

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE ANTONY DOMINIC
&
THE HONOURABLE MR. JUSTICE SHAJI P. CHALY

FRIDAY, THE 31ST DAY OF JULY 2015/9TH SRAVANA, 1937

O.T.Rev.No. 103 of 2012 ()

AGAINST THE ORDER IN T.A. NO. (VAT) 974/2011 of KERALA VAT APPELLATE TRIBUNAL,
ERNAKULAM DATED 29-06-2012.

REVISION PETITIONER(S)/PETITIONER/ASSESSEE:

M/S.DELTA COMMUNICATIONS,
ADAM TOWERS, STAR JUNCTION,
KOTTAYAM-1, REPRESENTED BY H.A. JALEEL
ITS MANAGING PARTNER.

BY ADVS.DR.K.B.MUHAMED KUTTY (SR.)
SRI.SUNIL V.MOHAMMED
SRI.K.M.FIROZ

RESPONDENT/RESPONDENT/REVENUE:

THE STATE OF KERALA,
REPRESENTED BY THE SECRETARY TO GOVERNMENT,
TAXES DEPARTMENT, SECRETARIAT,
THIRUVANANTHAPURAM.

BY SENIOR GOVERNMENT PLEADER, SRI. LIJU STEPHEN

THIS OTHER TAX REVISION (VAT) HAVING BEEN FINALLY HEARD ON
16-07-2015, THE COURT ON 31.07.2015 PASSED THE FOLLOWING:

P.T.O.

APPENDIX

REVISION PETITIONER'S ANNEXURES:

- ANNEXURE-A: TRUE COPY OF THE ASSESSMENT ORDER DATED 03.06.2010 FOR THE ASSESSMENT YEAR 2007-2008.
- ANNEXURE-B: TRUE COPY OF THE FIRST APPEAL ORDER DATED 3.2.2011 FOR THE ASSESSMENT YEAR 2007-2008.
- ANNEXURE-C: TRUE COPY OF THE TRIBUNAL APPEAL ORDER DATED 29.06.2012 FOR THE ASSESSMENT YEAR 2007-2008.
- ANNEXURE-D: TRUE COPY OF THE SAMPLE COPY OF THE WORK ORDER PLACED BY M/S. RELIANCE COMMUNICATIONS LIMITED DATED 19.05.2007.

RESPONDENT'S ANNEXURES: NIL

//TRUE COPY//

P.S. TO JUDGE

St/-

**ANTONY DOMINIC
&
SHAJI P. CHALY, JJ.**

O.T.Rev.No.103 of 2012

Dated this the 31st day of July, 2015

ORDER

Shaji P. Chaly, J.

This revision is preferred by the assessee against the order dated 29.06.2012 in T.A.No.(VAT) No.974/2011 of the Kerala Value Added Tax Appellate Tribunal, Ernakulam. The Appellate Tribunal dismissed the appeal preferred by the revision petitioner and affirmed the order passed by the 1st Appellate Authority.

2. Brief facts relevant for the disposal of the revision are stated hereunder:

The revision petitioner is a partnership firm engaged in the business of outdoor marketing media at Kottayam. The advertisements are displayed in hoardings for the above purpose. The appellant acquires land on lease in various places in the State of Kerala, and structures are erected on the property taken on lease. Thereafter, hoardings are fixed on this structure and it is let out to various companies for

advertising their products. The revision petitioner receives rental charges for letting out the hoardings. During the year 2007-2008, the revision petitioner received rental charges amounting to Rs.36,70,983/-.

3. The Assessing Officer held that the revision petitioner is liable to pay tax under the Kerala Value Added Tax Act, 2003 (hereinafter 'the Act' for short), on rental charges received during the aforesaid return period. In arriving at the conclusion, the Assessing Officer placed reliance on the decision of the West Bengal Taxation Tribunal in '**Selvel Advertising Private Ltd. and Another v. Commercial Tax Officer**' [(1993) 89 STC 1] and BSNL v. Union of India reported in (2006) 14 KTR 115 = [(2006) 3 SCC 1]. Therefore, after making addition of 10% for probable omission and suppression to the rental amount received during the year, the total taxable turnover was fixed at Rs.40,38,081/- and the turnover was assessed at the rate of 4% as provided under the Act.

