IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE A.K.JAYASANKARAN NAMBIAR

&

THE HONOURABLE MR.JUSTICE MOHAMMED NIAS C.P.

MONDAY, THE 3RD DAY OF APRIL 2023/13TH CHAITHRA, 1945

W.A.NO.374 OF 2021

AGAINST THE JUDGMENT DATED 23.10.2020 IN WP(C).NO.18443/2020 OF HIGH COURT OF KERALA

APPELLANT/PETITIONER:

**PRODAIR AIR PRODUCTS INDIA PRIVATE LIMITED,
OFFICE NO.602, PENTAGON 5, MAGARPATTA CITY,
HADAPSAR, PUNE-411013, MAHARASHTRA, REPRESENTED
BY ITS AUTHORIZED SIGNATORY SRI.HEMEN KHOKHANI.**

**BY ADV.SRI.ASWIN GOPAKUMAR
BY ADV.SRI.K.AMAL NATH NAIK
BY ADV.SRI.KANDAMPULLY VIKRAM
BY ADV.SRI.NIRANJAN SUDHIR
BY ADV.SRI.RENOY VINCENT**

RESPONDENTS/RESPONDENTS:

1 **STATE OF KERALA,
REPRESENTED BY ITS SECRETARY (TAXES),
GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM-695001.**

2 **THE STATE TAX OFFICER (IB),
KERALA STATE GST DEPARTMENT, MATTANCHERRY,
MINI CIVIL STATION, ALUVA, ERNAKULAM-683101.**

BY SRI.MOHAMMED RAFIQ, SPL. GOVT. PLEADER

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 15.03.2023, ALONG WITH W.A.NO.73/2022 & 91/2022, THE COURT ON 03.04.2023 DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE A.K.JAYASANKARAN NAMBIAR

&

THE HONOURABLE MR.JUSTICE MOHAMMED NIAS C.P.

MONDAY, THE 3RD DAY OF APRIL 2023/13TH CHAITHRA, 1945

W.A.NO.73 OF 2022
AGAINST THE JUDGMENT DATED 06.01.2022 IN WP(C).NO.18783/2021 OF HIGH COURT OF KERALA

APPELLANT/PETITIONER:

PRODAIR AIR PRODUCTS INDIA PRIVATE LIMITED, AMBALAMEDU, ERNAKULAM, REPRESENTED BY ITS FINANCE EXECUTIVE MR.G.MALLIKARJUNA REDDY

BY ADV.SRI.P.S.SREEPRASAD

RESPONDENTS/RESPONDENTS:

THE DEPUTY COMMISSIONER OF STATE TAX, SPECIAL CIRCLE II, KERALA SGST DEPARTMENT, THEVARA, ERNAKULAM-682 015

BY SRI.MOHAMMED RAFIQ, SPL. GOVT. PLEADER

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 15.03.2023 ALONG WITH W.A.NO.374/2021 AND W.A.NO.91/2022, THE COURT ON 03.04.2023 DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE A.K.JAYASANKARAN NAMBIAR

&

THE HONOURABLE MR.JUSTICE MOHAMMED NIAS C.P.

MONDAY, THE 3RD DAY OF APRIL 2023/13TH CHAITHRA, 1945

W.A.NO.91 OF 2022

AGAINST THE JUDGMENT DATED 06.01.2022 IN WP(C).NO.17451/2021 OF HIGH COURT OF KERALA

APPELLANT/PETITIONER:

PRODAIR AIR PRODUCTS INDIA PRIVATE LIMITED, AMBALAMEDU, ERNAKULAM; REPRESENTED BY ITS FINANCE EXECUTIVE MR. G.MALLIKARJUNA REDDY

BY ADV.SRI.P.S.SREEPRASAD

RESPONDENT/RESPONDENT:

THE DEPUTY COMMISSIONER OF STATE TAX, SPECIAL CIRCLE II, KERALA SGST DEPARTMENT, THEVARA, ERNAKULAM 682 015

BY SRI.MOHAMMED RAFIQ, SPL. GOVT. PLEADER

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 15.03.2023 ALONG WITH W.A.NO.374/2021 AND W.A.NO.73/2022, THE COURT ON 03.04.2023 DELIVERED THE FOLLOWING:

'C.R.'

J U D G M E N T

A.K. Jayasankaran Nambiar, J.

These writ appeals separately impugn the judgment of a learned Single Judge that dismissed the writ petitions preferred by the appellant challenging (i) the orders of assessment under the KVAT Act for the assessment years 2015-16 to 2017-18 and a show cause notice for the year 2014-15 [W.P(C).No.17451/2021], (ii) the order of the assessing authority rejecting the claim for input tax credit on the purchase of capital goods [W.P(C).No.18783/2021] and (iii) the order imposing penalty on the appellant under the KVAT Act for the assessment years 2016-17 and 2017-18 [W.P(C).No.18443/2020]. While W.A.No.374 of 2021 arises from the judgment of a learned Single Judge in W.P(C).No.18443/2020, W.A.Nos.73 and 91 of 2022 arise from the common judgment of another learned Single Judge in W.P(C).Nos.17451/2021 and 18783/2021. Since the issue involved in all these appeals is common, they are taken up together for hearing and disposed by this common judgment.

THE FACTS IN BRIEF

2. The appellant is stated to be a private limited company

involved, *inter alia*, in the activity of production and sale of industrial gases such as Hydrogen, Nitrogen and HP Steam. It is a wholly owned subsidiary company of Air Products and Chemicals Inc., USA. It is also a registered dealer under the Kerala Value Added Tax Act [hereinafter referred to as the 'KVAT Act'] and an assessee on the rolls of the Asst. Commissioner (Assmt), Special Circle – II, Ernakulam. It is stated that for the purposes of implementing its Integrated Refinery Expansion Project, Bharath Petroleum Corporation Limited [BPCL] found it necessary to ensure a continuous and reliable supply of Hydrogen, Nitrogen and HP Steam of particular specifications so as to increase the production of their petroleum products. They accordingly published a notification inviting bids for supply of these gases. The appellant responded to the said notification and was eventually awarded the contract.

