



Himachal Pradesh National Law University, Shimla (India)



---

Journal Articles

ISSN:2582-1903

*Shimla Law Review*

---

Volume-II (2019)

**'SALE', IN TAXATION LAWS WITH SPECIAL REFERENCE TO WORK CONTRACT: A Journey of Conceptual Aberration during Pre and Post 46<sup>th</sup> Constitutional Amendment**

*Alok Kumar*

DOI: <https://doi.org/10.70556/hpnluslr-v2-11-2019-08>

This article can be downloaded from: <https://www.hpnlui.ac.in/journal-level-3.aspx?ref-id=11>

---

Recommended Citation:

Alok Kumar, 'SALE', IN TAXATION LAWS WITH SPECIAL REFERENCE TO WORK CONTRACT: A Journey of Conceptual Aberration during Pre and Post 46<sup>th</sup> Constitutional Amendment, HPNLU SHIMLA, II SML. L. REV. 164 (2019).

<https://doi.org/10.70556/hpnluslr-v2-11-2019-08>

This Article is published and brought to you for free and open access by Himachal Pradesh National Law University, Shimla. For more information, please contact [editorslr@hpnlui.ac.in](mailto:editorslr@hpnlui.ac.in)

## Contents

---

Volume II	ISSN: 2582-1903	April 2019 - March 2020
-----------	-----------------	-------------------------

---

<i>Special Articles</i>	<i>Page</i>
1. Episteme of Justice: A Genealogy of Rationality <i>Mritunjay Kumar</i>	1
2. Apocryphal 'State': Fragments on Theoretical Foundations, Constitution, Law and their Mythical Unification <i>Chanchal Kumar Singh</i>	40
 <i>Articles</i>	
3. The Right to be Forgotten in Digital Age: A Comparative Study of the Indian Personal Data Protection Bill, 2018 & the GDPR <i>Ashwinee Kumar</i>	75
4. Senior Citizens in India: A Critical Analysis of the Maintenance and Welfare of Parents & Senior Citizens Act, 2007 <i>Santosh Kumar Sharma</i>	101
5. Privacy Issues in the Age of Pandemic: A Critical Analysis <i>Lakhvinder Singh &amp; Vibhuti Jaswal</i>	119
 <i>Notes and Comments</i>	
6. Regulating Tax Havens: An Imperative Under International Law <i>Girjesh Shukla</i>	135
7. Building Insolvency Jurisprudence: Limits of the Judicial Role in the Constitutional Adjudication Relating to the Provisions of the Insolvency and Bankruptcy Code 2016 <i>Jasper Vikas</i>	150
8. 'Sale', in Taxation Laws with Special Reference to Work Contract: A Journey of Conceptual Aberration during Pre and Post 46 <sup>th</sup> Constitutional Amendment <i>Alok Kumar</i>	164

9. Full Protection and Security Standard in International Investment Law and Practice: An Indian Perspective  
*Santosh Kumar* 177
10. Human Rights Education in the Field of Engineering and Technology  
*Vinit Kumar Sharma* 191
11. Administrative Adjudication and Dispensation of Justice through Armed Forces Tribunal in India: A Way forward and Challenges  
*Sanjay Kumar Tyagi* 209
12. An Escape Pod to Acquittal: Assessing the Impact of *Mohan Lal v. State of Punjab*  
*Bharat Barowalia* 225

# **‘SALE’, IN TAXATION LAWS WITH SPECIAL REFERENCE TO WORK CONTRACT: A Journey of Conceptual Aberration during Pre and Post 46<sup>th</sup> Constitutional Amendment**

*Alok Kumar\**

*[Abstract: The Supreme Court in State of Madras v. Gannon Dunkerley (A.I.R. 1958 S.C. 560) held that the term "sale of goods" used in the Seventh Schedule of the Constitution and the Sale of Goods Act, 1930 are the same. On the basis of this case, the Apex Court of India has iterated that many other transactions such as Statutory Transaction, Work Contract, Hire Purchase etc. which look similar, in substance, like contract of sales, have been declared not to be assessed for sales tax. This development in law opened vast scope for avoidance of tax in various ways. To tackle such avoidance and loss of sale tax, various actions have been taken in India including constitution of Law Commission on the issue and subsequent Constitutional Amendment i.e. 46<sup>th</sup> Amendment of 1983. This paper is an endeavour to analyse the journey of change in the concept of sale in lieu of the recent development of adoption of Goods and Services Tax.]*

