**Reportable**

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

**CIVIL APPEAL NO. 1798 OF 2005**

Commercial Tax Officer & Ors. ... Appellant(s)

Versus

State Bank of India & Anr. ...Respondent(s)

**J U D G M E N T**

**Dipak Misra, J.**

The seminal question that emerges for consideration in this appeal is whether the State Bank of India (SBI) and its branches, which are registered dealers under the Bengal Finance (Sales Tax) Act, 1941 (for brevity, 'the Act') would be liable to levy of purchase tax under Section 5(6a) of the Act for accepting the Exim Scrips (Export Import Licence) on payment of premium of 20 per cent of the face value of the scrips in compliance with the direction contained in the letter of Reserve Bank of India (RBI) dated 18th March, 1992.

The authorities of the revenue as well as the Taxation Tribunal (for short, 'the tribunal') had held against the SBI but the Division Bench of the High Court of Calcutta in a writ petition has dislodged the said conclusion holding, *inter alia*, that the purchase of Exim scrips by the Bank did not attract the provisions of Section 4(6) (iii) of the Act and resultantly quashed the orders of fora below and issued consequential directions.

2. It is necessary to state the facts in detail to appreciate the controversy at hand. The SBI is a body corporate constituted under the State Bank of India Act, 1955 for the extension of banking facilities in the country and for other public purposes. The bank has to perform various functions as per the directions issued from time to time by the RBI in keeping with the economic and monetary policies of the Central Government.

3. Policies are notified by the Government of India under the Imports and Exports (Control) Act, 1947, as amended from time to time, and the Imports (Control) Order, 1955, to regulate imports into and exports out of the country and contain different incentive schemes and subsidies to build

up foreign exchange resources of the country. As the facts would reveal before July 4, 1991 there was provision for issuance of Replenishment Licences which were referred to as "REP Licences". The objective behind the grant of such licences was to provide the registered exporters the facility of importing essential goods required for the manufacture of the products to be exported. Such licences were made freely transferable and such transfer did not require any endorsement or permission from the licensing authority and only a letter from the transferor the transferee became the lawful holder of the licence and was entitled to either import the goods for which the licence had been issued or sell the licence to someone else.

4. The aforesaid policy remained in vogue till July 3, 1991, when it was substituted by a new policy with effect from July 4, 1991 and the nomenclature of the REP Licence was changed to "Exim Scrip" (Export Import Licence). The provisions governing Exim scrips were more or less the same as those governing REP licences with certain minor variations which are really not pertinent for the purpose of adjudication of the controversy.

5. In March, 1992, the RBI took a policy decision to the effect that the unutilised Exim scrips in the hands of the holders who were willing to dispose of the same should be mopped up through specified branches of the SBI. In pursuance to such a decision, the RBI issued a circular, being No. 12/92 on 27th March, 1992. The said circular is as follows:-

> "Reserve Bank of India had earlier notified that arrangements were being made to purchase Exim scrips at an appropriate premium from those holders of Exim Scrips who wish to dispose of them. The designated branches of State Bank of India would be purchasing these Exim scrips from March 23, 1992, up to the end of May 1992, at a premium of 20 per cent of the face value. The list of branches which would be purchasing these Exim scrips would be notified by the State Bank of India. The bona fide holder of the Exim scrips should submit an application to the designated branch of the State Bank of India, in the form prescribed by the State Bank of India. The scrips up to the face value of Rs. 5 lakhs will be straightaway purchased by the designated branch of State Bank of India and the premium amount would be paid to the holder of the scrips. Where the face value of the scrips exceeds Rs. 5 lakhs, the concerned branch would send it to the office of the JCCI, which had issued the scrip, for authentication and on receipt of the scrip duly authenticated would pay the amount of premium."

6. The RBI, pursuant to the circular sent a letter on March 18, 1992 to the Chairman, State Bank of India, Bombay, authorising all designated branches of the said Bank to purchase Exim scrips from holders, who intended to dispose of the same at a premium of 20 per cent of the face value of the Exim scrips, from March 23, 1992, subject to certain terms and conditions. Thereafter, the General Manager (Planning of the International Banking Department of the State Bank of India) communicated to the Deputy Manager, State Bank of India, Overseas Branch, Calcutta, the respondent no.1 herein, on March 21, 1992, forwarding the memorandum of procedure drawn up by the Central Officer of the SBI for the purpose of purchasing the Exim scrips as directed by the RBI. In due course, various holders of Exim scrips sold and/or surrendered their Exim scrips to the Bank and received a premium of 20 per cent of the face value of the scrips in compliance with the direction contained in the letter of the RBI dated March 18, 1992.

7. In the course of assessment proceedings under the Act for the four quarters ending on March 31, 1993, the Commercial Tax Officer, Park Street Charge informed the

assessee that apart from payment of sales tax on the sale of gold and silver, it would also be liable to pay “purchase tax” in respect of purchase of Exim scrips from the holders thereof at a premium of 20 per cent of the face value. Before the assessing authority, it was contended by the SBI that the Exim scrips had not actually been purchased but the same had been surrendered by their holders pursuant to the terms contained in the letter of the RBI dated March 18, 1992. It was also put forth that such surrender could not be treated as purchase for the purpose of levying tax under Section 4(6) of the Act. It was also averred that Exim scrips were not "goods" within the meaning of Section 2(d) of the Act and hence, no purchase tax could be levied under Section 4(6) of the said Act on the surrender of the Exim scrips by its holders. In addition to the above, a specific objection was taken that the Bank had not entered into any transaction on its own which could be regarded as purchase to attract the provisions of Section 4(6) of the Act but had merely acted as an agent of the RBI in terms of the order contained in the above mentioned circular dated March 18, 1992.

