(2013) 09 GUJ CK 0036

In the Gujarat High Court

Case No : Tax Appeal Nos. 667 and 668 of 2013 and Civil Application Nos. 474 and 475 of 2013 (Arising out of order of Gujarat V.A.T. Tribunal in Second Appeal Nos. 584 and 585 of 2007)

R.G. Scrap Traders APPELLANT

Vs

State of Gujarat RESPONDENT

Date of Decision : 12-09-2013

Acts Referred:

Citation : (2014) 44 GST 603

Hon'ble Judges : Sonia Gokani, J;Mukesh R. Shah, J

Bench : Division Bench

Judgement

M.R. Shah, J.—As common question of law and facts arise in both these appeals and as such by the common appellant and against the impugned judgment and order passed by the learned Gujarat Value Added Tax Tribunal (hereinafter referred to as the "Tribunal") both these appeals are decided and disposed of by this common order. Both these Tax Appeals have been preferred by the common appellant herein M/s. R.G. Scrap Traders challenging the impugned common judgment and order passed by the learned Tribunal dated 10.5.2013 passed in Second Appeal Nos. 584 and 585 of 2007, by which, learned Tribunal has dismissed the said appeals on merits with the following proposed substantial questions of law for the consideration of this Court.

I. Whether in the facts and circumstances of the case, the Tribunal was right in holding that the goods in question which were sold and made chargeable to tax in the State of Maharashtra are chargeable to tax in Gujarat since the payment thereof was made within the State of Gujarat?

II. Whether in the facts and circumstances of the case, the Tribunal was justified in imposing local sales tax on the same transaction which was already held to be chargeable/payable within the State of Maharashtra as local sales by the Maharashtra Sales Tax authorities thereby imposing double taxation on the same transaction?

III. Whether in the facts and circumstances of the case, the Tribunal was right in holding that the goods in question were chargeable to tax in Gujarat without there admittedly being any corroborative evidence to indicate that the goods have been delivered within the State of Gujarat?

IV. Whether in the facts and circumstances of the case, the Tribunal was right in holding that the assessment orders were not barred by jurisdiction having been issued by authority not authorized thereto and were not barred by limitation having been passed beyond the statutory time limit prescribed thereunder?

V. Whether in the facts and circumstances of the case, the impugned orders are perverse having been based upon irrelevant material and by ignoring relevant evidence/material for the purpose of determination of its taxability?

2. The facts leading to the present appeals in nutshell are as under?

2.1 That the appellant was carrying on the business of reselling ferrous and non-ferrous metal and is holding registration No. 073200102 under the Gujarat Sales Tax Act, 1969. That during the period 2001-02, the appellant had purchased the goods worth Rs. 1,11,80,006/- from M/s. Brihad Mumbai Nagar Palika, Mumbai and Rs. 97,61,094/- from M/s. Maharashtra State Electricity Board, Nagpur in the auction held in Mumbai and Nagpur and same were resold for Rs. 2,15,06,031/-. According to the appellant, the said goods were resold to various dealers of Maharashtra by dismantling the same for transportation purpose in the State of Maharashtra. According to the appellant, these purchases and sales were completed in Maharashtra. That the appellant filed its returns under the Gujarat Sales Tax Act and Central Sales Tax Act submitting that the appellant had also made purchase within the State of Gujarat and resold the said goods in the State of Gujarat and in the course of inter State trade and commerce and also claimed the set off under Rule 44 of the G.S.T. Act. That the refund under the G.S.T. Act was adjusted under the liability of C.S.T. Act and balance amount of Rs. 18,591/- was paid along with returns under the C.S.T. Act.

