IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.09.2024

CORAM :

THE HONOURABLE **DR.JUSTICE ANITA SUMANTH**
and
THE HONOURABLE **MR.JUSTICE G. ARUL MURUGAN**

W.P.No.34565 of 2007
and M.P.No.1 of 2007

Neyveli Lignite Corporation Limited,
Rep. By its Addl.Chief Manager (Finance)
AC/Mine- 1 and 1A AO Building
Block Mills, Neyveli – 607 803.
.. Petitioner

Vs

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

2.The Commercial Tax Officer (FAC),
Cuddalore (Taluk),
Cuddalore. .. Respondents

Prayer: Petition filed under Article 226 of the Constitution of India praying to issue a writ of certiorarified Mandamus directing the respondents to extend the input tax credit under Section 19(2)(ii) read with Section 19(2)(iv) of the Tamil Nadu Value Added Tax Act, 2006 on the purchases of capital goods by the Petitioners used in the mining and excavation of lignite at their Mine-I, Mine-1A Expansion and Mine-II Expansion.

For Petitioner	:	Ms.R.Charulatha for M/s.Lakshmi Kumaran & Sridharan
For Respondent	:	Mr.Haja Nazirudeen Additional Advocate General assisted by Mr.G.Nanmaran Special Government Pleader (T)

O R D E R

(Order of the Court was made by Dr.ANITA SUMANTH.,J)

The petitioner is the Neyveli Lignite Corporation Limited (NLC/petitioner). It had sought a clarification from the Special Commissioner and Commissioner of Commercial Taxes as to whether it would be entitled to Input Tax Credit (ITC) under the Tamil Nadu Value Added Tax Act 2007 (Act/TNVAT) on the capital goods utilised by it in the production of Lignite.

2. The admitted position is that Lignite is a taxable commodity in terms of Entry 78 of Part B of the First Schedule to the TNVAT. In the clarification sought, the detailed processes for the production of Lignite have been set out. The petitioner also clarified before us that it is only in

respect of the Lignite that was sold as a taxable commodity that ITC on capital goods was sought.

3. This distinction is necessary to meet one of the arguments put forth on behalf of the revenue to the effect that the Lignite produced was used in generation of electricity supplied to entities, and since electricity is exempt from tax, there is a statutory bar on the claim of ITC. We address this point in the paragraphs to follow.

4. The specific questions on which clarification was sought from the Commissioner are:

> *a. Whether the definition of manufacture under section 2 (27) of VAT Act 2007 covers "mining of lignite".*
>
> *b. Whether the Mining Equipments and its spares and accessories as stated above can be classified as capital goods for NLC to become eligible for 4% VAT.*
>
> *c. Whether NLC can claim input Tax Credit on capital goods purchased on or after 01.01.2007 as per Sec. 2 (11) of the TN VAT Act 2006.*
>
> *d. Under the TNGST Act a notification was issued by the Government of Tamil Nadu vide G.O. No.31 CT (B2), Dt.27.03.2002, reducing the tax payable by any dealer to 4% on the sale of any goods except Petrol, Diesel and Cement to the Neyveli Lignite Corporation, for use in generation, transmission and distribution of electrical energy subject to furnishing a declaration. It may please be clarified that the notification issued under TNGST still continues under TN VAT Act.*

5. The impugned Clarification dated 10.07.2007 answers the queries as follows:

S NO	*Question*	*Reply*
1	*Whether the definition of manufacture under Section 2 (27) of VAT Act 2006 covers 'mining of lignite*	*Mining does not fall under manufacture*
2(i) *2(ii)*	*Whether the mining equipments and its spares and accessories as stated above can be classified as capital goods for NLC to become eligible for 4% VAT* *Whether NLC can claim input tax credit as capital goods purchased on or after 1.1.2007 as per Section 2(11) of TNVAT Act 2006*	*NLC are not entitled for input tax credit as goods purchased for mining purpose are not capital goods.*
3	*It may be clarified whether the notification issued under TNGST, reducing the tax payable by any dealer to 4% on the sale of any goods except petrol, diesel and cement to the NLC for use in generation transmission and distribution of electrical energy subject to furnishing a declaration.*	*Notification granting reduction in rate of tax on purchase of goods as detailed in it still continues vide Section 88 3(i) of TNVAT Act 2006*

