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VAT AND SALES TAX

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I INTRODUCTION

AT THE outset, it may be clarified that the title of this survey "VAT AND SALES TAX" does not suggest that these are two different levies. As explained by the Supreme Court in *Federation of Hotel & Restaurant Association of India* v. *Union of India*:[1]

> It is trite that the true nature and character of the legislation must be determined with reference to the power of the legislature. The consequences and effects of the legislation are not the same thing as the legislative subject matter. It is the true nature and character of the legislation and not its ultimate economic result that matters.

Again, in *Venkateshwara Theater* v. *State of Andhra Pradesh*,[2] the Supreme Court observed:

> It is necessary to bear in mind that a tax has two distinct elements, viz. subject of the tax and the measure of the tax. The subject of the tax is the person, thing or activity on which the tax is imposed and the measure of the tax is the standard by which the amount of tax is measured. The competence of the Legislature to enact a law imposing a tax under a particular head of the legislative list has to be examined in the context of the subject of the tax. If the subject of the tax falls within the ambit of the legislative power conferred by the head of the legislative entry, it would be within the competence of the Legislature to impose such a tax.

Now, the nature of the tax, both under VAT and Sales Tax, is the same, *i.e*. taxes on the purchase and sale of goods and the relevant legislative entry in respect of both these taxes is also the same, namely entry 54, list II, schedule VII of the Constitution of India which reads thus: "Taxes on the Sale or

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1 (1989) 3 SCC 634 at 655.

2 (1993) 3 SCC 677 at 689.

Purchase of Goods other than newspapers, subject to the provisions Entry 92A of List I". The difference between these two taxes may be of 'measure of tax' and, as held by the Supreme Court in *T.N. Kalyana Mandapam Association* v. *Union of India*,[3] "it is well settled that the measure of taxation cannot affect the nature of taxation…." While the General Sales Tax Acts as in force in various states of the country, prior to 1.4.2005, envisaged levy of tax either at the first stage or at the last stage of sale, the VAT Acts impose tax at the first stage and even the subsequent stages of sale. But, as the source of levy and the nature of the tax is the same, both the Acts only differ so far as the measure of tax is concerned, though the nature of the tax remains the same.

During the year 2010, as usual, the decisions of the Supreme Court and various High Courts will be surveyed under the heads: (a) liability (b) assessment (c) judgments under the Central Sales Tax Act and (d) judgments having a bearing on the Constitution of India.

II LIABILTY

As is well known, in 1994, service tax was introduced by Parliament under chapter V of the Finance Act, 1994 with reference to its residuary power under entry 97, list I of the seventh schedule to the Constitution. It would be recalled that the Supreme Court had in *Imagic Creative Pvt. Ltd.* v. *Commissioner of Commercial Taxes*,[4] had observed:

> The Court, while interpreting a Statute, must bear in mind that the Legislature was supposed to know the law and the legislation enacted is reasonable one. The Court must also bear in mind that where the application of a Parliamentary and Legislative Act comes up for consideration, endeavours shall be made to see that provisions of both the Acts are made applicable.

But, ever since the introduction of service tax, there has arisen a controversy whether sales tax was exigible to a transaction or a part of the transaction on which service tax was leviable and *vice versa*. This controversy was first deliberated by the Kerala High Court in *Escotel Mobile Communications Ltd.* v. *UOI*[5] by holding that state legislature was competent to legislate on different aspects of the same transaction. It was held that on sale of SIM card (card containing computer chips with pre-recorded instructions which would, upon its activation, enable the customer access to the service of the cellular telephone company by means of electromagnetic waves) to subscriber by cellular telephone service provider, sales tax and

3 (2004) 5 SCC 632 at 648.
4 (2008) 2 SCC 614 at 627.
5 (2002) 126 STC 475 (Ker.).

service tax both were leviable. The court held that in a SIM card, there is a transfer of property in goods, by the service provider to the subscriber for cash or for deferred payment or for other valuable consideration.

The above judgment was dissented from by the Supreme Court in *Bharat Sanchar Nigam Ltd.* v. *Union of India*.[6] This is what the Supreme Court held:

> "It is not possible for this Court to opine finally on the issue. What a SIM card represents is ultimately a question of fact, as has been correctly submitted by the States. In determining the issue, however the assessing authorities will have to keep in mind the following principles; if the SIM card is not sold by the assessee to the subscribers but is merely part of the services rendered by the service providers, then a SIM card cannot be charged separately to sales tax. It would depend ultimately upon the intention of the parties. If the parties intended that the SIM card would be a separate object of sale, it would be open to the Sales Tax Authorities to levy sales tax thereon. …In our opinion the High Court ought not to have finally determined the issue. In any event, the High Court erred in including the cost of the service in the value of the SIM card by relying on the "aspects" doctrine. That doctrine merely deals with legislative competence. As has been stated in *Federation of Hotel & Restaurant Association of India* v. *Union of India:*[6a]
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> [S]ubjects which in one aspect and for one purpose fall within the power of a particular legislature may in another aspect and for another purpose fall within another legislative power.
> There might be overlapping: but the overlapping must be in law. The same transaction may involve two or; more taxable events in its different aspects. But the fact that there is overlapping does not detract from the distinctiveness of the aspects.

During the year under survey, the same controversy arose before the customs, excise and service tax appellate tribunal, New Delhi in *Commissioner of Central Excise, Raipur* v. *BSBK Pvt. Ltd.*,[7] wherein it was likewise held, relying on *Federation of Hotel and Restaurant Association of India* v. *UOI* that "a transaction may involve two or more taxable events in its different aspects. But the fact that there is an over lapping does not detract from the distinctiveness of the aspects."

The Madras High Court held in the same vein in *Madras Hire-Purchase Association* v. *UOI*[8] that the levy of service tax relating to leasing and hire-

6 (2006) 3 SCC 1.
6a (1989) 3 SCC 634.
7 (2010) 36 VST 92.
8 (2009) 25 VST 446 (Mad.).

purchase transaction is not contrary to articles 265 and 366(29A) of entry 54, list II of the seventh schedule to the Constitution nor it is violative of articles 14 and 19(1)(g) of the Constitution.

The above decision of Madras High Court was vehemently assailed before the Supreme Court by preferring a batch of civil appeals captioned *Association of Leasing and Financial Services Companies* v. *Union of India*.[9] The appellants argued that the effect of article 366(29A) incorporated in the Constitution by the Constitution (46th Amendment) Act, 1982 (which came into force w.e.f. 01.02.1983), was to treat six types of transactions (including hire purchase and leasing transactions) as deemed sales so as to enable the state legislatures to levy sales tax under entry 54, list II, schedule VII. Also, reading the Statement of Objects and Reasons to the Constitution (46th Amendment) Act makes it clear that all six transactions could have been taxed under entry 97, list I by Parliament. However, based on the 61st Report of the Law Commission, the Constitution has now conferred exclusive power to the states to levy sales tax by expanding entry 54, list II by insertion of article 366(29A). Thus, having characterized constitutionally the subject of hire purchase and leasing as a deemed sale, it is not open to the Parliament to tax the same subject-matter under entry 97, list I. In short, on behalf of the appellants it was submitted that the state legislature had the exclusive competence to levy a tax on hire purchase and financial leasing by reason of entry 54, list II read with article 366(29A).

Refuting the above contention, the Attorney General for India, referring to article 366(29A) and the 61st Report of the Law Commission, submitted that a legal friction was sought to be inserted in article 366 in order to give an artificial extension to the definition of "sale" so as to include the power to levy sales tax even on the hiring part and this was all that article 366 (29A) intended to do. From that, one cannot infer that Parliament had divested itself of the power to levy service tax. He further submitted that the question of service tax was not even present in the mind of Parliament when the Constitution (46th Amendment) Act was enacted and therefore, reliance on the 61st Report of the Law Commission was completely misconceived. Further, the judgment of the Supreme Court in *Bharat Sanchar Nigam Limited*, when read as a whole, recognizes the power of Union of India to levy service tax.

After hearing both sides and quoting from its judgments in *Second Gift Tax Officer, Mangalore* v. *D.H.Hazareth*,[10] *Ujagar Prints* v. *Union of India*[11] and *International Tourist Corporation* v. *State of Haryana*,[12] it relied on the following observations made in *International Tourist*:[12]

9 (2010) 35 VST 549 (SC).
10 AIR 1970 SC 999.
11 (1989) 3 SCC 488.
12 AIR 1981 SC 774 at 777-78.

> Before exclusive legislative competence can be claimed for Parliament by resort to the residuary power, the legislative incompetence of the State Legislature must be clearly established Entry 97 itself is specific that a matter can be brought under that entry only it it is not enumerated in List II or List III and in the case of a tax it is is not mentioned in either of those Lists, In a Federal Constitution like ours where there is a division of legislative subjects but the residuary power is vested in Parliament, such residuary power cannot be so expansively interpreted as to whittle down the power of the State Legislature. That might affect and jeopardize the very federal principle. The federal nature of the Constitution demands that an interpretation which would allow the exercise of legislative power by Parliament pursuant to the residuary powers vested in it to trench upon State legislation and which would thereby destroy or belittle State autonomy must be rejected……"

The court, affirming the decision of the Madras High Court held, on the facts, that the impugned levy, *viz.* service tax on leasing and hire purchase under section 65(12) and (105)(zm) of the Finance Act, 1994 related to, or was with respect to, the particular topic of "banking and other financial services" which included within it one of the several enumerated services, *viz.* financial leasing services. The taxable event under the impugned law was the rendition of service; it was not on material or sale. It was on the activity/service rendered by the service provider to its customer.

Law is well settled by the Supreme Court in its two judgments, *English Electric Co. of India Limited* v. *The DCTO*[13] and *Sahney Steel and Press Work Limited* v. *CTO*[14] that a dealer in one state with its branches in other states is one legal entity. The same principle applies even if a dealer has other branches of the same business in the same state. In *Kerala Tourism Development Corporation Limited* v. *State of Kerala*,[15] the petitioner was running hotels and restaurants where food and beverages were sold. All the branches and restaurants were in the State of Kerala. The dealer had a single registration under the Kerala Genral Sales Tax Act for all the branches and the outlets. Under the Act, a dealer whose turnover in a year exceeded Rs. 20.00 lacs was liable to pay tax @ 10 per cent. Though, the turnover of each branch/ restaurant was less than Rs. 20.00 lacs but the aggregate of all the branches was more than Rs. 20.00 lacs. It was accordingly held that the petitioner, a Government of Kerala undertaking, was liable to pay tax.

