

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **SALES TAX APPEAL NOS. 47/2014, 49/2014 & 50/2014**

Reserved on : 18th December, 2014
Date of decision: 5th February, 2015

ORIX AUTO INFRASTRUCTURE SERVICES LTD. .Appellant

Through Mr. Ashok K. Bhardwaj, Advocate.

Versus

COMMISSIONER, DVAT, DELHI & ORS. Respondents

Through Mr. Rajesh Mahna, Advocate.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE V. KAMESWAR RAO

SANJIV KHANNA, J.:

These three appeals under Section 81 of the Delhi Value Added Tax Act, 2004 ('Act', for short) impugn a common order dated 23rd June, 2014 passed by the Appellate Tribunal, Value Added Tax ('Tribunal', for short) in the case of M/s. Orix Auto Infrastructure Services Limited ('appellant', for short).

2. STA No.49/2014 arises out from the order-in-original passed by the Commissioner, Value Added Tax under Section 84 of the Act dated 29th March, 2006, which has been upheld by the Tribunal in the impugned order. STA No. 47/2014 is directed against 18 orders-in-original passed under Section 32 of the Act for monthly tax periods from April, 2005 to September, 2006. The said order again has been upheld by the Tribunal in the impugned decision. STA No. 50/2014 is directed against 18 orders-in-original for monthly tax periods April, 2005 to September, 2006 under Section 33 of the Act imposing penalty under Section 86(10) of the Act @

100% of the tax deficiency. In the impugned order, the Tribunal has mitigated the said penalty to 20% from 100% as imposed in the order-in-original.

3. We frame the following substantial question of law in STA Nos.47/2014 and 49/2014:

Whether in view of Sections 105 and 106 read with Section 3 of the Delhi Value Added Tax Act, 2004, lease rentals paid on or after 1st April, 2005 can be taxed under the aforesaid Act even when the lease agreement was executed between the parties on or before 31st March, 2005?

4. We also frame the following substantial question of law in STA No.50/2014:

Whether the order of the Appellate Tribunal, Value Added Tax imposing penalty at the rate of 20% under Section 86(10) of the Delhi Value Added Tax Act, 2004, is self contradictory and is contrary to the mandatory pre-conditions under the said Section?.

5. The appellant-assessee is engaged in the business of leasing of machinery and vehicles. It enters into a master lease agreement with the hirer, which stipulates the period of lease, including the date of commencement, lease value, lease rent, etc. The appellant-assessee continues and remains the owner and has title and interest over the machinery and vehicles and on expiry of the term, vehicles and machinery have to be returned. The lessee in terms of the master lease agreement is entitled to take on hire specific vehicles/machinery and at that time supplementary agreement is executed in accordance with the terms and conditions of the master lease agreement, including the term of the lease and other stipulations.

6. Article 366(29A) was inserted by way of Forty-Sixth Amendment to the Constitution and clause (d) thereof reads as under:-

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

xxx

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

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;”

7. The effect thereof is that the State Legislature could henceforth tax transfer of right to use in goods for any purpose, whether or not for specified period, for cash, deferred payment or other valuable consideration. By deeming fiction, these were treated as sale or purchase of goods. This had the effect of expanding the scope of the words “sale of goods” in Entry 54 of List II, Schedule VII of the Constitution of India, which empowers the State Governments to levy tax on sale or purchase of goods other than newspapers. Consequent to the aforesaid constitutional amendment, the Delhi Sales Tax on Right to Use Goods Act, 2002 (‘Act of 2002’, for short), as a separate enactment, was enacted. The said enactment was notified and came into operation with effect from 15th September, 2004 and remained in force till 31st March, 2005. Act of 2002 was repealed by the Act, i.e., Delhi Value Added Tax Act, 2004, which was enforced with effect from 1st April, 2005. From 15th September, 2004 till 31st March, 2005, leasing transactions under the Act of 2002 were taxed @ 4%. However, after enforcement of the Act, i.e., Delhi Value Added Tax Act, 2004, the rate of tax applicable to leasing transaction was the rate prevalent on individual items, namely, motor vehicles @ 12.5%, machinery @ 12.5%, furniture @ 12.5%, computers @ 4%, etc. It would be

appropriate to notice that the Act of 2002, i.e., Delhi Sales Tax Right on Right to Use Goods Act, 2002 was an independent enactment and unlike some of the other States, the Delhi Sales Tax Act, 1975 was not amended to bring within the ambit of taxation transfer of right to use goods. However, the Act, i.e. the Delhi Value Added Tax Act, 2004, repealed the Act of 2002, the Delhi Sales Tax Act, 1975, the Delhi Sales on Works Contract Act, 1999 and the Delhi Tax on Entry of Motor Vehicles into Local Areas Act, 1994. Therefore, the Act was enacted to consolidate as well as amend the law relating to levy of tax on sale of goods, tax on transfer of property involved on execution of work contracts, tax on transfer of right to use goods and tax on entry of motor vehicles by way of introducing a value added tax regime.

