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SALES TAX

*H L Taneja**

I INTRODUCTION

DURING THE year under survey, the decisions of the Supreme Court and High Courts will be dealt with, as done in the previous years, under the heads (a) liability, (b) assessment, (c) judgments under the Central Sales Tax Act, 1956 and (d) judgments having bearing on the Constitution of India.

II LIABILITY

The value added tax has replaced the general system of sales tax in our country. What prompted the government to embark upon this reformatory step, *inter alia*, was that the value added tax system will provide full set off for input tax paid by the dealers at the time of purchase, out of the output tax payable by them. As a result, the over all tax burden would be rationalized and the prices in general would fall.[1] In other words, problem of double taxation of commodities resulting in a cascading tax burden would be obviated.

It is common knowledge that the selling dealers, quite often, on the expiry of a financial year, give incentives to the purchasing dealers, keeping in view the quantity of goods purchased by them during the year. Such incentives normally reduce the sale price and the corresponding purchase price during the whole year. On receipt of such incentives, the purchasing dealers are expected to reduce their input tax credit in their books of account so that the government may not suffer loss. But, it is also a fact that the selling dealers some times do not give incentives with a view to reduce the selling price and do not claim refund out of the tax already paid by them on the original sale price. The incentives may be given for other purposes, *e.g.* for the growth of business of the purchasing dealers. This explains why the Supreme Court in *CIT* v. *Ponni Sugars and Chemicals Ltd.*,[2] relying on

* Advocate, and Counsel for NCT Government of Delhi in the High Court.

1 White Paper published in (2005) 1 VST (*Journal*) 1.

2 (2008) 306 ITR 392 (SC).

its earlier judgment in *Sahney Steel and Press Works Ltd.* v. *CIT*,[3] held that one has to apply the purpose test. The character of receipt of a subsidy (and for that matter an incentive) in the hands of an assessee under a scheme has to be determined with reference to the purpose for which the subsidy is granted. If the selling dealer pays full tax on the original sale price and, after giving the incentive to the purchasing dealers, does not reduce the sale proceeds in its books of account nor does he claim refund out of the tax originally paid by him, the purchasing dealers would not be required to vary the purchase price in their books of account and would be entitled to claim credit of full input tax paid by them to the selling dealer.

A somewhat similar situation arose before the Supreme Court in *Andhra Agencies* v. *State of AP*.[4] Under the AP General Sales Tax Act, 1957, sales tax was payable on the first and the last sale and the intermediate dealer was liable only on the differential turnover, *i.e.* they were entitled for exclusion of the turnover which had already suffered tax. The assessees were distributors of liquor manufactured by others. It came to light that the assessees had received periodical credit notes representing the discount. Revision proceedings were initiated and further sales tax was demanded. Upto the stage of High Court, the assessees did not succeed. However, the Supreme Court set aside the judgment of the High Court and explained the legal position as under:[4a]

> The basic issue can be better appreciated by way of an illustration. Hypothetically taking the sale price to be Rs. 100/- the tax to be paid by the selling dealers has to be on Rs. 100/-. He may collect 90/- after giving discount. If the sale price of the inter-medicate seller is Rs. 110/- his liability to pay tax shall be on Rs. 10/- *i.e.* 110/- - 100/-. The Department's stand is that it should be 20/- *i.e.* 110-90. This stand will not be correct if the first seller had paid tax on 100/-. Therefore, it has to be verified as to what was the amount on which tax was paid on the illustrative figure given above by the selling dealer.

From the ratio of this judgment, the legal position under the Value Added Tax Act would be the same, *i.e.* if the selling dealer pays tax, even after giving incentive, on the full sale price, the purchasing dealer can claim input tax credit on the full amount even after the incentive is given.

Under the general system of sales tax law as it prevailed before the introduction of the VAT system, the definition of the term "business", *inter alia*, included "any transaction in connection with, or incidental or ancillary to, such trade, commerce, manufacture, adventure or concern". The amended

3 (1997) 228 ITR 253 (SC).
4 (2008) 14 SCC 540.
4a *Id.* at 543.

definition of the term 'business' under the Madras General Sales Tax Act, 1959, which was introduced w.e.f. 01.09.1964, was first adjudicated upon by the Supreme Court in *State of Tamil Nadu* v. *Burmah Shell Co. Ltd.*[5] in which it was, *inter alia*, held that sales of advertisement materials, scrap and canteen sales were liable to sales tax. Subsequently, the Madras High Court, following the above Supreme Court judgment, held: "If an assesse is a dealer, with reference to the business carried on by him, every transaction of sale, whether it is of a capital asset or a stock-in-trade, would be liable to be included in the turnover of the assessee."[6]

Elucidating the legal position further on this subject, the Supreme Court in *State of Tamil Nadu* v. *Board of Trustees of the Port of Madras*[7] had, *inter alia*, held:[7a]

> Where the main activity is not "business", then the connected, incidental or ancillary activities of sales would not normally amount to "business" unless an independent intention to conduct "business" in these connected, incidental or ancillary activities is established by the Revenue. It will then be necessary to find out whether the transactions which are connected, incidental or ancillary are only an infinitesimal or small part of the main activities. In other words, the presumption will be that these connected, incidental or ancillary activities of sales are also not "business" and the onus of proof of independent intention to do "business" in these connected, incidental and ancillary sales will rest on the department.

Yet another important facet of this subject was touched upon by the Madhya Pradesh High Court in *Commissioner, Sales-tax, Madhya Pradesh* v. *L. Vasudeo Rao*[8] wherein, it was held that the sale by the assessee of an off-set printing machine, a fixed asset, on the closure of business, was not a transaction in the course of trade, commerce or adventure and, therefore, could not be included in the term "business". The same view was taken by the Allahabad High Court in *Commissioner, Sales-tax* v. *M/s Banila Industries*.[9] Following the above settled position in law, the Madhya Pradesh High Court in *STI India Ltd.* v. *Commissioner, CT*[10] held in the same vein that the expression "in the course of business" envisages continuous course of business and the sale of movable assets under memorandum of agreement to sell business as a going concern was not a sale in the course of business and not liable to sales tax.

5 AIR 1973 SC 1045.
6 *State of Tamil Nadu* v. *Thermo Electrics (Madras*) (1977) 39 STC 317.
7 (1999) 4 SCC 630.
7a *Id.* at 647-48.
8 (1981) 48 STC 447 (MP).
9 1992 UPTC 1097 (All).
10 (2009) 20 VST 37 (MP).

Law is well settled that in all cases of taxation, the burden of proving necessary ingredients laid down by law to justify taxation is upon the taxing authority,[11] while in case of claim of exemption from levy of tax, the burden is on the dealer to prove that he is not liable to pay tax. Similar was the position under section 12 of the Kerala General Sales Tax Act, 1963 where the dealer was required to explain his transactions, which included a credit entry in the accounting version.[12] The petitioner, during the accounting year 1998-99, accounted receipts of Rs. 45,80,168/- towards service charges and commission and claimed exemption on the ground that the same did not represent sales turnover of goods. The assessing officer, in the course of assessment, directed the petitioner to produce documentary evidence towards proof of the nature of receipt claimed as commission and service charges, but the petitioner could not establish the nature of exemption with the result that the assessing officer treated the sum as a sales turnover of the petitioner and levied tax. On appeal, the appellate authority deleted the addition on the ground that the assessing authority did not establish the receipts as representing sales turnover of goods. On further appeal by the department, the tribunal restored the addition. On a revision petition filed by the petitioner before the High Court, it was held, dismissing the petition, that "the transaction would have passed through the bank account and any amount representing commission received from foreign buyers would have been remitted through the bank and there was no reason why the petitioner kept the department in the dark about the financial transaction. In this case, the officer had taken the amount as unaccounted sales, which was probably the minimum damage that could be caused to the petitioner by virtue of section 12 of the Act. In other words, the addition was a necessary consequence of the petitioner's failure to explain the receipt in his account. The first appellate authority was wrong in casting the burden on the assessing officer to establish that the amount received by the petitioner was sales turnover of goods." Subsequently, however, when the case came up before the Supreme Court,[13] in appeal, the High Court judgment was set aside; the case remitted to the assessing authority to consider the matter afresh on the basis of the material placed by the appellant, namely income tax returns, orders of assessment and certificate granted by the marine products export development authority.

While the value added tax envisages multi-point system of sales tax, the general system of sales tax provided for single point system of sales tax, either first point of sale, *i.e.* either by the manufacturer or by an importer or, usually, the last point of sale, *i.e.* when the goods passed from a registered dealer to an unregistered dealer or a consumer. So far as the sales

11 *Deputy Commissioner of Agricultural Income Tax and Sales Tax, Quilon* v. *Travancore Rubber and Tea Co.* (1967) 20 STC 520 at 527.

12 *Haleema Zurbair, Tropical Traders* v. *State of Kerala* (2009) 19 VST 138 (Ker.).

13 *Haleema Zurbair, Tropical Traders* v. *State of Kerala* (2009) 19 VST 142 (SC).

taxable at the first point were concerned, it was held by the Madras High Court in *Govindan & Co.* v. *State of Tamil Nadu*[14] that to claim benefit of tax on the ground that the sales effected by the assesses were second sales, hence, exempt from tax, they need not show that their sellers had in fact paid the tax at the first point and it was enough for them to show that the earlier sales were taxable sales and that the tax was really payable by their sellers. The state preferred an appeal to the Supreme Court which dismissed it holding that there was no merit in appeal.[15]

In a case before the Kerala High Court,[16] the dealer contended before the intelligence officer that his sales of 16,280 bags of cement valued at Rs. 27,90,260/- were second sales, hence, not exigible to levy of tax. The officer not being satisfied with the explanation, imposed maximum penalty of Rs. 6 lacs stating that the dealer had failed to produce true and complete accounts. The deputy commissioner reduced the penalty to Rs. 5,000/- but the commissioner, in exercise of revision power, restored the order of the intelligence officer. When the matter reached the High Court in appeal, the same was dismissed observing that the dealer had no case and that the burden was entirely on him to establish that the disputed sales were second sales. It was accordingly held by the High Court that the commissioner had rightly invoked section 37 of the Kerala General Sales Tax Act and set aside the order passed by the deputy commissioner as erroneous.

