IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

J U D G M E N T

1. C.T.O. (AE), Jodhpur vs. M/s Marudhara Motors,Jodhpur

S.B.CIVIL SALES TAX REVISION NO.118/2008

2. C.T.O. (AE), Jodhpur vs. M/s Marudhara Motors,Jodhpur

S.B.CIVIL SALES TAX REVISION NO.138/2008

3. C.T.O. (AE), Jodhpur vs. M/s Marudhara Motors,Jodhpur

S.B.CIVIL SALES TAX REVISION NO.139/2008

4. C.T.O. (AE), Jodhpur vs. M/s Marudhara Motors,Jodhpur

S.B.CIVIL SALES TAX REVISION NO.140/2008

5. C.T.O. (AE), Jodhpur vs. M/s Marudhara Motors,Jodhpur

S.B.CIVIL SALES TAX REVISION NO.141/2008

6. C.T.O. (AE), Jodhpur vs. M/s Marudhara Motors,Jodhpur

S.B.CIVIL SALES TAX REVISION NO.142/2008

7. C.T.O. (AE), Jodhpur vs. M/s Marudhara Motors,Jodhpur

S.B.CIVIL SALES TAX REVISION NO.143/2008

8. C.T.O. (AE), Jodhpur vs. M/s Marudhara Motors,Jodhpur

S.B.CIVIL SALES TAX REVISION NO.144/2008

9. C.T.O. (AE), Jodhpur vs. M/s Marudhara Motors,Jodhpur

S.B.CIVIL SALES TAX REVISION NO.145/2008

10. C.T.O. (AE), Jodhpur vs. M/s Marudhara Motors,Jodhpur

S.B.CIVIL SALES TAX REVISION NO.146/2008

11.C.T.O. (AE), Jodhpur vs. M/s Marudhara Motors,Jodhpur

S.B.CIVIL SALES TAX REVISION NO.147/2008

12.C.T.O. (AE), Jodhpur vs. M/s Marudhara Motors,Jodhpur

S.B.CIVIL SALES TAX REVISION NO.148/2008

DATE OF JUDGMENT : 16th March, 2009

P R E S E N T

HON'BLE DR.JUSTICE VINEET KOTHARI

Mr.Vinit Kumar Mathur, for the Revenue.
Mr.R.P.Bhatt, Sr.Advocate along with
Mr.Vikas Balia &
Mr.Jagat Tatia, for the assessee

REPORTABLE

BY THE COURT:-

1. These revision petitions have been filed by the Revenue under Section 86 of the Rajasthan Sales Tax Act, 1994 (hereinafter referred

to as `the Act of 1994) being aggrieved by the order of the Rajasthan Tax Board, Ajmer dated 18/6/2007, whereby, the Tax Board decided a batch of six appeals filed by the Assessee and another batch of six appeals filed by the Revenue. These cross appeals arose out of the order of first appellate authority – Deputy Commissioner (Appeals), Jodhpur dated 22/7/2006, whereby, the Deputy Commissioner (Appeals) upheld the levy of tax upon the assessee, whereas, set aside the levy of interest and penalty imposed by the assessing authority under Section 65 of the Act. So far as levy of tax was upheld, the assessee was aggrieved and, therefore, it preferred six appeals for six different assessment years namely A.Y.2000-01, 2001-02, 2002-03, 2003-04, 2004-2005 and 2005-2006. As far as levy of interest and penalty is concerned, since first appellate authority had set aside the same, the Revenue preferred another batch of six appeals and these 12 appeals came to be disposed of by common judgment of the Tax Board dated 18/6/2007. It may also be stated that the assessment order for the A.Y.2000-01 to 2003-04 were passed by the assessing authority by invoking the power of reassessment under Section 30 of the Act to impose tax on turnover having escaped assessment, whereas, for A.Y.2004-05 and 2005-06 said assessment was framed

under Section 28 of the Act.

2. The issue which arises for consideration by this Court in present revision petitions is as to whether the assessing authority could impose tax on the assessee, a dealer of TATA Vehicles on the value of credit notes issued by the Manufacturer M/s TATA Motors for defective parts of cars and other vehicles supplied by the assessee, a dealer of the manufacturer under a warranty agreement between the manufacturer and the ultimate customer to whom such vehicles are sold by the assessee. The sole reason on which such tax was imposed by the assessing authority for three years by invoking the reassessment power under Section 30 of the Act though the original assessment was framed without imposition of tax and for later two years in regular assessment proceedings under Section 28 of the Act is that such levy of tax was upheld by the Supreme Court in case of ***Mohd. Ekram Khan & Sons vs. Commissioner of Trade Tax, U.P.Lucknow – (2004) 6 SCC 183 = AIR 2004 SC 3965 = (2004) 136 STC 515 (SC).***

3. Mr.Vinit Kumar Mathur, learned counsel appearing for the Revenue urged that the assessing authority as well as the first

appellate authority were justified in upholding imposition of tax on such consideration received by the assessee dealer from the manufacturer, M/s TATA Motors in the form of credit notes on account of replacement of defective parts of vehicles on the basis of Supreme Court decision in the case of Mohd. Ekram (supra) and Tax Board has fallen into error in setting aside such levy of tax distinguishing the case of the assessee from the one involved before the Supreme Court in Mohd. Ekram Case (supra) and, therefore, revision petitions filed by the Revenue deserve to be allowed and such levy of tax deserves to be restored along with interest and penalty imposed by the assessing authority, which was wrongly set aside by the first appellate authority as well as Tax Board. He emphatically relied upon the decision of Supreme Court in case of Mohd. Ekram (supra).

