Tube Investments Of India Ltd vs The State Of Tamil Nadu on 8 October, 2010

Bench: F.M.Ibrahim Kalifulla, M.M.Sundresh

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.10.2010

C O R A M:
THE HONOURABLE MR.JUSTICE F.M.IBRAHIM KALIFULLA
and
THE HONOURABLE MR.JUSTICE M.M.SUNDRESH

TAX CASE Nos.249 of 2006, 1102 of 2006, 2374 of 2008, 142 of 2009, 39 of 2009, 92 of 200
WRIT PETITION Nos.39474 of 2006, 20172 of 2009, 20173 of 2009, 7619 of 2008, 12608 of 20

T.C.No.39 of 2009

Tube Investments of India Ltd.,
(Formerly known as M/s.TI Diamond Chain Ltd.,)
No.234, N.S.C.Bose Road,
Chennai 600 001. .. Petitioner

vs.

The State of Tamil Nadu,
represented by the
Commercial Tax Officer, Backyear, Zone-I,
Harbour I Assessment Circle,
Chennai. .. Respondent

Prayer in T.C.No.39 of 2009: Tax Case Revision is filed under Section 38 of the Tamil N

For Petitioner : Mr.N.Sriprakash
in T.C.No.39/09

For Respondent : Mr.Haja Nasiruddin
in T.C.No.39/09 Spl.G.P. (Taxes)

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C O M M O N O R D E R

F.M.IBRAHIM KALIFULLA, J.

In these tax case revisions, as well as the writ petitions, the common questions of law that arises for consideration are as under:

> "(1) Whether the Tribunal has committed an error of law in failing to see that Section 3(4) had no operation since the situs of the export sales of the petitioners was the State of Tamilnadu ?
>
> (2) Whether Section 3(4) has operation when the situs of the export sales determined in accordance with Section 4 of the Central Sales Tax Act, 1956 read with Explanation (3) to Section 2 of the Tamil Nadu General Sales Tax Act, 1959, is inside the State of Tamilnadu ?"

2. For the sake of convenience and to understand the scope of the controversy, we refer to the facts involved in T.C.No.39 of 2009.

3. The issue pertains to the Assessment Year 2003-04. The petitioners effected purchase of chemicals, consumables and packing materials by using Form-XVII declaration and availed concessional rate of tax at 3% as provided under Section 3(3) of the Tamil Nadu General Sales Tax Act, 1959, hereinafter called 'the Act'. Such materials were used for the manufacture of automobiles parts and industrial chains. The petitioners also exported a part of the manufactured goods through Seaport as well as Airport. Initially proceeding on the basis that such exports would also attract liability under Section 3(4) of the Act, the petitioners paid a sum of Rs.4,31,832/- and at the time of assessment, they took the stand that since the export sale took place in the State of Tamilnadu, there could be no liability under Section 3(4) of the Act.

4. The said stand of the petitioners was not accepted by the Assessing Authority in his order dated 28.04.2006. The petitioners preferred an appeal before the Appellate Assistant Commissioner in A.P.No.121/2006. The Appellant Assistant Commissioner by his order dated 16.04.2007, confirmed the assessment of tax of Rs.4,31,832/- under Section 3(4) of the Act. The petitioners preferred a further appeal before the Sales Tax Appellate Tribunal in T.A.No.296 of 2007. The petitioners appeal was dismissed by the Tribunal by its order dated 12.09.2008, insofar as the liability under Section 3(4) was concerned. It is as against the above orders, the petitioners have come forward with these petitions.

5. Assailing the orders impugned, Mr.Sriprakash and other learned counsel addressed arguments on the legal question as to whether such export made from this State would attract a levy of tax as prescribed under Section 3(4) of the Act.

6. We heard Messers A.Thiagarajan, learned senior counsel, K.J.Chandran, N.Sriparkash, N.Prasad, V.Sundareswaran, R.Senniappan and T.V.Lakshmanan on behalf of the Assessees and Mr.Haja

Nasiruddin, Special Government Pleader (Taxes) on behalf of the State.

7. Mr.A.Thiagarajan, learned senior counsel who appeared for the petitioners in T.C.Nos.249 of 2006 and in some other cases, submitted that the petitioners purchased raw materials for manufacture of Tablets for sale locally, by way of interstate sale, as well as, branch transfer apart from exports. According to the learned senior counsel, such export sale which emanated from this State would also fall within the expression of 'sale' as defined under Section 2(n) of the Act and consequently stood exempted from the purview of Section 3(4) of the Act. The learned senior counsel also contended that in the case of the petitioners represented by him, the Assessing Authority's approach in adopting a formula for arriving at the liability was not justified when the books of accounts were accepted and the Act does not provide any scope for creating notional sales tax liability. In support of his submissions, the learned senior counsel relied upon the decision reported in (2002) 8 SCC 139 (Cemento Corporation Ltd Vs. Collector, Central Excise) and (2009) 22 VST 1 (SC) (State of Haryana and Others Vs. Liberty Enterprises).

8. Mr.N.Sriparkash, learned counsel who appeared for the petitioners in T.C.Nos.39 of 2009 and in some other cases, in his submissions contended that the petitioners purchased chemicals and packing materials by using Form-XVII and the seller charged 3% tax on the sales. The learned counsel pointed out that for using such materials, the petitioners manufactured automobile parts and industrial chains, part of which were exported to outside countries through Seaport as well as Airport.

9. The contention of the learned counsel was two fold. In the first place by virtue of Article 286(1)(b) of the Constitution, there is a fetter on the States to tax on exports and that Section 5(1) of the Tamil Nadu General Sales Tax Act prescribes what is an export. Therefore, though there is a sale by way of export, no tax could have been levied. For that proposition, the learned counsel also referred to Section 2(p) read with Rule 6(e) of the Act and the Rules framed thereunder and stated that it carves out export sales. Alternatively, it was contended that the opening words of Section 3(4) excludes the sale of manufactured goods from the purview of the said provision and the 'export sale' is also a sale covered by the said excluded category and Section 3(4) will have no application.

