# IN THE HIGH COURT OF JUDICATURE AT MADRAS

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| Reserved On | 24.01.2020 |
| Pronounced On | 06.02.2020 |

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.Nos. 32110, 32111, 37567 & 37568 of 2007
and
M.P.Nos.1, 1, 1 & 1 of 2007

M/s.Lakshmi Graha Enterprises,
29, Race Course Road,
Coimbatore – 18. ... Petitioner in all W.Ps.

Vs.

The Commercial Tax Officer,
Trichy Road Circle,
Coimbatore. ... Respondent in all w.Ps.

Prayer in W.P.32110 & 32111 of 2007: Writ Petitions filed under Article 226 of Constitution of India, to issue a Writ of Certiorari, to call for the records of the respondent in CST/626229/2002-2003 and in TNGST/1880911/2002-2003 and quash the orders dated 30.08.2007 passed therein.

Prayer in W.P.37567 & 37568 of 2007: Writ Petitions filed under Article 226 of Constitution of India, to issue a Writ of Certiorari, to call for the records of the respondent in CST/626229/2003-2004 and in TNGST/1880911/2003-2004 and quash the orders dated 30.08.2007 passed therein in so far the same levies tax on a turnover of Rs.21,62,77,779/- and Rs.96,14,23,150/- repectively.

For Petitioner : M/s. Hema Muralikrishnan
in all W.Ps.

For Respondent : Mr.Mohammed Shaffiq,
Special Government Pleader,
in all W.Ps.

C O M M O N O R D E R

By this common order, all the four writ petitions are being disposed.

2.In these writ petitions, the writ petitioner has challenged the assessment orders passed by the respondent Commercial Tax Officer, Trichy in respect of assessment years 2002-2003 and 2003-2004 under the provisions of the TNGST Act, 1959 and CST Act, 1956.

3.The respondent has demanded tax under the provisions of the respective Acts on the ground that the petitioner being a dealer within the meaning of the respective enactments had failed to pay the disputed tax.

4.Though, an alternate remedy was available to the petitioner, the petitioner has chosen to file the present writ petition stating that the petitioner has no alternative or efficacious remedy against the impugned order as the respondent had no authority to levy tax under the provisions of the respective Acts in as much as the sale has taken place from the petitioner's principal at Mumbai or principal's branch office who had paid CST/TNGST as the case may be, on the sale orders booked by the petitioner.

5.In the impugned orders, the respondent Commercial Tax Officer has held that the petitioner was acting as a Del credere agent for Tvl. Reliance Industries Ltd. and had failed to discharge the tax liability under the respective Acts. It is submitted that the demand was in violation of the provisions of the respective enactment in as much as the tax liability was on the principal and the appellant merely acted as an agent who received 'commission' from the principal for the orders booked for on behalf of the said principal.

6.The learned counsel for the petitioner relied on the decision of the Hon'ble Supreme Court in Peninsular Traders and Another Vs. Deputy Commissioner of Sales Tax (Law), Kerala, (1998) 108 STC (SC). In paragraph 7, the Hon'ble Supreme Court observed as under:-

> "7. The overall effect the agreement produced on our mind is that it is an agreement of agency and that there is no transfer of the said chemicals from the company to the firm. As is clear from several clauses in the agreement, particularly Clauses (6) and (10), a running account was to be maintained by the company of its dealings with the firm and that the value of the said chemicals was to be debited to the firm's account only when sold by the firm. Clause (4), when it required payment to be made of the quantity lifted by the firm by the end of the month or be charged interest at the rate of 9%, therefore, suggests that the firm's account would be debited only in the event that payment for all the chemicals lifted delivery during the month had not been sold by the month-end. There is

nothing in it which indicates that the property in the unsold chemicals would pass to the firm at the month-end. Clause (5) does not carry the matter further. Clause (7) is not an unusual clause, of the agent being responsible for the solvency of purchasers from itself; so also Clause (8), the terms whereof are not an unusual obligation undertaken by an agent."

