SGA
LAW OFFICES

Issue 5
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NOMINAL INDEX

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SUBJECT INDEX

Issue 5
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PUNJAB & HARYANA HIGH COURT

CWP NO. 1922 TO 1924 OF 2012
VATAP No. 74 of 2011 and
CWP NO. 28498 of 2013
CWP No. 17117 of 2014
CWP No. 241 of 2014
CWP No. 18604 of 2014
CWP No. 23290 of2012

FORTIS HEALTH CARE LIMITED AND ANOTHER
Vs.
STATE OF PUNJAB AND OTHERS

RAJIVE BHALLA AND AMIT RAWAL, JJ.

23rd January, 2015

HF ▶ Assessee

ARTICLE 366(29A) - SALE – HOSPITALS – TAXABILITY – MEDICINES/DRUGS/STENTS – ADMINISTRATION OF CONSUMABLES DURING MEDICAL TREATMENT – TAX LEVIED ON MEDICINES/DRUGS/STENTS ETC. ADMINISTERED DURING MEDICAL SERVICE. – REFUND CLAIMED ALLEGING THAT SUCH CONSUMABLES OR INCIDENTALS ARE NOT SALE BUT INTEGRAL PART OF MEDICAL PROCEDURE – HELD ARTICLE 366(29A) OF CONSTITUTION WHICH ENVISAGES SUCH CONTRACTS FOR SERVICE CALLED COMPOSITE CONTRACTS THAT INHER AN ELEMENT OF SALE WITHOUT FULFILLING ELEMENTS OF SALE DOES NOT INCLUDE HOSPITAL SERVICES UNDER IT - STATE CANNOT BY LEGAL FICTION INFER A SALE WHICH DOES NOT FALL UNDER ARTICLE 366 (29A) OR UNDER THE DEFINITION OF SALE AS GIVEN IN THE STATE VAT ACTS – ALSO, CONTRACTS NOT FALLING UNDER ARTICLE 366(29A) CANNOT BE SEPARATED AS AGREEMENT OF SALE AND AGREEMENT TO RENDER SERVICE TO LEVY TAX – DOMINANT NATURE TEST STILL APPLICABLE FOR TRANSACTIONS WHICH DO NOT SPECIFICALLY INCLUDED IN ARTICLE 366(29A)– THEREFORE, SUPPLY OF MEDICINES/DRUGS/STENTS ARE INTEGRAL TO A MEDICAL SERVICE OR PROCEDURE AND CANNOT BE SEVERED TO INFER A SALE UNDER PUNJAB VAT ACT OR HARYANA VAT ACT - WRIT PETITION ALLOWED.

The Petitioner had filed an application before the Excise & Taxation Commissioner, Punjab to seek advance determination of the question whether medicines, drugs and stents etc. administered to patients during a medical procedure are 'sale' under the Punjab VAT Act 2005. The Commissioner held it as sale and hence liable for payment of VAT. Based upon the judgment of Jharkhand High Court in the case of Tata Main Hospital vs State of Jharkhand and others the petitioner sent a letter dated 27.5.2008 to the Excise and Taxation Commissioner intimating that he has stopped charging VAT on the medicines, consumables

and stents etc. administered during the course of treatment of in-house patients. The refund application of the assessee u/s 39 was rejected by the Assistant Excise & Taxation Commissioner Mohali holding that the provisions of Bihar VAT Act are different from the Punjab VAT Act. The appeals filed by petitioner up to Tribunal were dismissed. On a writ petition filed before the High Court.

Held that a medical procedure is a composite contract involving the elements of Service and Sale with medical advice and medical procedure. The definition of sale includes the transfer of property of goods in cash etc and also includes composite contract as set out in Article 366 (29A) of the Constitution of India. The States of Punjab and Haryana can, therefore, levy Vat only on transactions as fall within the definition of sale. Where, however, the contract does not possess the element of a sale as set out in the Act nor its composite contract the State cannot by a legal fiction infer a sale and seek to tax the so called element to sale. The dominant nature of test continues to apply to all transactions that are not covered by Article 366(29A) of the Constitution of India as the ingredients of sale remain unchanged. A medical procedure is a pure service with no part having the attributes of Article 366(29A) of the Constitution of India or the definition of sale under the Punjab and Haryana VAT Acts, and, therefore cannot be held to involve a sale. The fiction of deemed sale applies only to such situations as would fall within the definition of Article 366(29A) which permits severance of the service element from sale element and empowers the State to tax the element of sale. The Constitution of India does not cover the services provided by hospitals. Accordingly, it is held that medical procedures / services offered by the petitioners are a service and supply of drugs, medicines, implants, stents, valves and other implants are integral to a medical procedure and cannot be severed to infer a sale as defined under the Punjab and Haryana VAT Acts and are not liable to tax under the PVAT Act and HVAT Act. Consequently, the writ petitions are allowed.

Present: Mr. N.Venkatraman, Senior Advocate with
Mr. Amit Aggarwal, Advocate and
Mr. Aashish Gupta, Advocate for the petitioner

Mr. Piyush Kant Jain, Addl.A.G.,Punjab

Mr. M.P. Devnath, Advocate and
Mr. Sandeep Goyal, Advocate, for the appellant/petition

Ms. Tanisha Peshawaria, DAG, Haryana

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RAJIVE BHALLA, J.

1. By way of this order, we shall decide Civil Writ Petition Nos.1922, 1923,1924 of 2012, 241 and 18604 of 2014 and VAT Appeal No.74 of 2011, filed by M/s Fortis Health Care Limited and another, Civil Writ Petition Nos.23290 of 2012, 28498 of 2013, filed Writ Petition No.17117 of 2014, filed by International Hospital Limited, as they involve answer of the same question of law, namely, exigibility of medicines, drugs, stents, valves, implants and other consumables and incidentals provided to patients during a medical procedure/treatment to value added tax. The petitioners have taken different routes for arriving before this Court

and though they essentially canvass the same point and pray for the same relief, it would be necessary to briefly narrate the facts of each case.

2. Civil Writ Petition No.1922 of 2012 has been filed by M/s Fortis Health Care Limited and another, challenging order dated 10.08.2005(Annexure P-5) holding that drugs, stents, implants etc. are exigible to tax, orders dated 09.02.2010(Annexure P-12), 01.08.2011 (Annexure P-14), passed by the Excise and Taxation Commissioner, Punjab, the Deputy Excise & Taxation Commissioner (A), Patiala Division, Patiala and the Punjab Value Added Tax Tribunal, Punjab, respectively, rejecting their application, in Form-29 for refund of Rs.72,70,406/-, deposited as VAT for accounting year 2005-06.

3. M/s Fortis Health Care Limited and another have also filed CWP Nos.1923 and 1924, challenging orders of even date rejecting their claims for refund of VAT pertaining to accounting years 2006-07, 2007-08 and 2010-11.

4. CWP No.241 of 2014 and 18604 of 2014 has been filed by M/s Fortis Health Care Limited challenging assessment orders, dated 08.10.2013 and 22.08.2014, respectively, passed by the Excise and Taxation Officer-cum-notified Authority, SAS Nagar, Mohali.

5. M/s Escort Hospital Research Centre Limited, has filed VAT Appeal No.74 of 2011, challenging dismissal of their appeal by the Haryana VAT Tribunal, on 24.08.2011 and has filed Civil Writ Petition No.23290 of 2012, challenging order dated 29.09.2012, passed by the Deputy Excise & Taxation Commissioner-cum-Revisional Authority, Faridabad, clarificatory order dated 30.04.2006 and demand notice dated 20.09.2012. Civil Writ Petition No.28498 of 2013 has been filed to challenge demand notice dated 05.11.2013.

6. Civil Writ Petition No.17117 of 2014 has been filed by M/s International Hospital Limited, which has merged with Escort Hospital and Research Centre, challenging Assessment Order dated 28.03.2014, passed by the Excise & Taxation Officer-cum-Assessing Authroity, Faridabad (West) and demand notice dated 20.03.2014 (Annexure P-1).

