"Recent Important Judgments under MVAT Act & CST Act"
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1] UTI Mutual Fund (VAT SA 100 to 102 of 2014 dt.22.9.2015)

Rule 52 of MVAT Rules,2005 which prescribes eligibility to set off reads as under:

"**52. Claim and grant of set-off in respect of purchases made during any period commencing on or after the appointed day.**

(1) In assessing the amount of tax payable in respect of any period starting on or after the appointed day, by a registered dealer (hereinafter, in this rule, referred to as 'the claimant dealer') the Commissioner shall subject to the provisions of [rules 53,54,55 & 55B] in respect of the purchases of goods made by the claimant dealer on or after the appointed day, grant him a set-off of the aggregate of the following sums, that is to say,

(a) the sum collected separately from the claimant dealer by the other registered dealer by way of [tax] on the purchases made by the claimant dealer from the said registered dealer of goods being capital assets and [goods the purchases of which are debited to the profit and loss account or, as the case may be, the trading account],

(b) tax paid in respect of any entry made after the appointed day under the Maharashtra Tax on the Entry of Motor Vehicles into Local Areas Act, 1987, and

(c) the tax paid in respect of any entry made after the appointed day under the Maharashtra Tax on the Entry of Goods into Local Areas Act, 2003.

(d) the purchase tax paid by the claimant dealer under this Act."

Thus, to find out actual availability of set off reference is required to be made to Rules like Rules 53 & 54. Rule 53 prescribes reduction in set off whereas Rule 54 is about negative list.

Rule 53(6)(b)

One of the Rules prescribing reduction in set off is rule 53(6). In particular Rule 53(6)(b) is applicable to dealers in general. The said rule is reproduced below for ready reference.

"**53. *Reduction in set-off*. –**

(6) If out of the gross receipts of a dealer in any year, receipts on account of sale are less than fifty per cent. of the total receipts, -

(a) …

(b) in so far as the dealer is not a hotel or restaurant, the dealer shall be entitled to claim set-off only on those purchases effected in that year where the corresponding goods are sold or resold within six months of the date of purchase or are consigned within the said period, not by way of sale to another State, to oneself or one's agent or purchases of packing materials used for packing of such goods sold, resold or consigned:

Provided that for the purposes of clause (*b*), the dealer who is a manufacturer of goods not being a dealer principally engaged in doing job work or labour work shall be entitled to

claim set-off on his purchases of plant and machinery which are treated as capital assets and purchases of parts, components and accessories of the said capital assets, and on purchases of consumables, stores and packing materials in respect of a period of three years from the date of effect of the certificate of registration.

Explanation.- For the purposes of this sub-rule, "receipts" means the receipts pertaining to all activities including business activities carried out in the State but does not include the amount representing the value of the goods consigned not by way of sales to another State to oneself

or one's agent."

It can be seen that the rule provides for reduction or, in other words, restricted set off, when the receipts from sales are less than 50% of gross receipts.

The Explanation under rule 53(6)(b) also provides meaning of gross receipts. There are disputes about meaning of gross receipts and how to compute it.

It can also be noted that if receipts from sales are less than 50% of gross receipts then set off is eligible only in respect of purchases which are sold within six months from the date of purchase. Therefore, the goods which are not sold like, consumed, capital goods or goods which are not sold within six months are not eligible for set off.

Mutual Funds

Recently there was controversy in relation to set off to Mutual Funds. The Hon. M.S.T. Tribunal had an occasion to decide such issue in case of **UTI Mutual Fund (VAT SA 100 to 102 of 2014 dt.22.9.2015)**. The facts as narrated in the judgment are as under:

"The Appellant is a mutual fund registered with the Securities and Exchange Board of India (SEBI) and is regulated under the SEBI (Mutual Funds) Regulations, 1996. UTI Gold Exchange Traded Fund (UTI GETF) is one of the schemes of the Appellant and the same is also regulated by SEBI under the SEBI MF regulations.

3. As per the SEBI MF regulations, the balance sheet and revenue accounts of the each scheme are required to be prepared separately and audited separately and no consolidated balance sheet of various schemes of a Mutual Fund is prepared. Thus, each scheme has a separate entity including separate receipts, funds, assets liabilities etc.

4. As per the MVAT provisions, VAT is applicable on the turnover of sale of goods and the definition of goods specifically excludes securities. Therefore only UTI GETF is subject to VAT and not the other schemes of the Appellant as other schemes invested in securities and not in gold. The Appellant obtained VAT registration simultaneously with the launch of UTI GETF and not earlier despite the other schemes of the Appellant dealer being in operation much before that. Thus the Appellant is assumed the role of dealer only on the launch of UTI GETF scheme and only this scheme should be considered and not any other scheme of the Appellant."

From the judgment, it can be seen that the Mutual fund has receipts from various schemes like relating to securities, gold etc.. Over all, the sales receipts are from sale of gold whereas there are other receipts towards securities etc.. The main issue involved was whether the gross receipts should be computed considering receipts from all the schemes or only from gold scheme separately.

The further argument was that under MVAT Act, only sale of goods can be considered as receipts and not other receipts which do not involve goods like shares, securities etc..

Hon. Tribunal has dealt with the issue in following words.

"The Learned representative of revenue has relied on the judgment of this Tribunal reported in the case of **M/s. UTI Mutual Fund (present Appeal) v/s. State of Maharashtra reported in 2013 (ST1) GJX 0626 STMAH** wherein it is observed:-

"The set-off u/s 48(1)(a)(ii) of MVAT Act is circumscribed with limitations. The limitations are (i) circumstances, (ii) conditions (iii) restrictions, as may be specified in the Rules. Rule 53 prescribe reduction in set-off in full or part, particularly Rule 53(6) (b) MVAT Rules prescribe restriction. Restriction is in the nature of duration of purchase and its sale. The restriction is where the receipts on account of sale are less than 50% of the total receipts, the set-off is permissible only on those purchases effected in that year where corresponding goods sold or resold within six months from the date of purchases. The "receipts" are explained in explanation. "Receipts" means the receipts pertaining to all activities, including business activities carried out in the State."

On the plain reading of Section 48(1)(a)(ii) of MVAT Act r/w Rule 53(6)(b) and Explanation of MVAT Rules, it is clear that the receipts would include all activities of the dealer including business activities. Receipts which are concerning the activities not involving the sale of goods, are also included in "Total Receipts" in Rule 53(6) of MVAT Rules. The submission of Smt. N.R. Badheka does not have a legal base in law.

Rule 53(6)(b) and explanation are within delegated powers conferred by section 48(1) of MVAT Act."

26. The Learned Advocate Smt. Badheka has strongly contended that UTI GETF is dealing in equity and therefore only the receipts pertaining to the activity of UTI GETF ought to have been considered for grant of set off u/r 53(6)(b) of MVAT rules. However, on going through the explanation attached to 53(6)(b), we find that the receipt means receipts pertaining to all activities including business activities carried out in the State and therefore in our considered opinion, the other activities of UTI Mutual Fund are also required to be taken into consideration while calculating the receipts for the purposes of set off as they are also business activities carried out in the State.

