

(2001) 11 GUJ CK 0032

In the Gujarat High Court

Case No : Special Civil Application No. 6787 of 2001

Cheminova India Ltd.

APPELLANT

Vs

Sales Tax Officer

RESPONDENT

Date of Decision : 09-11-2001

Acts Referred:

Gujarat Sales Tax Act, 1969 — Section 15B, 16, 2, 2(33), 41B

Citation : (2002) 126 STC 334

Hon'ble Judges : M.S. Shah, J;D.A. Mehta, J

Bench : Division Bench

Advocate : K.H. Kaji, for the Appellant; U.R. Bhatt, Additional Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

M.S. Shah, J.—In this petition under Article 226 of the Constitution, the petitioner, a public limited company engaged in the manufacture of pesticides, challenges the notices dated August 2, 2001 issued by the Sales Tax Officer, Surat, u/s 41B of the Gujarat Sales Tax Act, 1969 (hereinafter referred to as "the Act" for brevity) for making provisional assessment for the financial years 1997-98 to 2000-01 for levy of additional purchase tax u/s 15B of the Act. The petitioner has also prayed for a writ to permanently restrain the respondent from levying any additional purchase tax u/s 15B.

2. The facts leading to filing of the petition, briefly stated and as averred by the petitioner, are as under :

The petitioner is a manufacturing unit which is eligible to sales tax incentive scheme under which the purchases made by it of raw materials, etc., are nominally taxed in the hands of selling dealer who would recover the same from the manufacturer and the sales made by the manufacturer of the manufactured goods would be exempted wholly. To give effect to the said incentive scheme, the State Government exercising its powers u/s 49(2) of the Act issued various

notifications from time to time incorporating various entries under which various units were entitled to exemptions as per the terms and conditions of the said entries.

The present petition is concerned with entry 255 for earlier period and entry 69 for the subsequent period. Under entry 255(2) sales of raw materials, etc., by a registered dealer to an eligible unit like the petitioner is subjected to nominal sales tax only being 1/4th of 1 per cent, provided that eligible unit gives a certificate in form No. 26 which contains the declaration that the goods are required by him for use within the State of Gujarat as raw materials, in the manufacture of goods for sale within the State or outside the State. Thus, only nominal sales tax is levied on the registered dealer selling to the manufacturer which nominal sales tax he will recover from the manufacturer against form No. 26. It may be noted that form No. 26 permits the manufacturer not only to sell the goods within the State but also outside the State. Entry 255(3) dealing with the sales of the manufactured goods by the eligible unit provides for total exemption of sales tax on the condition that the manufacturer does not give form No. 40 prescribed by the Rules and also incorporates a declaration in the bill, invoice or cash memo in respect of the said goods that the sale is exempt from tax under entry 255(3) and that the buyer shall not be entitled to claim any drawback, set-off, etc., under the Rules and further that the buyer shall not give any certificate in form No. 40 of the Rules to any subsequent purchaser.

Subsequent entry 69 provides for similar exemption to eligible units. Reference may be made to Clause (2) with regard to sales by a registered dealer to the eligible unit where the tax payable would be only 1/4th of 1 per cent, if the eligible unit furnishes a certificate in form No. 40 prescribed by the notification declaring that the raw materials purchased shall be used within the State of Gujarat in the manufacture of goods for sale within the State. Entry 69(3) wholly exempts the sales made by an eligible unit and it has to give declaration on the bill, invoice or cash memo that the sale is exempt under entry 69(3) and that it shall not give form No. 40 prescribed by the Rules to the buyer.

3. When the matter was taken up for admission hearing, submissions were made on behalf of the petitioner contending that provisional assessment u/s 41B could be resorted to only where the Commissioner has reason to believe that the dealer has evaded the tax, but in the instant case leave alone any evasion of tax, in the first place there is no liability to pay tax u/s 15B since the petitioner is granted exemption u/s 49(2) of the Act in respect of the finished goods which are being manufactured by it and, therefore, since the petitioner is not manufacturing taxable goods as defined by Section 2(33) of the Act, the question of levy of additional purchase tax u/s 15B does not arise at all. On the other hand, on behalf of the revenue Mr. U.R. Bhatt, learned Additional Government Pleader submitted that since the liability to pay additional purchase tax u/s 15B was very much there, the respondents were prepared to pass orders of regular assessment.