10. According to the learned counsel, the other set of expressions "any other manner" will have to be read in conjunction with the set of expression "despatch" in which event, the export sale cannot be brought under the set of expression "any other manner". To support the said contention, the learned counsel also drew support of certain other expressions "inside the State" used in Section 3(3) as well as Section 7-A(1)(b) and pointed out that if really the Legislature wanted to restrict the sale within the State alone to be excluded from the imposition of liability of tax under Section 3(4), such a specific expression would have found a place in Section 3(4) as well. In other words, according to the learned counsel when such a specific expression "inside the State" after the set of expression "does not sell the goods manufactured" in Section 3(4) is not applied, it would only mean that all kinds of sale including 'export sale' would fall within the excluded category and therefore no liability under Section 3(4) in the case of the petitioners on the value of export of such manufactured goods can be made.

11. The learned counsel also referred to the definition of 'sale' under Section 2(n) read along with Explanation 3(a) of the said Section and contended that, applying the said definition to the export sale, the 'sale' would definitely be the one within the State of Tamil Nadu and consequently such an 'Export Sale' being a 'Sale' within the State of Tamil Nadu would stand excluded from the purview of the liability to tax as prescribed under Section 3(4) of the Act. The learned counsel pointed out that in the Explanation 3 (a) to Section 2(n) of the Act, it is specifically stated that such Explanation was meant "for the purpose of this Act", hence it should be applied in respect of all the provisions of the Act and a different interpretation of 'sale' cannot be attributed to Section 3(4) alone. He further pointed out that every return included 'export sale' and only if the assessee failed to prove the export sale, it will result in sufferance of the tax under the Act. He also pointed out that even under Section 3(3) of the Act, certain exempted goods are specified, for which, under no circumstances any tax liability could be imposed. The learned counsel placed reliance upon the decisions reported in 41 STC 409 (Polestar Electronic P.Ltd Vs. Additional Commissioner Sales Tax and Another), 63 STC 169 (Madras Marine & Co., Vs. State of Madras), 98 STC 426 (Sri Easwari Extractions Vs. IC-III (SMR) of CT, Madras), 134 STC 473 (Ashok Leyland Ltd., Vs. State of Tamil Nadu & another) and AIR 2008 SC 1120 (Sudesh Kumar Vs. State of Uttarakhand).

12. Mr.N.Prasad, learned counsel appearing for the petitioners in T.C.No.92 of 2009, pointed out that Section 5(3) of the Act came to be introduced on 01.07.1976, after the Judgment of the Hon'ble Supreme Court reported in 36 STC 136, which provided for exemption of tax liability under the Act. The learned counsel by referring to the decision of the Hon'ble Supreme Court reported in 107 STC 571 (State of Karnataka Vs. B.M.Ashraf & Co.,) rendered in relation to Section 6(i) of the Karnataka General Sales Tax Act, which provision is comparable to Section 7-A of the Act contended that the said decision is distinguishable as compared to Sections 3(3) and 3(4) of the Act, which are to be read together.

13. According to Mr.Prasad, when Sections 3(3) and 3(4) are read together, when in Section 3(3) the specific expression used while providing concessional rate of tax of 3%, that such purchase of materials were for the purpose of "manufactured for sale" and such sale not being restricted within the State, the sale as defined in Section 2(n) alone would apply and in which event, even the export sale would stand excluded as provided under Section 3(4) of the Act. The learned counsel also contended that the formula applied in the assessment order has no legal support. Reliance was placed upon the decision reported in 60 STC 314 (Onkarlal Nandlal Vs. State of Rajasthan (SC)).

14. Mr.K.J.Chandran, learned counsel who appeared for the petitioners in T.C.No.32 of 2009 and in some other cases, contended that all the cases were covered by Section 5(1) of the Central Sales Tax Act and he choose to adopt the arguments of Mr.N.Sriprakash.

15. Mr.V.Sundareshwaran, learned counsel who appeared for the petitioners in T.C.No.152 of 2009 and in some other cases, in his submissions contended that the expression "sale" or "any other manner" specified in Section 3(4) of the Act are to be read together and therefore it would only mean sale or any other manner of disposal of manufactured material after they were despatched outside the State by way of branch transfer or through any agent for the purpose of sale or for any other manner of disposal. The learned counsel therefore contended that the set of expression "any

other manner" cannot be attributed to an 'export sale'. He relied upon the decision reported in 95 STC 80 (State of Orissa Vs. Minerals & Metals Trading Corporation of India Ltd.,(v)(SC)

16. Mr.T.V.Lakshmanan, learned counsel appearing for the petitioners in W.P.Nos.20172 of 2009 and in some other cases, submitted that the decision reported in 107 STC 571 (State of Karnataka Vs. B.M.Ashraf & Co.,), is only comparable to Section 7(A) of the Act and what is stated with reference to purchase tax cannot be applied to Sections 3(3) and 3(4) of the Act. According to the learned counsel, the possibility of total evasion of tax which alone would attract Section 7(A) cannot be equated to Sections 3(3) and 3(4) of the Act. The learned counsel relied upon the decisions reported in 1994 (2) SCC 434 (Printers (Mysore) Ltd & Another Vs. Astt. Commercial Tax Officer and others) and (2009) 8 SCC 483 (Bihar School Examination Board Vs. Suresh Prasad Sinha).

