



IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 17<sup>TH</sup> DAY OF MARCH, 2023

BEFORE

THE HON'BLE MR JUSTICE S.R.KRISHNA KUMAR

WRIT PETITION NO. 9550 OF 2020 (T-RES)

C/W

WRIT PETITION NO. 26262 OF 2019 (T-RES)

R

IN W.P. No.9550/2020

BETWEEN:

FIS PAYMENT SOLUTIONS AND SERVICES INDIA PRIVATE LIMITED  
A COMPANY INCORPORATED UNDER  
THE COMPANIES ACT 1956  
HAVING ITS CORPORATE OFFICE AT  
FAIRMOUNT 3<sup>RD</sup> FLOOR, HIRANANDANI  
BUSINESS PARK, POWAI, MUMBAI - 400 076.  
REPRESENTED HEREIN BY ITS  
AUTHORISED SIGNATORY RAVI KHANDELWAL

...PETITIONER

(BY SRI. D.R. RAVISHANKAR, SENIOR COUNSEL APPEARING FOR  
SRI. PRADEEP NAYAK., ADVOCATE  
SRI. NAVEEN GUDIKOTE AND SRI. KISHORE KUMAR,  
SRI. SHASHANK SHEKHAR, PARTH, ADVOCATES)

AND:

1. THE STATE OF KARNATAKA  
REP BY ITS FINANCE SECRETARY  
VIDHANA SOUDHA  
BANGALORE - 560 001.
2. UNION OF INDIA  
THROUGH ITS SECRETARY (REVENUE)  
MINISTRY OF FINANCE,  
DEPARTMENT OF REVENUE  
GOVERNMENT OF INDIA  
NORTH BLOCK, NEW DELHI - 110 001.





3. CENTRAL BOARD OF INDIRECT TAXES AND CUSTOMS  
DEPARTMENT OF REVENUE,  
MINISTRY OF FINANCE,  
GOVERNMENT OF INDIA  
NORTH BLOCK, NEW DELHI - 110 001.
4. COMMISSIONER OF COMMERCIAL TAXES  
DGSTO-5, ROOM NO. 605, 6<sup>TH</sup> FLOOR, VTK-II  
B WING, RAJENDRANAGAR  
KORAMANGALA  
BANGALORE - 560 047.
5. DEPUTY COMMISSIONER OF COMMERCIAL TAXES  
DGSTO-5 ROOM NO. 605  
6<sup>TH</sup> FLOOR, VTK-II, B WING,  
RAJENDRANAGAR,  
KORAMANAGALA  
BANGALORE - 560 047.
6. COMMISSIONER OF CENTRAL GOODS AND SERVICES TAX  
16<sup>TH</sup> FLOOR,  
SATRA PLAZA PALM BEACH ROAD  
SECTOR -19D, VASHI  
NAVI MUMBAI - 400 705.

...RESPONDENTS

(BY SRI. HEMA KUMAR, AGA FOR R-1, R-4 & R-5  
SRI. AMIT ANAND DESHPANDE, SENIOR CGSC FOR R-2, R-3 & R-6)

THIS W.P IS FILED UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA PRAYING TO DECLARE THE IMPUGNED ORDER DATED 16.06.2020 FOR THE PERIOD F.Y 2015-16 (ANNEXURE-A) ALONG WITH THE CONSEQUENTIAL DEMAND NOTICE DATED 16.06.2020 ISSUED BY R-5 AS ILLEGAL, ARBITRARY, OF LAW, THEREBY VIOLATING ARTICLE 14, 19(1)(g) AND 265 OF THE CONSTITUTION OF INDIA AND QUASHING THE CONSEQUENTIAL IMPUGNED DEMAND OF SERVICE TAX AND ETC.



**IN W.P. No.26262/2019**

**BETWEEN:**

M/S. FIS PAYMENT SOLUTIONS AND SERVICES  
INDIA PRIVATE LIMITED  
A COMPANY INCORPORATED UNDER  
THE COMPANIES ACT 1956  
HAVING ITS CORPORATE OFFICE AT  
FAIRMOUNT 3<sup>RD</sup> FLOOR, HIRANANDANI  
BUSINESS PARK, POWAI, MUMBAI - 400 076.  
MAHARASHTRA  
REPRESENTED BY ITS BUSINESS DELIVERY  
LEADER (FINANCE)  
MR. RAVI KHANDELWAL  
AGED ABOUT 38 YEARS  
S/O S.R. KHANDELWAL.

...PETITIONER

(BY SRI. D.R. RAVISHANKAR, SENIOR COUNSEL APPEARING FOR  
SRI. PRADEEP NAYAK.,ADVOCATE  
SRI. NAVEEN GUDIKOTE AND SRI. KISHORE KUMAR,  
SRI. SHASHANK SHEKHAR, SRI. PARTH, ADVOCATES)

**AND:**

1. THE UNION OF INDIA THROUGH  
THE SECRETARY, MINISTRY OF FINANCE  
DEPARTMENT OF REVENUE  
NORTH BLOCK, NEW DELHI – 110 001.
2. THE STATE OF KARNATAKA  
FINANCE DEPARTMENT  
VIDHANA SOUDHA  
BENGALURU – 560 001.  
REPRESENTED BY ITS PRINCIPAL SECRETARY.
3. THE CENTRAL BOARD OF CUSTOMS AND INDIRECT TAXES  
DEPARTMENT OF REVENUE  
MINISTRY OF FINANCE, GOVERNMENT OF INDIA  
NORTH BLOCK, NEW DELHI – 110 001.  
BY ITS SECRETARY.



