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INDIRECT TAXES LAW

(VAT AND SALES TAX)

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I INTRODUCTION

DURING THE year 2011, as usual, the decisions of the Supreme Court and various high courts are surveyed under the heads: (a) liability (b) assessment (c) judgments under the Central Sales Tax Act and (d) judgments which have a bearing on the Constitution of India.

II LIABILITY

It will be recalled that before value added tax had come into force in various states, the Union Finance Minister had released a white paper on the Delhi Value Added Tax Bill 2004 (now Delhi Value Added Tax Act, 2004) which gave, *inter-alia*, the following justification for the introduction of VAT:[1]

> In the existing sales tax structure, there are problems of double taxation of commodities and multiplicity of taxes, resulting in a cascading tax burden. For instance, in the existing structure, before a Commodity is produced, inputs are first taxed, and then after the commodity is produced, inputs are first taxed, and then after the commodity is produced with input tax load, output is taxed again. This causes an unfair double taxation with cascading effects. In the VAT, a set-off is given for input tax as well as tax paid on previous purchases. In the prevailing sales tax structure, there is in several States also a multiplicity of taxes, such as turnover tax, surcharge on sales tax, additional surcharge, etc. With introduction of VAT, these other taxes will be abolished. In addition, Central Sales Tax is also going to be phased out. As a result, overall tax burden will be rationalized, and prices in general will also fall.

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1 Empowered Committee of State Finance Ministers, *A White Paper On State-Level Value Added Tax*, Ministry of Finance, Government of India, New Delhi January 17, 2005 *available at:* <http://finmin.nic.in/reports/whitepapervat.pdf> (last accessed on 18th July, 2012).

As is well known, under the Delhi VAT Act, 2004, the normal rate of VAT is 12.5%, whereas tax on the inter-state sales, made to registered dealers under the Central Sales Tax Act, 1956, is only 2%. Such a wide gap between the rates of tax under the VAT Act, on the one hand, and the CST Act, on the other, has prompted some dealers to take advantage of the system of tax under the VAT Act. As legitimate tax planning within the framework of law is permissible,[2] certain dealers noticing this wide difference tend to confine their business only to inter-state sales of the goods purchased locally on which they claim input tax credit. As a result they become entitled to heavy refunds, *i.e.,* the difference between 12.5% and 2%. The assessing authorities examine such claims of heavy refunds with keen eyes and often reject such claims on the grounds, for example, (i) that the selling dealer had not paid tax to the government or has paid nominal tax; (ii) that the selling dealer had made sales worth crores during a short period and paid no tax; (iii) that the record of the transporter did not inspire confidence; (iv) that the registration of the selling dealer had been cancelled; (v) that the dealer had made purchases from its sister concerns; (vi) that the purchasing dealer in the other state had consumed the goods purchased in the course of inter state trade himself and not sold them in the market. In this way the liability is fastened on the dealer by rejecting his claim of input tax credit and denying refund.

As has been observed by the Supreme Court in *CIT, West Bengal-II* v. *Durga Prasad More*:[3]

> …an apparent must be considered real until it is shown that there are reasons to believe that the apparent is not the real…The taxing authorities were not required to put on blinkers while looking at the documents produced before them. They were entitled to look into the surrounding circumstances to find out the reality of the recitals made in those documents.

What is relevant to mention, is not that the authorities should, without examination, allow refunds, but that if a claim of input tax credit is rejected, it should be according to law and not on mere suspicion. Particularly when the rejection is contrary to the law laid down by the Supreme Court.

A few examples where input tax claims have been rejected by the authorities and liability fastened on the dealer claiming refund may be cited here.

The Supreme Court in *State of Tamilnadu* v. *Govindan*[4] held:

> [T]hat to claim benefit of tax on the ground that the sales effected by the assessees were second sales, they need not show that their sellers had in fact paid the tax at the first point and it was enough for them to show that the earlier sales were taxable sales and that the tax was really payable by their sellers.

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2 *McDowell & Co. Ltd.* v. *CTO* (1985) 3 SCC 230 see also *Vodafone International Holdings BV* v. *Union of India*, 2012 (1) SCALE 530.

3 AIR 1971 SC 2439 at 2442; see also *Sumati Dayal* v. *CIT*, 1995 Supp (2) SCC 453.

4 [1994] 93 STC 185 (SC).

The Punjab and Haryana High Court in *Gheru Lal Bal Chand* v. *State of Haryana,*[5] observed that:

> In legal jurisprudence, the liability can be fastened on a person who either acts fraudulently or has been a party to the collusion or connivance with the offender. However, law nowhere envisages to impose any penalty either directly or vicariously where a person is not connected with any such event or an act. Law cannot envisage an almost impossible eventuality…

The court held that no liability under the Haryana Value Added Tax Act, 2003 could be fastened on the purchasing registered dealer on account of non-payment of tax by the selling registered dealer unless fraud or collusion on their part was established.

The Supreme Court in *State of Maharashtra* v. *Suresh Trading Company*[6] held that a purchasing dealer was entitled by law to rely and act upon the certificate of registration of the selling dealer. Whatever might be the effect of a retrospective cancellation upon the selling dealer, it could have no effect upon any person who had acted upon the strength of a registration certificate when the registration was valid. It was not the duty of persons dealing with registered dealers to find out whether the cancellation of their registration was foreseeable in the near future.

The Kerala High Court in *Southern Metal Rolling Mills (Pvt.) Ltd.* v. *State of Kerala*[7] held that the supply of goods to a sister concern at prices lower than it was supplied to outsiders could not be categorised under valuation. It observed that, sales at difference prices to different customers, was well recognised.

What is required is a legal mechanism to curb the tendency to claim heavy refunds and not to arbitrary fasten liability on a dealer if, otherwise, he is functioning within the framework of the Act and is entitled to the refund. In this connection the decision of the Orissa High Court in *Bajrang Steel and Alloys Ltd.* v. *State of Orissa*[8] deserves mention. There the high court had observed that it was in the interest of the revenue that all states adopt provisions regarding admissibility of input tax credit on the lines of the State of Orissa.

The question for determination before the Orissa High Court in *Prem Kumar and Company* v. *General Manager, East Coast Railway, Bhubaneshwar,*[9] was whether a transporter exclusively engaged in the business of transporting goods from one place to another, was a dealer. The court held that under section 2 (12) of Orissa VAT Act, 2004, a dealer was a person who carried on the business of buying, selling, supplying or distributing goods, executing works contract, delivering any goods on hire/purchase or any system of payment by installments, transferring the right to use any goods or supply by way of or as part of any service, any goods directly or otherwise, whether for cash or deferred payment, or for commission,

5 (2011) 45 VST 195 (P&H).
6 (1997) 11 SCC 378.
7 [1998] 111 STC 32 (Ker).
8 (2011) 43 VST 235 (Ori).
9 (2011) 41 VST 118 (Ori).

remuneration or other valuable consideration, etc. A transporter who was not involved in the business of such purchase and sale of goods could not be assessed as a dealer under the Act as entry 54 of list II of the seventh schedule to the Constitution authorised the levy of tax only on the sale and purchase of goods other than newspapers.

In *Pratiksh A Asher* v. *State of Kerala*,[10] the petitioner, whose place of business was at Coimbatore, Tamil Nadu, sold lubricant oils to a purchaser at Mangalore. The vehicle in which the goods had been transported had obtained a transit pass under section 30B of the Kerala General Sales Tax Act, 1963 but the pass had not been surrendered at any exit check-post in the State of Kerala and, therefore, on the inference drawn under sub-section (2) of section 30B of the Act (that the goods were sold in the State of Kerala) the petitioner was assessed to tax . This was affirmed in appeal by the appellate assistant commissioner, and, on further appeal, by the tribunal. In a revision petition it was contended that the petitioner, who was the vendor of the goods and who had parted with possession of the goods, could not be made liable for assessment under the Act since the goods had been sold only against a form 'C' issued under the Central Sales Tax Act, 1956.

