2013-2014
22nd Year

# ALL GUJARAT FEDERATION OF TAX CONSULTANTS

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# TAX GURJARI

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**Voice of All Gujarat Federation of Tax Consultants**

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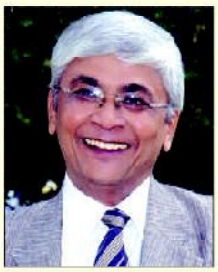
## PRESIDENT'S MESSAGE



My Dear Fellow Members,

April is the First month of new Financial Year. This time, April, 2014 is going to be unique, as it has, and it will, witness several significant changes and surprises. We have witnessed unprecedented rush force and other methods applied by Income Tax Authorities as they had fallen short of their Targets. For this many assessees were made Targets. We had seen various tactics applied in making assessment orders and also in creating demand and also in recovering such legitimate or otherwise dues.

Secondly, we had seen unprecedented changes in the atmosphere. Mornings were pleasant like winter and day time like Hot Summer in full swing. As if this was not enough, we experienced thunderstorm rains and bad weather in many parts of the city, state and in Nation.

Thirdly, we shall be witnessing, and shall be part of, World's Largest Democracy going for a new wave like Election to our Lok Sabha. More than 10 Crore new youths will be voting for the first time, thanks to the efforts made by the Election Commission, Radios, T V Channels and, of course, various Political Parties.

From April, we saw complete sea change in the Companies Act 2013, an Act which was overdue for a radical change and it did. There are numerous provisions in this new Act; some of them extremely important, some of them most desirable and some of them draconian. Well, that is the plus and minus of Democracy and of such a Government and Governance.

In Direct Tax Code also, some radical changes are made and it is proposed to have Tax Audit performed and certified by Cost Accountants and Company Secretaries. Whether they have appropriate training and consequential disciplinary mechanism or not is another question. But then more avenues for such professional and challenges for Chartered Accountants. We don't know whether the new Government will allow this Direct Tax Code to see the light of the day or not and if yes in what form.

Therefore, it is very very important and inevitable for all of us to vote. See the attractions and invitations being offered by various private sectors to encourage everyone to vote. Vote we must. I also, on behalf of A G F T C and in personal capacity, request each one of you to please cast your vote without fail.

No doubt some of us are going for R R C at Kashmir shall be unlucky to miss their chance & right to vote. We tried very hard to change the dates but as all Airlines tickets and Hotels were booked in advance, it was just not possible to reschedule the same. But I am sure, all the participants will be eagerly watching the elections in Gujarat when the Hon C M of Gujarat, who has been amongst us several times in various conferences and meetings, is projected, and is likely, to be the Prime Minister.

Our endeavor had been to publish Tax Gurjari every Quarter and this is the Third one at your command. We all strive toward excellence and I appeal all my members to gear up in the office for better services to the clients and also keeping updates in all spheres of life, be it education, knowledge, social or political.

Wish you all a very Happy and prosperous new Financial Year 2014-15.

With Best Wishes

**Sunil Talati**

President

# EDITORIAL

Dear members,

The Companies Act, 2013 is operational with effect from 1st April, 2014, barring provisions relating to National Company Law Tribunal and Appellate Tribunal and National Financial Reporting Authority. This has drastically affected the way in which the companies function and Chartered Accountants and other professionals dealing with the companies; be they private or public, are also made responsible for the number of matters for which they were hitherto not held so.

Most significant areas where the changes are drastic are: (1) acceptance of deposits by a company, (2) giving of loan to directors or any other person in whom the director is interested or giving guarantee or providing security in connection with loan taken by the director or such other person, (3) rotation of independent directors, (4) rotation of auditors, (5) definition of fraud and responsibility of independent directors and professionals in case of fraud committed by others.

Though the private limited companies are entitled to accept deposits from public subject to compliance with specified conditions, the deposits from shareholders and relatives of directors, which were excluded from the definition of deposit, are now falling with the definition of deposit.

There is blanket ban on granting of loans and advances to the directors, or to any other person in whom the director is interested like director's partner or relative, any firm in which any director or relative is a partner, any private company of which any such director is a director or member, etc. The private limited company is also prohibited from giving any guarantee or providing any security in connection with any loan taken by a director or such other person.

In case of violation of any of the provisions of the companies act, 2013, severe penalties and prosecution are provided for the directors, professionals working with the company, auditors, company secretaries, etc. The function of auditors has become very onerous, requiring the chartered accountants to critically look at the provisions of the Act as well as functioning of the company before accepting audit of any company for the financial year 2014-15 onwards. The auditors and independent directors are also required to obtain professional indemnity policy of appropriate amount to protect them against any impending claim that may arise in future. This is imperative in view of the provisions relating to class-action suits which may be instituted by anybody including government organisations, lenders, suppliers, investors or any other persons against the company, its directors as well as auditors.

Looking to the compliance requirements and extent of responsibilities cast on management and auditors as well as other professionals, converting a private limited company into a limited liability partnership after considering tax and stamp duty implications may be a good option.

In the earlier issue, I had requested for contribution of articles and other useful professional materials by the members to convert the Tax Gurjari into monthly issue and also requested for feedback and suggestions. I am eagerly awaiting the response.

Wish you happy experience of voting in the Lok Sahha election scheduled on 30th April.

**K. V. Karkar**

Editor

# VARIOUS ASPECTS OF TRANSFER OF RIGHT TO USE ANY GOODS AMOUNTING TO DEEMED SALE

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The subject of deemed sale for the purpose of Sales Tax assumed great importance by reason of adding Art. 366(29A)(d), by Constitutional (46th) Amendment Act, 1982, to the definition Article, which very much expanded the conventional and strictly legal connotation of the word "sale" which had very much crystallized by the decision of the Supreme Court in the case of State of Madras v/s. Gannon Dunkerly & Co. (1958) 9 STC 353(SC) and Builders Association of India v/s. Union of India – AIR (1989) SC 137. The Supreme Court in these cases adopted and accepted the connotation of "sale" as defined in the Sale of Goods Act, 1930.

Under the Sale of Goods Act, 1930, the word "sale" was defined in Section 4 of the sale of goods Act as "a Contract of sale of goods to the buyer for a price".

The resultant effect of the said decision was that works contract and transfer of right to use goods, hire purchase etc. were not covered within the net of Sales Tax Acts which were enacted by the various States under Entry 54, Schedule II.

On insistent campaign by the States that there was considerable escapement of Sales Tax by reason of many transactions which were not sale in the conventional sense but still in effect served similar purpose to the parties to the contract, the Parliament enacted Article 336(29A) in the definition Article by providing for inclusive definition in the expression "tax on the sale or purchase of goods" and expanded the meaning of sale or purchase so as to include six types of transactions contained in the said Constitutional Amendment.

In this article, I will be dealing with Article 336(29-A)(d) which reads as under : -

"(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".

The State legislatures promptly amended the Sales Tax laws prevailing in the States by amending the definition of "sale" by including such transactions. For example, Gujarat Sales Tax Act, 1969 amended the inclusive definition of "sale" by adding clause (b) as follows:-

"Transfer, otherwise than in pursuance of contract, of property in any goods for cash, deferred payment or other valuable consideration".

The Gujarat Value Added Tax, 2003, which came into force on 1-4-06, similarly enacted in the definition of "sale" in Section 2(23) Clause (d) as under:-

"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".

The aim of this article is to examine the amplitude and width of this amendment and to ascertain how far and to what extent transfer of right to use would amount to deemed sale under the amended Sales Tax or VAT law in the State of Gujarat, and may be in other parts of India, as the inclusion is in similar words..

Similar to the issue of works contract resulting in large number of case law throughout the country, "transfer of right to use any goods" has also been the subject matter of several decisions of the Supreme Court and various High Courts which have tried to crystallize the true scope and effect of the deemed sale as a result of transfer of right to use any goods.

Article 366 is the article which defines various words and phrases used in the Constitution unless the context otherwise requires. Clause 12 defines "goods" as follows: "includes materials, commodities and articles".

The Sale of Goods Act, 1930 defines goods as follows:-

"Goods" means every kind of movable property other than actionable claims and money, and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale".

