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INDIRECT TAXES LAW—II

(SALES TAX)

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I INTRODUCTION

IT IS well known that the courts in India in *Chatturam* v. *Commissioner, Income-tax (FC)*[1] and *A.V. Fernandez* v. *State of Kerala*[2] approved the opinion of Lord Dunedin in *Whitney* v. *Commissioners of Inland Revenue*[3] that there are three stages of imposition of a tax. There is the declaration of liability that is the part of the statute which determines what person, in respect of what property are liable. Next there is the assessment. Liability does not depend on assessment. That *ex-hypothesi,* has already been fixed. But assessment particularises the exact sum, which a person liable has to pay. Lastly, comes the method of recovery if the person taxed does not voluntarily pay.

During the year, under survey, there has been a rich crop of decisions of the Supreme Court and the various high courts. These decisions will accordingly be surveyed under the heads (a) liability; (b) assessment; (c) judgments under the Central Sales Tax Act, 1956; and (d) judgments having a bearing on the Constitution of India.

II LIABILITY

Much judicial thought has been expended by the Supreme Court upon the scope of the term 'goods' which is the basic concept in any system of sales tax law — be it general sales tax or the value added tax, which has been introduced in the country with effect from 1.4.2005.

As early as the year 1968, it was held in *Commissioner, Sales-tax, Madhya Pradesh* v. *Madhya Pradesh Electricity Board*[4] that 'electricity' is goods. It was elucidated that the term "movable property" when considered with reference to "goods" as defined for the purposes of sales-tax, cannot be taken in a narrow sense and merely because electric energy is not tangible or cannot

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1 (1947) 15 ITR 302 (FC).

2 AIR 1957 SC 657.

3 (1926) AC 37 at 52.

4 (1969) 1 SCC 200.

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be moved or touched like e.g., a piece of wood or a book, it cannot cease to be movable property when it had also the attributes of such property. Electricity is capable of abstraction, consumption and use and it can be transmitted, transferred, delivered, stored, possessed, etc.

Thereafter, in the year 1985, in *H. Anraj* v. *Government of Tamil Nadu,*[5] it was held that a lottery ticket is 'goods' because on the sale of a lottery ticket there is also a transfer of the right to participate in the draw which takes place on its sale and this transfer of beneficial interest in movable property to the purchaser amounts to transfer of goods.

Relying on this judgment, it was held in *Vikas Sales Corporation* v. *Commissioner of Commercial Taxes & Anr*[6] that import licences called REP licences or Exim Scrips are goods and liable to sales-tax. In this evolution of the scope of the term 'goods' came the judgment in *Associated Cement Companies Ltd.* v. *Commissioner of Customs.*[7] In this case, the question, *inter alia,* was whether customs duty was leviable on technical material supplied in the form of drawings, manuals and computer disc, etc. It was argued that customs duty could be levied as the drawing, designs, diskettes, etc. were not goods and that they only constituted ideas. It was submitted what was being transferred was technology i.e., knowledge or know-how—an intangible property. It was held that any media whether in the form of books or computer disks or cassettes which contain information technology or ideas would necessarily be regarded as goods, under the provisions of the Customs Act.

The question whether 'electricity' can be termed as 'goods' again arose before a constitution bench of the Supreme Court in *State of Andhra Pradesh* v. *National Thermal Power Corporation Ltd.*,[8] and the court, noticing the earlier authorities, held that the definition of 'goods' in article 366(12) of the Constitution of India was very wide and included all kinds of movable properties. It was held that the term 'movable property' when considered with reference to 'goods' as defined for the purposes of sales-tax cannot be taken in a narrow sense. It was reiterated that electricity was 'goods'.

Following the judgment in *Associated Cement Companies* case, and relying on the judgments discussed above, it was held in *Tata Consultancy Services* v. *State of Andhra Pradesh*[9] that the term 'goods' for the purpose of sales-tax cannot be given a narrow meaning. Properties which are capable of being abstracted, consumed and used and/or transmitted, transferred, delivered, stored or possessed, etc., are 'goods' for the purpose of sales-tax. The test is not whether the property is tangible or intangible or incorporeal. The test is whether the concerned item is capable of abstraction, consumption and use and whether it can be transmitted, transferred, delivered, stored,

5 (1986) 1 SCC 414.
6 (1996) 4 SCC 433.
7 (2001) 4 SCC 593.
8 (2002) 5 SCC 203.
9 (2005) 1 SCC 308.

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possessed, etc. It was further held that in case of software, both canned and uncanned, all of these are possible. Intellectual property when it is put on a media becomes goods.

In this processes of evolution of the term 'goods' the Supreme Court in *State of Uttar Pradesh & Anr.* v. *Union of India & Anr.,*[10] *inter alia,* has held that "The term 'goods' as defined under section 2(d) of the U.P. Trade Tax Act, 1948 is in very wide terms so as to bring in both tangible and intangible objects. The telephone connection and all other accessories which give access to the telephone exchange with or without instruments are 'goods' within the meaning of section 2(d)."

During the year under survey, a three judge bench of the Supreme Court in *Bharat Sanchar Nigam Ltd. & Anr.* v. *Union of India & Ors*[11] has over-ruled the above judgment in *State of U.P.* It has been held that:[11a]

> 'Goods' do not include electromagnetic waves or radio frequencies for the purpose of article 366 (29A)(d) of the Constitution of India. The goods in telecommunication are limited to the handsets supplied by the service provider. There are two reasons: (i) Electromagnetic waves are neither abstracted nor consumed in the sense that they are not extinguished by their user. They are not delivered, stored or possessed. Nor are they marketable. They are the medium of communication. What is transmitted is not an electromagnetic wave but the signal through such means. The signals are generated by the subscribers themselves. In telecommunication what is transmitted is the message itself by means of the telegraph. No part of the telegraph itself is transferable or deliverable to the subscriber. (ii) The second reason is more basic; a subscriber to a telephone service cannot reasonably be taken to have intended to purchase or obtain any right to use electromagnetic waves or radio frequencies when a telephone connection is given. Nor does the subscriber intend to use any portion of the wiring, the cable, the satellite, the telephone exchange, etc. At the most the concept of sale in the subscriber's mind would be limited to the hand-set that may have been purchased. As far as the subscriber is concerned no right to the use of any other goods, incorporeal or corporeal is given to him or her with the telephone connection. Electromagnetic wave (or radio frequencies as contended by one of the counsels for the respondents), does not fulfil the parameters applied by the Supreme Court in Tata Consultancy for determining whether they are goods, the right to use of which would be a sale for the purposes of article 366(29A)(d). The essence of the right under article 366(29A)(d) is that it related to the user of goods.

10 (2003) 3 SCC 239.
11 (2006) 3 SCC 1.
11a *Ibid.*

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> It may be that the actual delivery of the goods is not necessary for effecting the transfer of the right to use the goods but the goods must be available at the time of transfer, must be deliverable and delivered at some stage. If the goods or what are claimed to be goods are not deliverable at all by the service providers to the subscribers, the question of the right to use those goods would not arise.
> If the SIM card is not sold to the subscribers but is merely part of the services rendered by the service providers, the SIM card cannot be charged separately to sales tax. If the parties intended that the SIM card would be a separate object of sale, it would be open to the sales tax authorities to levy sales tax thereon. If the sale of the SIM card is merely incidental to the service being provided and facilitates the identification of the subscribers, their credit and other details, it would not be assessable to sales tax.

At the end of this evolutionary process of the term "goods", is the judgment of the constitution bench of the Supreme Court in *Sunrise Associates* v. *Govt. of NCT of Delhi & Ors.*[12] This was on a 'reference'[13] by an order dated 13.10.1999, to consider the decisions in *H. Anraj* v. *Govt. of Tamil Nadu*[14] as well as *Vikas Sales Corporation* v. *Commissioner, Commercial Taxes*[15] (insofar as it affirmed the decision in *H. Anraj*), the question whether lottery tickets are goods for the purposes of article 366 (29A)(a) of the Constitution and the state sales tax laws, was correct or not. Over-ruling *H. Anraj*, it has now been held:[16]

> The contention that the lottery ticket itself is the subject-matter of sale which is assessable to sales tax is unacceptable.
> A sale of a lottery ticket amounts to the transfer of an actionable claim. A lottery ticket has no value in itself. It is a mere piece of paper. Its value lies in the fact that it represents a chance or a right to a conditional benefit of winning a prize of a greater value than the consideration paid for the transfer of that chance. It is nothing more than a token or evidence of this right. A lottery ticket is a slip of paper or memoranda evidencing the transfer of certain rights.
> The sale of a ticket does not necessarily involve the sale of goods. It is nothing other than a contract of carriage. The actual ticket is merely evidence of the right to travel. A contract is not property, but only a promise supported by consideration, upon breach of which either a claim for specific performance or damages would lie. Like railway tickets, a ticket to see a cinema or a pawnbroker's ticket are

12 (2006) 5 SCC 603.
13 *Sunrise Associates* v. *Govt. of NCT of Delhi,* (2000) 10 SCC 420.
14 *Supra* note 5.
15 *Supra* note 6.
16 *Supra* note 12 at 619, 621.

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> memoranda or contracts between the vendors of the ticket and the purchasers. Tickets are themselves, normally evidence of and in some cases the contract between the buyer of the ticket and its seller. Therefore a lottery ticket can be held to be goods if at all only because it evidences the transfer of a right.
> On purchasing a lottery ticket, the purchaser would have a claim to a conditional interest in the prize money, which is not in the purchaser's possession. The right would fall squarely within the definition of an actionable claim and would therefore be excluded from the definition of "goods" under the Sale of Goods Act and the sales tax statutes……
> There is no value in the mere right to participate in the draw and the purchaser does not pay for the right to participate. The consideration is paid for the chance to win. There is therefore no distinction between the two rights. The right to participate being an inseparable part of the chance to win is therefore part of an actionable claim.