While dismissing the petition, the court held that the petitioner's contention that the liability did not extend to the vendor who was not a registered dealer and that the sale did not take place within the state, was not tenable in view of the language of sub-section (4) of section 30B which declared that it be presumed that the goods are sold in the state by the consignee or owner of the goods on establishment of certain factors. One of the factors being the failure to establish the *bonafides* of the transport. Neither the petitioner nor the transporter could establish the *bonafides* of the transport by producing the appropriate documents including the document indicating exit of the goods from the State of Kerala. In the court's view that fact that a declaration in form 'C' was given, need not necessarily establish that the contents of the declaration were true. The burden was on the assessee to establish the truth of its contents. In view of the nature of the transaction a statutory fiction was created that unless the exit of the goods was established, in all the cases where admittedly the goods enter the State of Kerala, it was to be presumed that the goods were sold in the State of Kerala. In the absence of any proof to the contrary, a mere declaration in form 'C' did not override the statutory presumption.

In *Mfar Constructions Limited* v. *Commissioner of Commercial Taxes (Karnataka)*,[11] the appellant-dealer was admittedly liable to pay tax under section 5B of the Karnataka Sales Tax Act, 1957. The question for determination was whether he was also liable under section 6B. On an application to the authority for clarification and advance rulings, the authority held that the dealer being liable to tax under section 5B was not liable to resale tax under section 6B. The commissioner in proceedings under section 22A(2) set aside the authority's order holding that the dealer was liable to resale taxes under section 6B in respect of goods purchased from registered dealers and used in the execution of works contracts. While allowing the appeal from the order of the commissioner the court held that though sections

10 (2011) 39 VST 485 (Ker).
11 (2011) 43 VST 60 (Karn).

5, 5A, 5B, 5C, 6 and 6B were independent charging sections, if a registered dealer had paid tax under any one of those sections, he was not liable to pay tax under the others. The appellant was accordingly held not liable to pay resale tax under section 6B on that portion of the turnover which formed part of the levy and was liable only on such portion which had not yet suffered tax.

In *Ashoka Creations Pvt. Ltd.* v. *State of Karnataka*,[12] the petitioner, carrying on the business of resale of ball bearing copper wire, was a dealer registered under the provisions of the Gujarat Sales Tax Act, 1969 and the Central Sales Tax Act, 1956. In an auction sale of the assets of a company at Bangalore the petitioner was declared the successful bidder. The petitioner was called upon by the authorities to get registered as a non-resident dealer in Karnataka and pay tax under the Karnataka Sales Tax Act, 1957 on the purchase. This was affirmed by the appellate authorities. The revision petition filed against the order of the appellate authority was dismissed and it was held that a single, casual or a solitary transaction of sale or purchase would not make a person a dealer within the meaning of the 1957 Act. But, admittedly, the petitioner was a dealer duly registered in the State of Gujarat both under the Central Sales Tax Act as well as under the Gujarat Act for carrying on the business of resale of certain items of machinery. He had come to Karnataka and purchased used machinery in an auction sale. After the purchase, the machinery had been dispatched to the State of Gujarat. The petitioner could, therefore, not be said to be a person who had made a solitary purchase. The petitioner had come to Karnataka and purchased used machinery and transferred it to the State of Gujarat, in the course of his business for which he had obtained registration both under the Central Sales Tax Act and Gujarat Sales Tax Act. The Karnataka Sales Tax Act in its definition of 'dealer' under section 2(1) (k) of the Act included a non-resident dealer also. The petitioner was, therefore, held to be a non-resident dealer within the meaning of that Act and was liable to pay tax under section 6(2).

The question before the Uttarakhand High Court in *Scholars Home Senior Secondary School* v. *State of Uttarakhand,*[13] was whether a dealer (whose main activity was imparting education) selling food in a hostel to students, was carrying on a 'business'. The court held that it was not, as under section 3 of the Uttarakhand Value Added Tax Act, 2005, there had to be a sale of taxable goods by a dealer or a person and this dealer or person must carry on the business of taxable goods. For a 'sale' under section 2(40) there must be a transfer of property in goods by one person to another in the course of trade or business. A dealer under section 2(11) was a person who for the purpose of or in connection with or incidental to or in the course of his business carried on the business of buying, selling, supplying or distributing goods with a motive of profit. 'Business' as defined under section 2(6) of the Act included any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture, or any transaction in connection with or incidental or ancillary to such trade, commerce, manufacture, adventure or concern. In view of this scheme it was further held that where the principal activity

12 (2011) 43 VST 120 (Karn).
13 (2011) 42 VST 530 (Uttara).

of an institution was predominantly academic or charitable, an activity which may have some incident of business but only minor, subsidiary and incidental to the principal activity and was not an integral part of it, could not be held to be a business. A tax was leviable on the sale of taxable goods by a dealer where the business of sale of those taxable was the primary and a dominant activity. If the main activity was not a business, any transaction incidental or subsidiary to it would not be a business unless there was an intention to carry on the business.

III ASSESSMENT

Deemed sale

As is well known, by the Constitution (Forty-Sixth) Amendment Act, 1982, which came into force *w.e.f.* 2.2.1983, article 366 of the Constitution was amended and a new clause (29A) was added expanding the concept of 'sale' by including within it certain 'deemed sales' under sub-clauses (a) to (f). Under sub-clause (d) of clause (29A) tax on the sale or purchase of goods includes a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration.

This sub-clause came up for consideration before the Supreme Court in *20th Century Finance Corporation Ltd.* v. *State of Maharashtra,*[14] and therein it was held that where a party had entered into a formal contract and the goods were available for delivery (irrespective of the place where they were located) the *situs* of such sale would be where the property in the goods passed, namely, where the contract was entered into. It was further held that this sub-clause could not be read as implying that the tax was to be imposed not on the transfer of the right to use goods but on the delivery of the goods. In other words under sub-clause (d) the goods were not required to be left with the transferee; all that was required was a transfer of the right to use the goods. Also the concept of deemed sale was of no relevance where the goods were delivered for use pursuant to the transfer of the right to use them, though in the case of an oral or implied transfer of the right to use goods, the sale was effective only by the delivery of goods.

The principal question before the Supreme Court in *Bharat Sanchar Nigam Ltd.* v. *Union of India*[15] was regarding the nature of transaction by which mobile phone connections were enjoyed. In an earlier decision[16] a two-judge bench had taken the view that transferring the right to use a telephone instrument fell within section 2(h) of the Uttar Pradesh Trade Tax Act, which defined 'sale' to include the transfer of the right to use goods. Doubting its correctness, the matter had been referred to a three-judge bench. Answering the reference it was held by the court that though giving a telephone connection was a transfer of the right to use the goods, there could be no transfer of the right to use in the case of a telephone service as 'use of electro magnetic waves is neither abstracted nor are they consumed in the sense they are not extinguished by their user'. The leading opinion noted that

14 (2000) 6 SCC 12.
15 (2006) 3 SCC 1.
16 *State of Uttar Pradesh* v. *Union of India* (2003) 3 SCC 239.

whether there was a transfer of the right to use goods or not would depend ultimately upon the intention of the parties, to be determined with reference to the contract between them. The concurring opinion pointed out the following factors to constitute the transfer of the right to use goods: (a) goods must be available for delivery; (b) there must be a consensus *ad idem* as to the identity of the goods; (c) the transferee should have the legal right to use the goods; (d) for the period during which the transferee has such legal right, it must be to the exclusion of the transferor; (e) having transferred the right to use the goods , the owner must not again transfer the same rights to others.