8. The contention of the appellant is that the Act would be applicable only to such agreements, which have the effect of transfer of right to use goods executed on or after 1st April, 2005. The agreements executed prior to 1st April, 2005 would be governed and accordingly charged to tax under the Act of 2002 @ 4% even if the lease rentals were payable on or after 1st April, 2005. The contention is that the taxable event is the transfer of right to use goods and the said event had occurred when the master agreement was executed and/or on delivery of the motor vehicle or machinery. Payment of rental instalment does not create a taxable event. Periodical payment of lease instalments have reference to the point of time when tax is to be collected, which need not be in sync with the taxable event. At best, it can be treated as having reference to measure of tax, but not the subject matter of tax. Reliance is placed upon the decision of the Supreme Court in *M/s 20th Century Finance Corporation Limited and Another versus State of Maharashtra*, (2000) 119 STC 182, *Union of India and Others versus Bombay Tyre International Limited*, (1984) 1 SCR 347 and

decision of the Karnataka High Court in STRP No.356/2012 and STRP Nos. 544-620/2013, *State of Karnataka versus M/s Lease Plan India Limited*, decided on 6th August, 2014. It is submitted that the decision of the Division Bench of the Delhi High Court in *M/s Infrastructure Leasing and Financial Services Limited versus Commissioner of Value Added Tax and Others*, (2010) 29 VST 346 (Delhi) is distinguishable in view of the difference in language of Section 3 of the Act of 2002, i.e., Delhi Sales Tax Act on Right to Use Goods Act, 2002 and Section 105(1)(b) of the Act, i.e., Delhi Value Added Tax Act, 2004.

9. In order to appreciate the controversy, we would like to reproduce Sections 105 and 106 of the Act and the same read:-

“105 Application to sales and purchases

(1) The tax imposed by section 3 of this Act applies to every –

(a) sale, including an instalment sale and hire purchase of goods, made on and after 1st April, 2005;

(b) sale in the form of the transfer of a right to use goods, to the extent that the right to use goods is exercised after 1st April, 2005.

(2) Tax credits arising under section 9 of this Act shall be allowed only for –

(a) a purchase, including a purchase under an instalment sale and hire purchase of goods, made on and after 1st April, 2005; and

(b) a purchase occurring in the form of the acquisition of a right to use goods, to the extent that the right to use goods is exercised after 1st April 2005.

Explanation.- This provision does not prevent the person claiming the special tax credit allowed under section 14 of this Act.

(3) Where an amount is paid or received prior to 1st April, 2005 in respect of a sale or purchase occurring after 1st April, 2005, and the person calculates his turnover or turnover of purchases based on amounts paid and received, the amount shall be treated as forming part of the person's turnover or

turnover of purchases in the tax period in which the sale occurs.

(4) Where a dealer registered under the repealed Delhi Sales Tax on Works Contract Act, 1999 (Delhi Act 9 of 1999) (hereinafter referred to in this sub-section as “the repealed Act”), is liable to pay tax under this Act, and has at any time prior to the 1st day of April, 2005 entered into any works contract, where the total contract value was inclusive of the tax payable under the repealed Act, and the execution of the said work contract has continued after the 1st day of April, 2005, then the liability of the dealer to pay tax under this Act shall be discharged at the rates applicable under this Act, and the liability so discharged in respect of the said contract shall not exceed the liability which would have accrued under the repealed Act if it had continued to be in force and in the case of a dealer who had opted for composition of tax under the repealed Act, the liability under this Act in respect of a contract where the execution has started before the 1st day of April, 2005 and has continued thereafter shall not exceed the sum which would have been payable by way of composition in respect of the said contract under the repealed Act if it had continued to be in force:

PROVIDED that the provisions of this sub-section shall be valid up to the 31st day of March, 2007:

PROVIDED FURTHER that the provisions of this sub-section shall not apply where the contract value has been changed on account of increased liability under this Act:

PROVIDED ALSO that the provisions of this sub-section shall apply only if there was no provision in the contract for revising the value of the contract on account of the change of tax liability.]

