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February, 2020 for uploading. The respondents are directed to enable compliance of such uploading by making necessary/consequential corrections on its official portal.

The aforesaid directions are being passed without prejudice to the rights 20
and contentions of the either parties. We further direct that the Union of India may file an affidavit by the portal operators regarding the status of its working and the magnitude or the ability of such portal or system for accepting a requisite number of returns/forms. We further direct that if necessary, the Union of India may also direct the service provider to enhance its capacity to accept returns/forms. Since it is well-settled that where the last date of submission has been prescribed by law, it would be incumbent on the part of the Revenue to provide for adequate facility for accepting such declarations or returns or forms within the period stipulated.

List this matter on February 12, 2020. 21

[2020] 75 GSTR 497 (All)

[IN THE ALLAHABAD HIGH COURT]

TATA CONSULTANCY SERVICES

v.

COMMISSIONER OF TRADE TAX, U. P.

ROHIT RANJAN AGARWAL J.

April 4, 2019.

HF ▶ Assessee/Remanded

TRADE TAX—SERVICE TAX—SOFTWARE DEVELOPMENT—SALE OR SERVICE—DEALER DEALING IN TWO TYPES OF PRODUCTS—BRANDED SOFTWARE SOLD OFF THE SHELF AND UNBRANDED SOFTWARE DEVELOPED TO SPECIFICATIONS OF CLIENT—LATTER DEVELOPED FOR CLIENT AND DEALER HAVING NO RIGHT TO SELL IT TO OTHER CLIENTS AS BRANDED ITEM—DEALER FAILING TO PRODUCE AGREEMENTS WITH CLIENTS BEFORE AUTHORITIES TO SHOW SOFTWARE DEVELOPMENT NOT SALE—PRODUCING AGREEMENTS BEFORE COURT—MATTER REMANDED TO TRIBUNAL—U. P. TRADE TAX ACT (15 of 1948), s. 2(d)—FINANCE ACT (32 OF 1994), s. 65(95).

Service tax and sales tax operate in different areas and unless the works contract involves an element of sale of goods, the State Legislature has no power to levy tax. Similarly Parliament has no power to levy service tax on

the sale of goods, if it involves sale of goods. Both enactments specify the type of activity liable to tax. Thus, where any dealer is carrying on both the work of sale of software and development of software, the assessing authority has to distinguish and indentify between the two in a harmonious way so as to uphold the right of both legislations to levy tax, and the dealer is duty bound, apart from submitting his return, to produce such documents as may be necessary and demanded by the authority concerned to segregate the two, so as to make it abundantly clear as to which law, i. e., the State law or the Central, will be applicable. The moment the dealer produces works contracts or agreements before the assessing authority so as to bring his case within the purview of software development, the case goes out of the purview of the State taxing authority and becomes amenable to service tax under the law enacted by Parliament.

The petitioner-dealer was engaged in the business of software development and rendering support services. Its software business was divided in two parts, one which dealt with standard software packages, which were sold off the shelf, and the other was software development to the client specifications and rendering support work for its client (software consultancy). The dealer entered into a number of agreements for providing consultancy services with Government, semi-Government and other authorities within the State of U. P. and provided services for development of application software. The assessing authority rejected the dealer's claim in regard to billing for software development being treated as consultancy service charges and imposed tax on the receipt treating it sale of software. The dealer-company filed an appeal before the Joint Commissioner (Appeals) who upheld the assessment order. The Tribunal dismissed the dealer's further appeal. On a revision petition :

Held, *(i) that no agreement or contract was filed or brought to the notice of the assessing authority or the appellate authority by the dealer, despite notice by the assessing authority. The entire case of the dealer rested upon the fact that the software developed was on the instructions and specification of the client and after the software was developed it became the property of the client. The agreement was the basis of claim of the dealer. The dealer should have brought on record the agreement before the assessing authority so as to substantiate its claim but failed to do so, and for the first time filed these before the court in revision. The Tribunal being the last fact finding court, could have perused them and gone into the question of validity of the agreement brought on record. There was no doubt as to the fact that the dealer was dealing in two types of products, namely, branded software which was sold off the shelf, and unbranded software, which was developed according to the*

specifications of the client. The software so developed was undoubtedly for the client and became the property of the client, the moment it was developed and the dealer had no right over it nor could it sell it to other clients as a branded item.

(ii) That in respect of the refusal by the first appellate authority and by the Tribunal to consider the additional grounds with regard to the sale of computer hardware to P. W. D. which was exempted under section 3A of the Act, the Tribunal had not recorded any finding and had only upheld the order passed by the first appellate authority. Additional grounds could be raised in the appeal and the Tribunal being the last fact finding court should have taken note of this fact and recorded a specific finding.

[*Matter remanded to Tribunal to record specific finding after going through the agreements and contract as to the claim of the dealer in regard to the application of software development and support service given to its client as unbranded software not covered under the definition of goods and was a service to the customers.*]

Cases referred to :

Associated Cement Companies Ltd. *v.* Commissioner of Customs [2001] 124 STC 59 (SC) (para 18)

Bharat Sanchar Nigam Ltd. *v.* Union of India [2006] 3 VST 95 (SC) ; [2006] 145 STC 91 (SC) ; [2006] 282 ITR 273 (SC) ; [2006] 6 RC 276 (para 18)

Federation of Hotel & Restaurant Association of India *v.* Union of India [1989] 74 STC 102 (SC) ; [1989] 178 ITR 97 (SC) (para 19)

Imagic Creative Pvt. Ltd. *v.* Commissioner of Commercial Taxes [2008] 12 VST 371 (SC) (para 19)

Larsen & Toubro *v.* Union of India [1993] 88 STC 204 (SC) (para 19)

Raza Textile Limited *v.* Commissioner of Sales Tax [1974] 33 STC 112 (All) (paras 16, 29)

Sasken Communication Technologies Ltd. *v.* Joint Commissioner of Commercial Taxes [2012] 55 VST 89 (Karn) (paras 16, 19, 21, 34, 35, 41)

State of Madras *v.* Gannon Dunkerley & Co. (Madras) Ltd. [1958] 9 STC 353 (SC) (para 19)

Tata Consultancy Services *v.* State of Andhra Pradesh [2004] 137 STC 620 (SC) ; [2004] 3 RC 535 (paras 16, 18, 25, 35)

Tata Consultancy Services *v.* State of Andhra Pradesh [1997] 105 STC 421 (AP) (paras 10, 16, 17, 28, 32, 35)

Virendra Kumar Trading Co. *v.* Commissioner of Commercial Tax [2017] 100 VST 192 (All) (para 29)

Trade Tax Revision No. 1566 of 2006.

Tarun Gulati along with *Kunal Kishore* and *Ms. Pooja Talwar* for the petitioner.

B. K. Pandey for the respondent.

JUDGMENT

1 ROHIT RANJAN AGARWAL J.—Heard Sri Tarun Gulati along with Sri Kunal Kishore and Ms. Pooja Talwar, learned counsel for revisionist and Sri B. K. Pandey, learned standing counsel for the respondent.

2 Revisionist is a company incorporated under the Companies Act, having its unit in Uttar Pradesh at Noida and Lucknow. It is registered both under the U. P. Trade Tax Act as well as Central Sales Tax Act. Dispute is in regard to assessment year 2001-02 (U. P.). According to revisionist, it is engaged in the business of software development and rendering support services. According to revisionist its software business is divided in two parts, one which deals with standard software packages, which are sold off the shelf, and the other type of product in which the company is mainly involved is software development as per client specifications and rendering support work for its client (software consultancy). According to revisionist, Noida unit, which is registered with Software Technology Park of India (known as "STP") renders only the software services to overseas client while Lucknow unit has two distinct locations known as Lucknow STP and Lucknow non-STP. The STP location works on similar basis as Noida unit providing only software services to overseas clients, while non-STP location caters to domestic client by providing specific application software development and support services generally known as software consultancy services.

3 According to revisionist, computer software sold off the shelf also called as branded software, trade tax was charged and the same was deposited with the Department and the customer can use the licensed standard software as it is. As far as the agreement entered by the assessee with various clients for developing application software strictly on the basis of the specific needs of a particular client, the intellectual rights in so developed software solution vested with the client.

4 According to the revisionist-assessee, the branded software comes under the definition of goods. Section 2(d) of the U. P. Trade Tax Act (hereinafter called as an "Act") defines as under :

> "2.(d) 'Goods' means every kind or class of movable property and includes all materials, commodities and articles involved in the execution of a works contract, and growing crops, grass, trees and things

attached to, or fastened to anything permanently attached to the earth which, under the contract of sale, are agreed to be severed, but does not include actionable claims, stocks, shares, securities or postal stationery sold by the Postal Department."

While unbranded software, which is developed according to the specification of the client also known as unbranded software or software, tailor made to the customers particular requirement does not cover under the definition of goods and comes under service and is not amenable to tax under the Act. 5

By the Finance Act of 1994, Chapters V and V-A were inserted and provisions relating to service tax was incorporated. Section 65(95) defines the service tax as under : 6

" '*Service tax*' means tax leviable under the provisions of this Chapter."

Section 66 defines "charge of service tax" as under :

"66. *Charge of service tax*.—There shall be levied a tax (hereinafter referred to as the service tax) at the rate of twelve per cent of the value of taxable services referred to in sub-clauses (a), (d), (e), (f), (g,) (h), (i), (j), (k), (l), (m), (n), (o), (p), (q), (r), (s), (t), (u), (v), (w), (x), (y), (z), (za), (zb), (zc), (zh), (zi), (zj), (zk), (zl), (zm), (zn), (zo), (zq), (zr), (zs), (zt), (zu), (zv), (zw), (zx), (zy), (zz), (zza), (zzb), (zzc), (zzd), (zze), (zzf), (zzg), (zzh), (zzi), (zzj), (zzk), (zzl), (zzm), (zzn), (zzo), (zzp), (zzq), (zzr), (zzs), (zzt), (zzu), (zzv), (zzw), (zzx), (zzy), (zzz), (zzza), (zzzb), (zzzc), (zzzd), (zzze), (zzzf), (zzzg), (zzzh), (zzzi), (zzzj), (zzzk), (zzzl), (zzzm), (zzzn), (zzzo), (zzzp), (zzzq) (zzzr) (zzzs) (zzzt),(zzzu), (zzzv) and (zzzw) of clause (105) of section 65 and collected in such manner as may be prescribed."

Thus, the U. P. Trade Tax Act has been enacted by the State Legislature while the Finance Act is a law enacted by the Parliament and both the laws operate in different areas. 7

According to revisionist-assessee it had entered into a number of agreements for providing consultancy services with Government, semi-Government and other authorities within the State of U. P. and has provided services for development of application software. 8

The dispute is in regard to this unbranded software developed by the assessee for its customers for which the assessing authority issued a show- 9

cause notice on February 13, 2004 for making assessment for the relevant year. Through the aforesaid notice the assessee was required to give explanation as to why no tax was deposited for development and sale of software amounting to Rs. 4,96,08,284. It was further required to submit detail, as to whom the sale was made within and outside the State and further the notice stated why the company was not liable to pay tax. The assessee was required to submit his reply by February 25, 2004. Revisionist-assessee replied the said notice which was received on February 24, 2004, wherein it was specifically mentioned that Lucknow unit which has STP location and non-STP location, the STP location was working on similar basis as Noida STP providing services only to overseas clients, while Lucknow non-STP centre caters to domestic clients by providing application software development and support services (generally known as "consultancy services"), and licensing of standard software packages, generally known as product for sales. It was further stated that billing done for consultancy services, i. e., application software development and support services for domestic clients, do not fall within the definition of term goods because these are services rendered for development of software, according to clients specific requirement.

10 Reliance was also placed on the decision of Andhra Pradesh High Court in the case of *Tata Consultancy* v. *State of Andhra Pradesh* [1997] 105 STC 421 (AP) ; [1996] SCC On Line AP 1260, in which the court held software designed and made for customer for his individual need is not goods. It was also replied that out of Rs. 4,96,08,824, Rs. 14,58,380 is on account of fees for annual technical support. It was also contended that licensed products sold were shown under the taxable sale and tax was paid. Lastly, it was stated that any further details or clarification so required by the Department would be provided.

11 The assessing authority passed assessment order under section 41(8) of the Act, accepted the books of accounts, but rejected the claim of assessee in regard to billing for software development being treated as consultancy service charges and imposed a tax of Rs. 19,84,184 on the receipt of Rs. 4,96,04,597 as a tax on sale of software.

12 Aggrieved by this order the assessee-company filed an appeal before the Joint Commissioner (Appeals), Trade Tax, Noida. An application was also filed for addition of grounds in the appeal. In the said application it was stated that the assessee had sold computer hardware to PWD, U. P., for Rs. 1,40,54,040 and had raised bills, further under section 3-A of the Act, the sale of computer hardware is exempted from tax. It was stated that due to clerical mistake the appellant showed the aforesaid sale of computer

hardware as computer consultancy services. Another ground taken was that during relevant year the assessee received Rs. 14,58,380 against annual maintenance contract, but the assessing authority had wrongly imposed tax on the appellant assuming it to be the sale of computer software.

The assessee relied upon various judgments of this court in support of his contention that new plea could be raised before the appellate authority in appeal, which was not raised before the assessing authority. **13**

By order dated March 23, 2005, the appellate authority upheld the assessment order and rejected the appeal of the revisionist. It was further held that additional ground so taken by the assessee amounts to contradiction and the same could not be permitted to be added at this stage and rejected the application for the addition of additional grounds. Aggrieved by the said order, the revisionist-assessee preferred an appeal before Trade Tax Tribunal, Noida which was rejected by order dated June 19, 2006. **14**

Sri Tarun Gulati, learned counsel for the revisionist-assessee, submits that the taxing authorities completely failed to distinguish between the branded and unbranded software. According to him, the software sold off the shelf, which is covered by branded item, come under the definition of goods as defined in section 2(d) of the Act, for which the tax has been deposited by the company. As far as the software developed and the support services given by the company to its client falls under the category of unbranded software, which is also termed as software "tailor made to the customer particular requirement", which is a service rendered to the client and does not fall within the definition of goods and not amenable to tax. **15**

Sri Gulati has relied upon the judgment of the apex court in the case of revisionist-company itself, i.e., *Tata Consultancy Services* v. *State of Andhra Pradesh* [2004] 137 STC 620 (SC) ; [2004] 3 RC 535 ; [2005] 1 SCC 308, *Tata Consultancy Services* v. *State of Andhra Pradesh* [1997] 105 STC 421 (AP) ; [1996] SCC On Line AP 1260, *Sasken Communication Technologies Ltd.* v. *Joint Commissioner of Commercial Taxes (Appeals)-3, Bangalore*, [2012] 55 VST 89 (Karn) ; [2011] 33 STT 507 and *Raza Textile Limited, Rampur* v. *Commissioner of Sales Tax, U.P., Lucknow* [1974] 33 STC 112 (All) ; [1973] SCC On Line All 479. **16**

According to him, matter of the revisionist-company in regard to branded software was under consideration in the case of *Tata Consultancy Services* [1997] 105 STC 421 (AP) ; [1996] SCC Online AP 1260 before the Andhra Pradesh, High Court. He relies upon paragraph Nos. 7, 36, 37 and 40 of the judgment, which are extracted hereunder (paras 8, 34, 35 and 38, pages 425, 433 and 434 in 105 STC) : **17**

"7. The learned Special Government Pleader for Taxes, contends that the questions raised in the writ petition are only academic questions and therefore the writ petition is liable to be dismissed. He further contends that the various software packages like Foxpro, Wordstar, Wings, Lotus, DBase, Windows, MS-Dos, Unix, etc., are 'goods' known in the market and therefore they have been correctly described in the instructions as liable to tax. In other words the contention of the learned Government Pleader is that the turnover relating to sale of 'branded software' will be the turnover relating to sale of 'goods' and therefore exigible to sales tax. However, insofar as unbranded software is concerned, the learned Government Pleader conceded that as it related to skill and labour so it might not be falling within the meaning of 'goods'.

. . . .

36. As our discussion is confined to branded software, as it is called here, of which American equivalent is 'computer software off the shelf', we do not consider it appropriate to embark upon discussion on the question of the nature of 'unbranded software' which is also termed as software 'tailor-made to the customer's particular requirements'.

37. In the light of the above discussion, we have no hesitation in concluding that the branded software can safely be treated as falling within the ambit of 'goods' under the APGST Act.

. . . .

40. Insofar as the computer software is concerned, we have already mentioned above two categories of software, viz., (i) the branded software and (ii) unbranded software. Whereas the first type of software falls within the meaning of 'goods', the second type of software, viz., unbranded software cannot be treated as 'goods'. Therefore, it would not only be inappropriate but also incorrect to state that intellectual property does not fall within the ambit of 'goods'. In our view a correct statement would be that all intellectual properties may not be 'goods' and therefore branded software with which we are concerned here cannot be said to fall outside the purview of 'goods' merely because it is intellectual property ; so far as 'unbranded software' is concerned, it is undoubtedly intellectual property but it may perhaps be outside the ambit of 'goods'. However, we consider it unnecessary to discuss its various aspects and express any opinion in that regard. We are, therefore, unable to accept the contention that

merely because software is 'intellectual property' it cannot be treated as 'goods' as being too broad a statement."

He further relied upon the 2005 judgment of the revisionist company in **18** *Tata Consultancy Services* [2004] 137 STC 620 (SC) ; [2004] 3 RC 535 ; [2005] 1 SCC 308, which was challenged before the apex court against the order of Andhra Pradesh High Court. Relevant paragraphs nos. 2, 3, 5, 27 and 29 of the said judgments reads as under (paras 2, 2.1, 24 and 26, pages 624, 625, 640 and 641 in 137 STC) :

"2. Briefly stated the facts are as follows :

The appellants provide consultancy services including computer consultancy services. As part of their business they prepare and load on customers' computers custom made software (for sake of convenience hereinafter referred to as 'uncanned software') and also sell Computer Software Packages off the shelf (hereinafter referred to as 'canned software'). The canned software packages are of the ownership of companies/persons, who have developed those software. The appellants are licensees with permission to sub-license these packages to others. The canned software programmes are programmes like oracle, lotus, master key, n-export, unigraphics, etc.

3. In respect of the canned software the Commercial Tax Officer, Hyderabad, passed a provisional order of assessment under the provisions of the Andhra Pradesh General Sales Tax Act, 1957 (hereinafter called 'the said Act') holding that the software were goods. The Commercial Tax Officer accordingly levied sales tax on this software. The Appellate Deputy Commissioner of Commercial Taxes also held that the software were goods and liable to tax. However, the matter was remanded back for purposes of working out the tax.

. . .

5. The question raised in this appeal is whether the canned software sold by the appellants can be termed to be 'goods' and as such assessable to sales tax under the said Act.

. . . .

27. In our view, the term 'goods' as used in article 366(12) of the Constitution of India and as defined under the said Act are very wide and include all types of movable properties, whether those properties be tangible or intangible. We are in complete agreement with the observations made by this court in *Associated Cement Companies Ltd.* [2001] 124 STC 59 (SC). A software program may consist of various commands which enable the computer to perform a designated

task. The copyright in that program may remain with the originator of the program. But the moment copies are made and marketed, it becomes goods, which are susceptible to sales tax. Even intellectual property, once it is put on to a media, whether it be in the form of books or canvas (in case of painting) or computer discs or cassettes, and marketed would become 'goods'. We see no difference between a sale of a software program on a CD/floppy disc from a sale of music on a cassette/CD or a sale of a film on a video cassette/CD. In all such cases, the intellectual property has been incorporated on a media for purposes of transfer. Sale is not just of the media which by itself has very little value. The software and the media cannot be split up. What the buyer purchases and pays for is not the disc or the CD. As in the case of paintings or books or music or films the buyer is purchasing the intellectual property and not the media, i. e., the paper or cassette or disc or CD. Thus a transaction sale of computer software is clearly a sale of 'goods' within the meaning of the term as defined in the said Act. The term 'all materials, articles and commodities' includes both tangible and intangible/incorporeal property which is capable of abstraction, consumption and use and which can be transmitted, transferred, delivered, stored, possessed, etc. The software programmes have all these attributes.

. . . .

29. Mr. Sorabjee submitted that the High Court correctly held that unbranded software was 'undoubtedly intellectual property'. Mr. Sorabjee submitted that the High Court fell in error in making a distinction between branded and unbranded software and erred in holding that branded software was 'goods'. We are in agreement with Mr. Sorabjee when he contends that there is no distinction between branded and unbranded software. However, we find no error in the High Court holding that branded software is goods. In both cases, the software is capable of being abstracted, consumed and use. In both cases the software can be transmitted, transferred, delivered, stored, possessed, etc. Thus even unbranded software, when it is marketed/ sold, may be goods. We, however, are not dealing with this aspect and express no opinion thereon because in case of unbranded software other questions like situs of contract of sale and/or whether the contract is a service contract may arise."

19 He further relied upon the judgments in the case of *Sasken Communication Technologies Ltd.* [2012] 55 VST 89 (Karn) ; [2011] 33 STT 507. The relevant paragraph Nos. 12, 19, 29, 31, 37, 39, 43, 44 and 50 of the said

judgment reads as under (paras 13, 20, 33, 35, 41, 43, 47 and 54, pages 100, 112, 113, 116-119, 121-126 and 128 in 55 VST) :

"12. The apex court after holding that even unbranded software when it is marketed/sold, may be goods, made it very clear that, in the aforesaid decision, they are not dealing with this aspect and expressed no opinion because in case of unbranded software 'whether the contract is a service contract' or 'contract of sale is also involved', may arise. That is precisely the question that has to be decided in these cases. Therefore, the said judgment does not come in the way of this court going into the said question, as the Supreme Court has not expressed their opinion on the said issue. Therefore, the field is open.

. . . . .

19. From the aforesaid reasons of the assessing authority, it is clear that the assessee is in the business of creating complete solutions to his clients. They have a comprehensive range of applications, services and solutions. They are a solution providers. They are in the development of software. Their solutions and services are backed by a proven reputation for expert support and high quality. The assessee provides solutions and develops software and the same is carried out on the software of the client company. The said software developed has to be on a media and then handed over to the customer. The transfer of property from the technicians of the assessee to the client constitute sale of goods in terms of the judgment and therefore liable to sales tax. It is the correctness of the said reasoning and finding which is assailed in these proceedings.

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29. The apex court in the case of *Imagic Creative Pvt. Ltd.* v. *Commissioner of Commercial Taxes* [2008] 12 VST 371 (SC) ; MANU/SC/0518/2008 ; [2008] 12 STT 392 held as under (pages 384 and 385 in 12 VST) :

'28. We have, however, a different problem at hand. The appellant admittedly is a service provider. When it provides for service, it is assessable to a tax known as service tax. Such tax is leviable by reason of a parliamentary statute. In the matter of interpretation of a taxing statute, as also other statutes where the applicability of article 246 of the Constitution of India, read with the Seventh Schedule thereof is in question, the court may have to take recourse to various theories including "aspect theory", as was noticed by this court in *Federation of Hotel & Restaurant Association of India* v. *Union of India* [1989] 74

STC 102 (SC) ; [1989] 178 ITR 97 (SC) ; MANU/SC/0180/1989 ; [1989] 3 SCC 634.

29. If the submission of Mr. Hegde is accepted in its entirety, whereas on the one hand, the Central Government would be deprived of obtaining any tax whatsoever under the Finance Act, 1994, it is possible to arrive at a conclusion that no tax at all would be payable as the tax has been held to be an indivisible one. A distinction must be borne in mind between an indivisible contract and a composite contract. If in a contract, an element to provide service is contained, the purport and object for which the Constitution had to be amended and clause (29A) had to be inserted in article 366, must be kept in mind.

30. We have noticed hereinbefore that a legal fiction is created by reason of the said provision. Such a legal fiction, as is well known, should be applied only to the extent for which it was enacted. It, although must be given its full effect but the same would not mean that it should be applied beyond a point which was not contemplated by the Legislature or which would lead to an anomaly or absurdity.

31. The court, while interpreting a statute, must bear in mind that the Legislature was supposed to know law and the legislation enacted is a reasonable one. The court must also bear in mind that where the application of a parliamentary and a legislative Act comes up for consideration ; endeavours shall be made to see that provisions of both the Acts are made applicable.

32. Payments of service tax as also VAT are mutually exclusive. Therefore, they should be held to be applicable having regard to the respective parameters of service tax and the sales tax as envisaged in a composite contract as contradistinguished from an indivisible contract. It may consist of different elements providing for attracting different nature of levy . . .'

