IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

SALES TAX REFERENCE NO. 16 OF 2003
WITH
SALES TAX REFERENCE NO. 3 OF 2008

M/s. Tata Engineering and }
Locomotive Co. Ltd. }

(now known as Tata Motors Ltd. } Applicant
versus
State of Maharashtra } Respondent

Mr. V. Sridharan-Senior Advocate with

Mr.Pradeep S. Jetly, Mr. Puneeth Ganapathy, Mr. H. N. Vakil i/b. M/s. Mulla and Mulla CBC for the Applicant.

Mr. V. A. Sonpal-Special Counsel for the Respondent.

CORAM :- S.C.DHARMADHIKARI &
A.A.SAYED, JJ.

Reserved on :- December 18, 2014 Pronounced on :- January 30, 2015 JUDGMENT: (Per S.C.Dharmadhikari, J.) These two references under the then Bombay Sales Tax Act, 1959 (hereinafter referred to as the "BST Act") seek an answer and opinion of this Court on the following questions of law, which have been formulated by the Maharashtra Sales Tax Tribunal. 2) In Sales Tax Reference No. 16 of 2003, on 12 th September, 2003, the Tribunal has referred the questions set out herein below: J.V.Salunke,PA STR.16.2003.Judgment.doc "(i) Whether on the facts and in the circumstances of the case, the Tribunal was legally justified in holding that the amount of Rs.8,34,781/- as per hire purchase agreement dated 7.2.1996 hire financed in favour of Shri. Ajit Singh Bhimrao was liable to tax under Section 8 of the B.S.T. Act, 1959? (ii) Whether on the facts and in the circumstances of the case, the Tribunal was legally correct in holding that an amount of Rs.3,27,601/- out of Rs.8,34,781/- which were option money, insurance charges for 3 years and hire premium recovered from Shri. Ajit Singh Bhimrao formed part of the Sale Price as defined in Section 2(29) of the B. S. T. Act, 1959? (iii) Whether in absence of a definition of VAT in the B. S. T. Act, 1959, and on a correct interpretation of Section 12A(3) the Tribunal was legally justified in holding that Applicant was liable to pay Sales Tax on the total value of Rs.8,34,781/- which comprised of a sum of Rs.5,08,180/- of Truck purchased from a registered dealer and entitled to deduction under section 8(ii) and sum of Rs.1/- option money, insurance charges of Rs.45,000/- and Rs.2,81,600/- being hire premium?" 3) In Sales Tax Reference No. 3 of 2008, the Tribunal has passed an order on 30th August, 2007 and referred the following two questions: "(i) Whether on the facts and in the circumstances of the case, the Tribunal was legally justified in disallowing the resale claim of the appellant under section 8 of the Bombay Sales Tax Act with regard to the sale made on hire purchase basis? (ii) Whether on the facts and in the circumstances of the case, the Tribunal was legally correct in holding that an amount of hire purchase premium in question formed part of the Sale Price as defined in Section 2(29) of the B. S. T. Act, 1959?" 4) Thus, common questions of law pertaining to the conclusion of the Tribunal in disallowing the resale claim of the Applicant under section 8 of the BST Act with regard to the sale made on hire purchase basis is referred for this Court's opinion. J.V.Salunke,PA STR.16.2003.Judgment.doc 5) In the statement of facts, it has been set out that the Applicant is a manufacturer of motor vehicles and also engaged in the business of hire finance of motor vehicles. As far as the first reference is concerned, the Applicant purchased a new Tata Diesel Chassis from M/s. India Automobiles, a registered Dealer of the Applicant, on payment of taxes for a total purchase price of Rs.5,08,180/-. The Chassis was sold by the Applicant on hire purchase basis to one Ajit Singh Bhimrao under sale invoice dated 7th February, 1996. As per the hire purchase agreement dated 7th February, 1996, entered into by the Applicant with the said Ajit Singh Bhimrao the buyer was to make initial payment of Rs.68,180/- and to pay the balance amount in 47 monthly installments. Thus, as against a purchase price of Rs.5,08,180/-, the Applicant was to receive an amount of Rs.8,34,781/- from the hirer. This consisted of the price of the Chassis, the hire premium, the insurance premium for three years

and auction money. 6) An application was made under section 52 of the BST Act by the Applicant to the Commissioner, regarding determination of the sale price in respect of this vehicle sold by the Applicant on hire purchase. It was the case of the Applicant that the hire charges receivable and received by them from the hirer in the context of the financial services will not form part of the sale price of the vehicle and J.V.Salunke,PA STR.16.2003.Judgment.doc that it is the only price of the vehicle at the time of delivery thereof to the hirer that will represent the sale price of the vehicle. That means, the sale price of Rs.5,08,180/- and not the amount of Rs.8,34,781/- should be taken as the sale price. The Commissioner decided this application on 21st March, 1998 and he did not accept the Applicant's contention. The Commissioner concluded that the sale price of the vehicle sold on the hire purchase basis would be the entire amount including the hire premium and insurance premium received from the hirer. In other words, the entire sum was taken to be the sale price by him. This order of the Commissioner was challenged by filing an appeal being Appeal No. 47 of 1998. That Appeal was decided on 5 th May, 2001. The Tribunal dismissed the appeal after noting several contentions, which have been raised by the applicant. The statement of case proceeds to state that this Judgment of the Tribunal was disputed by the Applicant and it sought rectification thereof under section 62 of the BST Act. This rectification application was registered as Rectification Application No. 42 of 2001. It was decided on 16 th January, 2002. It was partly allowed by modifying certain observations, but without making any change in the final decision. 7) That is how a reference application was made under section 61 of the BST Act bearing Reference Application No. 111 of J.V.Salunke,PA STR.16.2003.Judgment.doc 2001, which application also was rejected on 22 nd November, 2002. The Applicant filed an application before this Court under section 61(1) (proviso) being Sales Tax Application No. 2 of 2003. This was disposed of by this Court on 11th July, 2003. The Tribunal was directed to draw up a statement of case and refer questions of law to this Court for this Court's opinion. Accordingly, the consequential order was passed and the above questions have been referred. 8) Insofar as the second question is concerned, there, the Applicant Company was assessed for the financial year 1994-95 under the BST Act as well as the Central Sales Tax Act (CST). The assessment resulted in the demand of Rs.2,19,72,336/- and Rs.2,52,429/-. The resale claim made under section 8(2) of the BST Act was disallowed on the ground that the Applicants were holders of trade mark. The transaction and dealing was similar but a contention was raised by the Applicant that the trade mark was used when they sold their goods to the distributor and there was no occasion to use the trade mark when the vehicle, which was repurchased from the registered Dealer, was sold to the customer on hire purchase basis. The hire purchase premium does not form part of the sale price and should not have been treated as taxable. The Deputy Commissioner did not accept this contention. The assessment was confirmed and equally the Appeal against the same was J.V.Salunke,PA STR.16.2003.Judgment.doc dismissed. The Appeal also under the CST was dismissed and therefore, two Second Appeals were preferred before the Tribunal. These Second Appeals were partly allowed, holding

