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W.P.Nos.4407, 4408 of 2008, 7187, 7188 of
and 28853 of 2010, 170 and 3649 of



IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 07.07.2022

PRONOUNCED ON: 23.12.2022

CORAM

THE HONOURABLE DR. JUSTICE ANITA SUMANTH

**W.P.Nos.4407, 4408 of 2008, 7187, 7188 of 2012
and 28853 of 2010, 170 and 3649 of 2020**

and

**M.P.Nos.1 and 1 of 2012 and 1 of 2010,
206, 207, 4297 and 4298 of 2020**

Sri Kannapiran Mills Limited
Represented by its Director
B.Srihari

...Petitioner in W.P.Nos.4407 and 4408 of 2008

Gee Kay Printing Mills
Represented by its Partner
J.Jayaprakash

...Petitioner in W.P.Nos.7187 and 7188 of 2012

Tamil Nadu Petroproducts Limited,
Represented by its Chief Manager
(Excise & Commercial Tax)
R.Ralph

.... Petitioner in W.P.No.28853 of 2010

M/s.Varalakshmi Starch Industries (P) Ltd.,
Rep. by its Managing Director
V.Anbalagan

.... Petitioner in W.P.Nos.170 and 3649 of

2020



Vs

1. The Assistant Commissioner (CT),
Fast Track Assessment Circle – I,
Coimbatore – 641 018.

2. The Deputy Commissioner of Commercial Taxes, (RP)
Coimbatore.

3. The Joint Commissioner of Commercial Taxes,
Coimbatore.

4. The Commissioner of Commercial Taxes,
Ezhilagam, Chepauk, Chennai – 600 005.

... Respondents in W.P.Nos.4407 & 4408 of 2008

1. The Assistant Commissioner (CT),
Perundurai Assessment Circle.

... Respondent in W.P.Nos.7187 & 7188 of

2012

1. The Deputy Commissioner (CT) -I,
Fast Track Assessment Circle – II,
C.T.Building, III Floor,
Greens Road, Chennai – 600 006.

... Respondent in W.P.No.28853 of 2010

1. The Assistant Commissioner (ST),
Hasthampatti Assessment Circle.
Salem, Salem District.

... Respondent in W.P.Nos.170 & 3649 of

2020

Prayer in W.P.No.4407 of 2008: PETITION filed under Article 226 of The Constitution of India praying for the issuance of Writ of Certiorari, to call for the records on the files of the third respondent in R.P.No.58/2007 dated 18.12.2007 confirming the order of the first respondent in TIN No.33871820012/2006-07 dated 26.6.2007 and quash the same in so far as it denies input tax credit under Section 19(1) read with Section 19(2)(ii) of the



Tamil Nadu Value Added Tax Act, 2006 on the purchase and use of furnace oil by the petitioner at their factory at Sowripalayam.

Prayer in W.P.No.4408 of 2008: PETITION filed under Article 226 of The Constitution of India praying for the issuance of Writ of Certiorari, to call for the records on the files of the fourth respondent in Lr.No.VAT Cell/7011/2007, (VCC No.297) dated 11.4.2007 as reiterated in LR.VAT CELL/22402/07 (VCC No.445) dated 10.5.2007 and quash the same in so far as it denies the input tax credit on the purchase of furnace oil under Section 19(1) read with Section 19(2)(ii) of the Tamil Nadu Value Added Tax Act, 2006.

Prayer in W.P.Nos.7187 & 7188 of 2012: PETITIONs filed under Article 226 of The Constitution of India praying for the issuance of Writ of Certiorari, to call for the records on the files of the respondent in TIN No.33592923347/2008-09 dated 5.3.2012 and quash the same in so far as it reverses input tax credit to the extent of Rs.3,24,239/- and Rs.3,42,960/-, being credit availed on briquette.

Prayer in W.P.No.28853 of 2010: PETITION filed under Article 226 of The Constitution of India praying for the issuance of Writ of Certiorari, to call for the records on the files of the respondent in TIN No.33601082912/2006-07 dated 14.10.2010, and quash the same in so far as it relates to disallowance of input credit on the purchase of Furnace Oil and LSHS used by the petitioner for captive power generation and heating processes at their factory.

Prayer in W.P.Nos.170 & 3649 of 2020: PETITIONs filed under Article 226 of The Constitution of India praying for the issuance of Writ of Certiorari, to call for the records on the files of the respondent in its proceedings made in TIN No.33442661578/2007-08 dated 28.11.2019 and 07.01.2020, and quash the same which is contrary to the provisions of the Act.

