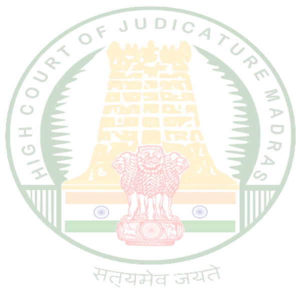


IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On	13.09.2024
Pronounced On	01.10.2024

CORAM:

THE HONOURABLE MR.JUSTICE R.SURESH KUMAR
and
THE HONOURABLE MR.JUSTICE C.SARAVANAN

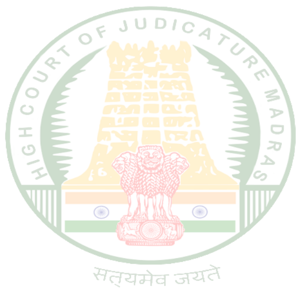
T.C.(Revision) Nos.41 to 43 of 2016
and
C.M.P.Nos.14217 to 14219 of 2016

The Appellate Assistant Commissioner (CT)
Commercial Taxes Department,
100 Ft. Road, Ellaipillaichavady,
Puducherry 605 005. ... Petitioner in all TCs.

vs.

M/s.Supreme Coaters & Fabricators,
Puducherry, rep.by its Proprietor ... Respondent in all TCs.

Prayer in all TCs.: These petitions have been filed under Section 51(2) of the PVAT Act, 20076 to revise the order of the Value Added Tax Appellate Tribunal, Principal District Judge, Puducherry dated 16.11.2021 passed in T.A.Nos.2 to 4 of 2016.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For Petitioner (in all TCs.) : Mr.J.Kumaran Addl.Govt.Pleader

For Respondent (in all TCs.) : Mr.M.N.Bharathi

COMMON ORDER

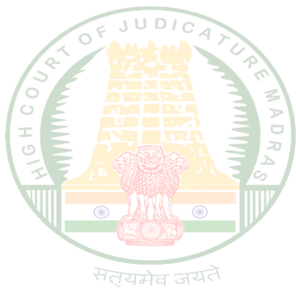
(Judgment of the Court was delivered by **C.SARAVANAN,J.)**

Heard the learned counsel for the Petitioner–Commercial Tax Department. There is no re-presentation on behalf of Respondent-Assessee despite service of notice.

2. These Tax Cases are directed against the orders dated **02.03.2016** passed by the Puducherry Value Added Tax Appellate Tribunal, Principal District Judge, Puducherry in T.A.Nos.2 to 4 of 2016 for the Assessment Years 2007-08 to 2009-10 respectively.

3. Operative portion of the impugned order read as under :-

In this case, the date of inspection for assessing the returns of the appellant factory, by the Assessing Authority on the appellant factory was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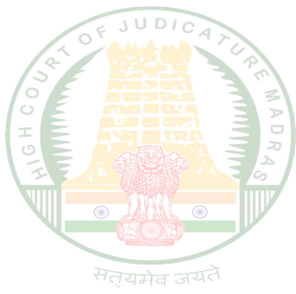
done on 8.2.2013. The assessment year pertains to 2007-2008. The assessment should have been made within three years from the end of the year i.e. 31.3.2008 namely within 31.3.2011 The assessment order had been passed only on 12.12.2014 and therefore, the assessment order itself is non-est in law There is no explanation on the side of the Respondent in this context. It is seen that the assessment order had been passed after the period stipulated in Section 24(5) of PVAT Act, 2007. The proviso does not apply since it is no the case of the Respondent that the input tax credit has been availed wrongly or the dealer had produced false invoice, vouchers, declaration certificate or any other documents with a view to support his claim of input tax credit or refund or the assessing authority had reversed the input tax credit availed by the dealer/ appellant and determined tax due as contemplated u/s 24(6) of the PVAT Act, 2007.

10. In such circumstances, this court holds that the Assessment Order dated 12.12.2014 is hit by the provision u/s 24(5) of the PVAT Act, 2007. Therefore the tax due as assessed by the Assessment Officer besides imposing 200% penalty on the tax payable without giving any sufficient reasons is against law and probabilities of the case The Appellate Assistant Commissioner, Puducherry also without going into the merits of the case had blindly upheld to the decision of the Assessing Authority without any justifiable reason. Therefore, I hold that that the Assessment Order dated 12.12.2014 requires interference and to be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set aside, on the ground of passing the assessment order after a period of three years from the end of the year to which the return relates, namely 31.3.2008.

11. In the result, the Order passed by the Appellate Assistant Commissioner (CT). Commercial Taxes Department. Puducherry in Proceedings in Appeal No.52/PVAT/2014-15, dated. 29.6.2015 in Assessment Order of the Commercial Tax Officer (IAC), Puducherry dated. 12. 12.2014 is set aside. No costs.

4. By the impugned Common Order, the Appellate Tribunal has set aside the order dated **29.06.2015** of the Appellate Assistant Commissioner (CT) Commercial Taxes Department, Puducherry. By the said order, the Appellate Assistant Commissioner (CT) Commercial Taxes Department, Puducherry in Appeal Nos.52 to 54/PVAT/2014-2015/AAC, had affirmed the Assessment Orders passed by the Commercial Tax Officer-IAC for the assessment years 2007-2008 to 2009-2010 respectively.

5. For the sake of convenience, the relevant Assessment Years and their respective Assessment Orders are as follows:-

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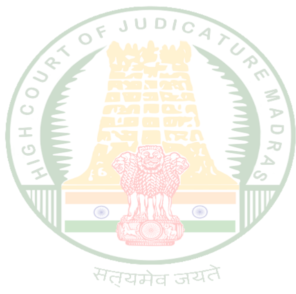
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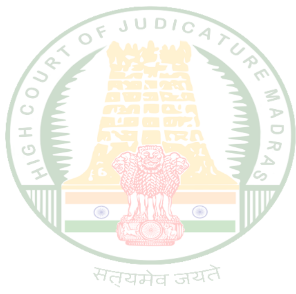
Tax Case Revision No.	***Assessment Year***	***Notice***	***Assessment Order***
41 of 2016	2007-08	05.03.2011	12.12.2014
42 of 2016	2008-09	05.03.2011	22.12.2014
43 of 2016	2009-10	05.03.2011	31.12.2014

6. These cases were admitted on **07.09.2016**. The following substantial questions of law were framed by this Court at the time of admission: -

> *i) Whether the work of powder coating undertaken by the Assessee amounts to execution of works contract or not? And*
>
> *ii) Whether the powder coating work involves transfer of property or not?*

7. Although, not raised the following substantial questions of law also arises for consideration : -

> *Whether the following assessment orders passed by the Assessing Officer for the Assessment years **2007-2008** to **2009-2010** were passed within the period of limitation prescribed for completion of the Assessment under the provisions of Pondicherry Value Added Tax Act, 2007 (hereinafter referred to as PVAT)?*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8. Earlier, the Respondent-Assessee had suffered adverse assessment orders for the Assessment Years 2007-2008 to 2009-2010 in the hands of the Commercial Tax Officer, - IAC as detailed above.

9. The aforesaid Assessment Orders also preceded a Pre-Assessment Notice dated **25.09.2014** which were replied by the Respondent-Assessee. In the notice dated **25.09.2014**, it was proposed to reject the Nil returns filed by the Respondent-Assessee for the above said years and also to levy tax on the sale of goods involved in the execution of works contract at the rate specified in the schedule for such goods. The notices also proposed to levy penalty on the Respondent-Assessee as provided under Section 24(3) of the Puducherry Value Added Tax Act, 2007.