## **I**

### **Introduction**

The modern sales tax laws were enacted in pursuance of the Government of India Act, 1935. Entry 48 of List II (Provincial Legislative List) of VII Schedule of the Government of India Act conferred power on states to impose tax on sale and purchase of goods. The expression, ‘Sale of goods’, provided in the Entry 48 in List II of Schedule VII of the Government of India Act, had the same meaning as in the Sale of Goods Act, 1930. The sales tax laws framed after the Constitution came into force, proceeded on the footing that the term "sale of goods", having regard to the rule as to broad interpretation of entries in the legislative lists, would be given a wider connotation. However, the Supreme Court came to hold, in *State of Madras v. Gannon Dunkerley*,<sup>1</sup> that the term "sale

---

\* Assistant Professor of Law, Himachal Pradesh National Law University (HPNLU), Shimla.  
Email: alok@hpnlu.ac.in

<sup>1</sup> A.I.R. 1958 S.C. 560.

of goods" used in the Seventh Schedule of the Constitution and the Sale of Goods Act, 1930 are same. On the basis of this case, in a number of subsequent decisions,<sup>2</sup> the Apex Court of India, held that many other transactions i.e. Statutory Transaction, Work Contract, Hire Purchase etc. which looks similar, in substance, like contract of sales, were declared not to be assessed for sales tax. This development in law opened vast scope for avoidance of tax in various ways. To tackle such avoidance and due to loss of sale tax, various actions have been taken in India including constitution of Law Commission on the issue and subsequent Constitutional Amendment i.e. 46<sup>th</sup> Amendment of 1983. This paper is an endeavour to analyse the whole journey of change on the concept of sale, in tax laws, keeping in view the recent development such as adoption of Goods and Services Tax.

## II

### Concept of Sale

Sale or exchange is a transmutation of property from one man to another, in consideration of some price or recompense in value. In other word "Sale is the transfer of the ownership of a thing from one person to another for a money price. Where the consideration for the transfer consists of other goods, or some other valuable consideration, not being money, the transaction is called exchange or barter; but in certain circumstances, it may be treated as one of sale.<sup>3</sup> To constitute a valid sale, there must be a concurrence of the following elements viz. (1) Parties competent to contract; (2) mutual assent; (3) a thing, the absolute or general property which is transferred from the seller to the buyer; and (4) a price in money paid or promised."<sup>4</sup>

The concept of sale, as it now obtains in our jurisprudence, has its roots in the Roman law. Under that law, sale, *emptio venditio*, is an agreement by which one person agrees to transfer to another the exclusive possession (*vacuam possessionem tradere*) of something (*merx*) for consideration. In the earlier stages of its development, the law was unsettled whether the consideration for sale should be money or anything valuable. By a rescript of the Emperors Diocletian and Maximian of the year 294 A.D., it was finally decided that it should be money, and this law is embodied in the Institutes of Justinian, vide Title 23. *Emptio venditio* is, it may be noted, what is known in Roman law as a consensual contract. That is to say, the contract is complete when the parties agree to it, even without delivery as in contracts *re* or the observance of any formalities as in contracts *verbis* and *litteris*. The common law of England relating to sales developed very much

---

<sup>2</sup> *New India Sugar Mills v. Commission of Sales Tax*, A.I.R. 1963 S.C. 1207; *Oil and Natural Gas Commission v. State of Bihar*, A.I.R. 1976 S.C. 2478; *Vishnu Agencies v. Commercial Tax Officer*, A.I.R. 1978 S.C. 449.

<sup>3</sup> *Halsbury's Laws of England*, 91 (5<sup>th</sup> edn., Vol. 5, 2012).

<sup>4</sup> *Supra* note 1

on the lines of the Roman law in insisting on agreement between parties and price as essential elements of a contract of sale of goods.<sup>5</sup>

Coming to the Indian law on the subject, the Sale of Goods Act, 1930 tried to define the contract of sale and also deals with the formalities required for making a contract of sale.<sup>6</sup> The said law expresses that a sale is a binding legal agreement between two parties i.e. a seller and a buyer for transfers of the property on consideration i.e. price.<sup>7</sup> A transaction of sale is a composite transaction consisting of an agreement to sell, passing of title, delivery of goods and payment of price, cost and charges of transportation. Sale includes 'an agreement to sell'<sup>8</sup>. The difference between 'sale' and 'agreement to sell' has been explained by the Supreme Court<sup>9</sup> in the following words:

“when the transfer is in *presenti*, it is called a “sale”. But when the transfer is going to be completed at any future time and subject to fulfilment of some conditions subsequently, it will be “an agreement to sell”. Therefore, either time has lapsed or the condition is fulfilled then agreement to sell will be sale”.

