

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01.11.2019

CORAM

THE HONOURABLE DR. JUSTICE ANITA SUMANTH

W.P. No.8999 of 2012

& M.P.No.1 of 2012

Premier Marine Products,
represented by its Authoritsed Signatory
Abdul Razzak Ganj

...Petitioner

Vs

The Assistant Commissioner (CT) (Additional),
Thiruvanmiyur Assessment Circle,
98, A.V.Church Road,
Vannandurai,
Chennai - 600 090.

... Respondent

Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari to call for the records on the file of the respondent herein in TIN No.33080920432/2007-08 dated 28.02.2012, quash the same in so far as it relates to tax on a turnover of Rs.4,88,62,652/-.

For Petitioner : Mr.N.Prasad

For Respondent : Mr.V.Haribabu, AGP

O R D E R

सत्यमेव जयते

The petitioner is a dealer and an exporter of prawn and fish based at Chennai, admittedly, effecting exports from the Port at Tuticorin. The petitioner had obtained a Duty Entitlement Pass Book (' Book/DEPB') from the office of the Joint Directorate General of Foreign Trade (JDGFT) at Bombay, Maharashtra. The passbook constitutes an asset in the hands of the petitioner. The object of the DEPB Scheme is to neutralise the incidence of customs duty on the import content of the products that are exported and such neutralisation is granted by way of a duty credit against the export product. The DEPB Scheme sets out

various parameters and conditions to be satisfied by the applicant/holder of the DEPB. Clause 4.3.4 dealing with transferability states as follows:

'4.3.4 Transferability

DEPB and/or items imported against it are freely transferrable. Transfer of DEPB shall however be for import at specified port, which shall be the port from where exports have been made.

Imports from a port other than the port of export shall be allowed under TRA facility as per terms and conditions of DoR notification.'

2. The Port at Tuticorin is a specified Port in terms of Clause 4.3.4. The book is freely transferable and may be sold to other importers, who then avail the credit of duty thereunder. The petitioner admittedly had not effected any exports utilising the DEPB in question. The passbook was sold to a buyer in Bombay even prior to exploiting of the same by the petitioner. The buyer is stated to have taken delivery of the passbook in the office of the petitioner in Bombay. Thus according to the petitioner, since the sale as well as delivery of the DEPB was completed at Bombay in the State of Maharashtra, it constitutes a domestic sale, liable to tax in terms of the Maharashtra Value Added Tax Act, 2002. An assessment has also been made in this regard by the commercial tax authorities at Maharashtra.

3. Now coming to State of Tamil Nadu, the petitioner, being a dealer registered on the files of the respondent in Tamil Nadu, had filed regular monthly returns. For the period 2007-08, an assessment under Section 22 of the Tamil Nadu Value Added Tax Act, 2006 (in short 'Act') was completed by the respondent on 17.06.2011. On 02.12.2011, the respondent issued a notice stating that since the exports had been completed through the Port in Tamil Nadu, the sale and delivery of the DEPB had to be construed as a taxable transaction in the State of Tamil Nadu only. The petitioner objected to the proposal vide reply dated 23.01.2012 reiterating that the application for the Passbook had been made at Bombay, the Passbook had been issued in Bombay, retained in Bombay and thereafter sold in Bombay to a purchaser based in Bombay, duly offered to tax, and rightly brought to tax at Maharashtra. Notwithstanding the objections raised, the impugned assessment has been completed bringing to tax the turnover in the State of Tamil Nadu, which is assailed in the present Writ Petition.

4. Heard Mr.N.Prasad, learned counsel for the petitioner and Mr.V.Haribabu, learned Additional Government Pleader for the respondent.

5. In order to determine the relevant State for fixing taxability, Section 2(33) of the Act read with Explanation (V) thereunder becomes relevant and is extracted below:

(33) "sale" with all its grammatical variations and cognate expressions means every transfer of the property in goods (other than by way of a mortgage, hypothecation, charge or pledge) by one person to another in the course of business for cash, deferred payment or other valuable consideration and includes , -

(i) a transfer, otherwise than in pursuance of a contract of property in any goods for cash, deferred payment or other valuable consideration;

(ii) a transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(iii) a delivery of goods on hire-purchase or any system of payment by instalments;

(iv) a transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(v) a supply of goods by any un-incorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

(vi) a supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating) where such supply or service is for cash, deferred payment or other valuable consideration, and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made;

.....

