

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On	10.03.2021
Pronounced On	22.03.2021

CORAM

THE HON'BLE MR.JUSTICE C.SARAVANAN

W.P.Nos.37341 & 37342 of 2007

and

M.P.Nos.1 & 1 of 2007

(Through Video Conferencing)

M/s.Russell Credit Ltd.,
Rep. by Sharad Jain,
Company Secretary,
90, Chamiers Road,
Chennai - 600 028.

... Petitioner in
both W.Ps.

Vs.

The Commercial Tax Officer,
Adyar I Assessment Circle,
Greenways Road,
Chennai - 600 028.

... Respondent in
both W.Ps.

Writ Petitions filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorari, calling for the records on the files of the respondent in TNGST 0862595/04-05 and TNGST 0862595/05-06 both dated 30.10.2007 and to quash the same as being without jurisdiction, violative of Article 286 of the Constitution of India, Sections 4 and 5(2) of the CST Act and Sections 3A(2)(a) and 12-C of the TNGST Act and Rules 15(6) of the TNGST Rules and also violative of Principles of Natural Justice and hence invalid and illegal.

For Petitioner : Mr.C.Manishankar, Senior Counsel
for Mr.V.Srikanth in both W.Ps.

For Respondent : Mr.Mohammed Shaffiq,
Spl. Govt. Pleader in both W.Ps.

C O M M O N O R D E R

The petitioner has challenged the impugned orders both dated 30.10.2007 passed by the respondent for the Assessment Years

2004-2005 and 2005-2006. By the impugned orders, the respondent has levied tax on the petitioner under Section 3-A of the Tamil Nadu General Sales Tax Act, 1959 on the ground that "there was transfer of right to use goods" within the State of Tamil Nadu by the petitioner in favour of the following four persons:-

- i. Sathia Match Works
- ii. Suriya Match Industries
- iii. The President Match Co.
- iv. Vasan Industries

2. The impugned orders are sought to be challenged primarily on the ground that the petitioner, a non banking financial company engaged in financing and equipment leasing to industrial consumers and the users had transferred a right to use goods, i.e. imported machineries, in favour of the above four persons during the respective Assessment Years prior to clearance of the goods from the customs barriers. Therefore, the sale was in the course of import within the meaning of Section 5(2) of the Central Sales Tax Act, 1956 and these transactions were exempted from levying tax under Section 3-A(2)(a) of the Tamil Nadu General Sales Tax Act, 1959.

3. The other grievances of the petitioner against the impugned orders are that they have been passed in gross violation of Rule 15(6) of the Tamil Nadu General Sales Tax Rules, 1959. It is submitted that as per the said proviso, before making an order of assessment, the Assessing Authority was required to obtain the concurrence of the Deputy Commissioner having jurisdiction over the petitioner if the assessment results in imposition of tax of one lakh rupees or above or results in enhancement of tax over one lakh rupees.

4. It is the case of the petitioner that these transactions are not liable to tax. It is submitted that though there was sale within the meaning of the extended definition of "sale" in Section 2(g)(iv) of the Central Sales Tax Act, 1956 and Section 2(n) of the Tamil Nadu General Sales Tax Act, 1959, it was not liable to tax since the sale took place before the goods were cleared from the customs barriers. In this connection, the learned Senior Counsel for the petitioner placed reliance on the decision of the Hon'ble Supreme Court in J.V. Gokal and Co. (Private) Ltd. and Another Vs. The Assistant Collector Sales-Tax (Inspection) and Others, AIR 1960 SC 595, wherein, the Hon'ble Supreme Court has summarised the position as far as the import-sale. In this connection, a reference was made to Paragraph No.11 of the said decision which reads as under:-

11. The legal position vis-a-vis the import-sale can be summarised thus: (1) The course of import of goods starts at a point when the goods cross

the customs barrier of the foreign country and ends at a point in the importing country after the goods cross the customs barrier; (2) the sale which occasions the import is a sale in the course of import; (3) a purchase by an importer of goods when they are on the high seas by payment against shipping documents is also a purchase in the course of import, and (4) a sale by an importer of goods, after the property in the goods passed to him either after the receipt of the documents of title against payment or otherwise, to a third party by a similar process is also a sale in the course of import.

5. The learned Senior Counsel for the petitioner further submitted that the test laid down in the context of transfer of right to use goods in decision of the Hon'ble Supreme Court in 20th Century Finance Corporation Limited Vs. State of Maharashtra, (2000) 6 SCC 12 cannot be made applicable to the facts of the present case in as much as the nature of transaction involved "deemed sale" during the course of import.

6. It is submitted that the transactions involved payment of monthly lease rental for a period of 7 years and the ownership of the machinery continued to be with the petitioner and therefore, the Bills of Entry were filed by the petitioner. It is submitted that the transactions of "deemed sale" by virtue of the Agreement were prior to the goods crossing the customs barriers. The learned Senior Counsel for the petitioner also relied upon the decision of this Court in State Trading Corporation of India Limited Vs. State of Tamil Nadu and Another, (2003) 129 STC 294 (Mad), wherein, while considering the scope of Section 5(2) of Central Sales Tax Act, 1956 read with Section 2(ab) of the Customs Act, 1962, this Court held that for a sale to be one in the course of import it has to be either one which has occasioned the import or has been effected by a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India. He further submits that in this case, before the goods were cleared, the respective operating lease agreements had been signed with the above four persons and therefore, there cannot be any levy of tax under the provisions of Tamil Nadu General Sales Tax Act, 1959.

7. The learned Senior Counsel for the petitioner also referred to the following decisions:-

- i. State of A.P. Vs. National Thermal Power Corpn. Ltd., (2002) 5 SCC 203.
- ii. State of Tamil Nadu Vs. Karnataka Bank Limited, (2012) 50 VST 93 (Mad).

iii. Tata Power Delhi Distribution Ltd. Vs. Commissioner of Sales Tax, Delhi and Others, (2016) 90 VST 1 (Del).

8. He specifically drew my attention to the decision of the Delhi High Court in Tata Power Delhi Distribution Ltd., referred to supra, wherein, the Court referred the above decision of the Hon'ble Supreme Court in 20th Century Finance Corporation Limited, referred to supra. In paragraph No.35, the Court held as follows:-

"35. As a result of the aforesaid discussion our conclusions are these:

(a) The State in exercise of power under Entry 54 of List II read with Article 366 (29A) (d) are not competent to levy sales tax on the transfer of right to use goods, which is a deemed sale, if such sale takes place outside the State or is a sale in the course of inter-State trade or commerce or is a sale in the course of import or export.

