CENTRAL SALES TAX AMENDMENTS

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"Free Enterprise was born with man and shall survive as long as man survives".

— A. D. Shroff
1899-1965
Founder-President
Forum of Free Enterprise

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By N.C. Mehta

Introduction

Under our Constitution States could levy tax only on the transactions which were sales within the meaning of the Sale of Goods Act, 1930. To enable the States and also the Central Government to levy tax on transactions which were not sales, 46th Amendment came to be carried out to the Constitution to cover such non-sale transactions in clause (29A) of article 366 of the Constitution effective from 2.2.1983. Such transactions being described as deemed sales, have been transfer of property under indivisible works contracts, transfer of the right to use goods (lease of goods), hire-purchase and instalment sale of goods, supplies by clubs, associations, etc. to their members, supply of food and drinks in hotels, restaurants, etc. For the levy of tax, as in the case of sales, such deemed sales also have been subject to constitutional restrictions in that they could not be taxed while taking place outside the State, or in the course of inter-State trade or commerce (under the State sales tax law) or in the course of export of goods out of, or import of goods

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into, the territory of India. In order that such deemed sales taking place in the course of inter-State trade or commerce can be subjected to Central Sales Tax (of course for the benefit of the States), Central Sales Tax Act, 1956 has been amended, which also covers other matters. These amendments have been explained and commented upon below:

Finance Act 2002, having been passed by the Parliament, got the assent of the President of India on 11.5.2002. Amendments to the Central Sales Tax Act, 1956 (the Act) covered by sections 150 to 155 of the Finance Act accordingly have now been part of the Act since 11.5.2002. However, mere enforcement of a statute would not necessarily bring about operation of its provisions. Amendments to the Act are enabling provisions entitling the Central Government to provide for the levy of Central Sales Tax on deemed sales as provided in sub-section (2) of section 6 and sections 7 to 13 of the Act, through creating a charge as contemplated by section 6(1) of the Act. It provides : "Subject to other provisions contained in this Act, every dealer shall, with effect from such date as the Central Government may, by notification in the Official Gazette, appoint, not being earlier than thirty days from the date of such notification, be liable to pay tax under this Act on all sales effected by him in the course of inter-State trade or commerce during any year on and from the date so notified. Initial date fixed for 1.5.1957 was extended to 1.7.1957 vide notification dated 26.3.57. This notification covered sales as then defined and not as defined from time to time. On 1.4.73 this notification

was amended to exclude from the levy sales of electrical energy. On 7.9.76 proviso was added to this notification, effective from 1.4.76, to provide that a dealer shall not be liable to pay tax on sales covered by section 5(3). With extension of the levy to cover 'deemed sales', notification issued under section 6(1) should be amended to cover 'the transactions falling under sub-clauses (i) to (vi) of clause (g) of section 2' (deemed sales vide 46th Amendment). Amendments to the Act then would be operative with effect from the date of such amendment.

Maharashtra Commissioner's Circular

While above should have been the position about the date of effect of operation of the amended provisions, according to the Circular No.15T of 2002 dated 27.5.2002 issued by the Maharashtra Commissioner of Sales Tax effective date would be 11.5.2002 though the amendments will be enforced since 1.6.2002. It has been stated in the circular that a reference has been made to the State Government for suitable administrative relief where by reason of the amended provisions a liability is cast on the dealers during the intervening period (11.5.2002 till 31.5.2002). The Government's decision in this regard will be made known to the trade in due course.

