Before the Central Sales Tax Appellate Authority
New Delhi

24th October, 2019

PRESENT

Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Mr. Ramayan Yadav, Member (Law)

Appeal No(s)- CST / 51 – 53/ 2016

Name & address of the Parties (Appellant(s) / Respondent (s)	:	M/s Adani Wilmer Limited Versus State of Karnataka & Ors.
Present for the appellant(s)	:	Mr. Naresh Thacker, Advocate Mr. Udit Jain, Advocate Mr. Prateek Bansal, Advocate
Present for the respondent(s)	:	Mr. Kaustav Saha, Advocate for Ms. Pritha Srikumar Iyer, Advocate for the State of Karnataka Ms. Rama Ahluwalia, Advocate for the State of Maharashtra Ms. Anusha Nagarajan for the State of Punjab Mr. Nishe Rajen Shonker for State of Kerala Mr. K.V. Ramkumar for Mr. K.V. Vijayakumar, Counsel for State of Tamil Nadu. Ms. Vishakha, Ms. Aastha Mehta and Mr. A.P. Mayee for State of Gujarat. Mr. M.L. Garg, Advocate, Government of NCT of Delhi

O R D E R

In these three appeals, the appellant has challenged the judgment dated 25.11.2015 passed by the Karnataka Appellate Tribunal at Bengaluru ("**Tribunal**"). By the impugned judgment the Tribunal has dismissed three appeals (STA No. 2167 to 2169 / 2014) filed by the appellant against the reassessment orders passed by the Deputy Commissioner of Commercial Taxes (Audit-3), Mangaluru ('**DCCT**' for short) for assessment period February 2009 to March, 2009, April, 2009 to March 2010 and April 2010 to March, 2011. As in these appeals common facts and issues are involved, they are being disposed of by this common order.

Ld. Counsel for the appellant has requested that Appeal No. CST/ 52/ 2016 be treated as lead appeal. Counsel for the respondents have no objection to this. Counsel are agreed that view taken in this appeal will govern the other two appeals. We therefore treat Appeal No. CST/52/2016 as lead appeal.

It is necessary to give gist of the facts of Appeal no. CST/ 52 / 2016. The gist is as follows-

> M/s Rajshri Packagers Limited ("**RPL**" for short) was a company incorporated under the Companies Act, 1956, engaged, *inter alia,* in the business of manufacture and sale of refined edible oil. M/s

Adani Wilmer Limited ("**AWL**") is a company incorporated under the Companies Act, 1956 and is engaged, *inter alia,* in the business of trading in commodities including edible oils. RPL and AWL were amalgamated pursuant to the order dated 06.03.2012 passed by the Gujarat High Court in Company Petition no. 168/2011. Though reassessment proceedings were initiated against RPL in view of amalgamation of RPL with AWL, AWL has prosecuted further litigation and hence AWL is the appellant herein. For convenience, the appellant is also referred to as **AWL** in this order.

On 16.01.2009, RPL entered into an agreement with AWL on principal-to-principal basis, under which AWL agreed to purchase edible oil manufactured by RPL as per the requirement/ quality specifications of AWL and under the brand names owned by AWL. We shall refer to this agreement as " **the First Agreement**". It is the case of AWL that the said agreement is only for local sales in Karnataka. This case is denied by the contesting respondents.

In January and February, 2009, RPL entered into various agreements with AWL in respect of different States. These agreements are described by AWL as Consignment Sales Agreements. One of such agreements is agreement dated 20.01.2009 between RPL and AWL in respect of the State of Maharashtra. Counsel are agreed that the contents of agreements in respect of different States are same and therefore agreement dated 20.01.2009 has been referred to by the Tribunal in the impugned judgment. We shall refer to agreement dated 20.01.2009 as "**the Second Agreement**" or **Consignment Sales Agreement** for convenience. Both i.e. first agreement and the

second agreement are reproduced verbatim in the impugned order passed by the Tribunal. It is the case of the appellant that AWL did not have much presence in other States. RPL had a significant customer base in other States. Therefore with a view to expanding its business in the States other than Karnataka, AWL approached RPL to conduct itself as a consignment agent of RPL in the other States so as to promote AWL's brand names. For this purpose these Consignment Sales Agreements were entered into. The contesting respondents have denied this case. According to them the sales effected outside Karnataka were inter-State Sales. In order to project them as a stock- transfer with a view to avoiding Central Sales Tax(CST), AWL entered into these sham agreements with RPL.

Vide internal order dated 20.11.2010, the audit assignment was issued by the Commissioner of Commercial Taxes, Karnataka for conduct of audit and for concluding assessments for the 12 tax periods (month-wise) of the financial year 2009-10. The lead appeal pertains to assessment period April 2009 to March 2010. Pursuant to this assignment, the business premises of RPL were visited by the Deputy Commissioner of Commercial Taxes (Audit-5) i.e. the **Assessing Authority** for the purpose of audit. On 30.11.2010, assessment order was passed by the Assessing Authority accepting the returns filed by RPL. The Assessing Authority accepted RPL's case that RPL had effected inter-State transfer of stock and not sales in the course of inter-State trade. The Assessing Authority, accordingly, accepted 'F' Forms.

To complete the sequence, it may be repeated here that on 06.03.2012 pursuant to the order of the same date of the Gujarat High Court, RPL and AWL were amalgamated.

On 31.12.2012, RPL's premises were visited by the Intelligence Wing of the Karnataka Value Added Tax Department and Intelligence Report dated 31.01.2013 came to be filed by the Intelligence Wing of the Commercial Taxes Department. The Inspecting Officer proposed to reject the claim of the appellant of inter-state stock transfer in respect of goods which bore the brand name of AWL.

