IMPLICATIONS OF RECENT JUDGEMENTS ON WORKS CONTRACT AND LEASING TRANSACTIONS

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1. INTRODUCTION

The taxation of ‘Works Contract’ had never been clear and simple. It was always surrounded by uncertainty. Whenever the States tried to levy tax on a transaction which did not involve Transfer of Property in a chattel-qua-chattel it was objected to by the tax-payer, as the term ‘sale’ as understood under the Sale of Goods Act, 1930 did not include composite transactions of supply of goods and labour. Further, there was no precise definition of the term “Works Contract” and therefore one had to look to the interpretation of the term ‘Works Contract’ made by the various courts in their judicial pronouncement.

Since in every sale and purchase there is transfer of property backed up by an agreement to transfer property. The intention of the parties is to be gathered from the terms and conditions of the agreement or the contracts. Therefore from the analysis of the contract the intention of the parties is to be gathered and the contract is required to be classified accordingly. There can be various contracts in which there can be a transfer of property in goods but each one of them cannot be a contract of ‘sale’ as understood under the Sale of Goods Act, 1930. There can be various contracts in which there is a Transfer of Property in goods yet these may not amount to a contract of sale.

2. TYPES OF CONTRACTS INVOLVING TRANSFER OF PROPERTY IN GOODS

The first important judicial pronouncement is in the form of Supreme Court decision in the case of Government of Andhra Pradesh vs. Guntur Tobacco Ltd. (16 STC 240). In this decision the Supreme Court has explained the types of contract in which there is a transfer of property. According to the Supreme Court there are 3 types of Contract where material is used:—

(i) The contact may be for work to be done for remuneration and for supply of material used in the execution of a work for a price.

(ii) It may be a contract for work in which use of material is incidental or accessory.

(iii) The last in which use of material is voluntary or freely given.

In the last type of contract there is no difficulty to say that there is no sale because even if property passes it is without any price. In the first case there is a composite contract for work and sale of goods and in the second type of work it is a contract for execution of works not involving sale of goods.

Thus where there is a contract in which there is transfer of title to the goods expressly or impliedly and not as incidental to the contract it is a Works Contract. However, where the contract is for work in which there is transfer of property in material but it is just incidental or accessory to the main contract then such transfer of property cannot be taxed under the Works Contract Act as the predominant object of the parties was to get the services and not to buy or sale any goods. Such contract were referred to as Service Contracts. There can be many examples of Service Contracts wherein there is a transfer of property in goods involved in the
execution of a work where in such transfer of property was not intended by the parties to the contract. The property passes in such contract only as incidental to the contract for the simple reason that the primary object of the party was to give and take services. An example can be that of a photographer. A person going to the photographer is not interested in purchase of the paper on which photograph is printed but is interested in the skill of the photographer though in such case there is a transfer of property, the property passes only as incidental transfer. A useful reference can be made in this regard to the case of M/s. B. C. Kame (39 STC 237). Another example of Service Contract could be that of a radiologist giving written opinion. The same will be a case with the painters and consultants.

3. **POSITION AFTER 46th CONSTITUTIONAL AMENDMENT**

To overcome the effect of certain judgements the Constitution was amended. The amendment is known as the 46th Amendment which took place in the year 1983. After 46th amendment, in Article 366, Clause (29A) was inserted; which reads as under:—

“(29A) tax on the sale or purchase of goods include (a)....,
(b) a tax on the transfer of property in goods (Whether as goods or in some other form) involved in the execution of a Works Contract,
(c)...., (d)...., (e)...., (f)...”

The objective behind introducing sub-clause (b) was to enable the States to levy tax on sale or purchase of goods where such sale/purchase of goods is by way of transfer of property in goods involved in the executions of Works Contract. Now a question arises as to whether after this amendment can the ‘Service Contract’; i.e., where the Transfer of Property in Goods involved in the execution of a Contract is only incidental or ancillary and was not intended to be purchased and sold by the parties can be taxed? In my humble opinion, ‘Service Contract’ cannot be taxed even after the 46th amendment in the Constitution because the predominant object theory still holds goods. A contract of sale or purchase of goods has to be with knowledge of the parties and with a clear objective in mind for transfer of property in goods involved in the execution of a particular contract where the parties to a contract did not intend the transfer of property in goods in the execution thereof there can be no sale or purchase of goods.

**SARVODAYA PRINTNG PRESS CASE (114 STC 240)**:— In this case the Supreme Court was dealing with a printing contract. It was held to be a Works Contract. While holding so the court has noted the observations made by it in the case of State of Tamilnadu vs. Anandan Vishwanathan’s case in following words:

“In our opinion the contract in this case is one, having regard to the nature of the job to be done and the confidence reposed for work to be done for remuneration and supply of paper is just incidental. Thus the Supreme Court did not describe the transaction before it as a Works Contract to be executed for a payment of contract price. The Supreme Court held that the case before it having regard to the nature of the job to be done and the confidence reposed was for work to be done for remuneration and supply of paper was just incidental."

Thus in the view of the Supreme Court also service contract do exist even after the 46th Constitution Amendment and such Service Contract cannot be subjected to tax under the Works Contract Tax Act.

**RAINBOW COLOUR LAB’s CASE (118 STC 9)**:— The Supreme Court in the case of Rainbow Colour Lab vs. State of Madhya Pradesh (118 STC 9) has observed that “all that has happened
in law after the 46th amendment following the judgement of this court in builders case is that it is now open to the State to divide the Works Contract into two separate contracts by a legal fiction.

(i) Contract for sale of goods involved in the said Works Contract.
(ii) For supply of labour and service.

