R

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 19TH DAY OF FEBRUARY 2016

PRESENT

THE HON'BLE MR.JUSTICE JAYANT PATEL

AND

THE HON'BLE MRS.JUSTICE S SUJATHA

STRP Nos.339-411/2015
C/W
STRP No.412/2015

BETWEEN:

HEWLETT PACKARD FINANCIAL SERVICES
INDIA PRIVATE LIMITED
NO.24, SALARPURIA ARENA
HOSUR MAIN ROAD
ADUGODI
BANGALORE – 560 030
REPRESENTED HEREIN BY ITS
COMPLIANCE OFFICER
MS.MYNA VENKATRAMAN

....PETITIONER
(COMMON IN ALL THE CASES)

(BY SRI.K P KUMAR, SENIOR COUNSEL A/W
SRI:VIKRAM HUILGOL FOR
M/S KING & PARTRIDGE, ADVOCATES)

AND:

1. THE STATE OF KARNATAKA
REPRESENTED BY THE
COMMISSIONER OF COMMERCIAL TAXES
VANIJYA THERIGE KARYALAYA
KALIDASA ROAD
GANDHINAGAR
BANGALORE-560 009

2. THE DEPUTY COMMISSIONER OF
COMMERICAL TAXES (AUDIT)-4.5
DVO-4, KORAMANGALA
BANGALORE – 560 047

...RESPONDENTS
(COMMON IN ALL THE CASES)

(BY SRI.T K VEDAMURTHY, HCGP)

STRPs.339-411/2015 ARE FILED UNDER SECTION 65(1) OF THE KARNATAKA VALUE ADDED TAX ACT, 2003 AGAINST THE ORDER, JUDGMENT AND DECREE DATED 25.06.2015 PASSED IN STA NOS.1346 TO 1381/13, STA NOS.2529 TO 2564/2013 AND STA NO.2063/2014 ON THE FILE OF THE KARNATAKA APPELLATE TRIBUNAL AT BANGALORE, DISMISSING THE APPEALS AND UPHELDING THE ORDERS OF THE AA AND FAA.

STRP 412/2015 IS FILED UNDER SECTION 23(1) OF THE KARNATAKA SALES TAX ACT, 1957 AGAINST THE JUDGMENT AND DECREE DATED 25.06.2015 PASSED IN STA NO.1382/13 ON THE FILE OF THE

KARNATAKA APPELLATE TRIBUNAL AT BANGALORE, DISMISSING THE APPEAL AND UPHOLDING THE ORDERS OF THE AA AND FAA.

THESE STRPs COMING ON FOR FINAL DISPOSAL THIS DAY, ***JAYANT PATEL J.,*** MADE THE FOLLOWING:

COMMON ORDER

As in all the matters, since common question arises for consideration and the matters also arise from the common judgment and order passed by the Tribunal, they are being considered simultaneously.

2. The present petitions are directed against the order passed by the Tribunal in respect of the period of assessment from April, 2006 to March, 2011, whereby the Tribunal by its order dated 25.06.2015, recorded the reasons and has dismissed the appeals by holding that the petitioner is not entitled for the exemption by virtue of Section 5(2) of the Central Sales Tax Act, 1956 (hereinafter referred to as 'CST Act' for

short) in the transaction of lease effected during the periods of 2006-07 to 2010-11 and other consequential directions were also issued.

3. The short cut of the case appears to be that as per the petitioner during the periods of 2004-11, the Master Lease Agreements (hereinafter referred to as 'MLA' for short) with its customers were entered into and the goods were leased by procuring from the vendors within the State of Karnataka. As per the petitioner, the operandi was that after the 'MLA' entered into between the petitioner and the customers, the purchase order was being placed by the customers directly on the foreign vendors. As per the purchase order, the goods are to be shipped to the customers, but the invoice has to be raised in the name of the petitioner. The shipping authorization letter is issued by the petitioner to the vendors. As per the petitioner,

after the goods are sold to the petitioner, but shipped to the customers, the invoice is raised by the vendors on the petitioners, but the bill of entry has to be filed by the customers clearing the goods from custom authorities and the goods are taken thereafter to the customers' location. As per the petitioner, after the goods are verified and accepted by the customers, the acceptance certificate has to be issued by the customers. When the goods have been delivered to them and the customers have unconditionally accepted the goods leased to them as per the 'MLA', as per the petitioner, the novation notice is also issued by the customers, confirming that the purchased documents would remain with the petitioner. Thereafter, the lease schedule is signed by the parties specifying the goods under lease as per terms and conditions of Master Rental and Finance Agreement. As per the petitioner,

when the aforesaid transaction of import is completed and the lease agreements are entered into by the parties, the same is exempted under Section 5(2) of the CST Act.

4. The second respondent after examining the books of accounts and records of the petitioner, passed re-assessment order on different dates i.e., 30.03.2011, 15.03.2012, 29.12.2012, 30.1.2013 under Section 39(1) of Karnataka Value Added Tax Act, 2003 (hereinafter referred to as 'KVAT Act' for short) holding that the petitioner has leased the equipment after the import of the same from outside India and therefore, the transaction cannot be said to be in the course of import as per Section 5(2) of the CST Act. Accordingly, the re-assessment order under Section 39 of the KVAT Act were relating to the periods from 2006-07 to 2010-11 and consequently, the demand notices were also issued.

The petitioner herein carried the matter before the Joint Commissioner of Commercial Taxes against the aforesaid re-assessment orders being the First Appellate Authority and the said First Appellate Authority vide order dated 28.02.2013 dismissed the appeals and confirmed the orders passed for re-assessment in respect of tax period of 2006-07 to 2007-2008. In the same manner, the other appeals were also preferred by the petitioner, ultimately, which came to be dismissed by the First Appellate Authority in respect of other assessment period of 2008-09 to 2010-11. The matters were further carried before the Tribunal by the petitioner against the aforesaid orders passed by the first Appellate Authority and the Tribunal vide order dated 25.06.2015, dismissed the appeal holding that the petitioner is liable to pay tax and no exemption is available under Section 5(2) of the CST Act. It is in

these circumstances, the present petitions before this court.