7. Facts are being taken from Civil Writ Petition No.1922 of 2012. The petitioner filed an application before the Excise & Taxation Commissioner, Punjab, Patiala Division, Patiala, seeking advance determination of the question whether medicines, drugs, stents etc., administered to patients during a medical procedure are a "sale", under the Punjab VAT Act, 2005. The Excise & Taxation Commissioner, Punjab, Patiala Division, Patiala, vide order dated 10.08.2005, held that medicines, implants, stents, etc. administered to a patient during a medical procedure like open heart surgery, angiography, knee surgery, hip replacement etc., are a "sale" under the Punjab VAT Act, 2005 and, therefore, exigible to VAT. The Central Sales Tax Act, 1956 at Mohali and began complying with its statutory obligations. The petitioner reflected a total sale of Rs.48,36,16,032/-with a tax liability of Rs.1,96,14,867/-for the financial year 2005-06. The issue regarding applicability of VAT to medicines, stents, implants came up for consideration before the High Court of Jharkhand in *Tata Main Hospital v. The State of Jharkhand and others, 2008(2) JCR 174 (Jhr.)*. After considering the definition of sale and nature of medical services the Jharkhand High Court held that the supply of medicines, vaccines, surgical items, implants, X-ray film etc. in the course of medical treatment does not involve a sale that would invite levy and payment of VAT. The State of Jharkhand, filed Special Leave Petition(Civil) No.3652 of 2008, which was dismissed by the Supreme Court on 10.03.2008.

8. The petitioner addressed a letter dated 27.05.2008, to the Excise and Taxation Commissioner, Patiala Division, Patiala, intimating that in view of the judgment in *Tata Main Hospital (supra)* it has stopped charging VAT for the medicines, consumables etc. administered during the course of treatment to, in house patients. The petitioner, thereafter, filed an application, under Section 39 of the Punjab VAT Act, 2005, on 28.10.2009, for refund of VAT. The Assistant Excise & Taxation Commissioner-cum-Designated Officer, SAS Nagar, Mohali, vide order dated 10.05.2010 rejected the application by holding that as the Bihar Finance Act is different from the Punjab VAT Act, the judgment by the Jharkhand High Court is a judgment in personam and as the petitioner has accepted clarificatory order dated 10.08.2005, it is required to pay VAT.

9. The petitioner filed an appeal before the Deputy Excise and Taxation Officer. Vide order dated 09.12.2010, the appeal was dismissed but by recording a finding that the petitioner has paid VAT from its own resources without recovering the same from patients/ECHS. An appeal filed before the Tribunal was dismissed by holding that jurisdiction to determine the controversy, lies with the High Court.

10. Counsel for the petitioner submits that the petitioner in Civil Writ Petition No.1922 to 1924 of 2012, 241 of 2014 and VAT Appeal No.18604 of 2014 confines claim to medical services provided to an Ex-servicemen Contributory Health Scheme (hereinafter referred to "ECHS"). The medical services provided to ECHS are governed by an agreement dated 19.11.2004, which requires the petitioner to provide medical services, broadly divided into two categories i.e., package and non-package services. A patient who opts for non-package treatment, is provided details of the cost component of medicines, implants, doctor's visit, room rent etc., whereas in the case of package treatment, a consolidated price is charged. The ECHS has, however, refused to pay VAT. The petitioner has, therefore, paid VAT from its own resources. Counsel for the petitioner further submits that drugs, stents, medicines, implants etc. are an integral part of a medical service/procedure. The administering of drugs, stents, medicines, implants does not partake the nature of a "sale" whether defined under the Punjab VAT Act, the Haryana VAT Act or under Article 366(29-A) of the Constitution of India. The States medicines, drugs, stents, etc. administered during a medical procedure. Counsel for the petitioner further contends that Article 366 (29-A) of the Constitution of India brings forth for taxation, transactions where one or the other element of sale, as defined under the Sale of Goods Act, is missing, but cannot be read to confer jurisdiction on the State to infer that administering drugs, medicines, stents and implants that are integral to any medical procedure/service, are a sale. The dominant purpose of a medical procedure is to provide medical services and as drugs etc. are not sold separately but are administered as an integral part of a medical procedure/service, they cannot be severed, so as to infer a sale or to hold that these articles are goods exigible to tax under the definition of "sale" in Section 2(z)(f) of the Punjab VAT Act, 2005 and Section 2 (1)(2e) of the Haryana VAT Act.

11. Counsel for the petitioner further submits that the power of the State to impose tax on "sale of goods" emanates from Entry 54 of List II of Schedule VII of the Constitution of India. The petitioner offers a contract of service to both packaged and non-packaged patients and as an integral, inseverable part of this service administers drugs, medicines, stents and implants. The supply of drugs, medicines, stents and implants cannot be deemed to be sale of

goods, taxable under the State enactments. The concept of deemed sale introduced by Article 366(29-A) of the Constitution of India, came up for consideration before the Supreme Court in *Bharat Sanchar Nigam Limited v Union of India, 2006(2) STR 161*. The Supreme Court after noticing the principle enunciated in *State of Madras v. Gannom Dunkerley and Company(Madres) Ltd. (1958) 9 STC 353*, held that the test for transactions other than those mentioned in Article 366(29-A) of the Constitution of India, continues to be whether parties intended to sell goods. The determinative factor for ascertaining the nature of a contract, therefore, remains the same. The supply of drugs, medicines, stents, implants, etc., cannot by a factual or a legal fiction, be severed from medical services and construed as a sale of goods.

12. Counsel for the petitioner further submits that the impugned orders are null and void as the petitioner provides medical services and as an integral and un-severable part of this service, is necessarily required to administer medicines, drugs, stents etc., as per medical advice. The articles so supplied are not sold across the counter but are directly issued from the petitioner's store. The question of exigibility of medicines, drugs, stents and implants provided during a medical procedure, to VAT has been answered against the revenue by the Jharkhand High Court in *Tata Main Hospital* (supra) and the Allahabad High Court in *M/s International Hospital Pvt. Ltd. v. State of U.P. and two others* and as provisions of the Bihar Finance Act 1981, the Act in Utter Pradesh, the Punjab and the Haryana VAT Acts are para materia, the opinion recorded by the Jharkhand and the Allahabad High Court apply to the States of Punjab and Haryana. The fact that the petitioner may not have challenged clarificatory order passed on 10.08.2005, is irrelevant as the question is one of the inherent lack of Constitutional or statutory power to demand VAT.

13. Counsel for the respondents, on the other hand, submits that judgments of the Jharkhand and Allahabad High Courts are not applicable as the definition of 'sale', as defined under the Punjab and Haryana statutes, are materially different. It is further submitted that order dated 10.08.2005, has become final as no appeal was preferred. It is further submitted that it is correct that during the course of treatment, the petitioner supplies medicines, drugs, stents and other implants, to its patients, but at cost. The petitioner does not supply drugs, medicines, stents, and other implants etc., free of cost but sells them to the patients by taking into consideration the sale value of such medicines, drugs, stents and other implants, whether as part of a package or separately etc. The petitioner is, therefore, doing nothing more than selling these articles and whether they are sold as integral to a medical procedure or otherwise is entirely irrelevant. The question is not whether drugs etc. are integral to a medical procedure but whether the supply of drugs etc. is a sale. A perusal of the sample invoice annexed with the petition reveals that medicines, drugs, stents and other implants, are tabulated and charged separately, thereby proving that the stand taken by the States of Punjab and Haryana is factually and legally correct. Counsel for the States of Punjab and Haryana submit that the supply of drugs, medicines, stents and other implants etc., are squarely covered by the definition of "sale" under the Haryana as well as the Punjab Act and the petitioner is covered by the term "person" as defined under Section 2(t) of the Punjab VAT Act and of the Haryana VAT Act. The supply of medicines, drugs, stents, and other implants etc., fall within the definition of "sale" and, therefore, there is no error in the impugned orders. Counsel for the respondents relies upon a judgment of the Kerala High Court in *Malan Bara Orthodox Syrian Charch v. State Tax Officer (2004) 135 STC 224*.

14. We have heard counsel for the parties, perused the impugned orders as well as the relevant statutory provisions.

15. The petitioners are business entities that run hospitals in the private sector and provide medical care, but at a price. One may disagree with the commercialisation of medical services or the exorbitant prices charged but these facts are irrelevant as there is no denying the fact that the petitioners provide all types of medical services, that include surgical procedures which require administering drugs and may involve installing stents, implants etc. as an essential part of such procedures, like open heart surgery, angiography, knee surgery, hip replacement etc. The States of Punjab and Haryana, have by treating medicines, drugs, stents and implants etc. provided during a medical procedure, as a sale, levied and collected VAT. The petitioners have been paying VAT in view of two separate clarificatory orders dated 10.08.2005 and 30.04.2006, passed in the States of Punjab and Haryana holding that administering drugs, stents, implants etc. are a sale liable to VAT.

16. The question posed before us, simply put is, whether supply of medicines, drugs, stents, and other implants etc., during the course of treatment or a medical procedure is a "sale" in the States of Punjab and Haryana.

17. The petitioners, as admitted, are private hospitals that provide medical services and supply medicines, surgical items, implants and stents as part of medical procedures like open heart surgery, angiography, knee surgery, hip replacement etc. The petitioners offer packages as well as individual rates for these medical procedures which, admittedly, involve medical opinion, tests, surgical procedures and management and depending upon the nature of the surgical procedure administering of drugs, medicines, implants, stents etc. all as an integral part of a medical procedure/service, but at a price.