Similarly, the Gujarat Value Added Tax Act, 2003 defines "goods" in s. 2(13) as follows:-

"Goods" means all kinds of movable property (other than newspapers, actionable claims, electricity, stocks and shares and securities) and includes live stocks, all materials, articles and commodities and every kind of property (whether as goods or in some other form) involved in the execution of works contract, all intangible commodities and growing crops, grass, standing timber or things attached to or forming part of the land, which are agreed to be severed before sales or under the contract of sale".

After examining the various definitions of the words "Sale", "goods" and other related words, it will be useful to analyse the various components of Clause (d) of Section 2(23), dealing with transfer of right to use any goods.

On analysis of the section, the following are the ingredients:

**(1) Transfer, (2) Right to use, (3) Goods, (4) For cash, etc.**

(1) The word **"transfer"** requires possession of the goods to be transferred and to be in full control and use of the transferee. If the control is retained by the owner then there is no transfer and the clause does not apply (see Bus Cases). Keeping full control of the goods and doing some work or errands for another will not be within the word "transfer", but may amount to "Service" liable to Service Tax.

**(2) Right to use** would mean that the transferee must have the right to use the goods owner cannot keep control through his employees, on the use. Whether the right is exclusively given to him or not or can right to use to be given to more than one person requires to be considered. Such cases will arise in relation to intangible goods such as trade mark, patent, electronic waves, etc. However, if there is outright assignment of the trade mark it will amount to "sale" in the normal course not falling in Clause (d).

**(3) Goods**: As stated above, goods include tangible and non-tangible things. Basically, it has to be a movable property as against immovable property which expression is defined in the General Clauses Act and Transfer of Property Act.

"Though the word immovable property is not exhaustively defined, it lays down that property attached to the earth will be immovable property. Further, the word immovable property is defined in Section 3(26) of General Cases Act, 1897 as follows:-

**"Immovable property** shall include land, benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth". The expression "Attached to the earth" is defined in Transfer of Property Act as follows:-

**"Attached to the earth"** means-

(a) rooted in the earth, as in the case of trees and shrubs;

(b) embedded in the earth, as in the case of walls or buildings; or

(c) attached to what is so embedded for the permanent beneficial enjoyment of that to which it is attached;

(4) **Consideration:** Such transfer without consideration would amount to "gift", hence not taxable under Clause (d).

So far as the meaning of the goods is concerned the following leading cases may be noticed.

**Electromagnetic waves or radio frequencies are not "goods"** within the meaning of the word "Goods" either in Art. 366(12) or (29A)(d) – Bharat Sanchar Nigam Ltd. v/s. Union of India (2006) 3 SCC 1, 37 (para 71) : AIR 2006 SC 1383.

The term "goods" as used in Art. 366(12) of the Constitution is very wide and includes all types of movable properties, whether those properties be tangible or intangible property. The term "goods" for the purposes of sales tax, cannot be given a narrow meaning. The submission that a software is different from electricity and that software is incorporeal intellectual property whereas electricity is not, cannot be accepted. In India, the test to determine whether a property is "goods" for the purposes of sales tax, is not whether the property is tangible or intangible or incorporeal. The test is

whether the item concerned is capable of abstraction, consumption and use and whether it can be transmitted, transferred, delivered, stored, possessed, etc.

Intellectual property, when it is put on a medium, becomes goods, whether it be in the form of books or canvas (in case of painting) or computer discs or cassettes and is marked. There is no difference between a sale of a software program on a CD/ floppy disc from a sale of music on a cassette/CD or a sale of film on a video cassette/CD. In all such cases, the intellectual property has been incorporated on a media for the purpose of transfer. Sale is not just of the media which by itself has a very little value. The software and the media cannot be split up. What the buyer purchases and pays for is not the disc or the CD. As in the case of painting or books or music or films the buyer is purchasing the intellectual property and not the media, i.e., the paper or cassette or disc or CD. Thus, a transaction/sale of computer software is clearly a sale of "goods". The term "all materials articles and commodities" includes both tangible and intangible/incorporeal property which is capable of abstraction, consumption and use and which can be transmitted, transferred, delivered, stored, possessed, etc. The software programs have all these attributes. [See Tata Consultancy Service Services v/s. State of A.P (2005) 1 SCC 308 (para 27 and 19) : AIR 2005 SC 371].

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

In the leading decision on the subject, Bharat Sanchar Nigam Ltd. v/s. Union of India (2006) 145 STC 91(SC), the issues dealt within the said judgment are set out in para 32 of the judgment as follows:-

(A) What are "goods" in telecommunication for the purposes of Article 366(29A)(d)?

Ans: Goods do not include electromagnetic waves or radio frequencies for the purpose of Article 366(29A)(d). The goods in telecommunication are limited to the handsets supplied by the service provider. As far as the SIM cards are concerned, the issue is left for determination by the Assessing Authorities.

(B) Is there any transfer of any right to use any goods by providing access or telephone connection by the telephone service provider to a subscriber?

Ans: There may be a transfer of right to use goods as defined in answer to the previous question by giving a telephone connection.

(C) Is the nature of the transaction involved in providing telephone connection a composite contract of service and sale? If so, is it possible for the States to tax the sale element?

Ans: The nature of the transaction involved in providing the telephone connection may be a composite contract of service and sale. It is possible for the State to tax the sale element provided there is a discernible sale and only to the extent relatable to such sale.

(D) If the providing of a telephone connection involves sale is such sale an inter-state one?

Ans: The issue is left unanswered.

(E) Would the "aspect theory" be applicable to the transaction enabling the States to levy sales tax on the same transaction in respect of which the Union Government levies service tax"?

Ans: The "aspect theory" would not apply to enable the value of the services to be included in the sale of goods or the price of goods in the value of the service.

Dealing with the most important Article as of today, namely electromagnetic waves or radio frequencies, the Supreme Court extensively dealt with the aspect of what are goods. It will be useful to reproduce the discussion in the Court judgement and its finding:-

**Bharat Sanchar Nigam Ltd. v/s. Union of India - (2006) 145 STC 91 (SC)**

"Goods" do not include electromagnetic waves or radio frequencies for the purpose of article 366(29A)(d) of the Constitution of India. The goods in telecommunication are limited to the handsets

supplied by the service provider. There are two reasons: (i) Electromagnetic waves are neither abstracted nor consumed in the sense that they are not extinguished by their user. They are not delivered, stored or possessed. Nor are they marketable. They are the medium of communication. What is transmitted is not an electromagnetic wave, but the signal through such means. The signals are generated by the subscribers themselves. In telecommunication what is transmitted is the message itself by means of the telegraph. No part of the telegraph itself is transferable or deliverable to the subscriber. (ii) The second reason is more basic: a subscriber to a telephone service cannot reasonably be taken to have intended to purchase or obtain any right to use electromagnetic waves or radio frequencies when a telephone connection is given. Nor does the subscriber intend to use any portion of the wiring, the cable, the satellite, the telephone exchange, etc. At the most, the concept of sale in the subscriber's mind would be limited to the handset that may be purchased. As far as the subscriber is concerned, no right to the use of any other goods, incorporeal or corporeal, is given to him or her with the telephone connection. Electromagnetic wave for radio frequencies do not fulfill the parameters applied for determining whether they are goods, the right to use of which would be sale for the purposes of Article 366(29A)(d). The essence of the right under Article 366(29A)(d) is that it relates to the user of goods. It may be that the actual delivery of the goods is not necessary for effecting the transfer of the right to use the goods, but the goods must be available at the time of transfer, must be deliverable and delivered at some stage. If the goods or what are claimed to be goods are not deliverable at all by the service providers to the subscribers, the question of the right to use those goods would not arise. (See para 63 to 65 and 75)

If the SIM card is not sold to the subscribers, but is merely part of the services rendered by the service providers, the SIM card cannot be charged separately to sales tax. If the parties intended that the SIM card would be a separate object of sale, it would be open to the sales tax authorities to levy sales tax thereon. If the sale of the SIM cards is merely incidental to the service being provided and facilitates, the identification of the subscribers, their credit and other details, it would not be assessable to sales tax. (See para 86)

The Union of India cannot include the value of the SIM cards, if they are found ultimately to be goods, in the cost of the service. (See para 89)