3. According to the appellant, its obligations under the contract were to Build, Own, Operate (BOO) and maintain a Hydrogen and Nitrogen manufacturing plant at its own cost and expenditure on the land to be allocated by BPCL on lease basis, with the objective of ensuring exclusive and uninterrupted supply of Hydrogen, Nitrogen and HP Steam to BPCL at competitive prices. In the agreement between the parties, the price of the gases is fixed in terms of a formula specified in Article 15 thereof, which comprises of Fixed Monthly Charges as well as

Variable Charges. The Fixed Monthly Charges consist of an fixed amount towards return on the investment of the appellant, a component towards maintenance costs and other overheads, as well as manpower costs. The variable charges, on the other hand, comprises of the variable costs of producing the industrial gases. Although separate invoices are raised for the Fixed Charges and Variable Charges, they together go to make up the price for the supply of the industrial gases under the agreement. As regards the production plant itself, the agreement envisaged that the plant to be installed by the appellant, together with all the pipelines, metering and other systems would be the property of the appellant during the term of the agreement, and even after its termination, unless transferred or removed in accordance with the agreement. It is significant that the agreement gives BPCL an option to takeover the production plant if the agreement is not renewed upon completion of its initial term of fifteen years from the date of commencement of the supply of gases to BPCL. In the event BPCL exercises its option, it has to compensate the appellant at a fair value as determined in accordance with the procedure set out in Appendix 8 of the agreement.

4. For the assessment years 2015-16 to 2017-18, the assessment of the appellant under the KVAT Act was completed, based on the penalty orders passed for the assessment years 2016-17 and 2017-18,

by construing the agreement entered into between the appellant and BPCL as one that effected a transfer of property in the plant and specified gases in the course of execution of a works contract. The assessing authority, like the intelligence officer who imposed the penalty, referred to the proviso to Rule 10 (2) of the KVAT Rules, 2005 which, in the context of determination of taxable turnover in relation to works contracts in which transfer of property takes place not in the form of goods but in some other form, mandates that '*when the turnover arrived at after deducting the amounts mentioned in clause (a) falls below the cost of goods transferred in the execution of the works contract, an amount equal to the cost of the goods transferred in the execution of the works contract together with profit, if any, shall be the taxable turnover in respect of such works contract*.' He then proceeded to find that the contract price shown as received by the appellant, which was the sum of the fixed and variable charges, was less than the cost of the plant that was brought to the site and hence the cost of the plant, together with a component of gross profit, would be taken as the taxable turnover for the purpose of levying tax @ 14% applicable to works contracts (as against 5% applicable to supply of gases) under the KVAT Act. The show cause notice issued for the assessment year 2014-15 also proceeded on the same lines. It was the said show cause notice, assessment orders and penalty orders that were impugned by the appellant in the writ petitions aforementioned which, as noticed earlier,

were dismissed by the learned single judges who relegated the appellant to its alternate remedy of approaching the appellate authorities under the KVAT Act for an adjudication on merits.

THE ARGUMENTS OF COUNSEL

5. The submissions of the learned senior counsel Sri. Arvind P Datar, assisted by Adv. Sri.N. Prasad, appearing on behalf of the appellants in these cases, briefly stated are as follows:

- The impugned assessment orders do not contain a finding that there is transfer of property involved in the execution of a works contract and hence, the very *sine qua non* for invoking Section 6 (1)(f) of the KVAT Act does not exist in the instant cases.

- A fact which is a condition precedent for applicability of a taxing provision is a jurisdictional fact and insofar as the authorities in the impugned orders have wrongly assumed that there is a transfer of property in goods in the course of execution of a works contract, this court can exercise its powers under Article 226 of the Constitution of India to correct an error in the determination of a jurisdictional fact. Reliance is placed on the decisions in **Raza Textiles Ltd. v. Income Tax Officer, Rampur – [(1973) 1 SCC 633]** and **Arun Kumar and Others v. Union of India and Others – [(2007) 1 SCC 732]**.

- A writ court can examine whether a taxable event exists in

the case before it while considering the legality of the order impugned in the writ petition, since the existence of a taxable event is fundamental to the levy of tax. Reliance is placed on the decisions in **Paradip Port Trust v. Sales Tax Officer and Others – [(1998) 4 SCC 90], Union of India and Another v. State of Haryana and Another – [(2001) 123 STC 539]** and **Govind Saran Ganga Saran v. Commissioner of Sales Tax and Others - [1985 (Supp) SCC 205]**.

• A writ petition will lie to quash the impugned proceedings when the findings therein are not sustainable based on the admitted facts. (See: **M/s. East India Commercial Co. Ltd. Calcutta & Another v. The Collector of Customs, Calcutta - [AIR 1962 SC 1893]**). That apart, when the issue in the writ petition relates to the interpretation of a contract which is a pyre question of law, the petitioner need not be relegated to an alternate remedy (See: **ABL International Ltd. and Another v. Export Credit Guarantee Corporation of India Ltd. and Others – [(2004) 3 SCC 553]; Deputy Commissioner, Central Excise and Another v. Sushil and Company – [(2016) 13 SCC 223]**. As for the challenge to a show cause notice, it is contended that where the issue has been decided by the authority for earlier years, it would be futile for an assessee to prefer a reply and the remedy of a writ petition is always available. Reliance is placed on the decision in **Siemens Ltd. v. State of Maharashtra and Others - [(2006) 12 SCC 33]**.

• A reference to the various clauses in the agreement between the appellant and BPCL would clearly reveal that the agreement was to build, own and operate a Hydrogen and Nitrogen Plant and

to effect sales of Hydrogen, Nitrogen and HP Steam to BPCL. The agreement was only for the sale of gases and the ownership of the plant continues to be with the appellant. There was no justification, therefore, to infer a transfer of goods in the course of execution of a works contract and levy tax thereon on the appellant.

• The authorities under the KVAT Act misread the provisions of the agreement to infer that the fixed monthly charge component of the price of the gases constituted the consideration for a works contract. It is standard industry practice to recover fixed and variable costs in the price of the goods being supplied. That apart, the method of computation of the price cannot be determinative of the character of the payment. It is also significant that the fixed monthly charge component of the price of the gas supplied has already been subjected to tax @5% while simultaneously subjecting it to tax again @ 14% as a works contract.

• In respect of assessment year 2017-18, the assessment order impugned has a portion involving input credit of Rs.23,85,79,747/- that is not vitiated by a jurisdictional error and this part can be severed from the rest of the assessment order for the purposes of relegating the appellant to its alternate remedy of challenging that portion before the appellate authority under the KVAT Act. Reliance is placed on the decisions in **The State of Jammu & Kashmir and Others v. Caltex (India) Ltd. - [(1966) 17 STC 612]; Union of India v. Hindalco Industries – [(2003) 5 SCC 194]**.

• In the case of W.A.No.73 of 2022, the proceedings impugned is one that denies input credit on capital goods. As no personal hearing was provided to the appellant, the impugned order is one

that was passed in violation of the principles of natural justice. That apart, if it is found that no works contract existed, then the appellant would be entitled to the input credit since the credit was denied solely on the finding that there was a transfer of the plant to BPCL.