The Supreme Court in *State of Andhra Pradesh* v. *Rashtriya Ispat Nigam Ltd.*[17] held that to attract a levy of tax under section 5E, the essential requirements of the transfer of the right to use must be shown to exist and collection of mere hire charges was not excisable to sales tax.

During the year under survey the following judgments on this subject have been delivered:

i) *Jasper Aqua Exports Private Ltd.* v. *State of Andhra Pradesh*[18] was a case in which a dealer used to send his trucks to others for transporting their goods to the destination of their choice. The Andhra Pradesh High Court held that hire charges collected by the dealer were liable to tax. The court was of the view that the control retained over the driver by the dealer was not relevant.

ii) In *Nutrine Confectionery Co. Pvt. Ltd.* v. *State of Andhra Pradesh*,[19] the Andhra Pradesh High Court held that an agreement allowing other companies to use assessee's trademark and logo was the transfer of a right to use goods and the consideration received as royalty was taxable.

iii) In *Kaveri Feeds* v. *The Secretary, Sales Tax Appellate Tribunal*,[20] the Madras High Court held that where the assessee leased motor vehicles to its sister concerns which used them exclusively for their own purposes, the lease rental was liable to tax.

iv) In *G.S. Lamba & Sons* v. *State of Andhra Pradesh*,[21] the Andhra Pradesh High Court held that a manufacturer of ready mix concrete hiring transit mixers to transport concrete to site-transit mixers under the complete control of the hirer was a transfer of right to use goods.

v) In *A. P. State Electricity Board* v. *State of Andhra Pradesh*,[22] the Andhra Pradesh High Court held that the electricity board supplying meters to customers for measuring electricity supplied was a transfer of right to use meters.

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17 (2002) 3 SCC 314; affirming the decision of the Andhra Pradesh High Court in *Rashtriya Ispat Nigam Ltd.*v. *Commercial Tax Officer, Visakhapatnam* [1990] 77 STC 182 (AP).

18 (2011) 37 VST 481 (AP).

19 2011) 40 VST 327 (AP).

20 (2011) 42 VST 255(Mad).

21 (2011) 43 VST 323 (AP).

22 (2011) 43 VST 359(AP).

vi) In *Viceroy Hotels Limited* v. *Commercial Tax Officer, General Bazar Circle, Hyderabad,*[23] the petitioner dealer had a five star hotel at Hyderabad which also gave on hire audio-visual equipment to customers. However, the hotel bills did not show any services rendered by dealer. The court held it to be a transfer of right to use equipment as effective control of the equipment was with the persons hiring it.

Re-assessment

There are two types of mechanisms in fiscal statutes to safeguard the interests of revenue; one is reassessment by the same authority and the second is *suo-motu* revision of the order by a superior authority. As early as 1969, the Punjab and Haryana High Court had in *Hari Chand Ratan Chand* v. *The Dy. Excise & Taxation Commissioner*[24] explained the difference between these two . The former empowers the assessing authority to reassess a dealer in respect of any turnover which had escaped assessment or which had been under-assessed, in consequences of any definite information which came into his possession after the original order of assessment was made. The latter empowers the revisional authority to call for the record of any case decided by the assess authority or an appellate authority in order to see whether the order passed was proper.

Now, the provisions dealing with 'reassessment' in taxing statutes are invariably preceded by the words 'if the authority has reasons to believe'. The significance of these words has been explained by the Supreme Court in *Sri Krishna Pvt. Ltd.* v. *Income Tax Officer.*[25] Therein, it was held that the existence of reasons to believe was intended to be a check, a limitation, upon the powers of the authority to reopen the assessment. A mere change of opinion could not form the basis for re-opening a completed assessment.[26] The court further noted that if 'reason to believe' of the assessing officer was founded on information received after the completion of the original assessment, it may be advisable to exercise the power under section 147 read with section 148 of the Income Tax Act, 1961.

To the same effect is the judgment of the Supreme Court in *Phoolchand Bajran Lal* v. *ITO,*[27] wherein it was held that a change of opinion would not justify reassessment. Though, sufficiency of reasons for forming the belief was not for the court to judge, the belief must be held in good faith and should not be a mere pretence.[28]

A few other important principles for initiating reassessment proceedings may be noted. The Supreme Court in *Y. Narayana Chetty* v. *ITO,*[29] speaking through Gajendragadkar J observed:

The notice prescribed by section 34 cannot be regarded as a mere procedural

23 (2011) 43 VST 424 (AP).
24 [1969] 24 STC 258 (P & H).
25 [1996] 221 ITR 538 (SC).
26 *CIT* v. *Kelvinator of India Ltd.* [2002] 256 ITR 1 (Del).
27 [1993] 203 ITR 456 (SC).
28 *CST* v. *Bhagwan Industries Pvt. Ltd.* [1973] 31 STC 293 (SC).
29 (1959) 35 ITR 388-392.

requirement; it is only if the said notice is served on the assessee as required that the Income Tax Officer would be justified in taking proceedings against him. If no notice is issued or if the notice issued is shown to be invalid then the validity of the proceedings taken by the Income Tax Officer without a notice or in pursuance of an invalid notice would be illegal and void.

The Supreme Court in *Commissioner of Income Tax* v. *Sun Engineering Works Pvt. Ltd.,*[30] clarified that the reassessment proceedings could be opened only as regards income escaping assessment. Matters having attained finality in the original assessment could not be agitated again before the assessing authority in reassessment proceedings.

These are some of the important cases of reassessment which were decided during the year 2011.

i) In *Purvi Bharat Steels Ltd.* v. *Union of India,*[31] the Orissa High Court held that the reassessment was permissible where a mistake of fact had been pointed out by the audit party.

ii) *Seagram Manufacturing Pvt. Ltd.* v. *Commissioner of CT, U.P.,*[32] is a case which held that a notice of reassessment on the same subject on which the case had earlier been remanded by the appellate tribunal that too during the pendency of assessment proceedings pursuant to remand was not permissible.

iii) In *R. R. Industries* v. *State of U.P.*,[33] it was held that reassessment proceedings to tax elastic rail clips at a higher rate was not permissible as it had already been settled by the Supreme Court that elastic rail clips were forgings

iv) In *ACC Ltd.* v. *State of U.P.*,[34] it was held that the notice for reassessment issued prior to date of approval was invalid and accordingly the notice was quashed. The court was of the view that the approval for reopening of assessment had been granted without application of mind.

v) In *Dwarikesh Sugar Industries Ltd.* v. *Deputy Commissioner Trade Tax*,[35] reassessment was made on information from the survey and seized books which disclosed that the dealer had effected purchases of diesel from outside the state and supplied it to transporters for transporting sugar cane. As the transaction had not been disclosed in returns the reassessment was upheld.

vi) In *Bhanu Pratap Singh* v. *State of Madhya Pradesh*,[36] it was held that the levy of penalty by way of reassessment was not justified where there was no omission or error on the part of dealer.

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30 JT (1992) (5) SC 543; see also, *Deputy Commissioner of Commercial Taxes* v. *H. R. Sri Ramulu* [1977] 39 STC 177 (SC) (where reassessment proceedings are initiated the original assessment order already framed, ceases to exist).

31 (2011) 39 VST 74 (Orissa).

32 (2011) 37 VST 530 (All).

33 (2011) 38 VST 153 (All).

34 (2011) 38 VST 328 (All).

35 (2011) 41 VST 475 (All).

36 (2011) 45 VST 58 (MP).