On 08.01.2013, show cause notice under Section 74(1) of Karnataka Value Added Tax Act, 2003 (" **KVAT Act**" for short) was issued by the JCCT (E), Mangalore stating , *inter alia,* that RPL is supplying goods under the brand name of AWL which transactions are in fact inter-State sales and not consignment sales as projected. The appellant filed its reply to the show cause notice vide letter dated 01.02.2013. The matter was re-assigned by the Commissioner of Commercial Taxes, Karnataka to the DCCT for examination of the issue and for concluding reassessment. Accordingly, officers of DCCT visited the business premises of RPL on 12.09.2013 and obtained the required information.

On 26.12.2013 reassessment notice was issued to the appellant in which it was proposed that tax would be levied on transactions as inter-State sales and exemption of inter-State stock transfer would be withdrawn. This reassessment notice was issued under Section 9(2) of the Central Sales Tax Act, 1956 ("**CST Act**") read

with Section 39(1), 72(2) and 36(1) of the KVAT Act. The appellant filed a detailed reply to the reassessment notice dated 26.12.2013. Reassessment order was passed by the DCCT under section 9(2) of the CST Act read with Section 39(1) and 72(2) and 36(1) of the KVAT Act. Vide the said order, DCCT confirmed the allegations raised and the demand proposed in the reassessment notice dated 26.12.2013.

Considering that the reassessment order was not passed under Section 6A of the CST Act the appellant was of the view that the appellant could not prefer an appeal under Section 18A of the CST Act. The appellant therefore preferred an appeal against the said reassessment order before the Joint Commissioner of Commercial Taxes (Appeals) ("**JCCT(A)**") in terms of the provisions of the KVAT Act. The JCCT(A) rejected the said appeal vide its order dated 26.08.2014 and directed that the appeal against the reassessment order be filed before the Tribunal even though the order was passed under Section 9(2) of the CST Act because the issues involved are in relation to adjudication of stock transfers under Section 6A of the CST Act.

As directed, the appellant filed appeal before the Tribunal against the reassessment order. The Tribunal vide the impugned judgement confirmed the reassessment order passed by the DCCT. By the same order, the Tribunal dismissed two other appeals of the appellant pertaining to different periods but involving identical facts and issues. As stated, hereinabove the said judgment is challenged in these appeals.

We have heard Mr. Naresh Thacker in support of the appeals. Counsel has assailed the impugned order on various grounds. Counsel has also filed written submissions. Gist of his submissions is as follows-

a) The Karnataka VAT Department had visited the appellant's premises and conducted a thorough audit of the appellant's books of accounts and also the entire affairs of the appellant's business so as to assess the liability under the KVAT Act and the CST Act for the relevant periods. After due scrutiny of relevant documents including the relevant agreements and upon furnishing of 'F' Forms by the appellant, the assessment was completed by treating as valid the stock transfer and thereby concluding that no tax is payable on such transactions.

b) In ***Ashok Leyland v. State of Tamil Nadu & Ors. [2004 (134) STC 473 (SC)],*** the order of an authority under Section 6A of the CST Act is held to be conclusive for all practical purposes and it is further held that once an assessment order accepting stock transfer claim is passed, a legal fiction is created which is required to be given full effect. Once the appellant's claim was accepted by the Department, it cannot revisit the acceptance. If the Assessing Authority omitted to act or delayed its actions, such omission or delay cannot benefit the Department.

   - ***Bharat Coking Coal Ltd. and Ors. versus Chhotu Birsa Uranw [AIR 2014 SC 1975***).

c) The present actions of the Assessing Authority are *ultra virus* under Article 265 and 300A of the Constitution of

India, besides being discriminatory and violative of Article 14 and 19(1)(g) of the Constitution of India.

d) In ***Ashok Leyland,*** it is held that an assessment can be reopened only in case of discovery of new facts or in case of any fraud, misrepresentation or collusion on the part of an assessee. Neither the reassessment notices dated 08.01.2013 and 26.12.2013 nor the reassessment order dated 26.02.2014 state how the Department discovered new facts, despite having audited the entire business of the appellant. They also do not mention about the existence of any fraud, misrepresentation or collusion on the part of the appellant so as to warrant revisit of the concluded assessment.

e) Since the reassessment notices and the reassessment orders do not mention existence of any fraud, misrepresentation or collusion on the part of RPL nor is there any mention of discovery of new facts, the Tribunal has in the impugned order made out a new case in favour of the Department which it had not canvassed. Therefore the impugned order which travels beyond show cause notices and reassessment order is without jurisdiction and authority of law.

- ***Reckitt & Colman of India Ltd. vs. CCE [1996 (88) E.L.T. 641 (SC)]***
- ***GTC Industries Ltd. vs. CCE [1997 (94) E.L.T. 9 (SC)].***

f) Consignment Sales Agreements have to be read as a whole and cannot be discarded without pointing out any flaws. This exercise is not done in this case.

g) A contract is to be read on its own terms and within the four corners thereof. It would be impermissible to interpret a contract on any extraneous basis unless it is ambiguous.

- ***Super Poly Fabriks Ltd. vs. CCE [2008 (10) S.T.R. 545 (SC)]***
- ***United India Insurance vs. Harchand Rai Chandan [(2004) 8 SCC 644]***

h) The Department ought to have read Consignment Sales Agreement on its own terms. The impugned order importing the terms of the Agreement dated 16.01.2009 into the Consignment Sales Agreement and reading the said Consignment Sales Agreement as being subject thereto, has failed to follow the binding legal principles.

i) Ordinarily the Court should proceed on the basis that the apparent tenor of the agreements reflect the real state of affairs and what is to be examined is whether the revenue has succeeded in showing that the apparent is not real and the price shown in the invoices does not reflect the true sale price.