In view of the aforesaid controversy centering round the basic question whether the petitioner is liable to pay additional purchase tax u/s 15B of the Act when the taxable raw materials purchased by it are used in manufacture of goods which are ultimately exempted from sales tax as per notifications u/s 49(2) of the Act and in view of the fact that this, controversy has arisen in case of all the industrial units exempted u/s 49(2) of the Act pursuant to various notifications issued by the State Government, at the joint request of the learned counsel for the parties, the Court proceeded to hear the elaborate submissions of the learned counsel on the merits of the controversy about applicability of Section 15B, that is, the very basic question about liability of the petitioner to pay additional purchase tax u/s 15B of the Act when the taxable raw materials purchased by it are used in manufacturing finished goods which are ultimately exempted from sales tax pursuant to the notifications u/s 49(2) of the Act.

4. Before enumerating the rival submissions, it is necessary to set out the main provisions of the Act which are relevant for the purposes of this petition.

Section 15B reads as under :

"15B. Purchase tax on raw or processing materials or consumable stores used in manufacture of goods.--Where a dealer who being liable to pay tax under this Act purchases either directly or through a commission agent any taxable goods (not being declared goods) and uses them as raw or processing materials or consumable stores, in the manufacture of taxable goods, then there shall be levied in addition to any tax levied under the other provisions of this Act, a purchase tax at the rate of--

(a) two paise in the rupee on the turnover of such purchases made during the period commencing on the 1st April, 1986 and ending on the 5th August, 1988 ; and

(b) four paise in the rupee on the turnover of such purchases made at any time after the 5th August, 1988 :

Provided that where the raw materials purchased and used in the manufacture of goods are bullion or specie,".

Section 2 of the Act defines "goods" and "taxable goods" as under :

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

..... (12) "goods" means all kinds of movable property (not being newspapers or actionable claims or stocks, shares or securities) and all materials, articles and commodities, including,.....

..... (33) "Taxable goods" means goods other than those on the sale or purchase of which no tax is payable u/s 5 or Section 49 or a notification issued thereunder."

Section 5 in so far as relevant reads as under :

"5. Sales and purchases of certain goods free from all tax.-- (1) Subject to the conditions or exceptions (if any) set out against each of the goods specified in column 3 of Schedule I, no tax shall be payable on the sales or purchases of any goods specified in that Schedule.

Sub-section (2) of Section 5 empowers the State Government to add to, or enlarge any entry in Schedule I, or relax or omit any condition or exemption specified therein. Sub-section (3) provides for laying of the notifications before the State Legislature."

Section 49 in so far as relevant reads as under :

"49. Exemptions.--(I) Subject to the conditions or exceptions, if any, specified in relation to them, the following classes of sales or purchases shall be exempt from the payment of the whole of tax payable under the provisions of this Act, namely :--".

Clauses (i) to (vii) enumerate sales to Canteen Stores Departments for members of Armed Forces and various agencies of the United Nations Organizations.

Sub-section (2) of Section 49 reads as under :

"Subject to such conditions as it may impose, the State Government may, if it considers it necessary so to do in the public interest, by notification in the Official Gazette, exempt any specified class of sales or of specified sales or of purchases from payment of the whole or any part of the tax payable under the provisions of this Act."

Sub-section (3) of Section 49 provides for laying of notifications before the State Legislature.

Rule 42E reads as under :

"42E. Drawback, set-off or refund of purchase tax u/s 15B.--In assessing the purchase tax levied u/s 15B and payable by dealer (hereinafter referred to as "the assessee") the Commissioner shall subject to conditions of Rule 47 in so far as they apply, and further conditions specified below, grant him a drawback, set-off or as the case may be, refund of the whole of the purchase tax paid in respect of purchase of goods effected on and from the 1st April, 1986 used by him, as raw materials, processing materials, or consumable stores, in the manufacture of taxable goods.