that the Applicant is not entitled for resale claim. The hire purchase premium cannot be excluded from the sale price. 9) Aggrieved by the Judgment and order of the Tribunal, Reference Applications under section 61(1) of the BST Act were preferred and the Tribunal passed the order on 30 th August, 2007 referring the above questions of law for answer and opinion of this Court. 10) Mr. Sridharan-Senior Counsel appearing for the Applicants in both matters submitted that the primary business of the Applicant involves sale of vehicles directly to Dealers. The small part of its business relates to hire purchase, wherein, vehicles sold to Dealers are re-purchased from the Dealers in order to dispose of the same on hire purchase basis to a customer. Thus, this is a exceptional transaction and in the light of the huge turnover of the Applicant, they offered Rs.148 crores approximately to tax. In comparison to this only on a sum of Rs.16 crores re-sale exemption was sought. Therefore, it is clear that hire purchase transactions constitute only a minor percentage of the Applicant's turnover. Mr. Sridharan clarifies that the Applicant J.V.Salunke,PA STR.16.2003.Judgment.doc discharges full tax burden in terms of the BST Act on the first sale of vehicles by them to the Dealers. The tax so paid is on the full price charged on the Dealer. He has invited our attention to the details of the sale transactions including the sample invoices and submits that after the first sale to the Dealer, re-purchase of the vehicles from the Dealers by the Applicant and the final and the last sale to the customer by the Applicant on hire purchase are the stages in brief. It is the last leg of the sale by the Applicant to the customer on hire purchase basis, which results in the above questions of law. 11) The argument of the Applicant is that on this last or third part of the transaction, they will be entitled to re-sale exemption under section 2(26) read with section 8 of the BST Act. Elaborating these submissions orally and in writing, Mr. Sridharan submits that section 2(26) of the BST Act was amended in 1981. Several amendments were made in 1981 with the object and purpose of imposing a single point Sales Tax levy under the Act. This is clear from the statement of objects and reasons to the Maharashtra Sales Tax (Amendment) Act, 1981. 12) Mr. Sridharan submits that therefore all re-sales covered by Clause (ii) were exempt from a second levy of tax by deducting the value of the same from the turnover assessable to tax under the provisions of the BST Act. J.V.Salunke,PA STR.16.2003.Judgment.doc 13) Section 12A of the BST Act at the relevant time read as follows: "(1) There shall not be deducted from the turnover of sales, the resales of goods purchased by a dealer after the commencement of the Bombay Sales Tax (Amendment) Act, 1965 from a registered dealer as provided in sections [7, 8, 9] unless the dealer claiming deduction produces a bill or cash memorandum containing a certificate that the registration certificate of the selling dealer was in force on the date of sale of the goods to him. Such certificate shall be signed by the selling dealer or a person duly authorized by him in this behalf. ....." 14) Mr. Sridharan relies upon Section 2(26) of the BST Act and submits that the Explanation added to the definition of re-sale in the year 1988 was added with the object and purpose and referred to in the budget speech of the Minister of Finance of the State of Maharashtra for the year 1988-89. The relevant extract of the said speech is as follows: "66. There are many

products that are sold under brand names, trade marks etc. and consequently command high prices in the market. But often the manufacture of such products is sub- contracted out with the result that sales tax being leviable at the first point, the tax is realized on a lower value. In order to capture the higher value-added, I propose to suitably amend the provisions regarding resale. To avoid double or multiple taxation, a provision for set-off is also being made. . . .." 15) Mr. Sridharan further submits that as per the Explanation and the speech of the Finance Minister, reproduced hereinabove, certain deemed re-sales as per section 2(26) were not deemed as re-sale where the seller held a trade mark in respect of the goods sold. The object and purpose of this Explanation was to ensure that the full value of the trademarked goods were captured by the first-point Sales Tax levy, in J.V.Salunke,PA STR.16.2003.Judgment.doc order to provide for those situations wherein a trade mark holder sub- contracted the manufacture of the goods to a third party and bought the same paying sales tax on such first sale, but subsequently affixed his trade mark to the value of such goods and then resold them claiming re- sale exemption. Consequently, prior to 1988 amendment, in such a chain of transactions, the value added by use of the trade mark is not captured by the sales tax levy in the first sale from the sub-contracted manufacturer to the trade mark holding reseller. 16) Mr. Sridharan further submits that such object and purpose is also clear from the wording of the Explanation to section 2(26) itself, which excludes only those transactions of re-sale where the re-seller holds a trade mark and specifically holds the same in respect of the goods sold. It is to be noted that any levy of sales tax is an individual transaction based levy and hence it is to be seen in each transaction of re-sale whether the reseller is holding a trade mark in respect of the goods sold in that particular transaction. 17) Mr. Sridharan further submits that in understanding what is the meaning to be attributed to the words 'hold' and in respect of the goods sold, reference must necessarily be had to the trade mark law. He further submits that such an approach flows from the decision of the Hon'ble Supreme Court in Aphali Pharmaceuticals Ltd. v. State of J.V.Salunke,PA STR.16.2003.Judgment.doc Maharashtra (1998) 44 ELT 613. In this case, the Court, while determining the meaning of patent or proprietary medicine in the Drugs Act, 1940 felt it necessary to apply the definition of a patent as defined in the Indian Patents Act, 1970. In CIT v. Bagyalakshmi and Co. (1965) 55 ITR 660 (SC), the Apex Court dealt with the power of an income tax officer to reject the registration of a partnership firm. In that context, the Supreme Court applied the relevant partnership law. It held that "Except where there is a specific provision. . . .. which derogates from any other statutory law or personal law, the provisions will have to be considered in the light of the relevant branches of law." 18) Mr. Sridharan further submits that a trade mark is held in respect of goods that are to be sold or commercially exploited. However, a trade mark held in respect of individual goods is lost or 'exhausted' on its first sale by the owner of the trade mark. This is referred to as 'first sale doctrine' expounded in common law. W. R. Cornish, in his treatise on intellectual property, explains the principle as follows: "In every intellectual property law it is necessary to decide which steps in the chain of production and distribution