There may be a transfer of right to use goods by giving a telephone connection. But the nature of the transaction involved in providing a telephone connection may be a composite contract of service and sale. The State can tax the sale element only, if there is a discernible sale and only to the extent relatable to such sale. [See para 92(B) and (C)]

The aspect theory will not apply to enable the value of the services to be included in the sale of goods for purposes of sales tax or the price of goods in the value of the services for the purpose of service tax. [See para 92(E)]

"Goods" may be tangible property or an intangible one. It would become goods provided it has the attributes thereof having regard to (a) its utility, (b) its capability of being bought and sold and (c) its capability of being transmitted, transferred, delivered, stored and possessed. This is the correct approach to the question as to what are "goods" for the purpose of sales tax. (See para 56 and 57)

The word "goods" has not been altered by the Forty-sixth Amendment: that ingredient of sale continues to have the same definition. The Forty-sixth Amendment does not provide in Article 366(29A) any licence to assume that a transaction is a sale and then to look around for what could be the goods. Nor has it affected the dominant nature test propounded in GANNON DUNKERLEY'S case (1958) 9 STC 353(SC) to be applied to a composite transaction not covered by Article 366(29A). Transactions which are mutant sales are limited to the clauses in Article 366(29A). All other transactions would have to qualify as sales within the meaning of the Sale of Goods Act, 1930 for the purpose of levy of sales tax. Of all the different kinds of composite transactions only three specific situations were brought within the fiction of deemed sale: a works contract, a hire-purchase contract and a catering contract. Of these three, the first and the third involve a kind of service and sale at the same time. Apart from these two cases where splitting of service and supply has been constitutionally permitted in clauses (b) and (f) of Article 366(29A), there is no other service which has been permitted to be split. (See para 44 and 45)

**HOSPITAL SERVICES**

The clauses of Article 366(29A) do not cover hospital services. If during the treatment of a patient in a hospital, he or she is given a pill, the sales tax authorities cannot tax the transaction as a sale even after the Forty-sixth Amendment. Similarly, doctors, lawyers and other professionals render service. But these services do not involve a sale for the purpose of Entry 54 of List II (State List) of Schedule VII to the Constitution, even after the Forty-sixth Amendment for reasons ultimately attributable to the principle enunciated in GANNON DUNKERLEY'S case [1958] 9 STC 353 (SC), viz, if there is an instrument of contract which is composite in form, in any case other than the exceptions specified in Article 366(29-A), unless the transactions in truth represents two distinct and separate contracts and is discernible as such, the State would have no power to separate the agreement to sell from the agreement to render service and impose tax on the sale element. 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, until if there was no such intention there is no sale even if the contract could be disintegrated. The test, which for want of a better phrase, could be called the dominant nature test, for deciding whether the contract falls into one category or the other is "what is the substance of the contract". (See paras 45 and 46)

After the Forty-sixth Amendment, the sale elements of those contracts which are covered by the six sub-clauses of Article 366(29A) of the Constitution are separable and may be subjected to sales tax by the States under Entry 54 of List II of the Seventh Schedule and there is no question of the dominant nature test applying.

What are the "goods" in a sales transaction, therefore, remains primarily a matter of contract and intention. The seller and such purchaser would have to be *ad idem* as to the subject matter of sale or purchase. The court would have to arrive at the conclusion as to what the parties had intended when they entered into a particular transaction. (See para 51)

"Replenishment (REP) licences/Exim Scrip (Export-Import Licences) are goods within the meaning of Sales Tax Act – Vikas Sales Corporation v/s. Commissioner of Commercial Taxes (1996) 4 SCC 433 (para 29): AIR 1996 SC 2082 - Electricity is goods - CST v/s. M. P. Electricity Board – AIR (2002) SC 1895.

After examining the general import of the transfer of the right to use any goods, the following specific cases on subject of right to use may be referred to:-

**I. (a) CELLULAR PHONES**

**Essar Telecom Infrastructure (P) Ltd. v/s. Union of India - (2012) 52 VST 306 (Karn)**

The petitioner, engaged in providing infrastructure service in relation to cellular telephones and paying service tax thereon, entered into contract with various telecom/ cellular operators for rendering the service in relation to passive telecom network including operation and maintenance. The Deputy Commissioner of Commercial Taxes issued notice to the petitioner under section 39 of the Karnataka Value Added Tax Act, 2003, proposing to impose value added tax on providing of cellular telephony towers on rent to various service providers stating that the transaction fell under the definition of "deemed sale" under section 2(29)(d) read with sections 3 and 4(1)(b) of the Act and assessment orders were passed accordingly. On writ petitions:

Held, allowing the petitions in part, that if the definition provided under the provisions of section 3 of the Transfer of Property Act or under the Sale of Goods Act was interpreted, this type of equipment fixed to the earth or on the building, could definitely be dismantled and replanted elsewhere. Except the civil work of putting up a platform to fix the equipment/ tower, the structure did not acquire the character of immovable goods to detract the application of the Value Added Tax Act. It being a superstructure in the form of movable, and lent to various telecom companies under agreement either for cash or liquidated payment or some other consideration, it would be a transfer of right to use the goods which attracted the provisions of the Value Added Tax Act. Further, it could be seen from the agreement that the component of delivery was involved

and that effective control and maintenance of the equipment was with the petitioner. Thus, what was being lent, in pith and substance, was the right to use the goods though service was incidentally involved. Therefore, the assessment order passed treating the transaction as transfer of right to use goods was to be upheld.

**(b) TELEPHONE CELLPHONE**

**Indus Towers Ltd. v/s. Deputy Commissioner of Commercial Taxes - (2012) 56 VST 369(Karn)**

Held, allowing the dealer's appeals, that the master services agreement was an agreement to share equipment and such sharing was by way of permission and not by way of transfer. The dealer provided accommodation to the sharing operator to keep its equipment, i.e., the permission to keep its equipment in the shelter provided by the dealer. Possession of the site was not handed over to the mobile operator. The right given to the mobile operator was the right to ingress and egress for the purpose of operating its active infrastructure. Such ingress and egress was available only to authorised employees of the sharing operator or its properly authorized sub-contractors. The right, title and interest in and to the passive infrastructure including any enhancements carried out by the dealer vested with the dealer. Therefore, the intention of the parties was not to transfer at any point of time, any right, title or interest in the infrastructure to the mobile operator under the terms of the contract. The dealer had no corresponding responsibility of maintaining the active infrastructure of the mobile operator. Moreover, the dealer retained the right to lease, license, the passive infrastructure to any advertising agency, the only limitation being that such advertising act should not hinder the right of the mobile operator to have uninterrupted access of the infrastructure. The entire infrastructure was in the physical control and possession of the dealer at all times and there was neither physical transfer of such goods nor transfer of right to use such equipment or apparatus. Merely because access provided to the mobile operator, could not be transferred by the dealer during the period of contract to a third party that would not amount to the dealer losing control over the infrastructure. There was nothing in law which prevented the dealer from putting an end to the contract and providing access to another mobile operator. None of the tests prescribed to constitute a sale of goods or the extended meaning of the sale of goods was present. The right conferred on the mobile operator was a permission to have access to the passive infrastructure, to keep the active infrastructure in the site belonging to the dealer, to mount the antennae on the tower erected by the dealer and to have the benefit of a particular temperature so as to operate the equipment belonging to the mobile operator. No sale of goods or transfer was involved in the transaction in question. Therefore, it did not fall within the mischief of Article 366(29A)(d) of the Constitution. There was no sale of goods or deemed sale so as to attract levy of tax under the Karnataka Value Added Tax Act, 2003.

**II. BANK LOCKERS**

**State Bank of India v/s. State of Andhra Pradesh - (1988) 70 STC 215(A.P)**

The hire charges collected by banks from constituents represent a consolidated charge levied by the banks for a variety of services and facilities provided of which the use of the locker forms a small part. Any endeavour to levy tax on the aggregate hire charges levied by banks would amount to levying tax not only on the right to use the locker, but also on the charges collected by the bank for the provision of strong rooms, round the clock watch and ward facility and employment of necessary staff for close supervision in the operation of strong rooms. Banks, therefore, could not be called upon to pay sales tax on the hire charge received for the use of lockers which forms a fractional and inseparable part of the composite charge for a variety of service.

