M/S. Tata Motors Ltd. vs The Deputy Commissioner Of Commercial ... on 15 May, 2023

Author: K.M. Joseph

Bench: K.M. Joseph, B.V. Nagarathna

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL No.1822/2007

M/S. TATA MOTORS LTD. …. APPELLANT(S)

VERSUS

THE DEPUTY COMMISSIONER OF
COMMERCIAL TAXES(SPL) & ANR. …. RESPONDENT(S)

WITH

CIVIL APPEAL No. 1446/2010

CIVIL APPEAL No.3733 of 2023
(@ SLP(C) No. 11509/2017)

CIVIL APPEAL No.3734 of 2023
(@SLP(C) No. 12119/2017)

CIVIL APPEAL No. 11724/2018

CIVIL APPEAL No. 3827/2011

CIVIL APPEAL No. 3856/2013

CIVIL APPEAL No. 5815/2012

CIVIL APPEAL No. 2756/2012

CIVIL APPEAL No.3718 of 2023
(@ SLP(C) No. 28859/2011)

Date: 2023.05.16
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Reason:

CIVIL APPEAL No. 5969/2011

CIVIL APPEAL No. 5967/2011

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CIVIL APPEAL Nos.3716-3717 of 2023
(@ SLP(C) Nos. 15642-15643/2011)

CIVIL APPEAL No. 3821/2011

CIVIL APPEAL No. 4019/2011

CIVIL APPEAL No. 3822/2011

CIVIL APPEAL No. 4021/2011

CIVIL APPEAL Nos.3719-3723 of 2023
(@ SLP(C) Nos. 31698-31702/2013)

CIVIL APPEAL No.3735 of 2023
(@ SLP(C) No. 25905/2013)

CIVIL APPEAL No. 4516/2018

CIVIL APPEAL No. 10924/2018

CIVIL APPEAL No. 1821/2007

CIVIL APPEAL No. 9979/2018

CIVIL APPEAL Nos. 3004-3006/2017

CIVIL APPEAL Nos.3730-3732 of 2023
(@ SLP(C) Nos. 12806-12808/2016)

CIVIL APPEAL No.3740 of 2023
(@ SLP(C) No. 12280/2014)

CIVIL APPEAL Nos.3725-3727_of 2023
(@ SLP(C) Nos. 5449-5451/2014)

CIVIL APPEAL No.3724 of 2023
(@ SLP(C) No. 5447/2014)

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CIVIL APPEAL Nos. 3825-3826/2011

CIVIL APPEAL No. 3823/2011

CIVIL APPEAL No. 6172/2009

CIVIL APPEAL No. 3824/2011

CIVIL APPEAL No. 3820/2011

CIVIL APPEAL No.3715_ of 2023
(@ SLP(C) No. 14260/2007)

JUDGMENT

NAGARATHNA, J.

Leave granted.

2. These Civil Appeals arise from the judgments of the High Courts of Karnataka, Rajasthan, Allahabad, Madhya Pradesh, Bombay, Andhra Pradesh, Kerala and Gujarat. Since common questions of law and facts have been raised in these appeals vide Reference Order dated 05.12.2019 made by a Bench of two judges to a Bench comprising of three judges, the reference has been heard and is accordingly answered.

In some of the civil appeals, the dealers–assessee are the appellants, while in rest of the appeals the respective States are the appellants.

Preface:

3. By order dated 05.02.2019, reference has been made to a Bench of three Judges which shall hereinafter be referred to as the "Reference Order".

The pertinent paragraphs of the Reference Order read as under:

> "15. We are not delving into the controversy in any further detail as we are of the opinion that the issue raised is required to be looked into by a larger Bench. The crucial point which would arise for consideration, and over which the matter needs to be debated, is as to whether, in the case of such a warranty for the supply of free spare parts; once the replacement is made, and the defective part is returned to the manufacturer, sales tax would be payable on such a transaction relating to the spare part, based on a credit note, which may be issued for the said purpose. This is in the context of the observations discussed aforesaid regarding the price of the car being inclusive of the cost of the spare parts, the latter being supplied for free, upon replacement. Sales tax on the car is paid. Sales tax on the inventory purchased by the dealer is paid. Thus, if there is no consideration for these replaced parts, can sales tax be levied at all? The judgment in Mohd. Ekram Khan & Sons case [Mohd. Ekram Khan & Sons v. CTT, (2004) 6 SCC 183] refers to the credit notes received as

consideration for the replacement; but it is a moot point whether credit notes can be treated as a mode of payment or not.

The judgment in Premier Automobiles Ltd.

case [Premier Automobiles Ltd. v. Union of India, (1972) 4 SCC (N) 1: (1972) 1 SCR 526] is stated to contain a different factual situation, as per the observations in Mohd. Ekram Khan & Sons case [Mohd. Ekram Khan & Sons v. CTT, (2004) 6 SCC 183]. There are observations referred to above, again in Mohd. Ekram Khan & Sons case [Mohd.

Ekram Khan & Sons v. CTT, (2004) 6 SCC 183], of the possibility of the manufacturer having purchased, from open markets, the parts for replacement, on which taxes would be paid. In that context, it was observed that "the position is not different because the assessee had supplied the parts and received the price". The assessee actually had purchased the parts and paid sales tax on it, but on return of the defective part to the manufacturer, was given a credit note.

16. We have some reservations in respect of the observations and legal propositions laid down in Mohd. Ekram Khan & Sons case [Mohd. Ekram Khan & Sons v. CTT, (2004) 6 SCC 183] and consider it appropriate that the matter be considered by a larger Bench."

4. The point for consideration under the Reference Order is, whether, a credit note issued by a manufacturer to a dealer of automobiles in consideration of the replacement of a defective part in the automobile sold pursuant to a warranty agreement being collateral to the sale of the automobile is exigible to sales tax under the sales tax enactments of the respective States. While considering the said question, the Reference Order doubts the correctness of the observations made in Mohd. Ekram Khan & Sons vs. CTT, (2004) 6 SCC 183 (Mohd. Ekram Khan).

5. It may be mentioned that in the aforesaid decision three other judgments of the Delhi High Court, Madhya Pradesh High Court and Kerala High Court in Commissioner of Sales Tax vs. Prem Nath Motors, (1979) 43 STC 52 (Delhi), (Prem Nath Motors); Prem Motors, Gwalior vs. Commissioner of Sales Tax, Gwalior 1986 (61) STC 244 MP (Prem Motors) and Geo Motors vs. State of Kerala (2001) 122 STC 285 (Geo Motors) respectively were considered and the latter two judgments were overruled. Factual Background:

6. Of the thirty-four cases before us, the factual conspectus involves provisions of the respective Sales Tax Act and similar questions of law. Thus, the facts in Commercial Tax Officer vs. M/s Marudhar Motors, C.A. No. 3856/2013 only are encapsulated for the sake of convenience as under:

i. The assessee, M/s Marudhar Motors is a dealer of TATA Vehicles. Under the dealership agreement, the dealer/assessee would provide replacement of warranty goods sold to the customer.

ii. There exists a separate warranty agreement between the manufacturer and the ultimate customer to whom such vehicles are sold by the assessee.

iii. In the normal course of business transactions involving the sale of automobile parts, Tata Motors sells vehicles and spare parts to Marudhara Motors by charging CST against "C" form. Thereupon, Marudhara Motors sells these goods to customers through invoices collecting local sales tax at a price not exceeding the maximum price prescribed by the manufacturer. iv. However, in the case of warranty claims raised by customers due to the emergence of defects in some parts, such parts are replaced free of cost to the customers to avoid delay in first securing such parts from the manufacturer, Tata Motors, and replacing the same. The dealer, on behalf of the manufacturer, collects a defective component or the vehicle itself from the customer and replaces it with part/s or vehicle in his stock purchased from the manufacturer. This defective component/s or vehicle received on exchange by the dealer from the customer is returned back to the manufacturer from whom the dealer had purchased the same in the first place i.e., Tata Motors, who after receiving the parts or the entire vehicle and satisfying themselves about it being defective, issues credit notes, thereby crediting the running account of the dealer which is maintained for sale transactions, at the price at which the good was initially sold to the dealer.

v. Pursuant to the decision of this Court in Mohd. Ekram Khan, the assessing authority invoked the power of reassessment under Section 30 of the Rajasthan Sales Tax Act, 1994 to impose a tax on assessee's turnover having escaped assessment for the assessment years 2000-2001 to 2003- 2004. However, for the assessment years 2004-2005 and 2005-2006, regular assessment proceedings were initiated under Section 28 of the Rajasthan Sales Tax Act, 1994. vi. On July 22, 2006, the Deputy Commissioner (Appeals) of Jodhpur passed an order upholding the levy of tax upon an assessee but setting aside the levy of interest and penalty imposed by the assessing authority under Section 65 of the Act.

vii. This decision gave rise to six cross-appeals filed by the assessee and another six appeals filed by the Revenue. The assessee was dissatisfied with the decision to uphold the levy of tax and filed six separate appeals for six different assessment years - 2000-2001, 2001-2002, 2002-2003, 2003- 2004, 2004-2005, and 2005-2006. On the other hand, the Revenue was aggrieved by the decision to set aside the levy of interest and penalty and filed another batch of six appeals. viii. The matter was taken up by the Rajasthan Tax Board in Ajmer, which issued a common judgment on June 18, 2007, disposing of all twelve appeals. The Rajasthan Tax Board set aside the decision of Deputy Commissioner (Appeals) and thereby set aside the imposition of tax. It found the transaction of replacing the defective parts did not fall within the definition of 'sale' as defined under Section 2(38) of the Rajasthan Sales Tax Act. It also concluded that the facts of the case are distinguishable from the facts in Mohd. Ekram Khan. ix. The Revenue filed revision petitions under Section 86 of the Rajasthan Sales Tax Act, 1994. The Rajasthan High Court, while dismissing these

revision petitions and affirming the order of Rajasthan Tax Board, distinguished the facts in the case from the facts and reasoning in Mohd. Ekram Khan by underlining three distinguishing factors. Firstly, it noted that the agreement between the manufacturer and dealer reflected a principal-to-principal relationship, and not a principal-agent relationship. Secondly, it was noted that the transaction between manufacturer and dealer, pertaining to the return of defective parts to the manufacturer and the issue of credit notes to the dealer, is independent of the transaction between manufacturer and customer, pertaining to the discharge of warranty obligation. Thirdly, it was considered that the warranty obligation was being discharged free of cost. It was noted that, Mohd. Ekram Khan was decided on the premise that the dealer assessee had supplied the parts and had received the price.

Gist of Cases under consideration:

7. The present appeals assail judgments rendered by eight High Courts. While all fifteen decisions rendered by Rajasthan High Court are in the favour of the assessee, all decisions rendered by Kerala, Karnataka, Bombay, Andhra Pradesh, Madhya Pradesh, and Gujarat High Courts are in the favour of Revenue. In the case of Allahabad High Court, one decision is in favour of Revenue while the other is in favour of the assessee. A table of cases is drawn up as under:

High Court	Number of Appeals by the Revenue	Number of Appeals by the Assessee

7.1. As is clear from the table above, fifteen out of the thirty-four cases before us pertain to revenue's appeals against the decisions of the Rajasthan High Court, relying upon the decision in C.T.O. (AE), Jodhpur vs. M/s Marudhara Motors, Jodhpur, (2010) 29 VST 114, (Marudhara Motors) dated 16.03.2009. In the aforementioned decision, the Rajasthan High Court distinguished the facts and reasoning in Mohd. Ekram Khan by underlining three distinguishing factors. Firstly, it noted that the agreement between the manufacturer and dealer reflected a principal-to- principal relationship, and not a principal-agent relationship. Secondly, it was noted that the transaction between manufacturer and dealer, pertaining to the return of defective parts to the manufacturer and the issue of credit notes to the dealer, is independent of the transaction between manufacturer and customer, pertaining to the discharge of warranty obligation. Thirdly, it was considered that the warranty obligation was being discharged free of cost. It was noted that, Mohd. Ekram Khan was

decided on the premise that the dealer assessee had supplied the parts and had received the price.

7.2. The other decision in favour of the assessee was rendered by Allahabad High Court in M/s. Vikrant Automobiles vs. Commissioner, Commercial Tax, U.P., vide order dated 06.11.2015. The High Court dismissed the revision against the order of Customs, Excise and Service Tax Appellate Tribunal wherein the transaction of replacement of spare parts as part of warranty was held not to be assessable. The High Court held that it was 'well recognized that in supply of spare parts to the customer by the dealer during the period of warranty free of charge, no sale consideration passes from the customer to the dealer and therefore the cost of the spare parts cannot be included in the turnover of the sale of the dealer.' 7.3. In a later judgment rendered by the same High Court, the above decision was found to be of no assistance to the assessee. Therefore, in The Commissioner, Commercial Tax Lko. vs. S/S Maskat Motors Pvt. Ltd., decided on 08.12.2016, the said Court reversed the finding of the Tribunal that the imposition of the tax was not justified because defective parts of motor vehicles have been replaced free of cost and the manufacturer had issued credit notes. The High Court found the above conclusion to be perverse, self-contradictory, and 'contrary to the charging section as well as the definition of "Sale" under the U.P. Act and Central Act.' Applying Mohd. Ekram Khan, the High Court found all elements of sale to be completed as the transaction of supply of spare parts to consumers was concluded by the payment of valuable consideration by the manufacturer in the form of credit notes to the dealer. Therefore, the High Court held that the assessee has sold spare parts for valuable consideration attracting liability to tax under the U.P. Act.

