

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

Special Appeal Nos.49 to 73 of 2003

Between:

Special Appeal No.49 of 2003:

M/s.Dinakar Process, B-5, Industrial Estate, Vijayawada rep. by its
Managing Partner J.M.Thyagaraj

.... Appellant

Vs.

Commissioner of Commercial Taxes, AP, Nampally, Hyderabad.

.... Respondent

DATE OF JUDGMENT PRONOUNCED: 22.07.2015.

SUBMITTED FOR APPROVAL:

**THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN &
HON'BLE SRI JUSTICE S. RAVI KUMAR**

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|---|---|--------|
| 1 | Whether Reporters of Local newspapers
may be allowed to see the Judgments? | Yes/No |
| 2 | Whether the copies of judgment may be
marked to Law Reports/Journals | Yes/No |
| 3 | Whether Their Ladyship/Lordship wish to
see the fair copy of the Judgment? | Yes/No |

*** THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN
AND
THE HON'BLE SRI JUSTICE S. RAVI KUMAR**

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+ Special Appeal Nos.49 to 73 of 2003

% Dated 22-07-2015

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M/s.Dinakar Process, B-5, Industrial Estate, Vijayawada rep. by its
Managing Partner J.M.Thyagaraj

.... Appellant

Vs.

\$ Commissioner of Commercial Taxes, AP, Nampally, Hyderabad.

.... Respondent

! Counsel for the appellant: Sri V.Bhaskar Reddy, Sri B.V. Ramamohan Rao & Sri P.Chakravarthy

^ Counsel for respondent: Sri Shaik Jeelani Basha, Spl. Standing Counsel for Commercial Taxes. (AP); and Special Government Pleader for Taxes.

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> HEAD NOTE:

? Citations:

[1] (Judgment in T.R.C.No.80 of 2002 and batch dated 31.03.2015)

² (2015) 78 VST 451 (SC)

³ (1999) 29 APSTJ 130

⁴ (2000) 31 APSTJ 37

⁵ (2013) 65 VST 1 (SC)

⁶ (2014) 7 SCC 1

⁷ (1967) 19 STC 84

⁸ (1989) 73 STC 370

⁹ (1993) 88 STC 204

¹⁰ (1975) 3 All ER 1050

¹¹ (2003) 1 SCC 433

¹² 1995 Supp (2) SCC 348

¹³ (1891) 2 QB 665

¹⁴ (1990) 3 SCC 682

¹⁵ 1899 AC 99

¹⁶ (1989) 1 SCC 164

¹⁷ 1991 Supp (2) SCC 18

¹⁸ (1971) 3 SCC 550

¹⁹ (1997) 5 SCC 536

**THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN
AND**

THE HON'BLE SRI JUSTICE S. RAVI KUMAR

SPECIAL APPEAL NOs.49 to 73 OF 2003

- **COMMON JUDGMENT:** (per Hon'ble Sri Justice Ramesh Ranganathan)

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These appeals are preferred, under Section 23(1) of the APGST Act against the order passed by the Commissioner of Commercial Taxes

dated 23.07.2003, setting aside the orders of the Appellate Deputy Commissioner, Guntur and Vijayawada, and restoring the orders of the assessing authority.

It would suffice, for the purpose of adjudicating this batch of special appeals, if the facts in Special Appeal No.49 of 2003 are noted. The appellants herein, manufacturers of cine-wall posters, were finally assessed to tax, both under the APGST Act and the CST Act, from the assessment year 1985-1986 upto the year 1990-91, on the turnover relating to cine wall posters treating them as sales exigible to tax under the APGST and the CST Acts. Aggrieved thereby, the appellants carried the matter in appeal, before the Appellate Deputy Commissioner, contending that their business related purely to skill and labour, and not to sale of goods or material; the entire process of litho-printing involved high skill, at several stages, before the cinema wall posters came into existence; the following steps were involved in the process of manufacture of cine wall posters (1) preparing the design; (2) taking photographs of the design; (3) developing negatives, of the design, of the required size; (4) taking as many negatives as there were colours i.e., one negative for each colour; (5) giving touches to each negative; (6) exposing the negative on zinc or aluminium sheets; (7) attaching the zinc or aluminium sheets to the printing machines; and (8) printing on paper as many times as there were plates; when a customer approached them, they prepared 3 to 4 designs keeping in view the size of the picture, the colour scheme, and placement of the pictures; emphasis was placed on the central idea in consultation with the customer and a final design, to the satisfaction of the customer, was set apart for further processing; if the approved design had four colours, then four negatives were taken; each negative absorbed a particular colour content of the design; in taking the negatives, a high degree of skill was exercised by blacking out the unnecessary colour, and absorbing only the desired colours by the use of filters; maximum care was taken, in fixing the timing of taking the photographs, as it involved different types of work, such as line work, solid work, figure work, screen work etc; any mis-adjustment of timing would have lead to loss of the costly negative; depending upon the size of the poster, required by the customer, the developed negative

was enlarged by adjusting the camera with utmost skill; the same process was repeated for each and every negative; necessary touch-ups were given to achieve the desired results; these enlarged negatives were then exposed on zinc or aluminium sheets by an elaborate process, and thereafter the colour posters were prepared; the work was executed only after the customer approached them, and placed an order; the order was placed by the customer on the basis of the skill of the manufacturer; and these transactions would not come under the purview of sale of goods, or sale of any material, as it involved a high degree of skill and labour.

The Appellate Deputy Commissioner, following the judgment of the Sales Tax Appellate Tribunal, ("STAT" for short) in T.A. No.310 of 1991 in the case of M/s. Foto Colours, upheld the appellants contention, and allowed the appeals. Subsequently, the Appellate Deputy Commissioner passed another order setting aside the order of the Commercial Tax Officer withholding refund under the APGST Act and the CST Act, and directed that the amounts withheld, under the APGST and the CST Acts, be refunded to the appellants. Consequent thereto, the assessing authority revised the assessment order, and refunded the tax paid by the appellants.

The Commissioner, Commercial Taxes issued notice dated 10.01.1996, calling upon the appellants to show cause why the order of the Appellate Deputy Commissioner should not be set aside, and the order passed by the assessing authority not be restored. The Commissioner observed that the dominant element, in the supply of wall posters, was not skill and labour; different materials namely paper, colours, and ink were involved; photographs, taken for private use, could be considered as works of art and skill; wall posters, which were printed on a large scale for the purpose of advertisement, had commercial value; they did not involve skill and labour; what was required to be examined was not the complicated process of making a commodity, but the basic object of the transaction; in the present case, it was a sale of wall posters that was the subject matter of the contract between the assessee and the purchaser; it was not a case of supply of skill and labour; to determine the taxability of publicity materials, the test to be adopted was the test of predominance of whether,

in the end product, the value of material was more or the value of service was more; a random analysis of the cost of expenditure, involved in the manufacture and printing of cine-wall posters, revealed that the assessee was spending roughly 10% of the total cost on workers salaries, 2% on artists charges, and 80% on printing and processing; the predominant element, in the supply of wall posters, was not skill and labour, but material ie paper, ink and different colours; wall posters should not be compared to photographs, as photographs were of a private nature, and were personal belongings which were printed in a limited number; wall posters were meant for publicity, and the exhibitors had necessarily to advertise them on walls or on boards in large numbers; in printing copies of the wall posters, no artistic skill was involved; the order of the Appellate Deputy Commissioner was illegal and improper; and the order was, consequently, prejudicial to the interests of the revenue warranting revision under Section 20(1) of the APGST Act.