4. Aggrieved, the assessee preferred appeal before the First Appellate Authority, which affirmed the findings of the Assessing Officer and held that the revision petitioner was

liable to tax under the Act on rental charges received for letting out the hoardings by applying the dictum laid down by the Hon'ble Apex Court in '**Bharat Sanchar Nigam Ltd. and Another v. Union of India and Others**' [(2006) 14 KTR 115] = [(2006) 3 SCC 1].

5. Aggrieved, the assessee preferred appeal before the Appellate Tribunal. The learned Tribunal, after taking into account the elaborate contentions put forth by the revision petitioner and after evaluating the various authoritative pronouncements of the Hon'ble Apex Court as well as the High Courts, came to the conclusion that the order of the First Appellate Authority holding the revision petitioner liable to tax under the Act was correct. It is thus aggrieved by the order of the Appellate Tribunal this revision is preferred by the assessee.

6. The following questions of law are raised by the revision petitioner before us:

"i) Whether on the facts and in the circumstances of the case since structures which are permanently attached and fastened on earth are immovable property, can such structures be considered as 'goods' within the meaning of the said term under the provisions of the KVAT Act.

ii) Whether on the facts and in the circumstances of the case, the Appellate Tribunal is justified in holding the Revision Petitioner liable to pay tax on the ground that effective control of the hoarding was with the hirer even though the custody of hoarding was with the Revision Petitioner? Whether the Appellate Tribunal is justified in holding that the custody of the hoarding was with the Revision Petitioner and the effective control of the hoarding was with the hirer?

iii) The Appellate Tribunal is justified in holding the view without properly appreciating the transaction and terms of the charges received by the revision petitioner is liable to be taxed under Section 6(1)(c) of the Kerala Value Added Tax Act for the reason stated by it?

iv) Is not the decision of the Appellate Tribunal unsustainable in law in the light of the various decisions of the Hon'ble Supreme Court and the High Court governing the issue?

v) Whether the additions sustained are sustainable in law?"

7. Heard Sri. Sunil V. Mohammed, learned counsel for the revision petitioner and Sri. Liju Stephen, learned Senior Government Pleader appearing for the Respondent.

8. The learned counsel for the revision petitioner contended that in order to attract liability for tax under Sec.6 (1)(c) of the Act, the paramount consideration should be

whether there is 'goods' as defined under the Act available for transferring the right to use. He contended that so far as the structures involved in this case are concerned, the same are immovable properties attached to earth and therefore cannot be termed as 'goods' as defined under the Act. Inviting our attention to Annexure-D work order issued by one company to the revision petitioner, he contended that the effective control of the hoardings still vested with the revision petitioner, the same being an immovable property and therefore there is no transfer of 'goods' to the lessee. It is his further contention that in order to make a product taxable under 6(1)(c) of the Act, same should be goods, which is capable of being handed over or delivered. Further during the course of dismantling the structure, damage should not be caused to the said structure and it should be easily removable from one location to another, contended the revision petitioner. Therefore, according to the counsel, considering the nature of the installation involved in a hoarding, the same can never be treated as 'goods' as defined under the Act and therefore is not exigible to tax.

9. In order to substantiate the said contention put forth by him, learned counsel has brought to our notice the decision rendered by the Hon'ble Supreme Court in '**T.T.G. Industries Ltd., Madras v. Collector of Central Excise, Raipur**' [(2004) 4 SCC 751] and '**Mittal Engineering Works (P) Ltd. v. Collector of Central Excise, Meerut**' [(1997) 1 SCC 203]. In the first case cited above, the question considered was whether the assessee therein was liable to excise duty taking into account the nature of installation of a large machinery in the factory premises and further, if it was an immovable property, whether the assessee was liable to be levied excise duty. Therein, the Hon'ble Apex Court after evaluating the facts and circumstances of the case has held in paragraph 27 as follows:

"27. Keeping in view the principles laid down in the judgments noticed above, and having regard to the facts of this case, we have no doubt in our mind that the mudguns and the drilling machines erected at site by the appellant on a specially made concrete platform at a level of 25 feet above the ground on a base plate secured to the concrete platform, brought into existence not excisable goods but immovable property which could not be shifted without first dismantling it and then re-erecting it at another site. We have earlier noticed the

*processes involved and the manner in which the equipments were assembled and erected. We have also noticed the volume of the machines concerned and their weight. Taking all these facts into consideration and having regard to the nature of structure erected for basing these machines, we are satisfied that the judicial member of CEGAT was right in reaching the conclusion that what ultimately emerged as a result of processes undertaken and erections done cannot be described as "goods" ⁷⁶⁴ within the meaning of the Excise Act and exigible to excise duty. We find considerable similarity of facts of the case in hand and the facts in *Mittal Engg.*⁴ and *Quality Steel Tubes*⁵ and the principles underlying those decisions must apply to the facts of the case in hand. It cannot be disputed that such drilling machines and mudguns are not equipments which are usually shifted from one place to another, nor is it practicable to shift them frequently. Counsel for the appellant submitted before us that once they are erected and assembled they continue to operate from where they are positioned till such time as they are worn out or discarded. According to him they really become a component of the plant and machinery because without their aid a blast furnace cannot operate. It is not necessary for us to express any opinion as to whether the mudguns and the drilling machines are really a component of the plant and machinery of the steel plant, but we are satisfied that having regard to the manner in which these machines are erected and installed upon concrete structures, they do not answer the description*

of "goods" within the meaning of the term in the Excise Act."

10. According to us, the facts of the case will reveal that the machinery as such was erected to a platform by bringing a part of the machinery from outside and rest of the parts were erected within the factory premises making it a very cumbersome procedure which made the machinery itself attached to earth and it was in that factual situation, the Hon'ble Apex Court has held that the machinery is attached to earth and therefore an immovable property which was not exigible to excise duty. Same is the case in the decision cited second *supra* wherein also the procedure of erection of the machinery was very cumbersome and therefore the Hon'ble Apex Court has held that the same is an immovable property attached to earth and held in paragraph 10 as follows:

"10. The Tribunal took an unreasonable view of the evidence. It was the case of the appellants, not disputed by the Revenue, that mono vertical crystallisers were delivered to the customers in a knocked-down condition and had to be assembled and erected at the customers' factory. Such assembly and erection was done either by the appellants or by the customer. Where it was done by the appellants, fabrication materials of the customer were used and the customer sent to the appellants debit

notes in regard to their value. Where the assembly and erection was done by the customer, there was no occasion for it to send to the appellants a debit note. The fact that there was no debit note in respect of one customer could not reasonably have led the Tribunal to conclude that in the case of that customer a complete mono vertical crystalliser had left the appellants' factory and that, therefore, mono vertical crystallisers were marketable. The Tribunal ought to have remembered that the record showed that mono vertical crystallisers had, apart from assembly, to be erected and attached by foundations to the earth and, therefore, were not, in any event, marketable as they were."

11. On the other hand, the learned Senior Government Pleader has brought to our notice the judgments in '**Perumal Naicker v. T.Ramaswami Kone and Another**' [AIR 1969 Mad. 346] and '**Edmund Francis Heberlet v. Fatima Khatoon**' [AIR 2011 Cal. 13] to substantiate the contention that what was erected by the revision petitioner is not an immovable property attached to the earth.

12. In the above referred cases, the nature of immovable property was considered taking into account Sec.3 of the Transfer of Property Act and also the nature of structure put up was considered in order to evaluate the situation in the light of Sec.108 of the T.P. Act respectively. In the first of the

decision cited *supra* in paragraph 3, the Madras High Court has considered the concept of immovable property as the term is defined in three enactments, that is 1) General Clauses Act 2) Registration Act and 3) Transfer of Property Act and the Court has held that the first two are not of much assistance, for they merely say that 'immovable property includes things attached to the earth, or permanently fastened to anything attached to earth. These decisions do not give any guidance as to what is meant by 'attached' or 'permanently fastened to earth'. Section 3 of the third enactment describes what is meant by 'attached to the earth', to wit, (a) rooted in the earth as in the case of trees and shrubs; (b) imbedded in the earth, as in the case of walls or buildings; or (c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached. Broadly speaking, the degree, manner, extent and strength of the attachment of the chattel to the earth or building, are the main features to be regarded. Having considered so, in paragraph 3, it was held as follows:

"x	x	x	x	x
x	x	x	x	x

For a chattel to become part of immovable property and to be regarded as such property, we

should think, it must become attached to the immovable property as permanently as a building or a tree is attached to the earth. If, in the nature of things, the property is a movable property and for its beneficial use or enjoyment, it is necessary to imbed it or fix it on earth, though permanently, that is when it is in use, it should not be regarded as immovable property for that reason. That, as we understand, is the ratio of 1955-2 Mad LJ 215: (AIR 1955 Mad 620) (FB). Subramanian Firm v. Chidambaram Servai, AIR 1940 Mad 527 resembles the principles of 1955-2 Mad LJ 215: (AIR 1955 Mad 620) (FB). Certain tenants installed an oil engine as part of a cinema in a certain leasehold land, with the object of utilising the machinery for their profit. Wadsworth, J., held that a security bond pledging the oil engine could not be deemed to be a transaction relating to immovable property. The learned Judge approached the question in the following manner:

"If a thing is imbedded in the earth or attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached, then it is part of the immovable property. If the attachment is merely for the beneficial enjoyment of the chattel itself, then it remains a chattel, even though fixed for the time being so that it may be enjoyed."

13. We find ourselves in agreement with the second part of these observations, which is apposite to the instant case. In the case before us, the attachment of the oil engine to earth, though it is undoubtedly a fixture, is for the beneficial enjoyment of the engine itself and in order to use the engine, it has to be

attached to the earth and the attachment lasts only so long as the engine is used. When it is not used, it can be detached and shifted to some other place. The attachment in such a case, does not make the engine part of the land and as immovable property. Mohammed Ibrahim v. N.C.F. Trading Company, Cocanada, AIR 1944 Mad 492 was decided by a Division Bench of this Court under the provisions of the Registration Act, that was a case of machinery of a mill fixed to a cement platform and attached to iron pillars fixed in the ground. It was held that the movable property so attached should be regarded as immovable property. It seems to us that this case turned on the special facts and the nature of the fixture, including the intention derived from the physical features of the fixture, that the mill was to be a permanent attachment to the earth. A Petter oil engine, as in this case, stands on a different footing and from the very nature of this type of machinery.

x x x x x
x x x x x."

Again in the decision of the Calcutta High Court *supra*, it was held as follows in paragraphs 27 and 30:

"27. Now the task is as to whether on the basis of materials available, the case of the plaintiff has been proved or for that matter, the learned trial Judge passed a decree on the basis of acceptable material or not. Before we dilate this question, we feel it expedient to examine what is the requirement for passing a decree

under clause (p) of Section 108 of the said Act. We think that in order to pass a decree under the aforesaid provision of the Act, the Court must see that the plaintiff pleads first that without the lessor's consent (here land-lady's consent), the defendant erected any structure of permanent character. We notice that in paragraph 4 of the plaint, such averment is there. When there is a denial followed by framing of issues, it has to be proved. The plaintiff landlord has to prove with cogent evidence that there has been an erection of any structure of permanent nature, on the property. Whether it is lawful or wrongful, is immaterial. Construction of any description or any structure cannot be a ground for eviction, and judicial pronouncement of this Court in this respect is very consistent.

30. It is thus clear from above pronouncements of this Court, in order to hold structure being permanent one, it must be of such a character that cannot be removed without damaging and/or impairing substantially any portion of demised premises. Unless these conditions are satisfied, it cannot be said to be a structure of permanent nature. Mere raising a wall, adjacent to the demised premises, either mud or bricks which can be removed without any difficulty at any point of time, cannot be said to be a structure of permanent nature and character. Even if any roof is constructed either with asbestos or corrugated tin shed or even with concrete slab, cannot be said to be permanent since it can be removed easily, unless such concrete roof is cast on a brick built massionary wall, which cannot be removed easily and need to be demolished with

substantially or structural damage to the building.”