8. The assessing officer did not accept the said stand of the Bank and levied purchase tax under Section 5(6a) of the Act, amounting to sum of Rs. 1,00,04,000/- on the total taxable specified price of Rs. 25,00,00,000/-. In the order of assessment, the assessing authority held that the scheme contained in the circular of the RBI dated March 18, 1992, provided for sale of Exim scrips by the holder and purchase by designated bankers and consequently such sale or purchase by the bankers could not by any stretch of imagination be treated as an act of surrender. It was also held that the purchase of the Exim scrips by the bankers from the holders thereof were as much sales as purchase by private importers who availed of the same for import of goods.



9. The aforesaid order of assessment was assailed in an appeal before the Assistant Commissioner, Commercial Taxes, Calcutta (South) Circle, who vide order dated September 19, 1996, rejected the appeal and confirmed the order of assessment. The Bank Manager of the concerned Branch and the Chairman of SBI approached the West Bengal Taxation Tribunal (for short, 'the tribunal'). During

the hearing of the appeal it was contended on behalf of the SBI that in order to attract the mischief of Section 4(6)(iii) of the Act, a dealer must be liable to pay tax under Section 4(1), 4(2), 4(4) or 8(3) of the aforesaid Act and since the said Bank was not a dealer under the provisions of the aforesaid Act, it did not have any liability to pay tax under Section 4(6) of the said Act. It was also submitted that the transactions involving recovery of Exim scrips from their holders could not be treated to be "purchases" for the purpose of Section 4(6) of the above Act, but amounted to "surrender" by the holders which had been wrongly equated with "purchase" at the Branch level. A further stand was taken that for Section 4(6) to apply, the purchase must have been made with the intention of re-selling the Exim scrips and that the same would be apparent from proper reading of Clauses (i) and (iii) of Section 4(6) of the above Act. It was argued that if such a construction was not adopted, Clause (iii) of Section 4(6) would be unconstitutional and violative of Article 14 of the Constitution.

10. The tribunal by its order dated 11th February, 1998 rejected all the contentions made on behalf of the appellants

and dismissed the appeal preferred by them. As has been stated earlier, the SBI had not levied purchase tax. When the matter travelled to the tribunal, the question arose whether the Bank by payment at a premium of twenty per cent on the face value or unutilised face value thereof was exigible to purchase tax under Section 4(6)(iii) read with Section 5(6) of the Act. The tribunal narrated the facts and noted the stand and the stance of the assessee and the Revenue and came to hold that the Bank had acted in relation to the impugned transactions as agent of RBI, which is an instrumentality of the Government of India, to accept Exim scrips on payment of a premium to the holders thereof and the activity is thus covered by Section 6(1)(a) and (b); that under Section 6(1)(n) such activity was certainly "incidental" or "conclusive" to the promotion or advancement of the business of the Company, because admittedly the assessee received commission for these transactions; that the stand that the Bank was not a dealer in view of the Banking Regulation Act, 1949 was unacceptable, for when Section 8 of the Act is correctly construed, it would be clear that purchase of Exim scrips

was not prohibited by it; that the Exim scrips were goods as has been conclusively settled in ***Vikas Sales Corporation and another v. Commissioner of Commercial Taxes and another***[1]; that the submission to the effect that the purchase is made not for resale and hence, the bank would not be liable for tax does not commend acceptation, for legislature does not contemplate or lay down that Section 4(6)(iii) would apply to purchase for the purpose of only resale but has left the expression unspecified and unqualified; that there is no rationale to restrict it to resale and limit the expression; that Section 4(6)(iii) uses the word "purpose", a purchase for any purpose other than those specified in clauses (i) and (ii) of Section 4(6) would be enough to attract the clause and in the case at hand, RBI's letter dated March 18, 1992 the purpose was to forward the "scrips" to the Joint Chief Controller of Imports and Exports, Government of India, after suitably cancelling them; that use of the purchased scrips by way of cancellation and onward transmission to the Joint Chief Controller was clearly subsequent to completion of the

[1] (1996) 4 SCC 433

transactions and such use cannot keep the transactions out of the mischief and purview of Section 4(6)(iii); that the transactions were really "surrenders" and not "purchases" is untenable because surrender is also envisaged by operation of law and hence, the concept of "surrender" is inapplicable in the instant case; and that there was enough indication of "sale" and "purchase" and transfer of property in the scrips as is evident from documents that the holder of script was "encashing" them by completely foregoing his "entitlements" under it. After so holding, the tribunal dealt with the concept of business as has been defined under Section 2(1) of the Act, referred to various decisions including ***Commissioner of Sales Tax v. Billion Plastics Pvt. Ltd.***[2], ***State of Tamil Nadu v. Burma Shell Co. Ltd.***[3], ***District Controller of Stores v. A.C. Taxation Officer***[4] and ***State of Tamil Nadu v. Binny Ltd., Madras***[5], ***Board of Revenue v. A.M. Ansari***[6] and ***State of Gujarat v. Raipur Manufacturing Co. Ltd.***[7] and after deliberating on them,

