

(2014) 11 TP CK 0003

Tripura High Court

Case No: W.P.(C) No. 315 of 2010, 277 and 278 of 2011

Quippo Oil and Gas
Infrastructure Limited and
Others

APPELLANT

Vs

State of Tripura and Others

RESPONDENT

Date of Decision: Nov. 3, 2014

Acts Referred:

- Constitution of India, 1950 - Article 246, 246(1), 366, 366(29A), 366(29A)(d)
- Tripura Value Added Tax Act, 2004 - Section 2(25)(d), 4, 4(2), 4(3)

Citation: (2015) 77 VST 547

Hon'ble Judges: Deepak Gupta, C.J; S. Talapatra, J

Bench: Division Bench

Advocate: G.N. Sahewalla, Senior Advocate, D. Senapati and S. Bhattacharji, Advocates for the Appellant; S. Deb, Senior Advocate, S. Chakraborty and P.B. Dhar, Advocates for the Respondent

Judgement

Deepak Gupta, C.J.

The main issue involved in these writ petitions is whether the transactions entered into by the petitioners amount to transfer of right to use any goods and, therefore, they are exigible to tax in terms of section 4(2) of the Tripura Value Added Tax Act, 2004 read with rule 7 of the Tripura Value Added Tax Rules, 2005. In W.P.(C) Nos. 277 and 278 of 2011, the petitioner-companies entered into a contract with the ONGC for digging directional wells. As per the petitioners digging directional wells has many components including drilling rig, logging services, cementing, mud engineering, directional drilling, etc. As per the petitioners directional drilling is one of the components of digging a directional well. According to the petitioners they have entered into a service contract providing service of directional drilling and, therefore, they are paying service tax to the Central Government. The petitioners contend that the contract does not amount to sale and no VAT can be levied on the

same.

2. In W.P.(C) No. 315 of 2010, the petitioner has provided mobile drilling rig service to the pro forma respondent. Here again the stand of the petitioner is that this is a contract for rendering services since this mobile rig services are provided along with crew and the rig remains in the possession and custody of the petitioner. The petitioner is also required to provide experienced and qualified persons for proper execution of the drilling and, therefore, these are contracts for service not amounting to sale.

3. On the other hand, the stand of the State in all the cases is that transactions entered into by the petitioners are for hiring of machineries which amounts to sale within the meaning of section 2(25)(d) of the Tripura Value Added Tax Act, 2004 read with rule 7(2) of the Tripura Value Added Tax Rules, 2005 and exigible to tax under section 4(2) of the Tripura Value Added Tax Act, 2004.

4. At this stage it would be pertinent to refer article 366(29A) of the Constitution of India which reads as follows:

"366(29A) "tax on the sale or purchase of goods" includes--

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

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

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

(f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), 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."

5. The case of the State is that since a tax on the sale or purchase of goods includes in terms of sub-clause (d) of article 366(29A) tax on the transfer of the right to use

any goods for any purpose the petitioners are liable to pay value added tax on such transfer of right to use goods. The contention of the petitioners is that they have entered into a service contract and only the Union can levy tax on services and not the State. The petitioners have also urged that they are paying service tax to the Central Government under the provisions of law and since they are paying service tax, if there is conflict between the Central law and the State Act the Tripura Value Added Tax Act must necessarily give way to the provisions which provide for imposition of service tax in the Finance Act of 1994.

6. Before dealing with other issues it would be pertinent to mention that the apex court in [The State of Madras Vs. Gannon Dunkerley and Co., \(Madras\) Ltd.,](#) held that the State had no power to tax a composite contract of goods and services (works contract) to be taxed as sale of goods. The court further held that the law also does not permit the severance of the contract for determining the value of the goods.

7. In view of this decision of the apex court, it was felt necessary to amend Constitution with a view to widen the definition of "sale" as traditionally understood. In common law, sale was understood to mean an agreement to transfer title in the goods on payment of consideration. The Constitution was amended and sub-article (29A) was introduced in the Constitution by the Constitution Forty-sixth Amendment Act, 1982. By means of this Constitutional amendment, tax on the sale or purchase of goods now covered six more categories which may otherwise not have fallen within the definition of "sale". Sub-clauses (a) to (f) to clause (29A) of article 366 of the Constitution bring within the ambit of sale, transactions where one or more of the essential ingredients of sale as traditionally understood were absent. By legal fiction such transactions, transfers and supply of goods were deemed to be sale and purchase of the goods.

8. After amendment of the Constitution the apex court in [Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others,](#) dealing with works contracts held that only the value of the goods involved in the execution of works contract could be taxed and this would have to be determined by taking into account the value of the entire works contract after deducting therefrom the charges towards labour, services, etc. The apex court in the second [Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others,](#) concluded that only the value of the goods involved in the execution of a works contract was amenable to the provisions of the Sales Tax/VAT Act of the State.

9. In the cases before us the contracts are for hiring of goods and services. The stand of the State is that ONGC has exclusive use and right to use the goods involved in the contracts and therefore there is transfer of the right to use goods and as such tax is leviable under section 4(3) of the TVAT Act read with rule 7(2) of the Rules. It is further contended that in terms of section 4(3) of the Act the person making payment on this account is bound to deduct tax as leviable under law.

Section 4 of the TVAT Act reads as follows:

"4. Tax on deemed sales.--(1) Notwithstanding anything contained elsewhere in this Act, any transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract shall be deemed to be a sale of those goods by the person making the transfer and shall be liable to be taxed at the rate specified in the Schedule:

Provided that in respect of any such transfer, only so much value of the goods involved in the works contract which has actually been paid to the dealer during the period, shall be taken into account for determining the turnover for the period.