106 Repeal and savings

(1) The Delhi Sales Tax Act, 1975 (Act 43 of 1975), the Delhi Tax on Entry of Motor Vehicles into Local Areas Act, 1994 (Delhi Act 4 of 1995), the Delhi Sales Tax on Works Contract Act, 1999 (Delhi Act 9 of 1999), and the 1[Delhi Sales Tax on Right to Use Goods Act, 2002 (Delhi Act 13 of 2002)] as in force in Delhi (referred to in this section as the “said Acts”), are hereby repealed.

(2) Notwithstanding sub-section (1) of this section, such repeal shall not affect the previous operation of the said Acts or any right, title, entitlement, obligation or liability already acquired, accrued or incurred thereunder.

(3) For the purposes of sub-section (2) of this section, anything done or any action taken including any appointment, notification, notice, order, rule, form or certificate in the exercise of any powers conferred by or under the said Acts shall be deemed to have been done or taken in the exercise of the powers conferred by or under this Act, as if this Act were in force on the date on which such thing was done or action was taken, and all arrears of tax and other amounts due at the commencement of this Act may be recovered as if they had accrued under this Act.

(4) Notwithstanding anything contained in this Act, for the purpose of the levy, assessment, deemed assessment, reassessment, appeal, revision, review, rectification, reference, registration, collection, refund or input or credit of input tax of allowing benefit of exemption or deferment of tax, imposition of any penalty or of interest or forfeiture of any sum, which relates to any period ending before 1st day of April, 2005 or for any other purpose whatsoever connected with or incidental to any of the purposes aforesaid, and whether or not the tax, penalty, interest or sum forfeited, if any, in relation to such proceedings, is paid before, on or after 1st day of April, 2005, the repealed Act and all rules, regulations, orders, notifications, forms and notices issued thereunder and in force immediately before 1st day of April, 2005 shall continue to have effect as if this Act has not been passed.”

10. Section 106 is a repeal and a savings clause. As already noticed above, the Act repeals four earlier enactments by a single consolidated Act. Sub-section (2) to Section 106 protects any right, title, entitlement, obligation or liability already accrued, acquired or incurred under the Act of 2002 and states that it shall not affect previous operation of the said Act. Sub-section (3) expands the scope and clarifies sub-section (2) but in respect of anything done or any action taken in exercise of powers by or under the four repealed enactments, as if these were done or taken in exercise of powers conferred by or under the Act, i.e., Delhi Value Added Tax Act, 2004. It specifically records that arrears of tax and other amounts due under four repealed enactments at the commencement of the Act, may be recovered under the Act. Sub-section (4) was inserted in 2012 but with

retrospective effect from 1st April, 2005 and relates to actions, etc. regarding levy, assessment, re-assessment, appeal revision, review, etc.

11. Section 105 in clause (a) stipulates that Section 3 would apply to every sale, including instalment sale or hire-purchase of goods made on or after 1st April, 2005. Sub-clause (b) is the material clause and requires elucidation, as it specifically pertains to transfer of right to use goods. Sale in the form of transfer of right to use goods, would be subjected to tax under Section 3 of the Act to the extent that right to use goods is exercised after 1st day of April, 2005. If we carefully read clause (b) to sub-section (1) to Section 105 of the Act, it can be bifurcated into two parts. The first part of the said clause relates to the subject matter of tax, i.e. the taxable event and the second part of the said clause relates to the manner/mode of collection or the time. Only when and to the extent that the right to use goods is exercised after 1st April, 2005, it would be taxable under Section 3 of the Act, i.e., Delhi Value Added Tax Act, 2004 in terms of clause (b) to Section 105 of the Act. To the extent the right to use goods was exercised before 31st March, 2005, Section 3 of the Act would not be applicable. Perceptibly, the extent of right to use goods exercised before 1st April, 2005 would be covered by the Act of 2002. The second part does not make reference to the taxable event, i.e. the sale in the form of transfer of right to use goods. The second part relates to the extent to which the right to use goods is exercised after 1st April, 2005. The first part relates to the taxable event or the subject matter of tax and is general and relates to sale in form of transfer of right to use goods, which may be before or after 1st April, 2005. Thus, what would be included and subjected to tax under Section 3 of the Act under clause (b) to Section 105, would be the extent to which the right to use goods is exercised after 1st April, 2005.

12. The aforesaid interpretation becomes clear and finds resonance in sub-section (2), which deals with tax credit under Section 9 of the Act. Under clause (a) to sub-section (2) to Section 105 of the Act, tax credit is to be allowed on purchases, including purchase on instalment or hire-purchase made on or after 1st April, 2005, which is in consonance with clause (a) to sub-section (1) to Section 105 of the Act. Clause (b) to sub-section (2) to Section 105 entitles the hirer to take tax credit in respect of purchase occurring in form of acquisition of a right to use goods and to the extent that the right to use goods is exercised. If the said right to use goods is exercised after 1st day of April, 2005, tax credit would be available to the hirer. Thus, the benefit of tax credit would be available to the hirer to the extent right to use goods is exercised after 1st April, 2005.