With Equal Force

Circular has stated that all the provisions contained in the C.S.T. Act, 1956 including those contained in sections 3,4 and 5 will apply with equal force to the transactions newly introduced. It may be that this circular is based

on views of or guidance from the High Powered Committee under the Chairmanship of the Finance Minister of West Bengal and hence it is expected that all the States including the Union Territories would implement the amendments on this basis. It is unfortunate that while providing for intended levy of Central Sales Tax Act on non-sale transactions, law explained by the Supreme Court about deemed sales as respects works contracts and 'lease' of goods has been overlooked. As laid down in the Builder Association case (73 STC 370) in the case of a works contract (only indivisible works contract is covered by the amendment) by legal fiction there would be distinct and individual sales of the respective goods which would be incorporated in the work; that is, when property would pass on accretion/accession carried out during execution of the works contract (73 STC 370 at 401), also as observed by the West Bengal Taxation Tribunal in Studio Kamalalaya case (89 STC 307 at 334-335). Thus if car owned by A is given for use to his friend B, whose driver C takes the car to the market and en-route the car meets with an accident and hence the garrage keeper D replaces the damaged parts by new ones, property in the new parts would directly pass to A, the owner of the car, who would have neither the knowledge of the accident nor any contract with D. Thus principles laid down in section 4(2) of the Act for determination of the situs of a sale based on location of goods in one State or the other at the time when contract for sale of specific or ascertained goods is made or at the time of appropriation of goods to the contract for unascertained or future goods cannot be

applied as in the case of indivisible works contract, existence of a contract or absence thereof has no consequence.

Transfer of property

Above principle is applicable also in the case of a sub-contract carried out with the materials provided by the sub-contractor, property in such materials passing not to the principal contractor but directly to the land-holder, who may be the owner of the land or lessee or even licencee. In the case of movable goods property in the materials would pass to the holder of the property who may be owner or lessee or even tenant.

Very often a contract provides that property in or title to the materials would pass to the customer only on completion of the work or on the work being taken over. Such stipulation aims to fix obligations and responsibilities of the contractor, the same having nothing to do with mode of transfer of property or the time at which the property in goods can be deemed to pass. Principal contractor and sub-contractor usually enter into the contract on a principal to principal basis. Agency between or amongst the contracting parties may be with reference to mutual rights and obligations or receipt of contract price; the same having no bearing on transfer of property in the goods involved in the execution of a works contract. Where a sales tax law makes an agent liable for payment of tax based on turnover, on the basis of the same turnover his principal cannot be made liable to pay tax (and consequentially liable for obtaining registration), applying ratio of the

Supreme Court judgments in State of West Bengal Vs. O.P.Loda (1997 - 105 STC 560) following Cardamom Planters' Association Vs. Dy.Commissioner of Sales Tax (1989 - 75 STC 118) (SC). Thus sections 5A and 7 of the Maharashtra Works Contract Tax Act, 1985 are based on misconception about legal position vis-à-vis agency.

Situs of lease of goods

Aforesaid circular surprisingly states that so far as situs of the goods for the purpose of the Maharashtra Sales Tax on the transfer of Right to use any goods for any Purposes Act, 1985 is concerned, the decision of the Supreme Court in the case of M/s. 20th Century Finance Corporation Ltd Vs. State of Maharashtra reported in 119 STC at page 182) stands superseded. That means that situs of lease of goods has now not to be fixed as laid down in that case but according to the amended provisions of the Act as implied by the statement in the circular that "It is needless to add that all the provisions contained in the C.S.T. Act, 1956, including those contained in sections 3, 4 and 5 will apply with equal force to the transactions newly introduced." This is the downright failure to note observation of the Supreme Court about fixing of the situs. In para 31 of the majority judgment the Court has observed : "We had already held that situs of sale can only be fixed by the appropriate Legislature by creating a legal fiction like omitted Explanation to article 286(i)(a) but situs of sale cannot be fixed by analogy of section 4 of the Central Sales Tax Act." Hence situs for lease tax cannot be

fixed by invoking Section 4(2). This is precisely sought to be the done. Amendment of section 2(g) adds to the category of taxable events; it does not fix situs of deemed sales Even otherwise, in the absence of any amendment, sub-section (2) of section 4 thereof, on its language, cannot be applicable to 'transfer of the right to use any goods for any purpose'. Accordingly situs of lease of goods has to be determined in terms of the majority judgment of the Supreme Court in 20th Century Finance case. It cannot be deemed to be superseded. In the case of goods of incorporeal or intangible character situs would be in the State in which assignment deed as required under the law is executed; no delivery of goods in such a case being envisaged as observed by the Bombay High Court in Commissioner of Sales Tax vs. Duke & Sons Pvt Ltd. (112 STC 370).