In *Bates India Pvt Ltd* v. *State of Karnataka*,[16] the tribunal held that the petitioner was carrying on business in advertising and publicity supplying

13 (1976) 4 SCC 460.
14 AIR 1985 SC 1754.
15 (2010) 27 VST 367 (Ker., FB).
16 (2010) 27 VST 236 (Kant.).

printed materials like booklets, calendars, dairies, visiting cards, *etc*. in the course of business and was therefore liable for turnover tax under section 6B. This order of the tribunal was affirmed by the High Court dismissing the petition of the petitioner observing that the conclusion arrived that by the authorities below after examining the materials was that the petitioner placed orders with printers for supply of the materials after receiving orders from his clients.

An interesting point of law came up before the West Bengal Taxation Tribunal in *ICICI Bank Limited* v. *Joint Commissioner Sales Tax, Kolkata*,[17] wherein sale by banks and non-banking financial companies of motor vehicles hypothecated to them, were held liable to sales tax. It was, *inter alia*, observed although the business of banking as defined in the Banking Regulation Act, 1949 does not include sale or purchase of goods, section 6 of the Act enumerated several forms of business in which a banking company may engage in addition to banking business including in clause (f) the business "of managing, selling and realizing any property which may come into the possession of the company in satisfaction or part satisfaction of its claims" and in clause (g) "of acquiring or holding and generally dealing with any property or any right, title or interest in any such property which may form the security or part of the security for any loans or advances or which may be connected with any such activity." Besides, section 6(m) generally empowers a bank to do as form of business "all such other things as are incidental or conducive to the promotion or advancement of the business of the company…."

In *State of Tamil Nadu* v. *Ashoka Motors*,[18] the respondent purchased a chassis which suffered tax at the point of sale. The respondent, thereafter, erected a body over it and after using the complete unit, sold the new product, namely the lorry, to a third party and contended that the chassis having already leveied tax once was not liable to be taxed again after the body was built over it. The tribunal, having held in favour of the respondent, on a revision petition being filed by the revenue, it was held by the High Court, following its earlier decision in *South India Automotive Corporation Private Ltd*. v. *Sate of Tamil Nadu*[19] and relying on its earlier decision in *TN Mosaic Manufacturers Association* v. *State of Tamil Nadu*[20] allowing the petition of the revenue, that even though the respondent had paid tax at the time of purchase of the chassis and thereafter built the body over it, having regard to the undisputed fact that what was sold by the respondent was the lorry as a whole the value of which was liable to be taxed under the provisions of the Act, the tax suffered on the chassis was immaterial. The order of assessing authority was held to be correct.

17 (2010) 31 VST 178 (WBTT).
18 (2010) 28 VST 116 (Mad.).
19 (1990) 76 STC 115 (Mad.).
20 (1995) 97 STC 503 (Mad.).

III ASSESSMENT

Legal principles

It is trite that in the interpretation of the provisions of any statute, the principle whether the provision is mandatory or directory is of great importance. Fortunately, there is enough judicial guidance available on the subject. The following are some of the Supreme Court and High Court judgments where this principle has been explained:

i) In *Maqbul Ahmed* v. *Onkar Pratap Narain*:[21] When consequences of the failure to comply with the prescribed requirement is provided by the statute itself, there can be no manner of doubt that such statutory requirement must be interpreted as mandatory.

ii) *Seth Bhikraj Jaipuria* v. *Union of India*:[22] Where a statute requires that a thing shall be done in the prescribed manner or form but does not set out the consequences of non-compliance, the question whether the provision was mandatory or directory has to be adjudged in the light of the intention of the legislature as disclosed by the object, purpose and scope of the statute. If the statute is mandatory, the thing done not in the manner or form prescribed can have no effect or validity: if it is directory, penalty may be incurred for non-compliance, but the act or thing done is regarded as good.

iii) *Raza Buland Sugar Co. Ltd.* v. *Municipal Board, Rampur*:[23] A constitution bench of the Supreme Court held that the question whether a particular provision is mandatory or directory cannot be resolved by laying down any general rule and it would depend upon the facts of each case and for that purpose the object of the statute in making out the provision is the determining factor. The purpose for which the provision has been made and its nature, the serious general inconvenience or injustice to person resulting from whether the provision is read one way or the other, the relation of the particular provision to other provisions dealing with the same subject and other considerations which may arise on the facts of a particular case including the language of the provision, have all to be taken into account in arriving at the conclusion whether a particular provision is mandatory or directory.

iv) *Lachmi Narain* v. *Union of India*:[24] The primary key to the problem whether a statutory provision is mandatory or directory is the intention of the law-maker as expressed in the law itself. The reason behind the provision may be a further aid to the ascertainment of that

21 AIR 1935 PC 85 (PC).
22 1962 (2) SCR 880.
23 AIR 1965 SC 895 reiterated in 2008 (17) SCC 117 (CB).
24 1976 (37) STC 267 (SC).

intention. If the legislative intent is expressed clearly and strongly in imperative words, such as the use of "must" instead of "shall" that will itself be sufficient to hold the provision to be mandatory, and it will not be necessary to pursue the enquiry further. If the provision is couched in prohibitive or negative language, it can rarely be directory. The use of peremptory language in a negative form is *per se* indicative of the intent that the provision is to be mandatory.

v) *Maxwell on Interpretation of Statutes*, "Where the statute relates to the performance of a public duty and prescribes a specific time within which that duty is required to be done, the law seems to be as follows, as pointed out in *Maxwell*.[25]

> 'It has often been held, for instance, when an Act ordered a thing to be done by a public body or public officers and pointed out the specific time when it was to be done, that the Act was directory only and might be complied with after the prescribed time…..
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> 'A statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others is directory unless the nature of the act to be performed, or the phraseology of the statute, is such that the designation of time must be considered a limitation of the power of the officer.'

vi) *P.T. Rajan* v. *T.P.M. Sahir*:[26] A statute as is well known must be read in the text and the context thereof. Whether a statute is directory or mandatory would not be dependent on the user of the words "shall" or "may". Such a question must be posed and having regard to the purpose and object it seeks to achieve.

vii) *Kailash* v. *Nankhu*:[27] The study of numerous cases on this topic does not lead to formation of any universal rule except this that the language alone most often is not decisive, and regard must be had to the context, subject-matter and object of the statutory provision in question, in determining whether the same is mandatory or directory. In an oft-quoted passage, Lord Campbell said: 'No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of the courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be considered.'

viii) *CIT* v. *Gupta Fabs*.:[28] The question as to whether a statute is

25 11th ed.,1962 at 369 as cited in *Shree Azad Transport Co. Pvt. Ltd*. v. *CTO*, reproduced in (2001) 123 STC 13 (Cal.) at 19-20.

26 2003 (8) SCC 498-515 reiterated in *Ashok Lanka* v. *Rishi Dixit,* 2005 (5) SCC 598.

27 2005 (4) SCC 480.

28 2005 (274) ITR 620.

mandatory or directory depends upon the intent of the legislature and not upon the language in which the intent is clothed. The meaning and intention of the legislature must govern, and these are to be ascertained not only from the phraseology of the provision but also by considering its nature, its design, and the consequences which would follow from construing it one way or the other.

The use of the word 'shall' in a statutory provision though generally taken in mandatory sense, does not necessarily mean that in every case it shall have effect, that is to say, unless the words of the statute are punctiliously followed, the proceeding or the outcome of the proceeding would be invalid. On the other hand, it is not always correct to say that where the word may has been used, the statute is only permissive or directory in the sense that non-compliance with those provisions will not render the proceedings invalid.

ix) *Stelco Strips Ltd.* v. *State of Punjab*:[29] In this case, the provisions of section 14B of the Punjab General Sales Tax Act, 1948 use the word 'shall' but the court, applying the principles laid down by the Supreme Court in *Rai Vimal Krishna* v. *State of Bihar*,[30] *inter alia*, held:

[T]he provision is more by way of procedure to achieve the object of speedy disposal of such disputes. It is expression of desirability in strong terms. But it falls short of creating any kind of substantive right in favour of the dealer….

x) *Vishwa Nath Prasad Bhagwati Prasad* v. *CIT*:[31] Held that the provisions dealing with procedure are not usually mandatory.

The Delhi High Court in *Commissioner of Sales Tax* v. *Behl Construction*[32] held that the provision of section 74(7) of the Delhi VAT Act, 2004 using the word 'shall' was directory. However, in *Swarn Darshan Impex Pvt. Ltd*. v. *Commissioner VAT*,[33] the court interpreted sub-section (3) of section 38 using the word 'shall' and held that where security for payment of refund was not demanded within fifteen days from the date on which the return was furnished or claim for the refund was made by a dealer, the revenue was bound to grant refund. The court was persuaded to distinguish its earlier judgment in *Behl Construction* and held sub-section (3) of section 38 to be mandatory as the section used the word 'shall' in the matter of grant of refund. Section 38 does not lay down the consequences, that is, if the security is not demanded within the prescribed time, grant of refund will be irresistible.

29 2009 (19) VST 498 (P & H).
30 2003 (6) SCC 401.
31 1993 (202) ITR 469 (All.).
32 2009 (21) VST 261 (Del.).
33 2010 (31) VST 475 (Del.).

The applicant aggrieved dealer is duly compensated by the grant of interest for the delay in grant of refund. That, however, does not mean that the department should not comply with the provisions of section 38 of the Act but, in any case, if there is inordinate delay, the court may in its discretion order grant of refund with interest immediately or give direction for early disposal of the case. The patinent question to be examined here is whether or not the provisions of section 38, because the word 'shall' is used in this section, are mandatory or directory. Moreover, the section is only procedural in nature and, as held by the courts as mentioned above, the procedural provisions are normally directory. With utmost respects to the High Court, this legal aspect needs a second look on some subsequent date when a similar question arises.