2.2 That there was surprise visit/inspection by the Sales Tax Authorities at the place of business of the appellant on 6.1.2003 and certain books of account of the appellant were seized by Enforcement Branch, Gandhinagar. That thereafter, the Sales Tax Officer, Enforcement Branch, Division 3, Gandhinagar issued show cause notice dated 27.11.2003 and another notice dated 28.11.2003 for provisional assessment u/s 41B of the G.S.T. Act for the years 2000-01 and 2001-02. That by the aforesaid notices, the appellant was asked to explain as to why the sales made out of purchases made in auction of Mumbai and Nagpur should not be treated as inter-State sales occasioning movement from Gujarat on the presumption that these goods which were purchased at Mumbai and Nagpur had been brought to Gujarat and again sent back to the Maharashtra parties. That the appellant filed written reply to the said show cause notice and notice for provisional assessment u/s 41B of the Act dated 27.12.2003. Thereafter, the Assistant Commissioner of Sales Tax issued the additional show cause notice and the appellant was directed to show cause as to why sales made out of purchases made in the auction of Mumbai and sales claimed in the State of Maharashtra should not be treated as local sales of Gujarat. That the appellant filed written reply on 28.3.2007 to the additional show cause notice and submitted that sale made out of purchases made in the auction in Mumbai and Nagpur were completed in the State of Maharashtra and the Maharashtra authorities had also accepted the said facts and submissions made in response to the notice dated 21.9.2005 issued u/s 49 of Bombay Sales Tax Act in form 36 and thereafter dropped the proceedings. Therefore, it was case on behalf of the appellant in the reply that Maharashtra authority i.e. Sales Tax Authority in Maharashtra had considered the sales made by the appellant from the goods purchased in Maharashtra to the Maharashtra dealers were within the State of Maharashtra. Therefore, the question of local sales out of goods purchased from Maharashtra does not arise. It was also the case on behalf of the appellant that the payment made in the State of Gujarat does not determine the nature and character of the transaction and therefore, how the payment of goods received was not at all relevant. That thereafter, the Assistant Commissioner of Sales Tax has not accepted the said submissions and passed provisional assessment u/s 41B of the Act 23.3.2007. While passing the provisional assessment order, the Assessing Officer on appreciation of evidences and materials on record considered sales made out of purchases made from Maharashtra as local sales of Gujarat and imposed tax at different rate considering the sales of different goods. While passing the provisional assessment order, the total demand of Rs. 65,51,804/- was raised against the appellant.

2.3 That thereafter regular assessment order came to be passed by the Commissioner, Sales Tax Office u/s 41 of the Act for the year 2001-02 on 31.3.2007 under the G.S.T. Act and C.S.T. Act. Under the G.S.T. Act, as a result of assessment order the total demand was raised to the tune of Rs. 65,51,804/- and under the C.S.T. Act the total demand was raised to the tune of Rs. 6,97,310/-.

2.4 Being aggrieved and dissatisfied with the aforesaid orders, the appellant preferred First Appeal before the Deputy Commissioner of Commercial Tax. In the said First Appeal, the First Appellate Authority passed an order directing the appellant/appellants to deposit 50% of the total demand by way of pre-deposit. However, the appellant did not comply with the order of pre-deposit passed by the First Appellate Authority i.e. 50% of the total demand and therefore, First Appellate Authority dismissed the said appeals for non-payment of 15% of the total demand by way of pre deposit.

2.5 Feeling aggrieved and dissatisfied with the orders passed by the First Appellate Authority dismissing the said appeals, the appellant preferred Second Appeal before the Tribunal. In the said appeal the appellant submitted the stay application. It appears that appellant also preferred appeals on merits against the order passed by the Assessing Officer. That by order dated 6.12.2007 the learned Tribunal granted stay against the recovery of remaining amount of sales tax, penalty and interest. That thereafter, the appellant submitted written statement on merits against the assessment order passed by the Assessing Officer and submissions were made by the learned advocate for the appellant on merits against the order of assessment passed by the Assessing Officer inclusive of issue of limitation in passing the order of assessment and on merits etc.