of goods require the licence of the right-owner; manufacturer; first-sale by the manufacturer; subsequent sales and other dealings; export and import; use.... In many cases, both in British and in Foreign laws the rights are 'exhausted' after first sale by the right owner or with his consent.... It amounts to a principle of ..... exhaustion" (page 105-B of compilation Volume-I)" J.V.Salunke,PA STR.16.2003.Judgment.doc 19) Mr. Sridharan further submits that to understand what is the essential function and subject matter of a trade mark, further reference must be made to existing jurisprudence in common law. As explained in the treatise Kerly's law of trade marks and tradenames, 14 th Edn., (page 5 to 12 of compilation Volume-II), the definition of the specific subject matter of a trade mark was determined by the European Court of Justice in Centrafarm v. Winthorp (1974) ECR 1183 where is held as follows: "In relation to trade marks, the specific subject-matter of the industrial property is the guarantee that the owner of the trade mark has the exclusive right to use that trade mark, for the purpose of putting products protected by the trade mark into circulation for the first time, and is therefore intended to protect him against competitor wishing to take advantage of the status and reputation of the trade mark by selling products illegally bearing that trade mark" 20) Mr. Sridharan further submits that similarly the said treatise refers to the decision in Cnl-Sucal NV SA v. HAG GF AG (1990) I ECR 3711, wherein it was similarly stated that the subject matter of a trade mark was: "to grant the owner the right to use the mark for the first marketing of a product and, in this way to protect him against competitors who would like to abuse the position and reputation of the mark by selling products to which the mark has been improperly affixed" (emphasis supplied)" 21) Mr. Sridharan then submits that this principle has been further explained by the United Status Supreme Court in Kirtsaeng, dba vs. Wiley and Sons. Inc. 568 US S.C. 2013 in its Judgment dated 19th J.V.Salunke,PA STR.16.2003.Judgment.doc March, 2013 (page 83 and 97 of Volume-II). The Judgment of the US Supreme Court explains that the first sale doctrine is a principle of common law dating back centuries, and applies it in stating that once a trademarked item is subjected to a transaction of sale, the trade mark in the goods sold is specifically exhausted in relation to the trade mark holder's right of commercial exploitation of the specific item. 22) Mr. Sridharan has relied upon the following decisions and material in support of his contentions. 1. Goodwill India Ltd. vs. The State (1980) 45 STC 368 2 Jay Bharat Credit and Investment Co. v. CST (2000) 120 STC 1 3 Association of Leasing and Financial Service Companies vs. Union of India and Ors. (2011) 2 SCC 352 4 Order and Judgmnt of the High Court of Jharkhand dtd. 1.3.2012 in TELCO v. State of Jharkhand in WP/ 6040/2002 23) Thus, Mr. Sridharan's arguments revolve around the central theme that the trade mark is exhausted once the goods, in respect of which the trade mark is held, are first sold. In the last leg or third sale, the Applicants do not affix the trade mark on the goods. The trade mark is thus not used in respect of that particular sale transaction. In the instant case, the trade mark was already used when the Applicant sold the vehicles to their Dealers. This trade mark was therefore exhausted and the Explanation to section 2(26) will then not come into play. This interpretation is in consonance

with the object and purpose J.V.Salunke,PA STR.16.2003.Judgment.doc of the Explanation. That is only to capture the value of trade mark in levying the sales Tax, where such value had not already been captured. In the present case in the first leg the vehicles are sold to the Dealers, the trade mark is used. Thereafter, these vehicles are re-purchased and then disposed of in favour of the customers. In these circumstances, there is no basis for the finding that the Applicants are holders of the mark. The interpretation placed by the Revenue will result in absurdity. Because of their interpretation, the first sale between the Applicant and Dealer is liable to Sales Tax. The resale from the Dealer to the Applicant does not attract the Sales Tax to be eligible to re-sale exemption. The third transaction between the Applicant and the customer is denied re-sale exemption and again subjected to Sales Tax as if it is a first point levy. The fact that the second transaction, namely, re-sale by the Dealer to the Applicant attracts the re-sale exemption is apparent from the invoices. It is in these circumstances that he terms the transaction involved in the present case as re-sale transaction not hit by the Explanation below section 2(26) of the BST Act. 24) He finally concluded his submissions by submitting that the hire purchase premiums are not taxable under the applicable provisions of the BST Act for both assessment years 1994-95 and 1995-96, in the light of the legal position emerging from the Judgment of three Judge J.V.Salunke,PA STR.16.2003.Judgment.doc Bench of the Hon'ble Supreme Court in the case of Association of Leasing Financial Services Companies vs. Union of India (2011) 2 SCC 352. That holds that hire purchase transactions are essentially financial services. These are services and not sales on which Sales Tax may be levied. 25) The attempt of Mr. Sridharan thus is to get over a Judgment delivered by the three Judge Bench of the Hon'ble Supreme Court, in the case of Jay Bharat Credit and Investment Co. vs. Commissioner of Sales Tax (2000) 120 Sales Tax Cases 1 and an order passed in the very Assessee's case by a Division Bench of the High Court of Jharkhand. The High Court of Jharkhand has, in the unreported Judgment dated 1st March, 2012 in Writ Petition No. 6040 of 2002 (TELCO Ltd. vs. the State of Jharkhand and Ors.) and connected matters negatived the contentions of the Applicants, relying on the Judgment in the case of Jay Bharat Credit and Investment Co. (supra). For all these reasons, he submits that the questions be answered accordingly. 26) Mr. V. A. Sonpal appearing on behalf of the Revenue, on the other hand, relies upon the definition of the term "sale" and "re-sale" in the BST Act. Mr. Sonpal submits that the transactions are nothing but sale of vehicles, in which, the purchase price is tendered in installments. It is a deemed sale. He relies upon the factual findings of the Tribunal J.V.Salunke,PA STR.16.2003.Judgment.doc to contend that in the instant cases the third transaction is nothing but a sale. The price is paid in installments and because the price is paid in installments, the Applicants are charging interest to the customers. The price then paid by them includes this interest. Therefore, it is nothing but a sale. It does not fall within the term re-sale also because of the Explanation. The speech of the Finance Minister, which has been pressed into service will never control the interpretation of the provision. These are nothing but devices to get over the BST Act and avoid paying taxes.

