

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 11393 OF 2015

1. M/s. BrahMos Aerospace }
Private Limited }
A company incorporated under }
the Companies Act, 1956, adj. to }
DRDL Rear Gate, Kanchanbagh PO }
Hyderabad - 500 058, }
represented by its Executive }
Director (Production), Vice }
Admiral Nadella Niranjan Kumar }
(Retd.) }

2. M/s. BrahMos Aerospace }
Private Limited }
Branch at DRDL (PJ-10) }
Complex, near Reliance Petrol }
Pump, Bothi, via Bothipuri, }
Nagpur, State of Maharashtra, }
Rep. By its Executive Director }
(Production) Vice Admiral }
Nadella Niranjan Kumar (Retd.) }

Petitioners

versus

1. The State of Maharashtra }
through the Government Pleader }
High Court, Mumbai }

2. State of Andhra Pradesh }
Rep. By its Principal Secretary }
Revenue Department, }
A. P. Secretariat, Saifabad, }
Hyderabad, State of Telangana }

3. State of Telangana }
represented by the Principal }
Secretary, Revenue Department, }
Telangana Secretariat, }
Hyderabad, State of Telangana }

4. The Commissioner of Sales Tax }
 Having his office at 3V-7, }
 3rd floor, Old Vikrikar Bhavan, }
 Mazgaon, Mumbai - 400 010 }
 }
 5. The Assistant Commissioner }
 of Sales tax }
 (NAG VAT D 003), Vikrikar }
 Bhavan, Civil Lines, Nagpur, }
 Maharashtra }

Respondents

Mr. V. Sridharan - Senior Advocate with
 Mr. Prakash Shah and Mr. Rahul Thakar
 i/b. M/s. PDS Legal for the petitioners.

Mr. V. A. Sonpal - Special Counsel with
 Ms. Sushma Bhende - AGP for respondent
 nos. 1, 4 and 5.

**CORAM :- S. C. DHARMADHIKARI &
 B. P. COLABAWALLA, JJ.
 Reserved on 26th October, 2016
 Pronounced on 10th January, 2017**

Judgment :- (Per S. C. Dharmadhikari, J.)

1. Heard both sides.
2. Leave to amend the writ petition by incorporating the proposed/draft amendment is granted. We are of the view that the amended paras do not raise any new factual issue. Therefore, the writ petition can be amended in terms of the draft amendment. For the reasons indicated hereinafter, we do not deem it necessary to go into the pleas of both sides on these amended paragraphs.

3. Rule. Respondents waive service.

4. By this writ petition under Article 226 of the Constitution of India, the petitioners are challenging an order of assessment dated 17th August, 2015 passed by the fifth respondent to this writ petition for the year 2012-13.

5. The petitioners state that the Indo-Soviet Treaty of August, 1971 and Inter-Government Agreement dated 12th February, 1998 has been entered into between the Government of Russian Federation and the Government of Republic of India based on which the petitioner company has been formed. That is a joint venture company established by Defence Research and Development Organisation (hereinafter referred to as "the DRDO") and NPO Mashinostroyeniya - a State Unitary Enterprise incorporated and registered under the Russian Federation's Legislation (hereinafter referred to as "the NPOM"). The petitioner has been established for the purpose of design, development, production and sale of Brahmos Cruise Missile weapon system. The DRDO has contributed 50.50% of the equity capital and NPOM has contributed 49.50% of the equity capital in the above joint venture company.

6. As per agreement dated 9th July, 1999, development work sharing and development cost sharing was also finalised, by which, the DRDO, the Ministry of Finance, Government of Maharashtra and NPOM, work share was in the ratio of equity contribution.

7. After development and successful trials of Brahmos Cruise Missiles, the Indian Arm Forces have awarded contracts to the petitioner for manufacture and supply of Brahmos Cruise Missiles. Taking into consideration the production capacities, the petitioner has entered into contracts and supplements with NPOM, joint venture partner for different configuration of missiles and various other Indian industry partners. Within the purview of the inter-Government agreement dated 12th February, 1998, NPOM and the petitioner shall have equal ownership on industrial and/or intellectual property, including inventions, industrial designs/models and other scientific and technical results on know-how, information etc., acquired by them in the course of implementation of the contracts and their supplements between them under the said agreement. These agreements have not been referred to and the terms thereof need not detain us.

8. It is stated that pursuant to this agreement, a manufacturing unit of the petitioner has been set up at

Hyderabad, erstwhile United State of Andhra Pradesh and presently the State of Telangana. The manufacturing unit has been established in the year 2001 and the manufacturing facility came in for operation from 2007-08. During the interregnum period of 2001-08, the petitioner has been importing fully integrated missiles from its joint venture partner, namely, NPOM and has been effecting sales of the same to the Indian Armed Forces. Consequent on the completion of the manufacturing facility in the year 2007-08, the petitioner has been importing missiles in Semi-Knocked Condition (SKD), assembling them with certain bought out items in the erstwhile United State of Andhra Pradesh and has been effecting the sales of the same to the Indian Armed Forces.

9. It is submitted that the Petitioner manufactures three types of Missiles namely, Combat Missiles , Practice Missiles and Technology/Training Missiles. The combat missiles which are used in battle field are equipped with warheads.

10. The terms "Warhead" refers to the explosive and/or toxic material that is delivered by a missile rocket or torpedo.

11. It is an explosive charge used to destroy the target and destroy surrounding areas with a blast wave.

12. Since the Warhead is an explosive, used in missiles manufactured by the petitioner, the same is covered by certificate issued by the Centre for Fire Explosive and Environmental Safety (CFEES) which was established in the year 1992, which emphasises the key role of services coming under the Armament cluster of Defense Research Laboratory. It functions as Defense Establishment for Fire, Explosive and Environment Safety. It is the repository of expertise in the field of fire services, explosive safety and environmental engineering monitoring. In order to strengthen and enrich the technological base for the above functions, it carries out R & D projects and activities in these areas with the help of State-of-the-Art Laboratory facilities for environmental analysis and modeling.

13. In respect of practice-missiles, there is no warhead and are used for training purposes. As warhead is an explosive item, the said item is prohibited to be brought into the factory of the petitioner company at Hyderabad under the Indian Explosives Act, 1884, as the manufacturing unit located in Hyderabad is in civilian area and if the said item explodes, it would damage the surrounding civilian establishments. In view of the above, the combat missiles fitted with warhead cannot be brought into the factory for the purpose of storage and sale thereon to the Indian

Armed Forces. The Petitioner is having its branch located at Bothili village, Butibori Taluka, Nagpur District, in the State of Maharashtra which is far away from the civilian area.

14. In view of the above location, the warhead which are imported from Russia at Hyderabad International Airport, are directly transported to the Petitioners unit located in Nagpur District for the purpose of storage. The Nagpur office issues F form prescribed by Section 6-A of the CST Act read with rule 12(5) of CST (R & T) Rules 1957. 'F' form is prescribed to prove that the movement of goods from one State to another was occasioned by reason of transfer of such goods is not by reason of a sale and that the goods are meant for storage.

15. The Combat missile which is manufactured by the petitioner at its Hyderabad unit which is complete in all respects except with warhead is sent to Nagpur unit for the purpose of integration of warhead and subsequently dispatched to the Indian Armed Forces from Nagpur as directed by the Hyderabad office.

16. The process of dispatch is initiated by the Hyderabad branch by sending the "made to order fully finished missile" without warhead to Nagpur branch for job work of warhead integration and issuing of the despatch note i.e. PDI-JRI

Programme (Pre Delivery Inspection – Joint Receipt Inspection) from Hyderabad upon completion of job work.

17. The Petitioner also relies on Rule 16B of the Central Excise Rules 2002, which empowers the Commissioner to permit a manufacturer of the final product to send the inputs / partially processed inputs / semi-finished goods to a job worker on a job work challan and impose such conditions including the manner in which duty, if leviable is to be paid, allow final products to be cleared from the premises of the job worker. It is in exercise of this power the Commissioner of Customs and Central Excise, Hyderabad – II, issued permission to the petitioner's Hyderabad branch to send fully finished missile without warhead to the job worker i.e. the petitioner's branch situated at Bothli, Butibori, Nagpur, and allowed job worked missiles to be cleared from Nagpur.

18. As per Trade Notice 23.01.2004, the Commissioner of Customs and Central Excise, Hyderabad-II has permitted the petitioner's Hyderabad unit to send the fully finished Combat Missiles without warhead to the job worker i.e. the petitioner's branch situated at Bothli, Butibori, Nagpur. The job worker after completion of the warhead integration, sends the duplicate copy of the challan to principal manufacturer (BrahMos Hyderabad

Unit), mentioning the batch number, serial numbers of the packages kept ready for dispatch.