In their reply, to the show cause notice dated 30.09.1996, the appellants contended that the primary difference between a contract for work and service, and a contract for sale, was that in the former there was, in the person performing or rendering service, no property in the thing produced as a whole, notwithstanding that a part or even the whole of the material used by him may have been his property; the finished product, supplied to a particular customer, was not a commercial commodity in the sense that it could not be sold in the market to any other person; the transaction was only a works contract; when the film neared completion, and for its successful running, wall posters were used; they were designed to draw the public to the theatre; different kinds of wall posters were prepared; a wall poster was an act of creativity of the producer; it was the result of skill, and was created to cater to the idea and message of the producer of the film; and creation of wall poster was a work of art, as the purpose of the wall poster was to sustain interest of the audience in the film even after the film had run for a considerable length of time. The appellants then narrated in detail the process of preparation of these wall posters commencing from its design till its eventual printing. They

contended that there was no bargain, between the appellants and their customers, to sell paper, ink and colour; the only bargain between them was the wall poster which was required to be produced as per the agreed design; the basic object of the transaction was use of skill and labour to produce an exact replica of the design, but not sale of the material which had gone into its making; the contents of the design were reproduced and translated in the form of a wall poster; the customer became the owner of the wall poster; hence there was no property in the thing produced as a whole; the things produced as a whole, i.e., wall poster, belonged to the customer as the design belonged to him; the printer could not sell it to any other person in the market, as he did not have any title over the property i.e., the wall poster; the transaction was in the nature of a works contract involving skill and labour; the design owner was the customer; once the customer's design was reproduced in the form of wall posters, the customer became its owner; the title, in the wall poster, remained vested in the customer even though the design was reproduced in the form of a wall poster; as the title in the wall poster was vested in the customer, the appellants could not pass title; the consideration, they received from the customer, was only for the services rendered by them, and not for passing of title; in the instant case, i.e., in the wall poster, passing of material to the customer, in the form of paper, inks, etc, was purely incidental; the basic object of the transaction was to convert the customer's design to that of a wall poster; the bargain, between the customer and the appellant, was for a true translation of the design into a wall poster, with all the effects which the design contained; as the purpose and significance of the wall poster was the impact it would have on the public, the customer was concerned only about the final outcome of the wall poster; bargaining for paper or inks was never the subject matter of the contract; the contract was only to convert the design into a wall poster, and was a supply of skill and labour; the work was developed on the property belonging to the customer; and the design, which belonged to the customer, was converted into a wall poster. The appellants requested the Commissioner to drop the proposal to revise the order of the Appellate Deputy Commissioner.

In his order dated 21.03.1997, the Commissioner held that the

primary difference between a contract for work or service, and a contract for sale, was that, in the former, there was in the person performing or rendering service, no property in the thing produced as a whole, notwithstanding that a part or even the whole of the materials used by him may have been his property; where the finished product, supplied to a particular customer, was not a commercial commodity in the sense that it could not be sold in the market to any other person, the transaction was only a works contract; the difference between a contract for work or service, and a contract for sale, was whether property was vested in the person performing or rendering the service; where the finished product, supplied to a particular customer, was not a commercial commodity, in the sense that it could not be sold in the market to any other person, the transaction was only a works contract; and the twin considerations were (1) whether the property was vested with the seller or whether it was a commercial commodity which could be used or supplied to anybody other than the customer.

The Commissioner further held that the seller no doubt printed the wall poster as per the requirement of the customer, but it did not signify that the property in the goods stood transferred automatically to the buyer, the moment the wall poster was printed; these wall posters were used by the customers for publicity, and the transfer of property was effected by the selling dealer when the goods were handed over to the buying dealer; the selling dealer had to develop the poster as per the specifications clearly mentioned by the buying dealer, and once the buying dealer was satisfied that the wall posters conformed to the specifications, he took delivery of the goods and then the transfer of property was effected; the buyer purchased the raw material and used the same to develop the design and make the poster; the property in the goods was vested with the seller till such time payment was made, and delivery was effected; the wall posters were sold by distributors to the exhibitors for a price, and was not used exclusively by the exhibitors for their personal use; persons, who bought these wall posters, used them as publicity material for the film; these posters were resold by them to distributors, and to the exhibitors; the exhibitors in B and C class centres bought the wall posters, and in some cases the

distributors themselves screened the shows in theatres using wall posters as publicity material for themselves; it only showed that it was a commodity put up for sale; it had all the ingredients of a commercial commodity; it was not meant for personal and exclusive use of any individual; the very fact that the dealer had obtained the required amount of paper, chemicals, ink and zinc sheets, using "C" forms, showed that the process of manufacturing of wall posters was a commercial activity, and was exigible to tax under the Act; what was supplied by the dealer was only finished goods, and the skill and labour involved therein was incidental; the contract involved production of a marketable commodity; commercial activity was reflected in the entire process, and did not depend purely on work and labour; and the essence of the process was a sale of the finished product and not a case where work and labour alone was involved.

Rejecting the objections raised by the appellant, the Commissioner set aside the order of the Appellate Deputy Commissioner and restored the order of the Commercial Tax Officer. Aggrieved thereby the appellant herein filed Special Appeal No.25 of 1997 and batch before this Court.

A Division bench of this Court, in its order in Special Appeal No.25 of 1997 and batch dated 09.12.2002, held that the controversy raised in the appeal was whether the works undertaken by the appellants were works contracts; whether in the process of making the cinema wall posters, which were made to order by the producer, an element of sale was involved in it or not; these were matters to be decided by the Commissioner of Commercial Taxes, on the basis of relevant material that would be placed by the appellants; the question was whether the appellant had placed material before the Commissioner in support of their claim that the activity undertaken by them did not involve an element of sale; the appellant did not place relevant material before the Commissioner; and they had pleaded that, if an opportunity was given to them, they would place all the relevant material before the Commissioner who should decide matters on the basis of such material, keeping in view the effect of the 46th amendment to the Constitution, which came into force in the year 1982.

The Division bench was of the view that the matters required a fresh hearing by the Commissioner, and the appellants should be permitted to

place relevant material before him to enable him to reach the conclusion whether the activity undertaken by the appellant would amount to sale within the meaning of Section 2(1)(n) of the APGST Act, liable to be taxed in terms of the provisions of the Act. The Division bench set aside the orders assailed in the special appeals, and remitted the matter to the Commissioner, Commercial Taxes directing him to rehear these matters under Section 20 of the APGST Act by giving them an opportunity to place all relevant material in support of their case. The Commissioner was also directed to indicate the date of hearing to enable the appellants to participate in the hearing. The Commissioner was requested to decide the appeals as expeditiously as possible and within a period of six months from the date of receipt of a copy of the order. The Division bench made it clear that the Commissioner was entitled to decide the matters afresh in accordance with law.

The Commissioner, Commercial Taxes issued show cause notice dated 04.06.2003 wherein it was stated that the order of the Appellate Deputy Commissioner was erroneous and unsustainable; the appellate authority should have seen that, when a dealer files an appeal with delay, each day's delay involved in filing the appeal should be explained in the petition for condoning the delay; the dealer had filed the appeal with a delay condonation petition of 165 days; the Appellate Deputy Commissioner had mechanically condoned the enormous delay, without examining the fact whether such delay was because of good and sufficient cause as envisaged under Section 19 of the APGST Act; there was non-application of mind by the Appellate Deputy Commissioner, and he had failed to deal with and dispose of the condone delay application in the manner expected of a quasi-judicial authority, which resulted in the ultimate order being passed; the Appellate Deputy Commissioner should not have entertained the appeal as the assessee had paid the tax, which was collected from their customers, long before filing the appeal; allowing the appeal, beyond the period of limitation, would result in unjust enrichment to the dealer with public money; the Appellate Deputy Commissioner was not justified in categorising the sale of wall posters as a job work involving skill and labour; the contract was for printing and

selling of the cine wall posters, and such a contract must be termed as a contract of sale, but not a contract for work or service; printing and the subsequent sale of cine wall posters on a large scale for advertising purposes had commercial value, and any skill and labour involved therein was only incidental; what had to be seen was not the complicated process of making a commodity, but the basic object of the transaction; the nature of the transaction was the sale of cinema wall posters which was the subject matter of the transaction between the assessee and the customer; it was not a case of mere skill and labour; the cost of expenditure involved showed that the assessee had roughly spent 10% of the cost, in the manufacture of wall posters, on workers salaries, 2% on artist charges, and 80% on printing and processing; the predominant element, in the supply of cinema wall posters, was not skill and labour, but only sale of material i.e., paper, ink and colours; there was transfer of property in these goods to the customers; and the order of the Appellate Deputy Commissioner necessitated revision.