(b) The appropriate legislature by creating legal fiction can fix situs of sale. In the absence of any such legal fiction the situs of sale in case of the transaction of transfer of right to use any goods would be the place where the property in goods passes, i.e. where the written agreement transferring the right to use is executed.

(c) Where the goods are available for the transfer of right to use the taxable event on the transfer of right to use any goods is on the transfer which results in right to use and the situs of sale would be the place where the contract is executed and not where the goods are located for use.

(d) In cases where goods are not in existence or where there is an oral or implied transfer of the right to use goods, such transactions may be effected by the delivery of the goods. In such cases the taxable event would be on the delivery of goods.

(e) The transaction of transfer of right to use goods cannot be termed as contract of bailment as it is deemed sale within the meaning of legal fiction engrafted in Clause (29A) (d) of Article 366 of the Constitution wherein the location or delivery of goods to put to use is immaterial."

9. The learned Senior Counsel for the petitioner submitted that in the decision of the Hon'ble Supreme Court in State of A.P. Vs. National Thermal Power Corpn. Ltd., (2002) 5 SCC 203, the Court considered its earlier decision in 20th Century Finance Corpn. case referred to supra, and concluded that a situs of sale so as to create territorial nexus attracting applicability of tax legislation enacted by any State Legislature and tax an inter-state sale in breach of Section 3 of the CST Act read with Articles 286(2) and 269(1) and (3) of the Constitution cannot be justified. He further submitted that the Hon'ble Supreme Court in the above case held as follows:-

29. In 20th Century Finance Corpn. Case [(2000) 6 SCC 12] the Constitution Bench by reference to the definition of "tax on the sale or purchase of goods" [which too has been inserted as clause (29-A) in Article 366 by the Sixth Amendment] opined that the situs of sale can be fixed either by the appropriate legislature or by Judge-made law and no settled principles for determining situs of sale can be laid down. Further, the State Legislature cannot by law, treat sales outside the State and sales in the course of import as "sales within the State" by fixing the situs of sales within its State in the definition of sale, as it is within the exclusive domain of the appropriate legislature i.e. Parliament to fix the location of sale by creating legal fiction or otherwise. The majority has clearly opined that the State where the goods are delivered in the transaction of inter-State sale, cannot levy a tax on the basis that one of the events in the chain has taken place within the State; so also where the goods are in existence and available for the transfer of right to use, there also that State cannot exercise power to tax merely because the goods are located in that State. Then it was observed that in case where goods are not in existence or where there is an oral or implied transfer of the right to use the goods, such transactions may be effected by the delivery of the goods in which case the taxable event would be on the delivery of goods. However, we are dealing with the case of electricity as goods, the property whereof, as we have already noted, is that the production (generation), transmission, delivery and consumption are simultaneous, almost instantaneous. Electricity as goods comes into existence and is consumed simultaneously; the event of sale in the sense of transferring property in the goods merely intervenes as a step between generation and consumption. In such a case when the generation

takes place in one State wherefrom it is supplied and it is received in another State where it is consumed, the entire transaction is one and can be nothing else excepting an inter-State sale on account of instantaneous movement of goods from one State to another occasioned by the sale or purchase of goods, squarely covered by Section 3 of the CST Act.

10. The learned Special Government Pleader appearing for the respondent submitted that as far as the objection to the impugned proceedings under Rule 15(6) of the Tamil Nadu General Sales Tax Rules, 1959 is concerned, the issue is squarely covered against the petitioner in terms of the decision of this Court in M/s.Ultra Chem (P) Ltd. Vs. The Commercial Tax Officer and Another, in W.P.Nos.14817 to 14820 of 2007, order dated 13.12.2016.

11. The learned Special Government Pleader further submitted that whether the sale took place in the course of import or not within the meaning of Section 5(2) of the Central Sales Tax Act, 1956 is a mixed question of fact and law and therefore, this Writ Petition is liable to be dismissed in the light of the decision of the Hon'ble Supreme Court in Zunaid Enterprises and Others Vs. State of Chhattisgarh and Others, (2012) 4 SCC 211. In this connection, a reference was drawn to Paragraph No.7, wherein, in the context of inter-State sales, the Court observed as under:-

7. At the outset, we intend to note that in these types of cases, the High Court ought not to have entertained the writ petitions filed under Article 226 of the Constitution. We say so for the reason, that, whether a sale originating in a State is an inter-State sale or not is essentially a question of fact to be determined by the authorities under the Act, since it involves the application of the provisions of Sections 3, 5, 6 and 9(1) of the Act to the facts established and hence, it will be a mixed question of law and fact. The facts are required to be brought to the notice of the assessing authority by the appellants and it is for the assessing authority to come to a conclusion, based on those facts whether a particular transaction is intra-State sales which is exigible to the taxes under the VAT Act or inter-State sales, as envisaged under Section 3 of the Act read with Section 6 of the charging provisions therein. It is after such adjudication, the matter can travel from one stage to the other as provided under the Act.

12. The learned Special Government Pleader also submitted that there is no dispute that there is a transfer of right to use as explained by the Hon'ble Supreme Court in State of Andra Pradesh Vs. Rashtriya Ispat Nigam Ltd., (2002) 3 SCC 314, in Bharath Sanchar Nigam Ltd., and Another Vs. Union of India and Others, (2006) 3 SCC 1 and in Aggarwal Brothers Vs. State of Haryana, (1999) 9 SCC 182.

13. It is submitted that the only issue to see is whether the transfer took place in the course of import. It is submitted that there is no endorsement either in Bills of Lading or Bills of Entry in favour of the leasee. Therefore, it cannot be assumed that there was a sale in the course of import within the meaning of Section 5(2) of the Central Sales Tax Act, 1956. He further submitted that Bills of Entry were also filed by the petitioner themselves and the customs duty was also paid by the petitioner themselves and therefore cannot be held that there was a sale in the course of import within the meaning of the aforesaid Section. He further submitted that the operation agreements were signed in Chennai and therefore the sale would attract local sale tax under Section 3-A of the TNGST Act, 1959. The learned Special Government Pleader for the respondent therefore submits that this Writ Petition was misconceived and was liable to be dismissed.