2.6 By impugned judgment and order the learned Tribunal has dealt with and considered the appeals on merits against the order of assessment passed by the Assessing Officer and thereafter on appreciation of evidence has dismissed both the appeals confirming the assessing order passed by the Assessing Officer.

2.7 Being aggrieved and dissatisfied with the impugned common judgment and order passed by the learned Tribunal in dismissing the aforesaid two appeals and, the appellants have preferred present appeals before this Court with the above proposed question of law.

3. Shri Jay Kansara, learned advocate for M/s. Wadia Ghandy and Co. learned advocate for the appellant has vehemently submitted that learned Tribunal as well as learned Assessing Officer both have materially erred in holding that the goods in question which as such were purchased in the State of Maharashtra in public auction were sold in the State of Gujarat and therefore, they are chargeable to tax in the Gujarat.

3.1 It is submitted by Shri Jay Kansara, learned advocate for the appellant that as such there is no evidence whatsoever to indicate that goods had travelled within the State of Gujarat or have been delivered within State of Gujarat. It is submitted that therefore, the Tribunal has failed to appreciate that in absence of any evidence whatsoever to indicate that the goods have been travelled within State of Gujarat and have been delivered within the State of Gujarat it is not possible in law to conclude that the transaction/sales have taken place in the State of Gujarat.

3.2 It is further submitted by Shri Jay Kansara, learned advocate for the appellant that merely because some entries have been found suggesting payment made in the State of Gujarat by that itself cannot be said that the goods have been treated and sold in the State of Gujarat. It is submitted that assuming that some payments have been made in the State of Gujarat by that itself it cannot be concluded that sales have taken place in the State of Gujarat. It is submitted that as the appellant is having place of business in State of Gujarat and is also carrying on the business in the State of Gujarat payments are bound to be made in the State of Gujarat and therefore, it cannot be said that there is sale transaction in the State of Gujarat with respect to the goods which are purchased in the public auction in the State of Maharashtra.

3.3 It is further submitted by Shri Jay Kansara, learned advocate for the appellant that cogent evidences were produced before the Assessing Officer including invoices with respect to the dealers in the State of Maharashtra to show that in fact the goods which were purchased in State of Maharashtra were sold to the dealers of the State of Maharashtra and therefore, there was no local sale in the State of Gujarat as alleged. It is submitted that despite the above, learned Tribunal has not appreciated above evidences on record and has materially erred in holding that transaction with respect to the goods purchased by the appellant in public auction in the State of Maharashtra have taken place in the State of Gujarat and therefore, the appellants are liable to pay the sales tax.

3.4 It is further submitted by Shri Jay Kansara, learned advocate for the appellant that learned Tribunal has even not properly appreciated the fact that as such the order of assessment was beyond the period of limitation under the Act. It is submitted that the learned Tribunal has materially erred in holding that as the appellants have given the consent for extension of period of limitation, no question with respect to limitation can be raised. It is submitted that learned Tribunal has materially erred in not properly appreciating the fact that mere consent does not extend the period of limitation. It is submitted that if the assessment is barred by limitation, by consent the period of limitation cannot be extended.

3.5 It is further submitted by Shri Jay Kansara, learned advocate for the appellant that the learned Tribunal has materially erred in relying upon the aspect that payment for the transaction is vital element for deciding the tax liability or incidence of tax and the nature of the transaction can be determined based upon it. It is submitted that the learned Tribunal has failed to appreciate that the statutory provisions do not provide or enable to determine the taxability of goods based upon the place of payment made for the transaction. It is therefore, submitted that the learned Tribunal has materially erred in dismissing the appeal and confirming the assessment order holding the appellant liable to pay sales tax on the ground that goods which were purchased by the appellant in public auction in the State of Maharashtra have been sold in the State of Gujarat, more particularly, when there is no material or documentary evidence indicating that the goods in any case have moved inside the State of Gujarat and were sold within the State of Gujarat.