10. The dispute related to powder coating process on the products like yokes, links and tubes etc supplied by local industries like Lucas TVS, Rane Madas and Remi Electricals to the Respondent-Assessee.

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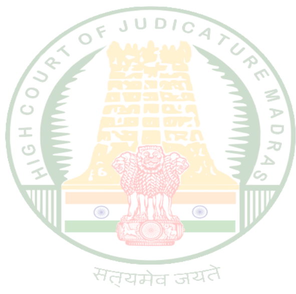
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11. The Respondent-Assessee had earlier filed Nil (Returns) stating that the activity carried out by it was only a job work and did not involve any sale i.e. works contract. The Respondent-Assessee was procuring materials, both from local dealer as well as from suppliers located outside the State by making Inter-State purchases for its powder coating activities on job work. The materials procured include chemical's used for pre-cleaning the materials to remove rust and dust, 'powder' used for powder coating, 'sprays' for Touch-up purposes etc.

12. The Commercial Tax Department concluded that since the materials purchased by the Respondent-Assessee both locally and Inter-State purchases were used in the process for powder coating and resulted in transfer of these materials in the execution of work, the job work carried out by the Petitioner is in the nature of Works Contract of powder coating and was liable to pay tax under **Section 15(1)** of the Puducherry Value Added Tax Act, 2007.

13. Thus, the Nil returns filed by the Respondent-Assessee were

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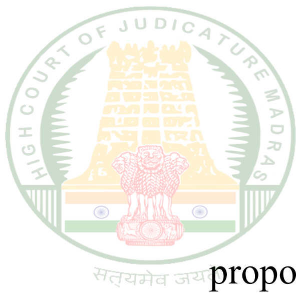
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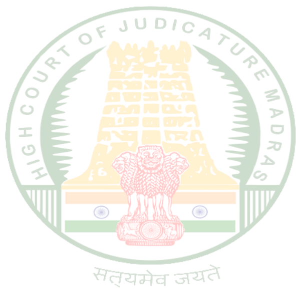
proposed to be rejected as incorrect. The notice also proposed to assess by scrutiny of accounts as provided under proviso to **Section 24(2)** of the PVAT Act, 2007.

14. In response to the pre-assessment notices, the Respondent-Assessee had given a representation dated **07.10.2014** which was rejected by the Assessing Officer. It is in this background that the Assessment Orders were passed for the Assessment Years 2007-2008 to 2009-2010 against which, the Respondent-Assessee had preferred appeals before the Appellate Assistant Commissioner in Appeal Nos.52 to 55 and 61/PVAT/2014/2014-15/AAC.

15. In the appeals filed for these Assessment Years, the Assistant Commissioner of Appellate Commissioner, Commercial Tax, considered the following issues :-

> *(i) Whether the assessment order issued on 12-12-2014 for the years 2007-08, 2008-09, 2009-10 and 2010-11 after a period of 3 years are time bared or Not?*
>
> *(ii) Whether the business activity under taken by the appellant has to be treated as job work or exempted sale or transfer of*



properly in execution of works contract?

(iii) If it is treated as works contract (Transfer of Property) penalty is leviable as per Section 24(3) of the PVAT Act, 2007.

16. These appeals were also dismissed by Appellate Assistant Commissioner vide order dated **29.06.2015**, along with Appeals filed for the Assessment Years 2010-11 and 2011-12 on the ground that there was transfer of property involved in the job works executed by the Respondent.

17. Thus, the Appellate Assistant Commissioner concluded that the activity carried by the Respondent–Assessee involved works contract and thus upheld that the Assessment Orders passed by the Assessing Officer for the respective Assessment Years. In so far as imposition of penalty under Section 24(3) of the PVAT Act, 2007, the Appellate Assistant Commissioner also held that it did not warrant any interference.

18. Aggrieved by the said order dated **29.06.2015** of the Appellate

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Assistant Commissioner (CT), the Respondent-Assessee has preferred Tax Appeal Nos.2 to 4 of 2016 before the Sales Tax Appellate Tribunal, Puducherry for the Assessment Years 2007-08 to 2009-10. These Appeals were allowed by the Sales Tax Appellate Tribunal, Puducherry, vide Impugned Order dated **02.03.2016**, on the ground that the Assessment Order was passed after a period of three years from the end of the year to which returns relates and therefore the order passed by the Appellate Assistant Commissioner (CT), Commercial Taxes Department was set aside.

19. The Appellate Tribunal thus reversed the order of the Appellate Assistant Commissioner vide Impugned Order dated **02.03.2016** in Tax Appeal Nos.2 to 4 of 2016 and held that the Assessment Orders passed by the Commercial Taxes Department for the Assessment Year 2007-2008 were hit by **Section 24(5)** of the PVAT Act, 2007.

20. The learned counsel for the Petitioner-Commercial Tax Department submits that the Tribunal had failed to appreciate the fact that the assessing officer had issued a notice on **05.03.2011** for the

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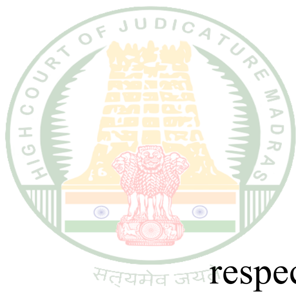
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respective Assessment Years viz., 2007-2008 to 2009-2010, directing the Respondent-Assessee to explain the basis for claiming exemption. It is submitted that since the department had initiated action within three years of the close period to which the return relates, Assessment Orders passed on various dates covered in the appeals, were not time barred under **Section 24(5)** of the PVAT Act, 2007.

21. The learned counsel for the Petitioner-Commercial Tax Department further submits that the Tribunal has failed to consider that the Respondent-Assessee had wrongly reported 'Nil' return by treating their work as job work and failed to report the taxable turnover for the respective Assessment Years viz., 2007-2008 to 2009-2010.

22. It is submitted that the Assessing Authority had come to a correct conclusion that the powder coating job works carried out by the Respondent-Assessee was taxable, as it involved transfer of property in the course of execution of the job work and passed the Assessment Orders. It is submitted that the Commercial Tax Officer-IAC was empowered to levy penalty under **Section 24(3)** of the Puducherry Value Added Tax Act, 2007 on the Assessment Orders.

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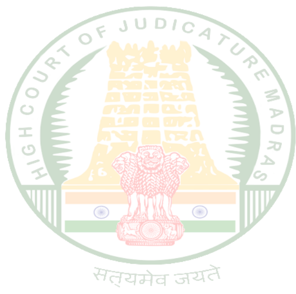

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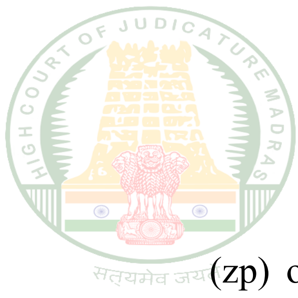
23. In this case, the dispute pertains to the Assessment years **2007-08** to **2009-10.** The Respondent-Assessee had filed Nil return under the provisions of Puducherry Value Added Tax Act, 2007 r/w **Rule 25(3)** of the PVAT Act, and Rules 2007 and claimed that the works carried out by the Respondent-Assessee on job work basis was exempted from payment of tax under the PVAT, Act, 2008. Thus, the Assessment Orders came to be passed and the assessment was preceded by a notice dated **05.03.2011**.

24. It appears that the purchase of materials used in works contract, were procured at concessional rate and that the Respondent-Assessee had applied C-Form. Thus, the Respondent-Assessee was called upon to explain the basis on which, the Respondent-Assessee was claiming the exemption from payment of tax on powder coating activity. This was followed by a Pre-Assessment notice dated **25.09.2014** which also proposed to levy penalty under **Section 24(3)** of the Puducherry Value Added Tax Act, 2007.