Further, where the lockers were imbedded in the floor they were not "goods" for the purpose of levy sales tax.

## III. PLANT & MACHINERY

(a) **The Growth Leasing & Finance Ltd. v/s. State of Gujarat - (1992) 85 STC 25 (Guj)**

Whether a particular plant and machinery would be considered to be immovable property or not would depend upon the facts and circumstances of each case. At the time when the plant and machinery are to be leased out and an agreement to give the right to use the plant and machinery is being entered into or executed, the plant and machinery may not be ordinarily fixed with the land or in building. In that state, both plant and machinery would be chattel, and not immovable property. But if they are embedded in earth and attached to earth, and the facts and circumstances in a particular case show that they are intended to be part of the land or building and if it is proved that they have been so annexed they would cease to be chattel or goods.

(b) **Deputy Commissioner of Sales Tax (Law) Board of Revenue (Taxes) v/s. Bobby Rubber Industries - (1998) 108 STC 410 (Ker)**

It has to be established that there is a transfer of right to use any goods. If the transaction is not in respect of any goods, it will not attract the provisions of the Act. Similarly, even if the transaction is in respect of goods, unless there is a transfer of property in the goods by one person to another or unless there is a transfer of right to use any goods, the provisions of the Act are not attracted even if the other conditions of the definition of "sale" are satisfied.

The Tribunal found that the respondent had a hydraulic press which was part and parcel of the plant and machinery embedded in the factory, and that when the factory did not have full work, the respondent allowed customers to use the facility of the hydraulic press within the factory and received a payment therefor. The Tribunal held that the hiring of the facility attached to a factory to various customers on a job work basis did not by itself operate as a transfer of the right to use goods, and that it was at best a permission to use and no more or a fruitful utilization of an asset otherwise lying idle. On a revision petition:

Held, dismissing the petition, that only movable property is comprehended within the definition of "goods" and the press was not movable property.

(c) **Commissioner, Sales Tax v/s. Prahlad Industries - (1999) 112 STC 548 (All)**

It was held that the plant and machinery were attached to earth and were immovable property and were not goods within the meaning of section 2(d) of the Act. There was no agreement between the parties that the lessee shall be entitled to sever the goods fastened to the earth. The subject matter of the lease was the woolen factory and the same was leased out as a unit and not as an individual piece of plant and machinery. In that view of the matter, there was no transfer of the right to use "goods" as envisaged under the Trade Tax Act.

(d) **Commissioner of Sales Tax v/s. Bombay Sound Service - (1999) 112 STC 290 (Bom)**

Goods have been defined specifically to means "all kinds of movable property". The definitions of "sale price" and "turnover of sales" also make it clear that the tax is on the amount of valuable consideration received or receivable for the transfer of right to use any goods, meaning thereby movable property.

From the definitions of "movable property" and "immovable property" in the General Clauses Act, 1897 and of the expression "attached to the earth" in the Transfer of Property Act, 1872, it is clear that if any property is embedded to the earth or attached to the earth in a manner essential for the beneficial user of the immovable property, it would be an immovable property. The real criteria to examine whether a property is movable property or immovable property is whether the movable property which is embedded or attached to

the earth can be used without so attaching and the attachment is only for the proper and smooth functioning of particular movable property or equipment or it is for the beneficial user of the immovable property. If a thing is embedded to the earth or attached to what is so embedded for the permanent beneficial enjoyment of that to which it is attached; then it is part of the immovable property. On the other hand, if the attachment is mainly for the beneficial enjoyment of the movable property itself, then it remains movable property even though fixed for the time being for proper enjoyment thereof.

The respondents were owners of cine laboratories and studios. All the studios were located in Mumbai. These studios were fully air-tight and air conditioned. In these studios sound recording instruments were permanently installed with electric fittings, etc. The respondents did the job of sound recording, re-recording, dubbing, mixing and transferring the sound on the negative films. These studios were taken on hire by film producers for recording songs on shift basis. The recordists, projector operators and helpers were engaged in the studios on permanent basis by the respondents who were the owners of the studios.

Held, accordingly, that undisputedly, recording of songs, background music and dubbing of sound can be done only in studios which are fully equipped for that purpose. It is not possible to undertake these activities anywhere and everywhere even with the aid of the very same machines or equipments which are fitted or installed permanently in the studios. In fact, what is really required is the studio and the instruments for recording of songs, etc. are essential part of the studio. There cannot be any studio without such equipment. The construction of studio is a very sophisticated task and what is taken on hire is the studio and not the recording machines and instruments installed there. The various instruments for recording music, etc. are annexed or embedded to the earth for the purpose of beneficial enjoyment of the studio which is an immovable property and not for the beneficial enjoyment of those instruments. The instruments are essential fixtures of studios. Therefore, the hiring of studios for the purpose of recording songs, background music and dubbing of sound did not amount to transfer of right to use any movable property and hence such transactions did not fall within the definition of "sale" as contained in clause (10) of Section 2 of the Act.

(e) **Karthik Engineering Works v/s. State of Karnataka - (2000) 119 STC 88 (Kar)**

There may be an instance where the machinery has been given under the lease agreement as movable property. Certain machineries can be used as movable while others, because of their nature or other reasons, cannot be termed as movable, but have to be embedded in the earth so as to make it as immovable property. If at the time of entering into an agreement, the right to use is given of a movable property, i.e., the goods, then there would be liability of tax under section 5C (transfer of right to use any goods). But if at the time of entering into an agreement the machinery itself is an immovable property, then it will be beyond the scope of the "goods" as defined under section 2 and also under the definition of "goods" as given in the Sale of Goods Act, 1930.

(f) **State of Andhra Pradesh and Another v/s. Rashtriya Ispat Nigam Ltd. - (2002) 126 STC 114 (SC)**

The High Court, on a consideration of the agreement of the respondent with the contractors, found that the effective control of the machinery, even while the machinery was in use, was with the respondent, the contractors were not free to make use of the machinery for other works or move the machinery out during the period the machinery was in use, and held that the transactions between the respondent and the contractors did not involve the transfer of right to use the machinery in favour of the contractors and the hire charges could not be brought to tax under section 5-E

(transfer of right to use any goods). On appeal to the Supreme Court:

Held, affirming the decision of the High Court, that the transaction did not involve the transfer of the right to use the machinery in favour of the contractors.

(g) **New Central Group Engineering (P) Ltd. and Another v/s. A.C.C.T, Calcutta (South) Circle and Others - (2001) 124 STC 637 (W.B.T.T)**

The applicant received amounts shown in accounts as hire charges for dumpers, loaders and cranes held that if any specific job was to be accomplished and the applicant executed the job with its own men and machinery, it would be a service contract. Here, the job specification and the time limit and the service charges would form the essence of the contract. The necessary document must have specific reference to the job so specified. But, if the applicant lent its men and machinery to the user on hire on the terms that the latter would have the choice as to the manner of utilizing the same suiting the hirer's job requirement during the period under hire, the contract would come within section 2(g)(ii) of the Act, because it would be a case of transfer of the right to use the goods. Here, the machinery, the period of hire and the rate of hiring charges would be the essence of the contract. In spite of the fact that C was the applicant's sister concern, no document had been brought to identify the jobs which the applicant claimed to have undertaken by using its men and machinery. A mere mention of hire charges without any job specification would lead to an inference that the applicant let the machinery on hire for use thereof by the user in a manner suitable to his requirement. For appropriate handling of such costly machinery the applicant might send its own machine operators, but that alone would not mean that the applicant was given a contract of accomplishing the job. The inescapable conclusion was that the applicant transferred the right to use the machinery to C which in turn got the machinery utilized according to its own requirement with the help of the operators and paid hire charges. The transaction came within the purview of section 2(g)(ii) and was liable to tax.

(h) **Viceroy Hotels Limited v/s. Commercial Tax Officer (2011) 43 VST 424(AP)**

The assessing authority noted that the sample bill, produced as part of the objections, produced for verification did not reveal that technicians were provided along with the audio/video equipment, that consideration was charged exclusively for the equipment, that effective control over the said goods had been transferred to the customers for use in their function, the dealer did not render any other service and that in view of Explanation (iv) to section 2(28), the activity of renting of LCD projectors and audio and video equipment was "sale" attracting tax under section 4(8) of the Act.