. . . . .

31. Therefore, a computer programming and providing of computer software involves two aspects, one falling within the power of the Parliament and the other falling within the power of the State Legislature to enact the law, the law so enacted cannot be found fault with. When the programming and providing of computer software is treated as works contract, as the works contract necessarily involves an agreement to render service and an agreement for sale of goods, service aspect could be taxed by the Parliament and the sale of goods aspect could be taxed by the State Legislature. But, this distinctive-

ness of two transactions is to be ascertainable from the terms of the composite contract. If such an intention is not discernible from the terms of the contract then we have to find out what is the pith and substance of the contract or in other words what is the true nature and character of the contract. If on an examination of the contract as a whole, it is not possible to discern that the contract involves sale of goods but is essentially an agreement to render service, neither the concept of a works contract nor the concept of aspect theory is attracted. It is by virtue of entry 54 in List II of the Seventh Schedule to the Karnataka Value Added Tax Act is enacted by the State Legislature, as the State Legislature is competent to enact laws in respect of sale of goods. By introducing a schedule to the said enactment and describing under a works contract, 'programming and providing a computer software is specified', unless the said works contract involves an element of sale of goods, the State Legislature has no power to levy tax under the said Act. Similarly, the Parliament also has no power to levy service tax on sale of goods if by including in the Finance Act, development of information technology software, study, analysis, design and programming, information technology software and various other aspects touching software if it involves sale of goods. It has to be necessarily confined to the service aspect. In both the enactments they specify the types of activities which are liable for tax. A duty is cast on the court to interpret those provisions in such a harmonious way so as to uphold the right of both the legislations to levy tax which fall within their respective sphere.

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37. The apex court in the case of *Bharat Sanchar Nigam Ltd.* v. *Union of India* [2006] 3 VST 95 (SC) ; [2006] 145 STC 91 (SC) ; [2006] 282 ITR 273 (SC) ; [2006] 6 RC 276 ; MANU/SC/1091/2006 ; [2006] 3 STT 245 dealing with deemed sale has stated as under (pages 115-117 and 129 in 145 STC) :

'43. All the clauses of article 366(29A) serve to bring transactions where one or more of the essential ingredients of a sale as defined in the Sale of Goods Act, 1930, are absent, within the ambit of purchases and sales for the purposes of levy of sales tax. To this extent only is the principle enunciated in *Gannon Dunkerley & Co. (Madras) Ltd.* [1958] 9 STC 353 (SC). The amendment especially allows specific composite contracts, viz, works contracts clause (b), hire purchase contracts clause (c), catering contracts clause (f) by legal

fiction to be divisible contracts where the sale element could be isolated and be subjected to sales tax.

44. *Gannon Dunkerley & Co. (Madras) Ltd.* [1958] 9 STC 353 (SC) survived the 46th Constitutional Amendment in two respects. First, with regard to the definition of "sale" for the purposes of the Constitution in general and for the purposes of entry 54 of List II in particular except to the extent that the clauses in article 366(29A) operate. By introducing separate categories of "deemed sales", the meaning of the word "goods" was not altered. Thus the definitions of the composite elements of a sale such as intention of the parties, goods delivery, etc., would, continue to be defined according to known legal connotations. This does not mean that the content of the concepts remain static. Courts must move with the times. But the 46th Amendment, does not give a licence for example to assume that a transaction is a sale and then to look around for what could be the goods. The word "goods" has not been altered by the 46th Amendment. That ingredient of a sale continues to have the same definition. The second respect in which *Gannon Dunkerley* [1958] 9 STC 353 (SC) has survived is with reference to the dominant nature test to be applied to a composite transaction not covered by article 366(29A). Transactions which are mutant sales are limited to the clauses of article 366(29A). All other transactions would have to qualify as sales within the meaning of the Sale of Goods Act, 1930 for the purpose of levy of sales tax.

45. Of all the different kinds of composite transactions the drafters of the 46th Amendment chose three specific situations, a works contract, a hire-purchase contract and a catering contract to bring within the fiction of a deemed sale. Of these three, the first and the third involve a kind of service and sale at the same time. Apart from these two cases where splitting of the service and supply has been constitutionally permitted in clauses (b) and (f) of clause (29A) of article 366, there is no other service which has been permitted to be so split. For example the clauses of article 366(29A) do not cover hospital services. Therefore, if during the treatment of a patient in a hospital, he or she is given a pill, can the sales tax authorities tax the transaction as a sale ? Doctors, lawyers and other professionals render service in the course of which can it be said that there is a sale of goods when a doctor writes out and hands over a prescription or a lawyer drafts a document, and delivers it to his/her client ? Strictly speaking with the payment of fees, consideration does pass from the

patient or client to the doctor or lawyer for the documents in both cases.

46. The reason why these services do not involve a sale for the purposes of entry 54 of List II is, as we see it, for reasons ultimately attributable to the principles enunciated in *Gannon Dunkerley & Co. (Madras) Ltd.*'s case [1958] 9 STC 353 (SC) ; MANU/ SC/0152/19, namely, if there is an instrument of contract which may be composite in form in any case other than the exceptions in article 366(29A), unless the transaction in truth represents two distinct and separate contracts and is discernible as such, the State would not have the power to separate the agreement to sell from the agreement to render service, and impose tax on the sale. The test therefore for composite contracts other than those mentioned in article 366(29A) continues to be—did the parties have in mind or intend separate rights arising out of the sale of goods. If there was no such intention there is no sale even if the contract could be disintegrated. The test for deciding whether a contract falls into one category or the other is as to what is "the substance of the contract". We will, for the want of a better phrase, call this the dominant nature test.

. . . . .

50. We agree. After the 46th Amendment, the sale elements of those contracts which are covered by the six sub-clauses of clause (29A) of article 366 are separable and may be subjected to sales tax by the States under entry 54 of List II and there is no question of the dominant nature test applying. . . . .

51. What are the "goods" in a sales transaction, therefore, remains primarily a matter of contract and intention. The seller and such purchaser would have to be ad idem as to the subject-matter of sale or purchase. The court would have to arrive at the conclusion as to what the parties had intended when they entered into a particular transaction of sale, as being the subject-matter of sale or purchase. In arriving at a conclusion the court would have to approach the matter from the point of view of a reasonable person of average intelligence. Lastly, they held that no one denies the legislative competence of the States to levy sales tax on sales provided that the necessary concomitants of a sale are present in the transaction and the sale is distinctly discernible in the transaction.

. . . . .

88. This does not however allow State to entrench upon the Union List and tax services by including the cost of such service in the value

of the goods. Even in those composite contracts which are by legal fiction deemed to be divisible under article 366(29A), the value of the goods involved, in the execution of the whole transaction cannot be assessed to sales tax. As was said in *Larsen & Toubro* v. *Union of India* [1993] 88 STC 204 (SC) ; [1993] 1 SCC 365 :

"The cost of establishment of the contractor which is relatable to supply of labour and services cannot be included in the value of the goods involved in the execution of a contract and the cost of establishment which is relatable to supply of material involved in the execution of the works contract only can be included in the value of the goods".'

. . . .

39. From the aforesaid clauses it is abundantly clear that the parties have entered into an agreement whereby the assessee renders service to the client for development of software, i.e., for software development and other services. Pursuant to the agreement and the work orders, the service shall be performed by the assessee. Services must be requested by issue of a valid work order together with a statement of work. As compensation for the service rendered to the customer, the fees specified in the relevant work order or in the statement of work is payable and billing is done on a time and material basis or on a fixed price on a monthly basis. Pricing for time and material projects shall be fixed at a rate set forth in annexure A to the agreement.

. . . . .

43. In the agreement or from any other material on record, there is nothing to indicate that the assessee purchases the software from the market, improves the same according to the specification of the client and then delivers the same to the client. On the contrary, the agreement clearly discloses that the assessee's technicians either work at their office or go to the place of the client, carry out the project work and find solutions and if at the end of the day, any software emerges, same is embedded on a CD. The software so developed, from the inception is the property of the customer. At no point of time the said software is the property of the assessee. Even before the software/ goods came into existence, it was the property of the customer. The terms of the contract as set out above, do not indicate sale of any software. On the contrary, those terms make it very clear that the agreement is a simple service contract, where under the assessee provided its staff and its employees who are well trained in the field and who

would develop the software according to the specification of the customer.

44. In fact, a careful reading of the agreement shows that, the employees of the assessee and the employees of the customer have to work hand in hand, consult at every stage, have interactions and understand the need and requirement of the customer and through their employees, the software is to be developed. The technicians of the assessee and the employees of the customer are working together at the project site. In most of the cases, the service rendered by the assessee is in the nature of making one of the inputs into a final product which is produced at the project place with the assistance of the staff of service providers. In fact, the material on record discloses that the customers have engaged the services of several service providers, who have expertise in different fields and all of them put their mind and hands together and find a solution to the problem of the customer. The end-product, i. e., the ultimate software, is not necessarily the work of any one such service provider. It is a collective effort. Nobody can claim that the end-product exclusively belongs to them except the customer who has paid for the service rendered by the various service providers.

. . . .

50. In the light of the aforesaid discussion, the finding recorded by the assessing authority that the contract in question involves a sale of software development by the assesses cannot be sustained. It is contrary to the material on record, the constitutional provisions and the law declared by the apex court. Accordingly it is hereby set aside."

Sri Tarun Gulati submits that the apex court in the case of assessee arising out of the judgment of the High Court had considered the case of the branded software and has referred as "canned software", and held it to be goods liable to tax but had not expressed any opinion in regard to unbranded software, but the Tribunal fell into trap and relying upon the said judgment upheld the order of the assessing authority as well as first appellate authority imposing tax liability on the so called unbranded software. He further emphasized that revisionist-assessee himself in its reply to the show-cause notice had stated that in view of the judgment of the Andhra Pradesh High Court the software so developed by the assessee as per its client specification cannot be termed as goods, amenable to tax. But, the assessing authority wrongly interpreted the said provision of law and held otherwise. He further emphasised that the Tribunal also fell in the trap and wrongly interpreted the judgment of both Andhra Pradesh High Court as

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well as the apex court in the matter of assessee itself where the issue was in regard to the branded software, which is sold off the shelf and falls within the definition of goods for which the assessee had already paid the tax.

21 He laid stress on the judgment of the Karnataka High Court in the case of *Sasken Communication Technologies Ltd.* [2012] 55 VST 89 (Karn) ; [2011] 33 STT 507 wherein the court had held that when the assessee's technicians worked at their office or go to the place of client, carry out the project work and finds solutions and, if at the end of the day, any software emerges, same is embedded on CD and the software so developed from the inception is the property of the customer. At no point of time the said software is property of the assessee. Further, it was held that before the software came into existence, it was the property of the customers as set out in the terms of the contract, which do not indicate sale of any software and it is clear that the agreement is a simple service contract.

22 Further, the first appellate authority committed error in not allowing the application of the revisionist for the additional grounds in the appeal, as the assessee can move such application and the same was supported by catena of judgments of this court, that as the first appellate court is a fact finding court, such grounds could have been added by the assessee and the first appellate authority committed gross error by not allowing the same. He further submitted that the assessee by the said application only wanted to add the ground that certain sales of hardware made to the Public Works Department, which were exempted from the trade tax under section 3-A of the Act, was shown by mistake under the head of computer consultancy service. He further contended that the observation of the first appellate authority in regard to the contradictory grounds in the grounds of appeal was not correct and instead of moving application for additional ground the assessee should have amended his appeal.

23 He also submitted that whatever information was required by the assessing officer in pursuance to the show-cause notice was given by the assessee-company as such the imposition of tax liability on the services so provided for the software development and rendering support service to its client was unjustified, treating it to be a sale.

24 Per contra, Sri Bipin Kumar Pandey, learned standing counsel vehemently argued and submitted that the revisionist-assessee failed to bring on record any material to prove that he was in the work of developing application software for his client and it was unbranded software and no agreement was filed before the assessing authority or till the stage of Tribunal to substantiate their claim. Sri Pandey submits that it is for the

first time before this court that the revisionist-assessee has come up with a case that the applicant had entered into an agreement for consultancy services with various Government, semi-Government bodies as well as banks. He invited attention of the court to the reply submitted by the assessee firm and submits that nowhere it has been stated or any document appended so as to substantiate the claim of development of software for its client. He also submits that the notice dated February 13, 2004 issued by the assessing authority categorically stated that the assessee was required to submit the sales made by it within and outside the Uttar Pradesh to its client.

25 Sri Pandey had invited attention of the court to paragraph 29 of the judgment of the apex court in the case of *Tata Consultancy Services* [2004] 137 STC 620 (SC) ; [2004] 3 RC 535 ; [2005] 1 SCC 308 wherein it was stated that even unbranded software when it is marketed/sold may be goods and as the apex court was not dealing with this aspect as such it did not express any opinion in regard to unbranded software because question like situs of contract of sale and/or whether the contract is a service contract may arise.

26 He emphasised that as the apex court had also not gone into this question of unbranded goods as there was no material before it and the same was based upon the agreement or contract between the assessee and its client. While in instant case, no agreement or contract was brought into the knowledge of either the assessing authority, first appellate authority as well as before the Tribunal by the assessee, as such no relief can be granted.

27 Sri B. K. Pandey in his usual fairness submits that the assessee though had brought the bank account and the bills, and relevant documents before the assessing authority, but the claim of the assessee could have been substantiated from the contract/agreement so entered between him and his client, and whether the goods claimed as unbranded software developed for client being a service and not amenable to tax. He submits that as for the first time assessee has brought on record the various agreements so entered during the relevant period and the matter should be relegated to the Tribunal as it being the last fact finding court to go into the question which has been left open by the apex court in the case of assessee itself and the same be decided on the basis of material so adduced before it.

28 Sri Tarun Gulati in rejoinder submits that in reply filed by the assessee to show-cause notice, had categorically stated that in case any further details are required the assessee was ready to provide the same. He submitted that through the said detailed reply the assessee had distinguished the query so raised in regard to the branded and unbranded software, i. e.,

the application software development and support services provided by the revisionist company which does not fall within the definition of goods. He further relied upon the 1996 judgment where the Andhra Pradesh High Court *(Tata Consultancy Services* [1997] 105 STC 421 (AP) ; [1996] SCC Online AP 1260) held that the software which is specialized and exclusively custom made to cater individual need of the client is not goods. He further contended that had the assessing authority any doubt in regard to treating such type of application software development as goods, it should have sought further clarification for which the assessee was always ready to provide. He further contended that neither the assessing authority nor the first appellate authority as well as the Tribunal asked the assessee to establish his case on this ground as the company had brought on record all the material so available, with the authorities concerned and had relied upon the judgments of various High courts and apex court to substantiate its claim and there was no doubt or ambiguity, which needed any further clarification.

29 Reliance was also placed upon judgment of *Raza Textile Ltd.* [1974] 33 STC 112 (All) ; [1973] SCC On Line All 479 wherein the court held that burden to prove the fact regarding the sale was upon the Department. He submitted that if the assessing authority did not accept the contention of the assessee it should have recorded a finding that the software development and support services rendered by the assessee came under the heading of branded goods. He further relied upon the judgment of this court in the case of *Virendra Kumar Trading Co.* v. *Commissioner of Commercial Tax* [2017] 100 VST 192 (All) wherein the court while dealing with reassessment proceedings held that onus to establish that the disclosure was incorrect was upon the Department and could not be shifted upon the assessee.

30 It is not in dispute that the assessee-company is engaged in the business of software. The revisionist provides consultancy services including computer consultancy services and prepare a load on customers' software and also sell computer software packages off the shelf.

31 The sole dispute is in relation to the unbranded software also known as uncanned software, which is being made liable to tax on the ground of it being goods and covered under the branded software.

32 The revisionist company, which has number of units throughout the country, and in one of its unit at Hyderabad the dispute arose in the year, 1996 in regard to the branded software (canned software), which was decided by the Andhra Pradesh High Court in the case of revisionist-company, i. e., *Tata Consultancy Services* [1997] 105 STC 421 (AP) ; [1996]

SCC On Line AP 1260 holding that the branded software was covered under the definition of goods and liable to be taxed. The court, however, in its judgment made distinction between the branded and the unbranded software. However, it decided the matter in regard to the branded software. The said judgment was challenged before the apex court which was upheld in 2005, as regards the branded software while the matter regarding unbranded software was left open by the apex court holding that in case of unbranded software other questions like situs of contract of sale and/or whether the contract is a service contract may arise.

33 The question before this court is in regard to the second part of the case where the claim is as to the unbranded software also known as tailor made to the customers particular requirement and the same being service and not covered under the definition of goods.

34 The reliance placed by counsel for the revisionist in the case of *Sasken Communication Technologies Ltd.* [2012] 55 VST 89 (Karn) ; [2011] 33 STT 507 as far as the unbranded software is concerned, the Karnataka High Court held, after considering the agreement and contract so placed that the agreement was a simple service contract and not covered under the definition of goods and not amenable to tax.

35 Argument of Sri Gulati as regards the unbranded software, which is a part of software development and support service for its client is covered under service and not under goods has force and the said fact is in consonance with the view taken by the Andhra Pradesh High Court (*Tata Consultancy Service* [1997] 105 STC 421 (AP) ; [1996] SCC On Line AP 1260) as well as the apex court in the case of *(Tata Consultancy Services* [2004] 137 STC 620 (SC) ; [2004] 3 RC 535 ; [2005] 1 SCC 308). Further, the judgment of *Sasken Communication* [2012] 55 VST 89 (Karn) ; [2011] 33 STT 507 also in categorical term held such type of software development for the client pursuant to the agreement/contract as a service and not branded goods sold off the shelf, so developed by the assessee.

36 In the present case, it is not disputed that no agreement or contract was ever filed or brought to the notice of the assessing authority or the appellate authority by the assessee, despite the show-cause notice given by the assessing authority. Argument of Sri Gulati to the extent that had the assessing authority called for further information or document, the assessee was ready to furnish the same does not have much force, as the entire case of the revisionist-assessee rest upon the fact that software so developed, is on the instructions and specification of client and after the software is developed it becomes the property of the client as per the contract or agreement so arrived between them, hence the agreement/contract is

the basis of claim of the assessee, relying upon which his case falls apart from the definition of goods and immediately come within the purview of service.

37 As it is clear that service tax and U. P. Trade Tax Act operate in different areas and unless the works contract involves an elements of sale of goods, the State Legislature has no power to levy tax under the said Act. Similarly the Parliament also has no power to levy service tax on the sale of goods, if by including in the Finance Act, development of information technology software, study, analysis, design and programming and various other aspects touching soft wares, if it involves sale of goods. In both the enactments they specify the type of activity, which are liable for tax. Thus, where any assessee is carrying on both the work of sale of software and development of software, then the assessing authority has to distinguish and identify between the two in such a harmonious way so as to uphold the right of both the Legislation to levy tax, which falls within their respective area for arriving at such conclusion the assessee is also duty bound, apart from submitting his return to produce such documents as may be necessary and demanded by the authority concerned to segregate between the two, so as to make it abundantly clear as to which law, i.e., the State Law or the Central Act will be applicable.

38 In the present case, the moment assessee produces/submits works contract/agreement before the assessing authority so as to bring his case within the purview of software development, the case comes out of the purview of the State taxing authority and the same becomes amenable to service tax under the law enacted by the Parliament.

39 Argument raised by Sri Pandey, learned standing counsel has force to the extent that the assessee-revisionist should have brought on record the agreement so claimed before the assessing authority so as to substantiate its claim and the assessee failed to do so, and for the first time the same are being filed before this court in the revisional proceedings. The question is whether the court can rely upon the agreement so placed under the revisional jurisdiction while the Tribunal is the last fact finding court, and could have perused and gone into the question of validity of the agreement so brought on record along with the present revision.

40 In my opinion, there is no doubt as to the fact that the company is dealing in two types of products, namely, the branded software which are sold off the shelf, which is not under dispute and the other unbranded software, which is developed according to the specification of the client. These soft wares so developed are undoubtedly are for the clients and the same becomes the property of the client, the moment it is developed and the

assessee-company has no right over the same, nor it can sell the same to the other clients as a branded item. But, in the present case during the assessment proceedings when the assessee-company was required by the assessing authority to substantiate the sale under the head "unbranded software", it was the duty of the company which was relying upon the judgment of the Andhra Pradesh High Court and was claiming difference between the unbranded software and the branded software, should have placed the basic material, i. e., the agreement or the contract so entered by it with its client to bring the said software out of the purview of the goods. The assessee failed to bring, not only before the assessing authority, first appellate authority as well as the Tribunal the agreement, which it is relying upon before this court.

In the case of *Sasken Communication Technologies* [2012] 55 VST 89 (Karn) ; [2011] 33 STT 507, the agreement was placed before the assessing authority, as such it was after the consideration of the agreement that the High Court came to the conclusion that it was the service provided and was not covered under the definition of "goods" as it being unbranded software. The decision so relied upon is distinguishable in the present case as agreement so executed between the assessee and its clients are being placed for the first time before this court in exercise of revisional jurisdiction. **41**

As far as challenge to the additional grounds not considered by the first appellate court as well as by the Tribunal in regard to the sale of computer hardware to P. W. D. which is exempted under section 3A of the Act, the Tribunal had not recorded any finding and has only upheld the order passed by the first appellate authority. It is well settled law that additional grounds can be raised in the appeal and the Tribunal being the last fact finding court should have taken note of this fact and recorded a specific finding. **42**

In view of the above, the order passed by the Tribunal dated June 19, 2006 is set aside and the matter is remitted back to the Tribunal to record specific finding after going through the agreements/contract as to the claim of the assessee in regard to the application of software development and support service given to its client as unbranded software not covered under the definition of goods and is a service to the customers. **43**

The assessee shall place all the agreements/contract so executed by it with its client during the relevant assessment year before the Tribunal, who shall consider the same in the light of the judgment of the apex court as well as various High Courts and pass a reasoned and speaking order **44**

preferably within a period of three months from the date of production of a certified copy of this order.

45 The revision is partly allowed.

[2020] 75 GSTR 520 (WBTT)

[BEFORE THE WEST BENGAL TAXATION TRIBUNAL]

RAJ KUMAR GUPTA

v.

DEPUTY COMMISSIONER OF COMMERCIAL TAXES, CENTRAL SECTION, BUREAU OF INVESTIGATION, UNIT III AND OTHERS

MALAY MARUT BANERJEE *(Judicial Member)* and **CHANCHALMAL BACHHAWAT *(Technical Member)***

June 17, 2019.

HF ▶ Department

VALUE ADDED TAX—PURCHASE TAX—DEALER IN COUNTRY LIQUOR—LIQUOR SOLD IN BOTTLES—NO MONEY COLLECTED SEPARATELY AS CAUTION MONEY OR SECURITY DEPOSIT FOR BOTTLES NOR ACCOUNTS MAINTAINED SEPARATELY FOR BOTTLES—SALES TAX PAID ON COMPOSITE SALE OF COUNTRY LIQUOR IN BOTTLES—COMPOSITE SALE PRICE INCLUDED IN INVOICE VALUE—BUYER UNDER NO OBLIGATION TO RETURN EMPTY BOTTLES—RETURN OF EMPTY BOTTLES NOT A CASE OF SALES RETURN BUT PURCHASE OF GOODS LIABLE TO TAX—WEST BENGAL VALUE ADDED TAX ACT (37 of 2003), ss. 2(34), 12(1)(a), 16(2), 17(1)(b).

The provisions of section 16(2A) of the West Bengal Value Added Tax Act, 2003 apply when there is a composite sale of goods under the Act. Similarly, the provisions of section 16(2B) apply only when goods exempted under the Act are sold along with packing material, i. e., where there is a composite sale of the goods exempted under the Act. The provisions of section 16(2A) and (2B) override those of section 16(2) of the Act : the rate of tax will be determined with reference to provisions of section 16(2) of the Act only when the provisions of section 16(2A) and (2B) are not applicable. Where the rate was to be ascertained only for packing materials, the provisions of section 16(2A) and (2B) do not apply. Hence, the turnover of purchases from unregistered dealers in the case of packing material shall attract the rate as applicable under section 16(2) of the Act. However, if taxable goods are purchased along with the containers or packing materials, the rate applicable under

section 12(1)(a) would be applicable in terms of the provisions of section 16(2A) and no tax shall be charged if these are exempted goods under section 16(2B) of the Act.

Country liquor is not exempt under the Act. The tax rate on purchase of packing materials alone, as applicable under section 12(1)(a), shall be governed by provisions of section 16(2) of the Act with reference to section 17 of the Act.

