

(2007) 04 MAD CK 0072

In the Madras High Court

Case No : W.A. No's. 1882 of 2005, 909, 199 and 200 of 2006 and 465 of 2007, W.P. No's. 47132 of 2002, 28798 of 2004, 6123 to 6126, 30250 and 30251 of 2005 and 1830 to 1832, 2410 to 2412, 2640, 2641, 3131, 3132, 3254, 3255, 3593, 3617, 3408, 3409, 3919, 6328, 632

Hotel Shri Kannan

APPELLANT

Vs

The State of Tamil Nadu

RESPONDENT

Date of Decision : 24-04-2007

Acts Referred:

Central Excises and Salt Act, 1944 — Section 37B

Income Tax Act, 1961 — Section 119

Tamil Nadu General Sales Tax Act, 1959 — Section 2, 28A, 28A(1), 28A(2), 3

Citation : (2007) 8 VST 97

Hon'ble Judges : P.P.S. Janarthana Raja, J; P.D. Dinakaran, J

Bench : Division Bench

Advocate : C. Natarajan in W.A. No. 199/2006 for Pushya Sitaraman, in W.P. Nos. 9309 and 9310/2006 and W.P. No. 12393/2006 and R. Hemalatha, W.A. No. 465 of 2007 and W.A. No. 909 of 2006, for the Appellant; Haja Nazirudeen, Spl. Government Pleader, for the Respondent

Judgement

P.D. Dinakaran, J.—The challenge in these batch of writ appeals and writ petitions is as to the power to levy purchase tax u/s 7-A of the Tamil Nadu General Sales Tax Act (for brevity, "the Act") by the Revenue from the respective appellants/petitioners (for brevity, "the Dealers") in the context of the Circular D.Dis.Acts Cell II/75893/99, dated 24.12.1999, as amended by the clarification No. 91/2000, D.Dis.Acts Cell II/52300/2000, dated 4.10.2000 issued by the Revenue to the effect that the stock transfer of turmeric to other States is liable to purchase tax u/s 7-A of the Act if it is purchased from unregistered dealers within the State; that purchase tax u/s 7-A of the Act is leviable only if the turnover of the dealer under the Act exceeds Rupees Three hundred crores in a year; that the exemption granted under Third Schedule to the Act is not a general exemption, but on conditional that the sale of turmeric by a dealer whose turnover exceeds Rupees three hundred crores per year does not fall under Third

Schedule; that since there is no other entry in the Schedules, such dealers are liable to pay tax at 11% under Entry 67 of Part-D of the First Schedule; and that turmeric in any form such as balls, fingers and powder continue to be the same commodity, if tax was paid in one stage, the subsequent change in forms will not attract sales tax since it is only second sale of the tax suffered commodity.

2. Concededly, the Revenue issued show causes notices to the dealers, who have escaped assessment of purchase tax and have purchased turmeric, an agriculture produce from either agriculturists, marketing committee, householders or unregistered dealers or in some cases from registered dealers. When such show cause notices were challenged in writ petitions, finding that such show causes notices are of pre-revision assessments and the dealers could raise their objections to the same, they were permitted to submit their objections with supporting materials and the Revenue was directed to consider the same and pass appropriate orders in accordance with law. As a result, writ appeals were preferred and other writ petitions challenging the show cause notices were tagged with the writ appeals.

3.1. Mr. C. Natarajan, learned Senior Counsel arguing on behalf of the dealers invited our attention to Sections 2(ooo), 2(q), 2(r) , 7-A, 8, 28-A of the Act and Entry 16 of Part-B of Third Schedule. Our attention was also drawn to the Circular D.Dis.Acts Cell II/75893/99, dated 24.12.1999, as amended by the clarification No. 91/2000, D.Dis.Acts Cell II/52300/2000, dated 4.10.2000 issued by the Revenue, the existence of which in the statute book is not denied by the learned Special Government Pleader.