5. As said, common questions arise for consideration and as the period relates to the year 2006-07 to 2010-11, the same are separately numbered as per their respective span of tax period.

6. We have heard Mr.K P Kumar, learned Senior Counsel with Mr.Vikram Huilgol appearing for the petitioner and Mr.T K Vedamurthy, learned Counsel appearing for the respondents.

7. Section 5(2) of the CST Act, 1956, which is relevant for the purpose of present petitions, can be reproduced as under:

> "**Section 5. When is a sale or purchase of goods said to take place in the course of import or export.** (1) xxxxxxxx.

> (2) A sale or purchase of goods shall be deemed to take place in the course of the import of the goods into the territory of India only if the sale or purchase either occasions such import or is effected by a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India.

8. The aforesaid shows that if the sale or purchase of goods has occasioned by a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India, the sale or purchase of goods shall be deemed to have taken place and in the course of import of the case into the territory of India.

9. The case put-forward by the petitioner for the mode and the manner is already referred to hereinabove. Therefore, we need not repeat. However, when the matter came up before the Tribunal, the Tribunal after formulation of the point to consider as to whether the transactions effected by the petitioner is in the nature of course of import for the impugned tax periods observed at paragraph-8 to 13 as under:

> "**Point No.1:-** Except for the tax periods of 2005-06 which involves the question of time limitation, the dispute is common for all the other impugned tax periods under KVAT Act and for the assessment year 2004-05 under KST Act. The appellant has submitted paper books for each year containing (1) Master lease agreement between HPFS and the customer; (2) Purchase Order issued by the customer to HPFS ("PO"); (3) Invoice issued by the foreign

supplier to HPFS and shipped to the customer; (4) Bill of Entry ("BOE") filed by the customer; (5) 'Lease Schedule' executed between HPFS and the customer; (6) Acceptance Certificate signed by the customer; & (7) Invoice raised by HPFS on End Customer. The appellant has submitted several copies of the same for each year to support his submissions as urged in the grounds. Since, the material facts are not being disputed either at the level of AA or FAA, it is suffice for us to consider one representative paper book for the purpose of analyzing the transactions to come to conclusion whether the leasing transactions effected by the appellant is in the course of import falling u/s.5(2) of the CST Act. The assessing authority has taken the stand after due analysis of MLA, PO, Bill of entry, Shipping authorization letter, Lease schedule,

Acceptance Certificate and the invoice raised by the foreign vendor and the invoice by the HPFS that the appellant is the owner of the leased equipments and the leasing has taken place only after the end customer has issued the acceptance certificate. As per the AA, MLA governs all the financing/leasing transactions and all other documentations are ancillary to the Master Lease Agreement. While coming to this conclusion, the MLA has been analyzed and reliance is placed on Accounting Standard (AS)-19 and based on the fact that the transaction is in the nature of financial lease and the depreciation not being claimed by the appellant on the leased equipments. Per contra, the appellant has submitted that it is an integrated transaction and not two independent transactions to fasten the tax liability and as the integrated transaction is in

the course of import falls under the purview of Section 5(2) of the CST Act and has given his submission by rebutting on each point raised by the AA and the FAA by relying on the propositions laid down by the *Hon'ble Apex Court in The Indure Limited, Embee Corporation and K.G.Khosla & Co.Pvt.Ltd.,* cases cited supra.

9. In order to appreciate the rival contentions of the petitioner as well as the respondent, it is first of all necessary to look into Section 5 in general and Sub-Section 5(2) in particular as well as Section 3 and definition of Sale u/s. 2(g) of the Central Sales Tax Act, 1956.

> "**Section 5. When is a sale or purchase of goods said to take place in the course of import or export.**
> (1) A sale or purchase of

goods shall be deemed to take place in the course of the export of the goods out of the territory of India only if the sale or purchase either occasion such export or is effected by a transfer of documents of title to the goods after the goods have crossed the customs frontiers of India.

(2) A sale or purchase of goods shall be deemed to take place in the course of the import of the goods into the territory of India only if the sale or purchase either occasions such import or is effected by a transfer of documents of title to the goods before the goods have

crossed the customs frontiers of India.

(3) Notwithstanding anything contained in sub-section (1), the last sale or purchase of any goods preceding the sale or purchase occasioning the export of those goods out of the territory of India shall also be deemed to be in the course of such export, if such last sale or purchase took place after, and was for the purpose of complying with, the agreement or order for or in relation to such export,]

(4) Xxx xxx xxx."

"**Section 3. When is a sale or purchase of goods said to take place in the**

course of inter-State trade or commerce:- A sale or purchase of goods shall be deemed to take place in the course of inter-State trade or commerce if the sale or purchase-

(a) occasion the movement of goods from one State to another;or

(b) is effected by a transfer of documents of title to the goods during their movement from one State to another.

Explanation 1:- xxx xxx xxx;
Explanation 2:- xxx xxx xxx."

Section 2(g) **"Sale"** with its grammatical variations and cognate expressions, means any transfer of property in goods by one person to another for cash or deferred payment or for any other valuable consideration, and includes,-

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

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

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

(iv) a 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;

(i). xxx xxx xxx;

(ii). Xxx xxx xxx."

10. From the reading of the *Clause (iv)* of Section 2(g) of the Act under definition of 'sale' above clearly confirms the fact that the sale has wider connotation

and meaning which includes even the leasing transactions. This has come into effect subsequent to the amendment of the Article 366 (29-A) of the Constitution of India. This fact is not being disputed either by the appellant or the respondent. The respondent views the transaction as the sale within the State amounting to the leasing of imported equipments whereas, the appellant has taken the defense, the same is in the course of import. For this purpose, Section 5(2) of the CST Act need to be analyzed. The Said sub-section has two limbs. The first limb envisages the sale or purchase *in the course of import* if such sale or purchase **occasions** such import. The second limb envisages the sale or purchase *in the course of import* when it is effected by transfer of documents of title to the goods before the goods have crossed the customs frontiers of India. This type of transaction is usually termed as "High-Seas Sales". The transactions before us does not fall under the second limb of the Section 5(2) of the Act since, the transfer of documents of title to the goods has not taken place on High-Seas. Therefore, the issue which is to be resolved in these appeals is whether the transactions under dispute falls under the

first limb of the Section 5(2) of the CST Act or not. The expression "occasions such import" used u/s. 5(2) of the said Act has the same meaning which occurs as "occasions the movement of goods from one State to another" u/s. 3(a) of the said Act. This has been ruled so by the *Hon'ble Apex Court in K.G.Khosla & Co. (P) Ltd. Vs. DCCT reported in 1966 AIR 1216 or [1966] 17 STC 473 (SC) – (decision rendered by the Constitution Bench consisting of five members).* To decide whether the leasing transactions are in the course of import, the land mark decisions on this subject matter are to be looked into.