6. In sum and substance, the denial was on the grounds that (i) the activity of mining did not amount to 'manufacture' in terms of Section

2(27) of the Act and (ii) in any event, the goods purchased were not capital goods. On the question of whether Notification issued under the erstwhile Tamil Nadu General Sales Tax Act 1959 granting benefit of reduced rate of tax on the sale of petrol, diesel and cement for generation of electricity would continue, the Commissioner clarifies that the benefit was saved and would continue under Section 88(3)(i) of the TNVAT.

7. Ms.Charulatha, learned counsel for the petitioner assails the impugned clarification dated 10.07.2007 on various grounds. Firstly, she would submit that the definition of '*manufacture*' under the provisions of the TNVAT Act includes within its ambit, the activity of production as well. She takes us through the detailed processes followed in the production of Lignite as well as various cases to buttress her submission that the activity of mining of Lignite would amount to production. She would also undertake a comparison of definitions of the term '*manufacture*' in various revenue enactments to illustrate that the contours of the term *'manufacture'* under the TNVAT Act are wide.

8. She relies on the following decisions in support of her submissions.

1. *CIT V. N.C.Budharaja and Co.*[1]

1 [1993]204 ITR 412

2. *Commissioner of Income-Tax V. SESA Goa Ltd.*[2]
3. *Commissioner of Income Tax V. Mercantile Construction Co.*[3]
4. *Commissioner of Income Tax V. Singareni Collieries Company Limited*[4]
5. *Principal Commissioner of Income Tax V. Dhansar Engineering Co. (P) Ltd.*[5]

9. The specific submission is that the activity of production of lignite would equally satisfy the definition *'manufacture'* under the TNVAT Act and as a result, the petitioner would be entitled to the benefit of ITC on capital goods.

10. Per contra, Mr.Haja Nazirudeen, learned Additional Advocate General assisted by Mr.G.Nanmaran, learned Special Government Pleader for the Commercial Taxes Department would, at the outset, object to the submission that the activity engaged in amounts to '*manufacture'*. He refers to the provisions of Section 3(d) of the Mines and Minerals (Development and Regulation) Act, 1957. Section 3(d) defines ''*mining operations' to mean any operations undertaken for the purpose of winning any mineral'*.

11. Thus, according to him, the activity of mining is a profit generating activity not entitled to any benefit under the TNVAT Act. This

2 [2004] 271 ITR 331 (SC)
3 (1994) 74 TAXMAN 41 (CAL)
4 [1996] 221 ITR 48
5 (2022) 285 TAXMAN 404 (Calcutta)

argument has no merit for the reason that Lignite is a taxable commodity in terms of Entry 78 of Part B to the First Schedule of the TNVAT Act subject to the rigour as well as entitled to benefits, if any, available under the Act.

12. He would rely on the decisions of this Court in *Schwing Stetter (India) Pvt. Ltd. V. Commissioner of Commercial Taxes and Others.*[6] and *Commercial Tax Officer and Another V. Mohan Brewaries and Distrilleries Limited*[7] in defence of the impugned Circular.

13. He submits, relying on the definition of the term '*manufacture'* under the TNVAT Act, that no distinct commercial product has been manufactured by the petitioner, as Lignite is an ore that is available in the Earth. He takes us to the provisions of Sections 19(2)(ii) and 19(5)(a) of TNVAT Act to submit that there is an embargo on the grant of ITC in respect of those goods that are exempt from tax under the TNVAT Act.

14. Since, according to him the deployment of Lignite has been in the generation of electricity, which is exempt from tax, the claim for ITC on the capital goods purchased cannot be considered.

