IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Civil Writ Petition No.18339 of 2015 (O&M)
DATE OF DECISION: 14.07.2017

M/s WS Retail Services Private Limited

…..Petitioner

versus

Union of India and others

.....Respondents

CORAM:- HON'BLE MR. S.J. VAZIFDAR, CHIEF JUSTICE

HON'BLE MR. JUSTICE ANUPINDER SINGH GREWAL

Present: Mr. Tarun Gulati, Advocate and
Mr. Sandeep Goyal, Advocate for the petitioner

Ms. Sudeepti Sharma, Additional Advocate General, Punjab

..

S.J. VAZIFDAR, CHIEF JUSTICE:

1. Respondent Nos.2 and 3 are the State of Punjab and the State of Karnataka. Respondent Nos.4 and 5 are the Excise & Taxation Commissioner and the Excise and Taxation Officer-cum-Assessing Authority (ETO).

2. The petitioner seeks a writ of certiorari to quash two show cause notices dated 16.10.2014 and 05.06.2015, an assessment order dated 03.08.2015 and a demand notice dated 18.08.2015. The petitioner also seeks a writ of mandamus directing respondent No.3-State of Karnataka to refund the Central Sales Tax (CST) collected from the petitioner.

The impugned order dated 03.08.2015 is an assessment order made by respondent No.5 (ETO) for the accounting year 2012-13 under section 29(2) of the Punjab Value Added Tax Act, 2005 (PVAT Act) as it stood at the relevant time. The impugned order dated 18.08.2015 is a tax demand notice directing the petitioner to pay a sum of Rs.55,21,230/- pursuant to the assessment order. The assessment order assessed the balance tax due at Rs.1,30,84,500/-. Interest under section 32 of the PVAT Act was levied and penalty under sections 56 and 60 of the PVAT Act was imposed.

An assessment was also made under the Central Sales Tax Act, 1956 (CST Act) at Rs.15,73,000/-. Interest and penalty were also levied and imposed.

3. We would normally have relegated the petitioner to the alternate remedy of filing an appeal. We have, however, entertained this writ petition for two reasons. Firstly, there has been an exponential growth in online trading. The indication is that online trading will increase. There are certain questions of law which have been dealt with in several judgments of the Supreme Court and of certain High Courts concerning the legal issues that arise in these cases. These have neither been noticed nor considered in the impugned orders. They relate, at least to a large extent, to the jurisdiction of the officers concerned initiating the proceedings under the PVAT Act. The Kerala and the Madras High Courts have dealt not only with a similar case but with the petitioner’s case regarding other transactions. In the facts

and circumstances of this case, it is desirable that there is clarity on the issues of law.

4. We have refrained from expressing any views on merits of each transaction for there are far too many of them. This judgment deals with the legal issues leaving it to the assessing authority to pass a fresh assessment order in accordance with this judgment.

5. The facts, so far as the questions we intend dealing with are concerned, are as follows:

The petitioner carries on business of selling goods through an online portal www.flipkart.com to customers for their personal use. The petitioner also provides logistic services to various parties which also carry on the business of selling goods through the said online portal. The goods sold and transported by the petitioner to parties in the State of Punjab were subject to CST in the State from where the goods were despatched. The goods were brought to Punjab from other States. The petitioner's warehouses are located outside the State of Punjab. They are located in the States of Karnataka, Tamil Nadu, Maharashtra, Haryana, Uttar Pradesh, Delhi and West Bengal. The petitioner had paid the CST in respect of such goods. As the petitioner did not undertake any sale transaction in the State of Punjab, it did not have a taxable turnover for the purpose of assessment under the PVAT Act and, therefore, filed 'nil' returns for the Assessment Year 2012-13 on quarterly basis in Form VAT-15. Based on these

returns, the annual statements, as required under Rule 40 in Form VAT-20, were also filed.

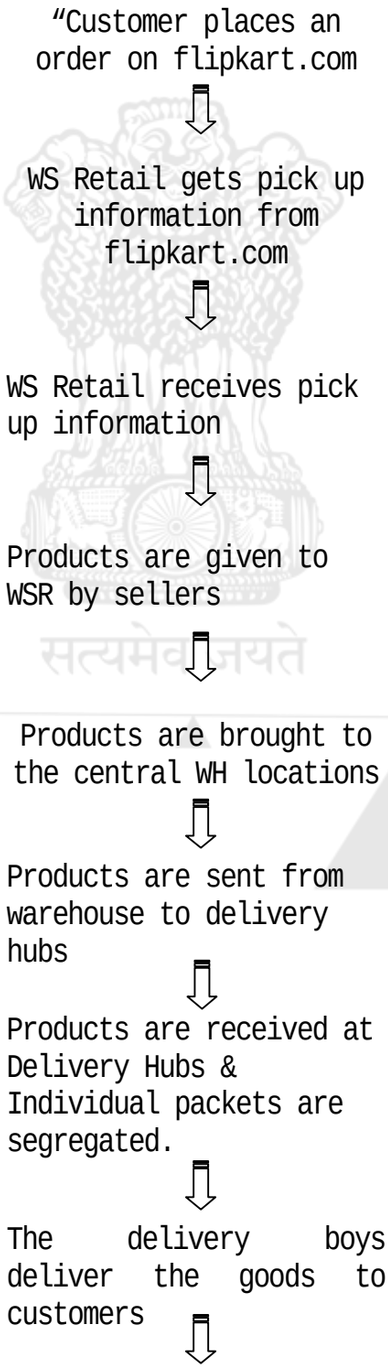
6. The State of Punjab enacted the Punjab Value Added Tax Act, 2005. It provides for the levy and collection of Value Added Tax (VAT) and turnover tax on the sale and purchase of goods and for the matters connected therewith and incidental thereto and for the repeal of the Punjab General Sales Tax Act, 1948. The petitioner registered itself as a taxable person/registered person under the PVAT Act as it intended setting up a warehouse in the State of Punjab. However, for reasons which are not material, the petitioner did not set up a warehouse for undertaking any business of sale or purchase of goods in the State of Punjab.

7. It would be useful to refer to the essential features relating to online transactions undertaken between the petitioner and its customers.

The customer logs on to the online portal "www.flipkart.com." The customer then selects goods to be purchased. Upon agreeing to purchase the goods, the customer places an order on www.flipkart.com. The order is received by the sellers such as the petitioner. The petitioner provides a pick up confirmation to www.flipkart.com. The petitioner then despatches the good(s) from one of its warehouses.

The petitioner has delivery hubs in the State of Punjab. This is necessitated on account of the voluminous transactions of a similar nature. The hubs only facilitate the distribution and delivery of the goods ordered by the

customers in the State of Punjab. The goods delivered to the hubs are on account of the transactions that were earlier entered into by the customers' selecting the goods and agreeing to purchase them by logging on to the online portal www.flipkart.com. Delivery boys then pick up the goods from the hubs and deliver them to the customers. The petitioner furnished the following flow chart to the authorities as well as before us:-



Order Delivery is
confirmed to the website
flipkart.com"

The petitioner's case, therefore, is that the goods moved from various States to the State of Punjab on account of the contracts of sale entered into between the petitioner and various purchasers.

Invoices are issued in the State from which goods are sourced with the name and address of the customer. The invoices accompanied the goods. This, according to the petitioner, makes it clear that the movement of the goods is on account of a contract of pre-existing sale.