3.2. The core contention of Mr. C.Natarajan, learned Senior Counsel for the dealers is that the Revenue, having issued Circular D.Dis.Acts Cell II/75893/99, dated 24.12.1999, as amended by the clarification No. 91/2000, D.Dis.Acts Cell II/52300/2000, dated 4.10.2000, either by exercise of the power conferred under Sections 8 or 28-A of the Act, as the case may be, is bound by the same, as the same are in force. In this regard, reliance was placed on the decision of the Division Bench of this Court in Mohan Breweries and Distilleries Limited Vs. Commercial Tax Officer and Others, , to which one of us was a party (P.D. DINAKARAN, J.), wherein the below stated decisions of the Apex Court and other High Courts were followed:

- i. State Bank of Travancore Vs. Commissioner of Income Tax, Kerala, ;
- ii. Keshavji Ravji & Co. v. Commissioner of Income Tax : [1990]183ITR1(SC) ;
- iii. Collector of Central Excise, Patna Vs. Usha Martin Industries, etc., ;
- iv. The Paper Products Ltd. Vs. Commissioner of Central Excise, ;
- v. UCO Bank, Calcutta Vs. Commissioner of Income Tax, West Bengal, ;
- vi. Commissioner of Sales Tax, U.P. v. Indra Industries 2001 122 STC 100 (SC);
- vii. Commissioner of Income Tax v. Kelvinator of India Ltd. [2002] 256 ITR 1 ;

- viii. Collector of Central Excise, Vadodra Vs. Dhiren Chemical Industries, ;
- ix. Collector of Central Excise, Vadodara Vs. Dhiren Chemical Industries, ; and
- x. Commissioner of Customs, Calcutta Vs. Indian Oil Corporation Ltd. and Another, .

3.3. Mr. C. Natarajan, learned Senior Counsel also relied on the decision of the First Bench of this Court in an unreported judgment dated 19.9.2006 in W.A. No. 1101 of 2006, etc (between Om Plastics and The Deputy Commercial Tax Officer), and also the decision of this Bench in India Cements Ltd. v. Asst. Commissioner (CT) [2007] 6 VST 140 whereunder the applicability of the circular and clarification issued u/s 28-A of the Act was dealt with and the ratio laid down by the Apex Court and other High Courts on the point, as followed in Mohan Breweries and Distilleries Limited Vs. Commercial Tax Officer and Others, , was referred to.

3.4. According to Mr. C.Natarajan, learned Senior Counsel, as the circular and the clarification referred to above, were in existence during the relevant period, in view of the settled proposition of law that the circular is binding on the Revenue, the show cause notice raising a demand contrary to the terms of the circular and the clarification is ab initio void, as per the ratio laid down by the Apex Court in Commissioner of Customs, Calcutta Vs. Indian Oil Corporation Ltd. and Another, ; and The Paper Products Ltd. Vs. Commissioner of Central Excise, .

4.1. Per contra, Mr. Haja Nazirudeen, learned Special Government Pleader, vehemently contends that even though the existence of the Circular D.Dis.Acts Cell II/75893/99, dated 24.12.1999, as amended by the clarification No. 91/2000, D.Dis.Acts Cell II/52300/2000, dated 4.10.2000 is not disputed, the same is not valid, inasmuch as the same is contrary to the terms of the statute.

4.2.1. According to Mr. Haja Nazirudeen, learned Special Government Pleader, the impugned circular either could have been issued under Sections 8 or 28-A of the Act. If it is construed that the circular has been issued u/s 8 of the Act read with Entry 16 of Part-B of Third Schedule, the Circular is contrary to the terms of the statute, as Entry 16 of Part-B of Third Schedule refers only to sale tax, but not purchase tax, as the same is applicable only to the commodities specified thereunder being "sold", but not purchased. Entry 16 of Part-B of Third Schedule reads as under:

16. Chillies, tamarind, corriander, turmeric and shikakai sold by any dealer whose total turnover in respect of these items does not exceed Rs. 300 Crores in a year

4.2.2. Argued that there is no reference to "purchase" in Entry 16 of Part-B of Third Schedule. Therefore, what was intended to be exempted under Entry 16 of Part-B of Third Schedule is only "sales tax", but not "purchase tax", even though Section 8 of the Act provides that subject to such restrictions and conditions as may be prescribed, a dealer who deals in the goods specified in the Third Schedule shall not be liable to pay "any tax" under this Act, in respect of such

goods.