Principles of natural justice

The Supreme Court in *Rash Lal Yadav* v. *State of Bihar*[37] has explained the scope of the principles of natural justice thus:

> The concept of natural justice is not a static one but is an ever expanding concept. In the initial stages it was thought that it had only two elements, namely, (i) no one shall be a judge in his own cause and (ii) no one shall be condemned unheard. With the passage of time a third element was introduced, namely, of procedural reasonableness because the main objective of the requirement of rule of natural justice is to promote justice and prevent its miscarriage.

Rules of natural justice are neither embodied rules, nor can they be elevated to the position of fundamental rights. As observed by the Supreme Court in *A.K. Kraipak* v. *Union of India*:[38]

> The aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law of the land but supplement it.

It is true that if a statutory provision can be read consistently with the principles of natural justice, the courts should do so because it must be presumed that the legislature intends to act in accordance with the principles of natural justice.[39]

The Supreme Court, speaking through Krishna Iyer J, crystallized the scope of the principles of natural justice in the following words:[40]

> Natural justice is no unruly horse, no lurking land mine, nor a judicial cure-all. If fairness is shown by the decision- maker to the man proceeded against, the form, features and the fundamentals of such essential processual propriety being conditioned by the facts and circumstances of each situation, no breach of natural justice can be complained of. Unnatural expansion of natural justice, without reference to the administrative realities and other factors of a given case, can be exasperating. We can neither be finical nor fanatical but should be flexible yet firm in this jurisdiction. No man shall be hit below the belt – that is the conscience of the matter.

The scope of principles of natural justice has been liberated by the Supreme Court in its decision in *ECIL* v. *B. Karunakar*.[41] Reiterating the principles laid down therein the Supreme Court in *Haryana Financial Corporation* v. *Kailash Chandra Ahuja*[42] observed that:

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37 (1994) 5 SCC 267 at 277.
38 AIR 1970 SC 150.
39 *Union of India* v. *Col. JN Sinha*, AIR 1971 SC 40 at 42.
40 *Chairman, Board of Mining Examination and Chief Inspector of Mines* v. *Ramjii*, AIR 1977 SC 965 at 969-970.
41 (1993) 4 SCC 727.
42 (2008) 9 SCC 31.

> 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 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.

Further, the Orissa High Court in *Utkal Asbestos Ltd.* v. *Sales Tax Officer,*[43] speaking through Arjit Pasayat J lucidly crystallized the term 'natural justice' thus:

> Natural Justice is another name for common sense justice. Rules 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.

These are the few important cases involving the application of the principles of natural justice which were decided in the year under survey.

In *Bhagwan Das Chandi Ram* v. *Dy. Ex. & Taxation Commissioner*[44] (a case of claim of input tax credit) it was held that the onus was on the dealer to prove the genuineness of purchase. The statement of the seller that he had not made any sale and the dealer being unable to establish the purchase, were sufficient from disentitling him to claim that the assessment was vitiated for failure to give him an opportunity to cross-examine the seller.

In *Tushar Kanti Mazumdar* v. *State of Assam*[45] it was observed that:[46]

> … every violation of the rules of natural justice may not be sufficient for invalidating the action taken by the competent authority/employer and the court may refuse to interfere if it is convinced that such violation has not caused prejudice to the affected person/employee.

The court held that a failure to supply the dealer with a copy of the verification report on the seized documents was not *ipso facto* a failure of natural justice, unless it could be demonstrated that, by such failure, prejudice had been caused to him in replying to the show cause notice.

Following cases were decided during the year under survey on the subject of natural justice:

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43 [2003] 133 STC 22 (Orissa); see *Canara Bank* v. *Debasis Das* (2003) 4 SCC 557 at 569 and *Canara Bank* v. *V.K. Awasthy* (2005) 6 SCC 321 at 329.

44 (2011) 43 VST 475 (P&H).

45 (2011) 44 VST 438 at 444 (Gau).

46 *Id.* at 440.

i) In *Swastik Pipes Ltd.* v. *State of Haryana*, [47] it was held that the failure to issue a show cause notice to the dealer would by itself cause any prejudice where the dealer had cooperated in the reassessment which had been finalised with the information provided by the dealer.

ii) In *S. Kathiresan* v. *Dy. CTO, Puducherry*,[48] the court held that the order canceling registration certificate on reasons other than those stated in the show cause notice was bad in law.

iii) In *Bhawani Agencies* v. *Dy. CTO Puducherry*,[49] the court held that where the order canceling registration certificate proceeded on reasons different from those given in the show cause notice there had been a violation of principles of natural justice.

iv) In *Sarda Engineering Industries* v. *State of Karnataka*,[50] a show cause notice was issued calling for production of material within seven days. As the seventh, eighth and ninth were public holidays the objections were filed on the next working day. The court held that the assessing authority ought to have received and considered the objections filed by the assessee and the refusal to accept objections was not sustainable.

v) In *Indo Germa Products Ltd.* v. *Assistant Commissioner (CT) Chennai*,[51] the order of cancellation of the registration certificate of the assessee had been passed right after the show-cause notice had been issued. The court set aside the order for not having afforded an opportunity to the assessee to reply.

vi) In *Universal Music India Pvt. Ltd.* v. *CTO Chennai*,[52] where the dealer had sought time for production of books from Mumbai after finalization of the accounts at the head office it was held that the finalisation of assessment without giving the assessee an opportunity to be heard has resulted in the failure of natural justice.

vii) In *Millennium Motors* v. *CTO, Coimbatore*,[53] the court set aside an order levying penal interest for belated payment of additional sales tax which had been passed without issuing a show cause notice.

viii) In *State of Tamil Nadu* v. *A.N.S. Guptha & Sons*,[54] the court held that as an assessing authority performed *quasi*-judicial functions, its refusal to allow a dealer to cross examine a witness was not proper; cross examination being permissible in assessment proceedings.[55]

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47 2011) 40 VST 72 (P&H).
48 (2011) 40 VST 399 (Mad).
49 (2011) 40 VST 402 (Mad)
50 (2011) 41 VST 76 (Karn)
51 (2011) 45 VST 236 (Mad).
52 (2011) 39 VST 36 (Mad).
53 (2011) 39 VST 319 (Mad).
54 (2011) 38 VST 45 (Mad).
55 See also *State of Kerala* v. *K.T. Shaduli Yusuff* [1977] 39 STC 477 (SC) and *Electro Polychem Ltd.* v. *CTO, Chennai* (2011) 39 VST 69 (Mad).

ix) In *Shree Steel Castings Pvt. Ltd.* v. *Commissioner of Central Excise & Customs, Nagpur*,[56] the authority had raised a demand of tax and imposed a penalty on the assessee pursuant to show cause notice. The assessee's reply to show-cause notice acknowledged but not considered by lower authorities. It was held to amount to a denial of opportunity to be heard. Accordingly, the matter was remitted back.

Imposition of penalty

Administration of the Delhi VAT Act, 2004 in the last about seven years has shown it to be another case of the shoe pinching the genuine tax payer. Penalties are not only harsh but also are imposed in a mechanical way, dragging the honest dealers to avoidable litigation. The reason appears to be poor drafting. Each sub section of section 86 of the Act uses the word 'shall,' thus creating an impression that the assessing authority has no discretion in the matter of levy of penalty. The authorities believe that once a tax deficiency in the return is detected, the maximum penalty prescribed under the Act has to be imposed. The impression, however, appears to be misleading.

The Supreme Court in *CIT, Calcutta* v. *National Taj Traders*[57] held that the principle that a fiscal statute should be construed strictly is applicable only to the taxing provisions such as a charging sections or sections imposing penalty and not to those parts of the statute which contain machinery provisions.