- As regards the penalty orders involved in W.A.No.374 of 2021, it is submitted that for the reasons already stated in relation to the impugned assessment orders, they cannot be legally sustained as they have proceeded on an erroneous assumption of a jurisdictional fact/taxable event as also on an estimation of the taxable turnover.

6. *Per Contra*, the submissions of the learned Senior Government Pleader (Taxes) Sri. Mohammed Rafiq, briefly stated, are as follows:

- Under the scheme of the KVAT Act, it is for the respondent assessing authority to decide during the course of the assessment as to whether or not the assessee has executed a works contract. The decision so taken by the assessing authority cannot be termed as without jurisdiction as jurisdiction only refers to the authority of a person to decide the matter and that authority to decide the matter in the instant case is admittedly conferred on the assessing officer by Section 25 (1) of the KVAT Act. Reliance is placed on the decision in **Smt. Ujjam Bai v. State of U.P. and another - [AIR 1962 SC 1621]** and **Embassy Property Development Private Limited v. State of Karnataka & Others – [(2020) 13 SCC 308]** to point out that lack of jurisdiction has to be differentiated from errors committed within the available jurisdiction and that in the

latter case, interference under Article 226 of the Constitution of India is not warranted.

• There are ample provisions under the KVAT Act to correct erroneous orders of the assessing authorities and in the absence of any pleading to that effect or material to demonstrate that the statutory remedies are not adequate, efficacious or meaningful, this court ought not to interfere with the orders of the assessing authority, or the penalty orders, through the exercise of the writ jurisdiction. Reliance is placed on the judgments in **Thansingh Nathmal v. Superintendent of Taxes - [AIR 1964 SC 1419], Titaghur Paper Mills Co. Ltd. v. State of Orissa – [(1983) 2 SCC 433] and CIT v. Chhabil Dass Agarwal – [(2014) 1 SCC 603]** in support of the said contention.

• At any rate, inasmuch as a single judge of this court had exercised his discretion to not entertain the writ petitions and relegated the appellant herein to its alternate remedy under the statute, a writ appeal under Section 5 of the Kerala High Court Act could not be entertained since the impugned judgment cannot be seen as illegal, irregular or improper warranting interference in an intra-court appeal. Reliance is placed on the decision in **Red Bee Enterprises v. Assistant Commissioner of State Tax – Neutral Citation Number 2019/KER/64699** in support of the said contention.

OUR ANALYSIS AND FINDINGS

7. We have gone through the pleadings on record and considered

the submissions of the learned counsel on either side. We have also perused the judgments cited by counsel before us. We find that the issue before us lies in a narrow compass and requires us to determine whether the learned Single Judges were justified in relegating the appellant to its alternate remedies under the KVAT Act against the orders impugned in the writ petitions ? We deem it apposite, therefore, to examine the law in that regard.

JUDICIAL REVIEW AND THE ALTERNATE REMEDY ARGUMENT

8. The true basis of judicial review has been the subject matter of discussion among legal scholars for many years. While under American jurisprudence, even prior to the formal enunciation of a principle in ***Marbury v. Madison***, the court's power of judicial review was seen as emanating from the larger concept of a fundamental law to which all state action, including legislation, had to conform, in England, where there was no written constitution, the basis for judicial review was often seen located in the concept of Parliamentary sovereignty, and the allied concept of 'ultra vires', that frowned upon any exercise of power by a statutory authority that went beyond the mandate of the statute. In more recent times, however, there has been a shift in judicial thinking in England, and it is now fairly well established that judicial review is nothing more than a means adopted by courts to uphold the rule of law

in a modern day democratic republic. The many instances where courts have thought it fit to interfere with decisions of non-statutory bodies that have an impact on the rights of citizens, and where the doctrine of ultra vires has no role to play, clearly reveal that the said doctrine is not the sole basis for the exercise, by courts, of the power of judicial review. Judicial review is no longer seen based solely on principles of statutory interpretation, but on the application of some general principles of good administration to the exercise of power, irrespective of the source of that power.[1]

9. Tom Bingham[2] observes that Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably. Judicial review is the tool that the courts use to ensure this standard. Review is an appropriate judicial function since the law is the judges' stock-in-trade, the field in which they are professionally expert. In the exercise of the power of judicial review, judges do not substitute their view for that of the statutory authority for they often do not have the expertise necessary for taking such a view. They are expected to act only as auditors of legality and nothing more.

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1 Dawn Oliver, 'Is the Ultra Vires Rule the Basis of Judicial Review? - 1987 Public Law, 543

2 Tom Bingham, 'The Rule of Law', Penguin Books, London, 2011

10. Under our Constitution, the power of judicial review is traceable to Articles 32 and 226 that confer on the Supreme Court and the High Courts the power to issue prerogative and like writs to protect the citizens from state action that infringes upon their rights. The Constitution being the supreme law of our land, and the rule of law being one of its basic features, the exercise of statutory power has to conform, *inter alia*, to the requirements of fairness, non-arbitrariness and reasonableness, all of which are integral aspects of the rule of law. Thus, when a litigant approaches a writ court, alleging a breach of his rights – be it a constitutional right, a statutory right or a common law right – by an authority empowered by the State, the court examines the manner in which the decision was arrived at, and in exceptional cases, the decision itself, to see whether it conforms to the requirements mandated by the rule of law.

11. The writ jurisdiction being a discretionary jurisdiction, it is for the constitutional courts to decide whether or not they should exercise their discretion to entertain a writ petition. In that context, it would be apposite to point out that there is a subtle distinction that exists between instances when a court dismisses a writ petition as ‘not maintainable’ and when it exercises its discretion against ‘entertaining’ it. The former is a case where the court finds that the circumstances are

such that it is rendered incapable of even receiving the *lis* for adjudication whereas the latter is a case where the court finds that, while it is competent to adjudicate the *lis*, the adjudication is better left to other forums that are more suited for the same[3]. An argument as regards existence of an alternate remedy is one that is aimed at persuading a court against 'entertaining' a writ petition that is otherwise 'maintainable' before it. While accepting such an argument, the court essentially finds that notwithstanding the petitioner having made out a sound legal point it would be against public interest for it to entertain and adjudicate the matter.