For Petitioner in the above W.Ps : Mr.N.Prasad and Mr.S.Rajasekar



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For Respondents in the above W.Ps : Mr.C.Harsha Raj
Additional Government Pleader

COMMON ORDER

A common issue arises in these Writ Petitions that are hence disposed by way of a consolidated order. Detailed submissions of Mr.Prasad and Mr.Rajasekar, learned counsel for the petitioners and Mr.Harsha Raj, learned Additional Government Pleader for the respondents have been heard and duly taken into consideration.

Facts in relation to each of the writ petitions:

2. The prayer in the Writ Petitions filed by Sri Kannapiran Mills Limited (SKML) is for a quash of an order of assessment made by the first Respondent Assistant Commissioner (R1) and confirming of the same by the third respondent Joint Commissioner (R3) in terms of the provisions of the Tamil Nadu Value Added Tax Act, 2006 (in short 'TNVAT Act') for the period 2006-07 as well as the clarification issued by the Commissioner of Commercial Taxes clarifying that the purchase of furnace oil is taxable at 4%.

3. The issue relates to disallowance of Input Tax Credit (ITC) for the months of January to May, 2007 specifically ITC availed on purchase of furnace oil for production of electrical energy. SKML is a Public Limited Company



engaged in the manufacture of cotton yarn, declared goods falling under Sl.No.41/PartB/I Schedule to the TNVAT Act, taxable at 4%. SKML was initially relying on the supply of power by the Tamil Nadu Electricity Board (TNEB), but in order to augment power supply as well as ensure uninterrupted power supply, a captive power plant was installed.

4. Furnace oil was procured for the running of the power plant from Indian Oil Corporation upon payment of VAT. The furnace oil was utilized as an input in the generation of the power itself, such power not being sold as a commodity per se, but only utilized captively to run the machinery in the factory. ITC was claimed by SKML on the purchase of furnace oil.

5. In the case of Gee Kay Printing Mills (GKPM), the challenge is to two orders of assessment passed under the provisions of the TNVAT Act for the periods 2008-09 and 2009-10. GKPM is a partnership firm executing job work for the processing of knitted fabric from export houses. The fabric received from customers is processed utilizing inputs such as dyes, chemicals, fuel and other auxiliaries.

6. It is registered as a dealer executing works contract and offered turnover from such works contract to tax in terms of Section 5 of the Act. In the course of its activity, briquette is used as an input for the purpose of processing. Briquette is a bio-mass agro comprising of a mix of groundnut shell, coffee husk



and coco/coir pith. It is widely accepted as having substantial use as an alternate fuel. ITC was claimed by GKPM on the purchase of briquette.

7. The challenge by Tamil Nadu Petro Products Limited (TNPPL) is also to an order of assessment passed for the period 2006-07 in terms of the provisions of the TNVAT Act. The petitioner is a public limited company engaged in the activity of manufacture of linear alkyl benzene (LAB), epichlorohydrin and caustic soda. Turnover from the sale of the aforesaid products is offered to tax.

8. For the purpose of manufacturing/processing activity carried on by it, furnace oil (fuel oil) and Low Sulphur Heavy Stock (LSHS) is purchased from Chennai Petroleum Corporation Limited. The production of LAB and other products is stated to be required for continuous supply of electricity and to ensure that there is no interruption in power supply that would result in a breakdown of the chemical reaction necessary for sustaining the manufacturing process.

9. Besides this, the process itself involves heating of various elements at high temperatures. Thus, in order to ensure continuous chemical reaction at every stage, TNPPL requires supply of electricity in addition to that received from the TNEB grid. A CPP was thus set up that utilizes furnace oil for the



generation of electricity. ITC was claimed by TNPPL on the tax paid on purchase of Furnace Oil.

10. In the affidavit filed in support of W.P.No.28853 of 2010 in the case of TNPPL, the chemical processes carried on requiring uninterrupted power supply are as follows:

‘Illustratively, in the Pacol process which is one process in the production stream, there is a necessity to remove hydrogen molecules from Paraffin. This requires heating of the process stream at a very high temperature. Thereafter, before the process stream enters the next stage, namely, the Detergent Alkylation section, the process stream has to be cooled. This is done by operating fans which helps to cool the process stream. If the process stream is not cooled, the same remains at high temperature and would prove to be hazardous. Besides, the process would stop and it would be difficult to recover the product. Besides, Furnace Oil is used as fuel to run the captive power plant which help to maintain continuous and uninterrupted supply of power.

ii) Furnace Oil is also used to generate steam which is captively consumed. Olefin is received in the Detergent Alkylation section. Here Benzene is added. The process stream contains various chemicals such as Benzene, Hydrofluoric Acid, Paraffin and Linear Alkyl Benzene (LAB). A mixture is received which contains these components. There is a necessity to extract LAB from the mixture which contains Benzene, Hydrofluoric Acid and Paraffin. For separation and extraction of LAB, there is a necessity for a Vacuum. Furnace Oil is used as fuel to heat water. The steam so generated, is sent into a vacuum-ejector. This vacuum ejector creates a vacuum which helps to extract/separate the LAB from other components, namely, Hydrofluoric Acid and Paraffin. Thus, furnace oil is used integrally and directly in the process of extraction of LAB in the Detergent Alkylation section.