17. Mr.N.Inbarajan, learned counsel who is also appearing for the petitioners in T.C.No.39 of 2009, by referring to Rule 6(e) of the Tamil Nadu General Sales Tax Rules, pointed out that the rules themselves provide for a reduction of Export Sale from the taxable turnover, meaning thereby that such 'Export Sale' though a 'Sale' within this State, is none the less not eligible to tax by virtue of Constitutional exemption.

18. As against the above submissions, Mr.Haja Nasiruddin, learned Special Government Pleader (Taxes) contended that Section 3(3) overrides Sections 3(2), 3(2-A) and 3(2-C). According to the learned Special Government Pleader while under Section 3(2) reference is to the first sale in the State for sufferance of tax at the rates specified in the First Schedule. Section 3(3) provides for concessional rate of that very tax by using Form-XVII solely in public interest and thereby augment more manufacturing activities in the State.

19. The learned Special Government Pleader would further contend that when such manufacturing of goods takes place, that would provide for levy of tax, in the event of it is 'sale' within the State and keeping the said consequence in mind, when Section 3(4) is examined, such sale does not provide for any revenue by way of branch transfer or despatch to an agent outside the State and also in any other manner of sale taking place outside the State though not a revenue to the extent to which it could be achieved, the State would be in a position to recover at least 1% more on the value of the materials purchased by availing Form-XVII by the manufacturers. When such is the purport of Section 3(4), it cannot be defeated by bringing in 'export sale' also within the exempted category. In support of the above submissions, the learned Special Government Pleader placed reliance on the two provisos of Section 3(3) which specifically prescribed the levy of difference of tax in case of abuse of the concession prescribed under Section 3(3) which according to him support the above point of view.

20. As far as the formula applied is concerned, by making reference to Rule 22(4)(A) of the Tamil Nadu General Sales Tax Rules, the learned Special Government Pleader contended that once the liability is fixed, it is for the assessee to suggest any other formula. The learned Special Government Pleader placed reliance on the decisions reported in 38 STC 519 (The State of Tamil Nadu Vs. Chettinad Cement Corporation Ltd.,), 138 STC 169 (Krishna Traders & another Vs. Commercial Tax Officer Annathanpatty Circle, Salem & Others), 95 STC 80 (State of Orissa Vs. Minerasl & Metals

Trading Corporation of India Ltd.,), 95 STC 93 (State of Orissa Vs. Johrimal Gajanand), 45 STC 291 (Ponnu Saw Mills Vs. State of Tamil Nadu), 87 STC 315 (State of Tamil Nadu Vs. A.S.Raj & Co.,) and 2005 (1) SCC 604 (State of Punjab Vs. Punjab Fibres Ltd.,) in support of his submissions.

21. The sole question for consideration in all these petitions is as to whether the 'export sale' will also be a 'sale' which does not attract the levy of tax under Section 3(4) of the Act ?

22. In order to appreciate and analyse the issues involved, the relevant provisions to be noted are Sections 2(n) read along with Explanation (3)(a), Sections 3(3) and 3(4) of the Act and Section 5 of the Central Sales Tax Act as well as Article 286(1) of the Constitution of India.

23. For the sake of convenience these provisions are extracted here under:

> Tamil Nadu General Sales Tax 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 a mortgage, hypothecation, charge or pledge) by one person to another in the course of business for cash, deferred payment or other valuable consideration and includes--
>
> (i) a transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;
>
> (ii) a transfer of property in goods (whether as goods or in some other form) involved in the execution of a work contract;
>
> (iii) a delivery of goods on hire-purchase or any system of payment by instalments;
>
> (iv) a transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;
>
> (v) a supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;
>
> (vi) a supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating) where such supply or service is for cash, deferred payment or other valuable consideration, and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made;

Explanation (1)-- ***** Explanation (2)--***** Explanation (3)-(a) The sale or purchase of goods shall be deemed for the purposes of this Act, to have taken place in the State, wherever the contract of sale or purchase might have been made, if the goods are within the State--

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

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

"Section 3(3): Notwithstanding anything contained in (sub-section (2), (2-A) or (2-C), but subject to the provisions of sub-section (1), the tax payable by a dealer in respect of sale of any goods including consumables, packing material and labels, but excluding plant and machinery, to another dealer for use by the latter in the manufacture, and assembling, packing or labelling in connection with such manufacture inside the State, for sale by him of any goods other than ethyl alcohol, absolute alcohol, methyl alcohol, rectified spirit, neutral spirit and denatured spirit goods falling under Part A of the Third Schedule, goods falling under item 1 of the Sixth Schedule and arrack, shall beat the rate of only three per cent on the turnover relating to such sale:

PROVIDED that the provisions of this sub-section shall not apply to -

(a) any sale of high speed diesel oil, light diesel oil and molasses; and

(b) any sale, unless the dealer selling such goods furnishes to the assessing authority in the prescribed manner and within the prescribed period, declaration duly filled in and signed by the dealer to whom the goods are sold containing the prescribed particulars in a prescribed form obtained from the prescribed authority :

PROVIDED FURTHER that any dealer who, after purchasing the goods in respect of which he had furnished any declaration, fails to make use of the goods so purchased for the purpose specified in the declaration but disposes of such goods in any other manner, shall pay the difference of tax payable on the turnover relating to sale of such goods at the rate prescribed and three per cent :

PROVIDED ALSO that the dealer purchasing the goods maintains a separate stock account for each of the goods purchased by him showing such particulars as may be prescribed."

"Section 3(4): Where any dealer, after availing the concessional rate of tax under sub-section (3), does not sell the goods so manufactured, but despatches them to a place outside the State either by branch transfer or by transfer to an agent, by whatever name called, for sale, or in any other manner, except as a direct result of sale or purchase in the course of inter-State trade or commerce, shall pay in addition to the concessional rate of tax already paid under sub-section (3), tax at one per cent on the value of the goods so purchased."