It is common knowledge that the term "goods" for the purpose of sales tax may be tangible or intangible/incorporeal. In *Associated Cement Companies Ltd.* v. *Commissioner of Customs,*[17] the value of drawings was added to their cost since they contained and formed part of the technical know-how which was part of a technical collaboration between the importer of the drawings and their exporter. It was recognized that knowledge in the abstract may not come within the definition of "goods" in section 2(22) of the Customs Act. This view was adopted in *Tata Consultancy Services* v. *State of A.P.*[18] for the purposes of levy of sales tax on computer software. It was held:[18a]

> A 'goods' may be a tangible property or an intangible one. It would become goods provided it has the attributes thereof having regard to (a) its utility; (b) capable of being bought and sold, and (c) capable of being transmitted, transferred, delivered, stored and possessed. If a software whether customized or non-customised satisfies these attributes, the same would be goods.

14 (1975) 35 STC 50 (Mad).
15 (1994) 93 STC 185 (SC).
16 (2009) 20 VST 101 (Ker).
17 (2001) 4 SCC 593.
18 (2005) 1 SCC 308 at 342; see also *BSNL* v. *Union of India* (2006) 3 SCC 1.
18a *Id*. at 342.

The Kerala High Court in two of its judgments[19] has held that royalty income received by the dealer from franchisees for use of trade mark would be liable to tax.

It is well settled in law that in construing fiscal statutes and in determining the liability of a subject to tax, one must have regard to the strict letter of the law and not merely to the spirit of the statute or the substance of the law.[20] The preamble to the Madhya Pradesh *Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam*, 1976 provided to levy a tax on entry of goods into a local area in M.P. for consumption, use or sale therein. Section 3(1)(a) of the Act which is the charging section states that there shall be levied an entry tax on the entry in the course of business of a dealer of goods specified in the schedule to the Act into "each local area for consumption, use or sale therein". Hence, liability to pay entry tax under the Act would arise only if entry of goods into the local area is for consumption, use or sale in the local area. In the two cases before the Madhya Pradesh High Court,[21] it was held that coal loaded in the trucks of the purchasers at the pit heads and taken to the weighbridges owned by the petitioner for weighment was not for consumption, use or sale and, therefore, entry tax was not attracted in these cases.

In *Harsha Wheel Movers Pvt. Ltd.* v. *Deputy Commissioner, Commercial Taxes, Bangalore*,[22] the petitioner built bodies on chassis supplied by its customers. The Karnataka state road transport corporation (KSRTC), being one of its customers, brought the chassis to its workshop for the purpose of building a body. The petitioner, after constructing the body on the chassis brought by KSRTC delivered the buses to the corporation and the buses were removed from the workshop of the petitioner by through its drivers. The plea was that the petitioner had not caused any entry of goods into the local area. On a revision petition against orders of authorities holding that the petitioner had caused entry of the chassis on behalf of KSRTC and was liable to pay entry tax for causing the entry of chassis into local area, it was held by Karnataka High Court, allowing the petition, that the petitioner had not caused any entry of the chassis into the local area either for its own use or the benefit of KSRTC. The chassis was admittedly purchased by KSRTC and the petitioner assessee only built the body the benefit of KSRTC. It was the specific contention of the petitioner that the chassis was supplied by KSRTC to it and the body was built by the petitioner in its workshop and after building the body, buses were taken by

19 *Jojo Frozen Foods (P) Ltd.* v. *State of Kerala* (2009) 24 VST 327 (Ker.) and *Kreem Foods Pvt. Ltd.* v. *State of Kerala* (2009) 24 VST 333 (Ker).

20 *A.V. Fernandes* v. *State of Kerala*, AIR 1957 SC 657.

21 *Western Coalfields Ltd.* v. *CST, Madhya Pradesh* (2009) 19 VST 459 and *Western Coalfields Ltd.* v. *CST*, MP (2009) 19 VST 466.

22 (2009) 20 VST 27 (Karn.).

KSRTC from the premises of the petitioner. It was, accordingly, held by the High Court that no entry tax was leviable on the petitioner.

In yet another case before the Chhattisgarh High Court, in *South Eastern Coalfields Ltd.* v. *Assistant Commissioner of Commercial Tax, Bilaspur,*[23] coal was sold and delivery was effected to the purchaser at the SILO site or railway siding for further transport to destination where coal was to be consumed or used. It was, likewise, held that entry tax was not exigible.

III ASSESSMENT

Legal principles

With the repeal of the state sales tax Acts by the value added tax Acts by the states, the scope of the expression 'repeal and savings' generally incorporated in the repealing enactments has assumed importance. The scope of this expression is, however, judicially well ploughed.[24] The question as to when the right of a person under the repealed Act accrues which can be pursued under the repealing Act is also well settled.[25] What is a 'vested right' is also no longer *res integra*. The expression "vested right" has been explained in *Black's Law Dictionary*. This term, as explained in *Law Lexicon,* is reproduced in a judgment of the West Bengal taxation tribunal as under:[26]

> A right is said to be vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest, independent of a contingency. It is right which cannot be taken away without the consent of the owner. Vested rights can arise from contracts, from statute and from operation of law.

Brief facts of *AD ADD* v. *Additional Appellate Assistant Commissioner of CT*[27] were that the petitioner, an advertisement consultant, neither registered itself as a dealer under the Tamil Nadu General Sales Tax Act, 1959 and nor filed its returns. Based on the inspection conducted on 12.08.1998 and the report submitted by the officials, the assessing authority, by proceedings dated 31.12.2003, passed an *ex parte* assessment order for the year 1998-99, imposing tax and penalty under section 12(3)(b) of the Act. The petitioner preferred an appeal under section 31 of the Act before the additional appellate assistant commissioner of commercial taxes

23 (2009) 24 VST 348 (Chhat).
24 See *Gammon India Ltd* v. *Special Chief Secretary* (2006) 3 SCC 354-373.
25 See *Hoosein Kasam Dada (India) Ltd.* v. *State of Madhya Pradesh,* AIR 1953 SC 221; see also *Ghanshyamdas* v. *Regional Asst. Commissioner, Sales Tax, Nagpur,* AIR 1964 SC 766.
26 (2009) 20 VST 910 at 922.
27 (2009) 20 VST 94 (Mad).

but the same was rejected on the ground that the petitioner had failed to pay 25 per cent of the disputed tax as a pre-condition for entertaining the appeal. A writ petition was filed before the High Court contending that since section 31 was amended substituting "12.5 per cent of tax" by "25 per cent" only in the year 2002, the section as amended was not applicable to appeal proceedings initiated prior to the amendment and, therefore, the petitioner need not deposit 25 per cent of the disputed arrears of tax as a pre-condition for filing an appeal. Dismissing the petition, it was held by Madras High Court that in the case of an unregistered dealer, the assessment proceedings or the "lis" commences only from the notice and not earlier. As the pre-assessment notice was issued on 10.03.2003 after the amendment to section 31(1) of the Act, the petitioner was liable to pay 25 per cent of the disputed tax and submit satisfactory proof of payment of tax for entertaining the appeal.

In *Okey Textiles* v. *Commissioner of CT, Chepauk, Chennai*,[28] for the assessment year 1996-97, the petitioner claimed exemption on the entire sales pertaining to export of hosiery garments but the commercial tax officer levied tax on the sales of quota, industrial salt and cartons, and also penalty, without issuing a pre-assessment notice. The petitioner filed an application before the special committee constituted under section 16D of the Tamil Nadu General Sales Tax Act, 1959 for a direction to the assessing authority to make fresh assessment. The application was rejected on the ground that under section 88 of the Tamil Nadu Value Added Tax Act, 2006, the Tamil Nadu General Sales Tax Act, 1959 had been repealed with effect from 1.1.2007 and the application filed by the petitioner under section 16D of the repealed Act could not be entertained after that date. In a writ petition, Madras High Court held that for the assessment year 1997-98, a vested right had accrued to the petitioner for invoking section 16D of the Act and it could not be divested of it. The reason for rejecting the application was not sustainable. The court, therefore, set aside the order and remitted the matter to the authority to reconsider the issue including the point of laches.

The same High Court in *CTO, Chennai* v. *CPD Computer Peripheral Devices Pvt. Ltd.*,[29] laid down the law on the subject in the following words when the Taxation Special Tribunal Act, 1992 was repealed by the Tamil Nadu Taxation Special Tribunal (Repeal Act, 2004):[29a]

> The 1992 Act has been repealed in its entirety by the Tamil Nadu Taxation Special Tribunal Act, 2004, and it is a case of total repeal or pro tanto repeal. Section 3 of the repealing Act 2004 clearly

28 (2009) 20 VST 232 (Mad).
29 (2009) 21 VST 581.
29a *Id.* at 595-96.