Conditions:--(1) The assessee is a registered dealer,

(2) The goods purchased are taxable goods other than declared goods,

(3) The said goods have been used by the assessee within the State as raw materials or processing materials or consumable stores in the manufacture of taxable goods,

(4) The goods so manufactured have been sold by the assessee in the State of

Gujarat."

5. Mr. K.H. Kaji, learned counsel for the petitioner, has vehemently contended as under :

5.1. User of taxable raw materials in the manufacture of taxable goods is sine qua non for levy of additional purchase tax u/s 15B. Section 2(33) of the Act specifically provides that the goods exempted from sales tax under the notifications u/s 49(2) go out of the definition of "taxable goods". Since the petitioner is manufacturing goods which are exempted from sales tax. pursuant to the notifications u/s 49(2) of the Act, there could be no levy of purchase tax u/s 15B of the Act.

5.2. The expression "taxable goods" came up for consideration of this Court in *Nowroji N. Vakil & Co. v. State of Gujarat* [1979] 43 STC 238. In the said decision, this Court has held that what is to be seen is whether the assessee sold taxable goods or not and it would be determined by ascertaining whether a sale by the assessee was taxable or exempt. The said decision came to be confirmed by the Supreme Court in *Hindustan Brown Boveri Ltd. v. State of Gujarat* [1981] 47 STC 376 wherein the apex Court compared and contrasted the definition of "goods" under the Gujarat Act with the same expression as defined under the Bombay Act and held that the goods exempted under the Government notifications u/s 49(2) go out of the category of taxable goods and the dichotomy that is stated to exist between "taxable goods" and "taxable events" has been given a go-by by the definition u/s 2(33) with the result that one has to wait till the disposal of the goods by the dealer to find out whether the goods are taxable goods or not.

5.3. The levy u/s 15B becomes effective or gets activated on manufacture of taxable goods and that activation can only be ascertained by finding out whether the goods have borne tax or not and whether the said goods are exempted either by virtue of Section 5 or by virtue of notifications u/s 49(2). Even if charging event or taxable event takes place earlier, the levy only materialises or becomes active on manufacture of taxable goods or in other words the dormant charge becomes alive only when the goods are manufactured and are sold as taxable goods which event can only be ascertained at a later stage when the finished goods are sold.

5.4. When the State Government has already granted exemption to the petitioner's manufacturing unit u/s 49(2) from payment of sales tax on sale of the finished goods, there is no rationale in the department interpreting Section 15B to mean that additional purchase tax is payable by the petitioner u/s 15B (over and above the tax reimbursed by the petitioner to the dealer of the taxable raw materials) on the use of such raw materials in manufacture of goods which are ultimately not to be subjected to sales tax on account of the aforesaid exemption u/s 49(2) of the Act.

6. In the alternative, even if the department is right in law in contending that the

petitioner is liable to pay purchase tax u/s 15B, the petitioner has been bona fide believing that the petitioner is not liable to pay the said tax because for the financial years 1994-95 and 1995-96 the Sales Tax Officer had accepted the petitioner's case that it was not liable to pay such tax and it was only thereafter that the respondents sought to fasten the liability on the petitioner for the period from 1996-97 onwards.

7. In reply, Mr. U.K. Bhatt, learned Additional Government Pleader for the respondents, submitted as under :

7.1. When the constitutional validity of Section 15B of the Act came to be challenged before this Court in *Madhu Silica Private Limited v. State of Gujarat* [1992] 85 STC 258, this Court also examined the question about the scope of expression "taxable goods" as occurring in Section 15B and this Court held that once the raw materials are utilised in the manufacturing process for manufacturing goods which are generally taxable under the Act, charge u/s 15B gets attracted and that the question whether ultimately the manufactured goods emerge or not and the subsequent question whether sales tax would be payable or not are matters of no consequence. Mr. Bhatt heavily relied upon the aforesaid decision and further submitted that the decision of this Court on the question of constitutional validity and interpretation of Section 15B of the Act came to be confirmed by the Supreme Court in *Hotel Balaji v. State of Andhra Pradesh* [1993] 88 STC 98. Mr. Bhatt, therefore, vehemently submitted that the question sought to be raised in the present petition is no longer *res Integra* and is already concluded by the aforesaid decisions in favour of the revenue.