27. The basic rule of interpretation is laid down by the Hon'ble Apex Court in the case of **Union of India and Others v/s. Priyankan Sharan and Another (LIS/SC/2008/1228)** wherein it is observed:

"It is well settled principle in law that the Court cannot read anything into a statutory provision which is plain and unambiguous. A statutes is an edict of the Legislature. The language employed in a statute is the determinative factor of legislative intent".

28. It is well settled that in the matter of grant of set off or exemption, the relevant provisions are required to be construed strictly. No liberal interpretation is permissible in such matters. On going through the explanation attached to Rule 53(6(b) of MVAT Rules, it clearly appears that receipts for the purpose of said rules means the receipts pertaining to all the activities including business activities of the dealer carried out in the State. The contention of Learned Advocate Smt. Badheka that only the activities of UTI GETF should be taken into consideration for the purposes of grant of set off u/r 53(6)(b) is thus devoid of merit and cannot be accepted."

Thus the interpretation lays down that the gross receipts should be computed considering receipts from all activities in Maharashtra. It will include receipts from

sale of goods as well as non sale activities also. Further Mutual fund is considered as one entity and cannot be considered scheme wise.

The ratio laid down above will also apply to other dealers. The dealers in Maharashtra are required to consider above interpretation while computing the setoff.

Impact

1. What are the activities in Maharashtra?
2. How to prove that activity is not in Maharashtra?
3. Examples of proprietary concerns.
4. Position of receipts towards sale of assets/shares, etc.

2] Raj Shipping (W.P.4552 of 2015 and others) dated 19.10.2015

"Sale within State"- Nexus

In earlier days there was issue about determining the 'situs of sale' i.e. the State where the sale has taken place and which state was eligible to levy tax on such sale. There was situation where on one sale, different states were contemplating levy of tax. The State from where goods moved used to claim tax, the State where actually delivery given was also claiming tax as well as other States, picking up some connection of sale transaction with their State like, receiving payment, raising of invoice and so on.

This was known as nexus theory.

To avoid above multiple claiming, the CST Act was amended. Section 4 was inserted in the Act to determine the 'situs' of sale. Section 4(2) is as under:

"**Section 4(2) in the Central Sales Tax Act, 1956**

(2) A sale or purchase of goods shall be deemed to take place inside a State, if the goods are within the State—

(a) in the case of specific or ascertained goods, at the time the contract of sale is made; and

(b) in the case of unascertained or future goods, at the time of their appropriation to the contract of sale by the seller or by the buyer, whether assent of the other party is prior or subsequent to such appropriation.

Explanation.- Where there is a single contract of sale or purchase of goods situated at more places than one, the provisions of this sub-section shall apply as if there were separate contracts in respect of the goods at each of such places."

The attempt was to crystallize the state of sale. It is provided that the sale will be in the State where the goods are ascertained in relation to contract of sale.

Thus, the nexus theory was given go bye and only one State in which physically goods are ascertained in relation to contract of sale, is the State in which sale is to be deemed to have taken place.

Nexus Theory revisited

In the case of M/s. **Raj Shipping (W.P.4552 of 2015 and others) dated 19.10.2015**, Hon'ble Bombay High Court has dealt with the issue as under;-

Facts of Case

The short facts of the case before Hon. Bombay High Court can be noted as under:

"In the additional affidavit, that is filed, the Petitioner states that it is engaged in the business, namely, Bunker Supplies. Bunker supplies mainly consist of supply of petroleum products such as high speed diesel oil (HSD), light diesel oil (LDO) and furnace oil (FO) to various incoming and outgoing vessels within or beyond the port limits of Mumbai Port. These outgoing vessels, to which the supplies are made, are located beyond approximately 1.55 nautical miles from the coast of Mumbai and are anchored in various anchorage points within the territorial waters of the Union of India, off the coast of Maharashtra. It is stated that the outgoing shipping vessel places an inquiry for the required quantity of HSD with the Petitioner. Pursuant to the inquiry made by the customer, the Petitioner gave a quote for their supplies. In many cases, the Petitioner enters into a formal agreement with their customers for the purchase of HSD. At page

86 of the paper book is one of the illustrative copy of such an agreement. Pages 86 to 89 of the paper book read as under….

81) Thus, pursuant to such agreement or an approval of a quote by the customer, the shipping vessel places a purchase order/nomination with the Petitioner for the required quantity and the name of the vessel to which the supplies are to be made. The illustrative copy of the purchase order/nomination is also at page 90 of the paper book. It is on receipt of the purchase order/nomination from the shipping vessel that the Petitioner, in turn, places a purchase order

on any of the oil marketing companies such as M/s. Indian Oil Company Limited, M/s. Bharat Petroleum Corporation Limited etc. Thereafter, the further documents are prepared, including the shipping bill and once they are ready, the oil marketing company loads the required quantity of high speed diesel in the tank lorries, which then come to the barge loading point at Mallet Bunder along with the invoice copy of the oil marketing company.

82) The sister concern of the Petitioner owns self propelled barges having large cargo tanks (below deck) ranging from 40 thousand liters (40KL) to 200 thousand liters (200KL). The barges have pumps fitted on them with a flow meter in order to pump out the HSD to the vessel. These are similar to petrol pumps where petrol is sold to the regular customers. At the Mallet Bunder, the HSD supplied by the oil marketing company is decanted into the cargo tanks of the barges owned by the Petitioner. The entire activity of decanting is done under the supervision of a Customs Officer. After taking delivery of the HSD from the oil marketing company, the barges sail to the anchorage point of the nominated vessel.

83) Paras 12 to 15 at pages 82 and 83 of the paper book read as under:

12. After reaching the anchorage point of the nominated vessel, the HSD is pumped out of the barge into the fuel tank or bunker of the nominated vessel. Once the supply is complete, the Master or the Authorized Officer of the vessel acknowledges the receipt of

the ordered quantity of HSD on the Bunker Delivery Note (BDN) and the Shipping Bill. An illustrative copy of the Bunker Deliver Note (BDN) duly acknowledged by the officer of the vessel is marked and annexed as Exhibit "7".

13. The barges go beyond 1.54 Nautical Miles from the base line of the coast of Mumbai to deliver the HSD to the vessels anchored therein, in the territorial waters of the Union of India.

14. After the delivery of the HSD to the nominated vessel is complete, the Petitioner raises an invoice on the shipping line based on the BDN. An illustrative copy of the invoice raised by the

Petitioner is marked and annexed as Exhibit "8". The Petitioner invoices the shipping line for the quantity of HSD actually delivered, along with charges for transportation and hiring of the

barge belonging to its sister concern companies. These may be way of a lumpsum rate/KL previously agreed to by the Petitioner or the charges for sale of HSD and transportation may be

indicated separately in the invoice.

15) The sister concern of the Petitioner separately charges the Petitioner company for the hire of the barge by the Petitioner company for the purpose of the supplies to be made to various

customers. An illustrative copy of a credit note issued by the Petitioner in favour of its sister concern is marked and annexed as Exhibit "9"."

