

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**SPECIAL CIVIL APPLICATION No. 5575 of 2011**

**For Approval and Signature:**

**HONOURABLE MR.JUSTICE AKIL KURESHI  
HONOURABLE MS JUSTICE SONIA GOKANI**

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
  - 2 To be referred to the Reporter or not ?
  - 3 Whether their Lordships wish to see the fair copy of the judgment ?
- Whether this case involves a substantial question of law
- 4 as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
  - 5 Whether it is to be circulated to the civil judge ?
- =====

**LARSEN & TOUBRO LTD & 1 - Petitioner(s)  
Versus  
UNION OF INDIA & 4 - Respondent(s)**

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**Appearance :**

MR N.VENKATRAMAN, SR.ADV. with MR NITIN K MEHTA with MR MOHAMMED SHAFIA with MR P.PURSHOTTAM for Petitioner(s) : 1 - 2.  
NOTICE SERVED BY DS for Respondent(s) : 1 - 2, 5,  
MR PRAKASH JANI, GOVERNMENT PLEADER with MS MAITHILI MEHTA, ASST.GOVERNMENT PLEADER for Respondent(s) : 2 - 4.  
MR UDAY JOSHI with MR PRANAV TRIVEDI for M/S TRIVEDI & GUPTA for Respondent(s) : 5,

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**CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI  
and  
HONOURABLE MS JUSTICE SONIA GOKANI**

**Date : 02/09/2011**

**ORAL JUDGMENT**

**(Per : HONOURABLE MR.JUSTICE AKIL KURESHI)**

1. Draft amendment dated 22.4.2011 is allowed. Amendments shall be carried out forthwith.
2. The petitioners have challenged an order dated 23.3.2011

annexed at Annexure-A to the petition passed by the Deputy Commissioner of Commercial Tax, State of Gujarat ( hereinafter referred to as the Assessing Officer). By the said order the Assessing Officer framed assessment in the case of the petitioner under the Central Sales Tax Act ( "CST Act" for short) for the period between 1.3.2006 to 31.3.2007. The Assessing Officer raised a demand of Rs.192,05,53,975/-, towards sales tax, interest and penalties. The petitioners have challenged the said order on various grounds. However, before us, the main ground pressed in service on behalf of the petitioners was that the respondents have no legal authority to demand and levy any sales tax under the CST Act with respect to the sale transactions between the petitioners and respondent No.5 Oil and Natural Gas Corporation ("ONGC" for short), which sales had taken place at Bombay High.

3. By an order dated 27.4.2011, while issuing notice in the present petition, we had granted ad interim relief preventing the respondents from carrying out coercive recovery of the tax under the impugned order on the condition that the petitioners shall deposit, if so desired, under protest, an amount of Rs.25 crores with the authorities by 1.6.2011.

4. It is stated that such amount has been duly deposited within the time permitted. Looking to the nature of disputes arising and also considering sizable amount of tax recovery raised by the respondents, both sides requested us to take up the petition for final disposal at the admission stage itself. Accordingly, we have heard learned counsel appearing for both sides at considerable length. Before advertng to rival contentions, it would be necessary to take note of facts emerging from the record.

5. Petitioner No.1 is a company registered under the Companies Act. Petitioner No.1 company is also a registered dealer both under

the Gujarat Value Added Tax Act, 2005 and CST Act. Petitioner No.1 company is involved in the business of manufacturing engineering goods and execution of works contracts in different parts of the country including the State of Gujarat. The petitioners have a manufacturing division at Hazira near Surat in the State of Gujarat. During the relevant assessment year, the petitioners had entered into four contracts with respondent No.5, ONGC. Details of such contracts are as follows:-

| Sl. No. | Contract no                                   | Project/ Scope of supply/ work  |
|---------|---|---|
| 1       | MR/OW/MM/SH-RC/14R/2003 dated 21.04.2005      | Survey, Design, Engineering, Procurement, Fabrication, Installation & Commissioning of "Reconstruction of SH complex Platforms comprising process platform, Gas compression platform, Wellhead platform etc". |
| 2       | MR/OW/MM/BCP-B2/02/2005 dated 06.02.2006      | Survey, Design, Engineering, Procurement, Fabrication, Installation & Commissioning of "BCP-B2 Compressor Platform with process platform bridge connected to BLQ2 platform".                                  |
| 3       | MR/OW/MM/MHB S4WPP-1/16/2005 dated 21.02.2006 | Survey, Design, Engineering, Procurement, Fabrication, Installation & Commissioning of "NH, NE, N2 Well Platform in Mumbai High North asset BE Platform in basin & satellite asset".                          |
| 4       | MR/OW/MM/PRP/02 (ICB) 2004 dated 06.05.2005   | Survey, Design, Engineering, Procurement, Fabrication, Installation & Commissioning of "Pipeline Replacement Project on turnkey basis".   |

6. It is the case of the petitioners and with respect to which no dispute has been raised by the respondents that all the above four contracts were indivisible turnkey projects consisting both of supply of goods and rendition of service including labour. To execute such turnkey contracts, the petitioners had arranged for supply of certain parts, equipments and machineries from its

Hazira plant at Surat to ONGC at Bombay High, which is situated around 180 kms off the baseline of coast of India and forms part of "Exclusive Economic Zone". It is also an undisputed position that such goods were used in execution of turnkey project of erection, installation and commissioning of the platforms located in Exclusive Economic Zone and only on commissioning that the petitioners' obligation under the contract would stand discharged. It is thus the case of the petitioners that the title of goods supplied by the petitioner to ONGC, during the course of and in furtherance of execution of the turnkey project, passed at Bombay High and not at Hazira. Even the respondents, in particular, the State authorities, under the CST Act, have accepted this factual stand of the petitioners and the entire order under challenge is founded on such admitted facts. We have, therefore, proceeded to examine the grievances of the petitioners on the basis of this conceded factual position, namely, that the title of the goods sold by the petitioners to ONGC passed at ONGC site at Bombay High and not at Hazira.

The respondent authorities holding a prima facie opinion that such sales would be covered under the provisions of the CST Act and therefore, exigible to tax at appropriate rate, issued a notice to the petitioners why sales tax should not be collected. The petitioners replied to the said show cause notice vide communication dated 15.7.2009. The principal stand of the petitioners in the said communication was that the works under the contracts had been carried out at off-shore platforms located outside 12 nautical miles from the Indian shores, that in absence of any notification issued by the Union of India extending the CST Act to the said area, the transaction in question was not exigible to any Central Sales Tax. It was also the case of the petitioners that the goods were exported outside India and that therefore, no tax can be levied under the CST Act.