7.2. As regards the decisions in *Nowroji N. Vakil and Co. Vs. The State of Gujarat*, and *Hindustan Brown Boveri Ltd. Vs. State of Gujarat*, , Section 15B was introduced on the statute book after the aforesaid decisions and, therefore, they have no relevance to the controversy in the instant case.

8. We have given anxious and thoughtful consideration to the rival submissions. There is no dispute that on analysis of Section 15B, the following conditions have to be complied with before the levy of purchase tax under the said provisions can become effective :

- (i) Dealer must be liable to pay tax, i.e., he must be a registered dealer.
- (ii) He purchases any taxable goods,
- (iii) He uses them as raw materials,
- (iv) Such use is in the manufacture of taxable goods.

It is upon fulfilment of the aforesaid conditions that there shall be levy of purchase tax u/s 15B of the Act in addition to any other levy under the Act. In the instant case, there is no dispute that conditions Nos. (i) to (iii) are fulfilled. The controversy is whether condition No. (iv) is complied with or not. According to the petitioner-assessee, since it uses the raw materials in question in

manufacturing goods which are exempted from sales tax pursuant to notifications u/s 49(2) of the Act, they fall outside the definition of "taxable goods" as contained in "Section 2(33) of the Act and, therefore, condition No. (iv) is not complied with.

For the sake of convenience, definition of "taxable goods" in Section 2(33) of the Act is again set out hereinbelow :

"Taxable goods" means goods other than those on the sale or purchase of which no tax is payable u/s 5 or Section 49 or a notification issued thereunder."

There is no dispute about the fact that the sales by the petitioner of the goods manufactured by it are exempted under entry 255(3) and entry 69(3) being part of the notification issued by the State Government u/s 49(2) of the Act.

9. The bone of contention between the parties is about the interpretation of the expression "taxable goods" as found in Section 15B of the Act. A prima facie perusal of the provisions of Section 15B read with Section 2(33) of the Act may prima facie indicate that there is considerable substance in the contention urged on behalf of the petitioner that the use of raw materials in question by the petitioner is not in the manufacture of taxable goods because the finished goods in question are exempted from payment of sales tax under the aforesaid entries of the notification u/s 49(2) of the Act. The thrust of the submissions of the learned Additional Government Pleader is that in *Madhu Silica's case* [1992] 85 STC 258, a division Bench of this Court has considered this very expression "taxable goods" as occurring in Section 15B of the Act and also the definition in Section 2(33) of the Act and has thereafter held that the expression in Section 15B means "generally taxable goods".

10. On the other hand, Mr. Kaji, learned counsel for the petitioner submitted that the question raised in the present petition was never the subject-matter of the controversy before this Court in *Madhu Silica Private Limited and Others Vs. State of Gujarat and Others*, because in that case the court was concerned with the question of constitutional validity of Section 15B of the Act and the court was merely examining the contention whether the provision of Section 15B seeks to levy tax in the nature of excise. It is, therefore, submitted that the observations made by this Court in *Madhu Silica's case* [1992] 85 STC 258 in the context of that controversy can never be taken out of context and used to fasten levy of purchase tax on the petitioner u/s 15B of the Act when the goods being manufactured by the petitioner are not taxable goods because they are exempted pursuant to notifications u/s 49(2) of the Act. It is, therefore, submitted by Mr. Kaji that when the controversy raised in the present petition was never in the focus before the division Bench deciding *Madhu Silica Private Limited and Others Vs. State of Gujarat and Others*, the observations made therein were mere dictum and did not intend to lay down the principle which is now being canvassed by the revenue.

Mr. Kaji further vehemently submitted that this very expression came to be

interpreted by this Court in *Nowroji N. Vakil & Co. v. State of Gujarat* [1979] 43 STC 238 and this interpretation also came to be confirmed by the Supreme Court in *Hindustan Brown Boveri Ltd. v. State of Gujarat* [1981] 47 STC 376.