Explanation.--For the purpose of this section, "Property in goods" shall mean the aggregate of the goods for which amounts have been received or receivable by a dealer during such period as valuable consideration, whether or not such amount has been separately shown in the works contract. The amount as received or receivable shall include the value of such goods purchased, manufactured, processed, or procured otherwise by the dealer, and the cost of freight or delivery as may be incurred by such dealer for carrying such goods to the place where these are used in execution of such works contract, but shall not include such portion of the aforesaid amounts as may be prescribed.

(2) Tax on transfer of the right to use any goods.--Notwithstanding anything contained elsewhere in this Act, any transfer of the right to use any goods for any purpose (whether or not for a specified period) shall be taxable at the rate as specified in the Schedule.

(3) Deduction of tax at the time of payment.--Every person responsible for paying any sum to any person on account of works contract and right to use any goods for any purpose, shall at the time of credit of such sum to account of the person or at the time of payment thereof in cash or by issue of a cheque or draft or any other mode, deduct such amount towards sales tax (not being more than the total tax payable by the dealer) as may be prescribed."

Rule 7(2) of the TVAT Rules reads thus:

"7. (2) Every person responsible for making payment to any person for discharge of any liability on account of valuable consideration payable for any transfer of the right to use any goods other than the goods in exempted list of the Act for any purpose (whether or not for a specified period) for cash or in any manner, shall at the time of making such payment deduct an amount at the rate as notified by the Government from time to time of the payment on account of such transfer of right:

Provided that till the Government notify the rate, the prevailing rate shall continue:

Provided no such deduction shall be made from the bill(s) or invoice(s) of the transferor where the amounts received as penalty for defaults in payment or as

damages for any loss or damage caused to the goods by the person to whom such transfer was made, ..."

The main issue is whether there is a transfer of the right to use any goods or not?

10. A Constitution Bench of the apex court in [20th Century Finance Corpn. Ltd. and Another Vs. State of Maharashtra](#), dealt with the issue with regard to the power of the State Legislature to levy tax under clause (29A)(d) of article 366 of the Constitution on the transfer of the right to use any goods. This is the leading judgment on the point. The following questions were framed by the apex court:

"The questions therefore, that arise for consideration in these cases are, whether a State can levy sales tax on transfer of right to use goods merely on the basis that the goods put to use are located within its State irrespective of the facts that--

(a) the contract of transfer of right to use has been executed outside the State;

(b) sale has taken place in the course of an inter-State trade; and

(c) sales are in the course of export or import into the territory of India..."

Answering this question the apex court held as follows (pages 202 and 203 in 119 STC):

"27. Article 366(29A)(d) further shows that levy of tax is not on use of goods but on the transfer of the right to use goods. The right to use goods accrues only on account of the transfer of right. In other words, right to use arises only on the transfer of such a right and unless there is transfer of right, the right to use does not arise. Therefore, it is the transfer which is sine qua non for the right to use any goods. If the goods are available, the transfer of the right to use takes place when the contract in respect thereof is executed. As soon as the contract is executed, the right is vested in the lessee. Thus, the situs of taxable event of such a tax would be the transfer which legally transfers the right to use goods. In other words, if the goods are available irrespective of the fact where the goods are located and a written contract is entered into between the parties, the taxable event on such a deemed sale would be the execution of the contract for the transfer of right to use goods. But in case of an oral or implied transfer of the right to use goods it may be effected by the delivery of the goods.

28. No authority of this court has been shown on behalf of respondents that there would be no completed transfer of right to use goods unless the goods are delivered. Thus, the delivery of goods cannot constitute a basis for levy of tax on the transfer of right to use any goods. We are, therefore, of the view that where the goods are in existence, the taxable event on the transfer of the right to use goods occurs when a contract is executed between the lessor and the lessee and situs of sale of such a deemed sale would be the place where the contract in respect thereof is executed. Thus, where goods to be transferred are available and a written

contract is executed between the parties, it is at that point situs of taxable event on the transfer of right to use goods would occur and situs of sale of such a transaction would be the place where the contract is executed."

11. According to the apex court the taxable event on the transfer of right to use goods would be the place where the contract is executed. In the case of Oil Field Instrumentation (India) Ltd. v. State of Tripura [2014] 3 VST-OL 550 (Tripura), the contract was executed in Maharashtra whereas in other cases the contracts were executed within Tripura.

12. The apex court in [M/s. Rainbow Colour Lab and Another Vs. The State of Madhya Pradesh and Others \[OVERRULED\]](#), was dealing with the issue as to whether the job rendered by a photographer in taking photographs, developing and printing films would amount to a works contract within the meaning of sub-clause (b) of article 366, clause (29A) of the Constitution. It held as follows (pages 12 and 14 in 118 STC):

"Prior to the amendment of article 366, in view of the judgment of this court in [The State of Madras Vs. Gannon Dunkerley and Co., \(Madras\) Ltd.](#), 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 Forty-sixth Amendment and the judgment of this court in [Builders Association of India and Others Vs. Union of India \(UOI\) and Others](#), 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 . . . What is pertinent to ascertain in this connection is what was the dominant intention of the contract ...

. . . On facts as we have noticed that the work done by the photographer which, as held by this court in [The Assistant Sales Tax Officer and Others Vs. B.C. Came, Proprietor Came Photo Studio](#), 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."

13. However, this view taken in [M/s. Rainbow Colour Lab and Another Vs. The State of Madhya Pradesh and Others \[OVERRULED\]](#), was doubted in case of [M/s. Associated Cement Companies Ltd. Vs. Commissioner of Customs](#), and the apex court observed as follows (pages 74 and 75 in 124 STC):

"... The conclusion arrived at in [M/s. Rainbow Colour Lab and Another Vs. The State of Madhya Pradesh and Others \[OVERRULED\]](#), in our opinion, runs counter to the express provision contained in article 366(29A) as also of the Constitution Bench decision of this court in [Builders Association of India and Others Vs. Union of India \(UOI\) and Others](#),."