7.4. The assessees have impugned four decisions of the Karnataka High Court. All these decisions have followed the reasoning and conclusions arrived at in the case of Dy. Commissioner of Commercial Taxes (Assessment), Bangalore vs. Prerana Motors (P) Ltd., disposed of on 19.10.2005. In the aforementioned case, an order against the Revenue, by Customs, Excise and Service Tax Appellate Tribunal was reversed on revision under Section 23(1) of Karnataka Sales Tax Act, 1957, on the ground that the dispute is covered by the decision in Mohd. Ekram Khan. It was reasoned that in Mohd. Ekram Khan, the assessee was a dealer registered under the provisions of the U.P. Trade Tax Act,1948 and also an agent of M/s. Mahindra and Mahindra (manufacturer). The manufacturer had a warranty agreement with the purchasers of vehicles to replace defective parts during the warranty period. The conclusion of Mohd. Ekram Khan was relied upon to conclude that the transaction was taxable as the manufacturer had made payment to its agent by issuing credit notes for the supply of defective parts during the warranty period.

7.5. In a similar vein, the five impugned decisions rendered by the High Court of Kerala followed the reasoning and conclusions in the case of M/s TVS and Sons Ltd. vs. State of Kerala, decided on 06.06.2007. Clause 23 of the Dealership Agreement states:

> "The Dealer is not and shall not be the agent of the Company for any purpose, and the dealer has no right or authority to assign or create any obligation of any kind, express or implied, on behalf of the Company to bind the Company in any way, to accept any service or process upon the Company or to receive any notice of any nature whatsoever."

7.6. Also Warranty Policy of Mahindra & Mahindra Ltd. on 'Warranty Repair Attention' states that the dealer should not charge the customer for warranty repairs. It emphasizes that the repairs should be carried out absolutely free of charge and the claims should be submitted to the manufacturer for reimbursement.

7.7. The High Court affirmed the decision of the Kerala Sales Tax Appellate Tribunal wherein the decision in Mohd. Ekram Khan was applied to confirm the assessment order passed by the Revenue against the dealer who had replaced defective parts of automobiles for free, in the discharge of his obligations under the dealership agreement. The Tribunal had rejected the argument that the dealer was merely discharging the obligations of the manufacturer in so far as the warranty was concerned and therefore, the transaction was not taxable.

7.8. The three impugned decisions, emanating from the Bombay High Court, follow the decision in M/s Navnit Motors Pvt Ltd. vs. State of Maharashtra, decided on 29.11.2011. The High Court recorded that the Sales Tax Tribunal had declined to refer the matter to the High Court under Section 61 of the Bombay Sales Tax Act, 1959. It further noted that the Tribunal, while following the law laid down in Mohd. Ekram Khan found that the dealer was not an agent of the manufacturer, i.e., Maruti Udyog Ltd. Furthermore, it was observed that the title and risk in the goods pass to the dealer once it is purchased from Maruti Udyog Ltd. and the delivered goods pass to him at the factory gate. Moreover, the replacement for defective parts covered by warranty is done by the dealer out of his stock of purchased goods. Also, the cost of parts incurred by the dealer in carrying out a repair, or replacement of the defective part is reimbursed by the manufacturer. The High Court rejected the attempt of the assessee to distinguish the facts in Mohd. Ekram Khan as the attempt was premised on the assertion that in Mohd. Ekram Khan, the relationship between the dealer and manufacturer involved an agency whereas in the present case, the transaction was on a principal-to-principal basis. The High Court affirmed the reasoning of the Tribunal on this question by recording that the nature of the relationship as found in the dealership agreement contested in Mohd. Ekram Khan was the same as that in the case at hand: principal-to-principal relationship. Therefore, the assessee cannot seek to take benefit of a sentence recorded in the judgment in Mohd. Ekram Khan that the dealer was an agent of the manufacturer. The High Court further reasoned that the terms of agreement in Mohd. Ekram Khan was similar to the case being considered as clause 49 of the Agreement of Dealership required the dealer to promptly and effectively deal with any claim made by the customer of any vehicle under the provisions of the warranty currently in force. In terms of the warranty, the cost of parts incurred by the dealer in carrying out repairs or replacement of defective parts is in accordance with the procedure established by the manufacturer and reimbursed by the manufacturer to the assessee.

7.9. Two decisions of the Madhya Pradesh High Court are assailed in the present case by the assessees. Both orders follow the reasoning of court in M/s. Harsh Automobiles Private Limited vs. The Commissioner of Commercial Tax, Indore, decided on 25.01.2018. The High Court relied upon the dictum in Mohd. Ekram Khan and rejected the assessee's contention that the replacement of motor vehicle part during the warranty period was not covered in sale and, therefore, is not liable to tax. 7.10. The sole impugned decision from the Gujarat High Court, M/s Kataria Automobiles Pvt Ltd. vs. State of Gujarat, was decided on 20.03.2015. The High Court applied the decision of this

Court in Mohd. Ekram Khan and concluded that the transaction of replacement of defective parts was taxable as the dealer had received payment in the form of credit notes for the discharge of the manufacturer's warranty obligation. The High Court observed that it was admitted that the dealer was purchasing the spare parts from the open market and replacing the defective parts during the warranty period. It also noted that the dealer was being compensated by way of credit notes. Moreover, the manufacturer has received the defective parts from the dealer. The High Court reasoned that if the said defective parts were purchased from the open market, the manufacturer would have been obliged to pay sales tax.

7.11. Two decisions of the Andhra Pradesh High Court are assailed in the present case by the assessees. These cases pertain to M/s Jasper Industries (P) Ltd. vs. State of Andhra Pradesh, decided vide common order dated 11.02.2011. The High Court applied the dictum in Mohd. Ekram Khan and reasoned that it was not open to the High Court to distinguish the judgment of the Supreme Court on a microscopic examination of the different facts situation. Therefore, the High Court refused to entertain the view of the Rajasthan High Court, as enunciated in Marudhara Motors. Triology of Cases considered/overruled in Mohd. Ekram Khan:

8. The three cases considered in Mohd. Ekram Khan shall be discussed at this stage.

I. Commissioner of Sales Tax vs. Prem Nath Motors, (1979) 43 STC 52 (Delhi): (Prem Nath Motors)

(i) The aforesaid case was a sales tax reference in which the following two questions were referred to the High Court of Delhi:

> "(I) Whether, having regard to the facts and circumstances of the case, the replacement of the parts during the continuance of the warranty entered into by the manufacturer and/or by its authorised dealer with the purchaser would constitute a "sale" within the meaning of Section 2(g) of the Bengal Finance (Sales Tax) Act, 1941 as in force in Delhi which is liable to be taxed under the provision of the Act?
>
> (II) Whether on the facts and in view of the circumstances of this case, if the supply of parts transferred to the purchaser of vehicles in replacement in compliance with the stipulations of the warranty is not "sale"

within the meaning of clause 2(g) of the Act, the purchase price of the parts purchased on the strength of certificate of registration free of cost or purchased at the concessional rate of tax under the Central Sales Tax Act, 1956, on furnishing 'C' form, is liable to be added to the taxable turnover of the purchasing dealer under the provisions of the second proviso to clause (ii) of sub-

section (2) of Section 5, of the Bengal Finance (Sales Tax) Act 1941, as in force in Delhi ?"

> (Underlining by us)

(ii) In the said case, the Division Bench of the Delhi High Court considered the order of the Financial Commissioner who had held that the transfer of property in the parts of a car replaced under a warranty constituted a "sale" and, as such, the replacement of parts as a consequence of the terms and stipulations of the warranty must be deemed to be a continuation of the original sale, the price of which was included in the consolidated sale price determined and realised at the time of transfer of goods in the shape of the car with a warranty. It was further observed that the replacement of parts of the car provided free of cost by the dealer in terms of the warranty was part of the consolidated price realised at the time of the initial transfer and on which sales tax was paid and the replacement of the parts would deem to be a 'sale' not liable to imposition of further sales tax.

(iii) The precise question considered in the said case was, whether, transfer of the parts replaced in pursuance of the warranty amounted to a sale within the meaning of the Sales Tax Act and whether the sale price of the car which had been subjected to the sales tax could be regarded as having included the cost or value of spare parts used in the replacement, in compliance with the stipulations in the warranty. On considering the warranty clause, it was noted that the sale of cars was along with the warranty to replace defective parts free of cost and the price was fixed at the time of the sale. After noting the distinction between the condition and warranty in a contract of sale of goods, it was observed that the consideration on the defective part, that might be replaced under the warranty was not separately specified because it was included in the price fixed at the time of sale of the car. In other words, the transfer of property and the part replaced in pursuance of stipulation of warranty is part of the original sale of the car for the price fixed and received from the buyer or consumer. The price so fixed and received was a consolidated price for the car and the parts that may have been supplied by way of replacement in pursuance of the warranty. Accordingly, it was observed that the Financial Commissioner was right in holding that the price for the replaced part was already charged and paid, on which sales tax was already levied and collected and hence, there was no liability to the imposition of further sales tax.

II. Prem Motors, Gwalior vs. Commissioner of Sales Tax, Gwalior, 1986 (61) STC 244 MP: (Prem Motors)

(i) The question considered in the said case under Section 44 (1) of the M.P. General Sales Tax Act, 1958 is extracted as under:

"Whether in the facts and circumstances of the case, the Tribunal was justified in holding that the reimbursement of Rs.33,263/- received from the principals will not form part of the sale price as defined under section 2 (o) of the M. P. General Sales Tax Act, 1958?" (Underlining by us) In the said case, the revenue contended that when the spare parts are replaced by the assessee (dealer) to the customer free of charge, being the condition of warranty, he recovers the price from the manufacturer

and in substance it is the sale of the spare parts to the customer and therefore, it is liable to tax payable by the dealer.

(ii) The Division Bench of the Madhya Pradesh High Court, however, held that the aforesaid contention of the revenue suffered from a basic policy issue. That the warranty for a sale of car is from the manufacturer and therefore, if during the warranty period any part is found to be defective and is to be replaced, the responsibility of replacement is that of the manufacturer. Therefore, when the assessee (dealer) replaces parts to the customers and either gets those parts from the manufacturer or gets it reimbursed, it is neither a sale of those parts by the dealer to the customer nor to the manufacturer, what it does only is to pass on the part from the manufacturer to the customer but in order to avoid delay and inconvenience to the customer, he replaces the parts first and gets them from the manufacturer later and thus, it does not fall within the ambit of the definition of sale as provided under the Act.

III. Geo Motors vs. State of Kerala, (2001) 122 STC 285: (Geo Motors)

(i) The facts in the said case were that the petitioner (Geo Motors) was an agent for automobile manufacturers like Hindustan Motors Ltd. in the State of Kerala. The new vehicles were covered by a warranty for a specified period. During the warranty period if spare parts had to be replaced, the petitioner therein as the agent of the manufacture, made the replacement free of charge to the owners of the vehicle. The value of such spare parts replaced by the petitioner therein during the warranty period was reimbursed by the manufacturer by issuing credit notes. The spare parts were purchased in bulk and replacement was made from out of such stock held by the petitioner. After replacement, the petitioner therein would make a claim to the manufacturer who would issue the credit notes. The manufacturer would issue credit notes for the value together with excise duty and sales tax, thereby, cancelling the original sale made to the petitioner in respect of the item replaced. Therefore, it was contended that there was only a sale cancellation between the manufacturer and the petitioner and that the petitioner therein had already suffered tax at the point of a sale and therefore, every component part of the car would have to be taken to have suffered tax at the point of a sale and when replacement was made it is in respect of an item which has suffered a tax at the point of a sale.

According to the revenue, the replacement of the spare parts was by purchase made from outside the State by issue of C-forms.

(ii) The Division Bench of the Kerala High Court held that the transaction in question cannot be said to be a sale. That the purchase of spare parts may have been by giving C-forms but it was used purely for replacement and not for sale. That credit notes are issued by the manufacturer by reducing the sale value. In this regard, reliance was placed on Prem Nath Motors. Hence, a direction was issued to exempt the turnover of the spare parts which were used for replacement. Mohd. Ekram Khan:

9. The aforesaid two cases, namely, Prem Motors and Geo Motors were overruled in Mohd. Ekram Khan. Further, the question considered therein was, whether, the amount received by the assessee therein for supply of parts to the customers as a part of the warranty agreement was liable to tax. The assessee therein was an agent of M/s Mahindra and Mahindra (manufacturer). The manufacturer had a warranty agreement with the purchasers of vehicles (the customers) to replace defective parts during the warranty period. The manufacturer would make payment of a certain price on account of parts supplied by the assessee to the customer by way of replacement of the defective part obviously without charging the customer for the same. Credit notes were issued by the manufacturer to the assessee as the price of the parts supplied to the customers. The assessing officer was of the view that the payment received through credit notes amounted to a sale in terms of Section 2 (h) of the Uttar Pradesh Trade Tax Act, 1948. The Trade Tax Tribunal, Varanasi held in favour of the assessee by stating that there was no sale. The revenue had carried the matter before the High Court which had held that the transactions constituted sale thereby, attracting levy of tax. 9.1. In the said case, reliance was placed on Prem Nath Motors, Prem Motors and Geo Motors by the assessee. It was contended that as part of a warranty agreement, replacement of the defective agreement was made by the dealer and there was no sale involved. As opposed to this, the revenue contended that the transaction between the assessee and manufacturer was a separate transaction. It was not the case of the assessee therein that the manufacturer had supplied the goods to the customers. If it had supplied parts to the customers through the assessee, the position may have been different. The manufacturer was obligated to make the replacement. If he did not possess the parts to meet the contractual obligation, he would have purchased the part from any seller of the part and would have paid the sales tax. In the said case, the assessee had supplied the goods for which it had received the consideration by way of credit notes and/or other mode of payment. This Court observed that the factual position in Prem Nath Motors case was different. That in Geo Motors and Prem Motors, the nature of the transaction between the assessee and manufacturer was lost sight of. It was observed that when the manufacturer may have purchased from the open market, parts for the purpose of replacement of the defective parts, it would have paid taxes. But the position is not different because the assessee had supplied the parts and had received the price. That the assessee had received the payment of the price supplied to the customer. Therefore, the transaction is subject to levy of tax. The decisions in Geo Motors and Prem Motors were overruled.