[2] [1995] 98 STC 184
[3] 31 S.T.C. 426 (S.C.)
[4] 37 S.T.C. 423 (S.C.)
[5] 49 S.T.C. 17 (S.C.)
[6] 38 S.T.C. 577 (S.C.)
[7] AIR 1967 SC 1066

posed the question whether mere lack of the element of regularity or frequency, when the other elements are present would it be sufficient to keep take the transactions out of the compass of "business" and opined that where an intention to carry on business was clearly established, mere lack of the element of regularity or frequency would not convert business transactions into non-business transactions and would not make a "dealer" a "non dealer". To arrive at the said conclusion, the tribunal referred to the definition of "dealer" under Section 2(c) of the Act and definition of "business" and other provisions and in that context, referred to ***State of Andhra Pradesh v. H. Abdul Bakhi and Bros.***[8] and ***Hindustan Steel Ltd v. State of Orissa***[9] and came to hold that profit motive is not imperative, because as per law "business" connects some activity actually in the nature of trade or commerce or manufacture which is done not for sport or pleasure or for charity. Thus, there is little difference between the primary or main part of the definition of "business" and its inclusive part which basically means, as in the present context, any

[8] AIR 1965 SC 531
[9] AIR 1970 SC 253

trade or commerce or similar activity and any transaction in connection with, or ancillary or incidental to, such trade or commerce. Process of exchange can be completed by the exchange of goods and services for money. The tribunal has observed that in the instant case the purchase of exim scrips was by way of exchange of the scrips, which are financial instruments, for money. Thereafter, the tribunal referred to the meaning of the terms trade and commerce and stated in Black's Law Dictionary and certain other dictionaries including Aiyer's Judicial Dictionary and eventually came to hold as follows:-

> "Thus, purchase of exim scrips for money, comprising a large volume (at least Rs. 25 crores) is in every sense a "business" within the meaning of Section 2(1a). That being so, having carried on such a "business" the applicant bank became a "dealer" under section 2(c), even apart from the fact that it was already a registered dealer for sale of gold. Since sale of gold has no connection with purchase of exim scrips, the latter transactions cannot be said to be either in connection with or ancillary or incidental to sale of gold. In our view, the purchase of exim scrips was a separate "business" of the applicant bank. A point was argued on behalf of the bank that it had to undertake this activity under instructions from the Reserve Bank of India. The fact that it was so, indicates that it was carried on as a business and with the intention to carry it on as a business".

11. Thereafter, it opined that the SBI is not an ordinary businessman, but it is a body created by an Act. Analysing the statutory scheme and the obligation, it proceeded to state thus:

> "We have to keep this distinction in mind when we consider whether purchase of exim scrips was done by the bank as a business with the intention to do a business. It is undisputed that not only the bank paid money for purchasing exim scrips but also it made some gain by receiving commission out of the transactions. Even without any commission the activity clearly constitutes a "business". Another question is : when the activity was carried on under the instructions of the Reserve Bank of India, can it be said to be a "business"? In the facts of the case, the apparently compulsory nature of purchase of exim scrips was not such as to take it out of the ambit of "business". The bank could not compel any holder of exim scrips to sell the same to it. It was wholly voluntary on the part of a holder to sell scrips to the bank. As soon as a holder exercises his opinion to sell and gives a scrip to the bank, the bank purchases it on payment of money. As already said, the compulsory nature of performance of the duty of purchase of exim scrips emanates from Act of 1955 which created the bank. Unlike any other dealer, the applicant bank could not think of acting beyond the provisions of Act of 1955. That being so, in the special circumstances of the case, the element of compulsion involved in the instruction of the Reserve Bank of India is irrelevant. Apart from that aspect, we may refer to the case of Coffee Board v. Commissioner of

> Commercial Taxes (1988) 70 S.T.C. 162 (S.C.) in which it was held that there was a sale, where the growers of coffee delivered coffee to the Board, though the growers did not actually sell it. It was a sale by operation of law. The imposition of sales tax on such sale of coffee was upheld. From the above points of view we hold that the purchase of exim scrips by the applicant bank were rightly brought to purchase tax under 1941 Act."

12. The said order was challenged before the High Court of Calcutta in a writ petition wherein it was contended that the Bank was not a "dealer" within the meaning of Section 2(c) of the Act in respect of the Exim scrips since it does not and/or did not carry on the business of sale or purchase of such Exim scrips; that in the case at hand it was only a solitary case and that too for a brief period from March 23, 1992 to May 31, 1992 but neither before nor after the said period had any such transaction been entered into which could justify the finding of the tribunal that the assessee-Bank had an intention to carry on business in purchase of Exim scrips and that mere lack of regularity or frequency would not convert a business into non-business and would not make a dealer a non-dealer; that there was no material on record to arrive at the conclusion that it was

clearly established that the writ petitioner No. 1, i.e., the SBI, had the intention to carry on business in purchase of Exim scrips; that even if the Bank was to be treated as a dealer, the provisions of Section 4(6)(iii) would have to be related to the business being carried on by the Bank inasmuch as the said provisions would otherwise suffer from vagueness and would expose it to attack on the ground of constitutional validity; that keeping in view the scheme of the Act and the intent and purpose of relevant provision, purchase tax could be levied on a dealer only if he carried on business of buying or selling the goods in question; that whatever may be the nature of the transaction, the Bank had only acted as an agent of the RBI in the transaction relating to Exim scrips and would not, therefore, come within the definition of the expression "dealer" as defined in Section 2(c) of the 1941 Act; that the transaction involving the acquisition of Exim scrips by the Bank could not be said to be a case of purchase but a case of surrender; that the Exim scrip was in substance a licence or a grant from the Sovereign and there could not be any sale of such Exim scrips to the Sovereign and accordingly, when the holder of

