in the collection thereof, nor because some of the contributories do not obtain the same degree of service as others may, ***Sudhindra Thirtha Swamiar v. Commr., Hindu Religious and Charitable Endowments, AIR 1963 SC 966, 975: 1963 Supp (2) SCR 302.***

26.2. In fees there is always an element of “quid pro quo” which is absent in a tax. Two elements are thus essential in order that a payment may be regarded as a fee. In the first place, it must be levied in consideration of certain services which the individuals accepted either willingly or unwillingly. But this by itself is not enough to make the imposition of a fee, if the payments demanded for rendering of such services are not set apart or specifically appropriated for that purpose but are merged in the general revenue of the State to be spent for general public purposes, ***Jagannath Ramanuj Das v. State of Orissa, AIR 1954 SC 400: 1954 SCR 1046.***

27. Fee and Tax

27.1. Between a tax and a fee there is no generic difference. Both are compulsory exactions of money by public authorities; but whereas a tax is imposed for public purposes and is not and need not, be supported by any consideration of service rendered in return, a fee is levied essentially for services rendered and as such there is an element of quid pro quo between the person who pays the fee and the public authority which imposes it. If specific services are rendered to a

specific area or to a specific class of persons or trade or business in any local area and as a condition precedent for the said services or in return for them cess is levied against the said area or the said class of persons or trade or business the cess is distinguishable from a tax and is described as a fee. Tax recovered by public authority invariably goes into the consolidated fund which ultimately is utilised for all public purposes, whereas a cess levied by way of fee is not intended to be and does not become, a part of the consolidated fund. It is earmarked and set apart for the purpose of services for which it is levied. There is, however, an element of compulsion in the imposition of both tax and fee, ***Hingir-Rampur Coal Co. Ltd. v. State of Orissa, AIR 1961 SC 459, 464: (1961) 2 SCR 537.***

27.2. Conceptually fee and tax stand on different footings; whereas the element of tax is based on the principle of compulsory exaction, the concept of fee relates to the principle of quid pro quo. The validity of tax cannot, therefore, be upheld on the ground that the same would be a fee, ***State of W.B. v. Kesoram Industries Ltd., (2004) 10 SCC 201.***

28.LEVY

28.1.Mean to realise or to collect. Only necessary condition is that the proceedings for realisation of the fine must be commenced within the stipulated period, **Mehtab Singh v. State of U.P., (1979) 4 SCC 597: 1980 SCC (Cri) 142.**

28.2.Includes proceedings for assessment, **Ashok Singh v. CED, (1992) 3 SCC 169.**

28.3.Levy includes not only the imposition of the charge but also the whole process up to raising of the demand, **Mafatlal Industries Ltd. v. Union of India, (1997) 5 SCC 536.**

28.4.The term "levy" is wider in its import than the term "assessment". It may include both "imposition" as well as "assessment", **CCE v. Smithkline Beecham Consumer Health Care Ltd., (2003) 2 SCC 169.**

28.5.The act of raising money or men. [Wharton's Law Lexicon.]

28.6.The term “levy” it is held, is an expression of wide import. It includes both imposition of a tax as well as its quantification and assessment, ***Ujagar Prints (2) v. Union of India, (1989) 3 SCC 488.***

29.***Levy and collect*** — In taxing statute the words “levy” and “collect” are not synonymous terms, while “levy” would mean the assessment or charging or imposing tax, “collect” would mean the physical realisation of the tax which is levied or imposed. Collection of tax is normally a stage subsequent to the levy of the same. The enforcement of levy could only mean realisation of the tax imposed or demanded, ***Somaiya Organics (India) Ltd. v. State of U.P., (2001) 5 SCC 519.***

30.***Levy and collection*** — While the expression “levy” may include both the process of taxation as well as the determination of the amount of tax or duty, the expression “collection” refers to actual collection of the payable duty or the tax, as the case may be. Since the taxable event for attracting excise duty or countervailing duty is the manufacture or import of excisable goods into the State, the charge of

incidence of duty stands attracted as soon as the taxable event takes place and the facility of postponement of collection of duty under the Act or the rules framed thereunder, can in no way affect the incidence of duty on the imported goods, ***S.K. Pattanaik v. State of Orissa, (2000) 1 SCC 413.***

31.***Levy, Imposition and Assessment*** — The term “levy” appears to be wider in its import than the term “assessment”. It may include both “imposition” of a tax as well as assessment. The term “imposition” is generally used for the levy of a tax or duty by legislative provisions indicating the subject-matter of the tax and the rates at which it has to be taxed. The term “assessment”, on the other hand, is generally used in this country for the actual procedure adopted in fixing the liability to pay a tax on account of particular goods or property or whatever may be the object of the tax in a particular case and determining its amount, ***Asstt. Collector of Central Excise, CCE v. National Tobacco Co. of India Ltd., (1972) 2 SCC 560: AIR 1972 SC 2563: (1973) 1 SCR 822: 1973 Tax LR 1607.***

32.DUTY

32.1.Means a duty of customs leviable under the Act, [**Section 2(15), Customs Act, 1962 (India)**].