The petitioner-dealer sold country liquor in glass bottles. Notice for suo motu revision was issued to the dealer, to which the dealer had filed a detailed objection claiming that he collected a "caution money" from his distributors and retailers, that if the bottles were not returned, the caution money was forfeited and if they were returned the money so charged was refunded. He contended that the empty bottles were not purchased from unregistered dealers but were obtained by way of sales returns from the corresponding dealers. The Deputy Commissioner did not accept the submissions and passed an order treating the transactions as purchases from unregistered dealers and raising a demand. On an application to the Taxation Tribunal :

Held, *that there was no evidence that any money was collected separately as caution money or security deposit. There was no averment to the effect that accounts were maintained separately for bottles or that money was collected separately. In fact, sales tax had been paid on the entire sales proceeds which included the product and the packaging material. Hence, the money returned for the empty bottles could not be treated as return of caution money. This was a case of composite sales of goods, i. e., product sold in a packaged condition. The country liquor was sold for a composite price, i. e., inclusive of the bottles in which it was packed, and there was no separate treatment for the bottles in any manner whatsoever, by the dealer in his returns. Since the composite sale price was included in the invoice value as well as the maximum retail price, sales tax was also paid at the rate applicable for the main product, i. e., country spirit. There was no agreement to the effect that the buyer of the goods was under an obligation to return the empty bottles. Sales return would normally denote return of the entire goods sold with reference to the terms of sale, i. e., invoice in this case or a separate agreement in this regard. If the country spirit bottles, i. e., bottles filled up with country liquor, were returned for whatever reason, it would certainly amount to sales return and would be accounted for accordingly under the West Bengal Sales Tax Act, 1994. However, this was not the position in this case. The dealer had accepted composite sales as sales in its invoice value and had not accounted for payments made for return of empty bottles as sales returns, i. e., reduced it from*

the turnover of sales in the concerned period. Once the goods were sold as composite sales and accounted for accordingly, without any specific agreement and accounting according to the agreement, return of empty bottles (or, for that matter any other packaging material) would not amount to return of goods and reduce the sale consideration, on which sales tax had already been paid. Any such return of goods would certainly amount to purchase of goods and would be liable to be dealt with under the law applicable. The purchase of bottles was liable to levy of value added tax under the Act. In fact, the dealer had been regularly paying value added tax at the time of purchase of empty bottles from regular dealers, i. e., purchase of new bottles. The issue of credit notes having cross reference to the original invoice and predetermined value would not change the nature of the transaction amounting to sale, particularly because only empty bottles were being returned for a price and there was no compulsion on the part of the purchaser nor was there any agreement to that effect. The transaction of sale having been completed as a composite sale, return of empty bottles after consumption of the main product could not be treated as sales return, when the amount was not realised separately as "deposits or caution money" and also not accounted for accordingly. The return of empty bottles, in the peculiar facts and circumstances of the case, amounted to purchase of goods under section 2(34) of the Act since there was transfer of property in goods, i. e., empty bottles, to the person making the purchase and payment was made for the empty bottles and would be subject to tax under the Act as per the relevant provisions of law. The orders passed in the suo motu revision proceedings could not be set aside nor could the report of Bureau of Investigation be set aside.

Cases referred to :

Kalyani Breweries Limited *v.* State of West Bengal [1990] 78 STC 441 (WBTT) (paras 14, 14.1, 16, 17, 18.3, 20.3)

Kalyani Breweries Ltd. *v.* State of West Bengal [1997] 107 STC 190 (SC) (paras 16, 20.2)

Raj Sheel *v.* State of Andhra Pradesh [1989] 74 STC 379 (SC) (para 20.2)

Richardson Hindustan Limited *v.* State of Maharashtra [1995] 99 STC 1 (Bom) (paras 18.1, 20.1, 20.1.1)

United Breweries Ltd. *v.* State of Andhra Pradesh [1997] 105 STC 177 (SC) (para 20.2)

Case Nos. RN - 590 and 591 of 2018.

B. Bhattacharyya and *A. Bagchi*, Advocate, for the applicant.

A. Chakraborty, State Representative, for the respondents.

JUDGMENT

CHANCHALMAL BACHHAWAT ***(Technical Member)***.—In course of hearing on August 20, 2018 learned State Representative admitted that form 70 issued to the petitioner for taking up suo motu review proceedings cannot be defended. Hence, notice dated April 2, 2018 was set aside and leave was granted for considering proposal for re-opening of the matter by Senior Joint Commissioner in accordance with law and disposal of the same by December 31, 2018. 1

Meanwhile, orders in the suo motu revisional proceedings were passed on December 21, 2018 for the financial year ended March 31, 2013 raising a demand of Rs. 29,67,236.25 against the petitioner and the respondents undertook not to take any action towards recovery of the outstanding demand emerging from the said order. The petitioner had also filed supplementary affidavit contesting the order dated December 21, 2018 passed by the respondents in suo motu revisional proceeding. The petitioner had, accordingly, prayed for setting aside the order dated December 21, 2018.

The main issue relates to demand raised against the petitioner on account of levy of purchase tax against return of empty bottles from unregistered dealers under section 12(1) of the WB VAT Act, 2003. 2

Pursuant to the application filed by the petitioner as well as supplementary affidavit filed by the petitioner, the petitioner has prayed for setting aside the adverse report dated March 24, 2018 drawn up Bureau of Investigation, notice in form 70 dated April 2, 2018 for suo motu review proceeding and orders passed in suo motu revisional proceedings on December 21, 2018. Notice dated April 2, 2018 issued in form 70 was already set aside in course of hearing and, hence, the said prayer stands disposed of. 3

The learned advocate for the petitioner made submissions with reference to application, supplementary affidavit and written submissions made in course of hearing. 4

4.1. The learned advocate for the petitioner had referred to submissions in the application that "as per the existing trade practice your petitioner states that the bottles containing country liquor is sold in glass bottles and as such the petitioner does not charge anything for the bottles, but collects a 'caution money' from his distributors/retailers as per the relevant provisions of rule 35(6)(g) of the W. B. Excise (Country Spirit) Rules, 2010 vide Notification No. 92-Ex., dated the 28th of January, 2011, Kolkata by the Excise Department, it is to be noted that if the bottle are not returned, the amount charged for the bottles as per the above mentioned

rule and notification under the W. B. Excise (Country Spirit) Rules 2010, are to be forfeited and the same is to be treated as a sale, while if the same is returned the money so charged will stand refunded, thereby confirming the transaction to be anything but that of a 'sale'."

5 The learned advocate for the petitioner also submitted that the petitioner in general had no liability under the W. B. Value Added Tax Act, 2003. However, the petitioner had made sale of certain old assets during the financial year 2012-13 and therefore the petitioner was assessed with liability of Rs. 59 during the said financial year. Copy of the assessment order dated April 27, 2015 was also enclosed with the petition (annexure B).

6 The learned advocate for the petitioner also submitted that an enquiry had been done by the Bureau of investigation, Unit III, at the manufacturing place of the petitioner and the concerned officers had raised a question of law as to the nature of the transaction with reference to return of empty bottle used for selling the country liquor, which the petitioner does not sell but simply doles out as a container of the country liquor upon caution money as also stated in para 2(ii) of the petition. Learned advocate also submitted that the officers of the Bureau of Investigation had drawn up a report dated March 24, 2018 and had held that the dealer was liable to pay tax under section 2(1)(a) of the WB VAT Act, 2003 on his taxable turnover of purchases under section 17(2) of the VAT Act, 2003 at the applicable rate, i. e., four per cent. or five per cent. of the value of goods, depending upon the concerned period of purchases during various financial years. Copy of the said report was placed at annexure A of the petition. Learned advocate for the petitioner submitted that the said liability of purchase tax under the VAT Act does not arise because the said transaction is neither a sale nor a purchase of the bottles and payment towards the empty bottles returned from the customers is only release of the caution money. It was emphatically submitted that the said transaction cannot be treated as "sales simpliciter".

7 It was also submitted that provisions of section 12 of the VAT Act, 2003 get attracted only when the unregistered purchase of goods are not meant for purpose specified in clauses (a) to (i) of section 22(4) of the VAT Act and the petitioner is not covered by the said provisions. Learned advocate also submitted that provisions of section 22 are to be read with in conjunction with section 17 of the VAT Act. It was also submitted that as per provisions of section 17 the dealer will pay tax at the rate specified under section 16(2) of the VAT Act. It was also submitted that provisions of section l6(2A) of the Act override provisions of section 16(2) of the Act, which provides that the tax rate for goods sold together with container or packing

materials will be the same as the goods contained in container/packing materials.

8 It was also submitted that "the liability to pay purchase tax under the WB VAT Act, 2003 arises only upon the occurrence of the two contingencies, namely, (i) the person is a registered dealer under the WB Value Added Tax Act, 2003 ; and (ii) such person is also liable to pay tax under the same Act ; but in the instant case, your petitioner is although a registered dealer under the WB Value Added Tax Act, 2003 but he is not liable to pay tax under the WB Value Added Tax Act, 2003, hence, the logic for demanding purchase tax against your petitioner falls flat".

9 It was also submitted that country spirit is not a goods under the WB VAT Act, 2003. Hence, it was submitted that country spirit is not chargeable to tax under the WB VAT Act, 2003, thereby necessarily meaning that the containers and/or packing materials, that is to say, the glass bottles, will also not be taxable under the WB VAT Act, 2003, as embodied under section 16(2A) of the WB VAT Act, 2003, and, that the packing materials will be taxed at the same rate as that of the parent material, as also stated in the petition.

10 The learned advocate also submitted that paper containers in which cigarette is packed is also not charged separately under the WB Value Added Tax Act, 2003 as also stated in para 4(x) of the petition.

11 The learned advocate for the petitioner also submitted that notice for suo motu revision under section 85 of the VAT Act, 2003 were issued to the petitioner, and the petitioner had filed a detailed objection to the said notice along with copy of all sale invoice and corresponding credit notes (named as bottle refund receipt) and copy of the party ledgers in support of the claim that the empty bottles were not purchases from unregistered dealers but were obtained by way of sales returns from the corresponding dealers.

12 It was submitted that the respondents did not accept the said submissions and had passed an order on December 21, 2018 treating the said transactions as purchases from unregistered dealers and raising a demand of Rs. 29,67,236.25 vide order dated December 21, 2018, as stated in para 3 of supplementary affidavit, as placed at annexure R of the supplementary affidavit and it was submitted in the supplementary affidavit that the said transactions were composite sale of goods and return of empty bottles constituted sales return. It was also submitted that there was no scope to treat such sales returns as "purchase simpliciter" as also stated in para 5 of supplementary affidavit.

13 The learned advocate for the petitioner also drew attention to para 5(vii) of the supplementary affidavit and explained difference between sales simpliciter and sales return in support of his contention that the said transactions were sales returns.

14 The learned advocate for the petitioner also submitted that para 15 of the judgment rendered by the WB Taxation Tribunal in the matter of *Kalyani Breweries Limited* v. *State of West Bengal* [1990] 78 STC 441 (WBTT), had been misquoted by including parts of other paras in the judgment and reflecting the judgment in a different manner altogether as also submitted in the written note by learned advocate for the petitioner. Learned State Representative submitted that this was an error on the part of the concerned officials of Bureau of Investigation who prepared the report and expressed his regrets.

14.1. We have gone through entire judgment and analysed the same in its perspective in this judgment. In our opinion, officials of bureau of investigation should have been careful in referring to the relevant parts of judgement of this Tribunal in the matter of *Kalyani Breweries* [1990] 78 STC 441 (WBTT).

15 We have gone through assessment order dated April 27, 2015 for financial year 2012-13 as placed at page 19 (annexure B) of the petition. The assessment order has been passed after hearing the petitioner under section 46(1) of the VAT Act. The petitioner had produced the books of account and necessary records which were duly examined by the respondents. The petitioner was assessed for tax liability on the best judgment basis for various expenses as reflected in final accounts and also for tax on sale of plastic crates. Purchase tax under section 12 was also levied upon the petitioner and the petitioner was made liable to pay a sum of Rs. 59, after giving credit for tax paid/tax deducted at source during the concerned financial year. It also appears that the petitioner did not dispute the said liability and the assessment order had attained finality.

15.1. It may be noted that from the applications and submissions made by the petitioner, it is not clear as to how the assessments for previous financial years were completed or whether the petitioner was assessed for the first time.

16 We have also gone through the reply of the petitioner dated 20th December, 2018 against the notice (annexure Q) issued on 15th November, 2018 for undertaking suo motu revisional proceedings. It is submitted by the petitioner that price of empty glass bottles used for manufacturing of country spirit is mandatorily to be declared on the label of the country spirit bottle under the relevant provisions of the Bengal Excise Act, 1909 read

with relevant rules. It is also stated that the said sum is required to be refunded when empty bottles are returned in good condition. It is also stated that the maximum retail price (MRP) includes the price of bottles and is one of the components of MRP. The petitioner also relied upon judgments in the case of *Kalyani Breweries Limited* v. *State of West Bengal* [1990] 78 STC 441 (WBTT), as delivered by this Tribunal and honourable Supreme Court of India, *Kalyani Breweries Ltd.* v. *State of West Bengal* [1997] 107 STC 190 (SC), in support of his contention that return of bottle did not constitute purchase of bottles from the retail vendors but constituted sales return and/or rebate or discount.

We have also gone through the orders passed in suo motu revisional proceeding. After narrating various facts of the case, revisional authority has passed a reasoned order. Reliance was also placed on the judgment of *Kalyani Breweries Limited* v. *State of West Bengal* rendered by this Tribunal [1990] 78 STC 441 (WBTT) as well as the provisions of the WB VAT Act, 2003 including definition of purchase. **17**

17.1. It is also recorded that it was evident that the dealer being registered under section 24 of the WB VAT Act, 2003 had to purchase goods from another registered dealer by payment of tax on the sale price and under prescribed tax invoice, i. e., in case of anything not done otherwise the dealer had to pay tax on his purchase.

The learned State Representative also submitted a written note in support of his contention in course of hearing. The last comprehensive note was submitted on March 15, 2019. **18**

18.1. The learned State Representative also relied upon the judgment of *Richardson Hindustan Limited* v. *State of Maharashtra* [1995] 99 STC 1 (Bom) in support of his contention that return of the empty bottles amounted to repurchase of the same.

18.2. The learned State Representative also submitted that whether there is an agreement or not for the returns of goods is no longer material for deciding the question whether such return of empty bottles would constitute purchase or re-purchase or not. Learned State Representative also submitted that provisions of section 16(2B) are not attracted in the case of the petitioner since country liquor is not defined as goods *under WB VAT Act, 2003*.

18.3. The learned State Representative for the petitioner also submitted deduction under the VAT Act was available for return of goods only within six months from the date of sales, while referring to the words used in the judgment of *Kalyani Breweries* [1990] 78 STC 441 (WBTT) by this Tribunal in para 15 of the judgment. Learned State Representative also referred to

the judgment of the honourable Supreme Court of India in the case of *Kalyani Breweries* [1997] 107 STC 190 (SC) wherein the honourable Supreme Court of India had stated, ". . . it seems to us upon these facts and circumstances that there was really a sale of the bottles to the customer, the assessee buying back the empties from some customers . . ." (part of para 9, page 195 in 107 STC of the judgment).

18.4 Accordingly, learned State Representative defended the orders passed in the suo motu revisional proceedings by concerned respondent officer.

19 We have referred to the provisions of section l2(1)(a) regarding contingent liability to pay tax on purchase. It is stated in the said part of the section that the liability arises for purchase of goods which are not meant for purposes specified in clause (a) to clause (i) of section 22(4) of the VAT Act. We have also referred to the provisions of section 17(1)(b) where it is stated that rate of tax on such turnover of purchase shall be at the rate as applicable to sale of such goods under section 16(2) of the VAT Act.

We have also referred to the provisions of section 16(2) which specifies rate of tax applicable for various goods. We have also referred to section 16(2A) which provides that rate of tax applicable for taxable goods sold together with containers or packing materials shall be that as applicable to the goods contained or packed and the sale price of the containers or packing materials, whether shown separately or not shall be included in the sale price of the goods. We have also referred to section 16(2B), which states that sale of any goods which are exempted from tax, when sold in packed conditions with containers or any packing material such containers or packing materials shall also be exempted from tax.

19.1 In our considered opinion the provisions of section 16(2A) apply when there is a composite sale of goods under the VAT Act. Similarly, provisions of section 16(2B) apply only when goods exempted under the VAT Act are sold along with packing material, i. e., composite sale of the goods exempted under the VAT Act. We are of the considered view that provisions of section 16(2A) and section 16(2B) override that of section 16(2) of the Act and the rate of tax will be determined with reference to provisions of section 16(2) of the Act only when provisions of section 16(2A) and section 16(2B) are not applicable. In this case, where rate is to be ascertained only for packing materials, i.e., empty bottles, provisions of section 16(2A) and section 16(2B) do not apply. Hence, for levy of purchase tax in case of computation of purchase tax on such turnover of purchases from unregistered dealers in the case of packing material shall attract the rate as applicable under section 16(2) of the VAT Act. However, if taxable goods are

purchased along with containers or packing materials, the rate applicable under section 12(1)(a) will be applicable as per provisions of section 16(2A) and no tax shall be charged if these are exempted goods under section 16(2B) of the VAT Act. It may be noted that country liquor is not a goods under the WB VAT Act ,2003, i. e., it is not an exempt goods under the WB VAT Act, 2003.

19.2. In view of what we have explained hereinabove the tax rate on purchase of packing materials only, as applicable under section 12(1)(a) shall be governed by provisions of section 16(2) of the VAT Act with reference to section 17 of the VAT Act.

It would now be relevant to refer to the relevant paragraphs of the judgment as cited by both the parties. **20**

20.1 The relevant paragraphs of *Richardson Hindustan Limited* v. *State of Maharashtra*, Bombay High Court, dated 1st February, 1995 [1995] 99 STC 1 (Bom), read as below (pages 1-7 in 99 STC) :

> " '1. Whether, on the facts and circumstances of the case and on a proper interpretation of section 2(36) of the Bombay Sales Tax Act, 1959, read with rule 4 of the Bombay Sales Tax Rules, 1959, the Tribunal was right in concluding that as in pursuance of clause 4 of Part C of the distributorship agreement executed by the applicants with Muller & Phillips (India) Pvt. Ltd. in which parties have consciously provided for repurchase of the goods and not return of goods, it was a case of a resale by the buyer to the seller, the sale price being the very same amount which the buyer had paid to the seller and, therefore, the claim of return of goods made by the applicants before the Sales Tax Officer was not sustainable ?
>
> 2. Whether, on the facts and circumstances of the case and on a proper interpretation of *section 8A(1)(b)* of the Central Sales Tax Act, 1956, the Tribunal was right in concluding that as in pursuance of clause 4 of Part C of the distributorship agreement executed by the applicants with Muller & Phillips (India) Pvt. Ltd. in which parties have consciously provided for repurchase of the goods and not return of goods, the applicants have repurchased the goods, it was a case of resale by the buyer to the seller the sale price being the very same amount which the buyer had paid to the seller and, therefore, the claim of return of goods made by the applicants before the Sales Tax Officer was not sustainable ?'
>
> . . . .
>
> 3. . . . The Assistant Commissioner, however held that by taking back the goods sold by it the assessee had violated the terms of the

declaration on the strength of which it had purchased the goods without payment of tax for use in manufacture of the goods in question for sale and hence it was liable to purchase tax under *section 14* of the Act. Against the above order of the Assistant Commissioner, both the assessee and the Revenue went in appeal to the Maharashtra Sales Tax Tribunal ('the Tribunal'). The assessee was aggrieved by the order of the Assistant Commissioner in so far as it had held that the assessee was liable to purchase tax under *section 14* of the Act. The Revenue was aggrieved by the above order in so far as the entitlement of the assessee for deduction of the value of the goods returned by the distributors from its turnover is concerned. The Tribunal rejected the appeals of both the assessee as well as the Revenue and held that the assessee was not entitled to deduction of the value of the goods returned by the distributors because it was not a return but repurchase of the goods after the same have been sold by the assessee to the distributors and in that view of the matter set aside the order of the Assistant Commissioner and restored that of the Sales Tax Officer. The Tribunal also held that in view of the above conclusion, the question of application of *section 14* did not arise. . . .

4. We shall first deal with the claim of the assessee under the Bombay Act. The relevant provisions of the said Act is clause (36) of section 2 which defines 'turnover of sales'. It reads :

'(36) "*turnover of sales*" means the aggregate of the amounts of sale price received and receivable by a dealer in respect of any sale of goods made during a given period after deduction the amount of sale price, if any, refunded by the dealer to a purchaser, in respect of any goods purchased and returned by the purchaser within the prescribed period.'

The period referred to in the above clause has been prescribed by rule 4 of the Rules which reads as follows :

'4. *Goods returned to a dealer*.—The period for return of goods for the purposes of clauses (35) and (36) of section 2 shall be twelve months from the date of their purchase :

Provided that, if in any particular case the Commissioner is satisfied that the purchaser could not return the goods within the said period on account of circumstances beyond his control, the Commissioner may, in such case, extend the said period by a further period not exceeding three months.'

5. On a conjoint reading of clause (36) of *section 2* and rule 4, it is clear that while computing the turnover of sales for the purpose of

assessment under the Bombay Act, the assessee is entitled to claim deduction of the amount of sale price of the goods refunded by the dealer to the purchaser in respect of any goods purchased and returned by the purchaser within a period of 12 months from the date of their purchase. The benefit of deduction under this provision, however, may be given to the dealers even for amounts refunded in respect of goods purchased and returned beyond the period of twelve months but not exceeding three months thereafter, on the satisfaction of the Commissioner that the purchaser could not return the goods within the said period on account of circumstances beyond his control. . . . The nomenclature given by the parties to such transaction of return of goods, viz., 'return of goods' or 'repurchase of goods', would be of no relevance because return of goods falling under *section 2(36)* of the Act envisages purchase of the goods earlier sold by the assessee-dealer to the purchaser. On return of goods, the purchaser would naturally be entitled to the refund of the price of the goods, if already paid, or to credit for the same, if it had been debited for the price thereof at the time of sale. The return of goods envisaged by clause (36) of *section 2* of the Act, therefore, in all cases will be preceded by a sale of goods and in effect, would be repurchase of the goods by the dealer. The Tribunal was therefore not justified in rejecting the claim of the assessee on the ground that the return of the goods amounted to repurchase of the goods by the assessee-dealer. In that view of the matter, we are of the clear opinion that the assessee is entitled to deduction of the sale price of the goods refunded by him to the purchaser in respect of goods purchased and returned by such purchaser.

. . . . . .

8. Our attention was also drawn to the order of the Assistant Commissioner as well as the Tribunal dealing with the applicability of *section 14* of the Act to the present case. No question was referred in regard to this aspect, because in view of the decision of the Tribunal against the assessee on the question of allowability of deduction, it became academic. However, to avoid further litigation on that the count, we perused the provisions of *section 14* of the Act with a view to ascertaining whether it can be applied to cases of return of goods by the purchaser. *Section 14* deals with liability of a dealer to purchaser tax for contravention of the terms of declaration. In the instant case, the goods had been purchased by the assessee on furnishing of declaration to the effect that they would be used by him for use in manufacture for sale. There is no controversy about the fact that the

goods purchased by the assessee were used in manufacture. It is also evident that the goods were sold. . . . ."

20.1.1 In our considered view, the principles emerging out of this judgment do not apply to this case. Submission of learned State Representative that the goods returned were treated as repurchase in this case does not hold relevance in this case, since the goods which were treated as repurchase were allowed to be deducted from turnover of sales as per judgment of the honourable Bombay High Court in the matter of *Richardson* [1995] 99 STC 1 (Bom) and also it was recorded in the said judgment that nomenclature (i.e., used in the agreement, as understood by us) was immaterial. We would also submit that reference was made to the terms of agreement and also the goods were returned in entirety in this case and not merely empty bottles or other packaging material. It may also be noted that deduction was allowed from turnover of sale, subject to satisfying the required conditions laid down under the Bombay Sales Tax Act, i. e., return of the goods within 12 months from date of purchase, etc.

It may also be noted that orders of assessing officer regarding levy of purchase tax under section 14 of the Act were also set aside. However, we do not consider the said part of judgment also relevant since the provisions of section 14 of the Bombay Sales Tax Act were applicable subject to certain conditions which did not exist in the case, as is clear from reading of the judgment.

20.1.2 It may also be relevant to note that deduction from turnover of sale only upon satisfying the conditions as laid under the relevant provisions of law. Thus, goods which were returned but were not allowed to deducted from turnover of sales, were again subjected to tax under the relevant provisions of law at the time of sale.