Central Sales Tax Act "Section 5. When is a sale or purchase of goods said to take place in the course of import or export:-

(1) A sale or purchase of goods shall be deemed to take place in the course of the export of the goods out of the territory of India only if the sale or purchase either occasions such export or is effected by a transfer of document of title to the goods after the goods have crossed the customs frontiers of India.

(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.

(3) Notwithstanding anything contained in sub-section (1), the last sale or purchase of any goods preceding the sale or purchase occasioning the export of those goods out of the territory of India shall also be deemed to be in the course of such export, if such last sale or purchase took place after, and was for the purpose of complying with, the agreement or order for or in relation to such export.

(4) The provisions of sub-section (3) shall not apply to any sale or purchase of goods unless the dealer selling the goods furnishes to the prescribed authority in the prescribed manner a declaration duly filled and signed by the exporter to whom the goods are sold in a prescribed form obtained from the prescribed authority.

(5) Notwithstanding anything contained in sub-section (1), if any designated Indian carrier purchases Aviation Turbine Fuel for the purposes of its international flight, such purchase shall be deemed to take place in the course of the export of goods out of the territory of India.

Explanation.- For the purposes of this sub-section. designated Indian carrier means any carrier which the Central Government may, by notification in the Official Gazette, specify in this behalf. "

Constitution of India "Article 286 {Restriction as to imposition of tax on the sale or purchase of goods}

1.No Law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place -

a.outside the State; or b.in the course of the import of the goods into, or export of the goods out of, the territory of India.

2.Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in clause (1).

> Any law of a State shall, in so far as it imposes, or authorises 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 (29A) 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 Parliament may by law specify. "

24. Under Section 3(3), the sale of any goods including consumables, packing materials and labels and excluding certain specific goods sold to another dealer for use by such dealer for manufacturing any other goods inside the State of Tamil Nadu for sale of any goods other than certain exempted goods, such sale would attract levy of only 3% by way of sales tax to be collected by the seller. The levy is however subject to Section 3(1) wherein the turnover limit for levy of tax has been prescribed. The proviso to Section 3(3) however makes it clear that any dealer after purchasing the goods by using Form-XVII violates the conditions of such purchase as stipulated in Section 3(3) and the declaration contained in Form-XVII but dispose of such goods in any other manner should pay the difference of tax payable on the turnover relating to sale of such goods at the rate prescribed under the Act and the 3% which is already paid. The second proviso prescribes that a separate stock account of the goods purchased by using Form-XVII should be maintained by the purchasing dealer.

25. As submitted by the learned counsel, the apparent purport of Section 3(3) is to provide a concessional rate of tax for the purchasing dealer who carries on any manufacturing activities inside the State and who also sell such manufactured goods within the State except by way of inter state sale which is governed by the CST Act. It is also apparent that in the event of such sale of manufactured goods taking place in the State, as such sale, would be the first sale would result in collection of revenue by way of tax at the rate prescribed for such goods under the Act.

26. It is also clear from a reading of Sections 3(3) and 3(4) that the liability of tax provided for under Section 3(4) has got very many interlinked factors which are to be fulfilled. The opening set of expression contained in Section 3(4) makes it clear that after availing of concessional rate of tax under sub-section(3), if the purchasing dealer fails to perform the sale in this State but resort to other modes of disposal of such manufactured goods either by way of branch transfer or by transfer to an agent to a place outside the State for the purpose of sale except by way of interstate sale or purchase, then in those cases, levy of 1% tax on the value of the materials purchased under Section 3(3) of the Act gets attracted.

27. The crucial test to be made therefore relates to the expressions "does not sell the goods so manufactured" and "in any other manner" used in Section 3(4) of the Act. The stand of the revenue of the State is that since the words "in any other manner" occurs prior to the exempted category of "interstate sale" and after the covered category of despatch to a place outside the state by way of branch transfer or by transfer to an agent for the purpose of sale, it should be construed that the export sale would fall under the said set of expressions "in any other manner" in as much as such

sale is not within the State.

28. To counter the said submission, on behalf of the assessees it is contended that if really the law makers wanted to restrict the sale only to a sale inside the State and not to export sale, such a restriction would have been clearly set out in the Section itself as has been provided in Sections 3(3), 7(A)(b) and 9(b) of the Act.

29. At the very outset, it will be worthwhile to make a mention about the restrictions imposed on imposition of tax by the State on Export sales under Article 286(1)(a) & (b) of the Constitution. In fact there is a Constitutional embargo on the States to enact any law providing for levy of tax both on interstate sale or purchase as well as export sale that takes place to any territory outside the country. The apparent purpose is quite clear that in the case of interstate sale the same is covered by the provisions of the Central Sales Tax Act in which the respective States get a part of the tax collection. As far as the export sales are concerned, it is needless to state that in the national interest, when by virtue of such exports, considerable foreign exchange is earned, by way of incentives and to augment more of such exports, the levy of any tax on such export sale is prohibited.

30. In fact under Section 5(3) of the Central Sales Tax Act, the last sale or purchase of any goods preceding the sale or purchase occasioning the export is also to be deemed as export sales. Such extended definition of export making it applicable even to the last sale or purchase of any goods plays a vital role in the article to be exported. Ultimately it only implies that the Constitutional framers want to attach great significance to export and its promotion in the national interest of earning sizeable foreign exchange.

31. Keeping the above prospective in mind, it will be appropriate to examine as to whether the export sale would fall within set of expression "but does not sell the goods so manufactured" as used in Section 3(4) of the Act.