In the present case, there has been no transaction between the Dealer and the customer admittedly. The customer has approached the Applicants, who are manufacturers. It may be that there is a paper sale of the vehicles to the Dealers earlier and re- purchase from the Dealers thereafter, but all this is to avoid the consequences under the BST Act. The Explanation which has been introduced in section 2(26) in 1988 would therefore govern the case. He submits that the References be answered in favour of the Revenue and against the Assessee. 27) Mr. Sonpal has relied upon the following decisions and material in support of his contentions: 1. Circular No. 21 of 1988 dated 27th May, 1988, Bombay Sales Tax (Amendment) Rules, 1988. 2. Jay Bharat Credit and Investment Co. v. CST (2000) 120 STC 1 J.V.Salunke,PA STR.16.2003.Judgment.doc 3. Sundaram Finance Ltd. vs. Asstt. Commissioner of I. T., Chennai (2012) 10 SCC 430 4. Commissioner of VAT, Delhi vs. Carzonrent (India) Pvt. Ltd. 198 (2013 Delhi Law Times 783 (DB) 5. Goodwill India Ltd. vs. The State (1980) 45 STC 368 6. Commissioner, Trade Tax, U. P. vs. Varanasi Auto Sales (P) Ltd. (1996) 101 STC 555 28) For a proper appreciation of the rival contentions, it would be necessary to refer to the relevant provisions and applicable for the assessment year, of the BST Act. Section 2(26) of the BST Act can be traced from 1981 and thus reads as under: 1-7-1981 to (26) “resale”, for the purposes of sections 7, 8, 12 and 13 30-4-1982 means a sale of purchased goods 1-5-1982 to (26) “resale” for the purposes of sections 7, 8, 12, 13 and 20-4-1987 13B, means a sale of purchased goods 21-4-1987 to (26) “resale”, for the purposes of sections 7, 8, 9, 12, 13 21-4-1988 and 13B means a sale of purchased goods 22-4-1988 to (26) “resale” for the purposes of sections 7, 8, 8A, 9, 12, 31-8-1990 13 and 13B means a sale of purchased goods 1-9-1990 to (26) “resale” for the purposes of sections 7, 8, 8A, 9, 12, 30-9-1995 13, 13AA and 13B means a sale of purchased goods 1-10-1995 (26) “resale” for the purposes of sections 7, 8, 8A, 12, 13, to date 13AA and 13B means a sale of purchased goods - 1-7-1981 (i) in the same form in which they were purchased, or to date 1-7-1981 to (ii) without doing anything to them which amounts to, or 31-3-1984 results, in a manufacture or

1-7-1981	(ii) without doing anything to them which amounts to, or
to date	results, in a manufacture (Deleted with effect from 19-1-
	1976)
1-7-1981 to	(iii) being goods specified in any entry in Schedule B,
31-3-1984	without doing anything to them which takes them out of
	the description thereof in that entry,
1-7-81	and the word "resale" shall be construed accordingly;
to date	

22-4-1988 to Explanation - For the purpose of this clause, a sale of 10-8-1988 purchased goods excluding declared goods shall not be deemed to be a resale, if the seller holds the trade mark or the patent in respect of the goods sold or if such trade mark or patent is assigned to the seller by the holder of the trade mark or patent in respect of such goods sold by him. 22-4-1988 to Explanation - for the purpose of clauses (i), (ii) and (iii) 30-4-1992 of section 8, a sale of purchased goods other than and Declared goods, shall not be deemed to be a resale - 9-9-1992 (i) if the seller holds a trade mark or a patent in respect of to 31-3-1994 the goods sold or if the seller holds a patent in respect of the method or process of manufacturing the goods sold; or (ii) if the seller is entitled to use a trade mark or a patent in respect of the goods sold, or if the seller is entitled to use a patent in respect of the method or process of manufacturing the goods sold; 1-5-1992 Explanation I - For the purposes of clauses (i) , (ii) and to 8-9-1992 (iii) of section 8, a sale of purchased goods other than Declared goods shall not be deemed to be a re-sale if the seller - (a) holds or is entitled to use, or uses, a patent in respect of the goods sold or in respect of the method or process of manufacturing the goods sold; or (b) holds or is entitled to use, or uses, a trade mark registered under the Trade and Merchandise marks Act, 1958 [43 of 1958] in respect of the goods sold; or (c) uses in respect of the goods sold, a trade mark registered, whether by him or by any other person, under the Trade and Merchandise Marks Act, 1958 [43 of 1958] in respect of any other goods. 1-5-1992 to Explanation II - Where a dealer has applied for grant of 8-9-1992 patent, or for the registration, or for the renewal of the registration of his trade mark, he shall be deemed to be holding a patent or, as the case may be, a registered trade mark from the date of his application for grant of patent, or for registration, or as the case may be, for renewal, of his trade mark till such application is finally decided. 9-9-1992 to Explanation - For the purpose of clauses (i) , (ii) and (iii) 31-3-1994 of section 8, a sale of purchased goods other than Declared goods shall not be deemed to be a resale - (i) if the seller holds a trade mark or a patent in respect of the goods sold or if the seller holds a patent in respect of the method or process of manufacturing the goods sold; or J.V.Salunke,PA STR.16.2003.Judgment.doc (ii) if the seller is entitled to use a trade mark or a patent in respect of the goods sold, or if the seller is entitled to use a patent in respect of the method or process of manufacturing the goods sold; 1-4-1994 to Explanation - For the purpose of clauses (i), (ii) and (iii) 30-9-1995 of section 8, a sale of purchased goods other than Declared goods, shall not be deemed to be a resale - 1-4-1994 to (i) if the seller holds a trade mark or a patent in respect of 30-9-1995 the goods sold, or if the seller holds a patent in respect of the method or process of manufacturing the goods sold; or 1-4-1994 to (ii) if the seller is entitled to use a trade mark or a patent 30-9-1995 in respect of the goods sold, or if the seller is entitled to use a patent in respect of the method or process of manufacturing the goods sold; The statement of objects and reasons