That use of the word 'shall' in a penalty provision is never mandatory but only directory. The Supreme Court in *State of Madhya Pradesh* v. *Bharat Heavy Electricals*[58] held that the assessing authorities were not bound to levy a fixed penalty (equal to ten times the amount of entry tax) whenever the provisions of section 7(5) were attracted. Depending on the facts of each case the assessing authority had to decide what would be the reasonable amount of penalty to be imposed, the maximum being ten times the amount of the entry tax.

Under section 86(10) of the Act, the power to impose penalty has been conferred upon the authorities when the return filed is found to be false. What is a false return, has been explained by the Supreme Court in *Cement Marketing Co. of India Ltd.* v. *Assistant Commissioner of Sale Tax, Indore*[59] thus:

> A return cannot be said to be 'false' unless there is an element of deliberateness in it. It is possible that even were the incorrectness of the return is claimed to be due to want of care on the part of the assessee and there is no reasonable explanation forthcoming from the assessee for such want of care, the court may, in a given case, infer deliberateness and the return may be liable to be branded as a false return. But where the assessee does not include a particular item in the taxable turnover under a bonafide belief that he is not liable so to include it, it would not be right to condemn the return as a 'false' return inviting imposition of penalty.

56 (2011) 37 VST 610 (CESTAT - Mum).
57 [1980] 121 ITR 535 (SC) at 536.
58 [1997] 106 STC 604 (SC).
59 AIR 1980 SC 346 at 348.

The second proviso to sub section (2) of section 86 of the Act reads as under:

> Provided further that the penalty imposed under this section can be remitted where a person is able to prove existence of a reasonable cause for the act or omission giving rise to penalty during penalty proceedings under section 74 of the Act.

The Kerala High Court in *St. Michael's Oil Mills* v. *State of Kerala*[60] held that the approach of the authority in levying penalty should be just and reasonable and it was only when there were aggravating circumstances that the authorities would be justified in levying the maximum penalty.

The decision of the Supreme Court in *Hindustan Steel Limited* v. *State of Orissa*[61] still holds the field:

> An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest or acted in conscious disregard of its obligation. Penalty will also not be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is technical or venial breach of the provisions of the Act or where the breach flows from bono-fide belief that the offender is not liable to act in the manner prescribed by the statute.

The Delhi High Court in *Devsons Pvt. Ltd.* v. *CIT*[62] relying on three Supreme Court decision[63] reiterated that as assessment and penalty proceedings were distinct, the findings recorded in the assessment proceedings may constitute evidence but they could not be regarded as conclusive.

The Supreme Court in *CIT, Ahmedabad* v. *Reliance Petroproducts Pvt. Ltd.*[64] has laid down that:

> [Where] there is no finding that any details supplied by the assessee in its return were found to be incorrect or erroneous or false … there is no question of inviting the penalty…. A mere making of a claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars

60 [1988] 68 STC 360 (Ker).
61 [1970] 25 STC 211(SC).
62 [2010] 329 ITR 483 (Delhi) at 501.
63 *CIT* v. *Answar Ali* [1970] 761 ITR 696 (SC); *CIT* v. *Khoday Eswarsa & Sons* [1972] 831 ITR 369 (SC) and *Anantharam Veerasinghaiah & Co.* v. *CIT* [1980] 123 ITR 457 (SC).
64 [2010] 322 ITR 158 (SC).

regarding the income of the assessee. Such a claim made in the return cannot amount to furnishing inaccurate particulars.

During the year 2011, the following important judgments regarding imposition of penalty have been delivered:

i) In *Essar Oil Ltd.* v. *Intelligence Officer, Kochi*[65] wherein a dealer in petroleum products was selling high speed diesel to a party registered in the Union Territory of Lakshadweep, the court held that the selling dealer was not obliged to ensure the use of the goods in Lakshadweep. Accordingly the penalty imposed was set aside.

ii) The case of *Niharbala Paul* v. *State of Tripura*[66] related to a return showing incorrect figures of purchases. The authority imposed a penalty on the assessee for failure to file a revised return without first issuing him a show cause notice. The court held that the imposition of the penalty was not permissible without issuing a show cause notice and as the accounts showing correct figure of purchases had subsequently been filed and the deficient tax paid there was no material to show any intention on the part of the assessee to evade the tax.

iii) *Hindustan Lever Ltd.* v. *Assistant Commissioner of Commercial Tax, Indore*[67] is a case related to resale of goods purchased from an exempted unit. The law mandates a duty to affix a seal on invoice that the tax on goods has not been paid and the failure of the assessee to affix the seal raises a rebuttable presumption of evasion of tax. Where the dealer had furnished material before the revisional authority which had not been considered by it while affirming the penalty, the Madhya Pradesh High Court held that the penalty imposed could not be sustained and remanded the matter back for fresh consideration.

iv) In *Eltex Super Casting Limited* v. *T.N. Sales Tax Appellate Tribunal*[68] the circular of the commissioner collecting tax and surcharge was set aside on the basis of a Supreme Court ruling and the dealer was refunded. The Madras High Court held that the subsequent of the penalty was not justified as it was not a case of unjust enrichment on the part of dealer.

v) In *ITI Limited* v. *Commissioner Trade Tax, U.P.*,[69] the dealer had placed a purchase order with party outside state for execution of contract with railways and the purchase order mentioned railways as the consignee. The dealer instructed the railways to send form XXXI to the consignor. However, the goods were seized at the entry check post without a form XXXI but released upon production of form XXXI issued by railways. The Allahabad High Court held that as there had been no attempt to evade the tax the penalty imposed was not justified.

65 (2011) 37 VST 192 (Ker).
66 (2011) 38 VST 65 (Gau).
67 (2011) 39 VST 479 (MP).
68 (2011) 40 VST 49 (Mad).
69 (2011) 41 VST 30 (All).

vi) In *Nitco Paints Ltd.* v. *State of Maharashtra*[70] where the dealer had failed to get its accounts audited and furnish the audit report within prescribed time, the court held that the penalty to be imposed was not automatic. The assessing authority had discretion in levying the penalty and was duty bound to consider dealer's explanation for the delay. A failure to consider the dealer's explanation would make the order liable to be set aside.

vii) In *S.R.S. Industries v. State of Tamil Nadu*[71] slips were found at the time of the inspection showing certain transactions. The court held that as there was no material which showed any willful suppression on the part of assessee, the penalty imposed was liable to be set aside.

viii) In *Rajeshwari and Co.* v. *State of Tamil Nadu*[72] the dealer for the first time in revision proceedings before the high court raised the contention that inter-state purchases were not taxable. The court upheld the penalty by stating that the contention had never been raised at any stage before or even in the revision petition before the high court.

ix) Further, in *Supreme Polytubes P Ltd.* v. *Dy. Excise & Taxation Commissioner (A)*[73] goods had been transported without proper documents. There was a finding that the goods receipt were fake and the dealer failed to produce the books of account. The manner of issuing the bills also created suspicion of evasion of tax. The penalty imposed was therefore upheld.

x) The case of *Food Corporation of India* v. *Commissioner of C.T., Patna*[74] related to the imposition of penalty because of delay in payment of tax. The court held that where there was no finding as to the delay being deliberate or willful, the imposition of the penalty was not justified.

IV JUDGEMENTS UNDER THE CENTRAL SALES TAX ACT, 1956

Inter-state sales

The question whether a sale is an inter-state sale or an intra-state sale is judicially well ploughed. There are important judgments which lay down principles on the subject. The Supreme Court in *Bharat Heavy Electricals Ltd.* v. *Union of India* held that: [75]

> [I]f a question arises whether a sale is an inter state sale or not, it has to be answered with reference to and on the basis of Section 3 and Section 3 alone. Section 4, or for that matter Section 5, is not relevant on the said question.