32. When the underlining principles of the framers of the Constitution itself in respect of export sales was so very paramount, at the very outset, it should be held that the imposition of tax as provided under Section 3(4) to be applicable to such an export sale would run counter to such an intention of the Parliament, which cannot be countenanced. In other words, when the State lacks the legislative competence by virtue of the Constitutional embargo to levy any tax on export sale, the indirect creation of any tax liability on such 'export sales' on the inputs purchased cannot at all be recognised. To put it differently, if the levy of 1% tax on the value of the goods purchased by the dealer who is dealing in manufacture of goods inside the State by availing concessional rate of 3% tax by using Form-XVII, under Section 3(3) of the Act would negate the very Constitutional restriction imposed under Article 286 as a 'deemed export' as set out under Section 5(3) of the Central Sales Tax Act, the same cannot be countenanced. In this context, it will be worthwhile to refer to a Division Bench decision of this Court reported in 2005 (3) LW 101 (N.PRIYADARSHINI VS. THE SECRETARY TO GOVERNMENT, EDUCATION DEPARTMENT, FORT ST. GEORGE, CHENNAI-9 AND ANOTHER). Para 27 of the said decision is relevant for our purpose, which reads as under:-

> ".....27. In this connection, it may be mentioned that according to theory of the eminent jurist Kelsen (the pure theory of law) in every country there is a hierarchy of laws and the general principle is that a law in a higher layer of this hierarchy will prevail over the law in a lower layer of the hierarchy (see Kelsen's "The General Theory of Law and State") In our country this hierarchy is as follows:-
>
> (i) The Constitution of India
>
> (ii) Statutory law (which may be either Parliamentary law or law made by the State legislature).
>
> (iii) Delegated Legislation (which may be in the form of rules made under the statute, regulations made under the statute, etc)
>
> (iv) Purely administrative or executive orders."

Applying the said principles to the facts of this case, as in the hierarchy of law, the Constitution provision will supersede any conflicting statutory provision, we hold that the interpretation sought to be laid on behalf of the State, to hold that Section 3(4) will apply to the export sale of the assesses will run counter to the well laid legal principles referred to above and the same cannot be countenanced.

33. On these grounds itself, it can be held that there would be no scope for invoking Section 3(4) in regard to the export sales of the goods manufactured.

34. When we examine the other submissions of the learned counsel appearing for the petitioners that the export sale is fully covered by the definition of 'sale' under Section 2(n) read along with Explanation 3(a) and thereby that is also a sale within the State, on that ground as well, no liability by way of tax can be fastened under Section 3(4) of the Act. The said submission of the learned counsel for the petitioners is also well founded.

35. When we examine Section 2(n) which defines sale to mean "every transfer of the property in goods other than by way of a mortgage, hypothecation, charge or pledge by one person to another in the course of business for cash, deferred payment or other valuable consideration". The Explanation 3(a) makes it further clear that such export sale should also be construed as a sale for the purposes of this Act. In order for a sale to come within the fiction of sale as prescribed in Explanation 3, the conditions are:

> (a) the goods should be within the State;
>
> (b) such situs of the goods in the case of specific or ascertained goods should be at the time of contract of sale or purchase was made; and

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

36. Therefore, Explanation-3 to Section 2(n) is wider in amplitude. It can never be disputed that the goods manufactured by availing the concessional rate of tax in respect of those materials purchased in the manufacture of such goods as provided under Section 3(3) by itself would make it unambiguous that such goods are within the State.

37. In the case on hand, it is not in dispute that Explanation-3(a)(i) is attracted viz., that such goods are specific or ascertained goods. It is also not in dispute that such ascertainment of the goods were existing at the time when the contract of sale or purchase in respect of the export was made. When such stipulations to be satisfied as prescribed under Explanation-3 are fulfilled, certainly the export sale is also deemed to be a sale as defined under Section 2(n) of the Act for the purpose of the Act.

38. When once we are able to assimilate the definition of 'sale' in the case of an export under the provisions of the Act, we are convinced that such a sale, is nothing but a sale for which an exigency of tax liability would not occur as provided under Section 3(4) of the Act.

39. In other words, the expression "but does not sell the goods so manufactured" cannot be put against the export sale in order to levy the tax on the value of the goods so purchased by availing the concessional rate of tax under Section 3(3) of the Act.

40. In view of our above conclusions, we have no hesitation to hold that such an export sale cannot be brought under the set of expressions "in any other manner" as used in Section 3(4) of the Act.

41. As rightly contended by the learned counsel for the petitioners, the said set of expressions having been used following the expression "for sale" and applying the maxim Ejusdem Generis, it can only mean and taken to the effect that any despatch to a place outside the State either by way of branch transfer or by transfer to an agent by whatever manner called, either for sale or for any other purpose, certainly it cannot be attributed to an export sale. It would be directly covered by the definition of 'sale' under Section 2(n) of the Act and thereby would not come within the exclusion of sale. We therefore need not have to even deal with the submission based on the comparison made by making a reference to Section 7(a), 7(b) and 9(b) of the Act.

42. On behalf of the State, heavy reliance was placed upon the decision of the Hon ble Supreme Court reported in (1997) vol 107 STC 571 (STATE OF KARNATAKA VS. B.M.ASHRAF & CO.). That was a case where, the assessee thereon purchased fish oil from unregistered dealers within the State of Karnataka, in turn, it sold the said oil to another dealer, who purchased the said oil in order to comply with the export order from its buyer in a foreign country. The assessee therein, claimed exemption from payment of sales tax on the sale made to another by claiming umbrage under Section 5(3) of Central Sales Tax Act 1956 i.e., last sale or purchase prior to the export. The said claim was however rejected by the assessing authorities. In fact, the levy of tax was based on Section 6 of the Karnataka General Sales Act, which provided for levy of purchase tax under such

circumstances, as stipulated under Section 6 of the said Act. Section 6(1) of the Karnataka General Sales Tax Act specifically stipulated as under :-