7.The Learned Counsel for the Petitioner submits that when the impugned orders were passed, the decision of the Honourable Supreme Court in the above case was not brought to the notice of the respondent.

8.It is submitted that respondent proceeded to pass the impugned order placing reliance on the following decisions which are distinguishable on facts and are inapplicable to the facts of the present case:-

i. Alwaye Agencies Vs. Dy. Commissioner of Agricultural Income Tax and Sales Tax, Ernakulam. 1988 (supp) SCC 394.

ii. Markar Co. Ltd. Vs. State of Kerala 105 STC 309.

9.Per contra learned counsel for the revenue submits that the impugned orders passed by the respondent were well reasoned and require no interference under article 226 of the Constitution of India. It is submitted that in any event, the petitioner has an alternate remedy by way of appeal before the Deputy Appellate Commissioner and instead of filing an appeal the petitioner has filed these writ petitions.

10.Learned counsel for the respondent submits that the decision of the Hon'ble Supreme Court in Peninsular Traders and Another Vs. Deputy Commissioner of Sales Tax (Law), Kerala, referred to supra and cited by the learned counsel for the petitioner was distinguishable and inapplicable in the facts of the present case.

11.He refers to the decision of the Hon'ble Supreme Court in Alwaye Agencies Vs. Dy.Commissioner of Agricultural Income Tax and Sales Tax Ernakulam, referred to supra, wherein it is stated even when the goods were destined directly to the customer, it was the distributor who had to guarantee to arrange the payment.

12.He further refers to the decision of the court in the Bhopal Sugar Industries Ltd. Vs. Sales Tax Officer, Bhopal, (1977) 3 SCC 147, wherein it was observed that "a contract of agency, however, differs essentially from a contract of sale inasmuch as an agent after taking delivery of the property does not sell it as his own property but sells the same as the property of the principal and under his instructions and directions." There the Court held that the mere fact that the word ' agent' or 'agency' was used or the words 'buyer' and 'seller' were used to describe the status of the parties concerned is not sufficient to lead to the irresistible inference that the parties did in fact intend that the said status would be conferred.

13.He further submits that the mere formal description of a person as an agent or buyer is not conclusive unless the context shows that the parties clearly intended to treat a buyer as a buyer and not as an agent.

14.Learned counsel for the respondent further submits that whether there was an intra or an inter-state sale is a mixed question of fact and therefore the present writ petition was liable to be dismissed.

15.In this connection, he places reliance on the decision of the Hon'ble Supreme Court in Zunaid Enterprises and Others Vs. State of Madhya Pradesh and Others, (2012) 4 SCC 211.

16.I have considered the arguments advanced on behalf of the petitioner and the respondent. Though the petitioner had an alternate remedy, as mentioned above, I do not see any point in relegating the petitioner to file an appeal at this distant point of time. Therefore, these writ petitions are taken up on merits and are being disposed by this order.

17. Short point that arises for consideration in these writ petitions is whether the petitioner as a 'Del Credere' agent of Tvl. Reliance industries Ltd was liable to tax or was outside the purview of the provisions of the respective tax enactments even though the definition of 'dealer' in both the enactment include a 'Del Credere' agent.

18. For the purpose of this case it will be useful to reproduce the definition of "dealer" and "sale". The definitions in the respective enactments are reproduced below:-

