

(2014) 09 TP CK 0018

In the Tripura High Court

Case No : W.P. (C) Nos. 75 of 2013, 374 of 2006, 506 of 2012, 507 of 2012, 42 of 2013, 85 of 2013, 86 of 2013, 291 of 2013, 412 of 2013 and 84 of 2014

**Arun Kumar Sen VsGAIL (India) Limited
Oil Field Instrumentation (India) Ltd. VsThe State of Tripura
Swapan Kumar Pal VsOil and Natural Gas Corporation Ltd.**

Date of Decision : 10-09-2014

Acts Referred:

Constitution of India, 1950 — Article 246, 246(1), 366, 366(29A), 366(29-A)

Finance Act, 1994 — Section 65

Tripura Value Added Tax Act, 2004 — Section 2(36), 4, 4(2), 4(3)

Citation : (2014) 203 ECR 432 : (2015) 2 GLD 153 : (2014) 4 GLT 842

Hon'ble Judges : Deepak Gupta, C.J.;S.C. Das, J

Bench : Division Bench

Advocate : A.K. Bhowmik, Sr. Adv., A. Banik, A. Bhowmik, D. Debnath, M. Choudhury, R. Dutta and S. Chakraborty, Advocate for the Appellant; A.K. Saraf and S. Deb, Sr. Advs., D.C. Nath, P. Datta, P.B. Dhar, R. Dasgupta, S. Chatia and S. Dutta, Advocate for the Respondent

Judgement

Deepak Gupta, C.J.—The main issue involved in these writ petitions is whether the transactions entered into by the petitioners amount to transfer of right to use any goods and, therefore, they are exigible to tax in terms of Section 4(2) of the Tripura Value Added Tax Act, 2004 read with Rule 7 of the Tripura Value Added Tax Rules, 2005.

2. There are two types of contracts which we are dealing with. In W. P (C) No. 75 of 2013 the petitioner entered into a contract for hiring of mud logging services with the ONGC. As far as the mud logging services are concerned this involves specialized machines which have been deployed by the petitioners at sites identified by the ONGC and the petitioner uses these machines to drill and analyze the soil and then gives an opinion whether it is economically feasible to extract natural gas out of the soil. The contract was treated as a works contract and the State wants to levy VAT on the same.

3. In all other matters the vehicles have been hired by the ONGC or GAIL on certain terms and conditions, along with services of drivers etc. According to the petitioners it is entirely a service contract whereas according to the State it is an out and out contract for hire or transfer of right to use goods. It would be pertinent to mention that in all the cases the ONGC or GAIL deducted VAT at source from the bills of the petitioners showing the contracts to be work contracts within the meaning of Section 2(36) of the TVAT Act. All the petitioners urge that the contracts were not works contracts within the meaning of Section 2(36) of the TVAT Act and therefore, the deduction of tax was totally incorrect.

On the other hand, the stand of the State is that though the contracts may not be works contract they are still exigible to tax because by the contracts the "right to use goods" has been transferred.

4. At this stage it would be pertinent to refer Article 366(29A) of the Constitution of India which reads as follows:

"366(29A) tax on the sale or purchase of goods includes-

(a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;

(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) a tax on the delivery of goods on hire purchase or any system of payment by installments;

(d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

(f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration, and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made;"

5. The case of the State is that since a tax on the sale or purchase of goods includes in terms of sub-clause (d) of Article 366(29A) tax on the transfer of the right to use any goods for any purpose the petitioners are liable to pay value added tax on such transfer of right to use goods. The contention of the petitioners is that they have entered into a service contract and only the Union can levy tax on services and not the State. The petitioners have also urged that

they are paying service tax to the Central Government under the provisions of law and since they are paying service tax, if there is conflict between the Central Law and the State Act the Tripura Value Added Tax Act must necessarily give way to the provisions which provide for imposition of service tax in the Finance Act of 1994.

6. Before dealing with other issues it would be pertinent to mention that the Apex Court in *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, held that the State had no power to tax a composite contract of goods and services (works contract) to be taxed as sale of goods. The Court further held that the law also does not permit the severance of the contract for determining the value of the goods.

7. In view of this decision of the Apex Court, it was felt necessary to amend Constitution with a view to widen the definition of sale as traditionally understood. In common law, sale was understood to mean an agreement to transfer title in the goods on payment of consideration. The Constitution was amended and sub article (29A) was introduced in the Constitution by the Constitution Forty-sixth Amendment Act, 1982. By means of this Constitutional amendment, tax on the sale or purchase of goods now covered six more categories which may otherwise not have fallen within the definition of sale. Sub-clauses (a) to (f) to Clause 29A of Article 366 of the Constitution bring within the ambit of sale, transactions where one or more of the essential ingredients of sale as traditionally understood were absent. By legal fiction such transactions, transfers and supply of goods were deemed to be sale and purchase of the goods.

8. After amendment of the Constitution the Apex Court in *Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others*, dealing with works contracts held that only the value of the goods involved in the execution of works contract could be taxed and this would have to be determined by taking into account the value of the entire works contract after deducting therefrom the charges towards labour, services etc. The Apex Court in the *Second Gannon Dunkerley Case* concluded that only the value of the goods involved in the execution of a works contract were amenable to the provisions of the Sales Tax/VAT Act of the State.