13. The reason in enacting clause (a) and (b) to sub-sections (1) and (2) to Section 105 of the Act has a purpose and object. Clause (a) to Section 105(1) refers to sales made on or after 1st April, 2005. The term ‘sale’ is defined in sub-section (zc) to Section 2 in a comprehensive manner and includes in clause (vi), transfer of right to use in goods for any purpose, whether or not for specified period, for cash, deferred payment or valuable consideration. The necessary sequitur is that transfer of right to use goods on or after 1st April, 2005 would be sale and covered by clause (a) to sub-section (1) to Section 105 of the Act. Clause (b) to Section 105(1) of the Act was not enacted for bringing within the ambit of Section 3, sales including sales in the nature of transfer of right to use goods made on or after 1st April, 2005, but to include in the ambit of Section 3 of the Act even sales in the form of transfer of right to use goods made prior to 1st April, 2005, to the extent that the right to use goods is exercised on or after 1st April, 2005. The expression “to the extent that the right to use goods is exercised” would necessarily refer to and can only refer to instalments or

lease rentals paid on or after 1st April, 2005. This would be the natural and judicious interpretation of the said clause. The hirer exercises his right to use goods by making payment of the lease rental. The aforesaid interpretation is lucid and clear from clause (a), which refers to sale including instalment sale or hire-purchase of goods made on or after 1st April, 2005. In such cases, sub-section (3) to Section 105 would be applicable, when the conditions stated therein are satisfied.

14. We have also examined and read Section 106 and do not find that the said Section in any way compels us or mandates a different interpretation. Sub-section (3) to Section 106 makes the provisions of the Act, i.e., Delhi Value Added Tax Act, 2004, applicable as if it was in force when the action was taken under the repealed enactments.

15. The aforesaid view taken by us in fact finds support from the decision relied by the appellant in the case of ***Bombay Tyre International Limited*** (supra). In the said decision, the Supreme Court drew an apparent distinction between subject matter of tax or the taxable event, which in the case of excise law is production or manufacture of goods, and the stage of collection. It was observed that the stage of collection need not be integrated with the completion of manufacturing process. In other words, the date of collection, need not synchronise with the taxable event which in the present case is the transfer of right to use goods. In other words, the date or time of payment may be different and subsequent to the taxable event, i.e., the date on which transfer of right to use goods is made. In ***Bombay Tyre International Limited*** (supra), the Supreme Court held that levy of tax in our country has a status of constitutional concept, but the point of collection, i.e., time of collection would depend upon the statute. The statute could, therefore, declare the point at which the tax is to be collected, which need not synchronise with the taxable event and can be

different in point of time. The said judgment also elucidates the difference between the taxable event/subject matter of tax and the standard by which the amount of tax is measured. Measure of tax should throw light on the general character of tax, but is not the true test of the nature of tax or necessarily determinative. Thus, duty on excise is chargeable on manufacture or production of goods, but measure of tax or the method by which the tax is calculated should not be identified with the nature of tax. Thus, the contention that the measure of tax cannot include manufacturing profits was rejected.

16. The view we have taken is not contrary to the decision of the Supreme Court in *20th Century Finance Corporation Limited & Another* (supra). The Constitution Bench in the said case resolved the controversy relating to *situs* or power of a State to tax transfer of right to use on the premise that the goods put to use were located within the said State. The controversy had arisen in a group of cases in view of the limitations placed upon the taxing power of the State by virtue of Article 286 of the Constitution of India, which imposes restriction on imposition of tax on sale or purchase of goods where sale or purchase of goods takes place; (a) outside the State; or, (b) in the course of import of goods into or export of goods out of India. Clause (2) of Article 286 stipulates that the Parliament may, by law, formulate principles for determining when a sale or purchase of goods takes place in such ways. The Supreme Court referred to the legislative history of Article 286, including removal/omission of the Explanation. The decision of the Supreme Court in *Bengal Immunity Company Limited versus State of Bihar and Others*, (1955) 2 SCR 603 that *situs* of sale or purchase is wholly irrelevant as regards its inter-State character, was relied. Reference in this regard was made to the amendment made by the Constitution (Sixth Amendment) Act, 1956 by which Entry