| Tamil Nadu General Sales tax Act, 1959 | Central Sales Tax Act, 1956 |
|---|---|
| 2(g): Dealer. | 2(b) : Dealer |
| 'Dealer' means any person who carries on the business of buying, selling, supplying or distributing goods, directly or otherwise, whether for cash, or for deferred payment, or for commission, remuneration or other valuable consideration, and includes | 'Dealer' means a person who carries on (whether regularly or otherwise) the business of buying, selling, supplying or distributing goods; directly or indirectly for cash, or for deferred payment or for commission, remuneration or other valuable consideration [even without a profit motive]<br><br>And includes, |
| (i) A local authority, company, Hindu undivided family, firm or other<br>association of persons which carries on such business;<br>(ii),<br>a causal trader | (i) a local authority, a body corporate, a company, any co-operative society or other society, club, firm, Hindu undivided family or other association of persons which carries on such businesses; |
| (iii) a factor, a broker, a commission agent or arhati, a del credere agent or an auctioneer, or any other mercantile agent by whatever name called, and whether of the same description as herein before or not, who carries on the business of buying, selling, supplying or distributing goods on behalf of any principal, or through whom the goods are bought, sold, supplied or<br>distributed; | (ii) a factor, broker, commission agent, del credere agent or an auctioneer, or any other mercantile agent, who carries on the business of buying, selling, supplying or distributing goods belonging to any principal whether disclosed or not; |

| Tamil Nadu General Sales tax Act, 1959 | Central Sales Tax Act, 1956 |
|---|---|
| (iv) every local branch of a firm or company situated outside the State; | (iii) an auctioneer who carries on the business of selling or auctioning goods belonging to any principal, whether disclosed or not and whether the offer of the intending purchaser is accepted by him or by the principal or a nominee of the principal<br><br>Every person who acts as an agent, in any State of a dealer residing outside that State and buys, sells, supplies, or distribute goods in the State or acts on behalf of such a dealer, as:- |
| (v) a person engaged in the business of transfer otherwise than in pursuance of a contract of property in any goods for cash, deferred payment or other valuable consideration; | (i) a mercantile agent, or |
| (vi) a person engaged in the business of transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract; | (ii) an agent for handling of goods or documents of title relating to goods, or |
| viii) a person engaged in the business of 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 | (iv) and every local branch or office in a State of a firm registered outside that State or a company or other body corporate, the principal office or headquarters whereof is situated outside that State, |

| Tamil Nadu General Sales tax Act, 1959 | Central Sales Tax Act, 1956 |
|---|---|
| (ix) a person engaged in the business of supplying 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. | Shall be deemed to be a dealer. |

| Section 2(n) TNGST Act, 1959 | Section 2(g) CST Act, 1956 |
|---|---|
| Sale' with all its grammatical variations and cognate expressions means every transfer of the property in goods (other than by way of 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 – | 'sale', with its grammatical variations and cognate expressions, means any transfer of property in goods by one person to another for cash or deferred payment or for any other valuable consideration, and includes,— |
| (i) a transfer, otherwise than in pursuance of a contract, of property in any goods of cash, deferred payment or other valuable consideration; | (i) a transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration; |

| Section 2(n) TNGST Act, 1959 | Section 2(g) CST Act, 1956 |
|---|---|
| (ii) a transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract; | (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 installments; | (iii) a delivery of goods on hire-purchase or any system of payment by installments; |
| (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 unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration; | (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 unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration; | (v) a supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration; |

| Section 2(n) TNGST Act, 1959 | Section 2(g) CST Act, 1956 |
|---|---|
| (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 (such) the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made; | (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, but does not include a mortgage or hypothecation of or a charge or pledge on goods; |

Explanation in 2(n) of the TNGST, Act, 1959

Explanation (1) - The transfer of property involved in the supply or distribution of goods by a society (including co-operative society), club, firm or any association to its members, for cash, or for deferred payment or other valuable consideration, whether or not in the course of business, shall be deemed to be a sale for the purposes of this Act.

Explanation (1-A)- Every transfer of property in goods by the Central Government or any State Government for cash or for deferred payment or other valuable consideration , whether or not in the course of business, shall be deemed to be a sale for the purposes of this Act.

Explanation (1-B)-The transfer of property involved in the purchase, sale, supply or distribution of goods through a factor, broker, commission agent or arhati, del credere agent or an auctioneer or any other mercantile agent, by whatever name called, whether for cash or for deferred payment or other valuable consideration, shall be deemed to be a purchase or sale, as the case may be, by such factor , broker, commission agent or arhati, del credere agent, auctioneer or any other mercantile agent, by whatever name called, for the purposes of this Act.