14. By way of rejoinder, the learned Senior Counsel for the petitioner submitted that there are no disputed questions of fact and therefore, it would be unfair to relegate the petitioner at this distant point of time to work out the remedy either before the Appellate Assistant Commissioner or to remit the case back to the respondent. He further submits that the respondent has not questioned the date of the respective agreements with the leasee to whom there was a "transfer of the right to use" and therefore, the "sale" falls within the meaning of Section 5 of the Central Sales Tax Act, 1956 and consequently exempted from the tax under Section 3 of the Tamil Nadu General Sales Tax Act, 1959.

15. I have considered the arguments advanced by the learned Senior Counsel for the petitioner and the learned Special Government Pleader for the respondent.

16. Since the dispute pertains to the Assessment Years 2004-2005 and 2005-2006 and since these Writ Petitions are pending considerably for a long period of 13 years before this Court, the Court is inclined to exercise its jurisdiction under Article 226 of the Constitution of India and therefore takes up the case for a final disposal on merits even though the petitioner may have an alternate remedy before an Appellate Authority under the

provisions of the Tamil Nadu General Sales Tax Act, 1959.

17. In the facts of the present case, the respective Operating Lease Agreements with the respective buyers are on a stamp paper purchased in Chennai indicating that the agreements were signed at Chennai on the date specified therein.

18. The dates of the respective Agreements are after the imported goods sailed from South Korea as is evident from respective Bills of Entries. They were signed before the respective Bills of Entry were filed by the petitioner for clearing the imported goods. The details of the respective Bills of Entry and Bills of Lading are as follows:-

Sl. No.	Bill(s) Lading date	Agreement(s) date	Bill(s) of Entry date
1	27.06.2003	23.07.2003	28.07.2003
2		23.07.2003	
3	14.02.2004	20.02.2004	23.03.2004
4		23.02.2004	

19. In this case, it is not the case of the petitioner that the sale occasioned during import of goods. On the other hand, it is the case of the petitioner that the sales were effected before the goods crossed the customs barriers and therefore not taxable in terms of Section 5(2) of the Central Sales Tax Act, 1956.

20. According to the petitioner, before the goods covered by the respective Bills of Entry were filed for their clearance and were cleared for Home Consumption, the petitioner entered into the respective Operating Lease Agreements with the respective buyers. Therefore, the transactions were outside the purview of levy in view of the 2nd limb of Section 5(2) of Central Sales Tax Act, 1956.

21. It is submitted that the respective Bills of Entry were filed by the petitioner as an agent of the users with whom it had entered into the Operating Lease Agreements on transfer of the right to use basis of the imported goods.

22. There is no dispute that the transaction involved "transfer of the right to use". The only point for determination in the present case is whether such transfer of the right to use goods can be said to have taken place in the course of import within the meaning of Section 5(2) of the Central Sales Tax Act, 1956 or not and therefore outside the purview of levy or whether

the respondent was justified in demanding tax under Section 3-A of the Tamil Nadu General Sales Tax Act, 1959?

23. Before dealing with the provisions of the Central Sales Tax Act, 1956, it will be useful to refer to scheme under the Constitution. Under Article 286(1) of the Constitution of India, there is a restriction on imposition of tax on sale or purchase of goods where "sale or purchase" takes place outside the State or in the course of the import of the goods into, or export of the goods out of, the territory of India.

24. As per Article 286(2) of the Constitution of India, the Parliament may, by law, formulate the principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in Clause (1) to Article 286 of the Constitution of India. Thus, Sections 3, 4 & 5 of the Central Sales Tax Act, 1956 were devised to satisfy the above requirements of Article 286(2) of the Constitution of India.

25. The 46th Amendment to the Constitution however expanded the definition of tax on "sale and purchase" by inserting Clause (29A) to Article 366 of the Constitution of India. Tax on the "transfer of the right to use" of any goods for any purpose (whether or not for a specified period) for cash, differed payment or other valuable consideration was made liable to tax. Concept of deemed sale was thus introduced under the Act.

26. As a sequitur, Article 286(3) of the Constitution was also amended to read as follows:-

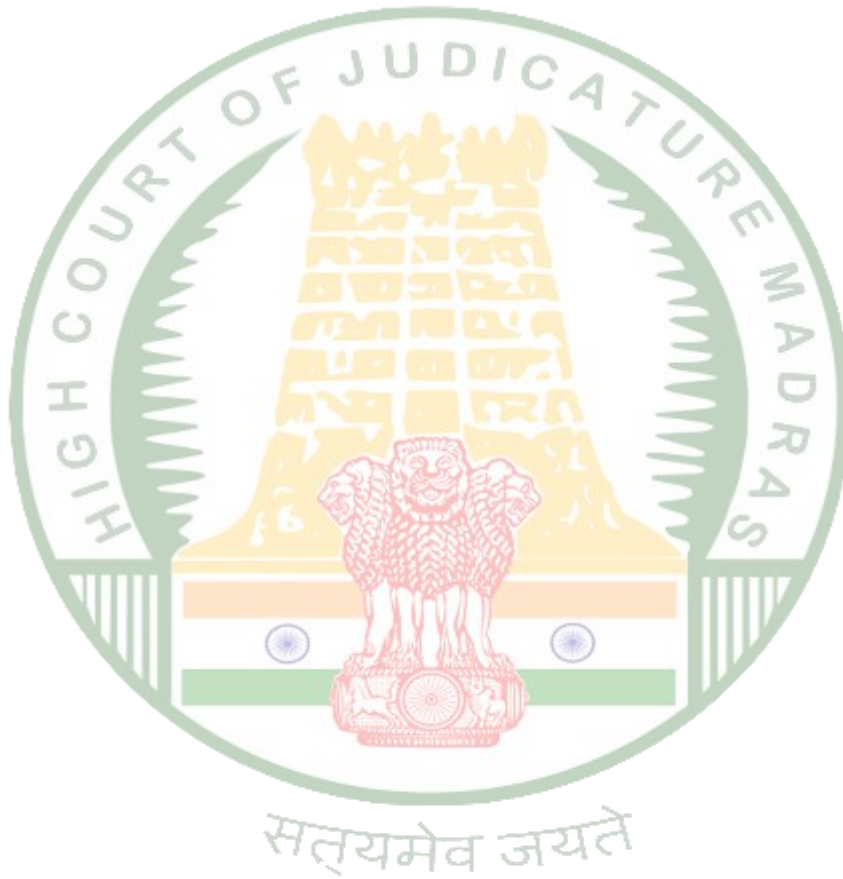
"(3) Any law of the State shall, insofar as it imposes or authorizes the imposition of,-

- (a) a tax on the sale or purchase of goods declared by Parliament by law to be of special importance in inter-state trade or commerce; or
- (b) a tax on the sale or purchase of goods, being a tax of the nature referred to in sub-clause (b), sub-clause
- (c) or sub-clause (d) of clause (29-A) of article 366

be subject to such restrictions and conditions in regard to the system of levy, rates and other incidents of the tax as the Parliament may by law specify.