4. *Per contra*, Mr.R.P.Bhatt, Senior Advocate assisted by Mr.Vikas Balia submitted that judgment of Supreme Court in Mohd. Ekram's case (supra) was not applicable in the facts of the present case and, therefore, Tax Board was perfectly justified in setting aside the levy of tax as well as interest and penalty. Learned counsel for

the assessee submitted that as far as the question of penalty is concerned since all disclosures were made in the books of accounts of the assessee, there was no question of imposition of penalty under Section 65 of the Act upon the assessee. However, he submitted that question of interest depended upon levy of tax itself and in his submission the levy of tax itself was wrong in the facts of the present case. In other words, he prays for dismissal of revision petitions filed by the Revenue. Learned Senior Advocate Mr. Bhatt also submitted that in fact, the facts of the present case were covered by the earlier decision of the Hon'ble Supreme Court in the case of ***Premier Automobiles Ltd. vs. Union of India(AIR 1972 SC 1690)*** as also decision of three High Courts in the case of ***M/s GEO Motors vs. State of Kerala – (2001) 122 STC 285 (Kerala), M/s Prem Motors vs. Commissioner of Sales Tax – (1986) 61 STC 244 (Madhya Pradesh) and Commissioner of Sales Tax vs. Prem Nath Motors – (1979) 43 STC 52 (Delhi).***He fairly submitted that though the decision of Kerala High Court in GEO Motors case (supra) and Madhya Pradesh High Court in Prem Motors (supra) were overruled by the Supreme Court in Mohd. Ekram's case (supra), however, the facts of Mohd. Ekram were clearly different and distinguishable from

the facts of present case and, therefore, the Revenue authorities had erred in applying the judgment of Hon'ble Supreme Court in Mohd. Ekram's case (supra) to the facts of the present assessee.

5. Explaining the sequence of transaction and nature of contract between the parties in respect of replacement of defective parts in the cars and other vehicles, manufacturer M/s TATA Motors and the assessee – dealer M/s Marudhara Motors, Mr. Bhatt submitted as follows:-

> "(a). ***The relationship between Tata Motors and Marudhara Motors is a Principal to Principal relationship, and not a Principal to Agent relationship.*** Marudhara Motors is a dealer of Tata Motors under a Contract, whereby Marudhara Motors sells Tata manufactured vehicles, spare parts and provides service support to these products and is under contractual obligations to provide product support during warranty period.
>
> (b) In view of the above contractual relationship ***Tata Motors sells vehicles and spare parts to Marudhara Motors by charging CST*** against "C" form.
>
> (c) Thereafter Marudhara Motors is free to sell these products to customers/vehicle users through its own Invoice collecting local sales tax at a price not exceeding maximum price prescribed by the manufacturer, but under the warranty, if some parts

have gone defective, such parts are replaced free of cost to the customers to avoid delay in first securing such parts from the manufacturer M/s Tata Motors and replacing the same.

(d) While selling vehicle manufacturer also sells a warranty bundled along with the vehicle taking upon itself certain obligations about product quality and service. These obligations are subject to a contract the terms of which are given in service manual.

(e) ***Dealer gets the title to vehicle and the warranty bundled with it*** at the time of purchase of vehicle, which he passes on at the time of selling to the ultimate customer whereby the ***primary obligation of fulfilling warranty obligation as per the terms contained in the service manual terms rests with the manufacturer.***

(f) In order to discharge its warranty obligations manufacturer has a dealer network to discharge its obligation on its behalf under the contract of dealership as and when a need to serve the vehicle under warranty arise.

(g) ***Dealer in turn on behalf of the manufacturer collects a defective component/s or the vehicle itself from the customer if its part/s or it is found to be defective and replaces it with part/s or vehicle in his stock purchased from the manufacturer. No money is charged*** from the customer as he has not been sold any new, part/s or vehicle. ***Only a defective component or vehicle has been replaced.*** This defective component/s or vehicle received on exchange by the dealer from the customer is returned back to the manufacturer from whom the dealer had purchased the same in the first place i.e. Tata Motors, who after receiving the part/s or the entire vehicle and satisfying themselves about its being defective and

defect being in the nature of manufacturing defect compensate the purchasing dealer at this purchase price which is their selling price by crediting the running account of the dealer with them used exclusively for the purpose of transaction of sale from them to dealer for such spare part/s or vehicle/s as the case may be.

As such the transaction train is as under:-

1. Sale of vehicle along with the warranty thereon with warranty by Tata Motors to Dealer (Marudhara Motors) at cost plus CST as applicable against "C" form.
2. Sale of spare parts of vehicles by Tata Motors to Marudhara Motors (Dealer) at cost plus CST as applicable against "C" form.
3. Sale of vehicle along with the warranty thereon by Marudhara Motors (Dealer) to customer (vehicle user) at selling price plus Rajasthan Sales Tax.
4. Vehicle coming back to Marudhara Motors during warranty period due to defect, Marudhara Motors replaces the defective part/s or the vehicle without charging anything from the customer out of the part/s of the vehicle in its stock.
5. Marudhara Motors returns such defective part/s or vehicle to Tata Motors sold earlier to it by Tata Motors.
6. Tata Motors pays back the purchase price to Marudhara Motors by crediting its running account for purchase of part/s or vehicle as the case may be."

6. Learned counsel for assessee also sought to further strengthen his argument on the basis of following book entries which are made in the books of accounts of the assessee dealer and manufacturer M/s

TATA Motors. The same are also noted below to explain the accounting part of the transactions in question:-

In the Books of Dealer M/s Marudhara Motors:

(i)	Vehicle Purchase Account to Tata Motors (Vehicle Purchase) (Vehicle purchased through Inv. No. .....dated.....)	Dr.
(ii)	Tata Motors (Vehicle Purchase) To Bank (Amount remitted to Tata Motors for vehicle purchased)	Dr.
(iii)	Tata Motors (Parts A/c) To Bank (Money remitted to Tata Motors for supply of parts)	Dr.
(iv)	Parts purchase A/c To Tata Motors (Parts A/c) (parts purchased through BN..... dated.....for Rs.....)	Dr.
(v)	Tata Motors (Relevant A/c) To Purchase Return A/c (Being return of defective part/s or vehicle)	Dr.