In reply thereto, the appellants filed their written submissions on 03.07.2003 stating that the delay condonation application was filed before the Appellate Deputy Commissioner wherein they had stated that the mistake in payment of tax was a mutual mistake, on their part as well as that of the assessing authority, as the tax paid and collected was contrary to the established position of law; thereafter the ADC had issued a hearing notice, first of all to hear them on the delay condonation petition, and the matter was argued; thereafter they had received another notice from the ADC's office for hearing on merits; they had inferred that the delay was condoned as otherwise it was not possible to hear the appeals on merits; there was a change in the office of the ADC and, subsequently, another ADC heard the matter on merits; condonation of delay was not the subject matter of revision by the Commissioner, Commercial Taxes earlier; the irregularity in conducting the appeal was neither pleaded nor raised nor argued in the High Court in the Special Appeals; it could not, therefore, be a ground in the extended revision proceedings under Section 20(1) read with Section 20(5) of the APGST Act; and the decision of the ADC, on condonation of delay, was allowed to become final at the volition of, and at

the behest of, the department.

On the question of unjust enrichment, the appellants contended that the proceedings of the CTO, withholding refund of the tax under Section 33(BB) of the APGST Act, was not before the Commissioner, Commercial Taxes; no objection was taken against the said order of the ADC which attained finality on the expiry of three years; the question of alleged unjust enrichment raised by the CTO, bypassing the orders under Section 33(BB), was struck down by the ADC by his proceedings dated 10.05.1994, which had attained finality; and this question could not be raised after the period of limitation had expired.

On merits, the appellants produced a copy of the agreement of lease entered into between the film producers and various district lessees, and the affidavits given by them. They contended that the salient features of the agreement of lease included the requirement of the lessee returning all prints and publicity material to the lessor on expiry of the lease; the lessees were given the right to exploit the film for the purpose of distribution and exhibition; the exclusive right granted to the sub-lessee (exhibitor) was to exhibit and exploit the same; the design was the product of the creativity of the producer; it was his intellectual property; the design was the main corpus which had to be exploited; wall posters were manufactured according to these designs; the producer/sub-lessee was least interested in the purchase of paper or ink from the press; and the process of manufacturing wall posters involved various stages such as taking photographs of the design, developing negatives of the photographs of the required size, taking as many negatives as there were colours, giving touches to each negative, exposing negatives on zinc or aluminium sheets, attaching the zinc or aluminium sheets to the printing machines, and printing on paper as many times as there were plates. The appellants referred extensively to the provisions of the Copy Rights Act and the APGST Act, and to several judgments, in support of their contention that there was no sale involved in the printing of wall posters which was more in the nature of a job work involving skill and labour.

The Commissioner, Commercial Taxes passed an elaborate order on 23.07.2003 holding that the contract involved production of a

marketable commodity; commercial activity was reflected in the entire process, and was not dependent entirely on work and labour; the cost of material involved was 80%, and labour 20%; the essence of the process was the sale of a finished product, and not a case where work and labour were alone involved; and all the objections raised by the dealer were untenable and were liable to be rejected. The Commissioner, Commercial Taxes set aside the order of the Appellate Deputy Commissioner, and restored the order of the assessing authority. Aggrieved thereby the present appeals.

The points which arise for consideration in these appears are:

1. Whether the Commissioner (Commercial Taxes) could have revised the order of the Appellate Deputy Commissioner on the ground that the appeal should not have been entertained as it was filed belatedly, when no such ground was raised in the earlier show cause notice proposing to revise the order of the Appellate Deputy Commissioner?
2. Whether printing and supply of cine-wall posters was in the nature of “works contract” and, if so, could it be subjected to tax as deemed sale of goods under the Andhra Pradesh General Sales Tax Act, 1957 and the Central Sales Tax Act, 1956 for the assessment years ending prior to 31.03.1993 ?
3. Whether the Commissioner (Commercial Taxes) could have directed the appellants to pay tax under the Andhra Pradesh General Sales Tax Act, 1957, and the Central Sales Tax Act, 1956, on such transactions when the order of the Appellate Deputy Commissioner, setting aside the order of the assessing authority withholding refund under Section 33-BB of the Andhra Pradesh General Sales Tax Act, 1957, had attained finality?
4. Are the appellants entitled to retain the tax collected by them under the Andhra Pradesh General Sales Tax Act, 1957 and the Central Sales Tax Act, 1956 ? Is the revenue entitled to recover the said amount from the appellants on the ground of unjust enrichment ?

Point No.1.

Sri V. Bhaskar Reddy, Learned Counsel for the appellants, would submit that neither the earlier show cause notice, nor the earlier order of

revision passed by the Commissioner, referred to any error in the order of the Appellate Deputy Commissioner in condoning the delay in preferring the appeal; the Commissioner had earlier chosen to revise the order of the Appellate Deputy Commissioner only to the extent he held that printing and supply of cine wall-posters was a job of skill and labour, and not of sale; the order of the Appellate Deputy Commissioner, condoning the delay, was not the subject matter of the earlier revision; it is the appellants who had preferred the appeal against the earlier order of revision; the matter was remanded to the Commissioner to enable the appellants to produce relevant material in support of their plea that the subject transactions were in the nature of works contract; and it was, therefore, not open to the Commissioner to revise the order of the Appellate Deputy Commissioner on this ground.

As noted hereinabove the Commissioner, commercial taxes issued notice dated 10.01.1996 calling upon the appellants to show cause why the order of the Appellate Deputy Commissioner should not be set aside, and the order of the assessing authority not be restored. After the appellants submitted their reply thereto by their letter dated 30.09.1996, the Commissioner, by his order dated 21.03.1997, set aside the order of the Appellate Deputy Commissioner, and restored the order of the assessing authority. It is relevant to note that the Commissioner, in his notice dated 10.01.1996, did not propose to revise the order of the Appellate Deputy Commissioner on the ground that he could not have entertained the appeal after the limitation prescribed for preferring the appeal had expired.

The order of the Commissioner dated 21.03.1997 was set aside by a Division bench of this Court, by its order in Special Appeal No.25 of 1997 and batch dated 09.12.2002; and the matter was remanded to the Commissioner for rehearing, after the appellants placed relevant material before the Commissioner to enable him to decide whether the activity, undertaken by the appellants, amounted to "sale", within the meaning of Section 2(1)(n) of the APGST Act, liable to be taxed under the provisions of the said Act. It is only to this limited extent was the Commissioner permitted to re-hear the matter, and decide the revision afresh. It was, therefore, not open to the Commissioner to revise the order of the

Appellate Deputy Commissioner on grounds other than those referred to in his show cause notice dated 30.09.1996. The Commissioner exceeded his jurisdiction in passing the order dated 23.07.2003, and thereby setting aside the order of the Appellate Deputy Commissioner, among others, on the ground that the appeal could not have been entertained belatedly. Unlike the proviso to Section 19(1) of the APGST Act, after its substitution by A.P. Act 8 of 1997 w.e.f. 04.01.1997, Section 19(1) of the APGST Act, as it stood during the relevant assessment years, enabled the Appellate Deputy Commissioner to condone the delay in preferring the appeal. Section 19 of the APGST Act related to appeals and, under sub-section (1) thereof, any dealer objecting to any order passed or proceeding recorded by any authority under the provisions of this Act, other than an order passed or proceeding recorded by a Joint Commissioner or the Deputy Commissioner under sub-section (4C) of Section 14, could, within thirty days from the date on which the order or proceeding was served on him, appeal to the prescribed authority. The proviso thereto enabled the appellate authority to admit an appeal, preferred after a period of thirty days, if he was satisfied that the dealer had paid the tax admitted to be due, or of such instalments as had been granted, and had sufficient cause for not preferring the appeal within that period.