4. THE COMMISSIONER OF COMMERCIAL TAXES  
HAVING HIS OFFICE AT DGSTO-5  
ROOM NO. 605, 6<sup>TH</sup> FLOOR, VTK-II  
“ WING” RAJENDRANAGAR  
KORAMANGALA, BENGALURU – 561 047.
5. THE DEPUTY COMMISSIONER OF COMMERCIAL TAXES  
(AUDIT- 5.6), DGSTO-5  
ROOM NO. 605, 6<sup>TH</sup> FLOOR, VTK-II, B WING,  
RAJENDRANAGAR,  
KORAMANAGALA  
BANGALORE – 561 047.
6. THE COMMISSIONER OF CGST AND C& EX.  
1<sup>ST</sup> AND 2<sup>ND</sup> FLOOR, BMTc BUS TERMINUS  
COMPLEX, DOMLORE,  
BENGALURU EAST – 560 089.
7. THE COMMISSIONER OF SERVICE TAX  
(UNDER ERSTWHILE FINANCE ACT, 1994 AND  
PRESENTLY UNDER CENTRAL GOODS  
& SERVICE TAX, ACT, 2017)  
16<sup>TH</sup> FLOOR, SATRA PLAZA,  
PALM BEACH ROAD, SECTOR -19D  
VASHI, NAVI MUMBAI – 400 705.

...RESPONDENTS

(BY SRI. HEMA KUMAR, AGA FOR R-2, R-4, R-5 & R-6  
SRI. AMIT ANAND DESHPANDE, SENIOR CGSC FOR R-3 & R-7  
SRI. MADANAN PILLAI, CGC FOR R-1)

THIS W.P IS FILED UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA PRAYING TO CALL FOR THE RECORDS PERTAINING TO THE PETITIONERS CASE AND AFTER GOING INTO THE VALIDITY AND LEGALITY THEREOF TO QUASH AND SET ASIDE TWO ORDERS BOTH DATED: 30.04.2019 PASSED BY THE DEPUTY COMMISSIONER OF COMMERCIAL TAXES, (AUDIT-5.6) ALONG WITH THE NOTIE OF DEMAND, FOR THE PERIOD APRIL 2013 TO MARCH 2014 AND APRIL 2014 TO MARCH 2015, VIDE ANNEUXRES-A AND B ( THE R-5) AND ETC.

THESE PETITIONS ARE COMING ON FOR DICTATING ORDERS, THIS DAY, THE COURT MADE THE FOLLOWING:



**ORDER**

In W.P.No.9550/2020, petitioner has sought for the following reliefs:-

*“ a) Issue writ in the nature of Certiorari or any other appropriate Writ, Order or Direction of like nature to declare the Impugned Order bearing CAS No. 386319489 dated: 16.06.2020 for the period FY 2015-16(Annexure-A) along with the consequential demand Notice dated: 16.06.2020 issued by Respondent No.5 as illegal, arbitrary, wholly without jurisdiction and without the authority of law, thereby violating Article 14, 19(1) (g) and 265 of the Constitution of India and quashing the consequential Impugned Demand of Service Tax;*

*b) Issue a writ in the nature of Certiorari or any other appropriate Writ, Order or Direction of like nature to declare the Impugned Order bearing CAS No. 329319520 dated for the period FY 2016-17(Annexure-B') along with the consequential demand Notice dated: 16.06.2020 issued by Respondent No.5 as illegal, arbitrary, wholly without jurisdiction and without the authority of law, thereby violating Article 14, 19 (1) (g) and 265 of the Constitution of India and quashing the consequential Impugned Demand of Service Tax;*

*c) Alternatively, Issue a Writ, of Mandamus or any other appropriate Writ, Order or Direction of like nature to direct the Respondent No.5 to seek for adjustment of Service Tax liability from the Respondent No.6 from the Service Tax paid on the very same turnover;*



d) *Such further and other relief, as this Hon'ble Court may deem fit and proper in the nature and circumstances of the case."*

In W.P.26262/2019, petitioner has sought for the following reliefs:-

*" (i) That this Hon'ble Court be pleased to issue a Writ of Certiorari or a writ in the nature of Certiorari or any other writ, order or direction under Article 226 of the Constitution of India calling for the records pertaining to the Petitioners' case and after going into the validity and legality thereof to quash and set aside two Orders No. DCCT(A)-5.6/DGSTO-5/2019-20 both dated: 30.04.2019 passed by the Deputy Commissioner of Commercial Taxes, (Audit-5.6) along with the Notice of Demand, for the period April 2013 to March 2014 and April 2014 to March 2015, vide Annexure-A and B ( the Respondent No.5);*

*(ii) that this Hon'ble Court be pleased to issue a Writ of Mandamus or any other appropriate writ, order or direction under Article 226 of the Constitution of India, directing the Respondents to forthwith:*

*(a) Refrain from taking any steps or proceedings in pursuance or in furtherance of the two Orders No. DCCT(A)-5.6/DGSTO-5/2019-20 both dated: 30.04.2019 passed by the Deputy Commissioner of Commercial Taxes, (Audit-5.6) Respondent No.5) for the period April 2013 to March 2014 and the period April 2014 to March 2015 and two Notice of Demand both dated: 30.04.2019;*



*(b) withdraw and /or cancel the impugned orders and Notice of Demand stated in clause (a) above passed by the Respondent No.5;*