32.2.A tax, an impost or imposition; also an obligation.
[Wharton's Law Lexicon.]

32.3.**Duty, direct taxes and indirect taxes** — The word “duty” means an indirect tax imposed on the importation or consumption of goods. “Customs” are duties charged upon commodities on their being imported into or exported from a country. The expression direct taxes includes those assessed upon the property, person, business, income, etc., of those who are to pay them, while indirect taxes are levied upon commodities before they reach the consumer and are paid by those upon whom they ultimately fall, not as taxes, but as part of the market price of the commodity, **Union of India v. Nitdip Textile Processors (P) Ltd., (2012) 1 SCC 226.**

33.ROYALTY

33.1.It is a payment reserved by the grantor of a patent, lease of a mine or similar right and payable proportionately to the use made of the right by the grantee, ***State of Orissa v. Titaghur Paper Mills Co. Ltd., 1985 Supp SCC 280.***

33.2.“Royalty” according to *Jowitts’ Dictionary of English Law* means “a payment reserved by the grantor of a patent, lease of a mine or similar right and payable proportionately to the use made of the right by the grantee”, ***Distt. Council, Jowai Autonomous Distt. v. Dwet Singh Rymbai, (1986) 4 SCC 38.***

33.3.Royalty in general connotes the State's share in the goods upon which the rights of its exploitation are conferred upon any person or the group of persons. If the royalty cannot be claimed by any individual, much less the controversial items being its attribute, even if assumed, can be claimed by a citizen, ***State of H.P. v. Raja Mahendra Pal, (1999) 4 SCC 43.***

33.4.In the transaction of patent, royalty is a payment to a patentee by agreement on every article made according to his patent or to an author by publisher on every copy of his book sold or to the

owner of mineral for the right of working the same on every tone or other weight raised, **Pradeep C. Mody v. Sashikant C. Mody, AIR 1998 Bom 351.**

33.5.Payment to a patentee by agreement on every article made according to his patent; or to an author by a publisher on every copy of his book sold; or to the owner of minerals for the right of working the same on every ton or other weight raised. [Wharton's Law Lexicon.]

33.6.In its primary and natural sense "royalty", in the legal world, is known as the equivalent or translation of **jura regalia or jura regia**. Royal rights and prerogatives of a sovereign are covered thereunder. In its secondary sense the word "royalty" would signify, as in mining leases, that part of the reddendum, variable though, payable in cash or kind, for rights and privileges obtained, **Inderjeet Singh Sial v. Karam Chand Thapar, (1995) 6 SCC 166.**

34.Royalty and compensation — "Royalty" means remuneration paid to an author in respect of the exploitation of a work, usually referring to payment on a continuing basis (e.g. 10% of

the sale price) rather than a payment consisting of a lump sum in consideration of acquisition of rights. It may also be applied to payment to performers. In the context of the Act, royalty is a genus and compensation is a species. Where a licence has to be granted, it has to be for a period. A "compensation" may be paid by way of annuity. A "compensation" may be payable on a periodical basis, as apart from compensation, other terms and conditions can also be imposed. The compensation must be directed to be paid with certain other terms and conditions which may be imposed, **Entertainment Network (India) Ltd. v. Super Cassette Industries Ltd., (2008) 13 SCC 30.**

35.Royalty and Dead rent — In **State of Orissa v. Titaghur Paper Mills Co. Ltd., 1985 Supp SCC 280: 1985 SCC (Tax) 538**, it was, inter alia, observed as follows: "102. ... 'Royalty' is not a term used in legal parlance for the price of goods sold. 'Royalty' is defined in *Jowitt's Dictionary of English Law*, 5th Edn., Vol. 2, as follows: *Royalty*, a payment reserved by the grantor of a patent, lease of a mine or similar right and payable proportionately to the use made of the right by the grantee. It is usually a payment of money, but may be a payment in kind, that is, of part of the produce of the exercise of the