9. In the cases before us the contracts are for hiring of goods and services. The stand of the State is that ONGC has exclusive use and right to use the goods involved in the contracts and therefore there is transfer of the right to use goods and as such tax is leviable u/s 4(3) of the TVAT Act read with Rule 7(2) of the Rules. It is further contended that in terms of Section 4(3) of the Act the person making payment on this account is bound to deduct tax as leviable under law. Section 4 of the TVAT Act reads as follows:

"4. Tax on deemed sales-(1) Notwithstanding anything contained elsewhere in this Act, any transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract shall be deemed to be a sale of those goods by the person making the transfer and shall liable to be taxed at

the rate specified in the Schedule:

Provided that in respect of any such transfer, only so much value of the goods involved in the works contract which has actually been paid to the dealer during the period, shall be taken into account for determining the turnover for the period.

Explanation:-For the purpose of this section, "Property in goods" shall mean the aggregate of the goods for which amounts have been received or receivable by a dealer during such period as valuable consideration, whether or not such amount has been separately shown in the works contract. The amount as received or receivable shall include the value of such goods purchased, manufactured, processed, or procured otherwise by the dealer, and the cost of freight or delivery as may be incurred by such dealer for carrying such goods to the place where these are used in execution of such works contract, but shall not include such portion of the aforesaid amounts as may be prescribed.

(2) Tax on transfer of the right to use any goods-Notwithstanding anything contained elsewhere in this Act, any transfer of the right to use any goods for any purpose (whether or not for a specified period) shall be taxable at the rate as specified in the Schedule.

(3) Deduction of tax at the time of payment-Every person responsible for paying) any sum to any person on account of works contract and right to use any goods for any purpose, shall at the time of credit of such sum to account of the person or at the time of payment thereof in cash or by issue of a cheque or draft or any other mode, deduct such amount towards sales tax (not being more than the total tax payable by the dealer) as may be prescribed."

Rule 7(2) of the TVAT Rules reads thus:

"7(2) Every person responsible for making payment to any person for discharge of any liability on account of valuable consideration payable for any transfer of the right to use any goods other than the goods in exempted list of the Act for any purpose (whether or not for a specified period) for cash or in any manner, shall at the time of making such payment deduct an amount at the rate as notified by the Government from time to time of the payment on account of such transfer of right: provided that till the Government notify the rate, the prevailing rate shall continue:

Provided no such deduction shall be made from the bill(s) or invoice(s) of the transferer where the amounts received as penalty for defaults in payment or as damages for any loss or damage caused to the goods by the person to whom such transfer was made, ****"

The main issue is whether there is a transfer of the right to use any goods or not?

10. A Constitution Bench of the Apex Court in 20th Century Finance Corpn. Ltd. and Another Vs. State of Maharashtra, dealt with the issue with regard to the

power of the State legislature to levy tax under Clause 29A(d) of Article 366 of the Constitution on the transfer of the right to use any goods. This is the leading judgment on the point. The following questions were framed by the Apex Court:

"The questions therefore, that arise for consideration in these cases are, whether a State can levy sales tax on transfer of right to use goods merely on the basis that the goods put to use are located within its State irrespective of the facts that--

(a) the contract of transfer of right to use has been executed outside the State:

(b) sale has taken place in the course of an inter-State trade; and

(c) sales are in the course of export or import into the territory of India.*****"

Answering this question the Apex Court held as follows:

"27. Article 366(29A)(d) further shows that levy of tax is not on use of goods but on the transfer of the right to use goods. The right to use goods accrues only on account of the transfer of right. In other words, right to use arises only on the transfer of such a right and unless there is transfer of right, the right to use does not arise. Therefore, it is the transfer which is sine qua non for the right to use any goods. If the goods are available, the transfer of the right to use takes place when the contract in respect thereof is executed. As soon as the contract is executed, the right is vested in the lessee. Thus, the situs of taxable event of such a tax would be the transfer which legally transfers the right to use goods. In other words, if the goods are available irrespective of the fact where the goods are located and a written contract is entered into between the parties, the taxable event on such a deemed sale would be the execution of the contract for the transfer of right to use goods. But in case of an oral or implied transfer of the right to use goods it may be effected by the delivery of the goods.

28. No authority of this Court has been shown on behalf of respondents that there would be no completed transfer of right to use goods unless the goods are delivered. Thus, the delivery of goods cannot constitute a basis for levy of tax on the transfer of right to use any goods. We are, therefore, of the view that where the goods are in existence, the taxable event on the transfer of the right to use goods occurs when a contract is executed between the lessor and the lessee and situs of sale of such a deemed sale would be the place where the contract in respect thereof is executed. Thus, where goods to be transferred are available and a written contract is executed between the parties, it is at that point situs of taxable event on the transfer of right to use goods would occur and situs of sale of such a transaction would be the place where the contract is executed."

According to the Apex Court the taxable event on the transfer of right to use goods would be the place where the contract is executed. In the case of M/s. Oil field Instrumentation (India) Ltd., the contract was executed in Maharashtra whereas in other cases the contracts were executed within Tripura.