25. The expression 'works contract' has been defined in Section 2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(zp) of the Puducherry Value Added Tax Act, 2007. It is an inclusive definition. It includes any agreement to carry out for cash, deferred payment or other valuable consideration, building construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, modification, repair or commissioning, of any movable or immovable property. Section 2 (zp) of the Puducherry Value Added Tax Act, 2007 reads as under :-

> " *Works Contract* " - "*includes any agreement to carrying out for cash, deferred payment or other valuable consideration, the building, construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, modification, repair or commissioning, of any movable or immovable property*".

26. After the 46th Amendment to the Constitution, the Hon'ble Supreme Court, had initially, in the case of **Rainbow Colour lab and Another vs. State of M.P. and Others** (2000) 2 SCC 385 espoused the "dominant intention" of the contract, to hold an activity exigible under the extended definition of " tax on the sale or purchase of goods" in clause 29A of the Article 366 of the Constitution of India. Relevant portion of the decision reads as under :-

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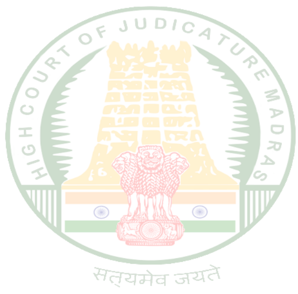
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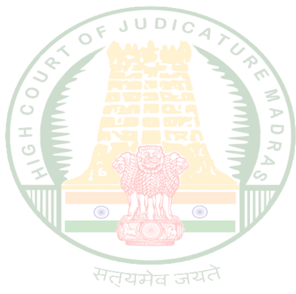
11. *Prior to the amendment of Article 366, in view of the judgment of this Court in* ***State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd.*** *[(1958) 9 STC 353 : AIR 1958 SC 560] the States could not levy sales tax on sale of goods involved in a works contract because the contract was indivisible. All that has happened in law after the 46th Amendment and the judgment of this Court in* ****Builders' case*** *[(1989) 2 SCC 645 : 1989 SCC (Tax) 317 : (1989) 73 STC 370]* ***is that it is now open to the States to divide the works contract into two separate*** *contracts by a legal fiction: (i)* ***contract for sale of goods involved in the said works contract,*** *and (ii)* ***for supply of labour and service.*** *This division of contract under the amended law can be made only if the works contract involved a* ***dominant intention to transfer the property in goods and not in contracts where the transfer in property takes place as an incident of contract of service. The amendment, referred to above, has not empowered the State to indulge in a microscopic division of contracts involving the value of materials used incidentally in such contracts. What is pertinent to ascertain in this connection is what was the dominant intention of the contract. Every contract, be it a service contract or otherwise, may involve the use of some material or the other in execution of the said contract. The State is not empowered by***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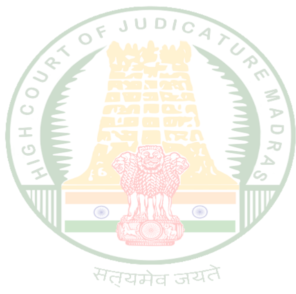
the amended law to impose sales tax on such incidental materials used in such contracts. *This is clear from the judgment of this Court in Hindustan Aeronautics Ltd. v. State of Karnataka [(1984) 1 SCC 706 : 1984 SCC (Tax) 90 : (1984) 55 STC 314] (STC at p. 322) where it was held thus: (SCC pp. 716-17, para 18)*

"Mere passing of property in an article or commodity during the course of performance of the transaction in question does not render the transaction to be transaction of sale. Even in a contract purely of works or service, it is possible that articles may have to be used by the person executing the work, and property in such articles or materials may pass to the other party. That would not necessarily convert the contract into one of sale of those materials. In every case, the court would have to find out what was the primary object of the transaction and the intention of the parties while entering into it."

15. *Thus, it is clear that unless there is sale and purchase of goods, either in fact or deemed, and which sale is primarily intended and not incidental to the contract, the State cannot impose sales tax on a works contract simpliciter in the guise of the expanded definition found in Article 366(29-A)(b) read with Section 2(n) of the State Act. On facts as*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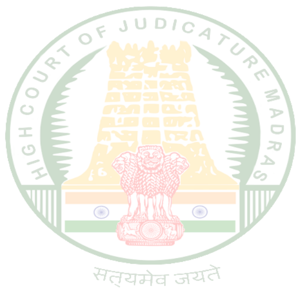
we have noticed that the work done by the photographer which as held by this Court in Kame case [(1977) 1 SCC 634 : 1977 SCC (Tax) 225 : (1977) 39 STC 237] is only in the nature of a service contract not involving any sale of goods, we are of the opinion that the stand taken by the Respondent State cannot be sustained.

* ***Builders' Association of India vs. Union of India,*** *(1989) 2 SCC 645*

27. The ratio laid down in ***Rainbow Colour lab*** (supra) was doubted as running counter to the express provision contained in Article 366(29-A) of the Indian Constitution by the Hon'ble Supreme Court in the case of **Associated Cement Companies Ltd. vs. Commissioner of Customs** (2001) 4 SCC 593. Relevant portion of the decision reads as under:-

> ***26.*** *In arriving at the aforesaid conclusion the Court referred to the decision of this Court in Hindustan Aeronautics Ltd. v. State of Karnataka [(1984) 1 SCC 706 : 1984 SCC (Tax) 90] and Everest Copiers [(1996) 5 SCC 390] . But both these cases related to the pre-Forty-sixth Amendment era where in a works contract the State had no jurisdiction to*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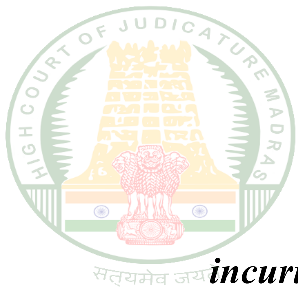
bifurcate the contract and impose sales tax on the transfer of property in goods involved in the execution of a works contract. ***The Forty-sixth Amendment was made precisely with a view to empower the State to bifurcate the contract and to levy sales tax on the value of the material involved in the execution of the works contract, notwithstanding that the value may represent a small percentage of the amount paid for the execution of the works contract. Even if the dominant intention of the contract is the rendering of a service, which will amount to a works contract, after the Forty-sixth Amendment the State would now be empowered to levy sales tax on the material used in such contract. The conclusion arrived at in Rainbow Colour Lab case [(2000) 2 SCC 385] , in our opinion, runs counter to the express provision contained in Article 366(29-A) as also of the Constitution Bench decision of this Court in Builders' Assn. of India v. Union of India*** *[Builders' Assn. of India v. Union of India, (1989) 2 SCC 645 : 1989 SCC (Tax) 317] .*

28. After a detailed discussion, the Hon'ble Supreme Court in the case of **Bharat Sanchar Nigam Ltd and Another vs. UOI** (2006) 3 SCC, held the ratio laid down in ***M/S Rainbow Colour lab*** (supra) as per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incuriam. The relevant portion of the decision reads as under :-

> ***40.*** *Recommendation (c) of the Law Commission to amend Article 366 by expanding the definition of sale to include the transactions negatived by the courts, was accepted by the Government. The Constitution (Forty-sixth Amendment) Bill, 1981 which was subsequently enacted as the Constitution (Forty-sixth Amendment) Act, 1982 set out the background in which the amendment to Article 366(29-A) of the Constitution was amended. Having noted the various decisions of the Supreme Court as well as of the High Courts excluding certain transactions from the scope of sale for the purpose of levy of sales tax, it was said that the position had resulted in scope for avoidance of tax in various ways. In the circumstances, it was considered desirable to put the matter beyond any doubt. Article 366 was therefore amended by inserting a definition of "tax on the sale or purchase of goods" in clause (29-A). The definition reads as under :-*
>
> *"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*