leading to the amendments reads as under: “In view of the experience gained in the working of the Bombay Sales Tax Act, 1959, certain amendments are proposed to be made in the Act to prevent unintended loss of revenue. Certain other amendments which are required to be made are either procedural or are necessary for the purpose of the effective implementation of the Act. Some of the amendments are being given retrospective effect as mentioned below 2. The following clauses indicate some of the important provisions of the Bill:- Clause 2. - (a) The definition of”Resale“in clause (26) of section 2 of the Act is now proposed to be restricted to certain clauses of section 8. It is now being clarified that a dealer holding a patent for a method or process of manufacturing any goods will not be entitled to claim resale in respect of his sale of such goods. The amendments now being made are retrospective with effect from 22nd April 1988 as the definition of”resale" was first amended with effect from that date." 29) A perusal of the above would reveal that the term re-sale has been defined for the purpose of sections 7, 8, 8A, 9, 12, 13 and 13B. That is for the purpose of levy of Sales Tax on goods specified in J.V.Salunke,PA STR.16.2003.Judgment.doc Schedule ‘C’, power to satisfy points of sale at which goods may be taxed, levy of turnover tax on goods specified in Schedule ‘C’ in case of certain Dealers. By section 12, there is a deduction permissible from turnover on conditions stipulated therein being satisfied. By section 13 and 13B, purchase tax payable on certain purchases of goods from unregistered Dealers and purchase tax payable on specified goods has been dealt with. In these circumstances, the definition of the term “re- sale” was necessitated. A re-sale means a sale of purchased goods in the same form in which they were purchased or without doing anything to them which amounts to or results in a manufacture. By Explanation which has been substituted w.e.f. 22nd April, 1988 by Maharashtra Act 22 of 1988, it has been stated that for the purposes of Clauses (i) (ii) and (iii) of section 8 of the BST Act, a sale of purchased goods other than declared goods shall not be deemed to be a re-sale. Therefore, a sale of purchased goods, which is ordinarily a re-sale, shall not be deemed to be as such in the event the same falls in Clauses (i) and (ii) of this Explanation. Prior to the insertion of this Explanation, the definition had only Clauses (i) and (ii). Therefore, the Explanation is deemed to have been substituted w.e.f. 22 nd April, 1988 and that is to take care of the sale of purchased goods other than declared goods, in which the seller holds the trade mark or a patent or the seller is entitled to use a trade mark or a patent either in the goods or in the process or J.V.Salunke,PA STR.16.2003.Judgment.doc method of manufacture of the goods sold. That is to take care of the tendency to effect a sale of purchased goods without divesting the seller of his right in the trade mark or patent. As has been set out in the statement of objects and reasons leading to the amendments noted above that the same were proposed to prevent unintended loss of Revenue. Certain amendments were necessitated for the purpose of effective implementation of the BST Act. Some of the amendments were given retrospective effect. Once this intent is noted and in the light of the plain language of the Explanation, then, there is no scope for limiting the words as desired by the Applicant. 30) Mr. Sridharan would submit that such an insertion or substitution by way of Explanation

apart, the Explanation itself is not attracted in the facts and circumstances of the present case. In that regard, he relies upon the activity undertaken by the Dealer/Applicant. He submits that during the manufacture of the vehicles, the primary business that the Applicant is involved is selling of such vehicles to Dealers. That is the principal and dominant activity compared to a small part of the business related to hire purchase. He submits that there are some vehicles which have been directly sold to the Dealers, but when Dealers offer them to the customers, the customers being unable to tender the full price at such sale, seek a facility or concession J.V.Salunke,PA STR.16.2003.Judgment.doc of payment of the same in installments. Therefore, the Dealers approach the Applicant and request the Applicant to re-purchase the vehicles. Such vehicles are then re-purchased from the Dealers and thereafter provided to the customers on hire purchase basis. Mr.Sridharan submits that there is no evasion of tax, inasmuch as in the first sale of the vehicles to the Dealer, full tax as applicable under the BST Act is paid. Once that tax is paid, on the sale transaction back to the Applicant, no tax has been charged. That qualifies as a re-sale. The third transaction of hire purchase is the one on which the tax is demanded. But, in terms of the Explanation, the Revenue will have to satisfy this Court that the Applicant holds the trade mark in the goods even after the first sale. In other words, the trade mark no longer subsists but is exhausted after the first sale. 31) We are unable to agree with Mr. Sridharan, because the Tribunal, in this case, has held that the Applicant is a holder of the trade mark. The Tribunal relied upon a decision of this Court rendered in the case of Federation of Association of Maharashtra and Anr. reported in 11 Sales Tax Cases 391. It may be that the said decision is rendered in the backdrop of a challenge to the constitutional validity of section 2(26) of the BST Act and particularly the Explanation referred by us hereinabove, yet, while upholding the constitutional validity, this Court J.V.Salunke,PA STR.16.2003.Judgment.doc held that the law in question and particularly the provision together with the Explanation is incorporated in the statute permitting imposition of tax on sale and purchase of goods. The Explanation in the definition of the term "re-sale" refers to the sellers who hold a trade mark or a patent in respect of the goods sold and the transactions and dealings of the nature referred to in the definition, by a seller of purchased goods of this class are deemed not to be a re-sale so as to classify the Dealers into those holding a patent or a trade mark and those not holding so. The classification has been held to be reasonable and founded on intelligible differentia having nexus to the object sought to be achieved. We do not go into the issue as to whether the larger Bench decision of the Tribunal in Raj Oil Mills lays down the correct position (Appeal No. 27 of 1992 decided on 30th December, 2006). But, independent of that, we are of the view that the Explanation refers to a sale of purchased goods other than declared goods. That would ordinarily fall within the definition of the term "re-sale" if that is satisfying the criteria, namely, the sale of purchased goods in the form in which they were purchased or without doing anything to them, which amounts to or results in a manufacture can be termed as a re-sale. However, even when this criteria or test is satisfied, still, if the sale of purchased goods is by a seller who holds a trade mark or a patent or is