This division of Works under the amended law can be made only if the Works Contract involved dominant intention to transfer the property in goods and not any contract where the transfer of property is as an incidence of contract of service. The amendment referred to above has not empowered the State to indulge in microscopic division of contract involving the value of material used incidentally in such contract. What is pertaining to ascertain in this connection is what was the dominant intention of the contract, every contract, be a Service Contract or otherwise, may involve the use of some material or the other in execution of the said contract. The State is not empowered by the amended law to impose Sales Tax on such incidental material used in such contract”.

From the above observations of the Supreme Court the jobs like Xeroxing, cyclostying, pest control etc. will not be covered by Article366 (29A) sub-clause (b).

4. DETERMINATION OF PREDOMINANT INTENTION :-

To judge the predominant intention of the parties to a contract also poses difficulty. Where the contract is in black and white then the terms of the contract may throw light on the dominant intention of the parties. But were there is no clear contract then the nature of work to be done, the monetary value of the goods in which there is a transfer of property, the common parlance will help in knowing the intention. All these tests cannot be applied independently and their application will depend upon the facts and circumstances of each case. In the case of purely artistic work such as photography, painting etc. it is easy to understand the predominant intention of the parties and there is no difficulty in saying that predominant intention of the party is to have the service of the photographer. Nobody is interested in buying the paper on which the photograph is printed. However, in case of a printing contract if the contractee has given the specification regards the paper on which the matter given by him should be printed and the paper is of such a type that it is not used ordinarily by printers in general then definitely it can be inferred that the parties intended to buy and sell paper on which the matter is printed. In such case the printer also fixes his charges accordingly by taking into consideration the cost of paper involved. The third case can be that of the monetary value of the goods in which there is a transfer of property. In the monetary value of the goods in which there is a transfer of property is of considerable high value it can be inferred that there is a transfer of property in goods involved in the execution of a works contract. In determining whether there is a transfer of property in goods involved in the execution of a works contract or not one may adopt the reasoning given by the Courts and the Tribunal while inferring deemed sale of packing material under the Sales Tax Law. For example in the case of Dhariwal Bottles Ltd., vs. The State of Maharashtra (99 STC 326) it was held by the Court that no deemed sales of empty gunny bags would be inferred which were used to pack empty bottles for transportation as such packing material was commonly used as a cheap and convenient mode of transportation. Therefore here the practices followed in common parlance were taken into consideration. Similar, in the case of Vidarbha Bottlers Ltd. the Tribunal had held that a deemed sale of packing material (glass bottles) in which the liquor was packed would be inferred as the value of glass bottles was significantly high or form an substantial component of cost of liquor.
However, the Rainbow Colour Labs case strengthened the concept of Service Contract. Supreme Court decision in case of Associated Cement Ltd. (124 STC 59) (ACC) unsettled the already settled position. In this case the division bench of 3 judges was examining the levy of custom duty on imported diskettes/paper/floppy etc. under the Custom Act. M/s. ACC and others had obtained technical knowhow from foreign experts. The foreign experts sent their opinion/advice on media like floppy/drawing paper/diskettes. The assessee declared nominal value of 1 dollar for the purpose of custom duty. Though they had paid a huge amount towards consultation fees. The Custom Authority however, imposed the custom duty on full amount paid by the importers. The Supreme Court held that the foreign experts sent the floppy/papers only on getting their fees and hence the entire fees is liable to custom duty. For the above purpose the Supreme Court took into consideration the definition of “goods” defined under the Customs Act, 1962 which is totally different from the definition of “goods” under the Sales Tax Laws so also the definition of “custom value” is different from the “sale price” and the “turnover of sales” under the Sales Tax Laws. The Supreme Court resolving the above controversy observed that the case under the Sales Tax Legislation are not of any relevance to the controversy under the Custom Act. However, observed as follows:

“Even though in our opinion the decisions relating to levy of Sales Tax would have, for reasons to which we shall presently mention, no application to the case of levy of customs duty, the decision in Rainbow Colour Lab (118 STC 9) (SC) requires reconsideration”.

The Supreme Court then further observed that

“The conclusion arrived in Rainbow Colour Lab (2000) (118 STC 9) (SC) in our opinion runs counter to the express provisions contained in Article 366(29A) as also of constitution bench decision of this Court in Builders Association of India vs. Union of India (73 STC 370)”.

Also Supreme Court observed that

“Apart from the decision in Rainbow Colour Lab’s case (118 STC 9) (SC) which does not appear to be correct, the other decisions cited relating to pre 46th amendment period. Thus, except observation that the judgement runs counter to the constitution or appears to be not correct, Supreme Court has not held further so as to declare it invalid or they have stated clearly that the judgement in Rainbow is overruled. Therefore, it can be said that Supreme Court in the above case has expressed doubts but certainly not overruled the judgement, as it has not examined the judgement of Rainbow Colour Lab on merits. The observations made by the Supreme Court in the judgement is said to be only an obiter dicta (passing remarks).”

5. HAS THE ACC CASE CLOSED ALL THE DOORS?

A question may arise whether the judgement of the ACC has put a last cap on the entire issue or there is still a ray of hope in the matter. In my humble opinion since the decision of ACC has not overruled expressly the decision of Rainbow Colour Lab there is still a chance of review of ACC’s decision by the Supreme Court. One may see that something comes out of the decision of larger bench in the case of M/s. Tata Consultancy vs. The State of Andhra Pradesh (122 STC 198) which was referred to the larger bench of the Supreme Court by division bench. In this case also before the division bench the decision of ACC was cited. Had the Supreme Court considered that ACC’s case has taken the matter to the finalising then that would have definitely followed it and decided the controversy regarding computer software which was referred to them for their opinion. Thus it may be inferred that the Supreme Court also feels that the ACC’s decision requires a rethinking.
6. **MATUSHREE’S DECISION BY BOMBAY HIGH COURT**