Arguments of Petitioner

Based on above facts the base argument of petitioner was that the sale cannot be said to be in State of Maharashtra. The territorial water was contended to be not part of State and hence State has no jurisdiction, when sale is taking place in territorial waters.

Alternatively it was contended that it can be liable under CST Act but not under MVAT Act. It was also contended that if at all it is liable in State then it will be exempt under Notification issued u/s.41(4) bearing no.VAT-1505/CR-135/Taxation-1 dated 30.11.2006 wherein sale of motor spirits by retail outlet is exempted from levy of VAT.

On behalf of Revenue the arguments were opposed stating that the State has power to deal with impugned sales.

Hon. Bombay High Court

After considering the facts, contentions & citations from both sides, Hon. High Court observed as under:

"95) If we apply this principle to the facts and circumstances of the present case, we do not have any hesitation in concluding that it is the goods which have been produced or manufactured or refined by the oil companies and which are drawn from their storage tanks in fixed quantity that are supplied on demand to the Petitioner. The manufacturers as also the refineries are very much within the State of Maharashtra viz. at Mumbai. The Petitioners are at Mumbai. Meaning thereby, their place of business is at Mumbai. It is from that place that the Petitioner requests the oil companies to supply to it the high speed diesel. It is received by the Petitioner from the oil companies at Mumbai. It may be that the Petitioner treats this as a contract on which they paid the sales tax as a component of the price. However, it is that very high speed diesel and supplied to the Petitioner at Mumbai which is carried from Mumbai in furtherance of a contract with parties like M/s. Leighton, which contract is also placed and finalised from Mumbai, through the barges of the Petitioner to the vessels of M/s. Leighton and which may be stationed in territorial waters. However, Leighton comes in the picture, as have been stated by them, for the purpose of fulfilling a contractual obligation of M/s. ONGC. It is for that obligation to be discharged that they have deployed the vessels. It is these vessels which require the bunker supplies and which supplies are met by the Petitioner.

The subject matter of the contract with M/s. Leighton is this high speed diesel or motor spirit which is taken and carried from Mumbai. Therefore, there is sufficient territorial nexus for the Maharashtra Value Added Tax Act to apply and to be invoked to the later sale by the Petitioner of the same goods to M/s. Leighton and other entities similarly placed. We do not see how the Petitioner can escape compliance with this legislation and by contending that the contract of M/s. Leighton being a distinct contract, the sale taking place in territorial waters that the sales tax legislation or the VAT legislation of the Maharashtra State would be applicable. Its applicability has to be tested by applying the above principles and particularly the nexus theory. After having found sufficient territorial connection, namely, between the back to back transaction and the taxing authority that we are not in a position to agree with Mr. Sridharan that MVAT Act is inapplicable."

Thus, Hon. Bombay High Court observes that tax applicable can be decided on nexus theory.

Observing as above, Hon. Bombay High Court has remanded matte back to authorities under State Act for deciding the correction position.

In other words, there is no finality of issue and it is left to appellate authorities to decide the taxability including under MVAT / CST and exemption under section 41(4).

Impacts

1. How to apply Nexus Theory?
2. Whether ascertainment of goods will decide the place of sale though the transaction is by works contract and works contract takes place outside India like Bombay high?
3. Whether judgment is final or still leaves open ends?

3] Technocraft Engineers (VAT SA No.237 of 2014 dt.3.11.2015)

<u>VAT on Service Tax collected separately</u>

Though there was certainty about non attraction of VAT on Service tax when the method for discharge of tax on Works Contract is statutory method like rule 58, there is debate about its applicability when the method for discharge is composition method.

The issue has been resolved by Hon'ble Tribunal vide judgment in case of **Technocraft Engineers (VAT SA No.237 of 2014 dt.3.11.2015)**. In this case, the issue was same. VAT was levied on the Service Tax collected separately on the works contract and the dealer was discharging liability under composition scheme.

Hon'ble Tribunal has referred to arguments from both the sides. There was also earlier judgment in case of **Nikhil Comforts (SA No.30 of 2010 dated 31.3.2012)** in which contrary view is taken.

However, in this judgment, Hon'ble Tribunal has held that no VAT can be levied on Service Tax collected separately, even if the tax is discharged under composition scheme. The reasoning of learned Tribunal is noted as under;

"(iii) In the impugned matter, assessment order for the year was passed on 26/12/2012, for the interior designing the appellant had received total amount of Rs.4,35,43,472/- on which 8% composition amount was charged and with interest under section 30(2) and 30(3) of the MVAT Act total demand was raised at rs.27,10,949/-. Appellant challenged the said order on the ground of incorrect determination of turnover, levy of tax on service tax and set-off claim and on interest. The First Appellate Authority confirmed the levy of tax on service tax amount saying that, it is part of contract price but he allowed other grounds hence VAT payable amount is changed from Rs.27,10,949/- to Rs.2,24,831/- with part payment made in appeal, the appellant got refund of rs.1,82,109/- on which no interest under section 52 of the MVAT Act was calculated. In total consideration, the service charges amount will

become the part of total receipt by the Contractor but service tax amount on service charges will not become part of total receipt, because appellant contractor wants to pay the said amount to the Central Excise Department. Although, the definition of sale price is later on amended with effect from 01/04/2015, and the separate Explanation IA is added clarifying that, service tax levied and collected separately shall not be included in sale price. It is the revenue's contention that, the said amendment is not retrospective, and it has effect from 01/04/2015. So upto 31/03/2015 total receipt should be considered including service tax. However, we made it clear that, in the definition of sale price under section 2(25) service tax was not incorporated as deemed sale price. In the instant case, sale means a valuable consideration of the goods involved in the works contract, the consideration must be received by the contractor. Even though he had collected service tax separately he has to deposit it with the Central Government. Therefore, it will not become part of his receipt. The revenue had cited most of the case laws on agreement for composition. Appellant is not denying that, he had not agreed for composition. He is ready to pay 8% tax on the valuable consideration received by him which he can utilize in his business, and the tax amount against service charges incurred by him, he cannot keep with him as consideration for receipt of works contract. In total contract receipt, the sale price of the goods, service charges shown etc. are includible. In Sub –clause (a) and (b) of sub –section (3) of Section 42, the wording is used "equal to 5% , of total contract value of the works contract in case of construction contract and 8% of total contract value of work contract of any other case." Here the meaning of total contract value is to be determined appropriately. By way of allotment of any works if assessee is receiving some amount against the property transferred in the goods and against the labour charges utilized in the said work, it will become a contract value. The various taxes levied separately, and those are to be deposited with the Govt. authorities will not constitute the total receipt against the said contract value hence element of service tax

will not be a part of sale prices before amendment also. One can understand total expenses required to be paid f or any particular work in which amount of taxes are also to be in total turnover but when a turnover for levy of tax is to be taken into consideration, the element shown separately in sale invoice It may be against sales tax VAT tax and service tax which cannot be included."

Thus, Hon'ble Tribunal has decided a controversial issue. For long dealer have not collected VAT on Service Tax collected separately and hence the above judgment will be big relief.