entitled to use the trade mark or patent in respect thereof, then, the transaction of sale of purchased goods by him J.V.Salunke,PA STR.16.2003.Judgment.doc is not deemed to be a re-sale. The language of the Explanation being plain, clear and unambiguous that the Tribunal committed no error in relying on it. If the admitted factual position is noted, then, the Explanation applies with full force. 32) In other words, the Explanation refers to the category or class of dealers holding a trade mark or patent. In other words, Mr.Sridharan submits that the applicability of the Explanation is dependent upon the rights conferred in a holder of the trade mark or patent or a person entitled to a use thereof in terms of the Trade Marks Act, 1999. He submits that the object and purpose sought to be achieved by the Trade Marks Act, 1999 must not be lost sight of. The Explanation will have to be construed in the light of the provisions contained in these two enactments. If in terms of these enactments the seller does not hold a trade mark or a patent or is not entitled to use the said trade mark or patent in the goods, in respect of which such rights are conferred, after they are sold for the first time, then, the subsequent acts in relation to these goods would not be covered by the Explanation. 33) Mr. Sridharan has relied upon the works of eminent authors. He brings to our notice the passage in the book Intellectual property: Patents, Copyright, Trade Marks and Allied Rights, Fourth Edition by W. R. Cornish. He submits that the general concept in every J.V.Salunke,PA STR.16.2003.Judgment.doc intellectual property law is that it is necessary to decide which steps in the chain of production and distribution of goods require the licence of the right owner, manufacturer, first sale by the manufacturer, subsequent sales and other dealings, export and import, use. He submits that in many cases, both in British and Foreign laws, the rights are exhausted after first sale by the right owner or with his consent. However, this is confined to first sale within the territory covered by the right and therefore, the principle of domestic exhaustion of rights would apply. Thus, the concept of exhaustion of rights is relevant to goods which emanated initially from the intellectual property owner or associated enterprises. Mr. Sridharan has also relied upon the passage from Kerly's Law of Trade Marks and Trade Names in that regard. He submits that in this work as well, this principle has been stated and with reference to the essential functions and specific subject matter of trade marks. Mr. Sridharan has also relied upon the principle that it is unjust to decide or respond to any particular part of law without examining the whole of the law (see Aphali Pharmaceuticals Ltd. vs. State of Maharashtra 1989 (44) ELT 613 SC). He has also relied upon Trade Marks Act, 1999 and a Judgment of the United States Supreme Court in the case of Kirtsaeng, DBA Bluechristine99 vs. John Wiley and Sons INC 568 U. S. - 2013. J.V.Salunke,PA STR.16.2003.Judgment.doc 34) We are unable to agree with Mr. Sridharan and for more than one reason. We do not see how the provisions in the BST Act and particularly the definition "re-sale" as appearing in section 2(26) therein together with its Explanation can be construed contrary to our Trade Marks Act, 1999 and the Trade and Merchandise Marks Act, 1958 or the Patent Act, 1970. The State legislature was aware of the parliamentary statutes namely, the Trade and Merchandise Marks Act, 1958 and the Patent Act holding the field.

It did not in any manner legislate contrary to the said statutes. It was aware of the existence of the above statutes when it substituted the Explanation by Maharashtra Act 22 of 1988. The provision of neither Acts can be construed as interfering with the power of the State legislature to make or amend a law, namely the BST Act, 1959/the Maharashtra Sales Tax Act. The area and field covered by the two legislations is distinct. Moreover, for the purpose of classification of the Dealers and who would be subjected to the tax under the BST Act that the legislature inserted or substituted the Explanation in the said Act. It was fully empowered to do so. It referred to the trade marks and the patents only for the purpose of the classification. Beyond that, we do not find that the said Act in any manner enlarges the restricted rights conferred in a trade mark or a patent holder under the parliamentary statutes. The said law therefore cannot be said to be containing any contrary stipulation or provision. J.V.Salunke,PA STR.16.2003.Judgment.doc We cannot assume that the State legislature enacted a law enabling imposition and levy of tax on sales and purchases of goods and in doing so, interfered with the aforenoted legislations. Far from interfering, the State legislature made a reference to the sellers holding a trade mark or a patent in the goods which are sold after they are purchased or the rights to use the trade marks or patent in relation to such goods solely to distinguish the sellers conferred with such rights from those not holding the same. The State never intended to travel beyond these parliamentary statutes and therefore, the wording of the Explanation in the instant case cannot be said to be creating any right or authority unknown or not provided by the parliamentary statutes. Once this conclusion is reached, strictly speaking, the alternate contention of Mr. Sridharan need not detain us. 35) Mr. Sridharan submitted that there is a exhaustion of the rights of a trade mark holder upon first sale and he relied upon the works of well known authors. However, we have to go by the scheme of the Trade Marks Act, 1999 and the Trade and Merchandise Marks Act, 1958. In both statutes, we find that there is not a complete or absolute exhaustion of the mark. The Trade Marks Act, 1999 must contain a specific provision enabling the Court to conclude that the trade mark is exhausted in the above manner. In both statutes, the definition and interpretation section is enacted so as to subserve the object and J.V.Salunke,PA STR.16.2003.Judgment.doc purpose in enacting the law. The Trade and Merchandise Marks Act, 1958 is an Act to provide for registration and better protection of trade marks and for the prevention of the use of fraudulent marks on merchandise. That Act contains 11 Chapters, in which, there are provisions for a Register of trade marks and conditions for registration, procedure for and duration of registration (see section 25). Then, the effect of registration is spelt out. There are provisions enabling the assignment and transmission of registered and unregistered trade marks. There is a Chapter on use of trade marks and registered users. The Register of trade marks can be rectified and corrected. Then, there are provisions enabling certification of trade marks. There are provisions relating to textile goods and then there are offences, penalties and procedure and miscellaneous provisions. This Act, namely the Trade and Merchandise Marks Act, 1958 has been repealed and its re-enactment is the Trade Marks Act, 1999. It is an Act to amend and