8. It would be convenient to note at this stage that the invoices issued by the petitioner to the customers upon the customers placing orders indicate the location of the warehouse. In the sample invoices, for instance, the warehouses are stated to be situated in Maharashtra, Karnataka, Delhi, Tamil Nadu and West Bengal. None of the invoices referred to a warehouse in Punjab. The invoices also mentioned the address of the purchasers who, in the present case, are all of Punjab. The shipping addresses accordingly also mention the addresses in Punjab. Along with the details of the products, the tax paid is also mentioned. For example, in one invoice, it is stated "12.50% in Maharashtra inter state VAT" and in another it is stated "5.50% Karnataka inter state VAT".

As we mentioned earlier, the petitioner's warehouses are located outside the State of Punjab. The goods were,

therefore, despatched from warehouses outside the State of Punjab to the purchasers in the State of Punjab. Contending that these are, therefore, inter-state sales, the petitioner paid the CST in the State where the warehouses from which the goods were despatched are located.

9. The petitioner is also a logistic service provider. This business is also related to the online portal www.flipkart.com which, being an online marketing place, displays goods of various sellers, who are registered with the portal. As we mentioned earlier, the customers purchased goods identified by them from various sellers including the petitioner. In respect of the transactions between the customers and the other sellers i.e. the sellers other than the petitioner, the petitioner undertakes transportation and logistic support for such sellers under its brand name “e-kart”. Such goods are despatched for various customers and are subject to CST in the hands of the sellers in the States from where such despatches take place. In respect of these transactions, the petitioner only acts as a service provider and has no other rights in respect of the goods.

10. The petitioner filed the relevant declaration at the Information Collection Centre (ICC) in accordance with section 51 of the PVAT Act contending that it did not have any taxable turnover in the State of Punjab and also contending that it had paid the CST in respect of the goods so brought into the State of Punjab. The petitioner filed “nil” returns of VAT

including for the assessment year in question, namely, 2012-13.

11. The Excise & Taxation Officer - respondent No.5 issued the first notice dated 16.10.2014 alleging that as per the ICC data the petitioner had in the Financial Year 2012-13 imported goods into Punjab of the value of Rs.10.25 crores and exported goods from Punjab of the value of Rs.1.10 crores. The notice alleged that the petitioner had, therefore, not assessed the tax liability as per the provisions of the PVAT Act and the 'Nil' returns filed by the petitioner were, therefore, not true and correct. The petitioner was afforded a personal hearing and was directed to produce details of the material purchased and sold along with the invoices and proof of movement of goods, balance-sheet for the year 2012-13, item-wise list of commodities imported from and exported outside the State and details of bank accounts. The petitioner was called upon to show cause why its tax liability be not calculated on the basis of the data available with the department and penal action be not taken under section 56 of the PVAT Act for suppressing the taxable turnover and evading the tax to the State's exchequer.

The petitioner filed a reply dated 09.02.2015 in which it stated some of the facts that we have already referred to. The petitioner stated that its logistic division had inadvertently quoted the TIN (Tax Identification Number) of Punjab in respect of the said sales. The petitioner stated that the transactions fall within the ambit of section 3 of

the CST Act. The petitioner enclosed sample manifest along with invoices with reference to the ICC data. The alleged export of Rs.1.10 crores was stated to be the value of goods returned by the customers.

12. The ETO(VAT), Punjab - respondent No.5 issued a further show cause notice dated 05.06.2015 termed "FINAL NOTICE" for framing the assessment under section 29(2) of the PVAT Act and under section 9(2) of the Central Sales Tax Act, 1956 read with section 29(2) of the PVAT Act in respect of the Assessment Year 2012-13. The notice directed the petitioner to produce a copy of the agreement with Flipkart as logistic partner, the agreement with Flipkart as a seller on its platform, the terms regarding the consideration to be paid by Flipkart to the petitioner as a logistic partner and as a seller, details of items sold by the petitioner and of the bills which are manifest according to petitioner, details of tax paid by the petitioner in Karnataka and the process flow of the movement of goods from the source of supply to the destination and the remittance of consideration received from the customers.

The petitioner by its reply dated 09.06.2015 stated that it had not undertaken any trading/sale/purchase in or from the State of Punjab. The documents sought were furnished under cover of the reply. The petitioner reiterated what it had stated in reply to the earlier show cause notice.

13. This brings us to the impugned assessment order dated 03.08.2015.

14. In the assessment order, the ETO framed and answered seven questions. The first question was whether the petitioner had traded in goods as defined under the PVAT Act. There is no dispute that the articles dealt with by the petitioner fall within the meaning of the word "goods" as defined in section 2(k) of the PVAT Act which reads as under:-

> "Definitions. 2. In this Act, unless the context otherwise requires, –
>
> …… …..' …..' …… …… …… …….
>
> (k) "goods" means all kinds of movable property, whether tangible or intangible, other than newspapers, actionable claims, money, stocks, shares and securities and includes livestock, growing crops, grass, trees, plants attached to or forming part of the land, which are agreed to be severed before the sale or under the contract of sale;"

15. The assessment order observed that most of the articles are electronic goods and we will presume that to be so. While answering question Nos.2, 3, 4 and 7, the ETO proceeded almost entirely, on the basis that the goods were brought into the State of Punjab through the ICC and that in Form VAT-36 the petitioner mentioned its TIN. This fact, according to the ETO, established that the petitioner had imported the goods to Punjab without anything more and sold the same only thereafter to various customers. Thus, according to the ETO, the petitioner sold the goods in the State of Punjab and that the sales were not inter-state sales as contended by the petitioner. This, in our view, was a fundamental error.

16. It will be convenient to set out the relevant parts of the order to indicate the extent of the importance placed by the ETO on this aspect.

> "Question 2: Whether the logistics partner is a trader?
>
> The WS Retail Services Private Limited, the logistics provider is a registered taxable person under the Punjab VAT Act, 2005 holding TIN 03392097512. The taxable person has imported the goods on its TIN. The taxable person does not have any physical stock or stock in the books of such imports made. Further, it has exported goods in the course of interstate trade and commerce. Thus, the taxable person is a legitimate trader. Any person importing goods on its TIN shall be required to dispose of such goods in course of trade and commerce. The dealer takes the plea that it happened by mistake. Mistake can be made once or twice. The dealer kept on importing the goods into the State of Punjab not in the present year but in the next years too. Further, the dealer has made e-icc entries in the present year. The details are given below:
>
> | Period | No. of e-icc entries | Value of e-icc entries |
> |---|---|---|
> | 2012-13 | 967 | 98319011 |
> | Period | No. of e-icc entries | Value of e-icc entries |
> | 2012-13 | 41 | 4223876 |
>
> The entries on e-icc platform rules out the possibility of mistake on the part of the dealer. They have also submitted that in the initial phases they were trying to expand their market and hence did not concentrate on state specific vat laws. There's an important legal principle that says "ignorance of the law is no excuse." For continuously three years the goods were being imported into the State of Punjab on the Tax Identification Number (TIN). The dealer has no stock of the goods with him in his books. Hence, it is very clear that all the goods have been sold in the State of Punjab on which the dealer is liable to pay tax. (emphasis supplied)

Question 3: Whether the taxable person be taxed?