12. While it is fairly well settled that when confronted with disputed questions of fact, the writ court will not ordinarily entertain a writ petition, but leave it to the civil courts or statutory forums to adjudicate the matter, it is equally well settled that the existence of an alternate remedy is not a bar to the entertainment of a writ petition where (i) the writ petition seeks the enforcement of any of the fundamental rights, (ii) where there is a violation of the principles of natural justice, (iii) where the order or the proceedings are wholly without jurisdiction or (iv) where the vires of an Act is challenged.[4] That apart, as observed in *State of UP & Ors. v. Indian Hume Pipe Co. Ltd.*[5]

3 M/s Godrej Sara Lee v. Excise & Taxation Officer-cum-Assessing Authority - JT (2023) 2 SC 32
4 Whirlpool Corporation v. Registrar of Trade Marks, Mumbai & Ors – (1998) 8 SCC 1
5 (1977) 2 SCC 724

and *UOI v. State of Haryana*[6], and re-iterated most recently in *M/s Godrej Sara Lee Ltd v. Excise & Taxation Officer-cum-Assessing Authority*[7] where the controversy is a purely legal one and it does not involve disputed questions of fact but only questions of law, then it should ideally be decided by the high court instead of dismissing the writ petition on the ground of an alternate remedy being available. The need for upholding the rule of law would also mandate that the high court decide the matter in situations where the exercise of statutory power does not conform, *inter alia*, to the requirements of fairness, non-arbitrariness and reasonableness and therefore falls foul of the culture of justification that is seen as a necessary and essential feature of administrative decision making[8]. The said feature requires the decision of the administrative authority to demonstrate responsiveness, justification and demonstrated expertise. Responsiveness refers to the requirement that the reasons given by the decision maker must respond to the central issues and concerns raised by the parties by 'listening' rather than merely 'hearing' the parties. Justification refers to the principle that the exercise of public power must be justified, intelligible and transparent, not in the abstract, but to the individuals subject to it. Demonstrated expertise refers to the requirement of the decision maker establishing the reasonableness of his decision by demonstrating therein

6 (2000) 10 SCC 482
7 JT (2023) 2 SC 32
8 Akshay N. Patel v. RBI – (2022) 3 SCC 694

his experience and expertise. Added to the above is the requirement of a reviewing court to understand the contextual constraints, if any, under which the decision under review was rendered by the administrative authority while assessing its reasonableness.[9]

IS THE EXERCISE OF JUDICIAL REVIEW WARRANTED IN THESE CASES ?

13. A reading of the assessment orders and penalty orders that are impugned in these cases would reveal that the assessing officer has interpreted the terms of the contract entered into between the appellant assessee and BPCL as requiring the appellant to transfer the property in the plant put up by them on land leased from BPCL and also to sell to BPCL the gases manufactured in that plant. The reasoning of the assessing officer is to be found at pages 41 to 46 of the assessment order and read as follows:

> "**The dealer is assessed to tax under section 6 of of the KVAT Act as in the case of transfer of goods involved in execution of works contract, where the transfer is not in the form of goods, but in some other form, at the rate of 14.5%**. Section 2(Iv) of the KVAT Act 2003 "works contract includes any agreement for carrying out for cash or **deferred payment** or other valuable consideration the construction, fitting out, improvement, repair, manufacture, processing, fabrication, erection, installation, modification, or commissioning of any movable or immovable property.
>
> The dealer signed an agreement with Bharat Petroleum Corporation Ltd on

9 Paul Daly, '*Vavilov and the Culture of Justification in Administrative Law*' – https://www.administrativelawmatters.com/blog/2020/04/20/vavilov-and-the-culture-of-justification-in-administrative-law/

August 21 2013 to build a Hydrogen, Nitrogen and HP steam plant to supply BPCL's requirements for industrial gas products as BPCL owns and operates a refinery at Kochi, Kerala, India and has a requirement for Hydrogen, Nitrogen and HP Steam. BPCL also intends to form a joint venture to build and operate a petrochemical plant to be located near BPCL's Plant (as defined herein). In response to BPCL's invitation for bid (bid document BPCL/IREP/BOO/01 dated 14 September 2012 and its Amendments), Air Products and Chemicals, Inc. (APCI), BOO OPERATOR's parent company, submitted an offer dated 26 January 2013, as revised on 22 March 2013, to (i) build a Hydrogen and Nitrogen plant to supply BPCL's requirements for Hydrogen, Nitrogen and Steam and (ii) to build Hydrogen, Nitrogen, Oxygen and Syn Gas plants to supply the joint venture's requirements for Industrial gas products.

Sri. Mallikarjuna Reddy, Representative of M/s. Prodair Air Products India Pvt Ltd. filed a reply along with copy of agreement executed with Contractors such as M/s. Ray Engineering, Simplex Infrastructure, M.P. Paulose etc. and copy of Profit and Loss Account and Balance Sheet for the years 2014-15 and 2015-16 before the State Tax Officer(lB), Mattancherry at Aluva while hearing their case as evident from the penalty order **Order No.IBM-III/IR-85/2016-17/OR-1/2020-21(2016-17) dt. 06.07.2020**. Later the company filed a letter on 29.05.2017, vide paper read as 14" cited. On 03.06.2017, Sri. Mallikarjuna Reddy, Representative of M/s. Prodair Air Products lndia Pvt. Ltd. appeared and gave statement before the State Tax officer that they have incurred above Rs.2000 crores for setting up the Plant and Machinery generating Hydrogen, Nitrogen, Oxygen and Syn Gas exclusively for BPCL in the land allocated by BPCL on lease. **It is also stated that the Basic Facility Charges of Rs.30 Crores per month is given by BPCL to M/s. Prodair Air Products India Pvt. Ltd. for 15 years of leased period and Mls. Prodair Air Products Ltd. raising invoices towards this as Fixed Monthly Charge for Hydrogen and Nitrogen and it is Return of Investment (ROI)** i.e., repayment of the expenses incurred by M/s. Prodair Air Products lndia Pvt. Ltd for setting up the Plant and Machinery in the land allocated by BPCL on lease i.e., the way of recouping the expenses incurred for setting up the Plant and Machinery is through raising invoices for Fixed Monthly Charges for Hydrogen and Nitrogen. They are raising separate invoices for supply of industrial gases such as Hydrogen, Nitrogen, Oxygen and Syn Gas. It is also stated that they are not making any sale of industrial gases to dealers other than BPCL and they are not permitted to do so without the consent of BPCL.

Hence from the statement above extracted from the penalty order **Order No.IBM-III/IR-85/2016-17/OR-1/2020-21(2016-17) dt. 06.07.2020** itself makes it evident that the assessee is engaged in works contract with BPCL limited for deferred payment of cash in monthly installment for 15 years as Fixed charges on BPCL vide Article 15 of the agreement entered into between the parties. Further the assessee himself awards contracts to various dealers in its own name and purchases made from both local and interstate using its own TIN, and no goods were stock transferred in from their parent company, in whose name the agreement was entered into from interstate which proves the same as a local works contract.