11. The important land mark decisions or judgments of the Hon'ble Apex Court on the subject matter of sale in the course of import/export falling u/s. 5(2) for 5(3) of the Act are listed below:-

1. The same commences from Land mark judgment of *Ben Gorim Nilgiri Plantations Co. vs. STO [First Constitution Bench] reported in [1964] 15 STC 753 (SC);*

2. J.V.Gokal & Co. Pvt. Ltd. Vs. Assistant Collector of Sales Tax reported in 1960 AIR 595/[1960] 11 STC 186 (SC) – constitution bench of five members;

3. K.G.Khosla & Co.(P) Ltd. Vs. DCCT 1966 AIR 1216 or [1966] 17 STC 473 (SC) – constitution bench of five members;

4. State of Madras vs. Devar & Co. [1969] 24 STC 481 – constitution bench;

5. Coffee Board vs. Joint Commercial Tax Officer [1970] 25 STC 528 (SC) – constitution bench;

6. State of Bihar vs. Tata Engineering & Locomotive Co. Ltd. [1971] 27 STC 127 (SC) – constitution bench;

7. Deputy Commissioner of Agricultural Income Tax & Service Tax vs. Kotak Co. [1973] 32 STC 6 (SC) – constitution bench;

8. Binani Brothers Pvt. Ltd. Vs. Union of India [1975] 33 STC 254 (SC) – constitution bench;

9. Mohammed Serajuddin vs. State of Orissa [1975] 35 STC 136 (SC) – constitution bench;

10. Deputy Commissioner of Agricultural Income Tax & Sales Tax vs. Indian Explosives Ltd. [1985] 60 STC 30 (SC) – three members bench;

11. State of Maharashtra vs. Embee Corporation [1997] 107 STC 196 (SC) – two members bench;

12. Minerals & Metals Trading Corporation of India Ltd., vs. Sales Tax Officer [1998] 111 STC 434 (SC) – two members bench;

1. The Indure Ltd. & Another vs. Commercial Tax Officer 2010 (69) Kar.L.J. 369A (SC) – two members bench;
2. K.Gopinathan Nair vs. State of Kerala/Cashew Corporation of

India vs. State of Karnataka reported together in [1997] 105 STC 580 (SC) – three members bench;

12. In the above decisions Ben Gorim Nilgiri Plantations Co. and Mohammed Serajuddin cases are related to the interpretation of Article 286(1)(b) of the Constitution prior to amendment and after amendment to the Constitution (Sixth Amendment) w.e.f. 01.11.1956 and prior to insertion of sub-section (3) of Section 5 of the CST Act respectively. J.V.Gokal & Co. Pvt. Ltd. And Devar & Co. cases are related to High-Seas sales i.e. sale in the course of import by the transfer of doucuments to the title of goods before the goods crossing the customs frontiers of India. Binani Brother Pvt. Ltd., Indian Explosives Ltd., Minerals & Metals Trading Corporation of India Ltd., and Kotak Co. cases are related to sale in the course of import based on the actual users import licenses being used. Thus, the case laws having a direct bearing on the factual matrix of the present appeals are K.G.Khosla & Co. (P) Ltd., Embee Corporation, The Indure Ltd. And K.Gopinathan

Nair/Cashew Corporation of India cases cited supra. The Hon'ble Apex Court in K.Gopinathan Nair vs. State of Kerala/Cashew Corporation of India vs. State of Karnataka reported together in [1997] 105 STC 580 (SC) (three members bench); has analyzed all the leading cases in its majority decision (speaking through his lordship Justice Sri S.B.Majmudar) at paragraphs No.08 to 17 of the said decision reported in 105 STC 580 at paragraph No.18, the Hon'ble Apex Court in the light of the settled legal position emerging from the constitution bench decisions of the Apex Court has laid down the following propositions for deciding whether the concerned sale or purchase of goods can be deemed to take place in the course of import as laid down by Section 5(2) of the CST Act, 1956. The said propositions are as under:-

> (1) "The sale or the purchase, as the case may be, must actually take place.
>
> (2) Such sale or purchase in India must itself occasion such

import, and not vice versa, i.e. import should not occasion such sale.

(3) The goods must have entered the import stream when they are subjected to sale or purchase.

(4) The import of the concerned goods must be effected as a direct result of the concerned sale or purchase transaction.

(5) The course of import can be taken to have continued till the imported goods reach the local users only if the import has commenced through the agreement between foreign exporter and an intermediary who does not act on his own in the transaction with the foreign exporter and who in his turn does

not sell as principal the imported goods to the local users.

(6) There must be either a single sale which itself causes the import or is in the progress or process of import or though there may appear to be two sale transactions they are so integrally inter-connected that they almost resemble one transaction so that the movement of goods from a foreign country to India can be ascribed to such a composite well integrated transaction consisting of two transactions dovetailing into each other.

(7) A sale or purchase can be treated to be in the course of import if there is a direct privity of contract between the Indian importer and the foreign exporter

> and the intermediary through which such import is effected merely acts as an agent or a contractor for an on behalf of Indian importer.
>
> (8) The transaction in substance must be such that the canalizing agency or the intermediary agency through which the imports are effected into India so as to reach the ultimate local users appears only a as mere name lender through whom it is local import-cum-local user who masquerades."