Explanation V.-(a) The sale or purchase of goods shall be deemed for the purposes of this Act, to have taken place in the State, wherever the contract of sale or

purchase might have been made, if the goods are within the State –

(i) in the case of specific or ascertained goods, at the time the contract of sale or purchase is made; and

(ii) in the case of unascertained or future goods, at the time of their appropriation to the contract of sale or purchase by the seller or by the purchaser, whether the assent of the other party is prior or subsequent to such appropriation.

(b) Where there is a single contract of sale or purchase of goods, situated at more places than one, the provisions of clause (a) shall apply as if there were separate contracts in respect of the goods at each of such places.'

6. It is the petitioners' case that the asset in question constitutes specific and ascertained goods. Mr. Haribabu however, points out that the DEPB is categorised in Entry 70/Part B/First Schedule to the Act as intangible goods along with copyright, patent and REP licence and is thus, according to him, unascertained. Since there is no difference between a DEPB and a REP licence, the former would be classifiable as intangible goods as well. Thus, according to him, the asset in question will fall under clause (ii) and since the registered office of the petitioner is in Tamil Nadu, the transaction will be taxable in the State of Tamil Nadu.

7. For this purpose, he relies on a decision of the Division Bench of the Kerala High Court in the case of Lal Products V. Intelligence Officer (W.P.(C) No.13408 of 2009 – U dated 06.12.2018, specifically the observations of the Bench at paragraph 20, extracted below:.

'20. The consideration of situs of sale insofar as the parties to the transaction herein, the seller and the purchaser, whose principal place of business exist in two connected cases different States offers no difficulty insofar as the specific provisions under the CST Act. We are also of the opinion that the amendment to the definition of "sale" in the CST Act though relevant for the six instances where there is a deemed sale of goods, has no effect insofar as the subject transaction. Dehors the amendment, the sale would come within the concept of sale as available under the CST Act, in which instance we have to look at Section 3, having accepted the sale of a trademark or patent rights as a sale of goods. Though intangible and incorporeal, it has an existence and its situs also has

to be pinned down to a particular place with reference to the owner. The situs of the principal place of business, from where the owner of such trademark exercises his right to sell specified goods, under the trademark or enforces his patent rights, which has been obtained by them as a statutory right, is the place where the goods exist. '

8. There is some discussion/debate on whether the asset in question would fall within the ambit of clause (i) or (ii) of Explanation (V)(a). Clause (i) relates to specified or ascertained goods and stipulates that the situs of such goods shall be the location of the goods at the time when the contract of sale or purchase is made. Thus, where the asset is identified and is located within the State of Tamil Nadu at the time when the contract of sale or purchase is made, then the appropriate State to tax the transaction would be Tamil Nadu. Likewise, if the asset were located in Mumbai at the time when the contract of sale or purchase was entered into, then the appropriate State would be the State of Maharashtra. Clause (ii) states that in case of unascertained future goods, what is relevant is the location of the goods at the time of their appropriation to the contract of sale or purchase by the seller or the buyer irrespective of whether the assent of the other party is prior or subsequent to such appropriation. Instances of such ascertainment touch upon the identification of goods of a smaller quantity of goods amongst a larger quantity or identification of goods that are to be manufactured in future.

9. To summarize my understanding, Explanation (V)(a)(i) provides that the sale or purchase of specified/ascertained goods shall be deemed to have taken place in the State if the goods are within the State at the time when the contract of sale or purchase is entered into. There being no dispute on the position that the goods in question, the DEPB, and additionally, the seller as well as the buyer were all located in Bombay at the time when the transaction in question was finalised, the turnover from the transaction is liable to tax only in Maharashtra.

10. In *Yasha Overseas V. Commissioner of Sales Tax and others* ((2008) 17 VST 182) the Supreme Court (placitum 64 of the report) states that both DEPB and Replenishment licences (REP licence) are identical in nature and that both licences are exigible to sales tax. There is no dispute on this position.

11. The sole argument of the Revenue is that the petitioner is an exporter, exporting and importing from the Tuticorin Port. Clause 4.3.4 of the Foreign Trade Policy containing the DEPB Scheme makes it clear that the passbook is issued only in regard

to a specified Port, which in this case is Tuticorin. This then is the only nexus which the State of Tamil Nadu has to the transaction in question and in my considered view, is insufficient to bring the transaction to tax in Tamil Nadu.