15. We have heard the submissions advanced by the learned counsel and have also studied the material papers and case law carefully.

6 2016 SCC OnLine Mad 33970
7 2020 SCC OnLine SC 552

16. There is no dispute on the position that Lignite is a taxable commodity in terms of Entry 78 of Part B to the First Schedule to the TNVAT Act. Learned counsel for the petitioner has made a specific submission to the effect that the claim of ITC is restricted to taxable sales of Lignite only and that the petitioner has excluded from this claim, the Lignite utilised towards generation of electricity. In other words, the claim of the petitioner is that the reversal of ITC is proportionate to taxable sales of Lignite.

17. However, neither application dated 29.05.2007 seeking clarification before the Commissioner nor the affidavit filed in support of the Writ Petition avers so. In both the application as well as in the writ affidavit, the petitioner's claim is unconditional and without caveat.

18. We thus find some force in the submission of the revenue that there could be no claim of ITC qua the Lignite used towards generation of electricity. As rightly pointed out, Section 19(2) of the TNVAT Act provides for grant of ITC only in specific conditions, excluding sale of goods exempted under Section 15 per Section 19(5)(a) of the TNVAT Act. Thus, the claim of the petitioner is liable to be tested only in the context of tax paid sales of Lignite.

19. The definition of *'manufacture'* under the provisions of the TNVAT Act is as follows:

> *Sec.2(27) ''manufacture'' with its grammatical variations and cognate expressions means producing, making, extracting, altering, ornamenting, finishing, assembling or otherwise processing, treating or adapting any goods and includes any process of goods which brings into existence a commercially different and distinct commodity but does not include any activity as may be notified by the Government;*

20. Various revenue enactments have defined the term *'manufacture'* in a manner unique to that enactment. Under the Central Excise Act, 1944, the definition of *'manufacture'* is under Section 2(f), reading thus:

> *2 (f) "manufacture" includes any process,-*
>
> *(i) incidental or ancillary to the completion of a manufactured product*
> *(ii) which is specified in relation to any goods in the section or Chapter notes of [the Fourth Schedule]as amounting to [manufacture; or]*
> *[(iii) which, in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or labelling or re-labelling of containers including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer,]*
> *and the word "manufacturer" shall be construed accordingly and shall include not only a person who employer hired labour in the production or manufacture of excisable goods, but also any person who engages in the production or manufacture on his own account;]*

21. The Income Tax Act, 1961 defines the term *'manufacture'* under Section 2(29BA) as follows:

> *2(29BA) "manufacture", with its grammatical variations, means a change in a non-living physical object or article or thing,—*
> *(a) resulting in transformation of the object or article or thing into a new and distinct object or article or thing having a different name, character and use; or*
> *(b) bringing into existence of a new and distinct object or article or thing with a different chemical composition or integral structure;*

22. The definition of *'manufacture'* under Section 2(29BA) of the Income Tax Act was inserted by Finance (No.2) Act, 2009 with retrospective effect from 01.04.2000 and till such time, tests had been devised by the Courts to interpret the term '*manufacture'*. This was necessitated by virtue of the fact that various provisions such as Section 32A, 80IA, 80IB etc. of the Income tax Act use the term '*manufacture'* and hence it was necessary for the Courts to evolve necessary tests to assist in the decision-making in that regard. The definition of *'manufacture'* in the Income Tax Act is thus a culmination of some of those tests judicially evolved over the years. Notably, it does not include within its ambit the term *'production'*.

23. The definition under the Central Excise Act is wider as it includes processes as well, including processes that are incidental or ancillary to completion of manufactured products and packing/re-packing/labelling/re-labelling of containers. Such benefit is extended to job works/supporting manufacturers as well.

24. The definition of *'manufacture'* under the TNVAT Act, is wide and brings within its ambit the activities of producing, making, extracting, altering, ornamenting, finishing, assembling, processing, treating or adapting any goods. Additionally, it includes any process which which brings into existence a commercially different and distinct commodity.