It will be recalled that the Supreme Court had, in *Federation of Hotel & Restaurant Association of India & Ors.* v. *Union of India & Ors.,*[17] *inter alia*, explained that the subject of a tax is different from the measure of the levy. The measure of the tax is not determinative of its essential character or of the competence of the legislature. The same principle has been applied in *State of Rajasthan & Anr.* v. *Rajasthan Chemists Association.*[18] Section 4A inserted in the Rajasthan Sales Tax Act, 1994 by the Rajasthan Finance Act, 2004, envisages levy of sales-tax on any transaction of sale of notified goods not on the actual price of consideration which is paid or becomes payable by the buyer to the seller on sales which have taken place, but on the "maximum retail price" of the goods declared on the package in accordance with the provisions of the Standard of Weights and Measures Act, 1976 or the rules framed thereunder or any other law for the time being in force which is chargeable only at the last point of sale by a retailer. The provision is not extended generally to all commodities sold in packages and in relation to which it is required to print the retail price thereon but only to such goods as may be specified by the state government by notification in the official gazette as may be abated by the rate specified in the said notification.

Now, the subject of tax under section 4A, referred to above, is a charge which arises on completion of transaction of sale by the manufacturer or distributor or whole-saler to the retailer. It has all the ingredients of a sale as crystallised in *State of Madras* v. *Gannon Dunkerley & Co. (Madras) Ltd.*[19] But, mere identification of the subject of tax is not enough to complete the charge. While the section levies taxes on the sale transaction by the manufacturer or whole-saler or distributor, the measure with which the total

17 1989 (3) SCC 634.
18 2006 (6) SCC 773.
19 AIR 1958 SC 560.

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turnover is to be determined is not part of the sale which attracts tax but its premise is found on a subsequent sale which, under the scheme of single point tax, is not exigible to tax at all.

Accordingly, affirming the judgment of the Rajasthan High Court[20] the court held, in the context of sales-tax, the subject of tax being sale, measure of tax for the purpose of quantification must retain nexus with "sale" which is the subject of tax. It was further held that tax on the sale of goods is a tax on the vendor in respect of sales and is substantially a tax on sale-price. The vendor or the buyer cannot be taxed *dehors* the subject of tax i.e. the sale by the vendor or the purchase by the buyer. The four essential ingredients of any transaction of sale of goods include the price of the goods sold. Therefore, in any taxing event of sale, the price component of such sale is an essential part of the taxing event. The measure to which rate of tax is to be applied must have a nexus to the taxable event of sale and not divorced from it. It has further been held that law prohibits taxing a transaction which is not a completed sale and also confines sale of goods to mean sale as defined in the Act. This cannot be overcome by devising a measure of tax which relates to an event which has not come into existence when tax is *ex hypothesi* determined, much less one which can be said to be completed sale by transplanting a sum related to a "likely price" to be charged for a subsequent sale. In short, it has been held that the state legislature has no power to enlarge definition of sale by creating legal fiction and cannot levy sales-tax on sale which has not come into existence.

Law is settled that unlike many agricultural products tea-leaves are not marketable in the market fresh from the tea gardens. Nobody eats tea-leaves. It is meant to be boiled for extracting juice out of it to make tea liquor. Tea-leaves are, therefore, only fit for marketing when by a minimal process they are fit for human consumption.[21]

Before the Uttaranchal High Court in *Dehradun Tea Co. Ltd.* v. *State of Uttaranchal & Ors.,*[22] the question for adjudication was whether the raw tea-leaves purchased from tea gardens by the dealer is liable to purchase tax under section 3AAAA of the U.P. Trade Tax Act, 1948, on being sold to other dealers after being processed. It was accordingly held that where separate commercial commodities emerge or come into existence they become separately taxable goods for the purpose of sales-tax and the goods merely subjected to some processing or finishing without change of their identity may remain commercially the same goods which cannot be taxed again. In the case of the petitioner the process applied to the tea-leaves is not to produce anything different but to make it fit for human consumption. The processed tea has not lost the form and condition of tea. Hence, under proviso (iii) to section 3-AAAA, purchase tax is not attracted. This decision, it may be stated, is in conformity with the law laid down by the Supreme Court in *Commissioner,*

20 *Rajasthan Chemists Association* v. *State of Rajasthan*, (2006) 147 STC 476 (Raj).
21 *Commissioner of Sale Tax* v. *D.S. Bist,* (1979) 44 STC 392 (SC).
22 (2006) 148 SRC 56 (Uttar).

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Sales-tax, U.P. v. *Lal Kunwa Stone Crusher (P) Ltd.,*[23] wherein, it has been held, that the purpose of Sales Tax Act is to levy tax on sale of goods of each variety and not the sale of the substance out of which they may have been made. As soon as separate commercial commodities emerge or come into existence, they become separately taxable goods for purposes of sales-tax.

III ASSESSMENT

Work contract

Of all the 'deemed sales' introduced by the Constitution (Forty-Sixth) Amendment Act, 1982, which came into force with effect from 02.02.1983, vide sub-clauses (a) to (f) of clause (29A) of article 366 of the Constitution of India, sub-clause (b) thereof which empowers the state legislatures to levy "tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract" has constantly engaged the attention of the apex court and this process has come to an end only in the year, under survey, with the judgment in *Bharat Sanchar Nigam Ltd.*[24] case. This litigative process began in the following circumstances:

The apex court in *Rainbow Color Lab.* v. *State of M.P.*[25] in the context of the question whether the job rendered by the photographer in taking photographs developing and printing films would amount to a "work contract" within the meaning of article 366 (29) (b) and would attract tax under section 2(n) of the Madhya Pradesh General Sales Tax Act, on the turnover of the photographers, held:[26]

> Prior to the amendment of article 366, in view of the judgment of this Court in *State of Madras* v. *Gannon Dunkerley & Co. (Madras) Ltd.,* the States could not levy sales tax on sale of goods involved in a works contract because the contract was indivisible. All that has happened in law after the 46th Amendment and the judgment of this Court in *Builders*[27] case is that it is now open to the States to divide the works contract into two separate contracts by a legal fiction: (i) contract for sale of goods involved in the said works contract, and (ii) for supply of labour and service. This division of contract under the amended law can be made only if the works contract involved a dominant intention to transfer the property in goods and not in contracts where the transfer in property takes place as an incident of contract of service… What is pertinent to ascertain in this connection is what was the dominant intention of the contract…. On facts as we have noticed that the work done by the photographer which, as held

23 (2000) 3 SCC 525.
24 *Supra* note 11.
25 (2002) 2 SCC 385.
26 *Ibid.*
27 *Builder Association of India Ltd.* v. *U.O.I. & Ors.,* (1989) 2 SCC 645.

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> by this Court in *Assistant Sales Tax Officer* v. *B.C. Kame,*[28] is only in the nature of a service contract not involving any sale of goods, we are of the opinion that the stand taken by the respondent-state cannot be sustained.

This conclusion was doubted in *Associated Cement Companies Ltd.* v. *Commissioner of Customs*[29] by saying that the conclusion arrived at in *Rainbow Colour Lab* ran counter to the express provision contained in article 366 (29A) as also of the constitution bench decision in *Builders Assn. of India* v. *U.O.I.*

After the above judgment, the general perception was that *Rainbow* was over-ruled. However, in *C.K. Jidheesh* v. *Union of India*[30] it was held that the aforesaid observations in *Associated Cement* were merely *obiter* and that *Rainbow* was still good law.

The true scope of the 'deemed sale' *vide* sub-clause (ii) of clause (29A) of article 366 was finally crystallized by the apex court in *B.S.N.L.* case,[31] wherein it has been held as under:[32]

> 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 dominant nature test applying. Therefore when in 2005, *C.K. Jidheesh* v. *Union of India* held, that the aforesaid observations in *Associated Cement* were merely obiter and that *Rainbow* was still good law, it was not correct. It is necessary to note that *Associated Cement* did not say that in all cases of composite transactions the 46th Amendment would apply.

The legal position that has now emerged as a result of *B.S.N.L.* case is that in a works contract whatever material passes which may even be of nominal value, will attract sales-tax. This legal position has been epitomized by the Bombay High Court in its judgment in *Commissioner of Sales Tax, Mumbai* v. *Hari & Co.*[33]

It can be treated as well settled that there is no standard formula by which one can distinguish a contract of sale from a contract for work and labour. There may be many common features in both the contracts, some neutral in a particular contract, and yet certain clinching terms in a given case may fortify a conclusion one way or the other. It will depend upon the facts and

28 (1977) 1 SCC 634.
29 (2001) 4 SCC 593.
30 (2005) 8 SCALE 784.
31 *Supra* note 11.
32 *Ibid.*
33 (2006) 148 STC 92 (Bom).

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circumstances of each case. The question is not always easy and has for all times vexed jurists all over.[34] The same observations were reiterated by the Supreme Court in *Hindustan Ship Yard Ltd.* v. *State of Andhra Pradesh.*[35]

Applying the principles as enunciated above the Karnataka High Court has, in *Cradle Runways (India)* v. *Commissioner, Commercial Taxes, Karnataka,*[36] given the following guide lines to determine whether a particular contract is for sale of goods or work contract:[37]

> The character of transaction is defined by the nature of the contract entered into by the parties. The nature of contract depends upon the intention of the parties as reflected in the terms and conditions of the contract document. The nature of the contract is decided on the totality of its terms and conditions, i.e., scope and obligation of the parties, contract value and payment terms, insurance coverage, transfer of ownership or title in goods supplied, liquidated damages whether restricted to supply value or not, etc. Thus, the nature of a contract is predominantly based on facts rather than being a question of law. It is the nature of the contract which is a deciding factor to determine whether the transaction between the parties is a contract of sale or works contract.