> shows the intention of the Legislature that on the coming into force of the repealing Act of 2004 the original provisions that were eclipsed during the currency of the 1992 Act again would come into operation, in the sense, the superimposition of the words "Special Tribunal" for the words "High Court" would fade out giving way to the words "High Court." Therefore from the date of repeal of the 1992 Act the High Court has the jurisdiction to entertain appeals or revisions under sections 37 & 38 of the 1959 Act.

Sale

It is trite saying that in any system of sales tax law, whether value added tax or general system of sales tax, the source of levy of tax for the state legislatures is the same, *viz.* entry 54, list-II, schedule VII of the Constitution of India. This term 'sale' was adjudicated upon by the Supreme Court in *State of Madras* v. *Gannon Dunkerley & Co. Ltd.*[30] and its ingredients were crystalised in the following words:

> In order to constitute a sale it is necessary that there should be an agreement between the parties for the purpose of transferring title to goods, which pre-supposes capacity to contract, that it must be supported by money consideration, and that as a result of the transaction property must actually pass in the goods. Unless all these elements are present, there can be so sale.

This judgment still holds the field, except that as a result of the Constitution (46th Amendment) Act, 1982, which came into effect from 2.2.1983, the concept of a 'deemed sale' was coined in respect of transactions which went out of the scope of the term 'sale' consequent upon the above mentioned judgment. The following observations of the Supreme Court in BSNL are quite apposite:[31]

> Gannon Dunkerley survived the Forty-sixth Constitutional Amendment in two respects. First with regard to the definition of 'sale' for the purposes of the Constitution in general and for the purposes of Entry 54 of List II in particular except to the extent that the clauses in Article 366(29-A) operate. By introducing separate categories of 'deemed sales' the meaning of the word 'goods' was not altered. Thus the definitions of the composite elements of a sale such as intention of the parties, goods, delivery, *etc*. would continue to be defined according to known legal connotations. This does not mean that the content of the concepts remain static. The

30 AIR 1958 SC 560.

31 *Supra* note 18 at 30.

> courts must move with the times[32]. But the forty-sixth Amendment does not give a licence, for example, to assume that a transaction is a sale and then to look around for what could be the goods. The word 'goods' has not been altered by the Forty-sixth Amendment. That ingredient of a sale continues to have the same definition. The second respect in which Gannon Dunkerley has survived is with reference to the dominant nature test to be applied to a composite transaction not covered by Article 366(29-A). Transactions which are mutant sales are limited to the clauses of Article 366(29-A). All other transactions would have to qualify as sales within the meaning of Sales of Goods Act, 1930 for the purpose of levy of sales tax.

In *Comtrust Eye Hospital* v. *Addl. Sales Tax Officer, Kozhikode*,[33] the assessing officer passed an assessment orders on the petitioner-hospital under the Kerala General Sales Tax Act, 1963 by assessing sales turnover of artificial lens replaced through cataract surgeries by making 50 per cent addition to the purchase turnover. The assessments were confirmed in first appeal as well as by the tribunal. In revision, the petitioner, *inter alia*, contended that the tribunal was wrong in holding that the lens sold by the petitioner in the course of cataract surgery would answer the description of spectacles falling under entry 136 of the first schedule to the Act and that in any case the liability should be fastened on the petitioner only from 2001-02 placing reliance on *Malankara Orthodox Syrian Church* v. *Sales Tax Officer*.[34]

It was, *inter alia*, held that replacement of natural lens with artificial lens supplied by hospital through implantation was not different from sale of medicines and hence liable to tax. Even though hospitals may be charging consolidated rates, the cost of material supplied is a major component of the charges and it is proportionate to the value of the item supplied, which again depends on its quality, brand name, *etc.* Therefore, the amount charged by the petitioner for cataract operation was liable to tax.

Of all the deemed sales added by clause (29-A) to article 366 of the Constitution, sub-clause (d) has been adjudicated upon by the courts in many cases during the year under survey. This sub-clause reads as under:

> (d) a tax on the 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.

32 *Attorney General* v. *Edison Telephone Co. of London Ltd.* (1880) 6 QBD 244.
33 (2009) 20 VST 532 (Ker).
34 (2004) 135 STC 224 (Ker).

The important judgments of the Supreme Court which have crystallised principles for adjudicating whether or not there was a transfer of the right to use goods, may first be noted. In 20th *Century Finance Corporation Ltd.* v. *State of Maharashtra,*[35] the apex court had observed:

> The State cannot levy a tax on the transfer of the right to use goods on the basis that one of the events in the chain of events has taken place within the State. The delivery of goods may be one of the elements of transfer of the right to use, but that would not be the condition precedent for a contract of transfer of the right to use goods. Where a party has entered into a formal contract and the goods are available for delivery irrespective of the place where they are located, the situs of such sale would be where the property in the goods passes, namely, where the contract is entered into. Clause (29A) of Article 366 cannot be read as implying that the tax under sub-clause (d) is to be imposed not on the transfer of the right to use goods but on the delivery of the goods for use. In the case of sub-clause (d) the goods are not required to be left with the transferee; all that is required is that there is a transfer of the right to use goods for use. On a plain construction fo sub-clause (d) of clause (29A) the taxable event is the transfer of the right to use goods regardless of when or whether the goods are delivered for use. Given that the locus of the deemed sale is the place where the right to use the goods is transferred, where the goods are 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 effective by the delivery of the goods. Where the goods are in existence, the taxable event on the transfer of the right to use goods occurs when a contract is executed between the lessor and the lessee and the situs of the sale of such a deemed sale would be the place where the contract in respect thereof is executed.

In *Aggarwal Brothers* v. *State of Haryana,*[36] the assessee had hired shuttering in favour of contractors to use it in the course of construction of buildings. It was found that possession of the shuttering materials was transferred by the assessee to the customers for their use and, therefore, there was a deemed sale within the meaning of this clause. The Supreme

35 (2000) 119 STC 182 at 184 (SC).
36 (1999) 9 SCC 182.

Court in *State of Andhra Pradesh* v. *Rashtriya Ispat Nigam Ltd.*[37] upheld the order passed by the High Court[38] and held as under:

> The High Court after scrutiny and close examination of the clauses contained in the agreement and looking to the agreement as a whole, in order to determine the nature of the transaction, concluded that the transactions between the respondent and contractors did not involve transfer of right to use the machinery in favour of the contractors and in the absence of satisfying the essential requirement of section 5E of the Act, i.e., transfer of right to use machinery, the hire charges collected by the respondent from the contractors were not exigible to sales tax. On a careful reading and analysis of the various clauses contained in the agreement and, in particular, looking to clauses 1, 5, 7, 13 and 14, it becomes clear that the transaction did not involve transfer of right to use the machinery in favour of contractors. The High Court was right in arriving at such a conclusion. In the impugned order, it is stated and rightly so in our opinion, that the effective control of the machinery even while the machinery was in use of the contractor was that of the respondent-company, the contractor was not free to make use of the machinery for the works other than the project work of the respondent or move it out during the period the machinery was in his use; the condition that the contractor would be responsible for the custody of machinery while it was on the site did not militate against respondent's possession and control of machinery."

Again, in *BSNL* v. *UOI*,[39] the apex court held as follows:

> To constitute a transaction for the transfer of the right to use the goods, the transaction must have the following attributes:
>
> (a) There must be goods available for delivery;
>
> (b) There must be a consensus ad idem as to the identity of the goods;
>
> (c) The transferee should have a legal right to use the goods – consequently all legal consequences of such use including any permissions or licenses required thereof should be available to the transferee;
>
> (d) For the period during which the transferee has such legal right, it has to be to the exclusion to the transferor – this is the necessary concomitant of the plain language of the statute, viz., a 'transfer of

37 JT (2002) 2 SC 493.
38 *Rashtriya Ispat Nigam Ltd.* v. *CTO, Visakhapatnam* (1990) 77 STC 182 (AP).
39 *Supra* note 18.

the right to use', and not merely a licence to use the goods;

(e) Having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others.

Ratio of the judgment

The question in *Mohd. Wasim Khan* v. *Commissioner of Trade Tax*[40] was whether the hire charges received by the assessee, for providing buses to companies for transportation of their employees from their place of residence to the factory and back to their residence, was liable to tax under section 3F of the U.P. Trade Tax Act, 1948 towards transfer of right to use the buses. It was held that the terms of the agreement entered into between the assessee and companies clearly showed that the effective control over the vehicles always remained with the assessee and had never been passed on to the companies. All legal consequences arising from the use of the vehicle were the responsibility of the assessee. Hence, hire charges were not exigible to tax. In *Commissioner, Trade Tax, UP* v. *Sri Ram,*[41] the respondent, the owner of a bus, provided the bus to the UPSRTC under an agreement and the assessing authority levied tax on the amount received towards hire charges from the UPSRTC under section 3F of the U.P. Trade Tax Act. On a revision petition, the tribunal deleted the tax and held, allowing the petition, that under the agreement, the possession and control of the vehicle remained with the UPSRTC during the period of the contract which showed that the possession was transferred by the respondent to the UPSRTC for use. The case squarely fell within the purview of provision of section 3F of the Act and the Tribunal was wrong in deleting the tax.

In *Indian Oil Corporation Ltd.* v. *Commissioner of Taxes, Assam,*[42] trucks and tankers were hired by the petitioner but it was found that as per the agreement between the petitioner and the contractor, possession and effective control of vehicles retained by the contractor. It was held that there was no transfer of right to use goods. *R.P. Kakoti* v. *Oil & Natural Gas Commission*[43] was a case where the dealer entered into a contract with the respondent (ONGC) for hiring of cranes. It was found that no delivery of possession of cranes was given to ONGC. The custody and control of the cranes remained with the petitioner. It was accordingly held that there was no transfer of right to use goods. The respondent in *State of Orissa* v. *Dredging Corporation of India Ltd.*[44] engaged its dredgers for dredging the

40 (2009) 20 VST 196 (All.); see also *Mohd. Sultan Khan* v. *Commissioner Trade Tax, UP* (2009) 20 VST 235 (All)

41 (2009) 20 VST 747 (All.).