Explanation(1-C)- Every transfer of property in goods including goods as unclaimed or confiscated or as unserviceable or as scrap surplus, old, obsolete or discarded materials or as waste products , by the persons or bodies referred to in

Explanation (2) [……….] [omitted by Act 28/34 w.e.f. 29th May 1984]

Explanation (3)-(a) The sale of purchase of goods shall be deemed for the purpose 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.

Explanation (3)(b):Where there is 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.

19.The Supreme Court in Peninsular Traders and Another Vs. Deputy Commissioner of Sales Tax (Law), Kerala (Supra), was concerned with Section 2 (xxi) of the Kerala General Sales Tax Act, 1963 which defined the expression sale as follows:-

xxi) 'Sale' with all its grammatical variations and cognate expressions means every transfer (whether in pursuance of a contract or not) of the property in goods by one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration, but does not include a mortgage, hypothecation, charge or pledge;

Explanation (1): - A transfer of the property in the following goods namely, tea, coffee, rubber, cardamom or timber, whether in the course of trade or business or otherwise, for cash or for deferred payment or other valuable consideration, by a person who produces the same, shall be deemed to be sale for the purposes of this Act;

Explanation (1A): - A transfer of property in goods by the Central Govt. or a State Govt. for cash or for deferred payment or other valuable consideration whether or not in the course of business shall be deemed to be a sale for the purposes of this Act;

Explanation (1B): - A transfer of property in trees which grow spontaneously and which are agreed to be severed before sale or under the contract of sale by the person entitled to make such transfer, whether in the course of trade or business or otherwise, for cash or for deferred payment or other valuable consideration, shall be deemed to be a sale for the purposes of this Act;

Explanation (2): - The transfer of property involved in the supply or distribution of goods by a society (including a cooperative society), club, firm or any association or body of persons, whether incorporated or not to its members, for cash or for deferred payment or other valuable consideration, whether or not in the course of business, shall be deemed to be a sale for the purposes of this Act;

Explanation (3): - A transfer of goods on hire-purchase or other installment system of payment shall, notwithstanding the fact that the seller retains the title in the goods as security for payment of the price, be deemed to be a sale on the date of delivery of the goods in pursuance of the agreement of such hire purchase or other system of payment in installments;

Explanation (3A): - A transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract shall be deemed to be a sale;

Explanation (3B): - A transfer of right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration shall be deemed to be a sale;

Explanation (3C): - Any supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other articles for human consumption or any drink (whether or not intoxicating), where such supply or service is for cash, deferred payment or other valuable consideration shall be deemed to be a sale;

Explanation (3D): - Unless otherwise expressly provided in this Act, any transfer, delivery or supply of any goods referred to in this clause shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and purchase of those goods by the person to whom such transfer, delivery or supply is made;

Explanation(4) (a) The sale or purchase of goods shall be deemed, for the purposes of this Act, to have taken place in the State whether 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;

(c) For the purpose of this Act, the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract shall be deemed to have taken place in the State, if the goods are within the State at the time of such transfer irrespective of the place where the agreement of works contract is made, whether the assent of other party to the contract is prior or subsequent to such transfer.