19. The petitioner has been awarded several contracts by the President of India on behalf of the Government of India for the supply of BRAHMOS Missiles and Associated Systems to the Indian Armed Forces. One of the contracts is contract No.100/DSR/C/05-06/Brahmos System dated 14-11-2005 for the supply and commissioning of BRAHMOS Cruise Missiles and Associated on Board Systems for SNF's Ranvir and Ranvijay, missile documentation, missile training and project management for a contractual consideration of Rs.1054,64,16,900/- to the Indian Navy. The other contract is Contract No.301601/GS/WE5/ D(Proc)/Brahmos dated 20-3-2010 for the supply and commissioning of BRAHMOS Missiles and Associated Systems for two regiments of Indian Army for the supply of combat missiles, practice missiles, training missiles, missile documentation and ground support equipment for launching of the missiles for a contractual consideration of Rs.8033,31,17,000/-.

20. As all the sales have been effected from the Petitioner's manufacturing unit located at Hyderabad and in view of the peculiarity and sensitivity of the goods involved, the missile completed in all respects had been despatched to its Nagpur unit

for warhead integration and with clear subsequent instructions by PDI-JRI Program Note to despatch the said missiles after warhead integration to the concerned unit of Indian Armed Forces. Till such time the Nagpur branch would have no knowledge to whom the missile is to be sent. The petitioner has treated the said transactions as inter-state sales of Missiles effected from its Hyderabad unit and accordingly charged and collected CST @ 14.5% and paid the same to its assessing authority namely the Assistant Commissioner (CT) (LTU), Saroornagar Division, Hyderabad (earlier united State of Andhra Pradesh). In respect of warhead integrated Combat Missiles supplied to the Indian Navy Unit located at Visakhapatnam, relating to the first contract, the petitioner charged and collected APVAT @ 14.5% and paid the same to its assessing authority namely the Assistant Commissioner (CT) (LTU), Saroornagar Division, Hyderabad (earlier united State of Andhra Pradesh), the third respondent herein.

21. Rule 16B of the Central Excise Rules 2002 deals with Special Procedure for removal of semi-finished goods for certain purposes. Sub-rule (6) of Rule 4 empowers the Commissioner to permit a manufacturer of the final product to send goods to a job-workers for job work and “impose such conditions” including the

manner in which duty, if leviable is to be paid, allow the job worked products to be cleared from the premises of the job-worker. It is in exercise of this power the commissioner of Customs and Central Excise, HYD-II issued permission to the petitioner's Hyderabad unit to send fully finished Combat Missiles without warhead to the job worker i.e. the petitioner's Branch at Bothli, Butibori, Nagpur and allowed the fully integrated Missiles to be cleared from Nagpur.

22. The Assistant commissioner (CT(LTU), Saroornagar Division, Hyderabad, the third respondent herein who is the assessing authority of the petitioner's unit at Hyderabad has passed Assessment of Value Added Tax in Form VAT 305, for the year 2012-13, by his proceedings dated 22-12-2014.

23. The petitioner questioning the above assessment order, filed Writ Petition No.2166 of 2015 before the Hon'ble High Court at Hyderabad, for the State of Telangana and for the State of Andhra Pradesh on 4-2-2015 and the same is pending adjudication in the Hon'ble High Court. In the said Writ Petition the Petitioner contended that it is not a branch transfer, but because of the peculiarity and sensitivity of the product, it would be an inter-state sale emanating from the erstwhile united State of Andhra Pradesh and not a branch transfer.

24. While matters stood thus, the Assistant Commissioner Sales Tax (Nag-VAT) Nagpur, issued notice dated 20-5-2015, for the assessment prior 2012-13 contending that the missile components are stored at Nagpur and the missile components are integrated into semi-finished state at Hyderabad and are sent to Nagpur unit for job work challan as per Rule 16 B of the Central Excise Rules for the final stage of warhead integration and the excise clearance is done from Nagpur and therefore that the fully finished ready to use Combat Missiles are despatched from Nagpur to the customers and therefore it is an inter-state sale from Nagpur exigible to tax in the state of Maharashtra.

25. The petitioners further submits that by their letter dated 19th June, 2015 filed its detailed objections contending inter-alia that the Nagpur branch cannot by itself cause the movement of Missiles which is an essential ingredient of an inter-state sale. The process of despatch is initiated by the Hyderabad branch by sending the "made to order semi-finished missile" to Nagpur branch for job work and issuing of the despatch note i.e. PDI-JRI Programme (Pre Delivery Inspection - Joint Receipt Inspection) from Hyderabad upon completion of job work. The petitioner also relied on Rule 16 B of the Central Excise Rules 2002, which empowers the Commissioner to permit a principal manufacturer

of the final product to send the inputs / partially processed inputs / semi-finished goods to a job worker and impose such conditions including the manner in which duty, if leviable, is to be paid, allow final products to be cleared from the premises of the job worker. It is in exercise of this power the Commissioner of Customs and Central Excise, Hyderabad-II, issued permission to the petitioner's branch at Hyderabad to send semi finished goods to the job worker, namely, the petitioners' branch situated at Bothli, Butibori, Nagpur, and allowed job worked missiles to be cleared from Nagpur. In the Commissioner's permission dated 30th March, 2012, the Trade Notice dated 23rd January, 2004 has been mentioned. According to the Trade Notice, the job worker after completion of the warhead integration, should send the duplicate copy of the challan to the principal manufacturer (Brahmos Hyderabad Unit), mentioning the batch numbers, serial numbers of the packages kept ready for dispatch.

26. The petitioners further submit that they submitted a further reply dated 29th July, 2015 to respondent no. 5, duly informing the pendency of Writ Petition No. 2166 of 2015 before the High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh and the matter is pending adjudication and therefore, requested to defer the

assessment proceedings, till the pronouncement of the said judgment as the said judgment also would have a bearing on the present case before the first respondent.

27. The petitioners further submits that the Assistant Commissioner of Sales Tax, Nagpur passed the impugned assessment order under the Central Sales Tax Act, 1956 (CST Act, 1956) holding that the final product was appropriated at Nagpur in the form of Combat Missile as intended in the contract entered with Indian Armed Forces is dispatched from Nagpur to the customer after the pre-delivery inspection. Accordingly, the said authority determined the gross turnover of sales amounting to Rs.1237,48,48,492/- from which the inter-State branch transfer of Rs.441,89,97,934/- and Rs.100,75,09,459/- representing the tax paid under the CST Act, 1956 in the State of erstwhile united State of Andhra Pradesh respectively were deducted and the inter-State sales turnover of Rs.694,83,41,099/- was arrived at and the same was subjected to tax @ 12.50% amounting to Rs.86,85,42,637/-. Besides the above, the said authority had also levied interest amounting to Rs.30,93,97,471/-, thus demanding a total amount of Rs.117,78,81,602/-. The said authority arrived at the above tax liability after considering the VAT Input Tax Credit of Rs.58,507/-.

28. The petitioners further submit that while arriving at the inter-State sales turnover of Rs.694,83,41,099/-, the assessing authority has erroneously included an amount of Rs.109,08,26,697/-, which is the sum total of price of a Practice Missile amounting to Rs.11,60,00,000/- and price of a Training Missile amounting to Rs.22,75,71,697/- and price of three Combat Missiles which were imported from the petitioners' joint venture partner, namely NPOM amounting to Rs.74,72,55,000/-, which were sent to the petitioners' Nagpur branch merely for the purpose of despatching along with other warhead integrated Combat Missiles that were despatched from Nagpur unit.

29. It is in the above circumstances that this petition has been filed.

30. Mr. Sridharan, learned senior counsel appearing for the petitioners would submit that the impugned assessment order is contrary to law. It is entirely contrary to the settled principles, inasmuch as the goods if at all they can be treated as such, are not marketable. They are meant for the use by the Department for the safety and security of the country. It is, therefore, clear that though the Government of India places an order for the said missiles, the transactions cannot be treated as a normal sale. Thus, the sale of missiles to the Indian Armed Forces is not

exigible to tax. Since the missiles are procured, assembled and delivered to Indian Armed Forces pursuant to the specifications by the Union of India, then, the impugned assessment order erroneously assumes this to be another market transaction.

31. Mr. Sridharan submits that the assembly and production of Brahmos Missiles takes place at the Hyderabad facility. The parts of of missiles in a SKD condition, such as warheads, boosters, fuel etc. are transferred to Nagpur facility for storage purposes. The rest of the parts are retained at Hyderabad facility only. Further, as and when required, all parts except warheads are re-transferred to Hyderabad facility for assembling the missiles. Warhead at all times remains at Nagpur facility only. Mr. Sridharan has explained to us as to how a missile is assembled and in a very detailed manner and which takes approximately three to four weeks. The missiles assembled and canistered at Hyderabad facility are complete in all respects. In other words, the assembled missile has its own battery, propulsion system and laser guide etc. The completely assembled missile has its own destructive power due to the kinetic energy generated by the missile. In addition, the missile may carry warhead depending upon the use to which it will be put.