Matushree Textiles Ltd. (132 STC 539) has completely negatived the concept of Service Contract. In this case the Bombay High Court was dealing with a case of a dealer engaged in the business of dyeing, bleaching and printing of grey fabrics received from customers. For the purpose of dyeing, bleaching and printing the respondent used material such as colours, dyes, and chemicals and these materials were converted into a solution and stored in a tank. Thereafter grey fabric was passed through the solution several times till the requisite colour shade was obtained on the fabrics as per the specification of the customers. The dyed fabric was washed by water to drain away the chemical solution remaining on the fabric. On completion of the job work the dyed/printed fabrics with the requisite colour shade were returned by the dealer to the customers. It was held by the court that in the above contract the dominant intention of the party is to transfer the requisite colour shade/print on the fabric supplied by the customers. How the coloured shade/print is to be passed to the fabrics and what ingredients or material should be used for obtaining the requisite colour shade/print may not be specified in the contract. In the present case, the colour shade was passed to the fabrics due to the chemical reaction of the material used in the process of dyeing. The colour shade represents the inherent chemical property of the material used. Once there is passing of the chemical property of the material used in the execution of Works Contract, then under the Maharashtra Works Contract Act there is a deemed sale of the material used in the execution of the Works Contract. Such passing of property of the material was a deemed sale and tax was leviable on such material under the Maharashtra Works Contract Tax Act. While holding so the Bombay High Court discussed the decision of M/s. RMDC Press (112 STC 307) wherein it was held that in a printing contract the ink is a tool of printer and the same is consumed in the printing and loses its identity as goods and therefore no property can be said to pass in ink used in the execution of the contract of printing. Bombay High Court held that the decision of RMDC Press was without considering the first bench decision of Sarvodaya Printing Press (93 STC 387) which has been upheld by the Apex Court. Once it is held that the property in goods used in the execution of the Works Contract passes incidentally or by theory of predominant intention such passing, though not a sale under BST Act would be deemed sale under the Works Contract Act. The Bombay High Court has also disregarded the theory of predominant intention, the value or the quantity of the material in which there is a transfer of property so also the passing of property in physical form to attract the Works Contract Tax. Therefore, after the Matushree’s decision it appears that practically the predominant intention theory and the concept of Service Contract will lose its importance under the Works Contract Tax Act.

The Government of Maharashtra has already started taking steps following the decision of the ACC and has taken out a trade circular No. 18T of 2001 dtd. 26-9-2001 wherein the Commissioner has clarified that after the Supreme Court decision in the case of **ACC vs. Commissioner of Customs**. The Departmental Authorities were instructed to follow the ACC’s case and to assess all like cases accordingly. However, it was also stated that the closed matters will not be re-opened. Following the said circular the Departmental Authorities started taking step for getting the printers, photographers, person engaged in dyeing and bleaching to get registered. The matter was then taken to the Government and the Government of Maharashtra took out Government Resolution No. STA-11.03/CR/197/Taxation-1 dtd. 7-8-2004 whereby it has now been provided that the dealer processes cloth and developing photographs will be granted administrative relief of tax liability for the period up to 31-3-2004 and interest and penalty of such tax will not be recovered. However, where tax has been partly collected or paid the administrative relief will be restricted only to the amount of tax not recovered/not
paid. Similarly, in the hands of dealer engaged in printing, all case which were closed prior to 11-8-1998 will not be reopen. The powers of granting administrative relief have been given to the Commissioner which can be delegated further.

SUPPLEMENT
by T. M. Chhatpar, Chairman

7. Paper cannot be concluded without taking cognisance of the implications of the latest decision of our own High Court in the Writ Petition No. 873 of 2004 pronounced on 6th March, 2004 in the case of M/s. Maharashtra Mudran Parishad and Ors. vs. The State of Maharashtra. In this case members of Printers Association who were undertaking jobs of printing on the paper supplied by their customers, who were served with the Notices of assessment by the department proposing to levy tax under the provisions of the Maharashtra Transfer of Property in Goods involved in the execution of the Contract Act, 1989 on alleged transfer of ink and other consumables used in the jobs of printings, had approached the Court for quashing of the Notices and the Trade Circular issued by the Commissioner of Sales Tax on the basis of which Notices were issued, as their cases were live as on 11-8-1998.

Petitioners had relied on the following rulings in support of their plea that there is no transfer of property in ink and consumables in the jobs of printing in the contracts which were service contracts and passing of property if any is merely incidental and not intended at all:

1. R.M.D.C. Press (112 STC 30)

Respondents on the other hand had relied on the following judgments:

1. Sarvodaya Printing Press vs. State of Maharashtra (93 STC 387) as approved by the Supreme Court — There is transfer of property in ink.
2. Associated Cement Companies Ltd. vs. Commr. of Customers (124 STC 59) — Rainbow Colour Lab is no more good law as the same is over ruled by this judgment.
3. Matushree Textiles Ltd. (132 STC 539) — Transfer of property in colours and chemicals in the changed form of shade in the job of printing and dyeing of cloth.

High Court after considering rival submissions, in para 11 has held as under which is important:

“It goes without saying that in each case the nature of the contract and transaction has to be seen. This is possible only when the intention of the parties that too dominant intention is found out. The fact that in the execution of the contract for work some materials are used, and the property/goods so used, passes to the other party, the contractor undertaking to do the work will not necessarily be deemed on that count, to sell the materials. Whether or not and which part of the job work relates to that depends as mentioned hereinaabove on the nature of the transaction and what is dominant intention which has to be found out in each case in the light of its own facts.”

As the Writs were filed against the Notices and Assessments were yet to be taken up, the High Court dismissed the Writs but with the following directions to find out the dominant intention between the contracting parties:

“The concerned members of the Petitioners’ Association whose assessments proceedings have been initiated or likely to be initiated on the basis of Trade Circular, shall be free to raise all contentions including the applicability of the Act of 1989 and or otherwise also
whether the judgment of this Court in the Matushree Textiles Ltd., could be attracted or not on the facts of the concerned case. Obviously, in the said assessment proceedings, the concerned officer shall scrutinise the nature of the contract and find out the dominant intention between the contractor and the customer.”