right. Royalty also means a payment which is made to an author or composer by a publisher in respect of each copy of his work which is sold or to an inventor in respect of each article sold under the patent. "Royalty" is not a tax. Simply because the royalty is levied by reference to the quantity of the minerals produced and the impugned cess too is quantified by taking into consideration the same quantity of the mineral produced, the latter does not become royalty. The former is the rent of the land on which the mine is situated or the price of the privilege of winning the minerals from the land parted with by the Government in favour of the mining lessee. The cess is a levy on mineral rights with impact on the land and quantified by reference to the quantum of mineral produced. It will be useful to know the meaning of the expressions "dead rent" and "royalty" and their connotation. *Wharton's Law Lexicon*, 14th Edn., at p. 300, defines *dead rent* as: "*Dead rent*. — A rent payable on a mining lease in addition to a royalty, so called because it is payable whether the mine is being worked or not." *Jowitt's Dictionary of English Law*, 2nd Edn., at p. 555, defined "dead rent" as: *Dead rent*, a term sometimes used in mining leases in contradistinction to a royalty, to denote a fixed rent to be paid whether the mine is productive or not. The same dictionary states under the heading "Rent", at p. 1544: "When a mine, quarry,

brickworks or similar property is leased, the lessor usually reserves not only a fixed yearly rent but also a royalty or galeage rent, consisting of royalties (q.v.) varying with the quantity of minerals, bricks, etc., produced during each year. In this case the fixed rent is called a dead rent." "Royalty" is defined in Jowitt's Dictionary of English Law, 2nd Edn., at p. 1595, inter alia, as: "*Royalty*, a payment reserved by the grantor of a patent, lease of a mine or similar right and payable proportionately to the use made of the right by the grantee. It is usually a payment of money, but may be a payment in kind, that is, of part of the produce of the exercise of the right. See Rent." "Royalty" is defined in *Wharton's Law Lexicon*, 14th Edn., at p. 893, as: "Royalty, payment to a patentee by agreement on every article made according to his patent; or to an author by a publisher on every copy of his book sold; or to the owner of minerals for the right of working the same on every ton or other weight raised." In ***H.R.S. Murthy v. Collector, AIR 1965 SC 177: (1964) 6 SCR 666***, this Court said that "royalty" normally connotes the payment made for the materials or minerals won from the land. In Halsbury's Laws of England, 4th Edn. in the volume which deals with "Mines, Minerals and Quarries", namely, Vol. 31, it is stated in para 224 as follows: "235. *Dead rent*. — It is usual in mining leases to reserve both a fixed annual rent (otherwise known as

a 'dead rent', 'minimum rent' or 'certain rent') and royalties varying with the amount of minerals worked. The object of the fixed rent is to ensure that the lessee will work the mine; but it is sometimes ineffective for that purpose. Another function of the fixed rent is to ensure a definite minimum income to the lessor in respect of the demise, ***State of H.P. v. Gujarat Ambuja Cement Ltd., (2005) 6 SCC 499.***

36. The purpose of Section 43B of the Act was to ensure that the Assessee does not delay the payment of these Government dues or statutory levies or imposts beyond the previous year itself, as in Section 43B originally enacted. The Proviso was later on brought by the Finance Act, 1987 with effect from 01.04.1988 to reduce the said rigor that if such payment of tax, duty, cess or fee was made before the due date of filing of the Return by the Assessee under Section 139 of the Act, the said accrued liabilities of Government dues in the form of tax, duty, cess or fee will also be allowed as deduction in that very previous year, even though payment was made after the expiry of previous year but before the said due date of filing of return of income.

37.The object and parameters of Section 43B of the Act are therefore clearly defined and do not permit transgression of 'other levies' made by the State Government in the realm of contractual laws to enter the specified zone of imposts clearly specified in Section 43B of the Act. The levy in question therefore, has to fall within the four corners of the four specified components, viz., tax, duty, cess or fee. These four components 'by whatever name called' in Section 43B of the Act, do not cover the special levies, like in the present case, viz. 'Nomination Charges'.

38.Section 43B is in the nature of a penal provision, which deters the Assessee to delay the timely payment of Government dues in the form of tax, duty, cess or fees and the consequence of delay beyond the date of filing Return of income is the disallowance of that payment as a deduction from taxable profit, which shifts and prepones the income tax liability of the Assessee from next year when he gets such deduction upon actual payment to present previous year. Even a bona fide Assessee, who may not have sufficient cash or fund flow available to pay such Government dues immediately also suffers a double whammy and a heavier income tax liability on account of such disallowance under Section 43B of the Act.