*(c) Alternatively, to transfer the payment of service tax made by the petitioner to the Union of India to the State of Karnataka in the even this Hon'ble Court hold that the transaction is liable to VAT and refund the excess tax paid to the petitioner as the same cannot be held by Respondent Nos. 1 and, if any, because of the express prohibition under Article 265 of the constitution of India.*

*(iii) To issue order(s), direction(s), writ(s) or any other relief(s) as this Hon'ble Court deems fit and proper in the facts and circumstances of the case and in the interest of justice.”*

2. The common issue for consideration in the writ petitions is whether the respondents have jurisdiction to levy Value Added Tax (“VAT”) under the provisions of the Karnataka Value Added Tax Act, 2005 (“KVAT Act”) KVAT Act on ATM Management Services provided by the petitioner to various Banks across the State of Karnataka on which the petitioner has already paid Service Tax as per the Finance Act 1994.

3. Petitioner is engaged in the provision of ATM Management Services for various banks at pan India level and undertake end to end services for the banks. Petitioner has paid



Service Tax on the entire value of the contractual consideration received from banks on account of rendering of the aforesaid services and has also been regularly filing returns with the Service Tax Authorities. It is contended that petitioner render these ATM Management services to various banks across the Country whereby, end to end management of the ATM Machines is provided by the petitioner. The petitioner has duly discharged Service Tax on the entire revenue earned from such transaction. It is the grievance of the petitioner that the respondents have sought to levy VAT on the very same consideration by passing the Impugned Assessment Orders and Demand Notices by ignoring the gamut of services provided by the petitioner and treating the transaction as a “financial lease” and therefore, holding the same to be transfer of right to use the ATM Machines and “deemed sale of goods” which is not only without jurisdiction or authority of law but also illegal, arbitrary and contrary to the material on record and deserve to be quashed.

4. The respondents have opposed the petitions and have filed their statements of objections, to which petitioners have also filed their rejoinder/reply.





5. Heard learned Senior counsel for the petitioner and learned AGA and learned CGSC for respondents and perused the material on record.

6. In addition to reiterating the various contentions urged in the petitions and referring to the material on record, learned Senior counsel for the petitioner has made the following submissions:-

(i) The transaction between the Petitioner and Banks does not involve a financial lease. The payment of Service Tax by the Petitioner is not in dispute but the VAT authorities have ignored that payment by stating that such payment was incorrect and that the transaction is one involving financial lease on which VAT ought to be paid.

(ii) Under the Agreements with the Banks, the Petitioner provides end to end services to provide ATM related services to Banks. The Petitioner is responsible for the successful operation of the ATM transactions by the Bank's customers and therefore, is responsible for deploying its own ATM machines, their installation, operation and maintenance, insurance etc. The dominant intention of the transaction is undoubtedly to provide services and not to transfer any property in the ATM Machines to the Banks.



(iii) VAT is charged only on sale of goods or deemed sale of goods; deemed sale includes the transfer of right to use goods; the transfer of right to use becomes leviable to VAT only if there is transfer of effective transfer of control and possession of goods; where the transferee is not allowed to use the goods at his free will but only uses it for the purpose of the transferor, there cannot be any transfer of effective control from the transferor to the transferee; where there is no transfer of control and possession, Service Tax is leviable.

(iv) Service Tax and VAT are mutually exclusive levies. If service tax is levied on the same consideration, VAT cannot be levied. Both levies are mutually exclusive and cannot be levied simultaneously on the same consideration.

(v) Composite contract involving both sale of goods and rendition of services cannot be split artificially to levy tax on separate components. The nature of the contract has to be determined by applying the dominant intention test as it is neither works contract or catering contracts.

(vi) The impugned orders have erroneously held the transaction to be one of deemed sale. A deemed sale under would arise only when goods are either delivered physically or granted



the effective control and possession to the recipient. In the present case, the transaction is a pure service transaction not entailing any transfer of property of goods or effective control of the goods the recipient. The various terms of the agreements with the Banks discloses that the primary intent of the contract is only provision of ATM management service for which the Petitioner deploys ATMs and other assets at various sites across India. The Petitioner uses the ATMs and other assets merely as a means for providing ATM management services to banks.

(vii) VAT can be charged on a transaction only where there is a 'sale' or a deemed sale of goods. There is no dispute that there is no sale of the ATM machines by the Petitioner to the Banks. For constituting a deemed sale, the transaction should involve a transfer of right to use by the Petitioner to the Banks.

(viii) The impugned orders fail to appreciate that there is a transfer of right to use only when the transfer of the right to use is complete i.e. there is an effective transfer of possession and control of the asset to the transferee. The transferee should have liberty to use the asset in any way that it wants. If the transferor retains effective control of the asset which can only be used for fulfilling the contract of the transferor, the transferor retains



effective control of the asset and no VAT can be charged. In such a situation, only Service tax is chargeable since exclusivity and transfer of effective possession and control of goods is essential for a transaction to constitute a transfer of right to use goods.

(ix) The respondents have also failed to consider and appreciate that in order to constitute a transfer, there must be goods available for delivery; there must be a consensus ad idem as to the identity of the goods; the transferee should have a legal right to use the goods consequently, all legal consequences of such use including any permissions or licenses required therefore should be available to the transferee; for the period during which the transferee has such legal right it has to be to the exclusion to the transferor which is the necessary concomitant of the plain language of the statute –viz. a “transfer of the right to use” and not merely a license to use the goods; having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others and in the absence of these conditions being satisfied, it cannot be said that there was a transfer as contended by the respondents.