20.2 The relevant parts of *Kalyani Breweries Ltd.* v. *State of West Bengal* the Supreme Court of India, dated September 15, 1977 [1997] 107 STC 190 (SC) read as below (pages 191-195 in 107 STC) :

"The assessment year with which we are concerned is the assessment year 1974-75. The assessee, the appellant, brewed and sold beer in beer bottles. For the beer it gave to its purchasers one invoice and another for 'the deposit on bottles'. On record are two such corresponding invoices. On the invoice which relates to 'deposit on bottles' there is another item, of 'truck charge'. It was the case of the assessee that the rate per bottle of the deposit was adjusted so as to cover the cost of the bottles that were purchased by it. . . . . The amounts received as such deposit were credit to an account entitled 'deposit on bottles' in the assessors ledger. When the empty bottles were

returned by customers, refunds were made at the same rate. There was no time-limit for the return and bottles taken from the assessee in one year might be returned was adopted : Deposited for three months were kept in the aforementioned account as a liability and the balance in that account as a liability and the balance in that account was transferred to an account called the 'bottle deposit forfeited account'. The amount of bottle deposit receipts, returns and forfeiture were shown by the assessee thus :

'1.4.1974	By Balance	Rs.	6,84,152
	Add : Deposit	Rs.	30,57,143
		Rs.	37,41,295
	Less : Refund	Rs.	11,62,974
		Rs.	25,78,321
	Less : Amount forfeited	Rs.	16,55,355
	Balance on 31.3.1975	Rs.	9,22,966'

The Commercial Tax Officers treated the amount of Rs. 16,55,355, being the forfeited deposit amount aforestated, as a part of the assessee's sales realisations and taxed it. The Assistant Commissioner confirmed the order, as did the West Bengal Commercial Taxes Tribunal. The matter was carried to the West Bengal Taxation Tribunal, whose order is under appeal. Both Tribunals placed emphasis upon the fact that it had been admitted by the assessee that there was no time-limit for the return of the empty bottles. They found that the transaction in respect of the beer bottles was not one of a bailment as contended by the assessee but one of sale.

. . . . Great emphasis was laid by learned counsel on the judgment of this court in *United Breweries Ltd.* v. *State of Andhra Pradesh* reported in [1997] 105 STC 177 (SC) ; [1997] 3 SCC 530 and *Raj Sheel* v. *State of Andhra Pradesh* [1989] 74 STC 379 (SC) ; [1989] 3 SCC 262. In learned counsel's submission, what had to be seen was whether the transaction in respect of the beer bottles was a sale. The intention of the assessee transaction was not to sell the beer bottles. The fact that the relevant invoice spoke of a deposit and the fact that so substantial a sum as Rs. 11 lakhs had been refunded from out of the bottles deposit account to customers who returned the empties showed that there was only a bailment of the beer bottles to the customers.

The *United Breweries Ltd.* [1997] 105 STC 177 (SC) ; [1997] 3 SCC 530, decided by a Bench of three learned judges, involved a brewer

making and selling, beer in bottles. In respect of the beer bottles the brewer had issued, circulars to its buyers. . . . .

. . . . .

. . . . Upon this basis this court came to the conclusion that the intention of the brewer did not appear to have been to sell the beer bottles ; on the contrary, the brewer was trying to ensure that the bottles in which the beer was supplied to customers through its customers were brought back to it so that they could be used again. It was in this context that it was said, 'It does not appear that any time-limit was fixed for return of bottles in this case. But, even if such limit was fixed, it is well-settled that time is not of the essence of the contract unless the parties specifically make it so'.

In *Raj Sheel* v. *State of Andhra Pradesh* [1989] 74 STC 379 (SC) ; [1989] 3 SCC 262, this court was again concerned with brewers who sold beer in bottles and the question was whether the bottles were exigible to sales tax. Learned counsel for the assessee relied upon the following observations therein :

'7. It is commonly accepted that a transaction of sale may consist of a sale of the product and a separate, sale of the container housing the product with respective sale considerations for the product and the container separately ; or it may consists of a sale of the product and a sale of the container but both sales being conceived of as integrated components of a single sale transaction/or, what may yet be a third case, it may consist of a sale of the product with the transfer of the container without any sale consideration therefor. The question in every case will be a question of fact as to what are the nature and ingredients of the sale. It is not right in law to pick on one ingredients of the sale. It is not right in law to pick on one ingredient only to the exclusion of the others and deduce from it the character of the transaction. For example, the circumstance that the price of the product and the price of the container are shown separately may be evidence that two separate transactions are envisaged, but that circumstances alone cannot be conclusive of the true character of the transaction. It is not unknown that traders may, for the advantage of their trade, show what is essentially a single sale transaction of product and container, or a transaction of a sale of the product only with no consideration for the transfer of the container as divisible into two separate transactions, one of sale of the product, and the other a sale of the container, with a distinct price shown against each. Similarly where a deposit is made by the purchaser with the dealer, the deposit may be

pursuant to transaction where there is no sale of the container and its return is contemplated, and in the event of its not being returned the security is liable to forfeiture. Alternatively, it may be a case where the container is sold and the deposit represents the consideration for the sale, and in the event of the container being returned to the. dealer the deposit is returned by way of consideration for the resale. In every case, the assessing authority is obliged to ascertain the true nature and character of the transaction upon a consideration of all the facts and circumstances pertaining to the transaction. . . . .

This court added that the question whether the packing material had been sold or merely transferred without consideration was dependent upon the contract between the parties. It found that there was a lack of adequate and clear factual material and, therefore, remanded the matter to the assessing authority for fuller investigation.

. . . . .

Decision :

Now, there is nothing on record which indicates that the terms under which the deposits would be repaid were communicated to the assessee's customers. There is no suggestion that there was an oral communication of such terms to the customers or that there was any trade usage in this behalf, it is difficult to visualise a bailment the terms whereof are not made known to the bailee. The forfeiture of amounts in the assessee's 'deposit on bottles' account does not appear to bear out of the assessee's case that the empties were returnable at any time. This must also be taken into account that the customers were required to deposit for the beer bottles a rate which was exactly equal to the cost of the bottles ; this would suggest the sale thereof more strongly than the intention to get them back upon bailment. It seems to us upon these facts and circumstances that there was really a sale of the bottles to the customers, the assessee buying back the empties from some customers. It is, therefore, that the assessee could show a refund of Rs. 11,62,974 out of the total amount of deposits, namely, Rs. 30,57,143. Had there been a bailment which necessarily pre-supposes that the bailee was aware of the terms thereof, a large refund would have been shown.

The judgment in the case of *United Breweries Ltd.* [1997] 105 STC 177 (SC) ; [1997] 3 SCC 530 proceeded upon the very clear terms of the bailment that were made known by circulars to the customers. The judgment found that the intention of the brewer was to get the

empties back, as evidenced by the fact that the rate of the deposit was less that the cost of the beer bottles.

For the reasons aforestated, we are of the view that the amount of Rs. 16,55,355, being the amount shown as forfeited as aforementioned, was rightly made liable to sales tax."

20.2.1 After going through the said judgment, we are of the considered view that honourable Supreme Court of India had adjudicated on the question of law as to whether the amounts forfeited for non-return of bottles amounted to sale and it was held, while confirming judgments of various authorities including that of the West Bengal Taxation Tribunal, that amount forfeited was liable to be treated as sale of goods and was, therefore, exigible to sales tax. However, it may be noted that while beer was being sold in bottles, there was no levy of sales tax on the money received towards price of empty bottles and amount realised for the empty bottles was shown separately in deposit account.

20.2.2 It is also clear that empty bottles returned were adjusted against the account entitled "deposit on bottles" by issuing refunds. No questions raised by the concerned officers regarding levy of purchase tax on such return of empty bottles. Hence, this aspect regarding applicability of purchase tax was not required to be adjudicated in the peculiar facts and circumstances of *Kalyani Breweries Ltd.*

20.3 The relevant parts of *Kalyani Breweries Limited*, West Bengal Taxation Tribunal [1990] 78 STC 441 (WBTT) read as below (pages 444 and 452 in 78 STC) :

"2. . . . The applicant sells beers in bottles raising separate invoices—one for beer simpliciter and another for the deposit of the price of bottles with a stipulation for return of such containers or bottles to the applicant within a period of four months from the date of supply. In the event of purchasers failing to return the empty bottles, the deposit with the petitioner stands forfeited. . . . .

. . . . .

15. It seems to us that the nature of the transaction was such that return of bottles could hardly be expected. . . . If, in some cases, bottles were returned and corresponding value returned therefor, the transaction remained a transaction of sale. The refund in such cases must have to be treated as a rebate or discount. Consequently, the amount refunded will be excluded from sale price ; but the amount forfeited must have to be treated as part of sale price, and, therefore, liable to levy of sales tax."

20.3.1 We would most respectfully like to interpret para 15 of the judgment as "the amount refunded will continue to be excluded from sale price", in the facts and circumstances of the case.

The main prayers for adjudication before this Tribunal in this application **21** is as to whether return of empty bottles would constitute purchase of empty bottles by the petitioner, with incidental prayers regarding setting aside of the report of Bureau of Investigation.

21.1 The prayers are based on various alternative grounds that :

(i) The country liquor is sold in glass bottles and the money charged by the petitioner for country liquor includes the price of bottles as packing materials, as per the relevant provisions of West Bengal Excise Rules. It is also stated that money is refunded to the buyers of goods for empty bottles and such transaction is nothing but that of a sales return.

(ii) If the goods are sold on composite basis, and if part of the goods are returned, such transaction amounts to sales return. It cannot be termed as purchase.

(iii) The said transaction cannot be treated as purchase, since credit notes in respect of each transaction is issued to the buyer of goods.

(iv) The money returned for empty bottles is basically return of caution money.

(v) It is submitted that as per provisions of section 16(2B) of the VAT Act packaging materials and/or container will be non-taxable since the country spirit is non-taxable under WBST Act. It is also submitted that provisions of the said section override that of section 16(2) read with section 17(1)(b) of the Act.

(vi) Country liquor is sold on MRP basis under WBST Act and tax is remitted on such MRP value under the relevant provisions of law, at the option of petitioner.

We have considered various alternative grounds or submissions for **22** adjudication of the questions of law raised in this application.

22.1 In our considered opinion, basis of levy of excise duty under the Bengal Excise Act and Rules made thereunder, i. e., determination of price does not have any relevance under WBST Act,1994 since the two Acts are different and levy of tax is made under the respective Acts.

22.2 On going through various submissions and documents such as copy of invoices produced at the time of filing, we do not find any evidence that any money was collected separately as caution money or security deposit. We do not find any averment to the effect that accounts were maintained separately for bottles or that money was collected separately. In

fact, sales tax has been paid on the entire sales proceeds which includes product and packaging material. Hence, we are unable to accept the submission that the money returned for empty bottles is basically return of caution money. It may be noted that the amount realised against bottles was kept as caution money in the case of *Kalyani Breweries*, which is not the position in this case.

22.3 In our considered opinion, this is a case of composite sales of goods, i. e., product sold in a packaged condition. The price of country liquor sold is a composite price, i.e., inclusive of bottles in which it is packed, and there is no separate treatment for the bottles in any manner whatsoever, by the petitioner in the returns filed in this regard. Since it is a composite sale price, which is in this case is included in the invoice value as well as Maximum Retail Price (i. e., MRP), sales tax is also paid at the rate applicable for the main product, i. e., country spirit. We do not find any agreement to the effect that buyer of the goods is under an obligation to return empty bottles. We are also of the considered view that sales return would normally denote return of the entire goods sold with reference to the terms of sale, i. e., invoice in this case or a separate agreement in this regard. If the country spirit bottle, i. e., bottle filled up with country liquor, is returned for whatever, reason, it would certainly amount to sales return and will be accounted for accordingly under the West Bengal Sales Tax Act, 1994. However, this is not the position in this case.

22.4 The petitioner has accepted composite sales as sales as per invoice value in the concerned year and has not accounted for payments made for return of empty bottles as sales returns, i. e., reduced from the turnover of sales in the concerned period. After considering various facts and circumstances of the case, including the agreements between the vendors and buyer of goods, the honourable Bombay High Court had decided that payment of sale consideration money on return of goods from the buyer of goods was return of goods or repurchase of goods and the petitioner was entitled to deduction of the same from turnover of sales, i. e., tax could not be levied on receipt of goods returned by the buyer of goods under specific agreement. It was also held that purchase tax also could not be levied keeping in view the specific provisions of the Bombay Sales Tax Act. The honourable Bombay High Court had also noted that nomenclature used was immaterial in this respect. It is reiterated that the judgment ruled that such return of entire goods would reduce turnover of sales, subject to return of the goods within the period laid down under the provisions of law.

22.5 In our considered opinion, once the goods are sold as composite sales and accounted for accordingly, without any specific agreement and accounting according to the agreement, return of empty bottles (or, for that matter any other packaging material) would not amount to return of goods and reduce the sale consideration, on which sales tax has already been paid. Any such return of goods would certainly amount to purchase of goods and will be liable to being dealt with under the concerned law applicable. Thus, in this case, if the petitioner-dealer is not a registered dealer under W. B. VAT Act, such petitioner-dealer would not be liable to be dealt with under W. B. VAT Act, unless such petitioner-dealer is required to be registered under W. B. VAT Act.

It may be recalled that in the case of *Kalyani Breweries*, the money realised as security deposit or caution money was not treated as part of sales price and hence, sales tax was also not paid thereon, keeping in view the specific agreements and nature of accounting. Sales tax liability was upheld only on the empty bottles not returned and security money forfeited, which is not applicable in this case since sales tax was already paid on the bottles as part of composite price.

22.6 We also do not agree that purchase of bottles is not liable to levy of value added tax under the W. B. VAT Act, 2003. In fact, it appears that the petitioner has been regularly paying VAT at the time of purchase of empty bottles from regular dealers, i. e., purchase of new bottles.

22.7 We are also of the considered view that issue of credit notes having cross reference to the original invoice and predetermined value would not change the nature of the transaction amounting to sale, particularly because only empty bottles are being returned for a price and there is no compulsion on the part of purchasers nor is there any agreement to that effect. In our considered view, transaction of sale having been completed with composite sale, return of empty bottles after consumption of main product cannot be treated as sales return, when the amount was not realised separately as "deposits or caution money" and also not accounted for accordingly .

It would be relevant to refer to provision of section 2(34) of the WB VAT **23**
Act, which reads as below :

> " '*purchase*' means any transfer of property in goods to the person making the purchase for cash or deferred payment or other valuable consideration, but does not include a transfer by way of mortgage, hypothecation, charge or pledge."

23.1 We are also of the considered view that return of empty bottles, in the peculiar facts and circumstances of the case, amounts to purchase of

goods under WB VAT Act, 2003 under section 2(34) of the Act since there has been transfer of property in goods, i. e., empty bottles, to the person making the purchase and payment has been made for the said return of empty bottles and will be subject to tax under the Act as per relevant provisions of law.

24 We, accordingly, are of the considered view that orders passed in the suo motu revisional proceedings on December 21, 2018, cannot be set aside on the point of law that the petitioner is not liable to pay tax on return of bottles from the dealers. Since report of Bureau of Investigation has been independently considered by the respondent authorities while undertaking suo motu revision, we are of the considered view that the said report of bureau of investigation cannot also be set aside.

25 We also make it clear that we have not gone into the factual aspects of other issues, if any, in this application since adjudication has been restricted to issue of taxability of return of empty bottles under WB VAT Act, 2003. We also make it clear that we have restricted ourselves to adjudication of questions of law raised in this petition, i. e., with reference to the prayers made in this application.

26 The application, thus, stands disposed of. Interim stay against the outstanding demand also stands vacated. Other applications bearing RN 591 of 2018 also stand disposed of, with the aforesaid decision that orders passed in the suo motu revisional proceedings cannot be set aside.

27 No order as to costs. Plain copy be supplied to both the parties.

MALAY MARUT BANERJEE ***(Judicial Member)***.—I agree.

[2020] 75 GSTR 540 (Gauhati)

[IN THE GAUHATI HIGH COURT]

COMMISSIONER, GST AND CENTRAL EXCISE, GUWAHATI

v.

BSNL

SUMAN SHYAM and **HITESH KUMAR SARMA** JJ.

February 12, 2020.

HF ▶ Department/Remanded

SERVICE TAX—SHOW-CAUSE NOTICE—NOTICE RAISING DEMAND AGAINST FOUR DIFFERENT SECONDARY SWITCHING AREAS OF BSNL WITHOUT INDICATION OF AMOUNT RECOVERABLE AGAINST EACH—NOTHING TO

SHOW THAT "NON-TAXABLE SERVICES" HAD BEEN EXCLUDED FROM GROSS RECEIPTS—NOTICE SET ASIDE—DEPARTMENT TO ISSUE FRESH SHOW-CAUSE NOTICE RAISING DEMANDS CLEARLY SPECIFYING AND EXCLUDING "NON-TAXABLE" SERVICES FROM GROSS RECEIPTS AND INDICATING PERIOD AND PARTICULARS OF SECONDARY SWITCHING AREA TO WHICH IT RELATES—FINANCE ACT (32 of 1994), ss. 73(1)(a), 74.

SERVICE TAX—APPEAL TO APPELLATE TRIBUNAL—POWERS OF TRIBUNAL—TRIBUNAL FOR FIRST TIME CARRYING OUT ASSESSMENT OF TAX LIABILITY OF ASSESSEE ON BASIS OF DOCUMENTS AND RECORDS MADE AVAILABLE BEFORE IT—NO JURISDICTION IN TRIBUNAL TO CARRY OUT ASSESSMENT OF TAX LIABILITY—ORDER OF TRIBUNAL UNSUSTAINABLE—CENTRAL EXCISE ACT (1 of 1944), s. 35C.

The Deputy Commissioner issued a show-cause notice addressed to the assessee and four of its secondary switching areas demanding a sum of Rs. 3,47,49,000 being the shortfall of service tax recoverable in terms of section 73 (1)(a) of the Finance Act, 1994 and interest and penalty, on the ground that the secondary switching areas had failed to pay service tax on the "gross receipts" charged by the service providers. The assessee filed a reply denying the liability. The demand of Rs. 3,47,49,000 raised in the show-cause notice was reduced by the Commissioner to Rs. 2,77,65,000 but heavy penalty of equal amount was also imposed upon the assessee under section 74 of the Finance Act, 1994. The assessee and the Department preferred appeals before the Customs, Excise and Service Tax Appellate Tribunal which set aside the order passed by the Commissioner and allowed the appeal filed by the assessee. On appeal :

Held, *allowing the appeal, that although the Department had issued show-cause notice raising a demand against four different secondary switching areas, there was no indication in the show-cause notice what was the amount recoverable against each secondary switching area. The show-cause notice also failed to give specific particulars of the gross receipts of the respective secondary switching areas which were taxable. The court could not infer that "non-taxable services" had been excluded from gross receipts for the purpose of computing the tax component. For the purpose of recovering service tax, each secondary switching area was to be treated as an independent entity. Therefore, it was incumbent upon the Department to furnish secondary switching area wise specific particulars of the default so as to enable the noticee to suitably respond to the allegation brought against it. There was adjudication by the Commissioner whether the demand of Rs. 3,47,49,000 was on the basis of gross receipt on account of "taxable services" or it included the*

entire gross receipt of secondary switching areas including the "non-taxable services". The Tribunal for the first time carried out assessment of the tax liability of the assessee on the basis of the documents and records made available before it and determined the amount of service tax actually payable by it and came to the conclusion that although there was short-payment of service tax to the extent of Rs. 52.88 lakh the assessee had voluntarily made excess payment of service tax to the extent of Rs. 74.20 lakh and no more service tax was payable. Section 35C of the Act did not confer any jurisdiction upon the Tribunal to carry out assessment of the tax liability and record its own conclusion on that behalf. That function which had to be left to the assessing authorities had been undertaken by the Tribunal in a manner impermissible in law, particularly, when such an exercise was not attempted even by the Commissioner. Moreover, no justification had been offered why the appeal preferred by the Department was rejected. The order of the Tribunal was unsustainable. The show-cause notice also was to be set aside. It would be open for the Department to issue fresh show-cause notice raising demands for recovery of service tax as permissible under the law, clearly specifying and excluding "non-taxable" services from the gross receipts and indicating the period and the particulars of the secondary switching area to which it related.

Order of the Customs, Excise and Service Tax Appellate Tribunal set aside.

C. Ex. App. 12 of 2019.

S. C. Keyal for the appellant.

V. K. Chopra for the respondent.

JUDGMENT[1]

The judgment of the court was delivered by

1 SUMAN SHYAM J.—Heard Mr. S. C. Keyal, learned ASGI appearing for the appellant. We have also heard Mr. V. K. Chopra, learned counsel appearing for the respondent.

2 The judgment and order dated December 13, 2018 passed by the learned Customs, Excise and Service Tax Appellate Tribunal (CESTAT), Eastern Zonal Bench, Kolkata in ST Appeal No. 198/2008 and ST Appeal No. 210/2008 have been assailed by the appellant in this appeal filed under section 35G of the Central Excise Act, 1944.

3 At the very outset, it would be apposite to mention herein that by filing only one appeal, the appellant has assailed the common judgment and order dated December 13, 2018 of the learned CESTAT disposing of both

1. Oral.

the appeals pending before it. However, taking note of the submission of Mr. Chopra that he would have no objection if the appellant is allowed to assail the common judgment and order passed by the learned CESTAT by filing a composite appeal, the issue of maintainability of the appeal stands resolved and therefore, we proceed to dispose of the appeal on merit.

The facts leading to the institution of the appeal, briefly stated, are as follows : 4

The Finance Act, 1994 had introduced the provision for realizing service tax. Accordingly, some of the services provided by the Secondary Switching Area (SSA) under the BSNL fell within the purview of the Act of 1994 and therefore, were liable to be taxed at five per cent. on gross receipt. On March 28, 2003, the Deputy Commissioner, Central Excise, Guwahati had issued a show-cause notice addressed to the respondent Bharat Sanchar Nigam Limited (BSNL), Assam Circle, Guwahati, and four of its SSAs demanding a sum of Rs. 3,47,49,000 being the shortfall of service tax recoverable from the Department in terms of section 73(1)(a) of the Finance Act, 1994 as well as for realization of interest and penalty as per the provision of the said Act. In the show-cause notice dated March 28, 2003, it has been, inter alia, projected that the respective SSAs had failed to pay service tax on the "gross receipt" charged by the service providers.

The sum of Rs. 3,47,49,000 pertains to the demand of service tax for the period from December 1, 1997 to March 31, 2000 in respect of the four SSAs named therein. Upon receipt of the notice dated March 28, 2003, the respondent filed reply denying the liability. Thereafter, the matter was taken up for adjudication and by the order dated August 28, 2008 passed by the Commissioner, Central Excise, Shillong, the proceeding was disposed of by confirming the demand of recovery of tax to the extent of Rs. 2,77,65,000. By the order dated August 28, 2008, the Commissioner of Central Excise had also imposed penalty of Rs. 2,77,65,000 upon the respondent by invoking the jurisdiction under section 74 of the Finance Act, 1994. Thus, the original demand of Rs. 3,47,49,000 raised in the show-cause notice dated March 28, 2003 was reduced by the Commissioner to Rs. 2,77,65,000 for the reasons recorded in the order. But at the same time, heavy penalty of equal amount was also imposed upon the respondent. 5

The operative part of the order dated August 28, 2008 is reproduced herein below for ready reference : 6

"ORDER

6.1 Having regards to above discussion and findings, I order confirmation of the demand and recovery of service tax of Rs. 2,77,65,000 (rupees two crore seventy seven lakh sixty five thousand only) from

M/s. BSNL, Assam Circle, Guwahati, in terms of section 73(1)(a) of the Finance Act, 1994.

6.2 I order recovery of interest at the appropriate rate in terms of section 75 of the Finance Act, 1994.

6.3 I impose penalty of Rs. 2,77,65,000 (Rupees two crore seventy seven lakh sixty five thousand only) on M/s. BSNL, Assam Circle, Guwahati, in terms of section 78 of the Finance Act, 1994".

7 Aggrieved by the order dated August 28, 2008, the respondent had preferred ST Appeal No. 198/2008 before the CESTAT. Simultaneously, the appellant had also preferred ST Appeal No. 210/2008 assailing the order dated August 28, 2008 to the extent of reduction of the original demand raised in the show-cause notice dated March 28, 2003.