39. Therefore, such penal provision requires a literal and not liberal interpretation of its operative field and only the specified four imposts namely, tax, duty, cess or fees, have to be timely paid. It cannot be extended to special levies or contractual levies by an extended interpretation. The exercise of sovereign power to tax behind the levy in question is necessary as held by the Hon'ble Supreme Court in the case of **CIT v. McDowell & Co.Ltd. (supra)**, which is not available in the present case of nomination charges.

40. In the present case, we find that the 'nomination charges' specified and prescribed by the State Government through various Government Orders, are none of these four imposts specified in Section 43B. It is simply a contractual payment of lease rental specified by the State Government being the Lessor for which both the Lessor and the Lessee had agreed at a prior point of time to fix and pay the said prescription of nomination charges. Rule 8-C(7) of the Rules, does not take it out from the four corners of Lease Deed which is a non-statutory contract between the parties. A mere reference of the statute, ie., Rule 8-C(7) of the Tamil Nadu Minor Mineral Concession Rules, 1959, does not make it a statutory levy, in the

realm of 'tax, duty, cess or fees'.

41. In our opinion, the application of Section 43B depends upon the character of the levy being either statutory or contractual (non-statutory). Once the levy in the present case in the form of 'nomination charges' depending upon the quantum of land and the commercial exploitation of the minerals by the Assessee is held to be non-statutory contractual payment, then Section 43B of the Act will not cover the case in hand and therefore, the Assessee was entitled to deduction of such 'nomination charges' paid by the Assessee to the State Government on 09.12.2007 even in the present Assessment Year 2004-05 on the basis of accrual of liability to pay the same arising for this relevant previous year only. The view that it is a contractual payment is further fortified by the enabling powers as provided under Clause-2 of the Annexure to the Lease Deed in question and the State Government was at liberty to fix the nomination charges or not to impose the same altogether. Therefore the said prescription of nomination charges cannot be held to be a compulsorily impost falling within the four corners of Section 43B of the Act. The State Government not only has the power to impose the same but also to waive, reduce or modify the same as well, depending

upon the quantum of commercial exploitation and other relevant circumstances. It could also be treated as 'Royalty' payable by the Assessee TAMIN, to the State for parting with its exclusive rights by giving Leasehold right to the Assessee. Royalty is not a tax, is a settled legal position by the Constitution Bench decision.

42.The series of Government Orders produced before us also indicates that initially the State Government provided for this special levy of Rs.6 Crores for the Assessee as nomination charges to be levied for the Year 2001-2002, but later on, in its discretion, it was increased to 10% of turnover which was further increased to 15% of turnover.

43.The statutory levy in general, will apply to all subjects uniformly and not to a specific Assessee or a person. In the present case, therefore, the levy in question in the name of 'nomination charges' emanates only from the contract of Lease between the parties, a privately contracted levy. Even with reference to the statutory rule, it does not, in our considered opinion, fall within the mischief or the specified zone of Section 43B of the Act. It is neither tax nor a cess nor a duty nor a fee. Therefore, Section 43B of the Act

does not stand attracted in the present case at all.

44.Once we come to the conclusion that Section 43B of the Act does not apply to the present payment, the question of applying the rigor of payment within the time schedule will not decide the allowability or otherwise of the said payment under Section 43B of the Act, which would then depend upon the method of accounting followed by the Assessee and if the Assessee has made a provision for this payment in its Books of Account and has claimed it as accrued liability in the Assessment Year 2004-2005, he is entitled to get that deduction in the Assessment Year 2004-2005 itself, without any application of Section 43B of the Act.

45.The reasons assigned by the authorities below in the present case on an incorrect interpretation for application of Section 43B of the Act made to the present levy in question, was not sustainable and therefore, in our opinion, the Assessee deserves to succeed in the present appeal.

46.The case laws relied upon by the learned counsel for the Revenue dealt with the statutory levies like 'Vend fees' or even SEBI

Turnover charges levied by SEBI, the statutory authority, which has powers to regulate the business of transaction of shares and it did not deal with any contractual payment between the parties.

47.For the reasons given aforesaid, we allow this appeal in favour of the Assessee and the substantial questions of law framed are answered in favour of the Assessee and against the Revenue. No costs.

Index : Yes/No
Internet : Yes/No

(V.K.,J.) (C.V.K.,J.)
22.04.2019

KM

To

The Income Tax Appellate Tribunal, 'C' Bench, Chennai.

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DR.VINEET KOTHARI, J.
AND
C.V.KARTHIKEYAN, J.

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Tax Case Appeal No.1806 of 2008

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