13. The concept of integrated transactions is prominent in case of imports and exports, as these involve a triangular transaction much in the same way as a lease does. The importing agent normally makes an import on the basis of an order of a local buyer. Similarly, an exporter gets an export order and makes purchase for that reason. Further, the word "occasions"

has also been used in Section 5 of the CST Act. The Hon'ble Supreme Court has held in *K.G.Khosla & Co. (P) Ltd., vs. Deputy Commissioner of Commercial Taxes"* cited supra as under:-

> "Movement of goods from Belgium to India was in pursuance of the conditions of the contract between the assessee and the Director-General of Supplies. There was no possibility of those goods being diverted by the assessee for any other purpose. Consequently the sales took place in the course of import of goods within Section 5(2) of the Act and were therefore exempt from taxation."

If the aforesaid conditions are satisfied, then the transaction of sale or purchase will fall within the sale of purchase in the course of import and accordingly will earn exemption under Section 5(2) of the CST Act. But if on the contrary the transactions between the foreign exporter and the

local user in India get transmitted through an independent canalizing-import agency which enters into back to back contracts and there is no direct linkage or causal connection between the export by foreign exporter and the receipt of the imported goods in India by the local users, the integrity of the entire transaction would be disrupted and would be substituted by two independent transactions-one between the canalizing agency & the owner of the goods imported and the other between the import canalizing agency and the local users for whose benefit the goods were imported by the wholesale importer being the canalizing agency. In such a case the sale by the canalizing agency to the local users would because of or by the import which would not be covered by the exemption provision of Section 5(2) of the CST Act."

10. It may also be recorded that the Tribunal thereafter proceeded further to examine the aspects of sale vis-à-vis the movement of the goods from foreign

vendor to the course of import observed from paragraph.14 to 22 as under:

> **"14.** In order to decide in the present appeals whether the sale by the appellant has occasioned the movement of goods from the foreign vendor in the course of import, it is necessary to analyze the Master Lease Agreement (MLA), Purchase order placed by the end customer on the foreign vendor, 'Lease Schedule' and the Acceptance Certificate and so also the Shipping Authorization letter. As stated above, the MLAs are common in all the cases and so also the purchase order, 'Lease Schedule' and the acceptance certificate. Therefore, one representative MLA is taken for consideration for the analysis. The learned counsel has relied on the MLA entered with Mphasis during the arguments and after going through all the MLAs which have been submitted, the MLA entered with M/s. Logica CMG Private Limited with

Registration number: JTA/PS/23830/CN21/2003 of Divyasree Technopolls, 124-125 Yemlur P.O. Off Airport Road, Blore – 37 is taken for analysis & reproduced hereunder:- xxx xxx xxx

15. It is pertinent to note that under Clause 2 of the MLA with a caption 'rental procedure', envisages the provisions of the schedule namely the leasing schedule will prevail over the provisions of the MLA to the extent of any inconsistency between them. It is also to be noted that the description of the equipment and financed items in a schedule differs from the description in the related acceptance certificate, then the appellant has the liberty to amend the schedule so that the description of the equipments and the financed items in the schedule and the acceptance certificate are consistent. Thus, it is **acceptance certificate** which is the ultimate document for the purpose of entering into the leasing schedule as per

Clause 2 of the MLA by the appellant. Clause 3 of the MLA defines the acceptance certificate and the same has to be issued to the appellant in the format of Exhibit – B as prescribed in the MLA. Only after issuance of acceptance certificate, the 'Lease Schedule' comes into existence. The end customer places purchase order not on the appellant but on the foreign vendor and in the case of **Logica CMG**, who being the end customer has placed purchase order on M/s. Tech Pacific (India) Exports Private Limited, 60, Alexandra Terrace, 61-01, The Comtech, Singapore – 118502 wherein the description of the equipments are present. This purchase order mentions at the bottom against payment as per the leasing agreement signed between Logica CMG India and HPFS the appellant and the payment is to be done by the HPFS(not the lease schedule but MLA). It is to be noted that there are two schedules the first being Exhibit-A1 which is a financing schedule

and Exhibit-A2 which is the leasing schedule. The appellant has submitted the copies of only the leasing schedule but not the copies of the finance schedules. In many of the MLAs, three schedules are being mentioned as Exhibit-A1 to A3 and the same has been defined under Clause 26 under 'Definitions and Interpretation'. Exhibit A3 is relating to charged finance item and Exhibit-A1 and A2 are 'Lease Schedule' and 'Financing Schedule' respectively. In the instant case in the financing schedule the value of the goods in US dollars is mentioned and within the brackets, the value in the Indian rupees is mentioned along with the rent for financing. The shipping authorization letter which has been heavily relied upon by the appellant is nothing but the letter showing the appellant as financial guarantor and nothing more else. After the placement of the purchase order by the end customer on the foreign vendor, the journey of goods commences from the foreign

destination to the Indian destination in the name of the end customer only even though the name of the appellant appears with respect to billing. It is the end customer who clears the customs formalities and takes physical delivery of the goods and transports the same to his location. After due inspection of the goods and after due testing of the equipments imported on the strength of the purchase order placed by him i.e. the end customer, the acceptance certificate is issued in the form of Exhibit-B as envisaged under Clause 3.1 of the MLA. Only after the issuance of the acceptance certificate, the 'Lease Schedule' is entered into as Master Rental and Financing Agreement' (MR & FA). Before inking the Lease Schedule, the end customer is bound to **novate** by transfer or assignment of the purchase documents in favour of the appellant. For this purpose, it is essential to look into the 'Acceptance Certificate' and 'Novation Notice'. The specimen copies of the same in respect to

the above mentioned agreement is reproduced hereunder:- xxx xxx xxx

16. It is pertinent to note that only after issuance of acceptance certificate, lease acceptance and financing acceptance, Master Rental and Financing Agreement (MR & FA) as supplementary agreement to the MLA comes into existence. This fact is evident from the definition/interpretation of the expression 'purchase documents' appearing under Clause 26 of the MLA which defines the same as any agreement or other documentation between the end customer and the supplier of equipment relating to the purchase, ownership, use or warranty of equipment to be subject to a lease. The relevant clauses are selectively picked up from the MLA and reproduced hereunder:- xxx xxx xxx