Explanation 5: - Notwithstanding anything to the contrary contained in this Act or any other law for the time being in force, two independent sales or purchases shall, for the purposes of this Act, be deemed to have taken place,-

(a) When the goods are transferred from a principal to his selling agent and from the selling agent to the purchaser; or
(b) When the goods are transferred from the seller to a buying agent and from the buying agent to his principal, if the agent is found in either of cases aforesaid
(i) to have sold the goods at one rate and to have passed on the sale proceeds to his principal, at another rate, or
(ii) to have purchased the goods at one rate and to have passed them on to his principal at another rate, or
(iii) not to have accounted to his principal for the entire collections or deductions made by him in the sales or purchases effected by him on behalf of his principal ; or
(iv) to have acted for a fictitious or non-existent principal:

Provided that the deduction or addition, as the case may be of the commission agreed upon and specified in the accounts and incidental charges incurred by the agent which are specified in the accounts and which the assessing authority considers legitimate shall not be deemed to be a difference in the rates referred to in sub-clauses (i) and (ii)

20. It may be useful to refer to the definition of 'Dealer' in Section 2 (viii) defines as below of the Kerala General Sales Act, 1963:

" 'Dealer' means any person who carries on the business of buying, selling, supplying or distributing goods, executing works contract, transferring the right to use any goods or supplying by way of or as part of any service, any goods directly or otherwise, whether for cash or for deferred payment, or for commission, remuneration or other valuable consideration and includes:

(a) Omitted
(b) a casual trader
(c) a commission agent, a broker or a del credere agent or an auctioneer or any other mercantile agent, by whatever name called, who carries on the business of buying, selling, supplying or distributing goods executing works contract, transferring right to use any goods or supplying by way of or as part of any service, any goods on behalf of any principal;
(d) a non-resident dealer or an agent of a non-resident dealer, or a local branch of a firm or company or association or body of persons whether incorporated or not situated outside the State;
(e) a person who, whether in the course of business or not, sells;
(i) goods produced by him by manufacture, agriculture, horticulture or otherwise; or
(ii) trees which grow spontaneously and which are agreed to be severed before sale or under the contract of sale;
(f) a person who whether in the course of business or not:-
(1) transfers any goods, including controlled goods whether in pursuance of a contract or not, for cash or deferred payment or other valuable consideration;
(2) transfers property in goods (whether as goods or in some other form) involved in the execution of a works contract;
(3) delivers any goods on hire-purchase or any system of payment by installments;
(4) transfers the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;
(5) supplies, by way of or as part of any service or in any other manner whatsoever, goods, being food or any other articles for human consumption or any drink (whether or not intoxicating), where such supply or service is for cash, deferred payment or other valuable consideration;

Explanation: - (1) A society including a co-operative society, club or firm or an association or body of persons, whether incorporated or not) which whether or not in the course of business, buys, sells, supplies or distributes goods from or to its members for cash or for deferred payment, or for commission, remuneration or other valuable consideration, shall be deemed to be a dealer for the purposes of this Act;

Explanation: - (2) The Central Government or a State Government, which whether or not in the course of business, buy, sell, supply or distribute goods, directly or otherwise, for cash or for deferred payment, or for commission, remuneration or other valuable consideration, shall be deemed to be a dealer for the purposes of this Act.
(g) a bank or a financing institution, which, whether in the course of its business or not, sells any gold or other valuable article pledged with it to secure any loan, for the realisation of such loan amount; Explanation I: - Bank for the purposes of this clause includes a Nationalized Bank or a Schedule Bank or a Co-operative Bank;

Explanation II: - Financing Institution means a financing institution other than a bank;

21. A Del Credere Agent is someone who usually for extra remuneration undertakes the liability to guarantee the due performance of the contract by the buyer. A Del credere commission charged by him. He assumes responsibility for the solvency and performance of their contract by the vendees and thus indemnifies the Principal against any loss on account of possible default. He gives a security to the seller. The Del credere commission is the premium or price given by the principal to the Del credere agent for the guarantee given by the latter. A Del Credere agent is like any other agent bound to handover the money to the principal, as soon as he receives it or pays in advance and is distinguished from other agents.

22. For deciding the dispute, it would be useful to refer few decisions of the court as there is no definition of the expression 'Del credere' Agent in the respective Act.