Sale

Another 'deemed sale' which remained the subject of adjudication during the year, under survey, is sub-clause (d) of clause (29A) of article 366 of the Constitution. This deemed sale takes place when there is transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration. This sub-clause has also been judicially well ploughed. *20th Century Finance Corporation Ltd. & Anr.* v. *State of Maharashtra*[38] crystallized mainly the *situs* of this deemed sale. It was held:[39]

> In our view, therefore, on a plain construction of sub-clause (d) of Clause (29A) the taxable event is the transfer of the right to use the goods regardless of when or whether the goods are delivered for use. What is required is that the goods should be in existence so that they may be used. And further contract in respect thereof is also required to be executed. Given that, the locus of the deemed sale is the place where the right to use the goods is transferred. Where the goods are

34 *State of Gujarat (CST) Ahmedabad* v. *Variety Body Builders*, (1976) 38 STC 176 (SC).
35 (200) 119 STC 533 (SC).
36 (2006) 144 STC 465.
37 *Ibid.*
38 2000 (6) SCC 12.
39 *Ibid.*

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> when the right to use them is transferred is of no relevance to the locus of the deemed sale. Also of no relevance to the deemed sale is where the goods are delivered for use pursuant to the transfer of the right to use them, though it may be that in the case of an oral or implied transfer of the right to use goods, it is effected by the delivery of the goods.

In *Aggarwal Brothers* v. *State of Haryana & Anr.*[40] the apex court illumined the true scope of this provision and laid down that the provision expressly speaks of "transfer of the right to use goods" and not of transfer of goods. It was, therefore, not correct to say that to be a deemed sale within the meaning of this provision, there must be a legal transfer of goods or that the transaction must be like a lease. The essential ingredient of a deemed sale is that the goods transferred must be under the effective control of the transferee and that the transferee should be free to make use of the goods transferred.[41]

Before the Gauhati High Court in *Saumya Mining Pvt. Ltd.* v. *Commissioner of Taxes, Assam & Ors.,*[42] the brief facts were that the petitioner company had submitted tender and being successful was allotted work of removal of hard shale and carbonaceous shale by means of heavy earth moving machinery by North East Coal Fields. The petitioner was submitting bills and getting payments. However, on the basis of a clarification issued by the Commissioner of Taxes, the Superintendent of Taxes at Digboi informed the North Eastern Coal Fields to deduct tax at 5 per cent on the bills submitted by the petitioner since the petitioner-company was liable to pay sales tax on the transaction. In the petition challenging the clarification and the letter of the Superintendent of Taxes, Digboi, it was held, allowing the writ petition, that there is no material to show that the control, custody or possession of heavy earth moving machinery were at any point of time handed over to the respondent North Eastern Coal Fields or the work was carried out by the respondent-company with the help of the machineries. This is not a case of petitioner letting out their machinery for hire charges. The machinery all along remained under the control and possession of the petitioner and hence the works contract in question is not exigible to tax.

Before the Karnataka High Court in *Venkateshwara Engineering Works* v. *Addl. Commissioner of Commercial Taxes, Bangalore*[43] the question was whether the diesel generating sets used in the business of the assessee were 'plant and machinery' and the lease rentals received by the assessees were

40 1999 (9) SCC 182.
41 *State of A.P.* v. *Rashtriya Ispat Nigam Ltd.,* 2002 (3) SCC 314; *Rashtriya Ispat Nigam Ltd.* v. *CTO,* (1990) 77 STC 182 (AP).
42 (2006) 146 STC 343 (Gau). See also *Onaway Engineering Pvt. Ltd.* v. *State of A.P.,* (2006) 146 STC 634 (AP); *Ushakiran Movies* v. *State of A.P.,* (2006) 148 STC 453.
43 (2006) 146 STC 681 (Kar).
44 *Scientific Engineering House Pvt. Ltd.* v. *Commissioner of Income-tax,* (1986) 157 ITR 86 (SC).

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liable to tax and turnover tax. Relying on a judgment of the Supreme Court,[44] it was held that the diesel generating sets are 'plant and machinery' and, that the rentals received as a result of effecting the deemed sales of 'Transfer of Right to Use Goods' by giving the diesel generating sets on lease were liable to tax and turnover tax.

The Allahabad High Court also in *Banda Tent House Association* v. *State of U.P. & Ors.,*[45] held that where the petitioner, an association of members, was engaged in the activity of giving articles such as chairs, tents, pillows, bed-sheets, crockery etc. to other persons and other members of the association for the use of specific purposes, notwithstanding the fact that the goods remained within the ultimate control of the owner, the ingredients of the deemed sale within the meaning of section 3-F of the U.P. Trade Tax Act, were complete and the association was held liable to pay tax.

It is well known that the Central Sales Tax Act, 1956 was amended w.e.f. 11.05.2002 when the term 'sale under section 2(g) also brought within its ambit all the deemed sales as per sub-clauses (a) to (f) of clause (29A) of article 366 of the Constitution. Accordingly, when a sale is an inter-state sale within the meaning of section 3 of the Central Sales Tax Act, it is beyond the competence of the state legislatures to levy tax on such sales. Before the Gujarat High Court in *Amba Lal Sarabhai Enterprises Ltd.* v. *Sales Tax Officer*[46] the facts of the case were that the petitioner-company, a dealer under the Gujarat Sales Tax Act, 1969, was manufacturing and marketing life saving drugs, pharmaceutical preparations etc., and was having a factory in the State of Gujarat. On 19.10.1999, it entered into a deed of assignment and sale transferring corporeal rights to use trade mark and right to copyright, technology, etc., with another company by executing necessary documents at Mumbai in the State of Maharashtra and the respondent-authorities issued show cause notice and raised demand for payment of tax under the Gujarat Sales Tax Act, 1969 in respect of that transaction. In special civil application the respondent-authorities contended that the petitioner was liable under the Gujarat Act as the goods were located in the state.

It was held, relying on *20th Century*[47] and allowing the petition, that clause (30-C) added in section 2 of the Gujarat Sales Tax Act, 1969 with effect from 5.8.1985 define "specified sale" to mean "the transfer of the right to use goods" and taxing section 3-A inserted simultaneously enjoins a dealer to pay sales tax on the turnover of the specified sales of goods specified in schedule III, if such turnover exceeds the limit specified. However, section 3A of the Act does not fix *situs* of such specified sale by creating a legal fiction. In the absence of any such legal fiction the *situs* of sale in the case of the transaction of transfer of right to use any goods would be the place where the property in goods passes, i.e., where the written agreement transferring the right to use is executed. In the case of the petitioner it is not in dispute that deed of

45 (2006) 146 STC 355 (All).
46 (2006) 145 STC 523 (Guj).
47 *Supra* note 38.

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assignment and the deed of sale were executed at Mumbai in the State of Maharashtra, i.e., the property in the goods was transferred in the State of Maharashtra. Therefore, the transaction was not taxable in the State of Gujarat and the notices issued by the respondent-authorities were liable to be quashed.

An interesting question of law was involved in *Dhampur Sugar Mills Ltd.* v. *Commissioner, Trade Tax*[48] i.e., whether the transaction was 'sale' or 'barter'. It may be recalled that the Supreme Court had in *Devi Dass Gopal Krishan & Ors.* v. *The State of Punjab & Ors.,*[49] *inter-alia,* held that the expression "valuable consideration" took colour from the preceding expression "cash or deferred payment" and only meant some other monetary payment in the nature of cash or deferred payment. This judgment has, however, been distinguished in the instant case. The brief facts of the case were that a company, which owned a sugar mill, executed a deed of licence in favour of the appellant (the dealer). In terms of the deed the appellant was to pay the company a sum of Rs. 56 lakhs per annum by way of licence fee for the use of the entire sugar mill complex. Under that deed the appellant was to execute a performance guarantee in favour of the company. Under the performance guarantee deed the licence fee was to be paid in the shape of molasses. At the end of every licence year, the value of the molasses had to be ascertained on the basis of the rates notified by the government and any excess or shortage towards the amount of licence fee was to be made good by either party. The question was whether trade tax under the U.P. Trade Tax Act, 1948, was exigible in relation to the transfer of molasses under the deed of licence.

It was held (i) that the mode and manner in which the licence fee was to be paid was not the subject-matter of the deed of licence. The deed of licence did not contain any provision that the appellant was required to transfer to the company the molasses produced by it, in lieu of the licence fee. By reason of the performance guarantee deed only a provision was made in terms whereof the appellant was required to hand over the entire quantity of molasses to the company. This was not a case where molasses were required to be supplied in terms of the provisions of the licence. In terms of the Act a manufacturer was a dealer and the appellant was the dealer;

(ii) that it could not be said that the parties had entered into a contract for supply of molasses produced in the sugar mill by the appellant in favour of the company by way of barter or exchange;

(iii) that an adjustment of price in case of this nature would come within the purview of the term "other valuable consideration" inasmuch as the appellant and the company were fully aware that they had to fulfil their respective terms and obligation, i.e., (i) payment of licence fee on monetary terms, and (ii) payment of price of molasses supplied by the appellant to the company which was again in monetary terms. The parties by mutual consent

48 (2006) 147 STC 57 (SC).
49 (1967) 3 SCR 557.

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had only agreed to adjust the price of molasses supplied with the amount of the licence fee. This was not a transaction by way of transfer of stock. Nor was it a transfer by way of a mortgage or lease;

(iv) that molasses manufactured in the sugar mill were the property of the appellant, and answered the description of "goods". Transfer of such molasses by the appellant to the company was not a transfer by way of transfer of stock: it was a transfer of ownership in goods wherefor the company was to pay a price to the appellant. The transaction, therefore, answered the description of "sale" within the meaning of the provisions of the U.P. Trade Tax Act, 1948, and trade tax was leviable.