4.3. Mr. Haja Nazirudeen, learned Special Government Pleader also contends that the circular relied upon by the dealers, viz., Circular D.Dis.Acts Cell II/75893/99, dated 24.12.1999, as amended by the clarification No. 91/2000, D.Dis.Acts Cell II/52300/2000, dated 4.10.2000 could not have been issued u/s 28-A of the Act, as Section 28-A of the Act refers to only the clarifications relating to the rate of tax, but not with reference to the exemption of any tax.

5. We have given careful consideration to the submissions of both sides.

6. Before proceeding further, it is apt to refer Sections 2(ooo), 2(q), 2(r), 7-A, 8, 28-A of the Act and Entry 16 of Part-B of Third Schedule, which read as under:

Section 2(ooo): "tax" means and includes a sales tax, purchase tax, resale tax or surcharge, as the case may be, payable under this Act;

Section 2(q): "total turnover" means the aggregate turnover in all goods of a dealer at all places of business in the State, whether or not the whole or any portion of such turnover is liable to tax;

Section 2(r): "turnover" means the aggregate amount for which goods are bought or sold, or delivered or supplied or otherwise disposed of in any of the ways referred to in Clause (n), by a dealer either directly or through another, on his own account or on account of others whether for cash or for deferred payment or other valuable consideration, provided that the proceeds of the sale by a person of agricultural or horticultural produce, other than tea and rubber (natural rubber latex and all varieties and grades of raw rubber), grown within the State by himself or on any land in which he has an interest whether as owner, usufructuary mortgagee, tenant or otherwise, shall be excluded from his turnover;

Explanation 1: "Agricultural or horticultural produce" shall not include such produce as has been subject to any physical, chemical or other process for being made fit for consumption, save mere cleaning, grading, sorting or drying.

Explanation 1A: Any amount charged by a dealer by way of tax separately without including the same in the price of the goods bought or sold shall not be included in the turnover.

Explanation 2: Subject to such conditions and restrictions, if any, as may be prescribed in this behalf-

(i)[Omitted]

(ii)the amount for which goods are sold shall include any sums charged for anything done by the dealer in respect of the goods sold at the time of, or before the delivery thereof;

(iii)any cash or other discount on the price allowed in respect of any sale and any amount refunded in respect of articles returned by customers shall not be

included in the turnover; and

(iv) where for accommodating a particular customer, a dealer obtains goods from another dealer and immediately disposes of the same to the said customer, the sale in respect of such goods shall be included in the turnover of the latter dealer but not in that of the former.

Explanation 3: Any amount realised by a dealer by way of sale of his business as a whole, shall not be included in the turnover.

Explanation 4: The aggregate amount for which the goods are bought or sold or delivered or supplied through a factor, broker, commission agent or arhati, del credere agent or an auctioneer or any other mercantile agent, by whatever name called, whether for cash or for deferred payment or other valuable consideration, shall be deemed to be the turnover of such factor, broker, commission agent, arhati, del credere agent, auctioneer or any other mercantile agent, by whatever named called.