According to law, both of England and India, in order to constitute a sale, it is necessary that there should be an agreement between the parties for the purpose of transferring title to goods, which of course pre-supposed the capacity to contract, that it must be supported by money consideration, that as a result of the transaction, the property must actually pass in the goods. Unless all these elements were present there would be no sale.<sup>10</sup> On the basis of the above the essentials of contract of sale are as under:

1. **Two Parties:** Two parties are necessary to complete a sale as the same person cannot be both seller and buyer. The seller and the buyer must be different persons since a sale involves a change of ownership.
2. **Movable goods:** There must be contract for exchange of movable goods, the property which is to be transferred from the seller to the buyer. Such goods must be existing goods, owned or possessed by the seller. But there cannot be an actual sale of future goods. The principle underlying is “a man cannot in equity, any more than at law, assign what has no existence”.
3. **Transfer of property:** There must be a transfer of the absolute or general property in the thing sold. The transfer of any special property in the thing like pledge will not amount to a sale. It contemplates the transfer of the ownership in the goods. Though passing of the title in the goods is an essential ingredient of sale, physical delivery of goods is not essential.
4. **Price-Money:** The consideration for the contract of sale, called price must be money. In a contract of sale, the next essential element is the price, and when

---

<sup>5</sup> *Id.*

<sup>6</sup> Sections 4 and 5; Sale of Goods Act, 1930.

<sup>7</sup> *Id.*, section 4(1).

<sup>8</sup> *Id.*, section 4(3).

<sup>9</sup> *Hyderabad Engg. Industries v. State of A. P.* (2011) 4 S.C.C. 705.

<sup>10</sup> Pollock & Mulla, *THE SALE OF GOODS ACT*, 64 (2017).

there is no price there will not be a binding contract. An exchange of goods for goods is not a sale.

5. **Essential Elements of a Valid Contract:** All the essential elements necessary for the formation of a valid contract must be present.
6. **Mode:** A contract of sale may be express i.e. oral or reduced into writing. It may be implied from conduct of the parties.<sup>11</sup>
7. **Formation:** A contract of sale like any other contract is made by an offer on one hand to buy or sell goods by one party and its acceptance on the other hand by the other party.<sup>12</sup>

These are the essentials of the sale which has been mandated by the statutory provisions and various judicial pronouncements. In other words it can be said that the word "Sale" in legal nomenclature, is a term of precise legal import, both at law and in equity, and has a well-defined "legal signification, and has been said to mean, at all times, a contract between parties to give and pass rights of property for money, which the buyer pays or promises to pay to the seller for the thing bought or sold."<sup>13</sup> Analysing the meaning of the word sale, the Apex Court observed that "Sale' means any transfer of property for price in terms of money or payment which is deferred, however, bailment, pledge, or hypothecation is not included in sale. Therefore, the term 'purchase' has to be expressed accordingly."<sup>14</sup>

When we see the expression sale it resembles with various nomenclature such as exchange and barter, agreement to sale, statutory transaction, hire purchase and work contract which need to be clearly understood. But keeping in view the theme of the research paper the distinction between work contract is important therefore, the researcher make an endeavour to distinguish between sale and work contract.

### III

#### Distinction Between Sale and Work Contract

Contract of sale<sup>15</sup> is a legally binding agreement between two parties, one is a seller and other is a buyer, for transfer of a property for a price. There may be actual transfer or simply an agreement to transfer in future. In a work's contract, there is a legally binding agreement for carrying out a service e.g. construction on land, any modification or improvement thereupon, fitting etc. of the same for payment or remuneration which

---

<sup>11</sup> Section 5(2), The Sale of Goods Act, 1930.

<sup>12</sup> *Id.*, section 5 (1).

<sup>13</sup> *Supra* note 1 at para 12.

<sup>14</sup> *State of U.P. v. Union of India*, (2003) 3 S.C.C. 239.

<sup>15</sup> Section 4, Sale of Goods Act, 1930.

may be in cash or deferred payment.<sup>16</sup> The taxing authority were divided on the question of sale and work. It was posed to be a difficult question and to fix the same, clear differentiation between contract of sale and work contract is important. In this regard, some tests<sup>17</sup> have also been indicated by the Apex Court to distinguish between the two contracts. Here it is important to know that none of these tests are exhaustive. Further, these tests do not lay down any rigid formula for their application on any or to all transactions.<sup>18</sup> However, the difficulty, was not in the tests available for determination on the issue of sale and work contract, rather in the application of the tests to the facts of the case before the Court.