Thus, the right on the goods lies with the end customer till the acceptance certificate is issued followed by the novation

notice. By virtue of acceptance certificate and novation notice, the rights on the goods gets transferred to the appellant and till then the rights over the goods wrests with the end customer only. In-fact in the MLA as pointed out by the FAA and AA, the description of leased equipments are not forthcoming and the appellant is not aware of the goods to be leased till the purchase order is placed by the end customer on the foreign vendor. The appellant stands as financial guarantor only. 'In the course import' commences from the journey of the goods from the foreign destination and ends with the physical delivery being taken up by the end customer. Thus this being the first transaction which breaks after due location of the equipments in the nominated premises of the end customer. The second transaction commences after acceptance of the goods/equipments by the end customer after due inspection and testing followed by issuance of acceptance certificate and

novation notice followed by signing the 'Lease Schedule' ie the supplementary 'agreement not intrinsically linked to the Master Lease Agreement. The novation changes the expression 'we or us or our' and 'you or your' which denotes the appellant and the end customer respectively in the MLA gets reversed after "novation". After novation only, the end customer is identified as 'we or us or our' whereas, the appellant is identified as 'you or your'. In furtherance to the same, under Clause 16 of the MLA with the caption 'Renter Acknowledgements', the sub-clauses (b) to (g), clearly emphasizes that the selected equipment and financed item is without the assistance of the appellant, the appellant has not made any representation or warranty about the condition, quality, fitness for purpose etc, the appellant is not liable for any representation or warranty made by the supplier of any equipment or financed items and the appellant in noway responsible for

any of the equipments imported by the end customer except for financing and the appellant appears in the leasing scenario only after the execution of the supplementary agreement namely the lease schedule. Thus the factual matrix present in the present case clearly proves that there are two independent transactions even thought the contract is back to back contract which cannot be considered as an integrated transaction in the course of import and hence the transaction does not fall under the purview of Section 5(2) of the CST Act.

17. The appellant submits that the transactions effected by him squarely fits into the factual matrix prevailing in the *Karnataka Bank Limited* case cited supra decided by the *Hon'ble Madras High Court* by its judgment dated 30th September 2011. The factual matrix available has been narrated by her lordship at paragraphs Nos. 10 and 11 of the said decision. The

comparative matrix is distinct from the present case. In order to illustrate the same, the chronological events vis-à-vis prevailing in the present case is analyzed hereunder:-

(A). Karnataka Bank Limited case factual matrix:

(i). Hindustan Power Plus Ltd. – Lessee – purchase order on foreign vendor dated 14th July 1997;

(ii). Lessee requests to place PO on overseas supplier and assessee placing PO on foreign vendor on 05th April 1998;

(iii). Letter correspondence with the assessee i.e. Karnataka Bank for finance dt. 10th April 1998;

(iv). Master Lease Agreement entered between the Karnataka Bank and the lessee is dated 17th April 1998;

(v). Supplementary lease agreement dated 31st July 1998.

(B). ***Factual matrix prevailing in the present appeals:***

(i). Lessee M/s. Logica CMG Pvt. Ltd – PO placed on foreign vendor namely M/s. Tech Pacific, Singapore is dated 28th October 2005.

(ii). Letter correspondence with the appellant for finance – Not revealed/Not available.

(iii). Lessee's request to place PO on overseas supplier – No such request is

made and PO by the appellant is not placed on foreign vendor.

(iv). Master Lease Agreement (MLA) dated 10th May 2005.

(v). Acceptance certificate dated 15th December 2005.

(vi). Novation notice dated 15th December 2005.

(vii). Leasing schedule coming into existence by inference based on acceptance certificate and novation notice – dated 15th December 2005.

The comparative analysis clearly reveals that in the instant case, the appellant has not placed any purchase order as such on overseas supplier and the master lease agreement is prior to the purchase order placed by the end customer on the foreign vendor and the supplementary lease agreement or lease schedule is subsequent to the

issuance of acceptance certificate followed by novation which are on the same day. Thus, the case law of Karnataka Bank Limited is not applicable in the case of the appellant because of the different scenario prevailing so far as facts are concerned.

18. The reliance place by the appellant on *The Indure Limited case* cited supra is not applicable for the fact that the transaction between exporter i.e. foreign vendor and the buyer i.e. the end customer is not inextricably connected with the appellant's Master Lease Agreement in any manner and there exists two independent transactions, the first being with the foreign vendor and the end customer and the second being with the end customer and the appellant. These two are not inextricably linked to each other so as to the entitlement for exemption u/s. 5(2) of the CST Act. In the same manner, *Embee Corporation* case cited supra is also not applicable for the

same reason that the occasioning of import does not result in the purchase of goods/equipments by the appellant. Further, the advance rulings relied upon by the appellant is not applicable in the present case since the factual matrix is distinct. Hence, the transactions effected by the appellant are not covered by the exemption clause as envisaged u/s. 5(2) of the Act.

19. Even by following the minority opinion of *K.Gopinathan Nair vs. State of Kerala/Cashew Corporation of India vs. State of Karnataka reported together in [1997] 105 STC 580 (SC) (three members bench)*, the transactions effected by the appellant can not be construed as an integrated transaction. The dissenting opinion was given by her lordship Ms.Sujata V.Manohar (J.) who emphasized that:

"this seldom happens in the case of imports whenever the local seller imports the goods as per the specification of a specific local

buyer and on the mutual understanding between the local buyer and the local seller that the goods so imported by the local seller will be purchased by the local buyer. There is in such cases, a direct link between the local sale and the import. In fact it is this mutual understanding between the local buyer and the local seller which occasions the import". Proceeding further it was opined by her lordship as under:

"If we apply this test of inseverable link between the local sale and import to the transaction in the present case, it is clear that the local sale which is between the assessee and the cashew corporation of India is inextricably linked with the import of cashewnuts by the cashew corporation of India. In the first place, the very scheme of canalization in the present case envisages that the cashew corporation of India ascertains the exact requirements of the former importer who are now required to

secure their supplies through the canalizing agent. Orders of import which are placed by the cashew corporation of India are in exact terms of the requirements of each of the allottees and are a sum total of these requirements. There is a specific allocation of each lot before it is shipped from the foreign port, in favour of each of the allottees. The local purchaser has to clear the allocated goods on their arrival. Even a subsidiary licence is issued in favour of the local purchaser. The price of imported cashewnuts is paid by the local purchaser. The cashewnuts is paid by the local purchaser. The cashew corporation of India is only paid a commission. There is thus a clear allocation of the goods being imported in favour of the local purchaser and there can be no question of the diversion of the import to anybody else. The cumulative effect of this arrangement is: it is the specific requirement of local purchaser which has led to the specific requirement of local purchaser

which has led to the specific import. Whether the actual sale takes place before the import or after the import is irrelevant is this context".