14. It is clear that so far as the structures involved in this case are concerned, same are constructed using tempered steel/thick steel poles by attaching the same to a concrete structure embedded on earth and erected using nuts and bolts. The Assessing Authority had evaluated the factual circumstances and came to the finding that the structure erected is 'goods' as defined under the Act and therefore is exigible to tax. This finding was confirmed by the First Appellate Authority as well as the Tribunal after taking into account the principles laid down in various judgments of the Apex Court and other Courts and Tribunals. According to us, so far as the structure involved in this case is concerned, taking into account of the explanations of the learned counsel for the petitioner, it is fastened to earth and is detachable easily and therefore, is not an immovable property. Further the structure so erected is never a complicated installation unlike a heavy machinery fitted in a factory premises by assembling various components and then attached to earth, which becomes a complicated procedure, whereas a hoarding is fastened to a concrete structure on earth using nuts and

bolts, the removal of which is a simple procedure which makes it a movable article under the Act. In this connection counsel for the petitioner has brought to our attention the judgment in '**State of Tamilnadu v. TVL Jayalakshmi Enterprises**' [T.C. (Review) No.430/2006 dated 7.7.2011] and contended that in the said case also the issue related to the leasing out of hoardings for the purpose of advertisement and that the Madras High Court has held that since the hoardings erected on the concrete foundation, not capable of removal without causing any damage to the structure, is part of the immovable property and ceased to be goods for the purpose of attracting levy of tax under Sec.3A of the Act. But, according to us, the Madras High Court has considered the said case on appreciation of the covenants contained in the agreement between the parties and thereupon found that the entire responsibilities were carried out by the assessee and that therefore there is no transfer of right to use goods.

16. Now we shall proceed to consider whether the revision petitioner had effective control over the advertisement hoardings let out to the lessee, in order to ascertain whether there is transfer of right to use/for any purpose. The learned

counsel for the revision petitioner contended that the effective control of the hoardings let out is always with the revision petitioner and therefore there is no transfer of right to use goods to the third person involved in the transaction. He further contended that the hoardings are installed on leased premises and therefore the effective control of the revision petitioner is necessitated. Pointing out these factual circumstances, he contended that there is no transfer of any right to use at all, in order to make the revision petitioner exigible to tax under the Act.

17. But, according to us, so far as leasing out of hoardings in this case are concerned, once it is let out by entering into an agreement or work order, the owner of the goods ceases to have any control over the same for the reason that the advertisements are affixed on the hoarding by putting up and displaying necessary materials in accordance with the directions of the lessee and he has the effective control of the hoardings throughout the contract period entered into by him with the revision petitioner. The revision petitioner is unable to interfere with the nature of the advertisement carried out by the lessee in the hoardings since as per Annexure-D work

order, it is his absolute right to finalise the nature of advertisement that is put up on the hoardings. Therefore, according to us, the absolute control of the hoardings is transferred to the lessee by virtue of Annexure-D work order. Therefore, we are of the definite opinion that the control of the hoardings once it is passed for erecting advertising materials is left with the lessee absolutely for the period specified and therefore there is transfer of right to use as provided under Sec.6(1)(c) of the Act. Therefore the second question raised by the assessee is also answered in the negative and in favour of the Revenue.

18. The next question with regard to the exigibility of tax was argued by the learned counsel for the revision petitioner pinpointing on the aspect that since he is an assessee for the purpose of Service Tax and is paying service tax against the rent received by him for letting out the hoardings, is not liable to pay tax under the K.V.A.T Act due to the fact that the provisions of the Finance Act in respect of Service Tax and the K.V.A.T Act are mutually exclusive. In order to substantiate the said proposition, learned counsel has brought to our notice the judgment of the Hon'ble Apex Court

in '**Imagic Creative (P) Ltd. v. Commissioner of Commercial Taxes and Others**' [(2008) 2 SCC 614] which held in paragraphs 27-31 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 as also in Associated Cement Companies 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 245 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 & Restaurant Assn. of India v. Union of India.