After the repeal of the General Sales Tax Acts in various states by the VAT Acts, the question of scope of the term 'repeal' has arisen. As a matter of fact, this term 'repeal' has judicially been examined thoroughly by the Supreme Court in *Gammon India Ltd.* v. *Special Chief Secretary*,[34] wherein after examining the judgments and opinions of various authors, the court crystallized the scope of the term 'repeal' in the following words:

> On critical analysis and scrutiny of all relevant cases and opinions of learned authors, the conclusion becomes inescapable that whenever there is a repeal of an enactment and simultaneous re-enactment, the re-enactment is to be considered as reaffirmation of the old law and provisions of the repealed Act which are thus re-enacted continue in force uninterruptedly unless the re-enacted enactment manifests an intention incompatible with or contrary to the provisions of the repealed Act. Such incompatibility will have to be ascertained from a consideration of the relevant provisions of the re-enacted enactment and the mere absence of the savings clause, by itself not material for consideration of all the relevant provisions of the new enactment. In other words, a clear legislative intention of the re-enacted enactment has to be inferred and gathered whether it intended to preserved all the rights and liabilities of a repealed statute intact or modify or to obliterate them altogether.

Before the Allahabd High Court in *Dharma Rice Mill* v. *State of U.P.*,[35] a similar question of law arose. The High Court, relying on the above Supreme Court judgment, upheld that the notice issued for revision of the assessment order, observed:

> Although the U.P. Trade Tax Act, 1948 has been repealed with effect from January 1, 2008 the repeal does not have the effect of obliterating

34 2006 (3) SCC 354 at 373.
35 2010 (34) VST 503 (All.).

> completely from the record the 1948 Act, as if it had never been passed. A plain reading of the language of section 81(2)(b) of the U.P. Value Added Tax Act, 2008 as well as section 6(b) and (c) of the U.P. General Clauses Act,1904 clearly demonstrate that even though the 1948 Act as a whole has been repealed, the rights, privileges or obligations acquired by any party under the repealed enactment stand unaffected and such right or remedy can continue to be enforced as is the repealing Act had not been implemented….

Again, before the same High Court in *Maheshwari Agencies* v. *State of U.P.*,[36] the challenge was to the penalty levied under the repealed Act after repeal of the Act of 1948. Following *Gammon India Ltd.*, it was held that the order of penalty dated February 5, 2010 passed under section 15A(1)(l) of the 1948 Act was valid and the petitioner was at liberty to challenge the order in an appropriate statutory forum on the merits.

Best judgment assessment

This is a judicially well ploughed subject but 'best judgment' assessments made are, by and large, seldom in conformity with the principles enunciated. It is, therefore, necessary first to note down a few settled principles of 'best judgment' assessment. These are as under:

> The Supreme Court in *Reghubar Mandal Harihar Mandal* v. *The State of Bihar*,[37] following its earlier judgments in *Dhakeswari Cotton Mills Ltd*. v. *CIT*,[38] held that in making an assessment under section 10(2)(b), the sales tax officer is not fettered by technical rules of evidence and pleadings and he is entitled to act on material which may not be accepted as evidence in a court of law, but he is not entitled to make a pure guess and make an assessment without reference to any evidence or any material at all. There must be something more than bare suspicion to support the assessment.

In *State of Orissa* v. *Maharaja Shri B.P. Singh Deo*,[39] the court held that the mere fact that the materials placed by the assessee were unreliable did not empower the assistant collector to make an arbitrary order of enhancement. The power to levy assessment on the basis of best judgment was not an arbitrary power, the assessment had to be based on relevant material.

Again, the apex court in *State of Kerala* v. *C. Velukutty*,[40] observed that "The limits of the power are implicit in the expression "best of his judgment".

36 2010 (35) VST 80 (All.).
37 AIR 1957 SC 810.
38 1955 26 ITR 775 (SC).
39 1970 76 ITR 690 (SC).
40 (1966) 17 STC 465 (SC).

Judgment is a faculty to decide matters with wisdom truly and legally. Judgment does not depend upon the arbitrary caprice of a judge, but on settled and invariable principles of justice. Through there is an element of guess work in a best judgment assessment, it shall not be a wild one, but shall have a reasonable nexus to the available material and the circumstances of each case…."

The Punjab and Haryana High Court in *S. Sant Singh* v. *The Assessing Authority, Amritsar*[41] has also observed that "it has been well settled by their Lordships of the Supreme Court that even for the purposes of making a best judgment assessment the material and the basis of that assessment should be disclosed to the assessee who should be afforded an opportunity to rebut the same, if he can." Again, the Supreme Court in *State of Madras* v. *S.G. Jayaraj Nadar*[42] held that where account books are accepted alongwith other records, there can be no ground for making a best judgment assessment.

In a recent judgment, the Supreme Court in *Uma Nath Pandey* v. *State of U.P.*,[43] advised that the notice to be issued to a dealer should contain the following aspects:

> Notice is the first limb of this principle. It must be precise and unambiguous. It should apprise the party determinatively the case he has to meet. Time given for the purpose should be adequate so as to enable him to make his representation. In the absence of a notice of the kind and such reasonable opportunity, the order passed becomes wholly vitiated. Thus, it is but essential that a party should be put on notice of the case before any adverse order is passed against him.

During the year under survey, the following judgments relate to best judgment assessment:

1. *Arvind Kumar Giri* v. *STO, Manikatala*[44] - Held, allowing the petition, that the satisfaction as to the incompleteness or incorrectness of the returns had been derived upon enquiry but the findings of the enquiry were not made known to the petitioner, frustrating thereby the very purpose of issuing a notice. The notice was materially defective as it did not disclose any reason or reasons for which assessment proceedings were initiated.
2. *Kisan Brick Works* v. *Commissioner of Trade Tax, UP*[45] - The dealer was a manufacturer of bricks. At the time of survey, the kiln was found closed due to fault in the chimney. However, the assessing

41 (1971) 28 STC 567-569 (P & H).
42 AIR 1971 SC 2405 (SC).
43 (2009) 12 SCC 40.
44 (2010) 27 VST 46 (WBTT).
45 2010 28 VST 327 (All.).

authority presumed that the kiln started working on next day. It was held that this presumption was not justified without any material. No discrepancy having been found in the books of account, it was held that best judgment assessment was not proper.

3. *T.S. Metals* v. *State of Tamil Nadu*[46] - In this case, a slip bearing no. 97 was recovered in inspection showing transactions of certain amount. The assessing authority made addition of equal amount for serial nos. 1 to 96. It was held that this addition was unreasonable as the dealer was in possession of showing documents of loan and the dealer had further evidence to substantiate loan. It was accordingly held that the addition made was not justified and the case was remanded.
4. *Concept and Devices* v. *State of Tamil Nadu*[47] - During an inspection of the business premises of the petitioner, certain stock variations were noted and the turnover under the TNGST Act, 1959 was arrived at by adding the actual suppression and an equal amount of estimated suppression as suggested by the Enforcement Wing. It was held that the assessing officer was a quasi-judicial authority and in exercise of his quasi-judicial function of completing the assessment, he was not bound by the instructions or directions of the higher authorities. The order was accordingly set aside and the case was remanded.
5. *Trichy Café* v. *State of Tamil Nadu*[48] - In this case also, additions were made for fuel suppression estimated and wages paid to workers without any material justifying additions. Accordingly, it was held by the High Court that the assessment lacked rational basis and accordingly deleted the additions.
6. *Ambal Café* v. *State of Tamil Nadu*[49] - The petitioner ran a hotel and the authorities inspected the place of business on 29.05.1990, 14.08.1990 and 23.03.1991. The assessing officer worked out the average of sale recorded on 14.08.1990 and 23.03.1991, and estimated the annual sales on that basis. The matter having reached in the High Court, it was held, allowing the petition, that the factual finding was that there was no purchase or sales suppression in the accounts and that sales were maintained in a register. It was held that the revisional authority had not excercised his powers properly; his order was set aside and the order passed by the appellate authority was affirmed. The appellate authority accepted the turnover as per the accounts and added 10 per cent for defects.

46 2010 28 VST 381 (Mad.).
47 2010 29 VST 41 (Mad.).
48 2010 30 VST 461 (Mad.).
49 2010 33 VST 348 (Mad.).

7. *Kakada Ramprasad Sweet Stall* v. *State of Tamil Nadu*[50] - The petitioner was a dealer in sweets. An inspection was made on the eve of deepavali. At the time of assessment, estimate of turnover was made on the basis of suppression found on the day of inspection. It was accordingly held that the assessment order was not proper. It was found that the defects noted were only technical and inspection was made on the eve of deepavali, when there were bound to be higher sales. In these circumstances, 25 per cent of the estimated suppression was only added to the taxable turnover.
8. *Sarvodya Machinery Stores* v. *Commissioner of Trade Tax*[51] - In this case, the books of account were rejected on the basis of a bill dated March 13, 2002 recovered by the mobile squad from the possession of a third party with whom the dealer denied any connection. No opportunity was, however, given to the dealer to cross-examine the third party. It was accordingly held, following the law laid down by the Supreme Court in *State of Kerala* v. *K.T. Shaduli Yusuff*,[52] that the rejection of accounts and best judgment made were not justified.
9. *State of Tamil Nadu* v. *Ramshree Payal Bhandar*[53] - In this case, the court observed that, even while rejecting the accounts of the dealer as unreliable, the assessing officer is expected to make an honest estimate and must ensure that it is not vindictive. The respondent dealer was engaged in the manufacture of silver anklets. The enforcement wing registered a case for transportation of 40.140 kgs. of silver anklets which were not supported by any records and collected tax surcharge and compounding fee. When the officials of the enforcement wing inspected the place of business of the respondent dealer, various defects were noted, including an excess stock of 4.244 kgs. silver. Based on the above factors, the actual suppression was determined and to this equal addition was made towards probable omissions. The matter having reached the High Court, it was held that though the assessing officer pointed out certain defects in maintenance of records and accounts but he did not reject the turnover reported by the responding dealer. To the extent of the quantity of excess stock quantified at 4.270 kgs. of silver anklets and the transportation of 40.140 kgs. of silver anklets without bills, the addition could not be faulted, but the tribunal found that there was no continuous pattern of suppression adopted by the respondent dealer which warranted imposition of any additional amount, much less equal addition over and above the

50 2010 33 VST 363 (Mad.).
51 2010 33 VST 457 (All.).
52 AIR 1977 SC 1627.
53 2010 33 VST 452 (Mad.).

estimated suppression made by the assessing officer. It was held that such an approach was justified and the scaling down of the amount towards probable omission by the tribunal did not call for any interference.