3.6 After aforesaid submission on merits, Shri Kansara, learned advocate for the appellant has further submitted that the appeals before the learned Tribunal were against the order passed by the First Appellate Authority dismissing the appeal on the ground of non-deposit of pre deposit only, the learned Tribunal ought not to have entered into the merits of the case and/or ought not to have decided/ dismissed the appeals on merits. In support of his above submissions, he has relied upon the decision of the Hon''ble Supreme Court in the case of Commr. of C. Ex., Chandigarh Vs. Smithkline Beecham Co. Health C. Ltd., .

3.7 Shri Jay Kansara, learned advocate for the appellant has vehemently submitted that in light of the order passed by the Sales Tax Officer in the State of Maharashtra passed u/s 49 of the Bombay Sales Tax Act, by which, Sales Tax Officer of Mumbai has held that as sales/transactions have taken place within the

State of Maharashtra, the appellant is not liable to pay any further tax on the second sale in the State of Maharashtra and thereafter it is not open for the Sales Tax Authority in the State of Gujarat to hold contrary. It is submitted that in the aforesaid facts and circumstances of the case, the learned Tribunal is not justified in imposing local sales tax on the same transaction which was already held to be chargeable/payable within State of Maharashtra as local sales by the Maharashtra Sales Tax Authority. No other submissions have been made.

3.8 Making above submissions and relying upon the above decision, it is requested to admit/allow the present appeals.

4. Both these appeals are opposed by Shri Jaimin Gandhi, learned Assistant Government Pleader. It is submitted that as such there are concurrent findings of facts given by the learned Tribunal as well as Assessing Officer in holding that there are transactions/sales in the State of Gujarat, with respect to the goods which the appellant purchased in a public auction at Nagpur within the State of Maharashtra and the said findings are on appreciation of evidences which are neither perverse nor contrary to the evidence on record. It is submitted that therefore, the findings of fact which are arrived at by the authority as well as Tribunal, which are on appreciation of evidence, cannot be said to be a substantial question of law.

4.1 It is further submitted by Shri Gandhi, learned Assistant Government Pleader for the State that while considering the issue/factum whether the sales/ transactions have been taken place in the State of Gujarat, bundle of facts and entire material/evidence on record are required to be considered. It is submitted that while considering the factum of sale/transaction within the State of Gujarat, individual aspect is not required to be considered, as sought to be contended on behalf of the appellant. It is submitted that in the present case on investigation and inquiry by the Enforcement Branch and from the material seized it was found that with respect to some of the transactions which according to the appellant were sold in the State of Maharashtra, were found to be in favour of purchaser in the State of Gujarat and it has also been found that even appellants have also been paid in the State of Gujarat. It is submitted that invoices which were produced by the appellants and the particulars with respect to the dealers in whose favour the goods have been alleged to be sold in the State of Maharashtra, came to be considered by the authority and on inquiry and investigation it was found that all those deals are non-existing and not registered in the State of Maharashtra. It is further submitted that even it was also found that the appellant was also not registered dealer in the State of Maharashtra and therefore, even otherwise he could not have been sold the goods in the State of Maharashtra. It is submitted that considering the overall facts and circumstances and on appreciation of evidence, when both the learned Tribunal as well as Assessing Officer has held that goods which were purchased by the appellant in a public auction in State of Maharashtra have been sold in the State of Gujarat and therefore, the appellant is liable to pay sales tax on the said transaction, no illegality has been committed by the learned Tribunal as well as Assessing Officer.