It is in the above context that the Reference Order has been passed doubting the aforesaid observations.

Submissions:

10. We have heard learned senior counsel and learned counsel for the respective parties at length and shall proceed to answer the reference.

Arguments on Behalf of Assessees in the present Appeals/SLPs:

> I. Submissions of Sri Kavin Gulati, senior counsel for the appellant in Civil Appeal No.1822/2007:
>
> (i) Learned senior counsel Sri Gulati submitted that the Tata Motors dealership agreement, particularly clauses 1(a), 1(b), 1(e), 9, 10, 11(a), 12, 13(c), 25, and 33 indicate that the transaction between the manufacturer and the dealer is one of Principal and Principal. Tata Motors has already collected and paid Sales Tax while selling the automobiles in question to the dealers. The dealer is contractually bound to service the warranty obligations undertaken by the manufacturer at the time of the sale. It was brought to our attention that in the present appeals, the respective State's Sales Tax authorities had adopted varying interpretations of the allegedly taxable transactions. While the Assessing Officer in Karnataka had characterized the sale as between dealer and manufacturer;

the authorities in Kerala deemed it to be a sale by the dealer without specifying to whom the sale was made. He clarified that during the course of the hearing, the counsel for the State of Kerala adopted the stand that the sale was between dealer and manufacturer.

(ii) On the question of law referred to this Court, it was contended that, Mohd. Ekram Khan struck a discordant note against the well-established principle, enunciated in Premier Automobiles, Prem Nath Motors, Prem Motors and Geo Motors, that the cost of warranty was included in the initial transaction of sale and was not taxable separately. Therefore, it was contended that all transfers are not sales, as a sale has a definitive connotation in sale tax law. Sales tax is not applicable to all transfers which may happen by means of transactions other than sale, such as gift, barter, or exchange. Relying upon State of Madras vs. Gannon Dunkerley & Co, (1959) SCR 379, [Gannon Dunkerley (I)], it was submitted that crucial elements of a tax-eligible sale transaction are: i) the existence of buyer and seller, ii) existence of an agreement between parties for transferring title of goods, iii) such transfer should be supported by monetary consideration, and iv) property in goods must pass or be transferred. It was contended that the present facts do not present a taxable sale because:

> a. firstly, spare parts are supplied to the customers by the dealers completely free of charge by way of replacement of goods already sold.
>
> b. secondly, customer receives the new spare part as installed in his vehicle and returns the defective part. c. thirdly, the substance of the transaction remains the discharge of a warranty obligation assumed by the manufacturer, and through him, the dealer, while selling the original goods. As the spare parts are deducted from the stock of the dealer due to convenience, credit is deservedly given by the manufacturer to the dealer to account for the value of the goods supplied on behalf of the manufacturer.

d. fourthly, any dealer of the manufacturer herein can be approached for discharging the warranty obligation free of charge.

e. fifthly, the department has wrongly assumed that the supply of spare parts to the customer is a sale made to the manufacturer albeit the title is being transferred to the customer on account of the dealership agreement.

(iii) Learned senior counsel further submitted that replacement of spare parts during the warranty period does not constitute a sale. This proposition is supported by Section 12(3) of the Sale of Goods Act, 1930 ("the Act", for short) which states that a warranty is a stipulation collateral to the main purpose of the contract. Reliance was also placed upon the decision of the Canadian Supreme Court in General Motors Products of Canada Ltd. vs. Leo Krabvitz, (1979) SCC Online CAN SC 2, wherein it was clarified that the warranty claim by a purchaser was connected to his title over the product which was acquired through the original sale. Therefore, it was contended that the old parts were returned to the manufacturer through the dealer for the reason that it was crucial to servicing of the warranty obligation. The decision of this Court in Government of India vs. Madras Rubber Factory Limited, (1995) 4 SCC 349, not validating the treatment of warranty as a trade discount under excise law was also relied upon. Reliance was also placed on Devi Dass Gopal Krishnan vs. State of Punjab, (1967) 3 SCR 557, (Devi Dass Gopal Krishnan).

(iv) Learned senior counsel, Sri Gulati submitted that the enforcement of the warranty obligation presented the opposite of the contract of sale, which involves the volitional transfer of goods. A case of discharge of a warranty is the exact opposite as both the buyer and seller agree to subsist within the existing sale to facilitate the seller to compensate the buyer for a breach or damage or defect caused to them. Reliance was also placed upon Section 59 of the Act, which clearly stipulates that enforcement of the remedy for breach of warranty could be actualized in diminution or extinction of the sale price, and if he is not compensated, he may sue for the breach of warranty. Therefore, it was contended that a credit note is issued by the manufacturer to the dealer as an acknowledgment of the diminution of the original sale price.

Axiomatically, credit note is not a sale price or valuable consideration, as the character of credit is not towards the price of the newly replaced part, but a credit that embodies the diminution of the price already paid for the car. Therefore, it was submitted that, Mohd. Ekram Khan does not correctly conceive and appreciate the nature of a warranty transaction, i.e., an undertaking to ensure defect-free functioning of the sold product for the stipulated period of time. Therefore, the said judgment ought to be overruled was the submission. II. Submissions of Sri S.K. Bagaria, senior counsel for the petitioner, M/s TVS and Sons Ltd., in SLP (C) No. 14260 of 2007:

(i) Sri Bagaria, learned senior counsel submitted that the nature of the transaction was not that of a sale, as the service was provided free of cost to the customer by a

> dealer pursuant to a warranty clause. The property in the replaced part passed merely as an incident of the performance of the manufacturer's warranty obligation, which forms a part of the original sale of the automobile. Sri Bagaria referred to the relevant clauses of the Dealership Agreement and Warranty Policy to highlight two facts: (a) dealers are contractually obligated to provide free-of-

cost warranty services for warranty parts to the customer and

(b) defective parts are returned by the customers and become the property of the manufacturer.

(ii) Learned senior counsel clarified that the nature of the transaction was as a compensation to the buyer, and the measure thereof was equivalent to the cost of exchange of defective parts. He cited Benjamin's Sale of Goods Act (10th edn., para 16.032) to underline the compensatory principle, following which the manufacturer compensates the buyer for the breach that occurred by way of the defect in the part covered by way of a warranty. Citing para 1.069, learned senior counsel asserted that a transaction involving contractual compensation would not amount to the sale of a thing as the property passes merely as an incident of performance of a contract of indemnity.

(iii) Therefore, learned senior counsel submitted that enforcement of a contractual right for getting a free replacement in exchange for a defective part was neither any purchase by the buyer nor a sale to him. According to learned senior counsel, this proposition was crystallized in Gannon Dunkerley (I), Devi Dass Gopal Krishnan, Gannon Dunkerley (II), and Kone Elevators Pvt. Ltd. vs. State of Tamil Nadu, (2014) 7 SCC 1.

Relying upon Builders' Association of India vs. Union of India, (1989) 2 SCC 645, it was stressed that the constitutional position post-46th Amendment of the Indian Constitution whereby the States' legislative competence to tax the sale of goods was circumscribed by Entry 54, List II, Schedule VII of the Constitution. That taxation under this entry, being limited to "sale and purchase of goods" cannot be extended to activities that are not a sale.

(iv) Reliance was also placed upon Commissioner of Customs vs. Dilip Kumar & Co., (2018) 9 SCC 1 and CIT vs. Motor & General Stores Pvt. Ltd., AIR 1968 SC 200 to emphasize that taxing statutes ought to be specific and must be interpreted strictly, as taxation on citizens should not be subject to the whims and fancies of the government. Learned senior counsel adopted the arguments with respect to Mohd. Ekram Khan. That the case did not apply to facts of the present case where the warranty obligation was being discharged free of cost and the defective goods were being returned to the manufacturer. Alternatively, it was contended that the said case was not correctly decided as the essential elements of a sale were not considered in the said judgment. III. Submissions of Sri V. Sridharan, learned senior counsel for the petitioner in SLP (C) Nos. 12806-12808/ 2016:

> (i) Learned senior counsel Sri Sridharan submitted that the petitioner in the aforementioned cases being a dealer of M/s Maruti Suzuki India Ltd., merely fulfilled the manufacturer's warranty obligation. It was urged that the dealership agreement was a framework agreement. Taking note of the chain of transactions, the customer is

compensated for the consideration of purchase of an automobile from the petitioner.

Therefore, there is no contract of sale either between the petitioner and the customer for the replacement of defective parts or between the petitioner and manufacturer as sale of parts replaced for the defective parts.

(ii) Challenging the applicability of the Central Sales Tax Act, 1956 to the present case, learned counsel maintained that there is no inter-state movement of replacement parts as they are fitted at the dealer's location. There is only the movement of defective parts from the dealer's location to the manufacturer if located in another State.

(iii) Learned senior counsel stressed the importance of keeping prudent commercial sense in mind while construing the contractual obligations in the present case. In this regard, the decision of the United Kingdom Supreme Court in Rainy Sky SA & Orad vs. Kookmin Bank, (2011) UKSC 50 was cited wherein it was held that the Court was entitled to prefer the construction which is consistent with business common sense. Therefore, it was submitted that the contract of warranty cannot be equated with a contingent contract of sale, with the contingency being the occurrence of a defect in the parts covered under the warranty. Moreover, the construction preferred by the Revenue that there is an agreement to sell an unspecified good in the future for which the manufacturer will pay the consideration is an unreasonable one. On the other hand, the decision of this Court in Nabha Power Ltd. vs. Punjab State Power Corporation Ltd., (2018) 11 SCC 508 was relied upon as it laid a five-fold test for constructing a contract of warranty as a sale. Therein, it was held that to imply a term in a contract, the same must be (i) reasonable and equitable; (ii) necessary to give business efficacy; (iii) passes officious bystander test; (iv) be capable of clear expression; and (v) must not contradict express term of the contract. Thus, it was contended that the construction preferred by the Revenue was contradicting the express terms of the contract of warranty.

(iv) Learned senior counsel further submitted that even if the present transaction is assumed to be that of a sale between manufacturer and dealer, the same has to be treated as purchase return and not be eligible to sales tax. There is no scope for entertaining any doubt that a purchase return would be relevant only when a purchase tax is levied on the purchaser. Furthermore, the present transaction where manufacturer-issued credits are accounted as sales return which is a recognized accounting practice and not a tax avoidance strategy. Therefore, it was argued that sales return beyond statutory time limit does not lose its character of return. The only consequence could be that selling dealer may not be able to claim the deduction from gross turnover.

(v) Learned senior counsel also relied upon the judgment of the Court of Appeal, New Zealand, in the case of Suzuki New Zealand Ltd. vs. Commissioner of Inland Revenue, (2001) 20 NZTC 17. The said case pertained to supply of spare parts by the car manufacturer to the purchaser directly or through the dealer under the terms of a warranty. Here, the parts were transferred from the overseas Suzuki Motor Corporation to Suzuki New Zealand. Rejecting the claim for imposition of Goods and Services Tax, the Court of Appeal held that there was no export of service for GST purposes.

Arguments on Behalf of Revenue in the present Appeals/SLPs:

> Submissions of Sri Pallav Sisodia, senior counsel for the State of Kerala in SLP (C) No.14260/2007:
>
> (i) Learned senior counsel, Sri Pallav Sisodia submitted that the presence of a manufacturer's or dealer's warranty on the car sold by the dealer does not make any difference to whether the transaction of replacement of defective goods satisfies the elements of sale or not. The learned senior counsel listed various instances by way of illustrations when a customer purchases a car and reasoned that even when a customer did not purchase a car with a warranty but had taken an insurance, his expenses on the replacement of defective parts are reimbursed. Yet, the transaction is understood as a component of the taxable turnover of the dealer as per Explanation (5) to Section 2 (xxi) of the Kerala General Sales Tax Act, 1963. Even when the customer enforces the warranty, the dealer obtains a discharge of warranty obligation as a valuable consideration for the transfer of fresh parts from the dealer to the customer. The car dealer gets the replacement of parts as co-warrantor from the manufacturer towards the discharge of warranty obligation either on a principal-to-

principal basis or as an agent of the manufacturer. Moreover, there exists a form of recompense from the manufacturer to the dealer. It makes no difference if the recompense is in the form of a credit note or cheque or cash. Irrespective of the nature of the transfer of goods between manufacturer and dealer, it is a sale for the purposes of sales tax laws.

(ii) It was submitted that the Prem Nath Motors line of cases was decided on fallacious reasons, and the decision in Mohd. Ekram Khan deserves affirmation. Therefore, the idea of 'continuous sale', 'credit note as not a valuable consideration', or 'sales return' are all red herrings not supported by facts on record.

Submissions of Sri Ravindra K. Raizada, senior counsel for Commissioner, Commercial Tax, State of U.P. in SLP(C) Nos. 12119/2017 and 11509/2017:

> (i) Sri Raizada, learned senior counsel submitted that the Dealership Agreement between Tata Motors and M/s Vikrant Automobiles was on a principal-to-principal basis.

Furthermore, the case did not involve an exchange of the manufacturer's spare parts with customer's defective parts. Instead, the dealer purchased the parts from the manufacturer. It is clearly not a stock transfer from the manufacturer to the dealer. The ingredients of sale in the present case ought to be considered complete when goods i.e. new spare parts, are transferred to the customers and payment is received from the manufacturer who is fulfilling the warranty obligation as per established trade practice. He asserted that the manufacturer maintaining a running account of the dealer, through a credit note in respect of such sale of spare parts by dealer, has acknowledged such adjustment to be made in Sale and Purchase Account of the dealer. Thus, the warranty claims

ought to be taxable as elucidated in Mohd. Ekram Khan. On the issue of warranty obligation emanating from the original sale, learned senior counsel submitted that the performance of warranty obligations is determined through actual damage to the defective part at the relevant time a claim is made. Therefore, it cannot be said to have been totally accounted for and debited in manufacturer's Taxable Turnover of Sales and Purchase under VAT/Trade Tax.