The Court further provides that in a work contract, the execution of such work requires goods to be used in the following forms- (1) the contract may be of work and for the supply of materials going to be used in the same for a price; (2) it may be a contract for work in which the use of materials is accessory or incidental to the execution of the work; or (3) it may be a contract for supply of goods which require some labour & skill as incidental to the sale. Where a contract is of the first type, it is a composite contract consisting of essentially of two contracts, one for the sale and the other for work. The second type of contract is clearly a contract for work and labour not involving sale of goods, while the third type is a contract for sale where the goods sold as chattels and some work is undoubtedly done, but it is done only as incidental to the sale. No difficulty arises where a contract is of the first type because it is divisible and the contract for sale can be separated from the contract for work and labour and the amount payable under the composite contract can be apportioned between the two. The real difficulty arises where the contract is of the second or third type, because in such a case it is always a difficult and intriguing problem to decide in which category the contract falls. The dividing line between the two types of contracts is somewhat hazy and "thin partitions do their bounds divide". But even so the distinction is there and it is very much real and the Court has to perform at times the ingenious exercise of distinguishing one from the other.<sup>19</sup>

The distinction between contract and work contract has been provided in Halsbury's *Laws of England*. It specifies that the main object of any contract is to transfer the property. If the main object of the payee is not transfer of the property as property itself i.e. chattel qua chattel, then the contract is not of sale but that of labour. The factors that have resulted in the end product of the skill and labour put into it may be taken into consideration in determining the final value of the chattel or property for sale. This

---

<sup>16</sup> *Hindustan Shipyard v. State of Andhra Pradesh* (2000) 6 S.C.C. 579.

<sup>17</sup> These tests are "Dominant nature test" or "overwhelming component test" or "the degrees of labour and service test" as provided in *M/s Kone Elevators India v. State of Tamil Nadu* (2014) 7 S.C.C. 1; *M/s Bharat Heavy Electricals. v. State of Maharashtra*, 2017 TaxPub (VAT) 0515 (Bom-HC): (2018) 080 ITPJ (V) 0506, where the Court explained the tests as: "Determination of what the parties intended to from the term of the contract."

<sup>18</sup> *Sentinel Rolling Shutter and Engg. Co. v. The Commissioner of Sale Tax* (1978) 4 S.C.C. 260.

<sup>19</sup> *Id.*, at para 2.



primary test is that whether the skill and labour applied to the chattel has resulted in something that can become the subject matter of sale.<sup>20</sup>

Besides this primary test, there may be, and indeed as the decided cases show, there are a large number of cases which are on the border line and it is here that difficulty is often experienced in the application of the primary test. To resolve this difficulty, the courts have evolved some subsidiary tests. One such test is formulated by the Court in *Commissioner of Sales Tax Madhya Pradesh v. Purshottam Premji*<sup>21</sup>, where it has been said that The primary difference between a contract for work or service and a contract for sale of goods is that in the former there is in the person performing work or rendering service no property in the thing produced as a whole. In the case of a contract for sale, the thing produced as a whole has individual existence as the sole property of the party who produced it, at some time before delivery, and the property therein passes only under the contract relating thereto to the other party for price. Mere transfer of property in goods used in the performance of a contract is not sufficient; to constitute a sale there must be an agreement relating to the sale of goods and completion of the agreement by passing of title in the very goods contracted to be sold. Ultimately the true effect of an accretion made pursuant to a contract has to be judged, not by an artificial rule that the accretion may be presumed to have become by virtue of affixing to a chattel, part of that chattel, but from the intention of the parties to the contract."

The primary test served for a long time however, the Supreme Court of India after a long time observed that although the above-mentioned test is relevant to distinguish between contract of sale and work contract but not considered the same exhaustive. The Court further said that there cannot be absolute test to distinguish between sale and work contract but depends on fact and circumstances of each individual case.<sup>22</sup> The differentiation between a sale and a works contract is more of a subjective phenomenon where one has to analyse the overall contract and its conditions.<sup>23</sup> The Apex Court, while dealing with a sales tax matter, laid down the principle regarding distinction between sale and work contract. It explained that there is no universal rule to answer the nature of a given contract whether it is of sale or of a works-contract. Therefore, the terms of the contract would be an important factor to know the nature of the transaction. Hence, every case has to be decided on its own facts specially the terms and conditions of the contract between the parties. It is not possible to devise a straight-jacket formula to determine the difference between the two contracts. The contract must be read as a whole to ascertain its spirit by interpreting its terms read in consonance with the intention of the parties.<sup>24</sup>

---

<sup>20</sup> *Supra* note 3 at 6-7.