27. Simultaneously, various State Enactments were also

enacted their laws to implement the above restrictions in the Constitution of India. Thus, State had to give way to the law of the Parliament. In Tamil Nadu, while a new definition of sale in 2(n) of the Tamil Nadu General Sales Tax Act, 1959 was introduced and a new charging provision in the form of Section 3-A was also introduced. Section 3-A of the Tamil Nadu Sales Tax Act, 1959 incorporated the restriction contained in Article 286 (3) as substituted by the 46th Amendment to the Constitution of India. To give effect to the restriction under Article 286(3) (b), Sub-Section 2(a) to Section 3-A was incorporated. These provisions read as under:-



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Section 3-A	Section 2(n)
Levy of tax on right to use any goods. (1) (2) The taxable turnover of the dealer, of the business of transfer of the right to use any goods for any purpose, shall, on and from the 1st day of April 1986 be arrived at after deducting the following amounts from the total turnover of that dealer: - (a) all amounts involved in respect of goods involved in the business of transfer of the right to use any goods for any purpose, in the course of export of the goods out of the territory of India or in the course of import of the goods into the territory of India or in the course of inter-State trade or commerce; (b) all amounts for which any goods specified in the First Schedule or Second Schedule are purchased from registered dealers liable to pay tax under this Act and used in the same form in the transfer of the right to use such goods for any purpose; and (c) all amounts relating to sale of any goods involved in the business of transfer of the right to use, which are specifically exempted from tax under any of the provisions of this Act.	Section 2(n) "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 - (i) (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;

28. As per Sub-Section (2)(a) to Section 3-A of the Tamil Nadu General Sales Tax Act, 1959, taxable turnover of a dealer who has transferred the "right to use any goods" for any

purpose, shall, on and from the first day of April 1986, be arrived after deducting all amounts involved in respect of goods involved in the business of transfer of the right to use any goods for any purpose, in respect of export of the goods out of the territory of India or in the course of import of goods into territory of India or in the course of inter-State trade or commerce.

29. Thus, by a statutory design, a deduction for determining the taxable turnover in the case of transfer of the right to use goods has been provided to exclude all expenses:-

- a) incurred in the course of export of the goods out of the territory of India; or
- b) incurred in the course of import of the goods into the territory of India; or
- c) incurred in the course of inter-state trade or commerce

30. Likewise, an exporter also cannot be asked to pay tax on the expenses incurred in the transaction involving "transfer of right to use" of goods where such goods are exported to a user situated outside the country. An importer who imports goods and effects transfer of right to use or effects such transaction in the course of inter-state trade or commerce is also given abatement.

31. Though the 46th Amendment to the Constitution of India was of the year 1982, the Central Sales Tax Act, 1956 was amended only in the year 2002 with effect from 11.05.2002. It was synced with the expansion introduced by the 46th Amendment to the Constitution of India under Clause (29-A) to Article 366 of the Constitution of India. However, no corresponding amendment to Section 5(2) of the Central Sales Tax Act, 1956 was made. The mode for claiming exemption under Section 5(2) of the Central Sales Tax Act, 1956 continues to be same. It is by way of "documents of transfer title of the goods" before the goods cross the customs barriers.

32. The 46th Amendment to the Constitution did not confer on the State the power to levy tax on transactions involving sale in the course of import. In Paragraph No.30, in Builders Association of India Vs. Union of India (1989) 2 SCC 645 the Hon'ble Supreme Court held that if in the course of import while execution a work, a transfer of property in goods takes place, the State would have no power to levy sales tax on such contract for the purpose of execution of the work contract. Para 30 is reproduced below:

The 46th Amendment has no bearing on the location of the sale. It does not deem an outside sale to be an inside sale. It does not confer on the States the power to tax sales outside the State. Therefore, if in the process of executing a works contract, a transfer of property in the goods takes place outside the State, the State would have no power to levy sales tax on such a transfer. The 46th Amendment does not deem an inter-State sale to be an intra-State sale. It does not confer on the State the power to tax inter-State sales. Therefore, if in the process of executing a works contract a transfer of property in goods takes place in the course of inter-State sale, the State would have no power to levy sales tax on such a transfer. The 46th Amendment does not confer on the State the power to levy sales tax on a sale in the course of import. Therefore, if in the process of executing a works contract, a transfer of property in goods takes place in the course of import, the State would have no power to levy sales tax on such transfer. The price of goods supplied by a person who has assigned the contract for the purpose of executing a works contract cannot be treated as a part of the taxable turnover.

33. The Court further held that "It may be that by virtue of sub- clause 3 of Article 286, it is open for the Parliament to impose some kind of restrictions or conditions which are not generally applicable to all kinds of sale. That, however cannot make other parts of Article 286 inapplicable to the transaction which was deemed to be sales under Article 366 (29-A) of the Constitution.

34. In Paragraph No.32, the Court categorically took a view that all transfers, deliveries and supplies of goods referred in Sub-Clause (a) to Sub-Clause (f) of Clause (29-A) of Article 366 of the Constitution are subject to the restrictions and conditions mentioned in Clause (1), Clause (2) and Sub-Clause (a) of Clause (3) of Article 286 of the Constitution of India. The Court specifically considered "work contract" while making the above referred observations.

35. It further held that the transfer and deliveries that take place under Sub-Clauses (b), (c) and (d) of Clause (29-A) of Article 366 of the Constitution are subject to an additional restriction mentioned in sub- clause (b) of Article 286 (3) of

the Constitution of India.

36. However, it must be remembered that in the case of "works contract" the goods actually gets amalgamated with the work being executed and therefore such deemed sale as was considered in Paragraph No.30 in Builders Association of India case referred to supra can be understood.