the Exim scrips gives up his right in favour of the granter it is an act of surrender and nothing else; that SBI had merely acted as an agent of the Sovereign, namely, the department of the Central Government which had issued the Exim scrips, that is, the Joint Chief Controller of Import and Export and under the instruction of the RBI and once the said Exim scrips were surrendered by the holders, the same were required to be cancelled and forwarded to the office of the Joint Chief Controller of Import and Exports who had originally issued the same and in effect the grant under the Exim scrips would, upon cancellation by the Bank, cease to exist, which state of affairs is consistent with the concept of surrender and it was not intended that upon acquisition of the Exim scrips from their holders, the same would be utilised by the Bank for the purpose of either selling the same or using the same for the purpose for which they had been intended. Be it noted learned counsel for the Bank placed reliance on the decisions in ***Raipur Manufacturing Co. Ltd.*** (supra), ***Board of Revenue v. A.M. Ansari***[10] and ***Billion Plastics Pvt. Ltd.*** (supra).

[10] (1976) 3 SCC 512

13. Learned counsel for the Commercial Tax Officer, resisting the submissions of the learned counsel for the Bank contended that the controversy raised by the bank having set at rest by the three-Judge Bench in ***Vikas Sales Corporation*** (supra), wherein the Supreme Court had given stamp of approval to the decision in ***P.S. Apparels v. Deputy Commercial Tax Officer, Madras***[11]. It was urged by the revenue that REP Licence are goods and the premium or price received therefrom by transfer thereof was liable to sales tax within the ambit and sweep of Section 4(6) (iii) of the Act and, therefore, the finding recorded by the tribunal that the transaction involving the purchase of Exim scrips by the assessee bank amounted to sale could not be found fault with. It was also canvassed that the intention of the legislature was clear and in view of the authority rendered in ***Vikas Sales Corporation*** (supra), ***P.S. Apparels*** (supra) and the decision in ***Bharat Fritz Werner Ltd. v. Commissioner of Commercial Taxes***[12] nothing really remain to be adjudicated.

[11] [1994] 94 STC 139
[12] [1991] 86 STC 175

14. The High Court analysed the principles in all the authorities cited before it and came to hold that this Court has opined that REP licences/Exim scrips were merchandise and/or goods in the commercial world and were freely bought and sold in the market and hence, no argument could be urged that they do not constitute goods for the purposes of commercial transactions. The High Court referred to the circular dated March 18, 1992, issued by the RBI regarding purchase of Exim scrips by the designated branches of the SBI and opined that the said Exim scrips were handed over to the Bank solely for the purpose of cancellation and not be used as goods for the purpose of commercial transactions. According to the High Court, they were reduced to mere paper having no commercial value. The Division Bench distinguished the judgments rendered by this Court as well as by the High Courts of Madras and Karnataka. It further proceeded to opine that the purchases by the SBI were not effected in the usual course of business of the Bank, for it was a one-time affair and there was no continuity or regularity involved in such transactions so as to bring the same within the

concept of business. The High Court took note of the fact that the Bank was mainly confined to purchase and sale of gold and silver. On behalf of the revenue, it was contended that the bank was a registered dealer under the Act, but the said submission did not weigh with the High Court because as the impugned order would show, it has been persuaded by the decision rendered by the Bombay High Court in ***Billion Plastics Pvt. Ltd.*** (supra). Thereafter, the High Court came to the following conclusion:-

> "56. ….we are not inclined to accept the arguments advanced on behalf of the Revenue that purchasing of Exim scrips on the direction of the Reserve Bank of India for the purpose of destroying its very commercial nature, amounted to business being carried on by the writ petitioner-Bank in such Exim scrips. There was no question of selling the Exim scrips once they had been purchased by the Bank. The entire transaction appears to be in the nature of a mopping up operation for removing the Exim scrips from the market.
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> 57. Having regard to the view taken by us that the purchase of Exim scrips by the writ petitioner-Bank did not attract the provisions of Section 4(6)(iii) of the 1941 Act, we do not think it necessary to go into the other submission of Mr. Ghosh that the aforesaid provisions were either vague or uncertain and thus unconstitutional. We are not, therefore, inclined to dilate further on such point.

> 58. In view of what we have indicated hereinabove, we are unable to sustain the judgment and order of the learned Tribunal and we, accordingly, set aside the same and we also quash the order of assessment dated June 30, 1995 passed by the Commercial Tax Officer, Park Street Charge, as also the order dated September 19, 1996, passed by the Assistant Commissioner, Commercial Taxes, Calcutta (South) Circle, in Appeal case No. A495/1995-96 under Section 20(1) of the Bengal Finance (Sales Tax) Act, 1941".

The aforesaid conclusion entailed allowing the writ petition preferred before the High Court and resultantly the assessee was discharged from the undertaking given for the purpose of continuation of the interim order initially passed.

15. We have heard Mr. Soumitra G. Chaudhuri, learned counsel for the appellants and Mr. Pradip Kumar Ghosh, learned senior counsel with Mr. Chiraranjan Addey, learned counsel appearing for the respondents.

16. To appreciate the controversy, it is pertinent to extract the communication dated March 18, 1992 sent by the RBI, Exchange Control Department to the Chairman, State Bank of India, Bombay. The said letter is as follows:-

> "Dear Sir,
>
> Purchase of Exim Scrips by designate branches of SBI.