As the Appellate Deputy Commissioner was conferred the power, under the proviso to Section 19(1) of the APGST Act, to condone the delay in preferring the appeal, if sufficient cause was shown therefor by the appellant, it cannot be said that the Appellate Deputy Commissioner had exceeded his jurisdiction in entertaining the appeal, filed against the order of the assessing authority, after condoning the delay. Even otherwise the delay, which the Appellate Deputy Commissioner condoned, was not so inordinate as to have necessitated interference in revision proceedings by the Commissioner. Viewed from any angle the order of the Commissioner, seeking to revise the order of the Appellate Deputy Commissioner on this ground, must be and is accordingly set aside.

Point No.2:

Sri V. Bhaskar Reddy, Learned Counsel appearing on behalf of the appellants, would submit that the Commissioner erred in holding that the

transactions, relating to printing and supply of cine wall-posters, was a sale and not a works contract; the Division Bench of this Court, in **State of Andhra Pradesh v. M/s.Dinakar Litho Printers Pvt. Ltd.**^[1], held that printing and supply of cine wall-posters is in the nature of a works contract; the assessment years, both under the APGST and the CST Acts, relate to periods prior to the assessment year 1993-94; the term “works contract” was given a restricted meaning under the APGST Act during the said period, and did not include the works contracts of printing and supply of cine wall-posters; it is only by way of an amendment from 01.04.1995 was the restricted meaning, given earlier to the term “works contract”, removed and the definition given an extended meaning; while printing and supply of cine wall-posters is a works contract, it was not among the works contract specified under Section 2(t) of the APGST Act during the relevant period; consequently the Commissioner could not have assessed the appellants to tax, under the APGST Act, on the printing and supply of cine wall-posters; the term “works contract” has been defined under the CST Act only from 01.04.2005; for the assessment years prior thereto, the appellants could not have been subjected to tax, on the deemed sale of goods involved in the execution of a works contract, even under the CST Act; and, in the absence of the term “works contract” being defined under the CST Act, the Commissioner erred in revising the order of the Appellate Deputy Commissioner.

On the other hand Sri Shaik Jilani Basha, Learned Special Standing Counsel for Commercial Taxes, would submit that the order of the Commissioner is valid; these transactions relate to sale of cine wall-posters, and are not “works contracts”; and, even if they are held to be works contracts, the assessing authority is entitled to levy tax on the deemed sale of goods involved in such works contracts. Learned Special Standing Counsel would rely on **State of Karnataka v. Pro Lab**^[2]; **Nagarjuna Cotton Pressing Factory v. State of A.P.**^[3]; and **Hindustan Shipyard Ltd. v. State of A.P.**^[4] in this regard.

Article 366 is the definition clause of the Constitution. The definition

of the expression “tax on sale or purchase of the goods” is contained in clause (29-A) thereof. If the first part of Article 366(29-A) is read with sub-clause (b), along with the latter part of the clause, it reads like this: ***“tax on the sale or purchase of the goods includes 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 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.”*** The definition of “goods”, in Article 366(12), is inclusive. It includes all materials, commodities and articles. The expression ‘goods’ has a broader meaning than merchandise. Chattel or movables are goods within the meaning of Article 366(12). (**Larsen and Toubro Ltd. v. State of Karnataka**^[5]).

Article 366(29-A)(b) refers to transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract. The expression “in some other form” in the bracket is significant as, by this expression, the ordinary understanding of the term ‘goods’ has been enlarged bringing within its fold goods in a form other than as goods. Goods in some other form would thus mean goods which had ceased to be chattel or movables or merchandise, and had acquired some other form. A transfer of property in goods, under clause 29-A(b) of [Article 366](#), is deemed to be a sale of the goods involved in the execution of a works contract by the person making the transfer, and the purchase of those goods by the person to whom such transfer is made. (**Larsen and Toubro Ltd.**⁵; **Pro Lab.**²; **Kone Elevator India (P) Ltd. v. State of T.N.**^[6]).

Consequently, wherever the expression “tax on the sale or purchase of goods” is used in the Constitution, the said expression would include a tax on the transfer of property in goods involved in the execution of a works contract.

The decisions of the Supreme Court, which related to the period prior to the forty-sixth amendment of the Constitution when Article 366(29A) was inserted, held that a works contract could not be split, and

the State Legislatures lacked legislative competence to levy sales tax on a transaction which was not a sale of goods simpliciter. (**Pro Lab**²). In view of the forty-sixth amendment to the Constitution, the States now have the power to bifurcate the contract, and to levy sales tax on the value of the material used in the execution of a works contract. In other words, [Article 366 \(29-A\)](#) empowers the States to levy tax on the deemed sale of goods. (**Larsen and Toubro Ltd.**⁵). After insertion of [Article 366\(29-A\)](#) a works contract, which was indivisible, has, by legal fiction, been altered into a contract which is permitted to be bifurcated into two, one for "sale of goods", and the other for "services", thereby making the goods component of the contract exigible to sales tax. (**Pro Lab**²).

The following propositions are now well established: (i) as a result of the forty-sixth amendment to the Constitution, the contract which was single and indivisible has been altered by legal fiction into a contract which is divisible into one for sale of goods and the other for supply of labour and service and, as a result, such a contract, which was single and indivisible, has been brought on par with a contract containing two separate agreements; (ii) if the legal fiction introduced by [Article 366 \(29-A\) \(b\)](#) is carried to its logical end, it follows that, even in a single and indivisible works contract, there is a deemed sale of the goods which are involved in the execution of a works contract. Such a deemed sale has all the incidents of a sale of goods involved in the execution of a works contract where the contract is divisible into one for the sale of goods and the other for supply of labour and services; (iii) in view of [Article 366 \(29-A\)](#), the State legislature is competent to impose tax on the transfer of property in goods involved in the execution of a works contract. In the event of a law being made by Parliament under [Article 286\(3\)\(b\)](#), the exercise of the legislative power of the State under Entry 54 in List II, to impose tax of the nature referred to in sub-clause (b) of [Article 366 \(29-A\)](#), would be subject to the restrictions and conditions in regard to the system of levy, rates and other incidents of tax contained in the said law; and (iv) the measure for the levy of tax contemplated by [Article 366 \(29-A\)\(b\)](#) is the value of the goods involved in the execution of a works contract. Though

the tax is imposed on the transfer of property in goods involved in the execution of a works contract, the measure for levy of such imposition is the value of the goods involved in the execution of a works contract. Since the taxable event is the transfer of property in goods involved in the execution of a works contract, and the said transfer of property in such goods takes place when the goods are incorporated in the works, the value of the goods which constitute the measure for the levy of the tax is the value of the goods at the time of incorporation of the goods in the works, and not the cost of acquisition of the goods by the contractor. **(Larsen and Toubro Ltd.⁵).**

In order to constitute a sale it is necessary that there should be an agreement between the parties for the purpose of transferring title to the goods, the agreement must be supported by money consideration, and that, as a result of the transaction, the property should actually pass in the goods. Unless all the ingredients are present in the transaction there can be no sale of goods, and sales tax cannot be imposed. **(Commissioner of Taxes, Assam v. Prabhat Marketing Co. Ltd.^[7]).** Generally a contract to make a chattel and deliver it, when made, is a contract of sale, but not always. The test would seem to be whether the thing to be delivered has any individual existence before delivery as the sole property of the party who is to deliver it. **(Pollock and Mulla on Sale of Goods Act (1990, Fifth Edition, at page 53; Hindustan Shipyard Limited⁴).**

A contract may involve both a contract of work and labour and a contract of sale of goods. The distinction between a contract for the sale of goods and a contract for work (or service) has almost diminished in matters of composite contracts involving both (a contract of work/labour and a contract for sale) for the purposes of Article 366 (29-A)(b). Now, by legal fiction under Article 366(29-A)(b), it is permissible to make such a contract divisible by separating the transfer of property in goods (as goods or in some other form) from the contract of work and labour. **(Larsen and Toubro Ltd.⁵).** The dominant nature test” or “overwhelming component test” or “the degree of labour and service test” are no longer applicable. If the contract is a composite one, which falls under the definition of a “works

contract” as engrafted under clause (29A)(b) of [Article 366](#) of the Constitution, the incidental part as regards labour and service pales into insignificance in determining the nature of the contract. (**Kone Elevator India (P) Ltd.**⁶; **Larsen and Toubro Ltd.**⁵).