Impacts

To avoid future contingency by way of litigation, it is expected that the department will bring out one more circular to support the above judgment. The finality to the subject is important, so that dealers can predict their liability correctly and there is no any existence of contingency.

Whether the judgment can be said to be final?

Whether the judgment is subject to any different interpretation before Hon'ble High Court?

What the dealers should do at present?

Whether the judgment has effect on other schemes like for Hoteliers etc.?

4] Larsen & Tourbo Limited (2015-VIL-411-AP) dated 14.09.2015 AP High Court

Nature of Works Contract and Exempted Sales :-

This is elaborate judgment dealing with various issues about Works Contract taxation.

1. Though supply and installation are separate contracts whether they can be clubbed together?
2. Whether exempted sale as per section 6(2) is possible in Works Contract?
3. Nature of interstate sales under Section 3 (a) of the CST Act and taxability?
4. Sale in course of import and Works Contract transaction.

5] <u>F forms necessary for Inter State Transfer for Job work.</u>

Johnsons Matthey Chemicals India Pvt. Ltd. vs. The Deputy Commissioner of Sales Tax (W.P.No.7400 of 2015 dt.15.2.2016)

Recently Hon. Bombay High Court has decided important issue under CST Act by above judgment. It is held that even for inter-state transfers for job work , F forms will be required. This may create difficulties in cases where the respective parties are not registered, being only doing labour jobs or smallness of the volume etc.

6] <u>Hawala Transaction, burden on the sales tax department</u>

There are number of judgments wherein it is held that if the authorities are relying upon outside materials to declare any transaction as bogus/hawala or non genuine then the buyer party should be granted opportunity of cross examination. Without such process the disallowance of transaction is incorrect.

(i) Shree Bhairav Metal Corporation vs. State of Gujarat (Special Civil App. no.2149 of 2015 dated 26.3.2015)(Guj) 82 VST 324.

(ii) Brilliant Metals Pvt. Ltd. W.P.(C) 6656/2015 & CM 12140/2015, 13505/2015 dated 3.2.2016 (Delhi High Court).

<u>Retrospective Cancellation of Registration of the vendor cannot affect purchasing dealer and its purchases will remain as purchases from registered dealer.</u>

Mahadev Enterprises (Special Civil Application No. 90 of 2016 dt.6.1.2016) (Guj. High Court)

By this judgment Hon. Gujarat High Court has held that unless there is conspiracy between the seller and purchaser, the retrospective cancellation of registration certificate of vendor will not affect right of purchaser as purchases from registered dealer.

Impact

The ratio of above judgment will be useful in Maharashtra. In Maharashtra under MVAT Act there are number of cases where the ITC is disallowed on the ground that the registration of vendor is cancelled. If such cancellation is retrospective then unless the department is able to prove that there was conspiracy between the two parties such cancellation will not affect, the buyer. The purchases will remain as purchases from RD. Under such circumstances withdrawal of ITC will not be justified. Department will be required to assess the vendor and find out tax payment by the vendor before disallowing ITC.

7] Buthello Travels vs. State of Maharashtra (VAT A.No.1135 of 2015 dt.11.12.2015)

Transportation activity vis-à-vis Lease of Vehicles

Facts

Hon. Tribunal has noted the facts as under:

"12. Now in this case the issue agitated before us, which is regarding the amount received by the appellant from PMPML towards hire charges of the buses. In this context it would be useful to refer the settled legal position. The legal position is referred by **Andhra Pradesh High Court in the case of State Bank of India and Others v/s State of Andhra Pradesh (70 STC 215).** The principle is as under-

"With that there is a transfer of the right to use or not is a question of fact which has to be determined in each case having regard to the terms of contract under which there is said to be a transfer of right to use."

The second principle laid down is the agreement has to be read as a whole to determine the nature of transaction.

Therefore, it is very essential to refer to the Lease Agreement for Hiring of Buses. In view of the above, we reproduce herewith some relevant portions of the agreement dated 22 July 2004.

"Whereas a) Pune Municipal Transport intends to expand and augment its existing fleet of passenger buses.

b) to achieve the same Pune Municipal Corporation suggested to hire passenger buses. Accordingly PMT published a tender notice as on 28/04/2003 in Marathi and English newspapers.

c) in response to the above advertisement 1 of the bidder is present contractor who is second part of this Agreement submitted his tender as per the terms and conditions thereof.

Now therefore this agreement witnessth and it is hereby agreed by and between the parties as follows:

(1) This agreement will come into force only after buses are handed over by the contract work to PMT as per schedule "B", duly registered with RTO Pune and permitted by RTO Pune to ply the buses on stage carriage permits held up by PMT and no liability will be incurred on PMT till the agreement comes into force.

(2) Buses must comply to the specification as enumerated in Annexure 'A' and the number and size of buses to be provided shall be as per Annexure 'B'.

(3) Tenure of the Agreement will be for a period of 5 (five) years from the date of permission to ply the buses of contract of on PMT permit granted by RTO Pune.

(4) The hired the buses will be registered with RTO Pune in the name of PMT as lessee and will be operated as stage carriages within operational area of the PMT. The medium buses will be operated minimum 7000 km per month, the minibuses will be operated minimum 6000 km per month, subject to the reasonable daily operation.

(5) (i) the PMT will provide conductor with tickets, way bill and other conductor's equipment.

(ii) It shall be the right of PMT to collect the fare charges. The fare charges will be credited to the account of PMT. The contractor shall not have any right to claim over the cash collection for any reason whatsoever.

(iii) The conductor of the bus alone shall collect all the fare and luggage charges. Neither the private bus contractor nor the driver who shall have any claim on the fare and luggage charges or any amount so collected.

(6) The General Manager PMT shall have sole discretion to identify the routes on which hired buses shall be deployed. The contractor shall have no right to claim any particular route for operation.

(7) **Responsibilities of the Contractor**

(i) To provide the bus with driver possessing valid driving license with P.S.V. badge and complying PMT norms and certificate of medical fitness from competent authority. Driver shall follow the instructions of the authorities of the PMT. The driver will have to undergo training and test of driving. If, necessary driver should undergo medical examination by the medical officer of the corporation. Only successful driver will be approved. Expenditure of the training of the driver by PMT will have to be borne by the contractor. Driver must fulfill the norms prescribed by PMT. The driver should have knowledge of Pune City. However Contractor will be permitted to employ the surplus bus drivers employed with PMT where the post of drivers has become surplus on the Establishment of PMT.

(ii) It will be the responsibility of contractor to ensure that driver maintains close coordination with conductor and provide facilities to passengers and ensure that the passengers are not put any inconvenience. The driver should have polite behavior with public and passengers and PMT staff.

(iii) The contractor shall not employ a person as a driver for operating a bus on hire basis who has been removed or dismissed, retired on superannuation from the service of PMT or any other Public Undertaking. Also driver must be of the age less than 58 years. Driver who has met with a fatal accident during the contract period should not be continued for 2 months.

Thereafter the driver will be continued by the contractor on his satisfaction given in writing to the PMT that the driver was not at fault for the accident.