(ii) Accordingly, he prayed that the case of the revenue ought to succeed in both SLPs, therefore, SLP(C) No. 12119/2017 should be allowed, and SLP(C) No. 11509/2017, filed by a dealer, M/s Maskat Pvt Ltd, ought to be dismissed. Submissions of Dr. Manish Singhvi, senior counsel for the State of Rajasthan in Civil Appeal No. 3856/2013:

> (i) Dr. Singhvi, learned senior counsel, instructed by Sri Milind Kumar, submitted that the exact nature of the transaction has to be seen to determine whether sales tax was leviable or not.

It was stressed that the crucial issue pertains to the misuse or misdeclaration of C-Forms which are issued at concessional rate under Section 8(4) of Central Sales Tax Act, 1956 read with Rule 12 of Central Sales Tax Rules, 1957. Any internal adjustment qua accounts or even contracts is alien for the charging section to operate. Thus, in the case at hand, all spare parts were sold against C-Forms, and have been sold again, in violation of conditions pertaining to resale. That, spare parts were fitted during the warranty period for a consideration given by way of credit notes by the manufacturer. Therefore, the penalty is bound to be imposed on Dealer/Manufacturer company.

Submissions of Sri Nikhil Goel, Counsel for the State of Karnataka in Civil Appeal Nos. 1822/2007, 1821/2007 and SLP (C) Nos. 5449-5451/2014, 5447/2014:

> (i) Sri Goel, learned counsel submitted that the Karnataka Value Added Tax Act, 2003 specifically excludes those transactions which are not sales. Since the transaction under dispute is not specifically excluded, the assessees have sought to canvass that it does not satisfy the definition of sale under Section 2(t) of the Karnataka Value Added Tax Act, 2003. It was further submitted that the four elements of the sale are completed in the transaction under dispute. The State seeks to tax sales and it does not matter if there is an element of profit involved.

The cost of the car does not include the cost of the warranty. Therefore, he submitted that the argument made by assessee is incorrect, when seen in light of the decision of this court in Premier Automobiles. That the Supreme Court of England in Digital Satellite Warranty Cover Limited vs. Financial Services Authority, (2013) UKSC 7 held that warranty is in the nature of insurance. Even without such warranty, the Act binds the manufacturer to provide working goods, failure of which would invite an action in damages.

(ii) Learned counsel, Sri Goel, also underlined that in the accounting entries, the assessee was not accounting for the sale occasioned by a warranty to be a sales return. The concept of sale and purchase return applies to the same good, whereas the present facts pertain to a defective good.

Furthermore, the transactions of sale occasioned by warranty are separate from the sale of a car by the manufacturer. Both transactions ought to be tested independently. Therefore, the discharge of a larger obligation by the dealer to sell motor vehicles on which tax is already paid, does not render the separate transaction of return of defective parts to the manufacturer against a credit note, as not a sale. Submissions of Sri Aniruddha Joshi, learned counsel for State of Maharashtra in Civil Appeal Nos. 2756/2012, 10924/2018 and 9979/2018:

> (i) Sri Joshi submitted that the elements of sale for the imposition of sales tax were satisfied in the present transaction. It was urged that the real nature of the transaction and the substance thereof had to be deciphered to distinguish between a contract of sale between the dealer and manufacturer with that of an agency. It was submitted that the Dealership Agreement between the dealer-assessee and the manufacturer is a composite document that includes multiple contracts of sale, as understood from Section 4(1) of the Act. These include:
>
> a. Agreement to sell the car to the dealer; b. Agreement to sell spare parts by manufacturer to the dealer;
>
> c. Conditional Agreement to sell the spare parts by the dealer to the manufacturer if such a condition is fulfilled. The condition is a warranty claim being raised by a purchaser. d. Agreement to purchase wherein the dealer undertakes to purchase spare parts from the manufacturer.
>
> (ii) The counsel further submitted that all elements of sale are complete because there is a seller and a buyer, i.e. dealer and manufacturer; valuable consideration was paid by the manufacturer in the form of credit notes and the transfer of the property of goods is taking place to the nominee of the manufacturer, i.e. car purchaser.

It was also contended that there is no question of the delivery of spare parts and the consequent payment by way of credit note being an instance of sales return. The sale of the car is separate from the sale of spare parts, the sales in question would be specifically applicable to the latter.

Submissions of Ms. Deepanwita Priyanka, Counsel for the State of Gujarat in SLP (Civil) Nos. 12806-12808/ 2016:

> (i) Learned counsel submitted that the assessee's claim for exemption from payment of sales tax is not covered by the exemption notification issued under Section 8(4) of Central Sales Tax Act, 1956 on 13.05.2002. It was submitted that the burden of proving exemption was on the assessee and that the benefit of any ambiguity ought to go to the State.

11. Points for consideration:

(i) Whether the judgment of this Court in Mohd. Ekram Khan calls for reconsideration in terms of the Reference Order dated 05.12.2019? In other words, whether the aforesaid case has been correctly decided or not?

(ii) What Order?

12. At the outset, it is necessary to read the relevant provisions of the Act:

Sections 4 and 5 of the said Act read as under:

"4. Sale and agreement to sell. – (1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part-owner and another.

(2) A contract of sale may be absolute or conditional.

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or is subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

5. Contract of sale how made. – (1) A contract of sale is made by an offer to buy or sell goods for a price and the acceptance of such offer. The contract may provide for the immediate delivery of the goods or immediate payment of the price or both, or for the delivery or payment by instalments, or that the delivery or payment or both shall be postponed.

(2) Subject to the provisions of any law for the time being in force, a contract of sale may be made in writing or by word of mouth, or partly in writing and partly by word of mouth or may be implied from the conduct of the parties." 12.1. Section 4 defines the expression sale. In order to apply the said definition, four essential elements are necessary, namely, (i) parties competent to contract; (ii) mutual assent; (iii) passing of property; and (iv) price to be paid.

12.2. While understanding the said Section, the terms defined under Section 2, clauses (7), (13), (11), (1) and (10) respectively are necessary as the said clauses define the terms "goods", "seller", "property", "buyer" and "Price". Thus, to constitute a sale, in the legal sense, there must be a contract in pursuance of which the transfer of property, which transfer need not necessarily be by the owner himself, takes place on payment of a price, though there are exceptions to this rule enshrined under Sections 19 to 24 of the Act. The contract may be oral or in writing, or it may be inferred even from the conduct of the parties, but it must originate from an offer and its acceptance.

A sale must not be distinguished from a mere agreement to sell. If under the contract of sale, title to goods has not passed, then there is an agreement to sell and not a completed sale. An agreement to sell becomes a sale when the time lapses, or the conditions are fulfilled, subject to which the property in the goods are transferred. Thus, under the common law as well as the statute law, relating to sale of goods, it is of the essence that there must be an agreement, express or implied, relating to goods, to be completed by passing of title therein and also the agreement and the sale should relate to the same subject-matter. Thus, existence of a contract to sell is sine qua non for the coming into existence of a sale.

12.3. Therefore, the following elements must be present to constitute a valid contract of sale, namely, -

(1) a contract (as required by the Act and the Contract Act); (2) between two parties, (the one called the “seller” and the other called the “buyer”);

(3) to transfer or agree to transfer the property; (4) in goods;

(5) from the seller to the buyer;

(6) for a price, that is, money consideration.

12.4. It is also necessary to differentiate a contract of sale from other contracts, as the question whether a given contract is one of sale or a contract of any other description is one of substance and not of form. It depends on the real meaning and nature of the contract as to whether it is a contract of sale or – (i) a mere guarantee for the price, or (ii) a barter or exchange, or (iii) a bailment on trust, or (iv) a contract of sale or return, or (v) a contract of del credere agency, or (vi) a contract of sale on commission, or (vii) a contract for loan on security, or (viii) a mere wagering contract, or (ix) a contract for work and materials, or (x) a contract for hiring, or (xi) a contract to do work as an agent, or (xii) a licence to get mineral products from land, or (xiii) a pledge, or

(xiv) a gift.

12.5. In State of Madras vs. Gannon Dunkerley and Co. (Madras) Ltd., 1958 (9) STC 353 SC (Gannon Dunkerley and Co.-I), it was observed that the expression sale of goods in Entry 48, List II of Schedule VII of the Government of India Act, 1935, cannot be construed in its popular sense but must be interpreted in its legal sense and should be given the same meaning which it has in the Act. It was further observed that in order to constitute a sale, it is necessary that there should be an agreement between the parties for the purpose of transferring title in the goods, which presupposes capacity to contract, that it should be supported by money consideration, and that as a result of the transaction property must actually pass in the goods. Unless all these elements are present, there can be no sale. Thus, if merely title to the goods passes but not as a result of any contract between the parties, express or implied, there is no sale. So also, if the consideration for the transfer is not a money consideration but other valuable consideration, it may then be an exchange or barter but not a sale under the Act. Also if, under the contract of sale, title to the goods has not passed, then there

is an agreement to sell and not a completed sale. Moreover under the law there cannot be an agreement relating to one kind of property and a sale as regards another. There must be an agreement between the parties for the sale of the very goods in which eventually the property passes. It was further observed in the aforesaid case that both under the common law and the statute law relating to sale of goods in England and in India, to constitute a transaction of sale, there should be an agreement, express or implied, relating to goods to be completed by passing of title in those goods. It is of the essence of this concept that both the agreement and the sale should relate to the same subject matter. Where the goods delivered under the contract are not the goods contracted for, the purchaser has got a right to reject them, or to accept them and claim damages for breach of warranty. Under the law, therefore, there cannot be an agreement relating to one kind of property and a sale as regards another. Thus, the expression sale of goods must relate to an agreement between the parties for the sale of the very goods in which eventually the property passes.

12.6. It was further observed that the interpretation to the expression sale of goods in Gannon Dunkerley and Co.-I was made on the basis of the common law definition contained in Blackstone, Benjamin on Sale, Halsbury's Law of England, Chalmer's Sale of Goods Act, Corpus Juris, Williston on Sales and the Concise Oxford Dictionary. It was necessary to interpret the language of the Constitution with reference to the Common law, and the Court must place itself in the position of the men who framed and adopted the Constitution and inquire what they must have understood to be the meaning and scope of the principle that when power is conferred to legislate on a particular topic, to have regard to what is ordinarily treated as embraced within that topic in legislative practice and particularly in the legislative practice of the State which has conferred that power by the Constitution. Parliament must be presumed to have had Indian legislative practice in mind and unless the context otherwise clearly requires, not to have conferred a legislative power intended to be interpreted in a sense not understood by those to whom the Act was to apply. 12.7. In M/s Vishnu Agencies (Pvt.) Ltd. vs. Commercial Tax Officers, (1978) 1 SCC 520, while holding that even when there was a transfer of controlled commodities in pursuance of a direction under the Control Order where an element of mutual assent was absent, there was, nevertheless, sale as defined under the Act. In the said case, a Seven-Judge Bench of this Court held that the earlier decision in M/s New India Sugar Mills Ltd. vs. Commissioner of Sales Tax, AIR 1963 SC 1207 was not good law. Reliance was placed on the judgment in Gannon Dunkerley and Co.-I to observe that in order to constitute a sale, it is necessary that there should be an agreement between the parties for the purpose of transferring title to the goods, which presupposes capacity to contract and the contract must be supported by valuable consideration and that as a result of the transaction, property must actually pass in the goods. It was observed that, "unless all these elements are present, there can be no sale." 12.8. In Sunrise Associates vs. Govt. of NCT of Delhi, (2006) 5 SCC 603, a Constitution Bench of this Court speaking through Ruma Pal, J. observed that when there is a sale of a lottery ticket, there is no sale of goods within the meaning of Sales Tax Acts of the different States but at the highest a transfer of an actionable claim. Accordingly, the earlier decision of this Court in H. Anraj vs. Govt. of T.N., (1986) 1 SCC 414 was overruled.

13. Sections 12, 13 and 59 of the Act are relevant for the purpose of these cases and the same read as under:

> "12. Condition and warranty. — (1) A stipulation in a contract of sale with reference to goods which are the subject thereof may be a condition or a warranty.
>
> (2) A condition is a stipulation essential to the main purpose of the contract, the breach of which gives rise to a right to treat the contract as repudiated.
>
> (3) A warranty is a stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated.
>
> (4) Whether a stipulation in a contract of sale is a condition or a warranty depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract.

13. When condition to be treated as warranty. — (1) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition or elect to treat the breach of the condition as a breach of warranty and not as a ground for treating the contract as repudiated.

(2) Where a contract of sale is not severable and the buyer has accepted the goods or part thereof, [***] the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is a term of the contract, express or implied, to that effect.

(3) Nothing in this section shall affect the case of any condition or warranty fulfilment of which is excused by law by reason of impossibility or otherwise." xxx

59. Remedy for breach of warranty. — (1) Where there is a breach of warranty by the seller, or where the buyer elects or is compelled to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may—

(a) set up against the seller the breach of warranty in diminution or extinction of the price; or

(b) sue the seller for damages for breach of warranty.

(2) The fact that a buyer has set up a breach of warranty in diminution or extinction of the price does not prevent him from suing for the same breach of warranty if he has suffered further damage."
13.1. Section 12 deals with condition and warranty. A stipulation in a contract of sale with reference to goods which are the subject matter thereof may be a condition or a warranty. A condition is a stipulation essential to the main purpose of the contract, the breach of which gives rise to a right to treat the contract as repudiated. A warranty is, on the other hand, a stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated. Whether a stipulation in a contract of sale is a condition or a warranty depends in each case on the construction of the contract. However, a

stipulation may be a condition, though called a warranty in the contract. 13.2. There is also a distinction between a warranty and guarantee. As already stated, a warranty is an express or implied statement of something, which a party undertakes to fulfil as part of the contract, yet collateral to the main object of it. A warranty does not go to the root or substance of the contract. A guarantee is a contract which is ancillary and subsidiary to some other contract or liability whereby the promisor undertakes to be answerable to the promisee for the debt, default or miscarriage of another person whose primary liability to the promisee must exist, or be contemplated. It is an additional or collateral or conditional contract as distinguished from an original or absolute contract. 13.3. A warranty can only exist when the subject matter of the contract of sale is ascertained and is existing so as to be capable of being inspected at the time of the contract. It is a collateral engagement that the specific thing possesses certain qualities after the passing of the property under the contract of sale to the buyer. A warranty may be express or implied. It is express if entered into a contract in express terms or implied when deemed to be entered into a contract by implication of law, that is, in the absence of express stipulation to the contrary. 13.4. A breach of the warranty cannot entitle the vendee to rescind the contract and revest the property in the vendor without his consent. Under Section 59 of the Act, the remedies available for a breach of warranty for a seller are prescribed. One of the remedies is the right to return of goods; return of goods by the buyer falls into two categories, namely, (i) where there is an obligation to return the goods and (ii) where the buyer has the right or the power to return the goods.