7. Undeterred by the petitioners' above objections, the Assessing Officer formed a prima facie opinion that there was no

export of goods as claimed by the petitioners and further that tax at appropriate rate under CST Act was leviable. He, therefore, issued notice dated 21.2.2010 calling upon the petitioners to file reply within 15 days, why tax at the rate prescribed under the CST Act should not be levied. He also indicated his prima facie reasons for holding such a belief. He formed a prima facie opinion that there was no export of goods and that the CST Act would, therefore, apply and the petitioners cannot avoid the liability to pay tax at the appropriate rate.

8. The Assessing Officer also issued a separate notice dated 17.2.2011 proposing to impose penalty on the petitioners and calling upon to show cause why such penalty should not be imposed under the CST Act. The petitioners responded to the said notice by a detailed representation dated 24.2.2011 raising several contentions regarding tax and penalty demands. The petitioners contended that the proposal for levying tax was without authority and that demand for penalty was not supported by any specific instance of breach. The petitioners sent yet another communication dated 22.3.2011 to the Assessing Officer contending that before passing the order, following objections may be considered:-

(1) That the proposal for imposing penalty does not give any specific details of the transactions in relation to which such proposal is made and (2) unless specific notice, regarding the nature of transactions is issued, the petitioners would not be in a position to submit proper reply.

9. The Assessing Officer, however, by the impugned order turned down the petitioners' objections and held that the transactions were exigible to tax under the CST Act. That the petitioners failed to deposit the tax in time and, therefore, the interest was also chargeable. He also held that penalty should be imposed against the petitioners. He accordingly, raised a total

demand of Rs.192,05,53,975/- towards tax, interest and penalties. It is, this order that the petitioners have challenged in the present petition.

10. In the petition, petitioners have raised following four principal grounds of challenge:-

(1) That levy of tax was not authorized because in the present case, there was no inter-State sale of the goods.

(2) Even if the tax was leviable, the same could be charged only at 4% and not at 10% as wrongly charged by the Assessing Officer and if the petitioners were able to produce C Form, such rate would further go down.

(3) That imposing penalty was in violation of principles of natural justice. Notice for imposing penalty did not specify specific breaches for which such penalty was proposed. In absence of any such specification, the petitioners did not have reasonable opportunity to defend themselves against the proposal for imposition of penalty.

(4) In past, such tax demands were raised by the State authorities. However, upon representations from the petitioners such demands were dropped.

11. At the outset, we indicated to the counsel for the petitioners that being a writ petition directly filed against the order of assessment, we would not be dealing with 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> grounds of challenge and we would confine our enquiry only with respect to the first ground and if the petitioners failed in such challenge they would be relegated to appropriate appellate authority, who can examine all other contentions which are necessarily mixed questions of law and facts.

12. With this clear understanding learned counsel for the parties have made detailed submissions before us. It is the case of the petitioners that the petitioners had undertaken turnkey projects for and on behalf of ONGC. While in execution of such turnkey projects the petitioners supplied certain parts, equipments and machineries to ONGC from their Depot at Hazira. Such machinery and other parts were transported by the petitioners to Bombay High. Upon completion of the turnkey project, the responsibility of the petitioners under the contracts came to an end. The title in the goods passed from the petitioners to ONGC only at Bombay High. It is, thus, the case of the petitioners that when the goods were transported from Hazira to Bombay High, there was no inter-State movement since Bombay High is located at a distance of about 180 kms from the shores of India and does not form part of Indian territory. It may be that for the limited purpose of permitting exploitation of the natural resources located there, certain provisions have been made. Nevertheless, sovereignty of the Indian State does not extend to the said region. Counsel further submitted that as and when appropriate notifications are issued under different fiscal statutes such as the Income Tax Act, Customs Act etc., for the limited purpose indicated in such notifications, such area is deemed to be part of Indian territory. He submitted that in the present case, no such notification has been issued for then purpose of CST Act and that, therefore, the territory in which Bombay High is located, for the purpose of CST Act, cannot be considered to be part of Indian territory.

13. Counsel relied heavily on the decision of the Apex Court in the case of *Aban Loyd Chiles Offshore Limited and another vs. Union of India and others* reported in (2008) 11 SCC 439, wherein the Apex Court held that the goods supplied to a place in exclusive economic zone or continental shelf will not be treated as an export under the Customs Act and no export benefit can be availed on such supply and further that any mineral oil produced therein will

be chargeable to central excise duty as goods produced in India. Counsel pointed out that such conclusions were based on notifications issued extending the application of Customs Act and the Customs Tariff Act to the aforesaid areas.

14. Reliance was also placed on the decision of the Bombay High Court in the case of *Pride Foramer vs. Union of India* reported in 2002 (148) E.L.T. 19(Bom.). We may notice that the decision of Bombay High Court in the said case was upheld by the Apex Court in the case of *Aban Loyd Chiles Offshore Limited (supra)*.

15. Reliance was also placed on the decision of the learned Single Judge of the Bombay High Court in the case of *McDermott International Inc (No.1) vs. Union of India* reported in [1988] 173 ITR 0155, wherein it was held that since the petitioner's income accrued in the accounting year 1982-83, in respect of work done beyond 12 nautical miles, demand for payment of tax on such income was bad in law.

16. Counsel also placed reliance on the decision of the Madras High Court in the case of *Commissioner of Income-tax vs. Ronald William Trikard* reported in [1995] 215 ITR 0638, wherein also applicability of Income Tax Act to incomes arising out of the work done in Exclusive Economic Zone came up for consideration. It was held that such income was not exigible to tax.

17. Counsel also placed reliance on the decision of the Division Bench of Uttranchhal High Court in the case of *Commissioner of Income-tax vs. Atwood Oceanics International S.A.* reported in [2003] 264 ITR 0761, wherein also similar view was taken.

18. On the other hand, Shri P.K. Jani, learned Government Pleader, appearing for the State authorities opposed the petition contending that the petitioners' goods cannot be said to be



exported out of India and, that therefore, petitioners' contention that tax under the CST Act cannot be levied is not correct. Counsel further submitted that the transaction in question was covered under Section 3 of the CST Act since the sale occasioned the movement of goods from one Indian State to another. He, therefore, contended that CST Act was applicable and demand of tax, interest and penalty was, therefore, justified.

19. Counsel relied on the decision in the case of *Burmah Shell Oil Storage & Distributing Co. of India Ltd. vs. CTO* reported in AIR (1961) 1 SCR 902 to contend that there was no export of goods in the present case. For the same purpose reliance was also placed on the decision of Apex Court in the case of *Madras Marine and Co. vs. State of Madras* reported in (1986) 3 SCC 552 and in the case of *The State of Madras vs. Davar & Co. Etc.* reported in 1969 (3) SCC 406.