If the same test is applied in the present context, then it could be seen that the appellant has not imported goods/equipments from foreign vendor but it is the end customer's purchase order occasions the sale in the course of import and the same is completed after taking delivery of goods/equipments. This is the first transaction. The second being the novation of the imported goods by issuance of acceptance certificate & novation notice. Then only the Lease Schedule agreement is inked. Thus there does not exist any inseverable link in the transactions effected by the appellant.

20. Thus following the ratio laid down by the Hon'ble Apex Court in Cashew

Corporation of India / K.Gopinathan Nair case cited supra, the leasing transactions effected by the appellant is not in the course of import as there is no occasioning the movement of goods from the foreign vendor at the instance of the appellant and thereby leasing the same to end customer does not fall under the purview of 5(2) of the CST Act. Once it falls outside the purview of Section 5(2) of the CST Act, the concerned transactions are nothing but 'sale' falling under Section 2(29) of the KVAT Act 2003 and the turnovers qualifies as taxable turnover as per Section 2(34) of the KVAT Act and thus chargeable for VAT in the State.

21. Coming to the issue of levy of penalty and interest, it is observed that the appellant infact had not declared taxable sales at all during the impugned tax periods of April 2005 to March 2013. This fact has been admitted under the sequence of the

events available on STA No.2063/2014. The relevant paragraph is reproduced hereunder:

"The appellant, during a periodic review of returns filed, observed that lease transactions were inadvertently not disclosed the returns. In relation to the same, a letter was filed with the Assessing Authority stating that the turnover pertaining to the several types of transactions were inadvertently not disclosed in the returns filed for the relevant period. A copy of the letter is enclosed as Annexure-2 (the appellant's letter dated 19th June 2013 running from page Nos.101 to 122).

Based on such a review, the appellant suio-moto discharged the output tax of Rs.6,55,52,252/- along with applicable interest of rs.2,00,49,695/- for the period of April 2005 to March 2013. The appellant requested the same be considered as voluntary disclosure in compliance with the provisions of the KVAT Act as the time

limit for filing a revised return as per Section 35(4) had expired.

Based on the above submissions made by the appellant, a letter of endorsement was issued by the Assessing Authority dated June 19, 2013. The appellant filed its return response to the above mentioned letter vide its letter dated June 26, 2013 providing the above mentioned details.

A copy of the letter is enclosed as Annexure-3 (The said annexure is available from page nos.123 to 130).

This fact is present only in STA No.2063/2014 and not disclosed or narrated in any other STAs under consideration. While doing so, the appellant has taken shelter so far as the import transactions which is claimed as sale in the course of import which has been answered against the appellant as narrated in detail in the above paragraphs under Point no.1. It is not known whether such interest paid is in accordance with law since the AA has not dealt

that matter in the impugned reassessment orders. The reasons for not having disclosed such huge taxable turnover is not made known except stating that the same is detected during the periodic review. The periodic review for the years 2005-2006k, 2006-2007, 2007-2008, 2008-2009, 2009-2010, 2010-2011, 2011-2012 and 2012-2013 has taken place after March 2013. This means the tax to be paid for the year 2005-06 has been paid after a lapse of nearly 7 to 8 years which cannot be considered as inadvertent mistake. The appellant under goes statutory audit u/s.44-AB of the Income Tax Act, 1961 and also mandatory to submit Form VAT 240 from its inception. When such being the case, it is strange to note that the lower authorities have not taken cognizance of such omissions and have not given any definite finding on the admission of interest paid voluntarily by the appellant. In these circumstances, it is not possible to accept the version of the appellant that the mistakes are inadvertent and the interest as per Section 36 of the KVAT Act, 2003 is mandatory and the

imposition of interest is valid. So far as penalty is concerned as there is under statement of tax liability by not admitting the tax at all on the disputed transactions claiming that the same are liable for exemption is not acceptable proposition. Even the tax avoidance is also to be penalized on equal footing as tax evasion or suppression. As the question of mens-rea is not requisite condition for the imposition of penalty u/s. 72(2) of the Act, the penalty imposed has to be upheld. In this regard, the reliance is placed on the decisions of the Hon'ble Supreme Court rendered in the cases of Guljag Industries vs. Commercial Tax Officer reported in (2007) 09 VST 1 (SC) and Assistant Commercial Tax Office vs. Bajaj Electricals Limited reported in (2008) 18 VST 436 (SC). Infact, the Hon'ble Supreme Court has distinguished the D.P.Metals case (2001) 124 STC 611) in Guljag Industries case cited above. In view of the above facts, the levy of interest and penalty has to be held as correct."

> **22.** In view of the above detailed discussion, it has to be held that the orders of the AA and FAA are correct and thereby Point No.1 is answered in the negative."

11. We may record that in the above referred portion, we have extracted only the observations made by the Tribunal and excluded the reproduction of conditions of MLA so as not to burden the record. However, at the appropriate stage, the same shall be referred by us.

12. The above referred observations made by the Tribunal more particularly the factual matrix of the present petitions referred to by the Tribunal and thereafter, findings recorded by the Tribunal shows that the Tribunal found that the requirement for getting exemption is dependent upon inextricable link to the import from the foreign vendor and the customer and

further with the end customer and the petitioner. The Tribunal has specifically taken note of the fact that as the link is not established or proved by the petitioner and hence not covered by the exemption clause as envisaged under Section 5(2) of the Act.