Online trading is not defined in any of the fiscal statute or in the Constitution of India where definition of business, goods, sales, interstate sales, interstate sales, etc. are defined in respect of conventional trading. The taxable person stated that it has been providing logistics support to Flipkart Internet Private Limited. The data of the Department clearly shows that the taxable person has imported the goods on its TIN. If the goods have been imported by the taxable person, then it would have disposed off also by the taxable person. It is the taxable person who has dispatched the taxable goods to the end consumer. The consumer is in the State of Punjab. Most of the transactions made by the end users are on the basis of cash on delivery. The taxable person has also received the consideration for the goods sold to the end user. Thus, the transaction has the following ingredients:

a. Lawful buyer and the seller.

b. Sale of goods

c. Lawful Consideration.

Thus, the transaction is a legitimate sale by the taxable person within the State of Punjab and hence, the person is liable to be taxed.

(emphasis supplied)

Question 4: Whether the sale occurred within the State of Punjab?

a. The goods were imported into the State of Punjab by the taxable person on its TIN to supply to the customers who are the bonafide residents of Punjab.

b. The order was made by the customer of Punjab from his residence or the premises in Punjab. The customer used the resources like internet and hardware in Punjab to reach the website to place an order.

c. The goods were delivered to the Customer of Punjab.

d. The seller received the consideration for the goods sold to the customer of Punjab.

In this case, it is clear that the goods were imported by the taxable person to sell in the State of Punjab. Hence, all the Sales except clearly mentioned as exports as per ICC data have occurred within the State of Punjab.

…… …..  …..  …… …… ……

Question 7. If the dealer has acted as a logistics partner, then can we tax him?

…… …..  …..  …… …… ……

b. The goods for trade or use in manufacture of goods can be purchased from within the State of Punjab or from outside the State of Punjab. The taxable person has purchased the goods from outside the State of Punjab. Such goods should either be sold in the State, or sold in the course of interstate trade or commerce or in the course of export out of India or used in the manufacture of taxable or tax free goods or if not sold or used manufacture should be held as stock by the taxable person. The taxable person has been confronted with the fact that it has imported goods to the tune of Rs.10.25 crores through ICCs. Further, most of the import transactions are of electronics. The taxable person was asked to explain how the goods imported were disposed off. Whether they are sold within the State or sold outside India or in course of interstate trade and commerce or lying in the stock. The taxable person has failed to submit plausible explanation. The taxable person has failed to furnish the documents in the support of imports and also in support of the disposal of such goods. The taxable person failed to produce the documents in support of movement of goods and payments also. Further, they failed to produce any evidence regarding the physical or stock in the books of electronics imported by the taxable

> person on its TIN. Hence, it is established that the taxable person has suppressed the turnover and evaded the tax to the State's exchequer.
>
> d. …… …… …… …… …… ……
>
> Further, data pertaining to the year 2012-13 was also checked. The invoices clearly show that WS Retail is a consignor and not a service provider. The goods are being imported into the State from Delhi, Maharashtra, Karnataka, Chennai, West Bengal into the State of Punjab. The goods have been brought into the State by WS Retail on its TIN Number into the State of Punjab from its another TIN Number in other states. After entering the State of Punjab the goods are first unloaded and further delivered to the customers. Consideration was taken by it on "cash on delivery basis" from the customers in the State of Punjab. The dealer is liable to pay tax on such transactions in the State of Punjab. It is difficult to segregate the items tax wise. Further, invoice numbers mentioned in the excel sheet submitted by the dealer are not existing in the ICC data being confronted to the dealer."
>
> (emphasis supplied)

17. (A) Section 51 of the PVAT Act, 2005, in so far as it is relevant, reads as under:-

> "CHAPTER-IX
> ESTABLISHMENT OF
> INFORMATION COLLECTION CENTRES
>
> 51. (1) If, with a view to prevent or check avoidance or evasion of tax under this Act, the State Government considers it necessary so to do, it may, by notification, direct for the establishment of a check post or, information collection centre or both at such place or places, as may be specified in the notification.

(2) The owner or person Incharge of a goods vehicle shall carry with him a goods vehicle record, goods receipt, a trip sheet or a log-book, as the case may be, and a sale invoice or bill or cash memo, or delivery challan containing such particulars, as may be prescribed, in respect of such goods meant for the purpose of business, as are being carried in the goods vehicle and produce a copy each of the aforesaid documents to an officer Incharge of a check post or information collection centre, or any other officer not below the rank of an Excise and Taxation Officer checking the vehicle at any place:

Provided that a person selling goods from within or outside the State in the course of inter-State trade or commerce, shall also furnish or cause to be furnished a declaration with such particulars, as may be prescribed:

Provided further that a taxable person, who sells or despatches any goods from within the State to a place outside the State or imports or brings any goods or otherwise receives goods from outside the State, shall furnish particulars of the goods in a specified form obtained from the designated officer, duly filled in and signed.

…. …. …… …… …… …… …… …… …… …… …… ……

(4) The owner or person Incharge of a goods vehicle entering the limits or leaving the limits of the State, shall stop at the nearest check post or information collection centre, as the case may be, and shall furnish in triplicate a declaration mentioned in sub-section (2) alongwith the documents in respect of the goods carried in such vehicle before the officer Incharge of the check post or information collection centre. The officer Incharge shall return a copy of the declaration duly verified by him to the owner or person Incharge of the goods vehicle to enable him to produce the same at the time of subsequent checking, if any:

…. …. …… …… …… …… …… …… …… …… …… ……

Provided further that no penalty shall be imposed unless the person concerned has been given an opportunity of being heard.

…. …. …… …… …… …… …… …… …… …… …… ……

(6) (b) If the owner or the person Incharge of the goods has not submitted the documents as mentioned in sub-sections (2) and (4) at the nearest check post or information collection centre, in the State, as the case may be, on his entry into or before exit from the State, such

goods shall be detained alongwith the vehicle for a period not exceeding seventy-two hours subject to orders under clause (c) of sub-section (7).

(7) (a) The officer detaining the goods under sub-section (6), shall record the statement, if any, given by the consignor or consignee of the goods or his representative or the driver or other person Incharge of the goods vehicle and shall require him to prove the genuineness of the transaction before him in his office within the period of seventy-two hours of the detention. The said officer shall, immediately thereafter, submit the proceedings alongwith the concerned records to the designated officer for conducting necessary enquiry in the matter;

…. …..…… ……. ……. ……. ……. ……. ……. ……

(c) The officer referred to in clause (b), before conducting the enquiry, shall serve a notice on the consignor or consignee of the goods detained under clause (b) of sub-section (6) and give him an opportunity of being heard and if, after the enquiry, such officer is satisfied that the documents as required under sub- sections (2) and (4), were not furnished at the information collection centre or the check post, as the case may be, with a view to attempt to avoid or evade the tax due or likely to be due under this Act, he shall by order, for reasons to be recorded in writing, impose on the consignor or consignee of the goods, penalty equal to fifty per cent of the value of the goods involved. In case, he finds otherwise, he shall order release of the goods for sufficient reasons to be recorded in writing. He may, however, order release of the goods and the vehicle on furnishing of a security by the consignor or the consignee in the form of cash or bank guarantee or crossed bank draft for an amount equal to the amount of penalty imposable and shall decide the matter finally within a period of fourteen days from the commencement of the enquiry proceedings;

…. …..…… ……. ……. ……. ……. ……. ……. ……

Explanation.– The detained goods and the vehicle shall continue to be so detained beyond the period specified in sub–sections (6) and (7), unless released by the detaining officer or enquiry officer against surety or security as provided for in these sub–sections or the penalty imposed, has been realized or the enquiry officer orders release of the detained goods after enquiry, whichever is earlier.

