

TAX JURISPRUDENCE
CASE LAWS
VALUE ADDED TAX
AND
GOODS & SERVICE TAX

BY

Govind Reddy M

Barrister -at-Law(Lincoln's Inn)

Former –Solicitor(England and Wales)

Decision

- A decision is only an authority of what it actually decides and what is the essence is its ratio, but not every observation found therein or what logically flows from it. Air 1968 SC 647.
- A little difference in facts or additional facts may make a lot of difference in the precedential value of the decision. 2003 2 SCC 111.

Charging section

Section 4 of APVAT Act/ section 9 and 10 of GST

- There are three stages in the enforcement of taxing statutes – (1) Levy (2) Assessment and (3) Collection. Collection of tax without assessment and assessment of tax without levy are illegal.
- No one can be taxed by implication. A Charging section has to be construed strictly. If a person has not been brought within the ambit of charging section by clear words, he cannot be taxed at all -see CWT v. Ellis Bridge Gymkhana. (1998) 1 SCC 384 (SC)

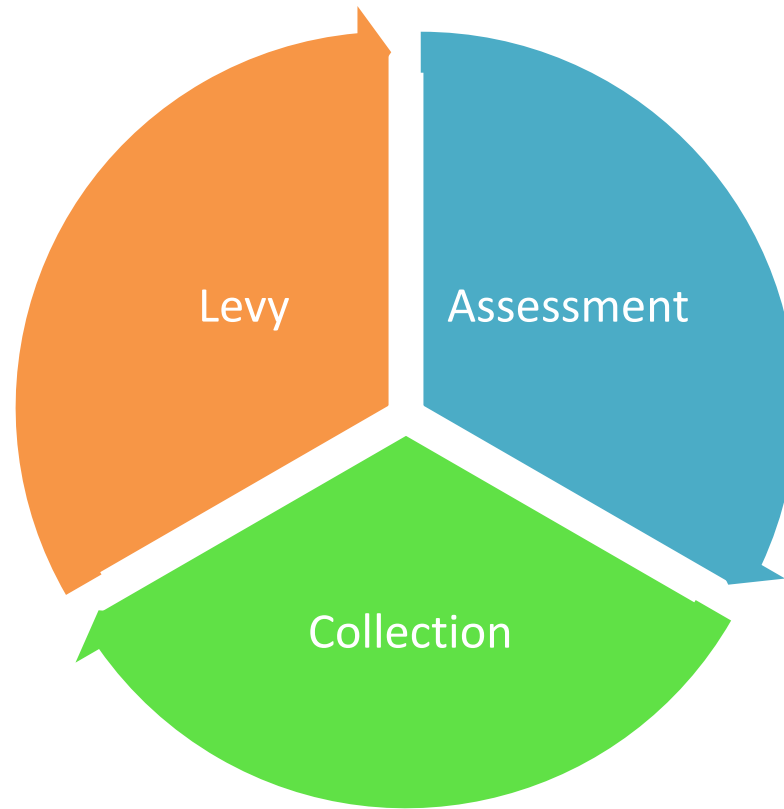
Charging section

The components which enter into the concept of the tax are well known

Govind Saran Ganga Sran 1985 Air (Sc) 1041

- Taxable event attracting the levy
- Clear indication on whom levy is imposed and who is obliged to pay
- Rate at which is to be paid.
- Measure or value to which rate will be applied

Three Stages in Enforcement of Taxes Statues



Assessment

- Assessment means quantification of the sales and sales tax payable on sales made by a dealer (of course within the period fixed under the statute) and verification of correctness of the returns submitted by him. Assessment may also be defined as determination of taxable turnover and tax payable by an assessee. In the case of *STO v. Sudarshanam Iyengar and Son* (1970) 25 STC 252 (SC), hon'ble Supreme Court observed that – “The appropriate dictionary meaning of the word ‘assess’ which is estimate, to fix tax.

Assessment of VAT dealer is taken up in following 3 instances.