- ***Union of India vs. Mahindra & Mahindra [1995 (76) E.L.T. 481 (SC)]***
- ***Mirah Exports Pvt. Ltd. vs. CC [1998 (98) E.L.T. 3 (SC)].***

j) Adjudicating Authority is obliged to apply its mind and analyze the agreements to decide the nature of relationship between the parties.

- ***Kashi Enterprises vs. CCE [2010 (261) E.L.T. 902 (Trid.-Del)].***

k) There is a distinction between a contract of sale and a contract of agency.

- ***Sri Tirumala Venkateswara Timber and Bamboo Firm vs. Commercial Tax officer, Rajahmundry [(1968) 21 STC 312].***

l) The ingredients for a sale to be an inter-State sale as envisaged under Section 3(a) of the CST Act are not satisfied in this case.

m) Without prejudice, in the event demand of CST is confirmed VAT paid by the appellant in destination States is legally required to be adjusted towards such CST liability in terms of Section 22 (1B) of the CST Act.

n) Without prejudice it is submitted that if transactions are held to be liable to CST, in the facts of this case, the transactions should be taxed at 2%.

- ***Sahney Steel and Press Works Ltd. vs. CTA [1985-60-STC-301-SC]***
- ***Hyderabad Asbestos Cement Production [(1994) 94 STC 410 (SC)].***

o) The appellant has disclosed the transactions in question and shown them in its return *bona fide* as stock-transfers. The appellant has filed 'F' Forms and evidences of

dispatch of goods. The appellant has acted in a *bona fide* manner. Without prejudice, it is submitted that no interest and penalty is leviable in the facts of this case.

- ***Fosroc Chemicals (India) Private Limited vs. State of Karnataka [(2015) 79 VST 25 (Karn)]***
- ***Anaparai Estates Ltd. vs. State of Karnataka (2016-(ST2)-GJX-0535-KAR].***
- ***Atlantic Foods vs. State of Tamil Nadu [2009(1) TMI 788]***
- ***Sri Venkateshwara Steel Industries vs. State of Tamil nadu [2009 (6) TMI 933]***
- ***Indus Steels & Alloys Ltd. vs. State of Tamil Nadu and Ors. [2008 (11) TMI 613].***
- ***Prabhat Solvent Extraction Industries Pvt. Ltd. vs. State of Gujarat [2010 NTN (Vol.44) 248].***

Mr. Kaustav Shah has addressed us on behalf of respondent no.1, the State of Karnataka. Counsel has also filed written submissions. Gist of his submissions is as under:

a) The conclusiveness of the deeming fiction created by the order of the Assessing Authority accepting Form 'F' declarations is subject to sub-section (3) of Section 6A of the CST Act which provides for grounds on which the Assessing Authority may conduct reassessment. They are discovery of new facts and the findings of the Assessing Authority being contrary to law. It is undisputed that in the present case the relevant ground is discovery of new facts.

b) After considering the contents of the first and second notice as well as the objections taken by RPL in response the Assessing

Authority has rightly observed in the reassessment order that the fact of the appellant having manufactured and sold goods for and on behalf of AWL under AWL's brand name was never brought to the notice of Assessing Authority during the initial assessment and would not have come to light in the absence of the subsequent inspection of AWL's premises.

c) Reassessment proceedings have been conducted pursuant to discovery of new facts and are therefore squarely within the jurisdiction of Section 6A(3) of the CST Act.

d) As per Section 6A (3) of the CST Act reassessment may be done in accordance with the provisions of general sales tax law of the State. Therefore, Section 39(1) of the KVAT Act is relevant. In ***Fosroc Chemicals,*** the Karnataka High Court has held that the Assessing Authority must have "reasons to believe" that tax liability is understated. In this case the first and the second notice clearly state the reasons for reassessment. The Assessing Authority had therefore jurisdiction to conduct reassessment proceedings.

e) The First Agreement and the Consignment Sales Agreements are to be read harmoniously and in conjunction. The appellant's contention that the First Agreement pertains to only local sales within the State of Karnataka is not supported by the provisions thereof.

f) The First Agreement and the Consignment Sales Agreements prescribe the same terms and conditions with respect to brand names of AWL. The Tribunal has therefore rightly linked them.

g) The contention that inter-State movement of goods has taken place only under the Consignment Sales Agreements is a bare assertion unsupported by any evidence.

h) In any case mere presence of a consignment agent in the destination State does not transform an inter-State sale into a stock transfer.

- ***South India Viscose Ltd. v. State of Tamil Nadu (1981) 3 SCC 457***

i) Levy of interest and penalty is according to law. Interest under Section 36 of the KVAT Act is incidental to tax liability and there is no provision in law to reduce it. Imposition of penalty is a civil liability.

- ***CST/5/2012 decided by this Authority on 29.10.2015***

j) In any event the appellant has willfully suppressed the First Agreement. Hence adequate *mens rea* is shown on the part of the appellant. Levy of penalty is therefore justifiable. The appeals be therefore dismissed.

Ms. Rama Ahluwalia, learned Counsel for respondent no. 3, the State of Maharashtra, has supported the submissions of Counsel for respondent no.1. Counsel submitted that the Tribunal has rightly held that the movement of goods from Karnataka to Maharashtra and other States is inter-State sales. However, further sale by AWL in Maharashtra are local sales. Hence tax paid under the Maharashtra Value Added Tax Act cannot be refunded under Section 22(1B) of the CST Act. Counsel submitted that contracts between AWL and RPL provide for manufacture and sale of

packed edible oil with brand names of AWL and retaining of intellectual property rights over its brand names by AWL in perpetuity. Therefore, the dispatches of the said goods from Karnataka to other States are inter-State sales liable to tax in the State of Karnataka. Counsel submitted that further sale by AWL in other States is another independent transaction liable to tax in those States.