10. *Bharti Chappal Store* v. *Commissioner, Trade Tax, UP*[54] - Held that it is an established principle of law that assessment is not a question of law but a question of fact and the court, while exercising power of judicial review, can interfere in the order passed by the tribunal only if a question of law is involved. In this case, there was concurrent finding of fact that the dealer had not maintained the account books properly. The best assessment judgment made was accordingly upheld.

Sale

The linchpin of legislative power under entry 54, list-II, schedule VII of the Constitution of India, which empowers the state legislatures to levy tax on the sale/purchase of goods, is the term 'sale'. The Supreme Court in it famous judgment in *State of Madras* v. *M/s. Gannon Dunkerley & Co. (Madras) Ltd.*,[55] explained the ingredients of the term 'sale' 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 presupposes capacity to contract, that it must be supported by money consideration, and that as a result of the transaction property must actually pass in the goods. Unless all these elements are present, there can be no sale.

The above ingredients of sale still hold hood even after the Constitution (46th Amendment) Act, 1982 which came into force w.e.f. 01.02.1983. The Supreme Court in *Sri Tirumala Venkateswara Timber and Bamboo Firm* v. *Commercial Tax Officer*,[56] *inter alia*, drew a distinction between a contract of sale and a contract of agency in the following words:

> As a matter of law there is a distinction between a contract of sale and 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 delivery of the goods to a person who

54 2010 33 VST 609 (All.).
55 AIR 1958 SC 560 at 567.
56 (1968) 21 STC 312 (SC).

> is to sell them, not as him 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….

In the same vein is the judgment in *Bhopal Sugar Industries Ltd*. v. *Sales Tax Officer, Bhopal*,[57] wherein a distinction has been drawn between the contract of sale and contract of agency. In a contract of sale, title to the property passes on to the buyer on delivery of the goods for a price paid or promised and, once this happens, the buyer becomes the owner of the property and the seller has no vestige of title left in the property. Before the Delhi High Court in *Havell's India Ltd*. v. *Commissioner of Value Added Tax*,[58] surprisingly enough, the consignment transactions between Havell's India Ltd. and his local agent were subjected to tax on the plea that the above said two judgments were not applicable after the enforcement of the VAT Act, 2004 which was different from the General Sales Tax Act. It was accordingly held that it was the transfer of property in the goods and not transfer of goods, which constituted 'sale' within the meaning of section 2(1)(zc) of the Act. Accordingly, the court held that the transaction between the principal and the consignment agent did not constitute sale unless there was transfer of property in the goods. The appellate tribunal's judgment was set aside.

Again, in *Infrastructue Leasing & Financial Services Ltd.* v. *Commissioner of Value Added Tax*,[59] the brief facts were that the Delhi Sales Tax on Right to Use Goods Act, 2002 came into force with effect from 15th September 2004. The petitioner had entered into various lease agreements prior to 15th September 2004, duration of which were 24/36/48 months. The petitioner filed writ petition and contended that though section 2(n) of the Act defining 'sale' was in line with clause (d) of article 366(29A), section 3(b) roping in subsequent payments of instalments of tax by treating them as independent sales was in excess of the powers conferred and that the petitioner would not be liable to pay tax under the Act, 2002 in respect of the amount towards the instalments received after 15th September 2004 in respect of the agreement entered prior to that date. The charging section 3 of the Act reads as under:

> *Incidence of tax* – Subject to the provisions contained in this Act and the Rules made thereunder, a tax shall be leviable on the turnover of sales in respect of –
>
> (a) not relevant for this discussion;

57 (1997) 40 STC 42.
58 (2010) 31 VST 20 (Del.).
59 (2010) 29 VST 346 (Del.).

(b) the transfer of the right to use any goods agreed to prior to the appointed day and wherein the right to use has been continued after the appointed day, to the extent of the sale price received or receivable in respect of such use on or after the appointed day, and

(c) not relevant for this discussion.

The court held, dismissing the petition, that 'sale' as defined in section 2(n) meant any transfer of right to use any goods for any purpose, for deferred payment or any other valuable consideration. Deferred payment would mean that the consideration for transfer of right to use goods had been fixed, but down payment has not been made which was allowed to be staggered. In such cases, goods were given on lease and rent was payable every month during the tenancy of the lease. Even as per the terms of the agreement, right to use accrued in favour of the lessee only when he pays the said rentals regularly, each month. Therefore, in such cases, deemed sale, *i.e,* transfer of right to use goods would accrue every month on payment. It may be added that the Madhya Pradesh High Court also in *Arihant Hire Purchase Company Ltd*. v. *State of Madhya Pradesh*[60] decided in the same manner.

In respect of 'deemed sale' under article 366(29A)(d) of the Constitution of India, the law settled by the Supreme Court in *20th CenturyFinance Corpn. Ltd*. v. *State of Maharashtra*[61] is that the state in which there is transfer of right to use goods is competent to levy sales tax. In that case, the Supreme Court was concerned with the *situs* of the deemed sale in respect of transfer of right to use and its relation to sales which are effected outside the state.

In *Vysya Bank Ltd*. v. *Commissioner of Trade Tax, U.P.*,[62] the petitioner entered into a contract with D for providing plant and machinery on rent and during the year under consideration received rent. The claim of the petitioner was that stamp paper for the agreement was purchased from Delhi and the agreement was executed at Delhi and, therefore, the right to use had been transferred at Delhi and trade tax authority of the State of U.P. had no jurisdiction to levy tax on the rent received in pursuance of the agreement under section 3F of the U.P. Trade Tax Act. The assessing authority did not accept the plea of the petitioner and levied tax on the entire amount of rent received during the year. The order of the assessing authority was upheld in first appeal and by the tribunal. The High Court also did not grant any relief observing that the tribunal had recorded a categorical finding that from the perusal of the lease deed it did not appear that the agreement had been executed at Delhi. This was a finding of fact.

It will be recalled that the Andhra Pradesh High Court in *State Bank of India* v. *State of Andhra Pradesh*[63] had held that the hiring of bank lockers

60 (2007) 5 VST 593 (MP).
61 (2000) 6 SCC 12.
62 (2010) 30 VST 487 (All.).
63 (1988) 70 STC 215 (AP).

was not taxable under the relevant sales tax statute. In this judgment also, it was likewise held that a bank locker, which is hired by a customer, continues to be a part and parcel of a thing attached and embedded with earth and, therefore, in the absence of any material otherwise to show that it has to be severed before sale or under the contract of sale, it cannot be movable property included within the definition of 'goods' under the 1948 Act. It is immovable property inasmuch it is to be used by the customers in the fixed condition and not by severing it from earth or the things attached to earth.

In *Indian Railways Catering & Tourism Corpn. Ltd*. v. *Government of NCT of Delhi*,[64] the brief facts of the case were: the petitioner, a government company, provided services, including catering on board trains run by the Indian railways, under identical contracts entered into with the Indian railways. The petitioner sub-leased the contract in respect of some trains to contractors. The consideration for these services was included in the fare charged by the Indian railways from passengers and the petitioner company was paid, by the Indian railways, for what it termed the services, including catering provided by it to the passengers. According to the agreement between the petitioner company and railway board, the meals cooked in the base kitchen and loaded on the trains were kept in the train compartments which were equipped with equipment required for catering, such as boilers, freezers, hot boxes, *etc.* which was provided and maintained by the Indian railways. On the question whether the transaction between the petitioner company and the Indian railways in respect of the food and beverages which were loaded on board the trains in Delhi was a contract of providing service and selling goods. In writ petitions, it was held that the passenger had absolutely no say in matters relating to food/snacks, *etc*. provided to him in the train. He got no refund from the railways if he did not like or did not take the meals offered to him in the compartment. The requisite charges in this regard were taken from him by the Indian railways at the time of purchase of ticket by him and he paid the same charges for the ticket, irrespective of whether he wanted meals in the trains or not. It was accordingly held that there was no element of service at all, except heating the cooked food and serving the food and beverages. It was accordingly held that value added tax was exigible under the provisions of the Delhi Value Added Tax Act, 2004. The court was prompted to hold this view keeping in view the provisions of section 23 of the Sale of Goods Act according to which as soon as the meals and snacks were cooked, and being in a deliverable state were appropriated to the contract by loading them on the compartments of Indian railways and keeping them in the equipment belonging to the railways, the property in the goods passed to the Indian railways.

In *Jaiprakash Industries Ltd.* v. *Commissioner of CT, Uttarakhand*,[65] the facts of the case were that the petitioner executed works contracts. After

64 (2010) 32 VST 162 (Del.).
65 (2010) 36 VST 152 (Uttara.).

constructing a hotel at Mussorie, it leased it out at quarterly lease rent of Rs. 95 lakh with its movable and immovable assets, namely sanitary fittings and installations, electrical fittings plant and machinery, kitchen equipment, air-conditioning and cold storage, lifts, furniture, fixture and other miscellaneous assets in terms of memorandum of understanding dated 7th September 1995 and lease agreement dated 1st October 1995. The assessing authority assessed tax liability under section 3F of the U.P. Trade Tax Act, 1948 on the assets which were movable. This included the air-conditioning and storage plant. The tribunal held that the air-conditioning and cold storage plant was movable property and the petitioner was liable to be taxed on the basis of the lease rent under section 3F of the Act. On revision petitions, it was held, dismissing the petitions, that if any article was immovable property, no tax could be levied in terms of section 3F of the Act. However, a perusal of the documents on record clearly showed that the petitioner had executed two separate agreements. The memorandum of understating to lease out the hotel mentioned various movable assets including the air-conditioning and cold storage plants. It was further provided that with regard to movable assets a detailed agreement would be executed separately.