(x) Petitioner is already paying Service Tax on the ATM Management Services, VAT under the Act cannot be levied on the



very same turnover; petitioner has already discharged Service Tax on the turnover on account of ATM Management Services received from the Banks, therefore, the same may be adjusted for the payment of any VAT liability if the demand is sought to be raised and the excess if any should be refunded the Petitioner.

(xi) Transactions of rendering Services cannot be artificially bifurcated to levy VAT; there does not exist any separate consideration, which is payable solely for the right to use ATMs and the entire contract is a composite indivisible contract for rendering a host of services; splitting of an indivisible contract is not permissible as splitting can only be done for specified contracts which involve a works contract; the intention of the parties to the composite contract is relevant in determining whether they intended separate rights arising out of the sale of goods; in case there is no such intention, there is no sale even if the contract could be disintegrated; the dominant nature test is relevant for arriving at the substance of the contract, if it was not a case of works contract or catering contract by way of constitutional fiat, splitting was made permissible; the bifurcation of the contract and revenue generated is only permissible in specified situations and where none of the



said transaction has even been alleged in the impugned order, levy of VAT is completely without jurisdiction.

(xii) In any case, KVAT Act does not contain any provision by which an indivisible contract of services and goods inviting transfer of right to use could be split and consideration segregated to charge both the taxes separately; in the absence of machinery provision to split the contract and determine value, the charge would fail and it would have to be inferred that the Legislature did not intend to tax indivisible contracts at all; the substantive and machinery provisions of a taxing statute are an integrated code and if there is no machinery to compute an integrated code and if there is no machinery to compute a tax, it has to be inferred that such transactions were not intended to be taxed by the substantive provisions. The dominant nature of the Agreements of the Petitioner with the Banks is service and hence only Service Tax is liable to be paid which has been done by the Petitioner in the present case.

7. It is therefore contended that the impugned levies and demands by the respondents deserve to be quashed.



8. Per contra, learned AGA and learned CGSC for the respondents submit that the sale of goods is effected after incorporating the same into a structure and when connected to bank network; it is only on the basis of successful integration certificate i.e. acceptance by the bank that the petitioner's payment terms comes into play; the property of ATM infrastructure is passed on to the bank immediately after successful integration and certification by the bank appointed person; if there is termination of services of the petitioner, it cannot recover back the goods but is entitled to the price of the goods based on agreed price; when there are goods, acceptance of goods, consideration for the said goods and also a transfer of the title in such goods, the same would be taxable under KVAT Act and not under the Finance Act, 1994 (service tax); service tax is payable only in respect of services and there is a clear demarcation in the Finance Act for excluding the turnover of goods. Under the ATM management services to banks, only services relating to management activities are taxable and not the goods transferred i.e. ATM and equipment. It is therefore submitted that there is no merit in the petitions and that the same are liable to be dismissed.



9. I have given my anxious consideration to the rival submissions and perused the material on record.

10. The two writ petitions involve identical issues and cover Financial Years 2013-14 to 2017-18. The details of the demand raised are tabulated below:

	W.P.No.26262 of 2019		W.P.No.9550 of 2020	
	2013-14	2014-15	2015-16	2016-17
Impugned order Date	30.04.2019	30.04.2019	16.06.2020	16.06.2020
Tax	4,53,03,094/-	6,40,04,403/-	8,80,47,133/-	10,56,18,848
Interest	4,44,12,917/-	5,10,69,936/-	7,44,42,689/-	7,04,97,929
Penalty	45,30,309/-	64,00,440/-	88,04,714/-	1,05,61,885
Total	9,42,46,320/-	12,14,74,779/-	17,12,94,536	18,66,78,662
Grand Total	21,57,21,099/-		35,79,73,198/-	

11. In my considered opinion, the impugned orders, levies and demands are illegal, arbitrary and without jurisdiction or authority of law and the same deserve to be quashed for the following reasons:

(i) A perusal of the agreements entered into between the petitioners and the Banks would reveal the following salient features:





- The Petitioner takes the premises for ATM sites on rent/lease basis (in case of off-site ATMs) and pays rent/ lease rentals; the possession of the ATMs and other assets is with the petitioner and not Banks; as the petitioner retains the possession of the ATM machines, the control is also with the Petitioner who uses these machines to provide services to the Banks.
- Ownership as well as risks pertaining to the ATMs always lies with petitioner.
- Petitioner is responsible to maintain operational efficiency of the ATMs and other assets. In case of downtime beyond tolerable limit, petitioner is liable to pay penalty.
- Petitioner provides bank guarantee which can be redeemed by banks in case of non-performance. The banks can also terminate the contract in case of non-performance.
- Security of the ATM machine along with that of the cash is of the petitioner. Petitioner takes insurance for both the ATM Machine as well as the cash to be loaded on the same.
- The petitioner assists Banks to identify the optimal location for deployment of ATMs and assist the Banks in entire set up of the site, which includes renovation or preparation of site,



installation of ATMs, air conditioner, VSAT, signage, electricity connection, networking arrangement, etc.