Further Article 3.5 of the agreement entered into between the parent company of the dealer with BPCL provides that the construction and commissioning of the Production Plant shall be under periodical inspection of representatives of BPCL undertaken with reasonable notice and in accordance with the safety rules of BOO OPERATOR. Article 5.4 of the agreement "the authorised representatives of BPCL shall have free access to BOO Operators Production Plant during erection and commissioning and during operation phase throughout the term of this agreement subject to reasonable notice and compliance with safety rules" makes it clear that BPCL is not only interested in ensuring regular and timely supply of industrial gases as the same was ensured through Article 3.7 "For any delay in commissioning of the Production Plant and meeting the First Delivery Date of Products for reasons attributable to BOO OPERATOR and not due to any event of Force Majeure, BOO OPERATOR shall compensate BPCL for the loss suffered by BPCL in the form of genuine liquidated damages in accordance with Article 26."

When the Article 5.4 read with Article 3.7 of the agreement it evidents that for ensuring the commissioning and delivery of the product in the agreed time is ensured by the Article 3.7, and the provision made in Article 5.4 clearly indicated BPCL's interest as an awarder in the design, layout, construction and commissioning of the work undertook by Prodair.

Under Article l5.1 Upon the commencement of the Term, the payment of the respective Fixed Monthly Charges and the Product Variable Charges will begin in accordance with this Article 15. The Fixed Monthly Charges for Hydrogen and Nitrogen are defined below in Article 15.1.1.

A) Fixed Monthly Charge for BPCL

This will have three components

1. Constant amount (towards return on investment (ROI) of BOO OPERATOR).
2. Component related to wholesale price indexed (WPI) for manufactured products (**towards maintenance cost and other overheads**).
3. Component related to consumer price index (CPI) for industrial workers

(towards manpower cost)

From the above article it is evident that the the dealer charges from BPCL, its Return on Investment in monthly installments for 15 years, and cost of maintaining the plant and an amount towards manpower cost apart from the Variable Charges for the actual supply of industrial gases based on the actual reading. Since the monthly fixed charges to be collected from BPCL to Rs.30,62,45,992.00 including the VAT charged @ 5% by the dealer Rs.1,72,26,337.00, even if there is no escalation made on the above, total fixed charge receivable by the company, for 15 years comes to Rs.5512,42,78,560.00 roughly 3 times of the investment made by the dealer.

A summary of monthly invoices raised by the Company to BPCL is provided

below:

Period	Particulars	Taxable Value	Excise Duty	VAT	Invoice Value
Jan – 17	Variable Cost invoice values	40972.00	5121.50	2304.68	48398.18
Feb – 17	Fixed Cost invoice values	24826899.52	3,103,362.44	1,39,6513.1	29,326,775.06
	Variable Cost invoice values	8,905,220.24	1,113,152.53	500,918.64	10,519,291.41
Mar– 17	Fixed Cost invoice values	306,245,992.56	38,280,749.07	17,226,337.08	361,753,078.71
	Variable Cost invoice values	262,714,798.49	31,290,250.12	15,877,568.19	309,882,616.81
Apr - 17	Fixed Cost invoice			17,221,83	
	values	306,165,870.32	38,270,733.79	0.21	361,658,434.32
	Variable Cost invoice values	552,145,985.82	64,119,303.34	34,536,462.67	650,801,751.82
May - 17	Fixed Cost invoice values	306,230,345.84	38,278,793.23	17,225,456.95	361,734,596.02
	Variable Cost invoice values	633,664,622.68	71,598,885.15	41,046,161.84	746,309,669.66
Jun - 17	Fixed Cost invoice values	306,390,298.56	38,298,787.32	17,234,454.29	361,923,540.17
	Variable Cost invoice values	525,189,209.88	55,889,103.18	36,471,172.17	617,549,485.23
	Total	3,232,520,215.91	380,248,241.66	198,739,179.82	3,811,507,637.39

As evident above, the invoices for fixed monthly charge was raised from February 2017.i..e. when the company, started to produce and supply the gases to BPCL.

As per Article 30.4 On completion of 15 (fifteen) years from the date of First Delivery of last delivered Product, this Agreement shall automatically

terminate without any compensation to either Party, unless extension of the term of the Agreement is agreed in writing between BPCL and BOO OPERATOR. Discussions on renewal of this Agreement and the terms thereof shall begin on completion of the 10" year of the Term.30.5 In case of termination of this Agreement in accordance with Article 30.4, BPCL will have the first right of refusal to acquire the Production Plant by compensating the BOO OPERATOR at Fair Value.

From the above articles, quoted from the agreement entered into between parties, on termination of this Agreement in accordance with Article 30.4, BPCL will have the first right of refusal to acquire the Production Plant by compensating the BOO OPERATOR at Fair Value. Since the dealer has given roughly 3 times of their investment during the above period by BPCL who have the right of refusal to acquire the Production Plant by compensating the BOO OPERATOR at Fair Value, and the written down value of the plant after adjusting the depreciation over the years will be less than 10% of the current value, the fair price for the transfer can be a nominal amount since the leader has already recouped 3 times of their investment and also gained from the sales of industrial gases as variable cost received from BPCL based on actual reading.

Further the agreement between the parent company of the dealer and BPCL had entered on the wake of the requirement of Bharat Petroleum Corporation Ltd, to implement the Integrated Refinery Expansion Project (IREP) and it is necessary for BPCL's Kochi Refinery to ensure a continuous and reliable supply of Hydrogen, Nitrogen and HP steam of specific parameters so as to increase the production of their petroleum products. BPCL also intends to form a joint venture to build and operate a petrochemical plant to be located near BPCL's Plant. From the same it was evident that BPCL needed continued supply of such industrial gases and intends to acquire the plant after the agreed period. For that purpose the lease period was limited for 15 years, and with a nominal lease value of Rs.1/acre.

All the above facts proves that the agreement entered into between the parent company of Prodair and BPCL was for a works contract, for setting up a production plant for BPCL's exclusive purpose and the consideration was given as deferred payment through the Fixed monthly charges of around Rs.30 crores per month, which help the dealer to recoup their investment in 15 years and also collected the value of industrial gases supplied to them as variable charges based on actual reading.

Since the goods which was suppressed from the books of accounts became the part of the goods used for works contract and its transfer was made not in the form of goods the suppressions established by this order is taxed @ 14.5%.”

14. As against that, the relevant clauses in the agreement that deal with the scope of the work and the payment terms read as follows:

"A. BPCL owns and operates a refinery at Kochi, Kerala, India and has a requirement for Hydrogen, Nitrogen and HP Steam. BPCL also intends to form a joint venture to build and operate a petrochemical plant to be located near BPCL's Plant (as defined herein).