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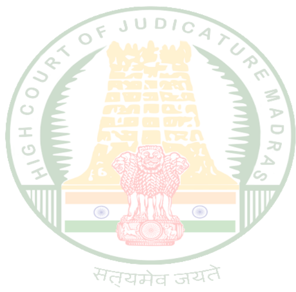
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valuable consideration;

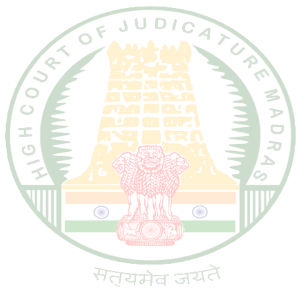
(b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

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

(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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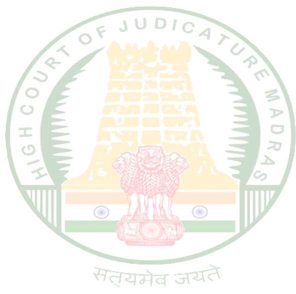
intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration,

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;"*

41. *Sub-clause (a) covers a situation where the consensual element is lacking. This normally takes place in an involuntary sale.* ***Sub-clause (b) covers cases relating to works contracts.*** *This was the particular fact situation which the Court was faced with in* ***Gannon Dunkerley [State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd.****, (1958) 9 STC 353 : AIR 1958 SC 560 : 1959 SCR 379] and which the Court had held was not a sale.* ***The effect in law of a transfer of property in goods involved in the execution of the works contract was by this amendment deemed to be a sale.*** *To that extent the decision in* ***Gannon Dunkerley [State of Madras v. Gannon Dunkerley & Co.*** *(Madras) Ltd., (1958) 9 STC 353 : AIR 1958 SC 560 : 1959 SCR 379] was directly overcome. Sub-clause (c) deals with hire-purchase where the title to the goods is not transferred. Yet by fiction of law, it is treated*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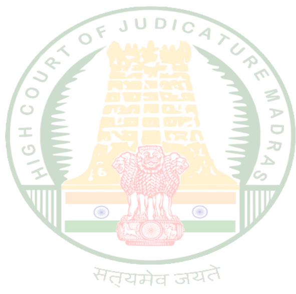
as a sale. Similarly the title to the goods under sub-clause (d) remains with the transferor who only transfers the right to use the goods to the purchaser. In other words, contrary to ***A.V. Meiyappan*** *decision [(1967) 20 STC 115 (Mad)] a lease of a negative print of a picture would be a sale. Sub-clause (e) covers cases which in law may not have amounted to sale because the member of an incorporated association would have in a sense begun as both the supplier and the recipient of the supply of goods. Now such transactions are deemed sales. Sub-clause (f) pertains to contracts which had been held not to amount to sale in* ***State of Punjab v. Associated Hotels of India Ltd.*** *[(1972) 1 SCC 472 : (1972) 29 STC 474] That decision has by this clause been effectively legislatively invalidated.*

42. *All the sub-clauses of Article 366(29-A) serve to bring transactions where one or more of the essential ingredients of a sale as defined in the Sale of Goods Act, 1930 are absent, within the ambit of purchase and sales for the purposes of levy of sales tax. To this extent only is the principle enunciated in* ***Gannon Dunkerley Ltd. [State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd.,*** *(1958) 9 STC 353 : AIR 1958 SC 560 : 1959 SCR 379] (sic modified). The amendment especially allows specific composite contracts viz.* ***works contracts*** *[sub-clause*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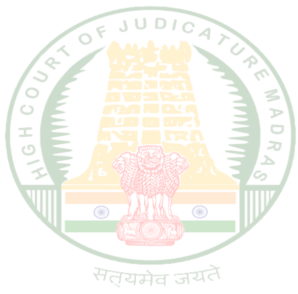
(b)]; hire-purchase contracts [sub-clause (c)], catering contracts [sub-clause (e)] by legal fiction to be divisible contracts where the sale element could be isolated and be subjected to sales tax.

43.Gannon Dunkerley [State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd., *(1958) 9 STC 353 : AIR 1958 SC 560 : 1959 SCR 379] survived the Forty-sixth 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 Article 366(29-A) 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. The courts must move with the times. [See* ***Attorney General v. Edison Telephone Co. of London Ltd.,*** *(1880) 6 QBD 244 : 43 LT 697]* ***But the Forty-sixth 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 Forty-sixth Amendment. That ingredient of a sale***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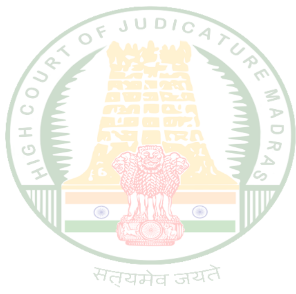
continues to have the same definition. The second respect in which Gannon Dunkerley [State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd., (1958) 9 STC 353 : AIR 1958 SC 560 : 1959 SCR 379] has survived is with reference to the dominant nature test to be applied to a composite transaction not covered by Article 366(29-A). Transactions which are mutant sales are limited to the clauses of Article 366(29-A). 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.

48. *This conclusion was doubted in* ***Associated Cement Companies Ltd. v. Commr. of Customs*** *[(2001) 4 SCC 593] saying: (SCC p. 609, para 26)*

> *"The conclusion arrived at in* ***Rainbow Colour Lab*** *case [(2000) 2 SCC 385 (2-Judge Bench)] , in our opinion, runs counter to the express provision contained in Article 366(29-A) as also of the Constitution Bench decision of this Court in* ***Builders' Assn. of India v. Union of India [Builders' Assn. of India v. Union of India,*** *(1989) 2 SCC 645 : 1989 SCC (Tax) 317 (5-Judge Bench)] ."*

49. *We agree. After the Forty-sixth Amendment, the sale element of those contracts which are covered by the six sub-clauses of clause (29-A)*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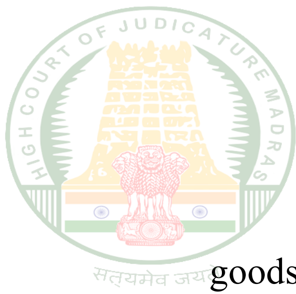
> *of Article 366 are separable and may be subjected to sales tax by the States under Entry 54 of List II and there is no question of the* ***dominant nature test*** *applying. Therefore when in 2005 C.K. Jidheesh v. Union of India [(2005) 13 SCC 37 : (2005) 8 Scale 784 (2-Judge Bench)] held that the aforesaid observations in Associated Cement [(2001) 4 SCC 593] were merely obiter and that Rainbow Colour Lab [(2000) 2 SCC 385 (2-Judge Bench)] was still good law, it was not correct. It is necessary to note that Associated Cement [(2001) 4 SCC 593] did not say that in all cases of composite transactions the Forty-sixth Amendment would apply.*