37. Where however like in the present case there is neither a transfer of possession nor ownership or effective contract before the clearance from the customs barrier, difficulty arises as to whether in a transaction there can be a "deemed sale".

38. In 20th Century Finance Corpn. Ltd. Vs. State of Maharashtra, (2000) 6 SCC 12, the Court held as follows:-

"28. No authority of this Court has been shown on behalf of the respondents that there would be no completed transfer of right to use goods unless the goods are delivered. Thus, the delivery of goods cannot constitute a basis for levy of tax on the transfer of right to use any goods. We are, therefore, of the view that where the goods are in existence, the taxable event on the transfer of the right to use goods occurs when a contract is executed between the lessor and the lessee and situs of sale of such a deemed sale would be the place where the contract in respect thereof is executed. Thus, where goods to be transferred are available and a written contract is executed between the parties, it is at that point situs of taxable event on the transfer of right to use goods would occur and situs of sale of such a transaction would be the place where the contract is executed."

39. The Court in 20th Century Finance Corpn. Ltd. Vs. State of Maharashtra, (2000) 6 SCC 12, further ruled as follows:-

"35. (c) Where the goods are available for the transfer of right to use, the taxable event on the transfer of right to use any goods is on the transfer which results in right to use and the situs of sale would be the place where the contract is executed and not where the goods are located for use.

(d) In cases where goods are not in existence or where there is an oral or implied transfer of the right to use goods, such transactions may be effected by the delivery of the goods. In such

cases the taxable event would be on the delivery of goods."

40. Though, not stated the observation in Paragraph No.35 extracted above is based on the language in Section 4 of the Central Sales Tax Act, 1956, which reads as under:-

Section 4: When is a sale or purchase of goods said to take place outside a State.

(1) Subject to the provisions contained in section 3, when a sale or purchase of goods is determined in accordance with Sub-Section (2) to take place inside a State, such sale or purchase shall be deemed to have taken place outside all other States.

A sale or purchase of goods shall be deemed to take place inside a State, if the goods are within the State--

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

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

Explanation.--Where there is a single contract of sale or purchase of goods situated at more places than one, the provisions of this sub-section shall apply as if there were separate contracts in respect of the goods at each of such places.

41. Under section 2(4) of the Sale of Goods Act, 1930, "documents of title to goods" includes a bill of lading, dock warrant, warehouse keeper's certificate, wharfingers' certificate, railway receipt, multimodal transport document, warrant or order for delivery of the goods and any other document used in the ordinary course of business as proof of the possession or control of the goods, or authorising or purporting to authorise, either by endorsement or by delivery, the processor of the document to transfer or receive goods thereby represented.

42. Since the petitioner continued to be the real owner of the goods imported under the arrangement as per the respective Operative Lease Agreements, it was quite natural for the petitioner to have filed the respective Bills of Entry and paid the customs duty on the imported goods. The petitioner also transported the goods to the respective factories of the respective user with whom it had entered to operative lease agreement.

43. Though under the Sale of Goods Act 1930, the definition of sale is restricted, it nevertheless recognizes any other document used in the ordinary course of business as a proof of possession or control of the goods or authorising or purporting to authorise, either by endorsement or by delivery, the processor of the document to transfer to receive the goods thereby represented. The expression "crossing of the customs frontiers of India" has been defined in Section 2(ab) of the Customs Act, 1962.

44. In the context of "transfer of right to use of goods", the question of such endorsement of the document is not required as title to the imported goods continues to vest with the owner and such owner merely transfers possession and effective control to the user. Therefore, transfer of title to the document cannot be countenanced for determining the transfer of right to use for the purpose of Section 5(2) of the Central Sales Tax Act, 1956 which reads as under:-

5. When is a sale or purchase of goods said to take place in the course of import or export.-

(1)

(2) A sale or purchase of goods shall be deemed to take place in the course of the import of the goods into the territory of India only if the sale or purchase either occasions such import or is effected by a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India.

45. In K.Gopinathan Nair and Others Vs. State of Kerala, (1997) 10 SCC 1, the Hon'ble Supreme Court held as under:-

14. In the light of the aforesaid settled legal position emerging from the Constitution Bench decisions of this Court the following propositions clearly get projected for deciding whether the concerned sale or purchase of goods can be deemed to take place in the course of import as laid down by Section 5(2) of the Central Sales Tax Act:

(1) The sale or the purchase, as the case may be, must actually take place.

(2) Such sale or purchase in India must itself occasion such import, and not vice versa i.e. import should not occasion such sale.

(3) The goods must have entered the import stream when they are subjected to sale or purchase.

(4) The import of the goods concerned must be effected as a direct result of the sale or purchase transaction concerned.

(5) The course of import can be taken to have continued till the imported goods reach the local users only if the import has commenced through the agreement between foreign exporter and an intermediary who does not act on his own in the transaction with the foreign exporter and who in his turn does not sell as principal the imported goods to the local users.

(6) There must be either a single sale which itself causes the import or is in the progress or process of import or though there may appear to be two sale transactions they are so integrally interconnected that they almost resemble one transaction so that the movement of goods from a foreign country to India can be ascribed to such a composite well-integrated transaction consisting of two transactions dovetailing into each other.

(7) A sale or purchase can be treated to be in the course of import if there is a direct privity of contract between the Indian importer and the foreign exporter and the intermediary through which such import is effected merely acts as an agent or a contractor for and on behalf of the Indian importer.

(8) The transaction in substance must be such that the canalising agency or the intermediary agency through which the imports are effected into India so as to reach the ultimate local users appears only as a mere name lender through whom it is the local importer-cum-local user who masquerades.

46. In a transaction involving a "transfer of right to use goods", the owner exercises neither "possession" nor "effective control" over the goods so transferred to the user. If the owner does exercise such right, it would not be a "sale" but a mere transfer of possession without transfer of effective control and therefore, there is no transfer of right to use [See BSNL Vs. UOI, (2006) 3 SCC 1].

47. The question therefore to be answered in the present writ petition is whether levy of tax under Section 3-A of the Tamil Nadu General Sales Tax Act, 1959 is attracted in view of the expanded definition of "sale" in Section 2(g)(iv) of the Central Sales Tax Act, 1956 as amended with effect from 11.05.2002 vide Act 20 of 2002 and Section 2(n)(iv) of the Tamil Nadu General Sales Tax Act, 1959 as amended on 29.05.1984 with effect from 01.04.1986 or whether the transaction was exempted under Section 5(2) of the Central Sales Tax Act, 1956.