4.2 Now, so far as contention on behalf of the appellant that as such there is no material and/or evidence on record to state that sales/transactions have taken place in fact in the State of Gujarat is concerned, it is submitted by Shri Gandhi, learned Assistant Government Pleader that initially the appellant produced the bills/invoices with the name of dealer to whom the goods have been sold in the State of Maharashtra in support of its case that they have sold the goods in the State of Maharashtra. However, on inquiry and investigation when it was found that all those dealers are non-existing and non-registered and therefore, the appellant has failed to substantiate his defence that the good which were purchased in the State of Maharashtra have in fact sold in the State of Maharashtra alone, thereafter it is for the appellant again to prove by leading the evidence that in fact the said goods are sold to the dealers in the State of Maharashtra, which the appellant has failed to prove. Therefore, it is submitted that no error and/or illegality has been committed by the learned Tribunal as well as Assessing Officer.

4.3 Now, so far as contention on behalf of the appellant that merely because amount is brought in the State of Gujarat and payment is made in the State of Gujarat, it cannot be held that the sale/transaction had taken place in the State of Gujarat is concerned, it is submitted that in given case the aforesaid alone cannot be a ground to hold so. As stated above, as such bundle of facts and entire evidence on record are required to be considered.

4.4 It is further submitted that so far as reliance placed upon the order passed by the Sales Tax Officer in the State of Maharashtra is concerned, as such there is no finding of Sales Tax Officer of the State of Maharashtra that in fact the sales/ transactions have taken place in the State of Maharashtra. It is submitted that the only question before the Sales Tax Department at Nagpur was whether since sales tax has already paid to the Maharashtra State Electricity Board on first sale within the (sic) Maharashtra, subsequent sales are liable to tax or not? It is submitted that before the Sales Tax Authority, Maharashtra whether in fact the sales/transactions have taken place in the State of Maharashtra or not was not under consideration at all. It is submitted that therefore, communication dated 17.1.2006 of the Deputy Commissioner of Sales Tax, Nagpur would not be of any assistance to the appellant.

4.5 Now, so far as issue with respect to limitation in passing an order of assessment, it is submitted that as such appellate authority passed an order extending time limit on 31.3.2006 and in fact the appellant even gave consent for extension of time. It is submitted as such proviso to sub-section (2) of Section 42 empowers the State Government and Commission to extend the period of limitation. It is submitted that therefore, the extension of period of limitation, which was as such with the consent of the appellant, has attained the finality, and therefore, the Tribunal has not committed any error and/or illegality in rejecting the aforesaid ground of challenge.

4.6 Now, so far as the last contention on behalf of the appellant that as appeal before the learned Tribunal was against the order passed by the First Appellate Authority dismissing the appeal on the ground of non-deposit of pre deposit and therefore, the Tribunal could not have and ought not to have gone into the merits of the case and dismissed the appeal on merits is concerned, it is submitted by Shri Gandhi, learned A.G.P. that as such it was the appellant who made submissions on merits and therefore, when the learned Tribunal has entered into the merits of the case and considered the appeals on merits, thereafter it is not open for the appellant having lost on merits before the Tribunal, to raise aforesaid objection. It is submitted that even written submissions were submitted on behalf of the appellant on merits against the order of assessment and therefore, considering the above, when the learned Tribunal has considered appeals on merits and has dealt with the appeals on merits and has given findings on merits and has dismissed the appeals on merits, thereafter having lost on merits, it is not open for the appellant to make aforesaid grievance. It is submitted that the decision of the Hon''ble Supreme Court in the case of Smithkline Beecham Co. Holding Ltd. (supra) which has been relied upon by the learned advocate for the appellant, would not be applicable to the facts of the present case. It is submitted that even before the Hon''ble Supreme Court, it was the revenue-respondent in appeal who raised the objection and the Hon''ble Supreme Court has held accordingly. It is submitted that if the appellant would have succeeded on merits in appeal, the appellant would not have taken such a objection. It is only when the appellant has lost on merits and appeal has been dismissed on merits, now the appellant has raised the aforesaid grievance which is not permissible. It is submitted that even the aforesaid objection is neither raised in the appeal nor any proposed substantial question of law is raised on the aforesaid.