20. Reliance was also placed on the decision of Bombay High Court in the case of *Oil and Natural Gas Corporation Ltd vs. Rt. Hon.Sir Michael Karr and another* reported in 1997(2)BomCR1, wherein learned Single Judge of the Bombay High Court had occasion to deal with the question of territorial jurisdiction for the purpose of arbitration proceedings.

21. Reliance was placed on the decision of Punjab High Court in the case of *Nand Lal Hira Lal vs. The Punjab State* reported in [1965] 16 STC 967(P&H), wherein the High Court was considering the question of collecting the Central Sales Tax when the sale occasioned the movement of goods from the State of Punjab to the State of Jammu and Kashmir. Though CST Act did not extend to the State of Jammu & Kashmir, the the Court held that on the sale in question, the tax would be charged.

22. Reliance was also placed on the judgment of Madras High

Court in the case of S. Mariappa Nadar and others vs. The State of Madras reported in [1962] 013 STC 0371W, wherein, the sale which occasioned the movement of goods to State of Jammu and Kashmir was held liable to sales tax.

23. Reliance was also placed on the decision of Murli Manohar and Co. and anr. vs. State of Haryana and anr reported reported in 1991(1)SCC 377, wherein it was observed that any sale affected by the assessee in the circumstances must fall in one of the three categories, namely, either local sale, inter-State sale or sale in course of export outside the territory of India.

24. Counsel also placed reliance on the decision of the Larger Bench of the Sales Tax Tribunal in the case of M/s.Industrial Oxygen Company Ltd. vs. State of Maharashtra decided on 9.7.2010, wherein the Tribunal came to the conclusion that even in absence of any notification issued for the purpose of CST Act, on any movement of goods to Exclusive Economic Zone from an India State, tax can be levied.

25. Having thus heard learned counsel for the parties and having perused the documents on record, before dealing with the rival contentions, it would be useful to take note of relevant statutory provisions. From the preamble to the CST Act, it can be seen that the Act was enacted to formulate principles for determining when a sale or purchase of goods takes place in the course of inter-State trade or commerce or outside a State or in the course of imports into or exports from India, to provide for the levy, collection and distribution of taxes on sales of goods in the course of inter-State trade or commerce and to declare certain goods to be of special importance in inter-State trade or commerce and specify the restrictions and conditions to which State laws imposing taxes on the sale or purchase of such goods of special importance shall be

subject.

26. Section 3 of CST Act provides when sale or purchase of goods can be said to take place in the course of inter-State trade or commerce and reads as under:-

"Section 3 of CST Act: 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) occasions 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."

Section 4 of CST Act provides when a sale or purchase of goods can be said to take place outside a State and reads thus:-

"4. When a sale or purchase of goods said to take place outside a State.-

(1) Subject to the provisions contained in section 3, when a sale or purchase of goods is determined in accordance with sub-section(2) to take place inside a State, such sale or purchase shall be deemed to have taken place outside all other States.

(2) A sale or purchase of goods shall be deemed to take place inside a State, if the goods are within the State-

(a) in the case of specific or ascertained goods, at the time the contract of sale is made; and

(b) in the case of unascertained or future goods, at the time of their appropriation to the contract of sale by the seller or by the buyer, whether assent of the other party is prior or subsequent to such appropriation."

Section 5 of the CST Act provides when a sale or purchase of goods is said to take place in the course of import or export and reads thus:-

"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 occasions 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) The provisions of sub-section (3) shall not apply to any sale or purchase of goods unless the dealer selling the goods furnishes to the prescribed authority in the prescribed manner a declaration duly filled and signed by the exporter to whom the goods are sold in a prescribed form obtained from the prescribed authority.

(5) Notwithstanding anything contained in sub-section (1), if any designated Indian carrier purchases Aviation Turbine Fuel for the purposes of its international flight, such purchase shall be deemed to take place in the course of the export of goods out of the territory of India."

Section 6 of the CST Act is a charging Section and provides when the liability to tax on inter-State sales arises. Sub-Section (1) of Section 6, in particular, provides that subject to other provisions contained in the Act every dealer shall, with effect from the date as the Central Government may notify, be liable to pay tax under this Act on all sales of goods other than the electrical energy effected by him in the course of inter-State trade or commerce during any year on and from the date so notified. Proviso to sub-Section (1) to Section 6 provides that a dealer shall not be liable to pay tax on any sale of goods which in accordance with the provisions of sub-Section (3) of Section 5, is a sale in the course of export of goods out of the territory of India.

27. From the above statutory provisions following two principal questions, which need to be answered in this petition arise:-

(1) Whether sale of goods in question can be said to have taken place in course of inter-State trade or commerce since it

occasions the movement of goods from one State to another ? and;

(2) Whether the sale of goods in question is one covered under sub-Section (3) of Section 5 of CST Act and whether the sale is in course of export of goods outside the territory of India and that therefore by virtue of proviso to sub-Section (1) of Section 6, no tax can be charged on such sale of goods ?

Answers to these questions shall have to be gathered from various provisions and judicial pronouncements cited before us.

28. Article 1 of the Constitution pertains to name and territory of the Union of India and reads thus:-

"1.(1) India, that is Bharat, shall be a Union of States.

[(2) The States and the territories thereof shall be as specified in the First Schedule.]

(3) The territory of India shall comprise-

(a) the territories of the States;

[(b) the Union territories specified in the First Schedule; and]

(c) such other territories as may be acquired.

Article 297 of the Constitution provides that things of value within the territorial waters or continental shelf and resources of the exclusive economic zone shall vest in the Union. Article 297 reads as under:-

[297.(1) All lands, minerals and other things of value underlying the ocean within the territorial waters, or the continental shelf, or the exclusive economic zone, of India shall vest in the Union and be held for the purposes of the Union.

(2) All other resources of the exclusive economic zone of India shall also vest in the Union and be held for the purposes of the Union.

(3) The limits of the territorial waters, the continental shelf, the exclusive economic zone, and other maritime zones, of India shall be such as may be specified, from time to time, by or under any law made by Parliament.]

First Schedule to the Constitution pertains to the States and provides for territories of the different States of the country. Item No.4 therein pertains to the State of Gujarat and reads as under:-

4. Gujarat The territories referred to in sub-section(1) of

section 3 of the Bombay Reorganisation Act,1960.

29. To provide for certain matters relating to the territorial waters, continental shelf, exclusive economic zone and other Maritime Zones of Indian Union, Legislature has enacted the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976 ( hereinafter after referred to as " the Maritime Zones Act").