18. A medical procedure commences with a patient visiting a hospital to elicit a doctor's opinion regarding his medical condition and in case he requires a medical procedure, information regarding the particulars of the procedure and the cost. The patient is, thereafter, informed of the particulars of the medical procedure, the drugs, implants, stents etc. that are required for his treatment/ medical procedure and the cost. The patient accepts the offer and opts for a particular procedure. Once having opted for a particular procedure, the choice of the drugs, implants, stents etc. would depend upon medical advice and only where, medically permissible, the choice of the patient. The question posed before us would, therefore, have to be further refined, namely, whether a medical procedure can be severed into separate elements of service and sale with service being the medical advise and medical procedure and the sale being the supply of medicines, surgical items, implants, to patients whether as part of a package or to an individual patient?

19. The State governments draws their power to impose tax on sale or purchase of goods, other than newspapers, from entry No.54 of List II of Schedule VII of the Constitution of India. The power of the Union to tax, can be traced to entry No.97 of List I or Entry 92-C of List I of Schedule VII of the Constitution of India. A State may impose tax on "sale of goods" but is not empowered to impose tax on services. There may and often are contracts for service called composite contracts that may inher an element of sale without fulfilling all the elements of a sale. As far back as in *Gannon Dunkerley &* co. (supra), the Supreme Court held that composite contracts are not a "sale" as one or the other element of "sale" is missing.

Article 366 (29-A) of the Constitution of India, was introduced to overcome this hurdle and allow taxation of the element of sale in composite contracts and provide a frame work for the Union as well as the States to bring forth to taxation transactions in which one or more of the elements of sale is missing. Article 366(29-A) of the Constitution of India reads as follows:-

Article 366(29-A)

"tax on the sale or purchase of goods" includes-

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

(b) a tax on the transfer of property in goods (whether as goods or in some other form) invoked in the execution of a works contract;

(c) a tax on the delivery of goods on hire-purchase or

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

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

(f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), were such supply or service, is for cash, deferred payment or other valuable consideration, and such transfer, delivery or supply or 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."

20. Sub clause(a) of Article 366(29-A) of the Constitution of India envisages situations where the element of consent is lacking; sub-clause(b) relates to works contracts, sub-clause (c) deals with hire-purchase agreements, sub-clause(d) deals with situations relating to right to use goods, as opposed to transfer of proprietary rights to the purchaser, sub-clause (e) covers situations which in law may not amount to a sale as the incorporated entity may be both, the owner as recipient of goods. Sub-clause (f) deals with situations pertaining to tax on goods which are part of any service of goods, being food or other articles for human consumption or drinks.

21. Article 366(29-A) of the Constitution of India having provided a framework for the States to tax transactions where one of the other element of sale is missing, the States of Punjab and Haryana have defined "sale" in the following terms:

Punjab VATAct, 2005

"sale" with all its grammatical or cognate expressions means any transfer of property in goods for cash, deferred payment or other valuable consideration and includes--

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

(ii) transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(iii) delivery of goods on hire-purchase or any system of payment by instalments;

(iv) 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;

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

(vi) supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating) where such supply or service is for cash, deferred payment or other valuable consideration; and

(vii) every disposal of goods referred to in Explanation (4) to clause (t) of this section;

and any such transfer, delivery or supply of any goods shall be deemed to be a sale of these goods by the person making the transfer, delivery or supply to a person to whom such transfer, delivery or supply is made, but does not include a mortgage, hypothecation, charge or pledge"

Haryana VAT Act, 2003

"Sale" means any transfer of property in goods for cash or deferred payment or other valuable consideration except a mortgage or hypothecation of or a chrge or pledge on goods; and includes-

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

(ii) the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(iii) the delivery of goods on hire-purchase or any system of payment by instalments;

(iv) 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;

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

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

22. A perusal of the definition of "sale" reveals that both statutes define "sale" to include transfer of property in goods for cash etc. and includes composite contracts as set out in Article 366 (29-A) of the Constitution of India. The States of Punjab and Haryana may, therefore, levy VAT on only such transactions as fall within the definition of "sale" whether as a sale of goods or as a composite contract. Where, however, the contract does not possess the element of a sale as set out in these sections nor is it a composite contract the State cannot by a legal fiction infer a sale and seek to tax the so called element of sale. Article 366(29-A) of the Constitution of India came up for consideration before the Supreme Court in *Bharat Sanchar Nigam Limited and another v. Union of India and others, 2006(3) SCC* 1. After setting out the legislative dimensions of the various clauses of Article 366(29-A) of the Constitution of India, the Supreme Court held as follows:

> *43. Gannon Dunkerley survived the 46th Constitutional Amendment in two respects. First with regard to the definition of 'sale' for the purposes of the Constitution in general and for the purposes of Entry 54 of List II in particular except to the extent that the clauses in Art.366(29A) operate. By introducing separate categories of 'deemed sales', the meaning of the word 'goods' was not altered. Thus the definitions of the composite elements of a sale such as intention of the parties, goods, delivery etc. would continue to be defined according to known legal connotations. This does not mean that the content of the concepts remain static. Courts must move with the times. But the 46th Amendment does not give a licence for example to assume that a transaction is a sale and then to look around for what could be the goods. The word "goods" has not been altered by the 46th Amendment. That ingredient of a sale continues to have the same definition. The second respect in which Gannon Dunkerley has survived is with reference to the dominant nature test to be applied to a composite transaction not covered by Article 366(29A). Transactions which are mutant sales are limited to the clauses of Article 366(29A). All other transactions would have to qualify as sales within the meaning of Sales of Goods Act 1930 for the purpose of levy of sales tax.*
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> *44. Of all the different kinds of composite transactions the drafters of the 46th Amendment chose three specific situations, a works contract, a hire purchase contract and a catering contract to bring within the fiction of a deemed sale. Of these three, the first and third involve a kind of service and sale at the same time. Apart from these two cases where splitting of the service and supply has been Constitutionally permitted in clauses (b) and (g) of Clause 29A of Art. 366, there is no other service which has been of Art. 366(29A) do not cover hospital services. Therefore, if during the treatment of a patient in a hospital, he or she is given a pill, can the sales tax authorities tax the transaction as a sale? Doctors, lawyers and other professionals render service in the course of which can it be said that there is a sale of goods when a doctor writes out and hands over a prescription or a lawyer drafts a document and delivers it to his/her client? Strictly speaking with the payment of fees, consideration does pass from the patient or client to the doctor or lawyer for the documents in both cases.*

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

23. A perusal of the above extract reveals that the 46th amendment does not introduce a new category of "deemed sales", nor does it alter the meaning of the word "goods" or "sale of goods" but merely allows certain transactions to be brought forth for taxation. This apart Article 366(29-A) of the Constitution of India does not raise a presumption that every transaction is a sale and, thereafter allows the State to search for what could be the element of sale, in a transaction. The dominant nature test continues to apply to all transactions that are not covered by Article 366(29-A) of the Constitution of India as the ingredients of a sale remain unchanged. The Supreme Court specifically observed though as an an illustration, that the sub-clauses of Article 366(29-A) of the Constitution of India do not cover hospital services and also held that unless the transaction in truth represents two distinct and separate contracts, the State would not have the power to separate the agreement of sale from the agreement to render services, and impose tax on the so called element of sale, thereby affirming the dominant nature test with respect to contracts, which do not fall within the sub-clauses of Article 366(29-A) of the Constitution. Thus, a medical procedure that as an integral part requires administering of drugs, stents, implants, etc. may only be brought forth for payment of VAT if it fulfills the ingredients of sale, as defined under the Punjab and Haryana VAT Acts and Article 366(29-A) of the Constitution of India. As a result the test whether a medical procedure involves a "sale of goods" continues to be the same i.e., the intention of parties, the nature of goods, their delivery etc. being determinative factors.

24. The questions posed before us as already delimited are whether providing medicines, implants, stents, and other items to a patient who seeks medical treatment involves a sale as defined by the Punjab and the Haryana VAT Act and whether a medical procedure is severable into elements of service and sale with the medical procedure being service and providing of stents, drugs etc.?

25. Admittedly, hospitals administer drugs, implants, stents to a patients on medical advice. The dominant purpose of medical treatment is medical services and integral to such a service is a medical procedure that involves administering medicines and drugs and may involve, implants, stents etc. as integral to a successfully medical treatment/procedure. Would the supply of medicines, stents, implants etc. at a price, enable the State to infer a fictional sale or a severable contract that can be brought forth to taxation as a sale? The answer in our

considered opinion is no. A perusal of the statutory definition of "sale" in both the Punjab and Haryana enactments, reveals that after setting out that a sale is a transfer of ownership in goods for consideration it proceeds to replicate Article 366 (29-A) of the Constitution of India. A medical procedure is a pure service with no part having the attributes or the elements set out in Article 366 (29-A) of the Constitution of India or the definition of sale under the Punjab and Haryana statutes and, therefore, cannot be held to involve a "sale".

