**(2012) 11 AP CK 0059**

**In the Andhra Pradesh High Court**

**Case No :** Tax Revision Case No''s. 229 and 252 of 1999 and 164 of 2003

National Mineral Development Corporation Limited APPELLANT

Vs

State of Andhra Pradesh RESPONDENT

**Date of Decision :** 21-11-2012

**Acts Referred:**
Constitution of India, 1950 — Article 366(28)

**Citation :** (2013) 58 VST 136

**Hon'ble Judges :** M.S. Ramachandra Rao, J;Goda Raghuram, J

**Bench :** Division Bench

**Advocate :** S. Krishna Murthy and M.V.J. Kumar, for the Appellant; P. Balaji Varma, SC for C.T., for the Department, for the Respondent

**Final Decision :** Dismissed

## Judgement

M.S. Ramachandra Rao, J.—These revisions are filed u/s 22(1) of the Andhra Pradesh General Sales Tax Act, 1957 and involve common question of law and hence they are being disposed of together. T.R.C. No. 229 of 1999 is filed by M/s. National Mineral Development Corporation Limited, Hyderabad, challenging the order dated April 6, 1999 passed in T.A. No. 413 of 1999 of the Sales Tax Appellate Tribunal, Andhra Pradesh, Hyderabad. It relates to the assessment year 1992-93 (APGST).

2. T.R.C. No. 252 of 1999 is filed by M/s. I.T.C. Limited-ILTD, Guntur, challenging the order dated April 6, 1999 passed in T.A. No. 101 of 1995 of the Sales Tax Appellate Tribunal, Andhra Pradesh, Hyderabad. It relates to the assessment year 1992-93 (APGST).

3. The order impugned in the above T.R.Cs. is a common order dated April 6, 1999 passed in T.A. Nos. 100 of 95 and 12 other appeals including T.A. No. 101 of 1995 and 413 of 1996.

4. T.R.C. No. 164 of 2003 is filed by the State of A.P. challenging the order dated June 29, 2002 in T.A. No. 734 of 1997 by the Sales Tax Appellate Tribunal,

 

Andhra Pradesh, Hyderabad. This relates to the assessment year 1992-93 (APGST).

5. Heard Sri Suribabu, counsel for the petitioners in T.R.C. No. 229 of 1999 and T.R.C. No. 252 of 1999, Sri M.V.J. Kumar, counsel for the respondent in T.R.C. No. 164 of 2003 and the Special Government Pleader for Commercial Taxes for the State.

6. The question to be considered in these T.R.Cs. is "whether the premium received on surrender of REP licences/exim scrips is ''sale consideration'' and whether the transaction of surrender of the REP licences/exim scrips pursuant to circular No. 11/93 dated May 5, 1993 is in the nature of ''sale'' within the meaning of section 2(1)(n) of the Andhra Pradesh General Sales Tax Act, 1957 and therefore, would constitute "turnover'' within the meaning of section 2(1)(s) of the Andhra Pradesh General Sales Tax Act ".

7. In T.R.Cs. 229 of 1999 and 252 of 1999, the Sales Tax Appellate Tribunal in its common order dated April 6, 1999 impugned therein took the view that the transaction of surrender by a licence holder for a premium paid by the Government was in the nature of "sale". In T.R.C. No. 164 of 2003, however, the Sales Tax Appellate Tribunal in its order dated June 29, 2002 in T.A. No. 734 of 1997 impugned therein held that the said transaction is not a "sale", the premium paid by the Government is not "sale consideration" and does not constitute "turnover" as defined under the Andhra Pradesh General Sales Tax Act, 1957.