Tata Motors issues a credit note to confirm the above debit entry and credits the proceed to parts/vehicle account as the case may be.

<u>In the Books of Customers</u>

The accounting entries in the Books of the customer's account

is as under:-

(i) Vehicle Purchase Account Dr.
To Marudhara Motors A/c
(Vehicle purchased through Bill No.
.....dated.....for Rs.....
from.....including RST)

There is no entry passed by him for replacement under warranty of part/s or vehicle as it results in no transaction as only defective goods are replaced without any consideration.

In the Books of manufacturer M/s Tata Motors

The accounting entries passed by Tata Motors have to be as under:-

(i) Marudhara Motors (Vehicle Sales) A/c Dr.
To Vehicle Sales A/c
To CST A/c
(Vehicle sold to Marudhara Motors through
Inv. No.....dated.....for Rs.....and
CST Rs.....)

(ii) Marudhara Motors (Parts Sales) A/c Dr.
To Parts Sales A/c
To CST A/c
(Parts sold to Marudhara Motors through
Inv. No.....dated.....for Rs.....)

(iii) Bank A/c Dr.
To Marudhara Motors (Vehicle Sales) A/c
(payment received from Marudhara Motors)

(iv) Bank A/c Dr.
To Marudhara Motors (Parts Sales) A/c
(Payment received from Marudhara Motors)

(v) Sales Return A/c Dr.
CST A/c Dr.
To Marudhara Motors parts/vehicle A/c
(Part/s or vehicle found defective by Marudhara Motors returned by them and received by us found to be defective, therefore, credit given for value received and being sales return CST is debited to reverse the earlier credit to CST A/c.

7. The following clause relating to `warranty', Clause no.18 of said agreement reads as under:-

> "18. The Dealer agrees that the only warranty binding on the company shall be the warranty published by the Company and all implied warranties under law are hereby excluded. The dealer shall have no authority to give to his purchasers a different warranty binding upon the company. The Dealer shall meet the Company's warranty obligations to the purchasers of the said products in accordance with the sales and service procedures and advices issued or to be issued by the Company from time to time"

8. Learned counsel for the assessee thereupon stressed that the warranty for replacing the defective parts of the vehicles is a contract between the manufacturer M/s TATA Motors and the ultimate customer and the property in goods namely spare parts which are so replaced remains with the manufacturer company M/s TATA Motors and, therefore, there is no question of imposition of tax in the hands

of respondent assessee-dealer, who merely provides it as a matter of service to the customers to immediately replace the defective parts and such defective parts are sent back to the manufacturer as purchase returns which are either replaced by the manufacturer company or the manufacturer instead, reimburses the same in the form of credit notes issued by the manufacturer in favour of the respondent assessee and, therefore, since no property in goods is transferred by the assessee dealer in favour of the manufacturer from whom the replacement is made or for which reimbursement is received in the form of credit notes, no taxable sale of such spare parts can be said to have taken place.

9. Learned counsel also drew the attention of the court towards the following warranty clause in the owner's manual of the vehicles issued by the manufacturer M/s TATA Motors. The same is also reproduced for ready reference:

> "We WARRANT each Tata Indicab car and parts thereof manufactured by us to be free from defect in material and workmanship subject to the following terms and conditions-
>
> 1. This warranty shall be for 18 months from the

date of sale of the car irrespective of the distance covered. However, for the cars used for commercial applications (used for hire or reward viz those operating with a yellow number plate), the warranty shall be limited to 18 months or 50,000 kms, whichever occurs earlier.

2. Our obligation under this warranty shall be limited to repairing or replacing, free of charge, such parts of the car which, in our opinion, are defective, on the car being brought to us or to our dealers within the period. The parts so repaired or replaced shall also be warranted for quality and workmanship but such warranty shall be co-termius with this original warranty.
3. ***Any part which is found to be defective and is replaced by us under the warranty shall be our property***."

10. Learned counsel for the assessee also urged that the transaction of replacing the defective parts did not fall within the definition of `sale' as defined under Section 2(38) of the Rajasthan Sales Tax Act and since the facts of the case are distinguishable from the facts obtaining before the Hon'ble Surpeme Court in Mohd. Ekram's case (supra), the assessing authority was not justified in imposing tax much less interest and penalty upon the assessee and, therefore, the Tax Board was correct in setting aside the imposition of tax and also upholding the deletion of interest and penalty by the first appellate

authority and revision petitions filed by the Revenue before this Court deserve dismissal.

11. I have heard learned counsels at length and given my thoughtful consideration to the impugned order of Tax Board, contentions raised by learned counsels and the judgments cited at the bar.

12. It is first considered appropriate to refer to the judgment of Hon'ble Supreme Court in the case of Mohd. Ekram (supra) which is the sheet anchor of the arguments of learned counsel for the Revenue. In para 1 of the judgment itself, the Hon'ble Court considered the question in the following terms:

> "The only question involved in these appeals is whether the amount received by the assessee for supply of parts to the customers as a part of the warranty agreement was liable to tax. ***The assessee was an agent of M/s Mahindra and Mahindra*** (hereinafter referred to as "the manufacturer"). The manufacturer had warranty agreement with the purchasers of vehicles (hereinafter referred to as "the

customers) to replace defective parts during the warranty period. ***As found by the taxing authorities and the High court, the manufacturer made payment for certain price as the parts were supplied by the assessee to the customers***. Credit notes were issued by the manufacturer to the assessee in respect of the price of the parts supplied to the customers. The assessing officer was of the view that the payments received through credit notes amounted to a sale in terms of Section 2 (h) of the Act."

13. In para no.5 of the judgment, the Hon'ble Court noticed the contention of Revenue in the following terms:-

"In response, learned counsel for the revenue submitted that the transaction between the assessee and the manufacturer was a separate transaction. ***It is not the case of the assessee that the manufacturer had supplied the goods to the customers. If it had supplied parts to the customers through assessee; the position may have been different***. (In the present case it is so).The manufacturer was obligated to make the replacement. If it did not possess the parts to meet the contractual obligation, ***it would have purchased the parts from any seller of the parts and would***

> ***have paid the sales tax.*** In the instant case, the assessee had supplied the goods for which it received the consideration by way of credit notes and/or other mode of payment. That being the position, the High Court was justified in its view about the taxability of the transactions."