The Supreme Court decision in *Oil India Limited* v. *Supt. of Taxes*[76] is also worth mentioning. There the court observed:[77]

70 (2011) 42 VST 71 (Bom).
71 (2011) 42 VST 166 (Mad).
72 (2011) 42 VST 224 (Mad).
73 (2011) 44 VST 98 (P&H).
74 (2011) 45 VST 9 (Patna).
75 JT 1996 (4) SC 427.
76 AIR 1975 SC 887.
77 *Id.* at 889.

> 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 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 preceed the inter-state movement in order that the sale may be deemed to have occasioned such movement. It is also not necessary for a sales to be deemed to have taken place in the course of inter-Sate 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.

The Supreme Court in *Union of India* v. *K.G.Khosla & Co. Ltd.*[78] held that if a contract of sale contained a stipulation for 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 was not necessary that the contract of sale provide for and cause the movement of the goods or that the movement of goods must be occasioned specially in terms of the contract. A sale could be an inter-state sale, even if the contract of sale did not itself provide for the movement of goods from one State to another, but such movement was the result of covenant in the contract of sale or was an incident of that contract.

The Supreme Court in *A&G Projects and Technologies Ltd.* v. *State of Karnataka*[79] observed:

> The question whether a particular sale is an inter-State sale or an intra-State sale, though essentially one of the fact, is not a pure question of fact in as much as the facts of a given case have to be examined in the light of section 3, and, therefore, it is a mixed question of fact and law. Section 3 defines when a sale or purchase of goods takes place in the course of inter-State trade or commerce. 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 test is that a sale or purchase takes place by transfer of documents of title, during the movement of goods from one State to another. ….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 later case the contract comes into existence only after commencement and before termination of the inter-State movement of the goods. Therefore, it follows that an inter- State sale can either be governed 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

78 AIR 1979 SC 1160.
79 (2009) 2 SCC 326 at 333.

words, a sale which takes place under Section 3(a) shall stand excluded from the purview of section 3(b) and *vise versa*.

The Supreme Court in *English Electric Company of India Ltd.* v. *Dy. CTO*[80] and *Sahney Steel and Press Works Ltd.* v. *CTO,*[81] held that a head office of a dealer in one state and its branches in other state of the country were one legal entity, as different branches could not be considered independent and separate entities.

During the year 2011, the following cases were decided whether or not the transactions were inter-state sales/intra-state sales/ stock transfer:

i) The Supreme Court in *Hyderabad Engineering Industries* v. *State of Andhra Pradesh*[82] held that where the sale or agreement for sale caused or had the effect of occasioning the movement of goods, or where the order was placed with any branch office or the head office, which resulted in the movement of goods, irrespective of whether the property in the goods passed in one state or the other, if the effect of such a sales was to have the movement of goods from one State to another, an inter-state sale was to ensue, resulting in exigibility to tax under section 3(a) of the Central Sales Tax Act, 1956. It was further held that it was only when the turnover related to sale or purchase of goods during the course of inter-State trade or commerce that it would be taxable under the Central Sales Tax Act.

ii) In *Essar Oil Limited* v. *Intelligence Officer, Kochi*[83] a dealer in petroleum products was selling high speed diesel to a party registered in the Union Territory of Lakshadweep. The court held that the selling dealer was not obliged to ensure the use of the goods in Lakshadweep.

iii) In *State of Tamil Nadu* v. *Craingmore Plantations (India) Pvt. Ltd.*,[84] the court held that the appellate tribunal being the final fact finding authority, findings arrived at by it after thorough examination of records need not be interfered with. The tribunal had held dispatches from a factory in Tamil Nadu to its branch in Kerala had no link with sales to party in Bombay entitling the assessee to claim exemption on branch transfers.

iv) In *Seagram Manufacturing Pvt. Ltd.* v. *Commissioner of Commercial Tax, Lucknow*[85] wherein the appellate tribunal had remanded the matter for verification of form 'F' produced by the dealer, the court held that the show cause notice for reassessment on same subject matter during pendency of assessment proceedings was not permissible.

v) In *Bell Ceramics Ltd.* v. *Dy. Commissioner of CT, Bangalore*[86] the assessee furnished a form 'C' declaration and claimed concessional rate of tax. However, the assessing officer rejected the claim for the period subsequent

80 AIR 1977 SC 19.
81 AIR 1985 SC 1754.
82 (2011) 4 SCC 705.
83 (2011) 37 VST 192 (Ker).
84 (2011) 37 VST 420 (Mad).
85 (2011) 37 VST 530 (All).
86 (2011) 38 VST 388 (Karn).

to June 30, 2002 on the ground that the purchasing dealer's registration had been cancelled *w.e.f.* July 1,2002. The court held that the assessing officer was not justified in rejecting the claim of the assessee, as the assessee could not be said to have used invalid 'C' form in absence of proof that purchasing dealer ceased to exist from July 1, 2002 and assessee had knowledge of it.

vi) In *L & T Komatsu Ltd.* v. *State of Karnataka*[87] a sale of equipments to a finance company who in turn sold them to hire purchase customers outside the State was held to be a inter-state sale.

vii) In The court in *Esjyapee Impex Pvt. Ltd.* v. *CTO, Chennai*[88] held that in a case of branch transfer, where the dealer had sought time to file form 'F', the authority was bound to intimate either grant of time or its denial. It, accordingly, set aside the order of assessment passed denying exemption for failure to produce form 'C'.

viii) In *Vasanthi Automobiles* v. *C.T.O.*,[89] as the declaration in form 'C' and 'F' were not available at the buyer's end, at the time of filing of the return for the assessment year 2006-07, the petitioner's dealer`s claim for exemption and concessional tax on turnover pertaining to stock transfer was rejected. The petitioner could get the declaration form 'F' only on January 12, 2010 and sought for a fresh assessment on the basis of the available form 'F'. The application was rejected on the ground that the petitioner had not filed it within 90 days. The court held that the furnishing of the statutory form was not within the control of the petitioner and was dependent on co-operation from dealers of other States. It was held that if on a sufficient cause the petitioner had satisfied the requirement of law, the claim could not be rejected unjustifiably.

ix) In *A.K.Veneers P Ltd.* v. *State of Kerala*[90] the transport of consignment from Tamil Nadu to Karnataka was done through Kerala. The transit pass had been obtained at entry check post in Kerala but not surrendered at the exit. The court held that the goods were not sold in the course of inter State movement, by endorsement of title to goods while in transit. Accordingly, the levy of tax and penalty in Kerala was upheld.

x) In *Sri Vishnu Cement Ltd.* v. *State of Tamil Nadu*[91] goods were dispatched from the factory in Andhra Pradesh to the branch in Tamil Nadu. Transfer of the documents of title to the goods had been effected before the delivery was taken. The court held it to be an inter- state sale.

xi) In *Bharat Electronics Limited* v. *Dy Commissioner (CT), Vijayawada*[92] there had been a transfer of goods from one unit of dealer to another one outside the State. The court held it to be a case of stock transfer and not

87 (2011) 41 VST 212 (Karn).
88 (2011) 42 VST 61 (Mad).
89 (2011) 43 VST 142 (Mad).
90 (2011) 44 VST 106 (Ker).
91 (2011) 46 VST 556 (Mad).
92 (2011) 46 VST 179 (AP).

sale. There was requirement of filing a valid form 'F'. The court held the Deputy Commissioner, in revision, had the duty to specify defects in the form 'F' submitted by the dealer, in its show cause notice, before rejecting it.

Sale in the course of export

As is well known, article 286(1) of the Constitution mandates:

> *286. Restrictions as to imposition of tax on the sale or purchase of goods.*—(1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place—
>
> (*a*) outside the State; or
>
> (*b*) in the course of the import of the goods into, or export of the goods out of, the territory of India.
>
> (2) Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in clause (1).