92A was added to List I of the VII Schedule and also addition of sub-clause (g) to clause (1) and sub-clause (3) to Article 269 of the Constitution. By these amendments, the Parliament was empowered to levy and collect tax on sale or purchase of goods where said sale or purchase takes place in the course of inter-State trade or commerce and also to lay down principles for determining when sale or purchase of goods takes place in the course of inter-State trade or commerce. It is in the said context and for determining whether or not the State Legislature had the necessary power and authority to tax transfer of right to use goods under clause 29A(d) of Article 366 of the Constitution, observations were made and the ratio was expounded. It was clearly held that in spite of enactment of clause 29A(d) to Article 366, the limitation on the power of the State Legislature to levy sales tax or deemed sales under other Articles continues and is valid. Sub-clauses (a) to (f) of clause 29A to Article 366 were not actually ‘sales’ strictly within the meaning of term ‘sale’, but are deemed as ‘sales’ by legal fiction, but the *situs* of said sales for the purpose of taxation by a particular State must not violate Articles 286 and 269 of the Constitution. For the purpose of deciding whether a State Legislature has power to tax transfer of right to use goods, the following observations were made:-

“**25.** Article 286 is in Part XII of the Constitution which deals with “Finance, Property, Contracts and Suits”. It is one of the several articles which are grouped under the heading “Miscellaneous Financial Provisions” in Chapter I of that Part. It is to be noted that it has not found a place in Part XI, Chapter I whereof deals with “Legislative Relations” including “Distribution of Legislative Powers” between Parliament and the legislatures of States. The marginal note to Article 286 is “Restrictions as to imposition of tax on the sale or purchase of goods”, which, unlike the marginal notes in Acts of the British Parliament, is part of the Constitution as passed by the Constituent Assembly, *prima facie*, furnishes some clue as to the meaning and purpose of the article. Apart from the marginal note, the very language of that article makes it

abundantly clear that its object is to place restrictions on the legislative power of the States with respect to the imposition of taxes on the sales or purchases of goods. It will be recalled that Section 100(3) of the Government of India Act, 1935 read with Entry 48 of List II of the Seventh Schedule to that Act gave power to the Provincial Legislatures to make laws with respect to “taxes on sale of goods and on advertisements”. Pursuant to the legislative power thus conferred on them the Provincial Legislatures enacted Sales Tax Acts for their respective Provinces. Although in most of those Acts “sale” was first defined as meaning transfer of the property in the goods, so as to make the passing of the property within the Province the principal basis for the imposition of the tax, yet by means of Explanations to that definition, those Acts gave extended meanings to that word and thereby enlarged the scope of their operation. The imposition of tax on the sales or purchases of goods on the basis of a very slight territorial connection or nexus resulted in what has been graphically described by Patanjali Sastri, C.J. in the passage quoted above from the majority judgment in the Bombay appeal. This imposition of multiple taxes on one and the same transaction of sale or purchase was certainly calculated to hamper and discourage free flow of trade within India regarded as one economic unit. This undesirable state of affairs had to be put right. Therefore, while the Constitution-makers by Article 246(3) read with Entry 54 in List II of the Seventh Schedule to the Constitution conferred power on the legislatures of Part A and Part B States to make law with respect to “Taxes on the sale or purchase of goods other than newspapers” they at the same time by Article 286 clamped on that legislative power several fetters. Broadly speaking, the fetters thus placed on the taxing power of the States are that no law of a State shall impose or authorise the imposition of a tax on the sale or purchase of goods where such sale or purchase takes place, (a) outside the State or (b) in the course of import or export or (c) except insofar as Parliament otherwise provides, in the course of inter-State trade or commerce and lastly (d) that no law made by the Legislature of a State imposing or authorising the imposition of a tax on the sale or purchase of any such goods as have been declared by Parliament by law to be essential for the life of the community shall have effect unless it has been reserved for the consideration of the President and has received his assent. It should be noted that these are four separate and independent restrictions placed upon the legislative competency of the States to make a law with respect to matters enumerated in Entry 54 of List II. In order to make the ban effective and to leave no loophole the Constitution-makers have considered the different aspects of sales or purchases of goods and placed checks on the legislative power of the States at different angles.