Thus matters of printers doing job work of printing using ink on the paper supplied by their customers were kept open and not held as concluded on the basis of Matushree Textiles judgment in which R.M.D.C. Press Judgment of the Bombay High Court has been held as per incuriam.

From the above judgment of the High Court, ratio once again emerges that dominant intention has to be found in each case about intention to pass property in goods and because incidentally or ultimately property in some goods passes, there is always liability to Works Contract Tax on that count of transfer of property whether intended or not is not a good law. Thus even in cases of printers using ink, there can be cases where there may not be transfer in property in ink whereas in some other cases there may be transfer of property in ink. Thus even Matushree is not the last word so far some bald propositions stated in the judgment. Thus some latter judgment of printing press arising from assessment proceedings before High Court may settle the issue.

It is further understood that High Court has admitted the Writ filed by M/s. Balkrishna Industries who were also doing job work of dyeing and printing textiles and granted stay of the recovery of tax demanded by the Department. As Matushree Textiles is closed, no appeal is filed before the Supreme Court in the case of M/s. Matushree Textiles Ltd.
POSERS FOR GROUP DISCUSSION
Framed by Mr. T. M. Chhatpar, Chairman

1. What is the important point of distinction between ‘SALE’ as covered by B.S.T. Act, 1959 and ‘SALE’ as covered by the Maharashtra Works Contract Act, 1989?

2. Is the intention or rather dominant intention to transfer the property in the goods by contractor to employer an essential ingredient to term the transaction as a SALE liable to tax under the Maharashtra Works Contract Act, 1989?

3. Can it be said that when the transfer of property in goods is insignificant, there is no taxable event to levy tax under the Maharashtra Works Contract Act, 1989?

4. What is the real connotation of the phrase “transfer of property in goods (as goods or in some other form)” contemplated under the 46th Constitutional Amendment Act, which phrase is adopted as taxable event even in the Maharashtra Works Contract Act, 1989 also?

5. Can the interpretation placed by the Bombay High Court in the case of M/s. Matushree Textiles Ltd. on the above phrase that transfer of property in goods even in chemical form like colour or shade (effect of colour) takes place can be successfully challenged before the Supreme Court? If so what should be the line of reasoning to assail the interpretation according to you?
6. Can the consumables in which property in goods is held as not transferred by the Supreme Court in the case of M/s. Gannon Dunkerley & Co. vs. State of Rajasthan (88 STC 204) be restricted to water, electricity and fuel only and no other consumable? If answer is in the negative, then give illustrations of other consumables, property in which cannot be held as transferred.

7. Can it be successful argued before the High Court or at least before the Supreme Court that only such sales are liable to tax under the Works Contract Act in which there is transfer of property in goods in the execution of contract by theory of accretion to land, by accession to other goods of owner, which is worked upon, blending in the case of liquid goods belonging to owner. Thus, when there is no accession, accretion or blending, there cannot be a taxable event liable to tax under the Work Contract. In short in order that transaction of transfer should result in sale liable to tax under Works Contract Act, contractor has to necessarily work upon the materials goods, land of the owner?

8. Is it necessary for raising the presumption of transfer of property in goods the price of such goods should be specifically and separately stated in the contract, attributable to each of the goods separately?

9. Is it necessary that transfer of property in goods in which there is deemed sale of that goods should be a marketable commodity available in the market at the counter?
10. When department is following Matushree Textiles Ltd. and ACC Ltd. by taking as letter of the law (final word), which types of contracts will be now held by the department as offering taxable event under the Mah. Works Contract Act, which contracts even earlier were held as not offering taxable event even by the Commissioner in DDQ proceedings?

11. What is understood by the “Doctrine of Prospective overruling” which is exercised by the S.C. and referred to and discussed by the S.C. in the case of M/s. Somaiya Organics Ltd. 2001 (7) S.C. 1723 which doctrine has been now extended for granting relief by way of Trade Circulars issued by Commr. after S.C. Judgment in the case of M/s. ACC Ltd. and Matushree Textiles Ltd. by mentioning dates of 25-1-2001 and 11-8-1998 as cut off dates for relief?

12. What will be legal implications of payment of Works Contract Tax in the hands of a contractor who is awarded Road Contraction Contract by Govt. under B.O.O.T. (Built Own Operate Transfer) basis as distinguished from contract awarded under B.O.T. (Build Operate Transfer) basis?
LEASE ACT

1. **Bombay High Court decision in case of Commissioner of Sales Tax Vs. Duke & Sons Pvt. Ltd., (Bom.) [112 STC 375]**

In this case the assessee was a holder of Registered Trade Marks. It used to manufacture concentrates for manufacturing aerated waters, beverages, etc. and sell the same to bottlers in the State of Maharashtra as also outside the State of Maharashtra for use in the manufacture of aerated waters, beverages, etc. The assessee also used to permit its customers to market these beverages by using the trade marks of the assessee. The assessee collected royalty for the user of its trade mark by the customers for which he used to enter into agreements which were known as “Franchise Agreements”. The assessee entered into an agreement with one M/s. Sal Star Foods & Beverages Ltd., for use of its trade marks and recovered a royalty of Rs. 1,500/-. The authorities held that the said transaction is a ‘sale’ within the meaning of section 2(10) of the Maharashtra Sales Tax on the transfer of the right to use any goods for any purpose Act, 1985 and the assessee was liable to pay tax on the royalty received by it for the transfer of right to use trade mark.