25. The line of decisions cited by the petitioner deals specifically with the activity of mining. In *N.C.Budharaja*[8] the Supreme Court considered the juxtaposition of the term '*production*' vis-a-vis the term *'manufacture'* observing that '*the word 'production' has a wider connotation than the word 'manufacture'. While every manufacture can be characterised as production, every production need not amount to manufacture'*.

26. The Bench went on to observe that '*the word 'production' or 'produce' when used in juxtaposition with the word 'manufacture' takes*

8 Foot Note Supra (1)

in bringing into existence new goods by a process which may or may not amount to manufacture'.

27. In the case of *Singareni Collieries Company Limited*[9], the Andhra Pradesh High Court considered the grant of investment allowance for new plant and machinery installed in the business of extraction of coal. Applying the judgment in the case of *N.C.Budharaja*[10] the Court expressed the view that the activity of mining of coal or ore would fall within the purview of production under the provisions of Section 32 of the Income Tax Act. The relevant observations are as follows:

> *Applying the principle, of interpretation spelt out by the Supreme Court in the aforementioned decision and the ordinary meaning of the word "produce" as disclosed by the dictionaries and by its ordinary connotation, we have no doubt in our mind that the activity of winning or excavating the coal from the mines can be aptly described as production activity. It is common to use the expression that the coal or ore is produced from the mine and the statistics of total production of coal or other minerals are required to be given under the statutory provisions governing mines and minerals. It is also not out of place to mention that under section 35E of the Income-tax Act which deals with deduction for expenditure on prospecting, etc., for certain minerals, the following is the language employed:*

9 Foot Note Supra (4)
10 Foot Note Supra (1)

"....engaged in any operations relating to prospecting for, or extraction or production of, any mineral....." (emphasis supplied).

Thus, the expression "production of mineral" is used in the allied provisions of the Act itself and it is a definite point that Parliament employed the expression "production" to the minerals extracted from underneath the surface as well as just as the legislative history taken into account by the Supreme Court, the internal aid to interpretation furnished by a cognate provision can be ultimately taken into account. Viewed from any angle, we are of the view that the benefit of section 32A is available to the respondent- assessee. The correct legal position regarding deduction of investment allowance should not be left in doubt and an uncertainty created in the mind of the respondent-assessee which is a public sector undertaking in the guise of raising a question as to interpretation of a provision which admits of no doubt. We, therefore, decline reference on the second question.

28. In the case of *SESA Goa Ltd.*[11], the Supreme Court considered an appeal filed at the instance of the revenue on the grant of Investment Allowance that hinged on the assessee being involved in the activity of manufacture. The substantial question of law in that case read thus:

"Whether, on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal was justified in holding that the assessee is entitled to deduction of investment allowance under section 32A of the Income-tax Act, 1961, in respect of machinery used in mining activity

11 Foot Note Supra (2)

ignoring the fact that the assessee is engaged in extraction and processing of iron ore, not amounting to manufacture or production of any article or thing?"

29. Section 32A(2)(b)(iii) of the Income Tax Act uses the term '*manufacture*' or '*production*'. The Bombay High Court had considered whether the activity of extraction and processing of iron ore would satisfy either term, i.e., production or manufacture. The High Court held that the activity of extraction and processing of iron ore did not amount to manufacture, but came to the conclusion that such activity and the processes involve production would satisfy the term '*production*', within the meaning of Section 32A(2)(b)(iii) of the Income Tax Act.

30. The Supreme Court, while reiterating the observations in *N.C.Budharaja*[12] and noticing the interplay between the terms '*production*' and '*manufacture*' confirmed the conclusion of the Bombay High Court, rejecting the revenue's appeal.