The bill showed that the customer was charged a sum towards audio visual equipment rental charge, in addition to the charges for food, liquor, etc. The contents of the bill did not justify the dealer's plea that the audio-visual equipment rentals charged on the consumer did not involve the transfer of the right to use the audio visual equipment. Admittedly, there was no privity of contract between the outsourcing agency and the dealer's customers. On the dealer's own admission, it did not render any service to its customers in relation to the audio visual equipment. The contract between the dealer and its customers was not a contract of "service" as it was not even the dealer's case that it rendered any service to its customers with regard to the audio-visual equipment facility provided to them. The assessing authority had recorded the finding that the audio-visual equipment was delivered to the customer who paid rental charges for such equipment, the dealer nowhere figured in the process of the customer putting the audio-visual equipment to use, and during the period of the conference, it was the customer who was using the said audio-visual equipment. Thus, effective control over the audio-visual equipment had been transferred to the

customer who paid rental charges to the dealer. The assessing authority was, therefore, justified in treating the transaction as a transfer of the right to use goods.

**(i) Commissioner, Trade Tax, U.P v/s. Gulshan Sugar and Chemicals Ltd. - (2009) 25 VST 505 (All)**

That the dealer admittedly leased out the entire factory on rent and realized a sum of Rs. 9,37,500 towards rent for plant and machinery, Rs. 6,25,000 towards rent for land and building. Tax under section 3F read with section 2(d) can be levied under the Act only on the turnover of movable property. Plant and machinery permanently attached to earth are not movable property and they are not goods. There was no illegality in the order of the Tribunal holding that no tax was payable under section 3F of the Act.

**IV. <u>OIL EXPLORATION - MACHINERY</u>**

(a) **HLS Asia Ltd. v/s. State of Assam & Ors. - (2007) 8 VST 314 (Gauhati)**

To constitute a transaction a transfer of the right to use goods, the transaction must have the following attributes : (a) there must be goods available for delivery; (b) there must be a *consensus ad idem* as to the identity of the goods; (c) the transferee should have a legal right to use the goods; (d) for the period during which the transferee has such legal right, it has to be to the exclusion of the transferor; (e) during the period for which it is to be transferred the owner cannot again transfer the same right to others. The judicially evolved principles to identify a transaction involving the transfer of right to use goods to be a sale clearly exclude the indispensability of delivery of physical possession thereof as an essential pre-condition.

A cumulative reading of the clauses of contract unequivocally proclaimed an all pervasive control of OIL over the appellant's equipment deployed for the execution of the contract during its subsistence. Evidently, the equipment, tools and machinery detailed by the contractor were owned by it, and physical possession of them was also permitted to be retained by it. Those were to be operated by its technically qualified personnel. The contractor was to realize rental charges therefor. OIL, thus, had hired the contractor's equipment for charges to be borne by it. OIL had undertaken the liability to pay the customs duty on the equipment, tools and machinery to be imported off-shore in the interest of the services to be rendered. The appellant company was obliged to utilize its equipment, tools and machinery wholly for the services under the contract and scrupulously in terms of clauses thereof. It was denuded of its liberty and authority to handle the equipment as desired by it though the ownership and possession of the same remained with it. The operation and utilization thereof were to be in rigorous compliance with the contract subject to the superintendence and inspection of OIL's representatives. The covenant requiring 24 hours service demonstrated in no uncertain terms that those equipment were to remain engaged for OIL's services and not liable to be either removed from their locations(s) or engaged for other works. Absolute authority of OIL in the use of the equipment was thus writ large. Therefore, the transaction in question involved transfer of right to use the equipment, plants and machinery under the lease within the meaning of section 2(33)(iv) of the Act.

(b) **Peerless Shipping and Oil Field Services Ltd. v/s. State of Assam - (2007) 8 VST 330 (Gauhati)**

That the contract in question had been made in respect of specific movable property at the deliverable stage and those goods had been delivered to OIL/ONGC in terms of such contracts. It was clear from the terms of the contract that once the machinery/ vehicles were placed at the disposal of OIL/ ONGC, the owner lost effective control over them. It was the absolute will and discretion of the transferee as to how or in what manner those were to be used. The transferee was not entitled to use the goods in any manner otherwise than as provided for in the contract and certain fixed charges

were to be paid to the petitioners even for the period when no work was provided. The relevant clauses of the agreement specifically provided that in the event of violation of such clauses the transferor would be liable to penalties as provided therein. The jural relationship that existed by virtue of entertaining the said contracts between the parties incurred certain statutory liabilities upon the parties. The terms of the contract, thus, disclosed that the transaction in question amounted to transfer of right to use goods within the meaning of clauses (10) and (15) of section 2 of the Assam General Sales Tax Act, 1993 and the Assam Value Added Tax Act, 2003.

(c) **Aban Lloyd Chiles Offshore Limited v/s. State of Tamil Nadu - (2012) 53 VST 89 (Mad)**

That the nature of work entrusted to the dealer was only to render services in drilling operations with its own personnel. In the light of the various clauses in the agreement, evidencing the fact that the effective control of the rigs remained with the contractor, that the ONGC merely gave directions where the rigs were to operate, even in the context of the ONGC giving directions to the contractor to take the rigs to specified points, the direction *per se* did not mean that the ONGC had complete control over the machinery. What was given to the ONGC by the contractor was his service through the rig owned by the contractor. The nature of work entrusted to the dealer was only to carry on the drilling operations by using its personnel and equipment. The mere fact that the operations had to be done in the area earmarked by the ONGC, by itself did not bring the machines within the effective control of the ONGC. There was no transfer of right to use the goods and the case did not fall under the charging provisions of the Act.

## V. WELL-LOGGING & WIRELINE SERVICES

**HLS Asia Limited v/s. State of Tripura - (2011) 41 VST 341 (Gauhati)**

That the contract agreement obliged the contractor to render the service of "well-logging, perforating and other wireline services" by using its own equipment and thereby no transfer of right to use equipment could be said to have taken place. The various clause of the agreement showed that the agreement entered into by the petitioner with ONGC was a contract for rendering of services and not a contract for transfer of the right to use any goods. In the performance of the contract, the petitioner had to use equipment necessary for the execution of works for which rental charges were payable to the petitioner; but there was no transfer of the right to use the equipment from the petitioner to the contractee: the agreement made it clear that the equipment shall remain the exclusive property and in the possession of the contractor and would simply be used by the contractor for providing services under the contract and the question of transfer of right to use the equipment from contractor to ONGC did not arise.

## VI. TRANSPORT CASES

(a) **Commissioner, Trade Tax, U.P Lucknow v/s. Jamuna Prosad Jaiswal - (2008) 13 VST 403 (All)**

For the transfer of right to use the goods and to invoke the provision of section 3F (transfer of right to use any goods) of the Act, it is necessary that there should be transfer of effective control of the goods in favour of the party. The terms of the contracts showed that the effective control of the buses had never been transferred to the two companies and it always remained with the respondent. The respondent only provided the buses for transportation of employees of the companies from one place to another and the price was stipulated only for the purpose of transportation and not for the leasing of the entire bus as such for a definite period. The entire expenses for running of the buses, namely, diesel charges, salary of driver and conductor, road tax, passenger tax, etc. were to be borne by the respondent. There was no transfer of right to use the vehicles by the respondent to the two companies and the

provision of section 3F of the Act was not applicable.

(b) **Commissioner of Trade Tax v/s. Prince Tourists Bus Service – (2008) 13 VST 412 (All)**

The respondent dealer provided buses to two companies under agreements for transportation of their employees from their residence to the factory and from the factory to their residence at a specified amount. The driver and conductor were of the dealer and buses were operated for limited hours. The Tribunal held that under the agreement, there was nothing to show that the custody of the buses was being transferred by the dealer to the companies for their use and that there was no transfer of right to use the buses for the purpose of section 3F of the U. P. Trade Tax Act, 1948. On a revision petition:

Held, dismissing the petition, that the assessing authority had not made out a case that under the agreement, possession or the control of the buses were transferred for use to the companies. The buses were only provided for transportation of the employees of the companies from their residence to the factory and from factory to their residence at a specified rate during specified hours. The driver and conductor were of the dealer.