8. Before dealing with the above question, we may note the background in which the said issue arises.

9. The Central Government, prior to 1991 was issuing what is called the import and export policy, published in the form of brochure. The import policy in vogue provided for issuance of what were called "replenishment licences" (for short, "REP licences"). Dealing with the same, the Supreme Court in Vikas Sales Corporation and another, etc. etc. Vs. Commissioner of Commercial Taxes and another, etc. etc., pointed out that the objective behind the licences was to provide to the registered exporters, the facility of importing the essential inputs required for the manufacture of the product exported, that the essential idea was to encourage exports and for that purpose import licences called REP licences were issued equal to the prescribed percentage of the value of exports, that these licences were made freely transferable, that it was provided that the transfer of such licences did not require any endorsement or permission from the licensing authority, that such transfer would be governed by the ordinary law and it only required a letter from the transferer recording and evidencing the transfer. On that basis, the transferee became the due and lawful holder of the licence and could either import the goods permitted thereunder or sell it to another in turn. With effect from July 3, 1991, the name of the licence was changed to exim scrip (export-import licence) but the provisions governing the exim scrip were broadly

 

the same as those governing the REP licence with certain minor variations. Several registered exporters who obtained REP licences/exim scrips sold them to others for profit. They were also being traded freely in the market and on stock exchanges. When the sales tax authorities of certain States proceeded to subjects such sales to sales tax under their respective enactments, the assessees had immediately protested contending that they do not constitute "goods" within the meaning of the relevant sales tax enactments and therefore, not exigible to tax. The Supreme Court after considering the provisions of the Import and Export Policy 1990-93 relevant to the REP licences/exim scrips, in the above case held as follows (page 119 in 102 STC):

The above provisions do establish that REP licences have their own value. They are bought and sold as such. The original licensee or the purchaser is not bound to import the goods permissible thereunder. He can simply sell it to another and that another to yet another person. In other words, these licences/exim scrips have an inherent value of their own and are traded as such. They are treated and dealt with in the commercial world as merchandise, as goods. An REP licence/ exim scrip is neither a chose-in-action nor an actionable claim. It is also not in the nature of a title deed. It has a value of its own. It is by itself a property--and it is for this reason that it is freely bought and sold in the market. For all purposes and intents, it is goods. Unrelated to the goods which can be imported on its basis, it commands a value and is traded as such. This is because, it enables its holder to import goods which he cannot do otherwise....

10. It followed the judgment of the Supreme Court in H. Anraj Vs. Government of Tamil Nadu, wherein the Supreme Court had held that lottery tickets are "goods" within the meaning of and as defined in the Tamil Nadu General Sales Tax Act, 1959 and the Bengal Finance (Sales Tax) Act, 1941. It held that they possess the characteristics of "goods" and therefore the sales tax authorities of the respective States had validly taxed the transfers of such REP licences/exim scrips.

11. With effect from March 1, 1992, the very policy and system under which these REP licences/exim scrips were issued was discontinued. The Director General of Foreign Trade, under the Commerce Ministry vide their circular No. 11/93 dated May 5, 1993 announced that unutilized exim scrips could be surrendered and authorized Joint Director General of Foreign Trade to pay 20 per cent premium to the exporters. The Reserve Bank of India authorized the State Bank of India and its subsidiaries to pay the premium after following the procedure laid down in the circular. In respect of exporters whose applications for issue of exim scrips/REP licences were pending in respect of exports made prior to March 1, 1992, it was announced that they would be paid 20 per cent straight away in respect of issuing licences.

12. The assessees in these three T.R.Cs. held REP licences/exim scrips which they had surrendered to the Government and received 20 per cent premium as provided in circular No. 11/93 dated May 5, 1993. The assessing authorities

having noticed the said fact, took the view that the amounts received by the assessees towards the premium/price on the surrender of the REP licences/exim scrips is liable to tax as they are "goods" within the meaning of section 2(h) of the Andhra Pradesh General Sales Tax Act, 1957. The assessees however contend that they surrendered the REP licences/exim scrips and received premium as incentive and therefore the surrender value of the scrips cannot be subjected to tax; that the basic requirement of sale, (i.e.), transfer of title of the right to import against REP licences/exim scrips has not taken place but they were cancelled on surrender. They therefore contended that the surrender value of the licences cannot be treated as sale consideration. They also contended that in a transaction of purchase or sale, there will be a transfer of property for valuable consideration either in cash or kind and the transferee or assignee is conferred in the eye of law unquestionable interest and rights in the transferred property but in a transaction of surrender, all these ingredients are lacking; that surrender is by operation of law in which case the essential ingredients of mutual consent, volition and payment of receipt of any valuable consideration is lacking; that upon surrendering, the surrenderor is not lawfully entitled to payment and receipt of any consideration and even if the Government pays any compensation to the holders of the scrips/licences on surrender, it is at best a payment gratis which cannot be equated with sale consideration. They contended that such payment may also be considered to be "solatium" or "incentive" and does not fit into the concept and definition of "sale" and therefore the assessment and levy of tax on the disputed turnover is without authority of law.