42 (2009) 22 VST 70 (Gau.).

43 (2009) 22 VST 136 (Gau); see also *CST, Maharashtra State, Bombay* v. *Rolta Computer & Industries Pvt. Ltd.* (2009) 25 VST 322 (Bom).

44 (2009) 25 VST 522 (Ori.).

floor of Paradeep Port. The man and machine were deployed for valuable consideration but there was no transfer of right to use dredgers, hence, hire charges were not liable to tax. The appellate tribunal had held in *Commissioner, VAT, Trade & Taxes Department, Delhi* v. *International Travel House Ltd.*[45] that the assessee-respondent, in hiring Maruti Omni cabs to a company, was providing services only and did not transfer any right to use the goods for the purpose of levy of tax and that the respondent was already paying tax on services under the Finance Act, 1994. On an appeal by the revenue, it was held that it was admitted that the permissions and licenses with respect to the cabs were not available to the transferee and the cabs remained in the control and possession of the assessee. These were never transferred to the transferee. Further, a consensus *ad-idem* as to the identity of the goods was also absent and, therefore, the contract in question was not at all a contract of sale of goods as envisaged in article 366(29A)(d) of the Constitution.

It is submitted that as per the ratio in *State of Andhra Pradesh* v. *Rashtriya Ispat Nigam Ltd.*,[46] transfer of effective control in any goods is a *sine-qua-non* to bring the transaction within the ambit of deemed sale of 'transfer of the right to use goods'. But to judge whether or not there was transfer of the effective control of the vehicle to the hirer, it had not to be seen, as observed in *International Travel House Ltd.*, whether or not there was transfer of the permissions and licences with respect to the cabs hired. From *Rashtriya Ispat Nigam Ltd.*, the only principle that can be deduced appears to be whether or not the contractor could use the machine of the company for some other purpose. So far as cabs are concerned, if only the vehicle is placed at the disposal of the hirer, it is not required further that permissions and licences should also be transferred in the name of hirer. Inspiration for this view is drawn from *HLS Asia Ltd.* v. *State of Assam*,[47] wherein it been held, *inter alia*, after noticing various attributes of the deemed sale, that delivery of physical possession of the goods is not necessary for the transfer of the right to use goods. Thus, if physical possession of the vehicle is not necessary, the transfer of the permissions and licences in the name of hirer also does not seem to be necessary.

Entertainment of appeal

The legal position of an appeal is that an appeal is a statutory right. Therefore, while granting such right in any fiscal statute, the legislature can impose any condition for its entertainment.[48] This explains why in various fiscal statutes concerning an appeal, it is provided that, while the appellant,

45 (2009) 25 VST 653 (Del.).
46 *Supra* note 37.
47 (2007) 8 VST 314 (Gau).
48 See *Anant Mills Co. Ltd.* v. *State of Gujarat*, AIR 1975 SC 1234 and *Vijay Prakash D. Mehta* v. *Collector of Customs (Preventive) Bombay*, AIR 1988 SC 2010.

as a condition precedent for entertainment of appeal, will deposit full admitted tax but in regard to the amount of disputed tax, the appellant may seek stay of the same and the appellate authority may, in its discretion, grant stay of the full or part of the disputed amount subject to furnishing of surety. In some of the state sales tax Acts, it is seen that the legislature has fixed a particular amount to be deposited out of the disputed amount, as a condition precedent to the entertainment of appeal. The Karnataka Sales Tax Act, 1957 provided that the appellant shall deposit 50 of the tax in dispute as a condition precedent for admission of an appeal by the tribunal. This provision was assailed as offending articles 14 and 19 of the Constitution. But the petition was dismissed by Karnataka High Court[49] holding that the relevant sub-sections (3) and (5) of section 22 of the Act were not violative of the Constitution as the right of appeal, which was the creature of the statue, can be availed of in the manner provided for in the statute itself and no one can claim any right independent of the statutory provision.

It is often seen that the appellate authorities, while passing an interim order in disposing of the application of the appellant for grant of stay, do not pass speaking order but would only say, after briefly stating the facts, that without going into the merits of the case, the appellant should deposit a particular amount. The result is that the appellant has then to approach the High Court to seek redress of the hardship caused by such laconic order.

The first important aspect of the fixing of the pre-deposit as a condition precedent for entertainment of an appeal is that it is not necessarily to be payment of a certain amount in cash; the entertainment of an appeal can be on furnishing of a bank guarantee/surety for the full amount.[50] In the context of refund of pre-deposit amount paid by the petitioner for availing the right of appeal, the Bombay High Court in *Suvidhe Ltd.* v. *Union of India,*[51] *inter alia,* clarified that pre-deposit was not a payment of duty but only a pre-deposit for availing of the right of appeal.

The concerned authority while disposing of an application for grant of stay of the disputed amount is also no longer *res-intergra.*[52] The Supreme Court in *Ravi Gupta* v. *Commissioner of Sales Tax, Delhi*[53] has reiterated the principle thus:[53a]

> Merely upon the dealer establishing a prima facie case in an appeal, an interim order of protection from collection of tax by the

49 *Prakrith Builers Pvt. Ltd.* v. *State of Karnataka* (2009) 19 VST 589 (Kar).

50 See *Food Corporation of India, Karnal* v. *State of Haryana* (2000) 9 SCC 397.

51 1996 (82) ELT 177 (Bom.).

52 See *Vetcha Sreeramamurthy* v. *ITO, Vizianagaram* (1965) 30 ITR 252; *Vijay Power Generators Ltd.* v. *Commissioner of Sales Tax* (2000) 120 STC 377 (Del) and *ICICI Bank Ltd.* v. *State of Maharashtra* (2009) 26 VST 552 (Bom).

53 (2009) 5 SCC 208.

53a *Id.* at 211.

> Department should not be passed. But if, on a cursory glance, it appears that the demand raised has no leg to stand on, it would be undesirable to require the assessee to pay the full or a substantive part of the demand. Petitions for stay should not be disposed of in a routine manner unmindful of the consequences flowing from the order requiring the assessee to deposit the full or part of the demand. There can be no rule of universal application in such matters and the order has to be passed keeping in view the factual scenario involved....

During the year under survey, the Supreme Court, while dealing with an application for grant of stay of the demand, considering two significant expressions used in section 35F of the Central Excise Act, 1944, *i.e.* 'undue hardship to such person' and 'safeguard the interest of Revenue', crystallized the law on the subject in the following words:[54]

> Petitions for stay should not be disposed of in a routine manner unmindful of the consequences flowing from the order requiring the assessee to deposit the full or a part of the demand. There can be no rule of universal application in such matters and the order has to be passed keeping in view the factual scenario involved. That the Supreme Court has indicated the principles does not give a licence to the forum/authority to pass an order which cannot be sustained on the touchstone of fairness, legality and public interest. Where denial of interim relief may lead to public mischief, grave irreparable private injury or shake the citizens' faith in the impartiality of public administration, interim relief can be granted.
>
> Undue hardship is matter within the knowledge of the applicant for waiver and has to be established by him. A mere assertion about undue hardship is not sufficient. For a hardship to be 'undue' it must be shown that the particular burden to have to observe or to perform the requirement is out of proportion to the nature of the requirement itself and the benefit which the applicant would derive from compliance with it. The word 'undue' adds something more than just hardship. It means an excessive hardship or a hardship greater than the circumstances warrant.

Natural justice

In *Xerox India Ltd.* v. *Government of Andhra Pradesh*,[55] the petitioner filed an appeal against the assessment orders of the commercial tax officer

54 *Benara Valves Ltd* v. *Commissioner of Central Excise* (2009) 20 VST 297 (SC).
55 (2009) 23 VST 141 (AP).

for the year 2002-03 under the Andhra Pradesh General Sales Tax Act, 1957 with an application for stay of collection of disputed tax. The appellate deputy commissioner refused to order stay. In a writ petition it was held that the order was liable to be set aside on the ground of failure to record reasons in its support and communicate them to the affected person. The requirement of passing a speaking order or recording of reasons and their communication to the affected party is an integral part of the concept of natural justice. While deciding the application for stay, the appellate deputy commissioner was exercising quasi-judicial function. Therefore, even though he was not expected to pass a judgment like a regular court, it was his bounden duty to record some reasons indicating the application of mind to the factors which were relevant for passing or refusing an order of stay in the matter of levy and collection of taxes. The order under challenge was totally silent on consideration of the relevant factors.

In *M.G. Garments* v. *STO, Bhubneswar*,[56] penalty under the Value Added Tax Act was collected at the rate of 20 per cent of the value of goods found unaccounted for during inspection. The petitioner was served with a show cause notice under section 73(10) of the Act for levy of penalty. However, before a reply to the notice was filed by the petitioner, the authorities collected tax and penalty amounting to Rs. 45,500/- both under the Orissa VAT Act and Orissa Entry Tax Act 1999, without any further inquiry and passing any speaking order for imposing such penalty. It was held by Orissa High Court that the authorities had never established that goods worth Rs. 1.75 lakhs found on the date of inspection and alleged to be unaccounted for were brought from outside the local area by the petitioner. Similarly, the collection of Rs. 45,000/- towards penalty under the Orissa VAT Act, and Orissa Entry Tax Act was held to be without authority of law. Again, the same court in *Utkal Sales Corporation* v. *State of Orissa*,[57] set aside the impugned order passed by the appellate tribunal on the ground of breach of the principles of natural justice as the appellate tribunal, on the appeal of the department, enhanced the assessment without notice to the dealer. It was observed that it was the basic principle of natural justice and mandatory provision that the assessee should be given notice for enhancement of the assessment.