26. A similar controversy came up for consideration before the Jharkhand High Court in *Tata Main Hospital v. The State of Jharkhand and others, 2008(2)JCR174(Jhr)*. After considering the judgment in *Bharat Sanchar Nigam Limited and another (supra*) the Jharkhand High Court held that supply of stents, medicines etc. is not a sale. A relevant extract from the judgment reads as follows:-

> *"45. Of all the different kinds of composite transactions the drafters of the 46th Amendment chose three specific situations, a works contract, a hire purchase contract and a catering contract to bring within the fiction of a deemed sale. Of these three, the first and third involve a kind of service and sale at the same time. Apart from these two cases where splitting of the service and supply has been Constitutionally permitted in clauses (b) and (g) of Clause 29A of Art. 366, there is no other service which has been permitted to be so split. For example the clauses of Art. 366(29A) do not cover hospital services. Therefore, if during the treatment of a patient in a hospital, he or she is given a pill, can the sales tax authorities tax the transaction as a sale? Doctors, lawyers and other professionals render service in the course of which can it be said that there is a sale of goods when a doctor writes out and hands over a prescription or a lawyer drafts a document and delivers it to his/her client? Strictly speaking with the payment of fees, consideration does pass from the patient or client to the doctor or lawyer for the documents in both cases.*
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> *46. The reason why these services do not involve a sale for the purposes of Entry 54 of List II is, as we see it, for reasons ultimately attributable to the principles enunciated in Gannon Dunkerley's case, namely, if there is an instrument of contract which may be composite in form in any case other than the exceptions in Article 366(29-A), unless the transaction in truth represents two distinct and separate contracts and is discernible as such, then the State would not have the power to separate the agreement to sell from the agreement to render service, and impose tax on the sale. The test therefore for composite contracts other than those mentioned in Article 366 (29A) continues to be -did the parties have in mind or intend separate rights arising out of the sale of goods. If there was no such intention there is no sale even if the contract could be disintegrated. The test for deciding whether a contract falls into one category or the other is to as what is 'the substance of the contract . We will, for the want of a better phrase, call this the dominant nature test.*
>
> 21. *In the above quoted para-46 of this very judgment while interpreting the principle laid down in Gannon Dunkerley's case, it has been held that if there is an instrument of contract which may be composite in form in any case other than the exceptions in Article 366(29-A), unless the transaction in truth represents two distinct and separate contracts and is discernible as such, then the State would not have the*

power to separate the agreement to sell from the agreement to render service, and impose tax on the sale.

22. *Thus, in view of the decision of the Supreme Court in the case of "Bharat Sanchar Nigam Limited: (supra) the test of deciding whether the contract falls into one category or the other is aso to what is the "substance of contract". According to the Supreme Court, it has to be seen as to what is the dominant nature test of the contract."*

The final conclusion that came to be recorded is as follows:

26. *The transaction of supply of medicines, vaccines, surgical items, x-ray films and plates etc. to the indoor patients in course of treatment in TMH does not come within the purview of the definition of 'sale' as envisages under Section 2(t) of the Bihar Finance Act for the following reasons:*

(i) Supply of those articles are part and parcel of the treatment and they are essentially required for the treatment of the patients.

(ii) Supply of those articles are incidental to the medical service being rendered by the TMH to the patients.

(iii) Those articles are not being sold to the patients but the cost price of the same being adjusted against the head 'pharmacy' and are not being spearately charged item wise.

(iv) Charge under the head 'pharmacy' is part of the composite charge realized by the TMH towards the treatment of those indoor patients.

27. *On the facts noticed in the foregoing paragraphs, we find that the TMH is not doing business of sale of the aforesaid articles, i.e. Medicines, vaccines, surgical items, x-ray films & plates etc. and, therefore, cannot be said that the Hospital is a 'dealer' within the meaning of "Dealer" under the Bihar Finance Act.*

28. *The transaction aforesaid, cannot be said to be 'sale' under the law as there is no element of sale at all in the said transactio. It is to be held that the transaction of supply of medicines, surgical items, x-ray films and plates etc. for the treatment of the indoor patients does not come under the purview of 'sale' in terms of the Bihar Finance Act because the TMH is not selling those items to the indoor patients but in fact they are being consumed, utilised, administered to those indoor patients, which are essentially required for their treatment. Accordingly, it is to be held that supply of the aforesaid articles by the TMH are not liable to be taxed."*

27. The Special Leave Petition against this judgment was dismissed, on 10.03.2008.

28. A similar controversy also came up before a Division Bench of the Allahabad High Court, wherein after considering the judgment by the Hon'ble Supreme Court in *Bharat Sanchar Nigam Limited and another*(supra), the Allahabad High Court relied upon the opinion recorded by the Jharkhand High Court and held that the supply of stents, implants etc. during a medical procedure is not a sale. A relevant extract from the judgment reads as follows:

"*Now, if we apply the aforesaid test, there can be no doubt about the position that in the case of a* patient who enters the hospital for the purpose of a *surgical procedure like an angioplasty, there is no intent between the parties to the agreement namely, the hospital and the individual that there would be a sale of a stent or valve by the hospital to the patient. The substance of the contract is not a contract for sale of the stent or valve that is used in the course of the surgical procedure. The contract, in substance, is an agreement in which the patient enters the hospital and is administered treatment in the form of a medical procedure, like an angioplasty. An intrinsic and integral element of that procedure, is the angioplasty. An intrinsic and integral element of that procedure, is the implantation of a stent or valve in the heart of the patient. True, the patient may have a choice of the nature of the stent or valve to be implanted, or in the nature of medicated stent or valve or otherwise, or in regard to the quality of the stent or valve which is implanted but even if that is so, that would not dilute the essential nature of the transaction, which is the performance of a medical procedure."*

29. The Allahabad High Court in view of the judgment of the Hon'ble Supreme Court in *Larsen and Toubro Limited & Anr. v. State of Karnatana 2004(1) SCC 708*, went on to hold that the dominant nature test does not survive with respect to transactions covered by Clause 29-A of Article 366 of the Constitution of India, but as hospital services and medical procedures do not fall within any of the sub-clauses of Article 366 (29-A) of the Constitution of India, the deeming definition of sale under Article 366 (29-A) of the Constitution of India shall not apply as a deeming fiction and render provisions of medical services or any part thereof as a sale as defined in the statute. The Allahabad High Court distinguished the judgments of the Kerla High Court in *P.R.S. Hospital v. State of Kerala 2003(1) KLT 633* and *Aswini Hospital Pvt. Ltd. and others v. C.T.O. Thrissur and others 2013 NTN (vol.51) 29*, (relied by the respondents) by holding as follows:-

"*In the present case, the limited issue is as to whether an element of sale is involved when a stent or valve is implanted in the course of a surgical procedure which is performed in a patient as an indoor patient in a hospital. We clarify that this is not a case where the petitioner is contending that the sale of medicines at the pharmacy in the hospital is not assessable to tax. The only issue is as to whether the definition of the expression 'sale' in Section 2(ac) of the Act is attracted where a stent or valve is implanted in a patient in the course of a surgical procedure. Plainly, in our opinion, there is no element of sale. The fact that in the bill which is raised on the patient, the hospital recovers, apart from the cost of the surgery, charges towards drugs and other consumables would not render the transaction of the implantation of a stent or valve a 'sale' within the meaning of Section 2(ac) of the Act. We clarify that we have dealt with only the aforesaid factual situation and our judgment as aforesaid does not deal with any other factual situation which is not before the Court."*