This is with reference to our discussion with Shri. B.S. Pandya, General Manager (Domestic & Operations) on the captioned subject. It has been agreed that designated branches of the State Bank of India would commence purchasing 'Exim Scrips', from holders who wish to dispose of them, at a premium of 20 percent on the face value of the scrip & (unutilized face value) from 23rd March 1992, subject to the following terms and conditions:

a) The holder of the scrips would be required to submit an application to the designated branch in the form prescribed by the State Bank of India.

b) State Bank of India would, incorporate, in consultation with their legal department, a suitable indemnity clause in the application form to be submitted by the holder of the scrip.

c) As the scrip is transferred by a letter, State Bank of India would verify the letter in favour of the holder presenting the scrip and would then make payment on the basis of usual banking procedures adopted for identification of the person to whom payment is made.

d) The payment would be rounded off to the nearest rupee and would be made only by means of a Crossed Banker's Cheque.

The term 'Exim Scrip' would also cover post paid REP licenses issued up to 29th February 1999 of export proceeds.

e) State Bank of India, Bombay Main Branch, would arrange to get daily details of scrips paid by their various designated branches and then seek reimbursement, on a consolidated basis, daily from Reserve Bank of India, Bombay on the basis of a certificate indicating the total amount paid by them.

f) Designated Branches of SBI would maintain the particulars of scrips paid including the application forms for such period as may be considered necessary. Bombay main branch would maintain the particulars of payments made by their various designated offices on the strength of which reimbursement was claimed by them from RBI, Bombay.

g) The paid scrips would be suitably cancelled and forwarded to the concerned office of J.C.C.I. & E. which had issued the scrips. In the case of scrips of face value up to Rs.5 lakhs, the concerned office of J.C.C.I. & E. should also be asked to conduct a check about genuineness of the scrips cancelled by SBI and report objections, if any, in regard to payments to the concerned designated office of SBI.

h) If in the case of any scrip of the face value up to Rs. 5 lakhs (which is paid without prior check by the office of J.C.C.I. & E.), it later turns out that the scrip was not genuine or not validly issued etc., the matter would have to be pursued by the office of the J.C.C.I. & E. SBI will, however, render whatever assistance is necessary to tract the party to whom payment has been made.

i) SBI would be acting on behalf of the Reserve Bank of India and would be paid commission at the rate at which commission is payable to them for conducting Government business. They would also be paid out-of-pocket expenses including expenses incurred on advertisements notifying designated branches.

2. As desired by you, we have also advised the Chief Controller of Imports & Exports to instruct all his regional offices to render necessary assistance to designated branches of SBI for a smooth implementation of the scheme. He has also been

advised to instruct his regional offices in particular that they should promptly (say, within 48 hours) furnish authentication of scrips of face value above Rs. 5 lakhs sent to them and their findings of the check done of scrips up to the face value of Rs. 5 lakhs paid without any prior authentication. He has also been requested to advise J.C.C.I. & E., Bombay, to assist you with a check list containing important features of the Exim Scrip to check their genuineness."

[Emphasis added]

17. The aforesaid, as is manifest, authorises the SBI to purchase the Exim scrips as an agent of RBI and after payment of the premium at 20% of the value to the holder, the scrip was to be cancelled. Certain formalities were stipulated to be complied by the holder as well as by SBI.

18. Section 2(1a) of the Act defines "business" as follows:-

"business" includes –
(i) any trade, commerce or manufacture or execution of work contract or any adventure or concern in the nature of trade, commerce or manufacture or execution of works contract, whether or not such trade, commerce, manufacture, execution of works contract, adventure or concern is carried on with the motive to make profit and whether or not any profit accrues from such trade, commerce, manufacture, execution of works contract, adventure or concern; and

(ii) any transaction in connection with, or ancillary or incidental to, such trade, commerce, manufacture, execution of works contract,

adventure or concern;"

19. The term "dealer" has been defined under Section 2(iv)(c), which reads thus:-

> ""dealer" means any person who carries on the business of selling goods in West Bengal or of purchasing goods in West Bengal in specified circumstances or any person making a sale under Section 6D and includes –
>
> the Central or a State Government, a local authority, a statutory body, a trust or other body corporate which, or a liquidator or receiver appointed by a Court in respect of a person defined as a dealer under this clause who, whether or not in the course of business sells, supplies or distributes directly or otherwise, for cash or for deferred payment or for commission, remuneration or other valuable consideration.
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> Explanation 1. – A co-operative society or a club or any association which sells goods to its members is a dealer.
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> Explanation 2. – A factor, a broker, a commission agent, a del credere agent, an auctioneer, an agent for handling or transporting of goods or handling of document of title to goods or any other mercantile agent, by whatever name called, and whether of the same description as hereinbefore mentioned or not, who carries on the business of selling goods and who has, in the customary course of business, authority to sell goods belonging to principals is a dealer;"

20. Section 2(d) of the Act defines "goods" as follows:-

> ""goods" includes all kinds of movable property other than actionable claims, stocks, shares or securities"