32. Mr. Sridharan explains to us as to why at Hyderabad this warheads cannot be fixed and fitted. The factory is in a civilian area. In terms of the Explosives Act, 1884 and its appurtenant rules, the warhead has to be, therefore, fitted at Nagpur. For that purpose, the canistered missile is transported to Nagpur facility of the petitioners for insertion of warhead. Mr. Sridharan has pointed out orally as also by a written note as to how after the missile is brought for fitment of warhead that insertion or fitment is done within a period of three to four days. After re-canistering, testing is undertaken on the missile, which lasts for three to four days. This re-canistered missile has a life span of approximately 10 years. Mr. Sridharan submits that out of the total missiles assembled at the Hyderabad facility, about 15% of the missiles are practice missiles, which do not carry the warhead. 5% of the missiles are technical missiles, which are not fully assembled and which are used for electronics testing and other research purposes. The remaining 80% missiles are Combat Missiles containing warhead and ready for deployment in a combat. Both the Practice and Combat Missiles are supplied to the Armed Forces. Mr. Sridharan submits that the cost of the missile is approximately Rs.25 crores in total subject to the currency exchange rates. Of this, the cost of the warhead procured is approximately 65 lakhs, namely, 2.6% of the total cost of the

missile. After explaining the process of despatch of the missile, Mr. Sridharan would submit that as all the sales have been effected from the Petitioners' manufacturing unit located at Hyderabad and in view of the peculiarity and sensitivity of the goods involved, the missile completed in all respects had been dispatched to its Nagpur unit for warhead integration and with clear subsequent instructions by PDI-JRI Program Note to dispatch the said missiles after warhead integration to the concerned unit of the Indian Armed Forces. Till such time the Nagpur branch would have no knowledge to whom the missile is to be sent. The Petitioner has treated the said transactions as inter-State sales of Missiles effected from its Hyderabad unit and accordingly charged and collected CST @14.5% and paid the same to its assessing authority namely the Assistant Commissioner (CT) (LTU), Saroornagar Division, Hyderabad, (earlier united State of Andhra Pradesh). However, in respect of Warhead integrated Combat Missiles supplied to the Indian Navy Unit located at Vishakhapatnam, relating to the second contract, the Petitioner charged and collected APVAT @ 14.5% and paid the same to its assessing authority namely the Assistant Commissioner (Ct) (LTU), Saroornagar, Division, Hyderabad (earlier united State of Andhra Pradesh), the third respondent herein. There is no dispute with respect to the same. The impugned assessment

order also records the fact that CST has been paid in the State of Andhra Pradesh.

33. Mr. Sridharan further submits that the missiles and Warheads are finished goods by themselves and cannot be termed as Semi finished goods.

34. The movement of goods has been made pursuant to an agreement of sale with the president of India.

35. Mr. Sridharan submits that, Brahmos has entered into an agreement with the President of India for sale of missile to Ministry of Defense. Pursuant to such agreement, Brahmos assembles the missile in Hyderabad. The Petitioner further submits that, due to the reason of the Hyderabad unit being situated in a civilian area, cainstered missile is transported to the Nagpur unit of the Petitioner for insertion of warhead.

36. Mr. Sridharan submits that, in the present facts of case, agreement for sale of missile has been entered into before manufacturing of missiles. Only pursuant to such agreement of sales, the Petitioner has assembled the goods and made further movements of the same.

37. Mr. Sridharan further submits that it is well settled principle that, the fact that property in goods transferred to a buyer in a destination state will not alter the nature of transaction till the time movement of goods has been undertaken pursuant to an agreement of sale. In the present case, movement of goods from the state of erstwhile united state of Andhra Pradesh has taken place pursuant to an agreement of sale. Accordingly, the transaction shall squarely fall within the ambit of inter-state sales.

38. Alternatively, Mr. Sridharan submits that the transaction between BrahMos and Ministry of Defense shall not fall within the purview of sales. The Petitioner submits that sale means transfer of general property in goods. In the present case, the property in goods has already been vested in the Government of India. The Petitioner has acted in the capacity of agent for the purpose of assembly of missiles and warheads. In other words, the impugned contract is a contract of service and not of sale.

39. The Petitioners place reliance on decision of Hon'ble Supreme Court in case of *Hindustan Aeronautics Limited V. State of Karnataka*¹, wherein it was held that, in the facts of that case, the property in the materials which are used in execution of the

¹ 1984 AIR 744

jobs entrusted to the contractor became the property of the Government before it was used. Accordingly, there was no sale between Hindustan Aeronautics and Government of India.

40. By placing reliance on the aforesaid decision, Mr. Sridharan submits that the transaction does not attract any further levy.

41. Mr. Sridharan has relied upon the following decisions in support of the above contentions:-

- (i) Commissioner of Commercial Taxes vs. Hindustan Aeronautics Ltd., 1972(29) STC 438
- (ii) Hindustan Aeronautics Ltd. vs. State of Orissa, 1984(55) STC 327.
- (iii) Shafeeq Shameem and Co. and Anr. vs. The state of Andhra Pradesh, 1964(15) STC 828.
- (iv) State of Uttar Pradesh and Ors. vs. Kores (India) Ltd., 1977(39) STC 8 (SC).
- (v) Sarvodaya Printing Press, Nagpur vs. State of Maharashtra, 1994 Mh. L. J. 1322.
- (vi) State of Maharashtra vs. Sarvodaya Printing Press Fine Art Printer (1999) 9 SCC 65.
- (vii) State of Tamil Nadu vs. Anandam Vishwanatham (1989) 1 SCC 613.
- (viii) Bharat Electronics Limited vs. Deputy Commissioner (CT) No. II, Division Vijaywada and Anr. (2011) 46 VST 179 (AP).
- (ix) State of Maharashtra vs. The Central Provinces Manganese Ore Co. Ltd., (1977) 39 STC 340.
- (x) Tata Iron and Steel Co. Ltd. vs. S. R. Sarkar, AIR 1961 SC 65.

- (xi) Indure Limited and Anr. vs. Commercial Tax Officer and Ors., (2010) 9 SCC 461.
- (xii) Oil India Ltd. vs. The Superintendent of Taxes and Ors. (1975) 1 SCC 733.
- (xiii) Union of India and Anr. vs. M/s. K. G. Khosla and Co. Ltd. and Ors., (1979) 2 SCC 242.
- (xiv) Sahney Steel and press Works Limited and Anr. vs. Commercial Tax Officer and Ors., (1985) 4 SCC 173.
- (xv) Deputy Commissioner of Agricultural Income Tax and Sales Tax, Ernakulam vs. Indian Explosives Ltd., (1985) 4 SCC 119.
- (xvi) Indian Oil Corporation Ltd. and Anr. vs. Union of India and Ors., 1980 (Supp) SCC 426.
- (xvii) K. G. Khosla and Co. vs. Deputy Commissioner of Commercial Taxes, AIR 1966 SC 1216.

42. On the other hand, Mr. Sonpal, learned Special Counsel appearing on behalf of the respondents, would support the impugned assessment order. He would submit that a writ petition under Article 226 of the Constitution of India, which challenges an assessment order, is not maintainable. He would submit that there are multiple remedies provided by the Maharashtra Value Added Tax Act, 2002/the Central Sales Tax Act, 1956 to challenge the impugned order and therefore, this court should dismiss the writ petition, on the ground of availability of alternate and equally efficacious remedy. Thirdly, he would submit that there are factual disputes and which cannot be decided in writ jurisdiction. This is not a case where any substantial question of

law and which is incapable of being decided and answered by the forums set up under the above Acts is raised. In these circumstances, we should not depart from the normal rule.

43. Without prejudice to the above and on merits as well, Mr. Sonpal would submit that a fair conclusion arrived at by the assessing officer cannot be termed as perverse or vitiated by any error of law apparent on the face of the record. Mr. Sonpal would submit that though the petitioners have tried to establish the movement of goods from Hyderabad to Nagpur to be in accordance with the contracts for supply of Combat Missiles to the Armed Forces and further that semi finished goods were transferred to Nagpur just for a finishing or a job work of warhead integration, yet, what has been discovered from their own records is that all the major components of missiles are imported and stored at Nagpur after their import from Russia. They are moved from Nagpur to Hyderabad for assembly as semi finished missile and the semi finished goods are then transferred from Hyderabad to Nagpur for warhead integration and final assembly of the Brahmos Missiles. Thus, the movement of finished goods has occasioned from the State of Maharashtra. Therefore, it is a inter-State sale from the State of Maharashtra. Mr. Sonpal submits that both situs of sale and the appropriation of the goods

is in the State of Maharashtra. The movement of finished goods, namely, Brahmos Supersonic Cruise Missile as intended to be supplied to the Defence Forces has occasioned from the State of Maharashtra. Therefore, Maharashtra is the appropriate State for the purpose of levy and collection of the Central Sales Tax of the transaction. That is how the dealer is assessed by considering the despatches of finished goods as sales from Nagpur. Mr. Sonpal has relied upon this factual aspect to submit that if the rest of the work and rather major one is carried out in the State of Maharashtra, then, this assessment order is in accordance with the settled principles and should not be interfered with. Mr. Sonpal has relied upon section 3 appearing in Chapter II of the Central Sales Tax Act, 1956, section 5 of the same and finally section 9 appearing in Chapter II, which is titled as "Levy and Collection of Tax and Penalties". Mr. Sonpal submits that it is the State of Maharashtra from which the movement of the goods commenced. For these reasons, he would submit that even on merits, there is no substance in the writ petition and it should be dismissed. Mr. Sonpal has placed reliance upon the judgment of the Hon'ble Andhra Pradesh High Court in the case of *Bharat Electronics Limited vs. Deputy Commissioner (CT), No. II Division, Vijaywada and Anr.*².