On behalf of the State of Gujarat, respondent no. 5 herein, affidavit in reply is filed by Kusum Ajubhai Desai, Deputy Commissioner of Commercial Tax. It is submitted that once 'F' Forms were accepted by the Assessing Authority in Karnataka and exemptions were allowed in terms of Section 6A of the CST Act, the assessment cannot be reopened on presumptions and assumptions. In any case even if reopening of the assessment is upheld demarcation will have to be made between transactions from Karnataka to Gujarat and subsequent transactions within Gujarat on which VAT is levied and paid by AWL. Tax is levied on these two types of transactions under different statutes. Tax is not levied twice on the same transaction. Therefore the appellant's prayer for adjustment of levy of CST raised in Karnataka against the local value added tax levied and paid in Gujarat should be rejected.

On behalf of respondent no. 9, State of Goa, counter affidavit is filed, *inter alia,* opposing prayer of adjustment made under Section 22(1B) of the

CST Act. In the counter-affidavit, respondent no.9 has supported the view taken by the Tribunal in the impugned order. It is submitted that 'F' Forms filed by the appellant are mere attempts at misrepresenting the inter-State sale transactions liable to CST in the State of Karnataka, as stock transfers in order to evade tax. Prayer of adjustment of tax made by the appellant is unsubstantiated. In any case, if this Authority upholds the impugned order in view of Section 10(1) of the Goa Value Added Tax Act, 2005, respondent no.9 will have excess credit, if any for the period 2009-10 and the same shall be adjusted accordingly.

Submissions of Ms. Nagrajan, learned Counsel for respondent no.10, the State of Punjab, are limited to opposing the basis of alternate plea of the appellant. Counsel submitted that the Tribunal has disbelieved the case that AWL was the agent of RPL. It has held that the transfer of stock from RPL to AWL was on principal-to-principal basis. Counsel submitted that it has always been AWL's case that the transactions between RPL and AWL were independent of and separate from the sale effected by AWL to the ultimate buyers in Punjab. Counsel further submitted that the return filed by AWL during the relevant period showed regular stock transfers from various States, including Karnataka to Punjab and subsequent sales of goods by AWL to different buyers. Counsel pointed out that on the basis of declarations submitted by AWL to this effect, 'F' Forms were issued by the authorities in Punjab. Counsel submitted that this is not a case where the

same transaction is being subjected to tax twice as every local sale is separate and distinct transaction from the inter-State sale from RPL to AWL. Therefore, the alternate plea for adjustment of VAT against CST premised on the principle that the above transactions cannot be subjected to tax more than once falls. Counsel further submitted that irrespective of whether or not CST is attracted on the transactions between RPL and AWL, the subsequent sales within the State of Punjab will still attract VAT. Hence there is no question of refund / adjustment of VAT against any liability of CST that may arise. Counsel submitted that in the circumstances the alternate plea is liable to be dismissed.

So far as State of Haryana, respondent no. 13 is concerned, in reply filed by Smt. Manju Bhasin, Excise and Taxation Officer-cum-Assessing Authority, Ambala has merely stated that the appellant is not entitled to refund of tax paid in State of Haryana.

Interpretation of the First Agreement and the Consignment Sales Agreement is crucial to this case. We shall therefore begin with the First Agreement.

The First Agreement bears no title and hence its terms will have to be carefully read to determine its nature. It is the case of the appellant that it pertains to local sales in Karnataka. Since this agreement does not bear any title we tried to find out whether any provisions thereof bear out this

submission of the appellant. We found that none of the provisions of this agreement suggest that it pertains to local sales in the State of Karnataka.

Clause 1 of the preamble to this agreement states that AWL is engaged in the manufacture and marketing of edible oil and RPL has the necessary capabilities for manufacturing and packaging of various types of edible oil. Clause 2 of the preamble states that RPL has represented that it has the necessary technical and infrastructural facilities at its Mangalore unit and has offered to manufacture, pack and supply edible oil as per the requirement / quality specification of AWL and under the brand names owned by AWL. Clause 3 of the preamble states that AWL has accepted the offer of RPL on a principal-to-principal basis to purchase edible oil under brand names given by AWL. These terms clearly establish that the First Agreement is an agreement to sell on principal-to-principal basis. The appellant is engaged in the manufacture of edible oils with brand names owned by AWL. The said manufacture of edible oil is for sale exclusively to AWL.

Several clauses of this Agreement make it clear, as stated by the Tribunal, that RPL was manufacturing packed edible oils with the brand names and specifications under the complete and overall control of AWL. For instance clause 2 states that AWL shall position a Quality Control officer in RPL's unit and RPL shall provide necessary support in terms of

manpower, equipment etc. to carry out quality control activities as per AWL's requirement. Before packing the quality is to be certified by AWL . Even packing material supplier has to be identified by AWL. Clause 2.1 states that AWL shall place purchase orders from time to time as per its requirement. Clause 3.1, 3.2, 3.3, 3.4, 3.5, 3.6 envisage AWL's complete control of RPL's processing and packing activity. It is pertinent to note that clause 3.9 states that RPL will nominate a coordinating officer for the proper performance of the activities envisaged under the contract and RPL has the responsibility of performing the work subject to AWL's inspection. Clause 4 of this agreement is important. It, *inter alia,* states that all intellectual property rights with respect to AWL's brand names shall remain the sole and exclusive property of AWL; that brand names of AWL shall be utilized only in respect of the required activities and for no other purpose; that RPL shall not make any use or reference to AWL's brand names in connection with the sale, distribution or promotion of edible oil manufactured by RPL for its own use or for any other party; that RPL shall not infringe, copy or imitate or otherwise interfere with brand name, trade or merchandise marks or devices or copyright belonging to AWL or which AWL may be entitled to use or otherwise alter, deface or interfere with the same or pass off other goods or describe other goods as that of AWL. After providing for confidentiality and for adherence to quality this agreement enumerates general conditions which make the control of AWL on the entire activity of manufacturing

