*	**IN THE HIGH COURT OF DELHI AT NEW DELHI**

RESERVED ON: 25.09.2012
PRONOUNCED ON: 28.09.2012

+ **ST.APPL. 51/2012**

+ **ST.APPL. 52/2012**

+ **ST.APPL. 53/2012**

+ **ST.APPL. 54/2012**

+ **ST.APPL. 55/2012**

+ **ST.APPL. 56/2012**

+ **ST.APPL. 57/2012**

+ **ST.APPL. 58/2012**

+ **ST.APPL. 59/2012**

+ **ST.APPL. 60/2012, C.M. No. 13198/2012**

+ **ST.APPL. 61/2012**

+ **ST.APPL. 62/2012**

+ **ST.APPL. 63/2012**

+ **ST.APPL. 64/2012**

+ **ST.APPL. 65/2012**

+ **ST.APPL. 66/2012**

+ **ST.APPL. 67/2012**

+ **ST.APPL. 68/2012**

+ **ST.APPL. 69/2012**

+ **ST.APPL. 70/2012**

ABB LIMITED ….. Petitioner

versus

THE COMMISSIONER, DELHI VALUE ADDED TAX ..... Respondent

………………..Petitioner
Through: Sh. S. Ganesh, Sr. Advocate with Sh. R. Jawahar Lal, Ms. Vrinda Aghi and Sh. Maank Kshirsagar, Advocates.

………Respondent
Through: Sh. Vineet Bhatia, Advocate.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT

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C.M. No. 13198/2012 (for exemption from filing fair typed copies of dim annexures) IN ST. APPL.60/2012

Allowed, subject to just exceptions.

ST.APPL.51/2012, 52/2012, 53/2012, 54/2012, 55/2012, 56/2012, 57/2012, 58/2012, 59/2012, 60/2012, 61/2012, 62/2012, 63/2012, 64/2012, 65/2012, 66/2012, 67/2012, 68/2012, 69/2012 & 70/2012

1. The questions of law which arise for consideration in this case are:

   (i) whether the sale transactions in the present case were in the course of the inter-state trade, so as to attract the provisions of Central Sales Tax Act, 1956 and

   (ii) Whether an inter-state trade is deemed to have been taken place in the course of movement of goods into and inside the country;

   (iii) Whether the sale made to the Deli Metro Rail Corporation in the course of import and consequently exempt from the Delhi VAT Act, 2004, especially Section 7 (c) of DVAT Act, read with Section 5 (2) of the Central Sales Tax Act.

2. The brief facts of the case are that the Appellant, a public limited company, *inter alia,* is engaged in the manufacture and sale of engineering Goods including power distribution system and SCADA system. It is a market leader in power and automation technologies that enable utility and industry customers to improve performance while lowering environmental impact. It is a subsidiary of ABB LTD., Zurich, Switzerland, which has operations in over 100 countries and employs about 130,000 personnel. The appellant responded to an Notice Inviting Tenders ("NIT") dated May 15, 2003 issued by Delhi Metro Rail Corporation (DMRC) for supply, installation, testing and commissioning of traction electrification,

power supply, power distribution and SCADA systems for Line 3 Barakhamba Road-Connaught Place-Dwarka Section of Delhi Metro Project.

3. As part of the scope of the Contract, the Appellant had to provide transformers, switch-gear, High Voltage cables, SCADA System and also provide complete electrical solution, including Control room for operation of metro trains, between Barakhamba Road-Connaught Place-Dwarka Section. The Bid Document contained detailed Bill of Goods, Quantities and specifications for the Goods, sources (i.e. name of the manufacturer/brand), detailed terms and conditions including app royal of sub-contractors/suppliers, testing, certification and Acceptance of Goods and components of work, were provided. The NIT was in two parts i.e. Technical Bid and Financial Bid. The Bidders had to quote a lump sum price for the entire scope of work, covered under the Bid document with individual break up of price of Goods, among other details. The bid was submitted with price break up for individual items. The Appellant submitted its offer. DMRC considered the Technical Bids of the participants and short listed the Appellant and others. Thereafter, on consideration of the Financial Bid, the Bids of the Appellant and other Bidders were shortlisted and DMRC conducted detailed discussions/ price-negotiations, with the shortlisted Bidder. After this process the DMRC accepted the Bid submitted by the Appellant and executed a contract with the Appellant on August 4th, 2004 (the "DMRC Contract") along with Special Conditions of Contract, General Conditions of Contract etc. The NIT was to be treated as and read as part of the Contract, in terms of Clause I of the Contract Agreement.

4. The Appellant contended that the provisions of the Contract in relation to Sale amounted to sale “in the course of imports” covered under Section 5 (2) of the Central Sales Tax Act read with Section 7 (c) of the Delhi VAT Act and therefore exempted from payment of VAT under the Delhi VAT Act. Reliance was placed on various terms and conditions of the contract, such as Clause 19 (13.1) of the Special Conditions of Contract, by which DMRC unequivocally expressed that it was pursuing for VAT exemption on works contract, read with Entry 8 of the Sixth Schedule to the Delhi VAT Act (which entitles to seek and obtain refund of the entire Sales Tax, including in respect of goods sold, in the course of import from the authorities. The appellant was also required to mark the goods as being meant for DMRC.