> ....6(i) :- either consumes such goods in the manufacture of other goods for sale or otherwise (or consumes, otherwise) or disposes of such goods in any manner other than by way of sale in the State, or
>
> (ii) dispatches them to a place out side State except as a direct result of sale or purchase in the course of inter-State trade or commerce Dealing with the said provision as well as after considering Section 5 of the Central Sales Tax Act, the Hon ble Supreme Court has held as under in paragraph 12 :
>
> " ...12. Similarly situs is irrelevant as regards the sales being in the course of export, as in the present case. In the context of sales tax law, the expression "sale in the State" occurring in Section 6 can only mean a local sale or an intra State sale as opposed to sale in the course of export or in the course of inter-State trade or commerce. Therefore, wherever, there is a sale in the course of export or an inter-State sale, then, that would not be regarded as a "sale in the State" falling under Section 6(i) of the Act and therefore, sale by the respondent to Kalbhavi, which was admittedly a sale in the course of export under Section 5(3) would not be regarded as "sale in the State" .....

43. While examining the reliance placed upon the said decision on behalf of the State, it will have to be noted that Section 6 of the Karnataka General Sales Tax Act is more or less in pari materia with Section 7(A) of the Act i.e., (TNGST Act). From what has been laid down by the Hon ble Supreme Court in the first blush, it does appear that irrespective of the fact that the sale of fish oil by the assessee therein was a sequel to an export order thereby governed by Section 5(3) of the CST Act, but, yet the Supreme Court held that such a sale cannot be construed as a Sale in the State and consequently it does not fall within the Set of expressions specifically stipulated in Section 6(i) of the Karnataka GST Act.

44. But at the very outset, it will have to be stated that the said decision can be considered in the event of a question arising relating to the exigibility of tax (purchase tax) under Section 7-A of the Act. Consequently, it is relevant to note that in Section 6(i) of the Karnataka Act, a specific expression by way of sale in the State has been used and the decision of the Hon ble Supreme Court was primarily while interpreting the said expression contained in Section 6(i) of the Karnataka Act. It is well laid down principle that a judgment cannot be an authority for a proposition which was not canvassed before it. In this context, it will be appropriate to refer to the decision of the Hon ble Supreme Court reported in 2003(4) Labour Law Notes = AIR 2003 SC 2661 = (2003) 11 SCC 584 (ASHWANI KUMAR SINGH VS. UTTAR PRADESH PUBLIC SERVICE COMMISSION AND OTHERS), wherein, the Hon ble Supreme Court has held as under:-

> ".....Observations of courts are not to read as Euclid's theorems nor as provisions of the statute. These observations must be read in the context in which they appear.

> Judgments of Courts are not to be construed as statutes...."

In this regard, reliance can also be placed upon the decision reported in (2004) 2 SCC 362 (MEHBOOB DAWOOD SHAIKH VS. STATE OF MAHARASHTRA), wherein, the Supreme Court in paragraph 12, has held as follows:-

> ".... A decision is available as a precedent only if it decides a question of law. A judgment should be understood in the lights of facts of that case and no more should be read into it than what it actually says. It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this Court divorced from the context of the question under consideration and treat it to be complete law decided by this Court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before this Court. .... Reliance can also be placed upon the decision reported in AIR 2008 SC 1120 (SUDESH KUMAR VS. STATE OF UTTARAKHAND). In para 22, the Hon ble Supreme Court has held as under:-
>
> ".....The Court would not construe a Section of a statute with reference to that of another statute unless the latter is in pari materia with the former. Therefore, a decision made on a provision of a different statute will be of no relevance unless underlying objects of the two statutes are in pari materia. ...."

Support can also be had on the very recent decision of the Hon ble Supreme Court reported in 2009 (8) SCC 483 (BIHAR SCHOOL EXAMINATION BOARD VS. SURESH PRASAD SINHA). In paragraphs 20, 21, 22, the Hon ble supreme Court after referring to certain earlier decisions has held as under in para 23:-

> ".... 23. We have referred to the aforesaid decisions and the principles laid down therein, because often decisions are cited for a proposition without reading the facts of the case and the reasoning contained therein. ..."

45. Applying the principles referred to in the above two decisions and the reliance placed upon Ashraf s case, it will have to be held that the said decision rendered in the context of the specific provisions contained in Section 6(i) of the Karnataka Act cannot be mutatis mutandis apply to the case on hand where Section 3(4) are worded differently. While in Section 3(4) the qualifying words are does not sell the goods so manufactured and the expression by way of sale in the State as contained in Section 6(i) of the Karnataka Act is significantly absent in Section 3(4). Therefore, what are to be examined while applying Section 3(4) is as to whether the dealer after availing the concession rate of sale under Section 3(3) failed to effect a sale. It is unnecessary for that dealer to establish that such a sale was a sale either by way of intra state sale or export sale . Keeping the above specific content of Section 3(4) in mind, when we examine, the definition of sale as contained in Section 2(n) read along with explanation 3(a) of the Act, the position becomes clear to the effect that by virtue of the fact that the manufactured goods of the assessee is available in the State and by virtue of compliance of explanation of 3(a) to Section 2(n), the transaction of the assessee even by

way of export satisfies the definition of sale under the Act and consequently the application of Section 3(4) automatically gets excluded. Therefore, having regard to the application of Section 2(n) read along with explanation 3(a) of the Act, the invocation of Section 3(4) of the Act stands excluded. The said legal position viz., reading of Section 2(n) into 3(4) being a special situation in the case on hand, which legal position was not present in Ashraf s case, we have to hold that whatever stated in Ashraf s case cannot be applied to the case on hand.