1. When the VAT dealer fails to file return in respect of any tax period within the prescribed time.
2. Where the return filed by the VAT dealer appears to be incorrect or incomplete or where the authority prescribed is not satisfied with the return filed.
3. Assessment can be taken up on a detailed scrutiny of the accounts of a VAT dealer basing any information available or on any other basis.

Assessment

Assessment Under GST

- a) When the taxable person is unable to determine the value of Goods or service or both
- b) Same as 2 above
- c) Assessment for non filers of returns.
- d) Audit/Special audit

Reassessment

Under the APVAT Act & Rules, reassessment can be done in two instances.

1. When the assessment done does not indicate the correct tax liability and
2. When rectification of assessment is needed on account of Clerical or arithmetical mistakes which are apparent from record

Definition of Business similar and/or identical in both VAT & GST

Business

- Any Trade, Commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture whether or not such trade, commerce, manufacture, adventure or concern is carried on or undertaken with a motive to make gain or profit and whether or not any gain or profit accrues there from;
- Any transaction in connection with, or incidental or ancillary to such trade, commerce manufacture, adventure of concern and
- Any transaction in connection with commencement or incidental or ancillary to the commencement or closure of such trade commerce manufacture, adventure or concern ;

- In Member, Board of Revenue v Controller of Stores AIR 1989 SC 1468 = (1989) 74 STC 5 (SC), it has been held that any activity which is included or ancillary to the main business also constitutes business and thereby the person engaged in such business becomes a dealer. Any transaction in connection with or incidental or ancillary to the main business would constitute 'business' even though the transaction by itself may not have the characteristics of business as understood in ordinary parlance State of Tamilnadu v Binny Ltd, (1982) 49 STC 17(SC) (in other words, ingredients of frequency, continuity etc. Would not be necessary

- In State of Gujrat v Raipur Manufacturing Co Ltd (1967) reported in 19 STC, it was held that normally, to constitute a 'business', there should be volume, frequency, continuity and regularity in transactions of sale. Transaction must ordinarily be entered into with a profit motive, though profit need not be in fact earned.

GOODS :

- Vat Act: goods means every kind of movable property other than news papers actionable claims stocks and shares, includes growing crops, grass, and things attached to or forming part of the land which are to be severed before sale or under contract of sale”

GST : includes Actionable Claim while money and securities are excluded

Services:

Services means anything other than goods Article 366 (26A) Constitution of India

Services Defined under GST: it excluded goods, money and securities but included activities relating to use of money or its conversion

Different types of goods :

Future, specific, ascertained and unascertained:

Future Goods are defined as – goods to be manufactured or produced or acquired by the seller after making the contract of sale.

Specific goods are defined - as goods identified and agreed upon at the time of contract of sale are made.

Ascertained goods are defined as – goods identified in accordance with the agreement after the time of contract of sale is made

In the case of State of Uttar Pradesh v UOI (2003)130 STC 1 SC, it has been held that supplying instrument/apparatus and other appliances in the premises of a subscriber, which are connected with a telephone line to area exchange is 'transfer of right to use goods and can be taxed and not used as a mere medium to transfer the magnetic waves. Subsequently, Bharat Sanchar Nigam Ltd. V Union of India, (2006), it has been held that there can be transfer of right to use' of only handset.

- However, electricity is goods for purpose of sales tax but 'supply' is different from 'sale'. Supply of electricity is service and not sale of goods for purpose of Consumer Protection Act - Karnataka Power Transmission Corporation v. Ashok Iron Works, (2003) 3 SCC 240 – following Southern Petrochemical Industries v. Electricity Inspector, (2007) 5 SCC 447,
- State of Andhra Pradesh v. National Thermal Power Corporation (NTPC), 2002) 127 STC 280 (SC).
- The electricity is goods – CST v. MPEB, (1970) 25 STC 188 (SC) (partly overruled in 2002 only to extent that it was held in 2002 judgment that electricity cannot be stored.
- Meaning of Sale defined under the VAT but in GST the word Sale is totally missing replace by the word supply:

- State of Madras v. Ganon Dunkerley & Co Ltd. (1953) 9 STC 353 (SC) that – Sale of goods is a composite expression consisting of various ingredients or elements: a bargain or a contract of sale, the payment or promise of the payment of a price, the delivery of goods, and the actual passing of property; each ingredient or element is essential to the completion of a transaction of sale. The expression ‘sale of goods’ is a nomen juris, its essential elements being an agreement to sell movables for a price, and property passing there in pursuant to that agreement.