6. *The Petitioners are submitting on the above to highlight the integral connection between the use of the Furnace Oil in the manufacture of their final product which is LAB.'*

11. Varalakshmi Starch Industries (VSI) is engaged in the business of manufacture and export of Tapioca starch, Tapioca Sago and modified starches made out of Tapioca Tuber. The petitioner uses furnace oil for the purpose of drying of the end products that constitutes, according to it, an integral part of the manufacturing process.

12. In revision orders passed on 12.10.2015, the Department had originally accepted the submission that furnace oil was an input for the manufacture of taxable commodity and hence the petitioner would be eligible for credit on the purchase of furnace oil as a consumable. However, instead of allowing the appeal, the matter was remanded for the Assessing officer to verify the factual aspects of the matter and pass orders afresh.

13. A Writ Petition had been filed by VSI as against the aforesaid order in W.P.No.22370 of 2008 and vide order dated 25.10.2019, this Court had noted that provisional orders had been passed reversing ITC for the months of April, May, June and August 2007 and that the assessment for the period 2007-08 had been pending on account of the interim stay granted in this Writ Petition on 11.09.2008.



14. Thus, and in the interests of expeditious disposal, the stay granted was vacated, the respondent was directed to continue with proceedings for assessment and complete the same within a period of four weeks. The petitioner was protected from coercive recovery proceedings under the order impugned in that Writ Petition, until further orders.

15. Now the petitioner brings to note that, in fact, an assessment had been made for the period 2007-08 under Section 22(2) on 10.09.2009 itself accepting the returns filed by the petitioner company. This had not been brought to the notice of the Court at the time of disposal of the earlier writ petition.

16. Taking advantage of order dated 25.10.2019, the respondent issued a notice on 26.11.2019 proposing to revise the assessment dated 10.09.2009, re-determining the total and taxable turnover under Section 22(4) and simultaneously proposing reversal of ITC on furnace oil, capital goods and exempted sales. What is addressed in the present order is only the reversal of ITC on fuel, and submissions have been advanced solely in this regard.

17. The submissions are that the furnace oil has been used as an input fuel for production of hot air in the hot air generator and the hot air generated is used in the drying of the final and finished products, being starches and modified starches. The submissions have been rejected on the ground that the



furnace is not a consumable as it was only used as a fuel. It has not, according to the officer, gone into the direct production of the starch.

Submissions of the petitioners:

18. All the petitioners canvass a common point, which is their entitlement to claim ITC on the various inputs utilized by them to aid the generation of electricity, which is a critical component in the manufacturing/processing activity carried on by them. The respective Assessing Officers have however reversed the ITC claimed on the ground that the electricity generated resulted in power and steam, that constitute goods exempt from the levy of tax.

19. In the case of SKML, a small portion of the electricity generated has itself been sold as a final product and the turnover from such sale is exempt. No ITC has been claimed in relation to this sale. The common submission of all petitioners is that the electricity generated has only been utilized in the manufacturing process and moreover, furnace oil and other fuels utilized in generation of electricity constitute an aid to the manufacturing activity and consequently to their businesses itself.

20. The common argument of the petitioners is that Section 19(2)(ii) of the TNVAT Act permits the availment of ITC on goods purchased as 'inputs' in the manufacture or processing of goods in the State. This entitlement is denied only by operation of Section 19(5)(a), where ITC is unavailable in respect of



turnover from goods that are exempt under Section 15 of the Act. In the present case, the turnover from the products manufactured/processed is not exempt and has admittedly been offered to tax. Thus, according to the petitioners, Section 19(5)(a) is inapplicable in this case.