Section 7-A. Levy of purchase tax.-(1) Subject to the provisions of Sub-section (1) of Section 3, every dealer who in the course of his business purchases from a registered dealer or from any other person, any goods (the sale or purchase of which is liable to tax under this Act) in circumstances in which no tax is payable u/s 3 or 4, as the case may be, (not being a circumstance in which goods liable to tax under Sub-section (2) (2-A) or (2-C) of Section 3 or Section 4, were purchased at a point other than the taxable point specified in Schedule in the First the Fifth, the Eleventh or the Second Schedule respectively and either:-

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

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

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

(d) installs and uses such goods in the factory for the manufacture of any goods, shall pay tax on the turnover relating to the purchase as aforesaid at the rate mentioned in Section 3 or 4, as the case may be.

(2) Notwithstanding anything contained in Sub-section (1), the provisions of Section 7 shall apply to a dealer referred to in Sub-section (1) who purchases goods the sale of which is liable to tax under Sub-section (1) of Section 3 and whose total turnover for a year is not less than one lakh of rupees but not more than two lakhs of rupees, and such a dealer may, at his option, instead of paying the tax in accordance with the provisions of Sub-section (1), pay tax at the rates mentioned in Sub-section (1) of Section 7:

PROVIDED that this sub-section shall not apply to the purchases made on or

after the 1st day of April, 1990.

(3) Every dealer liable to pay purchase tax under Sub-section (1) shall, for the purpose of this Act, be deemed to be a registered dealer.

Section: 8 Exemption from tax.- Subject to such restrictions and conditions as may be prescribed, a dealer who deals in the goods specified in the Third Schedule shall not be liable to pay any tax under this Act, in respect of such goods.

Section 28-A: Power to issue clarification by Commissioner of Commercial Taxes.-

(1) The Commissioner of Commercial Taxes on an application by a registered dealer, may clarify any point concerning the rate of tax under the Act. Such clarification shall be applicable to the goods specified in the application:

PROVIDED that no such application shall be entertained unless it is accompanied by proof of payment of such fee, paid in such manner, as may be prescribed.

(2) The Commissioner of Commercial Taxes may, if he considers it necessary or expedient so to do, for the purpose of uniformity in the work of assessment and collection of tax, clarify any point concerning the rate of tax under this Act or the procedure relating to assessment and collection of tax as provided for under this Act.

(3) All persons working under the control of Commissioner of Commercial Taxes shall observe and follow the clarification issued under Sub-section (1) and Sub-section (2).

7. There cannot be any dispute that the tax payable under this Act, as defined u/s 2(ooo) of the Act means and includes sales tax, purchase tax, resale tax or surcharge, as the case may be, and the total turnover, as defined u/s 2(q) of the Act means aggregate turnover in all goods of a dealer at all places of business in the State, whether or not the whole or any portion of such turnover is liable to tax. The words "whether or not the whole or any portion of such turnover is liable to tax" makes it clear that the turnover means aggregate turnover without reference to the payment of any particular tax, namely sales tax, purchase tax, resale tax or surcharge, which are liable to be paid on the whole or any portion of such turnover.

8. The Apex Court, while considering the scope and object of Section 7-A of the Act, in *The State of Tamil Nadu v. M.K. Kandaswami and Ors.* [1975] 36 STC 191, held that the main object of Section 7-A of the Act is to plug leakage and prevent evasion of tax and therefore, while interpreting Section 7-A of the Act, construction which would defeat its purpose and, in effect, obliterate it from the statute book should be eschewed. If more than one construction is possible, that which preserves its workability and efficacy is to be preferred to the one which would render it otiose or sterile.

9. With this rule of interpretation, we do not have any hesitation to hold that

Section 7-A of the Act is held to be a charging section as well as a remedial one, inasmuch as it levies a tax on the purchases of goods by a dealer from a registered dealer or from any other persons who may be either unregistered dealer or other persons (such as agriculturists and other producers) who are not liable to pay tax under this Act on their sales or purchases. A careful reading of Section 7-A of the Act makes it clear that if the purchases at a point other than the point at which tax is leviable u/s 3(2) or 4, the tax under this Section will not be attracted, as tax in such cases is liable to be recovered at the earlier or later point. In other words, the tax under this Section would be attracted only if the goods so purchased are either not sold in the State (when they cannot get taxed u/s 3 or 4) or not sold in the course of inter-State trade or commerce from this State (when they will get taxed under the CST Act).

