

THE HIGH COURT OF TRIPURA
A G A R T A L A
CRP No. 15 of 2015

Petitioner-Company :

M/s. Newsco International Energy Services Inc.

Canada, a company registered under the Companies Act, with its Registered office at #2100, 700 2nd Street S.W. Calgary, Alberta, T2P2W1, having its Corporate office at 7000 Railway Street SE, Calgary, Alberta T2 H3A 8, Canada, and having its Office in India at 301 Patel Industrial Estate, 03rd Floor, Plot NO. B-40, Off Link Road, Andheri West, Mumbai-400053.

By Advocate :

Mr. Somik Deb, Adv.

Respondents :

1. The State of Tripura,

Represented by the Secretary, Revenue Department, Government of Tripura, having office at Civil Secretariat Complex, Gurkhabasti, PO & PS-Kunjaban, Sub-Division-Agartala, District-West Tripura.

2. The Secretary,

Finance Department, Government of Tripura, having office at Civil Secretariat Complex, Gurkhabasti, PO & PS-Kunjaban, Sub-Div-Agartala, Dist.-West Tripura.

3. The Commissioner of Taxes,

Government of Tripura, having office at Pandit Nehru Complex, Gurkhabasti, PO-Kunjaban, P.S-Kunjaban, Sub-Div.-Agartala, Dist.-West Tripura.

4. The Superintendent of Taxes,

Government of Tripura, Charge-V, Agartala, P.O-Agartala, P.S-West Agartala, Sub-Div.- Agartala, District-West Tripura.

5. Oil and Natural Gas Corporation Ltd.

A Government of India enterprise, incorporated under the Companies Act, 1956 having its registered office at Jeevan Bharati, Tower-II, 124 Connaught Circus, New Delhi-110001 and its Onshore Service Group at Vadodara (Gujarat) and its Tripura Asset Office at A. D Nagar, Agartala, West Tripura.

By Advocates :

Mr. A. L. Saha, Adv.

Mr. D. C. Nath, Adv.

B E F O R E
THE HON'BLE CHIEF JUSTICE MR. DEEPAK GUPTA
THE HON'BLE MR. JUSTICE S. TALAPATRA

Date of hearing &
Judgment : **29th February, 2016.**

Whether fit for reporting :

Yes	No
	√

JUDGMENT & ORDER(Oral)

(Deepak Gupta, C.J.)

The main issue involved in this petition is whether the transactions entered into by the petitioner 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.

[2] The petitioner company entered into a contract with the ONGC for digging directional wells. As per the petitioner digging directional wells has many components including Drilling Rig, Logging Services, Cementing, Mud Engineering, Directional Drilling etc. As per the petitioner directional drilling is one of the components of digging a directional well. According to the petitioner it has entered into a service contract providing service of directional drilling and, therefore, it is paying service tax to the Central Government. The petitioner contends that the contract does not amount to sale and no VAT can be levied on the same.

[3] The stand of the State is that transactions entered into by the petitioner is 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 installments;

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

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

(f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), 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 petitioner is liable to pay value added tax on such transfer of right to use goods. The contention of the petitioner is that it has entered into a service contract and only the Union can levy tax on services and not the State. The petitioner has also urged that it is paying service tax to the Central Government under the provisions of law and since it is 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 ***State of Madras Vrs. Gannon Dunkerley & Co (Madras) Ltd., AIR 1958 SC 560*** 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. Vs. State of Rajasthan: 1993(1) SCC 364*** 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*** Case concluded that only the value of the goods involved in the execution of a works contract were amenable to the provisions of the Sales Tax/VAT Act of the State.

[9] In the case before us the contract is 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 contract 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 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 transferer 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 Vrs. State of Maharashtra : (2000) 6 SCC 12** 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:

“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.”

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 ***M/s. Oil field Instrumentation (India) Ltd.***, the contract was executed in Maharashtra whereas in other cases the contracts were executed within Tripura.

[11] The Apex Court in ***Rainbow Colour Lab Vrs. State of M.P ; (2000) 2 SCC 385*** 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:

"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 Forty-sixth Amendment and the judgment of this Court in Builders' case (1989) 2 SCC 645 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 STO vs. B.C. Kame (1977) 1 SCC 634 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".

However, this view taken in ***Rainbow Colour Lab's*** case was doubted in case of ***Associated Cement Companies Ltd. Vrs. Commr. Of Customs : (2001) 4 SCC 593*** and the Apex Court observe as follows:

"The conclusion arrived at in Rainbow Colour Lab Case, 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 Vrs. Union of India : (1989) 2 SCC 645."