(c) **Sunil Chandra Dey v/s. Food Corporation of India & Ors. - (2008) 13 VST 467 (Gauhati)**

The only question raised in this group of appeals is whether mere transportation of goods from one place to another by carrying contractors can be said to be a "deemed sale" within the definition of Clause 2(g)(ii) of the Act. This question need not detain us in view of a decision precisely on this question by a Division Bench of this court in Writ Appeal No. 67 of 2002. It was decided in that appeal that "there is no transfer of any right to use property in any goods in a pure and simple carrying contract so as to bring the transaction within the purview of Section 2(g)(ii) of the Act."

(d) **Mohd. Sultan Khan v/s. Commissioner, Trade Tax - (2009) 20 VST 235 (All)**

The petitioner owned a bus and entered into a contract with a company for the transportation of its employees from their residence to the factory and from the factory to their residence. In proceedings under section 7 of the U.P. Trade Tax Act, 1948, the petitioner contended that possession of the vehicle had never been transferred to the company, that the driver and conductor were of the petitioner and the entire expenses in operating the buses and other incidental expenses were borne by the petitioner. The assessing authority assessed the transportation charges under section 3F of the Act treating the transactions as transfer of right to use the bus. An appeal before the Deputy Commissioner (Appeals) was dismissed, as was a further appeal before the Tribunal. On a revision petition:

Held, allowing the petition, that this was not a case of transfer of right to use the bus and the levy of tax on the transportation charges was liable to be set aside.

(e) **Commissioner, Trade Tax v/s. Shri Ram - (2009) 20 VST 747 (All)**

Where the respondent, the owner of a bus, provided it to the UPSRTC under an agreement and the assessing authority levied tax on the amount received towards hire charges from the UPSRTC under section 3F of the U.P. Trade Tax Act, 1948, but the Tribunal deleted the tax, on a revision petition:

Held, allowing the petition, that under the agreement, possession and control of the vehicle remained with the UPSRTC during the period of contract, which showed that the possession was transferred by the respondent to the UPSRTC for use. The case squarely fell within the purview of provision of section 3F of the Act and the Tribunal was wrong in deleting the tax.

(f) **Indian Oil Corporation Ltd. v/s. Commissioner of Taxes - (2009) 22 VST 70 (Gauhati)**

The agreement entered into by the petitioner company with the contractors, showed that not only possession but also the effective control of the vehicles remained with the contractor and did not get transferred to the petitioner company. The agreement demonstrated that the intention of the parties was that the contractor would carry the petroleum and petroleum products from one place to another and such carriage would, ordinarily be, in those vehicles, which had been accepted by the petitioner company, but in unavoidable circumstances, the contractor might carry the petroleum and petroleum products in "drums" by "stake-trucks". Further, the contractor would bear and pay the entire operational cost of the vehicle which included salary and other emoluments of the driver and cleaner, cost of fuel and lubricating oil, maintenance of vehicles, payment of road tax, insurance, etc. It would be responsibility of the contractor to pay such fines, as might be imposed for non-compliance of any of the Rules, which might be applicable to the carriage of petroleum and petroleum products by the vehicle of the contractor. Any loss which might be incurred by the petitioner company due to confiscation of the petroleum and petroleum products delivered to the contractor for transportation; would be made good by the contractor. The requirement that the vehicles must conform to the design and fittings as might be specified by the petitioner company could not be stretched to mean that the right to use the tanker/ truck would stand vested in the petitioner company and/or the effective custody and control of the vehicle would stand transferred to the petitioner company because of the fact that petroleum and petroleum products, being highly inflammable substances could be carried safely and securely only in vehicles with specified designs and fittings. The contractor would be entitled to receive payment provided he "operated" the vehicles in accordance with the requirement of the petitioner company as stipulated in the agreement. These provisions were demonstrative of the fact that the contractor retained the possession and effective control of his vehicle; but while carrying the petitioner's petroleum and petroleum products he remained a trustee. Merely because of the fact that the vehicles stood identified under the agreement, it did not necessarily mean that the right to use the vehicles stood transferred in favour of the petitioner company by the contractor, more so when the contract agreement provided for substitution of the vehicles. Therefore, it became abundantly clear that there was no transfer of the right to use the vehicles involved in the contract agreement and that the contract agreement was merely for carriage of the petroleum and petroleum products.

(g) **Commissioner of Sales Tax v/s. Rolta Computer & Industries Pvt. Ltd. - (2009) 25 VST 322 (Bom)**

The essence of transfer of the right to use goods under Article 366(29A) is that it relates to user of goods. Even though the actual delivery of the goods is not necessary for effecting transfer of the right to use the goods, the goods must be available at the time of transfer, must be deliverable and delivered at some stage, the transferee having legal right to use the goods to the exclusion of the transferor. In the case of the respondent, computers and other necessary apparatus were available at the time of agreement. They being moveable properties were deliverable, but were never delivered or handed over to the ONGC. Although a fixed time was assigned and during that fixed time of the day, staff members of ONGC would come to the office of the respondent to get their work done, during all that period, the computers would be operated by the employees of the respondent and not by the employees of the ONGC. Merely because a person agrees to provide service to a particular customer during a particular period of time of day to the exclusion of all other customers for the purpose of convenience, it does not mean that goods have been actually delivered to that particular customer to the exclusion of

not only other customers but all so the owner. There was nothing to show that constructive possession of the computers and other instruments was with ONGC at any time and therefore the Tribunal was right in holding that the transaction was not taxable under the provisions of the Act.

(h) **State of Orissa v/s. Dredging Corporation of India Ltd. - (2009) 25 VST 522 (Orissa)**

The Tribunal, which is the final fact finding authority, held that the fact of a daily charge and a charge for the time during which the dredgers remained idle on the administrative directions of PPT was not indicative of transfer of any right to use the dredgers and control over the dredgers respectively, that in any case possession and effective control of the goods is not determinative of whether or not a sale took place by way of transfer of right to use goods within the meaning of provisions under section 2(g)(iv) of the Act and that there was nothing in the agreement to prove that there was a transfer of the right to use the dredgers. The Tribunal also held that there were stipulations in the agreement to dredge the sea-bed, with men and machines deployed for the purpose against a valuable consideration and that therefore it was a works contract, without transfer of property in goods in execution of such a contract. Transfer includes every transaction whereby a party divests himself of his interest, which subsequently vests in another party. Right is a claim to a thing. It is the liberty of doing or possessing something consistently with law. In the absence of satisfying the essential requirements of section 2(g)(iv) of the Act, no tax can be levied on the amount received by a transferor from the transferee on a transaction of transfer of right to use goods. Therefore, there was no infirmity in the order of the Tribunal holding that there was no transfer of right to use the dredgers by the respondent to the PPT in terms of the provisions of section 2(g)(iv) of the Act and that the consideration money received by the Corporation was not exigible to sales tax.

(i) **Jasper Aqua Exports Private Ltd. v/s. State of Andhra Pradesh - (2011) 37 VST 481 (AP)**

Held, dismissing the petition, that a reading of section 5E of the Act would show that the moment the petitioner sent its trucks to others for transporting the latter's goods to destinations of the latter's choice, the same amounted to transfer of the right to use the trucks, and would be sufficient to infer a taxable event under section 5E of the Act notwithstanding other incidental minor aspects of contracts. The mere fact that the petitioner retained control over the driver, or that they paid insurance charges for the trucks, was of no consequence.

(j) **Assam State Transport Corporation v/s. Oil and Natural Gas Corporation Ltd. - (2013) 57 VST 549 (Gauhati)**

That the transaction did not amount to transfer of right to use the mini buses in favour of the ONGC. The buses had been utilised by the ONGC only for rendering the services mentioned in the agreement, i.e., carrying ONGC's school children.

## VII. TRADE MARKS

(a) **Commissioner of Sales Tax v/s. Duke & Sons Pvt. Ltd. - (1999) 112 STC 370 (Bom)**

In the case of tangible property, handing over of the property to the transferee may be essential for the use thereof. That will depend upon the nature of the goods. The right to use machinery cannot be transferred by the transferor to the transferee without transfer of control over it. But the position in the case of a trade mark is different. For transferring the right to use the trade mark, it is not necessary to hand over the trade mark to the transferee or give control or possession of trade mark to him. It can be done merely by authorizing the transferee to use the same in the manner required by the law. The right to use the trade mark can be transferred simultaneously to any number of persons.