11. It is true that the expression "taxable goods" did come up for consideration before this Court in *Nowroji N. Vakil & Co. v. State of Gujarat* [1979] 43 STC 238 and before the Supreme Court in *Hindustan Brown Boveri Ltd. v. State of Gujarat* [1981] 47 STC 376. Those decisions support the petitioner's contention, but it cannot be overlooked that those decisions were rendered in 1978-1981 long prior to the introduction of Section 15B in its original form which was inserted in 1986 with effect from April 1, 1986. When the constitutional validity of such provisions made by the Legislatures in other States was challenged on the ground that the tax in question was a tax on consignments which was within the exclusive domain of the Parliament, the Supreme Court upheld that challenge in *Good Year India Ltd. v. State of Haryana* [1990] 76 STC 71. Original Section 15B as inserted in the year 1986 also came to be challenged in a group of writ petitions before this Court, but before the petitions could be heard, the Governor of Gujarat issued an Ordinance repealing the earlier section and enacting new Section 15B, The Ordinance was replaced by an enactment in 1990 and the said new Section 15B was brought into force with effect from April 1, 1986. Those writ, petitions, therefore, became infructuous and a fresh group of petitions were filed for challenging the validity of new Section 15B. The said petitions were dismissed by this Court on February 28, 1991 and the said decision is reported as *Madhu Silica Private Limited v. State of Gujarat* [1992] 85 STC 258. This Court speaking through a Division Bench comprising of honourable Chief Justice G.N. Ray and honourable Mr. Justice S.B. Majmudar (as their Lordships then were) examined in depth all the challenges to the constitutional validity of Section 15B and in the process also considered all the facets of the provisions of Section 15B of the Act. While the main challenge was on the touch stone of legislative competence for enacting Section 15B, in the course of that examination, the court was required to consider several aspects including the question whether Section 15B imposes a tax in the nature of excise. The discussion on that part of the controversy is to be found on page Nos. 301 to 307 of the judgment reported in *Madhu Silica Private Limited and Others Vs. State of Gujarat and Others*, .

In *Madhu Silica Private Limited and Others Vs. State of Gujarat and Others*, the contention of the assessee was that when the raw materials in question are used in the manufacture of taxable goods, the impugned levy u/s 15B would be in the nature of excise. The court negated that contention by holding that the charging event takes place on the purchase of raw materials, but the charge remains dormant till the goods (raw materials) are actually put to use in manufacture of taxable goods. The charge gets attracted then and the taxing event has nothing to do with ultimate emergence of taxable goods. At that stage, the court specifically considered the submission of the learned advocates for the petitioners in that case. It would be worthwhile to quote those observations in their entirety :

"The submission of the learned advocates for the petitioners that this section in substance imposes a tax in the nature of excise because manufacture contemplated by the section is of taxable goods and, therefore, till taxable goods emerge, taxing event would not be complete, cannot be countenanced for obvious reasons. Taxable goods are defined by Section 2(33) as goods other than those on the sale or purchase of which no tax is payable u/s 5 or Section 49 or a notification issued thereunder. The learned Advocate-General was right when he contended that which types of goods are covered by Section 4 or Section 49 are clearly indicated by the Legislature. A manufacturer/dealer who proceeds to manufacture taxable goods knows very well at the stage the manufacturing process starts as to which goods are sought to be manufactured by utilising raw materials. Ultimately, whether the concerned goods which he produces bear full burden of tax or get partial or full exemption from payment of tax on the happening of certain contingencies will have nothing to do with the question whether raw materials, etc., were utilised for manufacturing such goods. Measure of tax or ultimate liability to pay tax either wholly or partially on manufactured goods cannot have any impact on the question whether purchased raw materials were used or utilised in the manufacturing process for producing such manufactured goods. Reliance placed in this connection by the learned Advocate-General on the decision of the Supreme Court in [1975] 36 STC 191 (State of Tamil Nadu v. Kandaswami) is justified. Referring to a similar question which arose in connection with Section 7-A of the Tamil Nadu Act, the Supreme Court in that case held that taxable goods would mean the goods, the sale or purchase of which is generally taxable under the Act. Notwithstanding the goods being taxable goods, there may be circumstance in a given case by reason of which the particular sale or purchase does not attract tax u/s 3, 4 or 5. Sub-sections (4) and (5) of Section 7-A with which the Supreme Court was concerned read as under :

"(4) The goods purchased are goods, the sale or purchase of which is liable to tax under this Act ;

(5) Such purchase is in circumstances in which no tax is payable u/s 3, 4 or 5, as the case may be."