31. We are of the categoric view that the definition of '*manufacture*' under the TNVAT Act is wide, far wider than the decisions under the Income Tax and Central Excise Acts. In defining the term '*manufacture*', Legislature has thought it fit to equate the activity of

12 Foot Note Supra (1)

production, processing etc. with the term '*manufacture'* placing all such activities on an equal pedestal. The distinction in *N.C.Budharaja*[13] to the effect that the term '*manufacture'* is limited in scope when compared with the term *'production'*, would not stand in the way of the petitioner being entitled to relief, in view of the unique definition of 'manufacture' under the TNVAT.

32. In the present case, the processes undertaken by the petitioner have been set out in detail, both before the Commissioner as well as in the writ affidavit, as follows:

Sl.No.	*Stage in the excavation of lignite*	*Nature of Activity*
1.	*Area preparation*	*In the surface level the cutting Area are to be prepared with the help of dozers and other conventional mining equipments to make the area ready for removal of overburden/forward preparation.*
2.	*Drilling & Blasting*	*Blasting the hard strata for loosening the soil.*
3.	*Surgace Bench*	*Over burden removals by bucket wheel excavator, conveying & spreading.*
4.	*Top Bench*	*Removing the over*

13 Foot Note Supra (1)

		burden by bucket wheel excavator, conveying & spreading
5.	*Middle Bench*	*Removing the over burden by bucket wheel excavator, conveying & spreading*
6.	*Bottom Bench*	*Removing the over burden by bucket wheel excavator, conveying & spreading*
7.	*Lignite Bench*	*Lignite excavation by bucket wheel excavator, conveying & stacking in bunker.*
8.	*Ground water control & Strom water control*	*(1) Maintain the ground water level. (2) Pumping the water from sump to surface area during monsoon period and helps to pumpout the seepage water and.*

9. The Petitioners further state that various capital goods, such as Specialized Mining Equipment like Mobile Transport Conveyor, Bucket Wheel Excavator, Spreader and conventional mining equipments such as Dumpers, Dozers, Pipe Layers, Trench Cutters, Shovels and other ancillary equipments are used by the Petitioners in the mines.

33. The capital equipments utilised in the above processes are detailed in paragraph 10 of the affidavit being *(1) Bucket Wheel Excavator, (2) Spreader (3) Mobile Transfer conveyor, (4) Tripper, (5) Drive head and conveyor (6) Dozer, (7) Pipelayer (8) Backhoe (9)*

Dumper/Shovel (10) Cranes (11) Drilling Machine, (12) Stacker, (13) Reclaimer (14) Walking Pad (15) GWC Drill Rig (16) Floating Pontoons (17) Wireless System (18) Electrical Distribution System.

34. Similar processes have been considered by various High Courts that have reached the conclusion that the above activity would amount to production. We have thus no hesitation in holding that the activity of production engaged in by the petitioner for the mining of Lignite would satisfy the test of *manufacture* under the provisions of the TNVAT Act.

35. Reliance by the respondents on the decisions in *Schwing Stetter (India) Pvt. Ltd*[14] and *Mohan Brewaries and Distrilleries Limited*[15] do not impress for the following reasons. In *Schwing Stetter (India) Pvt. Ltd*[16], the Court was considering a challenge to the vires of Section 2(11) of the TNVAT Act such that the definition of capital good would include those capital goods that were imported into the State as well. That attempt was repelled by the State. This decision does nothing to advance the case of the respondent.

36. In *Mohan Brewaries and Distrilleries Limited*[17], the Supreme

14 Foot Note Supra (6)
15 Foot Note Supra (7)
16 Foot Note Supra (6)
17 Foot Note Supra (7)

Court was concerned with a batch of appeals involving interpretation of Section 7-A of the TNGST Act that deals with levy of purchase tax, and stated that every dealer who purchased from a registered dealer any goods, the sale or purchase of which was liable to tax under the TNGST Act, and who consumes or use such goods in the manufacture of other goods for sale or otherwise, would be liable to tax at specified rates. This decision is also not relevant to the facts and circumstances of the present case.