² (2011) 46 VST 179

44. For properly appreciating the rival contentions, we would first make a reference to the Central Sales Tax Act, 1956. It is an Act to formulate principles for determining when a sale or purchase of goods takes place in the course of inter-State trade or commerce or outside a State or in the course of imports into or export from India, to provide for the levy, collection and distribution of taxes on sales of goods in the course of inter-State trade or commerce and to declare certain goods to be of special importance in inter-State trade or commerce and specify the restrictions and conditions to which State laws imposing taxes on the sale or purchase of such goods of special importance shall be subject.

45. This Act extends to the whole of India. The definitions appear in Chapter I. Section 2(a) defines the term “appropriate State” to mean in relation to a dealer who has one or more places of business situated in the same State, that State and in relation to a dealer who has places of business situated in different States, every such State with respect to the place or places of business situated within its territory. The term business is defined in section 2(aa) in an inclusive manner. It reads as under:-

2(aa) “business” includes -

(i) any trade, commerce or manufacture, or any adventure or concern in the nature of trade, commerce or manufacture, whether or not such trade, commerce,

manufacture, adventure or concern is carried on with a motive to make gain or profit and whether or not any gain or profit accrues from such trade, commerce, manufacture, adventure or concern;

(ii) any transaction in connection with or incidental or ancillary to, such trade, commerce, manufacture, adventure or concern.

46. Similarly, for our purpose, the definition of the term “dealer” as appearing in section 2(b) is important. It reads as under:-

“2(b) “dealer” means any person who carries on (whether regularly or otherwise) the business of buying, selling, supplying or distributing goods, directly or indirectly, for cash or for deferred payment, or for commission remuneration or other valuable consideration, and includes -

(i) a local authority, a body corporate, a company, any co-operative society or other society, club, firm, Hindu undivided family or other association of persons which carries on such business;

(ii) a factor, broker, commission agent, *del credere* agent, or any other mercantile agent, by whatever name called, and whether of the same description as hereinbefore mentioned or not, who carries on the business of buying, selling, supplying or distributing, goods belonging to any principal whether disclosed or not; and

(iii) an auctioneer who carries on the business of selling or auctioning goods belonging to any principal, whether disclosed or not and whether the offer of the intending purchaser is accepted by him or by the principal or a nominee of the principal.

Explanation 1. - Every person who acts as an agent, in any State, of a dealer residing outside that State and buys, sells, supplies, or distributes, goods in the State or acts on behalf of such dealer as -

(i) a mercantile agent as defined in the Sales of Goods Act, 1930 (3 of 1930), or

(ii) an agent for handling of goods or documents of title relating to goods, or

(iii) an agent for the collection or the payment of the sale price of goods or as a guarantor for such collection or payment,

and every local branch or office in a State of a firm registered outside that State or a company or other body corporate, the principal office or headquarters whereof is outside that State, shall be deemed to be a dealer for the purposes of this Act.

Explanation 2. - A Government which, whether or not in the course of business, buys, sells, supplies or distributes, goods, directly or otherwise, for cash or for deferred payment or for commission, remuneration or other valuable consideration, shall except in relation to any sale, supply or distribution of surplus, un-serviceable or old stores or materials or waste products or obsolete or discarded machinery or parts or accessories thereof, be deemed to be a dealer for the purposes of this Act."

47. The term "goods" is defined in section 2(d), whereas, term "place of business" is defined in section 2(dd). Both are important and read as under:-

"2(d) "goods" includes all materials, articles, commodities and all other kinds of movable property, but does not include newspapers, actionable claims, stocks, shares and securities.

2(dd) "place of business" includes -

- (i) in any case where a dealer carries on business through an agent by (whatever name called), the place of business of such agent;
- (ii) a warehouse, godown or other place where a dealer stores his goods; and
- (iii) a place where a dealer keeps his books of account.

48. A perusal of these definitions would denote as to how the principles are formulated. These basic definitions would guide the formulation of these principles.

49. Chapter II is titled as "Formulation of Principles". These principles are formulated for determining when a sale or purchase of goods takes place in the course of inter-State trade or commerce or outside a State or in the course of import or export. The definitions to which we have made a reference above enable the legislature to formulate these principles in details. That is why section 3, which elaborates as to when a sale or purchase of goods is said to take place in the course of inter-State trade or commerce is important. That section reads as under:-

"3. When is a sale or purchase of goods said to take place in the course of inter-State trade or commerce. - A sale or purchase of goods shall be deemed to take place in the course of inter-State trade or commerce if the sale or purchase -

(a) occasions the movement of goods from one State to another; or

(b) is effected by a transfer of documents of title to the goods during their movement from one State to another.

Explanation 1. - Where goods are delivered to a carrier or other bailee for transmission, the movement of the goods shall, for the purposes of clause (b), be deemed to commence at the time of such delivery and terminate at the time when delivery is taken from such carrier or bailee.

Explanation 2. - Where the movement of goods commences and terminates in the same State it shall not be deemed to be a movement of goods from one State to another by reason merely of the fact that in the course of such movement the goods pass through the territory of any other State."

50. A perusal of this section would indicate as to how a sale or purchase of goods shall be deemed to take place in the course of inter-State trade or commerce if that sale or purchase occasions the movement of goods from one State to another or is effected by a transfer of documents, title of goods delivered, their movement from one State to another. There is an explanation below sub-clause (b), which would explain as to when clause (b) of section 3 would be applicable, particularly where the goods are delivered to a carrier or bailee for transmission. Therefore, it is the sale or purchase which must occasion the movement of goods or the sale or purchase is effected by a transfer of document of title to the goods delivered, their movement from one State to another. By section 4, the legislature points out as to when a sale or purchase of goods is said to take place outside a State. That section reads as under:-

“4. When is a sale or purchase of goods said to take place outside a State. - (1) Subject to the provisions contained in section 3, when a sale or purchase of goods is determined in accordance with section 3, when a sale or purchase of goods is determined in accordance with sub-section (2) to take place inside a State, such sale or purchase shall be deemed to have taken place outside all other States.

(2) A sale or purchase of goods shall be deemed to take place inside a State, if the goods are within the State -

(a) in the case of specific or ascertained goods, at the time the contract of sale is made; and

(b) in the case of unascertained or future goods, at the time of their appropriation to the contract of sale by the seller or by the buyer, whether assent of the other party is prior or subsequent to such appropriation.

Explanation. - Where there is a single contract of sale or purchase of goods situated at more places than one, the provisions of this sub-section shall apply as if there were separate contracts in respect of the goods at each of such places."

51. Therefore, by sub-section (1) of section 4, which is subject to the provisions contained in section 3, when a sale or purchase of goods is determined in accordance with sub-section (2) to take place inside a State, such sale or purchase shall be deemed to have taken place outside all other States. By sub-section (2), the legislature, by a deeming provision, indicates as to when a sale or purchase of goods shall be deemed to take place inside a State. If the goods are within the State in the case of specific or certain goods at the time the contract of sale is made and in the case of un-ascertained or future goods at the time of their appropriation to the contract of sale by the seller or by the buyer, whether assent of the other party prior or subsequent to such appropriation, such sale or purchase of goods shall be deemed to take place inside a State.

52. Since Mr. Sonpal relies upon section 5, we would reproduce it:-

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

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

(3) Notwithstanding anything contained in sub-section (1), the last sale or purchase of any goods preceding the sale or purchase occasioning the export of those goods out of the territory of India shall also be deemed to be in the course of such export, if such last sale or purchase took place after, and was for the purpose of complying with, the agreement or order for or in relation to such export.

(4) The provisions of sub-section (3) shall not apply to any sale or purchase of goods unless the dealer selling the goods furnishes to the prescribed authority in the prescribed manner a declaration duly filled and signed by the exporter to whom the goods are sold in a prescribed form obtained from the prescribed authority.

(5) Notwithstanding anything contained in sub-section (1), if any designated Indian carrier purchases Aviation Turbine Fuel for the purposes of its internal flight, such purchase shall be deemed to take place in the course of the export of goods out of the territory of India.