Sub-Section (1) of Section 3 of the Maritime Zones Act provides that the sovereignty of India extends and has always extended to the territorial waters of India and to the seabed and subsoil underlying and the air space over, such waters. Section 3 of the Maritime Zones Act reads as under:-

"3. (1) The sovereignty of India extends and has always extended to the territorial waters of India ( hereinafter referred to as the territorial waters) and to the seabed and subsoil underlying, and the air space over, such waters.

(2) The limit of the territorial waters is the line every point of which is at a distance of twelve nautical miles from the nearest point of the appropriate baseline.

(3) Notwithstanding anything contained in sub-section (2), the Central Government may, whenever it considers necessary so to do having regard to international Law and State practice, alter, by notification in the Official Gazette, the limit of the territorial waters.

(4) No notification shall be issued under sub-section (3) unless resolutions approving the issue of such notification are passed by both Houses of Parliament."

Section 5 of the Maritime Zones Act reads as under:-

"5. (1) The contiguous zone of India ( hereinafter referred to as the contiguous zone) is an area beyond and adjacent to the territorial waters and the limit of the contiguous zone is the line every point of which is at a distance of twenty-four nautical miles from the nearest point of the baseline referred to in sub-section (2) of Section 3.

(2) Notwithstanding anything contained in sub-section (1), the Central Government may, whenever it considers necessary so to do having regard to the

International Law and State practice, alter, by notification in the Official Gazette, the limit of the contiguous zone.

(3) No notification shall be issued under sub-section (2) unless resolutions approving the issue of such notification are passed by both Houses of Parliament.

(4) The Central Government may exercise such powers and take such measures in or in relation to the contiguous zone as it may consider necessary with respect to,-

- (a) the security of India, and
- (b) immigrations sanitation, customs and other fiscal matters.

(5) The Central Government may, by notification in the Official Gazette,-

(a) extend with such restrictions and modifications as it thinks fit, any enactment, relating to any matter referred to in clause (a) or clause (b) of sub-section (4), for the time being in force in India or any part thereof, to the contiguous zone, and

(b) make such provisions as it may consider necessary in such notification for facilitating the enforcement of such enactment, and any enactment so extended shall have effect as if the contiguous zone is a part of the territory of India."

Section 6 of the Maritime Zones Act pertain to continental shelf of India. Relevant portion of Section 6 reads as under:-

"6(1) The continental shelf of India ( hereinafter referred to as the continental shelf) comprises the seabed and subsoil of the submarine areas that extend beyond the limit of its territorial waters throughout the natural prolongation of its land territory to the outer edge of the continental margin or to a distance of two hundred nautical miles from the baseline referred to in sub-section (2) of section 3 where the outer edge of the continental margin does not extend up to that distance.

(2) India has, and always had, full and exclusive sovereign rights in respect of its continental shelf.

(3) Without prejudice to the generality of the provisions of sub-section(2), the Union has in the continental shelf,-

- (a) Sovereign rights for the purposes of exploration, exploitation, conservation and management of all resources;
- (b) exclusive rights and jurisdiction for the construction,

maintenance or operation of artificial islands, off-shore terminals, installations and other structures and devices necessary for the exploration and exploitation of the resources of the continental shelf or for the convenience of shipping or for any other purpose;

(c) exclusive jurisdiction to authorize, regulate and control scientific research; and

(d) exclusive jurisdiction to preserve and protect the marine environment and to prevent and control marine pollution."

Section 7 of the Maritime Zones Act pertains to exclusive economic zone and reads as under:-

"7. (1) The exclusive economic zone of India (hereinafter referred to as the exclusive economic zone) is an area beyond and adjacent to the territorial waters, and the limit of such zone is two hundred nautical miles from the baseline referred to in sub-section (2) of section 3.

(2) Notwithstanding anything contained in sub-section (1), the Central Government may, whenever it considers necessary so to do having regard to International Law and State practice, alter, by notification in the Official Gazette, the limit of the exclusive economic zone.

(3) No notification shall be issued under sub-section (2) unless resolutions approving the issue of such notification are passed by both Houses of Parliament.

(4) In the exclusive economic zone, the Union has,-

(a) sovereign rights for the purpose of exploration, exploitation, conservation and management of the natural resources, both living and non-living as well as for producing energy from tides, winds and currents;

(b) exclusive rights and jurisdiction for the construction, maintenance or operation of artificial islands, off-shore terminals, installations and other structures and devices necessary for the exploration and exploitation of the resources of the zone or for the convenience of shipping or for any other purpose.

(c) Exclusive jurisdiction to authorize, regulate and control scientific research;

(d) Exclusive jurisdiction to preserve and protect the marine environment and to prevent and control marine pollution; and

(e) Such other rights as are recognized by



International Law.

(5) No person ( including a foreign Government) shall, except under, and in accordance with, the terms of any agreement with the Central Government or of a licence or a letter of authority granted by the Central Government, explore or exploit any resources of the exclusive economic zone or carry out any search or excavation or conduct any research within the exclusive economic zone or drill therein or construct, maintain or operate any artificial island, off-shore terminal, installation or other structure or device therein for any purpose whatsoever: Provided that nothing in this sub-section shall apply in relation to fishing by a citizen of India.

(6) The Central Government may, by notification in the Official Gazette,-

(a) declare any area of the exclusive economic zone to be a designated area;

or

(b) make such provisions as it may deem necessary with respect to,-

(i) the exploration, exploitation and protection of the resources of such designated area; or

(ii) other activities for the economic exploitation and exploration of such designated area such as the production of energy from tides, winds and currents; or

(iii) the safety and protection of artificial islands, off-shore terminals, installations and other structures and devices in such designated area; or

(iv) the protection of marine environment of such designated area; or

(v) customs and other fiscal matters in relation to such designated area.

Explanation- A notification issued under this sub-section may provide for the regulation of entry into and passage through the designated area of foreign ships by the establishment of fairways, sealanes, traffic separation schemes or any other mode of ensuring freedom of navigation which is not prejudicial to the interest of India.

(7) The Central Government may, by notification in the Official Gazette,-

(a) extend, with such restrictions and modifications as it thinks fit, any enactment for the time being in force in India or any part thereof to the exclusive economic zone or any part thereof; and

(b) make such provisions as it may consider necessary for facilitation of the enforcement of such enactment, and any enactment so extended shall have effect as if the exclusive economic zone or the part thereof to which it has been extended is a part of the territory of India.

(8) The provisions of sub-section(7) of section 6 shall apply in relation to the laying or maintenance of submarine cables or pipelines on the seabed of the exclusive economic zone as they apply in relation to the laying or maintenance of submarine cables or pipelines on the seabed of the continental shelf.