29. The legal position regarding levy of sales tax on works contract was further clarified by the Hon'ble Supreme Court in **Larsen and Toubro Ltd and Another vs State of Karnataka** (2014) 1 SCC 708. It held that the term "works contract" in Article 366(29-A)(*b*) takes within its fold all genre of works contract and is not restricted to one specie of contract to provide for labour and services alone and nothing in Article 366(29-A)(*b*) limits the term "works contract", wherein a contract may involve both a contract of work and labour and a contract for sale, in such composite contract, the distinction between contract for sale of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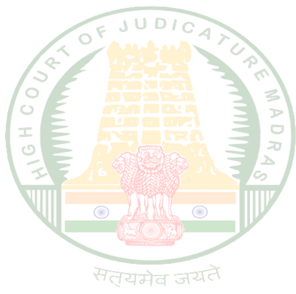
goods and contract for work (or service) is virtually diminished. It was further held that the **dominant nature test** has no application and the traditional decisions which have held that the substance of the contract must be seen have lost their significance where transactions are of the nature contemplated in Article 366(29-A). Relevant paragraph from the above decision is reproduced below :-

> **97.** *In light of the above discussion, we may summarise the legal position, as follows:-*
>
> ***97.1.*** *For sustaining the levy of tax on the goods deemed to have been sold in execution of a works contract, three conditions must be fulfilled: (i) there must be a works contract, (ii) the goods should have been involved in the execution of a works contract, and (iii) the property in those goods must be transferred to a third party either as goods or in some other form.*
>
> ***97.2.*** *For the purposes of Article 366(29-A)(b), in a building contract or any contract to do construction, if the developer has received or is entitled to receive valuable consideration, the above three things are fully met. It is so because in the performance of a contract for construction of building, the goods (chattels) like cement, concrete, steel, bricks, etc. are intended to be*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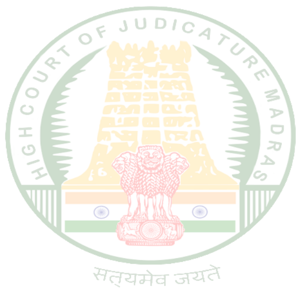
incorporated in the structure and even though they lost their identity as goods but this factor does not prevent them from being goods.

97.3.*Where a contract comprises of both a works contract and a transfer of immovable property, such contract does not denude it of its character as works contract.* ***The term "works contract" in Article 366(29-A)(b) takes within its fold all genre of works contract and is not restricted to one specie of contract to provide for labour and services alone. Nothing in Article 366(29-A)(b) limits the term "works contract"****.*

97.4.*Building contracts are a species of the works contract.*

97.5.*A contract may involve both a contract of work and labour and a contract for sale. In such composite contract, the distinction between contract for sale of goods and contract for work (or service) is virtually diminished.*

97.6. *The dominant nature test has no application and the traditional decisions which have held that the substance of the contract must be seen have lost their significance where transactions are of the nature contemplated in Article 366(29-A). Even if the dominant*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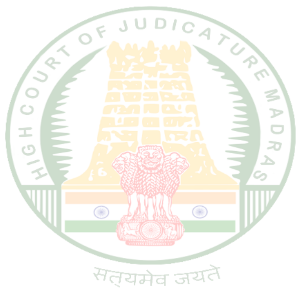
intention of the contract is not to transfer the property in goods and rather it is rendering of service or the ultimate transaction is transfer of immovable property, then also it is open to the States to levy sales tax on the materials used in such contract if such contract otherwise has elements of works contract. The enforceability test is also not determinative.

97.7. *A transfer of property in goods under clause (29-A)(b) of Article 366 is deemed to be a sale of the goods involved in the execution of a works contract by the person making the transfer and the purchase of those goods by the person to whom such transfer is made.*

97.8.*Even in a single and indivisible works contract, by virtue of the legal fiction introduced by Article 366(29-A)(b), there is a deemed sale of goods which are involved in the execution of the works contract. Such a deemed sale has all the incidents of the sale of goods involved in the execution of a works contract where the contract is divisible into one for the sale of goods and the other for supply of labour and services. In other words, the single and indivisible contract, now by the Forty-sixth Amendment has been brought on a par with a contract containing two separate agreements and the States now have power to levy sales tax on*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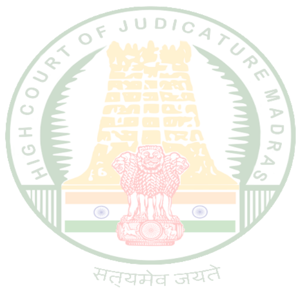
the value of the material in the execution of works contract.

97.9. *The expression "tax on the sale or purchase of goods" in Schedule VII List II Entry 54 when read with the definition clause (29-A) of Article 366 includes a tax on the transfer of property in goods whether as goods or in the form other than goods involved in the execution of works contract.*

97.10.*Article 366(29-A)(b) serves to bring transactions where essential ingredients of "sale" defined in the Sale of Goods Act, 1930 are absent within the ambit of sale or purchase for the purposes of levy of sales tax. In other words, transfer of movable property in a works contract is deemed to be sale even though it may not be sale within the meaning of the Sale of Goods Act.*

97.11.*Taxing the sale of goods element in a works contract under Article 366(29-A)(b) read with Entry 54 List II is permissible even after incorporation of goods provided tax is directed to the value of goods and does not purport to tax the transfer of immovable property. The value of the goods which can constitute the measure for the levy of the tax has to be the value of the goods at the time*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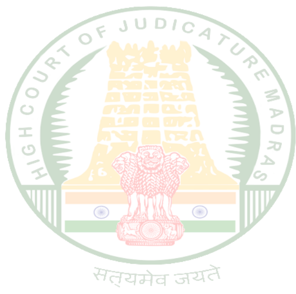
of incorporation of the goods in works even though property passes as between the developer and the flat purchaser after incorporation of goods".

30. A distinction was made between indivisible and composite contracts in the case of **Imagic Creative (P) Ltd. vs. Commissioner of Commercial Taxes and Others** (2008) 2 SCC 614, wherein the Hon'ble Supreme Court had held that a mere element of service was insufficient to attract sales tax for the entire contract. It reads as under :-

28. *We have, however, a different problem at hand. The appellant admittedly is a service provider. When it provides for service, it is assessable to a tax known as service tax. Such tax is leviable by reason of a parliamentary statute. In the matter of interpretation of a taxing statute, as also other statutes where the applicability of Article 246 of the Constitution of India, read with the Seventh Schedule thereof is in question, the Court may have to take recourse to various theories including "aspect theory", as was noticed by this Court in Federation of Hotel & Restaurant Assn. of India v. Union of India [(1989) 3 SCC 634] .*

29. *If the submission of Mr Hegde is accepted in its entirety, whereas on the one hand, the*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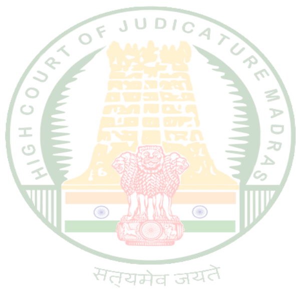
Central Government would be deprived of obtaining any tax whatsoever under the Finance Act, 1994, it is possible to arrive at a conclusion that no tax at all would be payable as the tax has been held to be an indivisible one. ***A distinction must be borne in mind between an indivisible contract and a composite contract. If in a contract, an element to provide service is contained, the purport and object for which the Constitution had to be amended and Clause (29-A) had to be inserted in Article 366, must be kept in mind.***

32. *Payments of service tax as also VAT are mutually exclusive. Therefore, they should be held to be applicable having regard to the respective parameters of service tax and the sales tax as envisaged in a composite contract as contradistinguished from an indivisible contract. It may consist of different elements providing for attracting different nature of levy.* ***It is, therefore, difficult to hold that in a case of this nature, sales tax would be payable on the value of the entire contract, irrespective of the element of service provided.*** *The approach of the assessing authority, to us, thus, appears to be correct.*

33. *We may notice that the concept of aspect theory which had found echoes in State of U.P. v. Union of India [(2003) 3 SCC 239] has expressly been overruled by a three-Judge*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Bench in BSNL [(2006) 3 SCC 1] stating: (SCC p. 39, paras 78-79)