Check-post provisions

The Madras High Court had once observed:[50]

> In most modern legislation there are quite a few provisions in which one may discern not only a common vocabulary, but also a certain basic framework and even certain identity of out-look. This is a common enough tendency to be found in taxing statutes. Courts have often found a comparative study of different tax laws a fruitful discipline even if it were not, strictly speaking, a direct aid to statutory construction. This kind of task is now easily undertaken because of the larger number of tax cases which go before our courts and the good number of which get reported in the specialized law journals. Learned judges who sit and dispose of tax revisions and tax references thus find themselves in a position to perceive broad trends which run right through case law, albeit under different fiscal enactments. They are able to deduce general principles even from the "bare bones" of the statutes. And when tax principles thus get established, slowly but surely, by this kind of judicial process, they become authoritative expositions in themselves of the way in which the relevant taxing provisions have perforce to be constructed. If the position were otherwise, courts would merely be adding their own contribution to the growing complexity of tax laws instead of discovering unity in complexity.

The above observations are quite apposite in respect of check-post provisions which now exist in the sales tax / Vat Acts of the various states. The one and the only aim of these provisions is to arrest and minimize tax evasion and to take penal action if there is an attempt on the part of the owner of the goods/vehicle to evade due payment of tax to the state from which the goods are being exported or these are being imported into the state. The aim of such provisions is indeed, laudable but the concerned authorities, more often than not, work in a high handed/mechanical manner, thus, causing great hardship to the honest tax-payers, where the lapse may be *bona fide*, or, the

50 (1980) 46 STC 264 at 265 (head notes).

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penalty imposed is much disproportionate or is in breach of the principles of natural justice. The following judicial pronouncements during the year under survey will bear out the above observations.

The Madhya Pradesh High Court in *Mena Transport* v. *Assistant Commissioner of Commercial Tax,*[51] finding that the impugned orders had been passed by the concerned authority in utter violation of the provisions of section 45-A of the Madhya Pradesh Commercial Tax Act, 1994 and also without hearing the petitioner, there was clear-cut violation of the basic principles of law that no one should be condemned unheard and that the order was *per se* illegal and void, tendered the following advice to the authorities:[51a]

> In a case where penalty is to be imposed by the check-post authority, a full-fledged enquiry is necessary in compliance of the provisions of law. Therefore, as per the mandate of law, the Check-post Officer is required to issue showcause notice, ensure that it is served on the affected party personally; provide reasonable time to file reply, explanation and to produce documents and thereafter provide opportunity of hearing to the party concerned; to rebut presumption about evasion of tax, and also an opportunity to explain and show cause the reasons for failure to furnish the relevant declaration form at the time, it was required to be produced before the Check-post Officer or for seizure of goods and vehicles; only thereafter the Check-post Officer should examine the reply, explanation and the documents produced by the party and if necessary record evidence and hold an enquiry into the matter and thereafter record findings thereon after following the principles of natural justice and due process of law. If the Check-post Officer wants to rely on some materials or documents against the party concerned, it is also his duty to disclose the same by supplying the copies thereof to the party concerned. Under the mandate of law unless fair procedure and principles of natural justice are followed effectively, it cannot be said that the Check-post Officer has acted fairly and has followed the law or applied his judicial mind. The rule of opportunity of hearing and following the principles of natural justice and fair procedure under due process of law is not merely an empty formality but it is the mandate of law and justice which is required to be followed by the Check-post Officer before imposing any penalty. It is to be remembered that observing fair procedure in the enquiry is the antithesis of arbitrariness and unreasonableness.

The Rajasthan High Court also in *Assistant Commercial Tax Officer, Flying Squad, Jaipur* v. *Gaurav Steels Ltd.*[52] observed, that "the Revenue

51 (2006) 143 STC 58 (MP).
51a *Id.* at 79-80.
52 (2006) 147 STC 36 (Raj).

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department should frame such guidelines and rules so that a balance is struck between the unnecessary harassment and penalty proceedings on the one hand and the actual cases of evasion of tax on the other hand and that the commercial taxes department should frame such guidelines expeditiously so that repetitive appeals or revisions involving small stakes do not unnecessarily burden the dockets of the court." Referring to two of its earlier judgments,[53] it was held that if the goods were accompanied by all other documents except declaration in form ST 18A and all the material particulars to be filled in such declaration form were disclosed in such other accompanying documents, levy of penalty for not carrying declaration form No. ST 18 would not be justified.

This same high court again in *Parashwanath Granite India Ltd.* v. *State of Rajasthan & Ors.*[54] advised that:[54a]

> Where the object of the provision is to check and prevent avoidance or evasion of tax, the order levying penalty must record a finding that nexus between the breach and the avoidance or evasion of tax resulting from such breach was established. Production of false and forged documents or non-production of documents even after opportunity was offered implies dishonest intention and opportunity of hearing provided under the Act is only to enable the person concerned to discharge the obligation about production of requisite documents within the time allowed by the authority. Therefore, if bona fide and genuine documents are produced before the authority containing correct information within the time allowed by it, that is the end of the matter. However, if within the time allowed the person concerned fails to produce the relevant documents, or the documents which are produced are found to be false or forged or incorrect, penalty becomes imposable.

Before the Kerala High Court in *Keiniku* v. *Sales Tax Inspector and Ors.,*[55] the petitioner was not given a transit pass inspite of his request. The court held as under:[56]

> No tax is leviable under the Kerala General Sales Tax Act, 1963 merely because goods enter the State en route to another State in transit. However, in order to ensure that goods entering the State en route to another State in transit are not sold within the State evading tax

53 *ACTO* v. *Voltas Ltd.,* (2000) 120 STC 217 (Raj) and *ACTO* v. *Rajasthan Taxation Tribunal,* (2001) 123 STC 172 (Raj). Also see *State of Rajasthan* v. *D.P. Metals,* (2001) 124 STC 611 (para 31) (SC).

54 (2006) 144 STC 271 (Raj).

54a *Id.* at 312.

55 (2006) 143 STC 353 (Ker).

56 *Id.* at 356.

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> liability, provisions have been made to safeguard the interest of the Revenue. On a reading of the provision of section 30B of the Act, it can be seen that only when the goods are actually sold or presumed to have been sold, the event of tax liability arises. Where the owner or driver fails to deliver the transit pass at the last check-post it will be presumed that the goods have been sold within the State. Likewise, if the declaration prescribed in clause (b) of sub-section (2) of section 29 is found to be false or bogus then also a presumption will arise that the goods have been sold within the State.

However, in the event of the transit pass not being delivered at the exit check-post, the presumption of evasion of tax on the ground that goods have been sold in the state, is rebuttable, if the requisite evidence to the contrary is adduced.[57]

The West Bengal Taxation Tribunal in its two judgments[58] dealt with cases of alleged under valuation, and relying on a judgment of the Calcutta High Court[59] held that as per sub-rule (9) of rule 212 of the West Bengal Sales Tax Rules, 1995, the correctness of the description, weight and value of the goods of a consignment is to be verified with respect to the accompanying way-bill. The provisions do not empower the check-post officer or such other officer to seize the goods on the ground of under-invoicing. Therefore, the goods seized on the interpretation of rule 212 that the invoice value of the goods is the relevant factor in the matter of verifying the correctness of the value is not proper and justified.

There is no provision to hold that the purchase from an unregistered dealer would make any transaction invalid on the presumption that the documents carried by the transporter in course of transportation were fake. Alleged non-existence of a dealer cannot be a ground for holding that the documents were fake and invalid.[60]

It appears that the somewhat strict approach of the courts of law in regard to the provisions relating to seizure of goods and imposition of penalty for the alleged violations of check-post provisions is owing to the following well settled propositions of law:

(i) In fiscal statutes, the import of the words "tax", "interest" and "penalty" is well known. They are different concepts. Tax is the amount payable as a result of the charging provision. It is a compulsory exaction of money by a public authority for public purposes, the payment of which is enforced by law. Penalty is

57 *Sodhi Transport Co. & Anr.* v. *State of U.P. & Anr.,* (1986) 2 SCC 486.

58 *Bestley Goods Transport Corporation & Anr.* v. *C.T.O. Check-post & Ors,* (2006) 146 STC 412 and *Bahubali Attraction Pvt. Ltd.* v. *C.T.O.,* (2006) 146 STC 538 (WBTT).

59 *Bhabaneswar Singh* v. *Commercial Tax Officer,* (2002) 126 STC 533 (WBTT).

60 *Ramesh Kr. Jadav* v. *Commercial Tax Officer,* (2002) 126 STC 533 (WBTT).

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ordinarily levied on an assessee for some contumacious conduct or for a deliberate violation of the provisions of the particular statute. Interest is compensatory in character and is imposed on an assessee who has withheld payment of any tax as and when it is due and payable;[61]

(ii) a statutory functionary has to act within the four corners of the statute or not at all;[62]

(iii) the imposition of penalty is quasi-criminal and unless strictly proved, the assessee is not liable to penalty;[63]

(iv) penalty provisions cannot be used as revenue yielding provisions and the object of the penalty provision is to ensure compliance in the larger public interest.[64] Penalty provisions are deterrent provisions.[65]

Natural justice

The Supreme Court has in *Suresh Chandra Nanhorya*[66] delivered during the year under survey, described natural justice, thus: "Natural Justice is the essence of fair adjudication, deeply rooted in tradition and conscience, to be ranked as fundamental. The purpose of following the principles of natural justice is the prevention of miscarriage of justice.

Besides, natural justice is an inseparable ingredient of fairness and reasonableness. It is even said that the principles of natural justice must be read into unoccupied interstices of the statute, unless there is a clear mandate to the contrary."