46. In this context, the reliance placed upon the decision reported in 41 STC 409 (POLESTAR ELECTRONIC (PVT.)LTD. VS. ADDITIONAL COMMISSIONER, SALES TAX, AND ANOTHER), of the Hon ble Supreme Court on behalf of the Assessees, fully fortifies their claim. At page 422, the Hon ble Supreme Court has held as under:-

> ".....It may be pointed out in the first place that the legislature could have easily used some such words as "inside the Union Territory of Delhi" to qualify the word "resale", if its intention was to confine resale within the territory of Delhi, but it omitted to do what was obvious and used the word "resale" without any limitation or qualification, knowing fully well that unless restrictions were imposed as to situs, "resale" would mean resale anywhere and not merely inside the territory of Delhi. The legislature was enacting a piece of legislation intended to levy tax on dealers who are laymen and we have no doubt that if the legislative intent was that "resale" should be within the territory of Delhi and not outside, the legislature would have said so in plain unambiguous language which no layman could possibly misunderstand. It is a well-settled rule of interpretation that where there are two expressions which might have been used to convey a certain intention, but one of those expressions will convey that intention more clearly than the other, it is proper to conclude that, if the legislature used that one of the two expressions which would convey the intention less clearly, it does not intend to convey that intention at all. We may repeat what Pollock, C.B., said in Attorney-General Vs. Sillem. That "if this had been the object of our legislature, it might have been accomplished by the simplest possible piece of legislation ; it might have been expressed in language so clear that no human being could entertain a doubt about it". We think that in a taxing statute like the present which is intended to tax the dealings of ordinary traders, if the intention of the legislature were that in order to qualify a sale of goods for deduction, "resale" of it must necessarily be inside Delhi, the legislature would have expressed itself clearly and not left its intention to be gathered by doubtful implication from other provisions of the Act. The absence of specific words limiting "resale" inside the territory of Delhi is not without significance and it cannot be made good by a process of judicial construction, for to do so would be to attribute to the legislature an intention which has chosen not to express and to usurp the legislative function. ...."

47. Applying the ratio laid down therein and having regard to the specific provision contained in explanation 3(a) to Section 2(n) wherein, it has been specifically provided that by virtue of the said explanation and the satisfaction of which would include the sale or purchase of goods as deemed sale or purchase for the purposes of this Act and in the event of satisfaction of the stipulations

contained in Explanation 3(a), such transaction will have to be necessarily construed as a sale within the State, it will stand excluded for the application of Section 3(4) of the Act. When once such a construction is authorized under the Act, negative stipulation viz., does not sell the goods so manufactured contained in Section 3(4) will not apply and consequently, invocation of Section 3(4) in the case of even an export sale will stand excluded. The reliance placed upon the decision reported in 63 STC 169 (MADRAS MARINE AND CO., VS. STATE OF MADRAS) by the assesses is also helpful to the petitioner. At page 176, the Hon ble Supreme Court has held as under:-

> "....The ratio of this decision would be applicable to the facts and circumstances of this case. It was rightly urged that the appropriation of goods took place in the State of Tamil Nadu when the goods were segregated in the bonded warehouse to be delivered to the foreign going vessels. It was not a case of export as there was no destination for the goods to a foreign country. The sale was for the purpose of consumption on board the ship. It was not as if only on delivery on board the vessel that the sale took place. The mere fact that shipping bill was prepared for sending it for customs formalities which were designed to effectively control smuggling activities could not determine the nature of the transaction for the purpose of sales tax nor does the circumstances that delivery was to the captain on board the ship within the territorial waters make it a sale outside the State of Tamil Nadu. ...."

To support the above conclusion, the decision of the Hon ble Supreme Court reported in 134 STC 473 (ASHOK LEYLAND LTD VS. STATE OF TAMIL NADU AND ANOTHER) can also be referred to. Paragraphs 69 and 71 of the said decision reads as under:-

> "...69. The expression "For the purpose of this Act", unless the context otherwise requires would mean "all the purposes" thereof. .....
>
> 71. The expression "for the purpose of the said Act" must also be given effect to. The same would ordinarily mean "for the purpose of all the provisions of the said Act". ....."

Applying the said ratio, it can be safely held that the export sale of the petitioners would squarely fall under the definition of sale .

48. We therefore hold that the 'export sale' is also a 'sale' as contemplated in the first part of Section 3(4) of the Act and consequently the exigibility to tax as provided under the said Section cannot be applied.

49. On behalf of the assesses, reliance was placed upon 2002 8 SCC 139 (CEMENTO CORPORATION LTD VS. COLLECTOR, CENTRAL EXCISE). In paragraph 17, the Hon ble Supreme Court held as under:-

> ".....17. In our view, the Tribunal and the Collector have incorrectly interpreted the provisions of Tariff Item 23 of the First Schedule to the 1944 Act. The tariff heading

> of the entry is "Cement.". Therefore when TI 23(2) speaks of "all others" it means "all other kinds or varieties of cement". It is axiomatic that if the product is not cement but can be used for some purposes like cement, such product is not cement. The test as enunciated by the Tribunal for determination of the question of classification is no doubt how the product is known to the trade. The appellant has produced evidence to show that lympo had never been known or indeed advertised as "cement" whether of a superior or inferior quality, but was known as a cement substitute. The respondents have produced nothing to show to the contrary. A substitute necessarily implies a difference in identity. When once it is admitted that lympo is a cement substitute, the Tribunal could not have come to the conclusion that lympo was cement or a variety of cement. In our view, there is no ambiguity in the definition of TI 23(1) or TI 23(2). Even if there were, on the principle that when two constructions can be equally drawn, the one favourable to the taxpayer should be adopted, the Tribunal should have held in favour of the appellant."