In *Babulal Agrawal* v. *State of Orissa*,[58] the assessment was reopened pursuant to vigilance report and order was passed based upon account books seized from R and statement of M. But the assessing authority did not grant opportunity to cross examine R and M as requested by the dealer. This resulted in violation of principles of natural justice. Accordingly, it was held, allowing the petition, that the sales tax authorities under the sales tax

56 (2009) 19 VST 372 (Ori).
57 (2009) 26 VST 447 (Ori).
58 (2009) 26 VST 565 (Ori).

Act were not precluded from collecting materials behind the back of a dealer and they might not disclose the source to the dealer. However, if they wanted to utilize any material collected behind the back of the dealer against him they were bound to confront the dealer with it giving him an opportunity to rebut it. On such confrontation, if the dealer denied the allegation and demanded cross-examination of any witness, he must be afforded an opportunity of cross-examination as cross-examination was one of the most effective methods of establishing the truth and exposing falsehood. It would be recalled that the Supreme Court in *State of Kerala* v. *K.T. Shaduli Yusuff*[59] had held that the principles of natural justice applied to the assessing authorities who were quasi judicial authorities and that, where the assessee applied to the sales tax officer for affording him an opportunity to cross-examine a certain person in regard to the correctness of his accounts, but this opportunity was denied to him and the sales tax officer had made best judgment assessment under section 17(3) of the Kerala General Sales Tax Act, 1963, the impugned assessment order was quashed and the case remanded for making fresh assessment according to law after giving an opportunity to the assessee to cross-examine the person from whom the information was collected.

The Kerala High Court in *K.P. Subair Haji* v. *Secretary to Government, Revenue(s)*[60] quashed an order passed on a revision petition observing that the statutory revision filed by the petitioner before the state government was heard by one officer but for various reasons he could not pronounce his decision and his successor, without hearing the parties to the *lis*, has passed the impugned order. The principle of judicial system is that a case should be decided by the authority hearing the arguments and that a successor cannot decide a case, without hearing the arguments afresh, on the ground that the arguments had already been advanced before his predecessor who left the case undecided. The settled legal principle is that if one person hears and another decides, personal hearing becomes an empty formality and mere farce and hearing by a predecessor authority cannot possibly be of any advantage to a successor in deciding the case.

In *Cement Sales Corporation* v. *Assistant Commissioner of Commercial Taxes, Mangalore,*[61] the petitioner submitted a representation on 04.09.2007 pointing out the mistake apparent on the face of the record and sought rectification of the order dated 16.6.2007 under section 39(1) of the Karnataka Value Added Tax Act, 2003. By invoking the powers under section 69, the assistant commissioner issued endorsement without affording an opportunity of hearing to the petitioner. The Karnataka High Court held that a perusal of the endorsement showed that no opportunity of

59 AIR 1977 SC 1627.
60 (2009) 20 VST 622 (Ker.).
61 (2009) 23 VST 210 (Karn.) See also *Bata India Ltd.* v. *Dy. Commissioner CT, Bangalore* (2009) 24 VST 510 (Karn).

hearing was afforded to the petitioner before issuing such endorsement. An endorsement issued by the quasi-judicial authority should be in full compliance with the principles of natural justice. In the instant case, there was no compliance with the principles of natural justice and, therefore, the endorsement was vitiated. The court set aside the endorsement and remitted the matter to the assistant commissioner for reconsideration.

The Kerala High Court in *Shajudeen E. A* v. *CTO, Ponkunnam*[61a] had also to invoke the principles of natural justice. The petitioner in this case, was served with a pre-assessment notice for assessment year 2003-04 proposing assessment on the basis of the verification report of the intelligence officer. The petitioner filed objections, requesting for a copy of the report. The assessment order, however, was passed overruling the objections and rejecting the request of the petitioner for a copy of the verification report. The Court observed that violation of the principles of natural justice is an established exception to the general principle that courts would not entertain writ petitions under article 226 of the Constitution in the face of effective and efficacious alternative remedies available. It was held, keeping in view the facts of the case, that, although the assessing authority had stated that the objections were not signed and, therefore, they were rejected, the order showed that the authority had considered the objections of the petitioner and rejected them on the merits, which he could have done only after an opportunity of being heard was given to the petitioner. The assessment order, therefore, was liable to be quashed and the assessing authority was to afford an opportunity of being heard to the petitioner and thereafter complete the assessment in accordance with law.

In *BGR Energy Systems Ltd.* v. *Assistant Commissioner of CT, Nellore,*[62] issued two show cause notices were issued to the petitioner. After receiving reply from the dealer to the first notice, the same was vacated. The respondent issued the second show cause notice proposing to make best judgment assessment and determination of turnover on estimated basis of Rs. 815.52 crore relating to the civil works contract in addition to the turnover relating to the civil works contract of Rs. 443.92 crore. Allowing the petition, it was held by the Andhra Pradesh High Court that the first show cause notice made no reference to the basis on which the above said turnover was sought to be taxed. The dealer had thereby been denied the opportunity of effectively showing cause why such turnover was not liable to tax under the Act. It was accordingly held that failure to indicate the basis for levy of tax under the Act in the show cause notice on a turnover of Rs. 815.52 crore fell foul of the *audi alteram partem* rule necessitating the setting aside of the assessment order on the ground of violation of

61a (2009) 24 VST 448 (Kar).
62 (2009) 25 VST 391.

principles of natural justice. However, it was further held that the impugned assessment order itself was to be treated as a show cause notice and the dealer was permitted to file its objections to the proposed assessment and the respondent, after affording the dealer an opportunity of personal hearing, was to pass an order afresh according to law.

In *Pramod Kumar Agarwal (Saraf)* v. *CTO, Siliguri*,[63] the applicant contended before the West Bengal taxation tribunal that he had not been served with the notices for assessment. The notices sent by registered post had returned unserved and the appellate authority erred in not setting aside *ex parte* assessment order, particularly when it did not follow the prescribed procedure in serving notices of appeals. It was held, allowing the applications, that the presumption of service could not be drawn. So, without examining the correctness of the respondent's statement as to the sending of notices under registered post, it could have been safely held by the appellate authority that the notices were not served. Thus the appellate authority committed an error in holding that the opportunity of being heard in the assessment proceeding was not denied to the applicant. Consequently, the impugned assessment orders were invalid. It was further observed that since both the assessments were hit by the limitation bar on the date of filing appeals in 2004, no effective purpose would be served in remanding the appeals to the assistant commissioner.

The question of law for examination by the Madras High Court in *Sornammal and Company* v. *Assistant Commissioner, CT, Viruthunager*,[64] was whether the dealer had to be put on notice before quantification of interest for late payment of tax. It is settled law that payment of interest in case of late payment of tax, is automatic[65] and no prior notice in this behalf was necessary. However, the quantification of interest due from a dealer was a different aspect. It was held that though the Act did not require, the principles of natural justice would apply before quantifying the interest due. Since no such notice had been issued prior to quantification of interest, there was a clear violation of the principles of natural justice and the petitioner was justified in filing the writ petition without filing the statutory revision. Accordingly, the order passed by the authority below was quashed and the matter remitted to the CTO for fresh consideration. The petitioner was directed to file objections to the notice dated 31.12.2007 and the CTO was directed to consider the objections of the petitioner and pass fresh orders on the merits of the case in accordance with law.

What emerges from the above judicial pronouncements about the scope of the principles of natural justice is: (i) There is no, and indeed, there cannot be, straight-jacket formula to explain the scope; (ii) Compliance with the principles of natural justice is dependent upon the facts and

63 (2009) 26 VST 421 (WBTT).
64 (2009) 26 VST 573 (Mad).
65 *Haji Lal Mohd. Biri Works* v. *State of UP*, AIR 1973 SC 2226.

circumstances of each case; (iii) Unless prejudice is shown, there can be no violation of the principles of natural justice; and (iv) Quintessence of these principles implies a duty to act fairly so as to do justice and to prevent miscarriage of justice.

Now, tested on the touch stones of these principles, it is worth considering whether the VAT Acts introduced in this country w.e.f. 01.04.2005, and, which adopt a system of self assessment in as much as the return filed by a dealer is deemed to be an assessment, comply with the above principles. The point for consideration is whether or not, in the event of finding a tax deficiency in the return, the assessing authority should give an opportunity to the dealer to make up the deficiency, if he can. In the Delhi VAT Act, 2004, for instance, there are provisions to issue a 'Default Assessment Notice' of tax/interest/penalty under sections 32 and 33 of the Act. The dealer may, if aggrieved, file an objection before the objection hearing authority within a period of two months. If he does so, no recovery is effected till the objection filed is settled, otherwise recovery may be effected on the expiry of the period of two months. The question for consideration is whether issuing a default assessment notice without giving an opportunity to the dealer violates the principles of natural Justice. The dealer may say that had an opportunity been given, he could have removed the tax deficiency and resort to litigation would have been obviated. From the revenue side, it can be said that VAT system is based on trust and since the return filed is treated as assessment, the dealer should file a complete return and, still if a default assessment notice is issued, he should avail of the remedy of filing an objection. The further plea of the revenue could be that since no recovery is effected during the period when the objection, if filed, remains pending, it cannot be said that the dealer is prejudiced in any way. Weighing the pros and cons of both sides, it appears that (i) it is well settled the principles of natural justice must not be stretched too far,[66] and (ii) the revenue authorities being quasi-judicial authorities, their duty is to act fairly. Viewed thus, it would be better if an opportunity of hearing is granted to the dealer when tax deficiency is found in his return. The revenue would also benefit for the reason that the number of objections will be greatly reduced and the authorities can devote their time so saved to other useful work.