- The petitioner manages the screen display on the ATMs as per the Bank's requirement.
- The petitioner is responsible to provide and maintain connectivity for the ATMs to the Bank networks through LAN switch and routers. The petitioner is also required to maintain backup network to ensure that there is no business disruption.
- The petitioner is responsible for selection of the ATM site and obtaining such sites on lease/ rent from the lessor/ landlord. The petitioner is also responsible for proper maintenance of site which includes cleaning, mopping, ensuring proper electronic fitting (i.e. lights, switches, starters), signages, leakages, proper functioning of air conditioner, UPS and other assets, replenishment of poster, stickers, etc.
- The petitioner is required to maintain a managed service centre and central help desk to monitor the ATMs located across India from remote location.



- The petitioner undertakes first level maintenance of the ATMs which includes clearing of paper jams/ currency jams, replacement of defective cables, replenishment of consumables such as ink, paper roll, etc. The petitioner also undertakes second level maintenance which includes annual maintenance of all the assets deployed i.e. ATMs, air conditioner, UPS, Communication equipment, etc. in order to ensure that there is minimal downtime of the ATMs.
- The petitioner is responsible for replenishment of adequate cash to ensure that services provided to Bank's customers is not disrupted due to cash outage.
- While for onsite ATMs (i.e. ATMs at Banks site) the security is provided by Banks, the petitioner provides security arrangement for deployment made at offsite locations.
- The petitioner provides extract of electronic journals of all the transaction carried out at each ATM / CD to centralized server of the bank.
- The petitioner earns a fixed monthly amount from Banks. This amount is determined on the basis of estimated cost to be incurred for the management of site and adding a profit margin to the total cost; in case of downtime beyond agreed



period, the banks deduct penalty from the monthly fixed payments.

- The petitioner earns revenue which is based on number of transactions undertaken by the users/ customer of Banks.

(ii) The material on record discloses that the petitioner is a service provider of ATM Management Services for various Banks at pan India level and undertakes end-to-end services for the banks in this regard and has been discharging Service Tax on the consideration received from banks on account of rendering the aforesaid services. Under the Agreements entered into with the Banks, the petitioner provides end-to-end services to provide ATM related services to Banks. The petitioner is responsible for the successful operation of the ATM transactions by the Bank's customers and therefore, is responsible for deploying its own ATM machines, their installation, operation and maintenance, insurance etc. The dominant intention of the transaction is undoubtedly to provide services and the ATM machines and other equipment never stood transferred to the Banks. The risk and reward with respect to the ATM and equipment is with the petitioner. The ATMs and equipment and even the cash handled by the petitioner in the



course of its activities are insured by the petitioner. Rental agreements with landlords are also entered by the petitioner.

(iii) As is clear from the agreements, the arrangement with the banks is a pure service agreement. At no stage does the petitioner deliver any goods including ATM and equipment to the banks. There is no transfer/delivery of possession of the ATMs and equipment to the banks. In fact, the banks have outsourced the entire ATM management activity to the petitioner and the petitioner only deploys the ATMs and equipment to effectively render the services to the banks. As per the terms of the agreements entered into with the Banks, end-to-end services with respect to ATM Management is provided, for which Fixed Revenue as well as Transaction Base Revenue is earned.

(iv) The subject transactions of ATM Management Services are not liable to VAT under the KVAT Act and the State of Karnataka does not have the legislative competence to levy VAT on such a transaction. A pure service transaction not entailing any transfer of property/ right to use of goods is consequently liable only to Service Tax and not to VAT and such exercise of power is beyond legislative powers of the State of Karnataka under entry 54 in List II of the Constitution of India. While the levy of tax on



services used to fall under the purview of Union in terms of Article 246 read with Entry 97 of List I, levy of VAT came under the purview of State as per Article 246 read with the then existing Entry 54 of List II. Consequently, once a transaction is undisputedly held to be service, State does not have the legislative competence of jurisdiction to impose VAT on the same transaction. The jurisdiction for the State authorities would arise on there being a sale of goods. The extended definition of sale found in Article 366(29a) of the Constitution of India following the 46<sup>th</sup> Amendment and what is popularly called deemed sale can come into play, in the instant case, when the revenue authorities can prove that there is a “transfer of right to use the goods” and that possession and control over the goods is necessary to attract the taxable event.

(v) In the case of **20<sup>th</sup> Century Finance Corpn. Ltd. v State of Maharashtra - AIR 2000 SC 2436**, the Apex Court held as under:-

*“35. As a result of the aforesaid discussion our conclusions are these:*

*(a) The States in exercise of power under entry 54 of List II read with article 366(29A)(d) are not competent to levy sales tax on the transfer of right to use goods, which is a deemed sale, if such sale takes place outside the*



*State or is a sale in the course of inter-State trade or commerce or is a sale in the course of import or export.*

- (b) The appropriate Legislature by creating legal fiction can fix situs of sale. In the absence of any such legal fiction the situs of sale in case of the transaction of transfer or right to use any goods would be the place where the property in goods passes, i.e., where the written agreement transferring the right to use is executed.*
- (c) Where the goods are available for the transfer of right to use the taxable event on the transfer of right to use goods is on the transfer which results in right to use and the situs of sale would be the place where the contract is executed and not where the goods are located for use.*
- (d) In cases where goods are not in existence or where there is an oral or implied transfer of the right to use goods, such transactions may be effected by the delivery of the goods. In such cases the taxable event would be on the delivery of goods.*

*The transaction of transfer of right to use goods cannot be termed as contract of bailment as it is a deemed sale within the meaning of legal fiction engrafted in clause (29A)(d) of article 366 of the Constitution wherein the location or delivery of goods to put to use is immaterial.”*