[12] In *State of A.P and Another Vrs. Rashtriya Ispat Nigam Ltd.: (2002) 3 SCC 314* 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 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.

[13] In *Bharat Sanchar Nigam Ltd. and another Vs. Union of India and others, (2006) 3 SCC 1* 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 sale 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-92-C 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."

[14] In the BSNL case 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 the Article 366 of the Constitution the Apex Court held as follows:

"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 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 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 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

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 vs. M/s. Associated Hotels of India Ltd. (supra)*. 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 *Gannon Dunkerley limited*. 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. *Gannon Dunkerley* survived the 46th Constitutional Amendment in two respects. First with regard to the definition of 'sale' for the purposes of the Constitution in general and for the purposes of Entry 54 of List II in particular except to the extent that the clauses in Art.366(29A) operate. By introducing separate categories of 'deemed sales', the meaning of the word 'goods' was not altered. Thus the definitions of the composite elements of a sale such as intention of the parties, goods, delivery etc. would continue to be defined according to known legal connotations. This does not mean that the content of the concepts remain static. The courts must move with the times. But the 46th Amendment does not give a licence, for example, to assume that a transaction is a sale and then to look around for what could be the goods. The word "goods" has not been altered by the 46th Amendment. That ingredient of a sale continues to have the same definition. The second respect in which *Gannon Dunkerley* has survived is with reference to the dominant nature test to be applied to a composite transaction not covered by Article 366(29A). Transactions which are mutant sales are limited to the clauses of Article 366(29A). All other transactions would have to qualify as sales within the meaning of Sales of Goods Act, 1930 for the purpose of levy of sales tax.

45. The reason why these services do not involve a sale for the purposes of Entry 54 of List II is, as we see it, for reasons ultimately attributable to the principles enunciated in *Gannon Dunkerley's* case, namely, if there is an instrument of contract which may be composite in form in any case other than the exceptions in Article 366(29-A), unless the transaction in truth represents two distinct and separate contracts and is discernible as such, then the State would not have the power to separate the agreement to sell from the agreement to render service, and impose tax on the sale. The test

therefore for composite contracts other than those mentioned in Article 366 (29A) continues to be:- Did the parties have in mind or intend separate rights arising out of the sale of goods? If there was no such intention there is no sale even if the contract could be disintegrated. The test for deciding whether a contract falls into one category or the other is to as what is 'the substance of the contract'. We will, for the want of a better phrase, call this the dominant nature test."

[15] 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:

"49. We agree. After the 46th Amendment, the sale element 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 (2005) 13 SCC 37 held that the aforesaid observations in Associated Cement (2001) 4 SCC 593 were merely obiter and that Rainbow Colour Lab (2000) 2 SCC 385 was still good law, it was not correct. It is necessary to note that Associated Cement 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."

[16] After referring to *20th Century Finance Corp. Ltd.* case 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:

"75. In our opinion, the essence of the right under Article 366 (29A) (d) is that it relates to 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."

[17] BSNL case 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 it can only levied tax on the service part of the contract.

[18] The other relevant judgment on the point is ***Imagic Creative(P) Ltd. Vrs. Commissioner of Commercial Taxes and Others; (2008) 2 SCC 614***. 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 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:

"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 (2005) 1 SCC 308 as also in Associated Cement Company (2001) 4 SCC 593, 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 & Restaurant Association of India, etc. v. Union of India & Ors. [(1989) 3 SCC 634].

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 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."

[19] The Apex Court in ***BSNL's*** case 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(P) Ltd.*** case. 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 ***Second Gannon Dunkerley*** Case.

[20] The contract between the parties is for providing directional well. 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.

[21] The case of the petitioner is that this is not a contract for hiring of machinery but for hiring of services. According to the petitioner, 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 petitioner 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.

[22] In Tripura the drills are being dug up to a depth of 3000-4000 meters. 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 ONHIRE survey and ONGC's acceptance thereafter. The date and time of ONGC's acceptance of ONHIRE survey will 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 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 of higher) from the area I 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.