Hon’ble Supreme Court, in the case of Indian Steel & Wire Products Ltd v. State of Madras (1968) reported in 21 STC 138, held that - To constitute a valid sale, there must be a concurrence of four elements:

1. Parties competent to contract:
2. Mutual assent
3. A thing in which the general or special property is transferred from the seller to the buyer, and
4. A price in money paid or promise
5. The two ingredients of sale, the passing of property and the payment of price need not take place at the same time.

Sale price

- Tax and duties on goods sold

The excise duty payable is includible in 'sale price' – Hindustan Sugar Mills v. State of Rajasthan, (1978) 43 STC 13.

- Packing Material and Packing Charges

Sale tax is leviable on packing material as well as packing charges. Sales Tax is leviable on Packing Charges, even is shown separately

Service Charges

If a hotel or restaurant adds a service charge to its bills, which the customer is required to pay it is part of the sale price- See Sun-n'Sand Hotel Private Ltd v. State of Maharashtra. (1969) 23 STC 507 (Bombay High Court)

Dealer

Means any person who carries on the business of buying, selling, supplying or distributing goods or delivering goods on hire purchase or on any system of payment and instalments, or carries on or executes any works contract involving supply or use of material directly or otherwise, whether for cash or for deferred payment, or for commission, remuneration or other valuable consideration and includes

- a) A company, a Hindu undivided family or any society including a cooperative society, club, firm or association which carries on such business;
- b) A society including a cooperative society, club, firm or association which buys goods from, or sells, supplies or distributes goods to its members;

- c) A casual trader, as herein before defined;
- d) Any person, who may, in the course of business or running a restaurant or an eating house or a hotel by whatever name called, sells or supplies by way of or as part of any service or in any other manner whatsoever goods, being food or any other article for human consumption or any drink whether or not intoxicating
- e) Any person, who may transfer the right to the use of any goods for any purpose whatsoever whether or not for a specified period in the course of business to any other person

- A commission agent, a broker, a declaredere agent, an auctioneer or any other mercantile agent, by whatever name called, who carries on the business of buying, selling, supplying or distributing goods on behalf of any principal (or Principals).
- Under GST Dealers not defined but it used more prolific term supplier supplying goods and services or both. Supply is defined and explained in Section 7 of GST
- Essentials requirement of a dealer :
All that is required for a person to come with the definition or a dealer is that he must carry on the business or selling and or supplying goods.

- In the case of Sanjos Parish Hospital Vs. State of Kerala (2012) 55 VST 208 Ker), hospitals are carrying on business of supply of medicine and going by the volume, frequency and continuity or regularity of transaction in regard to the purchase and sale of medicine by a hospital, it will answer the definition of 'dealer' under the Act beyond any doubt . Hospitals are liable to get themselves registered as dealers under the Kerala VAT Act 2003 and to pay tax under the said Act for the medicines and consumables sold to patients.

Government Company is not a department of Government it has separate legal existence and is not Government Concern. It is not an industry run under authority of Union Government – Praga Tools v. CV Imanual, (1969) 39 Comp CAS 889 (SC) = (1969) 1 SCC 585 * Dr. S L Agarwal v. Hindustan Steel Ltd., (1970) 1 SCC 177 (SC) Constitution Bench)

Government is 'dealer' if it carries on business of selling buying of goods etc

Customs and excise department selling confiscated goods are dealers

- It was held that customs department is liable to pay sales tax if it sales goods confiscated by it under Customs Act – view confirmed in – CC v. state of West Bengal (1999) 113 STC 167 (SC)

Railways is dealer

In Member, Board of Revenue v. controller of Stores (1989) 74 STC 5 (SC) it was held that Railways are liable to tax for sale of scrap and un-serviceable materials as well as sale of unclaimed goods; as this activity is incidental ancillary to its business as carrier of goods – similar view in controller of stories , Northern Railway v. Acto-(1976) 37 STC 423 (SC)

Club is not dealer:

Ranchi Club civil appeal No 26883/2013 and batch held that clubs are not dealers on the principle of Doctrine of Mutuality (one cannot supply for one to him self).