B. In response to BPCL's invitation for bid (bid document BPCL/IREP/BOO/01 dated 14 September 2012 and its Amendments), Air Products and Chemicals, Inc. (APCI), BOO OPERATOR's parent company, submitted an offer dated 26 January 2013, as revised on 22 March 2013, to (i) build a Hydrogen and Nitrogen plant to supply BPCL's requirements for Hydrogen, Nitrogen and Steam and (ii) to build Hydrogen, Nitrogen, Oxygen and Syn Gas plants to supply the joint venture's requirements for industrial gas products.

C. BPCL issued a letter of acceptance to APCI dated 15 May 2013 stating its desire to purchase Hydrogen, Nitrogen and HP Steam from APCI and APCI, as agreed, formally authorised the wholly owned subsidiary of APCI in India i.e, Prodair Air Products India Pvt. Limited as BOO OPERATOR to build own and operate a Hydrogen and Nitrogen manufacturing plant."

ARTICLE 3 - BUILD

3.1 BOO OPERATOR shall design, procure and construct the Production Plant for the supply of Hydrogen, HP Steam and Nitrogen to BPCL.

3.2 BOO OPERATOR shall submit specifications of flow meters for Product, Feed and Utilities, to be installed at the Delivery Point of the Production Plant ,to BPCL for their review prior to their procurement as in Article 9. Any disagreement on these specifications will be settled mutually between BPCL and BOO OPERATOR. BOO OPERATOR shall also submit to BPCL the documents listed in Appendix 15.

3.3 BOO OPERATOR shall obtain necessary clearances, permissions and licenses, if any, applicable for the construction, installation and commissioning of the Production Plant as required before start of construction as well as from time to time from the appropriate authorities at local, state and national levels for operations of the Production Plant. The requisite regulatory permission to work under the existing PRU are will be obtained by BPCL.

3.4 BOO OPERATOR shall ensure implementation of efficient project management and Quality Assurance Systems during the installation period.

3.5 The construction and commissioning of the Production Plant shall be

under periodical inspection of representatives of BPCL undertaken with reasonable notice and in accordance with the safety rules of BOO OPERATOR.

3.6 BOO OPERATOR shall adhere to the schedule of commissioning of the Production Plant and in no case shall BOO OPERATOR delay commissioning of the Production Plant due to any reason whatsoever other than BPCL delaying commencement of the First Delivery Date, Force Majeure and subject to BPCL fulfilling its obligations under this Agreement.

3.7 For any delay in commissioning of the Production Plant and meeting the First Delivery Date of Products for reasons attributable to BOO OPERATOR and not due to any event of Force Majeure, BOO OPERATOR shall compensate BPCL for the loss suffered by BPCL in the form of genuine liquidated damages in accordance with Article 26.

3.8 BPCL assumes responsibility for MoEF clearance to enable BOO OPERATOR to undertake construction of the Production Plant and supply Products to BPCL. Any delay on account of MoEF clearance will not affect the compensation to BOO OPERATOR from the agreed or rescheduled First Delivery Date. BOO OPERATOR shall follow all the norms and regulations of the Central Pollution Control Board / State Pollution Control Board and guidelines stipulated under MoEF clearance of BPCL's Integrated Refinery Expansion Project at Kochi. BOO OPERATOR shall obtain all necessary permissions/certificates in this regard as applicable from the appropriate authority.

3.9 BOO OPERATOR shall follow all applicable statutory provisions including labour laws and industrial laws for installation of the Production Plant and in no case the employees or workers engaged by BOO OPERATOR, directly or indirectly, shall be the employees of BPCL and claim for the same. For any breach of this Article 3.9 by BOO OPERATOR and/or its representatives, BPCL shall be indemnified against any claim or demand made by any authority against BPCL.

3.10 BOO OPERATOR shall ensure that all the personnel and employees engaged by them in operating the Production Plant for the continuous supply of Hydrogen, HP Steam and Nitrogen to BPCL shall follow all the applicable safety rules.

3.11 Hydrogen, HP Steam and Nitrogen shall be supplied by BOO OPERATOR at the Delivery Point. Pipelines from BOO OPERATOR's Production Plant to the Delivery Point shall be installed, owned, operated and maintained by BOO OPERATOR at its own expense.

3.12 BOO OPERATOR, at its premises and expense, will construct the Production Plant including supply pipelines to the Delivery Point and

connect these pipelines with BPCL's pipelines / systems at BOO OPERATOR's battery limit, subject to Article 3.11.

3.13 BOO OPERATOR, at its own Products expense, shall install Metering Equipment for measuring to BPCL for meeting excise requirements. BOO OPERATOR shall also, at its own expense, install Metering Equipment in the BPCL premises for Feed and Utilities and maintain, repair and replace the Metering Equipment as stipulated in Article 9. The Metering Equipment shall at all times remain the property of BOO OPERATOR. The total quantity of Hydrogen, HP Steam and Nitrogen supplied to BPCL shall be measured by the Metering Equipment. The Metering Equipment shall be integrating type flow meter and measurement of Natural Gas and Nitrogen will be in volume, the unit of which shall be the Normal Cubic Meter (NM3). Hydrogen, HP Steam, DM Water, Hydrogen rich off gas, Naphtha, flare gas, start up Hydrogen, start up HP Steam shall be measured in Tonnes. The Metering Equipment of Natural Gas and Hydrogen Rich Off Gas will have provision for measuring caloric content and the pricing of Natural Gas and Hydrogen Rich Off Gas will be based on this caloric content. Raw water, potable water, fire water will be measured in cubic meters. Back-up power to and from BOO OPERATOR will be measured through TOD Energy Meters.

3.14 BOO OPERATOR shall also ensure that materials of construction of all pipelines and various systems at BOO OPERATOR's Delivery Point are compatible with BPCL's pipelines and systems.

ARTICLE 4 – OWN

4.1 The Production Plant along with all other systems, pipelines, metering system, etc. installed by BOO OPERATOR to meet its obligations under this Agreement shall be the property of BOO OPERATOR at all times during the Term of this Agreement and alter the termination of this Agreement unless transferred or removed in accordance with the terms herein, and BPCL will not create liens, mortgages or charges over any property of BOO OPERATOR.

4.2 BOO OPERATOR shall take all necessary steps for the registration of the Production Plant and obtaining the necessary licenses and permissions from all the appropriate authorities for owning the Production Plant.

4.3 BOO OPERATOR shall notify BPCL regarding the readiness of the Production Plant separately for Hydrogen and Nitrogen. BPCL will, thereafter, decide upon a date for carrying out a test run for capacity and product quality demonstration as defined in Appendices 9 and 10 and notify the same to BOO OPERATOR. The duration of this test run will be maximum of 24 hours for each train / Product. The modalities and format for the test run shall be

mutually agreed upon in writing between BOO OPERATOR and BPCL. If BOO OPERATOR fails to demonstrate the performance with respect to capacity and Products quality(es), BOO OPERATOR will be given an opportunity for corrective engineering to demonstrate performance through a subsequent test run. BPCL will provide all the Feed and Utilities under BPCL's scope of supply at cost including taxes and duties to BOO OPERATOR for the commissioning and first test run of the units and for all subsequent test runs.