21. Section 4 of the Act deals with incidence of taxation.

Sub-Section (6) of Section 4 of the Act is as follows:-

> "(6) Every dealer, who has become liable to pay tax under sub-section (1) or sub-section (2) or sub-section (4) of this section or sub-section (3) of section 8 and is registered under this Act, shall, in addition to the tax referred to therein, be also liable to pay tax under this Act on all his purchases from –
>
> (i) a dealer who is not registered under this Act, of goods other than [gold, rice (Oryza sativa L.) and wheat (Triticcum Vulgare, T. compactum, T. sphaerococcum, T. durum, T. aestivum L., T. dicoccum)], intended for direct use in the manufacture in West Bengal of goods for sale, and of containers and other materials for the packing of goods so purchased or manufactured;
>
> (ii) a registered dealer, to whom a declaration referred to in the proviso to clause (bb) of sub-section (1) of section 5 has been or will be furnished by him in respect of sales referred to in sub-clause (i) or sub-clause (ii) of the said clause, of goods purchased against such declaration, and used by him directly in the manufacture in West Bengal, of goods or in the packing of such goods, when such manufactured goods are transferred by him to a place outside West Bengal or disposed of by him, otherwise than by way of sale in West Bengal.
>
> (iii) any person, whether a dealer or not, who is not registered under this Act, of goods other than gold, rice and wheat intended for a purpose, other than those specified in clause (i)."

22. Section 6C stipulates the liability to payment of purchase tax and rate thereof.

23. We have referred to the aforesaid statutory provisions as the learned counsel for the revenue would stress upon the tenor of the said provisions and submit that respondent Bank is a dealer and once it has purchased something, which is goods, it is liable to pay the purchase tax. In essence, the learned counsel for the State would defend the order passed by the tribunal in entirety and would contend that the High Court has wholly flawed in appreciation of the factual score and the provisions applicable to the transaction.



24. In ***Vikas Sales Corporation*** (supra), the question arose whether the transfer of an Import Licence called REP Licence/Exim Scrip by the holder thereof to another person constitutes a sale of goods within the meaning of and for the purposes of the Sales Tax enactments of Tamil Nadu, Karnataka and Kerala and if it does, it is exigible to sales tax, otherwise not. In the said case, the High Court had taken

the view that REP Licences/Exim Scrips constitute goods and, therefore, on their transfer, sales tax is leviable and the judgment of the High Court was founded on the decision of this Court in ***H. Anraj v. Government of Tamil Nadu***[13]. It was contended before this Court that the license/scrips are not goods and hence, they are not property. It was further urged that they represent merely a permission to import goods which permission can be revoked at any time by the licensing authority and, therefore, they are really in the nature of share and securities which have been expressly excluded from the definition of goods in the relevant enactments. Analysing various facets, the three-Judge Bench referred to Para 199 of "Import and Export Policy 1990-93" which deals with Transferability of REP Licences. It reads as follows:-

> "199. (1) The REP Licence will be issued in the name of the registered exporter only and will not be subject to 'Actual User Conditions'. A licence-holder may transfer the licence to another person. The licence-holder or such transferee may import the goods permitted therein.
>
> (2) The transfer of a REP Licence will not require any endorsement or permission from the licensing authority, i.e., it will be governed by the ordi-

[13] (1986) 1 SCC 414

> nary law. Accordingly, clearance of the goods covered by a REP Licence issued under this policy will be allowed by the Customs authorities on production by the transferee of only the document of transfer of the licence concerned in his name. Whenever a REP Licence is transferred the transferor should give a formal letter to the transferee, giving full particulars regarding number, date and address of the transferee, and complete description of the items of import for which the licence is transferred."

25. The Court also observed that the relevant features of Exim Scrips are identical to REP Licences. Thereafter, the Court proceeded to state:-

> "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. A 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".

And again:-

> "Another contention raised in the written submissions of Shri K.V. Mohan is that even if the said licences/scrips are treated as goods, the tax must be levied at the first point of sale, viz., upon the authority issuing the licence. We cannot agree. The grant of licence by the licensing authority to the registered exporter is not a sale. The sale is when the registered exporter or the purchaser sells it to another person for consideration".

26. The High Court has distinguished the aforesaid authority by stating that this Court did not have the occasion to consider the effect of purchase of Exim scrips made by SBI, for it was not a part of business regularly carried on by it but was a transaction which was to be undertaken on the direction of the RBI. Exim scrips were no longer available as "goods" for the purpose of commercial transaction and were to be reduced to mere papers having no commercial value whatsoever and such a scenario changed the entire perspective. The High Court has laid emphasis on immediate cancellation of Exim scrips and after cancellation to be sent to the original granting authority.

27. The controversy involved in the case at hand, in our considered opinion, has to be analysed regard being had to

the existing factual score. The observations made in ***Vikas Sales Corporation*** (supra), as the aforequoted passages would show, the initial grant of license by the Government to the registered exporters was not a sale. The said finding is significant and it has potency. It is also seen that the said authority extensively relies on the earlier judgment in ***H. Anraj*** (supra) that dealt with the question whether lottery tickets are "goods" and accordingly whether sale thereof would invite sales tax. ***H. Anraj*** (supra) draws distinction between lottery tickets and steamship tickets, railway tickets, cinema tickets, etc. Salmond's Jurisprudence, 12th Edition at pages 338-339 under the heading "The Classes of Agreements" was quoted to draw distinction between three classes, namely, agreements which create rights, agreements which transfer or assign rights, and lastly agreements which extinguish them. Agreements which create rights were divided into two sub-classes, namely, contracts and grants. A contract is an agreement, which creates an obligation or right in personam between the parties, whereas a grant creates a right of another description such as leases, assignments, patents,

etc. An agreement, which transfers a right, may be termed generically as an assignment. However, when a transaction extinguishes a right, it is called a release, discharge or surrender. The distinction between creation of a right by a grant and subsequent transfer or assignment was also highlighted in ***H. Anraj*** (supra) and noted by Sabyasachi Mukherjee, J. (as His Lordship then was) in his concurrent judgment with the following observations:-