4.7 By making above submissions, it is requested to dismiss the present appeals.

5. Heard the learned advocates for the respective parties at length and perused the impugned judgment and order passed by the learned Tribunal as well as assessment orders.

6. At the outset, it is required to be noted that the tax liability against the appellant has been confirmed by holding that the goods which were purchased by the appellant in public auction held in State of Maharashtra have in fact been sold in the State of Gujarat. The finding given by the Assessing Officer has been confirmed by the learned Tribunal by passing impugned judgment and order. From the impugned orders, it appears that the aforesaid findings given by the Assessing Officer are on appreciation of evidence on record and the same has been confirmed by the learned Tribunal. The findings given by the Assessing Officer as well as learned Tribunal are in realm of evidence and on appreciation of evidence on record which is neither perverse nor contrary to the evidence on record. It was the case on behalf of the appellant that in fact the appellant has sold the goods purchased in the public auction in the State of Maharashtra to

various dealers in the State of Maharashtra and in fact there was no sale or transaction with respect to the said goods in the State of Gujarat. In support of his above defence/case, the appellant produced on record the bills/invoices in favour of various dealers in the State of Maharashtra. However, on inquiry and investigation by the authority it has been found that all those dealers in whose favour alleged sales/transactions have taken place are non-existence and even they are not registered dealers with the sales authority in the State of Maharashtra. On appreciation of evidence, it has also been found that the said goods have been sold in the State of Gujarat and in favour of dealers in the State of Gujarat and even payments have also been received in the State of Gujarat. It has also found that even the appellant is not registered dealer in the State of Gujarat and therefore, appellant could not have sold the goods in the State of Maharashtra. Thus, as such the appellant could not prove and/or establish that in fact goods purchased in the State of Maharashtra were in fact sold to the dealers in the State of Maharashtra. Initially it was case on behalf of the appellant by producing invoices in the name of dealer in the State of Maharashtra that it sold the goods to the dealers in the State of Maharashtra and when thereafter it has been found that those dealers to whom the goods were alleged to have been sold in the State of Maharashtra are not existence and are not registered dealers in the State of Maharashtra, thereafter it was for the appellant to lead the further evidence to prove and/or establish that the goods were actually sold in the State of Maharashtra, which appellants have failed to prove. In any case, when there are concurrent findings of the facts given by both Tribunal as well as Assessing Officer, which are on appreciation of evidence, which are neither shown or demonstrated to be perverse, it cannot be said that any substantial question of law arise. Under appellate jurisdiction u/s 78 of the Act, this Court is not required to re-appreciate the entire evidence on record and/or interfere with the finding given by the authority below which are on appreciation of evidence unless it has been demonstrated that the findings are perverse and/or contrary to the evidence on record. While dismissing the appeals on merits and confirming the finding given Assessing Officer that goods which are purchased by the appellant, which is purchased in public auction in the State of Maharashtra were brought in the State of Gujarat and were also sold in the State of Gujarat, the learned Tribunal in para 19 has observed as under:

19. Coming to the merits of the matter, it appears to us that detailed inquiry was made by the departmental authorities and necessary evidence was also collected to that effect. It appears that pursuant to the notice issued by the assessing officer, certain details were supplied by the appellant in the form of statement which shows the sale of goods by the appellant in Maharashtra State from Mumbai/Nagpur. This statement, in all contains 25 transactions covering invoice numbers 1 to 25 starting from 30.1.2001 to 3.1.2002, the names of these parties are J.K. Steel Pvt. Ltd., Jagannath Metal Laxmi Corporation, M.K. Scrap Traders, Shree Amiksha Steel, Shree Bhagvati Traders, Shree Ram Metal Works and Suman Finance Pvt. Ltd. It is interesting to note that there are three invoices