Definition of Works contract under APVAT Act, Either similar or nearly identical in GST

Section 2 (45) of APVAT Act defines 'works contract', as follows – works contract' means a contract for carrying out any work which includes assembling construction building altering manufacturing, processing, fabricating, erection installation, fitting out, improvement, repair commissioning of any movable or immovable property.

Tax can be only on value of material

Builders Association of India v. UOI, (1989) 73 STC 70 (SC) 5 members constitution bench) is a landmark judgment of Supreme Court on 'works Contract'. The background of this case is that after amendment to constitution in 1983, various state Governments imposed levy on works contract. The tax was levied by some State Government on full value of contract which included the material cost and other costs like labour supply of services etc.

However, in the above judgment, Hon. Supreme Court held that power of states to levy tax on works contract is subject to limitation of Article 286 i.e. tax cannot be levied by state on a sale on (a) outside the state (b) during import/export. (c) restrictions placed on declared goods' are applicable even while levying tax is on 'transfer of property in goods involved in execution of works contract.' Thus tax on works contract can be levied only on 'value of goods involved' and not on whole value of works contract.

Deductions permissible while calculating 'value' for purpose of tax

Gannon Dunkerly & Co v. State of Rajasthan, (1993) 88 STC 204 (SC 5 member bench judgment) is another important judgment on 'works contract'. Here it was held that taxable event is the transfer of property in the goods involved in the execution of a works contract. The said transfer of property takes place when goods are incorporated in the works. Hence value of goods at the time of incorporation in the works can constitute measure for levy of tax. However, cost of incorporation of the goods in works contract cannot be made part of measure for the levy of tax. It was held that value of goods involved in the works contract would have to be considered for taxation on works contract. Charges for labour and services have to be deducted from total value of works contract.- Profits relatable to supply of material can be included in value of goods and profits which are relatable to supply of labour and services are to be excluded.

In the afore said judgment, it was held that value of goods involved in the execution of a works contract will have to be determined by taking into account the value of entire works contract and deducting therefrom the charges toward labour and services, which cover – (a) Labour Charges for execution of the works (b) Amount paid to a sub contractor for labour and services (c) charges for planning , designing and architect's fees (d) Charges for obtaining on hire or otherwise machinery and tools use for the execution of works contract (e) cost of consumables such as water, electricity, fuel etc., used in the execution of works contract, the property in which is not transferred in the course of execution of a works contract in which is not transferred in the course of execution of a works contract (f) cost of establishment of the contractor to the extent it is relatable to supply of labour and services (g) other similar expenses relatable to supply of labour and services (h) Profit earned by the contractor to the extent it is relatable to supply of labour and services.

Kone elevators 2014 7 SCC 1

The supreme court held that; if there are two contracts one for supply of material and another for installation of lift. It is nothing but a pregnant one as all fundamental characters are satisfied to be treated as works contract

Deemed sale

Transfer of Right to use – Lease

In Bharath Sanchar Nigam Ltd v. UOI, (2006) 145 STC 91, laid down certain guidelines for lease transactions. The court observed-“ To constitute a transaction for the transferee of right to use the goods, the transaction must have the following attributes- (a) there must be goods available for delivery (b) there must be a consensus ad idem to the identity of goods (c) the transferee should have a legal right to use the goods consequently all legal consequences of such use including any permissions or licenses required therefore should be able to transferee (d) for the period during which the transferee has such legal right , it has to be the exclusion to the transferor-this is the necessary concomitant to the plain language of the statute viza transfer of right to use and not merely a licence to use the goods.