13. If the scope of judicial scrutiny in the present petition is considered, it has to be limited to the question of law and it cannot be extended to the question of fact. The Tribunal upon re-appreciation of the evidence namely of various documents produced on behalf of the petitioner and after having taken note of the fact that certain relevant documents are not produced, has found that the link between the two i.e. the import and the transaction of lease is not established. In our view, when the matter falls in the arena of appreciation and re-appreciation of the documents pertaining to transactions entered into by

the petitioner with its customer, the same can be said to be the questions of facts examined and concluded by the Tribunal, such questions of facts cannot be gone into in the petitions before this Court which is limited to the questions of law.

14. However, the learned counsel appearing for the appellant made an attempt to contend that it is not a mere question of fact considered and examined by the Tribunal and the finding of fact is recorded. But, in his submission, it is a mixed question of law and fact. Therefore, the judicial scrutiny may be available even in the present petition. It was also submitted by the learned counsel for the appellant that if the finding recorded by the Tribunal is perverse to the record of the case, such would also fall under the judicial scrutiny of this Court in the present petition. He submitted that, the purchase order which was already produced is not

considered and the Tribunal has recorded a finding on the premise that the appellant has not placed any purchase order on the oversees supplier. It was also submitted that all documents produced pertaining to the transactions right from MLA till rental agreement is entered into between the petitioner and the lessee were produced. The Tribunal failed to consider the same and has recorded a finding which is not supported by the document or has recorded finding ignoring the documents produced on record and therefore, the learned counsel submitted that such being the situation, the judicial scrutiny would be available to this Court in the present petition.

15. He submitted, under these circumstances, this Court may further examine and thereafter, if the only one view is available or only one possible view is available then, the finding of the Tribunal can also be

said to be perverse which may be interfered with by this Court.

16. In order to consider the aspects as to whether the view or decision or the only one view is possible and the view taken by the Tribunal can be said to be perverse or not, we have permitted the learned counsel appearing for the petitioner as well as for the respondent to make the relevant record of the case available for supporting the contention.

17. It is true that, master lease agreement is entered into between the petitioner and the customer. The Tribunal in para.14 of the Judgment has reproduced the master lease agreement but, nothing is paid by the customer to the appellant by way of part consideration or by way of advance in furtherance to the master lease agreement or even at the time when master

lease agreement is entered into. We are conscious of the fact that, payment of any part consideration or advance is not a *sina qua non* but, at the same time, it may be one of the aspects when we consider totality of the circumstances for appreciating the case of the appellant and the genuineness thereof.

18. Learned counsel for the petitioner during the course of hearing has produced a compilation which, as per him was also produced before the Tribunal pertaining to the transaction by the petitioner with its customer i.e. M/s.Mphasis Ltd., (hereinafter referred to as 'the customer') wherein, in the said compilation at page.13 the bill is stated to be in the name of the petitioner whereas the shipping address is stated as that of customer.

19. In the very compilation, the material documents are produced which is not very legible but, the same in any case shows that the importer is the customer i.e. Mphasis Ltd., and not the appellant herein. If the said aspect is considered with the condition of subsequent master rental and Financing Agreement copy where of is also produced in the said compilation. Condition No.7 *inter alia* under the head of import concession reads as under:

> "**Import Concessions:**
>
> (a) You represent and warrant that:
>
> (i) (for the purposes of the Indian Export Import Policy 2002-2007 or any replacement policy (the `EXIM Policy) you are a company that is eligible to be set up under th Export Orientated Unit Scheme, the Export Processing Zone Scheme, the Electronic Hardware Technology Park Scheme, the Export Promotion Capital Goods Scheme or a similar scheme instituted by the Indian Government (or any state government) under which you afforded concessional customs and/or excise

treatment (hereinafter referred to as a "Scheme"), and

(ii) you are consequently authorized (under the EXIM Policy, the Customs Act, 1962, the terms of the applicable Scheme and any other applicable law), to import equipment (including the Equipment leased under this Schedule) into India at a nil rate of duty or of a concessional rate of duty (as determined by the rules applying to the applicable Scheme).

(b) You represent and warrant that you have complied and will continue to comply with all of the requirements of the EXIM Policy, the requirements of the applicable customs authorities, the requirements of any other authorities, the rules of the applicable Scheme and all applicable laws in India that apply in respect of the import of the Equipment as describedin paragraph (a) above. You acknowledge and agree that you will have sole responsibility to administer the import of the Equipment into India and shall comply with all applicable laws in the course of such import.

(c) Without limiting the generality of clause 15 of the Master Agreement you unconditionally undertake to indemnify us for any claim arising directly or indirectly out

of or in connection with any matter involving this clause.

(d) You additionally undertake to pay any duty that becomes payable in respect of the Equipment immediately upon the liability to pay that duty arising. We may (but are not required to) pay such duty onyour behalf in the event that you fail to do so. You unconditionally indemnify us against any Claim that we suffer or incur as a result of exercising our rights under this clause or otherwise in respect of the payment or non-payment of customs duty.

(e) In the event that, under the Master Agreement, you are obliged to return the Equipment to us or we are entitled to repossess the Equipment from you, you will cooperate with us and immediately comply with all of our directions in order to ensure that the Equipment is promptly removed from the Equipment location. Without limiting the generality of the foregoing, your obligations under this clause include filing with any relevant governmental authority all requests necessary to facilitate the legal removal of the Equipment from the Equipment Location.

(f) You represent and warrant that, pursuant to all applicable laws and the requirements of the applicable Scheme, you

are permitted to use the Equipment at the Equipment Location."