14. In [State of Andhra Pradesh and Another Vs. Rashtriya Ispat Nigam Ltd.,](#) the apex court dealt with meaning of the phrase "transfer of right to use goods". In that case the Rashtriya Ispat Nigam was the owner of the Visakhapatnam Steel Project. It engaged various contractors to do the work and supplied sophisticated machines to the contractors for being used in execution of the contracted works. The Rashtriya Ispat Nigam Ltd. received hire charges for the same. The tax was levied on this transaction on the ground that there was a transfer of the right to use goods. The Andhra Pradesh High Court in its judgment held that there was no transfer of the right to use this machinery in favour of the contractor. While coming to this conclusion the High Court of the Andhra Pradesh analysed the various clauses of the agreement and held that the contractors were not free to make use of the machinery for works other than the project work of the respondent or move out the machinery during the period of contract. The court went on to hold that the condition that the contractor would be responsible for the custody of the machinery while it was on the site did not militate against the possession and control of the Ispat Nigam over the property. The apex court upheld the judgment of the High Court of Andhra Pradesh.

15. In [Bharat Sanchar Nigam Ltd. and Another Vs. Union of India \(UOI\) and Others,](#) the apex court was dealing with the issue as to whether the transaction by which mobile phone connections are enjoyed is a sale or a service or both. The apex court held that if it was a sale only the State would be competent to levy sales tax on such a transaction under entry 54 of List II of the Seventh Schedule to the Constitution. If it was a service then the Central Government alone could levy service tax under entry 97 of List I or entry 92C of List I after 2003. The apex court further held if the nature of the transaction has characteristics of both sale and service then the moot question would be whether legislative authorities could levy separate taxes together or only one of them. The apex court dealt with the following question:

"The principal question to be decided in these matters is the nature of the transaction by which mobile phone connections are enjoyed. Is it a sale or is it a service or is it both? If it is a sale then the States are legislatively competent to levy sales tax on the transaction under entry 54 List II of the Seventh Schedule to the Constitution. If it is a service then the Central Government alone can levy service tax under entry 97 of List I (or entry 92C of List I after 2003). And if the nature of the transaction partakes of the character of both sale and service, then the moot question would be whether both legislative authorities could levy their separate taxes together or only one of them."

16. In the [Bharat Sanchar Nigam Ltd. and Another Vs. Union of India \(UOI\) and Others,](#) the petitioners before the Supreme Court argued that they were only providing service and there was no transfer of right to use goods. On the other hand it was contended by the State that there was transfer of the right to use goods and hence the transactions should be treated to be sales and were amenable to

sales tax. Dealing with sub clause (29A) of article 366 of the Constitution the apex court held as follows (pages 117 and 119 in 3 VST):

"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 [The State of Madras Vs. Gannon Dunkerley and Co., \(Madras\) Ltd.,](#) 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 [The State of Madras Vs. Gannon Dunkerley and Co., \(Madras\) Ltd.,](#) 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 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 Vs. Commissioner of Commercial Taxes, Board of Revenue, Madras and Another,](#) decision 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 been 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 [The State of Punjab Vs. Associated Hotels of India Ltd.,](#). That decision has by this clause been effectively legislatively invalidated.

42. All the sub-clauses of article 366(29A) 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 [The State of Madras Vs. Gannon Dunkerley and Co., \(Madras\) Ltd.,](#). The amendment especially allows specific composite contracts, viz., works contracts (sub-clause (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. [The State of Madras Vs. Gannon Dunkerley and Co., \(Madras\) Ltd.,](#) survived the 46th Constitutional Amendment in two respects. First, with regard to the definition of "sale" for the purposes of the Constitution in general and for the purposes of entry 54 of List II in particular except to the extent that the clauses in article 366(29A) operate. By introducing separate categories of "deemed sales", the meaning of the word "goods" was not altered. Thus the definitions of the composite elements of a sale such as intention of the parties, goods, delivery, etc., would continue to be defined according to known legal connotations. This does not mean that the content of the concepts remains static. The courts must move with the times¹. But the 46th Amendment does not give a licence for example to assume that a transaction is a sale and then to look around for what could be the goods. The

word "goods" has not been altered by the 46th Amendment. That ingredient of a sale continues to have the same definition. The second respect in which [The State of Madras Vs. Gannon Dunkerley and Co., \(Madras\) Ltd.](#), has survived is with reference to the dominant nature test to be applied to a composite transaction not covered by article 366(29A). Transactions which are mutant sales are limited to the clauses of article 366(29A). All other transactions would have to qualify as sales within the meaning of the Sale of Goods Act, 1930 for the purpose of levy of sales tax.

...

45. The reason why these services do not involve a sale for the purposes of entry 54 of List II is, as we see, it, for reasons ultimately attributable to the principles enunciated in [The State of Madras Vs. Gannon Dunkerley and Co., \(Madras\) Ltd.](#), , namely, if there is an instrument of contract which may be composite in form in any case other than the exceptions in article 366(29A), unless the transaction in truth represents two distinct and separate contracts and is discernible as such, the State would not have the power to separate the agreement to sell from the agreement to render service, and impose tax on the sale. The test therefore for composite contracts other than those mentioned in article 366(29A) continues to be--Did the parties have in mind or intend separate rights arising out of the sale of goods? If there was no such intention there is no sale even if the contract could be disintegrated. The test for deciding whether a contract falls into one category or the other is to as what is the substance of the contract². We will, for the want of a better phrase, call this the dominant nature test."