The schedule of rates is as follows:

SCHEDDULE OF RATES

Group	Group-II
Location	Tripura Asset
Total No. of set	1(One)
Area of operation	PEL/ML
Hole Size	17 ¹ / ₂ " to 6"
Currency	United Sates Dollar (USD)

(i)	Operating charges per day (for the equipments):		Basic Unit Rates	Service Tax @ 12.36%	Unit Rate with Service Tax
	(a) MWD + Gamma Ray Tool	A	2300	284.28	2584.28
	(b) SDMM	B	2180	269.45	2449.45
	(c) Jar	C	390	48.2	438.2
(ii)	Standby Charges-per Day (for the equipments) :-				
	(a) MWD + Gamma Ray Tool	D	1320	163.15	1483.15
	(b) SDMM	E	1280	158.21	1438.21
	(c) Jar	F	180	22.25	202.25
(iii)	Day Rate Charges:				
			Day Rate	Service Tax @ 12.36%	Day Rate with Service Tax
	(a) For 02 Nos. Directional Driller per day i.e. 01 Directional Driller per shift.	G1	10	1.24	11.24
	(b) For 02 Nos. MWD Engineers per day i.e. 01 MWD Engineer per shift.	G2	10	1.24	11.24
(iv)	Mob & De-Mob Charges (Lump-sum)				
			Basic Lump-sum Unit Rates	Service Tax	Unit Lump-sum Rate with Service Tax
	a)Mobilization charges	H	NIL	NIL	NIL
	b) De-Mobilization charges	I	NIL	NIL	NIL
(v)	Lost in Hole Value				
			Unit Basic Rate	Service Tax	Unit Rate with Service Tax
a)	For 12 1/4" Hole :				
	1. MWD tool		25000	NIL	25000
	2. Gamma ray tool		10000	NIL	10000
	3. NMDC 8" OD		20000	NIL	20000
	4. Float Sub 8"		1000	NIL	1000
	5. SDMM 3/4" / 8" OD		60000	NIL	60000
	6. String Stabilizer in the range of 11" to 12. 1/8"		10000	NIL	10000
	7. Drilling Jar 8" / 7 3/4" OD		40000	NIL	40000
	Total for 12 1/4" Hole (1 to 8 above)	L1	166000		166000
b)	For 8 1/2" Hole :				
	1. MWD tool		25000	NIL	25000
	2. Gamma ray tool		10000	NIL	10000
	3. NMDC 6 1/4" / 6 1/2" OD		18000	NIL	18000
	4. Float Sub 6 1/2"		900	NIL	900
	5. SDMM 6 1/2" / 6 3/4"		58000	NIL	58000
	6. String Stabilizer in the range of		8000	NIL	8000

	7 3/4" to 12. 8.3 / 8"				
	7. Drilling Jar 6 1/2" / 6 1/4"		38000	NIL	38000
	Total for 8 1/2" Hole (1 to 8 above)	L2	157900		157900
c)	For 6" Hole :				
	1. MWD tool		1000	NIL	1000
	2. Gamma ray tool		1000	NIL	1000
	3. NMDC 4 3/4" OD		500	NIL	500
	4. Float Sub 4 3/4"		100	NIL	100
	5. SDMM 4 3/4" OD		1500	NIL	1500
	6. String Stabilizer 5 1/2"		100	NIL	100
	7. String Stabilizer 5 3/4"		100	NIL	100
	8. Drilling Jar 4 3/4" OD		1500	NIL	1500
	Total for 6" Hole (1 to 9 above)	L3	5800	NIL	5800

A bare perusal of the provisions of the contract clearly show 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.

[23] This Court in ***Quippo Oil and Gas Infrastructure Ltd. Vrs. State of Tripura and Ors.: (2015) 1 TLR 38*** decided three writ petitions one of which filed by the present petitioner M/s. Newsco Directional & Horizontal Drilling Services. Inc. Canada and this Court after making reference to the provisions of the contract entered into between the petitioner company and the ONGC held that the agreement in question was a service agreement.

Conclusion:

[24] 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 petitioner has paid service tax it cannot be also asked to pay value added tax. As held by the Delhi High Court in ***Commissioner, VAT, Trade and Taxes Department vrs. International Travel House Ltd.(supra)***, if there is a conflict between the Central law and the State Act then the Central law must prevail. The petitioner cannot be burdened with two different taxes for the same transaction.

[25] After carefully going through the contract we are of the view that the contract is mainly for hiring of services. There may be a very small element of transfer of right to use goods but according to us the pre-dominant 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 contract 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.

[26] The petitioner has 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 petitioner or the ONGC cannot be made liable to pay both the taxes for the same transaction.

[27] In view of the above discussion, we are clearly of the view that in the present case the transactions do not amount to sale within the meaning of the TVAT Act, 2004. Therefore, the petition has to be allowed. The State is not entitled to levy any sales tax or Value Added Tax on the transactions in question. Since the petition has been allowed, it is directed that the amount of tax, already deducted and received by the State shall be refunded to the petitioner along with statutory interest latest by 31st May, 2016. In case the amount is not refunded by that date then the State shall be liable to pay interest @12% per annum with effect from 1st March, 2016.

[28] The petition is disposed of in the aforesaid terms. No order as to costs.

JUDGE

CHIEF JUSTICE