(iv) The contractor shall provide uniform to the driver as prescribed by the PMT. The contractor shall provide an identity card with photo attested by contractor and PMT to the driver. Contractor shall furnish photo copy of the driving licenses of the driver to PMT.

(vi) The contractor/driver shall scrupulously follow instructions issued by the PMT periodically. As and when the PMT finds behaviour and conduct of the driver questionable, upon the notice, the contractor of hired buses shall replace him with the substitute driver immediately. If the private bus contractor fails to replace such a driver within a period of 7 days of notice thereafter, the bus assigned to that driver shall be liable to be discontinued without prior notice and no hire charges will be payable to contractor.

(xiv) The contractor was shall produce the vehicle for inspection at the time of deployment and also subsequently whenever required by the PMT.

(xv) Contractor shall inform the place where he will be parking the vehicles and place where he will be repairing the vehicles. This may be checked by PMT authorities.

(8) **Calculation of kilometres of hired buses**

(iii) Distance operated for making payment will be reckoned from appointed terminus for plying vehicles as per the kilometers of the trip distance as per time table.

(iv) Cancelled kilometers on account of mechanical breakdown enroute and any other reasons beyond the control of PMT shall be deducted.

(v) The contractor shall make available the bus for a minimum 16 hours a day. In case bus is not made available minimum 16 steering hours a day, it will not be counted as a day for the purpose of reckoning the number of days operated in a month.

(vi) In case of cancellation of trips for any reasons deduction shall be made and actual kilometres operated be reckoned for payment for hire charges.

(vii) In case of breakdowns PMT can divert the passengers to any other hired bus or bus of PMT. On such occasion the kilometers from the point of the breakdown to the destination point shall be deducted.

(viii) Increase in kilometers due to enforcement of law and order shall not be reckoned for hire charges where PMT has not changed its fare structure. …"

There are further terms which are not reproduced here for sake of brevity.

Hon. Tribunal has referred to number of judgments cited from both the sides about nature of lease transaction. Hon. Tribunal has referred to judgments including in case of

Bharat Sanchar Nigam Ltd. (145 STC 91)(SC) and also considered the criteria laid down in the said judgment about nature of lease transaction.

After referring to citations, Hon. Tribunal has arrived to following conclusion.

"13. After having perused the copy of Agreement between the appellant and PMT, it becomes amply clear that the appellant has given the buses on hire to PMT for a specified period. During the entire period of contract, and when the buses are standing idle or have free time or are not being used by PMT, the contractor (appellant) is prohibited from using these same buses for his personal use or gain. This proves that, during this period of agreement the buses along with the drivers are completely at the disposal and under the control of PMT.

Now we need to address the appellant's claim that he is not a 'dealer' as defined under section 2 (8) of MVAT Act. In support of his claim the appellant has relied on the judgment of honourable Bombay High Court in the case of Commissioner of Sales Tax, Maharashtra State, Mumbai v/s General Cranes [2015] 82 VST 560 (Bom).

14. In order to determine whether there is a transfer of right to use goods so as to make the contracts one of sale under article 366 (29 A) (d) on the point of law, both the parties are unanimous that the test is of effective control and possession with respect of the goods.

In para 13 of the judgment of honourable Bombay High Court in the case of Commissioner of Sales Tax, Maharashtra State, Mumbai v/s General Cranes [2015] 82 VST 560 (Bom), their Lordships observed that,

"In the present case, the permissions and licenses with respect to the cabs are not available to the transferee and remained in control and possession of the respondent. It is the driver of the vehicle who keeps in his custody and control the permissions and licenses with respect to the Maruti Omni Cabs or the said permissions and licenses remained in possession of the respondent. These are never transferred to M/s NDPL. It, therefore, cannot be said that there is a sale of goods but transfer of right to use in as much as a necessary ingredient of sale, the transfer of right to use the goods, is absent".

15. In the present case before us, it is very crucial to understand the nature of transaction. It is broadly outlined, as we understand from the records and documents

placed before us. Pune Municipal Transport is a public transport undertaking established as per the provisions of section 66 (20) of the BPMC Act 1949, to cater to the needs of commuters in and around the Pune City, who holds the stage carriage permits. The appellant does not hold or own stage carriage permit.

It is agreed between the parties that, the buses must comply with the specification as enumerated in the terms and conditions of the agreement. Tenure of the agreement will be for a period of 5 years from the date of permission to ply these buses of contractor on PMT permit granted by RTO, Pune.

16. On perusal of the copy of the agreement before us, it clearly specifies that the buses should be registered in the name of PMT as leasee. Clause number 15 of the agreement indicates that, the copy of the RC book, insurance policy and fitness certificate of the bus be deposited with PMT or duly exhibit the copy of the documents in the bus. This clearly exhibits that, overall custody and control of the documents is with the PMT. The admitted position which emerges is that, PMT is made available with the legal consequence and legal right to use the goods, namely the permissions and licenses with respect to the goods. This being the factual difference in the present case and the case of Commissioner of Sales Tax, Maharashtra State, Mumbai v/s General Cranes [2015] 82 VST 560 (Bom), the appellant is a rightly held as a dealer under the MVAT Act, and assessed as unregistered dealer."

Thus, Hon. Tribunal has considered given transportation activity as liable to tax under MVAT Act as Transfer of Right to Use goods.

The further position considered by Hon. Tribunal is that, there were receipts for other transportation where the facts were not as discussed above. Hon. Tribunal has directed to delete the tax on such receipts. The said direction is as under:

"17. In our considered opinion, all the criteria as set out by Honourable Supreme Court in the judgment in the case of Bharat Sanchar Nigam Ltd. and another v/s Union of India and Others [2006] 3 VST 95 (SC), are satisfied. Therefore, we have no hesitation to determine the impugned transaction with PMT as a sale, as per section 2 (24) Explanation – (b) (iv) of MVAT Act, liable to tax.

However, on perusal of assessment order it is observed that the assessing officer has taxed the total income of the appellant, which includes bus hire receipts from other customers. In our considered opinion the appellant is entitled to relief of tax including consequential interest and penalty levied on the turnover of income from other customers, other than PMT.

Hence we pass the following order."

Impact

The issue whether there is lease or not is required to be seen on facts of each case.

In case of vehicles, amongst others, the lease transaction can take place where the licenses are transferred and registered in the name of lessee.

The Tribunal has not considered the effect of 'Exception-III' to the definition of 'dealer' under section 2(8) under which the sale/purchase of permit holding vehicles is excluded from the definition of dealer. The said effect is required to be contemplated by the aggrieved dealer as the case may be.

Permasteelisa (India) Pvt. Ltd.(Sales Tax Reference No.55 of 2014 dated 6.5.2016) (BHC)

Construction Contract

Under erstwhile Maharashtra Works Contract Act,1989 a composition scheme of 5% was announced for Construction Contract. In other words, if the contract executed by the contract or covered by is notified contract then the contractor can adopt this composition scheme, attracting composition rate of 5%.