17. Thereafter the court dealt with the question as to whether the dominant nature test would continue to apply even in respect of contracts falling within the ambit of clause (29A) of the Constitution. The apex court held as follows (pages 120 and 121 in 3 VST):

"49. We agree. After the 46th Amendment, the sale elements of those contracts which are covered by the six sub-clauses of clause (29A) 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 Vs. Union of India \(UOI\) and Others](#), held that the aforesaid observations in [M/s. Associated Cement Companies Ltd. Vs. Commissioner of Customs](#), were merely obiter and that [M/s. Rainbow Colour Lab and Another Vs. The State of Madhya Pradesh and Others \[OVERRULED\]](#), was still good law, it was not correct. It is necessary to note that [M/s. Associated Cement Companies Ltd. Vs. Commissioner of Customs](#), did not say that in all cases of composite transactions the 46th Amendment would apply.

50. 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 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."

18. As far as the present cases are concerned there can be no manner of doubt that both mud logging machinery and passenger cabs would be goods and there is no dispute on this count.

19. After referring to [20th Century Finance Corpn. Ltd. and Another Vs. State of Maharashtra](#), the apex court went on to hold that the delivery of the goods was also an essential part of the right to transfer of the goods. The relevant observations are as follows (para 74, pages 127 and 128 in 3 VST):

"75. In our opinion, 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. It is assumed, at the time of execution of any agreement to transfer the right to use, that the goods are available and deliverable. If the goods, or what is claimed to be goods by the respondents, are not deliverable at all by the service providers to the subscribers, the question of the right to use those goods, would not arise."

20. [Bharat Sanchar Nigam Ltd. and Another Vs. Union of India \(UOI\) and Others](#), has been relied upon by both the parties and the opening portion of the judgment makes it clear that the State is competent to levy sales tax only on the sale part of the contract and it is the Central Government alone can only levy tax on the service part of the contract.

21 The other relevant judgment on the point is [Imagic Creative Pvt. Ltd. Vs. The Commissioner of Commercial Taxes and Others](#), . In this case, the appellant before the apex court was an advertisement agency. It had entered into a contract with ISRO for conceptualizing, designing and producing computer artwork. It also supplied the advertising material to its customers. It raised bills under two heads; (1) the bills raised for conceptualizing and designing were treated to be in the nature of service and service tax was paid on the same. (2) With regard to the goods it supplied to its customers, the company treated the said transaction as sale and paid sales tax on the same. When the matter came up before the High Court it rejected the plea of the assessee holding that the contract was a comprehensive contract for supply of printed material developed by the company. The High Court held that the indivisible contract was divided by the company under different heads. The apex court after discussing all the relevant law on the point including the judgments which we have referred to hereinabove set aside the judgment of the High Court and held as follows (paras 28 to 33, pages 383 to 385 in 12 VST):

"27. What, however, did not fall for consideration in any of the aforementioned decisions is the concept of works contract involving both service as also supply of goods constituting a sale. Both, in [Tata Consultancy Services Vs. State of Andhra Pradesh](#), as also in [M/s. Associated Cement Companies Ltd. Vs. Commissioner of Customs](#), what was in issue was the value of the goods and only for the said purpose, this court went by the definition thereof both under the Customs Act as also the Sales Tax Act to hold that the same must have the attributes of its utility, capability of being bought and sold and capability of being transmitted, transferred, delivered, stored and possessed. As a software was found to be having the said attributes, they were held to be goods.

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 and Restaurant Association of India, etc., Vs. Union of India \(UOI\) and Others](#), .

29. If the submission of Mr. Hegde is accepted in its entirety, whereas on the one hand, the 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 (29A) had to be inserted in article 366, must be kept in mind.

30. We have noticed hereinbefore that a legal fiction is created by reason of the said provision. Such a legal fiction, as is well known, should be applied only to the extent for which it was enacted. It, although must be given its full effect but the same would not mean that it should be applied beyond a point which was not contemplated by the Legislature or which would lead to an anomaly or absurdity.

31. The court, while interpreting a statute, must bear in mind that the Legislature was supposed to know law and the legislation enacted is a reasonable one. The court must also bear in mind that where the application of a Parliamentary and a Legislative Act comes up for consideration; endeavours shall be made to see that provisions of both the Acts are made applicable.

32. Payments of service tax as also the 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."

22. The apex court in [Bharat Sanchar Nigam Ltd. and Another Vs. Union of India \(UOI\) and Others](#), clearly held that in a contract falling under clause (29A) of article 366 of the Constitution the dominant nature test would not apply and the contract could be split up to determine the value of that part of the contract which amounted to services and that portion of the contract which amounted to a deemed sale. This aspect has been also explained in [Imagic Creative Pvt. Ltd. Vs. The Commissioner of Commercial Taxes and Others](#), . The apex court has clearly taken a view that the service part of the contract cannot be taxed by the State. This view is in line with the view taken by the apex court in the [Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others](#), .