21. According to the petitioners, this issue is no longer res integra and has been considered in a slew of decisions, all of which have concluded in favour of the assessee, as follows:

- i) *Assistant Commissioner (Intelligence) V. Nandanam Construction Company* (1999) 115 STC 427)
- ii) *Sudesh Kumar V. State of Uttarakhand* (AIR 2008 SC 1120)
- iii) *Commercial Taxation Officer, Udaipur V. Rajasthan Taxchem Ltd.* ((2007) 5 VST 529
- iv) *State of Gujarat & Ors. V. AMI Pigments & Ors.* ((2009) 22 VST 615)
- v) *Gearcase India V. Commercial Tax Officer and another* ((2010) 28 VST 468)
- vi) *Tulshyan NEC Ltd V. Assistant Commissioner* (order dated 06.11.2019 in W.P.No.26960 of 2014)
- vii) *Thiagarajar Mills V. Additional Commissioner CT* ((2018) 54 GSTR 420)
- viii) *Saurashtra Calcine Bauxite V. State of Gujarat* ((1993) 91 STC 435)
- ix) *Partap Steel Rolling Mills V. State of Punjab* ((2007) 9 VST 629)
- x) *Reliance Industries V. Assistant Commissioner State Tax & Ors.* ((2008) 15 VST 228)
- xi) *AMI Pigments & Ors. V. State of Gujarat* ((2009) 22 VST 569)
- xii) *AMI Pigments & Ors. V. State of Gujarat* ((2010) 32 VST 97)
- xiii) *National Aluminium Company V. Deputy Commissioner, Commercial Tax* ((2012) 56 VST 68)
- xiv) *Brahmaputra Metalics V. State of Jharkhand* ((2019) SCC Online 816)



22. Per contra, it is the submission of learned Additional Government Pleader that the mere production of power, though not as a finished and final product, would still attract the bar under Section 19(5)(a) to disentitle the petitioner from the claim of ITC.

23. It is immaterial whether the power generated is sold as a final product, as, the intention of the Legislature, according to the Revenue, is to curtail the grant of ITC on mere 'manufacture' of exempted goods. On this reasoning, assessments have been completed reversing the ITC availed on Fuel/Furnace Oil utilized as industrial inputs.

24. The revenue relies upon the following decisions:

- i) *Deputy Commissioner of Sales Tax (Law) V. M/s.Thomas Stephen & Co. Ltd.* ((1988) 2 SCC 264
- ii) *Commissioner of Income Tax, New Delhi V. M/s.East West Import and Export (P) Ltd.* ((1989) 1 SCC 760)
- iii) *Maruti Suzuki Limited V. Commissioner of Central Excise, Delhi III* ((2009) 9 SCC 193
- iv) *Commissioner of Customs (Import), Mumbai V. Dilip Kumar and Company and others* ((2018) 9 SCC 1)
- v) *Keshavji Ravji and Co. and others V. Commissioner of Income Tax* ((1990) 2 SCC 231)
- vi) *State of U.P. V. Indian Hume Pipe & Co.* ((1977) 2 SCC 267)
- vii) *Ram & Shyam Company V. State of Haryana* ((1985) 3 SCC 267)
- viii) *J.K.Cotton Spinning & Weaving Mills V. Sales Tax Office* ((1965) 16 STC 563)
- ix) *Indian Copper Corporation V. Commissioner of CT* (AIR 1965 SC 891)
- x) *Madras Bar Association V. Central Board of Direct Tax* ((1995) 216 ITR 240)



- xi) *Canon India Pvt. Ltd. V. State of Tamilnadu* ((2013-14) 19 TNCTJ 251)
xii) *Collector of Central Excise, New Delhi V. Ballarpur Industries Ltd.* ((1990) 77 STC 282)
xiii) *AGI Glaspac V. Assistant Commissioner (CT)* ((2007) 10 VST 9)

Maintainability

25. Before proceeding to the merits of the matter, I will deal with the objection on alternate remedy that has been raised by the respondents. All the impugned orders comprise orders of assessment, that are amenable to statutory appeal, and in one case an appellate order as well and hence, a preliminary submission has been raised assailing the very maintainability of these Writ Petitions.

26. In my considered view, the question raised in these Writ Petitions revolves around an interpretation of the statutory provisions, specifically touching upon the eligibility or otherwise to ITC. The facts are undisputed. The authorities have, including the appellate authority, adopted the categoric view that the petitioners are not entitled to ITC in a situation where they have merely manufactured/purchased and consumed, an exempt product, though admittedly, such exempt product is not sold as an independent commodity, barring in one case.

27. This issue is one that can well be considered under Article 226 of the Constitution of India as, in the considered view of the Court, the authorities, as



revealed by the submissions of the Revenue before me and the stand taken in the impugned orders, have revealed their propensity to adopt a view that bypasses the spirit of the statutory provisions and scheme of the Act. The writ petitions are thus held to be maintainable.