5. It is stated that based on the *bona fide* understanding of applicable provisions of law, it (the appellant) submitted its return under the Delhi VAT for the tax period 01.04.05 - 31.04.05, whereby it claimed exemption from payment of VAT in respect of sale effected in the course of import [covered under Section 5(2) of the Central Sales Tax Act r/w Section 7(c) of the Delhi VAT Act] and interstate sale of Goods [subject to CST and exempted from levy of VAT under Section 3 read with Section 7(a) of the Delhi VAT Act]. The Assessing Officer, by order dated 25.11.2005 rejected the referenced exemptions claimed by the appellant and imposed Rs.45,18,484/- as VAT, Rs.3,32,258/- as interest and also imposed Rs.1,20,56,196/- as penalty. The appellant filed an appeal under Section 74 of the DVAT and the same was rejected by an order dated 11.03.08. Aggrieved, the appellant filed appeals, under Section 76(1) of the DVAT Act to the Tribunal constituted under the Act. The appellant filed similar appeals (40 in total) in respect of demand

VAT and imposition of penalty in respect of different assessment periods. During the pendency of the appeals, the appellant filed voluminous documents to support its submissions made in the appeal. Further, the appellant filed detailed written submissions before the learned Tribunal. Since the question of law involved in all the 40 appeals were the same, the Tribunal passed a common judgment, on 07.06.2012, rejecting the Appellant's contentions.

6. It is contended that the impugned judgment is unsustainable, because various clauses and conditions set out in the contract between DMRC, and the appellant, clarify that the importation of equipment was solely for the contract awarded by the DMRC, which, in fact, occasioned the event. Similarly, the DMRC's requirement led to the purchase and procurement of goods within the country, and their movement from one state to another. As a result, the transaction was not covered by the Delhi VAT Act, but the Central Sales Tax.

7. The Appellant's senior counsel urged that the contract specifically required approval of DMRC for sub-contractors/vendors; for that purpose, he relied on:

- Clause 1.1.2.6 (which defined "Sub-Contractor" as one for whom a part of the works has been *"subcontracted with the approval of the Employer and the legal successors in title to such person"*);
- Clause 4.5, which mandated prior approval from the Engineer of the Employer (DMRC) for proposed sub-contractors;
- Clause 38, which mandated approval of specified contractors' list by

the DMRC, requirement of inspection of the goods from the foreign buyer, before shipment, Customs and Central Excise exemption notification for the goods (since they were to be imported for use by DMRC etc).

8. It was argued that some of the goods and equipment in question were also manufactured at the appellant's own factories outside Delhi as per the designs, drawings and specifications provided by DMRC under the contract. The Contract expressly stipulated the factory in which the appellant was required to manufacture and supply the goods/equipment, to DMRC. Such goods manufactured in appellant's factories located outside Delhi, were to be delivered to DMRC in Delhi, under the Contract. The inter-state movement was expressly contemplated by the parties to the contract and specified in it.

9. It was argued that the Tribunal in the impugned judgment fell into error, by holding that no specific orders for supply of goods were issued by DMRC. In this context, submitted counsel for the Appellant, the applicability of Sales Tax Act, was rejected on the ground that in terms of the requirement under Section 3(a) of the CST Act, there should be privity of contract between DMRC and the appellant and specific instructions for inter-state movement of goods should be issued by DMRC. It was argued that the Tribunal's finding is contrary provisions of Section 3(a) of the CST Act as interpreted in a catena of judgments which held that the contract between the parties (DMRC and the appellant) ought to envisage inter-state movement of goods consequential to or as an incident of such contract. If the interstate movement of goods was within the contemplation of the

parties and reasonable presumption can be drawn that for the fulfillment of the contract, such interstate movement of goods is necessary, the same would fall under Section 3(a) of the CST Act. It was contended that the inter-state movement of goods was within the knowledge of DMRC, as there was a total ban of setting up/operation of heavy industry in Delhi, hence the goods could only be manufactured outside Delhi and supplied in Delhi.