23. The Delhi High Court in [Commissioner, VAT, Trade and Taxes Department Vs. International Travel House Ltd.](#), (Sales Tax Appeal No. 10 of 2009 decided on September 8, 2009) was dealing with a case wherein the International Travel House had entered into a contract with M/s. New Delhi Power Limited (NDPL) for hiring of Maruti Omni Cabs by the former to the latter. The conditions laid down provided that all the chauffeurs should wear uniforms and should know both Hindi and English. They should all have mobiles. The cars should be kept clean and the rates would be inclusive of fuel, maintenance and driving charges, etc. There were many other conditions. The Division Bench of the Delhi High Court held that such a contract was in the nature of contract for service. Dealing with the article 366(29A) of the Constitution the Delhi High Court held that only those contracts which fall within sub-clauses (a) to (f) of article 366(29A) could be severed by the State to tax the sale element. Even in cases falling under sub-clauses (a) to (f) of article 366(29A) the Delhi High Court held that only if it was the intention of the parties to sever the contract into two separate values in respect of goods and services could the contract be so divided. The Delhi High Court held as follows (pages 662 and 663 in 25 VST):

"10. Where the sale is distinctly discernible in the transaction, i.e., the contracts are by intention of the parties severable so that there are separate values with respect to goods and services, only then can one not deny the legislative competence of the State to levy sales tax on the value of the goods. This, however, does not allow the State to entrench upon the Union List and tax services by including the cost of such services in the value of goods. Even in the composite contracts, which are by legal fiction deemed to be divisible under article 366(29A), the value of the goods involved in the execution of the whole transaction cannot be assessed to sales tax. Referring to the decision in [Gujarat Ambuja Cements Ltd. and Another Vs. Union of India \(UOI\) and Another](#), it was held that mutual exclusivity which is referred to in article 246(1)

means that taxing entries must be construed so as to maintain exclusivity. Though liberal interpretation must be given to the taxing entries, however in substance if the statute is not referable to a field given to the State, then the court will not, by a principle of interpretation, allow a statute to include in its field what is not covered in its field. The "aspect" theory, (viz., the aspect of goods in composite contracts) would not apply to enable the value of the services to be included in the sale of the goods or the price of the goods in the value of the service.

11. The conclusion, therefore, which emerges with respect to the facts of the present case on applying the ratio of the [Bharat Sanchar Nigam Ltd. and Another Vs. Union of India \(UOI\) and Others](#), is that, since the contract in question is a composite contract of sale of goods and services, clearly, it is not permissible for the State Legislature by applying DVAT Act to tax composite contracts comprising of both goods and services. Not only the contracts cannot be artificially split up so as to enable the sale element to be taxed, but further, the States cannot treat the contract as only a contract of sale of goods and tax the whole value of the transaction as a sale of goods. Since the parties have not intended the contract to be mutilated/severable inasmuch as no different values are specified in the subject contract towards goods value separately and the value of services separately, it is not permissible by the DVAT Act to impose sales tax on the whole transaction value because that would amount to the State entrenching upon the Union List and tax services by including the cost of such services in the value of the goods. Thus, the contract in question being a composite contract is to be treated as a contract for services and no sales tax can be imposed on the contracts in question..."

24. The Delhi High Court thereafter went on to hold that there was no transfer of right to use goods because the control of the cabs remained with the owner.

25. Both sides have made reference to a number of decisions of the Gauhati High Court. In [Dipak Nath Vs. Oil and Natural Gas Corporation Ltd. and Others](#), the petitioner had entered into a contract with the ONGC for hire of trucks, trailers, tankers and cranes to the ONGC. The question was whether by means of such contract there was transfer of a right to use goods. After referring to a large number of conditions of the contract the Division Bench held that a reading of the core provisions of the terms of the contract indicated that insofar as the cranes are concerned they were under the control of the ONGC and therefore, it was the ONGC which had exclusive control and domain over the crane during the subsistence of the contract. The judgment in [Dipak Nath Vs. Oil and Natural Gas Corporation Ltd. and Others](#), was delivered on November 25, 2009.

26. However, a learned single judge of the Gauhati High Court in [D.P. Agarwala Vs. Oil and Natural Gas Corporation Ltd. and Others](#), took a different view. Here also the question was whether the contract for hiring of hydraulic cranes by the petitioner to the ONGC amounted to transfer of the right to use goods. After referring to various judgments including those referred to hereinabove the learned single judge made

reference to the various portions of the contract and then went on to hold as follows (para 31, page 37 in 32 VST):

"28. Axiomatically, therefore, the transactions in hand to be validly subjected to the levy under the Act would have essentially to be adjudged to constitute transfer of right to use the cranes. In the event a service element is traceable therein and any intention whatsoever of the contracting parties to contemplate two independent agreements, i.e., one for transfer of right of use and the other for service with respective values attached thereto is lacking, the bargain would catapult beyond the purview of the Act, thus, rendering the same in exigible to tax thereunder. To reiterate, the learned counsel for the Revenue in course of the arguments on a dialectical scrutiny of the clauses of the contract agreements has admitted the same to constitute indivisible contracts."

27. However, dealing with the [Dipak Nath Vs. Oil and Natural Gas Corporation Ltd. and Others,](#) the learned single Judge held that the facts of that case were different and distinguished the said judgment.

28. A Division Bench of the Agartala Bench of the Gauhati High Court dealt with a similar question in [HLS Asia Limited Vs. The State of Tripura and Oil and Natural Gas Corporation Ltd.,](#). In this case, the court was dealing with a case where the contract was for well logging, perforating and other wire line services and the question was whether such a transaction amounts to transfer of right to use any goods. The Division Bench held as follows (pages 373 and 374 in 41 VST):

"47. Of all the different kinds of composite transactions, the drafters of the Forty-sixth Amendment chose three specific situations, a "works contract", a "hire-purchase" contract and a "catering contract" to bring them within the fiction of a "deemed sale". Of these three, the first and third, namely, "works contract" and "catering contract" involve a kind of "service" and "sale" at the same time. Apart from these two cases, covered by sub-clauses (b) and (f) of clause (29A) of article 366, where splitting of the service and supply has been constitutionally permitted, there is no other service, which has been permitted to be so split. If there is an instrument of contract, which may be composite, in form, in any case other than the exceptions, which article 366(29A) makes, the State would have no power to separate the agreement to sell from the agreement to render service, and thereby impose tax on the component of "sale" unless the transaction, in truth, represents two distinct and separate contracts and is discernible as such.