10. Pointing out the above object behind Section 7-A of the Act, Mr. Haja Nazirudeen, learned Special Government Pleader contends that the Circular D.Dis.Acts Cell II/75893/99, dated 24.12.1999, as amended by the clarification No. 91/2000, D.Dis.Acts Cell II/52300/2000, dated 4.10.2000 relied upon by the dealers, if given effect to, would defeat the very object of Section 7-A of the Act. The learned Special Government Pleader for the Revenue, of course argues that even though the existence of the Circular D.Dis.Acts Cell II/75893/99, dated 24.12.1999, as amended by the clarification No. 91/2000, D.Dis.Acts Cell II/52300/2000, dated 4.10.2000 could not be disputed by the Revenue, the same runs contrary to the terms of Section 7-A of the Act and therefore, the dealers are not entitled to any benefit of exemption because the exemption under Entry 16 of Part-B of the Third Schedule read with Section 8 of the Act could be granted only on sales tax, but not for the purchase tax in view of the word "sold" used in the said Entry 16 of Part-B of the Third Schedule. But, we are unable to appreciate such contention of the learned Special Government Pleader for the obvious reason that the focal point of the expression used in the Circular D.Dis.Acts Cell II/75893/99, dated 24.12.1999, as amended by the clarification No. 91/2000, D.Dis.Acts Cell II/52300/2000, dated 4.10.2000 only refers to "purchase tax" and not "sales tax".

11.1. Of course, the argument made by the learned Special Government Pleader as to the interpretation of Section 28-A of the Act is interesting. According to the learned Special Government Pleader, Section 28-A of the Act only empowers the Commissioner of Commercial Taxes to clarify any point concerning the rate of tax and not for exempting the tax itself.

11.2. As rightly pointed out by the learned Special Government Pleader, Section 28-A(1) of the Act deals with the power of the Commissioner of Commercial Taxes on an application by a registered dealer, to clarify any point concerning the rate of tax under the Act, provided such application is accompanied by proof of payment of such fee.

11.3. Section 28-A(2) of the Act confers suo motu power on the Commissioner of Commercial Taxes to issue clarification, if and when he considers it necessary or

expedient to do so, the purpose being (i) to maintain uniformity in the work of assessment and collection of tax; (ii) to clarify any point concerning the rate of tax under the Act; and (iii) to clarify the procedure relating to assessment and collection of tax.

12.1. A careful reading of Sections 28-A(1) and 28-A(2) of the Act make it clear that the suo motu power conferred on the Commissioner of Commercial Taxes u/s 28-A(2) of the Act is wider, inasmuch Section 28-A(1) of the Act only empowers the Commissioner of Commercial Taxes to clarify any point concerning the "rate of tax" under the Act, as applicable to the goods specified in the application, but as per Section 28-A(2) of the Act, the Commissioner of Commercial Taxes has got suo motu power, which he can exercise whenever he considers it necessary and expedient to do so, and the reasons for conferring such suo motu power on the Commissioner are (i) to maintain uniformity in the work of assessment and collection of tax; (ii) to clarify any point concerning the rate of tax under the Act; and (iii) to clarify the procedure relating to assessment and collection of tax. Therefore, u/s 28-A(2) of the Act, the Commissioner of Commercial Taxes is empowered not only to clarify any point concerning the rate of tax under the Act, but also to clarify the procedure relating to assessment and collection of tax as provided for under the Act, which includes the power to grant exemption of tax itself in view of the word "or" used in between the words "clarify any point concerning the rate of tax under this Act" and "the procedure relating to assessment and collection of tax as provided for under this Act". That apart, it is a settled law that Nil rate of duty (which occurs in the case of exemption of tax) is also a rate of duty, vide Collector of Central Excise, Hyderabad etc. etc. Vs. M/s. Vazir Sultan Tobacco Company Limited, Hyderabad Etc. Etc., .