The test run will be separately carried out for Hydrogen (train wise) and Nitrogen, within 6 (six) months from the First Delivery Date of the respective Product. BPCL will accept and pay for Products produced during this first performance test run.

ARTICLE 5 - OPERATE

5.1 BOO OPERATOR shall ensure that the Production Plant is completed and fully operational within the time schedule specified in Article 12 and capable of delivering Hydrogen HP Steam and Nitrogen to BPCL at required parameters.

5.2 BOO OPERATOR shall engage its personnel and employees and workers directly for operating and maintaining the Production Plant. Shift supervisors should have at least a Degree in Chemical Engineering with minimum 5 years of experience in operation of a steam methane reformer and at least a Diploma in Engineering with minimum 3 years experience in operation of an air separation unit.

5.3 BOO OPERATOR shall arrange to procure all necessary clearances, permissions and licenses required for the operation of the Production Plant and BPCL render shall all necessary assistance to BOO OPERATOR, including providing relevant documents, and certificates, to enable BOO OPERATOR to obtain such clearances, permissions and licenses.

5.4 The authorised representatives of BPCL shall have free access to BOO OPERATOR's Production Plant during erection and commissioning and during the operation phase throughout the term of this Agreement, subject to reasonable notice and compliance with safety rules of BOO OPERATOR.

5.5 Representatives of B00 OPERATOR and BPCL shall meet to co-ordinate, as far as reasonably possible for planning Scheduled Maintenance of the Hydrogen and Nitrogen Plants.

5.6 At least 6 (six) Months prior to the expected First Delivery Date, the Parties shall develop and agree upon an Operating Protocol which shall include emergency response procedures to be

applicable during the Production Plant operating period.

ARTICLE 6 - SUPPLY

6.1 From the First Delivery Date and thereafter continuously during the Term and in accordance with the stipulations of this Agreement, BOO OPERATOR shall operate the Production Plant to supply BPCL requirements of Hydrogen, Nitrogen and HP Steam. Supply of the products to other consumers is not envisaged in this Agreement. However BOO Operator and BPCL / PETCHEM-JV may consider such option on mutually agreed terms later.

6.2 Representatives of BOO OPERATOR and BPCL shall meet to coordinate, as agreed, for planning scheduled requirements of the Hydrogen, HP Steam and Nitrogen.

6.3 On receiving communication from BPCL, BOO OPERATOR shall adjust the production level to match with change in demand within the turn down capability of the relevant Production Plant. Such adjustments will be @ 1% minimum per 3 (three) minutes for the Hydrogen Plant and @ 0.25 minimum per minute for the Nitrogen Plant of actual capacity of the plant running at that point of time, as ramp-up or ramp-down rate.

6.4 If BPCL requires Nitrogen at ow rates higher than 100% of the Contracted Quantity, then BOO OPERATOR will use all reasonable endeavours to supply the required additional Nitrogen at the prices set forth in Article 7.3.

6.5 If BPCL requires. Hydrogen at flow rates higher than the Contracted Quantity or in excess of those permitted by the operating limitations, then BOO OPERATOR shall endeavour, but have no obligation to supply the required additional Hydrogen. The additional Hydrogen shall be at the same price as set forth in Articles 15.1.1 and 15.1.3.

6.6 BPCL shall notify BOO OPERATOR to rectify the quality of Hydrogen, HP Steam and Nitrogen ,as the case may be, in case it falls below the Specifications.

6.7 BOO OPERATOR and BPCL shall adopt and comply with operational and communication guidelines as mutually agreed in writing from time to time.

7.1 BOO OPERATOR will sell and deliver Hydrogen H P Steam and Nitrogen at the Delivery Point and BPCL will purchase and receive from BOO OPERATOR, Hydrogen, HP Steam and Nitrogen requirements set forth in this Article 7. BPCL shall have the right to use these Products without restriction in any of the BPCL Plants.

7.2 BOO OPERATOR will deliver Requested Quantities of Hydrogen, HP Steam and Nitrogen to BPCL to meet the requirements of BPCL at the Delivery Points as set forth below:

7.2.1 Hydrogen
Maximum instantaneous requirement for BPCL 15.3 Tonne/h Minimum Instantaneous requirement for BPCL 5.74 Tonne/h until PET CHEM-JV is accepting Hydrogen and 5.35 Tonne/uh thereafter. BPCL may request BOO OPERATOR to shut down one train of the Hydrogen Plant and the Parties shall develop together a single train operating mode in the Operating Protocol.

7.2.2 HP Steam
Minimum instantaneous HP Steam supply will be guaranteed at 60-T/h when both Hydrogen trains are operating and at 30 T/h when single Hydrogen train is operating. Maximum instantaneous HP Steam supply shall not exceed 250 MT/h for all windows of operation as set out in Appendix 9.

10.1 BOO OPERATOR, at its own expense, will construct, operate and maintain the Production Plant on the land allocated by BPCL under lease for use for the purpose of setting up the Production Plant for the period required for the construction of the Production Plant plus 15 years from the date of First Delivery of last delivered Product unless terminated earlier in accordance with this Agreement and any extension of this Agreement as may be agreed between BOO OPERATOR and BPCL. The Production Plant will remain the property of BOO OPERATOR at all times and may be removed by BOO OPERATOR within 12 twelve months of the expiry or termination of the Agreement. Should BOO OPERATOR fail to remove the Production Plant or any part thereof from the leased site or to vacate the site within the said 12 (twelve) month period, BOO OPERATOR's Production Plant or such part thereof as remains unremoved and BOO OPERATOR's property whatsoever remaining on the Production Plant Site shall vest in BPCL free from any mortgage, charge, pledge, hypothecation or other encumbrance or third party rights whatsoever and/or liabilities whatsoever and shall be entitled to take such measures as it considers necessary including but not limited to measures under the Public Premises Eviction of Unauthorised Occupants Act, 1971 for the eviction of all BOO OPERATORs or third party personnel or their agents or representatives from the site.

10.1.1 BOO OPERATOR shall use the leased land for setting up operating and maintaining the Production Plant only pursuant to this Agreement and not for any other purpose, including any other commercial activity or residential purpose without the consent of BPCL.

10.1.2 BPCL and BOO OPERATOR shall execute a Lease Agreement for the use of the leased land in the form set out in Appendix 4.