48. In other words, if a contract is a composite contract for the sale of goods and services, it is not permissible for the State Legislature to tax composite contracts comprising of both, "sale" and "services". Not only the contracts cannot be artificially split up so as to enable the sale element to be taxed, the State cannot treat the contract as only a contract of sale of goods and tax thereby the whole value of the transaction as a sale of goods. Thus, a composite contract of sale of

goods and service, i.e., consisting of both transfer of right to use and of rendering of service, has to be treated as a contract of service and no sales tax can be imposed on such a type of contract. This takes us to the question as to whether the contract, in the present case, is a contract for transfer of right to use goods. . ."

29. We are not in total agreement with this judgment especially in view of the law laid down in [Imagic Creative Pvt. Ltd. Vs. The Commissioner of Commercial Taxes and Others](#), which has not considered by the Division Bench. However, we are clearly of the view that the State will be entitled to levy tax only if the sale portion of the contract can be ascertained with exactitude.

30. In *HLS Asia Ltd. v. State of Tripura* [2013] 1 GLR 107, another Division Bench of the Agartala Bench of the Gauhati High Court of which one of us (S.C. Das, J.) is the author was dealing with a matter relating to well logging perforating and other wire line services and it was held that the petitioner was a service provider and could not be compelled to be registered as a dealer under the TVAT Act.

31. On the contrary, in two other Division Bench judgments of the Gauhati High Court in [Brahmaputra Valley Construction and Suppliers Vs. Oil and Natural Gas Corpn. Ltd. and Others](#), (W.P.(C) No. 5280 of 2011 decided on July 24, 2012) and [Brahmaputra Valley Construction and Suppliers Vs. Oil and Natural Gas Corpn. Ltd. and Others](#), (W.P.(C) No. 578 of 2009 delivered on July 24, 2012) the court has come to the conclusion that on consideration of various factors the transaction clearly involved, a transaction for right to use.

32. A Division Bench of this court in W.P.(C) No. 75 of 2013 (*Oil Field Instrumentation (India) Ltd. v. State of Tripura* [2014] 3 VST-OL 550 (Tripura)) and other connected matters decided on September 10, 2014 after discussing the entire law on the subject held that no person can be directed to pay both sales tax and service tax on the same transaction. It was also held that if there are both elements of service and transfer of right to use goods present in a contract and the contract is not divisible then if service tax has been paid to the Central Government, the State cannot levy sales tax.

33. Having discussed the law we now proceed to discuss the facts of individual cases:

W.P.(C) Nos. 277 and 278 of 2011:

34. The facts of two cases being identical are being taken up together:

As pointed out above the contract between the parties is for providing directional drilling services. The opening portion of the contract provides that the contract has been entered into for hiring of machinery of MWD, SDMM, drilling jars and bits along with services of directional drillers at various places in the country including Agartala.

35. The case of the petitioners is that this is not a contract for hiring of machinery but for hiring of services. According to the petitioners, the soil conditions differ from place to place and soil conditions can be different as the drills go deeper down the hole. Therefore, it is not only the machinery which has to work but the experts in the field of directional drilling have to assess the data collected and decide what is the action to be taken. This assessment is based on the geological conditions and a variety of information which is collected and analysed. According to the petitioners the drill path has to be prepared by a well qualified planner with the objective of reaching the target. The tools which are used for such drilling are highly sophisticated tools which cannot be used by any unqualified person. These tools have to be used by highly qualified persons who have knowledge and expertise in the field. This highly specialized men power then operates the directional drillers and sometimes drillers have to be called from all over the world to carry out the drill. The directional driller monitors the path of the drilling minute to minute and this is a highly technical service provider.

36. In Tripura the drills are being dug up to a depth of 3000-4000 metres. The petitioner in one of the petitions has given details of the various experts' engagement. The relevant provisions of the contract with which we are concerned read as follows:

"1.12 Mobilisation:

Shall mean rendering the equipment fully manned and equipped as per CONTRACT and ready to begin work at site designated by ONGC after ONMRE survey and ONGC'S acceptance thereafter. The date and time of ONGC'S acceptance of ONHIRE survey will be treated as the date and time of mobilization.

1.17 Tests:

Shall mean such process or processes to be carried out by the CONTRACTOR as are prescribed in the CONTRACT considered necessary by ONGC or their representative in CONTRACT to ascertain quality, workmanship, performance and efficiency of equipment or services thereof.

1.20 Approval:

Shall mean and include the written consent duly signed by ONGC or their representative in respect of all documents, drawing or other particulars in relation to the contract.

...

5.0 Duties and power/authority:

5.1 The duties and authorities of the ONGC'S site representative are to act on behalf of the ONGC for:

(i) Overall supervision, co-ordination and project management at site.

(ii) Proper utilization of equipment and services.

(iii) Monitoring of performance and progress.

(iv) Commenting/countersigning on reports made by the CONTRACTOR'S representative at site in respect of works, receipts, consumption, etc., after satisfying himself with the facts of the respective cases.

(v) He shall have the authority, but not obligation at all times and any time to inspect/test/examine/verify any equipment machinery, instruments, tools materials, personnel, procedures and reports, etc., directly or indirectly pertaining to the execution of the work. However, this shall not construe to imply an acceptance by the inspector. Hence, the overall responsibility of quality of work shall rest solely with the CONTRACTOR. Each and every document emerging from site in support of any claim by the contractor has to have the countersignature/comments of the ONGC'S representative/engineer without which no claim will be entertained by the ONGC.