It was the submission of the assessee that since the assessee had not given the possession of the trade mark to the transferee there cannot be any transfer of right to use property within the meaning of clause 10 of section 2 of the Transfer of right to use any goods for any purpose Act, 1985. In other words it was contended that the transfer of right to use the goods necessarily involves the transfer of possession of the property.

The Bombay High Court did not agree with the submission of the assessee and held that since the agreement was executed in Maharashtra the royalty received was taxable in the State of Maharashtra even though the physical possession of trade mark not given. The Maharashtra Sales Tax on the transfer of right to use any goods for any purpose Act, 1985 was enacted with a view to levy tax on transfer of right to use any goods for any purpose. The contention of the assessee that mere user of the trade mark without transfer of possession of the trade mark would not amount to transfer of right to use trade mark goes counter to the levy, scheme and object of 1985 Act. The manner of transfer of the right to use goods to the transferee would depend upon nature of the goods. In case of tangible property, handing over of the property to the transferee may be essential for the use thereof. For transfer of right to use a trade mark, permission in writing as required by law may be enough.

Therefore, after this decision of Bombay High Court the lease of intangible property such as trade mark would be taxable in the State in which agreement in writing is executed to permit the user of trade marks. Therefore, prima facie inter-State lease of trade mark do not appear to be feasible as there cannot be any physical movement of the trade mark from one State to another. However, in my opinion there can still be an inter-State lease in case of patents etc. also. One may say that so far as tangible goods are concerned physical movement of goods outside the State pursuant to contract can be proved and established and is a pre-condition for considering any transaction as amounting to inter-State sales but in respect of intangible goods like patent the same should be inferred by taking into consideration the overall intention of the parties and the terms and conditions of the contract. If suppose the transfer of right to use a patent is made to a manufacturer who is situated outside Maharashtra and who is going to use patent in the goods produced by it in its factory outside Maharashtra by executing a contract in the State of Maharashtra, under which both the parties have expressly agreed about the place of use. In this case it becomes clear that both parties to the contract contemplate use of patent in other State where the production of goods is taking place. Thus, movement of patent outside the State is inextricably connected with the contract to transfer the right to use
patent. In my humble opinion different yard stick can be applied in respect of intangible goods as compared to tangible goods as has been held by Bombay High Court in the case of Duke & Sons Pvt. Ltd.

2. **Supreme Court decision in the case of M/s 20th Century Finance Corporation (119 STC 182) [SC]**

In this case the Supreme Court held that the explanation to section 2(10) of the Maharashtra Act transgresses the limits of legislative power conferred on the State legislature under Entry 54 of List II and thus, directed that the explanation to section 2(10) of the Act shall be read down to the effect that it would not be applicable to the transaction of the transfer of right to use any goods if such deemed sale is – (i) an outside sale, (ii) sale in the course of the import of goods into or export of the goods out of the territory of the India and (iii) inter-State sale. The Supreme Court interpreted the exact scope of the 46th constitutional amendment with reference to the deemed sale of transfer of right to use goods. The conclusions of the Supreme Court are as under:

(a) The States are not competent to levy Sales Tax on the transfer of right to use goods, which is a deemed sale, if such sale takes place outside the State or is a sale in the course of inter-State trade or commerce or is a sale in the course of import or export.

(b) The appropriate legislature, by creation of legal fiction, can fix situs of sale. In the absence of any such legal fiction, the situs of sale in case of transaction of transfer of right to use any goods would be the place where the property in goods passes; i.e., where the written agreement transferring the right to use is executed.

(c) Where the goods are available for the transfer of right to use, the taxable event on the transfer of right to use any goods is on the transfer which results in right to use and the situs of sale would be the place where the contract is executed and not where the goods are located for use.

(d) In case where the goods are not in existence or where there is oral or implied transfer of right to use goods, such transactions may be effected by the delivery of goods. In such cases the taxable event would be on the delivery of goods.

Thus after this decision of the Supreme Court prima facie it appears that the delivery of goods to the hirer or the handing over of the possession to the hirer is not relevant and mere execution of agreement to transfer right to use is sufficient. The situs of the transaction has to be decided based on the place of execution of the agreement transferring the right. However, in my opinion it is not always correct. One will have to be careful before executing the agreement for transfer of right to use act. The Supreme Court has confirmed that sections 3, 4 and 5 of the Central Sales Tax Act are equally applicable to the Lease Act.

3. **The Supreme Court's decision in the case of State of Uttar Pradesh and another Vs. Union of India and Another (130 STC 1)**

In this case the Supreme Court held that the handing over of possession is not the sine qua non of completing the transfer of right to use any goods. Providing telephone services by Department of Telecommunications which comprises of allotment of number, installation of an instrument/apparatus and other appliances at the premises of the subscriber which are connected with telephone line to the area exchange to enable him to have access to the whole system, to dial and receive calls, in effect, falls within the meaning of sale; i.e., transfer of right to use any goods. The Court further held that the fact that it is described as service in the
Indian Telegraph Act, 1985 or under the Finance Act, 1994 (liable to Service Tax) doesn’t alter the position. Thus, once again the Court has held that there is no double taxation as tax on right to use and Service Tax are imposed by different authorities and for different purpose. Further it was held that double taxation is not expressly prohibited neither under the right to use Act or under the Service Tax Act nor under the Constitution of India.

Prima facie it appears that in the above judgement the Supreme Court has held that the concept of transfer of effective control is of no relevance. Prior to this judgement the Supreme Court in the case of *Andhra Pradesh vs. Rashtriya Ispat Nigam Ltd* (126STC 114) has held that "the effective control of the machinery even while the machinery was in use of the contractor was that of the respondent company, the contractor was not free to make use of the machinery for the works other than the projected work of the respondent or move it out during the period the machinery was in his use. The condition that the contractor would be responsible for the custody of the machinery while it was on the site did not militate against respondent possession and control of the machinery”.