11. The Apex Court in *M/s. Rainbow Colour Lab and Another Vs. The State of Madhya Pradesh and Others* [OVERRULED], was dealing with the issue as to whether the job rendered by a photographer in taking photographs, developing and printing films would amount to a works contract within the meaning of sub-clause (b) of Article 366 Clause 29A of the Constitution. It held as follows:

"Prior to the amendment of Article 366, in view of the judgment of this Court in *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, the States could not levy sales tax on sale of goods involved in a works contract because the contract was indivisible. All that has happened in law after the Forty-sixth Amendment and the judgment of this *Builders Association of India and Others Vs. Union of India (UOI) and Others*, is that it is now open to the States to divide the works contract into two separate contracts by a legal fiction: (i) contract for sale of goods involved in the said works contract, and (ii) for supply of labour and service. This division of contract under the amended law can be made only if the works contract involved a dominant intention to transfer the property in goods and not in contracts where the transfer in property takes place as an incident of contract of service.....What is pertinent to ascertain in this connection is what was the dominant intention of the contract...

....On facts as we have noticed that the work done by the photographer which as held by this Court in *The Assistant Sales Tax Officer and Others Vs. B.C. Came, Proprietor Came Photo Studio*, is only in the nature of a service contract not involving any sale of goods, we are of the opinion that the stand taken by the respondent State cannot be sustained".

However, this view taken in *Rainbow Colour Lab's* case was doubted in case of *M/s. Associated Cement Companies Ltd. Vs. Commissioner of Customs*, and the Apex Court observe as follows:

"The conclusion arrived at in *Rainbow Colour Lab Case*, in our opinion, runs counter to the express provision contained in Article 366(29-A) as also of the Constitution Bench decision of this court in *Builders Association of India and Others Vs. Union of India (UOI) and Others*,

12. In *State of Andhra Pradesh and Another Vs. Rashtriya Ispat Nigam Ltd.*, the Apex Court dealt with meaning of the phrase "transfer of right to use goods". In that case the *Rashtriya Ispat Nigam* was the owner of the *Visakhapatnam Steel Project*. It engaged various contractors to do the work and supplied sophisticated machines to the contractors for being used in execution of the contracted works. The *Rashtriya Ispat Nigam Ltd.* received hire charges for the same. The tax was levied on this transaction on the ground that there was a transfer of the right to use goods. The *Andhra Pradesh High Court* in its judgment held that there was no transfer of the right to use this machinery in favour of the contractor. While coming to this conclusion the *High Court of Andhra Pradesh* analysed the various clauses of the agreement and held that the contractors were not free to make use of the machinery for works other than the project work of the respondent or

move out the machinery during the period of contract. The Court went on to hold that the condition that the contractor would be responsible for the custody of the machinery while it was on the site did not militate against the possession and control of the Ispat Nigam over the property. The Apex Court upheld the judgment of the High Court of Andhra Pradesh.

13. In *Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others*, the Apex Court was dealing with the issue as to whether the transaction by which mobile phone connections are enjoyed is a sale or a service or both. The Apex Court held that if it was a sale only the State would be competent to levy sale tax on such a transaction under Entry 54 of List-II of the Seventh Schedule to the Constitution. If it was a service then the Central Government alone could levy service tax under Entry-97 of List-I or Entry-92-C of List-I after 2003. The Apex Court further held if the nature of the transaction has characteristics of both sale and service then the moot question would be whether legislative authorities could levy separate taxes together or only one of them. The Apex Court dealt with the following question:

"The principal question to be decided in these matters is the nature of the transaction by which mobile phone connections are enjoyed. Is it a sale or is it a service or is it both? If it is a sale then the States are legislatively competent to levy sales tax on the transaction under Entry 54 List II of the Seventh Schedule to the Constitution. If it is a service then the Central Government alone can levy service tax under Entry 97 of List I (or Entry 92C of List I after 2003). And if the nature of the transaction partakes of the character of both sale and service, then the moot question would be whether both legislative authorities could levy their separate taxes together or only one of them."

14. In the BSNL case the petitioners before the Supreme Court argued that they were only providing service and there was no transfer of right to use goods. On the other hand it was contended by the State that there was transfer of the right to use goods and hence the transactions should be treated to be sales and were amenable to sales tax. Dealing with sub clause (29A) of the Article 366 of the Constitution the Apex Court held as follows:

"41. Sub-clause (a) covers a situation where the consensual element is lacking. This normally takes place in an involuntary sale. Sub-clause (b) covers cases relating to works contracts. This was the particular fact situation which the Court was faced with in *Gannon Dunkerley* and which the Court had held was not a sale. The effect in law of a transfer of property in goods involved in the execution of the works contract was by this amendment deemed to be a sale. To that extent the decision in *Gannon Dunkerley* was directly overcome. Sub-clause (c) deals with hire purchase where the title to the goods is not transferred. Yet by fiction of law, it is treated as a sale. Similarly the title to the goods under Sub-clause (d) remains with the transferor who only transfers the right to use the goods to the purchaser. In other words, contrary to *A.V. Meiyappan* decision a lease of a negative print of a picture would be a sale. Sub-clause (e) covers

cases which in law may not have amounted to sale because the member of an incorporated association would have in a sense begun as both the supplier and the recipient of the supply of goods. Now such transactions are deemed sales. Sub-clause (f) pertains to contracts which had been held not to amount to sale in *State of Punjab vs. M/s. Associated Hotels of India Ltd.* (supra). That decision has by this clause been effectively legislatively invalidated.