Thus in clause (1)(a) of Article 286 the question of the situs of a sale or purchase engaged their attention and they forged a fetter on the basis of such situs to cure the mischief of multiple taxation by the States on the basis of the nexus theory. In clause (1)(b) they considered sales or purchases from the point of view of our foreign trade and placed a ban on the States' taxing power in order to make our foreign trade free from any interference by the States by way of a tax impost. In clause (2) they looked at sales or purchases in their inter-State character and imposed another ban in the interest of the freedom of internal trade. Finally, in clause (3) the Constitution-makers' attention was rivetted on the character and quality of the goods themselves and they placed a fourth restriction on the States' power of imposing tax on sales or purchases of goods declared to be essential for the life of the community. These several bans may overlap in some cases but in their respective scope and operation they are separate and independent. They deal with different phases of a sale or purchase but, nevertheless, they are distinct and one has nothing to do with and is not dependent on the other or others. The States' legislative power with respect to a sale or purchase may be hit by one or more of these bans. Thus, take the case of a sale of goods declared by Parliament as essential by a seller in West Bengal to a purchaser in Bihar in which goods are actually delivered as a direct result of such sale for consumption in the State of Bihar. A law made by West Bengal without the assent of the President taxing this sale will be unconstitutional because (1) it will offend Article 286(1)(a) as the sale has taken place outside the territory by virtue of the Explanation to clause (1)(a), (2) it will also offend Article 286(2) as the sale has taken place in the course of inter-State trade or commerce and (3) such law will also be contrary to Article 286(3) as the goods are essential commodities and the President's assent to the law was not obtained as required by clause (3) of Article 286. This appears to us to be the general scheme of that article.

26. We come now to the particular bans. Although the legislatures of the States were empowered by Article 246(3) read with Entry 54 of List II to make a law with respect to taxes on sales or purchases of goods, the different State Legislatures, as already mentioned, considered themselves free to make a law imposing tax on sales or purchases of goods provided they had some territorial nexus with such sales or purchases e.g. that one or other of the ingredients or events which go to make up a sale or purchase was found to exist or had happened within their respective territories. Whether they were right or wrong in so acting is a question which has not been finally decided by the courts but the fact is that they did so. This resulted in multiple taxation which manifestly prejudiced the interests of the ultimate consumers and also

hampered the free flow of inter-State trade or commerce. So the Constitution-makers had to cure that mischief. The first thing that they did was to take away the States' taxing power with respect to sales or purchases which took place outside their respective territories. This they did by clause (1)(a). If the matter had been left there, the solution would have been imperfect, for then the question as to which sale or purchase takes place outside a State would yet have remained open. So the Constitution-makers had to explain what an outside sale was and, this they did by the Explanation set forth in clause (1). The language employed in framing the Explanation, however, has given scope for argument to counsel and presented considerable difficulties to the court in ascertaining its purpose and intendment. If the Explanation simply said "For the purposes of sub-clause (a), a sale or purchase shall be deemed to have taken place outside a State when the goods have actually been delivered for the purpose of consumption in another State, notwithstanding the fact; etc. etc." then none of the difficulties would have arisen at all. But why, it is asked, did the Constitution-makers seek to explain what was an outside sale or purchase by saying that a sale or purchase was to be deemed to take place inside the particular State mentioned in the Explanation? Was the purpose of the Explanation only to explain what was an outside sale or purchase or was it also its purpose to allot or assign a particular class of sales or purchases of the kind mentioned therein to a particular State so as to put the question of situs of the sales or purchases of that description beyond the pale of controversy? These are questions which arise and are raised because of the somewhat involved language of the Explanation. Four different views as to the true meaning and effect of the Explanation have been suggested for our consideration and arguments have been advanced for and against the correctness of each of them. In the view we have taken, it is not necessary for us to express any final opinion in the matter. We propose accordingly to note the possible views and record very briefly the criticisms relating to each of those views and the suggested answers to such criticisms.

27. One view which has been called the strict view is this. In clause (1)(a) the Constitution-makers have placed a ban on the taxing power of the States with respect to sales or purchases which take place outside the State. If the matter had been left there the ban would have been imperfect, for the argument would have still remained as to where a particular sale or purchase took place. Does a sale or purchase take place at the place where the contract of sale is made, or where the property in the goods passes or where the goods are delivered? These questions are answered by the Explanation. That Explanation is "for the purposes of sub-clause (a)" i.e. for the purpose of