issued in favour of J.K. Steel Pvt. Ltd. The invoice No. 1 is dated 5.4.2001 issued in favour of J.K. Steel Pvt. Ltd. whereas invoices No. 3 dated 30.1.2001 is also issued in favour of the same party namely J.K. Steel Pvt. Ltd. Under all these three invoices C.O. Pipes were sold to J.K. Steel Pvt. Ltd. It is practically impossible to believe that the invoice No. 3 is dated 30.1.2001 whereas Invoice No. 1 is dated 5.4.2001. Similarly, addresses of all these parties were also incomplete and because of that the sales tax officer Enforcement Branch Mumbai vide his letter dated 12.5.2003 informed the assessing officer that preliminary inquiries in the matter reveal that all these vendors are unregistered under the Mumbai Sales Tax Act, 1959 as per the computerized master list. The addresses of buyers provided by the assessing officer were insufficient and therefore, the places of these dealers could not be visited. However, on further inquiry and personal visit by the sales tax inspectors of the places of these buyers, it was found that none of these buyers were in existence. These alleged transactions are of the year 2001-02 and in the year 2003 if this was the position, it can hardly be believed that these transactions were real and genuine and that the same were taken place in the State of Maharashtra. It is therefore, clearly revealed that these parties are fake parties or they are merely name lenders. The real transactions were taken place in the State of Gujarat. The goods were brought in the State of Gujarat. The goods were brought in the State of Gujarat and they were also sold in the State of Gujarat for which the payments were received by the appellant in Gujarat. The appellant, is therefore, liable to pay tax in the State of Gujarat and accordingly, the liability was correctly worked out by the assessing officer. As far as the tax and the interest amount is concerned, there is no question of any interference by this Tribunal as it is rightly calculated and charged. However, the penalty levied by the assessing officer at the rate of 300% is on the very higher side and no proper justification is given for levy of such exorbitant penalty and hence it is reduced to 25% of the tax demand.

7. Now, so far as contention on behalf of the appellant by proposed substantial question of law that the Tribunal has committed an error in holding that goods in question were sold and chargeable to tax in State of Gujarat since payment thereof was made within the State of Gujarat is concerned, it is required to be noted that the learned Tribunal has not held that the goods in question were chargeable to tax in Gujarat solely on the ground that the payment thereof was made within the State of Gujarat. The entire evidence on record and bundle of facts are required to be considered. The Assessing Officer as well as learned Tribunal has held that goods in question were sold and chargeable to tax in Gujarat on appreciating the entire evidence on record and considering the entire facts and circumstances of the case which are referred to herein above, more particularly, identity and/or existence of the dealers to whom the goods were alleged to be sold in State of Maharashtra is not established; that those dealers in the State of Maharashtra to whom the goods were alleged to have been sold are not registered dealers in the State of Maharashtra; that there are transactions with the dealers in the State of Gujarat; payment with respect to

the goods sold is received in the State of Gujarat; that the appellant itself is not registered dealer in the State of Maharashtra and therefore, could not have even sold the goods in the State of Maharashtra. Under the circumstances, there is no substance with respect to the aforesaid ground.

8. Now, so far as reliance placed upon the communication of Deputy Commissioner, Nagpur dated 17.1.2006 is concerned, it appears that the Deputy Commissioner has simply communicated to the appellant that since tax has already paid to the Maharashtra State Electricity Board on first sale within State of Maharashtra the subsequent sales are not liable to tax. The authority at Nagpur had no occasion to consider whether in fact the appellant has sold the goods to the dealer in the State of Maharashtra as alleged. That was not the controversy before the sales authority at Nagpur. tinder the circumstances, reliance placed upon the said order is misplaced.