Notification

The relevant notification notifying construction contract under Works Contract Act was dated 8.3.2000, which is reproduced below for ready reference.

"Notification No.WCA-25.00/C.R.-39/Taxation-1 dated the 8 th March,2000.

In exercise of the powers conferred by sub-section (1) of Section 6A of the Maharashtra Sales Tax on the Transfer of Property in Goods involved in the Execution of Works Contracts (Re-enacted) Act, 1989 (Mah.XXXVI of 1989), the Government of Maharashtra

hereby notifies the following contracts to be the construction contracts for the purpose of sub-section (1) of the said section 6A, namely:-

A. Contracts for construction of,-

(1) Building, (2) Roads, (3) Runways, (4) Bridges, Flyover bridges, Railway overbridges, (5) Dams, (6) Tunnels, (7) Canals, (8) Barrages, (9) diversions, (10) Rail tracks, (11) Causeways, Subways, Spillways, (12) Water supply schemes, (13) Sewerage Works, (14) Drainage works, (15) Swimming pools, (16) Water purification plants.

B. Any contract incidental or ancillary to the contracts mentioned in paragraph A above, if such contracts are awarded and executed before the completion of the said contracts mentioned in A above."

Two categories were covered by above notification. One category was Part (A), which was relating to main activity of construction. Part (B) covered incidental contracts to above main contract, subject to they should be executed prior to completion of main contract.

The facts leading to the above judgment are noted by Hon. High Court in para (4) of judgment as under:

"4 The Applicant is a Private Limited Company incorporated under the Companies Act, 1956. It is also a registered dealer under the MVAT Act. The Applicant is engaged in activity of fixation of glass walls. It is the case of the Applicant that these glass walls also known as curtain walls are used in the construction of modern buildings. These glass walls are permanent walls and are constructed instead of usual brick walls. In the modern age of architecture these glass walls have replaced the traditional brick walls and many buildings are constructed and developed using glass walls. If the glass walls are erected for a building then brick walls are not required as these glass walls have all the characteristics of traditional brick walls as a result of which there are modern highrise buildings and skyscrapers. In applying the rates as applicable under the Work Contracts Act, the Applicant has relied upon the Notification dated 8 March 2000 in terms of which certain contracts specified therein are identified as construction contract eligible for beneficial rate of tax. According to the Applicant, the activities it undertakes are in respect of construction contracts or contracts incidental or ancillary to the construction

contracts as set out in the Notification dated 8 March 2000 and it has raised invoices and filed returns accordingly."

Observation of High Court

Hon. High Court referred to the contract terms for given transactions. In para 12 Hon. High Court observed as under.

"12. We are of the view that the contracts for construction of glass walls executed by the Applicant would not constitute 'contracts for construction of buildings' as mentioned in paragraph 'A' of the Notification dated 8 March 2000 nor would they constitute contracts incidental or ancillary to any contract as mentioned in paragraph 'B' of the Notification dated 8 March 2000 issued under section 6A(I) of the Works Contract Act and would not be covered by the said Notification. In the judgment and order dated 9 July 2010 of the Tribunal in Second Appeal No.106 of 2007, the case of the Applicant is interalia recorded. In paragraph 3 it is stated as follows:

"… The work is carried out as under:

"i) Contract for structural glazing is entered into on completion of foundation and plinth.

ii) On signing of the contracts intensive planning and designing is undertaken by Architect and Structural Engineers.

iii) Aluminum, silicon and glass of the desired prescription is ordered.

iv) Upon completion of 5th Slab, structural glazing commences from the bottom i.e. first slab.

v) Structural glazing gets completed along with concrete construction.

vi) Instead of convention brick wall, glass walls are used.

vii) Structural glazing of the building is something without `brick walls'. Instead of "brick wall" a "glass wall" is constructed.

It is further recorded in paragraph 4 that in respect of the assessment, the Applicant's case was that it had undertaken the contract of fabrication and erection of structural glazing works and the work of aluminum glazing contract would qualify as a construction contract made for building liable to composition rate of tax. Being aggrieved by the Assessment Order passed by the Sales Tax Officer, the Applicant had filed an Appeal before the Deputy Sales Tax Commissioner (Appeals) and in the order

dated 1 November 2006, the Commissioner of Sales Tax (Appeals) has recorded that the Applicant contended that "he is a dealer dealing in structural glazing aluminum cladding, doors and windows and doors of buildings in Corporate Offices."

After referring to further judgments cited and order of Advance Ruling in Karnataka on very same activity, in para 17 Hon. High Court concluded its decision as under:

"17 The fabricated structural glazings prepared by the Applicant are transported to the site by the Applicant and affixed on the exterior portion of the building, which building is constructed by the building contractor who is a third party. There is no dispute that Applicant is not a building contractor, in that, it is not in the business of construction and erection of buildings. The activity of affixing glass and erecting glass walls with aluminium frame work requires an altogether different expertise, and is ordinarily sub-contracted by the building contractor. The contention that some of the walls in the building are not required to be constructed by laying bricks and they are substituted by affixing the glass would not carry the case of the Applicant further. We are also unable to accept the contention that the work of the Applicant would be covered under the term "incidental or ancillary activity to the construction of the building" as that would have to have a direct nexus to the construction of the building itself. Therefore, the alternative argument that the contract would get covered by paragraph B of the said Notification which includes incidental or ancillary contract to the contract of construction also cannot be accepted. What meaning is to be attached to the word "building" as mentioned in the Notification would have to be determined considering the facts and circumstances of each case. In our view, the reliance on the definition of 'building' in the Regulation 2(3)(11) of DCR is misplaced and would not assist the Applicant in any manner. That definition is in the context and purposes of DCR and cannot be imported and applied in the facts and circumstances of the present case."

Hon. High Court has rejected the plea of the dealer about its contract being covered by category of Construction contract.

Impact

With due respect to High Court judgment it can be said that the judgment has created difficulties to the dealers. The activity may not be directly in the construction but certainly

incidental. Due to above judgment the department may take contrary views in other typies of incident contracts like painting etc., though it is not expected.

'Sale' vis-à-vis exchange/barter

Introduction

Under Sales Tax Laws, the transactions of 'sale' are liable to tax. The transaction of 'sale' is to be understood as per Sale of Goods Act, as held by Hon'ble Supreme Court in case of **Gannon Dunkerly & Co. (9 STC 353)(SC).** In this case Hon. Supreme Court has interpreted the term 'sale' and has held that the transaction to be a sale, it should fulfill the minimum criteria as laid down in Sale of Goods Act. In fact, Hon'ble Supreme Court has observed as under in relation to transaction of sale.

"Thus, according to the law both of England and of India, in order to constitute a sale it is necessary that there should be an agreement between the parties for the purpose of transferring title to goods, which of course presupposes capacity to contract, that it must be supported by money consideration, and that as a result of the transaction property must actually pass in the goods ……"

From above passage it is clear that to be a 'sale' following criteria should be fulfilled.

(i) There should be two parties to contract i.e. seller/purchaser,

(ii) The subject matter of sale is moveable goods,

(iii) There must be money consideration and

(iv) Transfer of property i.e. transfer of ownership from seller to purchaser.