48. Under Section 5(2) of the Central Sales Tax Act, 1956, a sale or purchase of goods shall be deemed to take place in the course of import of the goods into the territory of India only if the sale or purchase either occasions the import of the goods or is affected by a transfer of the documents of title to the goods before the goods have crossed the customs frontiers of India.

49. Only such sales are exempted from the sales levy under Central Sales Tax Act, 1956 in view of the restriction contained in Article 286(1) of the Constitution of India and outside the purview of Tamil Nadu General Sales Tax Act, 1959.

50. In Coffee Board, Bangalore Versus Joint Commercial Tax Officer, Madras 1969 (3) SCC 349, the Hon'ble Supreme Court upheld the decision of this High Court and held that unless the transaction are inextricably bound up with the particular export, it cannot be said to be sale in the course of export. If no particular export was in sight, the sale by the Coffee Board cannot go beyond the description of sale for export.

51. The Court there held that the sale in the course of export comprises of (a) sale; (b) the goods must be exported; and (c) the sale must be a part and parcel of the export. It held that the sale must be integral part of the export transaction before it can be said to have occasioned a particular export.

52. There, the court held that the first sale was by Coffee Board as seller to the export promoter. Thereafter, a separate sale by the export promoter to an overseas buyers. It observed

that the Coffee Board did not have any inkling about the 2nd sale when the 1st sale took place. The Coffee Board Sale was a having no connection with the second sale which was in the course of export.

53. The Hon'ble Supreme Court in State of Maharashtra Vs. Embee Corporation Bombay, (1997) 7 SCC190, the Court held that, "It is almost settled by numerous decisions of the Supreme Court that the expression "sale occasions import" is to be interpreted in the same manner in which the expression "occasions the movement of goods" occurring in Section 3(a) of the Act has received interpretation. In other words, the expression "sale occasions import" has to be given the same meaning which the expression "occasions the movement of goods" has received by the courts.

54. If the test in 20th Century Finance Corpn. Ltd. Vs. State of Maharashtra, (2000) 6 SCC 12 is applied, there is no difficulty in concluding that the deemed sale had taken place at Chennai. Since the goods were within the bounds of the customs barriers when the respective Operative Lease Agreements were signed and it could be argued that they were exempted transaction under Section 5(2) of the Central Sales Tax Act, 1956.

55. In BSNL Vs. Union of India, (2006) 3 SCC 1, the Hon'ble Supreme Court held as follows:-

75. In our opinion, the essence of the right under Article 366(29-A)(d) is that it relates to user of goods. It may be that the actual delivery of the goods is not necessary for effecting the transfer of the right to use the goods but the goods must be available at the time of transfer, must be deliverable and delivered at some stage. It is assumed, at the time of execution of any agreement to transfer the right to use, that the goods are available and deliverable. If the goods, or what is claimed to be goods by the respondents, are not deliverable at all by the service providers to the subscribers, the question of the right to use those goods, would not arise.

97. To constitute a transaction for the transfer of the right to use the goods, the transaction must have the following attributes:
there must be goods available for delivery;
there must be a consensus ad idem as to the identity of the goods;
the transferee should have a legal right to use

the goods—consequently all legal consequences of such use including any permissions or licences required therefor should be available to the transferee;

for the period during which the transferee has such legal right, it has to be the exclusion to the transferor—this is the necessary concomitant of the plain language of the statute viz. a “transfer of the right to use” and not merely a licence to use the goods;

having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others.

56. In case of regular sale other than those involving deemed sale under the extended definition of sale in Section 2 (g) of the Central Sales Tax Act, 1956 and 2(n) of the Tamil Nadu General Sales Tax Act, 1959 there is no difficulty in applying Section 5(2) of the Central Sales Tax Act, 1956.

57. As per the decision of the Hon’ble Supreme Court in BSNL Vs. Union of India, (2006) 3 SCC 1, actual delivery of the goods may not be necessary for effecting the transfer of the right to use the goods but the goods must be available at the time of transfer and must be deliverable and delivered at some stage.

58. If the above principles in BSNL Vs. Union of India, (2006) 3 SCC 1 are applied to the facts of the present case, the petitioner may contend that the extended definition of sale, viz. transfer of the right to use goods took place before actual clearance and there cannot be any levy of tax under Section 3-A of the Tamil Nadu General Sales Tax Act, 1959 as the transaction was exempted under Section 5(2) of the Central Sales Tax Act, 1959.

59. It is assumed, at the time of execution of any agreement to transfer the right to use, that the goods are available and deliverable. Thus, in case of transfer of the right to use, as in this case, irrespective of the actual delivery, at a later point, the “deemed sale” had taken place at Chennai outside the customs barriers.

60. It should be remembered that the “transfer of the right to use” implies transfer of the possession and effective control from the owner to the user. That would determine whether there was any “deemed sale” within the extended definition of sale. On the date of import, admittedly, there was not transfer possession or effective control though the Hon’ble Supreme Court in 20th Century Finance Corpn. Ltd. Vs. State of Maharashtra,

(2000) 6 SCC 12, has held that the situs of the sale would be the place where the contract is executed and not where the goods are located for use in the case of ascertained goods.

61. The petitioner continued not only to have legal ownership over the imported goods but also effective control and possession with it. The respective Operating Lease Agreements gave a right to the lessee to have possession and delivery with them from the petitioner.

62. Even if the agreements for "transfer of the right to use" was signed before the import, there can be only partial exemption from payment of tax under Section 5(2) of the Central Sales Tax Act, 1956 to the extent the petitioner may have received lease rent prior to the actual import and clearance from the Customs Barriers.

63. After the import, the petitioner will be liable to pay the sales tax to authority on the future rents / lease rentals under the agreements. There cannot be a comparison between the "sale" and "deemed sale" and "works contract" for levy of the tax under the respective enactments. If argument of the petitioner is accepted, even though the "transfer of the right to use" continues after the actual import and lease rents are paid in pursuance of the agreements in State, no tax is payable though the taxable event recur during the period of lease.