42. All the sub-clauses of Article 366(29A) serve to bring transactions where one or more of the essential ingredients of a sale as defined in the Sale of Goods Act 1930 are absent, within the ambit of purchase and sales for the purposes of levy of sales tax. To this extent only is the principle enunciated in *Gannon Dunkerley* limited. The amendment especially allows specific composite contracts viz. works contracts (Sub-clause (b)), hire purchase contracts (Sub-clause (c)), catering contracts (Sub-clause (e)) by legal fiction to be divisible contracts where the sale element could be isolated and be subjected to sales tax.

43. *Gannon Dunkerley* survived the 46th Constitutional Amendment in two respects. First with regard to the definition of "sale" for the purposes of the Constitution in general and for the purposes of Entry 54 of List II in particular except to the extent that the clauses in Art. 366(29A) operate. By introducing separate categories of "deemed sales", the meaning of the word "goods" was not altered. Thus the definitions of the composite elements of a sale such as intention of the parties, goods, delivery etc. would continue to be defined according to known legal connotations. This does not mean that the content of the concepts remain static. The courts must move with the times. But the 46th Amendment does not give a licence, for example, to assume that a transaction is a sale and then to look around for what could be the goods. The word "goods" has not been altered by the 46th Amendment. That ingredient of a sale continues to have the same definition. The second respect in which *Gannon Dunkerley* has survived is with reference to the dominant nature test to be applied to a composite transaction not covered by Article 366(29A). Transactions which are mutant sales are limited to the clauses of Article 366(29A). All other transactions would have to qualify as sales within the meaning of Sales of Goods Act, 1930 for the purpose of levy of sales tax.

45. The reason why these services do not involve a sale for the purposes of Entry 54 of List II is, as we see it, for reasons ultimately attributable to the principles enunciated in *Gannon Dunkerley*'s case, namely, if there is an instrument of contract which may be composite in form in any case other than the exceptions in Article 366(29-A), unless the transaction in truth represents two distinct and separate contracts and is discernible as such, then the State would not have the power to separate the agreement to sell from the agreement to render service, and impose tax on the sale. The test therefore for composite contracts other than those mentioned in Article 366(29A) continues to be:-Did the parties have in mind or intend separate rights arising out of the sale of goods? If there was no such intention there is no sale even if the contract could be disintegrated. The

test for deciding whether a contract falls into one category or the other is to as what is "the substance of the contract". We will, for the want of a better phrase, call this the dominant nature test."

15. Thereafter the Court dealt with the question as to whether the dominant nature test would continue to apply even in respect of contracts falling within the ambit of Clause 29A of the Constitution. The Apex Court held as follows:

"49. We agree. After the 46th Amendment, the sale element of those contracts which are covered by the six sub-clauses of clause (29A) of Article 366 are separable and may be subjected to sales tax by the States under Entry 54 of List II and there is no question of the dominant nature test applying. Therefore when in 2005, C.K. Jidheesh Vs. Union of India (UOI) and Others, held that the aforesaid observations in M/s. Associated Cement Companies Ltd. Vs. Commissioner of Customs, were merely obiter and that M/s. Rainbow Colour Lab and Another Vs. The State of Madhya Pradesh and Others [OVERRULED], was still good law, it was not correct. It is necessary to note that Associated Cement did not say that in all cases of composite transactions the 46th Amendment would apply.

50. What are the "goods" in a sales transaction, therefore, remains primarily a matter of contract and intention. The seller and such purchaser would have to be ad idem as to the subject matter of sale or purchase. The Court would have to arrive at the conclusion as to what the parties had intended when they entered into a particular transaction of sale, as being the subject matter of sale or purchase. In arriving at a conclusion the Court would have to approach the matter from the point of view of a reasonable person of average intelligence."

As far as the present cases are concerned there can be no manner of doubt that both mud logging machinery and passenger cabs would be goods and there is no dispute on this count.

16. After referring to 20th Century Finance Corpn. Ltd. case the Apex Court went on to hold that the delivery of the goods was also an essential part of the right to transfer of the goods. The relevant observations are as follows:

"75. In our opinion, the essence of the right under Article 366(29A)(d) is that it relates to user of goods. It may be that the actual delivery of the goods is not necessary for effecting the transfer of the right to use the goods but the goods must be available at the time of transfer must be deliverable and delivered at some stage. It is assumed, at the time of execution of any agreement to transfer the right to use, that the goods are available and deliverable. If the goods, or what is claimed to be goods by the respondents, are not deliverable at all by the service providers to the subscribers, the question of the right to use those goods, would not arise."

17. BSNL case has been relied upon by both the parties and the opening portion of the judgment makes it clear that the State is competent to levy sales tax only

on the sale part of the contract and it is the Central Government alone it can only levied tax on the service part of the contract.

18. The other relevant judgment on the point is *Imagic Creative Pvt. Ltd. Vs. The Commissioner of Commercial Taxes and Others*, In this case, the appellant before the Apex Court was an advertisement agency. It had entered into a contract with ISRO for conceptualizing, designing and producing computer artwork. It also supplied the advertising material to its customers. It raised bills under two heads; (1) the bills raised for conceptualizing and designing were treated to be in the nature of service and service tax was paid on the same. (2) With regard to the goods it supplied to its customers, the company treated the said transaction as sale and paid sales tax on the same. When the matter came up before High Court it rejected the plea of the assessee holding that the contract was a comprehensive contract for supply of printed material developed by the company. The High Court held that the indivisible contract was divided by the company under different heads. The Apex Court after discussing all the relevant law on the point including the judgments which we have referred to hereinabove set aside the judgment of the High Court and held as follows:

"27. What, however, did not fall for consideration in any of the aforementioned decisions is the concept of works contract involving both service as also supply of goods constituting a sale. Both, in *Tata Consultancy Services Vs. State of Andhra Pradesh*, as also in *M/s. Associated Cement Companies Ltd. Vs. Commissioner of Customs*, what was in issue was the value of the goods and only for the said purpose, this Court went by the definition thereof both under the Customs Act as also the Sales Tax Act to hold that the same must have the attributes of its utility, capability of being bought and sold and capability of being transmitted, transferred, delivered, stored and possessed. As a software was found to be having the said attributes, they were held to be goods.