Deemed sale by way of works contract

By 46th Amendment to the constitution, the deemed sales were introduced which can be taxed under sales tax laws. One of the deemed sales is 'works contract' which has been introduced by Article 366 (29A)(b) in the constitution.

A question arose as to whether the whole works contract price is liable to tax or only value relating to the goods. While analyzing the taxability of above deemed sale category of works contract, Hon'ble Supreme Court in case of **Builders Association of India (73 STC 370)(SC)** stated as under:

"Hence, a transfer of property in goods under sub-clause (b) of clause (29-A) is deemed to be a sale of the goods involved in the execution of a works contract by the person making the transfer and a purchase of those goods by the person to whom such transfer is made. The object of the new definition introduced in clause (29-A) of article 366 of the Constitution is, therefore, to enlarge the scope of "tax on the sale or purchase of goods" wherever it occurs in the Constitution so that it may include within its scope the transfer, delivery or supply of goods that may take place under any of the transactions referred to in sub-clauses (a) to (f) thereof wherever such transfer, delivery or supply becomes subject to levy of sales tax. So construed the expression "tax on the sale or purchase of goods" in entry 54 of the State List, therefore, includes a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract also. The tax leviable by virtue of sub-clause (b) of clause (29-A) of article 366 of the Constitution thus becomes subject to the same discipline to which any levy under entry 54 of the State List is made subject to under the Constitution.."

It can be seen that works contract is nothing but composite transaction for supply of goods and for supply of services. By constitution amendment the composite transaction is notionally divided between goods and services.

It is also clear that to the extent of supply of goods the nature and character of supply is at par with normal sale of goods. In other words, all the criteria as applicable to normal sale i.e. as discussed above in **Gannon Dunkerly & Co. (73 STC 370)(SC)** are equally applicable to this deemed sale under works contract.

Therefore, even under works contract also the transaction should be against money consideration and if it is against any other consideration in form of goods or property etc., it cannot be taxable transaction under sales tax laws, as it will not fall in the category of sale but in the category of barter or exchange.

Definition of 'sale' under MVAT Act, 2002

The definition of 'sale' in section 2(24) of MVAT Act, 2002 is as under;

"*(24)* "sale" means a sale of goods made within the State for cash or deferred payment or other valuable consideration but does not include a mortgage,

hypothecation, charge or pledge; and the words "sell", "buy" and "purchase", with all their grammatical variations and cognate expressions, shall be construed accordingly;

Explanation.—*For* the purposes of this clause,—

(a) a sale within the State includes a sale determined to be inside the State in accordance with the principles formulated in section 4 of the Central Sales Tax Act, 1956;

(b) (i) the transfer of property in any goods, otherwise than in pursuance of a contract, for cash, deferred payment or other valuable consideration;

(ii) the transfer of property in goods (whether as goods or in some other form) involved in the execution of' a works contract including , an agreement for carrying out <u>for cash, deferred payment or other valuable consideration</u>, the building, construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, modification, repair or commissioning of any movable or immovable property...."

(emphasis given)

It can be seen that even under MVAT Act, 2002 the works contract transaction should be against cash/deferred payment or other valuable consideration.

'**<u>Other valuable consideration'</u>**

The above term 'other valuable consideration' in relation to sales tax laws is also well understood by judicial pronouncements. Reference can be made to the judgment of Kerala High Court in case of **M. Jaihind vs. State of Kerela (111 STC 374)(Ker)**.

"The essence of a sale lies in the transfer of property "for cash or for deferred payment or for other valuable consideration". The definition of "sale" contained in the Kerala General Sales Tax Act, 1963 cannot be construed to include within its ambit those transactions which do not fall within the definition of "sale" as contained in the Sale of Goods Act, 1930 and the definition in the Kerala General Sales Tax Act, must therefore be construed accordingly. Section 4 of the Sale of Goods Act defines "sale" as a transaction whereby there is transfer of property in goods to the buyer for a price. Section 2(10) of the Sale of Goods Act defines "price as money consideration for a sale of goods". Thus in order that a transaction may amount to a sale in accordance with the Sale of Goods Act, the consideration has to be money. The expression "cash or deferred payment or other valuable consideration" used in the definition of "sale" in section

2(xxi) of the Kerala General Sales Tax Act has to be construed to mean cash or some other monetary payment. The words "other valuable consideration", which occur in section 2(xxi) of the Act can be interpreted by rules of ejusdem generis, as the payment by cheque, bills of exchange or other negotiable instruments. The words "deferred payment or other valuable consideration" used in section 2(xxi) of the Kerala General Sales Tax Act merely enlarge the ambit of the consideration beyond cash, but do not carry it outside the scope of the term "money". If, the consideration is not money, but for other valuable consideration, it cannot then be a sale."

Thus, the other valuable consideration should also be in money terms like Bill of Exchange or Cheque etc..

Recent judgment of MST Tribunal in relation to SRA Project

Hon'ble MST Tribunal had an occasion to decide one of the important issues in relation to alleged works contract transaction. The judgment is in case of **M/s Sumer Corporation (VAT SA No. 335 of 2015 dtd. 3.5.2016).**

In this case, the facts noted by the Tribunal are as under;

"2. Appellant contends that he is engaged in the business of construction of buildings and tenements for Slum Rehabilitation Authority (SRA). He was assessed by the Assistant Commissioner of Sales Tax, (INV- 7), Investigation-A, Mumbai for the period 2006-07 under MVAT Act vide order dated 12/05/2014. It is alleged that in the said assessment, assessing authority levied tax on a transaction which is not a sale within the meaning of MVAT Act.

Appellant states that he has constructed buildings for SRA for which he did not receive any money consideration. No contract value in terms of money was fixed. According to him, as per agreement, he has received TDR (Transferable Development Rights), which he has sold and realized money out of that. He claims that the transaction was barter and cannot be taxed under MVAT Act.

He states that assessing authority assessed him as unregistered dealer (URD). He contends that the assessing authority has committed illegality by holding the sale value of TDR and proposed value of TDR as turnover and tax is calculated on the same. He states

that TDR itself is not taxable under the MVAT Act. Hence, he contended that appeal be allowed."

Hon'ble Tribunal come to conclusion as under:

"19. Taking into consideration the definition of sale under the MVAT Act as defined in section 2(24) the word 'other valuable consideration' would include anything that would directly or indirectly fetch some element of money or any other consideration. In the present case, TDR which is mentioned as Transfer Development Rights can be converted into money and in the present case already appellant has en-cashed some TDR and obtained considerable amount therein and therefore TDR would be a valuable consideration. Under these circumstances, the contention of the appellant that the transaction is barter or free of cost or without consideration cannot be accepted."

Thus Tribunal has departed from settled position that there should be consideration in money terms from the buyer itself. Hon. Tribunal has expanded the meaning of 'other valuable consideration' in relation to contracts observing that the earlier judgments are now not relevant after 46th Amendment.