Natural justice is a term, which could have different connotations and dimensions depending on the facts of a case while keeping in view the provisions of law applicable thereto. It is not a codified concept but these principles are ingrained into the conscience of a man. Natural justice is the administration of justice in a common-sense/liberal way. Justice is based on substantially natural ideals and human values. The administration of justice is to be freed from the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical niceties. They are an integral part of the procedure that may be adopted by judicial, quasi-judicial and administrative authorities while making an order affecting rights.[67]

Concept of natural justice has undergone a great deal of change in recent years. Rules of natural justice are not rules embodied always expressly in a statute or in rules framed thereunder. They may be implied from the nature of the duty to be performed under a statute. What particular rule of natural justice

61 *Pratibha Processors and Ors.* v. *U.O.I.,* AIR 1997 SC 138 at 143.
62 *Gahendra Kumar Banthia* v. *U.O.I.,* (1996) 222 ITR 632 (Cal).
63 *CST, U.P.* v. *Mool Chand Shyam Lal,* (1988) 71 STC 226 (SC).
64 See, *supra* note 52.
65 *CIT* v. *Anwar Ali,* (1970) 76 ITR 696 at 701 (SC).
66 *Suresh Chandra Nanhorya* v. *Rajendra Rajak and Ors.,* (2006) 7 SCC 800.
67 *Canara Bank* v. *Debasis Das,* (2003) 4 SCC 557 at 561.

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should be implied and what its context should be in a given case must depend to a great extent on the facts and circumstances of that case, the framework of the statute under which the enquiry is held. The old distinction between a judicial act and an administrative act has withered away. The adherence to principles of natural justice as recognized by all civilized states is of supreme importance when a quasi-judicial body embarks on determining disputes between the parties, or any administrative action involving civil consequences is in issue. Even administrative order, which involves civil consequences, must be consistent with the rules of natural justice. The expression 'civil consequences' encompasses infraction of not merely property or personal rights but of civil liberties, material deprivations, and no-pecuniary damages. In its wide umbrella comes everything that affects a citizen in his civil life.

The concept of fair hearing has four essential elements, viz., (i) notice of hearing; (ii) opportunity for hearing; (iii) impartiality of the tribunal; and (iv) an orderly course of procedure. It is well-settled now that even an administrative tribunal must act in good faith, must have regard to relevant considerations and must have a sense of responsibility in discharge of its duties. Therefore, when a particular tribunal is clothed with power to determine a *lis*, acting as a quasi-judicial authority having power to impose the penalty, it is required to follow the procedure laid down under the law, the principles of natural justice, the rule of hearing, acting fairly, judicially without any bias and decide the matter impartially in accordance with the law and procedure laid down for the same.

In fine, observance of the principle of 'audi alteram partem' (hear the other side) and passing a reasoned order is the linchpin of administration of justice.[68]

Now, it is common knowledge that 'Value Added System of sales tax' in place of the 'General System of sales-tax' has been introduced in most of the states of the country w.e.f. 01.04.2005. Viewed in the light of the above crystal clear guidelines about the import of the expression 'Natural Justice' it is profitable to see whether this system of taxation conforms to the principles of natural justice. Take, for instance, the Delhi Value Added Tax Act, 2004 wherein, a system of 'self assessment' has been introduced. Sections 32 and 33 of this Act read as under:

> "32. Default assessment of tax payable – (1) if any person, -
> (a) has not furnished returns required under this Act by the prescribed date; or
> (b) has furnished incomplete or incorrect returns; or
> (c) has furnished a return which does not comply with the requirements of this Act; or
> (d) for any other reason the Commissioner is not satisfied with the return furnished by a person;

68 *S.L.Kapoor* v. *Jagmohan,* AIR 1981 SC 136.

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the Commissioner may for reasons to be recorded in writing assess or re-assess to the best of his judgment the amount of net tax due for a tax period or more than one tax period by a single order so long as all such tax periods are comprised in one year.

(1A) If, upon the information which has come into his possession, the Commissioner is satisfied that any person who has been liable to pay tax under this Act in respect of any period or periods, has failed to get himself registered, the Commissioner may for reasons to be recorded in writing, assess to the best of his judgment the amount of net tax due for such tax period or tax periods and all subsequent tax periods.

(2) Where the Commissioner has made an assessment under this section, the Commissioner shall forthwith serve on that person a notice of assessment of the amount of any additional tax due for that tax period.

(3) Where the Commissioner has made an assessment under this section and further tax is assessed as owed, the amount of further tax assessed is due and payable on the same date as the date on which the net tax for the tax period was due.

Explanation – A person may, if he disagrees with the notice of assessment, file an objection under section 74 of this Act.

33. Assessment of penalty – (1) where the Commissioner has reason to believe that a liability to pay a penalty under this Act has arisen, the Commissioner, after recording the reason in writing, shall make and serve on the person a notice of assessment of the penalty that is due under this Act.

(2) The amount of any penalty assessed under this section is due and payable on the date on which the notice of assessment is served by the Commissioner.

(3) any assessment made under this section shall be without prejudice to prosecution for any offence under this Act.

Explanation – A person may, if he disagrees with the notice of assessment, file an objection under section 74 of this Act."

A bare perusal of these provisions will transpire that these provisions confer on the commissioner, and, for that matter, the assessing authorities, the power to make a 'default assessment' without associating the dealer concerned with the proceedings and thus serving the 'default assessment notice' on the dealer; nay, as a result of this 'default assessment' even penalty is imposed and a notice of penalty is also served on the dealer. The Act, no doubt, envisages that the dealer can file an 'objection' against such 'default assessment' of tax/penalty notice and till the objection filed is settled, the recovery remains in abeyance, under section 35, but the stark fact remains that the liability to pay tax and penalty is fastened on the dealer without hearing him. It is trite saying that if the dealer is heard while making the assessment or before issuing the 'default assessment / penalty notices', the necessity of filing an objection, in most of the cases, might be obviated and unnecessary inconvenience and incurring of expenditure to pursue objection proceedings would be saved.

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It is doubtful if the above provisions as contained in sections 32 and 33, are in conformity with the principles of natural justice. It is submitted that these provisions need a second look; else, it is probable that these provisions may be assailed in a court of law in the near future and struck down being violative of the principles of natural justice. Further, it is trite saying that the aim of the government towards simplifying taxation laws, and, it is indeed, claimed that VAT system is an attempt to simplifying sales-tax law. But, the above provisions do not appear to fulfil this laudable objective.

IV JUDGMENTS UNDER THE CENTRAL SALES TAX ACT, 1956

Inter-state sale

Much judicial thought has been expended by the Supreme Court to crystallize as to what constitutes an inter-state sale. It is well settled that if a question arises whether a sale is an inter-state sale or not, it has to be answered with reference to and on the basis of section 3 of the Central Sales Tax Act.[69] Section 3 of the Act reads as under:

> "3. A sale or purchase of goods shall be deemed to take-place in the course of inter-State trade or commerce if the sale or purchase-
> (a) occasions the movement of goods from one State to another;
> ….."

By a catena of decisions of the Supreme Court, the ingredients of a sale in the course of inter-state trade or commerce are now well settled. These are (1) there must be a contract of sale, incorporating a stipulation, express or implied, regarding inter-state movement of goods; (ii) the goods must actually move from one state to another pursuant to such contract of sale; the sale must be the proximate cause of movement; and (iii) such movement of goods must be from one state to another state where the sale concludes. It follows as a necessary corollary of these principles that a movement of goods which takes place independently of a contract of sale would not fall within the meaning of an inter-state sale. In other words, if there is no contract of sale preceding the movement of goods, obviously, the movement cannot be attributed to the contract of sale. Similarly, if the transaction of sale stands completed within the state and the movement of goods takes place thereafter, it would obviously be independent of the contract of sale and necessarily by or on behalf of the purchaser alone and, therefore, the transaction would not be having an inter-state element.[70]

69 *Bharat Heavy Electricals Ltd.* v. *U.O.I. & Ors.,* AIR 1996 SC 1854.

70 See *Kelvinator India Ltd.* v. *State of Haryana,* 1973 (2) SCC 551; *Oil India Ltd.* v. *Superintendent of Taxes,* 1975 (1) SCC 733; *English Electric Company of India Ltd.* v. *Deputy Commercial Tax Officer,* 1976 (4) SCC 460; *Union of India* v. *K.G. Khosla and Co. Ltd.,* 1979 (2) SCC 242; *Sahney Steel and Press Works* v. *CTO,* 1984 (4) SCC 173.

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The Karnataka High Court in *State of Karnataka & Ors.* v. *ECE Industries Ltd.*[71] had to adjudicate in the context of a works contract whether the disputed sale was an inter-state or an intra-state one. The brief facts of the case before the court were that the respondent-company engaged in the business of manufacture, supply and installation of lifts and elevators had its branch office at Bangalore, which procured orders from customers in Karnataka. Lifts and elevators were manufactured in its factory at Uttar Pradesh according to the design and specifications of the customers and the manufactured items and after being tested were dismantled and dispatched to the customers' place in the State of Karnataka by way of stock transfers. The works contract was executed by the branch office by installation and commissioning of the lifts and elevators at the customers' place. After the revenue lost the case before the appellate tribunal and approached the high court, it was held, dismissing the petitions, (i) that in exercise of legislative power to impose tax on the sale or purchase of goods under entry 54 of the state list read with article 366(29-A)(b) of the Constitution, the state legislature while imposing a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract is not competent to impose a tax on such a transfer (deemed sale) which constitutes a sale in the course of inter-state trade or commerce or a sale outside the state or a sale in the course of import or export. Similarly, if clause (c) of explanation (3) to section 2(1) (t) of the Karnataka Sales Tax Act, 1957, which fixes *situs* of sale in case of works contract, is read with other provisions of the Act including clauses (a) and (b) of explanation (3) it cannot be said that in fixing the *situs* in respect of deemed sales resulting from the transfer of property in goods involved in the execution of works contract the state legislature has included a sale in the course of inter-state or commerce or sale outside the state or a sale in the course of import or export; that the principles for determining when a sale takes place in the course of inter-state trade or commerce laid down in section 3 of the Central Sales Tax Act, 1956, would apply equally to transfer of property in goods involved in the execution of works contract;

(ii) that for the purpose of section 3(a) of the Central Sales Tax Act, 1956, it is not necessary that the contract of sale must itself provide for and cause the movement of goods or that the movement of goods must be occasioned specifically in accordance with the terms of the contract of sale. A sale can be an inter-state sale even if the contract of sale does not itself provide for movement of the goods from one state to another but such movement is the result of a covenant in the contract of sale or is an incident of that contract;

(iii) that where the description of the goods is clear and goods of that description are dispatched then the goods so despatched can be taken as appropriated to the contract unconditionally and despatches from one state to another to an identified customer result in inter-state sale. Merely, because

71 (2006) 144 STC 605 (Kar).