10. Learned counsel relied on the text of Section 5(2) and 5(3) as well as Section 3, to contend that the movement of goods in either case - from the Appellant's factory within India or from the foreign supplier - did not attract provisions of the Delhi VAT Act. In support of the contention that the movement of goods procured from foreign suppliers was in the course of import, reliance was placed on decisions reported as *K. G. Khosla & Co vs Deputy Commissioner Of Commercial Taxes* AIR 1966 SC 1216, *State of Maharashtra Vs. Embee Corporation, Bombay* (1997) 7 SCC 190, and *Indure Ltd v Comercial Tax Officer* 2010 (9) SCC 461. It was argued that the terms of the contract between the appellant and DMRC clarified beyond any doubt that the equipment was procured from the foreign suppliers, for the purpose of the DMRC project, and no one else could use it; indeed, it was custom made. The DMRC dictated the specifications, had control over the quality of goods to be procured and supplied, and even dictated that the packaging contained markings that the goods were for its project. Similarly, Customs and Excise exemptions were given by the concerned authorities,

on this basis. Therefore, the movement of goods procured from foreign sellers, was occasioned by the contract, and was "in the course of import".

11. As regards the second question, it was urged that like in the case of supplies procured from foreign sellers, the appellant also procured items from other domestic suppliers; these too were occasioned by the contract with the DMRC; it also produced goods, and equipments, from its factories located in different states. The contract did not have to specifically stipulate the supply of goods but if the it triggered inter-state movement of goods in its performance, the same would amount to inter-state sale; rendering Delhi VAT Act inapplicable. In support of this proposition, counsel relied on the judgment of the Supreme Court reported as *Kelvinator India Ltd. v. State of Haryana* AIR 1973 SC 2526; *State of Orissa v. K.B. Saha and Sons Industries (P) Ltd.* 2007 (9) SCC 97.

12. It was argued that the project awarded by the DMRC to the appellant was specialized and complex and not assembly made or mass manufactured goods, like household articles; they cannot be diverted to other customers, as contended by the Respondent and upheld by the learned Tribunal. In terms of its contractual obligations, the appellant had to fabricate/tailor make goods and equipments in terms of the design, drawing and specifications provided by DMRC under the contract, from its factories in Vadodara, Bangalore, Nashik etc. The movement of these was directly the consequence of the contract with DMRC, and therefore, constituted inter-state sales.

13. The revenue relies on the order of the Tribunal, and contends that appellant did not establish from the record that sales by its foreign suppliers

to it and the sales by it to DMRC were inextricably interlinked and integrated. Nothing was pointed out from the records in the form of any sort of condition or clause in the agreement that diversion of the said goods to any other person or for any other use was simply not possible without violating the law. No prohibition in law to supply the goods to other persons, or its use for any other purpose was shown by the appellant to the Tribunal, from the terms and conditions of the Works Contract between it and DMRC. There was nothing to conclude that the entire transaction between the appellant, DMRC and foreign suppliers, was part of one single transaction and inextricably interlinked and integrally connected. Several conditions of the contract above showed that there was no stipulation of transfer of goods till the final payment on satisfaction of the work done is recorded.

14. It was submitted that the most glaring aspect in this case was that there was no privity of contract between the appellant's foreign suppliers – or for that matter, even the domestic suppliers, and DMRC. The mere reliance on some contractual conditions could not compel the revenue authorities to conclude that the transaction whereby the sales were completed, were independent of the movement of goods. In fact, there was no instance of goods being rejected, or that inspection took place. Having regard to all these aspects, the Tribunal's findings cannot be challenged.

15. Counsel for the revenue argued that the contract with DMRC only prescribed specifications. The inter-state purchases by the appellant dealer were through purchase bills issued in favor of DMRC for claiming tax exemption. No orders were issued by the DMRC to the supplier; no payment was made by it to the supplier. The contractor in his bills raised to the DMRC claimed the payment. The DMRC had not instructed the supplier to

dispatch or supply the goods. In either case (of import of goods and movement of goods through inter-state sales), the requirement is that the instructions of contractee (DMRC) should be specific and the inter-state movement of goods or import of goods should spring from the terms of the contract. No such instructions existed in the present case as there was no privity of contract; the DMRC is not a party to the arrangement of supply of goods between the supplier and the contractor. There was no specific condition of contract that the goods are to be supplied by the particular supplier at the will and instructions of the DMRC. There was no such link between the DMRC and the supplier except granting of exemption by the Custom Authorities.

16. In the absence of specific instruction or agreement by the DMRC to the appellant, the inter-state movement of the goods or import of goods cannot be occasioned from the terms of the work contract. Thus, the appellant's contention that the purchase made and exemptions claimed by him are covered under Sections Section 3(a), 5(2) of the CST Act and Section 7(a) and 7(c) of the DVAT Act, are not acceptable.

Provisions applicable

17. The relevant provisions of the Central Sales Tax Act, 1956 are as follows:

> ***"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.

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5. ***When is a sale or purchase of goods said to take place in the course of import or export.***

(1) A sale or purchase of goods shall be deemed to take place in the course of the export of the goods out of the territory of India only if the sale or purchase either occasions such export or is effected by a transfer of documents of title to the goods after the goods have crossed the customs frontiers of India.

(2) A sale or purchase of goods shall be deemed to take place in the course of the import of the goods into the territory of India only if the sale or purchase either occasions such import or is effected by a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India.