Analysing these ingredients of Section 7-A, the aforesaid observations were made by the Supreme Court. It is true that in the present case, there is a clear definition of taxable goods ; while in Tamil Nadu Act, on the ingredients of Sub-sections (4) and (5), the Supreme Court held that these sub-sections contained definition of taxable goods. However, the result remains the same. Ingredients of Subsections (4) and (5) of Tamil Nadu Act are parallel to the provisions found in the definition of taxable goods in Section 2(33) of the Gujarat Act. Therefore, it must be held on parity of reasoning, that the phrase "uses them as raw material or processing materials or consumable stores in the manufacture of taxable goods" as employed by Section 15B would mean user of such raw material in the manufacturing process for manufacturing generally taxable goods under the Act

and ultimately, in given circumstances, such manufactured goods may not attract tax under the charging provision and still they would remain taxable goods. It is, therefore, not possible to agree with the contention of the petitioners that charging event u/s 15B would be manufacture of taxable goods. As already discussed earlier, charging event would stop short at the stage of utilisation of the purchased raw material in the manufacturing process of taxable goods. Ultimately such taxable goods may emerge or not. That would be totally irrelevant, but the charge would operate under the section of its own the moment goods are purchased and utilised as raw materials, etc., in the manufacturing process of generally taxable goods."

Thereafter, this Court dealt with the submissions of the learned advocates for the petitioners in that case based on the decision of this Court in *Nowroji N. Vakil & Co. v. State of Gujarat* [1979] 43 STC 238 and the decision of the apex Court in *Hindustan Brown Boveri Ltd. v. State of Gujarat* [1981] 47 STC 376 which are also relied upon by the learned counsel for the petitioners in the instant case. After explaining those decisions, this Court observed as under :

"It is difficult to appreciate how these decisions can be of any avail to the petitioners. In the present case, once raw materials are utilised in the manufacturing process for manufacturing taxable goods which are generally taxable under the Act, charge u/s gets attracted. Ultimately, if the manufactured goods are found not to bear tax, then the question of refund at the stage of assessment may arise. But that by itself would not whittle down the charge or postpone it in any manner as suggested. It is also not possible to agree with the contention of the learned advocates of the petitioners that under the present section, the charge would extend even beyond the manufacture of taxable goods till manufactured taxable goods actually bear the tax. Actual liability to pay tax is quite distinct from general taxability of the goods manufactured, as laid down by the Supreme Court in *Kandaswami case* [1975] 36 STC 191. In fact, once purchased raw material is utilised in the manufacturing process, charging event gets completed under the section and the aspect whether ultimately the manufactured goods emerge or not, would pale into insignificance as seen earlier. It is not the taxing event under the section. Once taxing event takes place, subsequent event pales into insignificance. Thus, it is not possible to agree with contention of the learned advocates of the petitioners that the impugned provision seeks to impose excise duty or tax in the nature of excise. Decision of the Bombay High Court in [1990] 79 STC 255 (*Hindustan Lever Ltd. v. State of Maharashtra*) strongly pressed in service by the learned advocates of the petitioners with respect cannot be agreed to. It is difficult to agree with the reasoning of the Bombay High Court in the aforesaid decision to the effect that u/s 13AA, levy takes effect on the occasion of manufacture and, therefore, levy is in the nature of excise. Such a line of reasoning is not countenanced by the section. Neither in Section 13AA of the Maharashtra Act nor in Section 15B of the present case levy is imposed on the manufacture of taxable goods. As laid down by the Supreme Court in *Good Year case* [1990] 76 STC 71, taxable event is one

on the occurrence of which charge gets immediately attracted. In our view, charge gets attracted when the raw materials are purchased and used in the process of manufacture of taxable goods and it has nothing to do with ultimate emergence of taxable goods. They may emerge or may not emerge, they may remain taxable goods or may not remain taxable goods. Charge under the section is not concerned with these eventualities. Under these circumstances, with respect, it is not possible to agree with the view taken by the Bombay High Court in Hindustan Lever case [1990] 79 STC 255. In our view, Section 15B does not cover the field envisaged by entry 84 of the Union List, and cannot be termed as imposing any duty in the nature of excise..... The section nowhere contemplates the phraseology like "and use them for manufacture of taxable goods". Consequently, the moment goods are purchased as inputs and user of the purchased raw material, etc., is made in the manufacturing process and they enter as inputs in the manufacture of generally taxable goods, charge under the Act gets completely settled and attracted. Such charge has nothing to do with ultimate stage of manufacture of taxable goods nor does it cover it in its sweep."