Explanation. - For the purposes of this sub-section, “designated Indian carrier” means any carrier which the Central Government may, by notification in the Official Gazette, specify in this behalf.”

53. A reading of this provision would indicate as to how a sale or purchase of goods is said to take place in the course of import or export.

54. Then comes Chapter III, which deals with inter-State sales tax.

55. We, in this case, are not concerned with an issue as to whether the subject transaction can be said to be intra-State or inter-State. We have proceeded on the footing that this is an inter-State sale. The situs of the inter-State sale and therefore, the liability of the dealer to pay tax to a particular State, is the issue involved before us.

56. In that regard, one must notice the provisions of section 6, which deals with liability to pay tax on inter-State sale. Therein, by sub-section (1), every dealer shall be liable to pay tax under the Central Sales Tax Act, 1956 on all sales of goods other than electrical energy effected by him in the course of inter-State trade or commerce during any year on and from the date so notified. By sub-section (1-A) of section 6, the liability of the dealer to pay Central Sales Tax on a sale of any goods effected by him in the course of inter-State trade or commerce arises even if no tax would have been leviable whether on the seller or the purchaser under the sales tax law of the appropriate State if that sale had taken place inside that State. Which inter-State sale and in relation to goods covered by sub-section (3) of section 8 shall be exempt from tax under the CST Act is then set out in sub-section

(2) of section 6. By sub-section (3) of section 6 and which is the provision overriding anything contained in the Act, no Central Sales Tax is payable by any dealer in respect of sale of any goods made by such dealer and which sale takes place within the purview of sub-section (3) of section 6. Thus, this whole Chapter provides for the inter-State sales tax. In this also fall sections 7, 8 and 9 and which provide for the registration of dealers, rates of tax and levy and collection of tax and penalties. As far as the sales covered by clause (a) or (b) of section 3, the tax payable by any dealer on such sales shall be levied by the Government of India and tax so levied shall be collected by that Government in accordance with the provisions of sub-section (2) of section 9, in the State from which the movement of goods commenced. We would reproduce section 9 so as to understand the arguments of both sides properly:-

“9. Levy and collection of tax and penalties. - (1) The tax payable by any dealer under this Act on sales of goods effected by him in the course of inter-State trade or commerce, whether such sales fall within clause (a) or clause (b) of section 3, shall be levied by the Government of India and the tax so levied shall be collected by that Government in accordance with the provision of sub-section (2), in the State from which the movement of the goods commenced:

Provided that, in the case of a sale of goods during their movement from one State to another, being a sale subsequent to the first sale in respect of the same goods and being also a sale which does not fall within sub-section (2) of section 6, the tax shall be levied and collected -

(a) Where such subsequent sale has been effected by a registered dealer, in the State from which the registered dealer obtained or, as the case may be, could have obtained, the form prescribed for the purposes of sub-section (4) of section 8 in connection with the purchase of such goods; and

(b) where such subsequent sale has been effected by an unregistered dealer in the State from which such subsequent sale has been effected.

(2) Subject to the other provisions of this Act and the rules made thereunder, the authorities for the time being empowered to assess, re-assess, collect and enforce payment of any tax under general sales tax law of the appropriate State shall, on behalf of the Government of India, assess, re-assess, collect and enforce payment of tax, including any interest or penalty, payable by a dealer under this Act as if the tax or interest or penalty payable by such a dealer under this Act is a tax or interest or penalty payable under the general sales tax law of the State; and for this purpose they may exercise all or any of the powers they have under the general sales tax law of the state; and the provisions of such law, including provisions relating to returns, provisional assessment, advance payment of tax, registration of the transferee of any business, imposition of the tax liability of a person carrying on business on the transferee of, or successor to, such business, transfer of liability of any firm or Hindu undivided family to pay tax in the event of the dissolution of such firm or partition of such family, recovery of tax from third parties, appeals, reviews, revisions, references, refunds, rebates, penalties, charging or payment of interest, compounding of offences and treatment of documents furnished by a dealer as confidential, shall apply accordingly:

Provided that if in any state or part thereof there is no general sales tax law in force, the Central Government may, by rules made in this behalf make necessary provision for all or any of the matter specified in this sub-section.

(2-A) All the provisions relating to offences, interest and penalties (including provisions relating to penalties in lieu of prosecution for an offence or in addition to the penalties or punishment for an offence but excluding the provisions relating to matters provided for in sections 10

and 10-A of the general sales tax law of each State shall, with necessary modifications, apply in relation to the assessment, re-assessment, collection and the enforcement of payment of any tax required to be collected under this Act in such State or in relation to any process connected with such assessment, re-assessment, collection or enforcement of payment as if the tax under this Act were a tax under such sales tax law.

(2-B) If the tax payable by any dealer under this Act is not paid in time, the dealer shall be liable to pay interest for delayed payment of such tax and all the provisions for delayed payment of such tax and all the provisions relating to due date for payment of tax, rate of interest for delayed payment of tax, of the general sales tax law of each State, shall apply in relation to due date for payment of tax, rate of interest for delayed payment of tax, and assessment and collection of interest for delayed payment of tax under this Act in such States as if the tax and the interest payable under this Act were a tax and an interest under such sales tax law.

(3) The proceeds in any financial year of any tax, including any interest or penalty levied and collected under this Act in any State (other than a Union Territory) on behalf of the Government of India shall be assigned to the State and shall be retained by it; and the proceeds attributable to Union Territories shall form part of the Consolidated Fund of India.”

57. Sub-section (1) of section 9, in clearest terms, states that the tax levied on sales of goods in the course of inter-State trade or commerce shall be collected by that Government in accordance with the provisions of sub-section (2), in the State from which the movement of the goods commenced. We are not concerned in this matter with the subsequent sale.

58. As far as the essential ingredients of inter-State trade are concerned, they are summarised by the Hon'ble Supreme Court of

India in the five Judge Bench decision in the Case of *State of Andhra Pradesh vs. National Thermal Power Corporation Limited and Ors.*³. Para 24 of this judgment reads as under:-

“24. It is well settled by a catena of decisions of this Court that a sale in the course of inter-State trade has three essential ingredients: (i) there must be a contract of sale, incorporating a stipulation, express or implied, regarding inter-State movement of goods; (ii) the goods must actually move from one State to another, pursuant to such contract of sale; the sale being the proximate cause of movement; and (iii) such movement of goods must be from one State to another State where the sale concludes. It follows as a necessary corollary of these principles that a movement of goods which takes place independently of a contract of sale would not fall within the meaning of inter-State sale. In other words, if there is no contract of sale preceding the movement of goods, obviously the movement cannot be attributed to the contract of sale. Similarly, if the transaction of sale stands completed within the State and the movement of goods takes place thereafter, it would obviously be independently of the contract of sale and necessarily by or on behalf of the purchaser alone and, therefore, the transaction would not be having an inter-State element. Precedents are legion; we may briefly refer to some of them. In *English Electric Company of India Ltd. v. Deputy Commercial Tax Officer*, 1977(1) SCR 631, this Court held that when the movement of the goods from one State to another is an incident of the contract it is a sale in the course of inter-State sale and it does not matter which is the State in which the property passes. What is decisive is whether the sale is one which occasions the movement of goods from one State to another. In *Union of India v. K. G. Khosla and Co. Ltd.*, (1979) 2 SCC 242, it was observed that a sale would be an inter-State sale even if the contract of sale does not itself provide for the movement of goods from one State to another, provided, however, that such movement was the result of a covenant in the contract of sale or was an incident of the contract. Similar view was expressed in *M/s. Sahney Steel and Press Works Ltd. and Anr. vs. Commercial Tax Officer and Others* (1985) 4 SCC 173. In *Manganese Ore (India) Ltd. v. The Regional Assistant Commissioner of Sales Tax, Jabalpur*, 1976(2) SCC 44, it was observed that so far as Section 3(a) of the C.S.T. Act is concerned there is no distinction between

³ AIR 2002 SC 1895

unascertained or future goods and goods which are already in existence, if at the time when the sale takes place these goods have come into actual existence.”

59. Hence, there must be a contract of sale, incorporating a stipulation as found in Ingredient No. 1 by the Hon'ble Supreme Court of India regarding inter-State movement of goods. The goods must actually move from one State to another pursuant to such contract of sale and such movement must be from one State to another, where the sale concludes.