Discussion on merits

28. I now address the merits of the matter in regard to eligibility to ITC. In the case of the petitioner in W.P.Nos.170 and 3649 of 2020, we are concerned with the reversal of ITC in relation to the use of fuel purchased as an industrial input. In the cases of the petitioners in W.P.Nos.4407 and 4408 of 2008 and 28853 of 2010, we are concerned with utilization of the electricity generated, albeit exclusively, in the manufacturing process. In W.P.Nos.170 and 3649 of 2020, the issue that arises concerns the reversal of ITC on furnace oil used as fuel.

29. The Tamil Nadu General Sales Tax (Amendment) Act, Act 2 of 1970 sets out the statement of objects and reasons for insertion of new Section 7A in the 1959 Act. The insertion was as a measure of checking evasion of sales tax.

30. The statement of objects and reasons reads thus:

The Statement of Objects and Reasons appended to the Tamil Nadu General Sales Tax (Amendment) Bill, 1970, Fort St. George Gazette, Extraordinary, Part IV-Section 3, dated 23rd January, 1970, runs as follows:-



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“As a measure of checking evasion of sales tax, it has been decided to levy a tax on the purchase of goods within the State, in respect of which no tax has already been levied either on the sale point or on the purchase point under the Tamil Nadu General Sales Tax Act, 1959 (Tamil Nadu Act 1 of 1959), by any dealer who consumes such goods in the process of manufacture of other goods or disposes of such goods in any manner other than by way of sale in the State or despatches them to a place outside the State except as a direct result of sale or purchase in the course of inter-State trade or commerce. The rate of tax payable on such purchase is the rate mentioned in sections 3, 4 or 5, as the case may be, of the said Act. The tax on purchase as aforesaid will be payable irrespective of the quantum of the aggregate of such purchase price in a year. The Tamil Nadu General Sales Tax (Fourth Amendment) Ordinance, 1969 (Tamil Nadu Ordinance No.5 of 1969) was accordingly promulgated by the Governor on the 27th November, 1969, to give effect to the above decision.

.....’

31. Purchase tax was thus levied to make good escapement of tax in those cases where no tax was levied, either on the sale or purchase point. Any dealer who consumed the goods purchased either in the process of manufacture or which disposes them in any manner other than sale would be subject to a purchase tax.

32.The concept of an Input Tax Credit is a sequitur to the levy of purchase tax and was introduced as a measure to counter the cascading effect of tax and prevent the multiple levy of tax on the same commodity. Thus, where



tax had already been paid on any of the inputs in the manufacture of a taxable product, an assessee is entitled to credit of the same.

33. The relevant provisions of TNVAT Act are extracted below for better appreciation of the issue arising for decision, and the definitions of the relevant terms are as follows:

2. Definitions.--In this Act, unless the context otherwise requires, -

(23) "input" means any goods including capital goods purchased by a dealer in the course of his business;

(24) "input tax" means the tax paid [or payable under this Act Inserted] in the manner prescribed] by a registered dealer to another registered dealer on the purchase of goods including capital goods in the course of his business

19. Input tax credit .-- (1) There shall be input tax credit of the amount of tax paid Omitted[or Payable] under this Act, by the registered dealer to the seller on his purchases of taxable goods specified in the First Schedule :

Provided that the registered dealer, who claims input tax credit, shall establish that the tax due On such purchases has been paid by him in the manner prescribed.

Provided that the registered dealer, who claims input tax credit, shall establish that the tax due On purchase of goods has actually been paid in the manner prescribed by the registered dealer who sold such goods and that the goods have actually been delivered Provided further that the tax deferred under section 32 shall be deemed to have been paid under this Act for the purpose of this sub-section.

(2) Input tax credit shall be allowed for the purchase of goods made within the State from a registered dealer and which are for the purpose of—

(i)

(ii) use as input in manufacturing or processing of goods in the State;

(iii)



(iv) *use as capital goods in the manufacture of taxable goods.*

(v) *sale in the course of inter-State trade or commerce falling under sub-section (1) of section 8 of the Central Sales Tax Act, 1956 (Central Act 74 of 1956);] (v) sale in the course of inter-State trade or commerce falling under sub-section (1) and (2) of section 8 of the Central Sales Tax Act, 1956 (Central Act 74 of 1956)*

.....

(5) (a) *No input tax credit shall be allowed in respect of sale of goods exempted under section 15.'*

34. Section 19(2) permits grant of ITC on any goods purchased and used as input in the manufacturing or processing of goods in the State or used as capital goods in the manufacture of taxable goods. Section 19(5)(a) denies ITC on the turnover from sale of exempt products. The entitlement to ITC must thus be seen in the context of, and decided, bearing note, not just of the letter of the law but the purpose for which the benefit was intended in the first place.

