

M/S SUMER CORPORATION VS

THE STATE OF MAHARASHTRA

VAT SECOND APPEAL NO 335 OF 2015

BCA Suburban Study Circle

STATUTORY BACKGROUND

BACKGROUND

S. 2(24)- Sale

"sale" means a sale of goods made within the State for cash or deferred payment or other valuable consideration, but does

Explanation- For the purposes of this clause,-

(b)(ii) the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract including, an agreement for carrying out for cash, deferred payment or other valuable consideration, the building, construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, modification, repair or commissioning of any movable or immovable property;

OTHER VALUABLE CONSIDERATION.. INTERPRETATIONS

- *The expression “valuable consideration” takes colour from the preceding expressions “cash” or “deferred payment” and only means some other monetary payment in the nature of cash or deferred payment.*
- *Other valuable consideration would include cheques/bank draft, insurance, promissory note.*
- *Barter not subject tot tax*

JUDGEMENTS IN FAVOR OF BARTER/ VALUABLE CONSIDERATION

1. ***Devi Dass Gopal Krishnan (1967) 20 STC 430***
2. *CST vs. Ram Kumar Agrawal (1967) 19 STC 400 (All).*
3. *CST vs. Kansari Udyog (1979) 43 STC 176 (MP)*
4. *Rams vs. STO 91 STC 216 – Kerala High Court*
5. *CIT vs. Motor & General 66 ITR 692*
6. ***Radha Printers - Kerala High Court – 90 STC 201***
7. *CST vs. Ramkumar 1967 19 STC 400 – Allahbad HC*
8. *CST vs. Kansari Udyog – 1979 – 43 STC 176 MP HC.*
9. *State of A.P. v. Hotel Sri Lakshmi Bhavan, (1974) 33 STC 444, 448 (AP)*
10. *Assam Oil Co. Ltd. v. Com. Of Taxes (1991) 81 STC 37 (Gauh)*
11. *M. Jaihind v. State of Kerala (1998) 111 STC 374 (Ker-FB)*
12. *State of Tamilnadu vs. TMT Drill Pvt. Ltd. 1991 82 STC 59 (Madras)*
13. *IBP Company Ltd. vs. Assisstant CCT (2000) 118 STC 33 West Bengal Tax Tribunal*

OTHER VALUABLE CONSIDERATION.. INTERPRETATIONS

- *Gold exchanged for new jewellery, held to be sale.*
- *Gold being in the nature of money, payment by gold may be regarded as payment in the nature of cash or as money consideration*
- *Machinery was transferred against allotment of shares. Transfer of shares held to be mode of payment of price*
- *In case of construction of road, toll collection is valuable consideration. It cannot be debated that there is no valuable consideration.*
- *Every transfer of property in goods by one person to another for consideration would mean sale. Even exchange /barter will fall within the definition of sale*

JUDGEMENTS AGAINST BARTER/ VALUABLE CONSIDERATION

1. *VP Vadilal Achari vs. State of Madras (1969) 23 STC 273 (Madras)*
2. *CIT vs. M & G Stores AIR 1968 SC 200*
3. *Premier Electro Mechanical Fabricators vs. State of Tamilnadu 1984 55 STC 371 Madras*
4. *Vishweshwasadars Gokuldas vs. Govt. of Madras (1962) 13 STC 113 (Madras)*
5. *Dampur Sugar Mill Pvt. Ltd. vs. CTT 2006 147 STC 57*
6. *Ashoka Infrastructure v. State of Maharashtra (2014-VIL-12)*
7. *Bhatia Agency versus Commercial Taxes Officer - 2014(2) TMI 205 – Rajasthan High Court*
8. *V.P. Vadivel Achari v. Madras S.T. Appellate Tribunal (1969) 23 STC 273 (Mad.) Chettiar, in re (1948) 1 STC 168 (Mad)*

FACTS OF THE CASE

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- *The appellant is engaged in the business of construction of buildings and tenements for SRA. As per the agreement, appellant was to construct building consisting of 11900 tenements' of 225 sq. ft. each and hand it over to SRA*
- *Against the above work done, the appellant received TDR of 59,470 Sq. Mts. Out of total, part TDR of 28,390 was sold for consideration of INR 56 Crores*
- *T/o determined = rate per sq ft x 28,390 sq. ft of TDR sold.*
- *Output Tax based on purchase ratio was applied to the T/o and accordingly tax was calculated at INR 8.45 Crores*

CONTENTIONS

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Contention of Appellant

*The appellant constructed buildings for SRA for which he **did not receive any money consideration**. According to him, as per agreement, he has received TDR (Transferable Development Rights), which he has sold and realized money out of that. He claims that the transaction was **barter** and cannot be taxed under MVAT Act.*

The expression 'valuable consideration' takes colour from the preceding expression 'cash or deferred payment'. If so, it can only mean some other monetary payment in the nature of cash or deferred payment.