14. Then the two Judges' Bench of the Hon'ble Supreme Court proceeded to distinguish the earlier case of three Judges' Bench decision in case of Premier Automobiles in the following terms:

> "The decision in Premier Automobiles case (supra) is really of no assistance to the assessee. The fact situation there was different. The issues in the said case were different. One of the issues was whether the expenses on account of warranty and statutory bonus were to be excludable while working out the ex-work cost. It was held by this Court that manufacturers furnish warranty covering the cars sold. ***Under the warranty all defects on account of faulty manufacture have to be set right and the defective parts have to be replaced free of costs by the manufacturer or his dealer*** within the specified period or given distance travelled by the car. The car manufacturers enter into an agreement with the

manufacturers of components providing for a warranty so far as the components supplied are concerned. The whole object behind the warranty is that the consumer who has to make a heavy investment for the vehicle should be assured of a proper performance of the vehicle in a trouble free manner for reasonable length of time. ***Therefore, entire cost of warranty was to be borne by the manufacturer***. The issue was entirely different from the one at hand and the ratio in the said case provides no answer to the present dispute. Prem Nath's case (supra), as the factual position goes to show, dealt with transfer of property in the part or parts replaced in pursuance of the stipulation of warranty as part of the original sale of car for the fixed price paid by the buyer/consumer. ***The price so fixed and received was a consolidated price for the car and the parts that may have to be supplied by way of replacement in pursuance of the warranty***. That decision also throws no light on the present controversy. Though the decision in ***Geo Motor's case (supra) and Prem Motor's case (supra) support the stand of the assessee, we find that basic issue as to the nature of the transaction between the assessee and the manufacturer was lost sight of***. As noted above, in a case manufacturer may have purchased from the

> open market parts for the purpose of replacement of the defective parts. ***For such transactions, it would have paid taxes. The position is not different because the assessee had supplied the parts and had received the price. The categorical factual finding recorded by the taxing authorities and the High Court is that the assessee had received the payment of the price for the parts supplied to customers***. (Here in the present case there is no such finding by the revenue authority). That being so, the transaction was subject to levy of tax as has been rightly held by the High Court. The decisions in Geo Motor's case(Supra) and Prem Motor's case (supra) stand overruled."

15. It is also considered appropriate to now notice the observations of Hon'ble Supreme Court in a three judges Bench decision in the case of ***Premier Automobiles Ltd. vs. Union of India – AIR 1972 SC 1690).*** The context in which the said case arose before the Hon'ble Supreme Court was the fixation of fair price of motor cars under the provisions of Motor Car (Distribution and Sale) Control (Amendment) Order 1969 promulgated under Section 18G of the Industries (Development and Regulation) Act 1951, which was

challenged inter alia on the ground that the cost and expenses on account of warranty and statutory bonus have been wrongly excluded from the ex-works cost on the basis of which the fair price was fixed by the Commissioner. In this context, the Hon'ble Supreme Court in para no.13 observed as under:-

> "13. It is well known that the car manufacturers in India as elsewhere furnish a warranty covering the cars sold. ***Under the warranty all defects on account of faulty manufacture in workmanship have to be set right and the defective parts have to be replaced, free of cost by the manufacturer or his dealer*** within a specified period or a given distance traveled by the car. During the period of warranty which is now for one year three free services have to be rendered. The car owner has to pay the cost of consumable items like oil, grease, packing etc. during those free services. The car manufacturers enter into an agreement with the manufacturers of components providing for a warranty so far as the components supplied are concerned. As has been rightly observed by the Commission the whole object behind the warranty is that the consumer who has to make a heavy

investment should be assured of a proper performance of the vehicle "in a trouble-free manner for a reasonable length of time.

14.....

15. The Commission was of the view that many of the ancillary manufacturers cover their supplies to the car manufacturers with a warranty and are liable to replace the defective parts free of cost. The manufacturers are expected to use only those components which are of a standard quality. By improving the method of quality control and incidence of expense on account of warranty can be reduced and can, be absorbed in the return. According to the learned Attorney General the matter relating to inclusion of warranty charges in the ex-works cost is no longer res-integra. The report, of the Motor Car Quality Inquiry Committee (known as the Pande Committee), made a recommendation that the warranty should be made uniform for all the three motor cars and no cost of replacement including incidentals should be passed on to the customer. This Committee was appointed by a resolution of the Government of India dated February 12, 1968 in exercise of the powers conferred by s. 15 of the Act. Pursuant to the recommendation of this Committee an order was

promulgated by the Central Government in March 1968 under S. 16 of the Act which was to the following effect:

"The warranty with which cars are sold shall be, uniformly valid for a period of 12 months or, a distance covered. of 16,000 kms., whichever occurs earlier. ***All defects, due to faulty manufacture of workmanship shall be rectified and defective parts replaced during this period without passing any part of the burden including incident charges to the customer***". The effect of the above direction cannot be ignored although it may not be conclusive in the matter of fixing a fair price. We find the statement of the Commission unexceptionable that if the warranty is to be made out of the profits every manufacturer will try to minimise warranty cost by improving the quality of his product. If it is to be included in the ex-works cost it means virtually passing it on to the consumer."

16. As was noticed by the Apex Court in the case of Mohd. Ekram (supra) itself that the judgments relied upon by the counsel for

assessee of three different High Courts supported the stand of the assessee, however since basic issue as to the nature of transaction between the assessee and manufacturer was lost sight of , therefore, while the decisions of Delhi High Court in Prem Nath Motors (supra) was distinguished, those of M.P.High Court in Prem Motors case (supra) and Kerala High Court in Geo Motors case (supra) were overruled.