packed edible oils with AWL's brand names evident. That this entire exercise is for sale of the said packed edible oils with the brand names of AWL exclusively to AWL is not denied. As we have already noted, the appellant's case is that it is for the sale of the said packed edible oil in the State of Karnataka. We have already rejected this case. Nothing prevented the parties from making this case of alleged local sales clear by giving a title to that effect to this agreement or by incorporating a clause to that effect in the agreement which they have not done.

Now, we must go to the Consignment Sales Agreement. No doubt that it is an agency agreement. Under this agreement, RPL has appointed AWL as the agent to sell edible oil manufactured by it with brand names of AWL. We need to quote clause (iv) of this agreement:

> "(iv) *It was agreed that, Principal expressly acknowledge and acquiesces that all intellectual property rights with respect to AWL's brand "Fortune", "Raag", "Jubilee" and shall remain the sole and exclusive property of AWL. It is understood that the brand names of AWL shall be utilized only in respect of the required activities and for no other purpose. Principal shall not be entitled to make any use or reference to AWL's aforesaid brand names in connection with the sale, distribution or promotion of Edible Oil manufactured by Principal for its own use or for any other party, whether directly or indirectly during the continuance of this Contract and even after the termination of this Contract, in any manner whatsoever.*
>
> *Principal shall not infringe, copy or imitate or otherwise interfere with the brand name, trade or merchandise marks or devices or copy right belonging to AWL or which AWL may be entitled to use or otherwise alter, deface or interfere with the same or pass off other goods or describe others goods as the same as that of AWL or as having been manufactured for AWL or otherwise prejudice, alter or affect copy right, trade mark or merchandise mark, or design or colour of AWL labels or specification on the price or weight or other codification that is marked on*

the packaging or packing materials or cartons that may be given or caused to be given by AWL.

In case of any infringement of AWL's brand name, principal shall be responsible to pay all sums, costs, expenses and liabilities, including without limitation, all reasonable attorneys' fees and other costs, incurred by AWL, its officers, directors, agents, employees in connection with or otherwise arising out of any such proceeding, suit or claim.

Principal shall ensure that the packing materials carrying intellectual property rights of AWL shall not fall in the hands of any third party and they shall use those materials only for the purpose of packing the goods for AWL."

These clauses are similar to clause of the First Agreement relating to brands owned by AWL. We find substance in the Tribunal's observations that if as per the First Agreement RPL is manufacturing edible oils as per specifications of AWL with brand names of AWL for exclusive sales to AWL, how does RPL acquire the right to sell those goods to others or appoint anybody as agent to sell the said goods. The First Agreement makes it clear that RPL is manufacturing edible oil with the brand names of AWL under the complete control and supervision of AWL for exclusive sale to AWL. The Consignment Sales Agreement appointing AWL as agent for sale of these goods raises a question mark. Such a creation of principal agent relationship does not stand to reason.

It is urged that each agreement has to be read independently and on its own terms. It was wrong to subject the Consignment Sales Agreement to the First Agreement. In this connection reliance is placed on the

Supreme Court's judgments in ***M/s Super Poly Fabriks Ltd.(supra)*** and ***United India Insurance Co. Ltd. (Supra).***

In ***United India Insurance Co. Ltd.*** the Supreme Court was considering the question whether in terms of the insurance policy, the repudiation of the claim of the insured by insurance company was justified or not. The insured had raised claim under the insurance policy for incurring loss by theft. The insurance company repudiated the claim on the ground that theft is not covered by insurance policy. The insured's claim was allowed by the Courts below. The arguments centered round the definition of the words 'burglary and / or house breaking'. These words were defined as theft involving entry or exit by forcible and violent means. It is in this context that the Supreme Court observed that in absence of violence or force the insured cannot claim indemnification against the insurance policy. The Supreme Court went on to observe that terms of insurance policy have to be construed strictly, natural meaning has to be given to the terms and no outside aid should be sought unless the meaning is ambiguous.

Facts of the instant case are not similar. In this case the fact that Consignment Sales Agreement is a typical agency agreement is accepted. No outside aid is sought to come to this conclusion. But a Court's scrutiny of an earlier contract cannot be barred on the specious ground that each

contract has to be read independently when the Court finds on the facts before it that the later contract is made to evade Central Sales tax by deviating from principal-to-principal relationship and creating principal agent relationship. Ultimately the Courts duty is to find the truth.

In ***M/s Super Poly Fabriks Ltd.,*** the appellant therein had entered into an agreement with GAIL titled Consignment Stockistship Agreement. The question before the Supreme Court was whether the appellant renders any services so as to incur the liability to pay service tax. Against the appellant an order was passed directing payment of service tax. It was urged that the appellant merely accepts offer on behalf of its principal and its activities being not extended to the job of clearing and forwarding agent, the impugned order cannot be sustained. It is in these facts that the Supreme Court observed that the appellant's status can be ascertained from the terms of the agreement itself; that the document must be read as a whole and the purport or object of the parties can be ascertained from the terms of the contract. There can be no debate over these propositions. But the facts of this case are peculiar and cannot be equated with the facts which were before the Supreme Court. A principal-to-principal relationship is sought to be converted into a principal to agent relationship. For the goods manufactured by RPL under the brand names of AWL for sell exclusively to AWL, AWL is appointed as agent under the so called Consignment Sales Agreement. An unusual conduct of this nature requires

the Court to scrutinize both the agreements to rule out possibility of creation of agency agreement to make out a case of stock transfer to evade Central Sales Tax. We cannot fault the Tribunal for reading both the agreements together and linking them.