explaining which sale or purchase is to be regarded as having taken place outside a State. By saying that a particular sale or purchase is to be deemed to take place in a particular State the Explanation only indicates that such sale or purchase has taken place outside all other States. The Explanation is neither an exception nor a proviso but only explains what is an outside sale referred to in sub-clause (a). This it does by creating a fiction. That fiction is only for the purposes of sub-clause (a) and cannot be extended to any other purpose. It should be limited to its avowed purpose. To say that this Explanation confers legislative power on what for the sake of brevity has been called the delivery State is to use it for a collateral purpose which is not permissible. Further, it is utterly illogical and untenable to say that Article 286 which was introduced in the Constitution to place *restrictions* on the legislative powers of the States, by a side wind, as it were, gave enlarged legislative powers to the State of delivery by an explanation sandwiched between two *restrictions*. This construction runs counter to the entire scheme of the article and the Explanation and one may see no justification for imputing such indirect and oblique purpose to this article. Had the Constitution-makers so desired they could have done so in a more direct and straightforward way. To hold that the Explanation has, besides its declared purpose, another hidden purpose of conferring or enlarging legislative power is to build up a fanciful argument merely on the unfelicitous and involved language used in the Explanation although it is distinctly not the purpose of the Explanation and although it does not purport substantively and *proprio vigore*, to confer any legislative power on any State. Its only purpose is to explain what an outside sale is, so that, by one stroke, as it were, it takes away the taxing power, in respect of sales or purchases of the kind referred to in the Explanation, of all States other than the State where such sales or purchases are, by the Explanation, to be deemed to have taken place. This view of the Explanation was taken in the dissenting judgment in the case of the *State of Travancore-Cochin v. Shanmugha Vilas Cashew Nut Factory* [(1945) 5 SCR 53] . The view that the Explanation is only for the purposes of sub-clause (a) of clause (1) and cannot be carried over to clause (2) was also taken in the dissenting judgment in the *State of Bombay v. The United Motors (India) Ltd.* [(1953) 4 SCR 1069 at p. 1077] at p. 1103.”

17. The aforesaid observations and ratio are with reference to the question, which had arisen and are not wholly relevant and applicable for the issue in question. They do not relate to power and authority of taxation under the Act. They relate to the right of a State to tax, without violating

and breaching the limitation and restriction not to tax the inter-State sales. It is in this context it has been held that the levy of tax is not on use of goods, but on transfer of right to use goods. Right to use goods is the resultant effect of transfer of right to use goods and in the context of sub-clause (d) to clause 29A of Article 366 for the purpose of deciding which State and whether a particular State has the right to tax the said transfer, observations have been made. The aforesaid legal position becomes clear from the decision of the Supreme Court in the case of ***Bharat Sanchar Nigam Limited and Another versus Union of India and Others***, (2006) 145 STC 91 (SC).

18. In ***Bharat Sanchar Nigam Ltd. & Ors. versus Union of India & Anr.*** (supra), reference was made to the earlier judgment in the case of ***20th Century Finance Corpn. Ltd.*** (supra) and it was explained that the object and purpose of clause 29A to Article 366 is to bring specific transactions, where one or more essential ingredients of sale as defined in the Sales of Goods Act are absent, within the ambit of purchase and sales for purpose of levy of sales tax. Yet, there are certain limitations on levy of tax by the State Governments under Entry 54 of List II of the VII Schedule of the Constitution, which have not been overridden. Decision in ***20th Century Finance Corporation Ltd.*** (supra) cannot be interpreted as an authority for the proposition that delivery of possession of goods is not a necessary concomitant for complete transaction of sale under sub-clause (d) to Article 366(29A) and in order to decide whether particular State is entitled to levy tax, the court has to determine when and where the taxable event for the purpose of sale takes place. A.R. Lakshmanan, J. in his concurrent judgment has affirmatively stated that decision in ***20th Century Finance Corporation Ltd.*** (supra) related only to *situs* for the purpose of the State which could impose the tax and not subject matter of taxation which is a

transfer of right to use goods. The said observations are material and relevant.

19. At this stage, we would like to refer to the decision of Delhi High Court in *Infrastructure Leasing and Financial Service Ltd. vs. Commissioner of Value Added Tax & Ors.* (2010) 29 VST 349 (Del). The said case related to Act of 2002 and the issue was whether lease rentals received after 15th September, 2004 would be taxable though the agreements for transfer of right to use were prior to the said date. The Act of 2002 was enforced/notified with effect from 15th September, 2004 only. The challenge raised in the said writ petition was on the ground that the definition of term 'turnover of sales' in Section 2(s) was ultra vires the charging section, i.e. Section 3 which postulated and codified the instance of tax. The High Court applied the principle of harmonious construction and reconciled the two sections. It was further observed that principle of ultra vires would not be applicable when challenge made is that one provision of the Act is ultra vires of another. Thus, constitutional validity of Section 3, or for that matter Section 2(n) of Act, 2002, was not challenged and even the doctrine of reading down was not relied. The High Court observed that in terms of the two provisions, lease instalments paid after 15th September, 2004 would be subject to tax even when the agreements were prior in point of time. The term 'sale' as defined in Section 2(n) of Act 2000, it was distinguished, would include deferred payment, i.e. when payment is staggered and not at one time. In such cases, right to use accrues in favour of the lessee when he pays rental regularly and in terms of the agreement. In this context, reference was also made to clause 29A inserted to Article 366 which treats certain transactions as sale by deeming effect. Thus, the said decisions support and affirm our reasoning.