<sup>21</sup> (1970) 2 S.T.C. 287.

<sup>22</sup> *Larsen & Toubro v. State of Karnataka* (2014) 1 S.C.C. 708, para 76.

<sup>23</sup> *Supra* note 16.

<sup>24</sup> *State of Andhra Pradesh v. Kone Elevators* (2005) 3 S.C.C. 389 para 5.

It is not necessary that in every works contract there is presence of implied sale of components used for repair work. The question naturally depends on fact and circumstances of each case. Mere passing of property in a commodity during the course of performance of the transaction in question does not render the transaction to be transaction of sale.<sup>25</sup> Even in a pure works contract, it is possible that commodity may have to be used by person executing the work, and property in such commodity may pass to other party. That would not necessarily convert the contract into contract of sale of those commodities.<sup>26</sup> The question naturally depends on fact and circumstances of each case. Each case should be analysed on the basis of the object of transaction and the intention of the parties entering in to the same.

The question whether a contract is one of sale or work contract generally raised in the proceeding for assessment under the sales tax laws for deciding whether the transaction was eligible to tax. While deciding the same the Courts take help of statutes, terms of contract and also devise some tests in this regard.

## IV

### Contract of Sale Under Sales Tax Laws

In *State of Madras v. Gannon Dunkerley & Co.*<sup>27</sup> the Supreme Court held that to levy sales tax on any transaction, a transaction must fulfil certain conditions. Apart from conditions of a contract,<sup>28</sup> the transfer of property must take place. By a series of subsequent decisions<sup>29</sup>, the Supreme Court has, on the basis of the decision in *Gannon Dunkerley's case*, held various other transactions which resemble, in substance, transactions by way of sales, to be not liable to sales tax.<sup>30</sup>

After *Dunkerley case*, the stand of the Court through its subsequent decisions<sup>31</sup> and the interpretation of the same, it has become a grey area where tax can be avoided. One example can be inter-state consignment transfer. It also applies transfer of goods on consignment account, under the Central Sales Tax Act. Indivisible contracts make it rather impossible to levy tax on property of goods as it is already a settled position of law that such transfers are not transfers of property but only contract for work or labour.

---

<sup>25</sup> *Supra* note 10 at p. 76.

<sup>26</sup> *Id.*

<sup>27</sup> *Supra* note 1.

<sup>28</sup> Parties competent to contract, mutual consent and consideration *i.e.* price in terms of money.

<sup>29</sup> *Supra* note 2.

<sup>30</sup> Statement of Objects and Reasons appended to the Constitution (Forty-sixth Amendment) Bill, 1981, which was enacted as THE CONSTITUTION (Forty-sixth Amendment) Act, 1982. Available at: <https://www.constitution.org/cons/india/tamnd46.html>. (last visited 20 Mar., 2019).

<sup>31</sup> *Supra* note 2.

However, if the sale of materials can be separated from the contract of work then that transaction will be subjected to sales tax. Though practically, the purchaser in a hire-purchase agreement gets the goods on the date of the hire-purchase, it has been held that there is sale only when the purchaser exercises the option to purchase at a much later date and therefore only the depreciated value of the goods involved in such transaction at the time the option to purchase is exercised becomes assessable to sales tax. Similarly, while sale by a registered club or other association of persons (the club or association of persons having corporate status) to its members is taxable, sales by an unincorporated club or association of persons to its members is not taxable as such club or association, in law, has no separate existence from that of the members.<sup>32</sup>

Keeping in mind the importance of the problem of avoidance of sales tax, the author has separated his research in pre and post 46<sup>th</sup> Constitutional Amendment period to clearly understand the problem and subsequent efforts of the government to address the same.

#### **(a) Pre 46<sup>th</sup> Constitutional Amendment Period**

The decision made in *State of Madras v. Gannon Dunkerley & Co.* was followed in the *Associated Hotels Case*.<sup>33</sup> the Supreme Court rejected the argument that any supply of food items in the hotel to a person in capacity of a lodger comes within the purview of sales tax. Further, in the *New India Sugar Mills v. Commissioner of Sales Tax*<sup>34</sup>, the Supreme Court was of the view that when under a Control Order transfer of controlled commodities is carried out, one finds absence of essential ingredient of sale which is consent or assent or volition, as put by the court, and hence no sale occurs. In the *ONGC v. State*<sup>35</sup>, the Supreme Court considered its earlier decisions regarding the taxability of transfers of the controlled commodities. The Supreme Court held that in case of statutory compulsions, the statute itself should be treated as supplying the consensus and furnishing the modality of the consensus.