8 After hearing the arguments advanced by the learned counsel for both parties, the learned CESTAT had disposed of both the appeals by the impugned judgment and order dated December 13, 2018 thereby setting aside the order passed by the Commissioner of Central Excise and allowing the appeal filed by the respondent. There is, however, no mention in the said order as to the fate of the appeal preferred by the appellant. Aggrieved thereby, the present appeal has been filed.

9 This appeal was admitted by the order dated November 22, 2019 to be heard on the following substantial questions of law :

"Whether the appellant court was correct in accepting the contention of the respondent-BSNL that service tax is leviable on the actual receipts and not the gross receipts ?"

10 Mr. Keyal, learned ASGI has argued that confusion, if any, in the show-cause notice dated March 28, 2003 was created purely on account of non-co-operation of the BSNL authorities inasmuch as, when the assessing officers had examined the books of account and records so as to assess the actual taxable receipt of the services coming under the purview of the Finance Act, 1994 for the purpose of recovery of service tax, such documentary evidences were not made available to the officials so as to correctly assess the amount of taxable receipt. However, submits Mr. Keyal, even if it is assumed that the show-cause notice dated March 28, 2003 had raised erroneous demand, even then, the learned CESTAT did not have the jurisdiction to carry out assessment of the taxable component on its own and thereafter, set aside the claim of the Department. In any event, submits Mr. Keyal the Department was entitled to recover service tax on the gross receipt on account of taxable services and therefore, the demand cannot altogether be held to be illegal.

Responding to the said submission, Mr. Chopra, learned counsel for the respondent, has argued that the provision of the Finance Act, 1994 makes it amply clear that the service tax can be levied only on such items that have been held to be taxable. He submits that section 65 of the Act of 1994 has defined "taxable services" and therefore, no service tax can be recovered in respect of gross receipt on account of any service which is not included within the definition of "taxable service". It is also the submission of Mr. Chopra that by clubbing the assessment of different SSAs and by juggling the figures, the appellant had raised an erroneous demand in the show-cause notice dated March 28, 2003 by including such items in the "gross receipt component" which were exempted from taxable services. The said error was rectified by the learned Tribunal by carrying out reconciliation of the account whereby, it was found that no further amount was payable by the respondent. Under the circumstances, submits Mr. Chopra, no interference is called for with the impugned judgment and order dated December 13, 2018. **11**

We have gone through the materials available on record and have also bestowed our anxious consideration on the submission made by the learned counsel for both the parties. **12**

As noticed above, the Central Excise Department had issued show-cause notice dated March 28, 2003 raising a demand of Rs. 3,47,49,000 on account of default allegedly made by as many as four different SSAs., viz. M/s. Guwahati SSA, M/s. Jorhat SSA, M/s. Silchar SSA and M/s. Nagaon SSA. From a perusal of the show-cause notice, it is evident that each of the four SSAs were maintaining separate accounts of "gross receipts" and the demand of the Central Excise Department also pertains to the individual SSAs based on the records maintained by them. However, there is no indication in the show-cause notice dated March 28, 2003 as to what was the amount recoverable against each SSA. The show-cause notice dated March 28, 2003 also fails to give specific particulars as to the gross receipts of the respective SSAs which were found to be taxable. From the show-cause notice dated March 28, 2003, it is not possible for this court to infer that the "non-taxable services" had been excluded from gross receipts for the purpose of computing the tax component. On the contrary, it appears that the demand pertaining to those four SSAs had been clubbed together and the show-cause notice has been served upon the Chief General Manager, BSNL, Assam Circle, Guwahati, on a lump sum basis merely because he happens to be the apex administrative authority of the BSNL for the Assam Circle. **13**

14 What is to be noted herein is that in the show-cause notice dated March 28, 2003, the Central Excise Department is alleging evasion of service tax and is also seeking to realize interest besides levying penalty. There is no dispute about the fact that for the purpose of recovering service tax, each SSA was to be treated as an independent entity. Therefore, it was incumbent upon the Department to furnish SSA wise specific particulars of the default so as to enable the noticee to suitably respond to the allegation brought against it. However, as noticed above, specific facts and figures relatable to each of the SSAs have not been mentioned in the notice dated March 28, 2003.

15 From the order dated August 28, 2008, we also find that the Commissioner of Central Excise had confirmed the demand by reducing the amount from Rs. 3,47,49,000 to Rs. 2,77,65,000 but such reduction is merely on account of exclusion of claim of service tax on account of GMT, Silchar and GMT, Jorhat for the period from December 1, 1997 to June 30, 1999. Save and except the above, there is no adjudication as to whether, the demand of Rs. 3,47,49,000 is on the basis of gross receipt on account of "taxable services" or it includes the entire gross receipt of SSAs including the "non-taxable services".

16 A perusal of the impugned judgment and order dated December 13, 2018 passed by the learned CESTAT also goes to show that in order to figure out the liability of the respondent, the learned Tribunal had carried out reconciliation of the account of the respondent and determined the amount of service tax actually payable by it. Thereafter, the CESTAT came to a conclusion that although there is short-payment of service tax to the extent of Rs. 52.88 lakhs yet, the BSNL had voluntarily made excess payment of service tax to the extent of Rs. 74.20 lakhs. As such, no more service tax was payable. The operative part of the order dated December 13, 2018 is reproduced hereinbelow for ready reference :

> "12. Out of the total gross receipts, the amounts, which are not liable to service tax are to be excluded. After the said deduction, we note that BSNL, during relevant time, had short paid service tax to the extent of about Rs. 52.88 lakhs. However, it is also seen that BSNL has suo motu made payment of such differential service tax of Rs. 74.20 lakhs. As such, no more service tax is required to be paid.
>
> 13. Revenue has filed the present appeal challenging the amount of service tax dropped by the adjudicating authority. On the basis of recalculation of service tax dues and submission of a certificate from the independent chartered accountant, we are led to the conclusion that

the correct service tax liability has been arrived at and settled by BSNL.

14. In view of the above, we are of the view that the impugned order is not sustainable and we set aside the impugned order and allow the appeal filed by M/s. BSNL."

From a careful analysis of the impugned order dated December 13, 2018, we find that the learned CESTAT had carried out the assessment of the service tax payable by the Department on the basis of reconciliation of the account produced before it for the first time by the BSNL and thereafter, upon obtaining certificate from an independent chartered accountant, it has determined the service tax component payable by the respondent. In other words, by the impugned order dated December 13, 2018, the learned CESTAT had for the first time carried out assessment of the tax liability of the respondent on the basis of the documents and records made available before it and thereafter, arrived at a conclusion that the impugned order dated August 28, 2008 was not sustainable in law. **17**

Section 35C of the Central Excise Act, 1944 confers jurisdiction upon the Appellate Tribunal to pass such orders which are indicated therein, including orders confirming, modifying or annulling the decision or order appealed against. However, section 35C of the Act of 1944, does not confer any jurisdiction upon the learned Tribunal to carry out assessment of the tax liability and records its own conclusion on that behalf. Thus, a function which has to be left to the assessing authorities had been undertaken by the learned CESTAT in a manner, which in our opinion was, impermissible in law, more so, when such an exercise was not attempted even by the Commissioner of Central Excise. Moreover, no justification whatsoever has been offered in the impugned order dated December 13, 2018 as to the reason why the appeal preferred by the appellant herein was rejected. **18**

Although, we are in agreement with the submission of Mr. Chopra that the impugned show-cause notice suffers from certain vital deficiencies, yet, we are also of the view that the learned CESTAT was not correct in carrying out an independent assessment of the tax liability of the respondent and thereafter, recording a finding of fact by obtaining certificate from a chartered accountant. **19**

For the reasons stated above, the impugned order dated December 13, 2018 is held to be unsustainable in the eye of law and the same is accordingly, set aside. The show-cause notice dated March 28, 2003 also stands interfered with. **20**

We, however, make it clear that notwithstanding this order, it will be open for the appellant to issue fresh show-cause notice raising demands **21**

for recovery of service tax as may be permissible under the law. Such demand, if any, raised by the appellant, shall clearly specify and exclude the "non-taxable" services from the gross receipt and also indicate the period as well as the particulars of the SSA to which the same relates to.

22 Upon receipt of such notice, it will be open to the respondent to avail all procedural safeguards as may be permissible under the law. We also make it clear that the order dated August 28, 2008 shall cease to have any effect in the matter.

23 With the above observation, this appeal stands disposed of.

[2020] 75 GSTR 548 (CESTAT-New Delhi)

[BEFORE THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL — NEW DELHI]

MGF EVENT MANAGEMENT

v.

COMMISSIONER OF CENTRAL EXCISE, DELHI

DILIP GUPTA J. *(President)* and **C. L. MAHAR** *(Technical Member)*

February 3, 2020.

HF ▸ Department

SERVICE TAX—CHARGE OF TAX—CONSIDERATION FOR SERVICE NEED NOT BE PECUNIARY CONSIDERATION—CONSIDERATION IN TERMS OF SOME BENEFIT TO SERVICE PROVIDER WHICH CAN BE MEASURED OR CONVERTED INTO MONEY WILL CONSTITUTE VALID CONSIDERATION—ASSESSEE OPERATING PARKING AREAS IN SHOPPING MALLS THROUGH AGENCY—AGENCY PAYING GROSS COLLECTION ON MONTHLY BASIS AFTER DEDUCTING ITS DIRECT OPERATING COST AND MANAGEMENT FEES—RIGHT TO COLLECT PARKING FEES GIVEN BY MALL OWNERS IS CONSIDERATION—ASSESSEE PROVIDING SERVICE OF "MANAGEMENT, MAINTENANCE OR REPAIRS" TO MALL OWNERS.

SERVICE TAX—TAXABLE VALUE—ASSESSEE OPERATING PARKING AREAS IN SHOPPING MALLS THROUGH AGENCY—AGENCY PAYING GROSS COLLECTION AFTER DEDUCTING ITS DIRECT OPERATING COST AND MANAGEMENT FEES—MEASURE OF CONSIDERATION IS GROSS INCOME GENERATED THROUGH PARKING FEES—TO BE COMPUTED AFTER ABATING AMOUNT OF SERVICE TAX FROM GROSS RECEIPTS—ASSESSEE ELIGIBLE TO AVAIL OF CENVAT CREDIT OF SERVICE TAX PAID ON INPUT SERVICES.

Service tax—Extended period of limitation—Suppression of income from parking fees in returns to evade service tax—Misdeclaration and wilful suppression—Extended period invocable—Finance Act (32 of 1994).

For a service to be liable to tax, it is not necessary that the service recipient should receive any pecuniary consideration from the service. Even a service without any direct pecuniary benefit to the service recipient is a service. If the consideration is in terms of some benefit to the service provider which can be measured or converted into money it will constitute a valid consideration. Section 67(1)(i) of the Finance Act, 1994 clearly stipulates that where the consideration does not wholly or partly consist of money, it would be such amount in money as, with the addition of service tax charged, is equivalent to the consideration. Further, in section 67(1)(i) consideration has be taken as the gross amount charged by the service provider.

The assessee operated parking areas in shopping malls through an outside agency which managed the parking area and collecting "parking fees" on behalf of the assessee. The agency raised invoices for its operating cost and management fees and charged service tax on these amounts and paid the remainder gross collection on monthly basis to the assessee after deducting its direct operating cost and management fees. The assessee claimed that the income earned from parking fees belonged to assessee entirely and nothing was remitted to the mall owners from the collections made or otherwise, that it had no written contract with the mall owners and did not pay any amount by way of rent or space allocation to the mall owners for operating the parking area. No service tax was paid by the assessee on the income generated from the parking fees. On the basis of an audit, three show-cause notices were issued to the assessee alleging that the activity of the assessee amounted to "management, maintenance or repairs" which was liable to service tax under the provisions of the Finance Act, 1994. The Commissioner confirmed the demand for service tax of Rs. 2,47,31,755 and interest and penalties under sections 25 and 78 of the Finance Act, 1994, respectively, arising out of three show-cause notices. On appeal :

Held, *(i) that the huge parking space area could not have been given to the assessee without any agreement with respect to financial consideration or without an agreement with respect to contingent liabilities with respect to theft, injuries, fire or other liabilities. Even otherwise, the activity of the assessee was covered within the definition of "management, maintenance or repairs". The provision of hassle free parking to the mall owners was a service to the mall owners by the assessee. The contention that no monetary conside-*

ration was paid by the mall owners was not tenable. The assessee had been allowed to use space and collected parking fee. This was valid consideration in terms of the service tax provisions as it is not necessary that the consideration should always be directly in the form of money. Thus, there is no doubt that the right to collect parking fees given by the mall owners is nothing but a consideration provided to the assessee by the mall owners and the measure of such consideration is the gross income generated through the parking fees. When the operation of the parking area was examined qua the mall owners the assessee was providing the service of "management, maintenance or repairs" to the mall owners.

(ii) That however, the gross receipts would include service tax and the taxable value had to be computed after abating the amount of service tax from the gross receipts in terms of section 67(2) of the Act. Therefore, the income shown in the balance sheet as parking fees was to be considered as cum-tax value for determination of service tax. The assessee would be eligible to avail of the Cenvat credit of the service tax paid on input services, provided to the assessee by the third party agency or any other service provider in providing the service of "management, maintenance and repairs" of the parking area.

(iii) That there was a clear mis-declaration and wilful suppression inasmuch as the assessee had suppressed the income of parking fees in the relevant returns with an ulterior motive to evade service tax. It had wilfully designed its mode of operation to evade service tax. The extended period was invocable in the case.

(iv) That the penalties under section 78 of the Finance Act, 1994 had to be reworked accordingly.

HERO CYCLES P. LTD. *v.* COMMISSIONER OF INCOME-TAX [2015] 379 ITR 347 (SC) (para 3) *and* S. A. BUILDERS LTD. *v.* COMMISSIONER OF INCOME-TAX [2007] 288 ITR 1 (SC) (para 3) *referred to*.

Final Order No. 50154/2020 in Service Tax Appeal No. 53191 of 2014.

A. K. Batra, Chartered Accountant and *Ms. Vibha Narang*, Advocate for the appellant.

V. P. Pandey, Authorized Representative (Departmental Representative) for the respondent.

ORDER

1 C. L. MAHAR ***(Technical Member)***.—The present appeal has been filed against the impugned order-in-original whereby the learned Commissioner has confirmed service tax demand of Rs. 2,47,31,755 besides

demanding interest and imposing penalties under different sections 25, section 78 of the Finance Act, 1994, respectively, arising out from three show-cause notices, the details of which are given below :

Show-cause notice date	*Period of demand*	*Amount of demand in Rs.*
21/04/2011	1/10/2005 to 31/03/2010	1,52,04,251
26/08/2011	1/04/2010 to 31/03/2011	44,22,031
20/09/2012	1/04/2011 to 31/03/2012	51,05,473

Brief facts of matter are that the appellant is operating parking areas in **2** five malls by way of providing parking to the patrons/visitors of shopping malls and collecting parking fees for which they have appointed an outside agency (hereinafter referred to as the third party agency) for managing the parking area who is collecting "parking fees" on behalf of the appellants and remitting the proceeds to the appellant. The third-party agency raises the invoice for operating cost and its management fee and charges service tax on these amounts and pays the remainder amount of gross collection on monthly basis after deducting its direct operating cost and management fee. The entire revenue generated by way of selling parking tickets belongs to the appellant. Parking income is recorded as revenue by the appellant in its books of accounts. The appellants claims that the income earned from parking fees belongs to the appellants entirely and nothing is remitted to the mall owners from the collections made or otherwise. It is the claim of the appellant that it has no written contract with the mall owners and is not paying any amount by way of rent or space allocation or by whatever name it may be called to the mall owners for operating the parking area. The appellant asserts that the only interest of mall owners is that there should be a hassle-free parking and that the space available for parking should be utilized to the maximum possible extent so that there is adequate parking space for the vehicles, otherwise it will affect the popularity of the mall and may cause traffic chaos in nearby areas of the mall which may affect the business of the shops located in the mall and ultimately the mall owners. No service tax was paid by the appellant on the income generated from the parking fees. An audit of the appellant was conducted by the service tax department and on the basis of the audit, the above three show-cause notices were issued to the appellants alleging that the activity of the appellant amounted to "management, maintenance or repairs" which was leviable to service tax as per the provisions of the Finance Act, 1994. The allegations made in the show-cause notice were confirmed vide the impugned order-in-original against which the appellant is in appeal before the Tribunal.

3 In the appeal memorandum and submissions made during the course of hearing by Shri A. K. Batra, chartered accountant and Ms. Vibha Narang, advocate, it has been submitted that the impugned activity of providing parking facility in the malls was not taxable as mall owners did not receive any payment or consideration and were not recording any transaction in their financial records. They are only concerned with the hassle-free parking and are not charging any amount for providing the parking space to the appellant. There is, therefore, no provision of services by the appellant to the mall owners and no service provider and recipient relationship existed between them. The appellant is a partnership firm and is operating the parking area of the malls as an independent business ; there has been no arrangement or agreement to provide "management, maintenance or repair services" ; they are working on principal to principal basis ; there was no intention for provision of services in the nature of management, maintenance or repair services and the only essence was to provide a hassle-free parking ; no consideration flows from mall owners to the appellant ; the amount received from various vehicle owners as a consideration for parking cannot be taken for taxing the appellant for the alleged services rendered to mall owners and no consideration is paid or received from the mall owners ; the income earned from parking fees belongs to the assessee entirely and nothing is remitted to the mall owners from the collections made or otherwise; there is no privity of contract between the person who is paying the parking charges and the mall owners ; there should be a direct link between provision of services and consideration received ; consideration of service may be provided by the third party who is interested in the service to be provided to the participant, i. e., consideration should either flow from beneficiary or from a third person on behalf of the beneficiary ; they were conducting own business as they are operating the parking area by employing own resources and labour and they are bearing all the related expenses on their own account and booking the same as business expenses ; they are not managing the parking facilities for the mall owners but rendering parking services to the visitors or customers of the mall. The "management, maintenance or repair services" has been rendered to self by the appellant in order to run the business of parking. The learned counsel for the appellant further argued that the Revenue cannot guide any person as to how it should conduct its business. That it was mall owner's discretion that they did not want to charge any consideration against providing parking space to the appellant. They relied upon the case law in *Hero Cycles P. Ltd.* v. *Commissioner of Income-tax (Central), Ludhiana* [2015] 379 ITR 347 (SC) ; [2015] TIOL-280-SC-IT and *S. A. Builders Ltd.* v. *Commissioner of Income-tax (Appeals), Chandigarh* [2007] 288 ITR

1 (SC) ; [2006] TIOL 179-SC-IT. The learned counsel further claimed that operation activity is different from management and that the appellant is operating the parking area and not managing the same for the mall owners. They are also in arrangement with the mall owners for operating, managing and letting out of kiosks, space, etc., for the purpose of advertisements in the respective five malls, i.e., (a) the Metropolitan, Gurgaon, (b) the Plaza Gurgaon, (c) MGF Megacity, Gurgaon, (d) the Metropolitan, Saket, New Delhi and (e) the Metropolitan, Jaipur. The appellants have been paying monthly charges to owner of Metropolitan Mall, Gurgaon and the Plaza Mall, Gurgaon only and no charges have been paid to the developers of the three malls towards temporary space utilized. They are paying service tax under taxable category "sale of space" and "renting of immovable property" which was duly accepted by the Department hence, no allegation is made with regard to the above activity with respect to malls from whom no monthly charges have been taken. Similarly, upon the parking charges, no service tax is being discharged as no amount is paid to the mall owners and hence the Department adopted a biased approach and challenged the same commercial arrangement for creating demand on parking income under "management, maintenance or repair services". It is further added that dual approach of the Department upon same commercial transaction is unjustified. They have further claimed that instances exist where the service provider not only provides the services on free of cost basis but also gives money or incentives to the service recipient to avail its services like in computerized reservation system (CRS) software provided by Galileo India, Amadeus India and Calleo Distribution to encourage their business. In fact they pay incentives to air cargo agent or travel agents for using the software. Similarly, in the present case, the mall owners also find it more commercial viable to give space to the appellant for managing the parking on its own, account instead of bearing the cost and expenses of the managing the parking space themselves. They claimed that renting of immovable property service more appropriately classify the transaction but as no consideration is charged under this category, they cannot be made liable for service tax.

The learned Departmental Representative, however, vehemently argued **4**
supporting the order-in-original and maintained that the services of the appellant was duly covered under the category of "management, maintenance or repairs" and attracted levy of service tax in terms of the provisions of section 65(105)(zzg) of the Finance Act, 1994. He has supported the impugned order and has submitted that it was highly improbable that there was no agreement between the appellant and the mall owners as no

mall owner would allow unhindered activities at the will of the lessee/ occupants of the premises without any preconditions and without any financial consideration. He further supported the finding that the appellant is engaged in providing the service of "management, maintenance or repairs" of malls and in consideration thereof the appellant was given right of space, including parking area for collecting income earned from the parking fees. He further argued that it is admitted that parking space in the malls belong to the mall owners and it cannot be accepted that the applicant has been given permission to use such valuable space without any consideration. It is also an admitted fact that the applicant is incurring huge liabilities in managing and maintaining the parking space including the costs paid to the third party agency through which the appellant was managing the parking facilities. As the third party agency was paying service tax on the invoices issued to the appellant, the appellant in turn was also liable to pay service tax for the same service which it was providing to the mall owners for which the consideration was in terms of receipts of the parking fees collected from the visitors.

5 We have carefully gone through the rival arguments and have perused the record of the appeal.

6 To begin with, we cannot accept the appellant's plea that huge parking space area was given to the appellant without any agreement with respect to financial consideration or without an agreement with respect to contingent liabilities with respect to theft, injuries, fire or other liabilities. It is difficult to believe that such an enormous responsibility was given without any agreement. Even otherwise, the activity of the appellant is covered within the definition of "management, maintenance or repairs". It is not necessary that the service recipient, which are the mall owners in this case should receive any pecuniary consideration from the service. Even a service without any direct pecuniary benefit to the service recipient is also a service. Even if we take that the interest of the mall owners is that the appellant should provide a hassle-free parking, it is a service to the mall owners by the appellant. Again, the plea of the appellant that no monetary consideration is being paid by the mall owners is without substance. The appellant has been allowed to use space and collected parking fee. This is a valid consideration in terms of the service tax provisions as it is not necessary that the consideration should always be directly in the form of money. If the consideration is in terms of some benefit to the service provider which can be measured or converted into money it will constitute a valid consideration. Reference can be made to the relevant provisions of section 67 of the Finance Act, 1994 regarding valuation of the taxable service. It is as follow:

"67. *Valuation of taxable services for charging service tax*.—(1) Subject to the provisions of this chapter, where service tax is chargeable on any taxable service with reference to its value, then such value shall,—

(i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him ;

(ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money as, with the addition of service tax charged, is equivalent to the consideration ;

(iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner.

(2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged.

(3) The gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service.

(4) Subject to the provisions of sub-sections (1), (2) and (3), the value shall be determined in such manner as may be prescribed.

Explanation.—For the purposes of this section,—

(a) 'consideration' includes—

(i) any amount that is payable for the taxable services provided or to be provided ;

(ii) any reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service, except in such circumstances, and subject to such conditions, as may be prescribed ;

(iii) any amount retained by the lottery distributor or selling agent from gross sale amount of lottery ticket in addition to the fee or commission, if any, or, as the case may be, the discount received, that is to say, the difference in the face value of lottery ticket and the price at which the distributor or selling agent gets such ticket."

Section 67(1)(i) clearly stipulates that where the consideration is not wholly or partly consisting of money, it would be such amount in money 7

as, with the addition of service tax charged, is equivalent to the consideration. Further, in section 67(1)(i) consideration has be taken as the gross amount charged by the service provider. Thus, there is no doubt that the right to collect parking fees given by the mall owners is nothing but a consideration provided to the appellant by the mall owners and the measure of such consideration is the gross income generated through the parking fees.

8 We further find that the learned counsel for the appellant has sought to repudiate the liability on the impugned activity by contending that they are merely operating the parking area which is different from the service of "management, maintenance and repairs". We are not inclined to accept this distinction because as far as the business activity is concerned qua the appellant, it is operation of the parking area but when this activity is examined qua the mall owners they are providing the service of "management, maintenance or repairs" to the mall owners.