17. Just for ready reference, relevant extract of these judgments is also reproduced hereunder:-

In ***Commissioner of Sales Tax, Delhi Administration, Vikas Bhawan, New Delhi vs. Prem Nath Motors (P) Ltd – (1979) 43 SC S.T.C.*** 52, the Delhi High Court held as under:-

> "The questions that arose for consideration were : (i) whether the replacement of the spare parts free of cost under the warranty constituted a sale liable to sales tax and (ii) if it did not constitute a sale, whether the purchase price of such parts was liable to be included in the taxable turnover under the second

proviso to section 5(2)(a)(ii) of the Act. The Financial Commissioner held that the transfer of property in the parts replaced as a consequence of the terms and stipulations of the warranty constituted a sale and must be deemed to be a continuation of the original sale, the price of which stood included in the consolidated sale price determined and realised at the time of transfer of goods in the shape of the car with a warranty and on which sales tax was paid and that, therefore, the parts so replaced under the warranty were not liable to be imposition of further sales tax. On a reference at the instance of the Commissioner of Sales Tax:

Held, that the consideration for the part or parts that might be replaced under the warranty was included in the price fixed and paid for the car at the time of its sale and that the view taken by the Financial Commissioner that the replacement of the parts in pursuance of the warranty must be regarded as a "sale" the price for which was already paid and on which sales tax was already levied and collected, and that they were not liable to the imposition of further sales tax was correct."

In ***Prem Motors vs. Commissioner of Sales Tax, Madhya***

Pradesh – (1986) 61 STC 244, the Division Bench of M.P.High Court observed as under:-

> "When a dealer sells automobile vehicle, he sells it with all parts in a saleble condition. The warranty is the warranty from the manufacturer and therefore if during the warranty period any part is found to be defective and is to be replaced, the responsibility of replacement is that of the manufacturer. For the convenience of the customer, ***there is an arrangement between the manufacturer and the dealer so that the customer may get replacement done from the dealer which in due course is again made good by the manufacturer.*** Under those circumstances, when the dealer-assessee replaces parts to the customers and ***either gets those parts from the manufacturer or gets it reimbursed, it is neither sale of those parts by the dealer to the customer or to the manufacturer.*** What the dealer does only is to pass on the parts from the manufacturer to the customer but in order to avoid delay and inconvenience of the customer, he replaces the parts first and gets them from the manufacturer later. The pre-delivery charges incurred or damages in transit are also

practically of the same type. Therefore, those transactions when the dealer-assessee gets reimbursements in respect of parts supplied during the warranty period or gets parts from the manufacturer supplied during the period of warranty to the customers and the pre-delivery charges do not fall within the ambit of the definition of "sale"as has been provided in section 2(n) of the Madhya Pradesh General Sales Tax Act, 1958."

In ***Geo Motors vs. State of Kerala - (2001) 122 STC 285***, the Division Bench of Kerala High Court held as under:-

"On the question whether the cost of spares replaced by the petitioner during the warranty period forms part of the petitioner's turnover and is liable to tax:

Held, allowing the revision, that the transaction in question cannot be said to be a sale. The petitioner is the agent of the automobile manufacturer and the spare parts are given on the basis of warranty for replacement. It may be true that the petitioner had purchased the spare parts by giving C forms. ***But so far as the purchase of the spare parts is concerned, it is purely for replacement and not for sale.*** It is

> further seen that the ***credit notes are issued by the manufacturer reducing the sale value.*** The turnover of the spare parts which were given for replacement are to be exempted.
>
> Commissioner of Sales Tax V. Prem Nath Motors (P) Ltd. [1979] 43 STC 52 (Delhi) followed."

18. In a recent decision Division Bench of Andhra Pradesh High Court in ***Vijaya Vasava Motors – ACCJ (2009) 19 VSTC 322 (AP)*** held that Mohd. Ekram's case would not apply prospectively and the Govt. order declaring it to be so applicable only prospectively was liable to be quashed. From the head note of the reports to quote:

> "The law laid down by the Supreme Court must be held to be the law from the inception, unless the Supreme Court itself indicates that its decision will operate prospectively. Since the power to hold that a judgment of the Supreme Court will apply prospectively does not enure even in the High Courts, the Government could not have held that the judgment in Mohd. Ekram Khan & Sons vs. Commissioner of Trade Tax, U.P. (2004) 136 STC 515 (SC) would only have prospective operation. The action of the Government in doing so in its order in G.O.Ms.No.144

> dated February 11, 2008, in effect, amounted to declaring that the judgment of the Supreme Court in Mohd. Ekram Khan & Sons (2004) 136 STC 515 would not apply to matters which were either pending before statutory authorities or the Appellate Tribunal or even the High Court merely because they related to assessment years prior to the date of the judgment of the Supreme Court, i.e., prior to July 21, 2004. Therefore, that portion of G.O. Ms. No.144 dated February 11, 2008 wherein it was so declared was void and unenforceable."

The Bench was not considering the question whether Mohd. Ekram's case was at all applicable to the facts of particular case or not, but was called upon to decide the validity of Govt. order dated 11th February 2009, as aforesaid.

19. From the dispassionate and closer consideration of the material on record, it appears to this Court that facts of the present case obtaining in the case of respondent assessee dealer are distinguishable from the facts obtaining in Mohd. Ekram's case (supra) before the Hon'ble Supreme Court, therefore, the said

judgment of Apex court in Mohd. Ekram's case (supra) could not be blindly applied by the Revenue authorities to the facts of respondent assessee's case.

20. The major points of distinction between the two are as follows:

(i) In Mohd. Ekram's case relationship between assessee Mohd.Ekram and manufacturer was that of agent and principal, whereas, in the case in hand before this Court the relationship is that of principal to principal and not principal to agent, and that makes the foundational difference.