20. In view of the aforesaid discussion relating to interpretation of Sections 105 and 106 of the Act, we do not see any reason to interfere with the impugned decision on the said aspect. Noticeably, Section 3 of the Act which is a charging section imposes tax on every dealer in respect of every sale of goods. The term 'sale' as defined in Section 2(1)(zc) clause (vi) would include transfer of right to use goods. Section 2(1)(zm) defines 'turnover' to be aggregate of the 'sale price' which as per clause (zd)(iii) to Section 2(1) means valuable consideration or hire purchase amount received or receivable for such transfer irrespective of whether or not the rights to use goods is for specified period. Rule 4 of the DVAT Rules, 2004, in clause (b) stipulates that in case of transfer of right to use goods, not being hire purchase agreement or instalment sale agreement, is the proportion or sale price, i.e. lease rental due and payable during the relevant tax period.

21. We do not find any merit in STA Nos.47 and 49/2014. Accordingly, the substantial question of law framed in the said appeals is answered in against the appellant and in favour of the respondent Revenue.

22. However, the position in STA No. 50/2014 would be different. The said appeal relates to imposition of penalty under Section 86(10) of the Act. The finding given by the Tribunal reducing the penalty to 20% reads as under:-

“11. Regarding penalty there is substance in the submissions by the Ld. Counsel for the appellant that on account of different interpretation of law as was also sought of by the appellant by filing determination application it cannot be said that the return was false, misleading or deceptive in material particulars as there was sufficient reason for filing the return at rate of 4% as per provisions of the DST on Right to Use Goods Act, 2002 which was default assessed at the rate of 12.5% which fact created tax deficiency. Considering the submissions, this Tribunal is of the considered view that second proviso to clause 2 of Sec. 86 of the DVAT Act applies to the appellant in

term of submission that tax properly payable was not determined by the authorities including by this Tribunal as the determination was pending for adjudication in appeal against the orders passed by the Ld. Commissioner. Accordingly, considering that there existed reasonable cause for filing such a return which turn out to be a false, deceptive and misleading return, the penalties is remitted to the 20% only of the amount of penalty in each period which amount has been paid in compliance of the stay orders passed by this Tribunal.”

23. The aforesaid finding clearly shows that the Tribunal was of the view that there existed a reasonable cause for filing of the returns as such and declaring tax @ 4%, and the returns computing tax @ 4%, i.e. tax rate prescribed in the Act of 2002, and not @ 12.5% were not false, deceptive, or misleading.

24. Thus, there is merit in the contention of the appellant that there is inherent contradiction in the order passed by the Tribunal. There is also merit in this appeal as a Division Bench of the Delhi High Court in *Jatinder Mittal Engineers and Contractors versus Commissioner of Trade & Tax* (2011) 46 VST 498 (Delhi) has interpreted Section 86(10) and held that the penalty can only be imposed under the said provision when it is established that the return filed by the assessee is false, misleading or deceptive in material particulars or the assessee omits from a return any matter or thing without which return is false, misleading or deceptive in a material particular. The High Court drew a distinction between penalty under sub-section (10) to Section 86 and sub-section (12) to Section 86; the latter is compensatory in nature and deals with tax deficiency.

25. It is noticeable that in the present case, the notice for default assessment had set up on entirely different case. Revenue had asserted that the agreements between the appellant and third parties was in fact sale by way of instalments and not transfer by way of right to use. Additional

Commissioner accepted the objections filed by the assessee on the said aspect after acknowledging, incongruous assertions and ambiguities in the contention raised by the Revenue, which were also inconsistent. It was held that transactions were not hire purchase contracts and were not purchase of chattels by way of instalments. However, an order of remit was passed with the direction to the assessment authorities to re-examine the matter after scrutiny of documents. At the same time, it was observed that on the issue of applicability of rate of tax on the rental received as per the agreement, assessing authority was right in taxing them @ 12.5 and not at @4%.

26. In view of the aforesaid position, the substantial question of law framed above in STA No.50/2014 is answered in favour of the appellant and against the respondent Revenue holding that the Tribunal was not right in directing levy of penalty @ 20% under Section 86(10) of the Act, after recording the finding that the appellant assessee had a reasonable cause. No finding has been recorded that the assessed had furnished returns which were false, misleading or deceptive in material particulars.

27. The appeal Nos.47/2014 and 49/2014 are accordingly dismissed, and appeal No.50/2014 are allowed. No costs.

(SANJIV KHANNA)
JUDGE

(V. KAMESWAR RAO)
JUDGE

FEBRUARY 5th, 2015
VKR/kkb