28. We have, however, a different problem at hand. The appellant admittedly is a service provider. When it provides for service, it is assessable to a tax known as service tax. Such tax is leviable by reason of a parliamentary statute. In the matter of interpretation of a taxing statute, as also other statutes where the applicability of Article 246 of the Constitution of India, read with the Seventh Schedule thereof is in question, the Court may have to take recourse to various theories including "aspect theory" as was noticed by this Court in *Federation of Hotel and Restaurant Association of India, etc., Vs. Union of India (UOI) and Others*,

29. If the submission of Mr. Hegde is accepted in its entirety, whereas on the one hand, the Central Government would be deprived of obtaining any tax whatsoever under the Finance Act, 1994, it is possible to arrive at a conclusion that no tax at all would be payable as the tax has been held to be an indivisible one. A distinction must be borne in mind between an indivisible contract and a composite contract. If in a contract, an element to provide service is contained, the purport and object for which the Constitution had to be amended and clause

(29A) had to be inserted in Article 366, must be kept in mind.

30. We have noticed hereinbefore that a legal fiction is created by reason of the said provision. Such a legal fiction, as is well known, should be applied only to the extent for which it was enacted. It, although must be given its full effect but the same would not mean that it should be applied beyond a point which was not contemplated by the legislature or which would lead to an anomaly or absurdity.

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

32. Payments of service tax as also VAT are mutually exclusive. Therefore, they should be held to be applicable having regard to the respective parameters of service tax and the sales tax as envisaged in a composite contract as contradistinguished from an indivisible contract. It may consist of different elements providing for attracting different nature of levy. It is, therefore, difficult to hold that in a case of this nature, sales tax would be payable on the value of the entire contract, irrespective of the element of service provided. The approach of the assessing authority, to us, thus, appears to be correct."

19. The Apex Court in BSNL's case clearly held that in a contract falling under Clause 29A of Article 366 of the Constitution the dominant nature test would not apply and the contract could be split up to determine the value of that part of the contract which amounted to services and that portion of the contract which amounted to a deemed sale. This aspect has been also explained in Imagic Creative(P) Ltd. case. The Apex Court has clearly taken a view that the service part of the contract cannot be taxed by the State. This view is in line with the view taken by the Apex Court in the Second Gannon Dunkerley Case.

20. The Delhi High Court in Commissioner, VAT, Trade and Taxes Department vrs. International Travel House Ltd. (Sale Tax Appeal No. 10 of 2009 decided on 8th September, 2009) reported in Commissioner, VAT, Trade and Taxes Department Vs. International Travel House Ltd., was dealing with a case wherein the International Travel House had entered into a contract with M/s. New Delhi Power Limited (NDPL) for hiring of Maruti Omni Cabs by the former to the latter. The conditions laid down provided that all the chauffeurs should wear uniforms and should know both Hindi and English. They should all have mobiles. The cars should be kept clean and the rates would be inclusive of fuel, maintenance and driving charges etc. There were many other conditions. The Division Bench of the Delhi High Court held that such a contract was in the nature of contract for service. Dealing with the Article 366(29A) of the Constitution the Delhi High Court held that only those contracts which fall within sub-clauses (a) to (f) of Article 366(29A) could be severed by the State to tax the sale element. Even in cases falling under sub clauses (a) to (f) of Article 366(29A) the Delhi High Court

held that only if it was the intention of the parties to sever the contract into two separate values in respect of goods and services could the contract be so divided. The Delhi High Court held as follows:

"10. Where the sale is distinctly discernible in the transaction i.e. the contracts are by intention of the parties severable so that there are separate values with respect to goods and services, only then one cannot deny the legislative competence of the State to levy sales tax on the value of the goods. This, however, does not allow the State to entrench upon the Union List and tax services by including the cost of such services in the value of goods. Even in the composite contracts which are by legal fiction deemed to be divisible under Article 366(29-A), the value of the goods involved in the execution of the whole transaction cannot be assessed to sales tax. Referring to the decision in *Gujarat Ambuja Cements Ltd. and Another Vs. Union of India (UOI) and Another*, it was held that mutual exclusivity which is referred to in Article 246(1) means that taxing entries must be construed so as to maintain exclusivity. Though liberal interpretation must be given to the taxing entries, however in substance if the statute is not referable to a field given to the State, then the Court will not by a principle of interpretation allow a statute to include in its field what is not covered in its field. The "aspect" theory (viz. the aspect of goods in composite contracts) would not apply to enable the value of the services to be included in the sale of the goods or the price of the goods in the value of the service.