consolidate the law relating to trade marks with the same object and purpose as is sought to be achieved by the predecessor Act. This Act also contains similar provisions. It is divided into several Chapters and with more or less identical headings and titles. It contains 159 sections. 36) The term 'mark' is defined in section 2(m) and the term 'trade mark' is defined in section 2(zb). That is a mark capable of being J.V.Salunke,PA STR.16.2003.Judgment.doc represented graphically and which is capable of distinguishing the goods or services of one person from those of others. Section 2(r) defines 'permitted use' in relation to a registered trade mark. It also enables registration of trade marks. The powers in that behalf in the Registrar are set out in Chapter II and procedure and duration of registration is provided by Chapter III. The effect of registration is that subject to other provisions of the Act, the registration of a trade mark shall, if valid, gives to the registered proprietor of the trade mark, the exclusive right to use of the trade mark in relation to the goods or services in respect of which the trade mark is registered and to obtain relief in respect infringement of the trade mark in the manner provided by the Act. This right is subject to the conditions and limitations to which the registration itself is subjected. A person who claims to be a trade mark holder but does not have it registered either in relation to the goods or services, will only be able to prevent passing off the goods or services as the goods of another person or as services provided by another person or the remedies in respect thereof. 37) We do not find any provision which sets any limit of the nature read by Mr. Sridharan. The trade mark is not exhausted. All that is provided in the law is that the registration of a trade mark shall be for a period of 10 years but may be renewed from time to time. J.V.Salunke,PA STR.16.2003.Judgment.doc Since the definitions of the 'mark', 'trade mark', 'registered trade mark', 'well known trade mark' are all incorporated so as to distinguish the goods or services of one person from those of the others, then, unless some provision is specifically made so as to exhaust the distinction and right therein, we cannot take assistance of the works referred above and read into the Indian law of trade marks and patents something which the law itself does not provide for or enact in any manner. 38) Mr. Sonpal submitted that there are certain rights which are conferred by the common law and recognised by the Trade Marks Act, 1999. The law intends to provide for registration and better protection of trade marks for goods and for the prevention of the use of fraudulent marks. In that regard, Mr. Sonpal is right in submitting that in Chapter IV of the Trade Marks Act, 1999 the effect of registration is set out. By section 27, an unregistered trade mark cannot be made subject matter of any infringement action, but such a prohibition will not and shall not be deemed to affect the rights of action against any person for passing off goods or services as the goods of another person or as services provided by another person or the remedies in respect thererof. Section 28 of the Trade Marks Act, 1999 deals with rights conferred by registration and reads as under: "28. Rights conferred by registration - (1) Subject to the other provisions of this Act, the registration of a trade mark shall, if valid, J.V.Salunke,PA STR.16.2003.Judgment.doc give to the registered proprietor of the trade mark the exclusive right to the use of the trade mark in relation to the goods or

services in respect of which the trade mark is registered and to obtain relief in respect of infringement of the mark in the manner provided by this Act. (2) The exclusive right to the use of a trade mark given under sub-section (1) shall be subject to any conditions and limitations to which the registration is subject. (3) Where two or more persons are registered proprietors of trade marks, which are identical with or nearly resemble each other, the exclusive right to the use of any of those trade marks shall not (except so far as their respective rights are subject to any conditions or limitations entered on the register) be deemed to have been acquired by any one of those persons as against any other of those persons merely by registration of the trade marks but each of those persons has otherwise the same right as against other persons (not being registered users using by way of permitted use) as he would have if he were the sole registered proprietor. Objects and reasons - Clause 28 - This clause deals with the exclusive rights conferred by registration. This corresponds to the existing section 28 of the Trade and Merchandise Marks Act, 1958. This right has now been extended to include services also." 39) A bare perusal thereof would indicate as to how the exclusive right to use of a trade mark given under sub-section (1) of section 28 shall be subjected to any conditions and limitations to which the registration is subject. What is infringement of a registered trade mark is dealt with by section 29 and by sub-section (1), it is stated as to how the mark being used not by a registered proprietor or a person permitted to use it in the course of its trade uses, a mark which is identical with or deceptively similar to the trade mark in relation to goods or services, in respect of which it is registered and in such manner as to render the use of mark likely to be taken as being used as a trade mark would constitute infringement. J.V.Salunke,PA STR.16.2003.Judgment.doc 40) The preceding Chapter III deals with procedure for and duration of registration and the prior provisions enabling registration of trade marks would indicate that so long as the parameters in the legislation are fulfilled, the protection by virtue of registration can be claimed. The registration itself is subjected to renewal, removal and restoration. By section 30, it is clarified that even if the registered trade mark has a limited effect, one cannot, by resorting to section 29 and by virtue of the registration, prevent the use of the registered trade mark by any person for the purpose of identical goods or services as those of the proprietor, provided, Clauses (a), (b), (c), (d) and (e) are satisfied. Further, by sub-section (2) of section 30, a trade mark cannot be said to be infringed merely because of use in relation to goods or services and that is dealt with by Clauses (a), (b), (c), (d) and (e). Sub-sections (3) and (4) of section 30 read as under: "(3) Where the goods bearing a registered trade mark are lawfully acquired by a person, the sale of the goods in the market or otherwise dealing in those goods by that person or by a person claiming under or through him is not infringement of a trade by reason only of - (a) the registered trade mark having been assigned by the registered proprietor to some other person, after the acquisition of those goods; or (b) the goods having been put on the market under the registered trade mark by the proprietor or with his consent. (4) Sub-section (3) shall not apply where there exists legitimate reasons for the proprietor to oppose further dealings in the goods in particular,