(3) 1 [Notwithstanding anything contained in sub- section (1), the last sale or purchase of any goods preceding the sale or purchase occasioning the export of those goods out of the territory of India shall also be deemed to be in the course of

such export, if such last sale or purchase took place after, and was for the purpose of complying with, the agreement or order for or in relation to such export."

Terms of the contract between DMRC and the appellant

18. Some of the material terms governing the contract between the appellant, and DMRC, which were produced before the Tribunal, are discussed hereafter:

The Letter of Acceptance issued by DMRC, in terms of the Contract reads as:

> *"Your proposal to execute OHE works by M/s Best & Crompton Engg Ltd the sub-contractor and control and monitoring (SCADA, AMS, BMS) yourself is accepted. Other subcontractor (s)/vendor approval (s) shall be as per relevant tender conditions."*

The contract specifically required approval of DMRC for sub-contractors/vendors as evident from the following provisions of the SCC to the Contract:

> *"1.1.2.6 "Sub-Contractor" means any person named in the Contract as a sub-contractor, manufacturer or supplier for a part of the works or any person to whom a part of the Works ha sbeen subcontracted with the approval of the Employer and the legal successors in title to such person, but not any assignee of such person."* (excerpts from GCC).

Clauses 4 and 4.5 read as follows:

> *"4. <u>Sub-Contractors</u>*
>
> *For major sub-contracts (each costing over Rs. four hundred thousand) it will be obligatory on the part of the Contractor to <u>obtain approval of the Employer to the identity of the sub-contractor</u>. The Employer will give his approval after*

assessing and satisfying himself of the capability, experience and equipment resources of the sub-contractor. In case the Employer intends to withhold his approval, he shall inform the contractor in time to enable him to make alternative arrangements.

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4.5 The Contractor shall not sub-contract the whole of the Works unless otherwise stated in the Special Conditions of Contract:

(a) The Contractor shall not be required to obtain approval for purchases of Materials which are in accordance with the standards specified in the Contract or provisions of labour or for the sub-contracts for which the Sub-contractor is named in the Contract.

(b) The prior approval of the Engineer shall be obtained for other proposed Sub-contractors;

(c) Not less than 28 days before the intended date of each Sub-contractor commencing work, the Contractor shall notify the Engineer of such intention; and

(d) The contractor shall give fair and reasonable opportunity for contractors in India to be appointed as Sub-contractors.

The Contractor shall be responsible for observance by all Sub-contractors of all the provisions of the contract. The Contractor shall be responsible for the acts or defaults of any Sub-contractor, his representatives or employees, as fully as if they were the acts or defaults of the Contractor, his representatives or employees and nothing contained in sub-clause 4.5 (a) shall constitute a waiver of the Contractor's obligations under this Contract."

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38 (c) <u>Approved Sub-contractors</u>:

Approved Sub-contractors shall be appointed in accordance with the procedure described as hereunder. If the Engineer/Employer instructs, the letting of a sub-contract for an item of Provisional Sums will be subject to pre-qualification of tenderers. In such a case, the Contractor shall prepare documents required for the pre-qualification, (including where appropriate bills of quantities, quantified schedules of prices or rates, specifications, drawings and other like documents) for the work, Plant, Materials or services included in each such Provisional Sum."

Some of the other terms contained in the contract documents are as follows:

"13. Sub-clause 5.1

Construction and Manufacture Documents

No examination by the Engineer of the drawings or documents submitted by the Contractor, nor any approval by the Engineer in relation to the same, with or without amendment, shall absolve the Contractor from any of his obligations under the Contract or any liability for or arising from such drawings or documents.

Should it be found at any time after notification of approval that the relevant drawings or documents do not comply with the Contract or do not agree with the drawings or documents in relation to which the Engineer has previously notified his approval, the Contractor shall, at his own expense, make such alterations or additions as, in the opinion of the Engineer, are necessary to remedy such non-compliance or non-agreement and shall submit all such varied or amended drawings or documents for the approval of the Engineer.

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<u>Workmanship, materials and plant</u>

Inspection

7.3 The employer and the engineer shall be entitled during manufacture, fabrication and preparation at any places where work is being carried out, to inspect, examine and test the materials and workmanship, and to check the progress of manufacture, of all Plant and Materials to be supplied under the Contract. The contractor shall given them full opportunity to inspect, examine, measure and test any work on Site or wherever carried out.

The Contractor shall give due notice to the Engineer whenever such work is ready, before packaging, covering up or putting out of view. The Engineer shall then carry out the inspection, examination, measurement or testing without unreasonable delay. If the Contractor fails to give such notice, he shall, when required by the Engineer, uncover such work and thereafter reinstate and make good at his own cost."

The DMRC issued a letter listing out the approved or authorized list of suppliers which reads as:

"TO WHOMSOEVER IT MAY CONCERN

This is to certify that following is a list of the approved vendors for 3E21 contract entered into between the DMRC Ltd. and ABB Ltd. On 4th August 2004.