23. In Gurumukh Rai Radha Krishna Vs. The State of Bihar, (1979) 25 STC 70, the Patna High court observed that a Del Credere agent as someone who, in consideration of special remuneration, undertakes that the person with whom he enters into contracts on the principal's behalf will be in a position to perform their duties. In other words, while acting as an agent on the principal's behalf, he guarantees the performance by the persons with whom he deals on behalf of his principal and makes himself liable as a surety to the extent of any default which may be committed by such persons. The liability of the Del credere agents becomes co-extensive with that of

the third parties who enter into contract through him. The Del credere agent is not the agent of those third parties.

24. In Para 6, the Court further held as follows:

> "6. The definition of the 'dealer' as it stood at the relevant time clearly states that it means any person who sells or supplies any goods, whether for commission, remuneration or otherwise. It follows from this definition, therefore, that even though the assessee was selling or supplying goods to the purchasers outside the State of Bihar, on commission basis he will be a dealer within the meaning of Section 2(c) of the Act, and the transactions in question were sales within the meaning of clause (g) of the said Section When the goods were delivered to the railway for despatch by the factories showing in the railway receipts the assessee as the consignee, delivery to the railway on the facts and in the circumstances of this case amounted as delivery to the assessee. The goods remained his property until he endorsed the railway receipts in favour of the purchasers. On such endorsements being made, they became the property of the purchasers on its transfer by the assessee to them."

25. In Chennai Polymers Pvt. Ltd., Vs. The Commercial Tax Officer in W.P.Nos.32077 and 32078 of 2004, this Court in its order pointed out that if the transaction done by the petitioner was as a Del Credere agent, they ought to have maintained and furnished particulars and records as per Rule 26 (6) (a) and (b) of the TNGST Rules, 1959 and claimed exemption thereon. There a reference was made to the decision in Parikh Metal Corporation Vs. The commercial Tax Officer, Peddunaickenpet South Circle, Chennai in W.P.Nos.19246 of 2006, wherein it was held that the mere fact that the word agent or agency was used or the words buyer and seller were used to describe the status of the parties concerned is not sufficient to lead to an irresistible inference that the parties did in fact intend that the said status would be conferred. What is required to be seen is the predominant intention of the parties as could be culled out from agreement and on facts it was found that it was a principal to principal relationship.

26. In Para 9 to Para 14 of C.P. Coal Trading and Distribution Co. of Bombay Vs. Comm. Of Sales Tax, M.P. and another, AIR 1954 Nag 148, it was observed as below:-

"9. As stated in - 'Ex-parte while', (1871) 24 LT 45 A-
'a 'del credere' agent is distinguished from other agent who is to sell according to the instructions of the principal, simply in this that he guarantees that those persons to whom he sells shall perform the contracts which he makes with them, and, therefore, if he sells at the price at which he is ordered to sell by the principal and upon the credit which he is ordered to give by the principal, then no doubt, he guarantees that the customer will pay him at that time.'
10. The later view is—
The liability of the 'del credere' agent is a contingent pecuniary liability, not a liability to perform the contract; it is a pecuniary liability to make good in an event (of) default of the buyer in respect of a pecuniary liability. It does not extend to other obligations of the contract. It does not expose the 'del credere' agent to an action to ascertain the sum due. It is limited to a contingent pecuniary liability in respect of a sum which, as between the seller and the buyer, is an ascertained sum.'
11. Per Buckley L.J. in — 'Gabriel v. Churchill and Sim', 1914-3 KB 1212 at p. 1279 (B).
12. The petitioner is not thus a 'del credere' agent. He has not the possession of the goods for the purpose of sale. Nor has he any of the rights of a mercantile agent. So both the petitioner and the Sales Tax authorities erroneously described it as a 'del credere' agent. The same description is repeated in the petition made here and in the affidavit filed in support of it. The learned Counsel for the petitioner did not realize the mistake and did not seek to amend the petition though the definition of 'del credere' agent was brought to his notice during the course of arguments. However, on the facts admitted by the parties the petitioner is no more than a guarantee broker. A broker is an agent whose ordinary course of business is to negotiate and make contracts for his principal for sale and purchase of goods and other property of which he is not entrusted with the possession or control. He has not therefore the authority to deal with the goods which a factor enjoys.
13. Nor has he the authority to sue in his own name on contracts made by him. The business of the petitioner was to bring the buyer and