64. The three citations given by the learned Senior Counsel for the petitioner was based on decision of the Hon'ble Supreme Court in 20th Century Finance Corporation Ltd case referred to supra. In State of AP Vs. National Power Corporation Ltd and others, (2002) 5 SCC 203, the Hon'ble Supreme Court was concerned with inter-state sale of electricity between national thermal Power Corporation Ltd. and Electricity Boards of different States like State of Tamil Nadu, State of Kerala, State of Karnataka and State of Goa.

65. The Hon'ble Supreme Court in State of A.P. Vs. National Power Corporation Ltd. and others, (2002) 5 SCC 203, merely reiterated the principle that if there is no contract of sale preceding the movement of goods, obviously the movement cannot be attributed to the contract of sale. Similarly, if the transaction of sales stands completed within the state and the movement of goods takes place thereafter, it would obviously be independently of the contract of sale and necessarily by or on behalf of the purchaser alone and, therefore the transaction would not be having an inter-state element. Commenting on the decision of the Hon'ble Supreme Court in 20th century Finance Corporation Ltd case referred to supra, it was reiterated that the "situs" of the sale or purchase is wholly immaterial as regards the inter-state trade or commerce. In view of Section 3

of the Central Sales Tax Act, 1956, all that have to be seen are whether the sale or purchase (a) occasions the moment of the good from one state to another; or (b) is affected by transfer of documents of title to the goods during their movement from one state to another. If the transaction of sale satisfies any one of the two requirements, it shall be deemed to be a sale or purchase of the goods in the course of inter-state trade or commerce by virtue of Article 269 and 286 of the Constitution of India and shall be beyond the legislative competence of the State to tax without regard to the fact whether such a provision is paid out by the description of legislative entry in the Seventh Schedule or not.

66. The Court in *State of A.P. Vs. National Power Corporation Ltd and others*, (2002) 5 SCC 203, further held that the State Legislature cannot by law, declared sales outside the State and sales in the course of import as "sales within the State" by fixing the situs of sale by creating legal fiction or otherwise. It further observed that the majority in 20th century *Finance Corporation Ltd case* referred to supra has clearly opined that the State where the goods are delivered in the transaction of inter-state sale, cannot levy a tax on the basis that one of the events in the chain has taken place within the State; so also where the goods are in existence and available for the transfer of rights to use, there are also that state cannot exercise power to tax merely because the goods are located in that state.

67. In Para 31, the Court held as under:-

31. Though it may be permissible to fix the situs of sale either by appropriate State legislation or by Judge-made law as held by the majority opinion in 20th Century Finance Corp'n. case [(2000) 6 SCC 12] we would like to clarify that none of the two can artificially appoint a situs of sale so as to create territorial nexus attracting applicability of tax legislation enacted by any State Legislature and tax an inter-State sale in breach of Section 3 of the CST Act read with Articles 286(2) and 269(1) and (3) of the Constitution. No State legislation, nor any stipulation in any contract, can fix the situs of sale within the State or artificially define the completion of sale in such a way as to convert an inter-State sale into an intra-State sale or create a territorial nexus to tax an inter-State sale unless permitted by an appropriate Central legislation. But this is exactly what the definition of "consumer" in

Section 2(a) of the M.P. Electricity Duty Act, 1949 has done. The definition of consumer has been artificially extended to include any person who receives electrical energy (without regard to its consumption) and also to include a person who, receiving the electrical energy in bulk, forwards it onwards for distribution, (without regard to the fact whether it is transmitted outside the State and whether the electricity is or is not consumed within the State). The same definition has been adopted in the M.P. UpkarAdhiniyam, 1981. This definition of consumer shall have to be read down as including within it only such persons who receive the electricity for consumption or distribution for consumption within the State. Without such reading down, the definition of "consumer" would be rendered ultra vires of Articles 286 and 269 of the Constitution read with Section 3 of the Central Sales Tax Act, 1956.

68. While making the above observations, it has perhaps not taken note of the views expressed. In Mafatlal Industries Ltd. and Others v. Union of India and Others, 1997 (89) E.L.T. 247 (S.C.) : (1997) 5 SCC 536, it has been held as under:-

"...In the matter of taxation laws, the court permits a great latitude to the discretion of the legislature. The State is allowed to pick and choose districts, objects, persons, methods and even rates for taxation, if it does so reasonably. The courts view the laws relating to economic activities with greater latitude than other matters.

69. The Hon'ble Supreme Court while giving the above view followed a well settled principle of law.

70. The Hon'ble Supreme Court in Tamil Nadu Kalyana Mandapam Assn. Vs. Union of India, 2004 (167) E.L.T. 3 (S.C.) has held that levy of service tax on a particular kind of service could not be struck down on the ground that it does not confirm to a common understanding of word "service" so long as it does not transgress any specific restriction contained in the Constitution. Though observations of the Hon'ble Supreme Court in State of AP Vs. National Power Corporation Ltd and others, (2002) 5 SCC 203 were invited, in my view, the decision of the Hon'ble Supreme Court in State of A.P. Vs. National Thermal Power Corporation Ltd., (2002) 5 SCC 203 does not further the case of the petitioner.

71. Similarly, the decision of the Delhi High Court in Tata

Power Distribution Ltd Vs. Commissioner of Sales Tax, (2016) 90 VST 1 (Delhi) does not further the case of the petitioner. It merely reiterates the law laid down by the Hon'ble Supreme in 20th Century Finance Corporation Ltd. case referred to supra.

72. The decision of a Division Bench of this Court in State of Tamil Nadu Vs. Karnataka Bank Ltd., (2012) 50 VST 93 (Mad) which is closer to the facts of the present case cannot be applied. The respondent bank entered into an agreement with Hindustan Power Plant Limited, Hosur, for importing and leasing of machinery on rental basis. The master lease agreement was entered into on April 17, 1998. There afterwards, the respondent bank ordered for machinery as per the specification of the company-Hindustan Power Plant Limited from the foreign manufacturer/supplier in Japan. While the goods were in transit, the assessee and the company-Hindustan Power Plant Limited entered into a supplementary lease agreement on July 31, 1998, which is stated to be part of the master lease agreement dated April 17, 1998. There, on behalf of the Commercial Tax Department, it was contended that the delivery taking place inside the State and therefore the question of the respondent having the benefit to deduction under Section 3A(2)(a) of the Tamil Nadu General Sales Tax Act, 1959 does not arise. It was concluded that under the supplementary lease agreement, a reference was made to invoice as well as a reference to the master lease agreement. The Court concluded that there was an inextricable link between the Master Agreement and the supplementary lease agreement on the one hand and the import of specific goods based on which the purchase order was placed. The various documents were placed by the Bank particularly the Bill indicating the name of the user as Hindustan Power Plant Ltd. which showed that the import was linked to the purchase order placed on behalf of the said company. It was held that thus, but for the purchase order placed by Hindustan Power Plant Ltd and latter approaching the respondent Bank for financing the import, the question of the bank ever placing any purchase order with the Japanese manufacturers to supply did not arise. The purchase order was placed by the bank with the foreign supplier who in turn showed that the purchase order of Hindustan Power Ltd. with the Japanese firm and import itself was in connection with the Master Agreement between the Bank and the lessee. There, it was concluded that the receipt of rental by the Bank was on account of the transaction in the course of import and was not liable to tax by the State.