While examining the exercise of divisibility, the dominant intention behind such a contract, namely, whether it was for sale of goods or for services, is rendered otiose or immaterial. It follows as a sequitor that, by virtue of [Article 366\(29-A\)](#), the State Legislature is now empowered to segregate the goods part of the works contract and impose sales tax thereupon. (**Pro Lab.**²; **Larsen and Toubro**⁵). It is no longer necessary to ascertain what is the dominant intention of the contract. Even if the dominant intention of the contract is not to transfer the property in goods, and rather it is the rendering of service, then also it is open to the States to levy sales tax on the material used in such a contract if it, otherwise, has the elements of a works contract. (**Larsen and Toubro Ltd.**⁵ **Pro Lab**²). The contention that processing and printing of cine-wall posters etc. is essentially a service, wherein the cost of paper, chemical or other material used in processing and developing negatives, photo prints etc. is negligible, is founded on the dominant intention theory which is no longer valid in view of the 46th Amendment to the Constitution. (**Pro Lab**²).

As the dispute, in this batch of appeals, is whether the subject transactions are sale of goods, or a works contract, it is necessary to understand what the expression “works contracts” means. For sustaining the levy of tax on the goods, deemed to have been sold in the execution of a works contract, three conditions must be fulfilled: (i) there must be a works contract, (ii) the goods should have been involved in the execution of a works contract, and (iii) the property in those goods must be transferred to a third party either as goods or in some other form. (**Larsen and Toubro Ltd.**⁵). For being classified as a works contract the transaction, under consideration, must be a composite transaction involving both goods and services. If a transaction involves only service, i.e. work and labour, then it cannot be treated as a works contract. (**Pro Lab.**²).

After the 46th constitutional amendment, the narrow meaning given earlier to the term "works contract" no longer survives. Once the characteristics or elements of a works contract are satisfied in a contract then, irrespective of the additional obligations, such a contract would be covered by the term "works contract" because nothing in Article 366(29A) (b) limits the term "works contract" to contract for labour and service only. (**Kone Elevator India Pvt. Ltd.**⁶; **Pro Lab**²). The term 'works contract', in [Article 366\(29- A\)\(b\)](#), is wide and cannot be confined to a particular understanding of the term or to a particular form. The term encompasses a wide range and many varieties of contracts. The Parliament had such a wide meaning of a "works contract" in view, at the time of the forty-sixth amendment. Even if in a contract, besides the obligations of supply of goods and materials and performance of labour and services, some additional obligations are imposed, such a contract does not cease to be a works contract. The additional obligations in the contract would not alter the nature of the contract so long as the contract provides for a contract for works, and satisfies the primary description of a works contract. Once the characteristics or elements of a works contract are satisfied in a contract then, irrespective of the additional obligations, such a contract would be covered by the term 'works contract'. Nothing in [Article 366\(29-A\)\(b\)](#) limits the term "works contract" to a contract for labour and service only, and it is a contract for undertaking or bringing into existence some "works". The Parliament had all genre of works contract in view when clause 29-A was inserted in [Article 366](#). (**Pro Lab**.²; **Larsen and Toubro Ltd.**⁵).

In **Kone Elevator India (P) Ltd.**⁶, the Supreme Court held that if there are two contracts, namely, purchase of the components of the lift from a dealer, it would be a contract for sale and similarly, if a separate contract is entered into for installation, that would be a contract for labour and service; but a pregnant one, i.e., a composite contract for supply and installation, must be treated as a works contract for it is not a sale of goods/chattel simpliciter and it is not chattel sold as chattel or, for that matter, a chattel being attached to another chattel; it would not be appropriate to term it as a contract for sale; the contract itself speaks of an

obligation to supply goods and materials, as well as installation of the lift, which conveys performance of labour and service; and the fundamental characteristics of a works contract were satisfied in such contracts.

The power to make laws is conferred on Parliament and the State Legislatures under Articles 245 and 246 of the Constitution. Article 246(1) confers exclusive power on Parliament to make laws with respect to any of the matters enumerated in List-I of the VII Schedule to the Constitution. Article 246(3) enables the State Legislatures, subject to clauses (1) and (2), to make laws for such State or any part thereof with respect to any of the matters enumerated in List II of the VII Schedule to the Constitution. Entry 92-A of List-I of the VII Schedule relates to taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce. Entry 54 of List-II of the VII Schedule relates to taxes on the sale or purchase of goods other than newspapers, subject to the provisions of Entry 92A of List-I. The expression "tax on sale or purchase of goods", both in Entry 92A of List-I and Entry 54 of List-II of the VII Schedule, must be given the meaning referred to in Article 366 (29A) of the Constitution of India. The expression "tax on the sale or purchase of goods" in both the aforesaid entries would include 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.

The tax leviable, by virtue of sub- clause (b) of clause (29-A) of [Article 366](#) of the Constitution, thus becomes subject to the same discipline to which any levy under Entry 54 of the State List is made subject to under the Constitution. The 46TH Amendment does no more than making it possible for the States to levy sales tax on the price of goods and materials used in works contracts as if there was a sale of such goods and materials. As the Constitution exists today, the power of the States to levy taxes on sales and purchases of goods, including the "deemed" sales and purchases of goods under clause (29A) of [Article 366](#), is to be found only in Entry 54 and not outside it. (**Builders Association of India v. Union of India**^[8]).

The States have now been conferred the power to tax indivisible

works contracts, by enlarging the scope of “tax on sale or purchase of goods” wherever it occurs in the Constitution. Accordingly, the expression “tax on the sale or purchase of goods” in Entry 54 of List II of the Seventh Schedule, when read with the definition clause 29-A of Article 366, includes a tax on the transfer of property in goods whether as goods, or in a form other than goods, involved in the execution of a works contract. (**Larsen and Toubro Ltd.**⁵). Clause 29A of Article 366 empowers the States to levy tax on the deemed sale of goods. (**Larsen and Toubro**⁵; **Gannon Dunkerley & Co. v. State of Rajasthan (SC)**^[9]; **Pro Lab**²). It is open to the States to divide the works contract into two separate contracts by legal fiction: (i) contract for sale of goods involved in the works contract, and (ii) for supply of labour and service, and levy sales tax on the value of the material used in the execution of the works contract. (**Larsen and Toubro Ltd.**⁵).

As Article 246(1) and (3), read with Entry 92A of List-I and Entry 54 of List-II of the VII Schedule to the Constitution, enable Parliament and the State Legislatures respectively to make laws levying tax on the sale or purchase of goods referred to in the respective entries, both Parliament and the State Legislatures have, in view of Article 366(29A)(b), the power to make a law levying tax on the transfer of property in goods involved in the execution of a works contract. While the aforesaid provisions of the Constitution confer power on the legislature (Parliament and the State Legislatures) to make a law levying tax on the deemed sale of goods involved in the execution of a works contract, it is only on such a law being made can the dealer be made liable to tax on the deemed sale of goods involved in the execution of a works contract.