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

30. *We have noticed herein before 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."*

19. On the other hand, the learned Special Government Pleader has invited our attention to the judgments of this Court in '**Saj Flight Service Pvt. Ltd. v. Superintendent of**

Central Excise' [2006 (1) KLT 128] and '***Kerala Non-Banking Finance Companies Welfare Association v. Union of India***' [2009 (1) KLT 599] and contended that the service tax and the Value Added Tax are not necessarily mutually exclusive. In both the said cases, this Court was considering the question of liability of Service Tax and the question mooted there was whether the assessee paying tax under the Sales Tax/Value Added Tax Act is liable to pay Service Tax and held that consequent on the 46th amendment of the Constitution of India to Article 366 of the Constitution, sub-article 29A was added authorizing levy of tax on supply of any goods as part of service and held that even though there is sale of goods in supply of food and beverages, sales tax is leviable on the same by virtue of Sec.2(29) of the K.G.S.T Act introduced after the Constitutional amendment, it is essentially a contract of service. Therefore, payment of sales tax treating the transactions partly as sale of goods does not exonerate the petitioner from liability for service tax under the Central Legislation, since service of food and beverages by the caterers to aircraft amounts to sale of goods as well as rendering of service.

20. In the second cited decision also, a Division Bench of this Court was considering the question whether the Parliament is competent to authorise levy of service tax on banking and other financial services including equipments leasing and hire purchase. It was concluded that Article 366 (29A) empowers the authorities to impose levy of tax on deemed sale and purchase of goods and the same is not mutually exclusive with the liability for Service Tax. Therefore, according to us, the above two judgments are an authority for the proposition that the service tax and Value Added Tax are not mutually exclusive and if there is liability, both are to be paid by the concerned assessee. Viewed in that background, the contention raised by the revision petitioner that since it is paying service tax, is not liable to pay Value Added Tax can never be sustained.

21. Going through the facts of '**Imagic Creative Pvt. Ltd. case**' (*supra*), we find that, there, the question considered was the exigibility of Karnataka VAT Act and the question was whether advertisement service component was exigible to VAT. The advertisement service rendered by the assessee in that case was noted by the Hon'ble Apex Court as

follows:

- (i) Conceptualising and designing;
- (ii) producing printed advertising material on receiving party specific and issue specific orders.

The authority under the Karnataka VAT Act deciphered the two items and held that the assessee therein is exigible to pay tax under the V.A.T Act for former item. According to us, the Hon'ble Supreme Court therein was considering the question of a composite contract entered into between the assessee and the client and the Hon'ble Court ultimately came to the conclusion that the element of service tax and the liability for payment of tax under the V.A.T Act could not be identified separately and such an eventuality is not comprehended under Article 366 (29-A) of the Constitution making the supply of goods involved in works contract, subject to VAT. Therefore it was held that there is no element of taxability in the services so rendered. In our view, the facts and circumstances involved in the said case are entirely different from the facts of this case. In this case, what is transferred is the right to use goods viz., a defined product 'hoarding' and there is no element of integrity involved at all to be segregated from the

contract. Moreover, in the decision supra the product involved was "creation of concept" and produced printed advertisement material for its clients. According to us, viewed in any manner, the said decision has no bearing at all to the factual circumstances of this case. When such a well defined tangible and corporeal product is marketed, it involves transfer of right to use and therefore is exigible to tax under Sec.6(1)(c) of the Act. Moreover, once it is found that, the product is 'goods' as defined under the Act, there is no manner of difficulty in identifying the right to use, because it is nothing but transfer of right to use of hoarding for a definite period under a defined relationship. In the decision cited supra, the Hon'ble Apex Court has held that the service tax and Karnataka Value Added Tax are mutually exclusive, taking into account the peculiar facts involved in the said case.