seller together and its liability was to pay the price with a right to reimburse itself from the buyer. It was never placed in possession of the property, nor did the property in the goods pass to it at any time. At all material times the Colliery Control Order, 1945, was in force. Under Cl. 6 of the Order coal is delivered to a consumer at the rate fixed by the Order when a colliery owner signifies his willingness to sell direct to the consumer and an allotment is made by the Deputy Coal Controller to the consumer with his consent for such direct sale. A consumer has thus to apply for allotment of coal and the colliery owner has to express his willingness to sell direct to the consumer. If a broker is employed, a brokerage not exceeding six annas per ton may be paid by the colliery owner to the broker. The sales by the Company were thus direct to the consumers and the petitioner was a broker in the transactions. A broker is not a dealer within the meaning of Section 2(c) of the Sales Tax Act.

14. We therefore hold that on the facts admitted before us the petitioner was not carrying on the business of selling on behalf of the Company and was not a dealer within the meaning of S. 2(c) of the Act. It was therefore not liable to registration. The order dated 9-5-52 holding it a dealer under the Act is erroneous."

27. Thus, the fact that the petitioner acted as a 'Del Credere' Agent stands established and therefore, the petitioner was a dealer within the meaning of the respective enactments.

28. The definition of 'sale' in Section 2(n) of TNGST Act, 1959 and Section 2(g) of the CST, 1956 are almost identical. Both the definitions are inclusive and therefore expensive. For a transaction to come within the fold of 'sale' there should be:-

a) transfer of property of goods (other than by way of mortgage, hypothecation, charge or pledge);
b) by one person to another;
c) in the course of business; and
d) for cash, deferred payment or valuable consideration.

29. It was in the context of Explanation 5 to the definition of 'sale' in Section 2(xxi) of the Kerala General

Sales Act, 1963 as extracted above, the Honourable Supreme Court in Peninsular Traders and Another Vs. Deputy Commissioner of Sales Tax (Law), Kerala (supra), gave its decision. The definition of 'sale' did not include sale by a Del credere Agent as to compare to the definition of sale in TNGST Act, 1959.

30. As per Explanation (1-B) to Section 2(n) of TNGST Act, 1959, transfer of property involved in the purchase, sale, supply or distribution of goods through a factor, broker, commission agent or arhati, del credere agent or an auctioneer or any other mercantile agent, by whatever name called, whether for cash or for deferred payment or other valuable consideration, shall be deemed to be a purchase or sale, as the case may be, by such factor, broker, commission agent or arhati, del credere agent, auctioneer or any other mercantile agent, by whatever name called, for the purposes of this Act. Therefore, the decision of the Hon'ble Supreme Court in Peninsular Traders and Another Vs. Deputy Commissioner of Sales Tax (Law), Kerala (supra) though favourable to the petitioner is irrelevant.

31. Section 2(g) of the TNGST Act, 1959 which defines the expression 'dealer' as such persons who carry on business of buying, selling, supplying or distributing goods on behalf of any principal, or for through whom the goods are bought, sold, supplied or distributed are 'dealer' whereas under Section 2 (b) of the CST Act, 1956 such persons who carry on the business of buying, selling or supplying or distributing goods belonging to any principal whether disclosed or not would be a 'dealer'.

32. Thus, as per Explanation (1-B) to the definition of 'sale' in Section 2(n) of TNGST Act, 1959, transaction of transfer of property involving purchase, sale or distribution of goods through a 'Del Credere' Agent for cash or for deferred payment or other valuable consideration is deemed to be sale or purchase, as the case may be by such a 'Del Credere' Agent or auctioneer or any other mercantile agent, by whatever name.