…. …..…… ……. ……. ……. ……. ……. ……. ……

(12) Where a transporter fails to give information as required under sub- section (2) about the consignor or consignee of the goods, within such time, as may be specified, or transports the goods without documents or with ingenuine documents, he shall be liable to pay, in addition to the penalty leviable under this section, the tax due on such goods at the VAT rate applicable under this Act.

(13) The provisions of this Act shall, for the purpose of levy and collection of tax, determination of interest and recovery of tax and interest, apply to the transporter.

Explanation. – (1) For the purposes of this section, where goods are delivered to a carrier, a goods booking agency or any other bailee for transportation, the movement of the goods shall be deemed to commence at the time of such delivery and terminate at the time, such delivery is taken from such carrier, goods booking agency or any other bailee, as the case may be.

(2) For the purpose of sub-section (7), service of notice on the representative of the owner or the driver or other person Incharge of the goods vehicle, shall be deemed to be a valid service on the consignor or consignee of the goods"

(B) (i) Rule 64 (1) of the PVAT Rules is as follows:-

"R-64. Procedure for furnishing information at the Information Collection Centre .—

(1) The owner or person in charge of the goods vehicle shall submit before the authorised person at the Information Collection Centre ;-

…… …..  …..  …… …… …… …….

(b) declaration for transport of goods to and from the State in Form VAT36, in duplicate; and"

(ii) Form VAT-36, Insofar as it is relevant reads as under:-

"FORM VAT-36
(See Rule 64 and 65)
Declaration for transport of goods to and from the State of Punjab

…… …..  …..  …… …… …… …….

6. Description of the person to whom goods are sent or from whom goods are received by Punjab Dealer

Name:_____

Address: _____

_____

TIN No. _____"

18. The petitioner having mentioned its TIN is by no means conclusive of the question whether the sale of goods was in the course of inter-state sale. It can, at the highest, only be a factor to be taken into consideration in the determination of the question. In the present case, there is more than one reason why the TIN being mentioned does not indicate that the import of the goods was independent of or unconnected with the contract of sale.

19. Firstly, the petitioner stated that it obtained the TIN for Punjab as it intended setting up a warehouse in Punjab. Had it done so, i.e., had it set up a warehouse, it would have been necessary for the petitioner to obtain a TIN for Punjab. The impugned assessment order does not disbelieve this case. It is not the respondents' case that the

petitioner, in fact, set up a warehouse in Punjab and entered into sale transactions with customers in Punjab after it had warehoused its goods in Punjab.

20. Having said that, however, we must add that this fact does not conclude the matter in the petitioner's favour either. It only indicates that the petitioner having obtained a TIN is not conclusive against it. It also indicates that the petitioner having mentioned its TIN in the form is not conclusive against the petitioner.

21. The State of Punjab in exercise of powers under section 51 (1) of the PVAT Act set up Information Collection Centres (ICC). Further, in exercise of powers under section 51, the State of Punjab made rule 64 (1), which prescribes FORM VAT-36 in which the declaration for transport of goods to and from the State of Punjab is to be made. Paragraph 6 of this form requires a TIN to be maintained. On taking instructions from the respondents' officer in Court, Ms. Sudeepti Sharma, the learned Addl.A.G., Punjab, confirmed that if the TIN was not mentioned in FORM VAT-36, the goods would have been seized and the petitioner would have had to undergo the entire procedure prescribed in section 51 read with rule 64.

The petitioner, therefore, understandably mentioned its TIN in FORM VAT-36 which had mandatorily to be filled out and submitted at the ICC to ensure the smooth passage of the goods. It was not statutorily required. The requirement was by reason of paragraph-6 of the form requiring the TIN to be mentioned and the authorities' insistence upon the same.

22. In these circumstances, it cannot be said that the petitioner having mentioned the TIN in FORM VAT-36 establishes that it imported the goods on its own account into the State of Punjab and thereafter entered into agreements for the sale of the goods to the customers in Punjab. The requirement of filing the form including the TIN, although an assessee is not bound to do so in the case of inter-state sales, cannot prejudice such assessees.

23. Mr. Gulati's reliance upon paragraph 36 of the judgment of a learned single Judge of the Madras High Court in the petitioner's case – M/s W.S. Retail Services Private Ltd. vs. Union of India and others, 2016-VIL-661-MAD is well founded. The learned Judge held:-

> "36. One more aspect pointed out by the Revenue is with regard to use of incorrect TIN number in the E-Sugam form generated by the petitioner at Karnataka. Admittedly, the form is electronically generated and unless and until all columns are filled, the computer system will not generate the form. The petitioner's explanation is that the furnishing of TIN number is not required. However, the said column cannot be left blank and the movement of goods are to Puducherry, the first three digits of Puducherry code are mentioned and this is no way amounts to suppression. The explanation given by the petitioner is reasonable considering the facts and the nature of transaction done by the petitioner. The consigner and the consignee is the petitioner and the goods moved from State of Karnataka to Puducherry and it is on "self basis". The consignment is shown as electronic items, garments etc., stored in several bags. Therefore, mere mention of TIN number by giving only the code of Puducherry as assigned by the Commercial Taxes Department that by itself will not be a ground to state that the petitioner has committed an offence."

We are in respectful agreement with these observations which apply equally to the case before us.

24. The fifth question posed by the ETO in the assessment order was: "Where does the property in the goods transferred (sic transfer) to the buyer?". The ETO came to the conclusion that the proprietary rights in the goods passed to the buyers in the State of Punjab and the sale, therefore, occurred in the State of Punjab. Although the sequitur is not specifically mentioned, it is obvious that the assessment order was passed inter alia on account of this finding. In arriving at this conclusion, the ETO observed as follows: The property in goods is transferred from the seller to the buyer when the buyer acquires the proprietary rights over the goods and the obligations linked thereto. Ownership of goods is different from possession thereof. The transfer of property is the essence of a contract of sale. In the present case, the property in the goods remained with the seller i.e. the petitioner till they reached the buyer and the buyer paid for the same. The transfer of property and payment of consideration occurred in Punjab and the sale had, therefore, taken place in Punjab. The general rule is that the risk follows the ownership irrespective of whether the delivery has been made or not. If the goods are damaged or destroyed, the loss is to be borne by the person who was the owner of the goods at the time of damage or destruction. Thus, the risk or loss is of the seller till the goods are actually delivered to the buyer.

25. The observations and findings are wholly irrelevant in the determination of whether or not a transaction is in the course of inter-state sales under the CST Act.