(ii) In Mohd. Ekram's case, as can be seen from para no.5, the assessee had supplied the goods for which it received the consideration by way of credit notes and/or other modes of payments whereas in the present case the spare parts or defective parts collected by the assessee M/s Marudhara Motors are sent back physically to the manufacturer M/s TATA Motors, who either replenishes those spare parts or gives credit note equal to the value of such replaced new parts. Thus, transactions between dealer assessee and customer is independent from the one between dealer and the

manufacturer here.

(iii) Such spare parts are ***supplied by the present assessee free of cost*** to the customers is a fact not disputed by the Revenue in the present case, whereas in Mohd. Ekram's case Hon'ble Supreme Court observed in para no.6 that, `in case the manufacturer may have purchased from the open market parts for the purpose of replacement of the defective parts, for such transactions, it would have paid taxes and the position here is not different ***because the assessee had supplied the parts and received the price.***'

21. From the perusal of the agreement between the respondent assessee and the manufacturer, particularly clause 18 relating to warranty as quoted above, it appears to this Court that in the present case the respondent assessee is merely working on behalf of manufacturer in discharge of manufacturer's contractual obligation under the warranty agreement while replacing such spare parts which have gone defective and such defective parts are sent back by the respondent assessee to the manufacturer, who may either physically replace or replenish them or issue credit notes of value of the new parts replaced on its behalf of the respondent dealer. Since title of

property in goods namely spare parts passes from the hands of respondent assessee to the customer free of cost and such title of property in spare parts does not pass from assessee dealer to the manufacturer, no taxable sale can be said to have taken place in the hands of respondent assessee at all.

22. Whenever assessee dealer sells such spare parts to other customers who are not getting defective parts replaced under the warranty, the assessee is collecting due RST or local tax, as these parts were purchased by it from the Manufacturer under independent contract after paying due CST, but when such parts are replaced under warranty, they are supplied free of cost to the customers and thus no sale in such cases can be said to have taken place at the hands of the assessee. In other words, where there is supply of spare parts to the customer by the dealer there is no consideration passing as it is free of cost and where such consideration or payment is being received by the dealer from the manufacturer in the form of credit notes in discharge of manufacturer's warranty obligations, there is no transfer of property in goods viz. spare parts from dealer to the manufacturer. These two transactions viz. one between customer and

dealer, and another between dealer and manufacturer are independent and are not linked to each other. First is sans consideration against goods and second one is sans transfer of property in goods. The credit notes given by manufacturer to dealer in discharge of its warranty obligations to customers cannot be taxed under sales tax laws in the hands of the dealer.

23. For levying tax on the sale in the hands of respondent assessee, it is sine qua non by definition of `sale' itself that transfer of property in goods takes place for consideration. Admittedly, in the present case customer is not charged anything for the parts replaced by the respondent assessee as a dealer of the manufacturer M/s TATA Motors under the warranty agreement between the manufacturer and the customer. The manufacturer in discharge of its warranty obligation either replaces those defective parts which are physically sent back by the dealer or gives the equal credit in the form of credit notes against the debit notes sent by the assessee dealer and, therefore, such credit notes cannot be said to be consideration or payment for such spare parts supplied by assessee to the customer free of any cost. Thus, it appears to be more plausible to arrive at a

conclusion that the same is in discharge of manufacturer's warranty obligation and amounts to reduction in sale value of the vehicle itself. Cost of such spare parts is also included in the cost of vehicle while giving such warranty for limited period to the customer and warranty is given by the manufacturer, therefore, replacing of spare parts cannot be taxed as a sale taxable in the hands of assessee dealer at all.There is yet another aspect of the matter. If the defective parts are returned by the customer to the dealer and by the dealer to the manufacturer, it amounts to `sales returns' in the hands of dealer and therefore, proportionate sales tax rebate should be given to the dealer, as tax was duly charged on the sale of the entire vehicle. If tax were to be levied in the hands of the dealer upon such sale or supply of new spare parts in place of defective parts, any such tax levied would be set off by the sales tax rebate on such `sales returns' by the customer to the dealer. In this context the above quoted portion of Supreme Court judgment in Premier Automobiles case (supra) appears to support the case of assessee whereas the later decision in Mohd. Ekram's case (supra) on aforesaid three counts appears to be distinguishable from the facts of the present case.

24. This court draws guidance and strength on the aforesaid character of `sale' and different components to converge in order to levy tax on that, from the recent decision of Hon'ble Supreme Court in the case of ***State of Rajasthan vs. Rajasthan Chemist Association (2006) 6 SCC 773*** from which relevant paras including reference to earlier leading judgments from Apex Court are quoted hereunder extensively:-

> "10. STO, Pilibhit v. M/s Budh Prakash Jai Prakash (AIR 1954 SC 459) arose under the U.P. Sales Tax Act, 1948. In that case the issue related to levy of tax by the assessing authority on the turnover relating to forward contract. The assessee had challenged that the imposition of sales tax on forward contracts was ultra vires the powers of the State Legislature. The U.P. Sales Tax Act, 1948 had been enacted by the provincial legislature in terms of the legislative power conferred under the Government of India Act, 1936 under Entry 48 in List II of the Schedule Seventh of the said Act. Under Section 2(h) of the U.P. Act, a sale was defined to include forward contracts. This Court upheld the challenge by holding that the power conferred under Entry 48 to impose tax on the sale of goods can be exercised only when there is a sale under which there is a transfer of property in the goods, and not when there is a mere agreement to sell. The State Legislature cannot, by enlarging the definition of "sale" by including forward contracts arrogate to itself a power which is not conferred upon it by the Constitution, and the definition of "sale" in Section 2(h) of the Act XV of 1948 must, to that extent, be declared ultra-vires.

11. It was inter-alia held as follows:

"It would be proper to interpret the expression "sale of goods" in Entry 48 in the sense in which it was used in legislation both in England and India and to hold that it authorizes the imposition of a tax only when there is a completed sale involving transfer of title".