60. In an earlier judgment of the Hon'ble Supreme Court of India, in the case of *Bharat Heavy Electrical Limited etc. vs. Union of India and Ors.*⁴, the Hon'ble Supreme Court of India, after analysing all the provisions of the Central Sales Tax Act, 1956 and particularly section 9, held as under:-

17. The aforesaid survey of the relevant provisions of the Act clearly shows that Sections 3, 4, 5, 9(1), 14 and 15 pertain to and deal with distinct topics and different aspects of Articles 286 and 269. It follows that if a question arises whether a sale is an inter-State sale or not, it has to be answered with reference to and on the basis of Section 3 and Section 3 alone. Section 4, or for that matter Section 5, is not relevant on the said question - See the Constitution Bench decision in *Tata Iron and Steel Company Limited, Bombay v. S. R. Sarkar and Ors.* (1960) 11 S.T.C. 655 and the decisions in *Manganese Ore (India) Limited v. The Regional Assistant Commissioner* (1976 (3) S.C.R.99 and *Union of India v. K. S. Khosla and Company Limited* (1979) 43 S.T.C.457. Similarly, where the question arises, in which State is the tax leviable, one must look to and apply the test in Section 9(1); no other provision is relevant on this question.

4 AIR 1996 SC 1854

18. We may at this stage refer to the decision of the Bombay High Court in Commissioner of Sales Tax v. Barium Chemicals Limited (1981) 48 S.T.C. 121. A particular transaction of inter-State sale was subjected to Central Sales Tax in Andhra Pradesh. The same sale was again sought to be taxed under Central Sales Tax Act in Maharashtra, which was questioned. The High Court adopted the following approach: Central Sales Tax is levied and Collected by the Central Government; it is immaterial in which State it is collected; it cannot be levied or collected twice over; the State Governments are merely agents of the Central Government in the matter of levy and collection of Central Sales Tax; if so, once levied and collected in one State, rightly or wrongly it cannot be levied and collected in another State. In our opinion, this may be an over-simplification of the matter. May be from the point of view of the assesses, this approach is sound enough but from the point of view of the States keeping Article 269 in mind and the provisions of the Central Sales Tax acts this may not be correct. Section 9(1) specifies the State wherein Central Sales Tax shall be levied and collected and the Central Sales Tax has to be levied and collected in that State and in no other State. The approach of the Bombay High Court makes Section 9(1) which is enacted pursuant to Section 269(2), as pointed out hereinabove otiose and superfluous. It would not be proper to say in the light of above constitutional and statutory provisions that the dispute as to in which State is a particular inter-State sale is to be taxed is a matter between the States and that so far as the assessee is concerned, it is enough if he pays the tax at one place whether it is really leviable in that State as per Section 9(1) or not. The law requires that it should be levied and collected in the State from which the movement of goods commences. If a dispute arises in which State is the tax lawfully leviable, the authorities under the Act have got to decide it. If, in a given case, an assessee says that the particular transaction which is sought to be taxed in State 'A' has already been taxed in State 'B', nothing prevents him from impleading the State " in proceedings in State 'A' and have the matter decided in the presence of all parties. It must be remembered that while acting under Central Sales Tax Act, the State machinery acts as the machinery of the Central Government and not as the machinery of the State Government; in law, it is as if it belongs to Central Government. This view of ours gets re-inforced if one keeps the provisions in Section 8(2A) of the Central Sales Tax Act in view.

61. Hence, we would have to decide the present case on the touchstone of the above principles and the interpretation placed by the Hon'ble Supreme Court of India on the relevant provisions of the Central Sales Tax Act, 1956.

62. At the outset, we must clarify that the learned senior counsel appearing for the petitioners would submit that for the present petition, the petitioners proceed on the footing that though uniquely placed, the petitioners have received an order of missiles from the Ministry of Defence, Government of India. That was placed at its headquarters at New Delhi. That such missiles are assumed to be goods for the purpose of the Central Sales Tax Act, 1956. The further assumption on which the petitioners have proceeded is that the Central Sales Tax Act, 1956 could be invoked and applied to the transaction and deal in the present case. That the petitioners and consequently those solitary share holders, representing India and Russia together make this corporate entity, a dealer for the purposes of the Central Sales Tax Act, 1956. Therefore, there was indeed a case made out for invoking section 3 of the Central Sales Tax Act, 1956. Finally, the petitioners proceeded on the assumption that the State of Andhra Pradesh could have taxed the transactions even though that position is seriously disputed by the petitioners and they have

filed a writ petition challenging the assessment orders passed against them by the Sales Tax/VAT Commissionerate of the State of Andhra Pradesh. Hence, without in any manner prejudicing the contentions raised in that pending writ petition, the petitioners have submitted to the jurisdiction of the assessing authority and further to this court as they had no other remedy to challenge the assessment order. That raising a substantial question and of law that they have approached this court.

63. Having cleared the position as above, we now turn to the basic facts, which are undisputed.

64. What we have before us is an order of assessment. That order of assessment presupposes that there is an inter-State sale. We have before us an assessment order in which the assessing officer proceeds on the footing that the orders for the supply of Brahmos Missiles are from the Defence Ministry to the head office at Delhi. Accordingly, the components are imported from Russia and stored at Nagpur. As per the delivery schedule, the components are transferred to Hyderabad works for the purpose of job work of assembly and fixing on the SKD articles. The semi finished job is then transferred to Nagpur works from Hyderabad for carrying out warhead integration and final assembly of the Brahmos Combat Missiles, its final sealing on excise job work

challan. After carrying out leak test and electrical checks, the fully finished Combat Missile is cleared from Nagpur and despatched to various locations outside the State of Maharashtra without making payment of excise duty with prior permission of the Commissioner of Central Excise as per the provisions of Rule 16B of the Central Excise Rules. The excise duty on the said transaction is deposited at Hyderabad. That is as per the provisions of the Central Excise Act, 1944. Thus, the understanding of the assessing officer is that the petitioners have attempted to establish that the movement of goods from Hyderabad to Nagpur is in accordance with the contract for supply of Combat Missiles to the Armed Forces. That the semi finished goods were transferred to Nagpur just for job work of warhead integration. That is why the dealer has placed reliance on various judgments to establish the legality of the movement and remittance of tax in the State of Andhra Pradesh. However, the assessing officer proceeds on the footing that in all the judgments relied upon, the movement was of finished goods from one State to another to effect their delivery to the customers. The conclusions drawn in those judgments were on the basis of these specific facts of finished goods being transferred from one State to another. These decisions did not cover a situation when the semi finished goods were transferred to another State for conducting

further manufacturing process and the delivery from that State was never subject matter before these courts.

65. The assessing officer holds that the movement of semi finished goods from Hyderabad to Nagpur cannot be construed as a mere stop over in the inter-State movement as projected by the petitioners/dealer. The final product was appropriated at Nagpur in the form of a missile as per the contract entered with Armed Forces, which is despatched from Nagpur to the customer after pre-delivery inspection. This is not a branch transaction of warhead from Nagpur to Hyderabad as claimed by the dealer (petitioners) before us in the audit report. Hence, that cannot be allowed. It is held that all major components of missiles are imported and are stored at Nagpur (including warheads) after the import from Russia. They are moved from Nagpur to Hyderabad for their assembly as semi finished missiles and the semi finished job is again transferred from Hyderabad for warhead integration and final assembly of Brahmos Missiles. On this basis, the ultimate conclusion is that the movement of finished goods, namely, Brahmos Supersonic Missiles, as intended to be supplied to the Defence Forces, has occasioned from the State of Maharashtra. As such, it is an inter-State sale from the State of Maharashtra. The assessing officer concludes that both situs of

sales and appropriation of the goods is effected within the State of Maharashtra. Hence, the Maharashtra State is the appropriate State for the purpose of levy and collection of the Central Sales Tax on the transactions. It is on that footing that the assessment order has been passed.

66. We are of the opinion that there is a fundamental error, in the understanding of the assessing officer, of the provisions of the Central Sales Tax Act, 1956. We had to elaborately analyse the provisions only for clearing certain doubts of the authorities, particularly in the State of Maharashtra. They have failed to notice the salient features of the Central Sales Tax Act, 1956. In our view, the understanding of the assessing officer that it is the movement of finished goods, which would be the determining and conclusive factor is legally flawed. It is untenable, inasmuch as the presumption that all the decided cases speak about and dealt with movement of finished goods from one State to another and not semi finished goods. It is this erroneous presumption that has resulted in a conclusion completely vitiated in law. There is non application of mind to very crucial and relevant factors, which govern the applicability of the Central Sales Tax Act to the inter-State trade and commerce.