50. Applying the said principle to the case on hand, in the first place, we do not find any doubt at all to hold that there was a 'sale' viz., situs of sale' was within the state and consequently, the application of Section 3(4) of the Act stands excluded. Assuming if there is any doubt, it will have to be held that constructions which would favour the tax payer should be adopted and on that basis it will have to he held that Section 3(4) will not apply.

51. The contention of the learned Special Government Pleader (Tax) that the concession rate of tax provided under Section 3(3) of the Act by the State was with the paramount principle that the ultimate manufactured goods would derive better revenue at the time of its first sale within the State and that if an export sale were to be brought within the definition of sale and thereby applicability of Section 3(4) is excluded, the state would be deprived of its revenue in all respects and that was not the contemplation of the provision contained in Section 3(3) and 3(4) of the Act.

52. In fact the said contention was repelled by the Hon ble Supreme court in the following words in paragraph 5 of the decision reported in (1994) 2 SCC 434 (PRINTERS (MYSORE) LTD. AND ANOTHER VS. ASSTT. COMMERCIAL TAX OFFICER AND OTHERS):-

> "....Section 8, read as a whole, sys inter alia : where a dealer purchases goods (being non-declared goods) required by him for use in the manufacture or processing of goods for sale and issues Form 'C' to the selling dealer, the selling dealer shall be liable to pay tax only @ 4% as per Section 8(1) and not 10% as provided in Section 8(2), provided that the certificate of registration of the purchasing dealer specifies the class of goods purchased by him. (In case of declared goods, the selling dealer has to pay tax at the rate applicable to sale of such goods within the appropriate State.) It necessarily means that the selling dealer will collect (pass on) tax from the purchasing dealer only at the said concessional rate. The idea behind this provision is self-evident. It is to ensure that the price of the product manufactured by such purchasing dealers does not go up to the detriment of the consumers of those goods. The Parliament does not want to tax both the raw material and the finished goods at

> the full rate. Where the finished goods are meant for sale, the raw material utilised or consumed for the manufacture of said finished goods is taxed at the concessional rate, for the reason that the State derives revenue again by taxing the sale of the finished goods. However, it is not necessary that the finished goods are actually subjected to tax on their sale for they may be exempted either by the Act or by a notification issued thereunder. It is enough that the finished goods are meant for sale. Ordinarily, of course, their sale is taxed. ....."

Therefore, when a constitution embargo is created on export sales, on that sole ground, the contention of the respondent will have to be rejected.

53. The reliance placed upon the Division bench decision of this Court reported in 38 STC 519 (THE STATE OF TAMIL NADU VS. CHETTINAD CEMENT CORPORATION LTD.) on the interpretation of explanation 3 to Section 2 (n) of the Act on behalf of the State, cannot be accepted for the simple reason that in the said decision, what all the Division Bench has said is that the purpose of explanation of 3 to Section 2(n) is to fix the situs of the sale, for the purpose of taxation and made it clear that the question as to when the sale is completed was outside the scope of Explanation 3. As a matter of fact, the conclusion of the Division Bench to the effect that Explanation 3 to Section 2(n) was purported to fix the situs of the sale supports the sale of the assessee. Therefore, based on the said decision the interpretation to Section 3(4) cannot be made.

54. The decision relied upon by the State reported in 138 STC 169 (KRISHNA TRADERS AND ANOTHER VS. COMMERCIAL TAX OFFICER ANNANTHANPATTY CIRCLE, SALEM AND OTHERS) cannot also be applied inasmuch as the said decision follows the decision of the Supreme Court in Ashraf s case. The Division Bench rejected the contention of the assessee claiming exemption from purchase tax of Section 7(A) of the Act by relying on Section 5(3) of the CST Act inasmuch as the said decision was rendered in the context of application of Section 7(A) of the Act. For imposition of purchase tax, the ratio of the decision of the Hon ble Supreme Court in Ashraf s case was fully applicable. The said decision cannot however be applied to the case relating to the applicability of Section 3(3) and 3(4) of the Act. Reliance was placed upon the decision of the Supreme Court reported in 95 STC page 93 (STATE OF ORISSA VS. JOHRIMAL GAJANAND). The Hon ble Supreme Court while dealing with the provision contained in the Orissa Sales Tax Act, in the context, where an Assesee, a registered dealer to the said Act, purchase certain goods from another registered dealer based on a declaration furnished by it for resale of the purchased goods in the state and the goods were however sold in the course of inter state trade, in that context, held as under at page 97:-

> " .....It is the admitted case of the assessee that the sales in question were the sales in the course of inter-State trade and if that is the position then the question of the same sales being the sales within the State did not arise. ....."

Having regard to the peculiar facts involved in that case, the decision rendered therein cannot be applied to the facts of this case.

55. Similarly, the Division Bench decision reported in 45 STC 291 (PONNU SAW MILLS VS. THE STTE OF TAMIL NADU) cannot also be applied inasmuch as the said decision came to be rendered while applying Section 7-A of the Act. Inasmuch as the said section varies in very many degrees as compared to 3(3) and 3(4) of the Act, the same cannot be applied to the facts of this case. Similar is the decision reported in 87 STC 315 (STATE OF TAMIL NADU VS. A.S.RAJ & CO.,). Therefore, the same cannot be applied to the facts of this case.

56. Having regard to our above conclusions, we hold that Section 3(4) of the Act will have no application since situs of the export sales of the petitioners for the purpose of said Section was the State of Tamilnadu and by virtue of the said factual position, the applicability of Section 3(4) stands excluded for the exigibility of tax. The questions are accordingly answered in favour of the petitioners/assessee.

57. The petitions stand allowed. The impugned orders are set aside. No costs. Consequently, connected MPs are closed.

kk/nvsri To The Commercial Tax Officer, Backyear, Zone-I, Harbour I Assessment Circle, Chennai