30. We have considered the relevant statutory provisions of the Punjab and Haryana Statutes, the Bihar Finance Act, the Uttar Pradesh Act, the judgment of the Jharkhand and Allahabad High Courts, judgments of the Kerala High Court (cited by the respondents) are in

respectful agreement with the opinion recorded by the Jharkhand High Court and the Allahabad High Court and find no reason to record a contrary opinion or to hold that the supply of medicines, drugs, stents, implants etc. to a patient during a medical procedure inhers any element of sale, much less sets out the ingredients of a 'sale'. The power to impose sales tax/VAT flows from Entry 54 of List II of Schedile VII and Article 366(29-A) of the Constitution, the latter assigning the status of a deemed sale to transactions where one or the other element of sale is missing, but where the element of sale is altogether missing and the transaction does not fall within any of the clauses of Article 366(29-A) of the Constitution of India, a State shall not be empowered to levy of value added tax on such a transaction. For the purpose of attracting VAT,a transaction or a part thereof, which is essentially a service would have to qualify as a sale within the meaning of Sales of Goods Act, 1930 or the definition of sale. The fiction of a deemed sale applies only to such situations as would fall within the sub-clauses of Article 366(29-A) of the Constitution of India which permit severance of the service element from the sale element and empowers the State to tax the element of sale. A perusal of Article 366(29-A) of the Constitution of India does not enable us to record an opinion that it covers services provided by hospitals. Before such a transaction is put to tax, whether under the Haryana or Punjab VAT Act, it would have to satisfy the dominant nature test by reference to the substance of the contract. A contract for medical treatment necessarily involves medicines, supply of surgical items, stents, implants, valves, without which a medical procedure or medical treatment cannot be completed. The supply of these articles as held by the Allahabad and the Jharkhand High Courts are integral to and essential for the treatment offered to patients and even if one may categorize these as incidental to the actual medical procedure, one cannot but ignore that a medical procedure cannot be completed without supply of medicines, drugs, stents, implants, thereby leading to a singular conclusion that the State is not empowered under any provision of the Constitution much less the definition of goods, sale or dealer, to severe the contract and construe the supply of drugs, medicines, stents, implants etc. as a severable part of the contract and, therefore, exigible to VAT, as a sale. The situation would obviously be different if these articles are supplied from the pharmacy of a hospital.

31. A deeming fiction, must be rational and not farcical. The dominant purpose of a hospital is to provide medical treatment and if during a medical procedure it is required to provide medicines, stents, implants etc., it cannot by a deeming fiction be held to be a "sale". A patient may have a choice as to the quality of implant/stent but even that choice is confined to the suitability of a stent etc. The fact that a hospital may charge money for individual stents etc., whether as part of a package or separately is entirely irrelevant. A contract of medical service cannot be said to be a contract for sale of a stent, or valve or of medicines to be used in a medical/surgical procedure. The essential element of such a contract is the procedure of knee replacement, hip replacement, angioplasty, which as an intrinsic and integral part involves placing an implant whether in the knee, hip or a heart etc. The only choice available to the patient is the nature of the implant, namely, its quality but such a procedure is admittedly, a medical procedure and a service that cannot be completed without an implant/drugs and medicines as an integral part of the procedure. A private hospital does not provide medical services for free. The fact that it charges money, for drugs, medicines etc. cannot raise an inference of intent to sell goods in the shape of medicines, stents, implants etc. We are, therefore, in complete agreement with the opinion recorded by the Jharkhand

High Court in *Tata Main Hospital*(supra) and the Allahabad High Court in *M/s International Hospital Pvt. Ltd. v. State of U.P. and two others*.

32. An argument that the definition of "sale" under the Bihar and the Uttar Pradesh Acts, is entirely different, must also fail. A perusal of the definition of sale in the Bihar and the Uttar Pradesh Statutes reveals that this argument has apparently been raised by disregarding the definition of sale in these statutes which are essentially identical to the definition of sale of the present statute.

33. We therefore, have no hesitation in holding that medical procedures/services offered by the petitioners are a service. The supply of drugs, medicines, implant, stents, valves and other implants are integral to a medical services/procedures and cannot be severed to infer a sale as defined under the Punjab or the Haryana Act and therefore, are not exigible to value added tax.

34. Consequently, we allow the writ petitions and grant relief in the following terms:

Civil Writ Petition No.1922 of 2012

Civil Writ Petition No.1923 of 2012

Civil Writ Petition No.1924 of 2012

Civil Writ Petition No.18604 of 2014

35. In view of findings recorded hereinabove, orders dated 10.08.2005 (Annexure P-5) and 01.08.2011 (Annexure P-14), are set aside and the matter is remitted to the VAT Tribunal, for adjudication afresh and in accordance with law.

Civil Writ Petition No.241 of 2014

36. The writ petition is allowed, order dated 08.10.2013, passed by the Excise and Taxation Officer, Punjab, is set aside and the matter is remitted to the said officer for adjudication afresh and in accordance with law.

VATAppeal No.74 of 2011

37. The appeal is allowed, order dated 24.08.2011 is set aside and the matter is remitted to the Haryana VAT Tribunal, for adjudication afresh and in accordance with law.

Civil Writ Petition No. 23290 of 2012

38. The writ petition is allowed, revisional order dated 20.09.2012, passed by the Deputy Excise and Taxation Commissioner-cum-Revisional Authority, Faridabad, clarificatory order dated 30.04.2006 (Annexure P-2), passed by the Financial Commissioner and the Principal Secretary, Haryana, Excise and Taxation Department and demand notice dated 20.09.2012, are set aside, but the matter is restored to the Assessing Authority/Officer, for taking a fresh decision, in accordance with declaration of law.

Civil Writ Petition No.28498 of 2013

39. The writ petition is allowed, revisional order dated 05.11.2013, passed by the Deputy Excise and Taxation Commissioner-cum-Revisional Authority, Faridabad, revisional order dated 05.11.2013 (Annexure P-), and demand notice dated 05.11.2013, are set aside,

but the matter is restored to the Assessing Authority/Officer, for taking a fresh decision, in accordance with the declaration of law.

Civil Writ Petition No.17117 of 2014

40. The writ petition is allowed, the assessment order dated 20.03.2014 and demand notice dated 20.03.2014, are set aside, but the matter is restored to the Assessing Authority/Officer, for taking a fresh decision, in accordance with the declaration of law.

Civil Writ Petition No.22752 of 2014

41. The writ petition is allowed, the revisional order dated 22.09.2014 and demand notice dated 22.09.2014, are set aside, but the matter is restored to the Assessing Authority/Officer, for taking a fresh decision, in accordance with declaration of law.

PUNJAB & HARYANA HIGH COURT

CWP No. 4388 of 2014 & CWP No. 5025 of 2014

GATEWAY RAIL FREIGHT LTD.
Vs.
UNION OF INDIA AND OTHERS

RAJIVE BHALLA AND AMOL RATTAN SINGH, JJ.

13th February, 2015

HF ▶ Petitioner

PENALTY – ATTEMPT TO EVADE TAX – FURNISHING OF INFORMATION AT VIRTUAL ICC – HANDLING OF CARGOES BY PETITIONER COMPANY ON BEHALF OF CUSTOMS DEPARTMENT – PENALTY IMPOSED FOR NON FURNISHING INFORMATION AS REQUIRED U/R 64-C OF PUNJAB VAT RULES 2005 – PETITIONER CONTENDED AS NOT BEING LIABLE TO FURNISH INFORMATION UNDER THE RULE – HOWEVER, PETITIONER AGREED TO FURNISH INFORMATION IN ITS POSSESSION – NO OBJECTION RAISED BY STATE AGAINST THIS – ORDER IMPOSING PENALTY QUASHED – WRIT PETITION ALLOWED.

The petitioner is a cargos service providers. Penalty was imposed on the basis of non furnishing of information at the virtual information collection centre as required under rule 64-C of PVAT Rule. The petitioner argued that it was only a cargo handler and not liable to furnish any information at the virtual ICC and hence the penalty should be set aside. It was pleaded by the petitioner that it would produce the information as required by the state and no objection was raised by the state. The writ was thus allowed setting aside the impugned order.

Editorial Note

In the light of the arguments heard in this case, it is brought to the notice of our readers, that in this case the petitioner company agreed to give information through the e-mail to the state and prayed not to be called upon to generate information as required u/r 64-C of PVAT Rule.

Present: Mr.Sandeep Goyal, Advocate for the petitioner.
Mr. Sukhdev Sharma, advocate for respondent No. 1.

Mr. Jagmohan Bansal, Addl. Advocate General, Punjab

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RAJIVE BHALLA, J.

1. By way of this order, we shall decide CWP Nos.4388 of 2014 and 5025 of 2014, as the order impugned in both the petitions are similar. Facts necessary for adjudication are being taken from CWP No.4388 of 2014.

2. The petitioner who is admittedly a Cargo Service Provider, working with the Container Freight Station, Ludhiana, is before us to challenge order dated 22.01.2014 and demand notice, by praying that the State of Punjab may be restrained from calling upon the petitioner to furnish information under Rule 64-C of Punjab VAT Rules, 2005.

3. Counsel for the petitioner submits that as the petitioner merely provides safe custody to and handles cargo on behalf of the Customs Department, the petitioner is not obliged to furnish information to the State of Punjab but an order imposing penalty has been passed against the petitioner. Counsel for the petitioner further submits that the petitioner has furnished information as required by the State of Punjab and undertakes to continue furnishing information in its possession, as may be required by the State of Punjab.