Applicability of section 3

Of the deemed sales covered by the amended definition of sale most important are as respects works contracts, lease of goods and hire-purchase of goods or instalment sale. Accordingly analysis of the amended provisions need be restricted to these three topics. Inter-State deemed sale as respects indivisible works contract is now amenable to levy of Central Sales Tax. As observed by the Supreme Court in Builders Association case and then Gannon Dunkerley case (88 STC 204) nature of deemed sales has to be decided by the application of the principles laid down in section 3 of the Act. Supreme Court was not concerned with deciding whether clause (a) or both clause (a) as well as clause (b) of section 3 could be applicable. As laid down by the Supreme

Court in Tata Iron and Steel case (11 STC 655) where a sale occasioned inter-State movement of goods, the same would be covered by clause (a), whereunder property in the goods could pass in the State of despatch or in the State of destination, where inter-State movement was the result of a covenant or an incident of the contract of sale. This principle could be applied to a deemed sale as respects a works contract, where execution of it out of necessity involved inter-State movement of the goods which were to be incorporated in the work as they are. Obviously in the case of an indivisible works contract property could pass in the State in which accretion or accession would be carried out during execution of the works contract. Thus requirement of clause (a) could be satisfied but not that of clause (b), which contemplated that the taxable event, transfer of property in goods, would take place during inter-State movement of goods which could not be the case of a works contract as under it property could pass only after termination of inter-State movement at the site of work.

Applicability of sections 5

Sub-section (1) of section 5 covers a sale which occasions export of goods outside the territory of India as well as one which is effected by transfer of documents of title to the goods after the goods have crossed the customs frontiers of India. Similarly sub-section (2) of section 5 provides for import of goods into India. Deemed sale as respects a works contract can be covered by the first limb of sub-sections (1) and (2) and not the second limb thereof. Thus section 5 too

would not be applicable with equal force, so far as sub-sections (1) and (2) thereof are concerned. Sub-section (3) of section 5 would be applicable providing for exemption on sale to a contractor who has undertaken the works contract to be executed outside India.

Contract Price

Aforesaid circular has referred to application of the manner laid down in the Gannon Dunkerley case (88 STC 204) to determine contract price for the levy of tax on inter-State deemed sale as respects a works contract. Supreme Court was concerned with determination of taxable turnover of the contract as a whole. Where execution of the works contract involves distinct and separate deemed sales of individual materials and equipments which are incorporated in the work, as they are or as subjected to site assembly, fabrication assembly, process, etc., how contract price of such individual deemed sales can be determined in terms of the Supreme Court judgment is beyond one's comprehension. Would the contract price assigned by the contractor to individual deemed inter-State sales be acceptable ? Even when contract price is not a lumpsum and value of goods is separately mentioned, there would not be any value assigned to each and every individual materials and components of equipments which would be incorporated in the work as they are. That is why criteria for determination of such values based on the purchase or procurement price adopted in Maharashtra has gone well.

Rates of Tax

At what rates tax would be payable on individual sales referred to above would be another question. Execution of a works contract may involve transfer of property in goods procured from diverse sources, local, inter-State and import, own goods as well as bought-out goods. Section 8 of the Act being the only provision for determination of the rates at which Central Sales Tax would be payable deserves to be noticed.