Principles of natural justice

Much judicial guidance is available regarding the scope of the principles of natural justice. A few such principles are as under:

i) *Suresh Chandra Nanhorya* v. *Rajendra Rajak*[66] - "Natural justice is the essence of fair adjudication, deeply rooted in tradition and conscience, to be ranked as fundamental. The purpose of following the principles of natural justice is the prevention of miscarriage of justice."

ii) *C.B. Gautam* v. *UOI*[67] - "[T]he courts have generally read into the provisions of the relevant sections a requirement of giving a reasonable opportunity of being heard before an order is made which would have adverse civil consequences for the parties affected. This would be particularly so in a case where the validity of the section would be open to a serious challenge for want of such an opportunity."

iii) *J.T. (India) Exports* v. *UOI*[68] - "The principles of natural justice are not codified canons. But they are principles ingrained into the conscience of man. Natural justice is the administration of justice in a common sense liberal way. Justice is based substantially on natural ideals and human values. The administration of justice is to be freed from the narrow and restricted considerations which are usually

66 (2006) 7 SCC 800 at 802.
67 (1993) 199 ITR 530.
68 (2003) 132 STC 22 (Del., FB).

associated with a formulated law involving linguistic technicalities and grammatical niceties. It is the substance of justice which has to determine its form."

"The concept of natural justice has undergone a great deal of change in recent years. Rules of natural justice are not Rules embodied always expressly in a statute or in Rules framed thereunder. They may be implied from the nature of the duty to be performed under a statute. What particular rule of natural justice should be implied and what its context should be in a given case must depend to a great extent on the facts and circumstances of that case, the framework of the statute under which the enquiry is held. The old distinction between a judicial act and an administrative act has withered away. Even an administrative order which involves civil consequences must be consistent with the rules of natural justice. The expression "civil consequences" encompasses infraction not merely of property or personal rights but of civil liberties, material deprivations, and non-pecuniary damages. In its wide umbrella comes everything that affects a citizen in his civil life."

iv) *Kumaon Mandal Vikas Nigam Ltd*. v. *Girja Shankar Pant*[69] - "While it is true that over the years there has been a steady refinement as regards this particular doctrine, but no attempt has been made and if it may be said so, cannot be made to define the destine in a specific manner or method. Straight jacket formula cannot be made applicable but compliance of the doctrine is solely dependant on the facts and circumstances of each case."

v) *Haryana Financial Coporation* v. *Kailash Chandra Ahuja*[70] - "From the ratio laid down in B. Karunakar case[71] it is explicitly clear that the doctrine of natural justice requires supply of a copy of inquiry officer's report to the delinquent if the inquiry officer is other than the disciplinary authority. It is also clear that non-supply of the report of inquiry officer is in breach of natural justice. But it is equally clear that failure to supply report of the inquiry officer to the delinquent employee would not *ipso facto* result in proceedings being declared null and void and order of punishment *non est* and ineffective. It is for the delinquent employee to plead and prove that non-supply of such report has caused prejudice and resulted in miscarriage of justice. If he is unable to satisfy the court on that point, the order of punishment cannot automatically be set aside."

vi) *Sahara India (Firm)* v. *CIT*[72] - "Rules of natural justice are not embodied rules. The expression "natural justice" is also not capable

69 AIR 2001 SC 24 at 38.
70 (2008) 9 SCC 31.
71 (1993) 4 SCC 727.
72 (2008) 14 SCC 151 at 161.

of a precise definition. The underlying principle of natural justice evolved under the common law, is to check arbitrary exercise of power by the State or its functionaries. Therefore, the principle implies a duty to act fairly i.e. fair play in action. The aim of rules of natural justice is to secure justice or to put in negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made, they do not supplant the law but supplement it."

vii) *Canara Bank* v. *Debasis Das*[73] - "Administrative law - Natural Justice - Audi alteram partem – Hearing – pre-decisional and post-decisional – pre-decisional hearing not a substitute for post decisional hearing – but in absence of prejudice to the party, pre-decisional deficiency can be compensated by post-decisional hearing. So where in absence of pre-decisional hearing opportunity of post-decisional hearing was granted by Appellate Authority by giving personal hearing to the employee, though there was no such requirement ….and no prejudice has been shown, held, there was no violation of principles of natural justice."

viii) *Mohd. Yunus Khan* v. *State of Uttar Pradesh*[74] - "Natural Justice - Defect at initial stage if renders proceedings null and void, Further, reiterated the defect cannot be cured at appellate stage even if fairness of appellate authority is beyond dispute"

ix) *M/s. Krishna Wire & Metal Stores* v. *The Commissioner of Trade Tax*[75] - Where the counsel for the assessee did not make a request for providing an opportunity to cross-examine the transporter on whose statement, the assessee was held liable, there was no violation of the principles of natural justice.

x) *Siemens Engineering and Manufacturing Co. of India Ltd.* v. *UOI*[76] - That reasons have to be given in support of an order is a basic principle of natural justice, which must inform not only a judicial process but also a quasi-judicial process.

In sum, in the absence of any statutory administrative procedure code laying down minimum procedural requirements, there exist a bewildering variety of administrative procedures. Sometimes, procedure is laid down in the law under which authority is created. At times, the authority is left free to develop its own procedure or follow the procedure of the civil courts. In the absence of any of these, the administrative authority is required to follow the principles of natural justice which require a minimum standard of fairness expected to vary widely according to the context and cannot be stretched too far in a

73 (2003) 4 SCC 557 at 558.
74 (2010) 10 SCC 539 at 540.
75 (2010) UP Tax Cases 1675 (All.).
76 AIR 1976 SC 1785.

ritualistic manner.[77] This makes the administrative procedure less overtly judicial in nature.

During the year under survey, in the following cases, the orders/decisions were held to be in breach of the principles of natural justice:

i) *Assistant Commissioner, CT, Kota* v. *Shukla & Bros*.[78] – Held that recording of reasons is an essential feature of dispensation of justice. A litigant, who approaches the court with any grievance in accordance with law, is entitled to know the reasons for grant or rejection of its prayer. Reasons are the soul of orders. Non-recording of reasons could lead to dual infirmities: *firstly*, it may cause prejudice to the affected party and *secondly*, more particularly, it may hamper the proper administration of justice. These principles are not only applicable to administrative or executive action, but they apply with equal force, and, in fact with a greater degree of precision, to judicial pronouncement. In this case, the order of the High Court was set aside and case remanded for a fresh hearing observing that the High Court ought to have recorded some reasons for rejecting the revision petition.

ii) *Commissioner Service Tax, Bangalore* v. *MAA Communications Bozell Ltd.*[79] - It was, *inter alia*, observed that the appellate authority must give reasons where it is reversing the order of the lower authority. In *Commissioner of Income Tax* v. *Walchand and Co. P. Ltd*.[80] , the income tax appellate authority did not agree with the view of the income-tax officer, but without assigning any reasons, the tribunal allowed the claims of the assessee partially. It was held that the tribunal must record its reasons in support of its views. In fact, even when the appellate authority affirmed a decision of a lower body, it should give its own reasons and at least it should be indicated clearly by the appellate authority that it is accepting the reasons given by the lower authority.

iii) *Suguna Poultry Farm Ltd.* v. *CTO, South Coimbatore*[81] - In this case, the petitioner's application for a declaration form prescribed under the Act was rejected by the respondents on the ground of his earlier alleged misuse of the form. The High Court held that the denial of declaration form to the petitioner affected the civil rights of the petitioner attracting civil consequences. It was further held that the

77 *Bar Council of India* v. *High Court of Kerala* (2004) 6 SCC 311; *Escorts Farms Ltd.* v. *Commissioner of Kumon Division* (2004) 4 SCC 281.
78 (2010) 30 VST 114 (SC).
79 (2010) 36 VST 257-261 (para 8) (Kant).
80 (1967) 65 ITR 381 (SC).
81 (2010) 35 VST 341 (Mad.).

first respondent while rejecting the application was bound to issue notice and hear the petitioner particularly when past conduct was relied upon as a ground for rejection.

iv) *Tirupati Chemicals* v. *Deputy Commissioner of CT, Bangalore*[82] - This was a case of reassessment. The dealer had requested for a personal hearing subsequent to notice but the assessing authority concluded reassessment proceedings on basis of dealer's communication without giving reason for not considering the request for personal hearing. This was held to be in violation of the principles of natural justice.

v) *Radhika Electrocast (P) Ltd.* v. *Assistant Commissioner of CT*[83] - In this case, provisional assessment was framed against the dealer. There was no provision in the Act requiring the dealer to be heard before assessment. All the same, it was held that natural justice demands that hearing before passing an adverse order should be provided. As the provisional assessment made was without considering the request of the dealer for personal hearing, it was liable to be set aside.

vi) *Champion Plastics (India) Pvt. Ltd.* v. *CTO, Hosur*[84] - In this case, the notice of revision was sent to the address of the dealer by ordinary post and not by registered post. It was accordingly held that it was not a valid service and the order of revision was set aside. It may be added that in the same vein in the case of *R.L. Narang* v. *CIT, New Delhi*,[85] wherein it was held that service of notice not sent by registered post but under certificate of posting did not amount to proper service.

vii) *Nand Kishore Garg* v. *STO, Jorabagan Charge*[86] - In this case, the impugned assessment order was passed without communicating to the assessee the contents of report of bureau of investigation and material relied upon for making assessment. It was held that this was violation of principles of natural justice. Accordingly, the impugned order was set aside.