13.5. We may discuss on collateral contracts and collateral warranties as discerned from various legal treatises and commentaries:

> (i) A contract between two persons may be accompanied by a collateral contract between one of them and a third person relating to the same subject matter. When a person buys goods from a dealer, he is given a “guarantee” in the name of the manufacturer. Here the main contract of sale is between the customer and the dealer but it seems that the “guarantee” could also be regarded as a collateral contract between the manufacturer and customer. Special legislation applies to certain guarantees given to consumers in respect of goods sold or supplied to them. Where the requirements specified in the legislation are satisfied, such guarantees take effect as contractual obligations whether or not the requirements of a collateral contract are satisfied; and these requirements continue to apply to manufacturers’ guarantees not covered by any legislation. [Source: Chitty on contracts, Thirty-First Edition].
>
> (ii) A collateral contract between a third party and one of the parties to a main contract may be associated with the main contract. Such a contract may enable a third party to enforce the main contract. A “manufacturer” guarantee is an example of such contract collateral to the main contract of purchase of goods. When such collateral contract is expressed, it may not be an exception to the third-party rule, because the third party is a party to the collateral contract. It is a devise used or implied to impose obligations on persons not parties to the main contract. [Source: Pollock and Mulla - The Indian Contract Act].

> (iii) Where a preliminary statement or assurance is not a term of the principal agreement, the Courts may deem it as a contract or warranty, collateral to the principal agreement. Where a necessary contractual intention is present, the Courts would treat or would construe an assurance as a collateral contract or warranty conferring a right to damages. The device of a collateral warranty has been employed where the principal contract is one to which either the person giving or the person receiving the assurance is not a party vide Shanklin Pier Ltd.

vs. Detel Products Ltd., (1951) 2 KV 854. [Source: Anson's law of contract].

(iv) Thus, a contract between two persons may be accompanied by a collateral contract between one of them and a third person relating to the same subject matter. When a person buys goods from a dealer and is given a guarantee issued by the manufacturer, the main contract of sale is between dealer and the purchaser or customer but the guarantee from the manufacturer is a collateral contract between the manufacturer and the customer. To be enforceable as a collateral contract, a promise must be supported by consideration. (i) In the case of purchase of goods by the customer from the dealer for consideration, the guarantee from the manufacturer is collateral contract between the manufacturer and the customer. (ii) When a customer buys goods from a shop and the payment involves use of cheque, cards or credit cards issued by the bank, the main contract is between the customer and the shopkeeper but there is also a contract between the shop keeper and the issuer of the credit card, by which the latter undertakes that the shop keeper will be paid. (iii) In the case of a hire-purchase agreement, the primary contract is the customer entering into a hire-purchase agreement with the finance company. In such a case, the main contract is between the customer and the finance company. A representation by the dealer as to the quality of the goods used does not bind the finance company but it would be enforced against the dealer as a collateral contract by a customer. [Source: Benjamin's Sale of Goods, Eighth Edition]

(v) According to Halsbury's Laws of England, Fifth Edition-2012, Volume 91, meaning of warranty is as under:

> "64. Meaning of 'warranty'. 'Warranty' means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such a contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and tret the contract as repudiated. In order to satisfy the definition, therefore, a warranty must, first, be an agreement, a promise that the representation is or will be true; and, secondly, the agreement must be collateral to the main purpose of the contract, such purpose being the transfer of the property in, and the possession of, goods of the description contracted for. A warranty may be given in consideration of an agreement to enter into a contract of sale of the goods to which the warranty relates with a party other than the person giving the warranty." 13.6. In Rotork Controls India Pvt. Ltd. vs. Commissioner of Income Tax, Chennai, (2009) 13 SCC 283, a provision within the meaning of Section 40-A of the Income Tax Act, 1961 which deals with expenses or payment not deductible in certain circumstances came up for consideration. In that context, it was observed that a provision is a liability

> which can be measured only by using a substantial degree of estimation. A provision is recognised when:
>
> (a) an enterprise has a present obligation as a result of a past event (such as a sale); (b) it is probable that an outflow of resources will be required to settle the obligation; and (c) a reliable estimate can be made of the amount of the obligation. The assessee therein was in the business of valve actuators which are sophisticated goods and if any valve actuator was found defective then the warranty became significant. As the valve actuator is a sophisticated good, no customer was prepared to buy the same without a warranty. In other words, a warranty stood attached to the sale price of the product. In that context, it was observed that obligations arising from past events have to be recognized as provisions and these past events such as a sale of goods are known as obligating events.

It was observed on the facts and circumstances of that case that provision for warranty was rightly made by the appellant enterprise therein because it had incurred a present obligation as a result of past events which resulted in an outflow of resources. 13.7. In the context of levy of excise duty on the manufacturer who is also a seller at the point of first sale, this Court in Medley Pharmaceuticals Ltd. vs. Commissioner of Central Excise and Customs, Daman, (2011) 2 SCC 601 at paragraph 12 referred to Firm Ram Krishna Ramnath Agarwal vs. Municipal Committee, Kamptee, AIR 1950 SC 11 which had in turn referred to the distinction made by the Federal Court between a duty of excise and a tax on sale in Province of Madras vs. Boddu Paidanna and Sons, AIR 1942 FC 33 wherein it was observed as under:

> "9. ... ... Plainly, a tax levied on the first sale must, in the nature of things, be a tax on the sale by the manufacturer or producer; but it is levied upon him qua seller and not qua manufacturer or producer. It may well be that a manufacturer or producer is sometimes doubly hit.... If the taxpayer who pays a sales tax is also a manufacturer or producer of commodities subject to a central duty of excise, there may no doubt be overlapping in one sense; but there is no overlapping in law. The two taxes which he is called on to pay are economically two separate and distinct imposts. There is, in theory, nothing to prevent the Central Legislature from imposing a duty of excise on a commodity as soon as it comes into existence, no matter what happens to it afterwards, whether it be sold, consumed, destroyed or given away. ... It is the fact of manufacture which attracts the duty, even though it may be collected later.... In the case of a sales tax, the liability to tax arises on the occasion of a sale, and a sale has no necessary connection with manufacture or production." (emphasis supplied) 13.8. In Bharat Heavy Electricals Ltd. vs. Commissioner of Customs and Central Excise, Indore, (2003) 9 SCC 185, the question was, whether, excise duty is payable on the parts which are replaced during the warranty period. It was contended that the replaced part was free of cost during the warranty period and the sale price of the machinery sold included the price of the part which was subsequently being replaced. There could not be double levy of excise on the same part. It was observed that the price charge for the machinery may include the element of "complaint reserve". At

that time, it is not known whether there would be any need to replace any part. In many cases, parts are not required to be replaced. When parts are not replaced, the component of "complaint reserve" is not returned to the customer. Thus, as far as the customer is concerned, the total amount paid, including the component towards "complaint reserve" is the price for the machinery. It was further observed that when a manufacturer offers a warranty to replace a defective part within a particular period and defective part is replaced by another part, the latter is exigible to excise duty.

Pertinent Controversy: Analysis

14. In Mohd. Ekram Khan, this Court distinguished the judgment in Premier Automobiles by holding that the fact situation there was different and the issues in the said case were also different by observing that one of the issues was, whether, the expenses on account of warranty and statutory bonus were to be excludable while working out the ex-works cost. It was noted therein that car manufacturers furnish warranty covering the cars sold by entering into an agreement with the manufacturers of components providing for a warranty so far as the components supplied are concerned. The whole object behind the warranty is that the consumer who has to make a heavy investment for the vehicle should be assured of a proper performance of the vehicle in a trouble-free manner for a reasonable length of time. Therefore, entire cost of warranty was to be borne by the manufacturer.

15. Referring to Prem Nath Motors, it was observed in Mohd. Ekram Khan that the said case dealt with transfer of property in the part or parts replaced in pursuance of a stipulation or a warranty which is a part of the original sale of the car for the price fixed and received from the buyer or consumer. It was observed that the price so fixed and received was a consolidated price for the car and the parts that may have to be supplied by way of replacement in pursuance of the warranty. It was observed by this Court that the decision in Prem Nath Motors did not apply to the controversy in Mohd. Ekram Khan.

16. It was further observed in Mohd. Ekram Khan that in a case where manufacturer may have purchased from the open market parts for the purpose of replacement of the defective parts, the manufacturer would have to pay taxes. In such a situation, the dealer would have supplied the parts and not received any price either from the customer or from the manufacturer. The dealer (assessee) would have not received the payment of the price for the parts supplied to customers received from the manufacturer. Therefore, the transaction is not subject to levy of tax. What is significant to note is that when there is a warranty clause appended to the sale of a motor vehicle for the replacement of a defective part on the part of the manufacturer and if the manufacturer purchases the said part from the open market, it would have paid the tax. In such a case the dealer (assessee) would have supplied the part to the customer but not received the payment of the price from the manufacturer. In such a case, the transaction between the dealer and the manufacturer is not one of sale. But what is the nature of transaction when a dealer receives a credit note from the manufacturer while discharging his obligation under a warranty clause and uses a spare part from his own stock to replace a defective part was a question which was also considered.

17. In Prem Motors, it was observed that when a dealer sells an automobile, he sells it with all parts in a salable condition. The warranty from the manufacturer is that if, during the warranty period, any part is found to be defective and is to be replaced, the responsibility of replacement is that of the manufacturer. For the convenience of the customer, there is an arrangement between the manufacturer and the dealer so that the customer may get replacement done from the dealer which in due course is again made good by the manufacturer. The dealer/assessee replaces parts to the customers and gets it reimbursed, it is neither sale of these parts by the dealer to the customer or by the manufacturer. What he does only is to pass on the parts from the manufacturer to the customer but in order to avoid delay and inconvenience of the customer he replaces the parts first (from his own stock) and gets a recompense from the manufacturer later which is not a sale as per the definition of sale of goods.

18. Similarly, in Geo Motors, it was observed that when the replacement of the spare part is done during the warranty period free of charge, the same cannot be treated as a sale and included in the taxable turnover, even if the purchase of such spares was effected from outside the State by issuance of 'C' forms. This is because the transaction between the dealer and the customer is one as an agent of automobile manufacturer and the spare part is given on the basis of the warranty for replacement even though the dealer may have purchased the spare part by giving the 'C' form. It is purely for replacement and not for sale. Credit notes are also issued by the manufacturer reducing the sale value. Therefore, the spare parts which are given for replacement have to be exempted from the turnover.

19. In the Reference order, an attempt has been made to distinguish the judgment in Mohd. Ekram Khan by contending that a car manufacturer would enter into an agreement with the manufacturer of components, providing for a warranty so far as the components are concerned. During the period of warranty, the car manufacturer or his dealer has to replace the defective part free of cost. The whole object behind the warranty is that a consumer who has made a heavy investment, while purchasing a car, is assured of proper performance of the vehicle in a trouble-free manner for a reasonable length of time. According to the appellants this fundamental concept had been lost while deciding Mohd. Ekram Khan.

20. This Court in Mohd. Ekram Khan distinguished the factual situation in Premier Automobiles and Prem Nath Motors. In other words, after distinguishing the aforesaid cases, it was noted that "in a case the manufacturer may have purchased from the open market parts for the purpose of replacement of the defective parts. For such transaction, it would have paid taxes. The position is not different because the assessee had supplied the parts and had received the price." In other words, in Mohd. Ekram Khan, a situation where a manufacturer has purchased the part from the open market for the purpose of replacement of the defective part and for which taxes have been paid by the manufacturer and a situation where the dealer/assessee supplies the part from his own stock and has received the price for the same in the form of credit note on return of the spare part to the manufacturer have been considered to be not different to each other, but the same.

21. The question is, whether, this Court in Mohd. Ekram Khan was right in equating both the factual situations and holding that in the latter case, the dealer was liable to pay sales tax on the premise

that the transaction between the manufacturer and dealer was one of sale.

22. In Mohd. Ekram Khan, the facts were that the dealer/assessee therein had received the amount from the manufacturer for supply of spare parts to the customer as a part of the warranty, the manufacturer had the warranty agreement with the purchaser of automobiles to replace defective parts during the warranty period. The manufacturer made payment to the dealer / assessee as the price for the parts which were supplied by the dealer/assessee to the purchaser or customer. Credit notes were issued by the manufacturer to the dealer / assessee in respect of the price of the parts supplied to the purchaser of the automobile.

23. The above distinct factual basis in Mohd. Ekram Khan is equated to a case where a manufacturer purchases spare parts from the open market for the purpose of replacement of defective parts and the tax is paid by the manufacturer himself. The judgment in Mohd. Ekram Khan proceeds on the footing that the two situations are identical. Thus, a situation where the assessee supplies the part from his own stock and receives a credit note by way of recompense for the said replacement from the manufacturer is construed to be identical to a situation where a manufacturer buys a spare part from the open market and replaces the defective part through the dealer (assessee) and the dealer returns the defective part to the manufacturer. In the latter situation there would be no recompense paid to the dealer as the dealer has acted merely as an intermediary and/or an agent of the manufacturer in replacing the defective part with a part received from the manufacturer and returning the defective part received from the customer to the manufacturer. In contradiction, if the dealer replaces a defective part from his own stock and returns the defective part to the manufacturer, pursuant to a warranty clause appended to a sale of an automobile and, in turn, receives a recompense for the same, can it be termed a sale is the question to be considered.