- The tax on transfer of right to use any goods shall be levied only on movable goods and not immovable goods
- Tax can be levied on transfer of right to use goods in case of all goods, whether corporal or in corporal tangible or intangible, subject to condition the goods must be deliverable 2008 (vol12 VST 371 SC)
- The transfer of right to use goods, which is a deemed sale, can't be Taxed if such sale takes place outside the state or is a sale in the course of inter-state trade or commerce or is a sale in the course of import or export (20th century finance corp. V Ltd. state of Maharashtra (2000) 119 STC 182 (sc))
- Where the goods are available, the situs of sale, in the case of transaction of transfer of right to use any goods, would be the place where the property in goods passes, i.e. Where the written agreement transferring the right to use is executed irrespective of the location of the goods (20th century finance corp. V Ltd. state of Maharashtra (2000) 119 STC 182 (sc))
- In cases where goods are not in existence or where there is oral or implied transfer of the right to use goods, such transactions may be effected by the delivery of goods. In such cases the taxable event would be on the delivery of goods (20th century finance corp. V Ltd. state of Maharashtra (2000) 119 STC 182 (sc))
- A service, pure and simple, not having the element of goods component, is not liable to VAT (Imagic Creative (p) Ltd. V CCT (2008) 12 VST 371 sc).

Input tax

Both under GST & VAT charging output tax and recovery or claiming input tax is fundamental any derogation must be strictly interpreted

Both the dealer and the officer has to see whether supplies has been received in connection with the business activities of taxable person for the purposes of incorporating with its economic activities, and once the tax payers has identified the payment the question is did he obtain any thing at all used for the purpose of his business in return for the payment unless the same is excluded.

Doctrine of aspect theory

One aspect may fall within the power of one particular legislature and in another aspect for other purpose may fall in other legislature. They may be overlapping but that overlapping must be in law. The same transaction may involve two or more taxable events in its different aspects. But the fact that there is overlapping does not detract from distinctiveness of the aspects. AIR 1988 SC 1291. Ex: Property tax and rental income

MISCELLANEOUS

- Tax treatment has no necessary connection with accounting treatment. Tax officials must be concerned with the deductions permitted in terms of the act And not with debits or other provisions made in the tax based accounts Even though this may be regarded as prudent and proper from an accountant point of view
Reported in ABC vs. Commissioner of South Africa
- Specific entry Shall prevail over general entry
2014 (42) taxman.com 269

MISCELLANEOUS

Classification of goods

- Marketing is crucial
- Manufacturing technique
- Presentation
- Name/ description
- How it behaves after it is removed from packaging
- What a common man would consider
- Sometimes character of items in dispute must be determined at the time of purchase
- Of a kind ordinarily used for

- Essential character
- Primarily or principally
- Mainly or chiefly
- Objective Characteristics
- What a man in a street would regard
- Intended or Actually used

MISCELLANEOUS

Interpretation of entries in schedules:

Words in the entries of schedules must be construed not in any technical sense or nor from the scientific or botanical point of view, but as understood in common parlance, in the popular sense, meaning, that sense which people conversant with the subject matter with which the statute is dealing would attribute to it. The entries may be construed in technical, scientific, or botanical sense, only when there is an express provision to that effect in the schedule.

Definition in another statute is not a safe guide unless there is a reference to that statute. Classification of an item cannot change depending upon the person who buys them or the purpose for which he buys.

Items mentioned in a particular group shall be considered in a generic sense.

MISCELLANEOUS

- “Form” is distinct from “varieties” and includes various species and products.
- “Of all kinds”: the intention is to cover wider range of products.
- “Such as “: having that particular quality or characteristic specified.
- “Etc”: the rest, i.e., other things of the kind specified.
- “And” is use to give an exhaustive enumeration of the goods belonging to same category and to remove ambiguity.
- “That is to say”: the goods mentioned in the entry are exhaustive.

MISCELLANEOUS

- “Including” is used to enlarge rather than restrict the meaning of the word after which it has been used, indicating something which is not already included.
- “And the like”: identical or similar.
- “Namely” imparts interpretation, same as ‘that is to say’.
- “Accessory”: i.e. additional or perhaps optional
- “Parts”: without which the article to which it is to be joined couldn’t function as such article

Thank You