It is a settled principle of natural justice that no evidence can be used against any person without giving him opportunity to rebut it. Denial of opportunity to rebut the evidence in the course of assessment proceedings makes the assessment proceedings void *ab initio*.

viii) *Grain Processing Industries (India) P. Ltd.* v. *CTO*[87] - In this case,

82 (2010) 27 VST 380 (Kar.).
83 (2010) 28 VST 155 (WBTT).
84 (2010) 28 VST 463 (Mad.).
85 (1982) 136 ITR 108 (Del.).
86 (2010) 30 VST 101 (WBTT).
87 (2010) 31 VST 573 (WBTT).

the counsel for the dealer was unable to appear on last date fixed for hearing on account of appearance in another case in another part of the city. There was no noting on record that the case was closed for orders. Order passed on the next day. It was set aside and the dealer was granted one more opportunity to be heard.

ix) *ADPS Trust* v. *CTO*[88] - In this case also, the application of the dealer for issue of a declaration in Form-H under section 5(3) of the Central Sales Tax Act, 1956 was rejected giving reasons. However, no notice was issued prior to relying upon reasons for rejection. Accordingly, the impugned order, being in violation of principles of natural justice, was set aside.

x) *Suzion Infrastructure Service Ltd.* v. *CTO, Kochi*[89] - The petitioner filed a writ petition challenging the validity of the order of reassessment passed against the petitioner on the ground that the impugned order was passed without providing an opportunity of hearing. On the other hand, the respondent submitted that it was stated in the notice issued prior to the order that the objection was to be filed within fifteen days of the receipt of notice and that the petitioner was at liberty to have an opportunity of being heard on any day. But, the petitioner did not appear before the respondent for personal hearing. It was held, allowing the petition, that the party concerned had to be given an opportunity of hearing before passing the impugned order and this requirement was mandatory. Therefore the order passed on the petitioner was set aside.

IV JUDGMENTS UNDER THE CENTRAL SALES TAX ACT, 1956

Inter-State sales

It will be recalled that in *Bengal Immunity Co. Ltd*. v. *The State of Bihar*,[90] Venkatarama Ayyar J observed:

> A sale could be said to be in the course of inter-State trade only if two conditions concur: (1) A sale of goods, and (2) a transport of those goods from one State to another under the contract of sale. Unless both these conditions are satisfied, there can be no sale in the course of inter-State trade.

This view seems to have been adopted in section 3(a) of the Central Sales Tax Act, 1956. In *Tata Iron and Steel Co. Ltd.* v. *S.R. Sarkar*,[91] this provision was interpreted thus:

88 (2010) 35 VST 345 (Mad.).
89 (2010) 35 VST 451 (Ker.).
90 (1955) 6 STC 446-583 (SC).
91 AIR 1961 SC 65.

A sale being by the definition transfer of property, becomes taxable under section 3(a) if the movement of goods from one State to another is under a covenant or incident of the contract of sale, and the property in the goods passes to the purchaser otherwise than by transfer of documents of title when the goods are in movement from one State to another.

The scope of an inter-State sale is judicially well ploughed. Some of the important judgments in this behalf may first be noted:

i) *Kelvinator of India Ltd* v. *State of Haryana*[92] - A sale of the goods can be said to have taken place in the course of inter-State trade under clause (a) of section 3 of the Central Sales Tax Act, 1956, if it can be shown that the sale had occasioned the movement of goods from one state to another. A sale in the course of inter-State trade has three essentials: (i) there must be a sale, (ii) the goods must actually be moved from one state to another and (iii) the sale and movement of the goods must be part of the same transaction.

The movement should be incident of, and be necessitated by, the contract of sale and thus be interlinked with the sale of goods. A movement of goods which takes place independently of a contract of sale would not fall within the ambit of clauss (a) of section 3. If there is no contract of sale preceding the movement of goods, the movement cannot be ascribed to a contract of sale nor can it be said that the sale has occasioned the movement of goods from one state to another.

ii) *Union of India* v. *M/s. K.G. Kholsa & Co. Ltd*.[93] Held that "if a contract of sale contains a stipulation for the movement of the goods from one State to another, the sale would certainly be an inter-State sale. But for the purposes of section 3(a) of the Act, it is not necessary that the contract of sale must itself provide for and cause the movement of the goods or that the movement of the goods be occasioned specifically in accordance with the terms of the contract of sale. A sale can be an inter-State sale even if the contract of sale does not itself provide for the movement of the goods from one State to another but such movement is the result of a covenant in the contract of sale or is an incident of that contract.

iii) *Oil India Limited* v. *The Superintendent of Taxes*.[94] No matter in which state the property in the goods passes, a sale which occasions "movement of goods from one State to another is a sale in the course of inter-State trade." The inter-State movement must be the

92 (1973) 2 SCC 551 at 559.
93 (1979) 2 SCC 242 at 247-48.
94 (1975) 1 SCC 733 at 737.

result of a covenant, express or implied, in the contract of sale or an incident of the contract. It is not necessary that the sale must precede the inter-State movement in order that the sale may be deemed to have occasioned such movement. It is also not necessary for a sale to be deemed to have taken place in the course of inter-State trade or commerce, that the covenant regarding inter-State movement must be specified in the contract itself. It would be enough if the movement was in pursuance of and incidental to the contract of sale."

iv) *A & G Projects and Technologies Ltd*. v. *State of Karnataka*.[95] To ascertain whether a sale is an inter-State sale or not, two tests are applied, one of which is that a sale or purchase takes place in the course of inter-State trade if it occasions movement of the goods from one State to another, and the other is that a sale or purchaser takes place by transfer of documents of title during the movement of goods from one State to another.

The question whether a particular sale is an inter-State sale or an intra-State sale, though essentially one fact, is not a pure question of fact inasmuch as the facts of a given case have to be examined in the light of section 3 of the Central Sales Tax Act, 1956, and, therefore, it is a mixed question of fact and law.

The dividing line between sales or purchases under section 3(a) and those falling under section 3(b) is that in the former case the movement is under the contract, whereas in the latter case the contract comes into existence only after the commencement and before the termination of the inter-State movement of the goods. Therefore, it follows that an inter-State sale can either be governed [90] by section 3 (a), if it occasions movement of goods from one State to another, or under section 3(b) if it is effected by transfer of documents of title after such movement has started and before the goods are actually delivered. In other words, a sale which takes place under section 3(a) is excluded from the purview of section 3(b) and vice versa."

During the year under survey, the following cases came up for adjudication whether or not in the facts and circumstances of the case these were inter-State sales:

(i) In *M.M. Traders* v. *State of M.P.*,[96] the question was whether the sale was an inter-State sale or an intra-State sale. The petitioners purchased *tendu* leaves (*tendu patta*) and bomboos pursuant to tenders, and exported them outside the state against transit passes. In writ petitions against levy of sales tax and Value Added Tax, they

95 (2009) 2 SCC 326 at 333.
96 (2010) 36 VST 356 (MP).

contended that the movement of goods fulfilled the precondition essential for a sale in the course of inter-State of trade and commerce under section 3(a) of the Central Sales Tax Act, 1956, hence the transaction was not liable to tax under the state Act. Held on the facts, that the tender notice did not contemplate inter-State sale. The schedule mentioned in the tender notice indicated that it was for the purpose of disposal of cut and collected industrial bamboos. The situation of the registered office was also required to be mentioned along with postal address. Mere mention of an address outside Madhya Pradesh would not make it an inter-State sale. It was accordingly held that the movement of *tendu patta* had not taken place pursuant to the transaction in question or one incidental thereto or formed inseparable part. Merely by issuance of transit passes to the purchaser, it would not be a case of inter-State sale.

(ii) The Kerala High Court in *State of Kerala* v. *Thanikudam Bhagavathi Mills P Ltd.*[97] had to adjudicate a similar question. For the years 1998-99 and 1999-2000, the respondent dealer enjoyed sales tax exemption on local sales by virtue of certificate issued by the industries department. Pending the dealer's attempt to get exemption from government on inter-State sales, it filed monthly returns without payment of tax. However, the exemption not having being granted, the dealer claimed in the assessment proceedings that the sales in question were local sales since the purchaser's agent came from outside Kerala, took delivery and transported the goods outside Kerala. The assessing officer rejected the claim and brought the inter-State sales to taxThe revenue approached the High Court which held, allowing the petitions, that the dealer had not produced any details or evidence of agency transactions or how the agent transported the goods out of Sate of Kerala. The transaction was accordingly held to be intra-State transaction.

(iii) In *Riangdo Veneers Pvt Ltd* v. *State of Mizoram*,[98] the facts were that the tender submitted by the petitioner for supply of swaged steel tubular poles pursuant to a notice issued by the respondents was accepted and a supply order was placed at the petitioner's head office at Gauhati stipulating that the tax under the Mizoram Value Added Tax Act, 2005 had to be paid by the petitioner. The petitioner informed the respondents that the petitioner would be liable to pay central sales tax on the transaction which would be an inter-State sale since the goods would be manufactured and supplied from its factory in the State of Meghalaya and that the Mizoram Act would not be applicable. The petition was allowed holding that the petitioner did not have any office in the State of Mizoram nor was

97 (2010) 36 VST 346 (Ker.).
98 (2010) 27 VST 327 (Gau.).

there any evidence that the goods were actually purchased by the petitioner from any dealer in the State of Mizoram and then supplied to the respondent.

(iv) In *Jindal Irrigation Limited* v. *Commissioner of Trade Tax, UP*,[99] the petitioner dealer was engaged in the manufacture and sale of sprinkler irrigation systems and installations and erection thereof on works contract. Orders for erecting and installing sprinker irrigation systems were given to the dealer by parties outside the State of U.P. under which, digging of earth, filing of sand, laying of pipes, connecting of pipes with clamps, fixation of sprinklers in the pipes, making the land plain in original shape and connecting with source of water and commissioning the system were required to be carried on by the dealer. The assessing authority bifurcated the works contract as follows: 40 per cent towards the value of the goods and transportation; 40 per cent towards labour and installation charges and 20 per cent towards the profit and levied tax on the value of goods used in the execution of the works contract, and this was confirmed by the first appellate authority and by the tribunal. On a revision petition, it was held, allowing the petition, that the authorities below including the tribunal were not justified to separate the works contract into two contracts, one for supply of goods and the other towards installation expenses. The contract was one and indivisible. The demand for Central Sales Tax on supply of sprinklers used in execution of works contract was contrary to law.