12.2. We are, therefore, of the considered opinion that the power conferred u/s 28-A(2) of the Act on the Commissioner of Commercial Taxes to issue clarifications is wider in nature and independent, notwithstanding the statutory power conferred u/s 8 of the Act read with Entry 16 of Part-B of Third Schedule and such exercise of power by the Commissioner of Commercial Taxes u/s 28-A(2) of the Act cannot be restricted only with reference to the clarifications concerning rate of tax, denying the power of exempting the tax itself, as the nil rate of duty is also a rate of duty.

13. As long as the Circular D.Dis.Acts Cell II/75893/99, dated 24.12.1999, as amended by the clarification No. 91/2000, D.Dis.Acts Cell II/52300/2000, dated 4.10.2000 is in force, the same is binding on the Revenue as held by this Bench in India Cements Ltd. v. Asst. Commissioner (CT) [2007] 6 VST 140, following the well settled principles laid down by the Apex Court and other High Courts, referred to therein. The relevant portion of the said order is extracted hereunder:

In Mohan Breweries and Distilleries Limited Vs. Commercial Tax Officer and Others, a Division bench of this Court in which one of us was a party (P.D. DINAKARAN, J.), interpreting the power of issuing clarifications u/s 28A of the

TNGST Act, held as follows:

....the law is well settled on the point in the light of the following decisions, which are discussed hereunder.

8.6.2. The Apex Court in *State Bank of Travancore Vs. Commissioner of Income Tax, Kerala*, held that even though the clarifications issued by the revenue being executive in character cannot alter the provisions of the Act, since they are in the nature of concessions, they can always be prospectively withdrawn. In the instant case, even though the clarification dated 9.11.1989 is executive in nature, the concessions given to the assessee could be withdrawn only prospectively, but not retrospectively because, such executive circulars are binding on the authorities, as held by the Apex Court in *Keshavji Ravji & Co. v. Commissioner of Income Tax* : [1990]183ITR1(SC) . In *Keshavji Ravji & Co. v. Commissioner of Income Tax*, referred supra, while dealing with Section 119 of the Income Tax Act, which is *pari materia* to Section 28-A of the Tamil Nadu General Sales Tax Act, the Apex Court held that the benefits of such circulars to assesseees have been held to be permissible even though the circulars might have departed from the strict tenor of the statutory provision and mitigated the rigour of the law. That apart, the clarification dated 27.12.2000 gains a statutory force in view of Section 28-A of the Act, which was inserted by the Tamil Nadu Act 60 of 1997, which came into force with effect from 6.11.1997.

8.6.3. In *Collector of Central Excise, Patna v. Usha Martin Industries* [1998] 111 STC 254, three Judges of the Apex Court, held that when the Central Board of Excise and Customs made all others to understand a notification in a particular manner and when the latter have acted accordingly, it is not open to the revenue to turn against such persons on a premise contrary to such instructions, and such circulars would be binding on the department.

8.6.4. The Apex Court in *The Paper Products Ltd. Vs. Commissioner of Central Excise*, , while interpreting Section 37-B of the Central Excise Act, 1944 which is *pari materia* to Section 28-A of the Tamil Nadu General Sales Tax Act held that circulars issued by the Central Board of Excise and Customs are binding on the departmental authorities and they cannot take a contrary stand, and that the department cannot repudiate a circular issued by the Board on the basis that it was inconsistent with a statutory provision and further held that the assessee can contest the validity or legality of such Departmental Circulars or Instructions; the Department do not have a right to file an appeal against the correctness or binding nature of a circular; the Department's actions have to be consistent with the circulars; and that consistency and discipline are of far greater importance than winning or losing Court proceedings.