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the lifts and the elevators are installed and commissioned in the state, it cannot be said that it is a local sale exigible to levy under section 5-B of the Act on the ground that the actual transfer of property used in the works contract took place in the State of Karnataka and, therefore the tribunal was justified in coming to the conclusion that the transaction in question was not exigible to levy of tax under section 5-B of the Karnataka Sales Tax Act, 1957.

The Patna High Court in *Shakumbhri Udyog* v. *State of Bihar & Ors*,[72] likewise, had to adjudicate whether the disputed transaction was an intra-state or an inter-state transaction. The high court, reiterating the three essentials of an inter-state sale, held that there was no dispute that there was contract of sale as on the basis of the tender submitted by the petitioner, the same was accepted and a supply order was given to him to supply blankets on the terms and conditions given.

Supply order was sent to the petitioner at his residential address at Haryana. He was to transport blankets from Haryana and supply the same in the district of Darbhanga in the State of Bihar. The payment was to be made on the grant of quality certificate by the concerned officer. Therefore, the first condition that there should be contract of sale between the parties was thus, fulfilled. The second condition that the goods must move from one state to anther in pursuance of such contract of sale, was also fulfilled as after the supply order has been passed by the respondent, the goods moved from the State of Haryana to the State of Bihar. In other words, cause of supply of blankets from Haryana to Bihar arose because of acceptance of tender and issuance of supply order by the respondents. The third condition was also fulfilled as movements of the blankets have been made from State of Haryana to Bihar, where on being satisfied with the quality, certificates where issued and 90 per cent of the value of the blankets has been paid. So, even if the version of the state-respondent is accepted that the sale concluded here in Bihar after the blankets were found according to the specification prescribed in the supply order, the three conditions, as mentioned above, have been fulfilled in this case. The sale has taken place in course of the inter-state trade and, accordingly, the petitioner is not liable to pay sales tax or additional tax under the provision of the Bihar Finance Act, 1981.

Before the Orissa High Court in *State of Orissa* v. *I.D.L. Chemical (P) Ltd.*[73] the question for adjudication was whether the disputed transaction was an inter-state sale or a branch transfer. The brief facts of the case were that the assessee was a company engaged in manufacture of explosives, detonators and accessories, holding licence under the Explosives Act, 1884. It had a manufacturing unit in Orissa which was registered under both the Orissa Sales Tax Act, 1947 and the Central Sales Tax Act, 1956. During the assessment years 1976-77, 1977-78 to 1983-84, 1989-90 and 1990-91, the assessee effected supplies to the constituent collieries of Coal India Ltd. inside and outside the State of Orissa through its consignment agents against

72 (2006) 146 STC 15 (Pat).
73 (2006) 147 STC 231 (Ori).

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indents placed by the collieries subsequent to orders placed by CIL and claimed the dispatches to be stock transfer on the ground that the sales took place when the supplies to the collieries were made against the indents placed by the respective collieries. On the other hand the state claimed that the supplies were made on account of order placed by CIL and the movement of goods from the State of Orissa to outside the state was incident of the CIL's order for supply. According to the state, the transactions were purely inter-state sale from the State of Orissa as the assessee would not have despatched the goods outside the state for delivery to the collieries, had there been no order of CIL and also because consignee collieries and consignment agents of assessee were specifically named in the order placed by the CIL. The state also took the plea that the indents were not contract of sale and that the indents placed by the collieries were simple follow-up action of the purchase order of the CIL in compliance of the Indian Explosives Rules, 1983 and licence. On a reference it was held by the court that the purchase order was issued by Coal India Ltd. in response to the quotation offered by the asessee. The text of the said order at the very beginning contains a clear direction for supply of explosives, detonators, etc., to the collieries of CIL in different states on placement of indents.

A detailed reading of the purchase order showed that nothing was left to the decision of the constituent collieries except that they would take delivery of the explosives, etc., from the nearest magazines of the agents according to their requirement. No instance was brought by the assessee that such goods were ever diverted to other purchasers. Moreover, it was CIL which paid the railway/road freight charges or the transit insurance for the goods which moved from Orissa unit of the assessee to the consignment agents. That apart, in each invoice the number and date of the supply order issued by CIL had been noted and all the payments had been made to the assessee through the consignment agents which were indicative of the fact that the supply of the goods was made in response to the purchase order and that submission of indents and taking delivery of the goods were simply follow up actions of the said purchase order. There was also existence of record to show that on one occasion some of the explosives in containers despatched by assessee were damaged during transit due to rain and compensation was claimed by CIL from the railways. Rule 7 of the Explosives Rules, 1983 prescribes restrictions on delivery of explosives and the letter of the Chief Controller of Explosives to the CIL revealed that CIL was directed not to store explosives at the mines but make indents as required. May be for this reason, the respective collieries were asked to place indent and take delivery of the explosives from the magazines of nearest agents of the assesee from time to time as per their requirement. Thus, it was established that there was a conceivable link between the purchase order issued by CIL and the movement of goods from assessee's unit in Orissa to other states and inter-position of consignment agents of the assessee who temporarily intercepted the movement did not alter the character of sale. Therefore, the movement of goods from Orissa to different states were sales under section 3(a) of the Central Sales Tax Act, 1956.

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Deemed sale in the course of export

It may be recalled that after the Supreme Court in *Mohd. Serajuddin* v. *State of Orissa*[74] had held that in case of integrated transactions, that is, between the selling dealer to the exporter in India and between the exporter in India and the foreign buyer, the sale in the course of export within the meaning of article 286(1) (b) of the Constitution of India read with sub-section (1) of section 5 of the Central Sales Tax Act, 1956 is only by the exporter in India which would be immune from the levy of sales tax, for the reason, that, the privity of contract in such cases is only between the exporter in India and the foreign buyer. This judgment affected the export trade of the country, and, as a remedial measure, sub-section (3) was added to section 5 of the Act by the Central Sales Tax (Amendment) Act, 1976 with retrospective effect i.e., from 1.4.1976, with a view to give relief from payment of tax on penultimate sales made to the exporter in India.

Sub-section (3) of section 5 reads as under:-

> Notwithstanding anything contained in sub-section (1), the last sale or purchase of any goods preceding the sale or purchase occasioning the export of those goods out of the territory of India shall also be deemed to be in the course of such export, if such last sale or purchase took place after, and was for the purpose of complying with, the agreement or order for or in relation to such export.

The scope of the above provision was first explained by the Supreme Court in *Consolidated Coffee Ltd.* v. *Coffee Board, Bangalore,*[75] According to the court section 5(3) has been enacted to extend the exemption from tax liability under the Act not to any kind of penultimate sale but only to such penultimate sale as satisfies the two conditions specified therein, namely, (a) that such penultimate sale must take place (i.e., become complete) after the agreement or order under which the goods are to be exported; and (b) it must be for the purpose of complying with such agreement or order. It is only then that such penultimate sale would be deemed to be a sale in the course of export.

'The agreement' occurring in the phrase 'the agreement or order for or in relation to such export' in section 5(3) refers to the agreement with a foreign buyer and not to an agreement with a local party containing the covenant to export. Therefore, the obligation to export arising from an agreement for order with a foreign buyer alone would constitute the penultimate sale a sale in the course of export to claim the exemption under section 5(3).

This very question, that is, the scope of the newly added provision, as reproduced above, again came to be examined by the apex court on a special

74 (1975) 2 SCC 47.
75 AIR 1980 SC 1468.

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leave petition[76] filed against the judgment of the Madras High Court[77] and it was reiterated that in order to claim the protection of section 5(3), the assessee will have to establish that the last sale or purchase before the sale or purchase occasioning export were of those goods which were exported. The deeming section expands the concept of export sale to include the penultimate sale or purchase of goods preceding the sale or purchase occasioning the export. But the penultimate sale or purchase of goods must be of those goods, which were actually exported.

However, this question of law still remains *res integra*. The Supreme Court has, in *State of Karnataka* v. *Azad Coach Builders Pvt. Ltd.*[78] referred the matter to a larger bench with the following observations:

> The scope of Section 5(3) needs to be reconsidered. In none of the judgments cited on behalf of the Department due weightage had been given to the words 'in relation to such exports' occurring in Section 5(3). There cannot be a bus without the bus body. The subject-matter of the inter-State movement and the subject-matter of the export is a 'bus' and not a 'bus body.' It cannot be denied that the sale of the bus body by the assessee to the exporter is in the course of export of the bus. It is true that for accounting purpose, there was a bifurcation between the bus body and a complete bus. But, there is merit in the argument of the assessee that due weightage had not been given to the words 'in relation to such exports' occurring in Section 5(3). In the earlier days, when *Mohd. Serajuddin* case, held the field, India was under licence raj. At the time, exports were through STC. That system is disbanded. If so, the question which arises for determination is – What are the transactions covered by Section 5(3)? The basic point involved in the present case is whether the test of the 'same goods' is the essence of Section 5(3) or whether the test of the subject-matter of the contract occasioning the export is the principle behind Section 5(3). It is in that context that the words 'in relation to such exports' become crucial. If a transaction is in relation to the exports, can it be denied the benefit of Section 5(3)? The judgment in *K. Gopinathan Nair*[79] case is correct and in the light of that judgment and the tests propounded therein the decision in *Sterling Foods*[80] case and *Vijayalaxmi Cashew Co.*[81] case, need reconsideration by a larger Bench.