13. We have considered the submissions of the respective parties and also the common order dated April 6, 1999 in T.A. No. 101 of 1995 and T.A. No. 412 of 1996 and batch challenged in T.R.Cs. 252 of 1999 and 229 of 1999 and also the order dated June 29, 2002 in T.A. No. 734 of 1997 challenged in T.R.C. No. 164 of 2003.

14. We are of the view that the Sales Tax Appellate Tribunal in its order dated April 6, 1999 having noticed that the State Bank of India was not "purchasing" the REP licences/exim scrips but only carrying out the job of cancellation and was paying premium to the assessees as per the policy decision of the Government of India, that SBI had no use for the REP licences which were cancelled, that the assessees were transacting only with the Government of India at all times, ought not to have held that the transaction amounted to "sale" of goods. It gave importance to the transferability of the REP licences/exim scrips and wrongly held that the assessees could sell them in the open market or utilize them for importing goods. Admittedly the policy and system under which the REP licences/exim scrips were issued were discontinued with effect from March 1, 1992 and the unutilized REP licences/exim scrips could be surrendered to the Government of India by the assessees and they would be paid 20 per cent premium as per the circular No. 11/1993 dated May 5, 1993. After March 1, 1992, the holders of unutilized REP licences/exim scrips cannot deal with them in the open market or utilize them for importing goods as the very policy and scheme under which they

 

were issued are discontinued. Therefore we are of the view that the said order dated April 6, 1999 in T.A. No. 101 of 1995 and batch of the Sales Tax Appellate Tribunal impugned in T.R.C. Nos. 229 of 1999 and 252 of 1999 is erroneous.

15. On the other hand, the Appellate Tribunal in its order dated June 29, 2002 in T.A. No. 734 of 1997 impugned in T.R.C. No. 164 of 2003 noted that:

(i)... Element of free trade in exim scrips and REP Licences in open market is absent when they are surrendered to the Government of India which issued the same albeit paying certain percentage of their unutilised value.

(ii)... In evolving this scheme, the intention of Government is clear that it wanted to provide some solatium to those exporters who effected exports and who are entitled to the incentives but who could not make use of the incentives though granted by Government.

(iii)... It is obvious that, after the expiry of the period of validity, these exim scrips and REP licences became valueless and its holders could neither import duty-free or sell it for a value and they were rendered useless depriving the holder of the benefit of incentive.

(iv)... Thus the premium paid by the Government in such cases cannot be considered as ''price'' for the sale of goods.

(v)... The definition of ''sale'' in section 2(n) of Andhra Pradesh General Sales Tax Act provides that sale means every transfer of property in goods whether in pursuance of contract or otherwise by one person to another in the course of trade or business, for cash, or for deferred payment, or for any other valuable consideration. The words ''cash, deferred payment and any other valuable consideration'' indicate payment of ''price'' for the transfer of property in goods. The words ''transfer of property in goods'' in this definition indicates transfer in the course of trade or business in open market in the form of sale or purchase. Having regard to the meaning of sale in this provision, the premium paid by the Government to the appellant as a solatium for the inability to avail of the benefit of incentive, cannot be stretched by any amount of imagination to price or valuable consideration in the case of sale in open market and the surrender cannot be equated to sale within the meaning of this provision.

(vi)... This surrender is not in the course of trade or business in such licences and scrips by Government, but the same is by virtue of sovereign power exercised by the Government in pursuance of its import and export policy and both the scheme of issue as well as scheme for surrender on payment of premium is in exercise of sovereign power of regulating foreign trade but not in the course of trade or business done by it within the meaning of this provision.

(vii)... The provision made in this circular in paragraph 3(1)(b) that such premium is to be paid also in the case of pending applications filed prior to March 1, 1993 for issue of advance licences against which exports were made and export proceeds realized prior to March 1, 1993, if the concerned authority decides that the advance licence is issuable. Thus this scheme provides for payment of premium not only in the case of surrender of these licences but, also in cases where the exporter is found eligible for issue of licence in a pending application. In the case of pending applications there is no question of surrender or transfer of such licences or scrips because they are not yet issued but premium is to be paid if they are found as issuable.