There is a distinction between transfer of right to use a trade mark and assignment

of a trade mark. "Assignment" of a trade mark is taken to be a sale or transfer of the trade mark by the owner or proprietor thereof to a third party *inter vivos*. By assignment, the original owner or proprietor of trade mark is divested of his right title or interest therein. He is not so divested by transfer of right to use the same. Licence to use a trade mark is thus quite distinct and different from assignment. It is not accompanied by transfer of any right or title in the trade mark. The transfer of right to use a trade mark falls under the purview of the 1985 Act and not the assignment thereof.

(b) **Malabar Gold Private Limited v/s. Commercial Tax Officer - (2013) 63 VST 497 (Ker)**

That it could not be said that there were goods deliverable at any stage in the case of the appellant. If the franchise agreement entered into by the appellant with the franchisees was analysed, it could be seen that it was only a licence to use the trade mark and the transfer of its use was not to the exclusion of the transferor, viz, the appellant. The franchisee's rights were limited. It was bound to sell the products of the appellant. Even while the franchise agreement with one was in force, the company could use the trade mark on its own and could enter into franchise agreement with other parties. The terms of the franchise agreement would show that the appellant retained the effective control and merely because there was a franchise agreement enabling the franchisees to use the trade mark on the products of the appellant, it could not be said that the franchisees had effective control over the trademark. The franchisees had no right to sub-let, sub-lease or in any way sell, transfer, discharge, distribute, delegate or assign the rights under the agreement in favour of any third party. On termination of the agreement, the franchisee would forfeit all rights and privileges conferred on them by the agreement and the franchisees would not be entitled to use the trade name or materials of the appellant. Merely because the franchisee was not an agent, it would not get any other exclusive right. The franchisor retained the right, effective control and possession and it was not a case of transfer of possession to the exclusion of the transferor. Therefore, the franchise agreement would not attract the provisions of the Kerala Value Added Tax Act.

(c) **Nutrine Confectionery Co. Pvt. Ltd. v/s. State of Andhra**

**Pradesh - (2011) 40 VST 327 (AP)**

The petitioner company engaged in the manufacture and marketing of confectionery entered into agreements with other companies to allow those to use trademark and logo for an agreed royalty. The agreement also provided for obligation of the petitioner to suggest various business modalities and provide formulas and recipes.

Held, dismissing the petition, that there was no dispute that trademark and logo were goods within the meaning of section 2(h) of the Andhra Pradesh General Sales Tax Act. The use of the phrase "for any purpose, whatsoever" in section 5E of the Act, was the key to understand and resolve the question raised in these cases. That the agreement spoke of other aspects in addition to creating a right in the assignee to use the trademark and logo did not make any difference especially when the goods so transferred were incorporeal or intangible in character like copy right, patent, trademark etc. If the Legislature had intended that the exclusive transfer of right to use the goods alone was taxable without there being the transfer of technical knowhow, manufacturing process, etc., the Legislature must have said so. It was conspicuously absent. Even if there was transfer of right to use goods along with the transfer of other services and facilities even if it was for any limited period, the event was taxable. Either in relation to the taxable event or taxable person, the Legislature did not leave any ambiguity or doubt. There can be transfer of right to use goods under an agreement intended for that purpose or there could be such transfer of

the right to use the goods under an agreement for different purposes to be acted upon by the parties as agreed in different situations. The facilitating of use of technical knowhow, recipes and formulas was related to the brand value and, therefore, the petitioner undertook the obligation of providing those services. This was made clear by the clause of the agreement to the effect that the consideration of payment of royalty was only for permitting the assignee to use the trademark and logo. Even if the consideration could not be separated or discernible as to which part of the consideration for which service, it did not make any difference.

The assignee was free to make use of the trademark and logo and had full control over such use. The clause providing that there would be no exclusive entrustment of the logo and trademark to the assignee and that the petitioner would also use them for its operations did not in any manner mitigate in favour of the petitioner. A trademark or logo which was incorporeal or intangible could always be assigned by the proprietor, while retaining the right to use for itself. Furthermore, the determination whether a transaction amounted to transfer of right to use the goods, or not would depend ultimately upon the intention of the parties. Therefore, the consideration received as royalty for allowing the assignee the use of trademark and logo was realized in respect of the transfer of the right to use the goods and was taxable.

## VIII. CHARTER PARTY

**State of Tamil Nadu v/s. Essar Shipping Ltd. - (2012) 47 VST 209 (Mad)**

Time charter party is a charter for a specified period where the ship owner agreed to the charterer to render services through his master and crew to carry the goods that are put on board the ship by the charterer. Beyond the services rendered, there was no effective control given to the charterer. In order to attract charge under the transfer of right to use any goods for any purpose as a deemed sale, the intention to "transfer the right to use goods" which, in turn, implied transfer of effective control for use was necessary. Despite the fact that certain key words were used in most standard forms of the time charter such as "let", "hire", "delivery" and "redelivery", there was no hiring in the true sense, the use thereof was not to be understood in the literal sense of giving effective control and possession to the charterer. On the other hand, the same was referable to the time when the charter began and ended. Though, the charterers had the right to direct the course that the vessel would take, the master and the crew remained the servants of the owner and the parties had understood that there was no demise of the ship in favour of the charterer. The mere fact that the agreement had been entered into and that the assessee had been paid the hire charges, did not, *per se*, bring the transaction within the scope of section 3A of the Act.

## IX EMPTY BOTTLES

**Hindustan Coco Cola Beverages Private Limited v/s. State of Andhra Pradesh - (2013) 61 VST 393 (AP)**

The petitioner, a manufacturer and dealer in soft drinks with four brand names put them in the standard glass bottles and transported the same to the wholesale dealers in crates. The wholesale dealers, in turn, sold the same to the retailers, and the retail dealers to the consumers who after consuming the soft drinks, returned the bottles to the retailers who returned the same to the wholesalers who, in turn, returned them to the manufacturers. This circle continued until the bottles and crates became useless. In order to secure the return of bottles, the manufacturers had been collecting rentals on the bottles and crates.

When an end-customer purchased a soft drink in a bottle, the bottle was not sold to the end-customer. If there was such a sale of the bottle also, the question of the customer returning the bottle to his vendor/retailer, the retailer, in turn, returning to the wholesaler and the wholesaler to the manufacturer would not arise. The bottle was used only for storing the contents (soft drinks) and when the bottle was returned to the retailer by the customer and so on to the manufacturer, the cost of the

bottle could not be said to get included in the cost of the soft drink. Entry 21 of Schedule VI to the Andhra Pradesh General Sales Tax Act, 1957 imposed sales tax only on the soft drinks, which were bottled and sold under a brand name and merely because the words "bottled soft drinks under a brand name" were used in the entry, it did not follow that the bottle had to be taken as sold along with the soft drink. Merely because the soft drinks and bottles could not be separated till they reached the end-customer, in the absence of sale of the bottle, it could not be said that there was no transfer of the right to use the bottle. The end-customer might retain the bottle for more than 24 hours and after consuming the contents might even use it for storing water or other liquids. Similarly, the wholesaler/ retailer might be in possession of the crates/ bottles for a period of time extending up to may be even six months. Thus, for the said period both the end-customer and the retailer/ wholesaler would have control or domain over the bottles and crates. Therefore, there was a transfer of the right to use, such use being "for storing the contents", thereby attracting section 5E of the Act.