In *Vishnu Agencies Case*<sup>36</sup>, six of the seven Judges concurred in over-ruling the decision, in *New India Sugar Mills case* while the seventh Judge held the case to be distinguishable. It is, therefore, considered desirable to put the matter beyond any doubt.

Evasion of tax by way of lease of films has also been shown. In most cases, the film ceases to have any value. Therefore, in such cases only a lease or a transfer occurs and does not qualify for 'sale' of the film.<sup>37</sup>

Over a period of time the State governments informed about the large-scale avoidance of Central sales tax which was to be levied on inter-State sales of goods as well as to the

---

<sup>32</sup> *Id.*

<sup>33</sup> *State of Punjab v. Associated Hotels of India*, A.I.R. 1972 S.C. 1131.

<sup>34</sup> A.I.R. 1963 S.C. 1207.

<sup>35</sup> A.I.R. 1976 S.C. 2478.

<sup>36</sup> *Vishnu Agencies v. Commercial Tax Officer*, A.I.R. 1978 S.C. 449.

<sup>37</sup> *Supra* note 30.

leakage of local sales tax in works contracts, hire-purchase transactions, lease of films, etc. Though Parliament could levy a tax on these transactions, as tax on sales has all along been treated as an item of revenue to be assigned to the States, in regard to these transactions which resemble sales also, it is considered that the same policy should be adopted.<sup>38</sup>

Strangely the Court in *Northern India Caterers Case* has given rise to a new issue.<sup>39</sup> For long the States proceeded on basis of decision in the *Associated Hotels of India case*. This decision was overruled by the Honourable Supreme Court. The court expressed the view that when a lodger i.e. one lodged in hotel receives the food, it is sale. Rather it constitutes rendering of service and therefore is outside the ambit of sales tax. Whether a person is charged on the whole or separately for a dish, it would be considered that the hotel is rendering service for human satisfaction.

The Law Commission<sup>40</sup>, examined, the possibility to tax the works contract, the powers of the States to levy taxes which were overshadowed by the *Dunkerley case*. After careful examination of the difference between the contract of works and contract for sale and whether the states must be conferred the power to levy taxes on indivisible contracts, The Law Commission suggested three alternatives.<sup>41</sup> The last alternative was to bring about an addition in Article 366. That was of much utility as accordingly it would avoid multiple amendments. Hence Clause 29-A was included in Article 366 of Constitution of India.

### **(b) Post 46<sup>th</sup> Constitutional Amendment Period**

On the basis of the 61<sup>st</sup> Report of the Law Commission, the Parliament then added Clause 29 A in the Constitution, which provides -

29A - tax on the sale of goods includes:

### **(c) Transfer for consideration of Controlled Commodities**

This clause provides that a Compulsory sale is also a 'sale'. This was the response to the opinion of the Court in *New India Sugar Mills v. Commissioner of Sales Tax* that statutory transaction or compulsory sale as sale.

---

<sup>38</sup> *Id.*

<sup>39</sup> *Northern India Caterers v. Lt. Governor of Delhi*, A.I.R. 1978 S.C. 1591.

<sup>40</sup> See, The Law Commission of India, Report, *on Certain Problems Connected with Power of the States to Levy a Tax on Sales of Goods and with Central Sales Tax Act, 1956*, (61<sup>st</sup> Report, 1974).

<sup>41</sup> The Commission suggested for amendment in the State List, Entry 54, or adding a fresh entry in the State List, or insertion in Article 366 a wide definition of "sale" so as to include works contract. *Id.* Chapter 1A.

**(d) *The transfer of property in goods involved in the execution of a works contract***

The above said clause make goods involved in 'works contract', a deemed sale. By inserting this clause, the legislator answers to the difficulties raise by the *Gannon Dunkerley case* where the Supreme Court held that Building contract is one, entire and indivisible and it was held prior to the emergence of the concept of deemed sale, that there was no sale of movables (building materials). With this insertion, the government got power to apply legal fiction through which indivisible contract may be divided and declared deemed sale and made amenable to assessment of sales tax. Because prior to this insertion it was a standard norm that for a valid contract of sale, the main object is the transfer of Property and delivery of the possession of Chattel as a Chattel to the buyer, where it is not so, it is a contract of Works & Labour. If the deliverable property has an individual existence as a property of the one who is delivering it then it is contract of sale. And if the object of transaction is not to transfer the moveable goods as a moveable then it is not a sale.