Hon. Tribunal has also not appreciated that there is no procedure laid down for conversion of TDR in to money term to compute tax. Hon. Tribunal has applied its own theory and held that the monetary value can be ascertained as market value by reference to ready reckoner for stamp duty at the relevant time of agreement. Thus, Hon. Tribunal has held that transaction is taxable but changed the mode of computation. Lower authorities have levied tax on amount received against sale of TDR, whereas Tribunal has shifted it to market value on the date of agreement. The tax computation is left to the lower authorities.

Impact

With due respect, the judgment cannot be said to be laying down correct law. There will be also impact on the various other transactions which are in the nature of exchange like land owner granting rights of construction to the developer against allotment of certain flats. The issue will get decided at the higher forum in Appeals etc.

Lease Transaction vis-à-vis 'Hoarding',

Introduction

Whether hoarding charges liable under VAT?

There are different judgments on the above issue.

Selvel Advertising Private Ltd. v. Commercial Tax Officer (89 STC 1)(WBTT)

In this judgment, the West Bengal Taxation Tribunal, by majority held that the receipts towards hoardings are liable to Sales Tax as lease sales. The structure /hoarding was held as movable property.

M/s. The State of Tamil Nadu vs. Tvl. Jayalakshmi Enterprises 2011-12 (17) TNCT-J P. 92.(Mad)

Held, structure is immovable property and hoardings are not liable to VAT/Sales Tax.

M/s.TIM Delhi Airport Advertising Pvt. Ltd. vs. Special Comm.-II, Dept. of Trade and Taxes (W.P.(C)1625/2014 & CM 3374/2014 dt.2.5.2016) (Delhi)

The hoardings were situated in Airports, restricted area. High Court held that, there is no possibility of advertiser giving control of hoarding and hence not liable to VAT.

Recent Judgment

Recently Hon. Kerala High Court had an occasion to deal with above issue in case of **Delta Communications vs. The State of Kerala (90 VST 438)(Ker)**. The facts as reported by Hon. High Court are as under:

"2. Brief facts relevant for the disposal of the revision are stated hereunder:

The revision petitioner is a partnership firm engaged in the business of outdoor marketing media at Kottayam. The advertisements are displayed in hoardings for the above purpose. The appellant acquires land on lease in various places in the State of Kerala, and structures are erected on the property taken on lease. Thereafter, hoardings are fixed on this structure and it is let out to various companies for advertising their products. The revision petitioner receives rental charges for letting out the hoardings. During the year 2007-2008, the revision petitioner received rental charges amounting to Rs.36,70,983/-."

The prima argument of dealer was that it is immovable property and hence cannot liable to VAT. There was also argument based on ground that there is no passing of effective control, to consider transaction as lease transaction.

Hon. Kerala High Court referred to various judgments cited on both sides about meaning of nature of immovable property. Hon. High Court rejected the contention of dealer about immovable nature of hoarding in following words;

"14. It is clear that so far as the structures involved in this case are concerned, same are constructed using tempered steel/thick steel poles by attaching the same to a concrete structure embedded on earth and erected using nuts and bolts. The Assessing Authority had evaluated the factual circumstances and came to the finding that the structure erected is 'goods' as defined under the Act and therefore is exigible to tax. This finding was confirmed by the First Appellate Authority as well as the Tribunal after taking into account the principles laid down in various judgments of the Apex Court and other Courts and Tribunals. According to us, so far as the structure involved in this case is concerned, taking into account of the explanations of the learned counsel for the petitioner, it is fastened to earth and is detachable easily and therefore, is not an immovable property. Further the structure so erected is never a complicated installation unlike a heavy machinery fitted in a factory premises by assembling various components and then attached to earth, which becomes a complicated procedure, whereas a hoarding is fastened to a concrete structure on earth using nuts and bolts, the removal of which is a simple procedure which makes it a movable article under the Act. In this connection counsel for the petitioner has brought to our attention the judgment in ***'State of Tamilnadu v. TVL Jayalakshmi Enterprises'*** [T.C. (Review) No.430/2006 dated 7.7.2011] and contended that in the said case also the issue related to the leasing out of hoardings for the purpose of advertisement and that the Madras High Court has held that since the hoardings erected on the concrete foundation, not capable of removal without causing any damage to the structure, is part of the immovable property and ceased to be goods for the purpose of attracting levy of tax under Sec.3A of the Act. But, according to us, the Madras High Court has considered the said case on appreciation of the covenants contained in the agreement between the parties and thereupon found that

the entire responsibilities were carried out by the assessee and that therefore there is no transfer of right to use goods."

Regarding contention of effective control also Hon. High Court held in negative observing as under:

"17. But, according to us, so far as leasing out of hoardings in this case are concerned, once it is let out by entering into an agreement or work order, the owner of the goods ceases to have any control over the same for the reason that the advertisements are affixed on the hoarding by putting up and displaying necessary materials in accordance with the directions of the lessee and he has the effective control of the hoardings throughout the contract period entered into by him with the revision petitioner. The revision petitioner is unable to interfere with the nature of the advertisement carried out by the lessee in the hoardings since as per Annexure-D work order, it is his absolute right to finalise the nature of advertisement that is put up on the hoardings. Therefore, according to us, the absolute control of the hoardings is transferred to the lessee by virtue of Annexure-D work order. Therefore, we are of the definite opinion that the control of the hoardings once it is passed for erecting advertising materials is left with the lessee absolutely for the period specified and therefore there is transfer of right to use as provided under Sec.6(1)(c) of the Act. Therefore the second question raised by the assessee is also answered in the negative and in favour of the Revenue."

Ultimate argument of payment of Service Tax

Dealer in this case also tried to argue that it has paid service tax on very same receipts. It was canvassed that service tax and VAT are mutually exclusive and hence when service tax is levied and paid, no VAT should apply. This contention is also rejected by Hon. High Court observing as under:

"20. In the second cited decision also, a Division Bench of this Court was considering the question whether the Parliament is competent to authorise levy of service tax on banking and other financial services including equipments leasing and hire purchase. It was concluded that Article 366 (29A) empowers the authorities to impose levy of tax on deemed sale and purchase of goods and the same is not mutually exclusive with the liability for Service Tax. Therefore, according to us, the above two judgments are an

authority for the proposition that the service tax and Value Added Tax are not mutually exclusive and if there is liability, both are to be paid by the concerned assessee. Viewed in that background, the contention raised by the revision petitioner that since it is paying service tax, is not liable to pay Value Added Tax can never be sustained."

Thus rejecting all contentions, Hon. High Court upheld taxation under VAT.

Conclusion & Impact

It can be seen that there are conflicting judgments on given issue. It clearly appears that the matter is not decided by any common principle but based on facts/agreements in each transaction and it's appreciation by concerned court. Dealer will have hard time to visualize its liability.

The more difficulty is that dealer will be liable to pay both Service Tax /VAT. This will be a hard blow to financial viability of dealer.

Conclusion

Further impact will be that there are always developments in the taxation laws. All concerned like professionals, business men are required to be abreast of the developments by amendment and by impact of judgments. Therefore such conferences are important and I hope that the deliberations in this conference will be useful in day to day practice.