24. In both of the above situations, firstly, a dealer is acting pursuant to a warranty which he is bound to honour along with the manufacturer vis-à-vis a customer or purchaser of an automobile. Secondly, the dealer is also acting as an intermediary and/or an agent of the manufacturer as the warranty emanates from the manufacturer to the ultimate customer through the dealer. The warranty clause runs along with the sale of the automobile, firstly, from the manufacturer to the dealer on a principal to principal basis and secondly, from the dealer to the customer. Therefore, as an intermediary between the manufacturer and the customer, the dealer has to act on behalf of the manufacturer i.e. between the manufacturer on the one hand and the customer on the other hand in order to fulfil the obligation cast on the manufacturer under the warranty clause vis-à-vis the customer.

25. While so acting as an intermediary, the dealer may replace the defective part in the car either by receiving a spare part from the manufacturer directly. In such a case, (i) the manufacturer could either dispatch the spare part from its own factory or production unit to the dealer to replace the defective part in the automobile and seek return of the defective part or (ii) the manufacturer can procure the spare part from the producer of the same or from the open market. In both the above situations, there is no transaction of sale between the manufacturer and dealer. If the manufacturer of the automobile has purchased the spare part from the open market or from the producer of the spare part, sales tax would have been paid by the manufacturer on it and dispatched to the dealer to

replace it in place of the defective part.

26. But there can also be a situation when the dealer would replace the defective part in the automobile pursuant to a warranty from his own stock of spare parts which he would have purchased either from the manufacturer or from the open market or the manufacturer of the spare part. In the aforesaid three situations, the dealer would have paid sales tax while purchasing the said stock. When the defective part is replaced by the dealer from a spare part from his stock, the dealer is no doubt acting pursuant to the warranty on behalf of the manufacturer but is sourcing the spare part from his own stock. Simply put, the dealer is not "selling" the spare part to a customer while acting on behalf of the manufacturer but replacing the defective part free of cost by acting under the warranty. But what is to be borne in mind is that the replacement of the spare part is from the stock of the dealer who would have earlier bought the same by paying the requisite tax on the same. If the said part, instead of being replaced pursuant to the warranty free of cost had been sold, the dealer would have earned a return on his investment and possibly with a reasonable profit also and would have also collected the sales tax. But when the dealer replaces a defective part with a spare part from his stock pursuant to a warranty, he does not receive anything in return from the customer for the spare part used from his own stock. It is in such a situation that the manufacturer issues a credit note to recompense the dealer for his investment on the spare part in his stock which was used to replace a defective part pursuant to a warranty in the sale of automobile as nothing would have been received in return from the customer. This is because if the spare part from the stock of the dealer had been sold to any other customer, across the counter and not pursuant to any warranty, he would have received a return on his investment. But such a return is not received by the dealer from the customer when he replaces a defective part pursuant to a warranty. In such a situation, on return of the defective part to the manufacturer by the dealer, he is issued a credit note by the manufacturer which is to make good the stock of the dealer.

27. Therefore, we have to assess the nature of the transaction by discerning the manner in which the dealer would have acted under the scope of a warranty on the sale of an automobile. The similarity in both kinds of situations referred to above is that the dealer is acting on behalf of the manufacturer pursuant to a warranty and in both the situations does not receive any price or consideration from the customer. But, the significant distinction in the two situations must be borne in mind. In the first situation, the dealer merely transmits the spare part received from the manufacturer to the customer and in turn returns the defective part to the manufacturer and does not receive a recompense by way of cost of the spare part but may receive a service charge under a dealership agreement. On the other hand, in the second situation, the dealer would have used a spare part from his stock to replace the defective part and returns the defective part to the manufacturer, who then issues a credit note to the dealer.

28. The controversy in these cases is, whether, the second of the aforesaid situations would amount to a sale in the sense that the dealer is liable to pay sales tax on the credit note issued in his favour. In other words, whether the transaction is in the nature of a sale to attract payment of sales tax by the dealer under the sales tax laws under consideration. In this context, it is necessary to recapitulate as to why a credit note is issued by the manufacturer to the dealer. A credit note is issued with a particular intention in mind and that is to recompense the dealer. What is the reason

for doing so? The reason is not far to see and has already been adverted to above. The recompense in the form of credit note to the dealer is because the dealer would not receive any price from the customer for the replacement of the defective part while acting under the warranty on behalf of the manufacturer while using the spare part from his own stock which belongs to him and which he had procured by paying the necessary price including tax, either from the manufacturer himself or from the open market. If the dealer had sold the said spare part which he used to replace a defective part pursuant to a warranty clause, he would have received a return for his investment plus a profit. But, while acting under the warranty on behalf of the manufacturer, the dealer does not receive any price from the customer. Hence, he is recompensated by the manufacturer in the form of a credit note.

29. In this context, it is necessary to understand the legal import of the expression credit note which has been cited by Sri Kavin Gulati, learned senior counsel for the appellants. According to various dictionaries and references, definitions of credit note are as follows:

> (i) In P. Ramanatha Aiyar, Advanced Law Lexicon, 6th Edition, Volume 1 – "Credit Note" is defined as "A note showing that an allowance is to be made for shortage or defects in goods supplied and returned to sender, or for overcharge in price. The term is also used for a note or document that confirms the availability of funds for future purchases (as when goods are paid for but later returned to the supplier)". A "sales credit note" is defined as – "Note sent from a seller to a buyer to cancel (partly or in total) a charge that has already been invoiced. The credit thus granted can be offset against the cost of future purchases (and is, therefore, from the seller's point of view, better than making a cash refund".
>
> (ii) According to the Oxford Advance Learner's Dictionary – "if, damaged items have to be returned, the manufacturer may issue a credit note".
>
> (iii) According to the Cambridge Advanced Learner's Dictionary and Thesaurus – A credit note is an outstanding amount, to be used when needed. "It is the document that a seller gives to a buyer who returns a product, which the buyer may use at a later date/time to pay for something else".
>
> (iv) According to the Collins English Dictionary – "A credit note is a piece of paper that a shop gives when a person returns goods that have been bought from it, which entitle the buyer to take goods of the same value without paying for them".
>
> (v) According to Black's Law Dictionary, Fifth Edition, -

"Credit Memorandum" is "a document used by a seller to inform a buyer that the buyer's account receivable is being credited (reduced) because of errors, returns, or allowances".

(vi) Under the Goods and Services Tax Law – It has been stated that after the invoice has been issued there could be situations where the quality of the goods or services or both supplied is not to the satisfaction of the recipient, thereby, necessitating a partial or total reimbursement on the

invoice value. In order to regularize these kinds of situations the supplier is allowed to issue what is called as credit note to the recipient. Once the credit note has been issued, the tax liability of the supplier will reduce. The credit note is, therefore, a convenient and legal method by which the value of the goods or services in the original tax invoice can be amended or revised. The issuance of the credit note will easily allow the supplier to decrease his tax liability in his returns without requiring him to undertake any tedious process of refunds.

30. Therefore, the entire controversy must be viewed in the perspective of a composite transaction and not in isolation as the dealer (assessee) would be acting under a warranty with there being a manufacturer on one end and the purchaser or customer of an automobile at the other end and the dealer acting on behalf of the manufacturer or an intermediary between the said customer and manufacturer. The said transaction cannot be viewed in a myopic sense by truncating or excluding the role or action of a dealer under the warranty and viewing it only from the perspective of a transaction simpliciter between manufacturer and a dealer. Such an approach is not only skewed from a commercial perspective but also jurisprudentially or in the legal sense. There need not be a reiteration of the significance of a warranty in a transaction of a sale of goods already discussed above.

31. Thus, as a sequel to the aforesaid discussion, the following situations may be adumbrated by way of illustration. When a dealer–assessee sells an automobile to a customer containing a warranty for the replacement of a defective part of the automobile in terms of the warranty and when the customer during the period of warranty approaches the dealer for the replacement of a defective part, the dealer could resort to the following: -

> (a) request the manufacturer to supply the defective part of the automobile for replacement. In such a situation, the manufacturer of the automobile could do any of the following: -
>
> (i) send the spare part from his factory either as a manufacturer of the same to the dealer for replacement and seek return of the defective part, or
>
> (ii) purchase the spare part from the manufacturer of the particular part by paying the requisite taxes and send it to the dealer and seek return of the defective part, or
>
> (iii) purchase the spare part from the open market after paying the requisite taxes and send it to the dealer for replacement of the defective part in the automobile and seek return of the defective part.

or

(b) may purchase the spare part from the open market by paying the requisite taxes and replace the defective part and return the same to the manufacturer, or

(c) may replace the defective part from his stock maintained in his showroom and return the defective part to the manufacturer.

32. In situation (a), since the manufacturer himself has dispatched the spare part to the dealer for the purpose of replacement, there is no investment made by the dealer on the said part. The dealer merely acts on behalf of the manufacturer, pursuant to the warranty.

33. In situations (b) and (c), the dealer would have invested on the spare part either by buying it from the open market or earlier would have purchased the same from the manufacturer of the automobile or from the manufacturer of the particular part by paying the requisite price and taxes. The dealer has every right to sell such a part and seek a return on his investment and possibly a profit also. But when the same is used for the purpose of replacement of a defective part pursuant to a warranty, the dealer does not "sell" the part to the customer who has approached the dealer with the defective part. The dealer does not receive any consideration in the form of a price from the customer but on the basis of the warranty, the dealer is obliged to replace the defective part with a new part. The dealer then sends the defective part to the manufacturer of the automobile, who had given the warranty. The manufacturer, from whom the automobile has been purchased, then issues a credit note which may be equivalent to the value of the spare part used by the dealer. This credit note is in order to recompense the dealer for his investment made on the spare part which was "not sold" by him to the customer so as to earn any return but has been utilised to replace a defective part of the automobile as an obligation under a warranty given at the time of the sale of the automobile on behalf of the manufacturer. In such a situation, whether, the recompense made to the dealer can be termed to be a "sale" between manufacturer and the dealer within the meaning of the definition of "sale" under the Sales Tax Acts is the question. In other words, can it be construed that when the dealer has utilised a spare part from his own stock to undertake an obligation pursuant to a warranty for the sale of an automobile on behalf of the manufacturer to the customer and by acting as an intermediary, there would be a "sale" between a dealer and manufacturer of the automibile of the spare part and thus, a credit note being issued by the manufacturer to the dealer?

34. It has to be borne in mind that there is no transfer of property between the manufacturer and the dealer when the spare part from the stock of the dealer is used for the purpose of replacement of defective part in the automobile. The spare part used from the stock of a dealer is the property of the dealer which could have been either sold to any other customer and seek a return on his investment, in which case, the customer would have paid the requisite taxes to the dealer. Alternatively, the spare part could also be used from the stock maintained by the dealer to replace a defective part when an automobile has been sold by him and the customer approaches the dealer during the warranty period when there is a defect in any part of the automobile. In such a situation, the dealer is acting on behalf of the manufacturer or as an intermediary between the manufacturer and the customer of the automobile and discharging his obligation under a collateral contract. Hence, it is a warranty given by the manufacturer through the dealer to the customer during the period of warranty. In such a situation, when a credit note is issued to the dealer on return of the defective part by the manufacturer is there a sale within the scope and meaning of definition of "sale" under the Sale Tax Legislation? The transaction that takes place when the dealer discharges his obligation under a warranty appended to the sale transaction of the automobile is on behalf of the

manufacturer but the manufacturer issuing a credit note to a dealer is a "valuable consideration" paid by the manufacturer to the dealer, when the dealer is acting under the warranty.

35. The argument of Shri Pallav Sisodia, learned senior counsel that the purchaser or the customer seeking replacement of a defective part is distinct and disjunct from the earlier sale of the automobile by the dealer to the customer, cannot be accepted. This is for the simple reason that the dealer discharges his warranty obligation pursuant to the earlier sale of the automobile made by him to the customer which transaction of sale is accompanied by a collateral contract in the form of a warranty. There cannot be a warranty unless there is a sale of goods in the first place. That is why a warranty is termed as a contract collateral to the main contract of sale. But for the warranty which is a contract collateral to the main contract of sale of an automobile, the dealer would not have replaced the defective part with a spare part from his stock without any consideration from customer. This is obvious because when the defective part is replaced by another part, no consideration passes from customer to the dealer. This could be contrasted with a situation where the dealer would have sold the same part to any other customer and received a price on the sale as well as collected the tax on the said sale. Since, the dealer does not receive any consideration from the customer who approaches the dealer during the warranty period for replacement of a defective part and the dealer does so from his own stock of the spare parts, he receives a credit note from the manufacturer of the automobile. What is significant to note is in both of the aforesaid situations, there is transfer of property in the goods from the dealer to the customer.

36. Thus, the bifurcation of the two transactions as suggested by learned senior counsel Sri Sisodia, i.e., one, between the dealer and the customer for the sale of the automobile and the second, between the manufacturer and the dealer, when the dealer is discharging his warranty pursuant to the sale of the automobile, cannot be accepted.

37. But the issuance of a credit note to a dealer by a manufacturer is only when the dealer replaces a spare part from his stock in the automobile to the customer or has purchased the spare part from the open market for the said purpose and returns the defective part to the manufacturer which is pursuant to the warranty appended as a collateral agreement to the earlier sale of the automobile and the dealer acting on behalf of the manufacturer. Hence, whether the revenue is right in contending that the credit note issued to the dealer whilst he is discharging his obligation under the warranty is a "sale" and the dealer is liable to pay sales tax on the credit note is the point under consideration.