12. Significantly, the Court observed about substance of the levy as under:

"The substance of the matter is that the sales tax is a levy on price of the goods, and the reason of the thing requires that such a levy should not be made, unless stage has been reached when the seller can recover the price under the contract."

13.The aforesaid decision makes it clear that subject 'tax on sales of goods' in Entry 48 of List II of the Seventh Schedule of the 1935 Act providing for legislative field of sale of goods ought to be confined to levy of tax on sales of goods as defined in the Sales Act and in substance, it is a levy on price of goods and the State Legislature does not have power to enlarge the definition of sales by creating a legal fiction and levy tax on a sale which has not come into existence.

14. State of Madras v. Gannon Dunkerley & Co (AIR 1958 SC 560) is another decision which needs to be noted. A Constitution Bench of this Court considered the construction of Entry 48 in List II of Seventh Schedule of the 1935 Act. Tax on the sale of goods is in pari materia with Entry 54 in List II of Schedule VII of the Constitution. The case arose under the Madras General Sales Tax Act, 1939 as amended by Madras General Sales Tax (Amendment) Act, 1947. The definition of "sale" in Section 2(h) was enlarged so as to include "a transfer of property in goods involved in

execution of works contract". By creating a legal fiction, it was deemed that in execution of a work, property in the goods involved in works contract is transferred as goods so as to include value (not the price) of such goods as part of taxable turnover.

15. After referring to the definition of expression "sale of goods" from the times of Roman Law and the Law in England, this Court culled out and approved the following principle stated in Benjamin's book "Sale of Goods":-

"Hence it follows that to constitute a valid sale,there must be a occurrence of the following elements viz.

(1) the parties competent to contract (2) mutual assent; (3) thing of sale or general property in which transfer from seller to buyer and; (4) a price in money paid or promised".

16. On the aforesaid premises, the Court on considering the Indian Law and after referring to Section 77 of the Contract Act, (before enactment of Sale of Goods Act) defining sale as originally enacted in it, and the provisions of Sales Act reached the following conclusions about price as an essential element:

"that it must be supported by money consideration, and that as a result of the transaction property must actually passed on the goods unless all these elements are present, there can be no sale".

17. The following conclusions were arrived approving the view in Budh Prakash's case (supra):-

"A power to enact a law with respect to tax on sale of goods under Entry 48 must, to be intra vires, be once relating in fact to sale of goods, and accordingly, the

Provincial Legislature cannot, in the purported exercise of its power to tax sales, tax transactions which are not sales by merely enacting that they shall be deemed to be sales.

..."sale" in Entry 48 must be construed as having the same meaning which it has in the Sale of Goods Act,

..... It is of the essence of this concept that both the agreement and the sale should relate to the same subject matter".

18. Summing up the conclusions it was held :-

"the expression "sale of goods" in Entry 48 is a nomen juris, its essential ingredients being an agreement to sell moveable for a price and property passing therein pursuant to that
agreement".

19. The State Legislature does not have legislative competence to give the expression "sale of goods" extended meaning and to enlarge its legislative field to cover those transactions for taxing which do not properly conform to elements of sale of goods within the Sales Act. Tax on value of the material used in construction of building was held to be ultra-vires.

20. The decision in Firm of M/s Peare Lal Hari Singh v. The State of Punjab and Anr. (AIR 1958 SC 664) also relates to imposition of tax on supply of materials used in building contracts and this Court followed its earlier decision in Gannon and Dunkerley case (supra) and held that the expression "sale of goods" in Entry 48 in List II of Seventh Schedule of the Government of India Act, 1935 has the same import which it bears in the Sales Act.

21. The principle was reiterated in Bhopal Sugar

Industries Ltd., M.P. v. D.P. Dube Sales Tax Officer, Bhopal Region,Bhopal (AIR 1967 SC 549) where the question arose whether giving extended definition of "retail sale" which sought to render consumption by the owner of motor spirit liable to tax under the concerned Sales Tax Act by virtue of Section 3, is beyond the competence of the State Legislature and hence void. This Court relying on its earlier decision in Gannon and Dunkerley (supra) held as follows:

"In a transaction of sale of goods which is liable to tax there must be concurrence of the four elements, viz;
(1) parties competent to contract;
(2) mutual assent;
(3) a thing, the absolute or general property in which it is transferred from the seller to the buyer; and
(4) a price in money paid or promised.

A transaction which does not conform to this traditional concept of sale cannot be regarding as one in respect of which the State Legislature is competent to enact an Act imposing liability for payment of tax".

The Court quashed the assessment made on the aforesaid premises.

22. Levy by the State of Uttar Pradesh as to the basis of levy once a transaction is held to be a transaction of sale came up for consideration by a Constitution Bench in Ganga Sugar's case (supra). This Court said:

"Tax on sale or purchase must be on the occurrence of a taxing event of sale transaction".

23. This Court in M/s Govind Saran Ganga Saran v.Commissioner of Sales Tax & Ors. (AIR 1985 SC 1041) on analyzing Article 265 noted as follows:

"The components which entered into tax are well known. The first is the character of the imposition known by its nature which transpires attracting the levy. The second is a clear communication of the person on whom the levy is imposed and which is obliged to pay the tax. The third is rate at which the tax is imposed and the fourth is the measure or value to which the rate is applied for computing the tax liability".

Obviously, all the four components of a particular concept of tax has to be inter related having nexus with each other. ***Having identified tax event, tax cannot be levied on a person unconnected with event***, nor the measure or value to which rate of tax can be applied can be altogether unconnected with the subject of tax, though the contours of the same may not be identified.

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28. The question of tax on sale of goods may be examined in the said background. The subject of tax being sale, measure of tax for the purpose of quantification must retain nexus with 'sale' which is subject of tax. As noticed above, tax on sale of goods, is tax on vendor in respect of his sales and is substantially a tax on sale price. The vendor or buyer cannot be taxed de hors the subject of tax that is sale by the vendor or purchase by the buyer. The four essential ingredients of any transaction of sale of goods include the price of the goods sold, therefore, in any taxing event of sale, which become subject matter of tax price component of such sale, is an essential part of the taxing event. Therefore, the question does arise whether a particular taxing event of sale could be subjected to tax at the prescribed rate to be measured

with such price which is not the component of the transaction of sale, which has attracted the sales tax.