35. I am cognizant of the settled position that the grant of ITC cannot be claimed as a matter of right. It is a benefit that is statutorily conferred, the grant of which has to be strictly understood and extended. The judgement of the Hon'ble Supreme Court in the case of *Jayam & Co. V. Assistant Commissioner and another* (96 VST 1) is an authority for this proposition.

36. In the present case, the question that arises is as to whether the mere generation and consumption of electricity/ purchase and consumption of fuel, in the manufacturing process can disentitle the petitioners to ITC. This question



will have to be answered in favour of the petitioners bearing in mind the statutory scheme of the VAT Act, including specifically the scheme for grant of ITC as well the situations contemplated statutorily, when such ITC is to be denied.

37. Section 19(5)(c) is very specific to state that it is only sale of exempted products that would result in denial of ITC on inputs. There is nothing therein to suggest and hence support the proposition that mere purchase/generation and consumption of fuel/electricity respectively would attract the bar under Section 19(5)(c).

38. This very question, as to whether ITC on fuel purchased as an input for use in power generation came to be considered by several Courts. I now proceed to discuss some of the decisions relied upon at the Bar.

39. In the case of *Saurashtra Calcine Bauxite* (supra) the statutory provision considered was Section 5A of the Gujarat Sales Tax Act, 1969. The Court considered the import of its earlier judgments in the cases of *J.K.Cotton Spinning & Weaving Mills Co. Ltd. V. The Sales Tax Officer, Kanpur and another* (16 STC 563) and *Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam V. Thomas Stephen & Co. Ltd.* (69 STC 320).

40. The question that arose in these two cases was whether the furnace oil used must be regarded as a mere fuel and not as processing material. On an



overall consideration of the matter, the Court held in favour of the assessee concluding that the authorities were not justified in taking a view that furnace oil is used only as fuel and not as a processing material within the ambit of Rule 42A of the Gujarat Sales Tax Rules. There is no dispute in the present cases, either by way of pleading or argument that the fuels used do not constitute industrial input.

41. In *Partap Steel Rolling Mills Ltd.* (supra), the Court considered whether the tax paid on furnace oil can be claimed under Rule 29(xii) of the Punjab General Sales Tax Rules, 1949 on account of the purchase value of furnace oil used as an aid to manufacturing iron and steel goods.

42. The Court considered several of its earlier judgments, such as *Burmah-Shell Oil Storage and Distributing Co. of India Ltd. V. Belgaum Borough Municipality* (AIR 1963 SC 906), *Anwarkhan Mehboob Co. V. State of Bombay* (11 STC 698), *Kathiawar Industries Ltd. V. Jaffrabad Municipality* (AIR 1979 SC 1721), *J.K.Cotton Spinning & Weaving Mills Co. Ltd. V. The Sales Tax Officer, Kanpur and another* (16 STC 563), *Member, Board of Revenue, West Bengal V. Phelps and Co. (P) Ltd.* (29 STC 101), *Indian Farmers Fertiliser Co-operative Ltd. V. Collector of Central Excise* (AIR 1996 SC 2542), *Collector of Central Excise V. Ballarpur Industries Ltd.* (77 STC 282), *Jaypee Rewa Cement V. Commisioner of Central Excise* (AIR



2001 SC 3935), arriving at the conclusion that the furnace oil purchased was one of the primary and essential commodities required for the process of manufacture. Rule 29, which was interpreted, reads thus:

Rule 29. In calculating his taxable turnover a registered dealer may deduct from his gross turnover,-

(xii) the purchase value of goods which have already been subjected to tax under section 5(1A) used or consumed by him in manufacture in Punjab of goods other than goods declared tax-free under section 6 for sale,-

(i) in Punjab ;

(ii) in the course of inter-State trade or commerce;

(iii) in the course of export out of territory of India:

Provided that the dealer produces copies of cash memos or bills prescribed under rule 55A at the time of assessment or when called upon to do so, by notice, by the competent authority under the Act.'

43. In light of the finding of the Bench to the effect that the fuel had been 'used' or 'consumed' in the manufacture of goods, deduction as sought for, was granted.

44. In the case of *Rajasthan Taxchem Ltd.* (supra), it was the interpretation of Section 2(34) of the Rajasthan Sales Tax Act, 1994 (in short 'RST Act') that came up for consideration. The statutory provision has been extracted in paragraph 7 of that judgement and reads as under:



"Section 2(34). 'Raw material' means goods used as an ingredient in the manufacture of other goods and includes preservatives, fuel and lubricant required for the process of manufacture."