Under the First Agreement, which is admittedly an agreement on principal-to-principal basis, AWL has agreed to purchase the products manufactured by RPL under its brand name and as per its specifications. Clause-4 thereof states that AWL shall arrange the transportation for lifting the finished products purchased from RPL and RPL shall raise invoice to AWL for finished product dispatch. As we have already noted there is no evidence to establish that the First Agreement was only for sale within the State of Karnataka. We concur with the Tribunal that when goods earmarked for AWL alone were dispatched for delivery to AWL's branches outside the State, the said movement is occasioned by the contract of sale by virtue of the First Agreement which is on principal-to-principal basis and hence the said transactions are inter-State sales falling under Section 3(a) of the CST Act liable to Central Sales Tax in the State of Karnataka. The movement of goods outside the State of Karnataka is triggered by the First Agreement. When the First Agreement triggered, the movement of goods from the State of Karnataka to other States leaving AWL to sell the goods at the price as per its wish there was really no need to enter into separate agency agreements in respect of different States curiously appointing AWL

as agent unless AWL wanted to avoid payment of Central Sales Tax. We, therefore, endorse the Tribunal's view on this aspect.

In this connection reliance placed by the Tribunal on the Supreme Court judgment in ***M/s Tirumala Venkateswara Timber & Bambo Firm (Sri) v. CTO [(1968) 21 STC 312, 316*** is apt. In that case the Supreme Court explained the distinction between contract of sale and contract of agency in the following manner:

> "*As a matter of law, there is a distinction between a contract of sale and a contract of agency by which the agent is authorised to sell or buy on behalf of the principal and make over either the sale proceeds or the goods to the principal. The essence of a contract of sale is the transfer of title to the goods for a price paid or promised to be paid. The transferee in such a case is liable to the transferor as a debtor for the price to be paid and not as agent for the proceeds of the case. The essence of agency to sell is the delivery of the goods to a person who is to sell them, not as his own property but as the property of the principal who continues to be the owner of the goods and will therefore be liable to account for the sale proceeds. The true relationship of the parties in each case has to be gathered from the nature of the contract, its terms and conditions, and the terminology used by the parties is not decisive of the legal relationship."*

Thus the contract of agency contemplates delivery of goods to a person who is sell them, not as his own property but as the property of the principal who continues to be the owner of the goods. The agent is therefore liable to account for the sale proceeds. Here RPL was manufacturing goods having brand names of AWL as per specifications of AWL and for sale to AWL. Clause (iv) of the alleged Consignment Sales

Agreement which we have quoted above, *inter alia,* states that RPL acknowledges that all intellectual property rights with respect to brand name of AWL shall remain the sole and exclusive property of AWL. Similar clause is there in the First Agreement. Thus, though this agreement is termed as Consignment Sales Agreement, the relationship between AWL & RPL undoubtedly remained as that of principal-to-principal. Appointment of AWL as the agent is therefore against the principles underlying agency agreement and appears to have been done to evade payment of Central Sales Tax.

It is submitted by the appellant's Counsel that after accepting 'F' Forms submitted by the appellant the assessment order dated 30.11.2000 was passed by the Assessing Authority accepting the stock transfer claim of the appellant. It is true as pointed out by the appellant's Counsel that the Supreme Court has held in ***Ashok Leyland*** that once 'F' Form declarations are accepted by the Assessing Authority a legal fiction is created that the movement of goods has occasioned otherwise than as a result of sale and that legal fiction has to be given its full effect. It is also true that in ***Ashok Leyland*** the Supreme Court has held that an order of assessment can be reopened only in case of fraud, misrepresentation or collusion etc. on the part of the assessee. It is urged that none of these grounds are mentioned in any of the notices or the reassessment order and hence the concluded assessment order could not have been reopened.

In this connection, it is necessary to quote Section 6A of the CST Act. It reads thus-

> "6A Burden of proof, etc., in case of transfer of goods claimed otherwise than by way of sale. —*(1) Where any dealer claims that he is not liable to pay tax under this Act, in respect of any goods, on the ground that the movement of such goods from one State to another was occasioned by reason of transfer of such goods by him to any other place of his business or to his agent or principal, as the case may be, and not by reason of sale, the burden of proving that the movement of those goods was so occasioned shall be on that dealer and for this purpose he may furnish to the assessing authority, within the prescribed time or within such further time as that authority may, for sufficient cause, permit, a declaration, duly filled and signed by the principal officer of the other place of business, or his agent or principal, as the case may be, containing the prescribed particulars in the prescribed form obtained from the prescribed authority, along with the evidence of despatch of such goods [and if the dealer fails to furnish such declaration, then, the movement of such goods shall be deemed for all purposes of this Act to have been occasioned as a result of sale].*
>
> *(2) If the assessing authority is satisfied after making such inquiry as he may deem necessary that the particulars contained in the declaration furnished by a dealer under sub-section (1)[3] [are true and that no inter-State sale has been effected, he may, at the time of, or at any time before, the assessment of the tax payable by the dealer under this Act, make an order to that effect and thereupon the movement of goods to which the declaration relates shall, subject to the provisions of sub-section (3)] be deemed for the purpose of this Act to have been occasioned otherwise than as a result of sale.*
>
> *(3) Nothing contained in sub-section (2) shall preclude reassessment by the assessing authority on the ground of discovery of new facts or revision by a higher authority on the ground that the findings of the assessing authority are contrary to law, and such reassessment or revision may be done in accordance with the provisions of general sales tax law of the State.]*
>
> *Explanation- In this section, "assessing authority", in relation to a dealer, means the authority for the time being competent to assessee the tax payable by the dealer under this Act.*