(vi) In the case of ***Rastriya Ispat Nigam Limited vs. CTO - (1990) 77 STC 182 (AP)***, the Andhra Pradesh High Court held as under:

*“5. ....The essence of transfer was the passing on of control over the economic benefits of property which would result in terminating rights and other relations in one entity and creating them in another.....while construing the word "transfer" due regard must be had to the thing to be transferred.....a transfer of the right to use the goods necessarily involves delivery of possession by the transferor to the transferee. Delivery of possession of a thing must be distinguished from its custody. It is not uncommon to find the transferee of goods in possession while transferor is having custody.*

*.....When a taxi cab is hired under "rent-a-car" scheme, and a cab is provided, usually driver accompanies the cab; there the driver will have the custody of the car though the hirer will have the possession and effective control of the cab. This may be contrasted with the case when a taxi car is hired for going from one place to another. There the driver will have both the custody as well as the possession; what is provided is service on hire. In the former case, there was effective control of the hirer (transferee) on the cab whereas in the latter case it is lacking. Whether there is a transfer of the right to use or not is a question of fact which has to be determined in each case having regard*





*to the terms of the contract under which there is said to be a transfer of the right to use....*

*.... In the instant case, the petitioner-Rashtriya Ispat Nigam Limited owning Visakhapatnam Steel Project, for the purpose of the steel project allotted different works of the project to contractors. To facilitate the execution of work by the contractors with the use of sophisticated machinery, the petitioner has undertaken to supply the machinery to the contractors for the purpose of being used in the execution of the contracted works of the petitioner and received charges for the same. The respondents made provisional assessment levying tax on the hire charges under section 5-E of the Act....*

*....In this writ petition, the petitioner prays for a declaration that the tax levied by the 1st respondent in purported exercise of power under section 5-E of the Act on the hire charges collected during the period 1988-89, is illegal and unconstitutional. In our view, whether the transaction amounts to transfer of right or not cannot be determined with reference to a particular word or clause in the agreement. The agreement has to be read as a whole, to determine the nature of the transaction. From a close reading of all the clauses in the agreement, it appears to us that the contractor is entitled to make use of the machinery for purposes of execution of the work of the petitioner and there is no transfer of right to use as such in favour of the contractor. We have reached this conclusion because*



*the effective control of the machinery even while the machinery is in the use of the contractor is that of the petitioner-company. The contractor is not free to make use of the same for other works or move it out during the period the machinery is in his use. The condition that he will be responsible for the custody of the machinery while the machinery is on the site does not militate against the petitioners' possession and control of the machinery. For these reasons, we are of the opinion that the transaction does not involve transfer of the section 5E is absent, the hire charges collected by the petitioner from the contractors are not exigible to sales tax.....”*

(vii) The aforesaid decision of the Andhra Pradesh High Court was affirmed by the Apex Court in the case of **State of Andhra Pradesh and Another v Rastriya Ispat Nigam Limited - (2002) 126 STC 114 SC.**

(viii) It is also brought to my notice that in petitioners' own case before the Customs, Excise and Service Tax Appellate Tribunal in **India Switch Co. Pvt. Ltd. Vs Commissioner of Service Tax, Chennai - 2015 (39) STR 288 (Tri – Chennai)**, it was held that on the aforesaid transaction, Service Tax is payable by the petitioner under the category “ATM operations, maintenance or management services” as under:



*“10. From the above, it is evident that in the case of finance lease the lesser transfer all the risks and rewards incidental to the ownership to the lessee. In the present case, the ATMs are owned by the appellants and no rights or risk and rewards are transferred to the Banks. The appellant collects charges for providing ATM Services as facility charges per ATM per day basis. Therefore, by respectfully following the Apex Court decision, we hold that the appellants providing ATMs and other ATM related activities do not fall under BOF as financial leasing including equipment leasing and transfer of information or data processing. In view of the decisions of the Hon'ble Apex Court and the Tribunals cited above, the impugned orders of the adjudicating authority is set aside and allow all the three appeals filed by the appellants with consequential relief if any.”*

(ix) On a similar allegation as raised by the Karnataka VAT Authorities in the present case, the Madras High Court in petitioners' own case in **India Switch Co. Pvt. Ltd. vs Deputy Commercial Tax Officer - 2021 (3) TMI 192** has held that the relevant activity of the petitioners amounts to rendering of service and is not one of deemed sale. The Madras High Court held as under:

*“23. In the facts and circumstances of the present case, the above test enunciated for “transfer of right to use” is not satisfied. Therefore, the petitioner cannot be*



*subjected to tax under the provisions of the Tamil Nadu General Sales Tax Act, 1959 and/or under the provisions of the Central Sales Tax Act, 1956. In the transactions entered between the petitioner and the banks, the effective control over to ATM's continued to vest with the petitioner. Since the issue stands fully covered in favour of the petitioner in the above cited decision of the Hon'ble Supreme Court in Bharat Sanchar Nigam Ltd. and another Vs. Union of India and Other (2006) 3 SCC 1 ; 2006 (2) STR 2, these writ petitions deserve to be allowed by quashing the impugned orders.*

*24. As a matter of fact, the subject transaction may have been liable to tax under Section 65(105)(zzzzj) of the Finance Act, 1994 with effect from 2008 after service tax was levied on "Supply of Tangible Goods" as about test for "transfer of right to use" is conspicuously absent.*

*25. Therefore, the impugned orders seeking to tax the petitioner under the provision of the Tamil Nadu General Sales Tax Act, 1959 and under the provisions of the Central Sales Tax Act, 1956 are quashed with consequential relief to the petitioner."*