(9) In the exclusive economic zone and the air space over the zone, ships and aircraft of all States shall, subject to the exercise by India of its rights within the zone, enjoy freedom of navigation and over flight.

30. From the above statutory provisions it can be seen that as per Article 1 of the Constitution the territory of India comprises of the territories of the States, Union territories specified in the First Schedule and such other territories as may be acquired. Admittedly, Bombay High which is situated at about 180 kms. from the shores of India is not part of the territory of India as stated in Article 1 of the Constitution. As per Section 7 of the Maritime Zones Act, it is part of Exclusive Economic Zone. It is of course true that under Article 297 of the Constitution, it is provided that all lands, minerals and other things of value underlying the ocean within the territorial waters, or the continental shelf or the Exclusive Economic Zone of India shall vest in the Union and be held for the purposes of the Union.

Thus for the purpose of vesting of lands, minerals and other natural resources etc, clause (1) of Article 297 clearly provides that the same shall vest in the Union. However, this is not the same thing as to suggest that such areas of Exclusive Economic Zone form part of the Indian territory.

For the purpose of this petition, our enquiry is whether Bombay High, which is situated in the Exclusive Economic Zone is part of the territory of India. This is relevant because under Section 3 of CST Act, the sale and purchase of goods is deemed to take

place in the course of inter-State trade or commerce if the sale and purchase occasions movement of goods from one State to another. It is, therefore, necessary for us to ascertain whether the sale in question occasioned the movement of goods from one State to another. It is therefore, necessary for us to ascertain whether the movement of goods from Hazira to Bombay High can be stated to be a movement of goods from State of Gujarat to another State within the country.

31. From the statutory provisions contained in the Maritime Zones Act, as noted in the earlier portions of this order, it can be seen that the Act envisages territorial waters of India and limits of territorial waters is the line every point of which is at a distance of twelve nautical miles from the nearest point of the appropriate baseline.

Sub-Section (1) of Section 3 specifies that the sovereignty of India extends and has always extended to the territorial waters of India and to the seabed and subsoil underlying and the air space over, such waters. Maritime Zones Act also envisages contiguous zones of India as the area beyond and adjacent to the territorial waters and the limit of the contiguous zone is the line every point of which is at a distance of twenty-four nautical miles from the nearest point of the baseline referred to in sub-section (2) of section 3.

Sub-Section (5) of Section 5 empowers the Central Government by notification in Official Gazette to extend any enactment relating to any matter referred to in clause (a) or clause (b) of sub-Section(4), namely, the security of India and immigration, sanitation, customs and other fiscal matters to the contiguous zone and also make such provisions as it may consider necessary for facilitating the enforcement of such enactment. It is further provided that any enactment so extended shall have effect as if the contiguous zone is the part of the territory of India.

32. Section 6 of the Maritime Zones Act pertains to continental shelf and is described as an area which occupies seabed and subsoil of the submarine areas that extend beyond the limit of its territorial waters throughout the natural prolongation of its land territory to the outer edge of the continental margin or to a distance of two hundred nautical miles from the baseline referred to in sub-section (2) of Section 3.

Sub-Section (2) of Section 6 provides that India has, and always had, full and exclusive sovereignty rights in respect of its continental shelf. It may be noted that the words used are sovereign rights and not sovereignty in respect of such continental shelf. Sub-Section (5) of Section 6 empowers the Central Government to issue notification to declare any area of the continental shelf and its superjacent waters to be a designated area and to make such provisions as it may deem necessary with respect to besides other purposes, customs and other fiscal matters in relation to such designated area.

33. Section 7 of the Maritime Zones Act pertains to exclusive economic zone and is defined as an area beyond and adjacent to the territorial waters and the limit of such zone would be 200 nautical miles from the baseline referred to in sub-Section (2) of Section 3 and sub-Section (4) of Section 7 of the Maritime Zones Act providing inter alia that the Union has exclusive sovereign rights in such exclusive economic zone for the purpose of exploration, exploitation, conservation and management of the natural resources, both living and non-living as well as for producing energy from tides, winds and currents. Union also has, within such exclusive economic zone exclusive jurisdiction to authorize, regulate and control scientific research and exclusive jurisdiction to preserve and protect the marine environment and to prevent and control marine pollution.

Sub-Section (5) of Section 7 prohibits any person except

under, and in accordance with, the terms of any agreement with the Central Government or of a licence or a letter of authority granted by the Central Government, explore or exploit any resources of the exclusive economic zone or carry out any search or excavation or conduct any research within the exclusive economic zone or drill therein or construct, maintain or operate any artificial island etc.

Sub-Section (6) of Section 7 empowers the Central Government by notification in Official Gazette to declare any area of exclusive economic zone to be a designated area and to make such provisions as it may deem necessary with respect to, besides other purposes, customs and other fiscal matters in relation to such designated area.

Sub-Section (7) of Section 7 authorizes the Central Government by notification in Official Gazette to extend with such restrictions and modifications as it thinks fit, any enactment for the time being in force in India or any part thereof to the Exclusive Economic Zone or any part thereof and make such provisions as it may think necessary for facilitation of the enforcement of such enactment and any enactment so extended shall have effect as if the exclusive economic zone or the part thereof to which it has been extended is a part of the territory of India.

34. From the above provisions it can clearly be seen that though Union of India has certain rights over the Exclusive Economic Zone, the Indian Union does not have sovereignty over such an region. Clause (a) to sub-Section (7) of Section 7, for example provides that the Union has, over the Exclusive Economic Zone, sovereign rights for the purpose of exploration, exploitation, conservation and management of the natural resources. Sovereign rights are thus for the limited purposes provided therein.