37. The petitioner had sought and obtained a Clarification under Section 28-A of the TNGST Act, specifically relating to whether the petitioner would be entitled for the benefit of concessional rate of tax under Section 3(3) of the TNGST Act on production of Form XVII. The authority clarified as follows:

> *In view of the above facts and the decisions cited by the petitioners Tvl.N.L.C. Limited, it is clarified as follows:-*
>
> *As regards the issue whether machinery parts and consumables can be purchased against issue of Form XVII declarations u/s.3(3) and 3(5) of the Act, the petitioners are clarified as follows:*
>
> *Tv1.N.L.C. Ltd. can purchase consumables by issue of Form XVII declarations as per the provision of Section 3(3) of the Act.*
>
> *Taking into consideration the definition for 'manufacturer' as provided for u/s.3(h), the various decisions cited by the petitioners to show that the process of mining*

lignite and generation/production of electricity with the aid of lignite is an integrated process and there would be no ground for exclusion for the machineries which are used for extraction and removal of lignite to the factory/plant and the point that the Mines and the Thermal Power Station constitute a single integrated production system and the expression "in respect of sale of any of the goods manufactured in the Eighth Schedule to any other dealer for installation of and use in his factory site situate within the State for manufacture of any goods" employed in Section 3(5) of the TNGST Act may include the machinery, equipment etc., used for extraction and removal of lignite from Mine-I to the Thermal Power Station-I, B and C Plants; from Mine II to the Thermal Power Station - II; the plants and machinery used for production of fertilisers, chemicals etc., the plants and machinery used for production of Steam in the Steam Plant, the parts and accessories required for the maintenance of the above Plants and Machineries, it is clarified that the above said plants, machineries and the parts accessories thereof, if they fall under the Eighth Schedule. can be purchased by issue of Form XVII declarations u/s.3(5) of the TNGST ACT.

38. The Commissioner has noting that the activity of the petitioner amounted to '*manufacture'*, ultimately clarifying that it would be entitled to the benefit of concessional rate of tax under Section 3(3) of the TNGST Act, upon production of Form XVII.

39. This clarification would stand saved by virtue of Section 88(3)(i) of the TNVAT Act that reads thus:

88. Repeal and savings.- (3) Notwithstanding the repeal of the said Act or 1970 Act, as the case may be –

………………

(i) all Rules, regulations, notifications, clarifications or orders made or issued under any of the provisions of the said Act or 1970 Act, as the case may be, and continuing in force on the date immediately before the commencement of this Act, shall continue in force on or after such date in so far as they are not inconsistent with the provisions of this Act or the rules made thereunder until they are repealed or amended.

40. We do not find any inconsistency in the contents of Clarification dated 10.07.2007 and the provisions of the TNVAT Act enacted thereafter. In fact, and on the other hand, we find that the definition of 'manufacture' under the TNVAT would support the expansive interpretation of the term 'manufacture' as canvassed by the petitioner. Thus, and on this score too, we hold that the petitioner is entitled to the benefit as sought.

41. Impugned Clarification dated 10.07.2007, insofar as it relates to the grant of ITC on capital goods purchased for the manufacture of Lignite which is sold as a taxable commodity, is set aside. We make it clear that the benefit granted would enure only in respect of taxable sales of Lignite and the benefit is unavailable in respect of the utilisation of Lignite in the generation of electricity which is an exempted product.

42. This Writ Petition is disposed as above. No costs. Connected Miscellaneous Petition is closed.

[A.S.M., J] [G.A.M., J]
19.09.2024

Index:Yes
Neutral Citation:Yes
speaking order
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To

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

2.The Commercial Tax Officer (FAC),
Cuddalore (Taluk),
Cuddalore.

<u>DR. ANITA SUMANTH,J.</u>
<u>and</u>
<u>G. ARUL MURUGAN.,J</u>
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W.P.No. 34565 of 2007
<u>and M.P.No.1 of 2007</u>

<u>19.09.2024</u>