67. In support of our above observations and conclusions, we can safely rely upon a judgment of the Hon'ble Supreme Court of India in the case of *Bharat Heavy Electrical* (supra). The factual background, in which this decision was rendered may now be referred. We have reproduced the governing principles and tests, which have been culled out in this decision from the earlier judgments of the Hon'ble Supreme Court of India on the point. In part II of this judgment, the Hon'ble Supreme Court of India refers to the facts in great details as under:-

20. Bharat Heavy Electricals Limited [BHEL] is a major public sector corporation wholly owned by the Government of India. It has its units in several places viz., Haridwars Jhansi, Bhopal, Bangalore, Ramachandrapuram [Andhra Pradesh - near Hyderabad], Ranipet and Tiruchi [Tamil Nadu] and so off. Each of these units appears to specialise in the manufacture of particular type or class of machinery - in the interest of avoiding duplication and enhancing efficiency. Generally speaking, BHEL is engaged in the manufacture of heavy electrical machinery including equipment and material necessary for setting up power plants. Its head Office is at New Delhi. It appears that whenever it undertakes to set up a power-generation plant, it enters into two contracts, one for the supply of machinery and equipment called "the Supply Contract" and the other for installation or erection of the plant called "Service Contract". Once the job is undertaken, the Head Office sends instructions to relevant units to manufacture the appropriate machinery. For illustrating its method of working, we may take a concrete instance, viz., the setting up of five captive power plants [120 MW each] for the aluminium smelter complex at Angul, Orissa for the National Aluminium Company Limited, Bhubaneswar [NALCO], which too is a public sector undertaking. The facts relating to this contract are the following: on August 1, 1981, NALCO invited tenders for the said work. BHEL also submitted its tender. It was accepted. NALCO issued a Letter of Intent [LOI] on June 3, 1982 specifying the time-schedule for the work. The units were to be made ready for

commercial operation between March 1985 and November 1986. Pursuant to the LOI, BHEL commenced the work. It instructed its several units to manufacture the requisite machinery and equipment. Formal contracts, viz., supply contract and service contract were entered into much later, i.e., on March 15, 1985. The contract price under the supply agreement is Rs.295.37 crores. The supply contract specifies the price of each of the major items of machinery/equipment separately. It also provides the manner in which the contracted price was payable by NALCO. Now, what happened is this: Tiruchi unit, it appears, is engaged mainly in the manufacture of boiler systems. It was designated as the executing agency for the job at Angul including the responsibility of manufacturing and supplying the boiler systems required for setting up the power plants at Angul. The boiler system comprises innumerable parts and components, some of which are manufactured at the Hyderabad unit. The Tiruchi unit accordingly called upon the Hyderabad unit to manufacture those components/parts. The Hyderabad unit manufactured them and sent some of those parts/components to Tiruchi for being incorporated into the boiler system and sent the remaining directly to Angul Orissa to be incorporated into the boiler system at the work-site. According to the practice uniformly followed by BHELs and accepted by the Andhra Pradesh Government the parts components manufactured by the Hyderabad unit for incorporation in the boiler systems were treated as branch transfers not involving an element of sale, irrespective of the fact whether such parts/components were sent to Tiruchi or to Angul. Conversely, if the Tiruchi unit manufactured any parts/components to be incorporated in the machinery or system, the manufacture of which was entrusted to Hyderabad units the despatch of such parts/components from Tiruchi to Hyderabad unit or the work-site were treated as branch transfers and not as sales. The tax was levied by the State in which the main machinery system was manufactured. No tax was levied by the State wherein the parts components were manufactured and sent for incorporation into the main machinery or system manufactured in other States. From the year 1984, however, the State of Andhra Pradesh started levying and demanding Central Sales Tax upon the value of the parts and components which were manufactured at Hyderabad unit and sent to Tiruchi or Angul as the case may be for incorporation into boiler system manufactured by Tiruchi unit. BHEL protested against the said levy. It submitted that it has been paying the Central Sales Tax upon the value of the entire boiler

system manufactured by the Tiruchi unit in the Tamil Nadu State and that if Central Sales Tax is levied upon the parts and components which were manufactured at Hyderabad and sent to Tiruchi or Angul for incorporation into the boiler system, it would amount to double taxation insofar as the said parts and Components are concerned. According to it, they were merely branch transfers. The Andhra Pradesh State did not agree. Similar stand was taken by other States as well and assessment proceedings were in progress in various States. It is at that stage that BHEL approached this Court by way of Writ Petition (C) No.1608 of 1987 under Article 32 of the Constitution complaining that more than one State is taxing the same sale under the provision of the Act, which is making its functioning difficult. It submitted that such simultaneous taxing is Creating an uncalled for financial burden upon it. It requested the Court to give appropriate directions to ensure that an inter-State sale is not taxed by more than one State.

When the writ petition came up for hearing, it was brought to our notice that the Andhra Pradesh Sales Tax Appellate Tribunal has decided the said dispute relating to certain assessment years and that Tax Revision Cases preferred by BHEL were pending in the Andhra Pradesh High Court. The judgment of the Andhra Pradesh Tribunal was also placed before us. The Andhra Pradesh Tribunal had taken the view that insofar as the parts and components manufactured in the Andhra Pradesh unit and despatched to work-site at Angul were concerned, they must be treated as inter-State sales taxable in Andhra Pradesh State inasmuch as the said goods moved from Andhra Pradesh pursuant to the supply contract which was indeed a contract of sale. So far as the parts and components which were sent to Tiruchi are concerned, the Tribunal held that they cannot be treated to have been sold in the course of inter-State trade or commerce but that they represent merely branch transfers. While the State of Andhra Pradesh did not prefer any tax revision against the judgment of the Tribunal, BHEL did, which meant that the decision of the Tribunal insofar as it held that the despatch of parts/components to Tiruchi constituted branch transfers became final. The only question in the said Tax Revision Cases before the Andhra Pradesh High Court, therefore, was whether the Tribunal was right in holding that the despatch of parts/components from the Andhra Pradesh Unit to Angul for incorporation into the boiler system at the work-site represented inter-State sales and

whether they were taxable in the State of Andhra Pradesh. The High Court examined the said question at length and dismissed the Tax Revision Cases filed by BHEL agreeing with the view taken by the Tribunal, though on a different reasoning. Civil Appeals Nos. 5369-75 of 1996 are preferred against the judgment of the Andhra Pradesh High Court in the aforesaid Tax Revision Cases.

21. Civil Appeals Nos.5362-68 of 1996 arise from the judgment of the Andhra Pradesh High Court rendered in a batch of writ petitions filed by BHEL. The writ petitions raised the very same dispute as was involved in the Tax Revision Cases aforesaid with this difference: BHEL impleaded the States of Tamil Nadu, Uttar Pradesh, Karnataka Madhya Pradesh, Delhi and Union of India in addition to the State of Andhra Pradesh as respondents to the writ petitions and also claimed for a direction to the respondents to adjust the Central Sales Tax collected by them in such a manner that the amount is kept, or remitted to the State, which is lawfully entitled to levy it and the States no entitled to levy it do not keep the tax amounts collected by them. The batch of writ petitions have been disposed of by the High Court following its decision in the Tax Revision Cases. The High Court has, however, declined to give a direction for adjustment of tax as between the States as asked by BHEL mainly on the ground that this Court was seized of the matter. It left the matter to this Court.

22. Whether a particular sale is an inter-State sale or an inter-State sale is essentially a question of fact. Perhaps, it may be more appropriate to say that it is a mixed question of fact and law. It is, therefore, necessary to ascertain the factual position first. In Civil Appeals Nos.5369-75 of 1996 and 5362-68 of 1996, it is this: whenever BHEL enters into a supply contract with a party, it designates one of its units as the executing unit. That is treated as the main unit executing the work. Sometimes this is not done and each unit is entrusted a particular job. But it may happen that the executing unit does not manufacture all the parts and components which are required for completing the job entrusted to it. It, therefore, requests other units of BHEL to manufacture the parts and components required by it and to despatch the same. Some of the parts and components so manufactured by other units are sent directly to the executing unit for being incorporated into the main machinery/system while some parts and components are despatched directly to the

work-site. To revert to NALCO project aforementioned, referred to hereinbefore, this is exactly what had happened. Tiruchi unit was supposed to be the executing unit. But some parts and components required for the boiler system and other equipment which was the responsibility of the Tiruchi unit to manufacture were being manufactured at the Hyderabad unit. At the request of the Tiruchi unit - or on the instructions of the Head Office, as the case may be - the Hyderabad unit manufactured those parts and components and despatched some of them to Tiruchi and some of them directly to Angul in Orissa [work-site]. The consideration stipulated in the supply contract was payable in the manner provided therein.

.....

24. The parts/components, i.e., the goods in question, did move from the State of Andhra Pradesh to the State of Orissa - or West Bengal, as the case may be - and the said movement is occasioned by the supply contract entered into by BHEL which is in truth a contract of sale. The manner in which and the documentation under which these goods were sent to Angul - in particular, Clause 3.3.0 of the Supply Contract - do clearly establish that it was not a case of branch transfer but one of sale of the said goods to NALCO, pursuant to the supply contract. Further, because the movement of the said goods has commenced in the State of Andhra Pradesh, it is in the State of Andhra Pradesh that the Central Sales Tax is leviable according to Section 9(1) of the Act. We therefore, agree with the view taken by the Andhra Pradesh High Court that in the facts and circumstances concerning NALCO and NTPC [Farakka] contracts and the terms thereof, the direct despatch of goods by the Hyderabad unit to Angul or Farakka constitutes an inter-State sale with in the leaning of Section 3(a) and that tax thereon is leviable in the State of Andhra Pradesh according to Section 9(1) of the Act.