It is necessary to now examine the law as it stood for the years prior to 31.03.1995, since all the appeals relate to assessments made under the APGST and CST Acts for assessment years prior to 1991-92. Special Appeal Nos.49, 50, 52, 55, 56, 58, 59, 64, 65, 66, 71, 72 and 73 of 2003 are the appeals which arise out of the revisional order passed by the Commissioner, Commercial Taxes under the provisions of the APGST Act. These appeals relate to different assessment years from 1985-86 till

1990-91. Section 2(n) of the APGST Act, as inserted by Act 18 of 1985 w.e.f.1.7.1985, defined 'Sale', with all its grammatical variations and cognate expressions, to mean every transfer of the property in goods (whether as such goods or in any other form), in pursuance of a contract or otherwise, by one person to another in the course of trade or business for cash, or for deferred payment, or for any other valuable consideration or in the supply or distribution of goods by a society (including a co-operative society), club, firm or association to its members, but not to include a mortgage, hypothecation or pledge of, or a charge on, goods. Under Explanation VI thereto, (as inserted by Act 18 of 1985 w.e.f.1.7.1985), whenever any goods were supplied or used in the execution of a works contract, there was deemed to be a transfer of property in such goods, whether or not the value of the goods so supplied or used in the course of execution of such works contract was shown separately, and whether or not the value of such goods or material could be separated from the contract for the service and the work done.

Section 2(s) of the APGST Act defined "turnover". Under Section 2(s) (iii), as it then stood, if there was no bill of sale, the total amount charged as the consideration for the sale or purchase of goods by a dealer either directly or through another, on his own account or on account of others, whether such consideration be cash, deferred payment or any other thing of value, included the value of any goods, as determined by the assessing authority, to have been used or supplied by the dealer in the course of execution of a works contract. Section 5 of the APGST Act related to levy of tax on sales or purchases of goods and, under subsection (1) thereof, every dealer (other than a casual trader and an agent of a non-resident dealer) whose total turnover for a year was not less than Rs.2,00,000 and every agent of a non-resident dealer, whatever be his turnover for the year, was required to pay a tax for each year at the rate of five paise on every rupee of his turnover.

Section 2(t) of the APGST Act, as inserted by Act 18 of 1985 w.e.f. 1.7.1985, defined "Works contract" to mean any agreement for carrying out for cash or for deferred payment or for other valuable consideration, the construction, fitting out, improvement or repair of any building, road, bridge

or other immovable property or the fitting out, improvement or repair of any movable property. Section 2(t) was amended, subsequently, by Act 22 of 1995 w.e.f. 01.04.1995 and, after its amendment, included any agreement for carrying out for cash or for deferred payment or for any other valuable consideration, the building construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, modification, repair and commissioning of any moveable or immovable property.

While the definition of “works contract”, prior to 01.04.1995, began with the words “means”, the definition of “works contract” after 01.04.1995 began with the word “includes”. An interpretation clause in a Statute may serve two different purposes. If it states at greater length what an expression used in the other provisions in the Statute ‘means’, it is no more than a drafting device to promote economy of language. It is a direction to the reader: ‘Wherever you see this shorter expression in the statute you must treat it as being shorthand for the longer one’. Alternatively an interpretation clause may be used by the draftsman not to define the meaning of an expression appearing in the statute but to extend it beyond the ordinary meaning which it would otherwise bear. An indication that this may be its purpose is given if it purports to state what the expression ‘includes’ instead of what it ‘means’. (**Inland Revenue Commissioners v. Joiner**^[10]).

Generally, when the definition of a word begins with “means” it is indicative of the fact that the meaning of the word has been restricted; that is to say, it would not mean anything else but what has been indicated in the definition itself. (**Feroze N. Dotivala v. P.M. Wadhvani**^[11]). The use of the word ‘means’ indicates that the “definition” is a hard-and-fast definition, and no other meaning can be assigned to the expression than is put down in definition”. The word ‘includes’, when used, enlarges the meaning of the expression defined so as to comprehend not only such things as they signify according to their natural import, but also those things which the clause declares that they shall include. (**P. Kasilingam v. P.S.G. College of Technology**^[12]; **Gough v. Gough**^[13]; **Punjab Land Development and Reclamation Corpn. Ltd. v. Presiding Officer,**

Labour Court^[14]; Dilworth v. Commissioner of Stamps^[15]; Mahalakshmi Oil Mills v. State of A.P.^[16]; Municipal Corpn. of Greater Bombay v. Indian Oil Corpn. Ltd.^[17]; CIT v. Taj Mahal Hotel, Secunderabad^[18]).

Unless there are compelling reasons to do so, the meaning of a restrictive and exhaustive definition would not be expanded or made extensive to embrace things which are strictly not within the meaning of the word as defined. As the definition of “works contract” in the APGST Act, prior to 01.04.1995, began with “means”, it should be read and understood in the manner defined. There would be no justification to expand it by including some ingredients or elements which otherwise do not admit of such inclusion, and to give a different colour and meaning to the defined word. (**Feroze N. Dotivala**¹¹).

The appellants-assessee herein, respondents in **M/s. Dinakar Litho Printers Pvt. Ltd.**¹, were printers and dealers in cine-wall posters. The revisional and appellate authorities had treated the business transactions of the assessee as sale of goods, and not as works contracts. The Sales Tax Appellate Tribunal (“STAT” for short) held that the first part of the work, involving preparation of negatives of the wall-posters, was exclusively a job work involving skill and labour and, hence, the price charged for preparation thereof could not be subject to sales tax. However, the second part of the work involving printing of positive prints of wall-posters, in several copies, was deemed to be a works contract and, as such, tax was levied. The questions of law, framed for consideration in the revision cases filed before the High Court by the Revenue, were (1) whether the activity of preparing negatives and positives for delivery to customers was a job work as contended by the dealers, or a sale transaction; and (2) whether the STAT was justified in setting aside the orders of the lower authorities and remanding the matter to the assessing authority. Before the Division Bench, it was represented by the learned counsel for the parties, that, in view of the judgments of the Supreme Court in **Larsen Toubro**⁵ and **Pro Lab**², the questions which arose for

consideration, in the batch of cases, were already answered; with regards the first limb i.e., preparation of negatives and delivery etc., to the customers, the Supreme Court had held that it also amounted to a works contract which was part of a deemed sale; and, in that view of the matter, the order of the STAT, to the extent of exempting tax on the first limb i.e., preparation of negatives of wall-posters, was liable to be set aside. The Division Bench remanded the matter to the assessing authority with a direction to make fresh assessment after treating the entire work as a works contract.

While the subject transactions, undoubtedly, constitute a works contract as it is a composite contract of sale of goods and of labour and services, it is not all types of works contracts which could be subjected to tax under the APGST Act prior to 01.04.1995. By the use of the word "means" in the definition of "works contract", under Section 2(t) of the APGST Act as it stood prior to 01.04.1995, the legislature intended to subject only such "works contracts" to tax under the APGST Act as were specified in Section 2(t) of the Act.

The latter part of the definition of "works contract", as referred to in Section 2(t) of the APGST Act prior to 01.04.1995, dealt with movable property. The words used therein were "fitting out, improvement or repair of any movable property". In order to bring any activity within the term "works contract", the activity was required to fall within the ambit of any of these terms which were not defined or explained in the Act. As such its meaning had to be ascertained from the dictionary. The terms "fitting out", is referred to in the Law Lexicon, to mean "to supply things fit and necessary"; the word "improvement", is referred to in the Oxford dictionary to mean "something that improves, especially an addition or alteration that adds to value"; and the word "repair" is referred to in the Oxford dictionary to mean "restore to good condition after damage or wear". (**Nagarjuna Cotton Pressing Factory**³). The activity of manufacturing, printing and supply of cine wall-posters cannot be considered as falling under the terms "fitting out", "improvement" or "repair", as the supply of cine wall-posters is not a supply of goods which are fit and necessary; and there is no

improvement or repair of the cine wall-posters printed and supplied by the appellants. (**Nagarjuna Cotton Pressing Factory**³). Consequently these transactions did not constitute the specified “works contracts” referred to in Section 2(t), and were therefore not exigible to tax under the APGST Act during the relevant assessment years prior to 31.03.1995.