9 We also find that the case laws cited by the appellant are not relevant in the light of these findings. However, we accept the additional plea of the learned counsel of the appellant that such gross income will include service tax also and the taxable income has to be computed after abating the amount of service tax from the gross income in terms of section 67(2) of the Finance Act. Therefore, the income shown in the balance sheet as parking fees will be considered as cum-tax value for determination of service tax. We also accept the argument of the learned counsel of the appellant that they will be eligible to avail the Cenvat credit of the service tax paid on input services, which have been provided to the appellant by third party agency or any other service providers in providing the said service of "management, maintenance and repairs" of the parking area.

10 However, we cannot accept the plea of the appellant that no extended period was invocable as there was no wilful suppression of facts on their part as they were submitting regular service tax returns to the department. We find that there was a clear mis-declaration and wilful suppression in as much as the appellant has suppressed the income of parking fees in the relevant returns with an ulterior motive to evade the service tax. They have wilfully designed their mode of operation to evade the service tax. As such we find that the extended period is invocable in the case.

11 In view of entire above discussion we uphold the order-in-original so far as legality of levy of service tax on the activity under "management, maintenance or repair service" is concerned. However, the appellant will be entitled to avail Cenvat credit of service tax paid by the service providers and cum-duty benefit. The penalties under section 78 of the Finance Act, 1994 need to be reworked accordingly.

In view of the above findings we remand the case to the adjudicating 12
authority to re-determine the taxable demand, interest and penalties in the light of the above findings. The appeal is, accordingly, allowed to the extent indicated above.

[2020] 75 GSTR 557 (Mad)

[IN THE MADRAS HIGH COURT]

HINDUSTAN CONSTRUCTION CO. LTD.

v.

STATE OF TAMIL NADU

T. S. SIVAGNANAM and **N. SATHISH KUMAR** JJ.

January 3, 2019.

HF ▶ Assessee

SALES TAX—ADDITIONAL SALES TAX—TAXABLE TURNOVER—DEDUCTIONS—PAYMENTS TO SUB-CONTRACTORS—SUB-CONTRACTORS REGISTERED DEALERS—FINDING OF TRIBUNAL THAT THEY HAD PAID TAXES AND THAT PAYMENTS WOULD NOT FORM PART OF TAXABLE TURNOVER OF MAIN CONTRACTOR FOR PURPOSE OF ADDITIONAL SALES TAX—BUT PROVISO THAT DEALER SHOULD FILE FORM XXXVII-B AS CONDITION FOR EXEMPTION—WITHOUT JURISDICTION AND BEYOND SCOPE OF APPEAL FILED BY DEPARTMENT—TAMIL NADU GENERAL SALES TAX ACT (1 of 1959), ss. 2(1)(aa), 3B(2)(d)—TAMIL NADU ADDITIONAL SALES TAX ACT (14 of 1970), s. 3B—TAMIL NADU GENERAL SALES TAX RULES, 1959, FORM XXXVII-B.

For the assessment years 2003-04 and 2004-05 the petitioner-dealer claimed exemption in respect of payment made to sub-contractors during both the assessment years. The assessing officer verified the claim and found it in order and accordingly allowed the exemptions and computed the total turnover. However for the purposes of levy additional sales tax, the assessing officer added the payments made to the sub-contractors although in computing the total turnover for the purpose of levy of sales tax, they were excluded. The dealer preferred an appeal before the Appellate Deputy Commissioner who allowed the appeal finding that the principal agent relationship would not be applicable to the main contractor and sub-contractor as there was no buying or selling involved. On appeal the Tribunal held that if the payments made to sub-contractors were properly assessed at their end both under the Tamil Nadu General Sales Tax Act, 1959 and Tamil Nadu Additional Sales

Tax Act, 1970, they would not form part of the taxable turnover of the main contractor for levying additional sales tax but that such an exemption would be applicable only if form XXXVII-B was filed as proof of levy of tax and additional sales tax at sub-contractors end. On revision petitions by the dealer :

Held, *allowing the petitions, that this finding of the Tribunal was wholly without jurisdiction as it was never the case of the Department that form XXXVII-B was required to be filed for exempting the turnover for the purpose of levy of additional sales tax. It was not the case of the Department that the sub-contractors were not registered dealers nor that they had not paid taxes or additional sales tax. In fact, the finding rendered by the Tribunal on this aspect was clearly in favour of the dealer and against the Department. In such circumstances, the finding rendered by the Tribunal that the dealer should file form XXXVII-B was wholly without jurisdiction and beyond the scope of the appeal filed by the Department. The order passed by the Tribunal to that extent was unsustainable.*

Tax Case (Revision) Nos. 32 and 33 of 2013.

S. Ramanathan for the petitioner.

V. Haribabu, Additional Government Pleader, for the respondent.

ORDER

The order of the court was made by

1 T. S. SIVAGNANAM J.—These tax case revisions are filed by the dealer under the Tamil Nadu General Sales Tax Act, 1959 (the TNGST Act) challenging the orders passed by the Tamil Nadu Sales Tax Appellate Tribunal (Main Bench), Chennai in STA. Nos. 290 and 291 of 2008 dated November 19, 2012 for the assessment years 2003-04 and 2004-05.

2 These tax case revisions have been admitted on the following substantial questions of law :

> "(1) Whether, on the facts and in the circumstances of the case, the honourable Tribunal was correct in holding that form XXXVII B is essential to prove that the sub contractors are registered dealers and have paid the taxes, when section 3B(2)(d) of the TNGST Act grants exemption on the payments made to sub-contractors subject to the condition that sub-contractors are registered dealers and that such amounts (payments) are included in the return filed by the sub-contractors ?
>
> (2) Whether the honourable Tribunal having held that section 3B of the Act clearly speaks about the works contract and not defined the principal and agents relationship was correct in remanding the case to

ascertain whether form XXXVII-B is available for all sub-contractors when those forms are not prescribed as per section 3B of the TNGST Act for claiming exemption and the petitioner cannot file the form XXXVII-B also as directed by the honourable Tribunal ?

(3) Whether the *Explanation 1* to section 2(1)(aa) of the Additional Sales Tax Act which deals with transactions of the principal and agent would be applicable to main contractor and sub-contractor. When the agent is selling the goods of the principal and on behalf of the principal whereas the sub-contractors are independently dealing the goods and not in the name of the main contractor ?"

Heard Mr. S. Ramanathan, learned counsel for the petitioner and Mr. V. Haribabu, learned Additional Government Pleader for the respondent/Revenue. **3**

The assessment for the relevant years was completed under the provisions of the TNGST Act vide orders dated February 28, 2005 (2003-04) and January 2, 2006 (2004-05). The petitioner/dealer claimed exemption in respect of payment made to sub-contractors during both the assessment years. The assessing officer verified the claim for exemption and found the same to be in order and accordingly allowed the exemptions and computed the total turnover. With regard to the levy of additional sales tax, the assessing officer added the payments made to the sub-contractors for the purpose of computing the total turnover though for the purpose of levy of sales tax, the same was exempted. Aggrieved by such orders, the assessee preferred an appeal before the Appellate Deputy Commissioner (CT)-VI, Chennai. Before the first appellate authority, the petitioner-dealer disputed the inclusion of payments made to the sub-contractors in the taxable turnover for the purpose of arriving at the turnover liable to additional sales tax and levying additional sales tax on the same. The first appellate authority after considering the submissions on either side accepted the stand taken by the petitioner/dealer and allowed the appeal. At this juncture, it would be relevant to take note of the following finding rendered by the first appellate authority : **4**

". . . The equation of the payments made to sub-contractors with that of the transaction between a principal and agent is not tenable, as there is no actual transfer of property in goods from the side of the main contractor, but in the case of consignment sales, the goods actually more from the principal to agent. As rightly contended by the learned advocate, entire goods required to carry out the works contract are procured by the sub-contractor only and used in the works contract and hence the deemed sale value of such goods become the

taxable turnover of the sub-contractor only. The principal agent relationship will be apply only in cases where there is buying and selling as per the *Explanation I-B* of section 2(n) which define '*sale*' and it will not be applicable to the main contractor and sub-contractor as there is no buying or selling is involved in this case."

5 Aggrieved by the same, the Revenue filed an appeal before the Tribunal. We have perused the grounds of appeal filed before the Tribunal by the Revenue and the only contention raised by the Revenue is that the entire job is accomplished by the main contractor partly by them and partly by the sub-contractor and the main contractor is solely responsible to carry out the entire job. Therefore, the main contractor, namely, M/s. Hindustan Construction Co. Ltd., namely, the petitioner/dealer acted as a principal placing sub-contractor as an agent in the executing of contract by them to the customers and therefore, the payments made to sub-contractors would necessarily form part of taxable turnover of the main contractor for the purpose of levy of additional sales tax (AST). The petitioner resisted the contentions raised by the Revenue before the Tribunal contending that they have made payment to the sub-contractors during the relevant assessment years and those sub-contractors are registered dealers and the turnover is eligible for exemption as per section 3B(2)(d) of the TNGST Act and the assessing officer himself has granted exemption on the said turnover while arriving at the taxable turnover and therefore it would not form part of the taxable turnover also. Further, it was contended that the payment would not be liable for tax under section 7C of the TNGST Act and therefore, by adding the said turnover for the purpose of arriving the turnover for AST is not correct and without jurisdiction. Further, the petitioner contended that the Revenue is not correct in relying upon the *Explanation* to sub-section (1) to section 2(1)(aa) of the Additional Sales Tax Act as they have failed to consider that the said *Explanation* relates to agents, principal and in the petitioner's case, it is the main contractor and sub-contractor. Therefore, the *Explanation* will not be applicable. Furthermore, the assessing officer himself has granted exemption on the payments made to sub-contractors and therefore, it would not form part of the taxable turnover and hence, no additional sales tax can be levied on the said turnover as the charging section, namely, section 2(1)(aa) clearly reads that the additional sales tax is leviable only on the taxable turnover. Further, the petitioner contended that the payments made to the sub-contractor is the turnover of the sub-contractor and those sub-contractors are registered dealers and the turnover has been assessed to tax and additional sales tax at the hands of the sub-contractor and therefore, levying additional sales tax at the hands of the petitioner would amount to double taxation of the same turnover.

The Tribunal after considering the submissions made on either side 6
accepted the case of the petitioner and held that if the payments made to sub-contractors were properly assessed at their end both under the Tamil Nadu General Sales Tax Act, 1959 and Tamil Nadu Additional Sales Tax Act, 1970, it would not form part of the taxable turnover of the main contractor for levying AST. Further, the Tribunal held that section 3B of the Act clearly speaks about the works contract and not defines the principal and agent relationship. Accordingly, it held that the payment made to the sub-contractors is an exempted turnover and are not eligible for levy of AST. However, after having come to such a conclusion, the Tribunal held that such an exemption would be applicable only if form XXXVII-B was filed as proof of levy of tax and AST at sub-contractors end.

This finding of the Tribunal is wholly without jurisdiction as it was never 7
the case of the Revenue that form XXXVII-B was required to be filed for exempting the turnover for the purpose of levy of AST. In other words, this issue was never raised by the Revenue before the Tribunal. Furthermore, it is not the case of the Revenue that sub-contractors are not registered dealers and neither it is their case that they have not paid taxes or AST. In fact, the finding rendered by the Tribunal on this aspect is clearly in favour of the petitioner and against the Revenue. In such circumstances, we hold that the finding rendered by the Tribunal that the petitioner should file form XXXVII-B is wholly without jurisdiction and beyond the scope of the appeal filed by the Revenue. Hence, we are of the considered view that the order passed by the Tribunal to that extent is unsustainable.

For the above reasons, these tax case revisions are allowed and the sub- 8
stantial questions of law are answered in favour of the petitioner. No costs.

[2020] 75 GSTR 561 (Guj)

[IN THE GUJARAT HIGH COURT]

MONTAGE ENTERPRISES PVT. LTD.

v.

STATE OF GUJARAT

MS. HARSHA DEVANI and **MS. SANGEETA K. VISHEN** JJ.

September 30, 2019.

HF ▶ Assessee

GOODS AND SERVICES TAX—GOODS IN TRANSIT—DETENTION—CONFISCATION—DISPATCH OF TRUCKLOAD OF PACKING MATERIALS FROM M. P. FOR DELIVERY TO REGISTERED DEALER IN GUJARAT BY PETITIONER—

AS GOODS NEARING DESTINATION EMPLOYEE OF PETITIONER REALIZING THAT GOODS ERRONEOUSLY DISPATCHED TO GUJARAT AND DRIVER INSTRUCTED TO AWAIT FURTHER INSTRUCTIONS—DETENTION OF GOODS ON GROUND THAT GENUINENESS OF GOODS IN TRANSIT REQUIRED VERIFICATION—NOTICE ISSUED FOR CONFISCATION OF GOODS, AND REFUSAL TO RELEASE GOODS WITHOUT PAYMENT OF TAX, PENALTY AND REDEMPTION FINE EQUAL TO VALUE OF GOODS—THAT CONVEYANCE POSSESSED MANDATORY DOCUMENTS QUA ALUMINIUM FOILS NOT DISPUTED—NOTICE OF CONFISCATION QUASHED—DIRECTION TO RELEASE PACKING MATERIALS/ ALUMINIUM FOILS—RESPONDENTS PERMITTED TO PROCEED FURTHER PURSUANT TO NOTICE IN RESPECT OF PAN MASALA TRANSPORTED (OF WHICH NOBODY CLAIMED OWNERSHIP) AND CONVEYANCE—CENTRAL GOODS AND SERVICES TAX ACT (12 OF 2017), SS. 129, 130.

The petitioner, engaged in the business of manufacture and sale of packing materials had dispatched from Madhya Pradesh a truckload of packing materials for delivery to A his regular customer, a registered dealer in Gujarat. The driver of the truck was given tax invoice as well as e-way bill generated on the online portal and he was also carrying a transport receipt thereof. As the goods were nearing their destination, as mentioned in the e-way bill, the concerned employee of the petitioner telephonically informed the customer that the goods were about to be delivered. However, to the surprise of the employee, the customer informed him that there was no pending order from its end. Thereafter, upon internal assessment, the employee realized that the goods had been erroneously dispatched to Gujarat even though there was no pending order from A. The petitioner, therefore, immediately informed the driver to await further instructions and the State Tax Officer, Mobile Squad detained the goods under section 129 of the CGST Act on the ground that the genuineness of the goods in transit required verification. The respondent authorities did not accede to a request by the petitioner to release the goods since they were accompanied by e-way bill and tax invoice. However, the petitioner received a notice dated September 12, 2019 issued under section 130 of the CGST Act for confiscation of the goods, wherein it was mentioned that the place of recipient did not exist. The State Tax Officer refused to release the goods without payment of tax, penalty as well as redemption fine equal to the value of goods, as mentioned in the notice. On a writ petition seeking release of the goods :

Held, *allowing the petition, that the authorities did not dispute the fact that qua the packing materials/aluminium foils, the conveyance possessed the mandatory documents and did not object to the release of the goods in ques-*

tion. It was further stated that the court might not entertain the present petition qua both the goods being pan masala (of which nobody claimed ownership) and the conveyance and that the authorities be permitted to proceed further in respect of the same. Therefore the notice of confiscation issued under section 130 of the CGST Act was quashed and set aside to the extent the same sought to confiscate the packing materials/aluminium foils.

[*The court accordingly directed the respondents to forthwith release the packing materials/aluminium foils and permitted to proceed further pursuant to the notice insofar as the pan masala, which was being transported in the conveyance as well as the conveyance were concerned.*]

R/Special Civil Application No. 16555 of 2019.

Uchit N. Sheth (7336) for the petitioner.

Ms. Maithili Mehta, Assistant Government Pleader, for the respondent.

ORDER[1]

The order of the court was made by

MS. HARSHA DEVANI J.—Ms. Maithili Mehta, learned Assistant Government Pleader, has tendered affidavit-in-reply of the respondents. The same is taken on record. 1

Rule. Ms. Maithili Mehta, learned Assistant Government Pleader, waives service of notice of rule on behalf of the respondents. 2

Having regard to the controversy involved in the present case, which lies in a very narrow compass and with the consent of the learned advocates for the respective parties, the matter is taken up for final hearing. 3

By this petition under article 226 of the Constitution of India, the petitioner seeks a direction to the respondents to forthwith release the Truck No. MP09KD9851 along with the goods contained therein. However, in the light of the averments made in the affidavit-in-reply filed on behalf of the respondents, the learned advocate for the petitioner has restricted his prayer to the release of goods, being in the nature of packing materials/ aluminium foil, which has been seized under the detention order dated August 6, 2019 issued under section 129(1) of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as "the CGST Act") and the provisions of other relevant statutes. 4

The facts as averred in the petition are that the petitioner is engaged in the business of manufacture and sale of packing materials. The petitioner regularly sells packing materials to a registered trader in the State of 5

1. Oral.

Gujarat by the name of M/s. Alfa Enterprises in the ordinary course of business. The petitioner had dispatched a truckload of packing materials for delivery to M/s. Alfa Enterprises in July 2019. The driver of the truck was given tax invoice as well as e-way bill generated on the online portal and the driver was also carrying a transport receipt thereof. As the goods were nearing their destination, as mentioned in the e-way bill, the concerned employee of the petitioner telephonically informed the customer that the goods were about to be delivered. However, to the surprise of the employee, the customer informed him that there was no pending order from its end. Thereafter, upon internal assessment, the employee realized that the goods had been erroneously dispatched to Gujarat even though there was no pending order from M/s. Alfa Enterprises. The petitioner, therefore, immediately informed the driver to await further instructions regarding what was required to be done with the goods. While the truck with the goods was in Ahmedabad and the driver was awaiting instructions regarding further transportation, respondent No. 2, State Tax Officer (1), Mobile Squad, Division 1, Ahmedabad, detained the goods under section 129 of the CGST Act on the ground that the genuineness of the goods in transit required verification. The statement of the driver was taken in the prescribed format and the same was duly signed by the driver.

6 It appears that one of the grounds mentioned in the order was that the driver or the authorized person was not present, even though the driver had signed the statement at the time of detention. The petitioner orally requested the respondent-authorities to release the goods since they were accompanied by e-way bill and tax invoice, however, the respondent-authorities did not accede to such request. The petitioner also did not receive any notice for payment of tax and penalty, as envisaged under section 129 of the CGST Act. However, the petitioner received a notice dated September 12, 2019 issued under section 130 of the CGST Act for confiscation of the goods, wherein it was mentioned that the place of recipient did not exist.

7 Since respondent No. 2 is refusing to release the goods without payment of tax, penalty as well as redemption fine equal to the value of goods, as mentioned in the impugned notice, the petitioner has approached this court seeking release of the goods in question.

8 Heard Mr. Uchit Sheth, learned advocate for the petitioner and Ms. Maithili Mehta, learned Assistant Government Pleader, for the respondents.

9 From paragraph Nos. 10 and 11 of the affidavit-in-reply filed on behalf of the respondents, it emerges that according to the respondents, in its

statement, M/s. Alfa Enterprises, the purchaser herein, has denied purchasing any such goods, namely, aluminium foils, as per the invoice and e-way bill produced by the petitioner. It appears that the respondents have issued an advertisement in the newspaper calling upon the owner of the goods, namely pan masala, for the purpose of claiming the said goods. However, till date, no one has claimed ownership of the goods being pan masala.

10 It is further averred that the petitioner has claimed the goods, namely, aluminium foils, which was dispatched from Madhya Pradesh, as M/s. Alfa Enterprises has denied purchasing the said goods. The authorities do not dispute the fact that qua the aluminium foils, the conveyance possessed the mandatory documents. It is further stated that the court may not entertain the present petition qua both the conveyance as well as the goods being pan masala and that the authorities be permitted to proceed further in respect of the same.

11 Since the present petition is filed only to release the goods being packing materials/aluminium foils, in the light of the averments made in the affidavit-in-reply filed on behalf of the respondents, wherein they do not object to the release of the goods in question, the petition deserves to be allowed.

12 For the foregoing reasons, the petition succeeds and is, accordingly, allowed to the following extent :

The impugned notice of confiscation dated September 12, 2019 issued under section 130 of the CGST Act is hereby quashed and set aside to the extent the same seeks to confiscate the goods in question, namely, packing materials/aluminium foils and the respondents are directed to forthwith release the said goods. It is further clarified that insofar as the other goods being the pan masala, which was being transported in the conveyance as well as the conveyance itself are concerned, the respondents are permitted to proceed further pursuant to the impugned notice. Rule is made absolute to the above extent. Direct service is permitted.

[2020] 75 GSTR 566 (All)

[IN THE ALLAHABAD HIGH COURT]

INGERSOLL-RAND TECHNOLOGIES AND SERVICES PRIVATE LIMITED

v.

UNION OF INDIA AND OTHERS

BISWANATH SOMADDER and **AJAY BHANOT** JJ.

November 21, 2019.

HF ▶ Department

GOODS AND SERVICES TAX—TRANSITION PROVISION—INPUT-TAX CREDIT—REVISED DECLARATION IN FORM GST TRAN 1—FORM GST TRAN-1 SUBMITTED BY PETITIONER ON OCTOBER 10, 2017 TO CARRY FORWARD CREDITS AVAILABLE TO PETITIONER AS ON JUNE 30, 2017—LETTER DATED MARCH 28, 2019 TO CHAIRMAN, GOODS AND SERVICES TAX COUNCIL, REQUESTING IT TO ALLOW PETITIONER TO RE-SUBMIT FORM GST TRAN-1 WITHIN EXTENDED PERIOD TO ENABLE PETITIONER TO CARRY FORWARD CREDIT OF SPECIAL ADDITIONAL DUTY ON STOCK OF GOODS LYING AS ON JUNE 30, 2017 UNDER TRANSITIONAL PROVISIONS—WRIT PETITION SEEKING COURT'S INTERVENTION AND PRAYING FOR WRIT OF MANDAMUS—"FURTHER PERIOD AS MAY BE EXTENDED BY COMMISSIONER" UNDER RULE 120A, CANNOT GO BEYOND TIME-FRAME PROVIDED UNDER RULE 117—PERIOD OF EXTENSION STATUTORILY CIRCUMSCRIBED AT 90 DAYS AND THAT TOO ONLY ON RECOMMENDATION OF COUNCIL—COURT CANNOT ISSUE WRIT IN NATURE OF MANDAMUS—OPEN TO COUNCIL TO TAKE DECISION IN LIGHT OF WRIT PETITIONER'S LETTER—UTTAR PRADESH GOODS AND SERVICES TAX ACT (1 of 2017), s. 140(3)—UTTAR PRADESH GOODS AND SERVICES TAX RULES, 2017, rr. 117, 120A—CONSTITUTION OF INDIA, art. 226.

The writ petitioner had submitted form GST TRAN-1 on 10th October, 2017, to carry forward the credits available to it as on June 30, 2017. By a letter dated March 28, 2019, addressed to the Chairman, Goods and Services Tax Council, the writ petitioner had requested the Council to consider its case and to allow the writ petitioner to re-submit form GST TRAN-1 within the extended period in order to enable the writ petitioner to carry forward the credit of special additional duty amount in relation to stock of goods lying as on June 30, 2017, under the transitional provisions of section 140(3) of the Uttar Pradesh Goods and Services Tax Act, 2017. Thereafter the petitioner filed a writ petition praying for a writ in the nature of mandamus to allow the

writ petitioner to file a revised declaration in Form GST TRAN-1 or manually accept the same to enable the writ petitioner to carry forward the credit of SAD amount on stock of goods lying as on June 30, 2017, not claimed by it inadvertently :

Held, *that a conjoint reading of rules 120A and 117 of the Uttar Pradesh Goods and Services Tax Rules, 2017 would show that every registered person who had submitted a declaration electronically in form GST TRAN-1 within the period specified in rule 117 or rule 118 or rule 119 or rule 120 was allowed to revise such declaration once and submit the revised declaration in form GST TRAN-1 electronically on the common portal, "within the period specified in the said rules or such further period as may be extended by the Commissioner in this behalf." This further period—as might be extended by the Commissioner—which was provided under rule 120A, therefore, could not go beyond the time-frame provided under rule 117 of the Uttar Pradesh Goods and Services Tax Rules, 2017. The period of extension had been statutorily circumscribed at 90 days and that too was possible only on the recommendation of the Council. If it was assumed that the Commissioner while exercising his powers under rule 120A of the Uttar Pradesh Goods and Services Tax Rules, 2017 could extend the time period for the purpose of filing of a revised declaration by a registered person in form GST TRAN-1 for an unlimited or an indefinite period, it would simply mean that any registered person could avail of the benefit of filing a revised declaration in form GST TRAN-1 for an unlimited or indefinite period of time after submitting a declaration electronically in form GST TRAN-1 under rule 117 of the Rules. That surely could not have been the purpose and intention of the Legislature. Rather, the Legislature in its wisdom had noticed rule 117, rule 118, rule 119 and rule 120, while framing rule 120A of the Rules. The first proviso attached to rule 117 of the Rules, read "provided that the Commissioner may, on the recommendations of the council, extend the period of ninety days by a further period not exceeding ninety days". In such circumstances a writ in the nature of mandamus, as prayed for, could not be granted by the court.*

[*The court observed that it was open to the Council to take a decision in the matter in the light of the writ petitioner's letter dated March 28, 2019.*]

Writ Tax No. 1120 of 2019.