12. The above observations leave no room for doubt that this Court specifically considered the definition of "taxable goods" as contained in Section 2(33) of the Act and thereafter held that whether the concerned goods which the manufacturer produces bear full burden of tax or get partial or full exemption from payment of tax on the happening of certain contingencies will have nothing to do with the question whether raw materials, etc., were utilised for manufacturing such goods. At more than one place, this Court dealt with the definition of "taxable goods" in Section 2(33) of the Act and held that Section 15B levies tax on "user of such raw material in the manufacturing process for manufacturing generally taxable goods under the Act and ultimately in certain circumstances such manufactured goods may not attract tax and still they would remain taxable goods".

13. In our view, therefore, the question sought to be raised in this petition was already raised before this Court in Madhu Silica's case [1992] 85 STC 258. Merely because that was not the only question or merely because various other facets of Section 15B were also considered, it cannot be a ground for holding that the interpretation of the expression "taxable goods" in Section 15B in Madhu Silica's case [1992] 85 STC 258 was a dictum. This Court carefully considered the specific question after considering the provisions of Sections 15B, 2(33) and also Sections 5 and 49 of the Act and also very much after considering the decision of this Court in Nowroji N. Vakil & Co. [1979] 43 STC 238 and the decision of the apex Court in Hindustan Brown Boveri Ltd. [1981] 47 STC 376. At the cost of repetition, we may say that those decisions in Nowroji N. Vakil & Co. [1979] 43 STC 238 and Hindustan Brown Boveri Ltd. [1981] 47 STC 376 were rendered in 1978-1981, when Section 15B was not even on the statute book.

14. We may also note the principle laid down by the apex Court in Hico Products Ltd. v. Collector of Central Excise (1994) 71 ELT 339. In that case, the apex

Court has held that the exemption from duty by means of a statutory notification does not take away the levy or have the effect of erasing levy of duty ; the object of the exemption notification is to forgo due duty and to confer certain benefits upon the manufacturer or the buyer or the consumer through the manufacturer, as the case may be. Of course, that was a decision under the Central Excise Act and the Rules framed thereunder, but, in our opinion, the principle laid down therein is of general application to exemptions under all taxing enactments.

Section 2 of the Gujarat Sales Tax Act, 1969 opens with the words "In this Act, unless the context otherwise requires". In our view, the expression "unless the context otherwise requires" would be applicable for appreciating the import of the expression "taxable goods" occurring in Section 15B of the Act. It is also required to be noted that a manufacturer who is granted sales tax exemption under a notification u/s 49(2) of the Act is granted such exemption subject to several conditions. At the stage of levying charge u/s 15B of the Act when the raw materials are used in the manufacture of goods, it will be too early to know whether the goods in question will ultimately be taxable or not because the conditions stipulated in the notification u/s 49(2) may or may not be complied with. Even when sales tax exemption is given by way of incentive for establishing new industries in backward areas, there is an outer-limit of exemption. When that limit is reached and the goods are being sold beyond that exemption limit, the manufacturer would have to pay tax in respect of the goods when that limit is reached. Even for working out those limits of tax liability, the manufacturer would have to first proceed on the footing that the goods are taxable and then compute the benefits of exemption. We are, therefore, inclined to agree with the division Bench in *Madhu Silica Private Limited and Others Vs. State of Gujarat and Others*, when it observed that by the expression "taxable goods" what was meant was the goods which are generally taxable under the Act and that the charging event was not intended to be postponed till the finished goods were finally and actually sold. As already indicated above, the object of exemption is only to forgo due duty and not to erase the levy of tax.