46. In *Reliance Industries Ltd.* (supra), the question that arose was whether furnace oil was a consumable that qualified to be an input for the purpose of availing ITC. The definition of ‘input tax’ and ‘ITC’ in Sections 2(25), 2(26) and 2(27) of the Orissa Value Added Tax act, 2004 (in short ‘OVAT Act’) were interpreted, with the Court coming to the conclusion that furnace oil was, indeed, an input, and tax paid on the purchase thereof can be claimed as ITC under the relevant provisions of the OVAT Act.



47. To be noted, that the definitions of 'Input Tax' and 'ITC', which have been set out at placitum 14 of page 240 of the VST Report read thus:

'14. "Input" has been defined in section 2(25) to mean that any goods purchased by a dealer in the course of his business for resale or for use in the execution of works contract, in processing or manufacturing, where such goods directly goes into composition of finished products or packing of goods for sale, and includes consumables directly used in such processing or manufacturing. Section 2(26) defines "input tax" to mean tax collected and payable under this Act in respect of sale to a registered dealer of any taxable goods for use in the course of his business, but does not include tax collected on the sale of goods made to a commission agent purchasing such goods on behalf of such dealer. "Input tax credit" as defined under Section 2(27) of the OVAT Act means the setting off of the amount of input tax or part thereof under section 20 against the output tax, by a registered dealer other than a registered dealer paying turnover tax under section 16.'

48. In *AMI Pigments* (supra) a Division Bench of the Gujarat High Court has considered extensively, a challenge to Public Circular dated 19.02.2001 issued by the Gujarat commercial tax authorities. The issue was whether Natural Gas used as fuel can be treated as 'consumable goods'. The Bench undertook a comparison of the provisions of Section 5B of the Andhra Pradesh General Sales Tax Act, 1957 and the corresponding provisions of the Gujarat Sales Tax Act, 1969 and connected Rules. They also considered whether the principle laid down by the Hon'ble Supreme Court in the case of Coastal

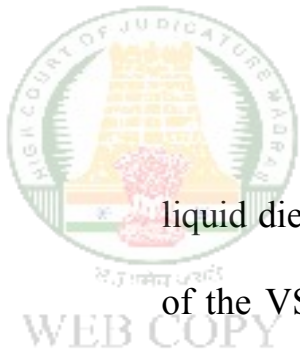


Chemicals Limited (supra) would be applicable to cases arising under the Gujarat Sales Tax Act.

49. The background to the matters have been captured extensively, whereupon, the Bench concluded that the reopening of the matters by the authorities in light of a decision of the Gujarat Sales Tax Tribunal Ahmedabad in Second Appeal No.682 of 2003 in the case of *Bandesara Industries Private Limited against State of Gujarat*, decision dated 28.09.2004, constituted a change of opinion. Thus the assessments that had been completed on the basis of an earlier Circular dated 19.02.2001 issued pursuant to the judgment of the Hon'ble Supreme Court in Coastal Chemicals Limited could not be disturbed.

50. As against this decision, the State of Gujarat went in appeal and in the judgment of the Hon'ble Supreme Court reported in 22 VST 615, *State of Gujarat V. AMI Pigments* (supra), the Hon'ble Supreme Court by way of a short judgment remanded the matters to the High Court directing the Court to decide the questions without reference to either Circular, i.e., Circular dated 19.02.2001 or Circular dated 02.09.2005.

51. Inter alia, they referred to the tests of essentiality or dependency that had been applied by the Hon'ble Supreme Court in the cases of J.K.Cotton and Ballapur Industries (supra) to decide whether the expressions 'raw material' or 'processing material' or 'consumable store' would cover fuels, such as, naptha,



liquid diesel oil, natural gas or others. They clarified at placitum 6 at page 618 of the VST report that the fuels consumed in that case constitute natural gas, furnace oil, diesel oil and naptha. Broadly, such fuels are used by industry for carrying on manufacturing process and in most of such cases the fuels generate electricity which are then used/consumed in the manufacture of end products, like caustic soda, industrial chemicals and others.

52. The question that arose was, whether the aforementioned fuels would come within the meaning of the expressions ‘raw material’ or ‘processing material’ or ‘consumable stores’. The Hon’ble Bench recorded that the parties had referred to the tests laid down in Ballapur Industries and J.K.Cotton (supra) on the one hand, and Coastal Chemicals Limited (supra) on the other, and directed the Gujarat High Court to reconcile which line of decisions should be applied while deciding the question framed by them.

53. On remand, in *AMI Pigment V. State of Gujarat* (32 VST 97), a subsequent Bench of the Gujarat High Court considered the matter afresh concluding that the fuels consumed by the industry to generate electricity would constitute ‘raw material’, ‘processing material’ or ‘consumable stores’. Following the judgment of the Hon’ble Apex Court in the case of Maruti Suzuki (supra), they clarified that if there is excess electricity which is used by the



assessee for any other purpose including distributed to the grid for a consideration, the process and user test would fail at that point.