1.	*40 MVA Traction Transformer*	*M/s. ABB Limited, Vadodara*
2.	*15 MVA Power Transformer*	*M/s. Crompton Greaves Ltd., Bhopal*
3	*66 KV/25 KV Circuit Breakers*	*M/s. ABB Limited, Vadodara*
4	*66 KV Capacity Voltage Transformer*	*M/s. ABB Limited, Vadodara*
5	*66 KV Current Transformer*	*M/s. ABB Limited, Italy*
6	*66 KV/25 KV Isolators*	*M/s. Switchgear and Structural Limited, Hyderabad*

7	*60 KV/42KV lighting arresters*	*M/s. Elpro International Ltd., Pune*
8	*Control and Relay panels*	*M/s. ABB Limited, Bangalore*
9	*SCADA Systems*	*M/s. ABB Limited, Bangalore*
10	*MV Switchgear*	*M/s. ABB Limited, Nashik*
11	*Battery Bank*	*M/s. AMCO Power Systems, Bangalore*
12	*LT Switchgear / ACDB/DCDB*	*M/s. HEI Engineering (P) Ltd., Gurgaon*
13	*3000/2500/1000/500/200 KVA Dry Type Auxiliary Transformer*	*M/s. Electromecannica Colombia, Italy*
14	*66 KV/33 KV/25 KV HT Cable*	*M/s. ILJIN, Korea*
15	*LV Cables (power and control)*	*M/s. KEI Industries, Bhiwadi*
16	*66/33/25 KV Cable Terminations and joints*	*M/s. Tyco, Germany*
17	*Ms. Round*	*M/s. IISCO, Kolkata*
18	*Cable Trays/Earthing materials/Electrodes.*	*M/s. Techno Engg. Co, Chandigarh*

Reasoning of the Tribunal

19. The VAT Tribunal's order, rejecting the argument that the sale of goods was in the course of import, is founded on the following reasons:

> *"25. Having heard in details the Ld. Counsels of the rival parties and after going through the record of the case file including the terms and conditions of the Contract and the impugned orders under challenged before this Tribunal, we are of the considered view that appellant failed to bring home the submissions that in the present case the sales by foreign suppliers to the Appellant and sales by the Appellant to DMRC were inextricably interlinked and integrated. Nothing has been pointed out on record of the case file any sort of condition or a*

clause in the agreement that diversion of the said goods to any other person or for any other use was simply not permissible or possible without violating the law. No prohibition in law to supply the goods to other persons or use thereof for any other purpose is also shown by the appellant from the terms and conditions of the Work Contract between the appellant and DMRC. It cannot also be said that the entire transaction between the appellant, DMRC and foreign suppliers was part of one single transaction and inextricably interlinked and integrally connected. In fact the clauses of the contract as quoted above reveals that there was no stipulation of transfer of goods till the final payment on satisfaction of the work done is recorded. This fact does not interlinked the transaction by the foreign supplier to the appellant as part of the same transaction occasioning import of goods from the foreign supplier specially when rejection of the goods and possibility thereof diversion for any other purpose cannot be ruled out in toto. In case of K.G. Khosla the facts were so crystal clear so as to rule that there was no possibility of goods being diverted by the assessee for any other purpose as the goods were imported into India for the consignee. On the contrary in the present case the facts are totally different as also import in the present case was not the direct result of Contract of Sale as there was no contract of sale as such in the present case between the appellant and the DMRC. The reference made to the case of Indian Explosive Ltd. (supra) is also of no help to the appellant as the appellant failed to point out in the present case that there was any term or condition prohibiting diversion of goods after the import. Similarly, in case of Indure Limited and Another (supra), their Lordship did not consider the belated plea raised for the first time before the Apex Court by the Revenue that the goods imported had been subjected to manufacturing process. In the present case the goods imported were also subjected to manufacturing process as stipulated in the terms and conditions of the Work Contract between the appellant and DMRC and as such it cannot be said that the interstate movement of goods or import of goods springs from the terms of the contract of sale or purchase, which is not in the present case in term of the *covenants of the work contract between the appellant and DMRC. Accordingly there is substance in the submission by the Ld. Counsel for the Revenue that since the contract between the appellant and DMRC is indivisible works contract, the only permissible deductions are those mentioned in Rule 3 of the Delhi Rules as also the sales in question are not covered by Section 7 of the Delhi Act."*

Similarly, the Tribunal held that the goods were not sold in the course of inter-state sales:

"In the present case the appellant dealer has made the purchase by import of the goods whereas the terms and conditions of the contract with the DMRC cited nowhere the name of the supplier from whom the goods were imported. The contract with the DMRC only lay down the specifications. The inter-state purchase made by the appellant dealer were vide purchase bills issued in favour of DMRC to claim exemption of tax whereas no orders were issued by the contractee to the supplier neither any payment was made by the contractee to the supplier. The contractor in his bills raised to the contractee has claimed the payment. The contractee has not instructed the supplier to supply the goods. There is no doubt that the term "sale or purchase either occasions (such import)" in section 5 (2) and "sale or purchase occasions the movement of goods (one state to another)" in section 3 (a) of the CST act both have the same meaning, but in both the cases the requirement is that the instructions of the contractee should be specific and the inter-state movement of goods or import of goods springs from the terms of the contract. No such instructions exist in the present case as there is no privity of contract as the DMRC is not a party to the arrangement of supply of goods between the supplier and the contractor. There is no specific condition of contract that the goods are to be supplied by the particular supplier at the will and instructions of the DMRC. There is no such link between the DMRC and the supplier except grants of exemption by the Custom Authorities.