15. In our view, therefore, the decision in *Madhu Silica Private Limited and Others Vs. State of Gujarat and Others*, concludes the controversy in favour of the revenue and accordingly we are of the view that the petitioner is liable to pay additional purchase tax u/s 15B of the Act on the purchase of raw materials by the petitioners and on their use in the manufacture of goods which are generally taxable goods under the Act, though they may be exempted from payment of sales tax pursuant to the notifications u/s 49(2) of the Act.

16. When the provisions of Section 15B have already been interpreted by this Court and the aforesaid view is taken, it is not necessary to go into the rationale of the levy of additional purchase tax u/s 15B of the Act on the goods which are generally taxable goods under the Act, but which are ultimately exempted from payment of sales tax pursuant to the notifications u/s 49(2) of the Act.

17. Even so, we are inclined to consider the alternative submission of Mr. Kaji for the petitioner that in the event of this Court holding against the petitioner on the interpretation of Section 15B, the respondent could not have formed the belief that the petitioner had evaded tax by reason of it raising a contention that levy u/s 15B is not attracted as it manufactures non-taxable goods. Mr. Kaji has strongly relied on the decision of this Court in *Batliboi & Co. Ltd. v. Sales Tax Officer* [2000] 119 STC 583, wherein this Court observed that the power u/s 41B for provisional assessment can be invoked only if the Commissioner or his delegate has reason to believe that a dealer has evaded the tax. The show cause notice issued for provisional assessment should record reasons or grounds for coming to the conclusion that the dealer had evaded tax. Such formation of opinion is also a condition for invoking the power of provisional assessment. The expression "evasion of tax" conveys mens rea on the part of the dealer. The expression conveys a meaning that the dealer by infringing the law has been trying to avoid payment of tax in due time. The court relied on the observations made by another division Bench of this Court in *Natraj Rubbers v. Sales Tax Officer* [1999] 113 STC 575, where the similar word "evasion" used in Section 62 of the Act was construed denoting "some overt or covert act on the part of the dealer in furtherance of avoiding or to evade the tax". Where the dealer has not paid tax under a bona fide belief, it would not amount to evasion of tax.

18. Since the expression "taxable goods" u/s 16 of the Act was earlier interpreted by this Court in *Nowroji N. Vakil & Co.* [1979] 43 STC 238 in favour of the assessee in that case and that decision was confirmed by the apex Court in *Hindustan Brown Boveri Ltd.* [1981] 47 STC 376 the assessee interpreted the same expression as occurring in Section 15B of the Act (though found on the statute book subsequently) on the same lines and since the Sales Tax Officer himself had accepted the interpretation canvassed by the petitioner for the financial years 1994-95 and 1995-96, we are of the view that the belief entertained by the petitioner for the subsequent years that it was not liable to pay tax u/s 15B of the Act was a bona fide belief and non-payment of tax by the petitioner on that ground cannot amount to evasion of tax.

19. On the aforesaid short ground only, while holding that the interpretation placed by the respondents on the expression "taxable goods" as occurring in Section 15B of the Act on the basis of the decision of this Court in *Madhu Silica Private Limited v. State of Gujarat* [1992] 85 STC 258 is the correct interpretation in law, we quash the impugned notices u/s 41B of the Act at annexure "C" to the petition for the years 1997-98 to 2000-01, without prejudice to the powers of the respondents to frame regular assessments in respect of the said period for the petitioner's liability for purchase tax u/s 15B of the Act.

20. Rule is made absolute to the aforesaid extent only with no order as to costs.

D.A. Mehta, J.

I have gone through the judgment of my learned brother and I agree with the

final order. However, I have my own reservation about the reasoning and findings recorded by my learned brother in paragraphs 8 to 16 dealing with applicability of Section 15B of the Gujarat Sales Tax Act, 1969 and I hereby clarify that I do not agree with the views stated therein. However, in view of the fact that the petition is otherwise allowable on the short ground of non-applicability of provision of Section 41B of the Gujarat Sales Tax Act, 1969, I have not rendered dissenting opinion in relation to stated views expressed by my learned brother vide paragraphs 8 to 16 dealing with applicability of Section 15B of the Gujarat Sales Tax Act, 1969 of his judgment.

22. Accordingly rule is made absolute to the aforesaid extent with no order as to costs.