22. Again, the learned counsel has brought to our attention the order of the West Bengal Taxation Tribunal in '**Selvel Advertising Private Ltd. case**' (supra) reported in [(1993) 89 STC 1] and drawn our attention to the dissenting order of the Judicial Member at paragraph 37, which reads thus:

"37. L.N. Ray (Judicial Member).--I had the advantage of going through the judgments prepared by the Honourable Chairman and the Honourable Technical member. With respect, I have not been able to agree with the reasons given in the judgment of the Honourable Chairman. Though I find that my views in principle are in concurrence with those of the Honourable Technical Member, I am unable to agree with the conclusion reached by him to the effect that on the facts of this case, the hoardings, which were let out by the applicant to different customers for the purpose of displaying their advertisements, are movable property and therefore, goods. In my opinion, apart from making a fresh determination of liability of the applicant to pay tax on sales effected from April 1, 1984 onwards, the assessing officer (1) should also determine whether the hoarding in each transaction is goods and if it is found to be goods, (2) then he should also determine whether having regard to the terms of the contract, the transaction in question amounts to a "sale" within the meaning of clause (g) of section 2 of the Bengal Finance (Sales Tax) Act, 1941, the relevant portion of which is reproduced below:

"'sale' means any transfer of property in goods for cash or deferred payment or other valuable consideration, and includes--

(i)

(ii) any 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, or".

23. Therefore, taking cue from those decisions, learned counsel contended that there is no element of exigibility of VAT involved in the subject issue since there is no goods transferred as provided under the Kerala VAT Act and further that the transaction is only service rendering it liable to pay service tax alone.

24. The learned counsel has also brought to our attention the judgment of the Hon'ble Apex Court in '**Bharat Sanchar Nigam Ltd. v. Union of India & Others**' [(2006) 3 SCC 1] and canvassed for the proposition that there is no element of transfer involved in this case also and that therefore there is no exigibility of tax in the matter of leasing out a hoarding also. As stated by us earlier, we have perused Annexure-D lease agreement entered into by the revision petitioner with the lessee and we have found that the stipulations contained in the said agreement clearly establish transfer of right to lessee to put up advertisement material on the hoarding. So also, the Appellate Tribunal in paragraph 18 of its order after appreciating the covenants of the agreement has explained how the transfer of right of the hoarding is utilised by the lessee, which clearly reveals that the entire art

work exhibited on the hoarding is a creation of the lessee and after the period of lease, the revision petitioner is liable to return the vinyl fixture displayed on the hoarding in re-useful condition. It was further found that once the printed vinyl is fixed on the hoarding, the revision petitioner does not have any control over the hoardings and the effective control vests with the lessee till the expiry of the period for which the hoardings are to be taken on rent. So also, all the stipulations contained thereunder imposes strict liability on the assessee during the period of transfer and therefore the principles laid down by the Hon'ble Apex Court taking into account Article 366 (29A) of the Constitution clearly applies to the facts and circumstances of this case and in order to evaluate the said principle against the facts of this case, paragraph 98 is extracted hereunder:

98. To constitute a transaction for the transfer of the right to use the goods, the transaction must have the following attributes:

- (a) there must be goods available for delivery;*
- (b) there must be a consensus ad idem as to the identity of the goods;*
- (c) the transferee should have a legal right to use the goods—consequently all legal consequences of such use including any  44 permissions or licences required*

therefor should be available to the transferee;
(d) for the period during which the transferee has such legal right, it has to be the exclusion to the transferor—this is the necessary concomitant of the plain language of the statute viz. a "transfer of the right to use" and not merely a licence to use the goods;
(e) having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others."

25. Therefore, in our view, when the principles so laid down by the Hon'ble Apex Court are applied to the facts involved in this case in the light of the stipulations contained in Annexure-D agreement, it is categoric and clear that there was a clear transfer of right for the use of the goods and therefore even though the facts and circumstances of the '**B.S.N.L case**' (*supra*) differs from the facts involved in this case, the principles laid down in the paragraph referred *supra* clearly applies to the facts of this case and therefore, according to us, the said judgment will not help the revision petitioner. So also, according to us, after the introduction of sub-article 29A and clause (d) of Article 366, there is a clear power conferred on the Legislature to impose tax on the transfer of right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable

consideration. So the duty casted on the authority was to find out whether there is a transfer of right by an assessee to a third person for the use of goods and once it is found, the assessee is liable to pay tax.