> "41. It was urged before us on behalf of the dealers that by the issue of lottery tickets, the right to participate in the draw is created for the first time in the buyers. In other words, it was urged that by the sale of lottery ticket, the right to participate is created for the first time; if it is considered to be a "grant" and as such a sale of goods, it was contended that such right was not existing before the sale of the lottery ticket. This contention has caused me anxiety from the jurisprudential point of view.
>
> 42. I agree with respect that "grant" is an agreement of some sort which creates rights in the grantee and an agreement which transfers rights may be termed as assignment. But the question, is, before the grant, was such a right, namely the right to participate in the draw, existing in the grantor? The point made is that there is no transfer of property involved in the issue of a lottery ticket and it is only after the issue of the lottery ticket that the grantee gets a right to participate. In other words, it was sought to be urged that in a lottery, the promoter sponsoring it does not have any right to participate nor to claim a prize

> in a draw and these come into existence for the first time by the purchase of lottery ticket when he purchases the ticket and therefore it cannot be said that any transfer of right is involved, but only creation of new right by the grantor in favour of the grantee."

The observations made in the aforesaid paragraphs that there is no transfer of property involved in a grant, for the rights come into existence after purchase.

28. The decision in the case of ***H. Anraj*** (supra) was overruled by the Constitution Bench in ***Sunrise Associates v. Govt. of NCT of Delhi and others***[14] on several grounds including that there was no distinction between the chance to win and the right to participate in the draw. Such a sub-division was not correct. There was no value in mere right to participate in the draw. Therefore, lottery tickets were not "goods" but were actionable claims. These were merely token of chances purchased and even otherwise the right to participate in the draw was not a moveable property and, therefore, there cannot be any transfer of beneficial interest in a moveable property. The reason being, the right to participate in a lottery draw was an actionable claim.

[14] (2006) 5 SCC 603

More significant for our purpose would be the observations of the Constitution Bench relating to the word "goods" for imposition of sales tax which, it was observed in the context, would carry its ordinary meaning of the subject matter of ownership and not denote the nature of interest of goods. The word "goods" was used to describe the thing itself. The relevant passages of the Constitution Bench in ***Sunrise Associates*** (supra) on the said aspect read as under:-

> "35. The word "goods" for the purposes of imposition of sales tax has been uniformly defined in the various sales tax laws as meaning all kinds of movable property. The word "property" may denote the nature of the interest in goods and when used in this sense means title or ownership in a thing. The word may also be used to describe the thing itself. The two concepts are distinct, a distinction which must be kept in mind when considering the use of the word in connection with the sale of goods. In the *Dictionary of Commercial Law* by A.H. Hudson (1983 Edn.) the difference is clearly brought out. The definition reads thus:
>
> > " '*Property*'.—In commercial law this may carry its ordinary meaning of the subject-matter of ownership. But elsewhere, as in the sale of goods it may be used as a synonym for ownership and lesser rights in goods."
>
> Hence, when used in the definition of "goods" in the different sales tax statutes, the word "property" means the *subject-matter* of ownership. The

> same word in the context of a "sale" means the transfer of the *ownership* in goods.
>
> 36. We have noted earlier that all the statutory definitions of the word "goods" in the State sales tax laws have uniformly excluded, inter alia, actionable claims from the definition for the purposes of the Act. Were actionable claims, etc., not otherwise includible in the definition of "goods" there was no need for excluding them. In other words, actionable claims are "goods" but not for the purposes of the Sales Tax Acts and but for this statutory exclusion, an actionable claim would be "goods" or the subject-matter of ownership. Consequently, an actionable claim is movable property and "goods" in the wider sense of the term but a sale of an actionable claim would not be subject to the sales tax laws."

And, again:-

> "51. We are therefore of the view that the decision in *H. Anraj (supra)* incorrectly held that a sale of a lottery ticket involved a sale of goods. There was no sale of goods within the meaning of Sales Tax Acts of the different States but at the highest a transfer of an actionable claim. The decision to the extent that it held otherwise is accordingly overruled though prospectively with effect from the date of this judgment."

29. We may note with profit that ***Sunrise Associates*** (supra) did not specifically deal with the question of replenishment licences, for the reference made to the Constitution Bench was limited to whether lottery tickets

were "goods". The Constitution Bench had specifically observed that they were not called upon to decide the question whether the replenishment licences were "goods." We may usefully refer to the relevant passage:-

> "29. .. We have not been called upon to answer the question whether REP licences (or the DEPB which has replaced the REP licences) are "goods". Although we have heard counsel at length on this, having regard to the limited nature of the reference, we do not decide the issue. The decision in *Vikas Sales (supra)* was referred to only because it approved the reasoning in *H. Anraj (supra)* and not because the referring court disagreed with the conclusion in *Vikas Sales (supra)* that REP licences were goods for the purposes of levy of sales tax. Indeed REP licences were not the subject-matter of the appeal before the referring court and could not have formed part of the reference. The only question we are called upon to answer is whether the decision in *H. Anraj (supra)* that lottery tickets are goods for the purposes of Article 366(29-A)(*a*) of the Constitution and the State sales tax laws, was correct."