76 *Dinod Cashew Corporation* v. *The Dy. CTO & Anr.,* (1996) 100 STC (FRSC) 3.
77 *Dinod Cashew Corporation* v. *The Dy. CTO & Anr.,* (1986) 61 STC 1(Mad).
78 (2006) 3 SCC 338 at 343-45.
79 (1997) 10 SCC 1.
80 (1986) 3 SCC 469.
81 (1996) 1 SCC 468.

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There was infact, divergence of view about the scope of section 5(3), between the Karnataka High Court[82] and the Tamil Nadu Taxation Special Tribunal.[83]

Before the Madras High Court in *Lavanya Enterprises* v. *Secretary to Government of Tamil Nadu,*[84] the facts were that the claim of the appellant, a successful bidder in the auction for sale of sandalwood, that the purchases which were to fulfil the contract with foreign buyer were exempt under section 5(3) of the Central Sales Tax Act, 1956 was rejected by the district forest officer on the ground that there was no provision in the sale notice to avail exemption of sales tax. The petitioner filed writ petitions challenging these orders and to direct the officer to accept form H filed by the appellant after the export was over without insisting on payment of sales tax but the petitions were rejected by the single judge holding that the appellant could not claim exemption as a matter of right as they had agreed to pay as per terms and conditions of the sale notice and that any claim of exemption had to be referred to the sales tax department and if exemption was granted then only refund of tax paid would arise. On writ appeals the respondent contending, *inter alia,* that the appellant had not produced any document at the time of conclusion of sale to show that the purchase was in the course of export held that the appellant could not be blamed for not producing the documents at the time of conclusion of sale in the absence of any such condition in the sale notice; that if the appellant satisfied the condition specified under section 5(3) of the Central Sales Tax Act, 1956, he was entitled to the benefit given under the said provision and no contract could stand in the way of the appellant getting the statutory benefit.

The same high court in another case,[85] under identical facts, took a similar view, and held that exemption was admissible.

In order to claim exemption from payment of sales-tax on penultimate sales within the meaning of section 5(3) of the Central Sales Tax Act, an important point of law is whether or not mere production of certificate in form 'H' prescribed under rule 12(10)(a) of the Central Sales Tax (Registration & Turnover) Rules, 1957 was sufficient or the assessing authority could ask for other documents particularly, a copy of the export agreement. This question was originally adjudicated upon by the Karnataka High Court in *A.R. Associates* v. *Commissioner of Commercial Taxes & Anr.*[86] and it was held that it was insufficient for the assessee to merely produce the certificate in form 'H' and the bill of lading because the most important evidence that was required to be produced as per the requirements of law was the export

82 *Azad Coach Builders Pvt. Ltd.* v. *State of Karnataka,* (2001) 123 STC 473 (Kar).
83 *L.G. Balakrishnan Brothers Ltd. & Ors.* v. *State of Tamil Nadu,* (2001) 123 STC 508.
84 (2006) 145 STC 442 (Mad).
85 *Gupta Enterprises* v. *Principal Chief Conservator of Forests, Madras & Ors.,* (2006) 145 STC 453 (Mad).
86 (2001) 122 STC 134 (Kar).

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agreement to ensure that there was not only in existence a valid agreement for export and an order but also to be able to indentify the particular export goods and to establish a link between those goods and the export agreement. The same view has found affirmation by the Madras High Court in *Gentlemen Exports & Anr.* v. *State of Tamil Nadu & Ors.*[87] In this case, the petitioner had not produced other documents at the time of assessment as the same were not with him but the petitioner was *bona fide* pursuing the remedy in high court. The petitioner thereafter being in possession of other supporting documents was permitted by the high court to prefer an appeal against the assessment order and produce other documents in addition to certificate in form 'H' to substantiate his claim of exemption under section 5(3) of the Central Sales Tax Act.

V JUDGMENTS HAVING A BEARING ON THE CONSTITUTION OF INDIA

Article 14

The scope of article 14 of the Constitution of India which mandates that "The Sate shall not deny to any person equality before the law or the equal protection of the laws within the territory of India" is judicially a well ploughed subject. As early as 1954, the Supreme Court explained its scope in *Kedar Nath Bajoria* v. *State of West Bengal*[88] by saying that:[89]

> Now, it is well settled that the equal protection of the laws guaranteed by article 14 of the Constitution does not mean that all laws must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons or things for the purpose of legislation. To put it simply, all that is required in class or special legislation is that the legislative classification must not be arbitrary but should be based on an intelligible principle having a reasonable relation to the object which the legislature seeks to attain. If the classification on which the legislation is founded fulfils this requirement, then the differentiation which the legislation makes between the class of persons or things to which it applies and other persons or things left outside the purview of the legislation cannot be regarded as a denial of the equal protection of law.

In the context of taxation laws, it has been held by the apex court in *East India Tobacco Co.* v. *State of Andhra Pradesh*[90] that taxation laws must also

87 (2006) 146 STC 298 (Mad).
88 1954 SCR 30.
89 *Id.* at 38-39.
90 AIR 1962 SC 1733.

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pass the test of article 14. But in deciding whether a taxation law is discriminatory or not it is necessary to bear in mind that the state has a wide discretion in selecting the persons or objects it will tax and that a statute is not open to attack on the ground that it taxes some persons or objects and not others. It is for the person who assails a legislation as discriminatory to establish that it is not based on a valid classification and this burden is all the heavier when the legislation under attack is a taxing statute.

The quintessence of the scope of article 14 has been crystallized by the apex court in its recent judgment in *Confederation of Ex-Servicemen Association & Ors.* v. *Union of India & Ors.,*[91] wherein it has, *inter alia*, been held that every classification to be legal, valid and permissible, must fulfil the twin test, namely, (i) the classification must be founded on an intelligible differentia which must distinguish persons or things that are grouped together from others leaving out or left out; and (ii) such a differentia must have rational nexus to the object sought to be achieved by the statute or legislation in question.

In *Associated Cement Companies Ltd.* v. *Govt. of Andhra Pradesh & Anr.*[92] an interesting point of law for adjudication was whether prescribing two rates of sales-tax on the sale of the same commodity i.e., when the price of cement includes the value of the packing material and when the price of cement is exclusive of the price of packing material, is violative of article 14 of the Constitution of India. The court applying the principle laid down in an earlier judgment[93] and affirming the judgment of the high court[94] held that the turnover base under entry 18(a) and entry 18(b) was different. The turnover base under entry 18(b) was inevitably higher than the turnover base that would be equivalent to the value of the packing material. The discrimination did not arise for any dealer because the dealer could avail any one of the options available in entry 18(a) and entry 18(b). If the dealer sold cement along with the packing material and the sale price included value of packing material he continued to pay tax at the previous rate i.e., 16%. If the dealer opted to sell the packing material and cement separately he had to pay tax at a higher rate i.e., 20% on cement only. The dealer was not left without any option. He could exercise one of the two options and pay the tax accordingly.

The high court was right in observing that the manufacturers, in order to claim the tax benefit had resorted to the *modus operandi* of the sale of containers (bags) by bifurcating the price. That when evidence was created *pima facie* supporting the plea of separate sale of packing material, it would be difficult for the taxing authorities to establish otherwise even though the design and purposes of creating such evidence by the process of billing, etc.,

91 2006 (8) SCC 399 at 415.
92 (2006) 1 SCC 597.
93 *Premier Breweries* v. *State of Karnataka,* (1998) 1 SCC 641.
94 *Associated Cement Companies Ltd.* v. *Govt. of Andhra Pradesh,* (2001) 121 STC 201 (AP).

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was quite evident. That in every case, elaborate enquiry would have to be made to decide on which side the transaction fell. To obviate such uncertainties and long-drawn enquiries, the legislature had laid down a straight formula prescribing the rate of tax on cement dependent on the two categories envisaged in entry 18(a) and entry 18(b). It was rationalization of the entries and was regulatory in nature.

The Punjab & Haryana High Court in *Jindal Oil & Fats Ltd.* v. *State of Haryana*[95] had to adjudicate on the legality of the state government notification prescribing the formula for reduction / refund of tax paid on the goods used in manufacture or processing by a dealer and laying down that for the purpose of calculating input tax the goods used in processing or manufacture would be goods used by a dealer as raw materials, processing materials, accessories, lubricants, etc., but excluding high speed diesel from the listed goods. The petitioner engaged in the manufacture of edible and non-edible oil filed writ petition contending that the high speed diesel had been arbitrarily excluded from the class of goods listed in the notification, that the distinction sought to be made between high speed diesel and other lubricants was discriminatory and that the notification was *ultra vires* the powers vested in the state government under section 15-A(1) of the Act as that section did not empower the government to exclude high speed diesel from the list of goods used for manufacture of edible and non-edible oil.

It was held, dismissing the petition, that the reason for excluding high speed diesel from the class of goods which constitutes raw materials used for manufacture or processing of goods was that it was not used in the manufacture or processing but for generating electricity which in turn was used for running the industry. The petitioner had not produced any evidence to prove to the contrary. Therefore, it could not be said that exclusion of high speed diesel from the listed goods used as raw materials for manufacture or processing was *ultra vires* the powers vested in the state government under section 15-A(1) of the Act. It was further held that the distinction made between the goods which were used in manufacture of the final product by the dealer and the goods not used for that purpose could not be termed as irrational or arbitrary. The two categories of goods constituted separate classes and, therefore, it could not be said that the provisions excluding high speed diesel from the listed goods used as raw materials for manufacture or processing was violative of article 14 of the Constitution.