Sub-Section (4) of Section 7 does not speak of unlimited sovereign rights much less sovereignty of the Union of India over

the exclusive economic zone. It is only by virtue of the notification in Official Gazette that the Central Government may declare any area of exclusive economic zone to be a designated area and make such provision as it may deem necessary with respect to such area for different purposes including for the purpose of customs and other fiscal matters in relation to such designated area. Further sub-Section (7) of Section 7 empowers the Central Government to issue notification to extend certain laws to any part of the exclusive economic zone and to make such provisions as are necessary for enforcement of such enactments. It is further provided that thereupon the enactments so extended shall have effect as if the exclusive economic zone or the part thereof to which it has been extended is a part of the territory of India. The language used in clause (b) of sub-Section (7) of Section 7 to the Maritime Zones Act is significant as it does not provide that the designated area upon notification by the Union of India, shall be part of the territory of India. It provides that law so notified shall be extended as if the exclusive economic zone or the part thereof is a part of the territory of India. The language is clear and gives rise to a deeming fiction for the limited purpose of extension and application of laws notified and for that limited purpose Exclusive Economic Zone shall be deemed to be a part of the territory of India. It is not the same thing as to suggest that Exclusive Economic Zone becomes part of the territory of India. It is not even the case of the respondents that the Exclusive Economic Zone is part of the territory of India as provided in Article 1 of the Constitution of India. There is no claim of sovereignty over such an area, it is sovereign rights which are extended to such area by virtue of formation of Exclusive Economic Zone for the limited purposes envisaged under the statute. By virtue of clause (b) of sub-Section (7) of Section 7 of the Maritime Zones Act it becomes further clear that as and when Union of India issues notification extending any enactment over the Exclusive Economic Zone or part thereof such enactment extended is

applicable as if the Exclusive Economic Zone or part thereof to which it has been extended is a part of the territory of India.

35. In view of the above discussion, it clearly emerges that when the sale of goods took place at Bombay High, for which the goods moved from Hazira to Bombay High, such movement does not get covered within the expression "movement of goods from one State to another" contained in clause (a) of Section 3 of CST Act. It is clear that the goods had not been moved from one State to another since, in our opinion, Bombay High does not form part of any State of Union of India.

We may notice that similar issues came up before different courts including the Apex Court under different fiscal statutes such as the Customs Act, Central Excise Act and the Income Tax Act. The Income Tax Act, 1961 by virtue of sub-Section (2) of Section 1 extends to the whole of India. In the present form Section 2(25A) of the Income Tax Act, 1961 reads as under:-

"Section 2(25A) : "India" means the territory of India as referred to in article 1 of the Constitution, its territorial waters, seabed and subsoil underlying such waters, continental shelf, exclusive economic zone or any other maritime zone as referred to in the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976 (80 of 1976), and the air space above its territory and territorial waters."

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Presently, Section 2(25A) of the Income Tax Act thus provides that "India" means territory of India and several other areas including Exclusive Economic Zone. Prior to its amendment by the Finance Act, 2007 with effect from 25.8.1976, Section 2(25A) of the Indian Income Tax Act read as under:-

"2(25A) "India" shall be deemed to include the Union territories of Dadra and Nagar Haveli, Goa, Daman and Diu and Pondicherry,-

(a) as respects any period, for the purposes of section 6; and

(b) as respects any period included in the previous year, for the purposes of making any assessment for the assessment year commencing on the 1st day of April, 1963, or for any subsequent year;"

36. In the background of the unamended Section 2(25A) of the Income Tax Act, 1961, the Bombay High Court in the case of McDermott International Inc (No.1) vs. Union of India (supra) held that the income which had arisen on account of work done beyond 12 nautical miles was not exigible to Income Tax. Madras High Court in the case of Commissioner of Income-tax vs. Roland William Trikard (supra) also applying the unamended Section 2(25A) held that in absence of any notification extending the Income Tax Act to continental shelf and exclusive economic zone (which was issued with effect from 1.4.1983) no tax can be levied for income arising in such region.

37. Such was also the view of the Division Bench of Uttaranchal High Court in the case of Commissioner of Income-tax vs. Atwood Oceanics International S.A. (supra) wherein, it was held and observed as under:-

" In this appeal we are concerned regarding taxability of income earned by a foreign technician, employee, on the rigs located in the continental shelf and the economic zone but beyond territorial waters of India during the accounting year ending March 31, 1983. On March 31, 1983, the Government of India issued Notification no.G.S.R. 304(E) (see [1983] 142 ITR (St.)11), under section 6(6) and section 7(7) of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976 ( hereinafter referred to for the sake of brevity as " the said Act, 1976"). By the said notification the provisions of the Income-tax Act were made applicable from April 1, 1983, to the continental shelf and exclusive economic zone. It is important to note that in this case we are concerned with the concept of taxable territory of India under the Income-Tax Act,1961. This is important as it is only by virtue of notification dated March 31, 1983, that the continental shelf and the exclusive economic zone became part of the taxable territory with effect from April 1, 1983. Therefore, the said tax could not



have been levied on the income which accrued in the accounting year ending March 31, 1983, when the territory in which it accrued was not the taxable territory to which the Income-tax Act applied. To levy the tax, the income must accrue in the territory to which the Income-Tax Act applies. In this case article 297 of the Constitution is not relevant. For the purpose of deciding this matter the only relevant issue is whether the income earned by a non-resident accrued in a taxable territory prior to April 1, 1983. On facts it is clear that the foreign technician had earned salary income before April 1, 1983, by working on the oil rigs, located beyond 12 nautical miles and therefore he was not taxable for the assessment year 1983-84. Our view is supported by the judgment of the Madras High Court in the case of CIT v. Ronald William Trikard [1995] 215 ITR 638 and also by the judgment of the Bombay High Court in the case of McDermott International Inc.(No. 1) v. Union of India [1988] 173 ITR 155. The various judgments of the Supreme Court cited by Mr. Posti on behalf of the Revenue have no application to the facts of the present case as in those judgments the facts related to the amendment of the Income-Tax Act either by the Finance Act or by the Tax Law Amending Act which is not the case herein. In the present case, there is only a notification issued by the Central Government, that notification is issued not under the Income-tax Act but under the said Act, 1976. For the aforesaid reasons, we answer both the above questions in the affirmative, i.e. in favour of the assessee and against the Department. Accordingly, all the above appeals are disposed of. No order as to costs."

38. We may notice that subsequently, however, the Union of India appears to have issued notification extending the Income Tax Act to the continental shelf and Exclusive Economic Zone with effect from 1.4.1983. It also emerges that the Income Tax Act, 1961 itself has been amended by making much wider provisions in Section 2(25A). In absence of such provisions as it stands in the present form and in absence of a notification extending the Income Tax Act to Exclusive Economic Zone and such other areas, as already noted, different High Courts have held that no tax can be collected on the incomes arising out of the works done in such Exclusive Economic Zone.

39. It may further be noticed that Union of India has issued

different notifications under different fiscal statues e.g. by a notification dated 19.9.1996 the Central Government has extended the Customs Act and the Customs Tariff Act to the designated areas of the continental shelf and the Exclusive Economic Zone with immediate effect. Likewise in a notification dated 11.6.1987, the Central Government has extended the Central Excise and Salt Act, 1944, the Mineral Products (Additional Duties of Excise and Customs) Act, 1958 and the Central Excise Tariff Act, 1985 to the designated areas in the continental shelf and Exclusive Economic Zone. Similarly, by notification issued in March, 1983 the Central Government has extended the Income Tax Act, 1961 to the continental shelf of India and Exclusive Economic Zone in respect of income derived by every person from all or any of the activities specified in the notification.