IV JUDGMENTS UNDER THE CENTRAL SALES TAX ACT, 1956

Deemed sale in the course of export

The Constitution under article 286(1) provides: "No law of a State shall impose, or authorize the imposition of, a tax on the sale or purchase of

66 *N.K. Prasada* v. *Govt. of India* (2004) 6 SCC 299-308.

goods where such sale or purchase takes place … (b) in the course of the import of the goods into, or export of the goods out of, the territory of India.

(2) Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in clause (1)."

Various provisions under the Central Sales Tax Act, 1956 (CST Act), for instance section 5 formulates the principles when such sale or purchase will be deemed to be a sale in the course of import of the goods into, or export of the goods out of, the territory of India. Sub-section (3) of section 5 of the CST Act, 1956 was added w.e.f. 01.04.1976 consequent upon a judgment of the Supreme Court in *Mod. Serajuddin* v. *State of Orissa*,[67] in which it was held that in case of chain transactions in the course of export, there could be only one sale covered by section 5(1) of the CST Act and this sale would be one where there is privity of contract between the exporting dealer in India and the importing dealer in a foreign country. Section 5(3) of the CST Act reads as under:

> (3) 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.

This section was subject of interpretation by the Supreme Court in *Consolidated Coffee Ltd.* v. *Coffee Board, Banglore*,[68] in which it was held that section 5(3) formulates a principle of general applicability in regard to all penultimate sales provided they satisfy the specified conditions mentioned therein and it does not at all create a legal fiction. This section 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 which satisfies the two conditions specified therein, namely (i) such penultimate sale must take place after the agreement or order, under which the goods are to be exported; and (ii) it must be for the purpose of complying with such agreement or order. The Andhra Pradesh High Court in *George Maijo & Co.* v. *State of Andhra Pradesh*[69] held that in order to come within the purview of section 5(3), the following three conditions should be fulfilled:

67 AIR 1975 SC 1564.

68 AIR 1980 SC 1468; see also *Sterling Foods* v. *State of Karnataka*, AIR 1986 SC 1809; *Vijayalakshmi Cashew Company* v. *Dy. CTO* (1996) 1 SCC 468 and *Shafeeq Shameel and Co.* v. *Asst. Commissioner, Commercial Taxes* (2003) 9 SCC 276.

69 (1980) 46 STC 41 (AP).

(i) There must have been pre-existing agreement or order to sell the specific goods to a foreign buyer.
(ii) The last purchase referred to in section 5(3) must have taken place after that agreement with the foreign buyer was entered into.
(iii) The last purchase must have been made for the purpose of complying with the pre-existing agreement or order.

In *Sreenivas & Co.* v. *State of Tamil Nadu*[70] the claim to exemption of turnover of purchases by the petitioner who purchased raw skins to fulfil export orders for finished leathers under section 5(3) of the CST Act, 1956 was rejected by the assessing authority for the assessment year 1986-87. The appellate authority on appeal allowed the claim of the petitioner but the tribunal on further appeal by the revenue relying on *K.A.K. Anwar & Co.* v. *State of Tamil Nadu*[71] held that the petitioner was not entitled to the benefit of exemption under section 5(3). On a revision petition, the petitioner, *inter alia*, contended that raw and dressed hides and skins were one and the same in view of circulars dated 18.07.1994 and 19.06.1992. Dismissing the petition, it was held by Madras High Court that raw hides and skins and dressed hides and skins were different taxable commodities notwithstanding the fact that they figured in section 14(iii) under one entry as "hides and skins whether in a raw or dressed state." Section 5(3) of the CST Act would be applicable where the goods which were sold or purchased had not undergone any transformation. What were purchased by the petitioner were raw hides and skins and they were not the same goods which were exported. Those raw hides and skins were then processed and it was the dressed hides and skins which were exported. Therefore, section 5(3) would have no application to the case of the petitioner.

The Kerala High Court in *Highlands Tea Factory* v. *State of Kerala*[72] had to adjudicate whether purchase of green tea leaves from unregistered dealers for manufacture of tea for export was covered within the scope of section 5(3) of the CST Act. It was held that the item purchased was entirely different from the item exported because green tea leaves were not the same as manufactured tea. The two items were commercially different. This position is recognized in entry 150(i) of the first schedule to the Act which provides for refund of tax in respect of sales tax paid whether at sale point or purchase point on green tea leaves, when tax is levied on the sale of manufactured tea produced out of the same. Section 5(3) provides for exemption on sale or purchase of goods made against prior orders for export. The petitioner could not claim that it had a purchase order for export of green tea leaves, a perishable commodity with no consumer use. So long as the green tea leaves were not exported, and what was exported was

70 (2009) 19 VST 39 (Mad).
71 AIR 1998 SC 518.
72 (2009) 20 VST 321 (Ker).

manufactured tea, the petitioner was liable to pay tax under section 5A of the purchase turnover of green tea leaves consumed in the production of manufactured tea exported.

As mentioned above, the sale in the course of export out of the territory of India is beyond the competence of the state legislatures to levy tax under entry 54 list II, schedule VII of the Constitution. An interesting question of law before the Kerala High Court in *K.J. James* v. *State of Kerala*[73] was whether, to claim exemption from payment of tax under section 5(3) of the CST Act, a dealer must be registered under the Act or even an unregistered dealer could also avail the exemption under these provisions. It was held by the High Court, allowing the petition, that the exemption provided under section 5(3) of the CST Act on sales preceding export sales could not be disallowed on technical grounds because article 286(1) of the Constitution prohibited levy of tax within a state on export sales. Therefore, if documents produced were sufficient to prove export exemption within the meaning of section 5(3) of the CST Act, the petitioner was entitled to avail the same even though the petitioner was not a registered dealer during the relevant year.

In *Tata Tea Ltd.* v. *State of Karnataka*,[74] the claim of exemption under section 5(3) of the CST Act by the assessee who exported coffee bean, which it purchased and got cured, to a foreign buyer pursuant to an order, was accepted by the assessing authority. However, the revisional authority in exercise of his powers under section 21(2) of the Karnataka Sales Tax Act held that the coffee bean purchased by the assessee and exported by it were different commodities and, therefore, the assessee was not entitled to exemption under section 5(3) of the CST Act. The Karnataka appellate tribunal also dismissed the appeal of the assessee. In a revision petition, it was held by Karnataka High Court that there was no change in the product even after curing the uncured coffee. Under the Karnataka Sales Tax Act, there is no different entry for a coffee bean/coffee cherry (uncured coffee). What was described in entry18 of the second schedule of part C to the Act was a coffee bean and coffee seed whether raw or roasted. In other words, the cured and uncured coffee were found in entry 18. Therefore, the assessee was entitled to exemption under section 5(3) of the CST Act.

Inter-state sale

Sections 3 and 6(2) of the CST Act read as under:

> "3. *When is a sale or purchase of goods said to take place in the course of inter-State trade or commerce* - 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-

73 (2009) 22 VST 165 (Ker).
74 (2009) 23 VST 287 (Karn).

(a) occasions the movement of goods from one State to another; or

(b) is effected by a transfer of documents of title to the goods during their movement from one State to another.

Explanation 1 - Where goods are delivered to a carrier or other bailee for transmission, the movement of the goods shall, for the purposes of clause (b), be deemed to commence at the time of such delivery and terminate at the time when delivery is taken from such carrier or bailee.

Explanation 2 - Where the movement of goods commences and terminates in the same State it shall not be deemed to be a movement of goods from one State to another by reason merely of the fact that in the course of such movement the goods pass through the territory of any other State."

"6. (2) Notwithstanding anything contained in sub-section (1) or sub-section (1A), where a sale of any goods in the course of inter-State trade or commerce has either occasioned the movement of such goods from one State to another or has been effected by a transfer of documents of title to such goods during their movement from one State to another, any subsequent sale during such movement effected by a transfer of documents of title to such goods-

(a) to the Government, or

(b) to a registered dealer other than the Government, if the goods are of the description referred to in sub-section (3) of section 8, shall be exempt from tax under this Act :
Provided...."

The above provisions are judicially well ploughed but still doubts persist about their scope. The Supreme Court in *A & G Projects and Technologies Ltd.* v. *State of Karnataka*[75] has observed that the scheme of section 6(2) of the Act which provides for exemption from payment of central sales tax on subsequent inter-state sales is to avoid cascading effect of multiple taxation. It means the subsequent inter-state sale within the meaning of section 3(b) of the Act will be exempt only if the first inter-state sale under section 3(a) of the Act has suffered tax. To the same effect is the judgment of the Allahabad High Court in *Commissioner Trade Tax, U.P.* v. *Azad Scrap Traders,*[76] in which, following its earlier judgment,[77] it has been held that for a second or subsequent inter-state sale to be exempt under section 6(2) of the CST Act, 1956, it was not sufficient that purchases were made

75 (2009) 2 SCC 326.
76 (2009) 20 VST 768 (All).
77 *Kohinoor Scrap Traders* v. *Commissioner of Trade Tax* (2006) 29 NTN 286 (All).

from a registered dealer. A further finding that the goods purchased were tax-paid under the CST Act was necessary.