## X. PLACE OF TRANSFER

**(a) Sandan Vikas (India) Ltd. v/s. State of Haryana - (2013) 59 VST 160 (P & H)**

The location or delivery of goods within the State cannot be made a basis for levy of tax on sales of goods. Under general law, merely because the goods are located or delivery of which has been effected for use within the State, it would not be the *situs* of deemed sale for levy of tax, if the transfer or right to use has taken place in another State. Where a party has entered into a formal contract and the goods are available for delivery irrespective of the place where they are located, the *situs* of such sale would be where the property in goods passes, namely where the contract is entered into. Article 366(29A)(d) of the Constitution empowers the State Legislature to enact law imposing sales tax on the transfer of the right to use goods. Clause (29A) cannot be read as implying that the tax under sub-clause (d) is to be imposed not on the transfer of the right to use goods, but on the delivery of the goods for use. Nor can a transfer of the right to use goods in sub-clause (d) of clause (29A) be equated with a transaction where the goods are left with the bailee to be used by him for hire, which implies the transfer of the goods to the bailee. In the case of sub-clause (d), the goods are not required to be left with the transferee. All that is required is that there is a transfer of the right to use the goods. Therefore, on a plain construction of sub-clause (d) of clause (29A), the taxable event is the transfer of the right to use the goods regardless of when or whether the goods are delivered for use.

Held, accordingly, that Note 4 to section 2(j) of the Haryana General Sales Tax Act, 1973 was in conflict with section 4(2)(a) of the Central Sales Tax Act, 1956. It could not be held to be applicable to transfer of right to use goods merely because the goods were within the State at the time of use when such goods were not in the State at the time of transaction.

**(b) Sandan Vikas (India) Ltd. v/s. State of Haryana - (2013) 59 VST 165 (P & H)**

Sales Tax – Deemed Sale – Transfer of right to use goods – *Situs* of sale – Goods used in manufacture of goods for sale – Transfer of right to use goods outside state – Tax not leviable on lease rent – Haryana General Sales Tax Act (20 of 1973), s. 6.

That tax could not be levied in the case of transfer of right of use of goods outside the State of Haryana merely because the goods were within the State at the time of use when such goods are not in the State at the time of transaction.

## XI. PLACE OF TRANSACTION

**20th Century Finance Corpn Ltd. v/s. State of Maharashtra - (2000) 119 STC 182 (SC)**

(i) The power of the State Legislatures to enact a law to levy tax on the transfer of

the right to use any goods under Entry 54 of List II of the Seventh Schedule to the Constitution of India has two limitations. One arises out of the entry itself which is subject to Entry 92-A of List I under which the Parliament has power to legislate in regard to taxes on sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce: Article 269 provides for levy and collection of such taxes. Because of these restrictions, State Legislatures are not competent to enact law imposing tax on transactions of transfer of right to use any goods, which take place in the course of inter-state trade or commerce. The second is by virtue of clause (1) of Article 286 under which the State Legislature is precluded from making a law imposing tax on the transactions of transfer of right to use any goods, where such deemed sales take place (a) outside the State and (b) in the course of import of goods into the territory of India. There are other limitations on the taxing power of the State Legislature by virtue of clause (3) of Article 286. Although, the Parliament has enacted late under clause (3)(a) of Article 286, no law has been so far enacted by the Parliament under clause (3)(b) of Article 286. When such law is enacted by the Parliament, the State Legislature would be required to exercise its legislative power in conformity with such law. These are the limitations on the power of the State Legislature on the levy of sales tax on deemed sales envisaged under sub-clause (d) of clause (29A) of Article 366 of the Constitution. The State Legislatures, in exercise of their legislature power under Entry 54 of List II read with Article 366(29A)(d), are not competent to levy sales tax on the transfer of rights to use goods, which is a deemed sale, if such sale takes place outside the State or is a sale in the course of inter-State trade or commerce or is a sale in the course of import or export. However, with amendment of CST Act w.e.f. 11-5-2002, in case of inter-state sale also deemed sale is included & *situs* will be determined under s. 4 of CST Act.

(ii) In cases where goods are not in existence or where there is an oral or implied transfer of the right to use goods, such transactions may be effected the delivery of the goods: in such cases the taxable event would be on the delivery of goods.

## XII. SALE OR SERVICE

There is always a question whether the transaction conferring right to use goods covered by Clause (d) of the definition of sale would also amount to "service" under the service law. It may be noted that while Sales Tax is a State subject, Service Tax is a Central subject and a transaction in particular case may amount to deemed sale as well as service. In such a situation, a person may be liable both for sale, as deemed sale and also liable for rendering service. It has been observed in some cases that sale and service may overlap in a given case. However, as observed by the Supreme court in the case of **Bharat Sanchar Nigam Ltd. v/s. Union of India - (2006) 145 STC 91 (SC)**, the State can only tax the sale element if there is discernible sale and only to that extent. The actual service part may separately become taxable under the service law. As stated above, there may be composite contract of service and sale and both transactions will have to be bifurcated so as to separate the service part from the deemed sale part. One would have thought that logically a transaction can be a sale or service but not both. However, the two taxes being levied by separate Governments, the law may require bifurcation of the transaction into sale and service permitting respective States/Centre to tax that portion within its jurisdiction.

## XIII. Following miscellaneous cases may also be considered:-

### (1) State of Andhra Pradesh v/s. Prakash Arts - (2008) 018 VST 0039 (AP)

The Hon'ble Andhra Pradesh High Court was examining the issue in this case whether hire charges for advertisement hoardings erected by Municipality at

various places were taxable as hire charges for goods. The Hon'ble Court held that this is not a case of transfer of right to use goods, since the same is lease of immovable property.

**(2) Modern Decorators V/s. Commercial Tax Officer, Maniktola and Others - (1990) 077 STC 0470 (WBTT)**

A question arose before West Bengal Taxation Tribunal whether charges received for construction of pandals, etc. on orders placed by customers were taxable under the sales tax laws. The Tribunal held that the customer has no right to use materials used in erection. It was not a case of lease of immovable property liable to tax.

**(3) Gandhi Associates Appeal No. 1 of 2004 dt. 30-8-2007**

The Gujarat Sales Tax Tribunal has also decided that Samiyana is not movable property and, therefore, not liable to tax under the sales tax law.

**(4) Saumya Mining Pvt. Ltd. - (2006) 146 STC 0343 (Assam)**

In this case, there was a contract for removal of over burden in mines using heavy earth moving machinery. The control, custody or possession of machinery was always with contractor. The court held that this was not a case of transfer of right to use goods and the tax not leviable.

**(5) Peerless Shipping and Oil Field Services Ltd. - (2007) 008 VST 0330 (Gau)**

This was a case of contract for hiring crane, oil tanker, light motor vehicles, driller/trailer, etc. with OIL/ONGC. The terms of the contract were indicating transfer of effective control upon delivered goods by transferee. The Court observed that transferor is liable to penalties, if terms violated. On facts of the case, the Court held that there was transfer of right to use goods.

**(6) Krushna Chandra Behera - (1991) 083 STC 0325 (Orissa)**

The State Transport Corporation hired buses. The Owner was bound by orders and directions of the Corporation in regard to journey, timing, routes, etc. The drivers were provided by owner, but were answerable to the Corporation. The Hon'ble Court held that the Corporation has effective control over the buses and, therefore, it was a case of transfer of right to use buses.

**(7) Great Eastern Shipping Company Limited - (2004) 136 STC 0519 (Kar)**

In this case, there was an agreement with Port Trust for hire of tug (towing vessel). The agreement provided for handing over of possession and control in all respects of the tug to the port trust. The Court held that this was a case of transfer of right to use tug.

**(8) Tripura Bus Syndicate - (2001) 122 STC 0175 (Tripura)**

In this case, the vehicles were requisitioned by Collector for election purposes. The owners were paid hire charges for the said vehicles. The Court held that the transaction, though under compulsion, is sale and, therefore, hire-charges are taxable under the provisions of the Act.

**(9) Tripura Bus Syndicate - (1997) 105 STC 0409 (Tripura)**

In this case, vehicles were requisitioned by the Collector for election duty along with drivers. The charges were paid on basis of mileage. The fuel cost was borne by the owner. There was no endorsement of use by Government in registration book or insurance policy. The Hon'ble Court held that there was no transfer of right to use goods.

**(10) L.V Sankeshwar - (2007) 006 VST 0010 (Kar)**

This was a case under the Service tax, wherein the Hon'ble Court held that the tour operators, bus operators and taxi operators rendering services as tour operators with vehicles covered by tourist permit granted under Motor Vehicle Act are liable to service tax. The Court held that the transaction is distinct from tax on deemed sale in transfer of right to use goods.

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