8.6.5. In *UCO Bank, Calcutta Vs. Commissioner of Income Tax, West Bengal*, , the Apex Court held that the circular issued by the revenue u/s 119 of the Income Tax Act are binding on the revenue and such circulars are meant for ensuring proper administration of the statute and they are designed to mitigate

the rigours of the application of a particular provision of the statute in certain situations by applying a beneficial interpretation to the provision in question.

8.6.6. In *Commissioner of Sales Tax, U.P. v. Indra Industries* [2001] 122 STC 100, the Apex Court held that a circular issued by the Sales Tax authorities is binding on the taxing authorities and the taxing authority cannot be heard to advance an argument that is contrary to that interpretation.

8.6.7. In *Commissioner of Income Tax v. Kelvinator of India Ltd.* [2002] 256 ITR 1, it was held that the Board has power to issue circulars u/s 119 of the Income Tax Act and it is trite that circulars which are issued by the Central Board of Direct Taxes are legally binding on the revenue.

8.6.8. The Constitution Bench of the Apex Court in *Collector of Central Excise, Vadodra v. Dhiren Chemical Industries* [2002] 126 STC 122, held that if there are circulars which have been issued by the Central Board of Excise and Customs which place a different interpretation upon the said phrase, that interpretation will be binding upon the revenue. Similar view was taken by the Apex Court in *Collector of Central Excise, Vadodara Vs. Dhiren Chemical Industries*, .

8.6.9. In *Commissioner of Customs, Calcutta Vs. Indian Oil Corporation Ltd. and Another*, , the Apex Court held that the circulars issued by the revenue u/s 37-B of the Central Excise Act, 1944 (which is *pari materia* to Section 28-A of the Act) are binding primarily on basis of language of statutory provisions buttressed by need of adjudicating officers to maintain uniformity in levy of tax/duty throughout the country and not on the basis of promissory estoppel, and that when a circular remains in operation, the revenue is bound by it and cannot be allowed to plea that it is not valid nor that it is contrary to the terms of statute.

8.6.10. It is, therefore, clear that even though the clarification dated 9.11.1989 is executive in nature, the same is binding on the authorities till the concessions given to the petitioner under the clarification were withdrawn, which could be done only prospectively, viz., in the instance case, with effect from 28.1.2002, and the revenue could not refuse the benefit of the clarifications dated 9.11.1989 and 27.12.2000 in respect of levy of purchase tax u/s 7-A of the Act for the impugned assessment year 1996-97.

8.7. For all these reasons, we are convinced that even though the purchase turnover with respect to the purchase of empty bottles from the unregistered dealers under bought note can be charged for purchase tax u/s 7-A of the Act, the petitioner is entitled for the benefit of the clarifications dated 9.11.1989 and 27.12.2000 till the same is withdrawn prospectively by the clarification dated 28.1.2002 and therefore, the impugned levy of purchase tax on the purchase turnover for the purchase of empty bottles from unregistered dealers u/s 7-A of the Act is illegal.

The decision in *Mohan Breweries & Distilleries Ltd. Case*, cited *supra*, has been followed by the I Bench of this Court in an unreported judgment dated 19.9.2006

in W.A. No. 1101 of 2006 and Anr. (between Om Plastics and The Deputy Commercial Tax Officer) wherein it is held that the circular issued u/s 28A of the TNGST Act would have prospective application.

14. We are, therefore, of the firm opinion that the Circular D.Dis.Acts Cell II/75893/99, dated 24.12.1999, as amended by the clarification No. 91/2000, D.Dis.Acts Cell II/52300/2000, dated 4.10.2000, whether issued u/s 8 or 28A of the Act, is binding on the Revenue. This finding leads us to the next question whether the circular is applicable to the facts and circumstances of the case of the dealers.