The relevant provisions of Sections 3, 4 and 9 of the CST Act, so far as they are relevant, read as under:-

> "3. When is a sale or purchase of goods said to take place in the course of inter-State trade or commerce.- A sale or purchase of goods shall be deemed to take place in the course of inter-State trade or commerce if the sale or purchase—
>
> (a) 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.
>
> Explanation 1.--Where goods are delivered to a carrier or other bailee for transmission, the movement of the goods shall, for the purposes of clause (b), be deemed to commence at the time of such delivery and terminate at the time when delivery is taken from such carrier or bailee.
>
> Explanation 2.--Where the movement of goods commences and terminates in the same State it shall not be deemed to be a movement of goods from one State to another by reason merely of the fact that in the course of such movement the goods pass through the territory of any other State.
>
> Explanation 3.—Where the gas sold or purchased and transported through a common carrier pipeline or any other common transport or distribution system becomes co-mingled and fungible with other gas in the pipeline or system and such gas is introduced into the pipeline or system in one State and is taken out from the pipeline in another State, such sale or purchase of gas shall be deemed to be a movement of goods from one State to another.
>
> 4. When is 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.

Explanation.—Where there is a single contract of sale or purchase of goods situated at more places than one, the provisions of this sub-section shall apply as if there were separate contracts in respect of the goods at each of such places."

…… …..… …..… …… …… …… …….

9. Levy and collection of tax and penalties-- (1) The tax payable by any dealer under this Act on sales of goods effected by him in the course of inter-State trade or commerce, whether such sales fall within clause (a) or clause (b) of section 3, shall be levied by the Government of India and the tax so levied shall be collected by that Government in accordance with the provisions of sub-section (2), in the State from which the movement of the goods commenced:

Provided that, in the case of a sale of goods during their movement from one State to another, being a sale subsequent to the first sale in respect of the same goods and being also a sale which does not fall within sub-section (2) of section 6, the tax shall be levied and collected—

(a) where such subsequent sale has been effected by a registered dealer, in the State from which the registered dealer obtained or, as the case may be, could have obtained, the form prescribed for the purposes of sub-section (4) of section 8 in connection with the purchase of such goods, and

> (b) where such subsequent sale has been effected by an unregistered dealer, in the State from which such subsequent sale has been effected."

26. We will assume that the observations in the assessment order as to when the property in the goods passes under the provisions of the Sale of Goods Act are correct. It makes no difference as far as the present case is concerned, which is governed by the provisions of the Central Sales Tax, 1956 and the PVAT Act. It has been repeatedly held that irrespective of which state the property in the goods passes, a sale which occasions the "movement of goods from one State to another" is a sale in course of inter-state trade. All that is required is that the inter-state movement must be the result of the sale. It is not even necessary for the contract of sale to expressly state or provide for the movement of the goods from one State to the other. It can be implied from the contract itself. Nor is it necessary that the sale must precede the movement in order that the sale may be deemed to have occasioned such movement. Mr. Gulati's reliance upon the judgments in this regard which we will now refer to is well founded.

27. The Supreme Court in Oil India Limited vs. Superintendent of Taxes and others, (1975) 1 SCC 733 held as under:-

> "9. Even though clause 7 of the supplemental agreement does not expressly provide for movement of the goods, it is clear that the parties envisaged the movement of crude oil in pursuance to the contract from the State of Assam to the State of Bihar. In other words, the movement of crude oil from the State of Assam to the State of Bihar was an incident of the contract of sale. No matter in which

> State the property in the goods passes, a sale which occasions "movement of goods from one State to another is a sale in the course of inter-State trade". The inter-State movement must be the result of a covenant express or implied in the contract of sale or an incident of the contract. It is not necessary that the sale must precede the inter-State movement in order that the sale may be deemed to have occasioned such movement. It is also not necessary for a sale to be deemed to have taken place in the course of inter-State trade or commerce, that the covenant regarding inter-State movement must be specified in the contract itself. It would be enough if the movement was in pursuance of and incidental to the contract of sale. See State Trading Corporation v. State of Mysore [(1963) 3 SCR 792: (1963) 14 STC 188]." (emphasis supplied)

In English Electric Company of India Ltd. Vs. Deputy Commercial Tax Officer, (1976) 4 SCC 460, the Supreme Court held as under:-

> "9. The sale as well as the movement of the goods from Madras to Bhandup at Bombay was a part of the same transaction. The movement of the goods from Madras to Bhandup was integrated with the contract of sale for the following reasons. The Bombay branch received the Bombay buyer's order and sent the same to the Madras branch factory. When the Bombay buyer asked for quotation of prices the Bombay branch wrote to the Madras branch and gave all the specifications and stated that the goods were for the Bombay buyer. The Madras branch in reply referred to the order of the Bombay buyer and gave particulars mentioning that the price was F.O.R. Madras, The Bombay branch thereafter wrote to the Bombay buyer reproducing all the particulars, conditions of sale and mode of despatch as stated by the Madras branch and further stated that the goods would be manufactured at the Madras branch factory.
>
> …… …'' …'' …… …… …… ……'
>
> 15. The appellant in the present case sent the goods direct from the Madras branch factory to the Bombay buyer at Bhandup, Bombay. The railway receipt was in the name of the Bombay branch to secure payment against delivery. There was no question of diverting the goods which were sent to the Bombay buyer. When the

movement of goods from one State to another is an incident of the contract it is a sale in the course of inter-State sale. It does not matter in which State the property in the goods passes. What is decisive is whether the sale is one which occasions the movement of goods from one State to another. The inter-State movement must be the result of a covenant, express or implied, in the contract of sale or an incident of the contract. It is not necessary that the sale must precede the inter-State movement in order that the sale may be deemed to have occasioned such movement. It is also not necessary for a sale to be deemed to have taken place in the course of inter-State trade or commerce, that the covenant regarding inter-State movement must be specified in the contract itself. It will be enough if the movement is in pursuance of and incidental to the contract of sale.

16. When a branch of a company forwards a buyer's order to the principal factory of the company and instructs them to despatch the goods direct to the buyer and the goods are sent to the buyer under those instructions it would not be a sale between the factory and its branch. If there is a conceivable link between the movement of the goods and the buyer's contract, and if in the course of inter-State movement the goods move only to reach the buyer in satisfaction of his contract of purchase and such a nexus is otherwise inexplicable, then the sale or purchase of the specific or ascertained goods ought to be deemed to have been taken place in the course of inter-State trade or commerce as such a sale or purchase occasioned the movement of the goods from one State to another. The presence of an intermediary such as the seller's own representatives or branch office, who initiated the contract may not make the matter different. Such an interception by a known person on behalf of the seller in the delivery State and such person's activities prior to or after the implementation of the contract may not alter the position."