30. Thus, the Constitution Bench did not overrule the decision of the Court in ***Vikas Sales Corporation*** (supra) holding replenishment licences were goods. The Constitution Bench, however, held that the reliance placed in ***Vikas Sales Corporation*** (supra) on the observations in ***H. Anraj*** (supra), which was agreed to and stood overruled, was to this extent bad in law. To clarify, ***Vikas Sales***

***Corporation*** (supra) specifically dealt with the transfer of replenishment licences after they had been issued. However, in ***Vikas Sales Corporation*** (supra) it was opined that the grant of a licence by the licensing authority to a registered exporter was not a sale. Sale will take place only when the registered owner further sells it to another person for consideration. The relevant paragraph of the judgment has been earlier reproduced.

31. A three-Judge Bench of the Court in ***Yasha Overseas v. Commissioner of Sales Tax and others***[15] had examined the question whether the sale or transfer of replenishment licences and duty entitlement passbooks would attract sale tax. Reliance placed on ***Sunrise Associates*** (supra) to contend that the decision in ***Vikas Sales Corporation*** (supra) impliedly overruled. The three-Judge Bench did not accept the contention by stating thus:-

> "40. Thus, on a detailed examination, we are unable to see how the decision in *Sunrise (supra)* can be said to alter the position in regard to the sale of REP licences as held by the earlier decision in *Vikas (supra)*. It is noted above that the Constitution Bench in *Sunrise (supra)* firmly and expressly declined to go into the question

[15] (2008) 8 SCC 681

whether REP licences (or DEPB which replaced REP licences) were "goods". It is indeed true that the Constitution Bench in *Sunrise (supra)* did not approve the decision in *Vikas (supra)* insofar as it gave their free marketability as an *additional* reason to hold that REP licences were not actionable claim but "goods" properly so called. The Constitution Bench held that the assumption that actionable claims were not transferable for value was quite unfounded and the conclusion drawn on that basis was quite wrong. In paras 39 and 40 of the decision, *Sunrise (supra)* decision gave illustrations of a number of actionable claims which are transferable.

41. But to our mind that does not in any way change the position insofar as REP licences are concerned. While examining the three-Judge Bench decision in *Vikas (supra)* earlier in this judgment it is seen that the Court first came to hold that REP licence/Exim scrip fell within the definition of goods quite independently. The Court found and held that REP licences had their own value; they were freely bought and sold in the market for their intrinsic value and for that reason alone those were goods. (See para 29 of the decision in *Vikas (supra)* that is reproduced above.) It was only after coming to the conclusion that the Court proceeded to examine the matter in light of the observations made in *Anraj (supra)* relating to lottery tickets and that too because the Karnataka and the Madras High Courts had heavily relied upon *Anraj (supra)* decision for holding that the sale of REP licences was exigible to sales tax. On a careful reading of the decision in *Vikas (supra)* it is apparent that it was the intrinsic value of REP licence that brought it within the definition of goods."

32. After so stating, the Court specifically referred to the

term "goods" as interpreted in ***Sunrise Associates*** (supra) to mean the title and ownership of a thing and not the nature of interest in the goods. The question of free-marketability, it was held, was not primarily relevant as per the decision in ***Sunrise Associates*** (supra), *albeit* could be relied upon as an additional reason, for replenishment licences fall within the definition of "goods" quite independently. These licences could have their own intrinsic value and could be freely brought and sold at their market value. There was also a ready market for the sale and purchase of replenishment licences.

33. Thus analysed, the replenishment licences or Exim scrips would, therefore, be "goods", and when they are transferred or assigned by the holder/owner to a third person for consideration, they would attract sale tax. However, the position would be different when replenishment licences or Exim scrips are returned to the grantor or the sovereign authority for cancellation or extinction. In this process, as and when the goods are presented, the replenishment licence or Exim scrip is cancelled and ceases to be a marketable instrument. It

becomes a scrap of paper without any innate market value. The SBI, when it took the said instruments as an agent of the RBI did not hold or purchase any goods. It was merely acting as per the directions of the RBI, as its agent and as a participant in the process of cancellation, to ensure that the replenishment licences or Exim scrips were no longer transferred. The intent and purpose was not to purchase goods in the form of replenishment licences or Exim scrips, but to nullify them. The said purpose and objective is the admitted position. The object was to mop up and remove the replenishment licences or Exim scrips from the market.

34. Be it noted that the initial issue or grant of scrips is not treated as transfer of title or ownership in the goods. Therefore, as a natural corollary, it must follow when the RBI acquires and seeks the return of replenishment licences or Exim scrips with the intention to cancel and destroy them, the replenishment licences or Exim scrips would not be treated as marketable commodity purchased by the grantor. Further, the SBI is an agent of the RBI, the principal. The Exim scrips or replenishment licences were not "goods" which were purchased by them. The intent and

purpose was not to purchase the replenishment licences because the scheme was to extinguish the right granted by issue of replenishment licences. The "ownership" in the goods was never transferred or assigned to the SBI.

35. In view of the preceding analysis, the other issues and questions, including the question whether the aforesaid exercise of procuring and cancelling replenishment licences or Exim scrips is "business" within the meaning of the Act, need not be decided. The facts of the case at hand has its distinctive features and, therefore, we unhesitatingly concur with the view of the High Court that the SBI was not liable to levy of purchase tax under the Act.

36. Consequently, the appeal, being devoid of merit, stands dismissed. There shall be no order as to costs.



.....J.
[Dipak Misra]

.....J.
[Shiva Kirti Singh]

New Delhi;
November 8, 2016