Some times, it is seen that the distinction between an inter-state sale and stock transfer under the CST Act and in particular, in respect of stock transfers to the consignment agents of a principal, whether situated in the same state or in another state, is not clear even to the authorities administering. For instance, under the Delhi VAT Act, 2004, there is a clarification issued by the Department under section 85 vide Notification No. F.4(3)/P-II/VAT/20051158 dated 2.12.2005 which, *inter alia*, reads as under:

> 1. The scheme of DVAT envisages taxing different stages in the production and distribution chain and allows set off for taxes paid at the earlier stages. Unlike the Central Sales Tax Act, 1956 wherein there is provision for transfer of goods by the dealer to his branch or his agent otherwise than by way of sale, in Delhi Value Added Tax, 2004 there is no similar provision for intra-State transfer of goods to the branch or an agent without payment of tax under the DVAT Act even an agent to whom goods are transferred on consignment basis are covered under the definition of "dealer" and transfer of goods to an agent for consideration, whether received in advance or subsequently on conclusion of sale of goods shall amount to sale and shall be taxed accordingly. However, the agent shall be eligible to claim input tax credit for taxes paid to the principal. To sum-up all intra-State transfer of goods to an agent within Delhi on consignment without payment of tax is not allowed under the provision of DVAT Act, 2004 and such intra-State transfers are covered under the definition of sale and are liable to tax as per provision contained in DVAT Act, 2004 from the day the DVAT Act came into force.

Now, what is a consignment sale is no longer *res-integra*. In *Sri Tirumala Venkateswara Timber and Bamboo Firm* v. *CTO, Rajahmundry*,[78] the apex court had observed:

> As a matter of law there is a distinction between a contract of sale and a contract of agency by which the agent is authorized to sell or buy on behalf of the principal and make over either the sale proceeds or the goods to the principal. The essence of a contract of sale is the transfer of title to the goods for a price paid or promised to be paid. The transferee in such a case is liable to the transferor as a debtor for the price to be paid and not as agent for the proceeds of the sale. The essence of agency to sell is the

78 AIR 1968 SC 784.

> delivery of the goods to a person who is to sell them, not as his own property but as the property of the principal who continues to be the owner of the goods and will therefore be liable to account for the sale proceeds. The true relationship of the parties in each case has to be gathered from the nature of the contract, its terms and conditions, and the terminology used by the parties is not decisive of the legal relationship.

Again in *Bhopal Sugar Industries Ltd.* v. *STO, Bhopal*,[79] it was observed:

> A contract of agency differs essentially from a contract of sale inasmuch as an agent after taking delivery of the property does not sell it as his own property but sells the same as the property of the principal and under his instructions and directions. Further more, since the agent is not the owner of the goods, if any loss is suffered by the agent he is to be indemnified by the principal.

The exact connotation of the term 'sale' as explained by the Supreme Court in *State of Madras* v. *Gannon Dunkerley & Co, (Madras) Ltd.*[80] is that there must be transfer of property in goods from the seller to the buyer, and, in case of a consignment transaction, there is never transfer of property in the goods and there is thus no question of passing of consideration either before or afterwards. It is also wrong to assume that while there is provision under the CST Act for transfer of goods by a dealer to his branch or his agent otherwise than by way of sale, there is no such provision in the DVAT Act. With respect to the issuing authority, there is no such provision under the CST Act. Section 6A of the Act which is relevant in this context, only places the burden of proof, *etc.* in case of transfer of goods claimed otherwise than by way of sale, on a dealer. Reference may be made to *Sardar Agro Oils Ltd.* v. *State of Andhra Pradesh*[81] where it has been held thus: "Section 6A of the Central Sales Tax Act, 1956, casts a burden on the dealer to prove the claim of consignment transfer by filing relevant documents. That section was amended with effect from May 11, 2002, making filing of form F compulsory for the purpose of such a claim. Before this amendment it was not mandatory to file form F to claim consignment transfer and this could be proved by filing other relevant documentary evidence." The definitions of the word "sale" both under the state Act and the CST Act, envisage that the essential ingredient of 'sale' is the transfer of property in the goods by one person to another for cash or deferred payment or other valuable consideration. Since in a

79 AIR 1977 SC 1275.
80 AIR 1958 SC 560.
81 (2009) 25 VST 243 (CSTAA).

consignment transaction – under the state Act or the CST Act - there is no transfer of property in the goods, the question of payment of consideration either in advance or afterwards, does not arise.

The central sales tax appellate authority in *Sheetal Refineries Pvt. Ltd.* v. *State of Andhra Pradesh*[82] has given certain guidelines as to when a transaction would be stock transfer or an inter-state sale. Again, the same authority, in *Dharmapuri District Co-operative Milk Producers Union Ltd., Krishnagiri* v. *State of Tamil Nadu*[83] has explained the law in regard to stock transfers. In *Commissioner of Trade Tax, U.P.* v. *Vijendra Engineering,*[84] the respondent-dealer made stock transfers through MSP of Tamil Nadu which it had appointed by a written agreement as its consignment agent. Under the terms of the agreement, the commission agent had to pay 90 per cent amount in advance and 10 per cent subsequently. The assessing authority treated the stock transfer as inter-state sales. The tribunal held that the movement of goods to Tamil Nadu was not in pursuance of any prior contract of sales, that the goods were dispatched under the agreement to the commission agent for sale in Tamil Nadu and that during the course of stock transfer, the freight incurred was debited in the account of the dealer. On a revision petition, it was held by Allahabad High Court that merely because under the terms of the agreement, some payments were received towards advance from the commission agent it could not be said that the movement of goods was in pursuance of prior contract of sales. The view of the tribunal, that the goods had moved by way of stock transfer for sale and not in pursuance of prior contract of sale, was not erroneous.

V CONSTITUTIONAL PROVISIONS

Promissory estoppel

The Supreme Court in *Babubhai Jamnadas Patel* v. *State of Gujarat*[85] observed as under:[85a]

> The courts, and in particular the High Courts and the Supreme Court, are the sentinels of justice and have been vested with extraordinary powers of judicial review and supervision to ensure that the rights of the citizens are duly protected. The courts have to maintain a constant vigil against the inaction of the authorities in discharging their duties and obligations in the interest of the citizens for whom they exist. This court, as also the High Courts, have had to issue appropriate writs and directions from time to time to ensure that

82 (2009) 21 VST 212 (CSTAA).
83 (2009) 25 VST 8 at (CSTAA).
84 (2009) 25 VST 600 (All).
85 (2009) 9 SCC 610.
85a *Id.* at 619.

> the authorities performed at least such duties as they were required to perform under the various statutes and orders passed by the administration.

Judicial review is the power of the courts to annul the acts of the executive and/or the legislature where it finds them incompatible with the Constitution or the ordinary law. The Gujarat High Court in *Kishorkumar Prabhudas Tanna* v. *State of Gujarat*[86] explained this concept in the following words:

> Judicial review is an integral part of the basic feature of the Constitution. It is a matter of discretion and restraint and also caution and it cannot be accepted as a principle that the scheme or the fiscal law is immune from judicial review or it is beyond the scope of judicial review. The law or the validity of the law could also be examined when it is challenged or attacked in the light of the constitutional provisions particularly articles 14, 19 and 21 and the directive principles of the State policy would also be enforceable and justiciable.

The petitioners, village industries established under the Khadi and Village Industries Commission Act, 1956 and availing of the benefit of exemption from sales tax under the Gujarat Sales Tax Act, 1969, sought, *inter alia*, orders quashing the notification dated 31.03.2006 by which exemption had been withdrawn. The respondents contended that the government had the right to withdraw an exemption or benefit in exercise of the power under which it was granted, that the benefit of exemption granted under the erstwhile Gujarat Sales Tax Act had been rescinded or withdrawn even before the Gujarat Value Added Tax Act, 2003 came into force, *i.e.* with effect from 1.4.2006, that the provision of section 100 of the 2003 Act which was repeal and saving clause did not apply to the facts of the case and that while interpreting and construing a statute particularly a fiscal statue there is little scope for judicial review. It was held by the High Court that exemption from tax for a fixed period was an accrual of right and withdrawal of exemption could not affect the right. Further, the objects and reasons of the Khadi and Village Industries Commission Act under which the petitioner units were established revealed the basic idea for establishment of the unit and the enactment itself was to permit industries for the development of rural areas. It was in a way a kind of promise held out for attracting establishment of such industries or units under the Act to achieve such object and if a detriment was caused as a result of the promisor resiling from his promise it would certainly be detriment attracting

86 (2009) 23 VST 298-300 (Guj.).

promissory estoppel. Even if the Sales Tax Act had been repealed, the benefit of the exemption granted under it by notification, which was to remain valid from 1.12.2005 to 30.11.2008, could have continued or remained and it was only for taking care of such eventualities that section 100 of the Gujarat Value Added Tax Act providing for repeal and saving clause had been made. When there was no explanation or justification for rescinding the benefit of exemption before the expiry of the period, the doctrine of promissory estoppel was attracted irrespective of the fact that it had been rescinded in exercise of the same statutory power under the Act. Once the notification had been issued in favour of the party in exercise of powers under the statute, an equity was created and thereafter it was no longer a legislative function, but it would be an executive function or it can be a delegated legislation by which such notification granting exemption had been issued. Even assuming that it was a legislative function by delegated legislation, it had to be tested on the touchstone of article 14 of the Constitution which had reference to fairness, equity and justice. The High Court accordingly, on the principle of promissory estoppel, held that there was no justification for withdrawing the exemption and quashed the impugned notification.