(emphasis supplied)

The relevant observations of the Supreme Court in Balabhagas Hulaschand vs. State of Orissa, (1976) 2 SCC 44 read as under:-

> "9. It appears that soon after the decision in Bengal Immunity Company Ltd. case was handed down it received statutory recognition in the shape of Section 3(a) of the Central Sales Tax Act, which was enacted by Parliament to remove any doubts or misgivings regarding the competence of a State legislature to levy tax on inter-State sales. Section 2(g) of the Central Sales Tax Act defines "sale" thus:
>
> > " 'Sale', with its grammatical variations and cognate expressions, means any transfer of property in goods by one person to another for cash or for deferred payment or for any other valuable consideration, and includes a transfer of goods on the hire-purchase or other system of payment by instalments, but does not include a mortgage or hypothecation of or a charge or pledge on goods;"
>
> Analysing this definition it would appear that it postulates the conditions:
> "(i) there must be a transfer of property in goods by one person to another;
> (ii) the transfer must be for cash or for deferred payment or for any other valuable consideration; and
> (iii) that such a transfer includes a transfer of goods on the hire-purchase or other system of payment by instalments, etc."
> It would thus be seen that the word "sale" has been given a very wide connotation by the Parliament so as to include within its fold not only sales of goods which are usually known in common parlance but also transactions which legally cannot be called sales, for instance, a transfer of goods on the hire-purchase system. It seems to us that Parliament wanted to give the widest amplitude to the word "sale" and that is why, while in Section 3 the words "sale of goods" have been used in Section 4(2) clauses (a) and (b) which deal with the situs of the sale the words "contract of sale" have been used in the same sense. In other words, the word "sale" defined in clause (g) of Section 2 and used in Section 3 and other sections, is wide enough to include not only a concluded contract of sale but also a contract or agreement of sale provided the agreement of sale stipulates that there was a transfer of property or movement of goods. In STO, Pilibhit v. Budh Prakash Jai Prakash [AIR 1954 SC

459 : (1955) 1 SCR 243 : 5 STC 193, 196] quoting Benjamin on Sale, (8th Edn.) Venkatarama Ayyar, J., who spoke for the Court observed as follows:

> "The distinction between a sale and an agreement to sell under Section 1 of the English Act is thus stated by Benjamin on Sale, Eighth Edition, 1950:
>
> In order to constitute a sale there must be—
>
> (1) an agreement to sell, by which alone the property does not pass; and
>
> (2) an actual sale, by which the property passes.
>
> It will be observed that the definition of a contract of sale above cited includes a mere agreement to sell as well as an actual sale.
>
> This distinction between sales and agreements to sell based upon the passing of the property in the goods is of great importance in determining the rights of parties under a contract."

It would thus appear that this Court clearly held that an agreement to sell by which the property did not actually pass was also an element of sale. Of course in that case the Court had to decide a different point, namely, whether it was within the competence of a State Legislature to tax not a sale but even an agreement to sell where an actual sale had not taken place. This Court held that the State Legislature was not competent to make such a levy under any statute passed by it.

…… ….. ….. …… …… …… …….

11. The serious question that arises for consideration in this case is whether or not the term "sale of goods" as used in Section 3 includes an agreement to sell. It has already been pointed out that an agreement to sell is undoubtedly an element of sale. In fact a sale consists of three logical steps – (i) that there is an offer; (ii) that there is an agreement to sell when the offer is accepted; and (iii) that in pursuance of the said agreement a concluded sale takes place. When the statute uses the words "sale or purchase of goods" it automatically attracts the definition of sale of goods as given in Section 4 of the Sale of Goods Act, 1930 which is a statute passed by the same Parliament and is to some extent in pari materia to the Central Sales Tax Act so far as transaction of sale is concerned. Section 4 of the Sale of Goods Act runs thus:

> "4. (1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part-owner and another.
>
> (2) A contract of sale may be absolute or conditional.
>
> (3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.
>
> (4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred."

Section 4(1), therefore, clearly provides that a contract of sale of goods includes also an agreement to transfer property in goods to the buyer for a price. The inevitable conclusion that follows from the combined effect of the interpretation of Section 3 of the Central Sales Tax Act and Section 4 of the Sale of Goods Act is that an agreement to sell is also an essential ingredient of sale provided it contains a stipulation for transfer of goods from the seller to the buyer. This being the position if there is a movement of goods from one State to another, not in pursuance of the sale itself, but in pursuance of an agreement to sell, which later merges into a sale, the movement of goods would be deemed to have been occasioned by the sale itself wherever it takes place. In this view of the matter the question as to whether agreement to sell was a forward contract or a contract in respect of unascertainable or future goods would make no difference for the simple reason that when once a sale takes place, or for that matter when the goods start moving from one State to another in pursuance of the agreement to sell they cease to be future goods because they are in existence and also ascertainable. The argument of the learned Counsel for the appellant is based on a clear fallacy because it seeks to draw an artificial distinction between a contract of sale of ascertainable goods and a contract of sale of unascertainable or future goods. The argument fails to take note of the fact that when the movement of the goods start they shed the character of either unascertained goods or future goods. Hence for the purpose of application

of Section 3(a) of the Central Sales Tax Act the question whether the contract is a forward contract or not makes no material difference.

12. Furthermore, we can hardly conceive of any case where a sale would take place before the movement of goods. Normally what happens is that there is a contract between the two parties in pursuance of which the goods move and when they are accepted and the price is paid the sale takes place. There would, therefore, hardly be any case where a sale would take place even before the movement of the goods. We would illustrate our point of view by giving some concrete instances:

> "Case No. I—A is a dealer in goods in State X and enters into an agreement to sell his goods to B in State Y. In pursuance of the agreement A sends the goods from State X to State Y by booking the goods in the name of B. In such a case it is obvious that the sale is preceded by the movement of the goods and the movement of goods being in pursuance of a contract which eventually merges into a sale the movement must be deemed to be occasioned by the sale. The present case clearly falls within this category.
>
> "Case No. II—A who is a dealer in State X agrees to sell goods to B but he books the goods from State X to State Y in his own name and his agent in State Y receives the goods on behalf of A. Thereafter the goods are delivered to B in State Y and if B accepts them a sale takes place. It will be seen that in this case the movement of goods is neither in pursuance of the agreement to sell nor is the movement occasioned by the sale. The seller himself takes the goods to State Y and sells the goods there. This is, therefore, purely an internal sale which takes place in State Y and falls beyond the purview of Section 3(a) of the Central Sales Tax Act not being an inter-State sale.
>
> Case No. III—B a purchaser in State Y comes to State X and purchases the goods and pays the price thereof. After having purchased the goods he then books the goods from State X to State Y in his own name. This is also a case where the sale is purely an internal sale having taken place in State X and the movement of goods is not occasioned by the sale but takes place after the property is purchased by B and becomes his property."
>
> (emphasis supplied)

The Supreme Court in Union of India and another v. K.G. Khosla & Co. Ltd. and others, (1979) 2 SCC 242, observed as under:-

> "18. The decisions to which we have referred above show that in order that a sale may be regarded as an inter-State sale, it is immaterial whether the property in the goods passes in one State or another. The question as regards the nature of the sale, that is, whether it is an inter-State sale or an intra-State sale, does not depend upon the circumstances as to in which State the property in the goods passes. It may pass in either State and yet the sale can be an inter State-sale."

In State of Maharashtra vs. Embee Corporation, Bombay, (1997) 7 SCC 190, the Supreme Court observed as under:-

> "7. The above definition of "sale" in the Act shows that the word "sale" has been given a very wide meaning so as to include not only the sale of goods, but also the transactions, namely, a transfer of goods on hire-purchase system. Further, the use of the words "sale of goods" in Section 3 of the Act and the words "contract of sale" occurring in Section 4(2) of the Act have been assigned the same meaning which is wider than the meaning of sale in the general law. In such a situation the word "sale" defined in Section 2(g) of the Act and employed in Section 3 and other sections of the Act would embrace not only completed contract, but also the contract of sale or agreement of sale if such contract of sale or agreement of sale provides for movement of goods or movement of goods is incident of the contract of sale. This matter may be examined from another angle. An agreement to transfer goods to the buyer for a price is an important element of sale and the same is also borne out from Section 4 of the Sale of Goods Act. If Section 4 of the Sale of Goods Act is read along with Sections 3 and 4 of the Act, it would mean an agreement to sell would also be a sale within the meaning of sale provided such agreement of sale stipulates for transfer or movement of goods or movement of goods is incident of the contract of sale and in that case, such movement of goods would be deemed to be

> occasioned by the sale. It is immaterial that actual sale does not take place at the time of movement of goods and takes place later on. This interpretation of Section 3(a) of the Act if applied to sub-section (2) of Section 5 of the Act, would mean that if an agreement for sale stipulates import of goods or import of goods is incident of contract of sale and goods have entered the import stream, such import would fall within the expression "sale occasions import". In the present case, the import of Carbamite is the direct result of the contract of sale and as such it can be safely held in the present case that sale has occasioned the import."