73. Though the relief has been granted by the Court in the said case to Karnataka Bank Ltd, I am unable to apply the said ratio to the facts of the present cases. The facts of the present cases are clear. The imports were made by the petitioner itself in its own name. The Bills of Lading were in the name of

the petitioner itself. The Bills of Entry for clearing the goods were also in the name of the petitioner. The only intervening event was the execution of four Operating Lease Agreements between the petitioner and the four lessees when the imported goods were allegedly in transit before being cleared from the customs barriers. As a concept, transfer of right to use during the course of import cannot be applied to the facts of the present case inasmuch as the petitioner not only continued to exercise both effective control but also possession over the imported machinery till they were actually delivered at a later point of time. The petitioner also continued to receive lease rental thereafter till the termination of lease period. Therefore, it cannot claim exemption under Section 5(2) of the Central Sales Tax Act, 1956.

74. The fact that the petitioner is stated to have acted as an agent of the lessee at the time of import under the respective Operating Lease Agreements is of no relevance as the petitioner neither transferred the possession nor effective control to the lessee till the actual delivery and also continued to receive lease rentals during the currency of the respective Operating Lease Agreements. Therefore, the petitioner cannot claim exemption under Section 5(2) of the Central Sales Tax Act, 1956 for the entire period.

75. Further, it should be noted that in the case of ordinary "sale", the transaction between the seller and the buyer ends with a single transaction. However, in the case of lease, where there is no transfer of ownership but only a transfer of possession and effective control. Tax is to be paid on the transaction for the period upto the period of lease under the Agreements. Each payment of lease rent would amount to extended definition of sale. Therefore, while the petitioner is entitled for deduction of lease rental received period upto the date of actual clearance of the imported goods from the customs barriers under Section 3-A of the Tamil Nadu General Sales Tax Act, 1959, for the period thereafter, i.e. after the effective possession and control were transferred to the respective lessees / actual users, the petitioner will be liable to pay tax under Section 3-A of the Tamil Nadu General Sales Tax Act, 1959.

76. Therefore, while upholding the impugned orders demanding sales tax for the period after delivery and transfer of effective control, I remit the cases back to the respondent to give the benefit of deduction to the petitioner upto the date of import to the petitioner for any lease rental which the petitioner may have received prior to the said date. This exercise shall be carried out by the respondent within a period of three months from the date of receipt of a copy of this Order.

77. The petitioner may therefore file suitable representation before the respondent within a period of four weeks from the date of receipt of a copy of this order.

78. Accordingly, these Writ Petitions are disposed of. No cost. Consequently, connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar (CS-VII)

//True Copy//

Sub Assistant Registrar

jen

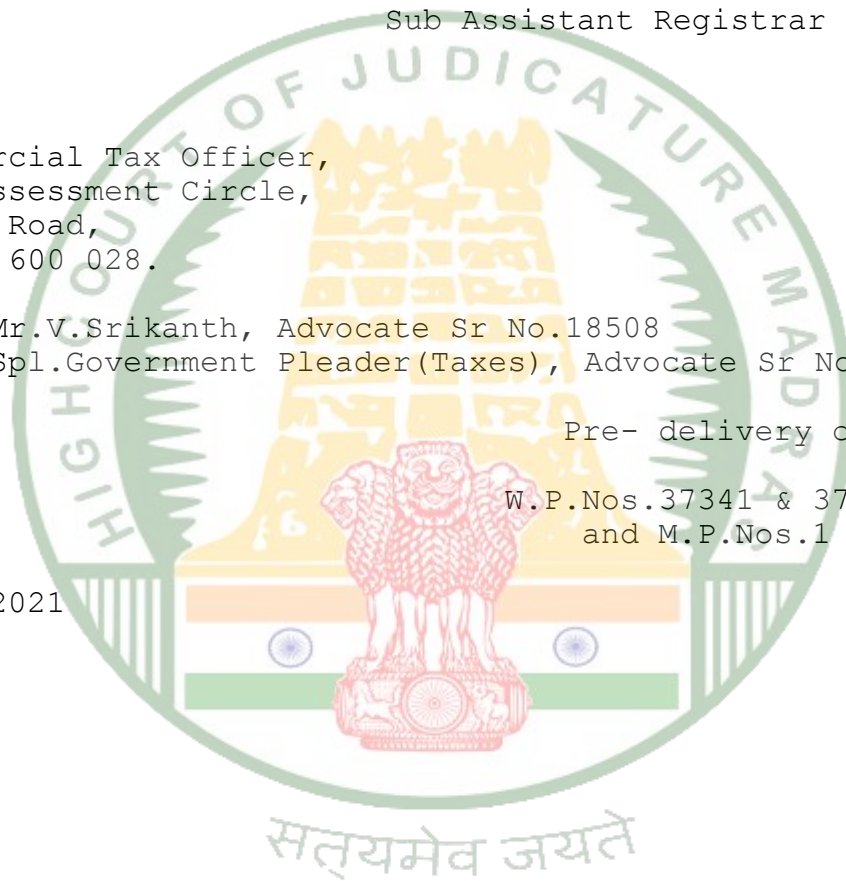
To
The Commercial Tax Officer,
Adyar I Assessment Circle,
Greenways Road,
Chennai - 600 028.

+1 CC to Mr.V.Srikanth, Advocate Sr No.18508

+1 CC to Spl.Government Pleader(Taxes), Advocate Sr No.18770

Pre- delivery common order
in
W.P.Nos.37341 & 37342 of 2007
and M.P.Nos.1 & 1 of 2007

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