4. Counsel for the State of Punjab submits that as the petitioner has undertaken to furnish information as required by the State of Punjab, it has no objection, if order dated 22.01.2014 (Annexure P-27) is quashed, provided the petitioner continues to furnish information.

5. We have heard counsel for the parties and in view of statement made by the counsel for the parties, allow the writ petition and set aside the order dated 22.01.2014, subject to the petitioner continuing to furnish information including copies of bill of entries, as required by the State of Punjab.

PUNJAB & HARYANA HIGH COURT

VATAP NO 91 of 2014
VAT NO 103 OF 2014

STATE OF PUNJAB AND ANOTHER.
Vs.
OCEAN METAL PVT. LTD.

RAJIVE BHALLA AND B.S. WALIA, JJ.

23th January, 2015

HF ▶ Assessee

APPEAL – REMAND – TRIBUNAL HOLDING GALVANIZED PIPES AS BLACK PIPES AND REMANDING THE CASE BACK TO THE ASSESSING AUTHORITY FOR ADJUDICATING THE NATURE OF TRANSACTION - REVENUE ON APPEAL BEFORE THE HIGH COURT CONTENDED THAT THE ENTIRE MATTER SHOULD HAVE BEEN LEFT OPEN FOR THE ASSESSING AUTHORITY – MATTER ALREADY REMITTED BACK – NO FORCE IN THE APPELLANT'S CONTENTION – APPEAL NOT ENTERTAINED – HENCE DISMISSED.

The revenue filed an appeal before the Punjab and Haryana High Court challenging the order passed by the Tribunal on the ground that though the Tribunal has remanded the matter but the case of the revenue was not that the black pipes are not galvanized pipes but that the transaction is a mere paper transaction. The revenue contended that while remanding the case the entire matter should have been kept open for adjudication by the Assessing Authority. The Hon'ble High Court held that on a due consideration of the order it reveals that the Tribunal has recorded an opinion as to the nature of pipes but remitted the matter to the Assessing Authority to examine the nature of transaction. Accordingly, the Tribunal having already remitted the matter for examining the nature of transaction, there is no force in the appeal and the same is accordingly dismissed.

Present: Mr. Jagmohan Bansal, Addl. Advocate General, Punjab

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RAJIVE BHALLA, J

C.M.No.14742-CII of 2014
C.M.No.16606-CII of 2014
Allowed as prayed for.

C.M.Nos.14743-44-CII of 2014
C.M.Nos.16607-08-CII of 2014 &
Main Appeals

1. By way of this order, we shall decide VAT Appeal Nos.91 of 2014 and 103 of 2014, as they pertain to the same assessee and the same dispute but relate to different assessment years.

2. Counsel for the appellant submits that, though, the Tribunal has remanded the matter, the case as set up by the revenue was not that the black pipes are not glavanized pipes but that the transaction is a mere paper transaction. The Tribunal has misdirected its consideration as while remanding the case, should have left the entire matter open for adjudication by the Assessing Officer.

3. We have heard counsel for the appellant and perused the impugned orders, passed by the VAT Tribunal.

4. Apart from the fact that the appeal is barred by limitation, a due consideration of the arguments and the impugned orders, reveals that the Tribunal has after recording an opinion as to the nature of the pipes, remitted the matter to the assessing authority to examine the nature of the transactions. A relevant extract from the order reads as follows:-

> *"During the course of arguments in a bid to rebut the contents of the above mentioned letter, the Ld. Counsel for the appellant has produced certain documents, which are required to be examined by the Designated Officer. As such, de novo assessment is required in this case. If during such assessment, it transpires that the goods have not been exported, then the assessee would be entitled to furnish 'C' forms and the assessment shall be framed by taking into consideration such forms. If as per the documents produced today, it turns out that the goods have been exported against 'H' form, then that fact has to be given due consideration.*
>
> *In view of the above circumstances, the impugned orders are set-aside and this matter is remanded back to the Designated Officer, Faridkot for framing fresh assessment in accordance with law as also in the light of the observations recorded hereinbefore, within two months from the date of receipt of the certified copy of this order. The appellant-assessee is directed to produce the documents before the Designated Officer."*

5. The Tribunal already having remitted the matter for examining the nature of the transaction, we find no force in the appellants' contentions and no reason to entertain the appeals, which are accordingly dismissed.

PUNJAB & HARYANA HIGH COURT

VATAP NO 46 OF 2013

GARG SALES CORPORATION, JIND
Vs.
STATE OF HARYANA AND ANOTHER

AJAY KUMAR MITTAL AND JASPAL SINGH, JJ.

31th March, 2014

HF ▶ Revenue

INTEREST – LEVY OF – SUPPRESSED PURCHASES – ASSESSMENT FRAMED – ON REVISION TAX LEVIED ON SUPPRESSED PURCHASES – LEVY OF INTEREST – DISALLOWANCE OF ITC TO SOME EXTENT DUE TO SHORTAGE OF C-4 FORMS – ORDER UPHELD BY TRIBUNAL ALLOWING C-4 FORMS SUBJECT TO VERIFICATION – APPEAL BEFORE HIGH COURT - HELD THAT SUPPRESSION OF PURCHASES WAS NOT BONAFIDE – THEREFORE, INTEREST IS RIGHTLY LEVIED – APPEAL DISMISSED.

REVISION – JURISDICTION – ASSESSMENT – REVISION TAKEN UP – TAX AND INTEREST LEVIED ON ACCOUNT OF SUPPRESSED PURCHASES – ORDER UPHELD BY TRIBUNAL – QUESTION OF JURISDICTION RAISED BEFORE HIGH COURT FOR FIRST TIME – HELD THAT ESSENTIAL REQUIREMENTS FOR INVOKING REVISIONAL POWER WERE FULFILLED – ISSUE REGARDING JURISDICTION NEVER RAISED BEFORE TRIBUNAL – THEREFORE, NO SUBSTANTIAL QUESTION OF LAW AROSE RELATING TO SCOPE OF REVISIONAL JURISDICTION – APPEAL DISMISSED.

The appellant was engaged in the business of manufacturing of agricultural equipments and filed its returns in time. Assessment was framed for the year 2005-06 determining excess ITC to be carried forward. However, on revision, tax was levied on suppressed purchases and an additional demand was created including interest. ITC to some extent was disallowed due to shortage of C-4 forms. The Tribunal upheld the order of revisional authority however allowing C-4 forms subject to verification. An appeal was filed before the Hon'ble High Court against the levy of interest. It is held that suppression of purchases was not bonafide. Therefore, levy of interest was right.

Regarding the question of jurisdiction of revisional authority raised by the appellant, it is held that this question was never raised before the Tribunal and did not emerge from the order of the Tribunal. Consequently, no substantial question of law arose relating to scope of revisional jurisdiction.

Present: Mr. Chetan Jain, Advocate for the appellant.
Ms. Tanisha Peshawaria, DAG, Haryana.

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AJAY KUMAR MITTAL, J.

1. This appeal has been preferred by the assessee under Section 36 of the Haryana Value Added Tax Act, 2003 (in short "the Act") against the order dated 11.1.2013 (Annexure A-7) passed by the Haryana Tax Tribunal, Chandigarh (hereinafter referred to as "the Tribunal"), claiming the following substantial questions of law:-

(i) Whether in the facts and circumstances of the case, the Ld. Tribunal was justified in upholding the jurisdiction of the Revisional Authority u/s 34 of the HVAT Act, 2003 to revise the Assessment Order with regard to imposition tax on turnover of purchase of goods which though part of assessment record at the time of assessment was not made part of the gross turnover or taxable turnover by the Assessing Authority and was not assessed to tax?

(ii) If answer to the above question is in the negative, can such turnover be assessed to tax by the Revising Authority within the limitation laid down in Section 17 of the Haryana VAT Act, 2003?

(iii) Whether, in the facts and circumstances of the case, the Ld. Tribunal was justified in upholding the jurisdiction of Revisional Authority to levy interest on the amount to tax assessed on such turnover particularly when the taxability of such turnover has not been disputed by the Assessing Authority?

(iv) Whether in facts and circumstances of the case, the Ld. Tribunal was justified in upholding jurisdiction of the Revisional Authority to levy interest even for the period prior to raising of the demand in view of the judgment, United Riceland Limited v. State of Haryana, (1997) 104 STC 362 (P&H)?