> *"78. But if there are no deliverable goods in existence as in this case, there is no transfer of user at all. Providing access or telephone connection does not put the subscriber in possession of the electromagnetic waves any more than a toll collector puts a road or bridge into the possession of the toll payer by lifting a toll gate. Of course the toll payer will use the road or bridge in one sense. But the distinction with a sale of goods is that the user would be of the thing or goods delivered. The delivery may not be simultaneous with the transfer of the right to use. But the goods must be in existence and deliverable when the right is sought to be transferred.*
>
> *79. Therefore whether goods are incorporeal or corporeal, tangible or intangible, they must be deliverable. To the extent that the decision in State of U.P. v. Union of India [(2003) 3 SCC 239] held otherwise, it was, in our humble opinion erroneous."*

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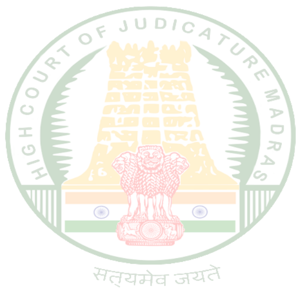
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31. The definition of work-contract in Section 2(zp) is very wide. It includes any improvement modification, repair or commissioning or any movable or immovable property. Thus, without doubt the work undertaken by the Respondent–Assessee for 'powder coating' the products like yokes, links and tubes etc amounts to works contract. Since the activity of powder coating is in the nature of works contract, it is to be construed that there is a transfer of property in the execution of works contract. Therefore, the Respondent-Assessee is liable to pay tax under Section 15(1) of the PVAT Act, 2007. Therefore, we answer both the substantial questions of law in favour of the Petitioner-CTO and against the Respondent-Assessee.

32. As per Section 24(1) of the Puducherry Value Added Tax Act, 2007, the Respondent–Assessee was required to file a tax return within a period of 15 days **a**fter end of the period in such manner as may be prescribed. A return submitted by the dealer along with tax due is to be accepted as self-assessed. As per proviso to Section 24(2) of the Act, the Assessing Authority may select either at discretion or as directed by the Commissioner any dealer for detailed assessment. Section 24(2) of the

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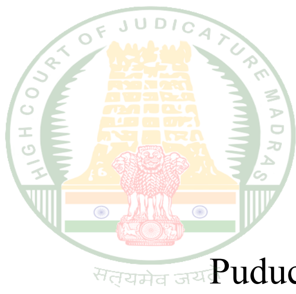
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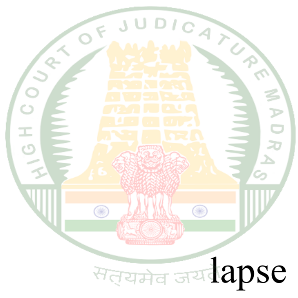
Puducherry Value Added Tax Act, 2007, reads as under :-

> *2) The returns submitted by the dealer along with tax due thereon shall be accepted as self-assessed:*
>
> *Provided that the assessing authority may select either at his discretion or as directed by the Commissioner, any dealer for detailed assessment [for a tax period or tax periods) by scrutiny of accounts and may make best judgement assessment if so required, where-*
>
> *(a) a person fails to file a return as required under sub-section (1); or*
>
> *(b) the assessing authority is not satisfied with the correctness and completeness of a return filed by a person; or*
>
> *(c) the Commissioner has reasonable ground to believe that a person will become liable to pay tax under this Act but is unlikely to pay the amount due."*

33. As per Section 24(4), the Assessing Authority has to serve a notice, on completion of the Assessment and the dealer is required to pay balance of tax in accordance with terms of that notice. As per sub-section (5) to Section 24, no Assessment under Section 24 shall be made after a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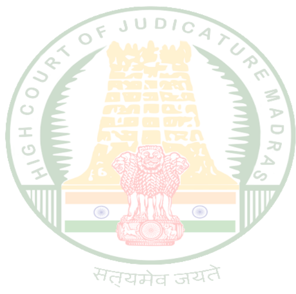
lapse of three years from the end of the year to which, the returns filed under the Act relates. Section 24 (5) of the PVAT Act, 2007 reads as under:-

> *(5) Subject to sub-section (6) of this section, no assessment under this section for any year shall be made after a period of three years from the end of the year to which the return under this Act relates."*

34. Sub-section 5 of Section 24, is however, subject to Sub-section (6) to Section 24 of the Puducherry Value Added Tax Act, 2007. Section 24(6) of the Puducherry Value Added Tax Act, 2007, reads as under :-

> *(6) Where, for any reason, the input tax credit has been availed wrongly or where any dealer produces false invoice, vouchers, declaration certificate or any other documents with a view to support his claim of input tax credit or refund, the assessing authority shall, at any time, within a period of five years from the end of the year to which the return relates, reverse input tax credit availed and determine the tax due after making such*



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> *an enquiry as it may consider necessary:*
>
> *Provided that no order shall be passed under this sub section without giving the dealer a reasonable opportunity to show cause against such order.*

35. Admittedly, return pertains to the Assessment year 2007-08 to 2009-2010 as mentioned above. An earlier notice was issued on **05.03.2011** calling upon the Respondent-Assessee to show cause as to the basis on which exemption was claimed for issuance of C-Form for purchases made under Inter-State purchase and was followed by pre-Assessment notice dated **25.09.2014**.

36. As far as the limitation is concerned, it is sufficient if a notice is issued for revising the assessment in time. This Court earlier had an occasion to deal with the case of ***Tvl.Victus Dyeings, Represented by its Partner A.Loganathan vs . The Assistnt Commissioner (ST), Rural Assessment Circle, Tirupur*** in the context of Section 27 of the TNVAT Act,2006., wherein the dispute related to the Assessment Years 2007-08 to 2010-2011 respectively.

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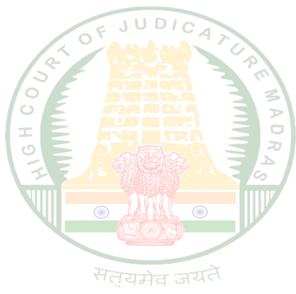
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37. As per proviso to Section 22 of the TNVAT Act, 2006 , the assessment years were deemed to have been completed on 30.06.2012. Thus, any proceedings to revise the assessment which is deemed to have been completed under proviso to Section 22 of the TNVAT Act, 2006 had to be initiated within six years for the deemed assessment under Section 27 of the TNVAT Act, 2006.

38. In ***Tvl. Victus Dyeings*** *(supra)* the notice itself came to be issued on 27.09.2018. A revised order of the Assessment was passed on **30.05.2019**. Thus, an attempt to make a re-assessment notice on **27.09.2018** followed by an Assessment Order dated **30.09.2018** was held to be bad in law. The Court held that taking the date of revised notice as a reckoning date, initiation of re-assessment proceedings was time-barred after the period of six years had already elapsed. This decision was cited by the Petitioner in the case of ***M/s.Orient Fans (Proprietor – M/s.Orient Paper and Industries Limited) Represented by its Branch Commercial Incharge, No.24, Ethiraj Salai, Egmore, Chennai 600 008 vs. The State Tax Officer, (Backyear Assessment), Egmore Assessment***

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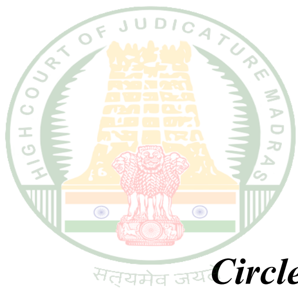
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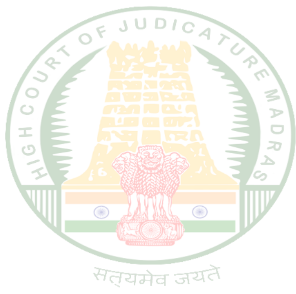
Circle, Chennai which was also rendered in the context of the Assessment Years 2006-07 to 2010-2011 respectively.