In Hyderabad Engineering Industries vs. State of Andhra Pradesh,(2011) 4 SCC 705, the Supreme Court held as under:-

> "39. From the above decisions, the principle which emerges is—when the sale or agreement for sale causes or has the effect of occasioning the movement of goods from one State to another, irrespective of whether the movement of goods is provided for in the contract of sale or not, or when the order is placed with any branch office or the head office which resulted in the movement of goods, irrespective of whether the property in the goods passed in one State or the other, if the effect of such a sale is to have the movement of goods from one State to another, an inter-State sale would ensue and would result in exigibility of tax under Section 3(a) of the Central Act on the turnover of such transaction. It is only when the turnover relates to sale or purchase of goods during the course of inter-State trade or commerce that it would be taxable under the Central Act.
>
> 40. The learned counsel, Shri Bagaria mainly contends that there is nothing in the sales agreement, express or implied, which may be regarded as a specific covenant under which the assessee's manufacturing unit was obliged to move the specific goods from its manufacturing unit at Hyderabad to its branch offices for delivery of the goods to UIL. The learned counsel submitted that a sale can be regarded as having occurred in the course of inter-State trade, if the contract of sale concerned itself includes a covenant either express or implied, to the effect that the goods must move from one State to another for the purpose of implementing "the sales agreement".

> 41. We cannot agree with the submission of learned counsel Shri Bagaria. We say so for the reason that the inter-State movement must be the result of a sale or an incident of the contract. It is not necessary that the sale must precede the inter-State movement in order that the sale may be deemed to have occasioned at such movement. It is also not necessary for a sale to be deemed to have taken place in the course of inter-State trade or commerce, that the covenant regarding inter-State movement must be specified in the contract itself. It would be enough if the movement was in pursuance of and incidental to the contract of sale (see Oil India Ltd. [(1975) 1 SCC 733 : 1975 SCC (Tax) 167 : (1975) 35 STC 445]).”

A learned single Judge of the Kerala High Court in Flipkart Internet Private Limited and another. Vs. State of Kerala and others, 2015 SCC Online Kerala 31723 held:-

> “11. As regards the finding in the impugned orders, that the situs of the virtual shop can be traced to Kerala on an analogy with the decision of the Karnataka High Court in Antrix Corporation Limited v. Assistant Commissioner of Commercial Taxes - [2011 (19) KTR 182 (Kar)], the said finding is legally flawed because, it is well settled that the situs of a sale is wholly irrelevant to a determination of the issue of whether a sale is an inter-state sale or not [See: Union of India v. K.G. Khosla & Co. Ltd. - [(1979) 2 SCC 242]; Oil India Limited v. Superintendent of Taxes - [(1975) 1 SCC 733]; English Electric Company of India Ltd. v. DCT - [(1976) 4 SCC 460]. The most perplexing aspect of the instant case, however, is that WS Retail, the seller responsible for effecting majority of the sales to customers in Kerala, through the online portal of the petitioner, is registered as a dealer under the KVAT Act and, in the returns submitted by the said dealer for the relevant period, they had conceded NIL taxable turnover under the KVAT Act, on the contention that their entire sales turnover pertained to inter-state sales effected by them. Under the said circumstances and, in the absence of any material to suggest that the returns filed by the said seller were rejected by the revenue authorities, one fails to understand how the revenue authorities could proceed to levy tax, or impose penalty, on the petitioner in respect of the same turnover. The

> findings in the impugned orders reflect a patent non-application of mind by the authority concerned and also smack of arbitrariness. I therefore quash Exts.P11 and P12 orders, Exts.P13 and P14 Demand Notices as also Exts.P8 and P9 show cause notices that are impugned in W.P. (C) No. 5348/2015 and allow the said writ petition."

A petition for special leave to appeal against this judgment was admitted by the Supreme Court on 20.02.2015.

28. Mr. Gulati also relied upon a judgment of the learned single Judge of the Madras High Court in the petitioner's case, i.e., M/s. WS Retail Services Private Limited vs. Union of India and others, reported as 2016-VIL-661-MAD. Paragraphs 2, 21, 25, 28 and 37 of the judgment read as under:-

> "2. The petitioner's case is that the goods meant for sale are stored by them in warehouses located in Mumbai, Kolkata, Bangalore, Delhi and Noida and on an order being placed by the customer located anywhere in the country or in particular from Puducherry, as the present controversy has arisen from Puducherry, via the online portal, the goods corresponding to the purchase order will be transported from one of the warehouses to Puducherry by way of an inter-state sale between the petitioner and the customer on which the Central Sales Tax (CST) is paid by the petitioner in the State where the goods originate in terms of the provisions of the Central Sales Tax Act, 1956, (CST Act). For the purpose of delivery of the goods within the Union Territory of Puducherry, the petitioner has installed a delivery hub in Puducherry, M/s.E-Kart logistics, a division of the petitioner. The delivery hub acts as a sorting facility to sort the deliveries based on the area/street for delivery to the customers. Therefore, the petitioner would contend that there is no sale or inventory holding transactions that are effected from the hub located in the Union Territory of Puducherry.
>
> ..... ..... ..... ..... ..... ..... .....

21. In Kerala State Small Industries Development and Employment Corporation Ltd., vs. State of Tamil Nadu, 1999 (113) STC 169, the law governing inter-state sale was explained in the following terms:-

> 18.The law governing inter-state sales is now fairly well-settled although in the application of law to individual cases difficulties continued to arise and each case will have to be decided with reference to its own special facts. That movement of the goods across the borders of State is an essential pre-condition, beyond any controversy only a transaction of sale connected with that movement can be regarded as an inter-State sales. The movement and the sale must have a reasonable direct link. Such movement can be stipulated in the contract of sale specifically or it may be contemplated by the parties as an implied term of contract. Even if the movement of the goods is not specified in the contract, and even if it cannot be regarded as an implied term, if such movement is incidental to the contract, then in such case also such transaction would be an inter-State sale. The tax that is levied is on the transaction of sale. The concept of sale itself being an intangible one, where there is no transfer of property in the goods there is no sale, and mere movement cannot be the subject-matter of the taxation, nor can a mere agreement to sell be taxed.
>
> 19. The relationship between the movement and the sale should be, very broadly put, be that of effect and cause. The sale should have occasioned the movement or the movement should have been incidental to the sale.

…… ……. ……. …… …… …… ……..