3. Briefly stated, the facts necessary for adjudication of the instant appeal as narrated therein may be noticed. The appellant is a dealer and is engaged in the business of manufacturing of agricultural equipments and trading of steel, hardware and sugar. The appellant filed its quarterly returns and annual returns in time. The case of the appellant was taken up for scrutiny and a notice under Section 15(3) of the Act was issued for assessment for the year 2005-06. In pursuance to the notice, the appellant produced all the copies of returns, books of account and the necessary documents. The assessing authority vide order dated 20.8.2008 (Annexure A-1) framed the assessment for the year 2005-06 determining the excess input tax credit at Rs. 71,532/- to be carried forward to the next year, i.e. 2006-07. The Deputy Excise and Taxation Commissioner-cum-Revisional Authority (DETC) exercised revisional power under Section 34 of the Act and vide order dated 5.10.2010 (Annexure A-2) levied tax on suppression of purchases amounting to Rs. 25,21,248/- and also created additional demand of Rs. 3,57,322/- including interest of Rs.1,78,661/-. However, input tax credit was disallowed for Rs.73,455/- due to shortage of C-4 Forms. Feeling aggrieved, the appellant filed an appeal before the Tribunal. The Tribunal vide order dated 19.7.2011 (Annexure A-4) upheld the order of the Revisional Authority and dismissed the appeal. Thereafter, the appellant filed a review application (Annexure A-5) before the Tribunal who vide order dated 11.1.2013 (Annexure A-7) allowed VAT C-4 forms subject to verification. Hence, the present appeal.

4. Learned counsel for the appellant submitted that the issue relating to difference in purchases as shown in the returns and on comparison with the trading account has not been properly adjudicated by the Tribunal. He further submitted that invoking of revisional jurisdiction under Section 34 of the Act was bad. Learned counsel has relied upon the judgment of this Court in **Haryana Agro Industries Corporation Ltd. v. State of Haryana (2002) 3 RTJ 405 (P&H)** in support of his contention. The charging of interest was also assailed as according to the learned counsel, no interest could be charged before raising the demand. Reliance was placed upon the judgments reported in **J.K. Synthetics Ltd. v. Commercial Taxes Officer (1994) 94 STC 422 (SC), United Riceland Limited v. State of**

Haryana (1997) 104 STC 362 (P&H), Punjab Breweries Limited v. State of Punjab (1999) 112 STC 314 and **Bansi Rice Mills v. State of Haryana (2002) 127 STC 218 (P&H).**

5. On the other hand, learned State counsel has supported the order passed by the Tribunal. It was argued that the issue relating to assumption of revisional jurisdiction by DETC was never raised before the Tribunal and, therefore, the same does not arise from the order of the Tribunal. It was urged that there was suppression of purchases and due to contumacious conduct of the assessee, the interest was payable from the date the tax was due.

6. We have heard learned counsel for the parties and perused the record.

7. The addition was sought to be made on account of difference in purchases shown in the trading account. The dealer had failed to explain the difference and, therefore, the difference could only be attributed to suppression of purchases. In the absence of any material produced by the appellant-dealer, the findings recorded by the revisional authority and upheld by the Tribunal could not be faulted. However, the Tribunal had allowed the benefit of Form VAT C-4 subject to verification which were produced at the time of hearing of the appeal before it.

8. Taking up the issue relating to chargeability of interest for the period the tax demand remained payable, it may be observed that the judgments in **J.K. Synthetics Ltd., United Riceland Limited, Punjab Breweries Limited** and **Bansi Rice Mills cases (supra)** were cases where the dealer had been disputing its liability to pay the tax bonafide. The issue of taxability was debatable in these cases. In Full Bench judgment of this Court in **United Riceland Limited's case (supra),** it was noticed on the facts involved therein that the petitioner assessee had not *mala fidely* or intentionally evaded to pay the tax thus incurring the liability to pay the interest within the meaning of sub-section (5) of section 25 of the Act.

9. Admittedly, in the present case, the appellant had suppressed purchases and on that account evaded payment of tax. The action of the appellant in such circumstances is not bonafide and the judgments relied upon by learned counsel for the appellant do not help the appellant. Further, the Hon'ble Apex Court in **Calcutta Jute Manufacturing Co. and another v. Commercial Tax Officer and others (1997) 106 STC 433** distinguishing the judgment of the Constitution Bench in **J.K. Synthetics Ltd's case (supra)** had held that interest was payable from the date prescribed for furnishing the correct return.

10. Examining the issue relating to validity of assumption of revisional jurisdiction and the judgment in **Haryana Agro Industries Corporation Limited's case (supra)**, it may be observed that the Division Bench therein had noticed the distinction between the reassessment proceedings and exercise of jurisdiction by the revisional authority. In the facts and circumstances of that case, it was concluded that the essential requirements for invoking revisional power were not fulfilled. Thus, no benefit can be derived by the appellant from the said pronouncement. Further, this issue was never raised and argued before the Tribunal and, therefore, it does not emerge from the order of the Tribunal. Consequently, no substantial question of law arises relating to scope of revisional jurisdiction in the present appeal.

11. In view of the above, no question of law muchless a substantial question of law arises in this appeal. Finding no merit in this appeal, the same is hereby dismissed.

PUNJAB VAT TRRIBUNAL

VATAP NO 491 of 2013

BHAGWATI TRADING CO.
Vs.
THE STATE OF PUNJAB

JUSTICE A.N. JINDAL, (RETD.) CHAIRMAN

19th December, 2014

HF ▶ Appellant

APPEAL - NON-SPEAKING ORDER – PROVISIONAL ASSESSMENT FRAMED – DEMAND RAISED – DISMISSAL OF APPEAL BY 1ST APPELLATE AUTHORITY – REASONS FOR DISMISSAL NOT MENTIONED AND GROUNDS SET OUT BY APPELLANT NOT EXAMINED – APPEAL BEFORE TRIBUNAL – FAILURE TO PERFORM ITS OBLIGATION BY 1ST APPELLATE AUTHORITY OBSERVED – HELD, NON-SPEAKING ORDER PASSED BY DETC – CASE REMANDED TO PASS A SPEAKING ORDER.

Pursuant to framing of assessment, an inspection was conducted in the business premises of the appellant. Provisional assessment was framed and an additional demand was raised. The Ld. DETC dismissed the appeal without considering the grounds set out by the appellant nor mentioning any reasons for dismissal. Aggrieved by the order, an appeal is filed before the Tribunal. It is held that the Ld. DETC passed a non-speaking order. It did not record the contentions raised nor any reasons for its order. Therefore, the matter is remanded to 1st appellate authority to pass a speaking order.

Present: Mr. Rohit Gupta, Advocate Counsel for the appellant.
Mrs. Sudeepti Sharma, Deputy Advocate General for the State

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JUSTICE A.N. JINDAL, (RETD.) CHAIRMAN

1. This appeal is directed against the order dated 19.6.2013 passed by the Deputy Excise and Taxation Commissioner (Appeals), Ludhiana Division, Ludhiana, who while upholding the order dated 4.3.2013 passed by the Excise and Taxation Officer-cum-Designated officer, Ludhiana-II dismissed the appeal of the appellant.

2. Pursuant to the assessment of the firm for the period 1.4.2012 to 6.9.2012, framed by the Designated Officer, Ludhiana-II inspected the premises of the appellant on 6.9.2012 in the presence of Shri Devi Dass, proprietor of the firm. During Inspection one bill book for the year 2011-12, sale bill file for the year 2012-13, 16 loose papers, one blank GR No. 147 of M/s H.S. Road line, 7 VAT-XXXVI export slips, original and 14 photostat copies of VAT XXXVI, export slips, one sale bill original and one laptop were impounded for verification Since the appellant had no evidence to produce in support of the discrepancies pointed out by the Designated Officer. The latter framed the provisional assessment u/s 30 of Punjab Value Added Tax Act, 2005 for the period from 1.4.2012 to 6.9.2012 and created an additional demand of Rs. 42,24,422. The appellant preferred the appeal before the First Appellate Authority which was dismissed on 19.6.2013.

3. The main grouse of the appellant is that the Deputy Excise and Taxation Commissioner (A), Ludhiana Division, Ludhiana did not examine the grounds as set-out by the appellant against the additional demand raised. He did not assign any reason for maintaining the order passed by the Designated Officer and did not assign any reasons to brush aside the plea as set-out by him before the Appellate Authority.

4. Having heard the rival contentions and perused the impugned orders, it transpires that though, the appellant raised various contentions in the grounds of appeal but not a word was mentioned regarding the same and no observations have been made by the Appellate Authority to ignore such contentions. The only observations which the Appellate Authority made in the impugned order read as under:-

> *"I have heard both the sides and gone through the record of the case and grounds of the appeal carefully and also thoroughly examined the documents produced by the departmental officer. I am of the view that the arguments put forth by the counsel have no force and the arguments put forth by the ETO/ETI have some merit. So in view of the facts of the case and in the interest of the natural justice, the appeal is dismissed."*

5. The basic spirit behind the passing of the judgment is to apprise a party of the decision of the officer and the reasons for his decision. The Officer while passing the judgment must record the contentions as raised by the counsel for the appellant and reasons for his agreement or dis-agreement with them while recording his conclusions. The Appellate Authority has failed in performing its obligations while passing the impugned order. The order being non speaking needs to be set-aside.