38. It is also significant to note that there is transfer of property in the spare part between the dealer and the customer on behalf of the manufacturer under a warranty. Hence, whether, one can construe the credit note as a price for the same and, therefore, subject to sales tax? The ingredients of a sale have been discussed above and would not call for reiteration. When the dealer is acting pursuant to a warranty, he is no doubt discharging his obligation not as a seller stricto sensu, but as an intermediary or an agent of the manufacturer as the case may be vis-à-vis the purchaser of the automobile. But, there is transfer of property between the dealer and the customer/purchaser of the automobile on the one hand and receipt of a valuable consideration by the dealer for the same from the manufacturer on the other in the form of a credit note. Further, it must be borne in mind that

credit note is issued only when a dealer discharges his obligation under the warranty and may be required to return the defective part to the manufacturer while seeking a recompense in the form of a credit note.

39. The contention of the revenue is that the credit note is a valuable consideration in the account of the dealer while the dealer is discharging his obligation pursuant to the warranty and therefore exigible to sale tax. This is based on the premise that the dealer "sells" the part while acting on behalf of the manufacturer while replacing a defective part under a warranty and discharging his warranty obligation for which the consideration flows from the manufacturer to the dealer and therefore is amenable to sales tax. There are two aspects to be considered here: firstly, there is transfer of property in the spare part between the dealer and the customer and secondly, for the said transfer, the manufacturer issues a credit note to the dealer which is in substance on behalf of the customer owing to the warranty with the customer.

40. Thus, when the transaction between the manufacturer and dealer is viewed in the larger canvas of a dealer discharging his obligations pursuant to a warranty appended to a sale of an automobile, the same cannot be narrowly construed. At the same time, whether the transaction resulting in payment by way of a credit note to a dealer/assessee is a sale within the definition of sale under the Sales Tax Acts of the respective States under consideration has to be considered.

41. For ease of reference, the definition of "sale" and "sale price" under the Rajasthan Value Added Tax Act, 2003, which is one of the legislations under consideration as per Section 2(35) and (36), are extracted for easy reference:

> "(35)"sale" with all its grammatical variations and cognate expressions means every transfer of property in goods by one person to another for cash, deferred payment or other valuable consideration and includes–
>
> (i) a transfer, otherwise than in pursuance of a contract, of property in goods for cash, deferred payment or other valuable consideration;
>
> (ii) a transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;
>
> (iii) any delivery of goods on hire–purchase or other system of payment by instalments;
>
> (iv) a transfer of the right to use goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;
>
> (v) a supply of goods by an unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration; and

(vi) a supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply is for cash, deferred payment or other valuable consideration, and such transfer, delivery or supply shall be deemed to be a sale and the word "purchase" or "buy" shall be construed accordingly;

Explanation.– Notwithstanding anything contained in this Act, where any goods are sold in packing, the packing material in such case shall be deemed to have been sold with the goods;

(36) "sale price" means the amount paid or payable to a dealer as consideration for the sale of any goods less any sum allowed by way of any kind of discount or rebate according to the practice normally prevailing in the trade, but inclusive of any statutory levy or any sum charged for anything done by the dealer in respect of the goods or services rendered at the time of or before the delivery thereof, except the tax imposed under this Act;

Explanation I. – In the case of a sale by hire purchase agreement, the prevailing market price of the goods on the date on which such goods are delivered to the buyer under such agreement, shall be deemed to be the sale price of such goods;

Explanation II. – Cash or trade discount at the time of sale as evident from the invoice shall be excluded from the sale price but any ex post facto grant of discounts or incentives or rebates or rewards and the like shall not be excluded;

Explanation III. – Where according to the terms of a contract, the cost of freight and other expenses in respect of the transportation of goods are incurred by the dealer for or on behalf of the buyer, such cost of freight and other expenses shall not be included in the sale price, if charged separately in the invoice;"

42. Under Section 4 of the Act, a contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. The expression "price" is defined in Section 2(10) of the said Act to mean a money consideration for sale of goods, i.e., whether the sale is for cash or credit, it must be in terms of money. If any consideration other than money is given, it is not a sale, but only an exchange or barter. If no consideration is given, then it will be a gift.

43. However, under Section 2(g) of the Central Sales Tax Act or the Sales Tax Act of the respective states under consideration, sale, with its grammatical variations and cognate expressions, means any transfer of property in goods by one person to another for cash or deferred payment or for any other valuable consideration. The definition of sale under the Sales Tax legislations are in consonance with Article 366(29-A) as per the Constitution 46th Amendment Act, 1982. The expression "dealer" is defined in Section 2(b) of the Central Sales Tax Act and, accordingly, under the respective State Acts to mean any person who carries on (whether regularly or otherwise) the

business of buying, selling, supplying or distributing goods, directly or indirectly, for cash or for deferred payment, or for commission, remuneration or other valuable consideration.

44. The expression "valuable consideration" is not defined either under the Central Sales Tax or under the respective State Acts under consideration. "Price" is the amount of consideration which a seller charges the buyer for parting with the title to the goods. The price would include not only the price of the goods but also the expenditure incurred for transporting the goods, duties levied, etc. The entire amount of consideration including the sales tax component which the purchaser pays, constitutes the price of goods. As already noted, the expression "price" under the Sale of Goods Act is limited to a money consideration, cash or deferred payment but under the definition of "sale" under the Sales Tax legislations, the expression used is not just cash or deferred payment but also a valuable consideration. The expression valuable consideration has a wider connotation but must be read ejusdem generis to cash and deferred payment. The expression valuable consideration takes colour from the preceding expressions cash or deferred payment, therefore, it means payment in monetary terms i.e. in the nature of cash or deferred payment such as cheque, bank draft, promissory note, etc. Cash and deferred payment are relatable to the expression "money". In other words, a transaction could amount to a sale if consideration is in terms of money. Thus, money is a genus of which cash or deferred payment in the form of cheque, bank draft, promissory note, etc. are species. Money has a wider connotation to include a valuable consideration in the form of money or a payment in monetary terms which is the price for the transfer of property paid. Thus, a valuable consideration is also a species of money which is the consideration for the transfer of goods under the sales tax enactments.

45. The aforesaid discussion could be illustrated better with reference to State of T.N. vs. Sri Srinivasa Sales Circulation, (1996) 10 SCC 648. In the said case, the facts were that under a scheme introduced by the assessee, 'A' purchased one coupon from the assessee on payment of Rs.5. 'A' was to name a particular kind of goods required by him and mentioned in the said coupon. On receipt of the coupon from 'A', the asssessee would forward to him by V.P.P. three more such coupons. 'A' was required to give the said three coupons to three persons 'B', 'C' and 'D' and keep the money so realised to himself. Each of 'B', 'C' and 'D' were to forward in the above manner, their respective coupons to the assessee, who was to send to each one of them three coupons separately by post (V.P.P.). On realisation of the three V.P.Ps. the assessee would supply to 'A' the article named by him. It was held that the consideration was not only money paid or promised to be paid, but it was something more. According to the High Court of Madras, the title to the goods did not pass to 'A' under a contract of sale. The transactions were held not to be sales liable to tax. However, the State came up to this Court contending that the respondent therein had offered the coupons against payment, in the scheme of circulation sales, and the article of choice was ultimately sent to the customer for payment of a price which was accepted by the customer; there was, thus, offer and acceptance. All the attributes and characteristics and requirements of a sale were present in the transaction. Though, designed by the adoption of a circuitous method, the transaction amounted to nothing but a sale and was liable to sales tax.

46. Applying the aforesaid principles and the judgment of this Court to the case at hand, it is noted that when the dealer uses one of the spare parts from his stock for the replacement of a defective

part in an automobile under a warranty, he is given a monetary benefit in the form of a credit note. The definition of "credit note" from various dictionaries and Law Lexicons have been adverted to above. A perusal of the aforesaid definitions would clearly indicate that a credit note issued by a manufacturer in favour of a dealer is a valuable consideration within the meaning of the definition of "sale" under both, Central Sales Tax Act as well as the respective State enactments under consideration. The object and purpose of including the expression valuable consideration within the definition of sale apart from cash and deferred payment is to enlarge the scope of the expression price than what is enunciated under the Sale of Goods Act which is an enactment of 1930. The expression as already noted, is relatable to a money consideration. No doubt, cash is a money consideration but the definition of "sale" under the Central Sales Tax Act as well as under the State enactments does not imply price to mean only a money consideration in a narrower sense but in a wider sense to include different forms of money consideration such as deferred payment and also a valuable consideration which need not be restricted to cash or deferred payment only but a valuable consideration which would include a credit note which is to be read within the definition of "price".

47. Benjamin's Sale of Goods, Eighth Edition, states that the consideration in a contract of sale of goods must in English law, be a price in money, either paid of promised. By money is meant legal tender; it does not mean money's worth. Payment need not, however, be made in cash: a method of payment that enables the seller to obtain money such as the use by the buyer of a credit card or a debit card or digital cash or cheque or banker's draft or trading cheque also comes within the expression "payment of price". It is only a method of payment or a form of payment. It is also irrelevant that the money payment comes, not from the buyer of the goods or to whom the property in the goods are transferred, but from the card issuer. Thus, there can be various methods of payment i.e., by cash, by negotiable instrument, by credit or charge card or by stored value card or sometimes referred to as digital cash card or electronic purses, internet payments on which that "value" is stored electronically. There can also be payment by direct debits to effect payment of goods supplied particularly when there are recurring payments of variable amounts. The seller can obtain through the banking system in direct debit forms to the buyer's bank. A converse to the system of direct debit is the credit note issued by a buyer in favour of a seller which is a recompense or monetary benefit showed in the buyer's accounts. Thus, the use of the banking system by instructing the bank to transfer of balance from the buyer's account to the credit of a seller is a form of transmission of a valuable consideration.

48. A credit note is a valuable consideration which is essentially a document to inform a buyer that the buyer's account is being credited because of errors, returns or allowances. On discharging his obligation under the warranty appended to a sale of an automobile, a dealer receives a credit note. This would be a receipt in the account of the dealer and a liability in the returns of the manufacturer which may ultimately enable the manufacturer to decrease his tax liability. Consequently, the dealer of the automobile in whose account a credit is shown would be ultimately a recipient of a valuable consideration on account of a transfer of goods, namely, spare part by a dealer to a customer while discharging his obligation under a warranty and thereby receiving a valuable consideration for the spare part used by the dealer from his stock from the manufacturer in the form of a credit note. When the entire transaction is viewed in the aforesaid perspective and in juxtaposition with the expression "sale" under the Central Sales Tax Act as well as the respective State enactments under

consideration which is of a wider connotation than the definition of sale under the Sale of Goods Act, we hold that the amount shown in the account of the dealer in the form of a credit note is nothing but a price received for a sale of a spare part by the dealer which is from his stock and which belongs to him. Where there is transfer of property by the dealer to the customer while acting under a warranty and the dealer being paid by the manufacturer, when viewed in the aforesaid prism, the credit note shown in the account of the dealer is a valuable consideration pursuant to the sale that has taken place of a spare part from his stock. The aforesaid transaction may be juxtaposed with the transaction of sale which the customer who would buy a spare part de hors a warranty. In such an event, the dealer would have collected the sales tax along with the price of the spare part and would have remitted the same to the revenue. Merely because the dealer is acting as an intermediary or on behalf of the manufacturer pursuant to a warranty and receives a recompense in the form of a credit note, the same cannot escape liability of tax under the Sales Tax Acts under consideration.

49. The assessees herein have placed reliance on the decision of Constitution Bench of this Court Devi Dass Gopal Krishnan. This Court in the said case considered amendments to various sections of the Punjab General Sales Tax Act, 1948 and interpreted the expression 'other valuable consideration', included in section 2(ff) defining purchase and section 2(h), defining sale, to have a wider connotation than cash and deferred payment. In para 25 of its decision, the court reasoned that the said expression takes colour from the preceding expression "cash or deferred payment." It was reiterated that 'other valuable consideration' has to be monetary in nature. The nature of consideration in the form of a credit note is also monetary in nature. Thus, the definition of price includes consideration paid by way of credit note. Therefore, payment of consideration through the mode of credit note signifies 'other monetary payment in the nature of a valuable consideration.' This decision is hence of no assistance to the assessees in the present case.

50. Our attention was also drawn to this Court's decision in CIT vs. Motors and General Stores (P) Ltd., (1967) 3 SCR 876. This Court, in that case, adjudicated the exigibility of the profits emanating from the sale of assets by way of transfer of 5% tax-free cumulative preference shares under the Income Tax Act. This Court noted that the transaction was one of exchange and the value of shares, as well as immovable properties, were recorded solely for the purpose of computing stamp duty. Due to the sheer variance of facts in the above case to the present cases, we find the above decision to be of no assistance.

51. We, however, clarify that the judgment of this Court in Mohd. Ekram Khan must be read in the context of a case where a dealer is utilising a spare part from his stock to replace a defective part under a warranty and receiving a recompense in the form of a credit note from the manufacturer. When given such an understanding of the judgment in Mohd. Ekram Khan to the aforesaid conspectus of facts, we do not think that the said judgment has been erroneously rendered.

52. However, in Mohd. Ekram Khan, the judgments of the High Court of Madhya Pradesh in Prem Motors and the High Court of Kerala in Geo Motors were overruled. The said judgments were rightly overruled. This is because, in those judgments, there was no consideration of the question whether the credit note issued by the manufacturer in favour of the dealer was valuable consideration within the meaning of the expression "sale" under the respective State laws and it was simply held therein

that there was no sale transaction within the meaning of the sales tax legislation considered therein.

53. But the matter does not end, it is necessary to take into consideration that all the credit notes received by the dealer are not indicative of the value of the spare part supplied by the dealer from his own stock or when he buys it from the open market, to the customer under a warranty. It could be for rendering a service under a dealership agreement which can cover a situation when the manufacturer sends the spare part to the dealer to replace a defective part and receives a consideration for the said service. In such a case, there is no recompense for spare part. It is only when a credit note is issued for a spare part used by a dealer from his own stock or when he has purchased it from the open market or from another manufacturer of a spare part that it becomes a sale within the meaning of the sales tax enactments under consideration.