Sub-Section(3)of the CST Act was inserted in the CST Act by the Finance Act, 2010 with effect from 08.05.2010. The Supreme Court delivered judgment in ***Ashok Leyland*** on 07.01.2004. Therefore, sub-

Section(3) could not have been noticed by the Supreme Court. Sub-section (3) permits the Assessing Authority to reopen the assessment on the ground of discovery of new facts. It says that nothing contained in sub-Section(2) shall preclude reassessment by the Assessing Authority on the ground of discovery of new Facts. Pertinently, sub-section (2) states that if 'F' Forms furnished by the dealer are found to be true and order is made to that effect, the movement of goods shall be deemed to have been occasioned otherwise than as a result of sale, but this is subject to provisions of sub-section(3). Thus, sub-section(3) which permits the Assessing Authority to reopen the assessment order on the ground of discovery of new facts overrides sub-section(2). In this case, therefore it was open to the Assessing Authority to reopen the assessment order on the ground of discovery of new facts. We shall examine whether there is discovery of new facts.

We will first go to the assessment order dated 30.11.2010. This order records that the business premises of the appellant were visited by the DCCT for audit and books of accounts of the appellant were verified. The order states that the assessee has claimed exemption on a certain turnover as consignment sales against F forms which were filed covering the said turnover. There is no reference to the First Agreement or the Consignment Sales Agreements in this order. It is contended by the appellant's Counsel that the burden of producing the documents does not lie on the appellant.

We do not agree. When the audit party visits the business premises of an assessee the assessee is expected to produce all the relevant record. The order merely states that books of account of the appellant were verified. Therefore the First Agreement and the Consignment Sales Agreement appear to have not been shown to the DCCT.

On 31.12.2012, the business premises of the appellant were visited by the authorities of the Intelligence Wing of the Commercial Tax Office. It appears that during the inspection, the Inspecting Officer found that the assessee is engaged in the manufacture and sale of edible oil for and on behalf of another company namely, AWL. Inspecting Officer came to a conclusion that the assessee company had lost its eligibility for the tax exemption. He accordingly submitted Intelligence Report dated 31.01.2013. This intelligence report is not on record, but these facts can be gathered from the reassessment order dated 26.02.2014. Pursuant to this report the case was assigned to the DCCT. He visited the business premises of the appellant on 12.12.2013 and obtained the required information. Show Cause Notice dated 08.01.2013 was issued to the appellant under section 74(1) of the KVAT Act. This notice states that the assessee company (RPL) has not disclosed the fact that it has manufactured and effected sale of goods under the brand names owned by AWL. It is stated that wrong claim of exemption on sale of branded goods resulted in understatement of tax liability which attracts penalty under the KVAT Act. This notice then quotes

the First Agreement and also refers to the alleged Consignment Sales Agreement which RPL has entered into with AWL. It refers particularly to condition 10 of the Consignment Sales Agreement. The notice further recites that in spite of this Consignment Sales Agreement the goods supplied by RPL to AWL will not be inter-State Consignment Sales for the reason that RPL has supplied the goods under the brands which belong to AWL that too as per the requirements of AWL. Therefore the transactions amount to inter-State sales and not Consignment Sales. Thus these two agreements were scrutinized before this notice was sent. It is true that in this notice there is no mention of fraud, collusion or misrepresentation. But it is categorically mentioned that the assessee company has not disclosed the fact that the company has manufactured and effected sales of the goods under the brand names owned by AWL and that wrong claim of exemption on sale of branded goods resulted in understatement of tax liability. Thus this notice is not silent about the appellant's conduct.

Thereafter the matter was assigned to the DCCT for reassessment. On 26.12.2013 notice of reassessment was issued by DCCT. This notice refers to the Intelligence Officers visit to the business premises of the appellant, Report dated 31.12.2012 submitted by him and the gist thereof. This notice further states that on going through the documents and information collected, it is seen that the appellant had entered into the First Agreement with AWL. It quotes the relevant clauses thereof and further

refers to the Consignment Sales Agreement. This notice compares the relevant clauses of the two agreements and records that the appellant's claim for inter-State stock transfer is proposed to be rejected and tax is proposed to be levied treating the transactions as inter-State sales. The appellant was called upon to file its objections which the appellant did. It is urged that in this notice there is no reference to discovery of new facts and therefore this is a case of mere change of opinion. We are unable to agree with the appellant's Counsel. It is pertinent to note that the DCCT who had issued the notice had personally visited the business premises of the appellant. Though he refers to the Intelligence Report submitted by the Intelligence Officer his notice is not based on it. The DCCT has personally scrutinized the two agreements, quoted the relevant paragraphs thereof and compared them. The DCCT has referred to the relevant provisions of the CST Act and recorded that it is proposed to conclude the reassessment and levy tax on the transactions of the appellant treating them as inter-State sales by rejecting claim of stock-transfer. The manner in which the notice is worded makes it clear that this is not a case of mere change of opinion and there is sufficient indication in the notice that it is only on discovery of new facts i.e. the First Agreement and the Consignment Sales Agreement, which do not find mention in the assessment orders, that the reassessment notice was issued.