20. Two aspects need to be emphasized; One is that, under the Customs Act, it is the consumer is shown as the importer. The second is that, as per the above referred condition and the import concession, the customer has claimed the exemption or Nil Duty as per the said scheme since the goods are to be used for 100% export oriented scheme. The aforesaid two aspects show that, so far as the Customs Act is concerned, the customer or the so called lessee is the person who is to claim benefit of exemption from duty or concessional rate of duty, as if the customer is the owner of the goods and since he has to utilize the goods for export oriented unit scheme. It is not the case of the petitioner that it has established any project of export oriented unit scheme nor it is the case of the appellant

that the goods are imported by the appellant which satisfies the requirement of Exim Policy for liability to pay duty, nil duty or concessional duty under the Customs Act. If the contention raised by the petitioner that it is the petitioner who has imported the goods in capacity as the owner of the goods and the contention is tested up to its logical end, it may dis-entitle the petitioner to claim any benefit of the duty under the Customs Act since it is not going to use those goods for itself in export oriented unit scheme and at the same time, the customer may not be entitled for the benefit of the scheme because customer is not the owner of the goods as per the say of the petitioner and it is the petitioner who is the owner of the goods. It is hardly required to be stated that if the importer is importing the goods on behalf of somebody, naturally, the principal shall be entitled to the benefit. Further, the

customer has not acted as a clearing agent at the customs but the customer in the present case themselves have imported the goods. We may not be understood to mean that we have expressed any view on the aspects of liability to pay any customs duty for the entitlement of exemption of the duty as the case may be. But in order to test the submission as to whether indivisible link of the transaction is broken or divided or the relationship as that of lessee or lessor is defeated or not the aforesaid observations are made. Even if we proceed on the basis that master lease agreement was entered into may be in the absence of any advance payment made or any part consideration paid, then also, so far as Customs Act is concerned, the relationship is severed in as much as, the customer is shown as the owner and only the payee of the consideration is shown as that of the petitioner.

21. Apart from the above, the documents which are made available by the Revenue which, as per him were also part of the record pertaining to the transaction by the petitioner with IGS Imagining Services (India) Pvt. Ltd., shows that the purchase order is placed by the customer i.e. IGS imaging Services (India) Pvt. Ltd., and in the payment terms it has been mentioned as under:

> "Payment through H.P.Financial Services as per our agreement on lease".

The aforesaid in our view can be termed that the customer in capacity as the buyer has placed the order with the foreign company for the purpose of importing of the goods and payment is only to be made by the appellant. To put in other words, the customer is the owner of the goods and the petitioner is only extending

financial services for the payment of the price of the goods.

22. If both the documents are considered, the situation resultant would be that after MLA is entered into between the appellant and the customer, the relationship of the ownership of the goods to be imported is severed at the time when the goods are to be imported from the foreign country, in as much as, the customer is the owner and the petitioner has made the payment on and behalf of the owner of the goods. The aforesaid position is until the goods have crossed the customer frontier of the Country.

23. As per the petitioner, after the goods are inspected and acceptance report is submitted by the customer, master rental and financial agreement is entered into for the lease of the goods. The relevant

aspect is that after the goods cross the customer frontier of the country, the transaction of not only acceptance of the product but the ownership of the goods imported vide the purchase order is re-entrusted by the customer to the petitioner and it is only thereafter, the master rental and financing agreement is entered into between the petitioner and the customer. The entrustment of the ownership and the entering of the lease agreement after the products are on Indian territory both can be said as substantial novation of the first agreement because after the so called MLA agreement is entered into, the relationship as that of the leassor and the lessee is severed and is shown as that the customer being the owner and the petitioner being rendering only finance. Thereafter, on account of the again novation of the contract, the ownership is

entrusted by the customer to the petitioner and then the rental lease agreement is entered into.

24. If the aforesaid is considered with the broad reasons recorded by the Tribunal, it is not possible to accept the contention of the learned counsel for the appellant that the finding recorded by the Tribunal for division of the link and non-satisfying of both the conditions is the only view which could be possible. As such, as observed by us hereinabove, if we consider the material produced taking a lenient view that it was mixed question of law and fact, therefore, wider scrutiny, then also in our view it can be said to be a finding of fact by the Tribunal which cannot be said to be impermissible view but rather can be said to a possible view.

25. We may now consider the decision upon which the reliance has been placed by the learned counsel for the petitioner. In the case of ***State of Tamil Nadu Vs.. Karnataka Bank Ltd.,*** the decision of Madras High Court reported at (2012) 50 VST 93 (Madras), the Court had no occasion to consider the division of the relationship and the link between the assessee and the customer when the goods were imported. The Court had no occasion to consider the aspects of entrustment of the ownership by novation of the contract as in the present case. Therefore, we find that the said decision is of no help to the petitioner.

26. Learned counsel for the petitioner also relied upon the decision of a co-ordinate Bench of this Court in case of Canara Bank vs. State of Karnataka in STRIP 82/05 decided on 24.11.2006. In the said case also, as observed by us hereinabove, the question did not come

up for consideration for division of link and change of status as that of owner and therefore, we do not find that the said decision would be of any help to the petitioner.

27. In the decision of the Apex Court in case of Indurev Ltd. and another vs. Commercial Tax Officer and others reported (2010) 34 VST 509(SC) it was a case where the transaction was found to be of sale in the course of import which pre-supposes the continuation of the relationship of the purchaser and the seller and the facts of the present case cannot at all be equated with the facts of the said case considered by the Apex Court. Therefore, the said decision cannot be applied to the facts of the present case.

28. In another decision of the Apex Court in case of 20th Century Finance Corporation vs. State of

Maharashtra reported at (2000) vo.119 STC 182, it is true that the observations were made keeping in view the provisions of Constitution limiting the power of the State to impose tax beyond its territorial jurisdiction but as observed earlier in the present case, the transaction of novation substantially altering the status of the owner of the goods, has taken place within the territory. Hence, it is not possible for us to apply the provisions of the Constitution more particularly when the facts of the present case are un-comparable with the facts of the case before the Apex Court.

29. In view of the aforesaid observation and discussion, it cannot be said that the Tribunal was not right in holding that the petitioner is not entitled to exemption under Section 5(2) of the Central Sales Tax Act, 1956. We do not find that the order of the Tribunal

deserves to be interfered with. The questions raised are held against the assessee and in favour of the revenue.

All petitions are disposed of. Considering the facts and circumstances of the case, no order as to costs.

So far as the question of law are concerned, the same position will prevail in connected STRP 412/15. Hence, ordered accordingly.

Sd/-
JUDGE

Sd/-
JUDGE

Sk/-