Reliance on CIT vs Motors & General Stores, Devi Dass Gopal Krishnan, Radhas Printers

Contention of Department

As per amendment in clause (29A) in Article 366 of Constitution of India, the definition of 'sale' includes deemed sale. Devi Dass & other judgements would not be applicable, as it was prior to the amendment.

The Revenue contended that TDR is itself a money consideration

ISSUES & OBSERVATIONS OF HON'BLE MSTT

1. Whether the transaction is works contract ?

- *On reading of Article 366(29A) and decision of SC in case of Larson & Toubro Ltd. vs State of Karnataka , it could be stated that **Building contracts are species of the works contract.***
- *Agreement shows that there is construction of building consisting of 11900 tenements of 225 Sq. feet each to be made and handed over to the SRA. Therefore, it becomes clear that the present contract is works contract.*

2. Whether there is any valuable consideration?

- *The rulings as stated by the appellant are based on the definition of sale and definition of price under of the Sale of Goods Act prior to the amendment in the Constitution, Article 366(29A) r/w. Entry 54 in List II. Therefore, the ruling would not be applicable to the changed circumstances, which are now prevailing.*
- *The word `other valuable consideration' would include anything that would directly or indirectly fetch some element of money or any other consideration. In the present case, **TDR which is mentioned as Transfer Development Rights can be converted into money** and in the present case already **appellant has en-cashed some TDR** and obtained considerable amount therein and therefore TDR would be a valuable consideration. Under these circumstances, the contention of the appellant that the transaction is barter or free of cost or without consideration cannot be accepted.*

3. Whether TDR sale price received could be taxed?

- *In order to determine the tax, one has to first establish value of entire contract. After arriving at the value of contract, one has to then carry out the deductions as per rule 58. Then applying the ratio in the judgement of the Supreme Court in the case of Larson and Toubro Ltd. Vs. State of Karnataka reported in [2014] 1 SCC 708 (SC) what is taxable is value of goods at the time of incorporation of goods in the works contract is to be worked out.*
- *Therefore, taxing entire amount received by way of sale of TDR by treating it as value of entire contract by the assessing authority is bad in law. Hence, we hold that the assessing officer and appellate authority committed error in levying heavy tax.*

4. Valuation

- *Argument of the appellant that there was no measurement for calculation of tax cannot be accepted in view of changed circumstance, wherein State has amended Rule 58*
- *One can arrive at the value of entire contract on the basis of the sale price that would have fetched on the date of the agreement of these tenements of that particular area. Hence, we deem it that in present set of circumstances, the value of contract will have to be ascertained as the price that would fetch, on date of agreement i.e. 01/12/2003, as if the said tenements have been sold in the market as per stamp duty ready reckoner under the Bombay Stamp Act.*
- *Hence we deem it proper to direct the appellate authority to obtain the value of entire contract on the basis of value of tenements that would have fetched as on date of agreement in that locality and thereafter apply rule 58 for determining the value of goods at the time of transfer of property in the goods*

5. Penalty

- *This being a debatable issue, we hold that levy of penalty stands deleted.*

POSERS...

- *In case of Redevelopment projects, construction of parking lots there is no valuable consideration received to the Builder*
- *Builder agrees to give 25% of constructible area to Land Owner in lieu of Land. Builder is following 1% Composition Scheme. Is Builder liable to pay VAT and if yes on what amount?*
- *Whether entire concept of Barter demolished?*

FOOD FOR THOUGHT

Works Contract vis-à-vis Indian Contract Act

- *The word consideration is not defined in MVAT Act, neither in General Clauses Act, 1987*
- *Decisions under Indian Contract Act that works contract are covered by Indian Contract Act*

[Section 2(d) When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise]

- *In absence of definition of consideration in Income Tax Act, it must carry the meaning assigned to it in Indian Contract Act [CGT vs Smt. C.K. Nirmala 215 ITR 156 (Ker), Chandrakant Shah vs ITO 121 TTJ 145]*

THANK YOU