(viii)... Thus, the entire scheme suggests that the payment of premium is not intimately connected with the transfer of scrips and licences as such though surrender is considered as transfer, but the same is paid only to compensate the exporter who is unable to make use of the benefit of the incentive granted by these licences and scrips. Thus payment of premium is an integral part of scheme of incentive and not consideration for any purchase made by the Government.

(ix)... This provision makes it clear that the Government is taking back the licences and scrips which are not utilized, not for the purpose of trading in them in open market but only to be cancelled and made useless and valueless. Thus, the element of further sale by Government is absent in this case which is the basis in the case of Vikas Sales Corporation and another, etc. etc. Vs. Commissioner of Commercial Taxes and another, etc. etc., ) to hold that exim scrips are goods falling under the Andhra Pradesh General Sales Tax Act as they are sold and purchased in open market in the course of free trade and commerce. These facts also make it clear that the transaction of such surrender is not sale as contemplated by the Andhra Pradesh General Sales Tax Act but the same is only cancelling a facility and incentive where it is not utilized by paying some amount as compensation which is in the form of solatium, in order to ensure that such incentive granted for a particular period is not rendered completely useless when the same could not be utilized. The transfer of property for valuable consideration contemplated under the Andhra Pradesh General Sales Tax Act is intended to cover sale and purchase in open market in the course of trade or business done by persons including Government. The transactions which are not sales in the strict sense of the term are also covered by making deemed provisions in the definition of "tax" in article 366(28) of the Constitution of India by the 46th Amendment in the year 1982 following which the same is incorporated in the definition of "tax" in section 2(1) (q) of the Andhra Pradesh General Sales Tax Act with effect from July 1, 1985 to include transfer of property in goods involved in the execution of works contracts, delivery of goods on hire purchase system and transfer of mere right to use any goods for valuable consideration, etc., But the type of these transactions do not cover transactions of this type of surrender of licences and slips granted by Government by paying some amount for compensating the exporters where they failed to avail of the incentive though granted.

(x)... Surrendering exim scrips/REP licences to the Government is not sale consideration as the transaction itself is not a sale within the meaning of section

 

2(1)(n) of the Andhra Pradesh General Sales Tax Act and therefore the same does not constitute turnover within the meaning of section 2(1)(s) of the Andhra Pradesh General Sales Tax Act on which tax can be levied under the Andhra Pradesh General Sales Tax Act.

16. We are in complete agreement with the reasoning mentioned above. Admittedly, the policy and system under which REP licences/exim scrips were issued was discontinued with effect from March 1, 1992 and the Director-General of Foreign Trade issued the circular No. 11/93 dated May 5, 1993 announcing that unutilized exim scrips could be surrendered and authorized the Joint Director-General of Foreign Trade to pay 20 per cent premium to the exporters through State Bank of India and its subsidiaries. After the expiry of the period of validity, these REP licences/exim scrips became valueless and holders of such REP licences/exim scrips could neither import duty-free or sell them for value. Thus, they ceased to be items which could be freely traded in the open market and on their surrender to the Government of India, even the Government of India cannot use them for trading in the open market and they would stand cancelled and made useless and valueless. Probably, the intention of the Government in introducing the scheme of surrender of REP licences/exim scrips and payment of premium prescribed in the above circular, is to prevent their misuse by any exporter after March 1, 1992. By no stretch of imagination can it be said that such a surrender by an exporter of REP licences/exim scrips is in the course of trade or business. The premium paid by the Government to the exporters on the surrender of the REP licences/exim scrips is only a solatium for the inability of the exporters to avail of the benefit of the incentives and in our view cannot be treated as price or valuable consideration. Therefore, the transaction of surrender of REP licences/exim scrips is not a "sale" within the meaning of section 2(1) (n) of the Act and also would not constitute "turnover" within the meaning of section 2(1)(s) of the Act. For the above reasons, we dismiss T.R.C. No. 164 of 2003 and allow T.R.C. Nos. 229 of 1999 and 252 of 1999. No costs.

 