29. In the absence of specific instruction or agreement by the DMRC to the appellant and the inter-state movement of the goods or import of goods cannot be occasioned from the terms of the work contract so as to accept the contention of the appellant that the purchase made and exemptions claimed by him are covered u/s 3 (a), 5 (2) of the CST Act and Section 7 (a) and 7 (c) of the DVAT Act, are also applicable.

The claim of exemption by the appellant dealer under the heads labour and services which includes the bills of transportation and other allied expenses has not been much emphasis during submission. Otherwise also the claim under the heads labour and services including the bills of transportation and other expenses if not acceptable as the same cannot be at all be termed as labour cost. In fact it is a cost of purchase of goods and has to be included in the purchase expenses in respect of the work contract agreement and enhance subject to levy of tax as deemed sale price of the goods."

Question No. 1 and 3:

20. The appellant contended that in terms of the contract, the goods in question were manufactured at its own factories outside Delhi in accordance with the designs, drawings and specifications provided by DMRC under the contract. The Contract stipulated the factory in which the appellant was to manufacture and supply the goods/equipment, to DMRC. Such goods manufactured in appellant's factories located outside Delhi, were to be delivered to DMRC in Delhi, under the Contract. The inter-state movement was therefore, clearly contemplated by the parties to the contract and specified in it.

21. The Tribunal (in para 28) of its impugned order, held that no specific orders for supply of goods were issued by DMRC and that under Section 3(a) of the CST Act, there should be privity of contract between DMRC and

the appellant. It further ruled that specific instructions for inter-state movement of goods should have been be issued by DMRC.

22. The impugned findings are contrary to Section 3(a). It was repeatedly held that the contract between the parties (DMRC and the appellant) ought to have envisaged inter-state movement of goods consequential to or as an incident of such contract. If the interstate movement of goods was within the contemplation of the parties and if a reasonable presumption can be drawn that to fulfill of the contract, such interstate movement of goods is necessary, it would fall under Section 3(a) of the Act. Here, inter-state movement of goods was within the knowledge of DMRC, as there is a total ban of setting up/operation of heavy industry in Delhi, hence the goods can only be manufactured outside Delhi and supplied in Delhi. Furthermore, importantly, it approved 13 places from within the country where the equipments and goods were to be supplied. These also included the appellant's premises and factories.

23. In *Tata Iron and Steel Co. Ltd. v. S.R. Sarkar & Others*, the Supreme Court held that where the goods are moved from one State to another as a result of a covenant in the contract of sale, that would be clearly a sale in the course of inter-state trade. The Court further proceeded to hold that even a movement of goods from one State to another, which is merely incidental to, and which is not part of the contract of sale, is also brought within the fold of Section 3(a) of the Central Act.

24. In *Oil India Ltd. v. The Superintendent of Taxes and Others* [1975] 35 STC 445 (SC), the Supreme Court held that:

> *"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."*

25. In *English Electric Company of India Ltd. v. The Deputy Commercial Tax officer and Others* [1976] 38 STC 475 (SC), the Court again held that:

> *"when a branch of a company forwards a buyer's order to the principal factory of the company and instructs them to dispatch the goods direct to the buyer and the goods are sent to the buyer under those instructions it would not be 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 taken place in the course of inter State trade or commerce as such a sale or purchase occasioned the movement of goods from one State to another. The presence of an intermediary, such as the seller's own representative 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 is the delivery State and such person's*

activities prior to or after the implementation of the contract may not alter the position."

26. Yet again, in *South India Viscose Ltd. vs. State of Tamil Nadu* [1981] 48 STC 232 (SC), the Supreme Court held that if there is a "conceivable link" between a contract of sale and the movement of goods from one State to another in order to discharge the obligation under the contract of sale, it must be held to be an inter-State sale and that character will not be changed on account of an interposition of an agent of the seller who may temporarily intercept the movement.