If the position decided by the Supreme Court in the case of *State of UP vs. Union of India* (130 STC 1) is accepted then each and every person giving services to other with his own equipments also will be liable to tax. However, in my humble opinion this cannot be the spirit of the scope of the 46th constitutional amendment whereby the Entry 54 of List II was enlarged and the transfer of right to use any goods for any purposes was incorporated therein. If restricted meaning of the transfer of right is given then suppose a person executes an agreement for transfer of right to use an assets, however, refuses to give the delivery of the goods to the hirer, then the hirer cannot take any action against the hirer and yet will be required to pay the hire charges and the right to use tax to the owner of the goods. Certainly this cannot be the intention. It is the delivery or the possession of assets which will enable hirer to exercise the right effectively which are being transferred to him. The absence of such transfer of possession of the goods, will make the transfer of right to use any goods an absurdity and in practicable.

4. **Kerala High Court decision in the case of M/s. Alpha Clays vs. State of Kerala (Ker.) (135 STC 107).**

In this case the Kerala High Court has held that in order to fall within the expression “transfer of right to use goods” there must be parting with the possession of the goods for the limited period of its use by the owner in favour of the hirer. In other words so long as the effective control of the goods is with the dealer, the rent received from the hirer for use of the goods will not attract the provisions of the Act. In this case on behalf of the dealer it was argued that he had received the hire charges in respect of the excavator owned by it and used for excavating claiming of one S. However, the effective control of the excavator was always with the dealer and with the assessee had only paid hire charges and the portion of the expenses were incurred by the owner. Before the Kerala High Court the Supreme Court decision in the case of *20th Century Finance Corporation vs. State of Maharashtra* (119 STC 182) and the *State of UP vs. Union of India* (130 STC 1) were also cited and discussed. However, the Kerala High Court did not rely on the above judgements and held that parting of possession of the assets is necessary. It appears to me that the Kerala High Court has followed the Law in right spirit.
LEARNER LAW

1. As per Supreme Court judgement in the case of M/s. 20th Century Finance Corporation (119 STC 182), Situs of Sales effected by way of Transfer of Right to use Goods which are ascertained and are in existence, is the place where Lease Agreement is executed and not at the place where goods in respect of which right is transferred exist at the time of Agreement, or place where right to use goods is exercised by enjoyment of right. In the above ratio of the Supreme Court judgment holds good and is a good law even after amendment of C.S.T. Act, 1956 by Finance Act, 2002 w.e.f. 11-5-2002 where by section 2(g) of the Act, defining ‘Sale’ is amended to include ‘Transfer of right to use also as a deemed sale?

2. For deciding which state will be competent to levy C.S.T. on Inter-state Lease Transactions whether place of execution of agreement or place where goods exist at the time of agreement or place where right to use the goods is exercised and continued to be enjoyed are decisive factors?

3. Maharashtra Sales ax on the Transfer of Right to use any goods for any Purpose Act, 1985 has been enforced in the State of Maharashtra w.e.f. 1-10-1986. Sections 3(i) and (ii) of the Act have provided for incidence of tax and levy on right to use goods exercised or continued after 1-10-1986 in respect of Lease Agreement executed prior to 1-10-1986 (On going Lease Transactions on 1-10-1986 taxable) are the provisions of sections 3(i) and (ii) valid constitutionally? If not why?
4. By Act No. 29 of 1994 which is enforced w.e.f. 1-5-1994, section 4 of Maharashtra Sales Tax on Transfer of Right to use Act, 1985 has been amended to provide for exclusion of sales in respect of which goods are purchased from registered dealer under the Bombay Sales Tax Act, 1959 and tax has already been paid under the Act, from levy of tax, thus earning exemption. (Concept of Resale introduced in the Lease Act) whether scope of exclusion (resale) will be admissible only for sales out of R.D. Purchases effected after 1-5-1994 in case of Lease Agreement executed after 1-5-1994?

5. W.e.f. 1-5-2001, VAT is introduced in Lease Act in the State of Maharashtra so that even if an asset is purchased from a R.D. in the state of Maharashtra under the B.S.T. Act, 1959, Lease Tax will be payable and set off of tax paid under the B.S.T. Act is provided. A Lease agreement is executed in March 2001 in respect of asset purchased from R. D. for which 12 monthly rentals from March 2001 to February 2002 are payable. Assessing Authority allows rentals for the two months of March and April, 2001 as resales but levies tax on remaining 10 monthly rentals payable w.e.f. 1-5-2001 under VAT provisions. Is the action of assessing authority justified in law?

6. In case of Lease Agreement executed in one assessment period providing for 12 monthly rental which are spread over to next period of assessment also. Can all the 12 monthly rentals (including rentals due and payable in next period be taken as turnover of sales in the first period in which Lease Agreement is executed?

7. Can the right to use very same goods be transferred to more than one transferee simultaneously by a dealer under Lease Act and at the same time even dealer continuing to use the same goods along with many transferees?
8. For completing the transaction of Transfer of Right to use goods, whether giving of delivery and possession of goods in respect of which right to use is transferred is necessary in the light of various decisions referred to and discussed by the paper writer?

9. In the light of Supreme Court judgment in the case of State of U.P. vs. Union of India (130 STC 1) popularly known as D.O.T. case holding transactions of charging of Telephone Rentals for providing Telephone connection by giving access to telephone system connecting the subscriber with the other subscriber as liable to Lease Tax as transfer of right to use telephone system, rentals charged by M.T.N.L. and B.S.N.L. in the state of Maharashtra be subjected to tax after providing of residuary entry under the Lease Act or even prior to that? If so under which entry?