54. With the disconnection of the nexus between the process and the end use, the commodity, i.e., electricity, would fail the test of 'raw material', 'processing material' or 'consumable stores' and if sold as an independent product, would be liable to tax by application of the regular provisions.

55. In the case of *National Aluminium Company Limited* (supra), the same question came up for consideration in the context of the Orissa Value Added Tax Act, 2004 as to whether consumables, such as coal, alum, caustic soda and others used in the captive power plant for generation of electricity to run an aluminium plant can be considered as input and the Bench held, considering the line of decisions that have been discussed in the preceding paragraphs, in favour of the assessee. The penalty that had been imposed was also reversed. This Court in the case of *Thiagarajar Mills* (supra) has held to similar effect in the context of the TNVAT itself.

56. In the present case, there is no dispute whatsoever that input fuel/electricity generated, has only been used to aid the process of manufacture. Except to a small extent in the case of SKML, neither the input fuel nor electricity generated, have been sold as an independent commodity. In that



exceptional case, the commodity has suffered the rigour of taxation per regular application of the Act.

57. The revenue has cited the judgment in the case of Thomas Stephen (supra) which had dealt with the levy of tax under the Kerala General Sales Tax Act, 1963 on consumption of goods. The provisions of Section 5A dealt with, read as follows:

5-A. Levy of purchase tax-(1) Every dealer who, in the course of his business, purchases from a registered dealer or from any other person any goods the sale or purchase of which is liable to tax under this Act in circumstances in which no tax is payable under Section 5, and either-

(a) consumes such goods in the manufacture of other goods for sale or otherwise; or

(b) disposes of such goods in any manner other than by way of sale in the state; or

(c) despatches them to any place outside the State except as a direct result of sale or purchase in the course of inter-state trade or commerce,

shall, whatever be the quantum of the turnover relating to such purchase for a year, pay tax on the taxable turnover relating to such purchase for the year at the rates mentioned in section 5.

58. The assessee therein was engaged in the manufacture and trading of tiles, terracotta ware and ceramics and had purchased cashew shells and lime shells to use as fuel in the kiln for such manufacture. The contention of the assessee was that the shells had been used as fuel and thus the purchase turnover of cashew shells was exempt from tax. Alternatively, the petitioner



contended that by application of Section 5A, it could seek exemption from the levy of tax, since none of the conditions prescribed therein was satisfied.

59. After considering the submissions of the parties, the Court rejected the case of the revenue holding that the assessee was eligible to the exemption in terms of clause (a) of Section 5A, in light of the admitted position that the shells purchased had been ‘consumed in the manufacture of other goods’.

60. In *Ballapur Industries* (supra), rendered in the context of the Central Excise and Salt Act of 1944, the Hon’ble Supreme Court considered the meaning of the term ‘raw material’ in the context of whether such raw material should be discernible in the end product in order to satisfy such usage. The Bench considered that several ingredients used in the manufacture of any end product might be consumed in the process of manufacture itself, while some may retain their dominant individual identity and character and may still be discernible in the end product. Thus, for an item to qualify as a raw material, it need not necessarily find place in the end product.

61. In light of the detailed discussion as above and the overwhelming conclusion arrived at by the Courts in the judgements cited and discussed, the impugned orders are reversed to the extent indicated, and the petitioners succeed. Connected Miscellaneous Petitions are closed with no order as to costs.



23.12.2022

Index : Yes
Speaking Order

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DR. ANITA SUMANTH, J.

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To

1. The Assistant Commissioner (CT),
Fast Track Assessment Circle – I,
Coimbatore – 641 018.
2. The Deputy Commissioner of Commercial Taxes, (RP)
Coimbatore.
3. The Joint Commissioner of Commercial Taxes,
Coimbatore.
4. The Commissioner of Commercial Taxes,
Ezhilagam, Chepauk, Chennai – 600 005.
5. The Assistant Commissioner (CT),
Perundurai Assessment Circle.
6. The Deputy Commissioner (CT) -I,
Fast Track Assessment Circle – II,
C.T.Building, III Floor,
Greens Road, Chennai – 600 006.

W.P.Nos.4407, 4408 of 2008, 7187, 7188 of 2012
and 28853 of 2010, 170 and 3649 of 2020
and M.P.Nos.1 and 1 of 2012 and 1 of 2010,
206, 207, 4297 and 4298 of 2020



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and 28853 of 2010, 170 and 3649 of



23.12.2022