9. Now, so far as contention on behalf of the appellant that learned Tribunal has materially erred in dismissing the appeals and not quashing and setting aside the order of assessment on the ground of limitation is concerned, it is required to be noted that competent authority did pass an order of extension of period of limitation in exercise of proviso to sub-section (2) of Section 42 which empowers the State Government and Commissioner to extend the period specified in sub-section (1) of Section 42. The order of extension which in fact was with the consent of the appellant, has attained the finality. Under the circumstances, learned Tribunal has rightly held that if any valid extension is there, assessment can be made subsequent to the date of expiry of the period provided in sub-section (1) of Section 42. In the present case the appellant herein gave consent for extension of time, 30.3.2006 and the Joint Commissioner of Sales Tax extended the time on 30.6.2006 and the time limit was extended up to 31.3.2007 and the assessment order has been passed on 31.3.2007 i.e. within the extended time limit. Under the circumstances, learned Tribunal has not committed any error and/or illegality in dismissing the appeals and not accepted the contention on behalf of the appellant that the assessment order is bad in law on the ground of limitation.

10. Now, so far last contention on behalf of the appellant that as the appeals before the learned Tribunal were against the order passed by the First Appellate Authority dismissing the appeal on the ground of non-deposit of pre-deposit and therefore, the learned Tribunal ought not to have entered into the merits of the case and/or decided the appeals on merits against the order of assessment and the reliance placed upon the decision of the Hon''ble Supreme Court in the case of Smithkline Beecham Co. Holding Ltd. (supra) is concerned, it is required to be noted that in fact the learned advocate for the appellant made submissions on merits before the learned Tribunal. Even written submissions were submitted on behalf of the appellant, which were on merits of the case and against the assessment order. Therefore, it was the appellant who invited decision on merits. When the written submission was made on merits against the order of

assessment and the learned Tribunal dealt with and considered the same and thereafter dismissed the appeals on merits, thereafter having lost on merits, it is not open for the appellant to make aforesaid grievance. If despite submitting the case on merits, the Tribunal had not dealt with the appeals on merits, in that case, the appellant would make the grievance of non-consideration of appeal on merits, though submissions have made. When pointed out question was asked to the learned advocate for the appellant that if the appellant would have succeeded on merits in the appeal, the appellant would have raised aforesaid grievance, the learned advocate for the appellant has fairly conceded that in such case the appellant would not have made such grievance. Under the circumstances, when the appellant made submissions on merits against the order of assessment as if the appeals before the Tribunal were against the order of assessment and when the Tribunal has dealt with and considered the same and decided the appeals on merits and when appellant has lost in the appeals on merits, thereafter it not open for the appellant now to make the grievance that the Tribunal ought not to have decided the appeals on merits. It is also required to be noted at this stage that as such there is no such grievance raised in the appeal and even no substantial question of law is proposed on the aforesaid. However, as the learned advocate for the appellant has made submissions on that we have dealt with and considered the same.

11. Now, so far as reliance placed upon the decision of the Hon''ble Supreme Court in the case of Smithkline Beecham Co. Holding Ltd. (supra) is concerned, as such there cannot be any dispute with respect to proposition of laid down by the Hon''ble Supreme Court in the said decision. It is true that normally when the appeal before the Tribunal is against the order passed by the First Appellate Authority, dismissing the appeal on the ground of non-deposit of pre deposit, the Tribunal is not required to enter into the merits of the case. However, it depends upon the facts and circumstances of the case. In a given case it may happen that identical question is before the Tribunal and/or some other appeals are pending before the Tribunal in the case of very appellant-assessee raising the similar question/issue but with respect to different assessment year, with the consent and by passing speaking order, the learned Tribunal may consider the appeals on merits. So far as present appeals are concerned, as observed hereinabove and for the reasons stated above, it is not open for the appellant now to raise a grievance that the learned Tribunal ought not to have entered into the merits of the case and dismissed the appeals on merits, when the submissions were made before the learned Tribunal as if appeals are on merits against the order of assessment also and more particularly, when the appellants have lost on merits. In view of the above and for the reasons stated above, both these appeals deserve to be dismissed and are accordingly dismissed. Consequently respective Civil Applications therein for stay also deserve to be dismissed and are accordingly dismissed. No costs.