10.1.3 Upon formation of the PETCHEM-JV, it is the intent that BOO OPERATOR and PETCHEM-JV enters into an agreement for the supply of Hydrogen, Syn Gas, Nitrogen and Oxygen on terms that are similar to the extent applicable to this Agreement.

13.1 The scope of work of B00 OPERATOR shall be to build, own, operate and maintain the Production Plant and "supply Hydrogen, Nitrogen and HP Steam to BPCL in accordance with the provisions of this Agreement.

15.1 Upon the commencement of the Term, the payment of the respective Fixed Monthly Charges and the Product Variable Charges will begin in accordance with this Article 15. The Fixed Monthly Charges for Hydrogen and Nitrogen are defined below in Article 15.1.1. The Variable Charges for Hydrogen, Nitrogen and HP Steam are defined below in Article 15.1.3."

15. What is apparent from the above is that while the agreement envisages that the appellant will build, own and operate a plant on land leased from BPCL for the purposes of supplying specified gases to BPCL, there is no transfer of the property in the plant, or any part of it, to BPCL. In fact, the assessing authority also admits this when he states that it is only on termination of the agreement entered into between the parties that BPCL gets the first right of refusal to acquire the production plant by compensating the appellant BOO Operator. His finding, however, is that insofar as the plant has been set up on land belonging to BPCL, albeit leased to the appellant, there is an accretion of the plant on land belonging to BPCL and hence the activity attracts the definition of

works contract under the KVAT Act, which reads as follows:

> "(lv) "Works contract" includes any agreement for carrying out for cash or for deferred payment or other valuable consideration the construction, fitting out, improvement, repair, manufacture, processing, fabrication, erection, installation, modification or commissioning of any movable or immovable property;

16. What the assessing officer completely overlooks, however, is the fact that there has been no transfer of the property in the goods involved in the execution of the works contract. The taxable event under the KVAT Act is not the execution of a works contract but the transfer of the property in the goods involved in the execution of the works contract. The latter aspect being absent in the transaction between the appellant and BPCL, as evident from the findings of the Intelligence Officer in the penalty orders, based on which the assessing officer rendered similar findings in the assessment orders, the assessing officer virtually usurped to himself the jurisdiction to tax a 'works contract' by erroneously assuming the existence of the jurisdictional fact/taxable event that would have conferred him with such a jurisdiction. The Intelligence Officer who confirmed the penalty on the appellant, as also the assessing officer who followed the said order while completing the assessments against the appellant by treating the transaction between the appellant and BPCL as a works contract, clearly find that the ownership of the plant continued with the appellant BOO operator for 15 years or till BPCL exercised its option to take over the plant in terms of

the agreement. They, however, treated the recovery of a portion of the investment in plant and machinery, as a part of the fixed component of the price of the gas supplied, as a disguised payment of consideration for the sale of the plant and applied the rate of tax applicable to works contract to the turnover of the gas supplied. This was patently illegal for the manner of pricing of the gas could not be used to determine the nature of the transaction or the character of the payment, as rightly pointed out by the learned senior counsel for the appellant. To illustrate the matter using an analogy, if A were to contract with B to provide electricity to B's premises using a generator belonging to A, then even if A charged B a price higher than the usual per unit electricity charges that would have been charged by a licensee under the Electricity Act, the agreement could not be construed as one where A had undertaken a works contract for B wherein the property in the generator had also passed from A to B, along with the electricity that was supplied using that generator. This would be the case, even if the generator was fixed/embedded firmly in B's property for the purposes of supplying the electricity contracted for. So long as the contract between the parties did not envisage the transfer of property in the generator, the contract would remain as one for the mere supply of electricity, notwithstanding that a part of the cost of the generator might have been recouped by A through incorporating the said cost in the price of the electricity

supplied. As observed by the Supreme Court in *Raza Textiles*[10];

> "No authority, much less a quasi-judicial authority, can confer jurisdiction on itself by deciding a jurisdictional fact wrongly. The question whether the jurisdictional fact has been rightly decided or not is a question that is open for examination by the High Court in an application for a writ of certiorari."

17. We are of the view that this is a clear case where the taxing authority assumed a jurisdiction that it did not have and hence it would be a case of palpable injustice to the appellant herein to force it to adopt the remedies provided by the statute.[11]

18. While on this subject, and going by the number of instances that we have come across of assessing authorities passing orders in a mechanical manner without showing how the taxable event is attracted in a given case or without giving reasons for denying the claim of an assessee for exemption or deduction, we deem it appropriate to observe that in matters of assessment under a taxing statute, the requirement of fairness, that is an integral aspect of the rule of law in our country, mandates that an assessing authority should apply its mind to the various factors that influence an assessment and give sufficient indication in the assessment order of having done so. This would necessitate his/her giving reasons for the finding regarding the existence of the taxable event that attracts the charge of tax as also other factors

10 Raza Textiles Ltd. Rampur v. Income Tax Officer – (1973) 2 SCC 154

11 State of HP v. Gujarat Ambuja Cement Ltd – (2005) 6 SCC 499

that result in a demand from an assessee of more tax than what has been admitted by him/her as payable. The profile of an assessing authority can no longer be that of a stern and unreasonable automaton that is programmed solely to collect the tax that the revenue department feels is due from an assessee. The right of an assessee to seek justification of state action would mandate that this court step in to correct unreasonable orders of assessing authorities so as to uphold the culture of justification that legitimizes state action.

In the result, we allow these writ appeals as follows:

(i) W.A.No.374 of 2021 is allowed by setting aside the impugned judgment of the learned Single Judge as also setting aside the penalty orders for assessment years 2016-17 and 2017-18, impugned in the writ petition.

(ii) W.A.No.73 of 2022 is allowed by setting aside the impugned judgment of the learned Single Judge as also the order for the assessment year 2017-18 that was impugned in the writ petition, to the extent it did not grant credit of the input tax paid on capital goods on the ground that the property in question did not belong to the appellant. The adjudicating authority shall consider the issue afresh in the light of the observations and directions in this judgment.

(iii) W.A.No.91/2022 is allowed by setting aside the impugned judgment of the learned Single Judge and quashing the

assessment orders for the assessment years 2015-16, 2016-17 and 2017-18, save to the extent the said assessment orders deal with the disallowance of the input tax credit to the appellant. The appellant is given liberty to agitate the latter issue before the appellate authority concerned for the said assessment years. The appellant is also permitted to file a reply to the show cause notice issued for the assessment year 2014-15 so as to enable the assessing authority to complete the assessment for the said assessment year in the light of the findings and directions in this judgment.

Sd/-
A.K.JAYASANKARAN NAMBIAR
JUDGE

Sd/-
MOHAMMED NIAS C.P.
JUDGE

prp/