Special Appeal Nos.51, 53, 54, 57, 60, 61, 62, 63, 67, 68, 69 and 70 of 2003 are the appeals which arise out of the revisional order passed by the Commissioner, Commercial Taxes under the provisions of the C.S.T.Act. These appeals relate to different assessment years from 1985-86 to 1990-91. The legislative power of the States, under Entry 54 of the State List, is subject to two limitations - one flowing from the entry itself which makes the said power subject to the provisions of Entry 92-A of List I, and the other flowing from the prohibition contained in [Article 286](#). The legislative power under Entry 54 of the State List is not available in respect of transactions of sale or purchase which take place in the course of inter-state trade or commerce. As a result of Article 286(1), the legislative power conferred under Entry 54 of the State List does not extend to imposing tax on a sale or purchase of goods which takes place outside the State or which takes place in the course of import or export of goods.

In view of the aforesaid limitations, imposed by the Constitution, on the legislative power of the States under Entry 54 of the State List, it is beyond the competence of the State Legislature to make a law imposing or authorising the imposition of tax on the transfer of property in goods involved in the execution of a works contract, with the aid of Sub-clause (b) of Clause (29-A) of [Article 366](#), in respect of transactions which take place in the course of inter-State trade or commerce or transactions which constitute sales outside the State or sales in the course of import or export. Consequently it is not permissible for a State to frame the legislative enactment, in exercise of the legislative power conferred by Entry 54 of the State List, in a manner as to assume the power to impose tax on such transactions, and thereby transgress these constitutional limitations. When a law is enacted by Parliament under Article 286(3) the legislative power of the States under Entry 54 in the State List has to be exercised subject to the restrictions and conditions specified in that law. In exercise of the

power conferred by [Article 286\(3\)\(a\)](#) Parliament has enacted [Sections 14 and 15](#) of the Central Sales Tax Act, 1956. No law has, however, been made by Parliament in exercise of its power under [Article 286\(3\)\(b\)](#). (**Gannon Dunkerley & Co.**⁹; **Builders Association of India**⁸).

The provisions of Sections 3, 4 and 5 and Sections 14 and 15 of the Central Sales Tax Act, 1956 are applicable to a transfer of property in goods involved in the execution of a works contract covered by Article 366(29-A)(b). (**Gannon Dunkerley & Co.**⁹). While enacting a law, imposing a tax on sale or purchase of goods under Entry 54 of the State List read with Sub-clause (b) of Clause (29-A) of [Article 366](#) of the Constitution, it is not permissible for the State Legislature to make a law imposing tax on such a deemed sale which constitutes a sale in the course of inter-State trade or commerce under [Section 3](#) of the CST Act or an outside sale under [Section 4](#) of the CST Act or a sale in the course of import or export under [Section 5](#) of the CST Act. So also it is not permissible for the State Legislature to impose a tax on goods declared to be of special importance in inter-State trade or commerce under [Section 14](#) of the CST Act except in accordance with the restrictions and conditions contained in [Section 15](#) of the Central Sales Tax Act. (**Larsen and Toubro**⁵; **Gannon Dunkerley & Co.**⁹; **Pro Lab**²).

Section 2(g) of the CST Act, prior to its substitution by Finance Act 20 of 2002 w.e.f. 13.05.2002, defined “sale”, with its grammatical variations and cognate expressions, to mean any transfer of property in goods by one person to another for cash or for deferred payment or for any other valuable consideration, and to include a transfer of goods on the hire-purchase or other system of payment by instalments, but not to include a mortgage or hypothecation of or a charge or pledge on goods. After its substitution w.e.f. 13.05.2002, Section 2(g) of the CST Act defined “sale”, with its grammatical variations and cognate expressions, to mean any transfer of property in goods by one person to another for cash or deferred payment or for any other valuable consideration, and to include a transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract. Section 6 of the CST Act relates to liability to tax on

inter-State sales and, under sub-section (1) thereof, subject to the other provisions contained in the Act, every dealer shall be liable to pay tax under the Act on all sale of goods, other than electrical energy, effected by him in the course of inter-State trade or commerce during any year on and from the date so notified. It is only after the amendment of the definition of "sale" under Section 2(g) of the CST Act, with effect from 13.05.2002, that the deemed sale of goods, involved in the execution of a works contract, were brought within the definition of "sale". As the assessment years under the CST Act, in relation to the appeals which form part of this batch, are long prior to 13.05.2002, no tax could be levied under the CST Act on the subject transactions.

Section 2(j) of the CST Act defines "turnover", used in relation to any dealer liable to tax under the CST Act, to mean the aggregate of the sale prices received and receivable by him in respect of the sale of any goods in the course of inter-State trade or commerce made during any prescribed period, and determined in accordance with the provisions of the CST Act and the rules made thereunder. Prior to 01.04.2005, "works contract" was not defined under the CST Act. Section 2(ja) of the CST Act, as inserted by Act No.18 of 2005 w.e.f.1.4.2005, defines "works contract" to mean a contract for carrying out any work which includes assembling, construction, building, altering, manufacturing, processing, fabricating, erection, installation, fitting out, improvement, repair or commissioning of any movable or immovable property. It is only after 01.04.2005 that all kinds of works contracts are brought within the ambit of "works contracts" as defined in Section 2(ja) of the CST Act. As all the appeals in this batch relate to assessment years prior thereto, no tax could have been levied on such works contracts under the CST Act also. While printing and supply of cine wall-posters are no doubt "works contracts", they are not among the "works contracts" which fell within the definition of "works contracts" under Section 2(t) of the APGST Act prior to 01.04.1995. It is only after 13.05.2002 were works contracts included within the definition of "sale" under the CST Act. As the assessment years, to which these appeals relate, are long prior thereto, the subject transactions were not liable to tax either under the APGST Act or the CST Act. Point No.2 is answered

accordingly.

Point No.3:

Sri V. Bhaskar Reddy, Learned Counsel for the appellants, would submit that the Appellate Deputy Commissioner, after having set aside the order of the assessing authority seeking to levy tax on these transactions, had subsequently set aside the order of the assessing authority withholding refund under Section 33(BB) of the APGST Act; the order of the Appellate Deputy Commissioner, to the extent it set aside the order of the assessing authority refusing to refund the tax, has attained finality; it was not, therefore, open to the Commissioner to direct the appellants to pay tax under the APGST Act and the CST Act on these transactions; the appellants are not liable to be taxed on these transactions; and, even if they have paid the tax which was later refunded to them, they cannot now be asked to repay the said amount as any action, for forfeiture of refund, can only be made within three years.

The assessing authority assessed the appellants to tax on the transactions of manufacture, printing and supply of cine wallposters holding that it amounted to sale of goods exigible to tax under the APGST and CST Acts. It is this order of the assessing authority which was set aside in appeal by the Appellate Deputy Commissioner on the ground that these transactions did not amount to sale of goods, or sale of material, as it involved a high degree of skill and labour. As the appellants had already paid tax, the consequence of the order of the Appellate Deputy Commissioner was that they were entitled to claim refund of the tax paid by them earlier. The assessing authority, however, withheld the refund order exercising powers under Section 33-BB of the APGST Act.

Section 33-B of the APGST Act related to refund on appeal and, where as a result of any order passed in appeal or other proceeding under the Act, refund of any amount became due to the assessee, the assessing authority was required to refund the amount to the assessee, without his having to make any claim in that behalf, or adjust or apply such amount as provided in Section 33. Section 33-BB of the APGST Act related to non-refund of tax in certain cases and, where a levy and collection of tax was held invalid by any judgment or order of a court or Tribunal, it was not

necessary to refund any such tax to the dealer, unless it was proved by the dealer, to the satisfaction of the assessing authority, that the tax had not been collected from the purchaser. Under the proviso thereto, where any Court or Tribunal held the levy and collection of tax as invalid, and ordered the refund of any tax collected, the refund was to be restricted to the period of three years immediately preceding the judgment or the order.