(v) An important point was decided by the Kerala High Court in *State of Kerala* v. *Crompton Greaves Ltd.*[100] in which it was held that mere production of form C was not sufficient proof of physical transport of goods from one state to another. The C form only showed that an inter-State purchase for local sale was accounted by a dealer in one state. If dealers in two states collude, the dealer can account local sales as inter-State sales by getting the dealer in the other state to account bogus inter-State purchase and sales.

(vi) The Allahabad High Court in *Commissioner Trade Tax, U.P.* v. *Dalu Ram Ganpat Ram*,[101] had to decide whether the disputed sale was an inter-State sale under section 3(a) or under section 3(b) of the Central Sales Tax Act, 1956. The respondent dealer carried on business in foodgrains. For the assessment year 1973-74, it disclosed a net taxable turnover of inter-State sales contending that it sold the goods to the local party and effected delivery but on the instructions of the purchaser, it sent the goods outside the State of

99 (2010) 28 VST 126 (All.).
100 (2010) 30 VST 426 (Ker.).
101 (2010) 33 VST 433 (All.).

U.P. by rail, getting the railway receipts prepared in its own name and then transferring them to the purchaser by making an endorsement thereon. The assessing authority found that the railway receipts having been endorsed during the course of movement of goods from one state to another, the transaction was covered by section 3(b) of the Central Sales Tax Act, 1956 and brought the turnover in question to tax. This was confirmed by the first appellate authority but the tribunal allowed the appeal filed by the dealer and held that the transaction in question did not amount to inter-State sale. On a revision petition filed by the revenue before the High Court, it was held, allowing the petition, that a sale effected by transfer of documents of title after the commencement of the movement of the goods and before its conclusion as defined by the two termini set out in Explanation (1) to section 3 will be regarded as an inter-State sale under section 3(b).

(vii) Again, in *Commissioner of Trade Tax, U.P.* v. *Kapri Bath Aid Pvt Ltd.*,[102] the question for adjudication before the High Court was whether the disputed transactions were inter-State sales or stock transfers. It was held that the burden of proof to claim stock transfer was on the dealer. In this case, the goods moved from the factory to the head office and, thereafter, to purchasers in another state. The name of the ultimate purchaser was mentioned in forwarding note in the factory. It was accordingly held that this was an indication that goods moved pursuant to prior contract. Accordingly, the disputed transactions were held as inter-State sales.

(viii) In the same vein is a judgment of the Madras High Court in *Guru Dhall Mills and Indus*. v. *CTO, Chennai*.[103] In this case, the High Court held that the burden of proof for claiming stock transfer is on the dealer. The appellate authority on the basis of documents produced by the dealer came to the conclusion that the disputed transaction was stock transfer. However, the joint commissioner, in revision, without reference to the documents, reversed the finding of the appellate authority on the basis of the statement set to have been made by the dealer. It was held by the High Court that the finding of the joint commissioner was not sustainable. It was further elucidated that in order to ascertain whether a particular transaction was an inter-State sale or stock transfer, two relevant considerations may arise. *Firstly*, the movement of goods should have been occasioned from one state to another. In order to prove such movement of goods, the burden lies on the dealer. *Secondly*,

102 (2010) 33 VST 748 (All.).
103 (2010) 35 VST 394 (Mad.).

whether a contact of sale was entered by the dealer, the burden of proving this lies on the revenue. The petition was accordingly allowed holding that the joint commissioner, without reference to the materials produced by the dealer in order to discharge the burden, and the consequent finding of the appellate commissioner, had relied upon statements said to have been given by the dealer, which could not be sustained, as against the indisputable factual finding given by the appellate assistant commissioner.

(ix) *Lakshmi Trading Co*. v. *Joint Commissioner Taxes, Chennai*,[104] and (x) *State of Tamil Nadu* v. *Kumaran Mills Limited*.[105] In both these cases, the Madras High Court held that the dealers had produced sufficient material in support of their contention that the disputed transactions were consignment transfers by the principal to his agent. In view of the settled principle of law that in a consignment transaction there is no transfer of property in the goods and the agent sells the goods on behalf of the principal, the disputed transactions were held to be not inter-State sales and not liable to central sales tax.

Deemed Sale in the course of Export

Section 5 (3) of the Central Sales ax Act, 1956 reads as under:

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

The scope of this provision was crystallized by the Supreme Court in *Consolidated Coffee Limited* v. *Coffee Board, Bangalore*,[106] in the following words:

> Section 5(3) has been enacted to extend the exemption from tax liability under the Act not to any kind of penultimate sale but only to such penultimate sale as satisfies the two conditions specified therein, namely, (a) that such penultimate sale must take place (i.e. become complete) after the agreement or order under which the goods are to be exported and (b) it must b for the purpose of complying with such agreement or order and it is only then that such penultimate sale is deemed to be a sale in the course of export.

104 (2010) 28 STC 259 (Mad.).
105 (2010) 28 STC 262 (Mad.).
106 AIR 1980 SC 1468.

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

The scope of the section was further explained by the Karnataka High Court in *A.R. Associates* v. *Commissioner of C.T*[107] in the following words:

> [T]hat from a reading of the requirement of section 5(3) of the Central Sales Tax Act, read with rule 12(10)(a) of the Central Sales Tax (Registration and Turnover) Rules, 1957, it is clear that it is insufficient for the assessee to merely produce the form 'H' and the bill of lading because the most important evidence that is required to be produced as per the requirements of law is the export agreement. The purpose behind the insistence of this provision is in order to ensure that there was not only in existence a valid agreement for export and an order but also to be able to identity the particular export goods and to establish a link or nexus between those goods and the export agreement. Non-fulfilment of those requirements will be fatal to the case of the appellant….

In *Rajarishi Exports Ltd*. v. *STO, Cuttack*,[108] the facts of the case were that the petitioner entered into a contract with a foreign buyer of Tokyo for sale of 50,000 M.T. of high grade Indian chrome ore pursuant to which, the petitioner also entered into a contract with TISCO for purchase of high grade chrome ore and on obtaining the material from TISCO, the petitioner supplied it to its foreign buyer. The matter having ultimately reached the High Court, it was held that there were involved two distinct transactions, the first being purchase of chrome ore by the petitioner from TISCO and the second being the sale of chrome ore by the petitioner to its foreign buyer of Tokyo. In the contract with TISCO, there was no reference to any preexisting export contract with the foreign buyer and "delivery of the materials" was to be effected at the mines site of TISCO in the State of Orissa. The petition was accordingly dismissed.

Sale in the course of import

In the classic judgment of the Supreme Court in *K.G. Khosla and Co. P. Ltd*. v. *Deputy Commissioner of Commercial Taxes, Madras*,[109] the following two principles were settled:

107 (2001) 122 STC 134 (Kant.).
108 (2010) 28 VST 87 (Ori.).
109 (1966) 17 STC 473 (SC).

(i) that the expression "occasions the movement of goods" occurring in section 3(a) and section 5(2) had the same meaning :
(ii) that before a sale could be said to have occasioned the import it was not necessary that the sale should have preceded the import.

In *State of Tamil Nadu* v. *Rajan Universal Export (Mfrs) P Ltd,*[110] pursuant to inspection by the inspecting wing of the department, exemption originally granted by the assessing authority in respect of certain turnover stated to be high seas sales under section 5(2) of the Central Sales Tax Act, 1956 was cancelled and the turnover was brought to tax on the ground that title to the goods were transferred after they reached the port and were warehoused. The order of revision was upheld by the appellate assistant commissioner. However, the tribunal held that the exemption under section 5(2) of the Act was available to the assessee on the ground that the assessee had endorsed the bill of lading by transfer of title to the goods to the purchaser before clearing the goods. Feeling aggrieved, the department filed a writ petition contending that although the documents of title were transferred, it was the assessee alone which had handled the goods subsequently, the property remaining in the name of the assessee and that, therefore, the sale was not in the course of import. The High Court dismissed the writ petition, *inter alia*, observing that in the case of the assessee, the goods were warehoused and were not cleared on payment of the customs duty and the transfer of documents was well prior to the goods being cleared for home consumption on payment of customs duty.

In *Hotel Ashoka* v. *Assistant Commissioner of Commercial Taxes, Bangalore*,[111] which was an appeal against the judgment of a single judge,[112] the assessee, which effected sales of goods from the duty-free shop at Bangaluru international airport, filed an appeal challenging the order of the single judge dismissing the writ petition as not maintainable, contending that the assessing officer had no jurisdiction to levy sales tax as the transactions were admittedly beyond the customs frontiers of India, and that, therefore, the writ petition should have been disposed of on the merits by the single judge instead of directing the appellant to avail of the alternative remedy of appeal. It was held, dismissing the appeal, that a careful examination of the facts of the case and the guidelines laid down by the Supreme Court in *K. Gopinathan Nair* v. *State of Kerala*,[113] showed that the assessing authority had jurisdiction to pass assessment order Therefore, the single judge was perfectly justified in holding that the order passed by the assessing officer was not required to be interfered with.

110 (2010) 28 VST 279 (Mad.).
111 (2010) 33 VST 39 (Kant.).
112 (2010) 33 VST 33 (Kant.).
113 AIR 1997 SC 1927.

V JUDGMENTS HAVING BEARING ON THE CONSTITUTION OF INDIA

Article 141

It is common knowledge that under article 141 of the Constitution of India, the law declared by the Supreme Court shall be binding on all courts within the territory of India. Of course, there are certain exceptions as under:

i. *State of UP* v. *Synthetics and Chemicals Limited*.[114] It was observed, *inter alia*, that "A decision which is not express and is not founded on reasons nor proceeds on consideration of issues cannot be deemed to be a law declared to have a binding effect as is contemplated by article 141."

ii. *Rajbir Singh Dalal (Dr.)* v. *Chaudhari Devi Lal University , Sirsa*.[115] A decision which is not based on reasoning but is based on concession, is not a precedent.

iii. Supreme Court judgment in *S. Shanmugavel Nadar* v. *State of Tamil Nadu*.[116] It was held, *inter alia*, that for a declaration of law, there should be a speech *i.e*. a speaking order. A decision which is not expressed and is not founded on reasons nor on consideration of the issues cannot be deemed to be a law declared, to have binding effect as is contemplated by article 141.