It has been clearly stated in *BSNL v. Union of India*, that value of service cannot be included in price of goods. It was confirmed that sales tax can be levied only on value of goods. All charges/amounts are deductible from value of works contract except value of goods sold in execution of works contract, for computing taxable value.

**(e) *Delivery of Goods on Hire-purchase or Any System of Payment by Instalments***

The insertion of this clause is a response to the Court decision in *K.L. Johar & Co. v. Deputy CTO*<sup>42</sup> where they hold that in hire-purchase, possession of goods is delivered by owner to hirer on condition payment of agreed number of instalments. Hirer has option to purchase the goods as per the terms of the agreement. 'Sale' includes a delivery of goods on hire-purchase. By the insertion of Article 366 (29A) (c), the hire purchase became 'deemed sale' and empowers the state to tax the same.

**(f) *Transfer of the Right to use any goods for any purpose for Cash, Deferred Payment or Other Valuable Consideration***

Insertion of this clause, empowered the states to impose sales tax on lease/licence agreements for use of goods. The essentials for a transaction for the transfer of right to use goods, must have the following attributes: (i) There must be goods available for delivery; (ii) There must be consensus ad idem as to the identity of the goods; (iii) The transferee should have a legal right to use the goods (iv) For the period during which the transferee has such legal right, it has to be for the exclusion to the transferor. This is the necessary concomitant of the plain language of the statute; (v) Having transferred

---

<sup>42</sup> (1965) 2 S.C.R. 112.

the right to use goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others.

The Apex Court in *State of Andhra Pradesh & Anr. v M/S. Rashtriya Ispat Nigam Ltd*<sup>43</sup>, held that hire charges are taxable only when full possession and control is given to the hirer. If the owner retains effective control over the equipment, it is not 'transfer of right to use'.

If the goods, such as, shuttering are supplied to the builders for a specified period for the purposes of construction at a consideration; the transferee is in effective control of the shuttering during the period it remains in his possession and therefore, it falls within the extended definition of 'sale'. A transaction is a transfer of the right to use the goods or a service is essentially a question of fact has to be determined in each case analysing the terms of the contract.

The Supreme Court in *20<sup>th</sup> Century Finance Corporation v. State of Maharashtra*<sup>44</sup> explained that the tax may be levied in case when the goods are in existence the taxable event occurs at the time of such. The place of sale will be the place of transfer. Location of goods is irrelevant in such cases. In other type of cases unless the actual delivery occurs the taxable event will not occur.

When the goods, namely, shuttering are supplied to the builders for a specified period for the purposes of construction at a consideration; the transferee is in effective control of the shuttering during the period it remains in his possession and therefore, it falls within the extended definition of 'sale'.

***(g) The supply of goods by an unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration***

The above said insertion was a proper response against the decision of the Supreme Court in *Associated Hotels of India case* where the Court imposed limitation over imposition of tax on Sale of food items to a lodger in hotel. The said clause empowers the state to impose tax on sale which consist supply of goods by an unincorporated making the same as deemed sale.

***(h) The supply, by way of or as part of any service, of food or any drink for cash, deferred payment or other valuable consideration***

This clause was a response to the decision of the Court in *Northern India Caterers Case*, where the Court held that supplying of food items in a hotel is not sale and outside the purview of sales tax. It only constitutes of rendering of service.<sup>45</sup>

---

<sup>43</sup> (1990) 77 S.T.C. 182 (A.P. H.C. D.B).

<sup>44</sup> (2000) 6 S.C. 12.

<sup>45</sup> The present position of sale includes supply, by way of or as part of any service or in any other

The 46<sup>th</sup> Constitutional Amendment expanded the horizon of the word 'sale' which was transfer of complete property in goods for valuable consideration prior to the Amendment. In post Amendment sales tax is levied on both sales as envisaged in the Sale of Goods Act, as well as that envisaged in Article 366 (29A) of the Constitution of India and the provisions as incorporated in Central Sales Tax Act and State VAT Acts.

Pursuant to the above amendment, many states amended the sales tax legislations and new provisions were made. The Constitutional amendment as well as the statutory changes by the States were challenged.<sup>46</sup> Analysing the constitutional validity of the 46<sup>th</sup> Amendment, the Apex Court in *Builders' Association Case*<sup>47</sup> upheld the validity of the 46<sup>th</sup> Amendment. The Court clarified that the amendment was necessary for enlarging the scope of term "tax of sale or purchase of goods".