68. From the above position, we do not see how the assessing officer in this case concludes that none of the decisions cited before him deal with a situation when the semi finished goods traveled from one State to another or that components and parts to manufacture the ultimate or final product are not supplied by

various locations of the dealer in several States. Therefore, if one does not dispute the factual position that there is a headquarter of the petitioners at New Delhi, it is that headquarter which receives orders for supply of Combat and other Missiles. It is in pursuance and furtherance of the execution of such an order that the requisite steps are taken. Therefore, it is clear that it is the establishment at Hyderabad, where the components are assembled, which makes the missiles. For the missile to be a Combat Missile, the warhead integration has to take place. Meaning thereby a warhead has to be fixed and fitted on this missile. That is dependent upon the deployment of the missile. After that warhead is fixed, the missile is then taken to the establishments of the Ministry of Defence/Armed Forces. They are either taken for the purposes of training or for Combat Operations. It is in these circumstances that the petitioners rightly contend before us that from their manufacturing unit at Hyderabad, which was established in the year 2001 with a manufacturing facility operational from 2007-08, that the missile takes shape. It has been pointed out by the petitioners that from 2001-08, the petitioners were importing fully integrated missiles from its joint venture partner NPOM, Russia. They were effecting the sales of these imported fully integrated missiles to the Indian Armed Forces. On the completion of the manufacturing facility in

the year 2007-08, the petitioners have been importing missiles in SKD condition, assembling them with certain bought out items in the State of Telangana and have been effecting sales to the Indian Armed Forces. The assembly and production of the Brahmos Missiles takes place at the facility in Hyderabad. After importing all parts of missile in SKD condition, certain parts, such as warheads, boosters, fuel etc. are transferred to Nagpur facility for storage purpose. There may be a slight dispute here and there, inasmuch as the respondents would contend that all the parts of the missiles in SKD condition arrive at Nagpur, they go to Hyderabad for the above activity, namely assembly, production and thereafter the missile is received for warhead integration at Nagpur. However, as the petitioners would contend, there is no dispute that the warhead at all times remains at Nagpur facility only. It is in these circumstances and by pointing out the further undisputed factual position that the location of the petitioners' facility at Hyderabad is in a civilian area, which makes it impossible for them to fit the warhead thereat that the assembled missile is brought to Nagpur for insertion of warhead. How that eventuality arises and for what purpose has also been explained in great detail.

69. The assumption of the assessing officer also overlooks the fact that the warhead is a complete unit when imported from Russia. The warhead is inserted in the front portion of the missile at the Nagpur facility. It is for inserting the warhead that the missile is de-canistered and re-pressurized. The front portion of missile is detached and the warhead is fitted. That is how the missile is ready for use in situation like a war. The process has also been explained to us in detail by Mr. Sridharan. He has relied upon the written submissions.

70. It is in these circumstances that we have no hesitation in agreeing with the petitioners that the movement of goods has been made pursuant to an agreement of sale with the President of India. The Ministry of Defence receives the missiles for use in times of war and also for training. Once the matter is covered by the judgment of the Hon'ble Supreme Court of India and noted above, then, we do not think that any other view is possible.

71. The view taken by the assessing officer cannot be supported in law. The assessing officer ought to have appreciated that this is not a case where there is any dispute about facts. Further, there is no dispute as to whether this is a inter-State or intra-State sale. Clearly, both sides understood the controversy as emanating from the admitted inter-State sale. Therefore, it is

only a question of the authority of the agent to collect the tax on behalf of the Central Government. Once the Hon'ble Supreme Court of India has clarified that this is not a tax which could be said to be levied in its true sense by the State Government, it is only the Central Sales Tax, which has to be collected and the authority in that regard was in issue. Hence, we do not see any justification in law for the distinction made by the assessing officer about the goods being brought in semi finished or finished status. In the facts and circumstances, such a dispute does not arise.

72. Mr. Sonpal, though aware of the above mandate, would still argue that this is a case where the goods are sent for processing to Nagpur. At Nagpur, they are received in semi finished stage and the rest of the work is done at Nagpur. Therefore, he would submit that this is a case pertaining to a complete act in the state of Maharashtra. He would submit that the entire act is performed in the State of Maharashtra and therefore, it is that State which has authority in terms of section 9(1) of the Central Sales Tax Act, 1956.

73. Mr. Sonpal's reliance on the judgment of a Division Bench of Andhra Pradesh High Court is entirely misplaced. In the case before the Andhra Pradesh High Court, the petitioner, a public

sector undertaking, engaged in the manufacture and sale of defence and scientific goods, had several units spread all over the country. The issue was that there was a unit of the said petitioner at Machilipatnam. There, the manufacturing activity took place. The goods manufactured in that unit were transferred to the units of the petitioner in the State of Punjab, Maharashtra, Tamilnadu and Karnataka. It was the petitioner's case that the goods are not sold by the Machilipatnam unit, but are only incorporated in the equipments manufactured by other units and eventually sold therefrom to the end customers. It was the case of the petitioner that the respective units, which incorporate the components manufactured and transferred by the Machilipatnam unit pay sales tax on the price of finished goods including the cost of components manufactured and supplied to them by the Machilipatnam unit. The assessment order held that the transaction is a inter-State sale from Andhra Pradesh to other States. The argument of the petitioner was that these are stock transfers and not inter-State sales. It is in these circumstances that the conclusion in the assessment order as also the revisional order was assailed before the Andhra Pradesh High Court. It is in dealing with such a controversy that the Andhra Pradesh High Court made the observations in para 15. Therefore, if the goods are sold as they are and are not incorporated in or did not form

part of other goods, would the question of such transfer of goods, attributing levy of tax under the Central Sales Tax Act, 1956, as inter-State sale, arise. These observations are made in the context of the facts before the Andhra Pradesh High Court, namely, that the Machilipatnam unit supplied the goods, which are mere components. They got incorporated in the goods manufactured by other units located outside the State of Andhra Pradesh. Thus, the goods transferred by Machilipatnam unit are not sold to Armed Force as they are. Mr. Sonpal would rely upon these observations in isolation and without appreciating the factual background. Before us, the controversy is not like the one in the Andhra Pradesh case. Before us, it is agreed that the petitioners manufactured missiles. These missiles are manufactured at the unit at Hyderabad. These missiles, only for warhead integration, are brought to Nagpur. The issue raised was that without warhead integration, the missile is not complete and cannot be used to target any particular place or point. The argument was that the components imported from Russia are brought to Nagpur, but the Revenue could not prove that the entire missile is manufactured at Nagpur. That the unit at Hyderabad assembles these components brought from Russia and makes a missile. Once the missile is the identifiable goods and it is in that form that it is sold, but the issue is whether the warhead

integration makes it a different or distinct article or goods, then, we do not think any assistance can be derived from the judgment of the Andhra Pradesh High Court. That is distinguishable on facts.

74. The attempt of the Revenue before us was demonstrated by filing an affidavit in reply stating that there is indeed a factual matter involved and we should not entertain the writ petition. Once we have held that there is a fundamental and basic legal error so also the assumptions on the part of the assessing officer being untenable in law, we do not think that the writ petition cannot be entertained. There may be remedies available to challenge the assessment order, but it is not that there is any absolute bar to entertain a writ petition under Article 226 of the Constitution of India against an assessment order. Once that assessment order is found to be vitiated in law and the assessing officer exceeding his powers, authority and jurisdiction, then, in the absence of a factual dispute, a writ petition would lie. In the present case, we have entertained it to correct the legal error.

75. Mr. Sonpal finally relied upon paras 9, 10 and 12 of the affidavit in reply. However, we do not see how reliance on these paragraphs would, in any manner, alter our above conclusion. There, the argument is that there is no integrated movement of

the missiles and warheads from Hyderabad, but they have moved separately and individually over a period of time and not at the same time more so when no individual warhead was earmarked for a particular missile, hence, it cannot be said that the movement of missiles and warheads was from Hyderabad. There is no dispute that the warheads, though imported from Russia, are brought to Nagpur and remained at Nagpur. In these circumstances, we do not see how affidavit in reply can be relied upon. That affidavit, which assumes certain factual position and contrary to the material before the assessing officer, cannot be relied upon. We do not see how the deponent of the affidavit in reply, who is the Joint Commissioner of Sales Tax, Nagpur Division, assumes that an individual warhead should be earmarked for a particular missile and in the absence of that, the movement of missile or warhead from Hyderabad is not proper. His assumption is not born out from the materials from the assessing officer, which we have noted above. Rather, this stand concedes that the movement of the goods commences from Hyderabad.

76. As a result of the above discussion, the writ petition succeeds. Rule is made absolute in terms of prayer clause (a). However, in the facts and circumstances of the case, there would

be no order as to costs. In the view that we have taken, it is not necessary to decide and rule upon the alternate contentions raised by the petitioners.

(B.P.COLABAWALLA, J.)

(S.C.DHARMADHIKARI, J.)