Before the Karnataka High Court in *Marico Industries Ltd.* v. *State of Karnataka & Ors.*,[96] the question for adjudication was whether or not the Karnataka Taxation Laws (Amendment) Act, 2001 introducing an entry enforcing higher rate of tax on branded coconut oil than on other edible oils sold under brand name on par with other toilet articles was violative of article 14. It was held, allowing the writ petition, that there is a deliberate intention

95 (2006) 143 STC 37 (P & H).
96 (2006) 148 STC 17 (Kar).

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and desire on the part of the state to treat coconut oil differently when it was taken out from the group of edible oils occurring in the entry 1 of part E of the second schedule to the Act and put under entry 17-A of part C. The respondent state has taken a stand that coconut oil sold under brand name is almost exclusively used as a hair oil to the extent of 95 per cent of users in the state and that the legislation has been brought about to ensure that coconut oil predominantly used as a toilet article does not escape tax at the rate as applicable to toilet articles by being marketed as edible oil. However, the respondent-state has not made good its stand by placing any material or facts or figures before the court which only indicates that the classification was made because of the view taken by the officers which is not the answer to meet the challenge of discrimination on the touch stone of article 14 of the Constitution. Therefore, the Act (5 of 2001) is unconstitutional being discriminatory and violative of article 14 of the Constitution insofar as it relates to introduction of entry 17-A in Part C of the Second Schedule to the Act.

The Andhra Pradesh High Court in *Larson & Toubro Ltd. &* v. *State of Andhra Pradesh & Ors.,*[97] in the context of a works contract, when tax was sought to be collected both from the contractor and the sub-contractor held that it was discriminatory offending article 14 of the Constitution.

Article 226

The Bombay High Court has, in *Kellogg India Pvt. Ltd.* v. *Union of India,*[98] *inter-alia,* epitomized the contours of article 226 of the Constitution of India, in the following words:[99]

> Except for a period when Article 226 was amended by the Constitution (42nd Amendment) Act, 1976, the power relating to alternative remedy has been considered to be a rule of self imposed limitation. It is essentially a rule of policy, convenience and discretion and never a rule of law. Despite the existence of an alternative remedy it is within the jurisdiction of discretion of the High Court to grant relief under Article 226 of the Constitution. At the same time, it cannot be lost sight of that though the matter relating to an alternative remedy has nothing to do with the jurisdiction of the case, normally, the High Court should not interfere if there is an adequate efficacious alternative remedy.

It will be recalled that the constitution bench of the apex court in *K.S. Rashid* v. *Income Tax Investigation Commission;*[100] *Sangram Singh* v. *Election Tribunal, Koth;*[101] *Union of India* v. *T.R. Verma;*[102] *State of U.P.*

97 (2006) 148 STC 616 (AP).
98 (2006) 193 ELT 385 (Bom).
99 *Ibid*.
100 AIR 1954 SC 207.
101 AIR 1955 SC 425.
102 AIR 1957 SC 882.

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v. *Mohammad Nooh*[103] and, *M/s K.S. Venkataraman and Co. (P) Ltd.* v. *State of Madras,*[104] had held that article 226 of the Constitution confers on all the high courts a very wide power in the matter of issuing writs. However, the remedy of writ is an absolutely discretionary remedy and the high court has always the discretion to refuse to grant any writ if it is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere. The court, in extraordinary circumstances, may exercise the power if it comes to the conclusion that there has been a breach of principles of natural justice or procedure required for decision has not been adopted.

These guidelines have been reiterated by the Supreme Court in *Star Paper Mills Ltd.* v. *State of U.P. & Ors.*[105]

The jurisdiction of the high courts under article 226 as also of the Supreme Court under article 32 of the Constitution is of "judicial review". It will be recalled that the Supreme Court in an earlier judgment in *H.B. Gandhi* v. *Gopi Nath & Sons*[106] had crystallized this concept by observing that judicial review was not directed against the decision but was confined to the decision-making process. Judicial review could not extend to the examination of the correctness or reasonableness of a decision as a matter of fact. The purpose of judicial review was to ensure that the individual received fair treatment and not to ensure that the authority after according fair treatment reached, on a matter which it was authorized by law to decide, a conclusion which was correct in law. Judicial review was not an appeal from a decision but a review of the manner in which the decision was made. It would be erroneous to think that the court sat in judgment not only on the correctness of the decision-making process but also on the correctness of the decision itself.

The same principles have been reiterated by the apex court in *Jayaraj Bhai Jayanthi Bhai Patel* v. *Anil Bhai Nathu Bhai Patel.*[107]

During the year under survey, few cases have been reported wherein, it has been held, that the case was not fit for invoking the extraordinary jurisdiction under article 226.

As per the settled law, a person who approaches the high court to invoke its extraordinary jurisdiction under article 226, must come with clean hands. Before the Karnataka High Court in *Chakrapani Vypar Pvt. Ltd.* v. *Dy. C.T.O. & Ors.,*[108] the petitioner had concealed the fact that it had also filed an appeal before the Tamil Nadu Taxation Special Tribunal and this fact came to light only when the objections were filed. At the time of filing the writ petition, the appeal was pending in Tamil Nadu. This fact, according to the court, showed the unclean hands of the petitioner thereby disentitling it to the remedy of writ

103 AIR 1958 SC 86.
104 AIR 1966 SC 1089.
105 (2006) 148 STC 144 (SC).
106 1992 Supp. (2) SCC 312.
107 (2006) 8 SCC 200 (paras-12 & 18).
108 (2006) 143 STC 124 (Kar).

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jurisdiction.

More often than not, persons rush to the high court under article 226 merely on the issue of a show-cause notice. The Supreme Court, had, earlier in *GKN Driveshafts (India) Ltd.* v. *I.T.O.,*[109] clarified that when a notice under section 148 of the Income-tax Act was issued, the proper course of action for the noticee was to file a return and if he so desired, to seek reasons for issuing notices. The assessing officer was bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee was entitled to file objections to issuance of notice and the assessing officer was bound to dispose of the same by passing a speaking order. In the instant case, as the reason had been disclosed in these proceedings, the assessing officer had to dispose of the objections, if filed, by passing a speaking order, before proceeding with the assessment in respect of the above said five assessment years.

In view of the above guidelines, the writ petitions filed against show cause notices, during the year under survey, were dismissed by the Madhya Pradesh,[110] Gauhati[111] and Allahabad High Courts.[112] However, the Supreme Court in *State of U.P. & Anr.* v. *Anil Kumar Ramesh Chandra Glass Works & Anr.,*[113] has held that article 226 of the Constitution of India should not be permitted to be invoked in order to challenge show cause notices unless, accepting the facts in the show cause notices to be correct, either no offence is disclosed or the show cause notices are *ex facie* without jurisdiction.

A similar view was taken by the Karnataka High Court also in *BRPL Fine Chemicals Pvt. Ltd.* v. *State of Karnataka & Anr.*[114] It may be stated that the observations made by the Supreme Court in *Whirlpool Corpn.* v. *Registrar of Trade Marks,*[115] reflect the quintessence of this jurisdiction vested in the high courts. It has been observed that 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. The high court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But it has imposed upon itself certain, restrictions one of which is that if an effective and efficacious remedy is available, it would not 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 a violation of the principle of natural justice or where the order of proceedings are wholly without jurisdiction or the *vires* of an Act which is challenged.

109 (2003) 259 ITR 19-20 (SC).
110 *B.P.L. Limited & Anr.* v. *State of Madhya Pradesh & Ors.,* (2006) 143 STC 316 (MP).
111 *Gauhati Neurological Research Centre Ltd.* v. *Commissioner of Taxes, Assam & Ors* (2006) 144 STC 640 (Gau).
112 *Pravati Mills Sahjanwa* v. *Sales Tax Officer,* (2006) 146 STC 672 (All).
113 (2006) 145 STC 656 (SC).
114 (2006) 143 STC 403 Kar).
115 (1998) 8 SCC 1.

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A writ petition under article 226 would also lie where the finding of fact is found to be perverse;[116] the impugned order is contrary to the law laid down by the Supreme Court[117] or the jurisdictional high court.[118]

Remedy under article 226 will normally not be available when (i) there is an efficacious remedy available under the statute; (ii) reasons are recorded in the order impugned, though, may not be approved;[119] (iii) the dispute arises out of contract;[120] (iv) conduct of the party is blameworthy, that is, the petitioner is guilty of laches and there is inordinate delay in filing a writ petition;[121] (v) the question involved is debatable and the petitioner had the remedy of raising them before the appellate authority or during the course of regular assessment;[122] (vi) sale whether inter-state or intra-state which required to be decided on facts; (vii) what rate of tax on supply of goods whether concenssional tax under the notification available, to be decided by the assessing authority and not by the court;[123] and (viii) question as to entry under which item falls and stage at which taxable.[124]

116 *Bharat Coal Product* v. *State of Jharkhand & Ors.,* (2006) 146 STC 102 (Jhar).
117 *Allana Cold Storage Ltd.* v. *Income-Tax Officers & Ors.,* (2006) 287 ITR 1 (Bom).
118 *Ponni Sago Factory* v. *Dy. C.T.O. & Ors.,* (2007) 5 VST 223 (Mad).
119 *Patiala Distillers & Manufacturers Ltd.* v. *State of Punjab & Ors.,* (2006) 143 STC 234 (P & H).
120 *Associated Cement Co. Ltd.* v. *Kerala State Rural Development Board,* (2006) 146 STC 677 (Ker).
121 *Malook Chand and Sons & Anr.* v. *U.O.I. & Ors.,* (2007) 288 ITR 111(Del).
122 *Pepsico India Holdings (P) Ltd.* v. *State of Punjab & Anr.,* (2006) 148 STC 30 (P & H).
123 *Reliance Generators (P) Ltd.* v. *S.T.O. & Ors.,* (2006) 146 STC 57 (Ker).
124 *Godrej Saralee Ltd.* v. *State of Bihar & Ors.,* (2006) 146 STC 639 (Pat).

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