40. By a notification dated 27.2.2010 provisions of Chapter V of Finance Act, 1994 ( pertaining to Service Tax) have been extended to continental shelf and Exclusive Economic Zone as indicated for the purposes specified in the notification. It can thus be seen that the Central Government has been issuing notifications extending different taxing statutes to designated areas, continental shelf and Exclusive Economic Zone. Such notifications have been issued extending the Income Tax Act, 1961, Customs Act and the Customs Tariff Act, Central Excise Act and the Central Excise Tariff Act, the Service Tax and the provisions contained in Finance Act, 1994. However, admittedly, no such notification has been issued extending all or any of the provisions of CST Act to any of the designated areas, continental shelf or Exclusive Economic Zone. To our mind in absence of such notification, respondents could not have demanded tax under the CST Act from the petitioners on its sale of machinery, parts etc. to the respondent No.5, which sale was completed at Bombay High.

41. Decision of the Apex Court in the case of Aban Loyd Chiles Offshore Limited and another vs. Union of India and others (supra) is relevant for our purpose. In the said case, the facts were that the appellants had engaged in drilling operations for exploration of offshore oil, gas and other related activities under the contracts awarded to them by ONGC. Such drilling operations were carried out at oil rigs/vessels, which were situated outside the territorial waters of India. In that background, question arose before the Apex Court whether the oil rigs engaged in the operations in exclusive economic zone /continental shelf falling outside the territorial waters of India, were foreign going facilities as defined under Section 2(24) of the Customs Act, 1962 and were entitled to consume imported stores without payment of customs duty. The appellant had imported the "stores" by air which landed at Sahara Airport. When they sought clearance to shift stores without payment of duty, the Revenue authorities opposed the same. The Revenue, relied on the decision of the Bombay High Court in the case of Pride Foramer vs. Union of India (supra), it was in this background the Apex Court considered the above noted legal question. The Apex Court examining the provisions contained in Section 6 of the Maritime Zones Act observed in paragraph 74 of its decision that it is clear that in respect of continental shelf and Exclusive Economic Zone, India has been given only certain limited sovereign rights and such limited sovereign rights conferred on India in respect of continental shelf and Exclusive Economic Zone cannot be equated to extending the sovereignty of India over the continental shelf and Exclusive Economic Zone. Referring to words "as if" used in the said provisions, it was observed that sub-Section (6) of Section 6 and sub-Section (7) of Section 7 create fiction by which continental shelf and Exclusive Economic Zone are deemed to be a part of India for the purposes of such enactments which are extended to those areas by the Central Government by issuing a notification. In paragraph 77 of the decision, it was observed that

the coastal State has no sovereignty in territorial sense of dominium over the contiguous zone, but it exercises sovereign rights for the purpose of exploring the continental shelf and exploiting its natural resources. In paragraph 79 it was observed that it is a concept of restricted sovereignty linked to the resources sense sans the incidents of territoriality. This is so because, in other respects, the status of the waters in this area as a part of the high seas is specifically recognised and retained in the Convention.

In this background, the Apex Court held as under:-

"85. Reading of Sections 6 and 7 of the Maritime Zones Act, 1976 makes it clear that India's jurisdiction over the Maritime Zones Act, 1976 extends to the continental shelf and exclusive economic zone. Consequently, if mineral oil is extracted or produced in the exclusive economic zone or continental shelf and is brought to the mainland, it will not be treated as import and, therefore,, no customs duty would be leviable. Likewise, goods supplied to a place in the exclusive economic zone or continental shelf will not be treated as export under the Customs Act and no export benefit can be availed on such supply. Any mineral oil produced in the exclusive economic zone or continental shelf will be chargeable to Central excise duty, as goods produced in India."

The decision of the Bombay High Court in the case of Pride Foramer was upheld observing as under:-

"89. We do not find any ambiguity in this situation. The interpretation given by the High Court in Pride Foramer case would not result in any absurd situation as contended by the counsel for the appellants. The appellants want the Court to read Section 2(21) of the Customs Act in isolation, which would not be the correct approach. The Customs Act has to be read along with the provisions of the Maritime Zones Act, 1976."

The Apex Court concluded as under:

"The combined effect of these notifications is to extend the application of the Customs Act and the Customs Tariff Act to the aforesaid areas declared as "designated areas" under the Maritime Zones Act,1976. The further effect of these

notifications is that the designated areas of the continental shelf and the exclusive economic zone become a part of the territory of India for limited purposes. The natural consequence of such declarations and the extension of the Customs Act and the Customs Tariff Act to these designated areas is to introduce the customs regime to such areas resulting in the levy and collection of customs duties on goods imported into these areas as if these areas are a part of the territory of India. In these circumstances, the definition of "India" as given in Section 2(27) of the Customs Act gets extended by these provisions to cover areas declared as designated areas beyond the territorial waters and located the continental shelf and the exclusive economic zone of India."

42. The decision in the case of Aban Loyd Chiles Offshore Limited and another vs. Union of India and others (supra), thus clearly lays down principle of limited sovereign rights over continental shelf and Exclusive Economic Zone regions and giving rise to a deeming fiction for the purpose of extension of the laws by notification issued by the Central Government under Sections 6 and 7 of the Maritime Zones Act. In the said case on extending the Customs Act and Central Excise Act, by virtue of notifications, the Apex Court held that any movement of goods to such Exclusive Economic Zone would not be an export and no export benefit can be availed on such supply. It was further held that mineral oil produced in the exclusive economic zone and continental shelf will be chargeable to Central Excise duty as goods produced in India.

In the present case, however, we are confronted with the situation where CST Act has not been extended by issuance of notification by the Central Government to the continental shelf or the exclusive economic zone.

43. Coming to the decisions cited by the counsel for the State, we may record that the cases of *Burmah Shell Oil Storage & Distributing Co. of India Ltd. vs. CTO* (supra), *Madras Marine and Co. vs. State of Madras* and *The State of Madras vs. Davar & Co.*

Etc., related to the question whether the movement of goods can be stated to be in course of export. **Counsel for the petitioners did not pursue this line of arguments in the present petition, confining challenge only to the non-applicability of the provisions of CST Act contending that since there is no inter-State movement, CST Act would not apply. We, therefore, need not go any further into this aspect.**

44. In the case of Oil and Natural Gas Corporation Ltd vs. Rt. Hon.Sir Michael Karr and another (supra), the Bombay High Court was concerned with the jurisdiction of arbitration proceedings and the decision therein, therefore, would have no direct bearing on the present issue.