Barring the above exceptions, the law declared by the Supreme Court is binding on all the courts in the country. The Supreme Court in *A & G Projects and Technologies Ltd.* v. *State of Karnataka*, analyzing the provision section 6(2) of the Central Sales Tax Act, 1956 according to which the subsequent inter-State sale is exempt from central sales tax, observed as under:

> Analyzing section 6(2) , it is clear that sub-section (2) has been introduced in section 6 in order to avoid the cascading effect of multiple taxation. A subsequent sale falling under sub-section (2), which satisfies the conditions mentioned in the proviso thereto is exempt from tax as the first sale has been subjected to tax under sub-section (1) of section 6 of the CST Act, 1956. Thus, in order to attract section 6(2), it is essential that the concerned sale must be a subsequent inter-State sale effected by transfer of documents of title to the goods during the movement of the goods from one State to another and it must be preceded by a prior inter-State sale. It is only then that section 6(2) may be attracted, in order to make such subsequent sale exempt from the levy of sale tax…..

114 (1991) 4 SCC 139 at 144.
115 (2008) 9 SCC 284.
116 (2002) 8 SCC 361.

The declaration of law by the Supreme Court in this judgment is clear that for attracting section 6(2) of the Central Sales Tax Act, the prior inter-State sale should have suffered tax. In fact, the Andhra Pradesh High Court in *Jadhavjee Laljee* v. *State of Andhra Pradesh,*[117] had taken a similar view which was approved by the Supreme Court in this judgment. However, the Delhi High Court in *Mitsubishi Corporation India Pvt Ltd* v. *Value Added Tax Officer*,[118] though noticed the above said Supreme Court judgment, distinguished the same and, even when the first inter-State sale was exempt in the State of West Bengal from which the goods moved, granted exemption on the subsequent inter-State sale, as according to the Delhi High Court, the conditions for exemption as laid down in the statute were fulfilled. It is hoped that the important aspect about the scope of section 6(2) of the Central Sales Tax Act, will have to be clarified by the Supreme Court in future.

Article 226

The scope of this article has been explained by the Supreme Court in a catena of judgments. In a recent judgment in *Ritesh Tewari* v. *State of UP*.,[119] the scope of this article has been reiterated in the following words:

> The power under Article 226 of the Constitution is discretionary and supervisory in nature. It is not issued merely because it is lawful to do so. The extraordinary power in the writ jurisdiction does not exist to set right mere errors of law which do not occasion any substantial injustice. A writ can be issued only in case of a grave miscarriage of justice or where there has been a flagrant violation of law. The writ court has not only to protect a person from being subjected to a violation of law but also to advance justice and not to thwart it. The Constitution does not place any fetter on the power of the extraordinary jurisdiction but leaves it to the discretion of the court. However, being that the power is discretionary, the court has to balance competing interests, keeping in mind that the interests of justice and public interest coalesce generally. A court of equity, when exercising its equitable jurisdiction must act so as to prevent perpetration of a legal fraud and promote good faith and equity. An order in equity is one which is equitable to all the parties concerned. The petition can be entertained only after being fully satisfied about the factual statements and not in a casual and cavalier manner.

Likewise, the scope of 'judicial review' has been explained on several occasions. In *H.B. Gandhi, ETO, Karnal* v. *Gopi Nath and Sons*,[120] the scope of judicial review had been crystallized in the following words:

117 (1989) 74 STC 201 (AP).
118 (2010) 34 VST 417 (Del.).
119 (2010) 10 SCC 677 at 685.
120 (1992) Supp. (2) SCC 312 at 317.

> Judicial review, it is trite, is not directed against the decision but is confined to the decision making process. Judicial review cannot extend to the examination of the correctness or reasonableness of a decision as a matter of fact. The purpose of judicial review is to ensure that the individual receives fair treatment and not to ensure that the authority after according fair treatment reaches, on a matter which it is authorized by law to decide, a conclusion which is correct in law. Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. It will be erroneous to think that the court sits in judgment not only on the correctness of the decision making process but also on the correctness of the decision itself.

In a recent judgment in *Counsel of Scientific and Industrial Research* v. *Ramesh Chandra Agrawal*,[121] it has been clarified that so far as policy matters are concerned, they are subject to judicial review and can be interfered with on the ground of irrationality. If there was nothing irrational in the policy assailed before the court, the principle of judicial review will not be invoked.

During the year under survey the following judgments regarding the scope of writ jurisdiction, deserve mention:

(i) In *BECIL* v. *Arraycom India Ltd*.,[122] it was held by the Supreme Court that in administrative matters, the scope of judicial review is limited and the judiciary must exercise judicial restraint in such matters. On Prasar Bharti issuing a notice inviting tenders for supply of two transmitters of 1000 KW each, the bidding of Arraycom and BECIL were technically qualified. The quotation given by Arraycom was for a sum of Rs. 51.457 crores. Prasar Bharti found that the bid of BECIL was the lowest. Arraycom filed a writ petition in the High Court which was allowed, holding that the bid was inclusive and no amount of central sales tax could have been added to that amount. On appeal to the Supreme Court, it was held, reversing the decision of the High Court, that it was the fault of Arraycom that it gave a bid that was ambiguous; the bid had two interpretations (i) that it was an inclusive bid; and (ii) that sales tax could be added to that bid. Prasar Bharti had taken the second interpretation, which was reasonable and possible; and the High Court ought not to have intervened.

(ii) In *Satguru Trading Co*. v. *State of Punjab*,[123] on a writ petition challenging the assessment order and the consequential demand on the ground that the assessment had been framed beyond the period

121 (2009) 3 SCC 35-36.
122 (2010) 29 VST 555 (SC).
123 (2010) 29 VST 58 (P & H).

of three years as envisaged by section 11(3) of the Punjab General Sales Tax Act, 1948, it was held that the question whether the assessment was framed beyond the period of limitation or not could not be gone into by the court because the question of limitation is a mixed question of fact and law. The petitioner had a remedy of appeal under section 20(1) of the Act and it could even approach the tribunal by filing a second appeal. Therefore, the petitioner was relegated to the remedy of filing the appeal.

(iii) *Total Environment Building Systems Pvt Ltd.* v. *Deputy Commissioner of CT, Bangalore.*[124] It would be recalled that the Supreme Court in *K. Raheja Development Corporation* v. *State of Karnataka*,[125] had explained the scope of the term 'works contract' which was subsequently doubted by a another bench of the Supreme Court and the matter was referred for consideration of a larger bench of the Supreme Court in *Larsen & Toubro Limited* v. *State of Karnatak.*[126] In the present case, the Karnataka High Court has held:

> [T]hat the law declared by the Supreme Court holding the field was the law that had been indicated and opined in 'K.Raheja'. The subsequent Bench of the Supreme Court might have expressed doubt about the correctness of this position of law. But, that in itself did not change the constitutional and legal positions and until and unless the Supreme Court itself opined otherwise, the law as had been declared in 'K.Raheja' was the law of land and the law declared by the Supreme Court under article 141 of the Constitution of India.

(iv) *Lloys Insulations (India) Limited* v. *Joint Commissioner (CT) Chennai.*[127] In this case, the jurisdiction of the High Court under article 226 of the Constitution of India to issue a writ of mandamus was explained. It was held that the issue of mandamus arises only if and when the statutory authority has the obligation to do a particular thing under the Act and that the authority fails to perform its statutory function. It was further held that there was no legal authority on the respondents to issue the clarification sought by the petitioner and it was *non est* in the eye of law. The clarification whether in favour of the department or the dealer could have no binding effect on the assessing authority in the assessment proceedings.

(v) *Mitsubhishi Corporation* v. *State of Karnataka.*[128] On a writ petition for a direction to the deputy commissioner that no action

124 (2010) 29 VST 572 (KTK).
125 (2010) 29 VST 572 (KTK).
126 (2008) 17 VST 460 (SC).
127 (2010) 35 VST 103 (Mad.).
128 (2010) 35 VST 214 (KTK).

on the proposition notice issued by him be taken until disposal of the appeal by the Tribunal for the earlier year, it was held, dismissing the petition, that no firm cause of action had arisen to the petitioner. Having filed its objection thereto, the petitioner had to await the outcome of the proposition notice. Just because a similar matter was pending before the tribunal, the deputy commissioner could not be directed to defer consideration of the proposition notice which was neither barred by delay nor without jurisdiction.

(vi) *MRF Limited* v.*Commissioner of CT, Bangalore.*[129] The prayer of the petitioner in this writ petition was whether the product of the petitioner falls under one entry or the other. It was held, dismissing the petition, that the question whether the product was covered under one entry or the other of the Karnataka VAT Act or even under the Central Excise Tariff Act, 2003 was a mixed question of fact and law. Such questions are best resolved by the authorities.

(vii) *Acmevac Sales Pvt Ltd* v. *State of Maharashtra.*[130] The petitioners filed a writ petition praying for setting aside the *ex parte* orders of dismissal of appeals by the sales tax tribunal for the financial years 1994-95 under the Bombay Sales Tax Act, 1959 and Central Sales Tax Act, 1956 and for 1995-96 under the Central Sales Tax Act, 1956, with a direction to the tribunal to hear the appeals on the merits and submitting that the petitioners were willing to deposit the sales tax liability to the extent of Rs. 10 lakh. The petitioner tendered in the court an undertaking to that effect. The court accepted the undertaking, condoned the delay, set aside the *ex parte* orders in the interest of justice and remanded the appeals to the tribunal for *de novo* consideration.

(viii) *Siemens Limited* v. *State of Bihar.*[131] In this case, it was held that the taxing authorities had collected the amount hurriedly without giving breathing time to the petitioner inasmuch as when an appeal was pending, the petitioner ought to have been given time but the demand amount had been collected by the taxing authorities. The appellate authority was to dispose of the matter positively on the next date of hearing. If the case was adjourned by the appellate authority without a request from the dealer, the amount collected should be refunded immediately to the petitioner. If the appeal was allowed, the amount recovered from the petitioner shall be refunded to the petitioner within one month from the date of disposal of such appeal.

129 (2010) 35 VST 539 (KTK).
130 (20100 30 VST 258 (Bom.).
131 (2010) 31 VST 304 (Pat.).