(x) In the case of **BSNL vs. Union of India - (2006) 3 SCC**

**1**, the Apex Court held as under:

*"42. Of all the different kinds of composite transactions the drafters of the 46th Amendment chose three specific situations, a works contract, a hire purchase contract and a catering contract to bring within the fiction of a deemed sale. Of these three, the first and*



*third involve a kind of service and sale at the same time. Apart from these two cases where splitting of the service and supply has been Constitutionally permitted in Clauses (b) and (g) of Clause 29A of Art. 366, there is no other service which has been permitted to be so split. For example the clauses of Art. 366(29A) do not cover hospital services. Therefore, if during the treatment of a patient in a hospital, he or she is given a pill, can the sales tax authorities tax the transaction as a sale? Doctors, lawyers and other professionals render service in the course of which can it be said that there is a sale of goods when a doctor writes out and hands over a prescription or a lawyer drafts a document and delivers it to his/her client? Strictly speaking with the payment of fees, consideration does pass from the patient or client to the doctor or lawyer for the documents in both cases.*

*43. The reason why these services do not involve a sale for the purposes of Entry 54 of List II is, as we see it, for reasons ultimately attributable to the principles enunciated in Gannon Dunkerley's case, namely, if there is an instrument of contract which may be composite in form in any case other than the exceptions in Article 366(29-A), unless the transaction in truth represents two distinct and separate contracts and is discernible as such, then the State would not have the power to separate the agreement to sell from the agreement to render service, and impose tax on the sale. The test therefore for composite contracts other than those mentioned in Article 366 (29A) continues to be - did the parties have in mind or intend separate*



*rights arising out of the sale of goods. If there was no such intention there is no sale even if the contract could be disintegrated. The test for deciding whether a contract falls into one category or the other is to as what is the substance of the contract. We will, for the want of a better phrase, call this the dominant nature test.*

*48. What are the “goods” in a sales transaction, therefore, remains primarily a matter of contract and intention. The seller and such purchaser would have to be ad idem as to the subject matter of sale or purchase. The Court would have to arrive at the conclusion as to what the parties had intended when they entered into a particular transaction of sale, as being the subject matter of sale or purchase. In arriving at a conclusion the Court would have to approach the matter from the point of view of a reasonable person of average intelligence.”*

(xi) So also, in ***Imagic Creative Pvt Ltd. vs. The Commissioner of Commercial Taxes - (2008) 9 S.T.R. 337 (S.C.)***, the Apex Court held as under:

*28. Payments of service tax as also the VAT are mutually exclusive. Therefore, they should be held to be applicable having regard to the respective parameters of service tax and the sales tax as envisaged in a composite contract as contradistinguished from an indivisible contract. It may consist of different elements providing for attracting different nature of levy. It is, therefore, difficult to hold*



*that in a case of this nature, sales tax would be payable on the value of the entire contract; irrespective of the element of service provided. The approach of the assessing authority, to us, thus, appears to be correct.”*

(xii) In the case of **CCE vs. Larsen & Toubro - 2015 (39)**

**S.T.R. 913 (S.C.)**, the Apex Court held as under:

*“16. At this stage, it is important to note the scheme of taxation under our Constitution. In the lists contained in the 7th Schedule to the Constitution, taxation entries are to be found only in lists I and II. This is for the reason that in our Constitutional scheme, taxation powers of the Centre and the States are mutually exclusive. There is no concurrent power of taxation. This being the case, the moment the levy contained in a taxing statute transgresses into a prohibited exclusive field, it is liable to be struck down. In the present case, the dichotomy is between sales tax leviable by the States and service tax leviable by the Centre. When it comes to composite indivisible works contract, such contracts can be taxed by Parliament as well as State legislatures. Parliament can only tax the service element contained in these contracts, and the States can only tax the transfer of property in goods element contained in these contracts. Thus, it becomes very important to segregate the two elements completely for if some element of transfer of property in goods remains when a service tax is levied, the said levy would be found to be constitutionally infirm.”*



(xiii) The Division Bench of this Court in the case of **Sasken Communication Technologies Ltd. vs. Joint Commissioner of Commercial Taxes (Appeals) – 3 Bangalore - 2012 (55) VST 89 (KAR)** held as under:-

*“30. Wherever legislative powers are distributed between the Union and the States, situations may arise where the two legislative fields might apparently overlap. It is the duty of the Courts, however difficult it may be, to ascertain to what degree and to what extent, the authority can deal with matters falling within these classes of subjects exists in each Legislature and to define, in the particular case, before them, the limits of the respective powers. It could not have been the intention that a conflict should exist; and, in order to prevent such a result the two provisions must be read together, and the language of one interpreted, and where necessary modified by that of the other. From time to time that legislation, though purporting to deal with a subject in one list, touches also on a subject in another list, and the different provisions of the enactment may be so closely intertwined that blind observance to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the Legislature enacting them may appear to have legislated in a forbidden sphere. In such circumstances the true nature and character is to be ascertained for the purpose of determining whether it is*





*legislation with respect to matters in this list or in that list. It is popularly known as 'pith and substance'. The law 'with respect to, a subject might incidentally 'affect' another subject in some way; but that is not the same thing as the law being on the latter subject. There might be overlapping; but the overlapping must be in law. The same transaction may involve two or more taxable events in its different aspects. But the fact that there is an overlapping does not detract from the distinctiveness of the aspects. The true nature and character of the legislation must be determined with reference to a question of the power of the Legislature. The consequences and effect of the legislation are not the same thing as the legislative subject-matter. What matters is the nature and character of the legislation and not its ultimate economic results that matters.*