12. The Division Bench in the case of Lal Products (supra) was dealing with the sale of patent rights and the determination of situs of that transaction. The Bench notes as a finding of fact that the products in which the patent rights vested had been sold all over India. Reference is then made to a decision of the High Court of Delhi in the case of CUB PTY Limited V. UOI and Ors. ((2016) 388 ITR 617) on the question of location of intangible intellectual property rights. Extracting paragraph nos.19 and 20 thereof, the Bench agrees with the conclusion of the Delhi High Court to the effect that the situs of the owner of an intangible asset would be the closest approximation of the situs of the asset itself. It is on the aforesaid reasoning that the situs of the patent rights that had been obtained by the assessee having its principal place of business in the State of Kerala, was held to be Kerala and the transaction in that case, an inter-state sale in terms of the provisions of the Central Sales Tax Act, 1956.

13. In the present case, we are concerned with a tangible asset, insofar as the right in connection with the export has been reduced to a passbook, constituting specified goods. The decision in Lal Products (supra) thus does not advance the case of the revenue. The categories of specific/ascertained goods and unascertained/future goods are separate and distinct from tangible and intangible goods. The assets may be tangible or intangible on the one hand, also simultaneously being specific/unascertained on the other.

14. This Court in the case of P.S.Apparels V. Deputy Commercial Tax Officer ((1994) 94 STC 139), at paragraph 11 thereof, as well as the Supreme Court in the case of Tata Consultancy Services V. State of Andhra Pradesh ((2004) 137 STC 620) have considered scenarios where intangible goods, such as REP licence/DEPB licence and computer software have been reduced to fixed media, such as compact discs holding that once in the form of a physical commodity, the asset assumes the form of ascertained goods for the purpose of levy of sales tax. There is no clash in my mind in regard to the aforesaid categories and the argument of the Revenue in this regard is clearly misconceived.

15. In the light of the aforesaid discussion, the impugned order is set aside and this Writ Petition is allowed. Consequently, connected Miscellaneous Petition is closed. No costs.

-s/d-

Assistant Registrar

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Sub-Assistant Registrar

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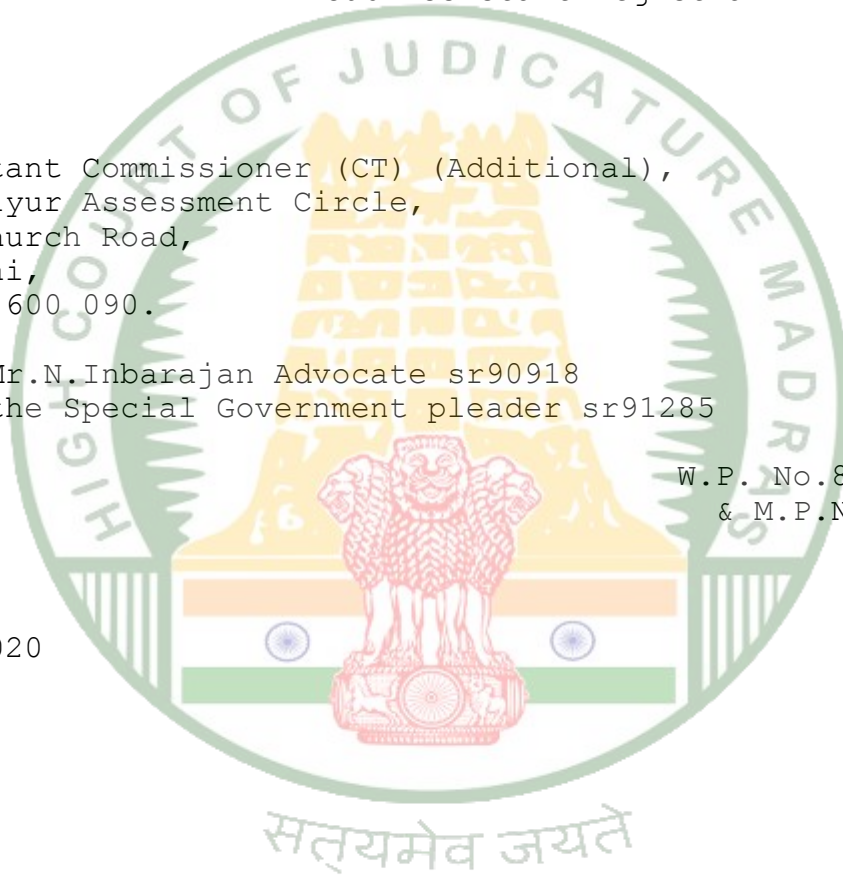
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+1 cc to Mr.N.Inbarajan Advocate sr90918

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