26. Then the learned counsel for the petitioner has brought to our notice the decision reported in '**State of Andhra Pradesh & Another v. M/s. Rashtriya Ispat Nigam Ltd.**' [(2002) 10 KTR 272 SC] and contended that the proposition laid down in the said judgment applies to the facts and circumstances of this case and therefore is entitled to get benefit of the said judgment. But, on a careful reading of the facts involved in that case, it is a case where there is no absolute transfer of goods involved whereas the goods therein were transferred solely for the purpose of carrying out the works of the assessee itself, and therefore the Court has found that there is no transfer of right to use in goods and thereby not liable to pay tax.

27. The learned counsel has also brought to our notice the judgment reported in '**Malabar Gold Pvt. Ltd. v. Commissioner of Central Excise and Customs & Others**' [2013 (3) ECS (6) (Ker-HC)]=[2013 (32) STR 3 Ker.] In the

said judgment, a Division Bench of this Court was considering the question of transfer consequent to a franchisee agreement, by which the franchisee is granted representational right to sell or manufacture goods or to provide service or to undertake any process specified by the franchiser, whether or not a trade mark, service mark, trade name or logo or any such symbol, as the case may be. In the said case, after scrutinizing the entire covenants contained under the franchisee agreement, it was held that there are no goods deliverable at any stage which is the test laid down by the Apex Court in paragraphs 78 and 79 of the **B.S.N.L's** case (*supra*) and therefore there was no transfer of right to user at all. It was also found that during the period in question, the franchisee's right was not to the exclusion of the franchiser. It was also found that even during the period of the transaction, the franchiser can again transfer the franchisee right to others and therefore the Court found that there was no transfer of right to use the goods exclusively to the transferee therein and in that circumstances, the assessee was not exigible to Value Added Tax.

28. The learned counsel for the revision petitioner also brought to our notice the judgment of the High Court of Delhi

in '**Indus Towers Ltd. v. Union of India and Others**' [W.P. (C) No.4976 of 2011 dated 18th April, 2013]. In the said decision also, the Court was considering the question as to whether in the nature of agreement entered into between the parties there is an exclusive transfer of right to use goods. There also, the Court has appreciated the terms and conditions of the agreements and found that there is no intention on the part of the writ petitioner to transfer the right to use goods. Further it was also found that there is no exclusive transfer of right to use goods but there was only a licence to use the tower for the purpose of telecom operation and in that circumstances it was held that there is no absolute transfer of right to use to the petitioner therein and in that circumstances, the proceedings initiated were quashed. According to us, as stated earlier, here is a case where under a contract or work order hoarding is transferred to a lessee for a specified period enabling the lessee to display the advertisement works on it according to the wishes and imaginations of the lessee and therefore the assessee is totally excluded from the realm of the work that is carried out by the lessee in the hoardings let out. So also, with regard to the maintenance of the

advertisement materials on the hoardings, the revision petitioner has no manner of role during the period of the contract and the same are also absolutely under the control of the lessee. Therefore, we are of the considered opinion that there is definitely a transfer of right to use goods by transferring the hoardings to the lessee by the revision petitioner and therefore the said product is exigible to tax as provided under the Act.

29. We also bear in mind that the goods defined under Sec.2(xx) of the K.V.A.T Act takes in not only the goods identified in common parlance but also various other kinds of products including livestock, all materials, commodities and articles and every kind of property (whether as goods or in some other form) involved in the execution of a works contract, and all growing crops, grass or things attached to, or forming part of the land which are agreed to be severed before sale or under the contract of sale. Therefore, when the facts of this case are considered, taking into account the said definition also, we are of the opinion that there was transfer of right to use goods by the revision petitioner which makes it exigible and liable to pay tax under Sec.6(1)(c) of the Act.

30. Therefore, in our considered opinion, there are no illegalities or infirmities in the order of the Appellate Tribunal nor the questions raised are substantial questions of law, warranting interference exercising the powers conferred on us under Sec.63 of the K.V.A.T Act.

Resultantly, the revision filed by the assessee fails and accordingly same is dismissed.

Sd/-

**ANTONY DOMINIC
JUDGE**

Sd/-

**SHAJI P. CHALY
JUDGE**

//true copy//

P.S. to Judge

St/-