10. How will you justify levy of tax on SIM Card under the B.S.T. Act, 1959?

11. Can there be Transfer of Right to use goods in the course of inter-State (Inter-State leasing) in case of goods of incorporeal or intangible character liable to tax under the C.S.T. Act 1956?
1] Whether set off u/r 41D is available to a dealer, who has claimed exemption from payment of sales tax on sales of bakery products up to first 15 lakhs, on corresponding purchase of goods used in manufacturing of bakery products for balance sale of it in excess of first 15 lakhs, on which regular sales tax is paid?

2] From 1-7-2004, hotelier enjoys benefit of slab rates irrespective of their turnover of sales and purchases in previous year, subject to condition of disallowance of set off and non-collection of tax. Whether such dealer can claim set off u/r 41D in respect of purchase of goods, after crossing maximum turnover of sales of Rs. 50,00,000/- ? Can he collect sales tax also?

3] Restaurant (below 4 star) having monthly food sales of Rs. 1 crore (excluding resale of soft drinks/sweets etc.) has filed monthly returns for April 2004 to August 2004 by disclosing turnover and paid tax @ 12 % as per Notification Entry A-13(3). Taxes are charged separately in cash memos.

Is restaurant eligible for set off u/r 41D for the period 1-4-2004 to 31-5-2004 and / or 1-6-2004 to 31-3-2005? [Please refer to page 95 of T. M. Chhattpar’s Book on Taxation of Hoteliers (revised edition) wherein it is stated that no set off is available to a restaurant covered by Notification Entry A-13 (3)]
4] ‘Lactose BP’ is covered under excise chapter 17.05 as sugar but not covered by chapter for additional excise duty. What is the rate of tax payable on sale of it, when it is imported under drug license and sold to a licensed dealer or when it is sold to a non-licensed dealer?

5] TV tuner is covered by notification entry A-33 as specified computer accessories liable to concessional rate of tax @ 8% and also covered by notification entry A-131, liable to concessional rate of tax @ 4%. The assessing authority denied concession under notification entry A 131, as it is a general entry and granted concession under notification entry A-34 being a specific entry. Whether view of assessing authority is correct?

6] Company A is merged with company B. Both are registered under the BST and CST Acts. As per the merger scheme the appointed date of merger was 1-4-2002. The High Court has subsequently sanctioned the scheme by its order dated 13-1-2004. There are no inter-company transactions. Company A has already issued sales bills to out of Maharashtra dealers against C forms up to 8-3-2004.

a) Whether company A should apply for cancellation of its registration with effect from date of order; i.e., 13-1-2004 as per section 33C or can it apply for cancellation with effect from any administrative convenient date, say 31-1-2004 / 31-3-2004?

b) Suppose BST registration certificate of company A is cancelled with effect from 13-01-2004. Whether company B in whose hands sales effected by company A during the period 13-1-2004 to 31-3-2004 shall be included, will be entitled to concessional rate of tax on production of C forms received in the name of company A?
7] ‘A’ is a holder of registered trademark in respect of edible oil. ‘A’ has entered into agreement with ‘B’ for manufacture and supply of edible oil to ‘A’ and to put his registered trademark, by charging applicable tax. Accordingly ‘B’ sold entire edible oil manufactured by it to ‘A’ and put registered trademark held by ‘A’. Whether ‘A’ will get claim of resale u/s 8 of the BST Act?

8] Whether service tax collected will form part of contract value for the purpose of determination of composition @ 4% u/s. 6A of the Works Contract Act?

9] T Ltd. is a pharmaceuticals company engaged in a manufacture and supply of medicine. The company sold medicines to its distributors under condition of free replacement of medicines not sold to ultimate user till expiry dates. The company received Rs. 1,00,000/ worth medicines from the distributors in 2004-05, which were sold in 2002-03 and replaced the same. A) The company wants to know whether it should prepare bill showing value of such medicines? Or it should show as goods return and prepare a fresh bill by charging applicable sales tax? B) Whether it can claim set off under rule 41D in respect of such replacements ? C) Whether it can give Form C for its OMS purchases?
10] Whether diamonds can be purchased on F-13A for the purpose of studding on gold ornaments, and whether set off under any rule is available when purchased by paying tax and dispatched the gold ornaments to its OMS Branch?

11] Whether providing ring tones to a mobile user is liable to any sales tax? If yes, then what will be the rate of tax?

12] Whether agriculturist supplying its products in the course of inter-State trade is liable to pay CST?

13] Whether contract of spraying pesticides (Pest control) is subject to works contract tax?
14] For the purpose of service tax, a contractor has agreed to divide the contract value in two parts, one for supply of goods, another for labour. The assessing authority disallowed the claim of works contract on the ground of Tribunal judgment in case of NOCIL and levied sales tax on it. Whether the view of assessing authority is correct?

15] 'A' is registered in Gujarat and Mumbai also. He has imported goods invoiced at Gujarat but cleared it in Mumbai. He then brought sold the same goods to a Gujarat dealer by endorsing L/R while goods were in transit from Mumbai to Gujarat. In which State he will be liable to pay tax and under which Act?

16] Whether provision of cancellation of ex parte assessment order inserted recently applies to other allied Acts?

17] Whether ex parte assessment order can be challenged on the ground of excessive enhancement in turnover of sales and purchases, disallowance of other claims etc. made by the assessing authorities without any reasonable basis? For these purposes, is it necessary to produce books of account?
18] Whether, appeal lies to Tribunal against the order passed by AC in appeal, rejecting application for rectification of mistake u/s. 62 of the Act?

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19] Whether appeal can be filed against order of STO rejecting application for cancellation of ex parte assessment order?