6. Resultantly, this appeal is accepted, the impugned order is set-aside and the case is remanded back to the Deputy Excise and Taxation Commissioner(A), Ludhiana Division, Ludhiana for passing a speaking order. Parties are directed to appear before the Deputy Excise and Taxation Commissioner, Ludhiana Division, Ludhiana on 20.02.2015.

PUNJAB VAT TRIBUNAL

VATAP NO 145 OF 2014

MALWA INDUSTRIES LTD.
Vs.
THE STATE OF PUNJAB

JUSTICE A.N. JINDAL, (RETD.) CHAIRMAN

9th January, 2015

HF ▶ Appellant

APPEAL – PRE-DEPOSIT – ENTERTAINMENT OF – ADJUSTMENT AGAINST INPUT TAX CREDIT – ITC ALLEGEDLY AVAILABLE TO APPELLANT AS COMPUTED BY THE DEPARTMENT – APPEAL TO ADJUST 25% OF ADDITIONAL DEMAND OUT OF AVAILABLE ITC FOR ENTERTAINMENT OF APPEAL – APPEAL ALLOWED BY TRIBUNAL – ANY BALANCE DUE AFTER ADJUSTING THE AMOUNT TO BE DEPOSITED BY APPELLANT – FAILURE TO COMPLY WITH THE ORDER TO LEAD TO ORDER OF ASSESSING AUTHORITY BEING INTACT.

In this case, an assessment order was passed against the appellant. The appellant appealed before the Tribunal for entertainment of appeal by allowing adjustment of 25% as pre-deposit against the amount available as ITC to the appellant. The Tribunal has accepted the appeal and allowed the adjustment of the requisite amount against the ITC. Also, any balance due would be deposited by the appellant. The receipt alongwith any amount due was ordered to be produced before the DETC failing which the order of the Assessing Authority would remain intact.

Present: Mr. Sandeep Goyal, Advocate alongwith Mr. Rohit Gupta, Advocate
counsel for the appellant.
Mr. N.D.S. Mann, Addl. Advocate General for the State.

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JUSTICE A.N. JINDAL, (RETD.) CHAIRMAN

1. As per the order dated 23.9.2013, total ITC available to the appellant as computed by the Department was 4,15,89,047. The counsel for the appellant has submitted that he is ready to get the amount of 25% of the additional demand adjusted from the ITC available to the appellant.

2. On the other hand, the counsel for the respondent State has stated that we do not know the exact position as on today about the availability of the Input Tax Credits. In any

case, the amount of ITC if any, available to the appellant could be adjusted against the additional demand of 25%, which is pre-requisite for hearing of the case the appeal.

3. Resultantly, this appeal is accepted and the impugned order is set-aside. The amount of 25% of additional demand may be adjusted against the Input Tax Credits available to the appellant. However, if any balance remains due, the appellant would deposit the same. The amount of Input Tax Credit would be adjusted within one and half month, thereafter, a receipt alongwith the remaining amount, if any, would be produced before the DETC within one week. In that situation, the appeal would be entertained, failing to comply with this order, the order of the assessing authority would remain intact.

PUNJAB VAT TRIBUNAL

VATAP NO 38 of 2014

MANAK CHAND GOBIND RAM
Vs.
THE STATE OF PUNJAB

JUSTICE A.N. JINDAL, (RETD.) CHAIRMAN

19th January, 2015

HF ▶ Appellant

PRE-DEPOSIT – APPEAL – ENTERTAINMENT OF – 25% OF DEMAND RAISED ALLEGEDLY DEPOSITED BY APPELLANT FOR ENTERTAINMENT OF APPEAL - DISMISSAL OF APPEAL FOR NON-COMPLIANCE OF SECTION 62(5) OF THE ACT BY THE LD. DETC – APPEAL BEFORE TRIBUNAL – DETC DIRECTED TO ENTERTAIN APPEAL PROVIDED REQUIREMENT OF PRE-DEPOSIT FULFILLED – OTHERWISE, PREVIOUS ORDERS PASSED BY THE LD. DETC AGAINST THE APPELLANT TO PREVAIL – APPEAL ACCEPTED BY THE TRIBUNAL.

The appellant had allegedly deposited 25% of the additional demand as required under Section 62(5) of the Act for the entertainment of its appeal before the 1st appellate authority. Despite the fulfilment of pre-condition, the appeal was dismissed for failure to comply with Section 62(5) of the Act by the Ld. DETC, Faridkot. Aggrieved by the order an appeal is filed before the Tribunal. Accepting the appeal, the Tribunal has directed the Ld. DETC to satisfy itself regarding the deposit of 25% by appellant and then hear appeal on merits. Otherwise, the previous order passed by the Ld. Authority would prevail.

Present: Mr. K.L. Goyal, Sr. Advocate alongwith Rishab Singla,
Advocate counsel for the appellant.
Mrs. Sudeepti Sharma, Deputy Advocate General for the State.

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JUSTICE A.N. JINDAL, (RETD.) CHAIRMAN

1. This is an appeal against the order dated 29.7.2013 passed by the Deputy Excise and Taxation Commissioner (Appeals) Ferozepur Division, HQ Bathinda. He had dismissed the appeal for non-compliance of section 62(5) of the Act, 2005.

2. The counsel for the appellant has submitted that the appellant has deposited the requisite 25% of the amount and now there would be no handicap for the Deputy Excise and Taxation Commissioner to entertain and decide the appeal on merits.

3. Heard. The counsel for the appellant has vehemently contended that the appellant has deposited 25% of the additional demand, which is a pre-requisite for entertaining the appeal.

4. I believe the counsel and leave it to the Deputy Excise and Taxation Commissioner to examine this fact. The Deputy Excise and Taxation Commissioner would be well within his rights to examine if the appellant has deposited 25% of the additional demand.

5. Resultantly, this appeal is accepted. The Deputy Excise and taxation Commissioner would entertain the appeal and decide the same on merits, if he feels satisfied that the amount of 25% of the additional demand has been deposited by the appellant, otherwise order passed by the Deputy Excise and Taxation Commissioner, Faridkot Division, HQ Bathinda would remain intact and he would not entertain the appeal.

PUNJAB VAT TRIBUNAL

VATAP NO 576 of 2013

RELIANCE INDUSTRIES LTD.
Vs.
THE STATE OF PUNJAB

JUSTICE A.N. JINDAL, (RETD.) CHAIRMAN

22th December, 2014

HF ▶ Appellant

PRE-DEPOSIT – APPEAL – ENTERTAINMENT OF – APPEAL BEFORE TRIBUNAL AGAINST THE ORDER DECLINING ENTERTAINMENT OF APPEAL WITHOUT DEPOSIT OF 25% ON PART OF APPELLANT – TIME GIVEN FOR PAYMENT OF PRE-DEPOSIT – SECOND APPEAL DISMISSED FOR FAILURE TO DEPOSIT 25% WITHIN THE TIME FIXED BY THE COURT – REQUISITE AMOUNT DEPOSITED BY THE APPELLANT LATER – EVENTUALLY, BOTH APPEALS FILED BEFORE TRIBUNAL ACCEPTED ON THIS GROUND – 1ST APPELLATE AUTHORITY DIRECTED TO HEAR APPEAL ON MERITS.

The court had declined the request of the appellant praying for not depositing 25% of the additional demand by it and had given time to make the payment. The second appeal of the appellant was also dismissed as the appellant had failed to deposit 25% of the additional demand till the time fixed by the court. However, the said amount was deposited later. The Tribunal accepted both the appeals and directed the Ld. Authority to hear the appeal on merits.

Present: Mr. K.L. Goyal, Sr. Advocate alongwith Mr. Sandeep Goyal,
Advocate counsel for the appellant.

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JUSTICE A.N. JINDAL, (RETD.) CHAIRMAN

1. This order of mine will dispose of two connected in appeal Nos. 699 and 576 of 2013. In appeal No. 576 of 2013, Court had declined the request of the appellant for not depositing 25% of the additional demand and had given time to make payment of the said amount. The second appeal No. 699 of 2013 relates to the same appellant, which was dismissed on the ground that the appellant had failed to deposit 25% of the additional demand, till the time fixed by the court.

2. Today, the counsel for the appellant has submitted that he has deposited the additional demand of 25% after correcting the same. Therefore, his right of appeal being heard on merits be not allowed to be destroyed.

3. The State has no objection, if the appeal is heard on merits. In view of the matter, both the appeals are accepted, impugned orders are set-aside and DETC is directed to hear and decide the appeal on merits according to law. The copy of the order be placed in Appeal No. 699 of 2013.