39. In ***M/S.Orient Fans*** *(Supra)*, the decision of ***Tvl. Victus Dyeings*** *(Supra)* was distinguished. It was held that the assessment proceedings were not barred by limitation, as the notice seeking to revise the assessment had been issued in time for four Assessment Years except 2010-2011. Since the revision notices were within time, the notice could not be challenged based on few decisions of the Hon'ble Supreme Court. We are concurring with a view taken in the said decision and reiterate the legal position applied in M/s.Orient Fans (supra) respectfully following decisions of the Hon'ble Supreme Court in the following cases :-

(i) **Ghanshyam Das vs. Regional Assistant Commissioner of Sales Tax, Nagpur, 1963 INSC 171**

(ii) The State of Punjab and Others vs. M/s.Tara Chand Lajpat Rai, (1967)19 STC 493

(iii)The State of Punjab and Another vs. Murlidhar Mahabir Parshad , (1968) 21 STC 29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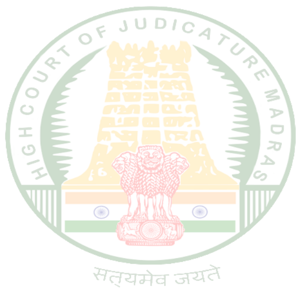
(iv) **Additional Assistant Commissioer of Sales Tax, Indore Region, Indore vs. Firm Jagmohandas Vijay Kumar,** (1970) 25 STC 74

40. In **Ghanshyam Das vs. Regional Assistant Commissioner of Sales Tax, Nagpur,** Limitation under Section 11 A (1) of the Central Provinces and Berar Sales Tax Act, 1947 . Section 11-A(1) of the Act, fell for consideration under Section 11 A (1) of the Central Provinces and Berar Sales Tax Act, 1947 read as under :-

> *"Section 11A(1): If in consequence of any information which has come into his possession, the Commissioner is satisfied that any turnover of a dealer during any period .... has escaped assessment .... the Commissioner may, **at any time within three calendar** years **from the expiry of such period**........ proceed in such manner as may be prescribed to ..... assess .... the tax payable on any such turnover."*

41. The Court held as follows :-

> *Under Section 11-A of the Act the period of 3 years has to be calculated from the expiry of the period in regard whereto any turnover has escaped assessment. As the unit of assessment is a quarter,*



> *the period in s. 11-A can only mean a quarter and it cannot be further split up into months, weeks and days. The said period is the fourth quarter and it expired on October 31, 1951. If so, it follows that the Commissioner has jurisdiction to assess the turnover in respect of the entire fourth quarter **as the notice was issued within three years from the expiry of the said quarter.***

42. The Hon'ble Supreme Court in ***The State of Punjab and Others vs. M/s.Tara Chand Lajpat Rai*** supra while answering a similar issue of Limitation in Section ***11(2) of the Punjab General Sales Tax Act, 1948*** followed its views in Ghanshyamadas' s case supra and held as under :-

> *"Reliance, however, was placed on two decisions of the High Court of Punjab: *M/s. Rameshwar Lal Sarup Chand v. Excise and Taxation Officer and # Jagat Ram Om Parkash v. Excise and Taxation Officer, Assessing Authority, Amritsar. Neither of these decisions would be of assistance as the question which was canvassed in Ghanshyamdas's case regarding **assessment proceedings having commenced within time and then remaining pending did not come up for consideration. Since the said notice dated January 11, 1957, was served on the Respondent-firm before the expiry of three years from the respective dates for furnishing the returns, the assessment proceedings must be held to have commenced from that date which was within time and thus the assessment***

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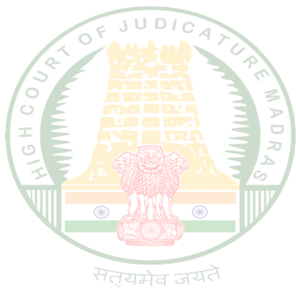
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> ***proceedings remained pending until they were terminated by the assessment order***. *Though that order was finalised after the expiry of three years from the said period, it could not be attacked on the ground of its being beyond limitation and therefore without jurisdiction. The order passed by the High Court allowing the Respondent's writ petition has, therefore, to be set aside. The appeal succeeds and the writ petition is dismissed. In the circumstances of the case, however, we do not propose to pass any order as to costs. Appeal allowed.*
>
> **M/s. Rameshwar Lal Sarup Chand v. Excise and Taxation Officer*
>
> *#Jagat Ram Om Parkash v. Excise and Taxation Officer, Assessing Authority, Amritsar*

43. In ***The State of Punjab and Another vs. Murlidhar Mahabir Parshad,*** (1968) 21 STC 29, wherein the above case, the Court was concerned with limitation under **Section 11** of the **Central Tax Act** which was amended by **Section 7** of the **East Punjab General Sales Tax (Amendment) Act, 1952** and later amended in the year 1955, by **Section 3 of the East Punjab General Sales Tax (Amendment) Act(No.4 of 1955). Section 11** of the **East Punjab General Sales Tax(Amendment) Act, 1952,** reads as under:-

"11. (1) If the Assessing Authority is satisfied without

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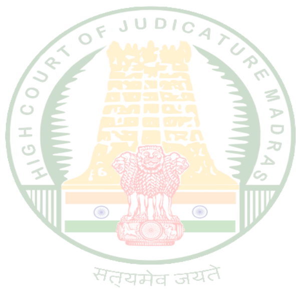
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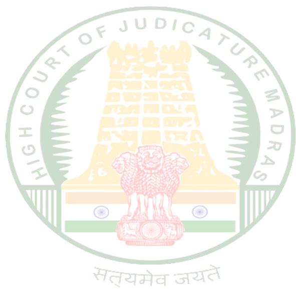
requiring the presence of a registered dealer or the production by him of any evidence that the returns furnished in respect of any period are correct and complete, he shall assess the amount of tax due from the dealer on the basis of such returns.

(2) If the Assessing Authority is not satisfied without requiring the presence of a registered dealer who furnished the returns or production of evidence that the returns furnished in respect of any period are correct and complete, he shall serve on such dealer a notice in the prescribed manner requiring him, on a date and at a place specified therein, either to attend in person or to produce or to cause to be produced any evidence on which such dealer may rely in support of such returns.

(3) On the day specified in the notice or as soon afterwards as may be, the Assessing Authority shall, after hearing such evidence as the dealer may produce, and such other evidence as the Assessing Authority may require on specified points, assess the amount of tax due from the dealer.