45. In the case of Nand Lal Hira Lal vs. The Punjab State (supra), the Punjab and Haryana High Court was examining a situation where the sale of goods had occasioned the movement from the State of Punjab into the State of Jammu and Kashmir. Since CST Act is not extended to Jammu and Kashmir, contention of the assessee was that no sales tax can be collected on such sale of goods. It was in this background, the Division Bench held that the provisions of CST Act would be applicable since the same are extended to the State of Punjab. In the said case, however, it can be seen that the movement of goods was from Punjab to Jammu to Kashmir, which was also part of the territory of India and thus squarely answered description "sale of goods having occasioned the movement of goods from one State to another." Similar facts were involved in the decision of Madras High Court in the case of S. Mariappa Nadar and others vs. The State of Madras (supra).

46. In the case of Murli Manohar and Co. and anr. vs. State of Haryana and anr (supra), the Apex Court did observe that there can

be movement of goods by virtue of local sale, inter-State sale or sale in course of export outside the territory of India. It was observed that sale effected by the assesseees in the circumstances, which have been set out in the earlier portion of the judgment, must fall in one of the three categories. It was observed that "We are unable to conceive of a fourth category of sale, which could be neither a local sale nor an inter-State sale nor an export sale." Much was sought to be made out from these observations of the Apex Court by the counsel for the State. It was contended that since the sale can fall in only one of the three categories, in the present case, the Court must hold that it is either inter-State sale or a local sale since the contention that it was an export sale has not been pressed.

We are, however, unable to accept the contention. The observations of the Apex Court cannot be seen in isolation and it is well settled that it is not observation of the Court but what the Court holds in the fact situation of a given case which is the ratio that can be applied in similar set of facts and circumstances. In the decision of *Murli Manohar and Co.*, the Apex Court was not considering the sale in the nature that we are confronted with. It was not a case where the sale of goods occasioned the movement from the Indian State to a territory which is not part of India and which is for the limited purpose of claiming rights to exploit the natural resources and exploration etc. the Indian Union claims limited sovereign rights.

47. Learned Government Pleader also referred to Section 9 of CST Act to contend that the State has the power to collect Central Sales Tax when the jurisdiction over the transaction is within the State. To such preposition there cannot be any dispute at all. The Central Sales Tax envisages tax collection by the respective States as contained in Section 9 of the Act. For application of Section 9 of

the Act, however, there must first be exigibility to tax of a certain transaction. When we hold that the transaction in question is not exigible to CST, the question of permitting the State to collect such tax does not arise.

48. In the reply affidavit filed, objection has also been raised with respect to availability of alternative efficacious remedy. We are conscious that the petitioners have assailed the order of assessment passed by the competent authority under the CST Act. We are also conscious that against such an order, statutory appeals are available. It is also true that the Courts normally do not permit the litigant to by-pass such alternative remedy, particularly in the matters of fiscal statutes. However, there are certain well established and well accepted exceptions to such a rule. For example when it is found that action of the authorities is wholly without jurisdiction, the Court may in a given case exercise writ jurisdiction despite availability of alternative remedy. We are fortified by the decision of the Division Bench of this Court in the case of Gujarat Gas Co. Ltd. vs. Joint Commissioner of Income-Tax (Assessment) reported in [2000] 245 ITR 84 (Guj.), wherein considering the facts of the case and finding that relegating the assessee to the Appellate Commissioner would be a futile exercise, the Division Bench of this Court after examining large number of decisions on the point held that alternative remedy would not be a bar to entertaining the writ petition directly against the order of assessment. The Court observed as under:-

"However, in our opinion, the rule that the court would not entertain a writ petition under article 226, if there was an alternative remedy was a rule of judicial policy. " It was a rule of policy, convenience and discretion rather than a rule of law." If the alternative remedy was onerous and burdensome or the decision of an authority was without jurisdiction or in violation of the rules of natural justice or there was an error of law apparent on the face of the record, or where the statute under which an administrative order was passed was unconstitutional, the courts granted the remedy under article 226. In our opinion, though learned counsel



appearing for the Revenue has relied upon several judgments of the Supreme Court regarding alternative remedy, the same are not applicable to the present case. In our view even if the petitioner files an appeal before the Commissioner of Income-tax, the Commissioner of Income-tax would be guided by what the circular of the Central Board of Direct Taxes says and, therefore, the remedy provided by way of appeal under the Act is futile and therefore also we are inclined to entertain this petition."

49. In this regard, we may also rely on the decision of the Apex Court in the case of Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai and others reported in AIR 1999 SC 22, wherein it was observed that jurisdiction of High Court in entertaining a writ petition under Article 226 of the Constitution of India in spite of alternative statutory remedy, is not affected specially in a case where the authority against whom the writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation. In the case of State of U.P. vs. Mohammad Nooh reported in AIR 1958 SC 86, the Apex Court observed that there is no rule with regard to certiorari as there is with mandamus, that it will lie only where there is no other equally effective remedy. It is well established that, provided the requisite grounds exist, certiorari will lie although a right appeal has been conferred by statute.

50. Before closing, we my record that counsel for the petitioners also argued that even if the sale had taken place and completed at Hazira, the same would not be categorized as a local sale as the sale occasioned the movement of goods from Hazira to Bombay High. He, therefore, argued that even if the sale had been completed at Hazira, the same would not be exigible to any sales tax. We, however, need not go into this question for the following reasons:-

(1) Both the sides have agreed on record and proceeded before us on the basis that title of goods passed on at Bombay High and

the sale took place at Bombay High.

(2) Therefore any observations that we may make with respect to the contention of the counsel for the petitioners would be only obiter in nature since such question has not arisen for our consideration in this petition.

(3) When the petitioners contended that the sale of goods had not occasioned movement of goods from one State to another, the question would be can it then still be kept out of the purview of the local sales tax if the sale had actually taken place at Hazira. In other words, would such a contention not lead to legal fallacy, is a question we keep open to be judged in appropriate case at appropriate time.

51. In the result, the petition is allowed. The impugned order at Annexure-A is quashed. Petition is disposed of accordingly.

52. At this stage, learned APP Ms. Maithili Mehta prayed for reasonable time to permit the State to file appeal against this judgment. It is stated that Rs.25 crores is already deposited by the petitioners with the State authorities under our order dated 27.4.2011. It is provided that State shall not be required to refund amount of Rs.25 crores deposited by the petitioners under our order dated 27.4.2011 for the period of 8 weeks from today.

(Akil Kureshi, J. )

(Ms. Sonia Gokani, J.)