Sales against C-D Forms

Under section 8(1) of the Act Central Sales Tax on inter-State sales would be leviable as under:

Against C or D form at 4 per cent or at the rate applicable to the sale or purchase of such goods inside the appropriate State under the sales tax law of that State, whichever is lower. Appropriate State may be presumed to be the State from which goods would be despatched to the destination in another State. Rate in this context should be the rate as specified in the Schedule, which would cover surcharge, turnover tax, etc. as applicable, aggregate of which may be less than 4 per cent. Under the Bombay Sales Tax Act, 1959 such goods would be bullion and specie and articles of gold and silver. Exemption from payment of tax at certain percentage of the turnover of sale or purchase as provided under the notification issued under section 41 of the Bombay Sales Tax Act, 1959 cannot be deemed to reduce the rate of tax within the meaning of the above provision. This has been the strict construction of the provision. Accordingly while

determining rate of tax provisions of section 41 notification have to be ignored.

A contractor subject to amendment of Section 2(g) to cover purchase can issue C form declarations for inter-State purchases of goods to be incorporated in the work as they are. A Leasing Company also can issue C form for inter-State purchases of goods for being leased under the lease agreement. Subject to amendment of Section 2(g) to cover purchase, goods for use in the telecommunications can be purchased against C form.

Without C - D Form

Inter-State sales of goods otherwise than against C or D form would attract tax -

(a) at double the rate of tax applicable to the sale or purchase of such goods inside the appropriate State ;

(b) at 10 per cent or at the rate applicable to the sale or purchase of such goods inside the appropriate State, whichever is higher; and

(c) at NIL rate in the case of goods, the sale or, as the case may be, the purchase of which is under the sales tax law of the appropriate State, exempt from tax generally (when exempt is only in specified circumstances or under specified conditions or when tax is levied at specified stages or otherwise than with reference to the turnover of goods, then there would be no general exemption).

Section 8(2A) has been omitted, part of which is covered above. Other part about applicability of the rate being generally less than 4 per cent has been omitted.

Appropriate State

In the case of a works contract, which does not take place in the course of inter-State trade or commerce, tax has to be paid in the State in which during execution of such contract accretion or accession takes place. For payment of Central Sales Tax on inter-State sales section 9 of the Act provides for the appropriate State. There being no amendment of this section, payment of Central Sales Tax on deemed inter-State sales under a works contract shall have to be made in the State/s from which individual materials/component of equipments, which would be incorporated in the work as they are, would move to the site of work in the destination State. If such despatches are made from various States, Central Sales Tax will have to be deposited in the respective States.

Lease of goods

If lease of goods takes place in the course of inter-State trade or commerce, the same now being exigible to Central Sales Tax, applying section 9(1) of the Act, lease tax would be payable in the State from which the goods to be leased would have moved. If lease of goods does not take place in the course of inter-State trade or commerce, lease tax would be payable in the appropriate State to be determined in terms of the majority judgment of the Supreme Court in 20th Century

Finance Corporation Ltd. Vs. State of Maharashtra (2000 - 119 STC 182).

Hire-Purchase/Instalment Sale

In the case of delivery of goods on hire-purchase or any system of payment by instalments (popularly called instalment sale) taxable event takes place when delivery of goods is effected, which obviously should be physical or actual delivery of goods. Section 4(2) cannot be applicable. If inter-State movement of the goods to be so delivered is the result of a covenant or an incident of hire-purchase agreement or agreement for instalment sale, such transaction would take place in the course of inter-State trade or commerce. Applying section 9, Central Sales Tax on such inter-State deemed sale would be payable in the State from which the goods to be delivered would move.

States' Power U/s 8(5)

State Government's power to grant exemption or concession about lower rate of Central Sales Tax on inter-State sales as provided in section 8(5) has now been circumscribed. Such power can be exercised only in the case of sales against C or D form. This substantive provision cannot be deemed to be retrospective, the same not having been so specified, as laid down by the Supreme Court in Land Acquisition Officer-cum-DSWO Vs. B.V. Reddy & Sons (2002 - 37 SCC 463). Even without notification granting such exemption/ concession having been modified to bring it in conformity with the amendment, some States have announced that C-D forms would be essential to avail

of the incentives even for the unexpired period for which the incentives had to be available. Karnataka has already moved for deletion or amendment. Unless amendment, withdrawal or repeal is not established to have been carried out in public interest as laid down by the Supreme Court (70 STC 59, 108 STC 274, 115 STC 29, AIR 1995 SC 874) denial of incentives in the absence of C-D forms for the unexpired period may have to meet with the plea of promissory estoppel. Judgements of the Supreme Court repeated in Motilal Padmapat case (44 STC 42) and Pournami Oil Mills case (65 STC 1) followed and applied in a large number of cases, may explain the principle.