Now, section 5(1) of the Central Sales Tax Act 1956 contains principle which govern a sale or purchase of goods in the course of export. This section reads as under: -

> *5. When is a sale or purchase of goods said to take place in the course of import or export*.—(1) A sale or purchase of goods shall be deemed to take place in the course of the export of the goods out of the territory of India only if the sale or purchase either occasions such export or is effected by a transfer of documents of title to the goods after the goods have crossed the customs frontiers of India.

The principle decision on this subject by the Supreme Court is *Burmah Shell Oil Storage and Distributing Co. of India Ltd.* v. *CTO,*[93] wherein it was observed:

> [W]hile all exports involve a taking out of the country, all goods taken out of the country cannot be said to be exported. The test is that the goods must have a foreign destination where they can be said to be imported. It matters not that there is no valuable consideration from the receiver at the destination end. If the goods are exported and there is sale or purchase in the course of that export and the sale or purchase occasions the export to a foreign destination, exemption is earned.

In *Mohd. Serajuddin* v. *State of Orissa,*[94] the Supreme Court held that sale which was to be regarded as exempt was a sale which caused the export or was the immediate cause of the export. To establish the export a person exporting and a person importing were necessary elements and the course of export was between them.

93 [1960] 11 STC 764 (SC) at 765.
94 AIR 1975 SC 1564.

This judgment necessitated an amendment of the Central Sales Tax Act 1956 because exemption on the penultimate sale in the course of export was denied by this judgment. The exports through Government companies began to suffer in as much as only the Government which had the monopoly of export could enjoy exemption from payment of tax and not the person exporting goods through the Government Company. The result was that sub section (3) to section 5 of the Central Sales Tax Act 1956 was added by the Central Sales Tax (Amendment Act) 1976 with retrospective effect from 01.04.1976. This sub section read as under:

> (3) Notwithstanding anything contained in sub-section (1), the last sale or purchase of any goods preceding the sale or purchase occasioning the export of those goods out of the territory of India shall also be deemed to be in the course of such export, if such last sale or purchase took place after, and was for the purpose of complying with, the agreement or order for or in relation to such export.

The leading case on section 5(3) of the Central Sales Tax Act 1956 is the decision of Supreme Court judgment in *K. Gopinathan Nair* v. *State of Kerala*[95] wherein the scope of section has been crystallized in the following words:

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

The 'agreement' occurring in the phrase 'the agreement or order for or in relation to such export' in section 5(3) 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).[96]

During the year 2011, the following important cases were decided on the subject of sale in the course of export:

i) In *Deepmani* v. *State of Maharashtra,*[97] goods selected by the foreign tourist had been moved from shop of the dealer to the International Airport to be personally handed over to them while checking in. It was held was not to be a sale in the course of export, hence not exempted, even though the payment had been made in foreign currency.

95 (1997) 10 SCC 1

96 *Consolidated Coffee Ltd.* v. *Coffee Board* (1980) 3 SCC 358 at 375.

97 (2011) 38 VST 275 (Bom).

ii) *Hindustan Unilever Ltd.* v. *Dy. Commissioner of Comm. Taxes, Kolkata*[98] was a case of despatch of goods to Bhutan. Before the court, the dealer stated that India Customs or sales tax authorities were not in habit of making any entries, but at the same time presented a certificate of arrival of goods given by the Bhutan authorities. Considering the peculiar facts of the case the court remanded the matter back to the assessing authority to verify whether this indeed was prevalent practice.

iii) In *V. Win Garments* v. *Addl. Dy. CTO, Tirupur,*[99] the petitioner-dealer (a manufacturer of hosiery goods) sought exemption on the basis of form 'H', for a transaction effected outside India. The dealer also produced a bills of lading to prove the transaction but did not produce the copy of agreement entered into by the dealer with the foreign buyer. The assessing authority denied the claim of the dealer. The court allowing the writ petition filed by the dealer held that what was required on the part of the dealer was to prove the factum of the transaction and once he was able to do so with sufficient and satisfactory documents its was value exempted from tax liability and there was no mandatory requirement to produce the agreement which had been entered into with the foreign buyer.

iv) In *Sri Rama Vilas Services Limited* v. *Tamil Nadu Taxation Special Tribunal, Chennai*[100] the taxation special tribunal had held that after construction of the body by the petitioner-dealer, the end product was a different one from the chassis which was entrusted to the dealer by the automobile manufacturer and as such, after conversion of the chassis as a bus, the petitioner was not entitled to the exemption granted under section 5(3). On a writ petition preferred, the court held referring inter alia, to an earlier judgment of the Supreme Court in *State of Karnataka* v. *Azad Coach Builders P. Ltd.,*[101] that the petitioner had to establish that the penultimate sale was inextricably connected with the export of goods by the exporter to the foreign buyer. In order to enable the petitioner to establish it, the matter was remitted to the assessing authority for fresh assessment.

v) *Sejwar Traders* v. *Commissioner of Commercial Tax, U.P*[102] concerned with the purchase of raw hides and skins and their sale to an exporter after getting them tanned. The court came to a finding that goods mentioned in the invoices for sale were different from goods mentioned in the bill of lading and form 'H'. Moreover, the copy of the order from foreign buyer had not been produced. The court held that it had not been conclusively established that the purchase by exporter was inextricably connected with the export. The claim for exemption was rejected.

98 (2011) 40 VST 423 (West Bengal Taxation Tribunal).
99 (2011) 42 VST 330 (Mad).
100 (2011) 39 VST 508 (Mad).
101 (2010) 9 SCC 524.
102 (2011) 41 VST 227 (All).

vi) In *Alleppey Company Ltd.* v. *State of Kerala*[103] an exporter of coir products purchased tags and labels giving product description from exempted dealers and exported the goods after attaching tags and labels to them. The court held that the purchase of tags and labels was the penultimate purchases for export and was therefore exempted.

V JUDGMENTS HAVING BEARING ON THE CONSTITUTION OF INDIA

Articles 226 and 136

The power of the high court under article 226 is wider than that of the Supreme Court under article 32.[104] The important question as to when a writ petition under article 226 lies, has been dealt with by the apex court in a catena of judgments. In *A.V.Ventatewaran, Collector of Customs, Bombay* v. *Ram Chand Sobhraj Wadhwani,*[105] the scope of this remedy was explained thus:

> The rule that the party who applies for the issue of a high prerogative writ should, before he approaches the court, have exhausted other remedies open to him under the law, is not one which bars the jurisdiction of the high court to entertain the petition or to deal with it, but is rather a rule which courts have laid down for the exercise of their discretion.

The court further held that the existence of an alternative remedy was a bar to the entertainment of a petition under article 226 of the Constitution unless (1) there was a complete lack of jurisdiction in the authority to take the action impugned, or (2) where the order had been passed in violation of the principles of natural justice and that in all the other cases, courts should not entertain petitions under article 226. It held that the two exceptions to the normal rule as to the effect of the existence of an adequate alternative remedy were not exhaustive, and even beyond them a discretion vested in the high court to entertain the petition and grant the petitioner relief notwithstanding the existence of an alternative remedy. The court, however, made it clear that if a petitioner had disabled himself from availing of the statutory remedy by his own fault in not doing do within the prescribed time, he could be permitted to urge the court to exercise its discretion in his favour.