27. In the present case, there can be no manner of doubt that there was a live and conceivable link between the sale and movement of goods; DMRC was aware that the goods were to be sourced from the appellant's factories, which were outside Delhi. The reference to specific locations, in the list issued by DMRC, in respect of particular equipments, which were integral to the contract, establishes that movement of those goods was clearly in the contemplation of the parties. Moreover, as noticed earlier, the goods were custom made. The only conclusion that could reasonably have been drawn was that the character of the transaction was that of inter-state sale, necessitating movement. Specific instructions, or allusions in the contract, or lack of such facts, can hardly be decisive; the intention of the contract, as gleaned from the document compels the court to draw the conclusion that inter-state sales were involved in the present case, as to attract Section 3 of the Central Sales Tax Act. In the opinion of this Court, the Tribunal fell into error in assuming that to avail exemption under Section 3(a) of the Act, the Agreement has to expressly stipulate for inter-state movement of goods, and

the fact that in performance of the Contract, the appellant would have to move the goods from other States to Delhi would not suffice. In this context, in *Oil India Ltd.* (supra) where it was very pertinently held that *"It is also not necessary for a sale to be deemed to have taken place in the course of 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…"*

Question Nos. 1 and 3 are answered in favour of the assessee and against the revenue.

Question No. 2: Sale in the course of import

28. In exercise of its powers under Article 286(2) Parliament enacted the Central Sales Tax Act, 1956. Section 3 of the Act prescribes that a sale or purchase of goods shall be deemed to take place in the course of inter-state trade or commerce if the sale or purchase (a) occasions the movement of goods from one state to another; or (b) is effected by a transfer of documents of title to the goods during their movement from one state to another. Section 5(1) states that a sale or purchase of goods shall be deemed to take place in the course of the export of the goods out of the territory of India only if the sale or purchase either occasions such export or it effected by a transfer of documents of title to the goods after the goods have crossed the customs frontiers of India. In terms of Section 5 (2), a sale or purchase of goods shall be deemed to take place in the course of the import of the goods into the territory of India *if the sale or purchase either occasions such*

import or is effected by a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India.

29. In *K.G. Khosla & co* (supra) a Constitution Bench of the Supreme Court had to consider whether sales in that case were in the course of import. The assessee therein had entered into a contract with the Director General of Supplies, New Delhi for supply of axle bodies manufactured by its principals in Belgium. The goods were inspected on behalf of the buyers in Belgium but under the contract they were liable to rejection after further inspection in India. In pursuance of the contract the appellant supplied axle bodies to the southern Railway at Parambur and Mysore. The assessee contended that sales by them to the Director General of Supplies were in the course of import. The contention was rejected by the Assessing Authority, holding that these were intra-state sales because the seller was the consignee of the goods and the buyer had reserved the right to reject the goods even after their arrival in India. The assessee's appeal to first appellate authority was rejected. Its appeal to the Tribunal was partly allowed. The High Court rejected the assessee's revision application. The constitution Bench of the Supreme Court held that section 5(2) of the Central sales Tax Act does not prescribe any condition that before a sale could be said to have occasioned import, it is necessary that the sale should have preceded the import and that it was apparent that it was incidental to the contract in that case; furthermore that the axle-box bodies would be manufactured in Belgium, inspected there, and imported into India for the consignee. Movement of goods from Belgium to India was in pursuance of the conditions of the contract between the assessee for any other purpose. Consequently, the sales took place in the

course of import of goods within Section 5(2). The entire transaction was an integrated one by which a foreign seller through its Indian agent, namely, the assessee sold the goods to Indian purchaser, namely, the Director General of civil Supplies through the agency of its local agent, namely, the assessee and, therefore, the transaction was treated by the Constitution Bench as representing sale in the course of import. The Court held as follows:

> *"….appellant K. G. Khosla & Co., hereinafter referred to as the assessee entered into a contract with the Director-General of Supplies and Disposal, New Delhi, for the supply of axle-box bodies. According to the contract the goods were to be manufactured in Belgium, and the D.G.I.S.D., London, or his representative, was to inspect the goods at the works of the manufacturers. He was to issue an inspection certificate. Another inspection by the Deputy Director of Inspections, Ministry of W.H. & S., Madras, was provided for in the contract. It was his duty to issue inspection notes on Form No. WSB.65 on receipt of a copy of the Inspection Certificate from the D.G.I.S.D. London and after verification and visual inspection. The goods were to be manufactured according to specifications by M/s La Brugeoies. ET. Nivelles, Belgium.*
>
> *…………………. …………………*
>
> *The next question that arises is whether the movement of axle-box bodies from Belgium into Madras was the result of a covenant in the contract of sale or an incident of such contract. It seems to us that it is quite clear from the contract that it was incidental to the contract that the axle-box bodies would be manufactured in Belgium, inspected there and imported into India for the consignee. A Movement of goods from Belgium to India was in pursuance of the conditions of the contract between the assessee and the Director-General of Supplies. There was no possibility of these goods being diverted by the assessee for any other purpose. Consequently we hold that the sales took place in the course of import of goods within s. 5(2) of the Act, and are, therefore, exempt from taxation."*