In *Raheja Development Case*<sup>48</sup>, the court reiterated the decision of the earlier case and explained further the term "tax on the sale" in Entry 54 of List II. The court emphasised that the Entry 54 when read with the definition clause 29-A clarifies this position. The taxable event is deemed sale. After the amendment a tax on the sale includes a tax on the transfer in form of goods or in any other form. After the amendment, the States became empowered to divide the works contract through legal fiction as:

- (i) contract for sale of goods involved in the works contract, and
- (ii) for supply of labour and service.

The amendment has now nullified the concept of the Dominant Intention. The states can now levy sales tax on those contracts that have ingredients of a works contract, that is on materials used, even if the intention of the parties is otherwise.<sup>49</sup>

The Apex Court reiterated the above-mentioned position in *Bharat Sanchar Nigam Ltd. & Anr. v. Union of India & Ors.*<sup>50</sup> and said that dominant nature test has no application. It is now settled principle that separable elements of contracts under 29-A may be a subject of sales by the States under Entry 54 of List II.

"The dominant nature test" are really not applicable any longer.<sup>51</sup> Another larger bench of the Supreme Court<sup>52</sup> while deciding the issue of levying sales tax on Processing and

---

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.

<sup>46</sup> *Supra* note 22 at para 57.

<sup>47</sup> *Builders' Association of India v. Union of India and others*; (1989) 2 S.C.C. 645.

<sup>48</sup> *Raheja Development Corporation v. State of Karnataka*, (2005) 5 S.C.C. 162.

<sup>49</sup> *Associated Cement Companies v. Commissioner of Customs*; (2001) 4 S.C.C. 593.

<sup>50</sup> (2006) 3 S.C.C. 1; *Federation of Hostel & Restaurants Association of India v. Union of India*; (2016) S.C.C. OnLine Del. 4545.

<sup>51</sup> *M/s Kone Elevators India v. State of Tamil Nadu*, (2014) 7 S.C.C. 1.

<sup>52</sup> *State of Karnataka v. Pro Lab A.I.R.* 2015 S.C. 1098.

supplying of Photographs upheld the decision and bifurcation given by Supreme Court in *Raheja Development Case*.

In this way, both, the addition of clause 29-A and various judicial pronouncements, cleared the way for the states to levy the sales tax on both composite contracts of both sale and work contract as well as indivisible contracts where sale and work contract may not be divided except through legal fiction. But confusion begins with the enactment of GST Laws. 115<sup>th</sup> Constitutional Amendment Bill, 2011, proposed to delete clause (29A) in Article 366. However, the bill which was introduced later and which lead enactment of the 115<sup>th</sup> Constitutional Amendment did not delete that clause. The issues came up for discussion before the Select Committee of Rajya Sabha was referred. Before the committee, some experts opined that in view of Article 246A empowering both Centre and States to levy tax on supply of goods and services, clause (29A) of Article 366 may be considered for deletion as this would become redundant. However, the Committee decided to retain the said Article 366(29A).

It is interesting to note that clause (29A) is active and can be used for interpreting provisions of GST law. In circular number 35/9/2018-GST dated 5th March, 2018, wherein the Department has reiterated its understanding in erstwhile service tax law about taxability of transactions between members of a joint venture applicable for taxation under GST also, they have claimed to have drawn strength from the provisions in sub-clause (e) of clause (29A) of article 366. The reliance is strange as sub-clause (e) is all about supply of goods, whereas circular attempts to clarify levy of tax in the name of services. It will not be out of place here to note that the effect of sub-clause (e) is still unsettled.

## V

### **Conclusion**

The 46<sup>th</sup> Amendment equipped the States with the power to divide the indivisible contract and impose tax on the material involved in the performance of the works contract. This has been specifically done to prevent tax evasion. It has introduced the concept of deemed sale. The differentiation between sale and contract for work has been diluted by many subsequent decisions of the Court. In light of the amendment, the law now stands to strengthen the State governments to analyse and classify contracts for the purpose of sales tax. This change in law has not only brought new dimensions to contracts of works which seldom had ingredients of sale contract, but has also facilitated the States to prevent tax evasion. On the question of existence of Clause 29 A after GST law, it has been formulated that they have claimed to have drawn strength from the provisions in sub-clause (e) of clause (29A) of article 366.