11. The conclusion, therefore, which emerges with respect to the facts of the present case on applying the ratio of the BSNL's case is that, since the contract in question is a composite contract of sale of goods and services, clearly, it is not permissible for the State Legislature by applying DVAT Act to tax composite contracts comprising of both goods and services. Not only the contracts cannot be artificially split up so as to enable the sale element to be taxed, further, the States cannot treat the contract as only a contract of sale of goods and tax the whole value of the transaction as a sale of goods. Since the parties have not intended the contract to be mutilated/severable inasmuch as no different values are specified in the subject contract towards goods value separately and the value of services separately, it is not permissible by the DVAT Act to impose sales tax on the whole transaction value because that would amount to the State to entrench upon the Union List and tax services by including the cost of such services in the value of the goods. Thus, the contract in question being a composite contract is to be treated as a contract for services and no sales tax can be imposed on the contracts in question.*****"

The Delhi High Court thereafter went on to hold that there was no transfer of right to use goods because the control of the cabs remained with the owner.

21. Both sides have made reference to a number of decisions of the Gauhati High Court. In *Dipak Nath Vs. Oil and Natural Gas Corporation Ltd. and Others*, the petitioner had entered into a contract with the ONGC for hire of trucks, trailers, tankers and cranes to the ONGC. The question was whether by means of such

contract there was transfer of a right to use goods. After referring to a large number of conditions of the contract the Division Bench held that a reading of the core provisions of the terms of the contract indicated that insofar as the cranes are concerned they were under the control of the ONGC and therefore, it was the ONGC which had exclusive control and domain over the crane during the subsistence of the contract. The judgment in Dipak Nath's case was delivered on 25th November, 2009.

22. However, a learned Single Judge of the Gauhati High Court in D.P. Agarwala Vs. Oil and Natural Gas Corporation Ltd. and Others, took a different view. Here also the question was whether the contract for hiring of Hydraulic Cranes by the petitioner to the ONGC amounted to transfer of the right to use goods. After referring to various judgments including those referred to herein above the learned Single Judge made reference to the various portions of the contract and then went on to hold as follows:

"28. Axiomatically, therefore, the transactions in hand to be validly subjected to the levy under the Act would have essentially to be adjudged to constitute transfer of right to use the Cranes. In the event a service element is traceable therein and any intention whatsoever of the contracting parties to contemplate two independent agreements, i.e., one for transfer of right of use and the other for service with respective values attached thereto is lacking, the bargain would catapult beyond the purview of the Act, thus, rendering the same in exigible to tax thereunder. To reiterate, the learned counsel for the Revenue in course of the arguments on a dialectical scrutiny of the clauses of the contract agreements has admitted the same to constitute indivisible contracts.****"

However, dealing with the Dipak Nath's case the learned Single Judge held that the facts of that case were different and distinguished the said judgment.

23. A Division Bench of the Agartala Bench of the Gauhati High Court dealt with a similar question in HLS Asia Limited Vs. The State of Tripura and Oil and Natural Gas Corporation Ltd., In this case, the Court was dealing with a case where the contract was for well logging, perforating and other wire line services and the question was whether such a transaction amounts to transfer of right to use any goods. The Division Bench held as follows:

"47. Of all the different kinds of composite transactions, the drafters of the Forty-sixth Amendment chose three specific situations, a "works contract", a "hire-purchase" contract and a "catering contract" to bring them within the fiction of a "deemed sale". Of these three, the first and third, namely, "works contract" and "catering contract" involve a kind of "service" and "sale" at the same time. Apart from these two cases, covered by sub-clauses (b) and (f) of clause (29A) of article 366, where splitting of the service and supply has been constitutionally permitted, there is no other service, which has been permitted to be so split. If there is an instrument of contract, which may be composite, in form, in any case other than the exceptions, which article 366(29A) makes, the State would have

no power to separate the agreement to sell from the agreement to render service, and thereby impose tax on the component of "sale" unless the transaction, in truth, represents two distinct and separate contracts and is discernible as such.

48. In other words, if a contract is a composite contract for the sale of goods and services, it is not permissible for State Legislature to tax composite contracts comprising of both, "sales" and "services". Not only the contracts cannot be artificially split up so as to enable the sale element to be taxed, the State cannot treat the contract as only a contract of sale of goods and tax thereby the whole value of the transaction as a sale of goods. Thus, a composite contract of sale of goods and service, i.e., consisting of both transfer of right to use and of rendering of service, has to be treated as a contract of service and no sales tax can be imposed on such a type of contract. This takes us to the question as to whether the contract, in the present case, is a contract for transfer of right to use goods. ****"

We are not in total agreement with this judgment especially in view of the law laid down in Imagic Creative(P) Ltd. case which has not considered by the Division Bench. However, we are clearly of the view that the State will be entitled to levy tax only if the sale portion of the contract can be ascertained with exactitude.

24. In HLS Asia Limited Vs. The State of Tripura and Oil and Natural Gas Corporation Ltd., another Division Bench of the Agartala Bench of the Gauhati High Court of which one of us (S.C. Das, J) is the author was dealing with a matter relating to well logging perforating and other wire line services and it was held that the petitioner was a service provider and could not be compelled to be registered as a dealer under the TVAT Act.

25. On the contrary, in two other Division Bench judgments of the Gauhati High Court in Motlib Ali Vrs. ONGC and others (W.P. (C) No. 5280 of 2011 decided on 24.07.2012) and M/s. Brahmaputra Valley Construction and Suppliers Vrs. ONGC and others (W.P. (C) No. 578 of 2009 delivered on 24.07.2012) the Court has come to the conclusion that on consideration of various factors the transaction clearly involved, a transaction for right to use.