The appellant preferred an appeal against the order of the assessing authority, withholding refund under Section 33-BB, and the Appellate Deputy Commissioner set aside the said order of the assessing authority. The Appellate Deputy Commissioner directed refund of the tax paid by the appellant-assessee only because he had, in his earlier order, set aside the order of the assessing authority treating the subject transaction as “sale” exigible to tax under the APGST and CST Acts. The earlier order of the Appellate Deputy Commissioner was revised by the Commissioner, the said order was set aside, and the order of the assessing authority was restored. Consequent upon the revisional order passed by the Commissioner, the earlier order of the Appellate Deputy Commissioner, holding the subject transactions not to be a sale of goods or material and as transactions involving a high degree of skill and labour, ceased to remain in force; and the order of the assessing authority, wherein it was held that the transaction amounted to “sale”, stood restored. As a result thereof, the appellants-assessees were liable to pay tax, under the APGST and CST Acts, on such transactions. The mere fact that the subsequent order of the Appellate Deputy Commissioner, whereby the order of the assessing authority withholding refund of tax was set aside, has attained finality matters little, as the subsequent order of the Appellate Deputy Commissioner is merely a consequence of his earlier order which was set aside by the revisional order of the Commissioner. As long as the order of the Commissioner remained in force, the appellants-assessees continued to remain liable to pay tax. It is only by the order now passed by us, have the subject transactions been held not to be a sale of goods exigible to tax under the APGST and CST Acts. It is of no consequence, therefore, that the subsequent order of the Appellate Deputy Commissioner, setting aside the order of the assessing authority

withholding refund of tax under the APGST and CST Acts, has attained finality. The Commissioner was not disabled from revising the earlier order of the Appellate Deputy Commissioner merely because he did not revise the subsequent order which was only a consequence of the earlier order. This point is answered in the affirmative, and in favour of the revenue.

Point No.4:

Sri Shaik Jilani Basha, Learned Special Standing Counsel for Commercial Taxes, would submit that the appellants had collected tax from their customers, and had retained them; such retention amounts to unjust enrichment; and the revenue is, therefore, entitled to recover the amount which the appellants had collected from their customers, on the printing and supply of cine wall-posters, and had retained them.

While the order of the Commissioner, treating the subject transactions as sale of goods and levying tax under the APGST and CST Acts is no longer valid, the question which still remains to be examined is whether the appellants-assesseees can be permitted to retain the amounts collected by them from their customers on the manufacture, printing and supply of cine wall-posters. While the appellants may not be liable to pay tax under the APGST and CST Acts, as the subject transactions are not “sale of goods”, but are works contracts other than those specified under the APGST Act during the relevant period, this Court cannot turn a blind eye to the fact that the appellants appear to have collected tax from their customers on the manufacture, printing and supply of cine wall-posters.

The doctrine of unjust enrichment is a just and salutary doctrine. No person can seek to collect tax/duty from both ends. In other words, he cannot collect tax/duty from his purchaser at one end and also collect the same tax/duty from the State on the ground that it has been collected from him contrary to law. The power of the Court is not meant to be exercised for unjustly enriching a person. The doctrine of unjust enrichment is, however, inapplicable to the State. The State represents the people of the country. No one can speak of the people being unjustly enriched. (**Mafatlal Industries Ltd. v. Union of India** ^[19]).

A claim for refund can succeed only if the petitioner alleges and establishes that he has not passed on the burden of tax/duty to another person/other persons. His refund claim shall be allowed only when he establishes that he has not passed on the burden of the tax/duty, or to the extent he has not so passed on, as the case may be. Whether the claim for restitution is treated as a constitutional imperative or as a statutory requirement, it is neither an absolute right nor an unconditional obligation but is subject to the above requirement. Where the burden of the tax/duty has been passed on, the claimant cannot say that he has suffered any real loss or prejudice. The real loss or prejudice is suffered, in such a case, by the person who has ultimately borne the burden, and it is only that person who can legitimately claim its refund. But where such person does not come forward, or where it is not possible to refund the amount to him for one or the other reason, it is just and appropriate that the amount is retained by the State, i.e., by the people. There is no immorality or impropriety involved in such a proposition. (**Mafatlal Industries Ltd.**¹⁹).

If, as is now contended before us by Sri Shaik Jilani Basha, Learned Special Standing Counsel for Commercial Taxes, that the appellants have collected tax on the manufacture and supply of cine wall-posters treating such transactions as “sale of goods”, then, notwithstanding the fact that the revisional order of the Commissioner is set aside and it is now held that the said transactions were not exigible to tax under the APGST and CST Acts during the relevant period, the appellants cannot be permitted to retain the amount collected by them from their customers as that would resulted in their unjust enrichment. As long as the revisional order of the Commissioner remained in force, the appellants were liable to tax under the Act. It is only by the order now passed by us, has the matter been put at rest, and the appellants have been held not liable to pay tax on the manufacture and supply of cine wall-posters. The period of limitation for recovery of the amounts, if any, retained by the appellants after collecting them as sales tax from their customers, would, therefore, commence only from the date of this order. The assessing authority shall, after giving the appellants an opportunity of being heard, consider whether the appellants have collected tax on these transactions from their customers and, if so,

recover the amount refunded to them earlier. The onus is on the appellants to show that they have not collected tax from their customers to whom they supplied the cine wall-posters manufactured and printed by them.

CONCLUSION:

As noted hereinabove the assessment years, to which the revisional orders of the Commissioner, Commercial Taxes related are all prior to the assessment years 1991-92 both under the APGST and CST Acts. During the aforesaid period, the term 'works contract' was given a restricted meaning under the APGST Act, and the works contract of manufacture, printing and supply of cine wall-posters did not fall within its ambit. It is only after 01.04.1995 that the definition of the "works contract" was amended and the word 'means' was substituted by the word 'includes' thereby expanding the scope of the term. Similarly, the definition of "works contract" was introduced in the CST Act only with effect from 01.04.2005, and the definition of 'sale' was substituted with effect from 13.05.2002. Prior thereto, the definition of "sale" under the CST Act did not include transfer of property in goods involved in the execution of a works contract. Consequently, the activities of manufacture, printing and supply of cine wall-posters did not fall within the ambit of a "works contract", and did not amount to "sale", under the CST Act and was, consequently, not exigible to tax under the CST Act also. The revisional order of the Commissioner, Commercial Taxes for the aforesaid assessment years, both under the APGST and CST Acts, are therefore set aside and are remanded to the assessing authorities for their consideration whether the appellants had collected sales tax (either under the APGST Act or under the CST Act) for the relevant assessment years from their customers and, if so, to recover the amounts refunded to the appellants earlier. The entire exercise, culminating in an order being passed afresh, shall be completed by the assessing authorities within four months from the date of receipt of a copy of this order. All the Special Appeals are disposed of accordingly. Miscellaneous Petitions pending, if any, shall also stand disposed of. No costs.

RAMESH RANGANATHAN, J

S. RAVI KUMAR, J

Date:22.07.2015.

Note: L.R. copy to be marked
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- [1] (Judgment in T.R.C.No.80 of 2002 and batch dated 31.03.2015)
[2] (2015) 78 VST 451 (SC)
[3] (1999) 29 APSTJ 130
[4] (2000) 31 APSTJ 37
[5] (2013) 65 VST 1 (SC)
[6] (2014) 7 SCC 1
[7] (1967) 19 STC 84
[8] (1989) 73 STC 370
[9] (1993) 88 STC 204
[10] (1975) 3 All ER 1050
[11] (2003) 1 SCC 433
[12] 1995 Supp (2) SCC 348
[13] (1891) 2 QB 665
[14] (1990) 3 SCC 682
[15] 1899 AC 99
[16] (1989) 1 SCC 164
[17] 1991 Supp (2) SCC 18
[18] (1971) 3 SCC 550
[19] (1997) 5 SCC 536