...

12.0 Discipline:

CONTRACTOR shall carry out operations hereunder with due diligence and in a safe and workman like manner according to good international oilfield practice. CONTRACTOR shall maintain strict discipline and good conduct among its employees and its SUB-CONTRACTOR'S employees and shall abide by and conform to all rules and regulations promulgated by the CORPORATION governing the operations.

Should Corporation feel that the conduct of any of contractor/sub-contractor's employees is detrimental to CORPORATION'S interest, the CORPORATION shall have the unqualified right to request for the removal of such employee either for incompetence, unreliability, misbehavior, security reasons, etc., while on or off the job. The CONTRACTOR shall comply with any such request to remove such personnel at CONTRACTOR'S expense unconditionally. The CONTRACTOR will be allowed a maximum of 7 (seven) working days to replace the person by competent qualified person at CONTRACTOR'S cost.

13.1 Verification of character and antecedents of contractual manpower.

In all contracts involving deployment of contractor's manpower within ONGC'S premises like plants, offices, installations, rigs, stock yards, etc., the Contractor shall submit the following documents to ONGC. . . prior to start of work:

(i) Undertaking from the Contractor that the Character and antecedents of the person(s) proposed to be deployed by them is/are impeccable.

(ii) Undertaking from the contractor that they have scrutinized the previous working of the person(s) proposed to be deployed by them and there is nothing adverse as regards his/her character and antecedent.

(iii) Along with the above-mentioned undertakings, the contractor will provide certified photocopies of police verification certificates for inspection by the authorized representative of ONGC. The contractor has to obtain police verification report (signed by an officer equivalent to DSP rank or higher) from the area where the person(s) to be deployed has/have been residing since the last five years. In case the person concerned has not resided at a place for five years at a stretch, police verification reports should be obtained from that area where the person(s) has/have stayed earlier.

...

8.3 Taxes:

Contractor, unless specified otherwise in the contract, shall bear all tax liabilities, duties, Govt. levies, etc., including service tax, customs duty, corporate and personnel taxes levied or imposed on the contractor on account of payments received by it from the CORPORATION for the work done under this CONTRACT. It shall be the responsibility of the CONTRACTOR to submit to the concerned Indian authorities, the returns and all other concerned documents required for this purpose and to comply in all respects with the requirements of the laws in this regard, in time.

...

13. Safety and Labour Laws:

CONTRACTOR shall comply with the provision of all laws including Labour Laws, rule's, regulations and notifications issued thereunder from time to time. All safety and labour laws enforced by statutory agencies and by ONGC shall be applicable in the performance of this CONTRACT and CONTRACTOR shall abide by these laws.

CONTRACTOR shall take all measures necessary or proper to protect the personnel, work and facilities and shall observe all reasonable safety rules and instructions. No smoking shall be permitted outside the living quarters, and welding jobs will be carried out with full safety precautions. ONGC'S employee also shall comply with safety procedures/policy.

The CONTRACTOR shall report as soon as possible any evidence which may indicate or is likely to lead to an abnormal or dangerous situation and shall take all necessary emergency control steps to avoid such abnormal situations.

...

16. Insurance:

(A) CONTRACTOR shall, at his own expense, arrange appropriate insurance to cover all risks assumed by the CONTRACTOR under this CONTRACT in respect of its personnel deputed under this CONTRACT as well as CONTRACTOR'S equipment, tools and any other belongings of the CONTRACTOR on their personnel during the entire period of their engagement in connection with this CONTRACT. ONGC will have no liability on this account.

However, CONTRACTOR shall not be required to take insurance cover for their equipment, tools when these are in the custody of ONGC."

The Schedule of rates is as follows:

Schedule of rates

Sibsagar and Jorhat/Silchar/Agartala Assets-PEL/ML Area-Category-4

A bare perusal of the provisions of the contract clearly shows that the contract is basically for providing of services inasmuch as highly specialized machinery along with specialized staff is provided and the rates not only include the rates for hiring of machinery but also for the staff and the services provided by the staff.

W.P.(C) No. 315 of 2010:

37. In this case it is mobile rigs which are being supplied along with crew required to operate these Rigs. Para 1 of the contract reads as follows:

"1. The contractor agrees to perform the services in accordance with the terms and conditions of this contract and, in consideration of its due performance of the services, the company agrees to pay the contractor according to the rates, terms and conditions herein contained in appendix 5 (Schedule of Compensation) attached hereto."

The other relevant portions of the contract are as follows:

"3.1 Equipment of personnel:

The drilling unit shall be fully equipped as set out in section II--Scope of works, and shall be adequate to conduct the well operations at the location specified by company and contemplated by this contract. The drilling unit and all other contractor's equipment shall be in first class working condition and, together with the contractor's personnel shall be provided and maintained by contractor at its sole cost. Contractor warrants good title to all contractor's equipment for performance of the work and contractor shall indemnify company against any claims, losses, costs and expenses arising out of any breach of the foregoing warranty. The contractor shall carry out all of its obligations under the contract and shall execute the work with all due care and diligence and with the skill to be expected of a reputable contractor experienced in the types of work to be carried out under the contract.

...

5.7.1 Mobilisation:

Mobilisation of contractor's equipment will be the sole responsibility of contractor. Contractor shall mobilise contractor's equipment from its current location to the first location or in respect of additional contractor's equipment as company may at its request on call out basis...

5.7.2 Demobilisation:

Demobilisation of the contractor's equipment will be the sole responsibility of contractor. Contractor shall be required to obtain all equipment and personnel necessary to demobilize the drilling unit ...

...