*31. Therefore, if computer programming and providing of computer software involves two aspects, one falling within the power of the Parliament and the other falling within the power of the State Legislature to enact the law, the law so enacted cannot be found fault with. When the programming and providing of computer software is treated as works contract, as the works contract necessarily involves an agreement to render service and an agreement for sale of goods, service aspect could be taxed by the Parliament and the sale of goods aspect could be taxed by the State Legislature. But, this distinctiveness of two transactions is to be ascertainable from the terms of the composite contract. If such an intention is not discernable from the terms of*



*the contract then we have to find out what is the pith and substance of the contract or in other words what is the true nature and character of the contract. If on an examination of the contract as a whole, it is not possible to discern that the contract involves sale of goods but is essentially an agreement to render service, neither the concept of a works contract nor the concept of aspect theory is attracted. It is by virtue of Entry 54 in List II of the VII Schedule the Karnataka Value Added Tax is enacted by the State Legislature, as the State Legislature is competent to enact laws in respect of sale of goods. By introducing a schedule to the said enactment and describing under a works contract "programming and providing a computer software is specified", unless the said works contract involves an element of sale of goods, the State Legislature has no power to levy tax under the said Act. Similarly, the Parliament also has no power to levy service tax on sale of goods if by including in the Finance Act, development of information technology software, study, analysis, design and programming, information technology software and various other aspects touching software if it involves sale of goods. It has to be necessarily confined to the service aspect. In both the enactments they specify the types of activities which are liable for tax. A duty is cast on the Court to interpret those provisions in such a harmonious way so as to uphold the right of both the legislations to levy tax which fall within their respective sphere."*



(xiv) In the case of **CST vs. Quick Heal Technologies Ltd., - [2022] 141 Taxmann.com 146 (SC)**, the Apex Court held as under:-

*“55. The sum and substance of the ratio of the case of BSNL (supra) as discernible is that the contract cannot be vivisected or split into two. Once a lumpsum has been charged for the sale of CD (as in the case on hand) and sale tax has been paid thereon, the revenue thereafter cannot levy service tax on the entire sale consideration once again on the ground that the updates are being provided. We are of the view that the artificial segregation of the transaction, as in the case on hand, into two parts is not tenable in law. It is, in substance, one transaction of sale of software and once it is accepted that the software put in the CD is "goods", then there cannot be any separate service element in the transaction. We are saying so because even otherwise the user is put in possession and full control of the software. It amounts to "deemed sale" which would not attract service tax.”*

(xv) As stated supra, the undisputed material on record, in particular the agreements also make it unmistakably clear that it is nowhere evident that the ATMs and equipment at any stage are transferred/delivered to the banks and neither does the possession get transferred to the bank. The petitioners all through out the tenure of the agreement continues to provide ATM Management



services to the banks deploying/using the ATMs and equipment. Delivery/transfer is *sine qua non* to attract levy of VAT. However, no delivery but only deployment takes places. The petitioners not only has the possession but is also in effective control of the ATMs and equipment. If it was neither in possession or in effective control over the ATMs and equipment, the petitioners would have been unable to provide the aforesaid services.

(xvi) The impugned orders have erroneously held the petitioners transaction to be one of deemed sale. A deemed sale or delivery on hire purchase would arise only when goods are either delivered physically or on the grant of effective control and possession therein to the recipient. In the present case, the transaction is a pure service transaction not entailing any transfer of property of goods or effective control of the goods to the recipient. The various terms of the Agreements with the Banks discloses that the only intent of the contract is only provision of ATM management service for which the petitioners deploys ATMs and other assets at various sites across India. The petitioners uses the ATMs and other assets merely as a means for providing ATM management services to banks.



(xvii) The aforesaid facts and circumstances are sufficient to come to the conclusion that the impugned orders, levies and demands are illegal, arbitrary and without jurisdiction or authority of law and the same deserve to be quashed.

12. In the result, I pass the following:-

**ORDER**

(i) Both petitions are allowed.

(ii) In W.P.Nos.26262-26263/2019

a. The Re-assessment order bearing No. DCCT(A)-5.6/DGSTO-5/2019-20, dated 30.04.2019, for the period 2013-14, passed by Respondent No.5 is hereby quashed. Consequently, the demand notice dated 30.04.2019 for the period 2013-14 is also quashed.

b. The Re-assessment order bearing No. DCCT(A)-5.6/DGSTO-5/2019-20, dated 30.04.2019, for the period 2014-15, passed by Respondent No.5 is hereby quashed. Consequently, the demand notice dated 30.04.2019 for the period 2014-15 is also quashed.

(iii) In W.P.No. 9550/2020



- a. The Re-assessment order bearing No. DCCT(A)-5.6/DGSTO-5/2020-21, dated 16.06.2020, for the period 2015-16, passed by Respondent No.5 is hereby quashed. Consequently, the demand notice dated 16.06.2020 for the period 2015-16 is also quashed.
- b. The Re-assessment order bearing No. DCCT(A)-5.6/DGSTO-5/2020-21, dated 16.06.2020, for the period 2016-15, passed by Respondent No.5 is hereby quashed. Consequently, the demand notice dated 16.06.2020 for the period 2015-16 is also quashed.

**Sd/-**  
**JUDGE**

Srl.