Atul Gupta and ***Abhishek Kumar Tripathi*** for the petitioner.

The Additional Solicitor General of India, C. S. C and ***Om Prakash Srivastava*** for the respondents.

JUDGMENT

The judgment of the court was delivered by

1 BISWANATH SOMADDER J.—The writ petitioner-company has approached this court essentially seeking its intervention to allow the writ petitioner to file a revised declaration in form GST TRAN-1 or manually accept the same to enable the writ petitioner–company to avail the credit pertaining to SAD (Special Additional Duty) amounting to Rs. 22,51,380.21 ; which, according to the writ petitioner was not claimed by it, inadvertently.

2 The question as to whether we can issue a writ in the nature of mandamus as prayed for can be answered if we look into the applicable provisions of law in the facts of the instant case. However, before we do so, certain facts relevant to the issue before us are required to be taken note of.

3 The writ petitioner intends to avail the credit pertaining to SAD (Special Additional Duty) amounting to Rs. 22,51,380.21 in respect of goods held in stock as on June 30, 2017. It is the admitted position that the writ petitioner has already submitted form GST TRAN-1 on 10th October, 2017, to carry forward the credits available to it as on June 30, 2017. By a letter dated March 28, 2019, addressed to the honourable Chairman, Goods and Services Tax Council, Government of India, the writ petitioner requested the Council to consider its case and to allow the writ petitioner to re-submit form GST TRAN-1 within the extended period in order to enable the writ petitioner-company to carry forward the credit of SAD amount of Rs. 22,51,380.21 in relation to stock of goods lying as on June 30, 2017, under the transitional provisions of section 140(3) of the Uttar Pradesh Goods and Services Tax Rules, 2017. Relevant portion of the letter dated March 28, 2019, is reproduced hereinbelow :

> "In view of the above, we request the council to consider our case and allow us the extended period to re-submit form GST TRAN-1 in order to enable us to carry forward the credit of SAD amounting to Rs. 22,51,380.21 in relation to stock of goods lying as on June 30, 2017 under the transitional provisions of section 140(3) of the CGST Act. We would again like to submit that as we were entitled to carry forward the credit of the said amount of SAD under the transitional provisions, such substantive benefit should not be denied to us due to a procedural lapse."

4 However, in spite of the above letter being on record, the writ petitioner has now come forward before this court claiming that it is the Commissioner, Commercial Tax, U. P., who has the power to extend the time period for the purpose of submitting a revised declaration in form GST TRAN-1.

The first of the relevant rules which we need to take notice of in the facts of the instant case is rule 120A of the Uttar Pradesh Goods and Services Tax Rules, 2017, which reads as follows : 5

"120A. *Revision of declaration in form GST TRAN-1.*—Every registered person who has submitted a declaration electronically in *form GST TRAN-1* within the time period specified in rule 117, rule, 118, rule 119 and rule 120 may revise such declaration once and submit the revised declaration in *form GST TRAN-1* electronically on the common portal within the time period specified in the said rules or such further period as may be extended by the Commissioner in this behalf."

The other rule which we need to take notice of is rule 117 of the Uttar Pradesh Goods and Services Tax Rules, 2017, which reads as follows : 6

"117. *Tax or duty credit carried forward under any existing law or on goods held in stock on the appointed day.*—(1) Every registered person entitled to take credit of input tax under section 140 shall, within ninety days of the appointed day, submit a declaration electronically in *form GST TRAN-1*, duly signed, on the common portal specifying therein, separately, the amount of input-tax credit (. . .) to which he is entitled under the provisions of the said section :

Provided that the Commissioner may, on the recommendations of the Council, extend the period of ninety days by a further period not exceeding ninety days :

Provided further that in the case of a claim under sub-section (1) of section 140, the application shall specify separately,—

(i) the value of claims under section 3, sub-section (3) of section 5, sections 6 and 6A and sub-section (8) of section 8 of the Central Sales Tax Act, 1956 made by the applicant ; and

(ii) the serial number and value of declarations in Form C or F and certificates in form E or H or form I specified in rule 12 of the Central Sales Tax (Registration and Turnover) Rules, 1957 submitted by the applicant in support of the claims referred to in sub-clause (I) ;

(1A) Notwithstanding anything contained in sub-rule (1), the Commissioner may, on the recommendations of the Council, extend the date for submitting the declaration electronically in form GST TRAN-1 by a further period not beyond March 31, 2019, in respect of registered persons who could not submit the said declaration by the due date on account of technical difficulties on the common portal

and in respect of whom the Council has made a recommendation for such extension.

(2) Every declaration under sub-rule (1) shall,—

(a) in the case of a claim under sub-section (2) of section 140, specify separately the following particulars in respect of every item of capital goods as on the appointed day—

(i) the amount of tax or duty availed or utilised by way of input tax credit under each of the existing laws till the appointed day ; and

(ii) the amount of tax or duty yet to be availed or utilised by way of input-tax credit under each of the existing laws till the appointed day ;

(b) in the case of a claim under sub-section (3) or clause (b) of sub-section (4) or sub-section (6) or sub-section (8) of section 140, specify separately the details of stock held on the appointed day ;

(c) in the case of a claim under sub-section (5) of section 140, furnish the following details, namely : —

(i) the name of the supplier, serial number and date of issue of the invoice by the supplier or any document on the basis of which credit of input tax was admissible under the existing law ;

(ii) the description and value of the goods or services ;

(iii) the quantity in case of goods and the unit or unit quantity code thereof ;

(iv) the amount of eligible taxes and duties or, as the case may be, the value added tax (or entry tax) charged by the supplier in respect of the goods or services ; and

(v) the date on which the receipt of goods or services is entered in the books of account of the recipient.

(3) The amount of credit specified in the application in form GST TRAN-1 shall be credited to the electronic credit ledger of the applicant maintained in form GST PMT-2 on the common portal.

(4)(a)(i) A registered person, holding stock of goods which have suffered tax at the first point of their sale in the State and the subsequent sales of which are not subject to tax in the State availing credit in accordance with the proviso to sub-section (3) of section 140 shall be allowed to avail input-tax credit on goods held in stock on the appointed day in respect of which he is not in possession of any document evidencing payment of value added tax.

(ii) The credit referred to in sub-clause (i) shall be allowed at the rate of sixty per cent. on such goods which attract State tax at the rate

of nine per cent., or more and forty per cent., for other goods of the State tax applicable on supply of such goods after the appointed date and shall be credited after the State tax payable on such supply has been paid :

Provided that where integrated tax is paid on such goods, the amount of credit shall be allowed at the rate of thirty per cent. and twenty per cent., respectively of the said tax ;

(iii) The scheme shall be available for six tax periods from the appointed date.

(b) The credit of State tax shall be availed subject to satisfying the following conditions, namely :—

(i) such goods were not wholly exempt from tax under the (name of the State) Value Added Tax Act ; . . .

(ii) the document for procurement of such goods is available with the registered person ;

(iii) the registered person availing of this scheme and having furnished the details of stock held by him in accordance with the provisions of clause (b) of sub-rule (2) , submits a statement in form GST TRAN-2 by March 31, 2018, or within such period as extended by the Commissioner, on the recommendations of the Council, for each of the six tax periods during which the scheme is in operation indicating therein, the details of supplies of such goods effected during the tax period :

Provided that the registered persons filing the declaration in form GST TRAN-1 in accordance with sub-rule (1A), may submit the statement in form GST TRAN-2 by April 30, 2019.

(iv) the amount of credit allowed shall be credited to the electronic credit ledger of the applicant maintained in form GST PMT-2 on the common portal ; and

(v) the stock of goods on which the credit is availed is so stored that it can be easily identified by the registered person."

A conjoint reading of the above two rules clearly reveals that every registered person who has submitted a declaration electronically in form GST TRAN-1 within the period specified in rule 117 or rule 118 or rule 119 or rule 120 is allowed to revise such declaration once and submit the revised declaration in form GST TRAN-1 electronically on the common portal, "*within the period specified in the said rules or such further period as may be extended by the Commissioner in this behalf*". This further period—as may be extended by the Commissioner—which is provided under 7

rule 120A, therefore, cannot go beyond the time-frame provided under rule 117 of the Uttar Pradesh Goods and Services Tax Rules, 2017. The period of extension has been statutorily circumscribed at 90 days and that too is possible only on the recommendation of the Council.

8 If we are to assume that the Commissioner while exercising his powers under rule 120A of the Uttar Pradesh Goods and Services Tax Rules, 2017 can extend the time period for the purpose of filing of a revised declaration by a registered person in form GST TRAN-1 for an unlimited or an indefinite period, it would simply mean that any registered person can avail the benefit of filing a revised declaration in form GST TRAN-1 for an unlimited or indefinite period of time after submitting a declaration electronically in form GST TRAN-1 under rule 117 of the Uttar Pradesh Goods and Services Tax Rules, 2017. That surely could not have been the purpose and intention of the Legislature. Rather, the Legislature in its wisdom has noticed rule 117, rule 118, rule 119 and rule 120, while framing rule 120A of the Uttar Pradesh Goods and Services Tax Rules, 2017. The first proviso attached to rule 117 of the Uttar Pradesh Goods and Services Tax Rules, 2017, reads as follows :

> *"Provided that the Commissioner may, on the recommendations of the Council, extend the period of ninety days by a further period not exceeding ninety days."*

9 In such circumstances as stated above, a writ in the nature of mandamus, as prayed for, cannot be granted by this court. However, it is open to the Council to take a decision in the matter in the light of the writ petitioner's letter dated March 28, 2019.

10 The writ petition is accordingly, disposed of.

[2020] 75 GSTR 572 (P&H)

[IN THE PUNJAB AND HARYANA HIGH COURT]

SHIVA TRADERS

v.

UNION TERRITORY OF CHANDIGARH AND OTHERS

AJAY TEWARI and **AVNEESH JHINGAN** JJ.

February 19, 2020.

HF ▶ Assessee

VALUE ADDED TAX—ASSESSMENT—LIMITATION—LIMITATION PRESCRIBED AT RELEVANT TIME FOR ASSESSMENT THREE YEARS FROM DUE DATE

for filing annual statement—Period extended to six years—For assessment year 2010-11 annual statement to be filed by November 20, 2011 and six years expired on November 19, 2017—Notices issued in 2019—Barred by limitation—Memorandum permitting reassessment where assessments finalised by fraud—Nothing to show assessments already completed—No action taken under section 29(7) which permits amendment of assessment in case of fraud or misrepresentation—Notices and assessment orders to be set aside—Punjab Value Added Tax Act (8 of 2005), s. 29—Punjab Value Added Tax Rules, 2005, r. 40.

For the assessment years 2008-09 to 2010-11 notices for assessment under section 29(2) of the Punjab Value Added Tax Act, 2005 were issued in the year 2019 and in some cases, after issuance of notices in 2019, assessment orders were finalised in the year 2019. On writ petitions challenging the notices and assessment orders as beyond limitation as prescribed under section 29(4) of the Act :

Held, *allowing the petitions, that under section 29, during the relevant time the limitation prescribed for making the assessment was three years from the date when the annual statement was filed or was due to be filed, whichever was later. The provision was amended and the period was extended to six years. In the* Explanation, *it was clarified that the period of six years would apply to those cases in which the period of six years had not yet expired. Under rule 40 of the Punjab Value Added Tax Rules, 2005 (as applicable to Union Territory, Chandigarh), the annual statement had to be filed by November 20 of the year concerned. The last assessment year involved in the case was assessment year 2010-11. The annual statement was to be filed by November 20, 2011 and six years expired on November 19, 2017. Admittedly, all the notices had been issued in the year 2019. A common reply was that the assessment orders were finalised by committing a fraud and even computer entries were made fraudulently and that the notices were issued in pursuance of memo dated July 30, 2018 to all Excise and Taxation Officers and that under section 29(7) of the Act in case of fraud or misrepresentation or escaped assessment, the assessment order could be amended. The memo specifically stated that the designated officers shall issue statutory notices "as per the provisions of the Act" whereas the notices under section 29(2) were not in consonance with the provisions of the Act. No dates of assessment orders had been mentioned in the reply. In any case, if there was already an assessment order, there was no occasion to proceed under section 29(2). Not only were the notices under section 29(2) issued but the assessments were also framed*

under section 29(2) of the Act. The specific provision, i.e., section 29(7) authorises amendment of the assessment order in the eventuality of fraud, but no action till date had been initiated under section 29(7). Admittedly, the notices were beyond limitation and in these circumstances the court could interfere. The notices and the assessment orders were liable to be set aside.

[*The court however clarified that the Department shall be at liberty to proceed against the dealers in accordance with law.*]

WHIRLPOOL CORPORATION *v.* REGISTRAR OF TRADE MARKS [1998] 8 SCC 1 *applied*.

WHIRLPOOL CORPORATION *v.* REGISTRAR OF TRADE MARKS [1998] 8 SCC 1 (para 15) *referred to*.

C. W. P. Nos. 16308, 16310, 16322, 16325, 16609, 16613, 16744, 16747, 16763, 17448, 18541, 18746, 21771, 22133, 22289, 22584, 22735, 22924, 23172, 23461, 23620, 23916, 24079, 24107, 24127, 24146, 24445, 24485, 24616, 24641, 24670, 24970, 24983, 25556, 26425, 26462, 27488, 27500, 27750, 28591, 28677, 29659, 30350, 30393, 30567, 33859 and 33938 of 2019.

Sandeep Goyal, Rishab Singla, Puneet Bassi, Ishan Malhotra, Chetan Jain, Navdeep Monga, Pranav Jain, Avneet Singh, B. D. Rana, Ravinder Arora and *Amit Aggarwal*, Advocates, for the petitioner.

Ajay Jagga, Senior Panel Counsel for Union Territory of Chandigarh for the respondents.

JUDGMENT

The judgment of the court was delivered by

1 AVNEESH JHINGAN J.—The following writ petitions have been filed seeking quashing of the impugned notices/assessment orders being time-barred :

Sl. No.	*Petition No.*	*Assessment year*	*Impugned notice/assessment order*
1	16609 of 2019	2010-11	Notice
2	16613 of 2019	2010-11	Notice
3	16744 of 2019	2010-11	Notice
4	16747 of 2019	2010-11	Notice
5	16763 of 2019	2010-11	Notice
6	17448 of 2019	2009-10 and 2010-11	Notice
7	18541 of 2019	2010-11	Notice
8	18746 of 2019	2009-10	Notice
9	21771 of 2019	2010-11	Notice

10	22133 of 2019	2010-11	Notice
11	22289 of 2019	2010-11	Notice
12	22584 of 2019	2009-10 and 2010-11	Notice
13	22735 of 2019	2009-10	Notice
14	22924 of 2019	2009-10	Notice
15	23172 of 2019	2010-11	Notice
16	23461 of 2019	2010-11	Notice
17	23620 of 2019	2010-11	Notice
18	23916 of 2019	2010-11	Notice
19	24079 of 2019	2009-10	Notice
20	24107 of 2019	2010-11	Notice
21	24127 of 2019	2009-10	Notice
22	24146 of 2019	2009-10	Notice
23	24445 of 2019	2010-11	Notice
24	24485 of 2019	2010-11	Notice
25	24616 of 2019	2010-11	Notice
26	24641 of 2019	2009-10	Notice
27	24670 of 2019	2009-10 and 2010-11	Notice
28	24970 of 2019	2010-11	Notice
29	24983 of 2019	2009-10	Notice
30	25556 of 2019	2008-09 and 2010-11	Notice
31	26425 of 2019	2010-11	Notice
32	26462 of 2019	2009-10	Notice
33	27488 of 2019	2009-10 and 2010-11	Notice
34	27500 of 2019	2009-10 and 2010-11	Notice
35	27750 of 2019	2009-10	Notice
36	28591 of 2019	2009-10	Notice and assessment order dated August 28, 2019
37	28677 of 2019	2009-10	Notice
38	29659 of 2019	2010-11	Notice
39	30350 of 2019	2008-09 and 2009-10	Notice and assessment order dated August 26, 2019
40	30393 of 2019	2010-11	Notice and assessment order dated August 26, 2019
41	30567 of 2019	2008-09	Notice
42	16308 of 2019	2008-09	Notice
43	16310 of 2019	2010-11	Notice
44	16322 of 2019	2010-11	Notice
45	16325 of 2019	2009-10	Notice

46	33859 of 2019	2009-10 and 2010-11	Notices and assessment orders dated August 28, 2019
47	33938 of 2019	2009-10 and 2010-11	Notices and assessment orders dated August 28, 2019

2 The assessment years involved in all these petitions are from 2008-09 to 2010-11. The notices for assessment under section 29(2) of the Punjab Value Added Tax Act, 2005 (for short, "the Act") (as applicable to Union Territory, Chandigarh) were issued in the year 2019 and in C. W. P. Nos. 28591, 30350, 30393, 33859 and 33938 of 2019, after issuance of notices in 2019, assessment orders were finalised in the year 2019. The case of the petitioners is that notices/assessment orders are beyond limitation as prescribed under section 29(4) of the Act, hence are liable to be quashed.

3 Section 29(1) to (4) during the relevant assessment years read as under :

"29. *Assessment of tax*.—(1) Where a return has been filed under sub-section (1) or sub-section (2) of section 26 or in response to a notice under sub-section (6) of section 26, if any tax or interest is found due on the basis of such return, after adjustment of any tax paid on self-assessment and any amount paid otherwise by way of tax or interest, then, without prejudice to the provisions of sub-section (2), an intimation shall be sent to the person specifying the sum so payable, and such intimation shall be deemed to be a notice of demand issued under sub-section (11) and all the provisions of this Act shall apply accordingly :

Provided that except as otherwise provided in this sub-section, the acknowledgment of the return shall be deemed to be an intimation under this sub-section, in case, either no sum is payable by the person or no refund is due to him :

Provided further that no intimation under this sub-section shall be sent after the expiry of two years from the end of financial year in which the return is filed.

(2) Notwithstanding anything contained in sub-section (1), the Commissioner or the designated officer, as the case may be, may, on his own motion or on the basis of information received by him, order or make an assessment of the tax, payable by a person to the best of his judgment and determine the tax payable by him, where,

(a) a person fails to file a return under section 26 ; or

(b) there are definite reasons to believe that a return filed by a person is not correct and complete ; or

(c) there are reasonable grounds to believe that a person is liable to pay tax, but has failed to pay the amount due ; or

(d) a person has availed input-tax credit for which he is not eligible ; or

(e) provisional assessment is framed.

(3) The Commissioner on his own motion or on the basis of information received by him, may, by an order in writing, direct the designated officer to make an assessment of the amount of tax payable by any person or any class of persons for such period, as he may specify in his order.

(4) An assessment under sub-section (2) or sub-section (3), may be made within three years after the date when the annual statement was filed or due to be filed, whichever is later :

Provided that where circumstances so warrant, the Commissioner may, by an order in writing, allow assessment of a taxable person or of a registered person after three years, but not later than six years, from the date, when annual statement was filed or due to be filed by such person, whichever is later."

The said provision was amended vide notification dated June 29, 2016 **4** and the following changes were made :

"Amendment in section 29 of the Punjab Act 8 of 2005 :

6. In the principal Act, in section 29,—

(1) for sub-section (4), the following sub-section shall be *substituted*, namely :—

'(4) An assessment under sub-section (2) or sub-section (3), may be made within a period of six years after the date when the annual statement was filed or due to be filed, whichever is later :

Provided that the assessment under sub-section (2) or sub-section (3), in respect of which annual statement for the assessment year 2006-07 has already been filed, can be made till the 20th day of November, 2014.

Explanations : (1) The limitation period of six years for an assessment under sub-section (2) or sub-section (3), shall also apply to those cases in which the aforesaid period of six years has yet not expired.

(2) It is clarified that prior to commencement of the Punjab Value Added Tax (Second Amendment) Act, 2013, the Commissioner was not required to issue any notice to the concerned person before extending the limitation period of assessment' ; and

(ii) after sub-section (10), the following sub-section shall be *inserted*, namely :—

'(10A) Notwithstanding anything to the contrary contained in any judgment, decree or order of any court, tribunal or other authority, an order passed by the Commissioner under sub-section (4) prior to commencement of the Punjab Value Added Tax (Second Amendment) Act, 2013 shall not be invalid on the ground of prior service of notice or communication of such order to the concerned person'."

5 As per section 29(1), if any amount is found due on the basis of return filed, an intimation is to be sent to the person specifying the sum payable then the same shall be deemed as demand notice. The first proviso to sub-section (1) states that acknowledgment of the return shall be deemed to be intimation under the sub-section either that no sum is payable or no refund is due. Sub-section (2) provides for best judgment assessment in the circumstances prescribed in clauses (a) to (e). As per sub-section (3), the Commissioner on his own motion or on an information received can order framing of an assessment by designated officer by any person or any class of persons for the period prescribed. Sub-section (4) provides limitation for making assessment under sub-section (2) or sub-section (3).

6 From the above provisions, it is evident that during the relevant time the limitation prescribed for making the assessment was within three years from the date when the annual statement was filed or was due to be filed, whichever was later. The said provision was amended and the period was extended to six years. In the *Explanation* added, it was clarified that the period of six years would apply to those cases in which the period of six years had not yet expired.

7 For deciding the present petitions, we are not considering the issue as to whether the amended period of limitation of six years would apply to the present cases or not. We are proceeding by assuming that there was period of six years from the date of filing of the annual statement or when it was due.

8 As per rule 40 of the Punjab Value Added Tax Rules, 2005 (as applicable to Union Territory, Chandigarh), the annual statement is to be filed by 20th November of the year concerned. The last assessment year involved in the bunch is assessment year 2010-11. The annual statement was to be filed by November 20, 2011 and six years expired on November 19, 2017. Admittedly, all the notices have been issued in the year 2019.

9 In spite separate writs, only a common reply has been filed in CWP No. 15870 of 2019. It would be relevant to quote the following stand taken by the respondents in the written statement :

"The case of the petitioner and all other connected cases falls in the category of those assessment orders, which were finalized by committing a fraud and even computer entries were made fraudulently. As such show-cause notices were issued as an opportunity to the petitioners to verify the correctness of assessment orders/computer entries and records of petitioners related to framed assessments."

10 The learned counsel for the respondents submitted that considering the circumstances, a Memo No. 3628, dated July 30, 2018 was issued to all Excise and Taxation Officers, Excise and Taxation Department and in pursuance to the memo notices were issued. He placed reliance on section 29(7) of the Act and argued that in case of fraud or misrepresentation or escaped assessment, the assessment order can be amended. The same is reproduced below :

"(7) The designated officer may, with the prior permission of the Commissioner, within a period of three years from the date of the assessment order, amend an assessment, made under sub-section (2), or sub-section (3), if he discovers under-assessment of tax, payable by a person for the reason that,—

(a) such a person has committed fraud or wilful neglect ; or

(b) such a person has misrepresented facts ; or

(c) a part of the turnover has escaped assessment :

Provided that no order amending such assessment, shall be made without affording an opportunity of being heard to the affected person."

11 The learned counsel for the respondents was not able to dispute the fact that notices issued were under section 29(2) of the Act and were beyond the period of six years.

12 The reliance on memo dated July 30, 2018 is of no help. The relevant portion is quoted below :

"To safeguard the Government revenue in the cases which have been falsely entered in electronic disposal registers pertaining to VAT assessments, the competent authority has ordered that the following steps are to be taken immediately :—

1. *Scrutiny assessments in these cases will be framed by the concerned designated officers by issuing statutory notices to the concerned dealers as per provisions of the Punjab Value Added Tax Act, 2005* (as applicable to U. T., Chandigarh).

2. The concerned ward officers are also directed to check disposal registers of their wards for the last three years along with the

additional demands created and submit the status report within fortnight." (emphasis[1] supplied)

13 Memo specifically states that the designated officers shall issue statutory notices as per the provisions of the Act whereas the notices under section 29(2) were not in consonance with the provisions of the Act.