26. Coming to the facts of the present case, we shall first deal with the W.P. (C) No. 75 of 2013 which relates to mud logging services. The NIT was flouted on all India basis at Bombay and the contract was entered into at Bombay. The ONGC was desirous of hiring number of mud logging units along with services of the contractors. The relevant portions of the contract and the terms and conditions are as follows:

"1.5 CONTRACTOR'S Crew.

a) for Segment I: Crew for each Mud Logging Unit consists of 2(two) Mud Loggers, 1(One) Maintenance Engineer, 1(One) Sample catcher (Sample catcher

deployment during operating mode only), with requisite qualifications and experience as per Scope of Work to perform work are to be provided by the CONTRACTOR.

b) for segment II & III: Crew for each Mud Logging Unit consists of 2(two) Mud Loggers, 1(one) Maintenance Engineer, 2(two) Sample catcher (Sample catcher as and when required) with requisite qualifications and experience as per Scope of Work to perform work are to be provided by the CONTRACTOR.

1.6 CONTRACTOR's Service Personnel are Experts, Consultants, AC Mechanics, Painters, Welders, etc to ensure uninterrupted Work, on as and when required basis and are provided by the CONTRACTOR. These personnel are not covered under CONTRACTOR's Crew and are not eligible for any Charges whatsoever.

1.7 Installation/Rig Up means any equipment or sensor/detector of the Mud Logging Unit shall be considered to be installed if it provides data and/or service on board rig as per Scope or Work.

1. No. of Mud Logging Units:

1.1 The Contract is for Hiring of 11 Nos. 8 Nos. & 7 Nos. of Mud Logging Units in Segment-I, Segment-II & Segment-III respectively along with the services of the CONTRACTOR'S crew for carrying out the Work in Indian Offshore and Onshore locations.

1.1 The Corporation reserves the right to increase or decrease the No. of Mud Logging Units at its sole discretion during the tenure of the Contract depending upon its operational need within the maximum number of awarded units. However the hiring period of subsequently mobilized equipment shall be co-terminus with the initially mobilized equipment."

4. Crew:

4.1 The CORPORATION's representative shall interview the CONTRACTOR's crew prior to issuance of Non-Employee Duty (NED) passes and deployment on any Mud Logging Unit.

4.2 During the tenure of the Contract, the approved CONTRACTOR's crew will not be changed. However, in case the CONTRACTOR requires any change in its crew, then equivalent substitute needs to be provided. In such cases, the above condition at Clause No. 4.1 shall apply.

5. Pre-inspection:

5.1 The CONTRACTOR, in the beginning of the Contract, shall offer the Mud Logging Units asked to be mobilized initially for inspection at its premises sufficiently in advance prior to scheduled date of mobilization as per initial mobilization order from ONGC and inform the Corporation, 7(seven) days in advance for inspection. CONTRACTOR is responsible for equipments mobilization at ONGC base within 70 days from the date of issue of Mobilization Order or on

mobilization date indicated on order (beyond 70 days) from ONGC.

Contractors responsibility have also been mentioned and the contractor is responsible for carrying out preventive and back ground maintenance. Clauses 21 and 23 read as follows:

21. Exclusive Responsibility:

In the performance of the Work, the CONTRACTOR is an independent contractor and shall be exclusively responsible for the means, manner and method of performing such Work, with the exclusive direction and control of and responsibility for and to its personnel, taking into account any instructions and/or guidelines from the CORPORATION.

23. Independent Contractor:

23.1 The CONTRACTOR shall act as an independent CONTRACTOR while performing the Work.

23.2 All employees, representatives or subcontractors engaged by the CONTRACTOR in performing the Work shall be under the complete control of the CONTRACTOR and shall not be deemed to be employees of the CORPORATION.

23.3 The CONTRACTOR shall be solely responsible for the acts, defaults or negligence of the CONTRACTOR's crew, its service personnel, its representatives and/or its sub contractor's personnel."

Relevant portion of Clauses 33, 35.6 read as follows:

33. Liquidated Damages:

33.1 The essence of the Contract is timely mobilization, installation and commissioning of Mud Logging Units and maintaining the Working efficiency to 100% during the tenure of the Contract.

33.3.2 Terminate the Contract or de-hire Mud Logging Unit along with the services of crew without a show cause notice to the CONTRACTOR.

35.6 Termination due to transfer of ownership and assignment:

The CORPORATION may at its absolute discretion terminate the Contract in case, the CONTRACTOR'S rights and/or obligations under the Contract and/or CONTRACTOR'S title and interest to the Mud Logging Unit are transferred or assigned without the CORPORATION'S consent. *****"

27. As far as this contract is concerned the mud logging units for the period of the contract can be used only by the ONGC. The contractor cannot even use the same for his own work. They have to be deployed as and where the ONGC directs them to be deployed. However, we cannot lose sight of the fact that these units have been hired along with the services of the contractor's crew and the responsibility of employing a proper crew, paying them and maintaining the mud

logging units is that of the contractor. The corporation can interview the contractor's crew prior to issuing of passes and the crew cannot be changed without the permission of the corporation but it is the responsibility of the contractor to maintain the mud logging units, pay the crew and arrange for the lodging, boarding and transportation of the crew of the contractor. The contractor is responsible for a large number of things and therefore, this is a contract which has both elements. It is a contract for hiring of the mud logging unit, but it is also a contract for hiring the services of the crew of the mud logging unit. The crew is a well trained crew which has to carry out scientific investigation, analyze the soil and then determine whether it is economically feasible to extract gas from the area or not.