5.10 Accommodation and meals on drilling unit:

Contractor shall provide on the drilling unit, at its sole cost, accommodation and meals of good quality and quantity in accordance with international onshore/drilling industry practice, for up to fifteen (15), on a monthly average basis, of company's and company's third party contractor personnel per day. Any accommodation and/or meals provided by contractor for company's or "company's third party contractor personnel in excess of the daily average of fifteen (15) over a period of one month shall be paid for by company at the rates specified in appendix 5.

Contractor shall provide accommodation and/or meal forms, which shall be completed on the drilling unit at the time of provision of accommodation and/or meals, and signed by the personnel who have been provided with such accommodation and/or meals. Such forms shall be attached to invoices submitted by contractor by way of substantiation of such invoices."

38. Clause 6.1 and sub-clauses thereof makes it the responsibility of the contractor to arrange for materials, Supply and equipment.

39. Clause 6.1.2 provides that the contractor shall be liable to furnish properly trained qualified and competent personnel as per the requirements of the contract.

"7.0 MATERIALS, SUPPLIES, EQUIPMENT, SERVICES AND PERSONNEL TO BE FURNISHED BY COMPANY:

7.1 Company equipment:

Company shall furnish all items stated as being furnished by company in section II. All such items, together with all items referred to in clause 7.2 shall be referred to as "company equipment". All such items shall be furnished at no cost to contractor unless otherwise specified in section II Contractor shall protect company equipment from damage or loss and exercise the same degree of care in handling and using

company equipment as it would with its own equipment.

...

11.6 Discipline

11.6.1 Contractor shall maintain at all times strict discipline and good order among its employees and sub-contractors and shall abide by and conform to all reasonable rules and regulations promulgated by company governing well operations.

11.9 Rig superintendent:

Contractor shall appoint a rig superintendent who shall have the general responsibility for matters affecting safety, emergency response, health or welfare and the maintenance of order and discipline and in the discharge of that responsibility shall exercise authority over all personnel of the contractor, its sub-contractors and other contractors of company when present on the drilling unit or carrying out work on the drilling unit."

40. Clause 15 provides that the contractor (petitioner) shall be liable for liability under the Workmen's Compensation and Employee's Compensation Act, 1923 and also for third party liability.

41. Clause 20 provides that in case the petitioners-contractor becomes insolvent then the company may take over the equipment of the contractor. Similar provision is clause 21.

42. Thus the ONGC or M/s. Jubilant Oil and Gas Private Ltd. has a right to take over the machinery only if the petitioners become insolvent or the performance is unsatisfactory. Otherwise there is no control of the ONGC or M/s. Jubilant Oil and Gas Private Ltd. over the drilling equipment. From the terms of the contract it is apparent that drilling unit always remained under the exclusive possession and control of the contractor and the pro forma respondents have no control over the same. Therefore, this cannot be a "sale" within the meaning of the TVAT Act, 2004.

Conclusion:

43. As has been held by the apex court either a transaction shall be exigible to sales tax/VAT or it shall be exigible to service tax. Both the taxes are mutually exclusive. Whereas sales tax and value added tax can be levied on sales and deemed sales only by the State, it is only the Central Government which can levy service tax. No person can be directed to pay both sales tax and service tax on the same transaction. The intention of the parties is clearly to treat the agreement as a service agreement and not a transfer of right to use of goods. We are also clearly of the view that it is impossible from the terms of the contract to divide the contract into two portions and since the petitioners have paid service tax they cannot be also asked to pay value added tax. As held by the Delhi High Court in [Commissioner, VAT, Trade and Taxes Department Vs. International Travel House Ltd.,](#) if there is a conflict between

the Central law and the State Act then the Central law must prevail. The petitioners cannot be burdened with two different taxes for the same transaction.

44. After carefully going through the contracts we are of the view that the contracts are mainly for hiring of services. There may be a very small element of transfer of right to use goods but according to us the predominant portion of the contract relates to hiring of services and not to transfer of right to use the goods. We are aware that the dominant nature test is not to be used in composite contracts falling within the ambit of article 366(29A) but from the reading of the contract it is more than apparent that the intention of the parties was to treat the contract as a contract for hiring of services. Moreover, it is impossible to divide the contract into two separate portions. Every element of the digging directional wells and mobile drilling rig service contains a major element of provisions of services. In such an eventuality it is virtually impossible to divide the contract. It is not possible to work out the value of the right to use goods transferred under the contract. In cases, where the contracts are easily divisible or where the parties have by agreement clearly indicated what is value of the service part and what is value of the transfer of right to use goods part, the contract may be divided. We are in agreement with the Delhi High Court that when the contract cannot be divided with exactitude then the Central law must prevail.

45. Parties have also been paying service tax and if the State is allowed to tax any portion of the value of the contract then there has to be a proportionate refund of the service tax to that extent. This cannot be done without hearing the Union of India. If there is any dispute between the State or the Union of India then they must resolve it between themselves. The petitioners or the ONGC cannot be made liable to pay both the taxes for the same transaction.

46. In view of the above discussion, we are clearly of the view that in all the cases the transactions do not amount to sale within the meaning of the TVAT Act, 2004. Therefore, all the writ petitions have to be allowed. The State is not entitled to levy any sales tax or value added tax on the transactions in question. It is, therefore, directed that the amount of tax, already deducted and received by the State shall be refunded to the petitioners along with statutory interest latest by February 28, 2015. In case the amount is not refunded by that date then the State shall be liable to pay interest at 12 per cent per annum with effect from January 1, 2015. All the petitions are disposed of in the aforesaid terms. No order as to costs.

¹See Attorney General v. Edition Telephone Company of London [1880] 6 QBD 244.

²See Atiyah: The Sale of Goods (1995) reprint, page 27.