33. As per explanation (1-B) to the definition of 'sale' in Section 2(n) of TNGST Act, 1959, for a transaction to qualify as 'sale' through a 'Del credere Agent' such an agent need not receive the goods in person, as the definition of 'dealer' in Section 2(g) of the TNGST Act, 1959 and Section 2 (b) of the CST Act, 1956 includes 'Del Credere agent'.

34. However, in terms of Explanation (3)(a) to Section 2 (n) of TNGST Act, 1959 for a transaction to attract the definition of 'sale' in Section 2 (n) of TNGST Act, 1959, the sale or purchase of goods shall be deemed to have taken place in the state, wherever the contract of sale or purchase have been made, if the goods are within the state:

a) in case of specific or a certain goods, at the time the contract of sale or purchase is made;

b) in 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.

35. Thus, from a cumulative reading of the definition of 'sale' in Section 2(n) of the TNGST Act, 1959 only in the case of 'ascertained goods' within the state of Tamil Nadu at the time of sale will be liable to tax in the hands of a 'Del credere' agent. In this case, it is the contention of the petitioner that the goods were transferred by their principal namely Reliance Industries Ltd directly from the State of Gujarat. This would require verification on facts.

36. The petitioner has enclosed copies of Central Excise invoice of the manufacturer namely M/s. Reliance Industries Ltd to demonstrate that the goods were directly dispatched to different buyers in the State of Tamil Nadu and the petitioner merely acted as Del Credere agent simpliciter who paid/settled the payment to M/s. Reliance Industries.

37. The question of treating a transaction as 'sale' by the petitioner would arise only if the 'goods' were available in the State of Tamil Nadu when the petitioner placed purchase orders for and on behalf of the prospective buyers on the supplier in Tamil Nadu. This is a question of fact which would be required to be ascertained only by the adjudicating authority.

38. To the extent movement of goods is stated from the State of Gujarat, the petitioner cannot be held liable to pay tax under TNGST Act, 1959. If transaction had originated from the State of Gujarat, the transaction would be an interstate sale, liable to tax in the hands of M/s Reliance Industries Ltd. and not in the hands of the petitioner in the State of Tamil Nadu. However if the supply had taken place from within the State of Tamil Nadu from M/s. Reliance Industries Ltd. and PO was placed on the branch of Reliance Industries Limited by the petitioner not only M/s. Reliance Industries Limited would be liable to pay tax but also the petitioner. The petitioner would be liable to re-sale tax under the Act.

39. In the light of the above discussion, the impugned orders dated 30.08.2007 and 30.10.2007 passed under the provisions of the Central Sales Tax Act, 1956 are quashed. In so far as the impugned orders dated 30.08.2007 and 30.10.2007 passed under the provisions of the Tamil Nadu General Sales Tax Act, 1959, are concerned, they are set aside and the cases

are remitted back to the respondent for proper determination of taxability in the light of the observations contained herein. Since the disputes pertain to the Assessment Years 2002-03 and 2003-04, the respondent Commercial Tax Officer or any other officer designated for the aforesaid purpose is requested to pass appropriate orders within a period of three months from the date of a receipt of a copy of this order in accordance with law. Needless to state, the petitioner shall be heard before such orders are passed..

40. In fine,

i. W.P.Nos.37567 & 32110 of 2007 are allowed.

ii. W.P.Nos.37568 & 32111 of 2007 are disposed.

iii. No cost.

iv. Consequently, connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar(CS-VI)

//True copy//

Sub Assistant Registrar

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To

The Commercial Tax Officer,
Trichy Road Circle,
Coimbatore.

+1cc to M/s. Hema Muralikrishnan, Advocate SR.No.9773

+2cc to Mr.Arunkurian, Advocate SR.No.10083, 10084

W.P.32110, 32111, 37567
& 37568 of 2007
and M.P.Nos.1, 1, 1 & 1 of 2007

SSD(CO)

GMY(09/07/2020)