In *Embee Corporation,* (supra) it was held by the Supreme Court that:-

> *"9. In this case (K.G. Khosla & Co.(P) Ltd. Vs. Dy. Commissioner of Commercial Taxes), the Constitution Bench specifically held that sale need not precede the import and this decision is a complete answer to the argument advanced by the learned counsel for the appellant.*
>
> *10. Learned counsel then tried to argue that the decision of the Constitution Bench in Khosla case is not applicable to the present case as in the said case, the materials were to be inspected at Belgium and London and thereafter the goods were to enter into India. This argument is not correct. In Khosla case the inspection of goods was to be carried out in Belgium as well as on arrival into India. In the present case, the inspection was to be done on arrival of goods into India and as such, there is no distinction on facts between the present case and that of Khosla. Learned counsel then urged that the decision of the Constitution Bench in Khosla case has not been correctly decided and as such this case be referred to a larger Bench. We have considered the matter and found that Khosla case has held the field nearly more than three decades and its correctness has not been doubted so far. We, therefore, reject the prayer of learned counsel for the appellant."*

Recently, in *Indure Ltd v Comercial Tax Officer* 2010 (9) SCC 461, wherein the dealer had procured the goods as a part of the contract to supply, erect and commission them as part of a larger project, the Supreme Court held that:

> *"[W]e are of the considered opinion that it has not been the Respondents' case that the MS Pipes imported by the Company were not used for the erection and commissioning of the plant for N.T.P.C. Thus, from the facts of Binani Bros supra, it is*

clearly spelt out that the facts of the case in hand are different. Thus, the ratio of the said case would not be applicable to it.

42. In fact, the ground, sought to be raised for the first time before this Court that MS Pipes were put to manufacturing process and thereby converted into distinct end product had not been raised before any of the Authorities earlier. It was not the Respondents case that pipes so imported were not necessary components for the erection and commissioning of the plant. Admittedly, the said pipes were used as components in the Ash Handling Plant in the same condition as they were imported without altering its originality. Thus, the ground which was sought to be raised before us for the first time has not been considered by any of the Authorities and in our opinion rightly so. Thus, we also do not deem it fit and proper to consider the same at this belated stage.

43. Apart from the aforesaid reasons, we are also of the considered opinion that such import would fall within the Constitutional umbrella. It is also to be noted that Company had admittedly imported the goods into India for completion of the Project on Turnkey Basis of N.T.P.C. Thus, by virtue of Article 286 (1) (b) of the Constitution, it would not be taxable. For ready reference, Article 286 (1) (b) of the Constitution is reproduced hereinbelow:

> *"286. Restrictions as to imposition of tax on the sale or purchase of goods –*
>
> *(1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place-*
>
> *(a) outside the State; or*
>
> *(b) in the course of the import of the goods into, or export of the goods out of, the territory of India.*

See (Minerals & Metals Trading Corporation of India Ltd. Vs. Sales Tax Officer 1998 (7) SCC 19)

44. In the facts and circumstances of the case we are of the opinion that the order passed by Division Bench of the High Court as also the orders passed by Tribunal and other Authorities cannot be sustained in law. Same are hereby set aside and quashed. Appellant is held entitled to claim benefit of Section 5(2) of the Act."

30. The common thread of reasoning which runs through all the decisions is that to determine whether the sale was in the course of import, the Court has to see whether the movement of goods through was integrally connected with the contract for their supply. Questions such passing of title, or whether the end user has a privity of contract with the supplier, or where the consideration flows from, are not determinative or decisive of the issue. Section 5 does not prescribe any condition that before a sale could be said to have occasioned import, it is necessary that the sale should have preceded the import.

31. In the present case, the various conditions in the contract and other related covenants between DMRC and the appellant amply bear out that:

(1) Specifications were spelt out by DMRC;

(2) Suppliers of the goods were approved by the DMRC;

(3) Pre-inspection of goods was mandated;

(4) The goods were custom made, for use by DMRC in its project;

(5) Excise duty and Customs duty exemptions were given, specifically to the goods, because of a perceived public interest, and its need by DMRC;

(6) The Project Authority Certificate issued by DMRC the name of the subcontractors as well as the equipment/goods to be supplied by them were expressly stipulated;

(7) DMRC issued a Certificate certifying its approval of foreign suppliers located in Italy, Germany, Korea etc. from whom the goods were to be procured.

(8) Packed goods were especially marked as meant for DMRC's use in its project.

32. In view of the above features, this Court is of opinion that the Tribunal fell into error in rejecting the Appellants' contention that the sale could not be deemed to have taken place in the course of the import of the goods into the territory of India, and that the import of the goods did not occasion it. The first question is, therefore, answered in favour of the assessee, and against the revenue.

33. Since all questions framed in these appeals have been answered in favour of the dealer/assessee, the appeals are entitled to succeed. The appeals are, therefore, allowed. In the circumstances, there shall be no order as to costs.

(S.RAVINDRA BHAT)
JUDGE

(R.V. EASWAR)
JUDGE

SEPTEMBER 28, 2012