where the condition of the goods, has been changed or impaired after they have been put on the market." J.V.Salunke,PA STR.16.2003.Judgment.doc 41) Thus, an action for infringement of registered trade marks may succeed in the event the limitations on effect of registered trade marks set out in section 30(2) of the Trade Marks Act, 1999 are not attracted. By sections 32 and 33, the protection of registration on ground of distinctiveness in certain cases is granted and the law also deals with effect of acquiescence. However, vested rights are saved and such right may vest with any person other than the proprietor or registered user of a registered trade mark. The Act has thus provisions which take care of the rights of those who may be of the category indicated hereinabove. There is a provision enabling rectification and correction of the Register. In all this, one does not find the absolute exhaustion of the trade mark as claimed by Mr. Sridharan. If the Act is read as a whole and the provisions thereof are construed harmoniously, it would be clear that the protection guaranteed by registration of the Trade Mark may have some limitations. However, they affect the enjoyment of the rights conferred by registration (see sections 28, 29 and 30). The registered Trade Mark is thus not exhausted as the rights therein are protected so long as the registration is in effect and valid. The rights therein are somewhat diluted and their enjoyment curtailed but we cannot infer from the statute the result that Mr.Sridharan reads in it. It is only the limitations or restrictions on the rights, which have been conferred upon registration that are spelt out. Those may include J.V.Salunke,PA STR.16.2003.Judgment.doc the restrictive provisions when the goods enter the market. The goods entering the market and dealings in such goods entering the market are cases which are specifically dealt with and some savings and restrictions have been enacted in the legislation pertaining to trade marks. However, the theory and principle which is relied upon by Mr. Sridharan by itself and without anything more cannot assist the Applicant. Such principle or theory ought to find place in the scheme of the Indian legislation. That having not been detected or to be found that we conclude that Mr. Sridharan's contentions based on the above principle have no merit. Rather we find some substance in the argument of Mr. Sonpal to the contrary. 42) In fact Mr. Sridharan was fair enough to point out an order passed in this very Assessee's case by the High Court of Jharkhand in Writ Petition No.6040 of 2002 and other connected Writ Petitions on 1 st March, 2012. We agree with the conclusion reached by the High Court of Jharkhand at Ranchi. 43) The distinction as sought to be made by Mr. Sridharan and by relying upon the Judgment of the Hon'le Supreme Court in the case of Association of Leasing and Financial Service Companies vs. Union of India and Ors. (2011) 2 SCC 352 cannot be of any assistance. The context in which the observations have been made by the Hon'ble J.V.Salunke,PA STR.16.2003.Judgment.doc Supreme Court must not be lost sight of. That is to deal with the competence of the parliament to levy, assess and recover service tax on leasing and hire purchase transactions. In that context that the observations in paras 65 and 66 have been made. That is to emphasise the taxable event in that enactment. These observations and conclusions cannot be of any assistance to construe the provision in the present case. In fact the Judgment of the Hon'ble Supreme Court was noted

by the High Court of Jharkhand. In these circumstances, we are of the view that the Tribunal committed no error in dismissing the Petitioner's Appeal to the extent indicated in its operative order. 44) In the case of Jay Bharat Credit and Investment Co.(supra), the Hon'ble Supreme Court was considering as to whether transfer of goods on hire purchase can be included in the definition of the term "sale" under section 2(g) of the Bengal Finance (Sales Tax) Act, 1941 as extended to the Union Territory of Delhi. There, the issue was whether the Respondents, namely, the Commissioner of Sales Tax was justified in holding that the hire purchase transaction entered into by the Appellant (Jay Bharat Credit and Investment Co. Ltd.) was liable to imposition of Sales Tax on the consolidated proceeds. The Hon'ble Supreme Court dealt with the Judgment delivered by it in the case of K. L. Johar and Co. vs. Deputy Commercial Tax Officer (1965) 16 STC 213 (SC). It is J.V.Salunke,PA STR.16.2003.Judgment.doc after distinguishing it that the Hon'ble Supreme Court arrived at the conclusion that the hire purchase transaction can be brought within the purview of the term "sale". Similarly, in the Assessee's own case, the High Court of Jharkhand dealt with identical controversy. The attention of the High Court of Jharkhand was invited to all the Hon'ble Supreme Court Judgments in the field including Jay Bharat Credit and Investment Co.(supra) and upon such attention being invited to, the High Court of Jharkhand in para 8 held that even in the State of Jharkhand, the position cannot be different than the one dealt with in Jay Bharat Credit and Investment Co.(supra). 45) Therefore, we do not think that anything that is dealt with and covered by these decisions can be re-agitated much less the controversy therein re-opened. Once we take this view, then, it is not necessary to refer to every decision cited by Mr. Sonpal. 46) In view of the above, the questions in Sales Tax Reference No. 16 of 2003 are answered in favour of the Revenue and against the Assessee. Those are questions, whether the issue was of re-sale within the meaning of section 2(26) of the BST Act read with the Explanation thereto. 47) In Sales Tax Reference No. 3 of 2008, the question No. (i) is identical to the questions in Sales Tax Reference No. 16 of 2003. The J.V.Salunke,PA STR.16.2003.Judgment.doc additional question in para 3(ii) above in Sales Tax Reference No. 3 of 2008 is also answered against the Assessee and in favour of the Revenue, because a different view other than taken by the Hon'ble Supreme Court in the case of Jay Bharat Credit and Investment Co. (supra) and the High Court of Jharkhand in the Applicant's own case cannot be taken. The References are disposed of accordingly. (A.A.SAYED, J.) (S.C.DHARMADHIKARI, J.)

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