Writ petition

In *Director of Entry Tax* v. *Sunrise Timber Company*,[87] the appellant, the director of entry tax, claimed before the West Bengal taxation tribunal that the respondent, in collusion with others, imported consignment of timber into the Calcutta metropolitan area from places outside the state for sale, use or consumption therein without payment of entry tax under the Taxes on Entry of Goods into Calcutta Metropolitan Area Act, 1972, thereby attracting section 24(1)(a) and (b) of that Act, besides committing the offences of forgery and cheating. The tribunal, however, accepted the stand of the respondent that it was being harassed and that the entire exercise of seizure and collection of tax was without legal sanction. The appellant preferred a writ petition before the High Court which held that after going through the materials on record, it was found that the tribunal had dealt with the matter extensively and there was no illegality or irregularity in respect of the order passed by it. On appeal, the Supreme Court set aside the order of the High Court and remanded the matter to it for fresh consideration of the issues raised by the appellant which were not without substance. The dismissal of the petition summarily by the High Court was disapproved by the Supreme Court. Likewise, in *South India Tanners & Dealers Association* v. *Dy. Commissioner of Commercial Taxes*,[88] it has been held that where the department has issued only a show cause notice and, without replying to it, the assessee filed a petition before the Tamil Nadu taxation

87 (2009) 19 VST 32 (SC).
88 (2009) 23 VST 8 (SC).

special tribunal or the High Court, they should not have interfered at that stage. They ought to have directed the assessee to reply to the show cause notice and exhaust the statutory remedies under the statute. The Supreme Court accordingly granted liberty to the department to amend the show cause notices and take up additional grounds, if so advised, within a period of eight weeks giving an opportunity to the assessee to reply to the amended notices as well as the original show cause notice within a period of six weeks; and the authority was thereafter directed to dispose of the matter expeditiously in accordance with law, without being influenced by any observations made by the special tribunal or High Court in the earlier round of litigation.

In *Godrej Sara Lee Ltd.* v. *Asst. Commissioner (AA)*,[89] the question was whether a notification could have retrospective effect or retroactive operation, being a jurisdictional fact, has to be determined by the High Court in exercise of its writ jurisdiction under article 226 of the Constitution. Following its earlier judgments in *Whirlpool Corporation* v. *Registrar of Trade Mark*[90] and *Committee of Management* v. *Vice Chancellor*,[91] it was held that when an order of a statutory authority was questioned on the ground that it suffers from lack of jurisdiction, alternative remedy was no bar to a writ petition. In the instant case, the appellant, a dealer which manufactured coils, mats, aerosols, liquids/refills, *etc.* which were used for driving away and destroying mosquitoes, filed a writ petition in the High Court contending, *inter alia*, that Notification S.R. No. 82 of 2006 dated 21.01.2006 seeking to amend and enhance the rate of tax on pesticides and insecticides from 4 per cent to 12.5 per cent was *ultra vires* the Kerala Value Added Tax Act, 2003, because, by virtue of section 6(1)(d) of the Act, the entry and rate of tax specified in schedules I and III of the Act could not be altered. The High Court dismissed the writ petition on the ground that the appellant had an alternative remedy by way of appeal. It was held by the Supreme Court that this was a fit case where the High Court should have entertained the writ petition.

In a writ petition, the Punjab & Haryana High Court in a case[92] had to decide whether the petitioner was entitled to input tax credit on petrol/ diesel which had evaporated after purchase and before sale. While the court dismissed the writ petition observing that even though alternative remedy may not be an absolute bar and the court may in its discretion entertain a writ petition in certain situations, the case was not of an exceptional nature where the petitioner could not take recourse to alternative remedy. All the same, the court observed that under the scheme of the Act, there has to be liability to pay output tax for claiming input tax credit. If the goods which

89 (2009) 25 VST 271 (SC).
90 (1998) 8 SCC 1.
91 (2008) 16 SCALE 310.
92 *BPCL* v. *State of Punjab*, (2009) 19 VST 118 (P & H).

had been purchased were not available and output tax was not attracted, there could be no deduction of input tax in respect of such goods. Therefore, the provision in rule 21 making input tax credit inadmissible where the goods were lost, destroyed or damaged, could not be held to be contrary to the scheme of the Act. Rule 21 of the rules was held valid.

In *Chemech Laboratories Ltd.* v. *CTO, Chennai*,[93] for the assessment year 2004-05, the assessing officer issued a proposal notice to the petitioner on 5.4.2006. On 7.5.2006 a revised notice was issued. In both notices, the petitioner-dealer was called upon to file its objections, if any, to the proposal. On receipt of the notice by the petitioner, as required in the notice, objections dated 20/21.04.2006 were delivered to the commercial tax officer but in the assessment order dated 19.05.2006, it was stated by the assessing officer that a notice was issued to the dealer on 7.5.2006 but no objection was made till date. The proposal in the notice was confirmed and tax in a sum of Rs. 21,88,453/- and surcharge in a sum of Rs. 1,09,404/- were levied as against tax of Rs. 1,61,916/- and surcharge of Rs. 1,292/- paid by the dealer. The assessing officer also imposed a penalty under section 12(3)(b) of the Tamil Nadu General Sales Tax Act, 1959 at 150 per cent of the tax and surcharge in a sum of Rs. 32,03,912/-. The dealer filed a writ petition, whereupon the court called for the records including the assessment file. The objections of the petitioner dated 20.04.2006 were found available in the file and department seal showed that it had been received on 20.04.2006. The Madras High Court observed, and rightly so, that the statute gave power to the assessing officer to frame the assessment in accordance with law only. Any assessment made by the assessing officer was quasi-judicial in nature and must stand scrutiny as to its correctness before a court of law. The authorities could not pass orders at their whims and fancies. The impugned order was accordingly set aside and the matter remitted to the authority to consider the objections filed by the petitioner and proceed further in accordance with law.

In *Thanjai Agro Traders* v. *Commissioner of CT, Chennai*,[94] the brief facts were that the commissioner of commercial taxes by his proceedings dated 12.05.2006 had issued a clarification that hybrid cotton seed was taxable at four per cent, under entry no. 6(iii) of the second schedule to the Tamil Nadu General Sales Tax Act, 1959 and hybrid sunflower seed was taxable at four per cent under entry no. 6(ix) of the Second same schedule to Act. The petitioner filed a writ petition against the pre-assessment notice issued by the assessing authority calling upon the petitioner to file objections, if any, against the proposed assessment order for the assessment year 2004-05 and the clarification issued by the commissioner of commercial taxes. The writ petition was dismissed observing that in

93 (2009) 20 VST 471 (Mad).
94 (2009) 20 VST 508 (Mad).

matter of taxation, it was inappropriate for the High Court to interfere in exercise of jurisdiction under article of 226 of the Constitution either at the stage of show-cause notice or at the stage of assessment where alternative remedy by way of filing a reply or appeal, as the case may be, was available. Similarly, in *Palaniappa Sago Factory* v. *Dy. CTO (Attur Town), Assessment Circle*,[95] the brief facts were that the appeal against the assessment order passed under the Tamil Nadu General Sales Tax Act was filed by the petitioner beyond the time prescribed under the Act with a delay which was beyond the power of the appellate authority to condone and the same was dismissed as not maintainable. A writ petition contending that the assessment order had been passed without assessment notice. It was held by the court that the ground on which the petitioner challenged the assessment order was that the basic principles of natural justice had been violated and reasonable opportunity had not been given to the petitioner since the notice itself had not been served on the petitioner. The order in question was liable to be set aside and the assessing authority was directed to proceed and finalise the assessment in accordance with law after giving the petitioner an opportunity of being heard.

The Karnataka High Court in *SAP India Pvt. Ltd.* v. *State of Karnataka*[96] had to deal with a new situation. In writ petitions against orders of assessment under the Karnataka Value Added Tax Act, 2003, the petitioner contended that the transactions in respect of which they had been taxed were in the nature of service on which the petitioners had been assessed under the Finance Act, 1994, that service and sales cannot co-exist and if the authorities under the Finance Act had already identified the activity as being in the nature of a service and had subjected that activity to levy of tax under the Finance Act there could not be a further levy under the respective sales tax enactment by the state and that, therefore, the assessment orders were not sustainable in law. The department contended that in the present cases, particularly in the case of writ petition by a Government of India company, the subject-matter of the assessment order was the activity of leasing a part of transponders located on a satellite in space; that no part of any service provided by the petitioner was sought to be assessed and that the question whether the activity attracted liability for payment of tax under the provisions of the Karnataka Value Added Tax Act had to be examined on the facts and by applying the relevant law, that having regard to the nature of the factually disputed aspects, even assuming that the petitioner had a strong case, the petitioner had to avail of the statutory appeal remedy as examination of all such questions in writ jurisdiction was not desirable. It was held by the court that although all the writ petitions might involve complicated questions of law, for a satisfactory resolving all such questions the factual matrix of the cases would have to be examined.

95 (2009) 24 VST 248 (Mad).
96 (2009) 23 VST 276 (Kar).

The law on this aspect being in a formative stage and in respect of new activities, as a result of advancement and developments in science and technology and their applications in the commercial field, for resolving questions of law arising in such context and even questions arising in the context of taxation statute, the question of the area under which they can be classified in the background either the sales tax enactment of the state legislature or in the context of the provisions of the Finance Act, 1994 seeking to levy tax on service, were matters essentially to be examined by the authorities in the first instance and then by the hierarchy of various authorities provided under the respective enactment. An examination on assuming certain facts even before it is fully settled or finalized could also lead to the possibility of law being not developed in a satisfactory manner. The court held that the petitioners must avail the statutory remedies and pursue their relief before the statutory authorities.