25. The above flowchart is as contained in the impugned order, illustrates the type of transaction done by the petitioner in respect of sales, where payment is effected on delivery. It is not disputed by the Revenue that the products listed for sale or available in the website www.flipkart.com. The customer goes to the online platform and chooses a particular product and confirms the purchase. A bill is generated and the identified package, that is the package containing the product purchased by the buyer is despatched

to Puducherry to the outlet of the petitioner on "self basis". The Revenue seeks to tax the transaction as a local sale by primarily contending that the identified package with the prospective bill along with other consignments are despatched from Karnataka to the petitioner on "self basis". When the consignments reach Puducherry, they are kept in a depot established by the petitioner, which is registered under the provisions of the PVAT Act, as only as a courier service, thereafter, the products are segregated and sales/delivery boys deliver to the ultimate customer at Puducherry, the customer accepts delivery and if effect payments the sale comes into existence. Thus, the focus is on the situs and it is stated that the consideration payable for the goods is paid at Puducherry, when the delivery boy takes the goods from the depot at Puducherry and delivers it to the customer and accepts the cash. Therefore, it is contended that a sale within the State of Puducherry and the destination State has full right to tax the goods under the appropriate State legislation.

…… …..  …..  …… …… …… …….

28. In the preceding paragraphs, the legal principle to be satisfied for determining as to whether a transaction is an inter-state sale has been culled out. Thus, the primordial test would be that the sale should have occasioned the movement of the goods or the movement should have been incidental to the sale. The Revenue does not dispute the fact that the goods in question at the time when the purchaser exercises his option to purchase it via online platform are the outside the State of Puducherry that is in Karnataka. Thus, but for the option exercised by the purchaser to buy a particular product displayed in the website of the petitioner, the movement would not have occasioned. This observations is made in the light of the facts as mentioned in the impugned assessment order.

…… …..  …..  …… …… …… …….

37. A screen shot of the petitioner's online platform has been produced which further strengthens the case of the petitioner. The platform contains all the relevant details and the purchaser is given the full details including the invoice number, which is in PDF format. The delivery bill number and the shipping details are also furnished. The purchaser is well aware that the shipping of the product is being handled by E-

> Kart logistic which is a unit of the petitioner handling logistic part of the business and the purchaser is aware about the approximate date of delivery. The cost of shipping the product is separately recovered and mentioned in the platform. Thus, the purchase order contains all the details, which clearly prove that the purchase order has occasioned the movement of goods from the State of Karnataka to Puducherry. The sample copy of the retail invoices/bills raised from Karnataka in the name of the purchaser at Puducherry had been produced, which shows that the petitioner, who is the registered dealer in Karnataka has paid Central Sales Tax at 5.5% for the said product. This also goes to establish that the transaction is an "inter-state sale"."

The learned Judge also followed the judgment of the Kerala High Court in Flipkart Internet and Ors. vs. State of Kerala and others (supra).

29. The assessment order has not considered any of the principles discussed elaborately in the above authorities. We will assume that the authorities were not brought to the notice of the ETO. The assessment order has proceeded on a basis which is contrary to these principles. We hasten to add that as stated in the assessment order it is also possible that the entire material was not produced before the ETO. Upon remand, it would be necessary for the Assessing Officer to consider the material in the light of the above principles and authorities.

30. The sixth question framed by the ETO in the assessment order was: "Isn't the e-commerce website a virtual showroom?"

The ETO held that e-commerce websites are virtual showrooms visited by persons where they are located, such as,

at home or at the place of work and such persons buy the products. In the present case, the purchasers are all in Punjab. The virtual showrooms offer the same services as a normal showroom provides. Buyers can view the products on the website, check the prices of different brands available in the showroom and choose/select the product. After selecting the product, the buyers pay for the same either by a debit or credit card. In the present case, the banks in which the purchasers had accounts were in Punjab. Payment in cash is when the goods are delivered to the purchasers. On the basis of these findings, the ETO held that sales and purchases on a website occurred, in the present case, in the State of Punjab.

31. Our observations as regards question No.5 apply equally to the observations in the assessment order as regards question No.6. It matters not where the sale was ultimately concluded while determining whether it is an inter-state sale or not. Even assuming that the sale was finally concluded in the State of Punjab, so long as the sale caused the movement of goods from another State to the State of Punjab, it would be an inter-state sale. If the petitioner's case, which we have already referred to in some detail, is correct the sales effected by it would constitute inter-state sales and fall within the ambit of the Central Sales Tax, 1956.

32. This brings us to question No.7 framed by the ETO, namely: "If the dealer has acted as a logistics partner, then can we tax him?"

The question has not been answered. The assessment order does not hold the petitioner liable for tax in respect of the sales by other vendors to purchasers in respect whereof it rendered services as a logistic provider. As a logistic provider the petitioner only facilitated the transport and delivery of goods by the vendors to the purchasers. It did not have any proprietary interest in these goods.

Ms. Sharma, agreed that in respect of such transactions the petitioner is, in any event, not liable to tax under the PVAT Act.

33. The assessment order refers to the manifest submitted by the petitioner. The manifest is not a statutory document. It is not a statutory requirement to maintain a manifest. The petitioner maintains it for its own convenience. The manifest tabulates numerous transactions entered into by it. The manifest would, therefore, at the highest contain information which can be used as evidence generally.

34. The order notes that the verification process has not been completed and that there is no record of tax, if any, paid, in any State by the dealer in the case of imports made by it on the TIN of Punjab. It further notes that the sale occurred after the goods entered into the State of Punjab. Even while dealing with this question, the ETO has made general observations regarding the petitioner having purchased the goods from outside the State of Punjab. There is, however, nothing in the order that substantiates the same. It is observed that the petitioner had failed to furnish documents

in support of its contention that the sales were in the course of inter-state trade. We intend directing the petitioner to produce the same upon remand even if already produced. These are issues of fact which we do not intend dealing with. It requires an examination of numerous transactions.

35. There may be several explanations for some of the discrepancies and aspects indicated in the assessment order. For instance, the fact that several packages weigh the same cannot be held against the petitioner. Each of them may consist of similar items. This is especially so when most of the consignments are of electronic items.

36. The observation that some of the invoices show the petitioner to be a consigner and not a service provider is irrelevant. As we noted earlier the petitioner is both a seller and a logistic provider. Where it is logistic provider the consigner is bound to be another party namely the seller.

37. Thus, if the transactions are as suggested by the petitioner and as set out in detail by us earlier, the sales would be in the course of inter-state trade and commerce. It is for the petitioner to establish the same. If on the other hand the goods were first imported into the State of Punjab without anything more and the petitioner entered into the transactions of sale with its purchasers thereafter they would not constitute sales in the course of inter-state trade and commerce. Further, where it is established that the petitioner

acted only as a logistic provider, the petitioner would not be liable under the VAT Act.

38. It would be necessary for the ETO to consider the transactions afresh in the light of this judgment. The ETO must in other words assess the documents already furnished and the documents that may hereafter be furnished in accordance with this judgment.

39. In the circumstances, the impugned assessment order and the demand notices issued pursuant thereto are quashed and set-aside. The matter is remanded to the ETO for passing a fresh assessment order in accordance with law.

(S.J. VAZIFDAR)
CHIEF JUSTICE

(ANUPINDER SINGH GREWAL)
JUDGE

14.07.2017
Parkash/ravinder

NOTE:
Whether speaking/non-speaking: Speaking
Whether reportable: Yes