15. Of course, it is trite law that the show cause notice and demand contrary to the existing circulars of the Board are ab initio void as held in Commissioner of Customs, Calcutta Vs. Indian Oil Corporation Ltd. and Another, and The Paper Products Ltd. Vs. Commissioner of Central Excise, , whereunder the circular relied upon was directly applicable to the case of the dealers therein. But, in these batch of cases, the applicability of the Circular D.Dis.Acts Cell II/75893/99, dated 24.12.1999, as amended by the clarification No. 91/2000, D.Dis.Acts Cell II/52300/2000, dated 4.10.2000 itself is disputed by the Revenue, and as the applicability of the circular and clarification referred to above depends on the facts of each case, we are unable to apply the ratio laid down in Commissioner of Customs, Calcutta Vs. Indian Oil Corporation Ltd. and Another, and The Paper Products Ltd. Vs. Commissioner of Central Excise, .

16. It is true that a dealer, who deals with the goods specified under the Third Schedule of the Act shall not be liable to pay any tax under the Act and the words "any tax" used in Section 8 of the Act includes "purchase tax". But, such power to exempt is subject to the restrictions and conditions that may be prescribed. Entry 16 of Part-B of Third Schedule, according to the Revenue is only applicable in the case of sale tax and not purchase tax in view of the word "sold" used in Entry 16 of Part-B of the Third Schedule. On the other hand, the focal point of expression used in the Circular D.Dis.Acts Cell II/75893/99, dated 24.12.1999, as amended by the clarification No. 91/2000, D.Dis.Acts Cell II/52300/2000, dated 4.10.2000, refers only to purchase tax. Since it is a settled law that the circular is binding and the Revenue is empowered to exempt any tax subject to the restrictions and conditions u/s 8 of the Act and also to issue necessary clarifications not only with reference to the rate of tax, but also as to the procedure relating to the assessment and collection of tax u/s 28-A(2) of the Act, as discussed above, unless the Revenue appreciates the merits of each case and renders a finding in this regard, it may not be proper for this Court to decide as to the applicability of the Circular D.Dis.Acts Cell II/75893/99, dated 24.12.1999, as amended by the clarification No. 91/2000, D.Dis.Acts Cell II/52300/2000, dated 4.10.2000 to the dealers at the stage of show cause notice itself.

17. Since the dealers, in these batch of cases, except a few, who, unfortunately, failed to place reliance on the Circular D.Dis.Acts Cell II/75893/99, dated

24.12.1999, as amended by the clarification No. 91/2000, D.Dis.Acts Cell II/52300/2000, dated 4.10.2000, approached this Court challenging the show cause notices, taking into consideration the scope of Section 7-A of the Act referred to above, suffice it to pass the following order:

(1)the assessment orders passed without reference to the Circular D.Dis.Acts Cell II/75893/99, dated 24.12.1999, as amended by the clarification No. 91/2000, D.Dis.Acts Cell II/52300/2000, dated 4.10.2000 stand set aside;

(2)all the dealers are permitted to submit their objections to the impugned show cause notices, supported with materials they propose to rely upon, of course placing reliance on Circular D.Dis.Acts Cell II/75893/99, dated 24.12.1999, as amended by the clarification No. 91/2000, D.Dis.Acts Cell II/52300/2000, dated 4.10.2000, within thirty days from the date of receipt of copy of this order and the same shall be forwarded by the respective Assessing Authority to the Commissioner of Commercial Taxes; and

(3)to direct the Government to authorise the Commissioner of Commercial Taxes to decide:

a) as to the applicability of the Circular D.Dis.Acts Cell II/75893/99, dated 24.12.1999, as amended by the clarification No. 91/2000, D.Dis.Acts Cell II/52300/2000, dated 4.10.2000 to the case of the dealers, depending upon the facts of each case; and

b) to pass such other further orders, as the case may be, in accordance with law.

The writ appeals and writ petitions are disposed of accordingly. No costs. Consequently, the connected miscellaneous petitions are closed.