28. The rates schedule for payment reads as follows:

PRICE SCHEDULE FOR SEGMENTATION (ONLAND NORTH EAST AREAS) TOTAL NUMBER OF UNITS ORDERED 7 NOS.

Conditions: 1. Rates should be inclusive of all taxes and duties except service tax. Service tax will be paid by the bidder and claimed in the invoices, if applicable.

2. Unit along with crew can be deployed in any area in the segment.

3. Equipments can be deployed in PEL/ML areas & Non PEL/ML area as per operational requirement on same rates, terms and conditions.

4. All charges will be paid after successful installation & commissioning of MLUs.

5. If at the time of release of MLU for next location, states of MLU is in breakdown mode, then Unit will remain in breakdown mode till it is installed, commissioned and drilling operations commences at next location.

6. Insurance of equipment & personnel of the contractor will be contractor's responsibility."

29. The first condition of the rate schedule shows that service tax is to be paid by the bidder but the bidder can claim it from the ONGC. It is not disputed that service tax has been paid on all the payments made. It is urged by Dr. Saraf, learned Sr. counsel for the State that only element "E" is a service and the rest is only hiring charges. We are unable to agree with this submission. Under element "A" the mobilization charges include the charges for crew, expertise, consultancy, maintenance, spares and all taxes excepts service tax. These are elements of service and not only transfer in the right to use goods. Similar language is employed in Elements "B", "C", "D" and "F". Under element "G" service tax if payable has to be in addition to the contractor. As pointed above, service tax is actually being paid.

30. As has been held by the Apex Court either a transaction shall be exigible to sales tax/VAT or it shall be exigible to service tax. Both the taxes are mutually exclusive. Whereas sales tax and value added tax can be levied on sales and

deemed sales only by the State, it is only the Central Government which can levy service tax. No person can be directed to pay both sales tax and service tax on the same transaction. The intention of the parties is clearly to treat the agreement as a service agreement and not a transfer of right to use of goods. We are also clearly of the view that it is impossible from the terms of the contract to divide the contract into two portions and since the petitioners have paid service tax they cannot be also asked to pay value added tax. As held by the Delhi High Court in *Commissioner, VAT, Trade and Taxes Department vrs. International Travel House Ltd.* (supra), if there is a conflict between the Central law and the State Act then the Central law must prevail. The petitioner or the ONGC cannot be burdened with two different taxes for the same transaction.

31. After carefully going through the contracts, as we have held above, there is both an element of service and transfer of right to use goods. It however appears to us that the pre-dominant portion of the contract relates to hiring of services and not to transfer of right to use the goods. We are aware that the dominant nature test is not to be used in composite contracts falling within the ambit of Article 366(29A) but from the reading of the contract it is more than apparent that the intention of the parties was to treat the contract as a contract for hiring of services. Moreover, it is impossible to divide the contract into two separate portions. Every element of the mud logging contract contains a major element of provisions of services. In such an eventuality it is virtually impossible to divide the contract. It is not possible to work out the value of the right to use goods transferred under the contract. In cases, where the contracts are easily divisible or where the parties have by agreement clearly indicated what is value of the service part and what is value of the transfer of right to use goods part, the contract may be divided. We are in agreement with the Delhi High Court that when the contract cannot be divided with exactitude then the Central Law must prevail.

32. Parties have also been paying service tax and if the State is allowed to tax any portion of the value of the contract then there has to be a proportionate refund of the service tax to that extent. This cannot be done without hearing the Union of India. If there is any dispute between the State or the Union of India then they must resolve it between themselves. The petitioners or the ONGC cannot be made liable to pay both the taxes for the same transaction. It is for the State in consultation with the Union of India to come up with the scheme whereby such contracts may be divided but in the absence of any such provision we are clearly of the view that the State has no jurisdiction to levy tax on such a transaction. While holding so we are also influenced by the judgment in *20th Century Finance Corpn. Ltd.* (supra) that the situs where such a transaction can be taxed would be the place where the agreement was entered and not where the goods were delivered.

33. As far as the remaining cases are concerned they all relate to hiring of vehicles. The contracts in question fall totally within the ambit of rent-a-cab

operator services as per Section 65 of the Finance Act, 1994 as amended under the Rent-a-Cab operator service with effect from 16.07.1997. By operation of law such services of renting-a-cab have been brought within the ambit of service tax. This is a Central law which governs the field and renting of cab services has been held to be a service amenable to service tax. The consistent view is that where vehicles are rented out with or without drivers they are amenable to service tax and therefore, no sales tax or VAT can be levied on such transaction.

34. In view of the above discussion, we are clearly of the view that all the writ petitions have to be allowed. The State is not entitled to levy any sales tax or Value Added Tax on the transactions in question. It is, therefore, directed that the amount of tax, already deducted and received by the State shall be refunded to the petitioners along with statutory interest latest by 31st December, 2014. In case the amount is not refunded by that date then the State shall be liable to pay interest @12% per annum with effect from 1st January, 2015.

35. All the petitions are disposed of in the aforesaid terms. No order as to costs.