(4) If a registered dealer, having furnished returns in respect of a period, fails to comply with the terms of a notice issued under sub- section (2), the Assessing Authority ***shall within three years*** *after the expiry of such period, proceed to assess to the best of his judgment the amount of the tax due from the dealer.*

(5) If a registered dealer does not furnish returns in respect of any period by the prescribed date, the Assessing Authority shall within three years after the expiry of such period, after giving the dealer a reasonable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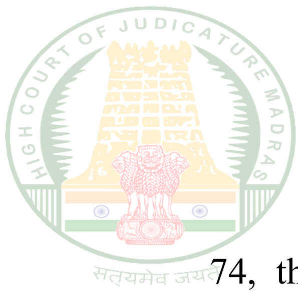
> *opportunity of being heard, proceed to assess to the best of his judgment, the amount of tax, if any, due from the dealer."*

44. A reading of the above proviso indicate that a limitation of three years was prescribed for assessment best Judgment, from the date of return and where no return was filed, within three years after the expiry of such period, after giving the dealer, a reasonable opportunity of being heard. The Hon'ble Supreme Court held if *proceedings are taken within the prescribed time though the assessment is finalised subsequently even after the expiry of the prescribed period, no question of limitation would arise*. Relevant paragraph of said decision reads as under :-

> *"In other words, the assessment proceedings commence in the case of a registered dealer either when he furnishes a return or when a notice is issued to him under section 11(4) or 10(3), and if such proceedings are taken within the prescribed time though the assessment is finalised subsequently even after the expiry of the prescribed period, no question of limitation would arise."*

45. In **Additional Assistant Commissioer of Sales Tax, Indore Region, Indore vs. Firm Jagmohandas Vijay Kumar,** (1970) 25 STC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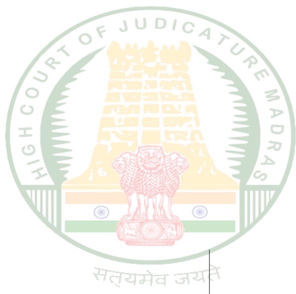
74, the Court was concerned with **Section 8 ((1)(a)** and **(b) of the Mahya Bharat Sales Tax Act, 1950. Section 8(1)(a)** and **(b)** and **Section 10 of the Mahya Bharat Sales Tax Act, 1950**.

46. The dispute that arose in the above case was under the provision of the **Madhya Bharat Sales Tax Act, 1950**, which later stood replaced by **Madhya Bharat General Sales Tax Act, 1959**. There the Assessing Officer had issued a notice under **Section 8(2)** of the **Madhya Bharat Sales Tax Act, 1950**, to the dealer to assess the turnover which had escaped assessment.

47. Relevant provisions read as under :-

Section 8	
(1)(a)*Assessment of taxable turnover and determination of tax due for any year shall be made after the returns for all the periods of that year have become due:* *Provided that in the case of Melas the assessment shall be made as soon as the return of turnover has been received.*	(1)(b): *Notwithstanding anything contained in clause (a), if any dealer fails to submit a return under Section 7(1) for the prescribed period within the prescribed time the Assessing Authority shall, after making such enquiry as he considers necessary and after giving the dealer a reasonable opportunity*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	of being heard, determine the turnover of the dealer for the said period to the best of his judgment and assess the tax on the basis thereof. This assessment, subject to the provisions of Section 10 and to such orders as may be passed in appeal or revision, shall be final for the period".
Section 10 : *Assessment of tax and a levy of licence fees, or registration fees or exemption fees incorrectly assessed.— If for any reason the whole or any part of the turnover of business of a dealer has escaped assessment to the tax, or if the licence fee, registration fee or exemption fee has escaped levy or has been assessed at too low a rate in any year, the assessing authority at any time within a period of three years next succeeding that to which the tax or the licence fee, registration fee or the exemption fee relates, assess the tax payable on the turnover which has escaped assessment or levy the correct amount of licence fee, registration fee or exemption fee, after issuing a notice to the dealer and after making such inquiry as he considers necessary."*	

48. The above provisions indicates that the limitation of three years was prescribed. Answering the point on the limitation, the Court held as under :-

"*We are therefore unable to accept the*

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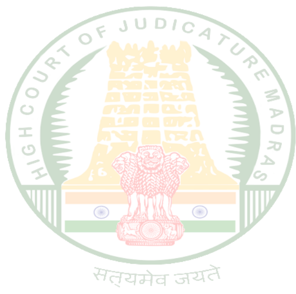
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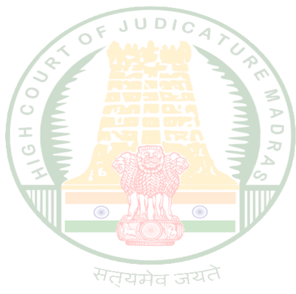
contention of the Respondent that the case in one of escaped assessment and the period of limitation contemplated by Section 10 of the Act is applicable to the case. The reason is that once the proceedings for assessment are initiated under Section 8(1)(a) or (b) it cannot be said that the turnover has escaped assessment unless the proceedings have come to a close."

49. The Court held that if proceedings are taken within the prescribed time though the assessment is finalised subsequently even after the expiry of the prescribed period, no question of limitation would arise and Section 10 was not attracted. The Court further held as under :-

"In other words, the assessment proceedings commence in the case of a registered dealer either when he furnishes a return or when a notice is issued to him under Section 11(4) or Section 10(3), and if such proceedings are taken within the prescribed time though the assessment is finalised subsequently even after the expiry of the prescribed period, no question of limitation would arise. The view expressed by this court in ***Ghanshyam Das v. Regional Assistant Commissioner of Sales Tax, Nagpur*** *has been followed by the court in two recent cases —* ***Regional Assistant Commissioner of Sales Tax, Indore v. Malwa Vanaspati & Chemical Co. Ltd.*** *[21 STC 431] and* ***State of Punjab v. Murlidhar Mahabir Prasad*** *[21 SC 29] in which the material facts are almost parallel to those in the present case. In view of the principle laid down by these decisions we hold that in the present case*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the proceedings for assessment to sales tax taken against the Respondent for the year 1955-56 by the assessing authorities are legally valid and the Respondent has made out no case for grant of a writ under Article 226 of the Constitution for quashing those proceedings or for quashing the notice issued on March 16, 1963 or the order of the appellant dated July 18, 1963."

50. As far as the present case is concerned, a limitation is prescribed under Section 24(5) of PVAT Act, 2007 for completing assessment. As per Section 24(5), no assessment shall be made after a period of three years from the end of the year to which the return under the Act relates. Applying the ratio of the Hon'ble Supreme Court and that of this High Court in a catena of decisions discussed above, the test to be applied is whether the notice for completing the assessment was issued within limitation i.e., three years to which the returns relates to. If so, even if the Assessment Order is passed beyond the period of **three years,** it will be in time. In the present case, since notices were issued on **05.03.2011** i.e., within three years contemplated under Section 24(5) of the PVAT Act, 2007, the assessment orders passed on 12.12.2014, 22.12.2014 and 31.12.2014 are held to have been passed in time.

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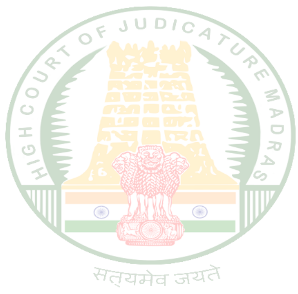
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51. In the result, these tax cases are allowed. The substantial questions of law framed are answered in favour of the Petitioner-Commercial Tax Department. No costs. Consequently, connected miscellaneous petitions are closed.

(R.S.K.J.,) (C.S.N.J.,)

01.10.2024

Index : Yes/No
Internet : Yes/No
Speaking : Non-Speaking Order
Neutral Citation : Yes/No
kkd

To

The Value Added Tax Appellate Tribunal,
Principal District Judge, Puducherry

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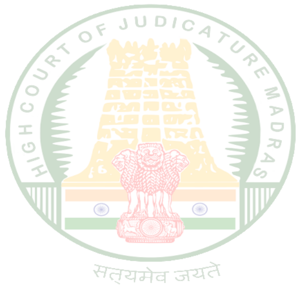

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R.SURESH KUMAR, J.

AND

C.SARAVANAN, J.

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Pre-delivery Common Order in
T.C.Nos.41 to 43 of 2016