54. On the other hand, when a dealer acts as an agent of the manufacturer (Principal) on the basis of an express or implied contract of agency he may be entitled to certain remuneration under the terms and conditions of agency which is recognised in law. Learned senior counsel for the respective parties have adverted to such agreements with regard to consideration received by a dealer under the terms of an Agency Agreement for the service rendered by the dealer pursuant to a warranty. We are not concerned with such kind of remuneration as the same cannot be construed as a transaction of sale. It is a service contract and possibly a service tax is leviable depending on the terms and conditions of the Agency.

55. In C.T.O. (AE), Jodhpur vs. M/s Marudhara Motors, Jodhpur, (2010) 29 VST 114, the learned Single Judge of the Rajasthan High Court considered the controversy under the provisions of the Rajasthan Sales Tax Act, 1994 in the context of a dealer of automobiles receiving credit notes issued by the manufacturer for replacement of defective parts of the automobiles, supplied by the dealer under a warranty agreement between the manufacturer and the ultimate customers to whom vehicles were sold by the dealer (assessee). After referring to the judgment of the Supreme Court in Mohd. Ekram Khan in paragraph 20, the major points of distinction between the facts in Mohd. Ekram Khan case and in the said case were considered in paragraph 21 and it was observed as under:

> “21. …. Since title of property in goods namely spare parts passes from the hands of respondent assessee to the customer free of cost and such title of property in spare parts does not pass from assessee dealer to the manufacturer, no taxable sale can be said to have taken place in the hands of respondent assessee at all.”

56. Thereafter, the learned Single Judge of the Rajasthan High Court has observed that:

> “22. In other words, where there is supply of spare parts to the customer by the dealer there is no consideration passing as it is free of cost and where such consideration or payment is being received by the dealer from the manufacturer in the form of credit notes in discharge of manufacturer's warranty obligations, there is no transfer of property in goods viz. spare parts from dealer to the manufacturer. These two transactions viz. one between customer and dealer, and another between

> dealer and manufacturer are independent and are not linked to each other. First is sans consideration against goods and second one is sans transfer of property in goods. The credit notes given by manufacturer to dealer in discharge of its warranty obligations to customers cannot be taxed under sales tax laws in the hands of the dealer."

57. While considering the gamut of transactions in the context of a warranty, bifurcation of the same, namely, one between customer and dealer, and another between dealer and manufacturer and the observation that the same being "independent and are not linked to each other" is not correct. This is because in order to ascertain whether the issuance of the credit note by the manufacturer to the dealer is one pursuant to a sale of spare part and therefore liable to sales tax law, as noticed above, it has to be viewed in the larger perspective of carrying out an obligation under a warranty at the time of sale of the vehicle and not independently as has been stated above. We also find that the learned single judge incorrectly distinguished the facts of the case with Mohd. Ekram Khan by reasoning that the dealership agreement contemplated a principal- principal relationship between the manufacturer and the dealer. On the other hand, we agree with the decision of the Division Bench of Bombay High Court in M/s Navnit Motors Pvt Ltd. vs. State of Maharashtra, where it compared the assessee's dealership agreement with Maruti Udyog Ltd. with the dealership agreement of the dealer in Mohd. Ekram Khan with Mahindra & Mahindra Ltd. The Bombay High Court correctly found that both dealership agreements established a Principal-to-Principal relationship and recorded that a solitary sentence in para 1 of the decision in Mohd. Ekram Khan ought not to be construed as the dealer was an agent of the manufacturer. Therefore, we do not approve of the observations made in paragraph 21 and 22 of the judgment of the learned Single Judge of the Rajasthan High Court in the aforesaid case and the said judgment is liable to be overruled.

58. We further place reliance on the decision of this Court in Govind Saran Ganga Saran vs. Commissioner of Sales Tax, AIR 1985 SC 1041 while analysing Article 265 of the Constitution while noting as follows:

> "The components which entered into tax are well known. The first is the character of the imposition known by its nature which transpires attracting the levy. The second is a clear communication of the person on whom the levy is imposed and which is obliged to pay the tax. The third is rate at which the tax is imposed and the fourth is the measure or value to which the rate is applied for computing the tax liability".
>
> Obviously, all the four components of a particular concept of tax has to be inter related having nexus with each other. Having identified tax event, tax cannot be levied on a person unconnected with event, nor the measure or value to which rate of tax can be applied can be altogether unconnected with the subject of tax, though the contours of the same may not be identified."

59. Reliance was placed on behalf of the Revenue on Dhampur Sugar Mills Ltd. vs. Commissioner of Trade Tax, U.P., (2006) 5 SCC 624, wherein the question was, whether, the adjustment of the price

of molasses from the amount of licence fee would amount "to sale" within the meaning of the Uttar Pradesh Trade Tax Act, 1948. The facts therein were that the concerned company owned and possessed a sugar mill. A deed of licence was executed by the said company in favour of the appellant therein (Dhampur Sugar Mills Ltd.) pursuant whereto and in furtherance whereof, the appellant therein executed a performance guarantee to ensure performance of the said deed of licence. It was agreed to by and between the parties that a major portion of the licence fee would be paid in the shape of molasses. It was contended by the appellant therein that in view of the consideration for the right to use the said sugar mill i.e. the licence fee, the appellant therein was required to hand over molasses to the said company for an amount equivalent to the licence fee and such a transaction would not constitute a sale of molasses so as to attract the provisions of the Act.

60. The precise question for consideration therein was whether the transaction involved a transfer of property or a transfer of a right to use any goods or not. This Court reasoned that molasses manufactured in the sugar mills, was the property of the appellant therein and it answers the description of goods, that the transfer of the ownership in the goods wherefor the company was to pay the price to the appellant therein was not in the form of cash but to be adjusted from the amount payable by the appellant therein to the owner by way of consideration for use of the mill. The expression cash, deferred payment or other valuable consideration had to be given its true meaning and the latter two expressions enlarge the ambit of consideration beyond cash only. It was observed that "once an essential component of sales takes place, sales tax would, indisputably, be payable". It was held that the arrangement between the parties therein being clear and unambiguous and not with a view to evade tax but there being transfer of goods from the appellant therein to the company in the form of supply of molasses, the appellant therein was entitled to a consideration which was in the form of the right to run the sugar mill under a deed of licence. It was also observed that a barter or an exchange being different from a sale, payment of a licence fee could not be a subject matter of barter or exchange. The aforesaid judgment is squarely applicable to the facts of the present cases on the interpretation of the expression valuable consideration in the definition of sale in the legislations under consideration.

61. In Commissioner of Central Excise, Mumbai vs. Fiat India Private Limited, (2012) 9 SCC 332, this Court observed that consideration means something which is of value in the eye of the law. In other words, it may consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other.

62. Webster's Third New International Dictionary (unabridged) defines, consideration thus: "Something that is legally regarded as the equivalent or return given or suffered by one for the act or promise of another." In Salmond on Jurisprudence, the word "consideration" has been explained in the following words:

> "A consideration in its widest sense is the reason, motive or inducement, by which a man is moved to bind himself by an agreement. It is for nothing that he consents to impose an obligation upon himself, or to abandon or transfer a right. It is in consideration of such and such a fact that he agrees to bear new burdens or to forego the benefits which the law already allows him." The gist of the term "consideration"

and its legal significance has been clearly summed up in Section 2(d) of the Indian Contract Act which defines "consideration" thus:

"When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration to the promise."

63. In Assistant Collector of Central Excise vs. Madras Rubber Factory Ltd., 1986 Supp SCC 751, the question arose under the Central Excises and Salt Act, 1944 with regard to the method of computation of assessable value in a cum-duty price at the factory gate and the permissible deductions to be made from the cum-duty paid selling price to arrive at the assessable value and then tariff rate being applicable to the assessable value. One of the contentions regarding deduction was with regard to TAC- warranty discount to be made for determining the assessable value. It was observed that a warranty is not a discount on the tyre already sold, but relates to the goods which are being subsequently sold to the same customers. It cannot be strictly called as discount on the tyre being sold. It is in the nature of a benefit given to the customers by way of compensation for the loss suffered by them in the previous sale.

64. The said view was reiterated in Government of India vs. Madras Rubber Factory Ltd., (1995) 4 SCC 349 where the question was whether the claim put forward as TAC-warranty discount is a trade discount within the meaning of Section 4 of Central Excises and Salt Act, 1944. It was observed that the claim is only a claim for refund by the buyer for the manufacturing defect in the tyre sold by the assessee therein, which is being honoured by the assessee in a manner acceptable to both the parties. It was reiterated that it is a benefit given to the customers by way of compensation for the loss suffered by them in the previous sale owing to a defective tyre. It is a compensation in the nature of a warranty allowance on a defective tyre.

65. Thus, the manufacturer gives the warranty to the consumer by making a representation with regard to the automobile. It is in the nature of a promise which the dealer assessee carries out on behalf of the manufacturer. There is transfer of property in the spare part from the stock of the dealer to the customer for which the manufacturer pays by way of a credit note. The said promise is carried out and a valuable consideration is received by the dealer through credit notes. In substance, when the dealer receives a credit note, it is a sale within the meaning of the definition under the respective sales tax legislation under consideration, pursuant to the warranty for which the manufacturer compensates the dealer by issuance of a credit note. The value of the credit note is a valuable consideration received which is in the nature of a benefit from the manufacturer which is exigible to tax. If the dealer had sold a spare part of the automobile from his stock to any other consumer across the counter, he would have collected the requisite sales tax along with the price from that consumer but in the instant case, the consideration is received in the form of a credit note from the manufacturer which is subject to sales tax. The person who pays the valuable consideration in a sale transaction is irrelevant so long as it is paid.

66. In this context, it would be relevant to refer to the provisions of the Indian Contract Act, 1872. Section 2 (d) of the said Act states that when, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise; Section 2 (c) states that the person making the proposal is called the "promisor", and the person accepting the proposal is called the "promisee"; Section 2 (a) states that when one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal; Section 2 (b) states that when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise; Further, promises which form the consideration or part of the consideration for each other, are called reciprocal promises vide Section 2 (f) of the said Act.

67. Applying the aforesaid definitions of the Indian Contract Act, 1872 to the facts of the present case, it would mean that as between the manufacturer of the automobile, the dealer and the customer, the manufacturer is the promisor who makes the proposal to recompensate the dealer when pursuant to a warranty clause, the dealer replaces a spare part from out of his own stock or by buying the same from the open market or from the manufacturer of the spare part. Thus, the dealer is the promisee. The occasion to replace the spare part is when the customer brings to the notice of the dealer a defect in a part of the automobile, pursuant to a warranty which has been given by the manufacturer to the customer.

68. Section 2(d) of the said Act in fact enables the promisee (the dealer) to provide consideration by conferring a benefit on a third party (customer) at the promisor's (the manufacturer's) request pursuant to a warranty between the manufacturer and customer. Thus, a contract could arise even though the promise is for doing or abstaining from doing something for the benefit of a third party. In other words, if the promisee (the dealer) replaces a defective part of an automobile sold to a third party, i.e., the customer, he would receive a credit note from the manufacturer. This is because the manufacturer would have proposed to the dealer to recompensate the dealer for the above act which proposal would have been accepted by the dealer and, thus, the manufacturer who has made the proposal is the promisor and the dealer who has accepted the proposal is the promisee. Further, when at the desire of the promisor (the manufacturer), the promise (the dealer) does some act or promises to do an act, such act or promise is called consideration for the promise. Therefore, the dealer (promisee) agrees to replace a defective part which is a consideration for the promise and in turn, receives a recompense in the form of a credit note from the manufacturer. Thus, there is an agreement between the manufacturer and the dealer, and it would be in an instance of there being reciprocal promises.

69. In view of the above, the transaction between the manufacturer and dealer while acting pursuant to a warranty in the circumstances explained above has to be construed as sale within the meaning and definition of sale under the Sales Tax Acts under consideration.

70. In the circumstances, the reference is answered in the following terms:

i) The judgment of this Court in Mohd. Ekram Khan is applicable to a situation where a manufacturer issues a credit note to a dealer acting under a warranty given by the manufacturer pursuant to a sale of an automobile in the following situations.

The dealer replaces a defective part of the automobile by a spare part maintained in the stock of the dealer or when the same is purchased by the dealer from the open market. In such situations, the credit note issued in the name of the dealer is a valuable consideration for a transfer of property in the spare part made by the dealer to the customer and hence a sale within the meaning of the sales tax legislations of the respective States under consideration. The value in the credit note is thus exigible to sales tax under the respective sales tax enactments under consideration.

ii) The judgment in Mohd. Ekram Khan does not apply to a case where the dealer has simply received a spare part from the manufacturer of the automobile so as to replace a defective part therein under a warranty collateral to the sale of the automobile. In such a situation also, the dealer may receive a consideration for the purpose of the service rendered by him as a dealer under a dealership agreement or any other agreement akin to an agent of the manufacturer which is not a sale transaction.

On the above understanding of the judgment of this Court in Mohd. Ekram Khan, we are of the view that the same does not call for any interference.

In light of the above, in our view, overruling of the judgments in the case of Prem Motors and Geo Motors in Mohd. Ekram Khan, is just and proper.

(iii) It is reiterated that a credit note issued by a manufacturer to the dealer, in the situations explained above, is a valuable consideration within the meaning of the definition of sale and hence, exigible to sales tax under the respective State enactments of the States under consideration. In the result, appellants-dealer/assessee are liable to pay sales tax under the respective State enactments under consideration.

(iv) In view of the above, the appeals filed by the dealers are dismissed. The appeals filed by the revenue are allowed. Parties to bear their respective costs.

.....J. [K.M. JOSEPH] .....J. [B.V. NAGARATHNA] .....J. [AHSANUDDIN AMANULLAH] New Delhi;

15th May, 2023.