The DCCT passed Reassessment Order dated 26.02.2014 under Section 9(2) of the CST Act read with Section 39(1), 72(2) and 36(1) of the KVAT Act. After considering the objections of the appellant and the relevant record, the DCCT has observed at the outset that the fact that the assessee manufactured and sold the goods for and on behalf of AWL under AWL's brand name was neither brought to the notice of the Department nor was it disclosed before the Assessing Authority at the time when the claim was verified and accepted by the Assessing Authority. The DCCT has further observed that this fact would not have come to light but for the inspection conducted by the Enforcement Wing of the Department. We have no reason to differ from this view. When the audit team visited the appellant's business premises it inspected the books of accounts. The two crucial agreements i.e. the First Agreement and the Consignment Sales Agreement were with the appellant. The appellant ought to have produced them before the audit team. It is not possible for the audit team to ferret out the agreements which were in the exclusive custody of the appellant. It is pertinent to note that it is during inspection conducted on 31.12.2012 by the Intelligence Wing that it came to light that the assessee company was engaged in manufacture and sale of edible oil for and behalf of AWL. It appears that Intelligence Wing had come across these facts after perusing the record and that set the process moving. Notices were then issued to the appellant and the reassessment order was passed after duly considering

the objections. The DCCT has drawn legitimate inference from the relevant documents and attendant circumstances. It is therefore not possible to hold that the reassessment order is based on presumptions. Pertinently, the DCCT had personally visited the appellant's business premises and obtained / culled out the information. He has stated so in the reassessment order. We have no reason to disbelieve this statement. The reasoning of the DCCT was rightly accepted by the Tribunal. We may quote the relevant paragraph of DCCT's reassessment order:

> *"As already discussed in the notice, a reading of the agreement dated 16.1.2009 entered into with AWL, it is clear beyond any doubt that the assessee has manufactured the edible oil and vanaspathi for and on behalf of AWL; not only according to their specification but also under the control and supervision of their representative. The assessee has no authority or control over the goods so manufactured, but to deliver them to AWL duly packed under their brand name. It is thus clear that the assesse has manufactured and sold the goods for and on behalf of AWL using their brand name. The agreement also makes it clear that AWL has to lift the goods so manufactured on payment of the price fixed; and thereafter AWL is at liberty to sell the same at a price as per their wish for which they are not answerable to RPL. This fact makes it clear that the claim for consignment stock transfer is nothing, but direct sale, and the documents are concocted to evade tax liability in the guise of stock transfer. When AWL has been appointed as the sole selling / consignment agent for the goods produced / manufactured by RPL, there was no necessity to enter into separate agreements for sales / supplies within the state of Karnataka and that for outside in the course of interstate trade, that too separately for each state. This would support the inference that the documents were concocted to suit the convenience and evade payment of taxes.*

It is not possible to accept the appellant's submission that the Tribunal's order travels beyond the scope of the notice. The notice proposing reassessment, the reassessment order and the Tribunal's order

are in sync. The discovery of new facts as a ground for reassessment is made out by the contents of reassessment notice and reassessment order. This submission is , therefore, rejected.

It is submitted that the appellant has acted in a bona fide manner and therefore no interest and penalty is leviable on the appellant. We have no hesitation in rejecting this prayer. In the circumstances of the case we are not inclined to interfere with the order regarding interest, and penalty and percentage of tax.

The appellant's alternative prayer needs to be considered now. The appellant has prayed that in the event demand of CST is confirmed, VAT paid by the appellant in destination States be adjusted towards such CST liability in terms of Section 22(1B) of the CST Act. It is contended by the appellant's Counsel that a sale transaction cannot have more than one event of taxation. There can be a situation where tax which is paid in one State may be subsequently demanded by the other State. It is submitted that since such a situation will lead to double taxation, Section 22(1B) of the CST Act is enacted wherein the primary focus is to avoid double taxation and hence the appellant is entitled to adjustment contemplated in Section 22(1B). This submission is opposed by the contesting respondents. We have already given the gist of their submissions.

Section 22(1B) empowers this Authority to issue direction for refund of tax collected by a State which has been held by the Authority to be not due to that State, or alternatively to direct that State to transfer the refundable amount to the State to which Central Sales Tax is due on the same transaction. Undoubtedly, the section seeks to protect an assessee from being subjected to double taxation on the same transaction. We have confirmed the view of the Tribunal that the movement of goods from Karnataka to other State which was claimed by the appellant as stock-transfer is not stock transfer, but the said transactions are inter-State sales. Therefore, State of Karnataka is entitled to levy and recover Central Sales Tax on these inter-State sale transactions. In respect of those transaction if the appellant has paid VAT in the destination States, the appellant will be entitled to adjustment in terms of Section 22(1B). However, if there are any further sales of those goods in the destination States to different buyers those would be different transactions on which the appellant will have to pay the local taxes. There is no question of double taxation qua the said transactions. It is not possible to accept the appellant's contention that if the stock transfer claim of the appellant is denied, the transactions would be considered as direct inter-State sale by the appellant to the customers located in other States. The inter-State sale transactions would be complete when the goods move from Karnataka and reach AWL in other States. The State of Karnataka will be entitled to Central Sales Tax on

those transactions. If AWL sells these goods to different buyers in the destination States those would be different transactions liable to local taxes. We, therefore, make it clear that if the appellant has paid any VAT on the transactions held by us to be inter-State sales, the appellant would be entitled to adjustment in terms of Section 22(1B) of the CST Act. We direct that the concerned State shall after ascertaining the correct amount of VAT paid by the appellant on those transactions transfer the refundable amount to the State to which it is due. However, in respect of any further sales effected by the appellant in the destination States to different buyers, the appellant will have to pay local taxes as they are different sale transactions.

In the view that we have taken, with the above direction we dismiss the appeals.

(Ramayan Yadav)
Member (Law)

(Justice Ranjana P. Desai)
Chairperson