14 From the stand quoted above, it is forth coming that the case of the respondents is that assessment orders were finalised and computer entries were made, albeit fraudulently. No dates of assessment orders have been mentioned in the reply. In any case, if there was already an assessment order, there was no occasion to proceed under section 29(2). From the writs challenging assessment orders, it is apparent that not only the notices under section 29(2) were issued but the assessments were also framed under section 29(2) of the Act. The contention of fraud does not enhance the case of the respondents. There is a specific provision, i. e., section 29(7) authorising to amend the assessment order in eventuality of fraud, etc., in the present case, though reliance has been placed on the said provision, however no action till date is initiated under section 29(7). Moreover, under section 65 of the Act, there are supervisory powers with the Commissioner to initiate revision proceedings who at his own motion can call the pending as well as disposed of proceedings by the subordinate authority.

15 Normally interference under article 226 of the Constitution of India is not made in the cases where there is alternative statutory remedy available, more so against challenge to show-cause notice or assessment order directly. The law is well-settled that exception can be given to the self imposed restriction, for enforcement of fundamental right in case of violation of principles of natural justice, the proceedings are without jurisdiction or vires are challenged. In *Whirlpool Corporation* v. *Registrar of Trade Marks, Mumbai* [1998] 8 SCC 1, the Supreme Court held as under :

> "14. The power to issue prerogative writs under article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the fundamental rights contained in Part III of the Constitution but also for 'any other purpose'.
>
> 15. Under article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to

1. Here italicised.

entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the fundamental rights or where there has been violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field."

16 The facts are not disputed, admittedly the notices are beyond limitation and it is in these circumstances that interference is made in the writ petitions. The impugned notices/assessment orders are set aside.

17 However, it is clarified that the respondents shall be at liberty to proceed against the petitioners in accordance with law if so advised.

18 The writ petitions are allowed.

19 Considering the magnitude of the alleged fraud vis-a-vis the number of cases and the amount involved, as it is pleaded that in a single case there was involvement of Rs. 60 crores, one of the petition from the bunch has been kept pending for the respondents to file status report on the various aspects of the matter.

[2020] 75 GSTR 581 (Delhi)

[IN THE DELHI HIGH COURT]

PITAMBRA BOOKS PVT. LTD.

v.

UNION OF INDIA AND OTHERS

VIPIN SANGHI and SANJEEV NARULA JJ.

January 21, 2020.

HF ▶ Assessee

GOODS AND SERVICES TAX—INPUT TAX CREDIT—ASSESSEE ENGAGED IN EXPORT AND MAKING ZERO-RATED SUPPLIES—CIRCULARS DENYING BENEFIT OF REFUND OF INPUT-TAX CREDIT WHERE CLAIM FILED FOR SEPARATE YEARS—WRIT PETITION—PRIMA FACIE, CIRCULARS TAKE AWAY VESTED RIGHT OF ASSESSEE—DIRECTION FOR STAY OF CIRCULARS AND DIRECTION

TO DEPARTMENT TO PROCESS ASSESSEE'S CLAIM—CONSTITUTION OF INDIA, ART. 286(1)—INTEGRATED GOODS AND SERVICES TAX ACT (13 of 2017), ss. 2(5), 16(1)(a), 44—CENTRAL GOODS AND SERVICES TAX ACT (12 of 2017), s. 54—INTEGRATED GOODS AND SERVICES TAX RULES, 2017, r. 89.

The assessee was engaged in the business of manufacturing and trading of books. The business involved procuring raw materials and allied goods from the domestic market for manufacture of final product through its in-house manufacturing facility, which was then exported to markets in the Sudan, Russia, Ethiopia, Guinea and other African and Asian countries. The export activity of the assessee was categorised as zero-rated supplies as defined under section 16(1)(a) of the Integrated Goods and Services Tax Act, 2017. For the period from November, 2017 to June, 2018, the assessee claimed that it was eligible for refund of input tax credit in terms of the rule 89(4) of the Integrated Goods and Services Tax Rules, 2017 of Rs. 2.80 crores. For the period from July, 2018 to March, 2019, the amount of eligible refund was Rs. 14.32 crores. At the end of June, 2018, the balance input tax credit was Rs. 6.49 cores and the balance at the end of March, 2018 was Rs. 20.68 crores which included input tax credit claimed and allowed till October, 2017. The assessee exported finished products worth Rs. 2,31,934,457 out of the raw-material received in the month of June, 2018. Upon export, the assessee became eligible for claiming refund of unutilised input tax credit amounting to a total of Rs. 2.80 crores. The assessee procured raw material after paying goods and services tax from the domestic market and manufactured the final product in the months from November, 2017 to June, 2018. However, the production done in the above months was exported only in June, 2018. Therefore, the input tax credit earned by the assessee was spread over two financial years, i. e., 2017-18 and 2018-19. Circular No. 37/11/2018-GST dated March 15, 2018 and Circular No. 125/44/19-GST dated November 18, 2019 inhibited refund claims for a period of two separate (not successive) financial years. On writ petitions claiming that the assessee had been deprived of the benefit of availing of refund of accrued and unutilised input tax credit for the period from April, 2018 to June, 2018, in contravention of section 44 of the Act and rule 89 of the Integrated Goods and Services Tax Rules, 2017 :

Held, *that, prima facie, by way of the circulars, the restriction pertaining to the spread of refund claim across different financial years was arbitrary. There was no rationale or justification for such a constraint. In exports, rotation of funds was essential for the business to thrive. Moreover, businesses did not run according to the whims of the executive authorities. The business*

world could not be told when to place orders for exports, when to manufacture the goods for export and when to actually undertake the exports. The circulars thus blocked the capital of the assessee and the unutilised input tax credit. The assessee had accumulated huge amount of unutilised input tax credit to the tune of Rs. 30 crores. Merely because it made exports in the month of June, 2018, there was no justification to deny the refund of the input tax credit accumulated in the previous financial years. The entire concept of refund of input tax credit relating to zero rated supply would be obliterated if the Department was permitted to put limitations and conditions that took away the assessee's right to claim refund of all the taxes paid on the domestic purchases used for the purpose of zero rated supplies. The circulars took away the vested right of the assessee that had accrued in the relevant period.

[*The court directed that till the next date of hearing, the rigour of paragraph 8 of Circular No. 125/44/2019-GST dated November 18, 2019 should be stayed and directed the Department to either open the online portal so as to enable the assessee to file the tax refund electronically, or to accept it manually within four weeks. The Department was to process the assessee's claim in accordance with law once the tax refund was filed.*]

COMMISSIONER OF CENTRAL EXCISE *v.* RATAN MELTING & WIRE INDUSTRIES [2008] 11 RC 653 *and* PIONEER INDIA ELECTRONICS P. LTD. *v.* UNION OF INDIA [2014] 26 GSTR 156 (Delhi) *relied on.*

COMMISSIONER OF CENTRAL EXCISE *v.* RATAN MELTING & WIRE INDUSTRIES [2008] 11 RC 653 (para 12) *and* PIONEER INDIA ELECTRONICS P. LTD. *v.* UNION OF INDIA [2014] 26 GSTR 156 (Delhi) (para 12) *referred to*.

W. P. (C) No. 627 of 2020.

Puneet Agrawal and *Yuvraj Singh* for the petitioner.

Satyender Kumar, CGSC, for respondent No. 1.

Ms. Sonu Bhatnagar and *Ms. Venus Mehrotra* for respondent Nos.2, 3 and 5.

ORDER

W. P. (C) No. 627 of 2020.—Issue notice. Counter-affidavit be filed within six weeks. Rejoinder, if any, be filed before the next date. 1

List the petition for hearing on August 11, 2020. 2

C. M. No. 1740/2020

The petitioner—who is engaged in the business of manufacturing and trading of books, is registered under the Goods and Services Tax Act (hereinafter referred to as "the Act"). The business involves procuring raw mate- 3

rials and allied goods from the domestic market for manufacture of final product through its in-house manufacturing facility, which is then exported to markets in Sudan, Russia, Ethiopia, Guinea and other African/Asian countries, etc. The export activity of the petitioner is categorised as zero-rated supplies as defined under section 16(1)(a) of the Integrated Goods and Services Tax Act, 2017 (hereinafter referred to as "the IGST Act").

4 The present petition, inter alia, impugns Circular No. 37/11/2018-GST, dated March 15, 2018 and Circular No. 125/44/19-GST, dated November 18, 2019. Mr. Puneet Agrawal, learned counsel for the petitioner, submits that owing to the restrictions imposed in the aforenoted circulars, the petitioner has been deprived of the benefit of availing refund claim of the unutilised input-tax credit for the period from April, 2018 to June, 2018. This is causing serious financial hardship as more than Rs. 30 crores of accrued and unutilised input-tax credit, that is eligible for refund is now lying stuck. The implementation of the aforesaid circulars on the GSTN portal has occasioned the disablement of the option for filing the refund of tax. He submits that the problem stems from paragraph 8 of the impugned Circular No. 125/44/2013/GST, dated 18th November, 2019, which inhibits refund claims for a period of two separate (not successive) financial years. He argues that this is in contravention of section 44 as also rule 89 of the IGST Rules. The aforesaid paragraph reads as under :

> "8. The applicant, at his option, may file a refund claim for a tax period or by clubbing successive tax periods. The period for which refund claim has been filed, however, cannot spread across different financial years. Registered persons having aggregate turnover of up to Rs. 1.5 crore in the preceding financial year or the current financial year opting to file Form GSTR-1 on quarterly basis, can only apply for refund on a quarterly basis or clubbing successive quarters as aforesaid. However, refund claims under categories listed at (a), (c) and (e) in para 3 above must be filed by the applicant chronologically. This means that an applicant, after submitting a refund application under any of these categories for a certain period, shall not be subsequently allowed to file a refund claim under the same category for any previous period. This principle/limitation, however, shall not apply in cases where a fresh application is being filed pursuant to a deficiency memo having been issued earlier."

5 Mr. Agarwal, relies upon article 286(1) of the Constitution of India which provides that no law of State shall impose, or authorise the imposition of tax on the supply where the said supply takes place in the course of export out of the territory of India. He also refers to the definition of

"export of goods" as provided in section 2(5) of the IGST Act which reads as under :

> "(5) 'export of goods' with its grammatical variations and cognate expressions, means taking goods out of India to a place outside India ;"

Mr. Agarwal also relies upon section 16(1)(a) of the IGST Act which **6**
deals with zero rated supply and reads as under :

> "16(1) '*zero-rated supply*' means any of the following supplies of goods or services or both, namely :—
>
> (a) *export of goods or services or both ; or*
>
> (b) supply of goods or services or both to a special economic zone developer or a special economic zone unit.
>
> (2) Subject to the provisions of sub-section (5) of section 17 of the Central Goods and Services Tax Act, credit of input tax may be availed for making zero-rated supplies, notwithstanding that such supply may be an exempt supply.
>
> (3) A registered person making zero rated supply shall be eligible to claim refund under either of the following options, namely :—
>
> (a) *he may supply goods or services or both under bond or letter of undertaking, subject to such conditions, safeguards and procedure as may be prescribed, without payment of integrated tax and claim refund of unutilised input-tax credit ; or*
>
> (b) he may supply goods or services or both, subject to such conditions, safeguards and procedure as may be prescribed, on payment of integrated tax and claim refund of such tax paid on goods or services or both supplied,
>
> in accordance with the provisions of section 54 of the Central Goods and Services Tax Act or the rules made thereunder." (emphasis[1] supplied)

He argues that the petitioner as exporter of goods, has a substantive **7**
right to claim refund of "unutilised input tax credit". He submits that sub-clause (a) of sub-section (3) of section 16 provides that a registered person making zero rated supplies shall be eligible to claim refund by making supply of goods and services under bond or letter of undertaking subject to such conditions, safeguards and procedure as may be prescribed, without payment of integrated tax and claim refund of unutilised input-tax credit in accordance with section 54 of the Central Goods and Services Tax (CGST)

1. Here italicised.

Act or the rules made thereunder. Section 54(1) of the CGST Act provides as under :

"54. *Refund of tax*.—(1) *Any person claiming refund of any tax and interest, if any, paid on such tax or any other amount paid by him, may make an application before the expiry of two years from the relevant date in such form and manner as may be prescribed* :

Provided that a registered person, claiming refund of any balance in the electronic cash ledger in accordance with the provisions of sub-section (6) of section 49, may claim such refund in the return furnished under section 39 in such manner as may be prescribed.

(2) A specialised agency of the United Nations Organisation or any Multilateral Financial Institution and Organisation notified under the United Nations (Privileges and Immunities) Act, 1947 (46 of 1947), Consulate or Embassy of foreign countries or any other person or class of persons, as notified under section 55, entitled to a refund of tax paid by it on inward supplies of goods or services or both, may make an application for such refund, in such form and manner as may be prescribed, before the expiry of six months from the last day of the quarter in which such supply was received.

(3) Subject to the provisions of sub-section (10), a registered person may claim refund of any unutilised input-tax credit at the end of any tax period :

Provided that no refund of unutilised input-tax credit shall be allowed in cases other than—

(i) zero-rated supplies made without payment of tax ;

(ii) where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies (other than nil rated or fully exempt supplies), except supplies of goods or services or both as may be notified by the Government on the recommendations of the Council :

Provided further that no refund of unutilised input-tax credit shall be allowed in cases where the goods exported out of India are subjected to export duty :

Provided also that no refund of input-tax credit shall be allowed, if the supplier of goods or services or both avails of drawback in respect of Central tax or claims refund of the integrated tax paid on such supplies. (emphasis[1] supplied)

1. Here italicised.

Section 54(3) of the said Act provides that a registered person claiming refund of any "unutilised input tax credit" at the end of any tax period, *may make an application before the expiry of two years from the relevant date as enabled by section 54(1)*. Further, rule 89(4)(F) of the CGST Rules define the term "relevant period" as the period for which the claim has been filed. He submits that on a harmonious reading of the aforesaid provisions, it emerges that a person making zero rated supplies can claim refund of unutilised input-tax credit at the end of any tax period by making refund application before the expiry of two years from the relevant date in such form and manner as may be prescribed. He further submits that Circular No. 17/17/2017 earlier provided that the refund period could not spread across different months. However, on receiving representations from traders and the stakeholders, the Government became cognizant of the difficulties faced by the exporters while claiming refund, and the CBIC issued the impugned Circular No. 37/11/2018, recognising the difficulties faced by exporters, which is evident from the following clauses of the said circular : **8**

> "11.1 In many scenarios, exports may not have been made in that period in which the inputs or input services were received and input-tax credit has been availed. Similarly, there may be cases where exports may have been made in a period but no input-tax credit has been availed in the said period. The above referred rule, taking into account such scenarios, defines relevant period in the context of the refund claim and does not link it to a tax period.
>
> 11.2 In this regard, it is hereby clarified that the exporter, at his option, may file refund claim for one calendar month/quarter or by clubbing successive calendar months/quarters. the calendar month(s)/ quarter(s) for which refund claim has been filed, however, *cannot spread across different financial years*."

Mr. Agarwal argues that the language of clause 11.1 indicates that respondents have acknowledged that in a situation where exports have been made in the period where no input tax credit has been availed, the relevant period in the context of refund claim cannot be linked to a tax period. He submits that despite recognising the difficulties faced by the exporters, the respondents have failed to address the scenario in which the petitioner is placed, wherein the refund claim pertains to a different financial year. Under clause 11.2, the exporter has been given an option to file a refund claim for one calendar month/quarter or by clubbing successive calendar months/quarters, however, the said clause restricts the claim of refund in case it is spread across different financial years. The aforesaid restriction is ultra vires the Act and the provisions contained thereunder. He further **9**

argues that the petitioner was availing the input tax credit (ITC) pertaining to zero-rated exports and taxable supplies. GST paid on raw materials which were used solely for making exempted supplies were separately identified and were reversed in accordance with the provisions of rule 42 of the CGST Rules. The ITC relatable to zero rated and taxable supplies so availed was utilised for meeting the output tax for domestic supplies. The ITC balance after utilising the same against output tax liability is eligible for refund subject to the computation of maximum eligible amount, i. e., the amount computed as per rule 89(4), which provides as under :

"(4) In the case of zero-rated supply of goods or services or both without payment of tax under bond or letter of undertaking in accordance with the provisions of sub-section (3) of section 16 of the Integrated Goods and Services Tax Act, 2017 (13 of 2017), refund of input-tax credit shall be granted as per the following formula :

Refund Amount = (Turnover of zero-rated supply of goods + Turnover of zero rated supply of services) × Net ITC ÷ Adjusted total turnover.

Where,—

(A) 'Refund amount' means the maximum refund that is admissible ;

(B) 'Net ITC' means input-tax credit availed on inputs and input services during the relevant period other than the input-tax credit availed for which refund is claimed under sub-rules (4A) or (4B) or both ;

(C) 'Turnover of zero-rated supply of goods' means the value of zero-rated supply of goods made during the relevant period without payment of tax under bond or letter of undertaking, other than the turnover of supplies in respect of which refund is claimed under sub-rules (4A) or (4B) or both ;

(D) 'Turnover of zero-rated supply of services' means the value of zero-rated supply of services made without payment of tax under bond or letter of undertaking, calculated in the following manner, namely :—

Zero-rated supply of services is the aggregate of the payments received during the relevant period for zero-rated supply of services and zero-rated supply of services where supply has been completed for which payment had been received in advance in any period prior to the relevant period reduced by advances received for zero-rated

supply of services for which the supply of services has not been completed during the relevant period ;

(E) 'Adjusted total turnover' means the sum total of the value of—

(a) the turnover in a State or a Union territory, as defined under clause (112) of section 2, excluding the turnover of services ; and

(b) *the turnover of zero-rated supply of services determined in terms of clause (D)* above and non-zero-rated *supply of services, excluding—*

(i) *the value of exempt supplies other than zero-rated supplies; and*

(ii) *the turnover of supplies in respect of which refund is claimed under sub-rule (4A) or sub-rule (4B) or both, if any, during the relevant period.*

(F) '*Relevant period' means the period for which the claim has been filed.*"

For the period from November, 2017 to June, 2018, i.e., for eight **10**
months, the petitioner claims that the eligible refund in terms of the above extracted rule 89(4) would be Rs. 2.80 crores in accordance with the figures available in the GSTR 3B return. For the period from July, 2018 to March, 2019, the amount of eligible refund is Rs. 14.32 crores. At the end of June, 2018, the balance ITC was Rs. 6.49 crores and likewise, the balance at the end of March, 2018 is Rs. 20.68 crores which includes the ITC claimed and allowed till October, 2017. The petitioner exported finished products worth Rs. 23,19,34,457 out of the raw-material received in the month of June, 2018. Upon export, the petitioner became eligible for claiming refund of unutilised ITC amounting to a total of Rs. 2.80 crores. The petitioner procured raw material after paying GST from domestic market and manufactured the final product in the months from November, 2017 to June, 2018. However, the production done in the above months was exported only in June, 2018. Therefore, the ITC earned by the petitioner is spread over two financial years, i. e., 2017-18 and 2018-19 and whereas the export against the said purchases was made only in the financial year 2018-19. Mr. Agrawal submits that in terms of section 16(1) and 16(3) of the IGST read with section 54(3) of the CGST Act, the petitioner is eligible for the refund of accumulated unutilised ITC of Rs. 2.80 crores on account of export of goods. The current position is that by virtue of the circulars, the petitioner is not able to claim the refund as the option of selecting the tax period

which lies with the petitioner in terms of the aforesaid provisions, has been denied. The petitioner has been trying to file the refund application for the unutilised input-tax credit claimed in the respective months of production ; however the impugned circulars have denied the petitioner the statutory rights. Rule 89(4) of the CGST Rules which provides the formula for calculating input tax for refund is in contravention of section 16 of the IGST Act read with section 54 of the CGST Act as the said rule restricts the computation of the refund taking the basis of ITC *"availed during the relevant period"*. The "relevant period" has been defined in rule 89(4)(F) as the period for which the claim has been filed and said provision is also impugned in the petition. Mr. Agarwal argues that the impugned circulars, in so far as they restrict the refund claims only on monthly basis, are contrary to the rights conferred by the Act.

11 Ms. Bhatnagar, learned senior standing counsel for the Revenue on the other hand, has argued that under the scheme of the Act, the tax period is on month to month basis. She submits that though the Government has provided for clubbing of the months and the quarters, however, under no circumstances can the refund claims spill over from one year to another. She argues that the petitioner does not have unfettered rights for claiming refund. Section 16(3) of the IGST Act, clearly stipulates that the refund is subject to conditions, and therefore, the Government is well within its jurisdiction to impose conditions by way of the impugned circular. Further, she submits that under section 2(106) of the GST Act, the tax period has been defined to mean a period for which a return is required to be filed. The return under the Act has to be filed on a month to month basis and, therefore, the petitioner does not have any right to claim refund for one financial year, in another.

12 The matter certainly requires our consideration and we have already called upon the respondents to file a detailed counter-affidavit to meet the contentions of the petitioner. However, at this stage, we are of the prima facie view that by way of the impugned circulars, though the respondents recognise the difficulties faced by the exporters and have permitted them to file refund claim for one calendar month/quarter or by clubbing successive calendar months/quarters, yet the restriction pertaining to the spread of refund claim across different financial years is arbitrary. There is no rationale or justification for such a constraint. In the instant case, where exports are not made in the same financial year, question arises as to whether respondents can restrict the filing of the refund for tax periods spread across two financial years and deprive the petitioner of its valuable right accrued in his favour. In exports, availability of the rotation of funds is essential for

the business to thrive. Moreover, businesses do not run according to the whims of the executive authorities. The business world cannot be told when to place orders for exports ; when to manufacture the goods for export ; and when to actually undertake the exports. Respondents' impugned circulars have thus blocked the capital of the petitioner and the unutilised ITC and it has accumulated huge amount of unutilised ITC to the tune of Rs. 30 crores. Merely because the petitioner made exports in the month of June, 2018, we do not see any justification to deny the refund of the ITC which have accumulated in the previous financial years. The entire concept of refund of ITC relating to zero rated supply would be obliterated in case the respondents are permitted to put any limitation and condition that takes away the petitioner's right to claim refund of all the taxes paid on the domestic purchases used for the purpose of zero rated supplies. The incentive given to the exporters would lose its meaning and this would cause grave hardship to the exporters who are earning valuable foreign exchange for the country. The respondents cannot, artificially by acting contrary to the fundamental spirit and object of the law, contrive ways to deny the benefit, which the substantive provisions of the law confer on the taxpayers. Thus, in our considered opinion, the petitioner has a strong prima facie case, and we cannot deny the petitioner of its right to claim refund which is visible from the mechanism provided under the Act. The impugned circulars take away the vested right of the taxpayer that has accrued in the relevant period. It would be profitable to refer to the judgment in this court in *Pioneer India Electronics P. Ltd.* v. *Union of India* [2014] 26 GSTR 156 (Delhi) ; ILR [2014] II Delhi 791 wherein impugned circular stipulating that section 27 of the Customs Act had no application was quashed, holding that circulars can supplant but not supplement the law. Circulars might mitigate rigours of law by granting administrative relief beyond relevant provisions of the statute, however, Central Government is not empowered to withdraw benefits or impose stricter conditions than postulated by the law. Further the Constitution Bench of the Supreme Court in the case of *Commissioner of Central Excise, Bolpur* v. *Ratan Melting & Wire Industries* [2008] 11 RC 653 ; [2008] 13 SCC 1, it was held as under (paras 6 and 7, page 656 in 11 RC) :

> "7. Circulars and instructions issued by the Board are no doubt binding in law on the authorities under the respective statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the court to direct that the circular should be given effect to and not the view expressed in a decision of this court or the High Court. So far as

the clarifications/circulars issued by the Central Government and of the State Government are concerned they represent merely their understanding of the statutory provisions. They are not binding upon the court. It is for the court to declare what the particular provision of statute says and it is not for the executive. Looked at from another angle, a circular which is contrary to the statutory provisions has really no existence in law.

8. . . . To lay content with the circular would mean that the valuable right of challenge would be denied to him and there would be no scope for adjudication by the High Court or the Supreme Court. That would be against very concept of majesty of law declared by this court and the binding effect in terms of article 141 of the Constitution."

13 Having regard to the aforenoted circumstances, till the next date of hearing, we stay the rigour of paragraph 8 of Circular No. 125/44/2019-GST, dated November 18, 2019 and also direct the respondents to either open the online portal so as to enable the petitioner to file the tax refund electronically, or to accept the same manually within 4 weeks from today.

14 The respondents are directed to process the petitioner's claim in accordance with law once the tax refund is filed.

(END OF VOLUME 75)