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20] The Pvt. Ltd. Co. engaged in the business of development of real estate. The associate concern of the company is in the line of business of construction of theatre and exhibition of films. The group had jointly purchased development rights for and in respect of the plot of land. The construction company is entitled to construct shopping mall on ground floor, first floor and fourth floor whereas the theatre company is entitled to construct theatre on the second and third floor. For the purpose of development of the said property, both the companies have entered into a Memorandum of Understanding for sharing cost of the joint development on the basis of FSI used by them. Accordingly, construction company raised debit note on the theatre Company for re imbursement of construction expenses incurred amounting to Rs. 5,00,00,000/-. Whether the works contract tax is applicable to real estate development company in respect of amount received for reimbursement of expenses from theatre company?
21] A dealer is a manufacturer of gold ornaments. He purchases bullion against Form 31 and claims set off u/r. 41F. An exhibition is held at Delhi where he has booked a stall for exhibition cum sale of his ornaments. Whether sale of ornaments at Delhi exhibition would be liable to tax at Delhi under Delhi Sales Tax Act? Whether Purchase Tax u/s. 13AA is leviable on bullion used in manufacture of ornaments, which are sold at Delhi? Whether in such a case, set off u/r. 41F would be denied?

22] While passing the Assessment Order, purchase tax u/s. 13AA remained to be levied. Purchase Tax is levied by passing order u/s. 62. Whether non-levy of purchase tax can be considered as mistake apparent on record?

23] Whether a ground can be taken in appeal against an order passed u/s. 33(2) for claiming set off which has not been claimed in returns?

24] What is the rate of tax payable on sale of fabrics ready to stitch?
25) A dealer in the State of Maharashtra receives an order for sale of goods from located Hyderabad dealer. A sales bill is raised on Hyderabad party. Goods are purchased from Daman and are transferred from Daman to Hyderabad under instructions. The goods are tax free in Daman. Whether Daman dealer can issue Form E-1?

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26) A dealer imports goods and keeps it in a bonded warehouse. The goods are sold from the bonded warehouse to a party who in turn exports these goods. Whether such a sale by the importer is liable to sale tax?

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27) Whether glass and engraved glass are one and the same commodity for levy of sales tax?

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28) Ball pens and pens were exempted from tax on the condition that sales is by a Registered Dealer. If sold by an unregistered dealer, whether benefit of this or other notification was available?

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29] Dealer is selling readymade garments. With sale of readymade garments, one watch is given free. Whether providing free watch would be considered a sale? What would be tax implications if the watches were imported from China for this purpose only?

30] Packed material is sent for repacking in pouches. The pouches are manufactured by the repacker. Whether repacking would amount to sale under the BST Act or would it be covered under the Works Contract Act?

31] Dealer is a manufacturer of signboards. Based on specifications, the dealer manufactures the boards and installs them at various places. Whether the activity is a works contract or a sale?

32] The dealer is a reseller of plywood, sunmica etc. Out of these purchases the reseller has made furniture and used for the office. Afterwards the firm is dissolved. Furniture is sold to one of the partners who has started his business as proprietor in the same office. Whether this sale can be considered as resale or manufacture? Whether it would make any difference if it is taken over through capital account as final settlement?
33] Whether Profession Tax is payable in case of company, if in a particular year no business activity is carried on by the company after obtaining registration?

34] Whether set off is available on packing material purchased and used to pack the goods, which are exported out of India?

35] Restaurant (below 4 star) having monthly Food Sales of Rs. 10 lakhs (excluding Resale of Soft Drinks / Sweets etc) has filed monthly returns for April 2004 to July 2004 by disclosing turnover and paid tax @ 12% as per Notification Entry A-13(3) by calculating tax as per rule 46-A without disclosing the same in monthly returns. Taxes are not charged separately in cash memos. Please note that in Annual Return filed for 2003-04, 46-A deduction is shown and claimed. From 01.08.2004, Restaurant has paid taxes as per slabs (Notification Entry — A-13(1)]; i.e., Rs. 1 to 6 lakhs — 2.1% , next Rs. 4 lakhs — 4.3%.

Is return filed for August 2004 by applying slab rates [A-13(1)] Rs. 1 onwards correct?

Is it necessary to revise returns for April 2004 to July 2004 ? Is it possible to adjust excess tax paid (as per revised returns) against monthly tax payable for subsequent months?

Is restaurant eligible for set off u/r 41D for the period April 2004 to July 2004 and / or August 2004 to March 2005?
A company is engaged in the business of Leasing of Containers in Mumbai to various shipping Companies all over the world. It has its branches at Gujarat and Tamilnadu. It is in the business of operations lease of container boxes to their customers from various ports in India and overseas and simultaneously gives the customers the flexibility for off-hire of the containers at various ports in India and overseas. Typically the container boxes are purchased from foreign suppliers who position the containers wherever the leasing company wants them to be. These container boxes are exclusively used for shipment of cargo on the ships / vessels from one country to the other.

The container boxes so acquired and positioned are offered by the company on the basis of lease agreements which could be executed in India, U.A.E or any place in the world to its customers who could be foreign flag carriers or Indian registered entities. The customer picks up the container boxes at the locations where they are situated, which could be Navi Mumbai, Noida, Kandla or any port outside India such as Dubai, Sharjah and they could be off-hired at any of these locations.

The company raises bills on its customers on a monthly basis, charging them lease rentals in respect of the containers leased to them at the dollar rates fixed as per agreement on per day basis.

At the time of agreement the containers are not ascertained or not available for delivery. They are to be delivered at the destinations mentioned in the agreement as and when buyer intimates to the company. All containers are having separate distinct identification number, which is mentioned in every bill. The company on receipt of intimation from the hirer, delivers the container from various places situated in or out of India at the locations in or out of India. However the bills are prepared in India and payment is received in India either in rupees or in foreign currency.

QUERY:

With the above modus operandi, whether provisions of the Lease Sales Tax on the operating lease of container boxes to its customers applies in following specified cases:—

- When containers are delivered to a place in Indian State from a place outside India?
- When containers are delivered to a place in Indian State from the same State?
- When containers are delivered in an Indian State from another State?
- Whether it will make any difference in above cases if lease agreements are executed prior to 11-5-2002?