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33. Thus primarily the rate of tax relates to ***measure of tax to come into existence simultaneous with occurrence of taxing event***. The machinery provisions relating to its quantification and collection can take place later. Providing measure to which rate is to be applied is integrally connected with charge itself.

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39. The position would have been different had the tax on taxable transaction of purchase have been levied with reference to price relatable to subsequent transaction of sale. In that event, ***the price forming part of subsequent sale would have lost nexus with the transaction that become taxable in the State***.

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41. These cases give a clear picture that Entry 54 in List II of Seventh Schedule empowers the State Legislature to impose and collect taxes on sale of goods. The measure to which tax rate is to be applied must have a nexus to taxable event of sale and not divorced from it.

50. Applying the principles enunciated above, the inevitable conclusion is that when the wholesaler sells any formulation to a retailer in bulk quantity, taxable event of sale of goods takes place where wholesaler and retailers are the parties to contract, the goods in

question are the formulations and the consideration is one which is agreed to between the parties to that transaction within the limits permissible by law. By substituting the assumed quantity of goods or a price which is not subject matter of that contract of completed sale for the purpose of measuring tax the legislature assumes existence of contract of sale of drugs by legal fiction which has not taken place and which cannot be considered to be a sale in the manner stated in the Sales Act, which alone can be subject of tax under Entry 54 in List II. Substitution of assumed price or the assumed quantity in place of actual price/quantity in a completed sale transaction, for the purpose of levy of tax on the subject matter of tax results in taking away from it the character of 'sale of goods' as envisaged under the Sales Act.

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52. ***Every transaction of sale is independent and can be subject to levy of tax and the components and the measure which can make the tax levy effective must have nexus with the taxable event***.

53.By devising a methodology in the matter of levy of tax on sale of goods, ***law prohibits taxing of a transaction which is not a completed sale and also*** confine sale of goods to mean sale as defined under the Act. This cannot be overridden by devising a measure of tax which relates to an event which has not come into existence when tax is ex-hypothesi determined, much less which can be said a completed sale and which cannot be subject of legislation providing tax on 'sale of goods' ***by transplanting a sum related to as "likely price" to be charged for subsequent sale to be taxed by the devise of measuring tax for the completed transaction which has become subject of tax***.

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55.If the legislation can provide for a measure of tax on

subject of tax by substituting any notional value, which at no point of time becomes part of or related to subject of tax viz. sale of goods, then the fact that it is related to MRP loses its significance altogether. If this is permitted to be done the legislation can provide for any measure the purpose of applying the rate of tax, whether it is founded on MRP or any other fixed value which legislature may provide will make little difference. It is not contended by appellant that even if the measure is not relatable to MRP, it can substitute any value as a measure of tax. ***Subject of tax is not the goods or goods sold,but a transaction of 'sale of goods' as defined under the Sales Act.***

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58. If Section 4-A is designed to bring a levy into existence which is divorced from the "sale" subject to tax under the Act, it is beyond legislative competence under Entry 54 of List II of Seventh Schedule. The notification to the extent it intends to levy tax on first point sale with reference to price which could be charged in respect of a subsequent sale ***which has not come into existence at the time liability to tax arise and is determined ex-hypothesi is unsustainable*** on that basis.

25. Similarly, the Division Bench of this Court in the case of ***Udaipur Distillery Co. Ltd. vs. Rajasthan Taxation Tribunal & Ors. - (2003) 132 STC 489 (Raj.)*** held as under:-

"Three ingredients of sale as envisaged in the Sale of Goods Act are generally required to be

present before a transaction can be considered a sale : (i) there should be an agreement between the parties for the transfer of title to goods, (ii) it should be supported by money consideration, and (iii) as a result of the transaction, the property in goods, should actually pass. ***The three ingredients must be established cumulatively and even if one of them is missing, there cannot be a sale***. This makes it clear that the ***consideration must relate to the commodity which is the subject matter of the transaction of sale***.

Where the sale price includes the charges or costs for packing of the goods before it is delivered to the buyer or before the transfer of property takes place, it becomes the sale price of the commodity itself. It does not become an independent sale. The definition of "sale price" given in section 2(p) of the Act cannot be used for the purpose of splitting the sale price of the commodity into the sale price of the commodity and the packing material relating to different commodities so as to constitute two sales in place of one. The provision is against splitting the cost incurred by dealer before commodity comes to the deliverable state."

26. Thus, this court concludes that credit notes received from

manufacturer by the assessee dealer could not be taxed as sale value of spare parts replaced for defective parts under warranty by the manufacturer to the customer, in the present case.

27. Consequently, the Tax Board cannot said to have committed any error in distinguishing the judgment of Supreme Court in Mohd. Ekram's case (supra) and finding that in the facts and circumstances of the case, the assessing authority was not justified in imposing tax in the hands of respondent assessee. The Tax Board is also justified in upholding the setting aside of interest and penalty because as far as interest is concerned the same is consequential to levy of tax which falls to the ground for the aforesaid reasons and penalty also because same in any case could not have been imposed as all the transactions were duly recorded in the regular books of accounts and, therefore, the same do not attract any penalty under Section 65 of the Act. The question relating to power of assessing authority to invoke Section 30 of the Act for reassessment as there was no escapement of turnover is also thus answered in favour of the respondent assessee and against the Revenue.

28. In view of the above, in the considered opinion of this Court, the order passed by the Tax Board in favour of respondent assessee is unassailable and revision petitions filed by Revenue are sans merit and deserve dismissal and same are accordingly dismissed with no order as to costs.

(DR.VINEET KOTHARI), J.

item no.38-49
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