The Delhi High Court in *Gee Vee Enterprises* v. *Addl. Commissioner of Income Tax*[106] has elucidated the scope of article 226 and has given some of the instances when the petitioner could make out a strong case for departing from the normal rule of availing of the alternative remedy:

1. that the impugned order was passed without jurisdiction;
2. that it violated rules of natural justice;
3. that it disclosed an error of law apparent on the face of the record;
4. that it was based on extraneous or malafide considerations;

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103 (2011) 46 VST 24 (Ker).
104 *P.N.Kumar* v. *M.C. of Delhi* [1988] 70 STC 189 (SC).
105 AIR 1961 SC 1506.
106 [1975] 99 ITR 375 (Delhi).

5. that the statutory remedy was not adequate or was onerous;
6. that resort to the statutory remedy would cause irreparable injury to petitioner;
7. that the impugned order infringes a fundamental right of the party; and
8. that the provision of law under which the order was passed was itself unconstitutional.

There is however, one rider when the writ petition would not be entertained. The courts of law are meant for imparting justice between the parties. One, who comes to the court, must come with clean hands.[107] A person whose case is based on falsehood has no right to approach the court. He can be summarily thrown out at any stage of the litigation.

The writ jurisdiction of the courts is a discretionary and an extra ordinary remedy. The Supreme Court in *Chandra Singh* v. *State of Rajasthan*[108] observed that:

> Issuance of a writ of certiorari is a discretionary remedy. The high court and consequently this court while exercising their extraordinary jurisdiction under Article 226 or 32 of the Constitution of India may not strike down an illegal order although it would be lawful to do so. In a given case, the high court or this court may refuse to extend the benefit of a discretionary relief to the applicant. Furthermore, this court exercised its discretionary jurisdiction under article 136 of the Constitution of India which need not be exercised in a case where the impugned judgment is found to be erroneous if by reason thereof substantial justice is being done.

In *GKN Driveshafts (India) Ltd* v. *I.T.O.*[109] it had been held by the Supreme Court that:

> [W]hen a notice under section 148 of the Income Tax Act is issued, the proper course of action for the noticee is to file return and if he so desires, to seek reasons for issuing notices. The assessing officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the assessing officer is bound to dispose of the same by passing a speaking order.

During the year 2011, the following important SLPs/writ petitions were decided with the result as shown below:

i) The Supreme Court in *State of U.P.* v. *Mahindra and Mahindra Ltd.*[110] held that in a special leave petition, the court could take notice of developments subsequent to filing of writ petition or special leave petition. It noted that the constitution had specifically demarcated the ambit of power

107 *S.P.Chenaalvaraya Naidu* v. *Jagannath*, AIR 1994 SC 853.
108 (2003) 6 SCC 545 at 562 (internal citations omitted).
109 [2003] 259 ITR 19 (SC).
110 (2011) 42 VST 365 (SC).

and the boundaries of the three organs of the state by laying down the principles of separation of powers and therefore it was inappropriate for the courts to issue a mandate to the legislature to enact a legislation or to the government to make a particular delegated legislation.

ii) In *Jasper Industries P Ltd.* v. *Assistant Commissioner (CT), Hyderabad*[111] while dismissing the writ petition *in limine*, the court observed that ordinarily, a writ against a show cause notice should not be entertained, unless the court was satisfied that the show cause notice was non-est in the eyes of the law for want of jurisdiction. In the court view the writ petitioners should be directed to respond to the show cause notices and take all stands highlighted in the writ petition before the concerned authority.

iii) In *B.A.Harish Gowda,* v. *Greenply Industries Ltd*.[112] it was held that an appeal do not lie against an order awarding costs. On a writ petition by the respondent dealer, a single judge had issued a direction to the commissioner (the appellant) to either comply with the order of the joint commissioner and refund the amount within a week or initiate such action as was permissible, in accordance with law. The court quantified the costs at Rs. 5000/- payable by the department and to be recovered from the salary of the appellant. On appeal contending that the appellant had taken all necessary *bonafide* and timely steps by bringing it to the notice of the concerned joint commissioner (who was in charge of enforcement) no negligence could have been attributed to the appellant. It was further pointed out that in view of the circular of the commissioner that refund orders involving a sum of Rs. 1 lakh and above had to be counter signed by the jurisdictional Joint commissioner (administration), and there was no responsibility on the Commissioner. While dismissing the appeal, the court held that if any one had to be blamed in respect of the complaint of the respondent dealer it could only be on the commissioner of commercial taxes.

iv) In *Sri Rajeshwari Agencies* v. *Addl. Dy. CTO, Puducherry,*[113] on the question whether non-payment of arrears of tax and penalty would disentitle the petitioner from getting the form 'C' licence, it was held that when the respondent could proceed against the petitioner for non-payment of tax or the penalty by attaching the sale proceeds from the properties or even the bank account of the petitioner, the respondent had no power to deny form 'C' licence to the petitioner. Section 9(2) of the Central Sales Tax Act, 1956 did not contemplate refusal of form 'C' licence for non-payment of tax or penalty. Therefore, the respondent could not deny the issuance of form 'C' licence to the petitioner.

v) The decision in *C.R. Venkatapathy* v. *Dy. CTO, Coimbatore*[114] concerned the recovery of tax-statement by dealer at the time of registration that he owned no properties but his father did. The father executed a form XIVB

111 (2011) 37 VST 455 (AP).
112 (2011) 37 VST 539 (Karn).
113 (2011) 40 VST 249 (Mad).
114 (2011) 40 VST 380 (Mad).

offering his land as security. There is a provision under the Act which gives priority for realisation of tax dues against property. A writ petition was filed questioning factum of valid mortgage. The court dismissing the writ petition held that the writ petition was not maintainable and the parties relegated to civil suit.

vi) In *Sterling Agro Industries Ltd.* v. *Union of India*[115] the court held that the concept of forum conveniences fundamentally means that it is obligatory on the part of the court to see the convenience of all the parties before it. The convenience in its ambit and sweep would include the existence of a more appropriate forum, expenses involved, the law relating to the *lis*, verification of certain facts necessary for just adjudication of the controversy and such other ancillary aspects. The balance of convenience is also to be taken note of.

vii) As per the facts in *Sakthi Enterprises* v. *Dy. Commissioner (CT), Enforcement (North), Chennai*[116] the petitioner, a dealer in Delhi, imported goods, through the Chennai port from Hong Kong. The goods were cleared by a clearing and forwarding agency and while the imported consignment was being transported through a local transporter for onward transportation to Delhi, the container, containing the goods in question , was intercepted on the presumption that the goods were being moved to a private godown and notice was issued levying tax and imposing compounding fee under the Tamil Nadu Value Added Tax Act, 2006. The petitioner in a writ petition sought an order directing release of the goods, subject to the adjudication proceedings to be conducted by the respondent, on the petitioner furnish a bank guarantee. It was held that the second respondent was to release the goods in question, on the petitioner furnishing a bank guarantee to the satisfaction of the second respondent.

VI CONCLUSION

It is settled that taxation laws are technical.[117] The Rajasthan High Court has aptly observed in *Chiranji Lal Tak* v. *Union of India,*[118] that 'litigation is not a luxury and /or amusement or entertainment. It is not pleasure or pleasant to come to the courts. Only when the Union or a state or its officers make it unavoidable, the litigants come up before the courts for redressal of their grievances or for enforcement of their legal or fundamental rights. The litigation is heavily cost …'. It is, therefore, implied that the persons who administer taxation laws should have a background in taxation so that passing of orders in a mechanical manner is avoided and unnecessary litigation by genuine taxpayer is obviated. This suggestion, if adopted, will benefit equally the revenue too as whatever is legally due to the government will be collected without any waste of resources.

115 (2011) 43 VST 375 (Delhi).
116 (2011) 43 VST 499 (Mad).
117 *Leader Engineering Works* v. *CIT* [1980] 124 ITR 44 (P&H).
118 [2001] 252 ITR 333 (Raj) at 335.