Section 6A

Section 6A of the Act read with Rule 12(5) of the Central Sales Tax (Registration and Turnover) Rules, 1957 provides for furnishing of a declaration in Form F in support of the claim that despatch of the goods by the dealer to his place of business or to his agent or principal in another State was not by reason of a sale. Section itself provides that the dealer may furnish such declaration. However, amendment now provides that if the dealer fails to furnish such declaration, then, the movement of such goods shall be deemed for all purposes of the Act to have been occasioned as a result of sale, that is, in such a case despatch of goods would be subjected to Central Sales Tax as an inter-State sale. If it is established that on facts and in law there was no inter-State sale involved, even in the absence of F form declaration, no tax could be levied as unless a transaction is a sale, no sales tax can be

levied. In Bimal Chandra Banerjee Vs. State of M.P. (81 ITR 105) Supreme Court has observed that basis of statutory power cannot be transgressed by rule making authority. In State of Orissa Vs. Titaghur Paper Mills Co. Ltd (1985 - 60 STC 213) Supreme Court at page 237 has observed : "As any attempt on the part of the State to impose by legislation sales tax or purchase tax in respect of what would not be a sale or a sale of goods or goods under the Sale of Goods Act, 1930 is unconstitutional, any attempt by it to do so in the exercise of its power of making subordinate legislation, either by way of a rule or notification, would be equally unconstitutional; and so would such an act on the part of the authorities under a Sales Tax Act purporting to be done in the exercise of powers conferred by that Act or any rule made or notification issued thereunder. Similarly, where any rule or notification travels beyond the ambit of the parent Act, it would be ultra vires the Act. Equally, sales tax authorities purporting to act under an Act or under any rule made or notification issued thereunder cannot travel beyond the scope of such Act, rule or notification."

Special Economic Zone

Under the newly inserted sub-sections (6) to (8) in section 8 no Central Sales Tax would be payable by any dealer to a dealer registered under section 7 of the Act who has been authorised to establish a Special Economic Zone by the authority specified by the Central Government on this behalf, in respect of inter-State sale of any goods for the purpose of manufacture,

production, processing, assembling, repairs, reconditioning, re-engineering, packaging or for use as trading or packing material or packing accessories in a unit located in any special economic zone. Special economic zone would be the one as specified in clause (iii), to Explanation 2 to the proviso to section 3 of the Central Excise Act, 1944. Goods sold should have been specified in the registration of the purchasing dealer, who would have to furnish declaration in the form to be prescribed. Section 10 has been amended to provide for conviction for furnishing false declaration, for failure, without reasonable excuse, to use the purchased goods as certified and for unauthorisedly obtaining forms. Punishment with simple imprisonment, extending to six months or with fine or both has been provided.

Declared Goods

On amendment of section 15, declared goods can be subject to tax under a State law at more than one stage, rate being the same at 4 per cent.

Deemed Purchase

To equate deemed sale with purchase for the purposes of the Act last part of clause (29A) of article 366 should have been added or section 2(g) should have provided that the words 'sale', 'buy' and 'purchase' with all their grammatical variations and cognate expressions shall be constituted accordingly.

The views expressed in this booklet are not necessarily those of the Forum of Free Enterprise.

"People must come to accept private enterprise not as a necessary evil, but as an affirmative good".

— Eugene Black

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FORUM OF FREE ENTERPRISE

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